

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

INTERIM STORAGE PARTNERS LLC

(WCS Consolidated Interim Storage Facility)

Docket No. 72-1050

NRC STAFF'S ANSWER IN OPPOSITION TO SUSTAINABLE ENERGY AND
ECONOMIC DEVELOPMENT COALITION'S APPEAL
OF LBP-19-11

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Introduction

Pursuant to 10 C.F.R. § 2.311(b), the U.S. Nuclear Regulatory Commission Staff (Staff) files this answer in opposition to the appeal of Sustainable Energy and Economic Development Coalition (SEED). SEED challenges the rulings of the Atomic Safety and Licensing Board in LBP-19-11. Because SEED has not shown that the Board committed an error of law or abused its discretion, the Commission should affirm the Board's decision.

Background

In April 2016, Waste Control Specialists LLC (WCS) applied to the Nuclear Regulatory Commission (NRC) for a license to construct and operate a consolidated interim storage facility for spent nuclear fuel and greater-than-Class C waste in Andrews County, Texas.¹ A year later, WCS asked the NRC to suspend consideration of its application and WCS and the NRC staff

¹ Waste Control Specialists LLC, Application for a License for a Consolidated Interim Spent Fuel Storage Facility (Apr. 28, 2016) (ADAMS Accession No. ML16133A100).

then jointly requested that the pending hearing opportunity be withdrawn.² Thereafter, WCS created a joint venture with Orano CIS LLC to form Interim Storage Partners LLC (ISP).³

In June 2018, ISP submitted a revised license application,⁴ and the NRC published a *Federal Register* notice that permitted interested members of the public to request a hearing and petition to intervene.⁵ SEED submitted a timely hearing request (jointly with several organizations collectively referred to as Joint Petitioners),⁶ as did several other petitioners. After briefing, the Board heard oral argument in Midland, Texas, concerning petitioners' standing and the admissibility of their contentions.⁷

In LBP-19-7, the Board denied SEED's hearing request and the hearing requests of all other petitioners except Sierra Club.⁸ Although the Board concluded that SEED had not proffered an admissible contention, the Board found that SEED had established standing.⁹

² *Joint Request to Withdraw the Federal Register Notice Providing an Opportunity to Submit Hearing Requests* (Apr. 19, 2017) (ML17109A480) (attaching letter to NRC Document Control Desk from Rod Baltzer, WCS (Apr. 18, 2017)).

³ Interim Storage Partners LLC License Application, Docket 72-1050, Andrews County, Texas, (rev. 2 July 2018) at 1-1, 1-4 (ADAMS Accession No. ML18206A483) [hereinafter ISP License Application].

⁴ Letter from Jeffery Isakson, ISP, to Document Control Desk, NRC, *Submittal of License Application Revision 2 and Request to Restart Review of Application for Approval of the WCS CISF, Docket 72-1050* (June 8, 2018) (ML18166A003); Letter from Jeffery Isakson, ISP, to Document Control Desk, NRC (July 19, 2018) (ML18206A482) (updated submittal).

⁵ Interim Storage Partners Waste Control Specialists Consolidated Interim Storage Facility, 83 Fed. Reg. 44,070, 44,070–75 (Aug. 29, 2018), corrected, 83 Fed. Reg. 44,680 (Aug. 31, 2018) (correcting the deadline date for petitioners to request a hearing to October 29, 2018). The Secretary of the Commission later extended this deadline to November 13, 2018. Order of the Secretary (Oct. 25, 2018) at 2.

⁶ *Petition of Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, Sustainable Energy and Economic Development Coalition and Leona Morgan, Individually, to Intervene, and Request for an Adjudicatory Hearing* (Nov. 13, 2018).

⁷ Licensing Board Notice and Order (Establishing Dates and Location of Oral Argument) (May 24, 2019) at 1 (unpublished).

⁸ *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-7, 90 NRC at ___, ___ (Aug. 23, 2019) (slip op. at 2).

⁹ *Id.*

Thereafter, the Board dismissed Sierra Club's sole admitted contention.¹⁰ Joint Petitioners' appeal of LBP-19-7, as well as the appeals of two other petitioners and ISP, is now pending with the Commission.¹¹

On September 23, 2019, the U.S. Nuclear Waste Technical Review Board (NWTRB) issued a report, *Preparing for Nuclear Waste Transportation*.¹² SEED submitted a motion for leave to file a late-filed contention (accompanied by its new proposed Contention 17), on October 23, 2019, based on the NWTRB report.¹³ The Secretary of the Commission, in a November 13, 2019, memorandum, referred SEED's motion to the Board.¹⁴

On December 13, 2019, in LBP-19-11, the Board denied SEED's late-filed Contention 17 and terminated the proceeding, as no other contention was pending before the Board.¹⁵ SEED has now appealed the Board's ruling in LBP-19-11.¹⁶

¹⁰ *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-9, 90 NRC ___, __ (Nov. 18, 2019) (slip op. at 1, 5).

¹¹ See *Don't Waste Michigan, et al., Notice of Appeal of LBP-19-7 and Brief in Support of Appeal* (Sept. 17, 2019) (ML19260J391); see also *NRC Staff's Answer in Opposition to Don't Waste Michigan et al.'s Appeal of LBP-19-7* (Oct. 15, 2019) (ML19288A228); *Interim Storage Partners LLC's Answer Opposing the Appeal of LBP-19-7 by Don't Waste Michigan et al.* (Oct. 15, 2019) (ML19288A282).

¹² U.S. Nuclear Waste Technical Review Board "Preparing for Nuclear Waste Transportation: Technical Issues that Need to Be Addressed in Preparing for a Nationwide Effort to Transport Spent Nuclear Fuel and High-Level Radioactive Waste," (Sept. 23, 2019) (ML19297A235) (NWTRB Report).

¹³ *Motion of Intervenor Sustainable Energy and Economic Development Coalition for Leave to File Late-Filed Contention, and Contention 17* (Oct. 23, 2019). (Contention 17).

¹⁴ Office of the Secretary, "Referral Memorandum from the Secretary to the Atomic Safety and Licensing Board Panel," (Nov. 13, 2019) (ML19317E079).

¹⁵ *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-11, 90 NRC ___, __ (Dec. 13, 2019) (slip op. at 1).

¹⁶ *Notice of Appeal of LBP 19-11 By Intervenor Sustainable Energy and Economic Development Coalition and Brief in Support of Appeal* (Jan. 7, 2020) (SEED Appeal).

Discussion

I. Applicable Legal Standards

A. Review of Decisions on Petitions to Intervene under 10 C.F.R. § 2.311

The NRC's regulations at 10 C.F.R. § 2.311(c) provide an appeal as of right on the question of whether a petition to intervene or request for hearing should have been granted. On threshold matters such as standing and contention admissibility, the Commission gives substantial deference to board rulings unless the appeal points to an error of law or abuse of discretion which might serve as grounds for reversal of the board's decision.¹⁷ The Commission has maintained that "[r]ecitation of an appellant's prior positions in a proceeding or statement of general disagreement with a decision's result is not sufficient."¹⁸ Rather, a valid appeal "must point out the errors in the [b]oard's decision."¹⁹ In addition, an argument made before the board but not reiterated or explained on appeal is considered abandoned.²⁰

B. Legal Requirements for New or Amended Contentions

New contentions submitted after the initial date for hearing requests must meet the requirements of 10 C.F.R. § 2.309(c)(1). To do so, a party must demonstrate good cause by showing that the following three conditions are met:

- (i) The information upon which the filing is based was not previously available;
- (ii) The information upon which the filing is based is materially different from information previously available; and

¹⁷ *S. Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 220 (2011); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 234 (2008).

¹⁸ *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 NRC 215, 219 (2017) (citations omitted).

¹⁹ *Id.*

²⁰ *Int'l Uranium Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001); see *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245 (2010).

(iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

The petitioner has the burden of demonstrating that any new contention meets the standards in 10 C.F.R. § 2.309(c)(1).²¹

C. Legal Requirements for Contention Admissibility

10 C.F.R. § 2.309(f)(1) establishes the “basic criteria that all contentions must meet in order to be admissible.”²² Pursuant to that section, a contention must:

- (i) provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) provide a brief explanation of the basis for the contention;
- (iii) demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and
- (vi) provide information sufficient to show that a genuine dispute with the applicant/licensee exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case of an application that is asserted to be deficient, the identification of such deficiencies and supporting reasons for this belief.²³

The Commission has strictly applied these contention admissibility requirements in NRC adjudications.²⁴ Failure to comply with any one of these criteria is grounds for the dismissal of a

²¹ *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260–61 (2009).

²² *Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 571–72 (2006); *see also USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 436–37 (2006) (stating that the Commission “will reject any contention that does not satisfy the requirements”).

²³ 10 C.F.R. § 2.309(f)(1).

²⁴ *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006) (citing *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for recons. denied*, CLI-02-01, 55 NRC 1 (2002)).

contention.²⁵ The requirements are intended to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”²⁶ The Commission has stated that it “should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing” as indicated by a proffered contention that satisfies all of the 10 C.F.R. § 2.309(f)(1) requirements.²⁷ The Commission has emphasized that attempting to satisfy these requirements by “[m]ere ‘notice pleading’ does not suffice.”²⁸ A contention must be rejected where, rather than raising an issue that is concrete or litigable, it reflects nothing more than a generalization regarding the petitioner’s view of what the applicable policies ought to be.²⁹

Further, a petitioner must do more than assert generally that there are deficiencies in the application. A petitioner must identify all pertinent portions of the document it is challenging and state both the challenged position and the petitioner’s opposing view.³⁰ To demonstrate a genuine, material dispute, the petitioner must address the specific analysis in the document and explain how it is incorrect.³¹ To show that a dispute is “material,” a petitioner must show that its resolution would make a difference in the outcome of the proceeding. The hearing process is

²⁵ *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); see also *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016).

²⁶ Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

²⁷ *Id.*

²⁸ *Oyster Creek*, CLI-06-24, 64 NRC at 119 (quoting *Exelon Generation Co., LLC* (Clinton ESP Site), CLI-05-29, 62 NRC 801, 808 (2005)).

²⁹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 129 (2004) (citing *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20–21 (1974)).

³⁰ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001).

³¹ 10 C.F.R. § 2.309(f)(1)(vi).

reserved “for genuine, material controversies between knowledgeable litigants.”³² In addition, 10 C.F.R. § 2.335(a) prohibits, absent waiver, a challenge to a Commission rule or regulation in any adjudicatory proceeding subject to 10 C.F.R. Part 2.

II. The Commission Should Affirm the Board’s Determinations on Good Cause and Contention Admissibility

In LBP-19-11, the Board denied SEED’s Contention 17 for (1) failing to provide good cause to satisfy 10 C.F.R. § 2.309(c)(1), and (2) failing to satisfy the admissibility requirements of section 2.309(f)(1).³³ Because this determination meant that no proposed or admitted contentions remained pending before the Board, the Board accordingly terminated the proceeding. For the reasons stated below, the Commission should affirm the findings of the Board.

A. SEED Failed to Demonstrate Good Cause

Initially in Contention 17, SEED asserted that the technical issues discussed in the NWTRB Report were new information and not addressed or discussed in the ISP environmental report (ER).³⁴ The Board found that SEED did not demonstrate good cause for the late filing because the information SEED relied upon was previously available.³⁵ The Board explained that “all or virtually all” of the information in the 2019 NWTRB Report on which SEED relies was publicly available before September 2019, including the conclusions from the 2013 NWTRB workshop cited by SEED as support for its contention.³⁶ The Board rejected SEED’s argument

³² *NextEra Energy Seabrook LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 307 (2012) (quoting *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 219 (2003)).

³³ LBP-19-11, 90 NRC at ___ (slip op. at 14).

³⁴ Contention 17 at 7-8.

³⁵ LBP-19-11, 90 NRC at ___ (slip op. at 5).

³⁶ *Id.* (slip op. at 5-6).

that an already-existing analysis becomes new information once it is adopted as the NWTRB's "official" position, explaining that a petitioner cannot delay filing until a document "summarizes" the facts supporting a contention.³⁷ The Board also found that parts of Contention 17 were "essentially the same claim" as Joint Petitioners' Contention 4, which the Board previously rejected as outside the scope of the proceeding.³⁸

On appeal, SEED reiterates its claim that Contention 17 is based on new information because it is "the first time a single members opinion became the officially adopted NWTRB finding."³⁹ But as the Board found, good cause is predicated on whether the information on which a contention relies is previously publicly available, not whether the information is subsequently referenced or relied on in another document.⁴⁰ SEED's appeal offers no legal support for its position, only its own policy preference that the NWTRB's compilation of existing public information thereby restarts the clock, and it disregards the Commission's longstanding precedent that petitioners must carefully examine "all publicly available documentary material" rather than waiting for a summary report.⁴¹ Fundamentally, SEED does not dispute that the information relied upon by SEED and its expert was available before September 2019. As SEED did not demonstrate that the Board committed an error of law or abuse of discretion, the Commission should affirm the Board's decision denying SEED's Contention 17 for lack of good cause to file after the initial intervention deadline.

³⁷ *Id.* (slip op. at 7 n.37).

³⁸ *Id.* (slip op. at 7).

³⁹ SEED Appeal at 14.

⁴⁰ LBP-19-11, 90 NRC at ___ (slip op. at 5-7); *see also Nuclear Innovation North America, LLC* (South Texas Project, Units 3 and 4), LBP-11-7, 73 NRC 254, 279-80 (2011) ("[T]he information itself must be new information, not information already in the public domain.").

⁴¹ *See N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-10-27, 72 NRC 481, 495-96 (2010).

B. SEED Failed to Demonstrate Contention 17's Admissibility

In Contention 17, SEED asserted that ISP's ER insufficiently addresses and discloses the environmental impacts of the transportation of all spent nuclear fuel within a twenty-year period because it fails to discuss certain technical issues raised in the NWTRB report.⁴² SEED then stated that ISP "limit[s] the scope of its ER to the CISF" and excludes a review of environmental impacts of spent nuclear fuel transportation.⁴³ SEED ultimately asserted that based on the "critical determination" of the NWTRB report, and assuming the ISP CISF is licensed in 2021, "there is no scenario" in which spent nuclear fuel could be transported to the CISF in the 20-year timeframe proposed by ISP or within the 40-year licensing period.⁴⁴

The Board found that Contention 17 failed to raise a genuine dispute with ISP's application because the findings of the NWTRB Report do not contradict ISP's plans.⁴⁵ While the report highlighted some technical issues that must be resolved before the "entire inventory of waste can be transported," the Board determined that all such issues need not be resolved before the "first of the waste can be transported."⁴⁶ Further, the Board explained that SEED's concerns over the safety of transportation canisters, which the NRC reviews, approves, and licenses under 10 C.F.R. Part 71, are outside the scope of a 10 C.F.R. Part 72 licensing proceeding for an interim storage facility.⁴⁷ The Board also found that SEED had failed to

⁴² Contention 17 at 7-8.

⁴³ *Id.* at 5-6.

⁴⁴ *Id.* at 17-8.

⁴⁵ LBP-19-11, 90 NRC at ___ (slip op. at 9).

⁴⁶ *Id.* (slip op. at 10).

⁴⁷ *Id.* Indeed, the Board further observed that SEED had previously raised essentially this same claim as Joint Petitioners' Contention 4, which the Board in LBP-19-7 had found to be outside the scope of the proceeding. *Id.* (slip op. at 7, 12). On appeal, SEED reiterates at length its assertions from both Joint Petitioners' Contention 4 and Contention 11. SEED Appeal at 7-9. The Board previously found both contentions inadmissible, and SEED's appeal of that ruling is already pending before the Commission. LBP-19-7, 90 NRC ___, ___ (slip op. at 74, 85); *Notice of Appeal of LBP-19-07 by Petitioners Don't Waste Michigan, Citizens' Environmental Coalition, Citizens For Alternatives to*

address, much less challenge, the parts of ISP's ER that did in fact analyze potential environmental impacts associated with transportation of high burnup fuel.⁴⁸ Instead, the Board concluded that SEED improperly sought to generically challenge the adequacy of the NRC's 10 C.F.R. Part 71 transportation regulations without seeking a waiver as required by 10 C.F.R. § 2.335.⁴⁹

On appeal, SEED reiterates its claim that ISP's ER is insufficient without analyzing repackaging of spent fuel because, SEED asserts, without repackaging "there is no scenario" in which "all" the fuel to be stored at the facility can be transported within the 20 years projected by ISP, or within the forty-year licensing period.⁵⁰ SEED also reiterates its claim that transportation of spent nuclear fuel is a "connected action" and must be addressed in ISP's ER.⁵¹ Finally, SEED generically asserts that the Board raised the burden of admitting contentions.⁵²

The standard for overturning the Board's contention admissibility decisions is a deferential one,⁵³ and SEED does not show that the Board made a legal error or abused its discretion by finding that SEED did not raise a genuine dispute with the application. SEED's claim of impermissible "segmentation" of transportation impacts ignores the Board's correct conclusion that SEED failed to acknowledge the portions of ISP's ER that analyzed those

Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers For Peace, Sustainable Energy and Economic Development Coalition, and Leona Morgan, Individually, and Brief in Support of Appeal (Sept. 17, 2019) at 19-22, 28-29.

⁴⁸ *Id.* (slip op. at 12).

⁴⁹ *Id.* (slip op. at 13).

⁵⁰ SEED Appeal at 16. SEED refers multiple times to ISP's plans for storage of "40,000" metric tons of spent nuclear fuel over a "20 year period." See *id.* at 5, 7, 12. However, as the Board correctly explained, the application under review would authorize storage of only 5,000 metric tons, and the only term limit for receiving the spent fuel would be the 40-year term of the initial license itself. LBP-19-11, 90 NRC __, __ (slip op. at 10 n.50).

⁵¹ SEED Appeal at 17-18.

⁵² *Id.* at 19.

⁵³ *Seabrook*, CLI-12-5, 75 NRC at 323.

impacts (including of high burnup fuel). SEED identifies no authority contradicting the Board's determination that SEED's challenges to the safety of spent fuel transportation are outside of the scope of this Part 72 proceeding; the Board correctly found that those claims impermissibly challenged the adequacy of NRC's Part 71 requirements. Likewise, SEED cites no authority to demonstrate that ISP's application must analyze fuel repackaging, given that ISP does not seek the authority to do so and is not required to analyze impacts of storage beyond the license term.⁵⁴

Finally, SEED's generic assertion that the Board "raised the burden of contention admissibility" does not specify any error in the Board's ruling. For the reasons summarized above, the Board properly found that proposed Contention 17 failed to meet multiple threshold contention admissibility requirements in 10 C.F.R. § 2.309(f)(1).

Conclusion

In sum, SEED has not demonstrated an error of law or abuse of discretion by the Board in LBP-19-11. The Board correctly concluded that proposed Contention 17 failed to meet the requirements of both 10 C.F.R. §2.309(c)(1) and (f)(1). Accordingly, the Commission should affirm the Board's decisions.

Respectfully submitted,

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⁵⁴ See LBP-19-11, 90 NRC at ___ (slip op. at 13); see also LBP-19-7, 90 NRC at ___ (slip op. at 73) (finding Contention 4 outside the scope of the proceeding for the same reason).

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC Staff's Answer in Opposition to SEED's Appeal of LBP-19-11," dated February 3, 2020, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the captioned proceeding, this 3rd day of February 2020.

/Signed (electronically) by/

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Dated in Rockville, MD
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