

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY LICENSING BOARD**

IN THE MATTER OF
HOLTEC INTERNATIONAL

(Consolidated Interim Storage Facility)

Docket No. 72-1051

May 11, 2020

**FASKEN LAND AND MINERALS, LTD.’S AND PERMIAN BASIN LAND AND
ROYALTY OWNERS MOTION TO REOPEN THE RECORD¹**

Now comes Fasken Oil and Ranch Ltd. (“Fasken”) and Permian Basin Land and Royalty Owners (“PBLRO”) (collectively “Joint Petitioners” or “Petitioners”), by and through undersigned counsel, who respectfully move the Atomic Safety Licensing Board (“ASLB”) to reopen the record in the above-captioned matter and in support of same states as follows:

1. On August 1, 2019, Petitioners filed a motion for leave to file new Contention No. 2, based on the NRC’s July 2, 2020 publication of a State of New Mexico Commissioner of Public Lands Letter relating to issues of subsurface mineral rights at and surrounding the proposed Holtec

¹ Pursuant to NRC regulations, counsel for Petitioners contacted Holtec’s counsel via email on May 7, 2020 regarding the foregoing Motion to Reopen. On May 9, 2020 Holtec responded that it will “not object on timeliness grounds to [Petitioners] filing of a motion to reopen with new and/or amended contentions in accordance with the Commission’s April 7 Order,” but that Holtec could not take a position on the substance or any motion or contention without reviewing same.

International (“Holtec”) consolidated interim storage facility (“CISF”) site, located in southeast New Mexico.² Thereafter, Fasken filed a motion to reopen, which it subsequently withdrew.³

2. When Contention No. 2 was filed, the ASLB decision rejecting all Petitioners’ then existing contentions had been appealed to the Commission and the ASLB record was closed.

3. On April 7, 2020 the Secretary of the Commission issued an Order stating “Petitions to intervene, hearing requests, and motions to admit contentions challenging the Holtec draft environmental impact statement” (“Holtec DEIS”) will be deemed timely if filed on or before May 11, 2020.”⁴

4. Thereafter, on April 23, 2020, the Commission issued a ruling on Petitioners’ appeal. In that ruling the Commission remanded Contention No. 2 to the ALSB “for consideration of the contention’s admissibility, timeliness, and *capacity* to meet the reopening standards.”⁵

5. 10 C.F.R. § 2.326 sets forth the requirements for reopening the record: (1) a motion to reopen the record must be timely; (2) the motion must address a significant safety or environmental issue; and (3) the motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially. The foregoing is also accompanied an expert affidavit attached hereto.

² See *Fasken Oil and Ranch and Permian Basin Land and Royalty Owners Motion for Leave to File a New Contention* (Aug. 1, 2019) (Fasken Motion for New Contention); Letter from Stephanie Richard, New Mexico Public Lands Commissioner, to Krishna Singh, President of Holtec International (June 19, 2019) (ML19183A429) (attached to Fasken Motion for New Contention as Ex. 5) (New Mexico Letter).

³ See *Fasken Oil and Ranch and Permian Basin Land and Royalty Owners Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019* (Sept. 3, 2019); *Fasken and PBLRO’s Withdrawal of Their “Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019”* (Sept. 12, 2019).

⁴ Commission “Order (Granting Motion for Extension of Time to File)” Docket No. 72-1051 (April 7, 2020) (ADAMS Accession No. ML20098F515).

⁵ Commission “Memorandum and Order”, CLI-20-04, Docket No. 72-1051 (April 23, 2020) (ADAMS Accession No. ML20114E150).

6. Petitioners original Contention No. 2 was filed within 30 days of the NRC’s initial publication of the Commissioner’s Letter and was further filed within a reasonable time of the executed date of the Letter that formed the basis (along with other facts and issues) of Petitioners’ original Contention No. 2.⁶ NRC regulations do not expressly define a time period under 10 C.F.R. § 2.309(c)(1) that is considered “timely,” however, the Commission has found 30 to 60 days to be a “reasonable deadline for proposing new or amended contentions.”⁷ Petitioners filed Contention No. 2 on August 1, 2020 within 30 days of the NRC publication of the Letter and well within 60 days of the Letter execution date. Petitioners’ original Contention No. 2 was filed within a reasonable time and should be considered timely.

7. Petitioners’ amended Contention No. 2 should similarly be considered timely. The information forming the basis for amending Contention No. 2 was not available prior to publication of the Holtec DEIS. As discussed in Petitioners Motion for Leave to File Amended Contention No. 2 (“Motion for Leave”), the inaccurate and insufficient data, reliance on sources, and recently developed conclusions, disclosed for the very first time in the Holtec DEIS, are inconsistent with and significantly vary in material respects from information contained in Holtec’s license application documents. Pursuant to the April 7, 2020 Order by the Secretary of the Commission “Petitions to intervene, hearing requests, and motions to admit contentions challenging the

⁶ See *Fasken Oil and Ranch and Permian Basin Land and Royalty Owners Motion for Leave to File a New Contention* (Aug. 1, 2019) (Fasken Motion for New Contention); Letter from Stephanie Richard, New Mexico Public Lands Commissioner, to Krishna Singh, President of Holtec International (June 19, 2019) (ADAMS Accession No. ML19183A429, published on July 2, 2019).

⁷ See *In the Matter of Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 N.R.C. 491, 491 (2012) (noting that “although ‘timely’ is not expressly defined by months or days in [NRC] regulations. . . typically [] 30 to 60 days from the initiating event [is considered] a reasonable deadline for proposing new or amended contentions.”); *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).

[Holtec] DEIS will be deemed timely if filed on or before May 11, 2020.”⁸ The foregoing Motion to admit amended Contention No. 2 to address information only recently published in the Holtec DEIS, and filed on May 11, 2020 is thus timely.

8. At the foundation of Petitioners’ amendments to Contention No. 2 are statements made in the Holtec DEIS that contain material omissions, inadequacies and inconsistencies when compared to Holtec’s licensing application documents, and which give rise to unaddressed technical and integration issues that the NRC must resolve to conduct a proper independent review as to the cumulative environmental impacts of the proposed project and to ensure that spent nuclear fuel (“SNF”) and high-level radioactive nuclear waste can be safely transported to and stored at the proposed Holtec site over the lifetime of the project.⁹ This new information and the unresolved issues it brings to light must be noticed, appropriately analyzed and fully disclosed in the Holtec DEIS and final EIS and resolutions and risk-mitigation strategies delineated and implemented within the Holtec SAR, as they implicate important legal, safety and environmental issues relating to the construction and operation of the proposed Holtec CISF project.

9. As detailed in Petitioners 30-page Motion for Leave to File Amended Contention No. 2, the Declaration of Stonnie Pollock and attached affidavit, the Holtec DEIS relies on false and speculative information that cannot reasonably form the basis for a proper analysis of environmental impacts or safety risks under NEPA or NRC regulations. Holtec’s licensing application misleads the NRC and the public regarding subsurface mineral rights, oil and gas and

⁸ Commission “Order (Granting Motion for Extension of Time to File)” Docket No. 72-1051 (April 7, 2020) (ADAMS Accession No. ML20098F515).

⁹ Consistent with 10 C.F.R. § 51.23(c), the Holtec DEIS “serves as *the site-specific review* conducted for the construction and operation of the proposed CISF for the period of its proposed license term.” See 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 for Comment, NUREG-2237 (March 2020) (ADAMS Accession No. ML20069G420), herein after “Holtec DEIS” at 1-5.

mining extraction operations, geologic characteristics and the cumulative impacts the proposed CISF site and regional activities will have on the environment, land use, and surrounding populations.

10. Potential for subsidence, sinkholes, and seismicity at the proposed Holtec site and in the surrounding region deserve a complete and independent review by the NRC. Indeed, these are important safety and environmental issues. As discussed in Petitioners' Motion for Leave, these issues also relate to Holtec's facility site design basis, safety structures and components, and the analysis of natural and man-induced events required by NRC regulations and siting evaluation factors. Under NRC and NEPA regulations, this information must be considered in an independent review and evaluation by the NRC and must be made available for public comment and to allow interested parties to participate in the proceedings.

WHEREFORE, Petitioners respectfully request that the record be opened in this case, pursuant to 10 C.F.R. § 2.326, the rulings of the Commission and in further support of Petitioners Motion for Leave to File Amended Contention No. 2.

Dated: May 11, 2020

Respectfully submitted,

/signed electronically by/
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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
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IN THE MATTER OF
HOLTEC INTERNATIONAL

Docket No. 72-1051

(Consolidated Interim Storage Facility)

May 11, 2020

AFFIDAVIT OF ALLAN KANNER

Allan Kanner, under oath, declares as follows:

1. I am an attorney with the law firm of Kanner & Whiteley, LLC in this proceeding. I personally prepared Petitioners amended Contention No. 2. In preparing amended Contention No. 2, I reviewed the original Contention No. 2 and the Holtec DEIS that form the basis of amended Contention No. 2, as well as the Declarations of Stonnie Pollock and Tommy Taylor, submitted in conjunction with amended Contention No. 2.
2. This affidavit is submitted to comply with the requirements of 10 C.F.R. § 2.326(b) in support of Petitioners Motion to Reopen the Record. The criteria in 10 C.F.R. § 2.326(a) are satisfied and incorporates all facts, arguments, references and Declarations from Petitioners concurrently filed Motion for Leave to Amend Contention No. 2.
3. The information forming the basis of amended Contention No. 2 was not available prior to publication of the Holtec DEIS. As discussed in Petitioners Motion for Leave to File Amended Contention No. 2 (“Motion for Leave”). Pursuant to the April 7, 2020 Order by the Secretary of the Commission “Petitions to intervene, hearing requests, and motions to admit contentions challenging the [Holtec] DEIS will be deemed timely if filed on or before May 11, 2020.”¹⁰ The foregoing Motion to admit amended Contention No. 2 to address

¹⁰ Commission “Order (Granting Motion for Extension of Time to File)” Docket No. 72-1051 (April 7, 2020) (ADAMS Accession No. ML20098F515).

information only recently published in the Holtec DEIS, and filed on May 11, 2020 is thus timely.

4. By its very nature, information in the Holtec DEIS implicates significant environmental and safety issues. Stonnie Pollock, an expert in geology and oil and gas operations, reviewed the Holtec DEIS and issued a Declaration discussing the serious and significant implications as to the inaccuracies of the Holtec DEIS as they relate to misconceptions regarding drilling depths, past, present and future regional oil and gas and mining extraction operations, abandoned wells and subsurface mineral rights. Mr. Pollock's Declaration and resume are attached to the Petitioners' Motion for Leave filed concurrently with the foregoing Motion to Reopen. Mr. Pollock concludes that the Holtec DEIS:
 - Erroneously and inconsistently depicts ownership and control over subsurface mineral rights beneath and adjacent to the proposed Holtec CISF site;
 - Fails to accurately describe shallower drilling depths and past, present and ongoing oil and gas operations in the area of the proposed Holtec CISF site;
 - Willfully ignores abandoned and orphaned wells drilled and/or plugged prior to the enactment of statewide plugging regulations that have the potential for casing corrosion; and
 - Materially omits information on interdependent factors with significant impacts on potential subsidence and sinkholes.
5. Holtec's application misleads the NRC and the public regarding subsurface mineral rights, ongoing oil and gas and mining extraction operations, geologic characteristics and the cumulative impacts the proposed CISF site and regional activities will have on the environment, land use, and surrounding populations.
6. As detailed in the concurrently filed Motion for Leave, not only do the above-mentioned items implicate important safety and environmental issues, they are required under NRC and NEPA regulations. Misleading, inadequate, incomplete, inaccurate and inconsistent information relating to subsurface mineral rights, oil and gas and mining extraction operations and geologic characteristics cannot form the basis for a proper review of cumulative impact analyses or preliminary recommendations in connection with an NRC licensing application.

- a. Petitioners dispute the following material facts and statements and have provided evidence to the contrary in their Motion for Leave:
 - i. ownership and control of the subsurface mineral rights below the proposed Holtec site over the lifetime of the project;
 - ii. Holtec's ability to proscribe lawful rights of industry operations at and in the vicinity of the proposed Holtec site over the lifetime of the project;
 - iii. the status of past, present and future oil and gas and mining extraction operations in the area; and
 - iv. the interdependent factors that influence possible subsidence, sinkholes, and seismicity.
7. Moreover, Holtec has refused to respond to requests for additional information issued by the NRC, information deemed necessary by the NRC for its review of Holtec's licensing application, which go to the heart and core of Petitioners' Amended Contention No. 2. As discussed in Petitioners' Motion for Leave, this crucial information precludes a proper analysis and review.
8. Petitioners' Motion to Reopen the Record is timely pursuant to the Commission's Order, implicates important legal issues, safety risks, and cumulative environmental impacts on land use and geology and soils, and as outlined in Petitioners' Motion for Leave to File Amended Contention No. 2, inaccurate and inconsistent statements in Holtec's application lead to faulty premises and conclusions.
9. Under NRC regulations, Holtec is required to provide "complete and accurate information in all material respects" and has failed to do so here.

Dated: May 11, 2020

/signed electronically by/

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(HI-STORE Consolidated Interim Storage
Facility)

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I Allan Kanner certify that, on this 11th day of May, 2020, true and correct copies of Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners Motion to Reopen the Record 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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