

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

IN THE MATTER OF  
HOLTEC INTERNATIONAL

(HI-STORE Consolidated Interim Storage  
Facility)

Docket No. 72-1051

April 2, 2020

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**FASKEN LAND AND MINERALS, LTD.’S AND PERMIAN BASIN LAND AND  
ROYALTY OWNERS’ UNOPPOSED MOTION TO EXTEND DEADLINES PENDING  
THE COVID-19 NATIONAL EMERGENCY**

Now comes Fasken Oil and Ranch Ltd. (“Fasken”) and Permian Basin Land and Royalty Owners (“PBLRO”) (collectively “Petitioners”), by and through undersigned counsel, before the United States Nuclear Regulatory Commission (“NRC”) and respectfully submit this unopposed motion,<sup>1</sup> pursuant to 10 C.F.R. § 2.307, to extend the deadlines in the above-captioned matter for any interested party to file petitions to intervene, new or amended contentions, hearing requests or associated documents in response to the Holtec draft Environmental Impact Statement (“Holtec DEIS”) by 30 days, given the pending COVID-19 national emergency (“Motion to Extend Deadlines”).

On March 10, 2020 the NRC made the nearly 500 page Holtec DEIS publicly available.<sup>2</sup> Three days later, on March 13, 2020, President Donald J. Trump declared a National State of Emergency relating to the COVID-19 pandemic.<sup>3</sup> In the following weeks, schools were closed,

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<sup>1</sup> Although not required under 10 C.F.R. § 2.307, on April 2, 2020 Petitioners’ counsel spoke with counsel for Holtec (Jay Silberg) and NRC Staff attorney (Sara Kirkwood), who both indicated consent to the filing of the Motion to Extend Deadlines and that neither would object to a request for a 30-day extension of deadlines relating to responses to the Holtec DEIS in the above-captioned matter.

<sup>2</sup> See NUREG-2237 “Environmental Impact Statement for the Holtec International’s License Application for a Consolidated Interim Storage Facility for Spent Nuclear Fuel and High-Level Waste, Draft Report for Comment,” (hereinafter “Holtec DEIS”), available March 10, 2019 at ADAMS No. ML20069G420.

<sup>3</sup> White House, “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak”, Issued on March 13, 2020.

non-essential businesses shut down and a large portion of the U.S. was put under shelter-in place orders. COVID-19 has upended and created a new reality for virtually everyone – requiring quarantining, homeschooling, caring for elderly relatives and vulnerable persons, remote working with limited access and resources, social distancing and imposing severe restrictions on public gatherings. The trajectory of this public health emergency is uncertain, it is ever-evolving and its impediments to timely filings and the ability to meaningfully participate in Holtec’s licensing proceedings, as well as the public comment period, change on a daily basis, as do individual’s personal responses to COVID-19 crises.

The foregoing request for an extension of deadlines in the above-captioned matter is with good cause and warranted given the seriousness and unavoidable circumstances of the COVID-19 emergency. An extension of deadlines in the Holtec matter is necessary to comport with due process, for interested parties to meaningfully participate and to provide a fair, efficient and transparent NRC adjudicatory process.

Most are beset with concerns and daily crisis-borne difficulties that distract and burden their ability to purposefully and effectively participate in the NRC’s processing of a license for Holtec. As COVID-19 ravages major population centers and disrupts the health care continuum, it is increasingly unfair to expect interested parties to review voluminous and complex material, perform time-consuming research and detailed analysis and further consult with experts in order to support and file petitions to intervene, new or amended contentions, and hearing requests based on the Holtec DEIS. They simply do not have the bandwidth for it at this time.

## **BACKGROUND**

On March 30, 2017, Holtec submitted its application seeking an NRC license to construct and operate a consolidated interim storage facility (“CISF”) for spent nuclear fuel (“SNF”) and

high-level radioactive waste disposal in Lea County, New Mexico.<sup>4</sup> Holtec’s proposed CISF is posited as a “temporary solution” to the nation’s growing inventory of SNF and lack of permanent repository for storage of same.<sup>5</sup> More specifically, Holtec seeks “the issuance of an NRC license authorizing the initial phase (Phase 1) of the project to store up to 8,680 metric tons of uranium [9,568 short tons] in 500 canisters for a license period of 40 years. Holtec plans to subsequently request amendments to the license to store an additional 500 canisters for each of 19 expansion phases of the proposed CISF (a total of 20 phases), to be completed over the course of 20 years, and to expand the proposed facility to eventually store up to 10,000 canisters of SNF.”<sup>6</sup> Holtec’s proposed CISF would be the largest repository of SNF and high-level radioactive waste in the world and will require transportation of SNF via railway from decommissioned facilities spanning the country from California to Maine. The potential impacts of this massive undertaking have far-reaching consequences that mandate civic involvement and thorough review.

On March 19, 2018, the NRC published a notice in the Federal Register regarding the acceptance and docketing of Holtec’s CISF license application.<sup>7</sup> The NRC subsequently published a Federal Register notice of opportunity to request a hearing and to petition for leave to intervene.<sup>8</sup>

Petitioners filed a motion to dismiss the proceeding on September 14, 2018,<sup>9</sup> which the Secretary referred to the Board for consideration under 10 C.F.R. § 2.309 as a petition to

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<sup>4</sup> See U.S. Dep’t of Energy (“DOE”) (High-Level Waste Repository), LBP-11-24, 74 NRC 368 (2011).

<sup>5</sup> Congress passed the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 (1983) (“NWPA”), which ultimately led the DOE to submit an application to the NRC for authorization to construct a geologic repository at Yucca Mountain, Nevada. See Letter from Edward F. Sproat III, Director, DOE Office of Civilian Radioactive Waste Management, to Michael F. Weber, Director, NRC Office of Nuclear Material Safety and Safeguards (NMSS) (June 3, 2008) (ADAMS No. ML081560407). However, shortly after DOE’s application was submitted in June 2008, Congress stopped funding the Yucca Mountain project, and a pending adjudication before an NRC licensing board was suspended in September 2011. U.S. Dep’t of Energy (High-Level Waste Repository), LBP-11-24, 74 NRC 368 (2011).

<sup>6</sup> 85 Fed. Reg. 16151 (March 20, 2020).

<sup>7</sup> Holtec Int’l HI-STORE CISF for Interim Storage of SNF, 83 Fed. Reg. 12,034 (Mar. 19, 2018).

<sup>8</sup> Holtec Int’l HI-STORE CISF for Consolidated Interim Storage of SNF, 83 Fed. Reg. 32,919 (July 16, 2018).

<sup>9</sup> Motion of Fasken to Dismiss Licensing Proceedings for Holtec Int’l HI-STORE CISF and Interim Storage Partners, LLC CISF (“WCS CISF”) (Sept. 14, 2018), at 1–8 (ML18257A330).

intervene.<sup>10</sup> Multiple others filed hearing requests and petitions to intervene as well.<sup>11</sup> After holding a hearing, the Board found Fasken had demonstrated standing but failed to submit an admissible contention.<sup>12</sup> And the Board further denied all petitions to intervene and terminated the proceedings on May 7, 2019.<sup>13</sup> Petitioners and others have appealed the Board’s decision, which are presently pending before the Commission.<sup>14</sup>

The NRC has indicated that new or amended contentions filed after the initial hearing requests in the Holtec matter are governed by 10 C.F.R. § 2.309(c)(1), which requires a party demonstrate good cause<sup>15</sup> and timely file such contentions within 30 days of any new information forming the basis of the contention becomes publicly available.<sup>16</sup>

On March 10, 2020 the NRC posted the Holtec DEIS to its website, making it available to the public.<sup>17</sup> On March 13, 2020, three days later, the President declared the COVID-19 virus a national emergency.<sup>18</sup> Amidst the national emergency, on March 20, 2020, the NRC issued a Federal Register Notice<sup>19</sup> (“NRC Notice”) announcing a 60-day public comment period to respond to the Holtec DEIS, ending on May 22, 2020. The NRC Notice states public meetings on the Holtec DEIS will be held and “meeting details will be announced in the near future.”<sup>20</sup>

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<sup>10</sup> Holtec Int’l HI-STORE CISF and WCS CISF, Order of the Secretary (Oct. 29, 2018), at 2 (unpublished) (ML18302A328).

<sup>11</sup> The other petitioners are: Alliance for Environmental Strategies; Beyond Nuclear, Inc.; NAC International Inc.; Sierra Club; and a group of joint petitioners led by Don’t Waste Michigan.

<sup>12</sup> *Id.* at 135–36.

<sup>13</sup> Holtec Int’l (HI-STORE Consolidated Interim Storage Facility), LBP-19-4, 89 NRC \_\_ (May 7, 2019) (slip op. at 135–37).

<sup>14</sup> See Fasken and PBLRO Notice of Appeal and Petition for Review of LBP-19-4 (June 3, 2019) (ML19154A455).

<sup>15</sup> To demonstrate “good cause” under 10 C.F.R. § 2.309(c)(1) a party must show 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 (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

<sup>16</sup> See *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), 67 N.R.C. 460, 493 (2008) (30 days held as presumptive time frame for timeliness of late-filed contentions).

<sup>17</sup> See Holtec DEIS, available March 10, 2020 at ADAMS No. ML20069G420. on March 10, 2020.

<sup>18</sup> White House, “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak”, issued on March 13, 2020.

<sup>19</sup> 85 Fed. Reg. 16151 (March 20, 2020).

<sup>20</sup> *Id.*

The present 30-day window for filing new or amended contentions under 10 C.F.R. § 2.309(c)(1) is wholly insufficient in light of the extenuating circumstances of the COVID-19 public health emergency, which has severely hindered interested parties’ ability to meaningfully and timely file petitions to intervene, new or amended contentions, hearing requests and submit comments in the Holtec matter.

### **LEGAL STANDARDS**

The presiding officer “has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process. . .[and] has all the powers necessary to those ends, including the powers to: . . .[t]ake any other action consistent with the Act, this chapter, and 5 U.S.C. 551-558.”<sup>21</sup>

Under NRC regulations, “the time fixed or the period of time prescribed for an act that is required or allowed to be done at or within a specified time, may be extended or shortened either by the Commission or the presiding officer for good cause. . .”<sup>22</sup> Good cause is not explicitly defined in the regulations,<sup>23</sup> but the Commission has interpreted “good cause” to require a showing of “unavoidable and extenuating circumstances.”<sup>24</sup> Participants may file a request for an extension under 10 C.F.R. § 2.307 in advance of a deadline or shortly thereafter “if unanticipated events. . . or unexpected health issues, prevented the participant from filing for a reasonable period of time after the deadline.”<sup>25</sup>

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<sup>21</sup> 10 C.F.R. § 2.319.

<sup>22</sup> See 10 C.F.R. § 2.307(a).

<sup>23</sup> The NRC has established that “good cause in 10 C.F.R. § 2.307 “does not share the same definition” as “good cause” under 10 C.F.R. § 2.309(c)(1). See 77 Fed. Reg. at 46,571-72; see also *In the Matter Of: FirstEnergy Nuclear Operating Company* (Davis-Besse Nuclear Power Station, Unit 1), Memorandum and Order, 81 N.R.C. 28, LBP-15-1, Docket No. 50-346-LR, ASLBP No. 11-907-01-LR-BD01 (Jan. 15, 2015)

<sup>24</sup> *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 342 (1998), *petition for review denied sub nom., Nat’l Whistleblower Center v. NRC*, 208 F.3d 256, 264 (D.C. Cir. 2000).

<sup>25</sup> “A participant may file such a request under § 2.307 in advance of a deadline—for example, if the participant is unable to meet a deadline because of health issues—or shortly after a deadline—for example, if unanticipated events, such as a weather event or unexpected health issues, prevented the participant from filing for a reasonable period of

Under NEPA, the NRC must “ensure that the [environmental impact] statement contains sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a ‘hard look’ at environmental factors, and to make a reasoned decision.”<sup>26</sup> To ensure opposing viewpoints are heard and adequate expert scrutiny, an interested party’s chance to focus on and participate in the adjudicatory process and hearings relating to the Holtec DEIS and subsequent EIS must be made as fair and informed as possible.<sup>27</sup>

The NRC frequently grants requests for extensions for additional time based on unanticipated events, the complexity of the underlying materials and to allow for thorough expert review and analysis.<sup>28</sup> A request that “promote[s] adjudicatory efficiency, because it will enable [participants] – with the benefit of their expert’s input – to provide th[e] Board with a higher quality answer that fully considers and addresses the issues” should be granted.<sup>29</sup> Indeed, “the expeditious completion of a proceeding must be pursued ‘while still ensuring that hearings are fair and produce an adequate record for decision.’”<sup>30</sup>

### **The COVID-19 National Emergency Establishes Good Cause for a 30-Day Extension of Deadlines in the Holtec Matter**

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time after the deadline.” See Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 571-72 (Aug. 3, 2012).

<sup>26</sup> *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 294, (D.C. Cir.1988).

<sup>27</sup> See e.g., *Myersville Citizens for a Rural Cmty., Inc v. FERC*, 783 F.3d 1301, 1324-25 (D.C. Cir. 2015) (Under NEPA’s “hard look” standard, an agency’s analysis is adequate if it “contains sufficient discussion of the relevant issues and opposing viewpoints, and . . . the agency’s decision is ‘fully informed’ and ‘well-considered.’”) (internal citations omitted).

<sup>28</sup> See *In the Matter of AmerenUE* (Callaway Plant Unit 2), et al., NRC Staff Answer to Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident, ADAMS No. ML111220569 (“[i]f 30 days are not sufficient in a given case based on the nature of the new information, case-specific motions for extensions of time to file (or to file out of time) are commonly requested and granted in NRC practice.”)

<sup>29</sup> See e.g., *In the Matter of Florida Power & Light Co.* (Turkey Point Units 6 and 7), Order Granting Joint Intervenor’s Motion for Extension of Time, Docket Nos. 52-040-COL and 52-041-COL, ASLBP No. 10-903-02-COL-BD01, ADAMS No. ML15357A225 (Dec. 23, 2015) (finding 30-day extension to respond to motion for summary disposition of amended contentions reasonable given the “length and complexity” of materials and that the filing occurred at a time “when it might reasonably be expected that essential members of . . . litigation team would be on travel or otherwise unavailable.”); *In the Matter of Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), Docket No. 40-09075-MLA, ASLB No. 10-898-02-MLA-BD01, ADAMS No. ML14295A420 (granting 30-day extension to submit additional testimony and exhibits on contention).

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There is no analogy to be drawn here—the COVID-19 national public health emergency presents unparalleled and extenuating circumstances that warrant good cause for an extension of deadlines, including but not limited to the 30-day window for filing new or amended contentions, in the Holtec matter. Presentation of opposing viewpoints and the NRC’s ability to take a “hard look” at the Holtec DEIS will be severely curtailed by the inability of parties, whose interests may be affected by the proposed Holtec CISF, to focus in on, review and analyze hundreds of pages of complex materials to meaningfully participate in due diligence during these trying times. Petitioners have presented multiple reasons and adequate justification to establish good cause to extend the deadlines for all interested parties as a result of COVID-19.: the breadth of scientific and technical topics the Holtec DEIS covers and volume of material to be reviewed and analyzed with further consultation from experts and litigators in such a relatively short time frame under distressed and distracted conditions, the inability to hold public meetings and gatherings, the logistical impediments of being forced to work remotely with limited access to data and resources, and the unknown variables and unexpected daily crises that accompany this evolving national public health emergency.

### **Extenuating Circumstances of COVID-19**

It is not “business as usual” for COVID-19 with closed schools and the need to home-school children, the need to care and tend to vulnerable elderly, family and friends, shuttered non-essential businesses and economic hard times, and the cancellation of vast majority of public gatherings across the country for an unknown and indeterminate time frame. COVID-19 has impacted daily life in epic proportions. But it should not impact due process rights and the right to meaningfully participate and comment on federal agency decisions and rulemaking decisions concerning the transportation and storage of the nation’s entire inventory of high-level radioactive

nuclear waste that have important environmental impacts and safety risks. Allowing NRC deadlines in Holtec proceedings to progress “business as usual” under the extenuating circumstances is unfair, prejudicial, and will discourage and prevent purposeful discussion and differing viewpoints on important issues in the Holtec matter.

The licensing of Holtec’s proposed CISF is a massive project with a nearly 500-page DEIS containing highly complex materials implicating important issues that warrant time-consuming review by scientific and technical experts as well as counsel. It presents an extensive array of nuanced scientific and legal considerations requiring interested parties to seek interpretation and advice across multiple disciplines that demand in-depth analysis and research.<sup>31</sup> This enormous undertaking, necessary to present opposing viewpoints for NRC consideration, is precluded by the daily impacts of COVID-19 under the current NRC deadlines, as well as Holtec’s failure to respond to NRC requests for additional information (“RAIs”) pertinent to the DEIS.<sup>32</sup>

The logistics of working remotely with limited access to information and resources during this national public health emergency create significant hurdles and impediments, hindering parties’ ability to analyze lengthy and complex materials to support timely participation in Holtec proceedings. For example, Petitioners’ geologists, environmental scientists and experts are working from home with limited access to data and software to fully and thoroughly analyze the Holtec DEIS findings in due diligence. General counsel is experiencing similar delays in working remotely with limited office resources, slower connections and lag time or delays in accessing files and information and difficulties e-filing documents.

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<sup>31</sup> The Holtec DEIS requires highly technical reviews of issues relating to, but not limited to, geology, stratigraphy, groundwater, surface water, seismicity, ecology, meteorology, transportation and socioeconomics in addition to novel and complex legal issues.

<sup>32</sup> See *e.g.*, Jose Cuadrado (NRC Project Manager) Letter to Kim Manzione (Holtec Licensing Manager) re First Request for Additional Information, Part 5 dated November 14, 2019, ADAMS No. ML193322C260



The NRC is surely facing similar constraints in “ensuring maximum telework for [its] employees in response to the coronavirus” and “requiring remote work in support of the national priority of limiting the spread of COVID-19.”<sup>33</sup> According to the NRC website, its response will also inevitably result in “[p]ostponing public meetings or rescheduling them to take advantage of communications technology, such as teleconference, videoconference and other means” and “using remote means to hold meetings, and cancelling or postponing in-person meetings” presenting additional delays.<sup>34</sup>

Indeed, the diversion of time and resources because of COVID-19 is unparalleled. This viral calamity has slowed response times across the board. It has rendered interested parties, experts and counsel unable to prepare, support and file petitions to intervene, new and amended contentions and comments in response to the Holtec DEIS in due diligence under the time afforded under standard NRC regulations. As such, an extension is necessary to ensure all-encompassing participation by interested parties and a fair and transparent NRC adjudicatory process.

Government officials across the country have submitted similar requests to stay or extend deadlines involving agency action and public comment periods in response to COVID-19.<sup>35</sup> On March 20, 2020, U.S. Senators and Representatives of New Mexico urged the Commission to delay public meetings and extend the 60-day comment period regarding the Holtec DEIS, stating:

[they] believe it is essential the NRC provide an open and transparent review process with ample opportunity for public input on Holtec’s proposal. . .[as] [a]ny proposal to store commercial spent nuclear fuel raises a number of health, safety and environmental issues, including potential impacts to local agriculture and

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<sup>33</sup> NRC, “NRC COVID-19 Update,” *available at*: <https://www.nrc.gov/reading-rm/doc-collections/faq/coronavirus.html> (last accessed April 1, 2020). *See also*, NRC Letter to Nuclear Energy Institute (Mar. 28, 2020) (granting exemptions to requirements for work hour controls during COVID-19 public health emergency).

<sup>34</sup> *Id.*

<sup>35</sup> A coalition of state and local governments requesting the White House extend all public comment periods, aptly note that COVID-19 has an “extreme impact on normal working and living conditions [that] will impair the ability of not only state and local officials, but also the general public, issue experts and others to provide thoughtful and meaningful participation and involvement in potential federal government actions that directly affect millions of people.”

industry, issues related to the transportation of nuclear waste, and disproportionate impacts on Native American communities. . .[and] concerns. . .that any temporary storage facility will remain in the state indefinitely while a pathway for permanent disposal for high-level radioactive waste is identified.<sup>36</sup>

Granting an extension in the Holtec proceedings will not prevent efficient adjudication or in any way harm the NRC or Board. To the contrary, an extension of deadlines is necessary, under the extenuating circumstances, to ensure adequate discussion and facilitate proper review of the Holtec DEIS in accordance with NRC and NEPA regulations.

### CONCLUSION

For the foregoing reasons and in light of the COVID-19 national emergency, Petitioners have demonstrated good cause and respectfully request the Commission grant this unopposed motion for a 30-day extension of deadlines in the above captioned matter.

Dated: April 2, 2020

Respectfully submitted,

/signed electronically by/  
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<sup>36</sup> T. Udall, M. Heinrich, B. Ray Lujan, D. Haaland, X. Torres Small Letter to K. Svinicki (NRC Chairman) dated March 20, 2020.

**UNITED STATES OF AMERICA  
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IN THE MATTER OF  
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**CERTIFICATE OF SERVICE**

Pursuant to 10 C.F.R. § 2.305, I Allan Kanner certify that, on this 2<sup>nd</sup> day of April, 2020, true and correct copies of Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners' Unopposed Motion to Extend Deadlines Pending the COVID-19 National Emergency were served upon the Electronic Information Exchange (the NRC's E-Filing System) in the above-captioned proceeding.

/signed electronically by/

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