UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of HOLTEC INTERNATIONAL (HI-STORE Consolidated Interim Storage Facility)	Docket No. 72-1051

NRC Staff Answer in Opposition to Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners' Motions to Amend Contention 2 and Reopen the Record

Introduction

Pursuant to 10 C.F.R. § 2.309(i)(1), the U.S. Nuclear Regulatory Commission Staff (Staff) submits this answer opposing the motion of Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (together, Fasken) to file Amended Contention 2 and the accompanying motion to reopen the record.[1] For the reasons set forth below, the Board should deny both motions because Fasken fails to meet the requirements of 10 C.F.R. §§ 2.309(c)(1), 2.309(f)(1), and 2.326.

Background

On March 30, 2017, Holtec submitted an application, including a Safety Analysis Report (SAR) and Environmental Report (ER), requesting that the NRC grant it a license for the construction and operation of a consolidated interim storage facility (CISF) for spent nuclear fuel (SNF).[2] The proposed CISF would be located in Lea County, New Mexico. In its license

[1] *Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners Motion for Leave to File Amended Contention No. 2* (May 11, 2020) (ADAMS Accession No. ML20132F019) (Fasken Motion to Amend); *Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners Motion to Reopen the Record* (May 11, 2020) (ML20132E724) (Fasken Motion to Reopen).

[2] Holtec's application materials are available at: https://www.nrc.gov/waste/spent-fuel-storage/cis/holtec-international.html. Citations to the proposed license are to Revision 1

application, Holtec requests authorization to store up to 8,680 metric tons of uranium in up to 500 canisters for a license period of 40 years.[3]

On March 19, 2018, the NRC published a notice in the *Federal Register* regarding the acceptance and docketing of Holtec's CISF license application.[4] The NRC subsequently published a *Federal Register* notice of opportunity to request a hearing and to petition for leave to intervene.[5] Multiple petitioners filed hearing requests and petitions to intervene.[6] Rather than filing a petition to intervene, Fasken instead filed before the Commission a motion to dismiss the proceeding, arguing that the NRC lacked jurisdiction over the application.[7] The Secretary of the Commission denied the motion and referred it to the Board for consideration under 10 C.F.R. § 2.309.[8] On May 7, 2019, the Board denied all petitions and terminated the proceeding, thereby closing the record.[9] Regarding Fasken, the Board held that it had demonstrated standing but had not submitted a proposed contention that met the requirements of 10 C.F.R. § 2.309(f)(1).[10] On June 3, 2019, Fasken appealed the Board's decision.[11]

(ML17310A223) (Proposed License), citations to the Safety Analysis Report (SAR) are to Revision 0H (ML19163A062), and citations to the Environmental Report (ER) are to Revision 7 (ML19309E337).

3 Proposed License at 1.

4 Holtec International HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 12,034 (Mar. 19, 2018).

5 Holtec International HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919 (July 16, 2018).

6 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.

7 *Motion of Fasken to Dismiss Licensing Proceedings for HI-STORE CISF and WCS CISF* (Sept. 14, 2018), at 1–8 (ML18257A330) (Fasken Motion to Dismiss).

8 *Holtec Int'l* (HI-STORE Consolidated Interim Storage Facility) and *Interim Storage Partners, LLC* (WCS Consolidated Interim Storage Facility), Order of the Secretary (Oct. 29, 2018), at 2. (unpublished) (ML18302A328).

9 *Holtec Int'l* (HI-STORE CISF), LBP-19-4, 89 NRC 353, 461–63 (2019).

10 *Id.* at 461-62.

11 *Fasken and PBLRO [Permian Basin Land and Royalty Owners] Notice of Appeal and Petition for Review* (June 3, 2019) (ML19154A455); *see also NRC Staff Answer in Opposition to Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners' Appeal of LBP-19-4* (June 28, 2019) (ML19179A221).

On June 19, 2019, the New Mexico Commissioner of Public Lands, Stephanie Garcia Richard, issued a letter to Holtec President and CEO, Krishna Singh, regarding Holtec's CISF application. The letter was served on the docket of this proceeding via the Electronic Information Exchange on July 2, 2019.[12] Fasken then filed its new proposed Contention 2 on August 1, 2019.[13] Thereafter, Fasken filed a motion to reopen, but subsequently withdrew it without withdrawing the initial motion for leave to admit new proposed Contention 2.[14]

On March 10, 2020, the NRC made the draft Environmental Impact Statement (DEIS) for Holtec's license application publicly available.[15] Subsequently, on April 2, 2020, Fasken filed an unopposed motion to extend by 30 days the deadline for any interested party to file petitions to intervene, new or amended contentions, or hearing requests based on the DEIS due to the COVID-19 public health emergency.[16] By order issued on April 7, 2020, the Secretary of the Commission granted Fasken's motion, setting May 11, 2020, as the new deadline for such filings.[17]

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[12] Letter from Stephanie Garcia Richard, Comm'r, N.M. State Land Office, to Krishna Singh, President and CEO, Holtec (June 19, 2019) (ML19183A429).

[13] *Fasken Oil and Ranch, Ltd. and Permian Basin Land and Royalty Owners Motion for Leave to File a New Contention* (Aug. 1, 2019) (ML19213A171); *see also NRC Staff Answer in Opposition to Fasken Oil and Ranch, Ltd. and Permian Basin Land and Royalty Owners' Motion to File New Contention* (Aug. 26, 2019) (ML19238A183).

[14] *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) (ML19246B809); *Fasken and PBLRO's Withdrawal of Their "Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019*" (Sept. 12, 2019) (ML19255G616).

[15] "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), NUREG-2237 (Mar. 2020) (ML20069G420) (DEIS).

[16] *Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners' Unopposed Motion to Extend Deadlines Pending the COVID-19 National Emergency* (Apr. 2, 2020) (ML20093K565).

[17] *Holtec Int'l* (HI-STORE Consolidated Interim Storage Facility), Order of the Secretary (Apr. 7, 2020), at 1 (unpublished) (ML20098F515).

On April 23, 2020, the Commission issued a decision in which it ruled on Fasken's June 3, 2019, appeal.[18] The Commission remanded Fasken's Contention 2 to the Board for consideration under the standards for reopening the closed record and the admissibility standards for contentions filed after the initial intervention deadline.[19]

Thereafter, on May 11, 2020, Fasken filed the instant motion to amend Contention 2 and an accompanying motion to reopen the record.[20] Although Contention 2, as initially filed, is currently pending before the Board, Fasken now seeks to expand the bases of Contention 2 to include additional arguments challenging the DEIS. In Amended Contention 2, Fasken incorporates the arguments and facts relied upon in its original Contention 2[21] and now asserts that "Holtec's application fails to adequately, accurately, completely and consistently describe the control of subsurface mineral rights and oil and gas and mineral extraction operations beneath and in the vicinity of the proposed Holtec CISF site" in violation of the National Environmental Policy Act (NEPA) and NRC regulations.[22]

Discussion

I. Applicable Legal Standards

A. Good Cause Requirements for Amended Contentions

New or amended 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:

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18 *Holtec Int'l* (HI-STORE Consolidates Interim Storage Facility), CLI-20-4, 91 NRC __ (Apr. 23, 2020).

19 *Id.* at __ (slip op. at 31–32).

20 Fasken Motion to Amend; Fasken Motion to Reopen.

21 Fasken Motion to Amend at 11 & n.39.

22 *Id.* at 10–11.

(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.

The petitioner has the burden of demonstrating that any new or amended contention meets the standards in 10 C.F.R. § 2.309(c)(1).[23]

New environmental contentions based on the Staff's draft environmental impact statement (EIS) are permitted if data or conclusions in the Staff's environmental document differ significantly from the applicant's environmental report.[24] Nevertheless, NRC's regulations and longstanding Commission precedent make clear that for issues arising under NEPA, a petitioner must first file contentions based on the applicant's environmental report and may amend those contentions only if the draft or final EIS differ significantly from the data or conclusions in the applicant's documents.[25] It is fundamental that a new or amended contention must be raised at the earliest possible opportunity.[26] Thus, as a general rule, contentions submitted for the first

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

[24] *See* 10 C.F.R. § 2.309(f)(2) ("Participants may file new or amended environmental contentions after the deadline in [§ 2.309(b)] (e.g., based on a draft or final NRC environmental impact statement, environmental assessment, or any supplements to these documents) if the contention complies with the requirements in [§ 2.309(c)]."); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264 n.6 (2000) (citing former 10 C.F.R. § 2.714(b)(2)(iii), currently § 2.309(f)(2)).

[25] *See* 10 C.F.R. § 2.309(f)(2) ("On issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant's environmental report."); *Tennessee Valley Auth.* (Clinch River Nuclear Site Early Site Permit Application), CLI-18-5, 87 NRC 119, 122–23 (2018).

[26] *See Clinch River*, CLI-18-5, 87 NRC at 122–23 (citations omitted); *Crow Butte Res., Inc.* (Marsland Expansion Area), LBP-18-3, 88 NRC 13, 26 (2018) (citing *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-1, 81 NRC 1, 7 (2015)).

Fasken cites LBP-18-4 for the proposition that availability of the DEIS is "the first opportunity to challenge language in the DEIS that was similar to language in applicant's Environmental Report that Intervenors had tried to challenge through previously filed contentions." Fasken Motion to Amend at 4 (citing *Tennessee Valley Auth.* (Clinch River Nuclear Site Early Site Permit Application), LBP-18-4, 88 NRC 55, 60 (2018)). But Fasken draws this sentence out of context and incorrectly asserts that the DEIS represents a fresh opportunity for Fasken to challenge information that is substantively the

time after the draft EIS is issued will be deemed untimely unless there are data or conclusions in the draft EIS that differ significantly from the data or conclusions in the applicant's documents.[27] Indeed, publication of the draft EIS alone does not provide an opportunity to renew previously filed contentions; rather, the petitioner must demonstrate that the draft EIS actually contains new data or conclusions.[28]

In the context of 10 C.F.R. § 2.309(c)(1), materiality generally relates to the degree or magnitude of the difference between previously available information and currently available information.[29] As such, the information on which a new or amended contention is based must be more than merely a new interpretation or restatement of previously available information.[30] Rather, a new or amended contention must be based upon *facts or information* that were previously unavailable.[31]

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same as what was in the ER. To the contrary, the Commission has made clear that petitioners must raise contentions at the earliest possible opportunity and may not later raise issues based on the DEIS that could have been raised as challenges to the applicant's ER. *Clinch River*, CLI-18-5, 87 NRC at 122–23. Fasken does not get a second bite at the same apple.

Moreover, Fasken did not previously challenge language in the ER when it would have been timely to do so. Indeed, the only contention that Fasken filed by the initial intervention deadline in this proceeding was a challenge regarding NRC's jurisdiction to review the application, a claim that Fasken repeatedly insisted was not a contention. *See* Fasken Motion to Dismiss at 1–8.

27 *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-12-12, 75 NRC 742, 755–56 (2012).

28 *Id.* at 756.

29 *See* Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,572 (Aug. 3, 2012) (noting that in the NEPA context "materially different" is equivalent to "differs significantly"); *Fla. Power & Light Co.* (Turkey Point Units 6 & 7), LBP-17-6, 86 NRC 37, 48 (2017), *aff'd*, CLI-17-12, 86 NRC 215, 227 (2017) (noting that "materially" in the context of 10 C.F.R § 2.309(c)(1)(ii) is "synonymous with, for example, 'significantly,' 'considerably,' or 'importantly'") (citing *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-1, 71 NRC 165, 183 n.9 (2010)).

30 *See Progress Energy Fla., Inc.* (Levy Cty. Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 142 (2009) ("The fact that a party 'integrates,' consolidates, restates, or collects previously available information into a new document, does not convert it into 'previously unavailable' information.").

31 *See Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 344 (2011) (citing *System Energy Resources, Inc*. (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144, 146 (2007)).

B. Requirements for Contention Admissibility

In addition to meeting the requirements of 10 C.F.R. § 2.309(c)(1), new or amended contentions must also satisfy the six contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). That section requires that each contention:

(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 that support the petitioner's position and upon which the petitioner intends to rely; and

(vi) Provide information sufficient to show that a genuine dispute with the applicant/licensee exists on a material issue of law or fact.

The contention admissibility requirements are intended to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[32] In this regard, the Commission has explained that the rules governing the admissibility of contentions are "strict by design."[33] Failure to comply with any one of these criteria is grounds for the dismissal of a contention.[34] An issue is inadmissible if the petitioner "'has offered no tangible information, no experts, no substantive affidavits,' but instead only 'bare assertions and speculation.'"[35]

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

[33] *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016) (citing *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for recons. denied*, CLI-02-1, 55 NRC 1 (2002)).

[34] *Id.*

[35] *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003) (citation omitted).

C. Requirements for Reopening the Record

Pursuant to 10 C.F.R. § 2.326(a), a petitioner seeking to open a closed record must show that its motion (1) is timely, however, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented; (2) addresses a significant safety or environmental issue; and (3) demonstrates that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.[36] A motion to reopen the record accompanying a new or amended contention may be considered timely if filed within 30 days of the date upon which the new information is available.[37] Reopening the record is "an extraordinary action," and thus, the Commission imposes a "deliberately heavy" burden upon a petitioner who seeks to supplement the evidentiary record after it has been closed, even with respect to an existing contention.[38] Indeed, reopening will only be allowed where "the proponent presents material, probative evidence which either could not have been discovered before or could have been discovered but is so grave that, in the judgement of the presiding officer, it must be considered anyway."[39]

II. Fasken Fails to Meet the Good Cause Requirements in 10 C.F.R. § 2.309(c)(1) and the Motion to Amend Contention 2 Should Be Denied

Fasken fails to satisfy the good cause requirements in 10 C.F.R. §§ 2.309(c)(1) because the information on which Amended Contention 2 is based is neither new nor materially different from information previously available. Further, because the information forming the basis of Amended Contention 2 was previously available, Amended Contention 2 is untimely. As such,

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36 10 C.F.R. §§ 2.326(a)(1)–(3).

37 *See Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460 493 (2008) (noting that "[m]any times, boards have selected 30 days as [the] specific presumptive time period" for timeliness of contentions filed after the initial deadline).

38 *Vermont Yankee*, CLI-11-2, 73 NRC at 337–38.

39 Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986).

Fasken does not satisfy the requirements of 10 C.F.R. § 2.309(c)(1) and the motion to amend Contention 2 should be denied.

A. Amended Contention 2 Does Not Satisfy the Requirements in 10 C.F.R. §§ 2.309(c)(1)(i)–(ii)

Fasken asserts that it has satisfied the good cause requirements because the information forming the basis of Amended Contention 2 was not available prior to the DEIS's issuance and that certain sources and conclusions in the DEIS "vary in material respects" from the information contained in Holtec's license application documents.[40] But, as further explained below, the information to which Fasken points is not new or materially different from information previously available. Therefore, Fasken fails to meet the requirements in 10 C.F.R. §§ 2.309(c)(1)(i)–(ii).

1. Fasken Fails to Show that Its Claim Concerning the Cumulative Impacts Determination for Geology and Soils Is Based on Information that Is New or Materially Different

Fasken states that the DEIS "recently concluded that the project would have a 'small cumulative impact' for geology and soils, which when combined with regional activities would result in an 'overall MODERATE cumulative impact.'"[41] Fasken then asserts that this conclusion represents "new and material information that is significantly different" from the ER's conclusion that the cumulative impacts of the proposed CISF on geology and soils would be "minimal."[42] However, Fasken errs in characterizing this as "new" information. While Fasken identifies differences between the ER and the DEIS, Fasken does not identify any new facts that are presented in, or undergird the conclusions in, the DEIS. The correct legal standard is not simply whether there are differences between the ER and the DEIS, but whether new or amended

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40 Fasken Motion to Amend at 5.

41 *Id.* at 12 (citing DEIS at 5-10 to 5-11).

42 *Id.* (citing ER at 5-3).

contentions are "*based on new facts* not previously available."[43] Here, Fasken fails to demonstrate that the facts underpinning the conclusions in the DEIS were not previously available.

Moreover, Fasken fails to demonstrate that the conclusions in DEIS concerning the cumulative impacts to geology and soils are materially different from the conclusions in the ER. Fasken notes that the ER concluded that the proposed CISF would have a "minimal" impact to geology and soils.[44] Fasken then suggests that this conclusion is significantly different from the Staff's determination. Although the terminology used in the ER to describe the cumulative impacts differs from the terminology defined in NUREG-1748 and used by the Staff in the DEIS, there is nothing that requires the ER to use the same significance terminology to describe potential environmental impacts.[45] Further, Fasken fails to show how the DEIS's conclusion regarding the incremental and cumulative impacts on geology and soils is materially different from the determination in the ER. In the DEIS, the Staff concluded that the SMALL incremental impact of the proposed CISF on geology and soils, when added to the overall MODERATE impacts from all other past, present, and reasonably foreseeable future actions within the geographic scope, does not change the overall MODERATE cumulative impacts determination for geology and soils.[46] Stated differently, the incremental impact that the proposed facility is expected to contribute does not alter the Staff's overall cumulative impacts determination for geology and soils within the region analyzed. Because Fasken neither identifies any new information that the Staff's cumulative impacts analysis relies on nor explains how the DEIS's

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[43] *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 493 n.70 (2012) (emphasis original).

[44] Fasken Motion to Amend at 12.

[45] *See* "Environmental Review Guidance for Licensing Actions Associated with NMSS Programs" (Draft Report for Comment), NUREG-1748 (Aug. 2003), at 4-14 (ML032450279) (NUREG-1748).

[46] DEIS at 5-11.

conclusion differs in a meaningful way from the ER's conclusion, Fasken fails to meet the requirements of 10 C.F.R. §§ 2.309(c)(1)(i)–(ii).

2. Fasken Fails to Show that Its Claim Concerning the Description of Subsurface Mineral Rights Is Based on Information that Is New or Materially Different

Fasken asserts that the descriptions of subsurface mineral rights in the DEIS are inaccurate and incomplete.[47] Referencing the letter from the New Mexico Commissioner of Public Lands, Fasken states that contrary to statements in the DEIS, Holtec does not own the mineral rights below the proposed CISF and cannot prevent other entities from extracting minerals below and adjacent to the proposed site.[48] The information presented in Amended Contention 2 simply reasserts claims made previously in Contention 2,[49] which Fasken now attempts to refashion as a challenge to the DEIS. However, as explained by the Staff in August 2019, the information upon which Fasken based Contention 2 was not new when it was initially asserted.[50] And it is not new now. Indeed, information upon which Amended Contention 2 is based was available in Holtec's application materials. Specifically, Section 3.1.2 of the ER states "the subsurface minerals are owned by the state of New Mexico."[51] Further, more than a year ago (and months before Fasken initially filed its original Contention 2), in response to a Request for Additional Information (RAI), Holtec provided a copy of the potash mining partial relinquishment lease agreement between it and Intrepid Potash – New Mexico, LLC. That agreement acknowledges that "[t]he mineral rights for Section 13 [the proposed CISF site] and certain adjacent areas are held in trust by the New Mexico Commissioner of State Lands [ ].

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47 Fasken Motion to Amend at 13.

48 *Id.*

49 *See Fasken Oil and Ranch, Ltd. and Permian Basin Land and Royalty Owners Motion for Leave to File a New Contention* (Aug. 1, 2019), at 4–11 (ML19213A171).

50 *See NRC Staff Answer in Opposition to Fasken Oil and Ranch, Ltd. and Permian Basin Land and Royalty Owners' Motion to File New Contention* (Aug. 26, 2019), at 5–9 (ML19238A183).

51 ER at 3-2. This statement has appeared in all versions of the ER. *See* https://www.nrc.gov/waste/spent-fuel-storage/cis/hi/hi-app-docs.html.

Intrepid is the lessee under Potash Mining Lease No. M-651-11 [ ], which includes Section 13."[52] This information was made publicly available on April 9, 2019.[53] Taken together, these facts show that the information on which this portion of Amended Contention 2 is based was available months or years ago in Holtec's application and its public submissions to the NRC. As such, this portion of Amended Contention 2 does not satisfy the requirements of 10 C.F.R. §§ 2.309(c)(1)(i)–(ii).

3. Fasken Fails to Show that Its Claim Concerning the Use of a 6-Mile Radius to Describe Land Use Impacts Is Based on Information that Is New or Materially Different

Fasken claims that a 6-mile radius for assessing the cumulative impacts on land use was "applied for the first time in the Holtec DEIS."[54] However, Fasken does not demonstrate that the use of this radius raises any new or materially different information. Indeed, the ER utilizes a 6-miles radius to describe land uses surrounding the proposed CISF[55] and a larger, 50-mile radius for the cumulative impacts analysis.[56] In other words, the information relied upon in the DEIS to evaluate cumulative impacts on land use is necessarily a subset of the same information already provided in ER. Accordingly, Fasken does not identify how the information underpinning the DEIS's cumulative impacts determination for land use differs in any way from the ER, let alone that the information is materially different. Therefore, this portion of Amended Contention 2 fails to meet the requirements of 10 C.F.R. §§ 2.309(c)(1)(i)–(ii).

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52 Holtec License Application Responses to Requests for Supplemental Information (Apr. 9, 2019) (ML19081A083) Attachment 9, Potash Mining Lease Partial Relinquishment Agreement (Oct. 5, 2016), at 1 (ML19081A080).

53 *Id.*

54 Fasken Motion to Amend at 13 (citing DEIS at 5-17).

55 ER at 3-2.

56 *Id.* at 5-1.

4. Fasken Fails to Show that Its Claims Concerning the Description of Past, Present, and Future Oil and Gas Operations Are Based on Information that Is New or Materially Different

Fasken asserts that the DEIS's descriptions of the oil and gas drilling depths and the status of oil and gas operations in the region of the proposed CISF constitute new and materially different information. For example, Fasken asserts that the DEIS uses new sources of information to describe the depths of oil and gas target production zones in the vicinity of the proposed site, pointing to the DEIS's reliance on an article from 1978.[57] But Fasken does not explain in what way the DEIS's reference to that article presents any new or materially different information. The DEIS's description of the currently known oil and gas exploration targets in the vicinity of the proposed site is based on information that was cited by Holtec in the ER, including information from a 2007 report prepared by the Eddy Lea Energy Alliance that evaluated the suitability of sites in southeastern New Mexico to host activities under the Global Nuclear Energy Partnership (GNEP).[58] Table 2.3.2.2-2 of that report provides information on the location and depth of oil and gas wells in the vicinity of the proposed site.[59] As such, the information that forms the basis for this portion of Amended Contention 2 was previously available. Moreover, the 1978 article cited in the DEIS describes the Salado Formation and is consistent with the locations of known drilling targets identified in the Table 2.3.2.2-2 of the ELEA Siting Report. Because Fasken fails to demonstrate how the information in the 1978 article differs significantly from information that was previously available in the ER, it fails to show that the DEIS presents new information is materially different for purposes of good cause under 10 C.F.R. § 2.309(c)(1).[60]

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57 Fasken Motion to Amend at 16.

58 *See, e.g.,* ER at 3-2 to 3-3 (citing Eddy Lea Energy Alliance, "Final Detailed Siting Report," (Apr. 28, 2007) (ML102440738) (ELEA Siting Report)).

59 ELEA Siting Report at 2.3-24 to 2.3-25.

60 *See* Amendments to Adjudicatory Process Rules, 77 Fed. Reg. at 46,572; *Turkey Point*, LBP-17-6, 86 NRC at 48, *aff'd*, CLI-17-12, 86 NRC at 227.

Fasken further asserts that statements in the DEIS describing future oil and gas exploration and development are inconsistent with the information provided in Holtec's application materials.[61] In particular, Fasken compares statements in the DEIS, which indicate that oil and gas extraction will occur at depths greater than 3,050 feet, to statements in Holtec's application, which indicate that oil and gas activities will occur at depths greater than 5,000 feet.[62] While Fasken again describes a difference between the DEIS and the application, Fasken fails to demonstrate how this difference is material to the DEIS's analysis of impacts.[63] Fasken does not explain why the specific depth of oil and gas activities (let alone the difference between 3,050 and 5,000 feet) would meaningfully alter the proposed CISF's potential impacts on the surrounding environment. Thus, Fasken does not explain how the asserted inconsistencies would be material to the conclusions in the DEIS. Because Fasken does not demonstrate how statements in the DEIS concerning the depth of oil and gas activities differ in a significant way from information that was previously available in Holtec's application,[64] this portion of Amended Contention 2 fails satisfy the requirements of 10 C.F.R. § 2.309(c)(1)(ii).

Finally, Fasken claims that the DEIS discusses "for the very first time" an active oil and gas well on the southwest portion of Section 13 that operates at a minimum level of production to maintain mineral rights.[65] This is incorrect. Rather, the information underpinning the statement in the DEIS was provided months ago in the SAR.[66] Specifically, SAR Section 2.2.2 states, "[o]ne active oil/gas well on the southwest portion of Section 13 operates at minimum

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61 Fasken Motion to Amend at 17–18.

62 *Id.*

63 *See Turkey Point*, LBP-17-6, 86 NRC at 48, *aff'd*, CLI-17-12, 86 NRC at 227.

64 *See* Amendments to Adjudicatory Process Rules, 77 Fed. Reg. at 46,572; *Turkey Point*, LBP-17-6, 86 NRC at 48, *aff'd*, CLI-17-12, 86 NRC at 227.

65 Fasken Motion to Amend at 18–19 (citing DEIS at 3-7).

66 *See* SAR at 2-44.

production to maintain mineral rights."[67] Moreover, information concerning this oil and gas well, including the location, current status, and depth, is and has been publicly available on the New Mexico State Land Office's website and geographic information system (GIS) platform.[68] Accordingly, this portion of Amended Contention 2 is based on information that was previously available months or years ago in Holtec's application materials and on New Mexico's publicly available website. Further, Fasken also does not even attempt to explain in what way the existence or status of the identified well on the southwest portion of Section 13 affects the DEIS's analysis. Therefore, this portion of Amended Contention 2 does not meet the requirements of 10 C.F.R. §§ 2.309(c)(1)(i)–(ii).

5. Fasken Fails to Show that Its Claims Concerning Pending Requests for Additional Information (RAIs) Are Based on Information that Is New

In Amended Contention 2, Fasken states that Holtec has not yet provided responses to certain RAIs regarding regional drilling activities, orphaned and abandoned wells, potash mining, and seismicity.[69] Without more, simply identifying that certain RAIs remain outstanding does not present new information.[70] The Commission's well-settled rules of practice permit new or amended contentions based on the Staff's draft EIS if the data in the Staff's environmental document differ significantly from the applicant's environmental report.[71] Here, Fasken has not articulated how the existence of pending RAIs reveals information in the DEIS that is

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67 *Id.*

68 *See* State of New Mexico Oil and Conservation Division, OCD Geographic Information Systems (GIS), http://www.emnrd.state.nm.us/OCD/ocdgis.html.

69 Fasken Motion to Amend at 20–28.

70 As discussed further in Section III.E below, the fact that the Staff has sought additional information does not, without more, suffice to show an admissible contention. This is so because it is the petitioner's obligation to timely articulate its own basis for asserting deficiencies in the application. *See PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-15-8, 81 NRC 500, 506 n.47 (2015) (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336 (1999)).

71 *See* Amendments to Adjudicatory Process Rules, 77 Fed. Reg. at 46,567; *Private Fuel Storage,* CLI-00-21, 52 NRC at 264 n.6.

significantly different from (or inconsistent with) the information in the ER. If Fasken believed that relevant information was omitted from the ER or SAR and thereby rendered the application deficient, Fasken could have identified and asserted that same challenge at the time that the application materials were made publicly available. As such, the facts on which this portion of Amended Contention 2 is based were available when Fasken filed its original petition. Therefore, this portion of Amended Contention 2 fails to satisfy the requirements of 10 C.F.R. § 2.309(c)(1)(i).

B. Amended Contention 2 Was Not Timely Filed as Required by 10 C.F.R. § 2.309(c)(1)(iii)

The Staff agrees that Amended Contention 2 was filed within the timeframe prescribed by the Secretary of the Commission for contentions challenging the DEIS (i.e., on or before May 11, 2020). But the Secretary's extension of the filing deadline in no way altered Fasken's obligation under 10 C.F.R. § 2.309(c)(1) to show that its new or amended contention is timely filed based on when the assertedly new or materially different information became available. And as discussed above, because the information upon which Amended Contention 2 is based was available prior to the issuance of the DEIS, Amended Contention 2 is untimely. The determination of timeliness under 10 C.F.R. § 2.309(c)(1)(iii) is based on when the factual information giving rise to the contention was reasonably available to the public.[72] Where a petitioner could have asserted the same challenge to the applicant's ER, the triggering event for timeliness is thus when the *information underpinning* the DEIS was reasonably available, not when the DEIS itself was available.[73] Because the information relied on by Fasken was previously available in the ER, the SAR, Holtec's responses to RAIs, or other publicly available resources, the claims raised in Amended Contention 2 could have been made at the outset of

[72] *HI-STORE*, LBP-19-4, 89 NRC at 406.

[73] *See Pilgrim*, CLI-12-10, 75 NRC at 493 n.70 (stating "new or amended contentions must be *based on new facts* not previously available").

this proceeding or promptly after the relevant RAI responses were made publicly available. Accordingly, Fasken's motion to amend Contention 2 is untimely under 10 C.F.R. § 2.309(c)(1)(iii).

III. Amended Contention 2 Does Not Meet the Admissibility Requirements of 10 C.F.R. § 2.309(f)(1) and Should be Denied

While Fasken's failure to meet the good cause requirements of 10 C.F.R. § 2.309(c)(1) is sufficient grounds to reject Amended Contention 2, Fasken must also meet the general contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). The matters in Amended Contention 2 are inadmissible because they fail to demonstrate that the issues are material to the findings that the NRC must make in its environmental review, they lack sufficient factual or expert support, and they do not raise a genuine dispute on a material issue of fact or law. As such, Fasken does not satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1) and Amended Contention 2 should be denied.

A. Fasken's Claim Concerning the Cumulative Impacts Determination for Geology and Soils Fails to Raise a Genuine Dispute with the DEIS

Fasken asserts that the DEIS presented significantly different information when it concluded that the proposed CISF would have a SMALL incremental effect and overall MODERATE cumulative impact on geology and soils. To the extent that Fasken intended this statement to be included as part of Amended Contention 2, Fasken does not actually raise a challenge to the DEIS. While Fasken notes a difference between the ER and the DEIS, Fasken fails to articulate what aspect of the DEIS's conclusion it disputes. Simply pointing to a difference in the DEIS, without more, is insufficient to raise a genuine dispute as required by 10 C.F.R. § 2.309(f)(1)(vi). As such, this portion of the Amended Contention 2 is inadmissible.

B. Fasken's Claim Concerning the Description of Subsurface Mineral Rights Fails to Raise a Genuine Dispute with the DEIS and Fails to Demonstrate that the Issue Is Material to the Environmental Findings the NRC Must Make

Fasken asserts that it raises a genuine dispute with the DEIS because, "contrary to statements in… the most recent Holtec DEIS," Holtec does not own the mineral rights below the proposed CISF and does not have the ability to control extraction activities adjacent to the proposed site.[74] In fact, the DEIS does acknowledge in several places that the State of New Mexico and the Bureau of Land Management (BLM) own the subsurface property rights within and surrounding the proposed project area. For example, Section 3.2.1 of the DEIS states "[t]he State of New Mexico owns the subsurface property rights within the proposed CISF project area, and BLM or the State of New Mexico owns subsurface property rights on privately-owned land surrounding the proposed CISF project area (EIS Figure 3.2-2)."[75] This portion of Amended Contention 2, therefore, fails to raise a genuine dispute with the DEIS and does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

Fasken further claims that it raises a genuine dispute because the DEIS, according the Fasken, "cannot conclusory rely on speculative future contracts, future land use restrictions or agreement terms which are unknown and uncertain and by their very nature."[76] However, Fasken does not articulate how ownership of the subsurface mineral rights and control of subsurface activities beneath and surrounding the proposed CISF would affect, let alone contradict, the environmental analyses presented in the DEIS. In other words, Fasken fails to demonstrate that the Staff's environmental and cumulative impacts analyses are affected by the way in which subsurface mineral rights are exercised. Without such an explanation, Fasken

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74 Fasken Motion to Amend at 13.

75 DEIS at 3-2*; see also* DEIS 4-3 ("The State of New Mexico owns the subsurface property (or mineral) rights within the proposed project area (EIS Figure 3.2-2)."); DEIS at 4-4 ("[T]he State of New Mexico and the BLM, respectively, own the subsurface property (mineral) rights within and surrounding the proposed project area, and these rights are leased to production companies for development.").

76 Fasken Motion to Amend at 15.

fails to articulate any deficiency in the analyses or conclusions in the DEIS. Because Fasken does not show how ownership and control over subsurface mineral rights and activities are material to the Staff's environmental review, this portion of Amended Contention 2 fails to demonstrate that the issue it seeks to raise is material to the findings that the NRC must make, as required by 10 C.F.R. § 2.309(f)(1)(iv).

C. Fasken's Claim Concerning the Use of a 6-Mile Radius to Describe Land Use Impacts Fails to Raise a Genuine Dispute with the DEIS

Fasken asserts that using a radius wider than 6 miles for evaluating land use is necessary to "truly evaluate cumulative impacts."[77] But Fasken does not explain how the use of a 6-mile radius renders the DEIS deficient. The Commission has long held that contentions must point to a deficiency in the NEPA analysis and cannot merely offer "suggestions" of other ways the analysis could have been done.[78] Indeed, NEPA's "hard look" requirement "does not call for certainty or precision, but an *estimate* of anticipated (not unduly speculative) impacts."[79] And neither does NEPA require a detailed examination of every conceivable aspect of a project. Rather, "NEPA gives agencies broad discretion to keep their inquiries within appropriate and manageable boundaries."[80] Here, the Staff applied the guidance in NUREG-1748 and determined that a 6-mile radius is reasonable "because of the small footprint, low profile, and passive nature of the project."[81] While Fasken may prefer that the analysis be expanded, it has not articulated in what way the Staff's approach violates the requirements of NEPA. Therefore,

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77 *Id.* at 15–16.

78 *See NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 323 (2012) (citing *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 477(2006).

79 *Louisiana Energy Servs, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005) (emphasis in original).

80 *Louisiana Energy Servs, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 103 (1998) (citing *South Louisiana Env'tl. Council, Inc. v. Sand,* 629 F.2d 1005, 1011 (5th Cir. 1980)).

81 DEIS at 3-1.

this portion of Amended Contention 2 fails to raise a genuine dispute as required by 10 C.F.R. § 2.309(f)(1)(vi) and is inadmissible.

D. Fasken's Claims Concerning the Description of Past, Present, and Future Oil and Gas Operations Lack Sufficient Support, Fail to Raise a Genuine Dispute with the DEIS, and Fail to Demonstrate That the Issues Are Material to the Environmental Findings the NRC Must Make

Fasken asserts that the DEIS's description of oil and gas production "alters reality" because it misrepresents past and present oil and gas operations within a 6-mile radius of the proposed CISF.[82] More specifically, Fasken suggests that there are wellbores within 6 miles of the proposed site that have not been identified in the DEIS[83] and that the DEIS contains inconsistent statements concerning existing well depths.[84] In making this claim, Fasken relies on a map created using commercially-available Petra GIS software that purportedly shows a total of 527 wellbores within a 6-mile radius of the proposed CISF, 82 of which have been drilled at depths shallower than 3,050 feet.[85] Further, Fasken asserts that the DEIS's description of future oil and gas exploration and development is inaccurate.[86] In this regard, Fasken cites the declaration of petroleum geologist Stonnie Pollock, who states that recent technological advances make drilling at shallower depths and revisiting existing wells a "real possibility."[87] Yet Fasken does not explain how the existence of possible additional wellbores at any depth is material to the Staff's assessment of environmental and cumulative impacts.[88] Nor does Fasken

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82 Fasken Motion to Amend at 15.

83 *See id.* at 15–16 (stating that Fasken obtained an allegedly "accurate" well-count).

84 *Id.* at 16–18.

85 *Id.* at 15–16, 18; Fasken Motion to Amend, Ex. 4 at 8.

86 Fasken Motion to Amend at 18–20.

87 *Id.* at 18, Fasken Motion to Amend, Ex. 4 at 2–3.

88 To the extent that Fasken's claim can be understood to raise a challenge to the adequacy of the DEIS's description of the affected environment, it fails to raise a genuine dispute as required by 10 C.F.R. § 2.309(f)(1). The DEIS provides a map of the oil and gas industry wells within and surrounding the proposed CISF based on information from the New Mexico Oil and Conservation Division. DEIS at 3-8, Figure 3.2-7. Fasken does not specify in what way this map or the underlying data is deficient. Indeed, Fasken's own affiant admits that "there is no definitive index to adequately

articulate how the potential for future drilling at shallower depths or revisiting existing wells would ultimately affect, much less materially contradict, the Staff's environmental review. The DEIS summarizes existing and possible future extraction activities surrounding the proposed CISF.[89] Additionally, the DEIS provides a map showing the location of wells associated with past and present oil and gas exploration and development.[90] Together this information was used by the Staff to evaluate, among other things, the cumulative impacts to land use.[91] In short, the DEIS assesses past, present, and future oil and gas extraction activities in the region. Fasken does not explain in what way the conclusions in DEIS do not already account for the information identified as the basis for Amended Contention 2. Fasken's bare assertions that additional wellbores might exist and its speculative statements that there is a "possibility" for future drilling at shallower depths are insufficient to demonstrate that the issues raised in this portion of Amended Contention 2 are material to the findings that the NRC must make in the DEIS, or to show a genuine dispute with the DEIS's assessment of the project's environmental impacts. As such, Amended Contention 2 does not meet the requirements of 10 C.F.R. §§ 2.309(f)(1)(iv) and (vi).

In addition, Fasken alleges that the information relied upon in the DEIS concerning the status of oil and gas operations in Section 13 is unreliable and that this raises a genuine dispute with the DEIS.[92] According to Fasken, the statement in the DEIS that "[t]here is one active oil/gas well on the southwest portion of Section 13 that operates at minimum production to maintain mineral rights" is conclusory and is not grounded upon a reliable source.[93] But Fasken

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count all the wellbores drilled in any given area." Fasken Motion to Amend, Ex. 4 at 3. As such, Fasken fail to raise a genuine dispute with the site characterization presented in the DEIS.

89 DEIS at 3-7 to 3-8.

90 *Id.* at 3-8, Figure 3.2-7.

91 *See, e.g., id.* at 5-17 to 5-18.

92 Fasken Motion to Amend at 18–19.

93 *Id.*

offers no evidence to support this claim other than bare assertions. As identified in the DEIS, the information used by the Staff concerning the wells surrounding the proposed CISF—including the well on the southwest portion of Section 13—is based on publicly available data from the New Mexico Oil and Conservation Division.[94] Fasken neither explains why it questions the veracity of the information underpinning the statement in the DEIS nor supports its assertion with factual evidence. Fasken's conclusory statements, without more, do not provide sufficient support to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(v).

E. Fasken's Claims Concerning Pending Safety RAIs Fail to Raise a Genuine Dispute with the DEIS and Fail to Demonstrate That the Issues Are Material to the Environmental Findings the NRC Must Make

As a basis for Amended Contention 2, Fasken notes that Holtec has not yet provided responses to certain RAIs issued by the Staff regarding regional drilling activities, orphaned and abandoned wells, potash mining, and seismicity.[95] However, as the Commission has made clear, to satisfy the contention admissibility requirements, "petitioners must do more than rest on the mere existence of RAIs as a basis for their contention."[96] Fasken then asserts that the DEIS "allegedly relied" on information that Holtec has yet to provide in response to these RAIs and that the Staff "cannot feasibly conduct an independent review and analysis without considering Holtec's RAI responses."[97] But Fasken does not identify any specific section of the DEIS that, in fact, relies on information that may be provided by Holtec in response to the outstanding safety RAIs. All of the pending RAIs that Fasken cites pertain to the Staff's safety review. As such, the conclusions in the DEIS are not based on any information requested from Holtec in the RAIs

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94 DEIS at 3-7 to 3-8, Figure 3.2-7 (citing to "NMOCD, 2016").

95 Fasken Motion to Amend at 20. In fact, Fasken claims that Holtec "refuses" to provide responses the RAIs issued by the Staff on November 14, 2019. This is false. By letter, Holtec indicated that it would provide responses to the RAIs issued in November 2019 by no later than October 30, 2020. Letter from Kim Manzione, Holtec, to Jose Cuadrado, NRC (Jan. 7, 2020) (ML20009C903).

96 *Susquehanna*, CLI-15-8, 81 NRC at 506 n.47 (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336 (1999)).

97 Fasken Motion to Amend at 21.

that remain outstanding. Without a meaningful explanation showing how the DEIS is deficient, Fasken does not raise a genuine dispute with the DEIS, as required by 10 C.F.R. § 2.309(f)(1)(vi).

Additionally, Fasken asserts that the outstanding responses to RAIs related to interdependent regional activities "are of paramount importance to an independent and thorough review under NEPA and NRC regulations" and have "obvious relevance" to the DEIS's cumulative impact analyses for geology and soils and land use.[98] Fasken also generally claims that information from the pending RAI responses concerning orphaned and abandoned wells, potash mining, and seismicity is "materially omitted" from the DEIS.[99] But Fasken does not identify a specific requirement of NEPA or NRC's environmental regulations that render the DEIS deficient based on these claims. Nor does Fasken explain how the inclusion of allegedly omitted information would alter the analyses or conclusions in the DEIS. Each of the referenced RAIs were issued as part of the Staff's safety review, not the environmental review. Fasken accordingly fails to explain why information sought for the purpose of the Staff's safety findings is relevant to, let alone a material dispute with, the environmental analyses required under NEPA. Indeed, Fasken concedes as much. For example, Fasken states that outstanding information on regional activities that Holtec may provide in responses to the RAIs is important "as it relates to the safety structure features."[100] Concerning outstanding information on abandoned wells, Fasken points to an alleged potential for casing corrosion and states that this issue "implicate[s] serious safety risks."[101] Regarding outstanding information on seismicity, Fasken asserts that such information is "imperative to a proper analysis of the safety of

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98 *Id.* at 22.

99 *Id.* at 26–28.

100 *Id.* at 22.

101 *Id.* at 25.

structures and system components."[102] Tellingly, Fasken cites several safety related regulations in 10 C.F.R. Part 72.[103] While the information requested from Holtec in the outstanding RAIs may be relevant for the Staff's *safety analyses*, Fasken does not identify how that information impacts or demonstrates deficiencies in the Staff's *environmental analyses*. At bottom, Fasken is attempting to use publication of a Staff environmental document to raise safety issues that are outside the scope of NEPA and that it could have raised as challenges to Holtec's application earlier in the proceeding. As such, Fasken fails to demonstrate that the issues it raises are material to the determination that the Staff must make in its environmental review, and Fasken does not raise a genuine dispute with the DEIS. Therefore, this portion of Amended Contention 2 fails to satisfy the requirements of 10 C.F.R. §§ 2.309(f)(1)(iv) and (vi).

Finally, Fasken asserts that the DEIS makes statements that are "inconsistent with the underlying factual premises" in RAI 2-8.[104] Specifically, Fasken notes that the DEIS states that the Green Frog Café drill island is no longer proposed while RAI 2-8 states that "holes were drilled from the Green Frog Café drill island just east of the proposed site."[105] But Fasken does not demonstrate how the statement in the DEIS is inconsistent with the statement in RAI 2-8. And indeed, it is not. Like RAI 2-8, the DEIS acknowledges that "drill islands were established by the BLM in consideration of appropriate oil and gas technology."[106] Areas of land that BLM establishes as drill islands may already contain existing wells, and the mere designation of an area as a drill island does not determine the current status of that drill island. Simply put, both the DEIS and RAI 2-8 recognize the existence of a designated drill island and previously drilled holes outside of the eastern boundary of the proposed project area, facts that Fasken does not

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[102] *Id.* at 27.

[103] *See id.* at 22–28.

[104] *Id.* at 24.

[105] *Id.*

[106] DEIS at 3-8.

dispute. Moreover, Fasken makes no attempt to explain in what way the current status of the Green Frog Café drill island affects the Staff's environmental review or the conclusions presented in the DEIS. Fasken's conclusory assertion that the DEIS is inconsistent with the factual premise of a safety-related RAI is insufficient to demonstrate that the issue raised is material to the findings that the NRC must make in the DEIS. As such, this portion of Amended Contention 2 fails to meet the requirements of 10 C.F.R. §§ 2.309(f)(1)(iv) and (vi).

In sum, it is Fasken's burden to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). Fasken does not satisfy this burden because Amended Contention 2 does not raise issues material to the findings that the NRC must make in its environmental review, lacks sufficient support, and does not raise a genuine dispute with the DEIS on a material issue of fact or law. For these reasons, Fasken's Amended Contention 2 is inadmissible and should be denied.

IV. Fasken Fails to Meet the Reopening Standards of 10 C.F.R. § 2.326 and the Motion to Reopen the Record Should Be Denied

Fasken's Motion to Reopen fails to satisfy the requirements in 10 C.F.R. §§ 2.326(a)(1), (2), and (3), for reopening the record.[107] Specifically, it is (1) untimely, (2) fails to address a significant safety issue, as required by 10 C.F.R. § 2.326(a)(2), and (3) fails to demonstrate that a "materially different result would be or would have been likely" as required by 10 C.F.R. § 2.326(a)(3).

A. Fasken's Motion to Reopen Is Untimely

As discussed above in Section II.A, Fasken's Amended Contention 2 and supporting Motion to Reopen are untimely because the statements in the DEIS on which they are based are not materially different from what was publicly available in Holtec's application materials. Moreover, to the extent that Fasken intends the instant Motion to Reopen to encompass its

[107] *See Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 700 n.54, 701 (2012).

initial Contention 2, filed August 1, 2019 (nearly a year after the initial deadline for filing contentions), it is clearly untimely. Notably, approximately one month after filing its initial Contention 2, Fasken filed an associated motion to reopen, but subsequently withdrew that motion. Thus, despite Fasken's recognition that it was required to meet the reopening standards of § 2.326, the current Motion to Reopen was submitted more than 9 months after its initial Contention 2.[108] Indeed, Fasken does not even attempt to argue that the Motion to Reopen is timely with respect to its initial Contention 2 filing, but rather asserts only that its original Contention 2 was timely. While the Commission may excuse untimeliness for an "exceptionally grave issue,"[109] Fasken does not address that standard and has not provided information that would support such a finding. Accordingly, Fasken's Motion to Reopen should be rejected as untimely.

B. Fasken's Motion to Reopen Does Not Address a Significant Environmental Issue

As discussed above, Fasken's Amended Contention 2 is based on the DEIS, and thus, the motion to reopen must demonstrate a significant environmental issue. A motion to reopen must be accompanied by the affidavit of a qualified expert presenting the claim with evidence that meets the evidentiary standard in 10 C.F.R. § 2.337.[110] In contrast to this requirement, Fasken's accompanying affidavit solely relies on vague assertions that there are "technical and integration issues," that must be "analyzed and fully disclosed" in the DEIS.[111] Furthermore, rather than an affidavit from a qualified expert on the technical subject matter, Fasken's affidavit

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[108] *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) (ML19246B809); *Fasken and PBLRO's Withdrawal of Their "Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019*" (Sept. 12, 2019) (ML19255G616).

[109] *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 NRC 491, 500–01 (2012) (finding that potential noncompliance with the Endangered Species Act was not an "exceptionally grave issue" that threatened the public health and safety).

[110] 10 C.F.R. § 2.326(b).

[111] Fasken Motion to Reopen at 4.

is from its counsel, who does not identify his qualifications regarding the technical subject matter beyond merely stating that he reviewed documents related to Fasken's proposed Amended Contention 2.[112] The Motion to Reopen further asserts that there are issues regarding subsidence, sinkholes, and seismicity that relate to the site design basis and the analysis of events required by the siting evaluation factors.[113] This asserted basis for the motion is not only impermissibly vague, but it is also irrelevant to demonstrating a significant environmental issue. As discussed above, Amended Contention 2, which the instant Motion to Reopen supports, is assertedly triggered by the issuance of the DEIS. Thus, by its own terms Amended Contention 2 is an environmental contention and its arguments concerning safety issues are outside the scope of the NRC's NEPA review. Accordingly, Fasken has not demonstrated that it has raised a material environmental issue, let alone a significant one. As such, the Motion to Reopen should be rejected.

C. Fasken's Motion to Reopen Does not Demonstrate That a Materially Different Result Would be Likely

Fasken has failed to demonstrate how granting its Motion to Reopen would likely result in a material change in the outcome of the proceeding as required by 10 C.F.R. § 2.326(a)(3). As demonstrated above, Amended Contention 2 does not show a genuine dispute with the application or the DEIS, does not raise issues material to the findings that the NRC must make in its environmental review, and lacks sufficient support. Thus, Amended Contention 2 does not meet the standards for an admissible contention in 10 C.F.R. § 2.309(f)(1). Because Amended Contention 2 is inadmissible, a materially different result would not have been likely had it been considered initially.

For these reasons, Fasken's Motion to Reopen fails to satisfy the requirements of 10 C.F.R. § 2.326(a) and should be denied.

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[112] Fasken Motion to Reopen, Affidavit of Allan Kanner at 6.

[113] Fasken Motion to Reopen at 5.

Conclusion

For the reasons set forth above, Fasken has not shown good cause for its filing, has not proffered at least one admissible amended contention, and has not shown that the criteria for reopening the record are satisfied. Accordingly, Amended Contention 2 and the accompanying motion to reopen the record should be denied.

Respectfully submitted,

/Signed (electronically) by/

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Dated this 4th day of June 2020

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of HOLTEC INTERNATIONAL (HI-STORE Consolidated Interim Storage Facility)	Docket No. 72-1051

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing "NRC Staff Answer in Opposition to Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners' Motions to Amend Contention No. 2 and Reopen the Record," dated June 4, 2020, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding, this 4th day of June 2020.

/Signed (electronically) by/

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Dated this 4th day of June 2020