**June 5, 2020**

**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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| In the Matter of | ) | |
| | ) | Docket No. 72-1051 |
| Holtec International | ) | |
| | ) | |
| (HI-STORE Consolidated Interim Storage Facility) | ) | |
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# HOLTEC INTERNATIONAL'S ANSWER OPPOSING FASKEN LAND AND MINERALS, LTD'S AND PERMIAN BASIN LAND AND ROYALTY OWNERS MOTION TO REOPEN THE RECORD AND MOTION FOR LEAVE TO FILE AMENDED CONTENTION NO. 2


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**Holtec International's Answer Opposing Fasken Land and Minerals, Ltd's and Permian Basin Land and Royalty Owners Motion to Reopen the Record and Motion for Leave to File Amended Contention No. 2**

## I. Introduction

On May 11, 2020, Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (collectively "Fasken") filed two motions, a Motion to Reopen the Record ("Motion to Reopen") and a Motion for Leave to File Amended Contention No. 2 ("Motion for Leave").[1] Fasken's Amended Contention No. 2 ("Amended Contention") seeks to raise issues regarding the control of subsurface mineral rights and oil and gas mineral extraction operations beneath and in the vicinity of the site of the proposed Central Interim Storage Facility ("CISF") of Holtec International ("Holtec").

More than a year ago, the record of this proceeding was closed by the decision of the Atomic Safety and Licensing Board ("Licensing Board") which denied intervention by all six petitioners (including Fasken) and ruled that the proceeding was terminated.[2] To raise a new

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

[2] *Holtec International* (HI-STORE Consolidated Interim Storage Facility), LBP-19-04, 89 N.R.C. 353, 461-63 (May 7, 2019).

contention at this juncture, Fasken must therefore meet the standards for reopening the record, the criteria for late-filed contentions, as well as the requirements for contention admissibility. Fasken has met none of these.

For the reasons set forth in detail below, the Licensing Board should reject the Amended Contention.

## II. Background

The Commission's Notice of Opportunity published on July 16, 2018, required that interested parties submit requests for hearing including proposed contentions by September 14, 2018. 83 Fed. Reg. 32919. Fasken instead filed a motion to dismiss the Holtec proceeding, arguing that the Commission lacked jurisdiction because the application was allegedly premised on the U.S. Department of Energy's responsibility for the spent fuel to be transported and stored at Holtec CISF. The Commission's Order dated October 29, 2018, denied the motion to dismiss without prejudice, referring it to the Licensing Board to be considered as a contention under 10 C.F.R. § 2.309.[3]

Evaluating Fasken's motion to dismiss as a contention as directed by the Commission, the Licensing Board (though finding that Fasken had standing) determined not to admit the contention, and absent an admissible contention the Licensing Board denied Fasken's petition to intervene.[4] Since none of the petitioners was admitted to the proceeding, the Licensing Board

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[3] In a subsequent filing Fasken emphasized to the Licensing Board that it had not intended to file a contention, but rather a motion to dismiss directly to the Commission. Reply of Fasken and PBLRO to Holtec's Answer Opposing Movant's Motion to Dismiss/Petition to Intervene (Dec. 10, 2018) (NRC ADAMS Accession No. ML18344A682).

[4] *HI-STORE CISF*, LBP-19-04, 89 N.R.C. 461-62.

appropriately terminated it.[5] With the termination of the proceeding, the record was closed.[6] On June 3, 2019, Fasken filed a Notice of Appeal and Petition for Review, addressed solely to its arguments that NRC lacked jurisdiction to consider the Holtec application.[7]

On August 1, 2019, ten and a half months after the deadline for filing contentions had passed, Fasken for the first time raised an issue other than a jurisdictional one, in this case relating to oil and gas (and mineral) extraction at the site.[8] Fasken's proposed late-filed contention alleged that Holtec's CISF Application made "[s]tatements . . . regarding 'control' over mineral rights below the site" that were "materially misleading and inaccurate" and that relying on these statements "nullifies Holtec's ability to satisfy the NRC's siting evaluation factors,"[9] relying on a June 19, 2019 letter from the New Mexico Commissioner of Public Lands to Holtec.[10] Notwithstanding the fact that the record of the proceeding was closed as a result of the Licensing Board's decision, Fasken failed to accompany its August 1 Motion with the required motion to reopen the record.

In their oppositions to the August 1 Motion, both the NRC Staff and Holtec pointed out Fasken's failure to even mention the need to satisfy the motion to reopen criteria, and also addressed Fasken's attempts to satisfy the late-filed contentions requirements and the contention

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5 *Id.* at 461-63.

6 *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3) CLI-09-05, 69 N.R.C. 115, 120 (2009) ("The Board correctly determined that because it had already denied the intervention petition, a motion to file new or amended contentions must address the motion to reopen standards." (quotations omitted)).

7 Following Fasken's filing of its appeal, Holtec cross-appealed the Licensing Board determination that Fasken had adequately demonstrated its standing. *See* Holtec International's Brief in Opposition to Fasken and Permian Basin Land and Royalty Owners' Appeal of LBP-19-4 at 14-19 (Jun. 28, 2019) (NRC ADAMS Accession No. ML19179A328).

8 Fasken Oil And Ranch And Permian Basin Land And Royalty Owners Motion For Leave To File A New Contention (Aug. 1, 2019) (NRC ADAMS Accession No. ML19213A171) ("August 1 Motion").

9 *Id.* at 3.

10 Letter from Stephanie Garcia Richard, State of New Mexico Commissioner of Public Lands, to Dr. Krishna Singh, President and CEO of Holtec International (Jun. 19, 2019) (NRC ADAMS Accession No. ML19183A429) (Exhibit 3 to Motion for Leave).

admissibility standards.[11] Perhaps in response to Holtec and the NRC Staff's pointing out Fasken's failure to file a motion to reopen, on September 3, 2019, Fasken filed one.[12] The motion recognized that NRC case law "typically" required a motion to reopen to be filed contemporaneously with the motion for leave to admit a late-filed contention, but attempted to distinguish this case law because the NRC Staff had argued that one part of Fasken's late-filed contention met the contention admissibility standards.[13]

Nine days after filing its Motion to Reopen, on September 12, 2019, Fasken without explanation withdrew it.[14] However, because Fasken's withdrawal was unclear, Holtec still responded within the allotted time.[15]

On March 20, 2019, the Commission announced the publication of the draft Environmental Impact Statement for the Holtec CISF ("DEIS"). 85 Fed. Reg. 16150 (March 20, 2020). At Fasken's request, the Commission extended the deadline for filing new or amended contentions based on the DEIS until May 11, 2020.[16]

On April 23, 2020, the Commission issued its decision on the appeals to LBP-19-04.[17] As relevant here, the Commission rejected Fasken's original jurisdictional contention and

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[11] Holtec International's Answer Opposing Fasken's Late-Filed Motion to File a New Contention (Aug. 26, 2019) (NRC ADAMS Accession No. ML19238A343); NRC Staff Answer in Opposition to Fasken Oil and Ranch, Ltd. And Permian Basin Land and Royalty Owners' Motion to File a New Contention (Aug. 26, 2019) (NRC ADAMS Accession No. ML19238A183).

[12] Fasken Oil and Ranch, Ltd. And Permian Basin Land and Royalty Owners Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019 (Sept. 3, 2019) (NRC ADAMS Accession No. ML19246B809).

[13] *Id.* at 2-4.

[14] Fasken Oil and Ranch, Ltd. And Permian Basin Land and Royalty Owners Withdrawal of their "Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019" (Sept. 12, 2019) (NRC ADAMS Accession No. ML19255G616).

[15] Holtec International's Answer Opposing Fasken's Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019 (Sept. 13, 2019) (NRC ADAMS Accession No. ML19256B874).

[16] Commission Order (Granting Extension of Time to File) (April 7, 2020) (NRC ADAMS Accession No. ML20098F515).

[17] Memorandum and Order, *Holtec International* (HI-STORE Consolidated Interim Storage Facility), CLI-20-04, 91 N.R.C.___(Apr. 23, 2020) (NRC ADAMS Accession No. ML20114E150) ("CLI-20-04").

remanded to the Licensing Board Fasken's late filed contention "for consideration of the contention's admissibility, timeliness, and capacity to meet the reopening standards."[18] The Commission did not address Holtec's cross-appeal regarding Fasken's standing.[19]

On the May 11 deadline set by the Commission for filing contentions based on the DEIS, Fasken moved to file an "Amended Contention No. 2"[20] and a second motion to reopen the record.[21]

## III. Standing

Holtec will not address the arguments presented in the Motion for Leave on Fasken's standing as the Licensing Board ruled on that issue in LBP-19-04 and the Commission did not address Holtec's appeal of that decision in CLI-20-04.

## IV. Fasken Fails to Meet the Requirements for a Motion to Reopen.

### A. Legal Standards for a Motion to Reopen

The Commission's long-standing jurisprudence requires that an attempt to admit a contention after the record of the proceeding has been closed and the proceeding terminated, must be accompanied by a motion to reopen the record.[22] The Commission considers "reopening the record for any reason to be 'an 'extraordinary' action,'"[23] and places "an intentionally heavy burden on parties seeking to reopen the record."[24] Indeed, "a party seeking to reopen a closed record to raise a new matter faces an elevated burden to lay a proper

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[18] *Id.*, slip op. at 55 (recognizing that Fasken had filed a motion to reopen with respect to its August 1 Motion, which it subsequently withdrew).

[19] *See* Second Errata to CLI-20-04, (Jun. 3, 2020) (NRC ADAMS Accession No. ML20155K906).

[20] Motion for Leave.

[21] Motion to Reopen.

[22] 10 C.F.R. § 2.326.

[23] *Tennessee Valley Auth.* (Watts Bar Unit 2), CLI-15-19, 82 N.R.C. 151, 156 (2015).

[24] *Id.* at 155.

foundation for its claim."[25] "Commission practice holds that the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention."[26] "Obviously, 'there would be little hope' of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings."[27]

The standards to be met to justify reopening the record are set forth in 10 C.F.R. § 2.326(a). The criteria are:

i. The motion must be timely, but the Board has discretion to consider an untimely issue if it is "exceptionally grave";

ii. The motion must address a significant safety or environmental issue;

iii. The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

In addition, the motion must be accompanied by an affidavit setting forth the factual and/or technical basis for the claim that these three criteria have been met.[28] The affidavit must be from "competent individuals with knowledge of the facts alleged," or from "experts in the disciplines appropriate to the issues raised."[29] And since the motion to reopen is for the purpose of "consider[ing] additional **evidence**,"[30] the "[e]vidence contained in the affidavits must meet the admissibility standards of this subpart."[31] The Motion to Reopen must meet all of these standards, but fails to meet any of them and must be rejected.

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[25] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 N.R.C. 345, 350 (2005).

[26] *Id.*

[27] *Id.* at n. 18 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 555 (1978)).

[28] 10 C.F.R. § 2.326(b).

[29] *Id.*

[30] 10 C.F.R. § 2.326(a) (emphasis added).

[31] *Id.*

### B. The Motion to Reopen Is Unjustifiably Late

In order to be admitted, the party submitting a late-filed contention must demonstrate good cause for the late filing, including showing that the filing was submitted in a timely fashion.[32] Fasken's August 1 Motion made no attempt to meet the reopening standards. As noted above, just over a month later, it filed a motion to reopen, without explaining its late filing. Then, nine days later, it inexplicably withdrew the motion. For the next eight months, Fasken did nothing to meet the reopening standards until May 11, 2020, when it filed the Motion to Reopen, purportedly based on the DEIS filing date. But nothing in the Motion to Reopen explains or justifies the nine-month delay in attempting to meet the reopening standards for its original late-filed contention. The time for Fasken to demonstrate that it met the reopening standards was when it filed Contention 2. Even without the timeliness requirement in the reopening standards, Fasken should not be permitted to supplement its filing nine-months after the fact.

As described in more detail below in the timeliness section, Fasken failed to meet both the timeliness standards for the Motion to Reopen and for the Motion for Leave to file its Amended Contention 2.

### C. The Issues that Fasken Seeks to Raise Are Not Exceptionally Grave

Given that the issues raised in Amended Contention 2 are untimely, as described in more detail in Section V below, Fasken can only support reopening the record by establishing that the issues are "exceptionally grave" pursuant to 10 C.F.R. § 2.326(a)(1).[33] As an example the Commission explained that "exceptionally grave" matters may include "potential harm to an

[32] 10 C.F.R. § 2.309(c).

[33] 10 C.F.R. § 2.326(a)(1).

endangered species" if it is "likely to occur."[34] Fasken does not claim it is raising exceptionally grave issues. Nor could it. Fasken fails to even address materiality, or a precise environmental or safety impact, let alone establish an exceptionally grave matter. As discussed below, Fasken's allegations about oil, gas, and minerals exploration and production are untethered to the CISF Application. Indeed, Fasken alleges no imminent, or even any particular, environmental harm, providing no additional justification for reopening the record, in the absence of a timely filing.

### D. Fasken Does Not Raise a Significant Safety or Environmental Issue

The Motion to Reopen, and Amended Contention 2, also fail to raise an issue that is material to the Application, let alone a significant safety or environmental issue, as required by 10 C.F.R. § 2.326. Fasken claims that the "DEIS implicates significant environmental and safety issues."[35] Notwithstanding Fasken's failure to explain how the DEIS can raise "significant . . . **safety** issues,"[36] the fact that the DEIS may "implicate[] significant environmental and safety issues,"[37] does not mean that Fasken has raised such issues in Amended Contention 2.[38] Significant safety or environment issues are those that invoke true safety significance, such as engineering significance.[39] A "mere showing" that a possible violation of regulatory safety standards could occur is not enough.[40] The regulation "requires motions to reopen to be

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[34] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 N.R.C. 491, 501 (2012).

[35] Affidavit of Allan Kanner at 7 (May 11, 2020) ("Kanner Affidavit").

[36] *Id.* (emphasis added).

[37] *Id.*

[38] "There may, of course, be mistakes in the DEIS, but in an NRC adjudication, it is Intervenors' burden to show their significance and materiality. Our boards do not sit to 'flyspeck' environmental documents or to add details or nuances. If the ER (or EIS) on its face 'comes to grips with all important considerations' nothing more need be done." *Exelon Generation Co. LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 N.R.C. 801, 811 (2005) (internal quotations omitted).

[39] *Cleveland Electric Illuminating Co*. (Perry Nuclear Power Plant), CLI-86-7, 23 N.R.C. 233 (1986); *aff'd State of Ohio v. NRC,* 814 F.2d 258 (6th Cir. 1987).

[40] *Amergen Energy Co. LLC* (License Renewal for Oyster Creek Nuclear Power Plant), CLI-08-28, 68 N.R.C. 658, 670 (2008).

accompanied by affidavits of qualified experts presenting the factual and/or technical bases for the claim that there **is** a significant safety issue."[41] The claims in Fasken's Motion to Reopen do not rise to this level.

First, Fasken makes claims as to the ownership of mineral rights under the site. However, as discussed at length in our August 26, 2019 Answer to the August 1 Motion, the ownership of mineral rights is accurately portrayed in the Application and immaterial to the safety and environmental findings that the NRC must make regarding the Application. Thus, a contention over ownership of mineral rights does not generate a genuine dispute with the application on a material issue of fact or law, let alone a significant safety or environmental issue.

Fasken also claims that old wells and potential drilling could lead to subsidence. However, Fasken's claims regarding the collapse of old wells and subsidence due to future drilling are unavailing. By its own admission, Fasken is "unclear" if drilling depths and subsurface mineral rights have been considered in the design basis or safety analysis.[42] An "unclear" impact can scarcely rise to the level of a significant safety or environmental impact.[43]

Additionally, Fasken makes a claim that there may be earthquake risks due to a recent 5.0 magnitude earthquake. Yet, Fasken concedes that it is "unclear" if adequate consideration has

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[41] *Id.* (emphasis added).

[42] *See* Motion for Leave at 17.

[43] Moreover, as noted in the Section VI admissibility analysis, Fasken does not address or challenge the analyses of subsidence at the site presented in the SAR, ER and the ELEA 2007 report. If Fasken had, it would have noted that the subsidence analysis is historical in nature, and thus encompassed the preexisting shallow wells nearby. *See* Eddy Lea Energy Alliance, LLC, *Eddy-Lea Siting Study* at 2.3-47 to 2.3-52 (Apr. 28, 2007) (NRC ADAMS Accession No. ML102440738) ("ELEA 2007"); Environmental Report (ER), Rev. 7 at § 3.3.3 (ADAMS Accession No. ML19309E337); Holtec Safety Analysis Report (SAR), Rev. 0H at §§ 2.6.4-2.6.6 (ADAMS Accession No. ML19163A062). Nor does Fasken explain how this subsidence would have any impact on the engineering of the CISF itself, leading to a matter of any material safety or environmental issue let alone one of significance.

been given to the risks of seismicity.[44] Once again, by admitting that the impact is "unclear," Fasken cannot establish a significant safety or environmental impact.

In addition, the earthquake analysis was and is fully available to the public.[45] Safety Analysis Report Section 2.6.2 includes an analysis for the 10,000-year return earthquake, including ground acceleration. Fasken does not acknowledge this analysis or otherwise demonstrate that this recent earthquake challenges the facility analysis such that it might raise a matter of safety significance. Fasken's speculation is not sufficient to support a motion to reopen. The Commission has previously found that the mere existence of a recent earthquake in the immediate vicinity of a facility is not enough to support a motion to reopen by itself without true safety significance, such as engineering significance.[46]

Finally, as addressed in the admissibility section below and described in our August 26, 2019 Answer to the August 1 Motion for Leave, Fasken's claims fail to raise a genuine dispute with the Application or DEIS on a material issue of law or fact. Thus, the same issues cannot rise to the level of a significant safety or environmental issue for the purpose of this Motion to Reopen.

### E. Fasken Fails to Demonstrate that a Materially Different Result Would Have Been Likely Were Contention 2 Initially Considered

The Motion to Reopen fails to even address the requirement to demonstrate that a materially different result would have been likely if Amended Contention 2 had been considered initially. Fasken is required to demonstrate that "consideration of [its] evidence will materially

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[44] *See* Motion for Leave at 27.

[45] Fasken alleges without basis that Holtec "prevent[ed] interested parties from meaningfully reviewing and commenting on" seismic risks because of its "confidential probabilistic hazard analysis, Motion for Leave at 27. Fasken provides no citation as to this "confidential" analysis, which is not surprising since no such analysis exists. Holtec is unaware of any "confidential" seismic analysis. The Holtec probabilistic look at seismic is described in SAR Section 2.6.2, which is fully public.

[46] *Perry Nuclear Power Plant*, CLI-86-7, 23 N.R.C. at 233.

affect the outcome of this proceeding"[47] or, in other words, to "show a likelihood that consideration of [its] contention would result in the **denial or conditioning**" of Holtec's CISF Application.[48] Fasken does not attempt to meet that standard now, nor could it, for the reasons already explained in our August 29, 2019 Answer and the remainder of this Answer.

### F. The Motion to Reopen Is Not Accompanied by an Appropriate Affidavit

Not only does Fasken fail meet the requirements of 10 C.F.R. § 2.326(a), it also fails to meet the independent requirements of 10 C.F.R. § 2.326(b). Under 10 C.F.R. § 2.326(b), a motion to reopen the record must be accompanied by affidavits that specifically address the criteria of 10 C.F.R. § 2.326(a) and explain why each has been met. This affidavit "must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised."[49]

Contrary to this requirement, Fasken submitted an affidavit from its attorney representative, Mr. Kanner. Mr. Kanner is neither a factual witness nor an expert competent in the issues raised. Mr. Kanner is an attorney, and accordingly his affidavit provides nothing more than legal argument. If an attorney could draft an affidavit and substitute his or her own legal argument for the supporting affidavit required under 10 C.F.R. § 2.326(b), it would significantly lower than the "intentionally heavy burden"[50] placed upon parties seeking to reopen the record in Commission proceedings.

Indeed, when the rules for a motion to reopen were proposed, commentators argued that "affidavits of lawyers repeating allegations of undisclosed principals should not be sufficient" to

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[47] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-08-12, 68 N.R.C. 5, 23, *aff'd* CLI-08-28, 68 N.R.C. 658 (2008).

[48] *Oyster Creek*, CLI-08-28, 68 N.R.C. at 673 (emphasis added).

[49] 10 C.F.R. § 2.326(b).

[50] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-16-6, 83 N.R.C. 329, 333 (2016) (quoting *Watts Bar*, CLI-15-19, 82 N.R.C. at 155 (quotations omitted)).

support a motion to reopen.[51] In response, the Commission codified the standard set forth in *Pacific Gas and Electric Company*, that affidavits "must be given by competent individuals with knowledge of the facts or experts in the disciplines appropriate to the issues raised."[52] While Mr. Kanner may have knowledge of the law, he has no knowledge of the facts or expertise in the issues raised in Amended Contention 2.

To the extent that Fasken argues that Mr. Pollock's Amended Declaration provides expert analysis to fulfil the affidavit requirement, that is clearly not the case. In accordance with 10 C.F.R. § 2.326(b), the affidavit submitted in support of the Motion to Reopen must address each of the reopening criteria. The Pollock Declaration does not address the requirements for a Motion to Reopen, nor does it even address specific portions of the Holtec Application or DEIS. Thus, Mr. Pollock (were he the affiant) has not fulfilled any of the requirements of an affidavit supporting a motion to reopen.

In addition, "[b]are assertions and speculation" without "technical details and analysis," even from an expert, is insufficient to support a Motion to Reopen.[53] The Pollock Amended Declaration is full of speculation. Pollock states that it is "likely" the petroleum industry will continue to extract minerals from the site[54]; that the shallow depths around the CISF "could" become viable candidates for drilling and exploration;[55] that for older wells there "may" be no information and it is "unknown" if any exist near the site;[56] that "[p]otential" casing collapse

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[51] *Criteria for Reopening Records in Formal Licensing Proceedings*, 51 Fed. Reg. 19535, 19537 (1986).

[52] *Pacific Gas and Electric Company* (Diablo Canyon Nuclear Power Plant, Units 1 and 3), ALAB-775, 19 N.R.C. 1361, 1367 n.18 (1984).

[53] *Oyster Creek*, CLI-08-28, 68 N.R.C. at 674.

[54] Amended Declaration of Stonnie Pollock at 1.

[55] *Id.* at 3.

[56] *Id.* at 4.

"could" cause surface disruptions;[57] and that there is a "potential existence of unstable characteristics."[58] Such speculative language in support of a motion to reopen has been rejected by the Commission in the past,[59] and should be rejected here once again.

In conclusion, Fasken did not submit an affidavit sufficient to meet the requirements set forth in 10 C.F.R. § 2.326(b). For this reason alone, its Motion to Reopen should be rejected.

## V. Fasken Does Not Meet the Lateness Criteria for Either a Motion to Reopen or a Motion for Leave to File a Late Contention.

### A. Legal Standards for Timeliness

Fasken's Motion to Reopen is not timely under 10 C.F.R. § 2.326(a)(1). To determine if a filing is timely for the purposes of a motion to reopen, the Commission looks at "whether the contention could have been raised earlier—that is, whether the information on which it is based was previously available or whether it is materially different from what was previously available, and whether it has been submitted in a timely fashion based on the information's availability."[60] As the Commission has stressed, "proceedings would be incapable of attaining finality if contentions—that could have been raised at the outset—could be added later at will, regardless of the stage of the proceeding."[61]

The same principle applies to Fasken's Motion for Leave ostensibly based on the DEIS: contentions that could have been raised at the outset of the proceeding are impermissible when raised later based on the DEIS. Pursuant to 10 CFR § 2.309(f)(2), "On issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant's

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[57] *Id.*

[58] *Id.*

[59] *Oyster Creek*, CLI-08-28, 68 N.R.C. at 674.

[60] *Pilgrim Nuclear Power Station*, CLI-12-21, 76 N.R.C. at 498.

[61] *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 N.R.C. 479, 483 (2012).

environmental report." Under Commission jurisprudence, "as a matter of law, an intervenor *must* file contentions on the basis of an applicant's environmental report, and does not have good cause for delaying its filing until issuance of a Staff document unless it establishes that new or different data or conclusions are contained in the Staff environmental document."[62]

Additionally, it is *not* sufficient to claim that "certain concerns that were not dealt with in the ER have additionally not been dealt with in the DEIS."[63] Nor is it sufficient to wait for the "[NRC] reports [to] bring to light" "new evidence on issues that already were apparent at the time of application, had the application been carefully reviewed."[64] Indeed, "[a]n intervenor that awaits the publication of a DEIS or FEIS before filing a contention for which the intervenor has sufficient information does so 'at its peril.'"[65]

Additionally, "[t]he Commission has stated 'a petitioner has "an ironclad obligation" to examine the application, and other publicly available documents, with sufficient care to uncover any information that could serve as the foundation for a contention.'"[66] And "participants in agency proceedings have been counseled to evaluate all available information at the earliest possible time to identify the potential basis for contentions and preserve their admissibility."[67]

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[62] *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 N.R.C. 200, 251 (1993), *petition for review and motion for directed certification denied*, CLI-94-2, 39 N.R.C. 91 (1994).

[63] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 N.R.C. 216, 223 (2000).

[64] *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 N.R.C. 328, 338 (1999) (internal quotations omitted) (citing *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55 (D.C. Cir. 1990)).

[65] *Private Fuel Storage*, LBP-00-27, 52 N.R.C. at 223 (quoting *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-94-11, 39 N.R.C. 205, 212 (1994)).

[66] *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-99-43, 50 N.R.C. 306, 313 (1999) (quoting *Oconee*, CLI-99-11, 49 N.R.C. at 338).

[67] *Id.* (citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 N.R.C. 1041, 1050 (1983) (intervenors are expected "to raise issues as early as possible")).

The Commission has determined that RAI responses can give rise to a contention.[68] As a result, Licensing Boards have also found that information contained in RAI responses triggers the "obligation to come forth with a contention based on that information."[69]

### B. The Information Proffered by Fasken Is Insufficient to Remedy Its Lateness.

The vast majority of information relied on by Fasken to meet the lateness requirements for the Motion to Reopen and the Motion for Leave is either predated by information actually known to Fasken, well outside the timeliness criteria, undated, or immaterial. Fasken makes reference to the DEIS, but as established above, the publication of the DEIS is not sufficient, by itself, to support a late filed contention or motion to reopen. The petitioners must identify and adequately challenge "*new or different* data or conclusions [that] are contained in the Staff environmental document."[70] On the occasions where Fasken does reference the DEIS, it fails to meet this standard. By and large, the information that Fasken refers to in the DEIS is not new but was available to Fasken well before the DEIS was published. In the alternative, the information (such as the differences in drilling depths between the ER and DEIS) involves issues on which Fasken could have and should have raised a contention at the outset of this proceeding. Beyond its references to the DEIS, Fasken fails to identify any new information that would form the basis of an admissible contention.

#### 1. Fasken's Reliance on the DEIS Publication Date Is Insufficient to Support Timeliness.

Fasken claims that its Motion to Reopen is timely filed based on the publication date of the DEIS. However, as described above, it is well established that the publication of the Staff's

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[68] *See Oconee*, CLI-99-11, 49 N.R.C. at 338. As discussed in more detail in Sections VI.C and VI.D.3, while RAI **responses** can give rise to new contentions if they include sufficiently new information, the mere existence of a RAI by itself is insufficient basis to establish a contention.

[69] *Private Fuel Storage*, LBP-99-43, 50 N.R.C. at 314.

[70] *Rancho Seco*, LBP-93-23, 38 N.R.C. at 251.

DEIS is not sufficient justification by itself to support the filing of a new contention. The new contention must be one that could *not* have been raised previously on the Environmental Report. Fasken does not address this requirement, and this alone is fatal to Fasken's attempts to justify the timeliness of its revised contention.

Indeed, Fasken clearly had sufficient information to file Amended Contention 2 before receiving the DEIS, because *it already did so*. As a general matter, Fasken's Amended Contention 2 alleges that the Holtec DEIS "*continu[es]* to misrepresent the control and ownership of subsurface mineral rights, the status of industry operations, and geologic characteristics in the region."[71] Indeed, this argument is repetitive of Fasken's earlier claims, which were not timely in the first instance. Fasken again raises the Land Commissioner's Letter from 2019. There is nothing new about this Letter, nor was there anything new about the Land Commissioner's Letter, as we established in previous submittals.[72] Fasken's Vice President (and one of its affiants for the Motion for Leave) wrote to the NRC nearly a year before Contention 2 was first filed with the same information that underpins the Land Commissioner's letter[73]. Because Fasken was aware of this information almost a year before the Commissioner's letter that it claims as a basis for its late filing, the Commissioner's letter cannot support a late-filing, either as of August 1, 2019 or as of May 11, 2020.

Additionally, Fasken reiterates its claims regarding older well bores and drilling nearby the Holtec site, also included in the July 30, 2019 Pollock affidavit attached to Fasken's August 1

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[71] Motion for Leave at 11.

[72] *See* Holtec International's Answer Opposing Fasken's Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019, dated September 13, 2019 (NRC ADAMS Accession No. ML19238A343); Holtec International's Answer Opposing Fasken's Late-Filed Motion to File a new Contention, dated August 26, 2019 (NRC ADAMS Accession No. ML19238A183).

[73] *See* Letter from Tommy E. Taylor (Fasken) to M. Layton (NRC-NMSS), USNRC Docket No. 72-1051 and 72-1052, Proposed Holtec High Level Nuclear Waste Storage Facility, Lea and Eddy County, NM at 2 (July 30, 2018) (NRC ADAMS Accession No. ML18219A710).

Motion. While Fasken attempts to remediate and supplement this claim in its latest filing by linking it to subsidence at the site, it does not establish that any of the information underlying this claim is new. Nor can it. The information related to older wells and drilling near the site was included in the ELEA 2007 report that is referenced in the ER. Thus, there is nothing new or timely about the presence of old wells or drilling near the Holtec CISF.

In summary, Fasken's original Contention 2, filed in August 2019, raised many of the same issues that are raised in its Amended Contention 2 and these issues should have been raised at the outset of this proceeding. In addition to the points made above, more detail on the lack of timeliness in the original Fasken filing can be found in our August 2019 Answer to the original filing.

**2. Fasken's Specific References to the DEIS Are Insufficient to Support Timeliness.**

It is also clear that none of the individual issues identified in the DEIS and raised by Fasken in Amended Contention 2 are timely. It is most telling that nothing in Fasken's filings tells us **when** it learned of the information on which it now relies. None of that information appears to be of recent vintage. To take but one example, the map attached to Mr. Pollock's Amended Declaration shows "Wellbores in 6 Mile Radius" of the Holtec CISF site.[74] While the map has a Fasken logo, it is undated and more significantly it fails to state when Fasken collected the data and when Fasken first learned that the data was available to be collected.

Fasken claims that the DEIS's language constitutes "materially different conclusions and reliance on sources of data and information and statements made for the very first time the recent Holtec DEIS."[75] Of course, the DEIS is the first document drafted by the NRC Staff that records

[74] Amended Declaration of Stonnie Pollock at 9.

[75] Motion for Leave at 11.

the NRC's assessment of environmental impacts. However, that is not enough, by itself, to support a new or amended contention. New or amended contentions – even when ostensibly based on recently issued NRC environmental review documents – "must be based on **new facts** not previously available."[76] As discussed in the below examples, none of Fasken's references to the DEIS truly rise to the level of *new facts* not previously available.

- Cumulative Impacts. Fasken appears to challenge the cumulative impacts analysis in the DEIS,[77] but it also openly admits that the analysis is based on "publicly available information," information in Holtec's Application, and information in Holtec's RAI responses.[78] All of which is information that would be available before the DEIS was published.

- Land Use Radius and Local Oil and Gas Operations. Fasken also challenges the six-mile land use radius described in the DEIS, which Fasken asserts is "applied for the first time in the Holtec DEIS."[79] However, the six-mile radius has its origins in the land use description in Holtec's ER.[80] Therefore, the use of a six-mile radius was neither new when used in the DEIS, nor "applied for the first time in the Holtec DEIS."[81] Thus, it should have come as no surprise to Fasken that the DEIS land use analysis is six miles. Interestingly, Fasken itself supported a smaller five-mile radius for land use analysis in its original Contention 2 based on an NRC Staff NUREG.[82] In addition, although citing to nothing, Mr. Pollock's July 31, 2019 Affidavit in support of the original Contention 2 also relied on a five-mile radius.[83] In short, not only is Fasken's criticism late, it is also wrong and inconsistent with its prior statements.

- Oil and Gas Operations. Indeed, Fasken provides nothing to demonstrate that the description of "oil and gas operations at and in the vicinity of the proposed CISF"[84] was not information well known to it years before the Holtec Application was filed. After all, Fasken "drilled its first oil well in the Permian Basin 70 years ago and its first well in the vicinity of the Holtec site in 1979" and has acreage

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[76] *Pilgrim Nuclear Power Station*, CLI-12-10, 75 N.R.C. at 493 n.70 (emphasis in original).

[77] Motion for Leave at 10.

[78] *Id.* at 11-12.

[79] *See id.* at 13, 15; DEIS at 5-17.

[80] *See* ER at 3-2, 3-3 (describing lands and pipelines within 6 miles/10 km of the site).

[81] Motion for Leave at 13.

[82] *See* August 1 Motion at n.25 ("NUREG-1567 § 2.4.2 requires that an applicant regionally analyze all man-made facilities within a 5-miles radius of an ISFSI.").

[83] Affidavit at 2.

[84] Motion for Leave at 15.

"directly west and adjacent to the proposed site."[85] It seems incredulous for Fasken to claim that it was unaware of information on oil and gas development in the region prior to the publication of the DEIS. Even if was not aware of specific pieces of information, Fasken cannot conceivably deny that it knew how to obtain that information at any time of its choosing.

- Ownership/Control of Subsurface Rights. Fasken claims that the DEIS "erroneously and inconsistently depicts ownership and control over subsurface mineral rights beneath and adjacent to the proposed Holtec CISF site."[86] Fasken, however, instead of pointing to language in the DEIS, refers back to the Land Commissioner's Letter and Holtec's ER, the first of which has been available for almost a year, and the second for more than two years. Both were already addressed in our prior response. As we have stated, the Holtec Application accurately reflects the state of land ownership at the site. However, even if the Application were inaccurate (it is not), the ownership of the mineral rights and the site is publicly available information and should have been challenged by Fasken at the outset of this proceeding.

- State Land Office Discussions. Fasken states that the DEIS "speculat[es] on a proposed but not yet-accepted 'land use restriction or condition' at the Holtec site and the prospective future contractual relationships between oil and gas lessees and the State Land Office."[87] Fasken provides no citation to the DEIS for this assertion, which alone is fatal to this claim.[88] It appears that Fasken is referencing a statement in the DEIS that "Holtec has entered into an agreement with Intrepid to relinquish certain potash mineral rights to the State of New Mexico and is in discussions with the New Mexico State Land Office regarding an agreement to retire potash leasing and mining within the proposed CISF project area."[89] However, as clearly indicated in the DEIS, this information is derived from a Holtec RAI response dated March 15, 2019, that was made publicly available in April 2019.[90] Fasken had an obligation to file any challenge that it may have based on information in this RAI response when it was first published over a year ago. The availability of this information in April 2019 means that Fasken's

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[85] Declaration of Tommy Taylor, dated May 11, 2020 at 1-2, Ex. 1 to Motion for Leave. In fact, the Motion for Leave (at 2) states that Permian Basin Land and Royalty Owners "has been drilling and extracting oil in the region for over 80 years."

[86] Kanner Affidavit at 7.

[87] Motion for Leave at 14.

[88] As an aside, Fasken, as a participant in NRC adjudicatory proceedings, is "obligated in their filings before the board and the Commission to ensure that their arguments and assertions are supported by **appropriate and accurate** references to legal authority and factual basis, including, as appropriate, citation to the record." *Policy on Conduct of Adjudicatory Proceedings*, 48 N.R.C. 18, 22 (Jul. 28, 1998) (emphasis added). Fasken's inaccurate use of quotes in its brief and failures to provide references to the DEIS are examples of Fasken failing to meet this basic requirement. *See, e.g.*, Motion for Leave at 10, n.35 (citing Intervenor argument in a different case as legal authority), *id.* at 11, 14, 15 (failing to provide citation to DEIS).

[89] DEIS at 5-24.

[90] *See* Attachment 1 to Holtec Letter 5025041 HI-STORE RAI Part 4 Responses (NRC ADAMS Accession No. ML19081A075).

attempt to raise this issue on August 1, 2019 in its original Contention 2 was already untimely. Its attempt to raise it in May 2020, is untimely to the extreme.

- Age of Citations. Fasken argues that the DEIS's reliance on a 1978 Cheeseman report for the depth of the geologic Salado formation is inadequate "given the advancements in drilling technologies and practice over the past several decades."[91] Fasken later claims that the Holtec DEIS relies on outdated, historical sources to describe and predict oil operations in the area.[92] Fasken does not specifically identify which sources it is challenging, except for the Cheeseman report,[93] and Fasken does not provide any evidence to indicate that the Salado Formation has moved since the 1978 Cheeseman reference or that any of the information in that study is incorrect. Moreover, the 2007 ELEA report underpinning Holtec's ER also relies on publications of the same era (and same year), thus if the age of a publication were a relevant concern, Fasken could have raised the same issue regarding Holtec's ER.

- Drilling Depths. Fasken challenges the depth of the oil and gas production targets specified in the DEIS. Fasken argues that drilling could occur at depths shallower than 3,050 feet, contrary to statements in the DEIS.[94] The Staff's DEIS includes a more conservative estimate of drilling depth than Holtec's application, which mentioned that drilling would occur at depths below 5,000 feet.[95] If Fasken is now arguing that drilling will occur at depths less than 3,050 feet, it should have first challenged the Environmental Report estimate of drilling below depths of 5,000 feet at the pendency of this proceeding.

  In addition, contrary to Fasken's assertions, Holtec did not "turn[] a blind eye" to the history near the site.[96] Information on the depth of wells near the CISF site (including old wells drilled at depths less than 3,050 feet) was included in the ELEA 2007 report prominently referenced in ER Sections 3.1.1-3.1.2.[97] To the extent that Fasken wanted to assert that advances in drilling would enable renewed interest at lower depths, and that shallower wells do exist, it should have

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[91] Motion for Leave at 16.

[92] *Id.* at 19.

[93] To the extent that Fasken is challenging the sources used in the DEIS, ER, and SAR, it should have identified and evaluated each one of those sources, including the ELEA 2007 report referenced in the Holtec Application. It is Fasken's obligation to clearly establish their contention from the outset: it is not up to the Board to assume the existence of missing information. *See, e.g.*, *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 N.R.C. 149, 155 (1991); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-07, 69 N.R.C. 235, 260 (2009) (noting that the contention admissibility rules "require the petitioner (not the board) to supply all of the required elements for a valid intervention petition" (footnote omitted)).

[94] Motion for Leave at 18.

[95] *See* ER at § 3.1.1; DEIS at 4-4 – 4-5.

[96] Motion for Leave at 18.

[97] ELEA 2007 at Tables 2.3.2.2-1 – 2.3.2.2-2.

done so when this proceeding first began.[98] It is incomprehensible that an entity that has been involved in oil and gas drilling for seven decades would not have been aware of any inconsistencies in the initial Application before contentions were due in September 2018.

- Active Well Onsite. Finally, Fasken challenges the assertion in the DEIS that "there is one active oil/gas well on the southwest portion of the Section 13 that operates at minimum production to maintain mineral rights," and claims that this is new and material information.[99] Fasken goes on to assert that this statement "was discussed for the very first time in the Holtec DEIS."[100] Fasken is incorrect. The exact same sentence appears at the end of Section 2.2.2 of the Holtec SAR. Here again, to the extent that Fasken is disputing the description of this well, its allegation could have been raised in September 2018.

In summary, Fasken fails to establish the existence of any new facts in the DEIS sufficient to give rise to a new contention. give rise to a new contention.

**3. Fasken Has No Other Justification Sufficient to Support Timeliness.**

Fasken's Motion for Leave also does not try to raise a contention on any other new issues, beyond its references to the DEIS. Fasken claims that the existence of unanswered NRC Requests for Additional Information ("RAIs") can form the basis of a litigable contention. As addressed later in the admissibility section, the *mere existence* of yet-to-be-answered RAIs is not a sufficient basis to form an admissible contention under Commission caselaw. Notwithstanding Fasken's unjustified labelling of Holtec's scheduling of the RAI answers as "refus[ing]" to provide NRC with information and a "disregard of regulatory obligations",[101] Fasken ignores the fact that all of these RAIs were addressed to safety issues. The NRC Staff's issuance of the DEIS prior to receiving responses to these *safety* RAIs demonstrates that that information was

[98] Of note, while the May 11 Motion for Leave references the Pollock Amended Declaration for the "perforations as shallow as 887 feet," Motion for Leave at 18, no such information is mentioned in the Pollack Declaration. This is another example of Fasken failing to adequately support its assertions with appropriate and accurate references.

[99] Motion for Leave at 18 (emphasis omitted) (citing DEIS at 3-7).

[100] *Id.* at 18.

[101] *Id.* at 21-22.

not deemed "crucial" by the NRC Staff for the DEIS.[102] However, even if the RAIs could be the basis for an admissible contention, there is no reason for Fasken to have waited 6 months after the November 2019 publication of the RAIs before filing its Contention.

Finally, the Pollock Amended Declaration references no new information at all, whether from the DEIS or otherwise. Nothing in the Declaration provides any indication when the information was first available to Fasken or Mr. Pollock. Nor does the Declaration provide any references or citations to support any of Mr. Pollock's statements at all, beyond the occasional reference to Holtec's Application. Thus, there is no way to determine whether Mr. Pollock's statements present information that was not available until after the Holtec Application was filed, after the deadline for submitting contentions, or any other date. There is nothing in the Pollock Declaration to support the timeliness of Fasken's Amended Contention 2. In addition, any challenge that Mr. Pollock might raise against Holtec's Application, based solely on the Application, is months too late.

## VI. Fasken Amended Contention 2 Does Not Meet the Admissibility Criteria Set Forth in 10 C.F.R. 2.309(f)(1).

### A. Legal Standards for Contention Admissibility

Even if Fasken were able to show the requisite good cause for its late filing, the late-filed contentions must still meet the Commission's admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1). Specifically, contentions must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted;

(ii) Provide a brief explanation of the basis for the contention;

[102] Interestingly, none of the RAIs relied upon by Fasken were submitted in connection with the preparation or content of the DEIS. Instead, each is submitted with respect to the SAR. Therefore, even if the existence of an RAI were an appropriate basis for a new contention (which it is not), where the submittal of Fasken's late-filed Amended Contention 2 is tied to the issuance of the DEIS, RAIs relating to the review of the SAR are irrelevant.

(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 which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;

(vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.[103]

These standards are enforced rigorously. "If any one . . . is not met, a contention must be rejected."[104] A licensing board is not to overlook a deficiency in a contention or assume the existence of missing information. Under these standards, a petitioner "is obligated to provide the [technical] analyses and expert opinion showing why its bases support its contention."[105] Where a petitioner has failed to do so, "the [Licensing] Board may not make factual inferences on [the] petitioner's behalf."[106]

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[103] 10 C.F.R. § 2.309(f)(1)(i)-(vi).

[104] *Palo Verde*, CLI-91-12, 34 N.R.C. at 155 (citation omitted); *USEC, Inc.* (American Centrifuge Plant), CLI-06-09, 63 N.R.C. 433, 437 (2006) ("These requirements are deliberately strict, and we will reject any contention that does not satisfy the requirements." (footnotes omitted)).

[105] *Georgia Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-06, 41 N.R.C. 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 N.R.C. 1 (1995), *aff'd in part*, CLI-95-12, 42 N.R.C. 111 (1995).

[106] *Id*. (citing *Palo Verde*, CLI-91-12, 34 N.R.C. at 149); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-07, 47 N.R.C. 142, 180 (1998) (explaining that a "bald assertion that a matter ought to be considered or that a factual dispute exists . . . is not sufficient;" rather, "a petitioner must provide documents or other factual information or expert opinion . . . to show why the proffered bases support [a] contention" (citations omitted)).

Further, admissible contentions "must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]."[107] In particular, this explanation must demonstrate that the contention is "material" to the NRC's findings and that a genuine dispute on a material issue of law or fact exists.[108] The Commission has defined a "material" issue as meaning one where "resolution of the dispute **would make a difference in the outcome** of the licensing proceeding."[109]

Furthermore, a statement "that simply alleges that some matter ought to be considered" does not provide a sufficient basis for a contention.[110] Similarly, "[m]ere reference to documents does not provide an adequate basis for a contention."[111] Rather, NRC's pleading standards require a petitioner to read the pertinent portions of the license application, including the safety analysis and the environmental report, state the applicant's position and the petitioner's opposing view, and explain why it has a disagreement with the applicant.[112] If the petitioner does not believe these materials address a relevant issue, the petitioner is "to explain why the application is deficient."[113] "[A]n allegation that some aspect of a license application is 'inadequate' or 'unacceptable' does not give rise to a genuine dispute unless it is supported by facts and a reasoned statement of why

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[107] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 N.R.C. 349, 359-60 (2001).

[108] 10 C.F.R. § 2.309(f)(1)(iv), (vi).

[109] Final Rule, Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989) (emphasis added).

[110] *Rancho Seco*, LBP-93-23, 38 N.R.C. at 246.

[111] *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 348 (1998).

[112] Final Rule, Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170-171 (Aug. 11, 1989); *Millstone Nuclear Power Station*, CLI-01-24, 54 N.R.C. at 358.

[113] 54 Fed. Reg. at 33,170. *See also Palo Verde*, CLI-91-12, 34 N.R.C. at 156.

the application is unacceptable in some material respect."[114] Likewise, mere speculation is not sufficient to raise a genuine dispute with the application.[115]

Nor may a petitioner base its claims solely on the idea that information, if provided, might raise some issue. Commission regulations expressly provide that contentions "**must** be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee . . . ."[116] To meet the Commission's standards for admission of a contention, "petitioners must do more than rest on the mere existence of RAIs as a basis for their contention."[117] This is because "RAIs generally indicate nothing more than that the staff requested further information and analysis from the licensee. . . . The NRC's issuance of RAIs does not alone establish deficiencies in the application, or that the NRC staff will go on to find any of the applicant's clarifications, justifications, or other responses to be unsatisfactory."[118]

### B. NEPA Standards

The National Environmental Policy Act ("NEPA") requires agencies, including the NRC, to take a "hard look" at the environmental impacts of a proposed action and alternatives to that action.[119] This "hard look," however, is subject to a "rule of reason" such that the consideration of environmental impacts must address only those impacts "that are reasonably foreseeable or have some likelihood of occurring."[120] The agency has broad discretion over the thoroughness of the

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[114] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 N.R.C. 257, 358 (2006) (citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 N.R.C. 509, 521 & n.12 (1990)).

[115] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 N.R.C. 215, 225 (2017).

[116] 10 C.F.R. § 2.309(f)(2) (emphasis added).

[117] *Oconee*, CLI-99-11, 49 N.R.C. at 36 (citations and quotations omitted).

[118] *Id.*

[119] *Southern Nuclear Operating Co*. (Early Site Permit for Vogtle ESP Site), LBP-09-07, 69 N.R.C. 613, 719 (2009).

[120] *Id.*

analysis, and may decline to examine issues the agency in good faith considers "remote and speculative" or "inconsequentially small."[121] Furthermore, NEPA does not call for a "worst-case" inquiry because it "creates a distorted picture of a project's impacts and wastes agency resources."[122]

The Commission has found that NEPA serves a dual purpose: to ensure that "officials fully take into account the environmental consequences of a federal action before reaching major decisions, and to inform the public, Congress, and other agencies of those consequences."[123] NEPA does not mandate particular results, but prescribes the necessary process.[124]

Moreover, "an [EIS] is not intended to be 'a research document.'"[125] "NEPA does not call for 'examination of every conceivable aspect of federally licensed projects.'"[126] Although "there 'will always be more data that could be gathered,' agencies 'must have some discretion to draw the line and move forward with decisionmaking.'"[127] Accordingly, NEPA does not demand virtually infinite study and resources.[128] If there are mistakes in the FEIS, "in an NRC adjudication, it is Intervenors' burden to show their significance and materiality."[129]

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[121] *Id.*; *see also Vermont Yankee Nuclear Power Corp*. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 N.R.C. 29, 44 (1989) (citing *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 739 (3d Cir. 1989)).

[122] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 N.R.C. 340, 352 (2002) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354-55) (1989)).

[123] *Id. at* 348.

[124] *Robertson*, 490 U.S. at 350.

[125] *Entergy Nuclear Generation Co. et. al.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 N.R.C. 202, 208 (2010) (citation omitted).

[126] *Private Fuel Storage*, CLI-02-25, 56 N.R.C. at 349 (quoting *Louisiana Energy Services L.P.* (Claiborne Enrichment Center), CLI-98-03, 47 N.R.C. 77, 102-03).

[127] *Entergy Nuclear Generation Co. et. al.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 N.R.C. 287, 315 (2010) (quoting Town of Winthrop v. FAA, 535 F.3d 1, 11-13 (1st Cir. 2008)).

[128] *Id.* at 315.

[129] *Clinton ESP Site*, CLI-05-29, 62 N.R.C. 811.

At bottom, NEPA "does not require [a] crystal ball inquiry."[130] Nor does it call for certainty or precision. When faced with uncertainty, NEPA requires "reasonable forecasting."[131] An agency is obligated to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made."[132]

### C. Contentions of Omission

To raise a contention based on an allegation that an application lacks sufficient information, a petitioner must do more than merely allege the existence of an outstanding RAI. The Commission's precedent is clear that the existence of outstanding RAIs in itself does not provide support for admission of a contention, as "RAIs generally indicate nothing more than that the Staff requested further information and analysis from the licensee."[133] In order to show that the outstanding RAIs raise a dispute or are material, petitioners "must use the RAI to make the issue of concern their own. This means they must develop a fact-based argument that actually and specifically challenges the application."[134]

In explaining the rules underlying a contention of omission, the Board has explained that "[g]eneralized grievances with the sufficiency of the NRC Staff's analysis or the adequacy of included documentation are not enough to raise a proposed contention to the level of admissibility."[135] Notably, the Commission has held that "The extent to which an RAI might help support a contention must be considered on a case by case basis, but the Commission

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[130] *Natural Res. Def. Council v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972) (internal quotations omitted).

[131] *Scientists' Inst. For Pub. Info., Inc. v. AEC*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

[132] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

[133] *Oconee*, CLI-99-11, 49 N.R.C. at 336 (quoting *Sacramento Municipal Utility Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-03, 37 N.R.C. 135, 146 (1993) (quotations omitted)).

[134] *Id.* at 341.

[135] *Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-13-09, 78 N.R.C. 37, 47-48 (2013)

expects that in almost all instances a petitioner must go beyond merely quoting an RAI to justify admission of a contention into the proceeding."[136]

A contention alleging that an application is deficient must identify "each failure and the supporting reasons for the petitioner's belief."[137] If a petitioner wishes to raise a contention based on an outstanding RAI, "[i]t is the petitioner's job to review the application and to identify **what** deficiencies exist and to explain **why** the deficiencies raise material safety concerns."[138]

### D. Fasken's Arguments are Insufficient for Admission of Amended Contention 2

Fasken has amended its original Contention 2, as put forth in its August 1 Motion, to focus not only on ownership of mineral rights but also on the description of oil and gas activities in the vicinity of the CISF site. As amended, Fasken's Amended Contention 2 states 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, which precludes a proper analysis under NEPA and further nullifies Holtec's ability to satisfy NRC's siting evaluation factors now and anticipated in the future and is in further violation of NRC regulations.[139]

Fasken offers a multitude of arguments in support of this contention, alleging that: the Application and DEIS contain misstatements regarding ownership of mineral rights at the site; the DEIS relies on allegedly outdated and often-unspecified information which Fasken claims is inaccurate; the DEIS fails to adequately consider advanced drilling technologies; the NRC is precluded from performing the required NEPA analysis because Holtec has not yet responded to some of the Staff's Requests for Additional Information (RAIs); and the DEIS makes an

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[136] *Oconee*, CLI-99-11, 49 N.R.C. at 341.

[137] *Id. at* 336 (1999).

[138] *Id.* at 337 (emphasis in the original).

[139] Motion for Leave at 10-11.

arguably different characterization than the Holtec ER with respect to cumulative impacts on geology and soils.

None of Fasken's many claims satisfies the Commission's rules for contention admissibility, and thus Fasken's Amended Contention 2 is inadmissible. In many cases, Fasken simply ignores the information and analyses presented in the Application and the DEIS. Fasken's arguments are filled with conclusory statements that the DEIS "alters reality"[140] or "defies all logic and common sense,"[141] that the Application "misleads the NRC and the public,"[142] that Fasken "object[s] to reliance on insufficient data and speculative agreements with unknown terms,"[143] that claims in the DEIS are "unlikely [to have been] based on solid evidence or substantial factual support when made"[144] and are "unforgivingly inaccurate,"[145] that the DEIS fails to consider a number of factors such as advances in drilling technology, and that "it is unclear if . . . factual reality . . . has even been considered."[146] The Motion for Leave is also replete with hyperbole and inappropriate characterizations, labelling the Application and the DEIS as "misleading", "distorted," "unreliable", "alter[ing] reality", "fundamentally misrepresent[ing]", "absurd associated conclusions", "unmoored," "bizarre[]", and "lack[ing] integrity."[147] Such language does not support a contention's admissibility.

To meet the Commission's pleading standards, a petitioner must do more than offer conclusory assertions claiming that there is new information while ignoring the contents of the

[140] *Id.* at 15.
[141] *Id.* at 16.
[142] *Id.* at 12.
[143] *Id.* at 13.
[144] *Id.* at 17.
[145] *Id.*
[146] *Id.*
[147] *See generally* Motion for Leave.

Application, assert that an Application or DEIS is incorrect, or state that a DEIS should consider some factor. Rather, the NRC's pleading standards require a petitioner to read the pertinent portions of the license application, then state the applicant's position and the petitioner's opposing view, and then the Petitioner must explain *why* it has a disagreement with the applicant. In addition, to raise a contention on a DEIS, a petition must reference the specific language in the DEIS that it disputes. Yet, Fasken rarely identifies the specific portions of the Application or DEIS which it purports to dispute, in contravention of the Commission's specificity requirements.

Nor does Fasken establish the materiality of its claims. Wholly apart from its obligation to meet the reopening and timeliness requirements, to submit an admissible contention, Fasken must show why the Application or DEIS is deficient, "explain[ing], with specificity, particular safety or legal reasons requiring rejection of the contested [application]."[148] The Commission has explained that petitioners "must articulate at the outset the specific issues they wish to litigate as a prerequisite to gaining formal admission as parties."[149] Yet, Fasken fails to establish specific legal authority underpinning its litany of claims throughout Amended Contention 2. As an example, there is no NRC requirement that Holtec identify every well drilled in a 10 or 17-mile radius of the site.[150] Nor is there a requirement that the NRC use only recent citations for scientific propositions.[151] The absence of any legal analysis in Fasken's exhaustive listing of Amended Contention 2 allegations,[152] along with the scattershot nature of its claims devoid of

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[148] *Millstone Nuclear Power Station*, CLI-01-24, 54 N.R.C. at 359-60.

[149] *Oconee*, CLI-99-11, 49 N.R.C. at 338.

[150] Motion for Leave at 16 ("Petitioners believe a wider radius is necessary to truly evaluate cumulative impacts. previously [sic] provided similar statistics for operations within a 10-mile radius and 17-mile radius in its original Contention No. 2[.]").

[151] *Id.* at 16 ("[R]elying on a 1978 historical source to accurately describe 2020 oil and gas operations defies all logic and common sense.").

[152] *See id.* at 10-28.

specific references to regulations and the Application, alone justifies the dismissal of its Contention.[153]

Moreover, to the extent Fasken attempts to attack the DEIS under NEPA, Fasken's arguments boil down to a request for a "crystal ball inquiry."[154] NEPA does not demand virtually infinite study and resources,[155] and is subject to a "rule of reason" limiting consideration of environmental impacts to those impacts "that are reasonably foreseeable or have some likelihood of occurring."[156] Speculative assertions, such as the many speculative claims in the Pollock Amended Declaration,[157] do not justify further analysis under NEPA. If there are alleged errors or omissions in the environmental analysis, "in an NRC adjudication it is the Intervenors' burden to show their significance and materiality."[158] Fasken's challenges to the DEIS, though, amount to no more than repetitive claims that the DEIS should have considered other factors, or weighted factors differently—advanced drilling, the CISF site radius, etc.—and therefore cannot serve as a challenge to the DEIS.

Despite the obvious and fatal flaws with Fasken's pleading, however, due to the multitude of arguments put forth, Holtec addresses Fasken's individual arguments and their admissibility, or lack thereof, below.

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[153] Of note, even if Fasken has identified alleged errors or omissions in the environmental analysis, "in an NRC adjudication, it is Intervenors' burden to show their significance and materiality." *Clinton ESP Site*, CLI-05-29, 62 N.R.C. 811.

[154] *Natural Res. Def. Council v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972) (internal quotations omitted).

[155] *Pilgrim Nuclear Power Station*, CLI-10-11, 71 N.R.C. at 315.

[156] *Vogtle ESP Site*, LBP-09-07, 69 N.R.C. at 719.

[157] The Pollock Amended Declaration includes plainly speculative claims such as: that it is "likely" the petroleum industry will continue to extract minerals from the site, Amended Declaration of Stonnie Pollock at 1; that the shallow depths around the CISF "could" become viable candidates for drilling and exploration (*id.* at 3); that for older wells there "may" be no information and it is "unknown" if any exist near the site (*id.* at 4); that "potential" collapse "could" cause surface disruptions (*id.* at 4); and that there is a "potential existence of unstable characteristics," (*id.* at 4).

[158] *Clinton ESP Site*, CLI-05-29, 62 N.R.C. at 811.

### 1. Fasken's Arguments Regarding Ownership of Mineral Rights Do Not Show a Material Issue

In support of its Amended Contention 2, Fasken raises—again—its arguments that Holtec does not have full ownership of mineral rights beneath the DEIS, and therefore the Application and DEIS are flawed. However, as Holtec explained in its answer to Fasken's original Contention 2,[159] Fasken's arguments fail to address a matter that is material to the findings the NRC must make and are not within the scope of the proceeding. Ownership or control over the site is not a matter for NRC NEPA review, and the NRC has a settled practice of reviewing an application before an applicant's ownership or control over the site at issue has been established. Fasken's arguments in support of its Amended Contention 2 add nothing new to its previous arguments to show that this practice should not apply here.

No statute or regulation requires the applicant for an NRC license for a CISF or other NRC-licensed facility to own or control a site before an application for a nuclear facility may be considered or the license granted.[160] Nor do the applicable NRC guidance documents and regulations require that ownership of the site be included in the Application.[161] As stated by the District Court in *Concerned Citizens* more than forty years ago, the NRC has a "settled practice" of permitting docketing and review of nuclear power reactor applications before the applicant acquires ownership or control of the site.[162] While the focus of a hearing must be on a specific

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[159] Holtec International's Answer Opposing Fasken's Late-Filed Motion for Leave to File a New Contention, dated August 26, 2019, at pp. 24-26, 27-28 (NRC ADAMS Accession No. ML19238A343).

[160] *See, e.g.*, *Concerned Citizens of Rhode Island v. NRC*, 430 F. Supp. 627, 632-33 (D. R.I. 1977); *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 N.R.C. 1125, 1136 (1981); *New England Power Company* (NEP, Units 1 and 2), LBP-78-9, 7 N.R.C. 271, 277 (1978).

[161] *See, e.g.*, 10 C.F.R. §§ 72.24, 72.34, 51.41, 51.61; Regulatory Guide 3.50, *Standard Format and Content for A Specific License Application for an Independent Spent Fuel Storage Installation or Monitored Retrievable Storage Facility* (NRC 2014a); NUREG-1748, *Environmental Review Guidance for Licensing Actions Associated with NMSS Programs* (NRC 2003).

[162] *Concerned Citizens*, 430 F. Supp. at 632 n.9. *Accord North Coast Nuclear Plant*, ALAB-662, 14 N.R.C. at 1136; *NEP, Units 1 and 2*, LBP-78-09, 7 N.R.C. at 281.

site, the site is no less specific because the applicant does not yet own it.[163] This conclusion is equally applicable to the licensing of an ISFSI. Holtec explained this in its answer to Fasken's original Contention 2,[164] and Fasken has made no attempt to raise any new point of law or fact to controvert Holtec's prior Answer.

Indeed, in a similar contention in a proceeding very similar to this one, the intervenor State of Utah alleged that Private Fuel Storage ("PFS") failed to list all of the Federal permits, licenses, approvals or other entitlements that it needed to obtain, or otherwise update the PFS environmental report with the status of those approvals. Specifically, Utah alleged that PFS failed to show "that it [was] entitled to use the land for the ISFSI site and if it [did] have such right whether there are any legal constraints imposed on the use and control of the land," and that PFS was required to disclose the provisions of its lease with the Skull Valley Band to show that it was entitled to use the site.[165] Notwithstanding the requirement that PFS obtain approval from the Bureau of Indian Affairs for its lease with the Skull Valley Band, the Atomic Safety and Licensing Board nonetheless rejected the State's contention. Instead, the Board found the contention inadmissible for "fail[ing] to establish with specificity any genuine dispute and impermissibly challeng[ing] the Commission's regulatory processes, regulations or rulemaking-associated generic determinations, including those relating to site ownership."[166] Indeed, at the time that the NRC issued the license to PFS in 2006, the lease between PFS and the Skull Valley Band had yet to be approved.[167]

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[163] *Concerned Citizens*, 430 F. Supp. at 633 n.11; *NEP, Units 1 and 2*, LBP-78-09, 7 N.R.C. at 277.

[164] Holtec's Answer Opposing Fasken's Late-Filed Motion to File a New Contention at 24-26, 27-28 (Aug. 26, 2019).

[165] *Private Fuel Storage*, LBP-98-07, 47 N.R.C. 142 at 198.

[166] *Id.*

[167] *See Skull Valley Band of Goshute Indians v. Davis*, 728 F. Supp. 2d 1287, 1287, 1306 (D. Utah 2010) (overturning the Bureau of Indian Affairs rejection of the PFS-Skull Valley Band lease). Even today, PFS still lacks approval from BIA for the lease, but the NRC license remains in effect.

Whether or not Holtec has established "control" of the CISF site or mineral rights beneath the site, such control is not required in order for the NRC to consider and (if appropriate) grant the licensing application. Holtec supplied the information required by regulation and necessary for the NRC Staff's review in part by conservatively assuming that there will be oil and gas drilling and subsidence beneath the site and addressing these assumed conditions by building in engineered solutions to them.[168] Fasken has failed to even address these solutions, let alone demonstrate how its claims regarding the site ownership would undermine them. Thus, Fasken's Amended Contention 2 must be rejected as lacking any demonstration of a proposed safety or environmental impact.

Moreover, although Fasken challenges "statements in Holtec's application documents and the most recent Holtec DEIS,"[169] Fasken provides not a single citation to the DEIS or the Application in this section of its Motion for Leave. Fasken "dispute[s] statements made for the first time in the Holtec DEIS, speculating on a proposed but not-yet-accepted 'land use restriction or condition.'"[170] However, the DEIS never uses this phrase, and so it is unclear exactly what Fasken is disputing. Such vague references fall entirely short of the Commission's requirement that a petitioner "include references to specific portions of the application."[171] Accordingly, Fasken's arguments cannot support its Amended Contention 2.

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[168] The Safety Analysis Report addresses the safety of an oil recovery facility and abandoned wells at the site; potash mining and subsidence; casing corrosion and well collapse; and wells surrounding the site. SAR at 2-3, 2-111, 6-42, 2-8 to 2-10, 2-36 to 2-38, 2-40, 2-11 to 2-12, and 2-39. The Safety Analysis Report also addresses the CISF's engineering solutions for subsidence and earthquakes (whether natural or man-made), including: the support foundation pad, which is "designed to minimize long-term settlement" and support the modules during earthquakes; the subgrade, which provides support during earthquakes; and the HI-STORM UMAX System, which is independently certified and qualified for the Design Basis Earthquake of the CISF site. *Id.* at 2-11, 2-39, 1-15 to 1-16, 1-11 to 1-12, and Table 4.3.3. Fasken makes to effort to address this analysis.

[169] Motion for Leave at 13.

[170] *Id.* at 14.

[171] 10 C.F.R. § 2.309(f)(1)(vi).

Finally, Fasken fails to show how its previous arguments are still relevant given Holtec's submittal of its answer to Staff's RAI on this topic. More than a year ago, Holtec addressed ownership issues in its March 19, 2019 letter containing responses to NRC Staff's RAIs.[172] The NRC Staff considered and discussed this information in the DEIS.[173] Fasken has not explained why its previous arguments, which it states it incorporates by reference, are still relevant given Holtec's provision of this new information (which Fasken ignores), and the consideration thereof by the DEIS.

### 2. Fasken's Claim that the DEIS and Application Contain Inaccurate Descriptions of Regional Oil and Gas Operations Lack Specificity and Do Not Show a Material Issue

Fasken next claims that the DEIS and the Application contain misleading or inaccurate information with respect to drilling depths and regional oil and gas operations, alleging the Application "fundamentally misrepresents" regional oil and gas operations, and that the DEIS "alters reality."[174] These claims are insufficient to support Fasken's Amended Contention 2, as Fasken's arguments do not meet the NRC's requirements with respect to specificity and materiality.

#### a. Fasken's Arguments Lack Specificity

To support its contention, Fasken's argument "must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]."[175] Fasken must review the pertinent portions of the license application, and then state Holtec's position and Fasken's

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[172] *See* Attachment 1 to Holtec Letter 5025041 (NRC ADAMS Accession No. ML19081A075).

[173] DEIS at 4-4 ("As noted in the Holtec RAI responses, '[t]he New Mexico State Land Office is currently in discussions with Holtec International regarding an agreement in principle to retire any potash, unencumbered by regulatory restrictions, in perpetuity' (Holtec, 2019c). In addition, Holtec has entered into an agreement with Intrepid to relinquish certain potash mineral rights to the State of New Mexico (Holtec, 2019c).").

[174] Motion for Leave at 15.

[175] *Millstone Nuclear Power Station*, CLI-01-24, 54 N.R.C. at 359-60.

opposing view, and explain why it has a disagreement with the applicant.[176] This Fasken has failed to do.

First, Fasken argues that the DEIS "defies all logic and common sense" when it "bizarrely and unjustifiably" relies on a 1978 study to reach conclusions about the likely depth of oil and gas production zones, given "advancements in drilling technologies and practice."[177] Fasken states these advancements "have enabled operations to revisit formations once thought to be depleted," and "make revisiting existing wells beneath and around the proposed Holtec CISF site a real possibility."[178]

However, Fasken does not explain why advancements in drilling technologies might impact the 1978 study's conclusions about the depths of oil and gas deposits in the vicinity of the site. Perhaps Fasken may be implying that the 1978 study presumes shallower deposits are depleted, but that these deposits could be further developed using technology not available in 1978. Or perhaps Fasken may be implying that modern techniques could allow the discovery of previously unknown shallow production zones. However, Fasken never actually provides these or any other explanations, and "the [Licensing] Board may not make factual inferences on [the] petitioner's behalf."[179] The Licensing Board should not have to guess.

More importantly, Fasken ignores entirely that the DEIS did not base its conclusions solely on the 1978 study. The DEIS's conclusions also cite to the 2007 ELEA study and

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[176] Final Rule, Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170-171 (Aug. 11, 1989); *Millstone Nuclear Power Station*, CLI-01-24, 54 N.R.C. at 358.

[177] Motion for Leave at 16; 19. *See also id.* at 19 ("Petitioners dispute the factual basis of such statements.").

[178] *Id.* at 19-20.

[179] *Georgia Tech*, LBP-95-06, 41 N.R.C. at 305.

Holtec's 2019 ER.[180] Even if Fasken's criticisms of the 1978 study were understandable, Fasken is nevertheless obligated to show why these other sources are insufficient to support the DEIS's conclusions.

Fasken next takes issue with the DEIS's conclusions that the CISF will have no impact on oil and gas exploration and development because extraction will continue to occur at depths greater than 3,050 feet. Fasken asserts that "[i]t is unlikely that any of these claims were based on solid evidence or substantial factual support when made" and that the DEIS "presents new sources of information and new conclusions . . . that are unforgivingly inaccurate, misleading and unreliable."[181] In support of these claims, Fasken cites to a map it claims shows that 82 out of 527 wellbores within a six-mile radius were drilled at depths shallower than 3,050 feet.[182] However, Fasken never explains how the existence of some small number of shallower wellbores affects the DEIS's conclusion about the likely depth of oil and gas production zones or how it impacts the safety or the environmental impact of the CISF.

These arguments cannot meet the Commission's specificity requirements—Fasken not only fails to *explain why* it disagrees with the 3,050 feet depth, Fasken does not even state *what drill depth the DEIS should use,* or why the DEIS' choice of the 3050 feet depth makes a difference. Fasken also misrepresents its own expert, claiming he states that there are well perforations as shallow as 887 feet,[183] when no such statement appears in his Amended

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[180] DEIS at 4-4 to 4-5 ("all oil and gas production zones in the area of the proposed CISF occur beneath the Salado Formation at depths greater than 914 m [3,000 ft] (Cheeseman, 1978; *Holtec, 2019b*). . . . oil and gas exploration targets within and surrounding the proposed project area range from relatively shallow oil and gas at approximately 930 to 1,524 m [3,050 to 5,000 ft] in upper to middle Permian formations to deep gas targets in middle Paleozoic formations in excess of 4,877 m [16,000 ft] deep (**ELEA, 2007**)." (emphasis added)).

[181] Motion for Leave at 17.

[182] *Id.* at 18. The map attached to the Amended Declaration of Stonnie Pollock is undated, provides no source for its information, and no indication when the underlying information was first available to Fasken.

[183] *Id.*

Declaration. Fasken also claims that Mr. Pollock's Amended Declaration "clearly states" that "drilling near the proposed site at shallower depths frequently occurs,"[184] when in fact he states that "Drilling at Shallower Depths is a Real Possibility."[185]

Finally, Fasken's claim that the DEIS "fail[s] to consider: (1) the New Mexico Land Office has imposed no such restrictions on drilling depths, (2) the advantages of drilling at shallower depths (i.e. lower risk of triggering seismicity and lower costs), and (3) the advancements in drilling technology for shallower depths such as the Yates Formation beneath and surrounding the proposed Holtec CISF site"[186] also lacks specificity. Fasken does not explain how the DEIS fails to account for these factors, nor does Fasken state its position as to how these factors might undermine or affect the conclusions reached by the DEIS.

**b. Fasken's Arguments Fail to Show a Genuine Dispute on a Material Issue**

Fasken's arguments also fail to satisfy the Commission's standards requiring a petitioner to show that a genuine dispute exists. To be admissible, Fasken must show some legal or safety reason which is material to the proceeding, meaning that "resolution of the dispute would make a difference in the outcome of the licensing proceeding."[187] In addition, the Staff's NEPA review need not include all theoretically possible environmental effects arising out of an action, but may be limited to effects with some likelihood of occurring, given the statutory NEPA command imposing an obligation to make *reasonable* forecasts of the future.[188]

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[184] *Id.*

[185] Amended Declaration of Stonnie Pollock at 2.

[186] Motion for Leave at 18.

[187] Final Rule, Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989).

[188] *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 N.R.C. 41, 48, 49 (1978).

None of Fasken's criticisms of the Application or DEIS with respect to drill depths meet this standard and thus cannot support the admission of Fasken's Amended Contention 2. While Fasken criticizes the DEIS's conclusion that drilling will occur at depths below 3,050 feet,[189] it does not provide any legal or safety reason which might undermine the DEIS's conclusions were drilling to occur at a shallower depth.

Fasken also fails to establish materiality with respect to its claim that the DEIS does not adequately consider advanced drilling technologies, directional drilling, restrictions imposed by the New Mexico Land Office, and the advantages of shallow drilling.[190] "One can always flyspeck an Environmental Impact Statement (EIS) to come up with more specifics and more areas of discussion that could have been included."[191] For Fasken's argument to support its contention, it must do more than allege the NRC staff should have considered some issue. Fasken fails to even attempt to show how any of these factors, if considered in greater depth by the DEIS, would make an impact on the conclusions reached therein.

Similarly, Fasken fails to establish an environmental or safety impact regarding the DEIS's statement about an active oil/gas well in the southwest portion of Section 13. Fasken alleges these are "unmoored statements, discussed for the very first time in the Holtec DEIS."[192] Fasken appears to be arguing that the DEIS has a material flaw because it does not base this statement on any source. However, this language in the DEIS *is taken almost word for word from the Holtec SAR*.[193] Therefore, Fasken does not establish any material dispute because the

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[189] Motion for Leave at 16-18.

[190] *Id* at 18-20.

[191] CLI-20-04, *supra* at 28.

[192] Motion for Leave at 18-19.

[193] SAR at § 2.2.2 ("One active oil/gas well on the southwest portion of Section 13 operates at minimum production to maintain mineral rights.").

language is consistent with the application, and Fasken provides no other safety or environmental impact relevant to this well.

Fasken also fails to show any material issue when it attempts to point out alleged differences between the Application and the DEIS. Fasken notes that while Holtec's ER found "minimal potential" for any cumulative impact to geology and soils at the CISF site, the DEIS concluded that the CISF would have a "small cumulative impact" for geology and soils, which "when added to the MODERATE impacts from other past, present, and reasonably foreseeable future actions [would] result[] in an overall MODERATE cumulative impact to geology and soils."[194] Fasken claims this difference "constitutes new and material information that is significantly different."[195] However, Fasken provides no explanation whatsoever as to why this difference matters, or whether it is in fact a material difference. Nor does Fasken articulate any environmental or safety impact relevant to the findings in either the Application or DEIS which could serve to support its Amended Contention. This is particularly so given that NEPA is procedural, not a mandate to arrive at particular results.[196]

Fasken goes on to claim that it "object[s] to reliance on insufficient data and speculative agreements with unknown terms, object[s] to the omission of material information, and further object[s] to the improper conclusions drawn from same in the recent Holtec DEIS" and then states that it "dispute[s] the use of the 6-mile radius for land use impacts."[197] Fasken concludes that "[a] wider radius is necessary to account for the multitude of interdependent and unique factors tied to regional operations."[198] However, Fasken provides no explanation for any of these

[194] DEIS at 5-11.
[195] Motion for Leave at 12.
[196] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).
[197] Motion for Leave at 13.
[198] *Id.*

statements, making no effort whatsoever to describe the "data," "speculative agreements," or "material information" to which this passage refers. Fasken's argument is also unclear as to the meaning of "interdependent and unique factors," why these factors might compel the DEIS to use a different radius, and what the radius should be. Fasken notes that it provided statistics for a 10-mile and 17-mile radius in its August 1 Motion, but does not say which, if either, of those radii it supports here. While Fasken may claim to dispute the 6-mile radius, as well as the ambiguous data, agreements, and information noted above, Fasken wholly fails to show how these disputes relate to any material issue.

Fasken's similar attacks on the DEIS for reaching slightly different conclusions than the ER related to the depth for oil and gas extraction, also cannot support the Amended Contention. Fasken notes that the CISF states extraction will occur at depths greater than 3,050 feet, whereas the ER stated drilling would occur at depths greater than 5,000 feet.[199] However, regardless of the depth that is listed, Fasken does not challenge the ultimate conclusion: that drilling will occur at sufficient depths to avoid subsidence issues. A subsidence analysis was performed at the Holtec site demonstrating that there is no evidence of subsidence at the site—even though drilling has historically occurred in the vicinity of the site at a variety of depths. Fasken does nothing to challenge this analysis or to show that future drilling, with the benefits of the modern technology that Fasken espouses, would change this result. Instead, Fasken merely speculates that subsidence might occur. Such speculation is not enough to show a material issue. As Fasken fails to show any material issue or material safety concern, these arguments cannot support the admissibility of its Amended Contention.

[199] *Id.* at 17.

Fasken later reiterates its criticisms of the radius used in the DEIS, arguing that the Application "fundamentally misrepresents past, present and potential for future oil and gas operations in the 6-mile region and flat out ignores operations at any further increments of distance."[200] Fasken proffers what it alleges is an "accurate well-count . . . [showing] a total of 527 wellbores within a 6-mile radius of the proposed site."[201] Fasken does not explain how its well-count differs from the well-counts in the information relied upon by the DEIS, or the ER or SAR, nor does Fasken explain how its well-count is relevant to the DEIS's evaluation of environmental and safety impacts. Instead, Fasken merely alleges, without support, that "industry operations and geologic characteristics in the region" support its "belie[f] [that] a wider radius is necessary to truly evaluate cumulative impacts."[202] Although Fasken notes that its motion supporting its original Contention 2 provided statistics for a 10-mile radius and a 17-mile radius, as noted previously, Fasken ignores and does not address the fact that its original motion actually supported using a 5-mile radius for the NEPA analysis.[203]

Essentially, Fasken claims the DEIS contains such misleading and inaccurate descriptions of regional oil and gas operations that it "alters reality."[204] For such a strong claim, one would expect Fasken to show how at least one claim or statement in the DEIS was, on some level, inaccurate or misleading, and to explain how any of the alleged inaccuracies might impact a material environmental or safety issue. In the end, Fasken's arguments fall far short of this

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[200] *Id.* at 15.

[201] *Id*.

[202] *Id.* at 16.

[203] *See*, August 1 Motion at n.25 ("NUREG-1567 § 2.4.2 requires that an applicant regionally analyze all man-made facilities within a 5-miles radius of an ISFSI.").

[204] Motion for Leave at 15.

mark. Accordingly, Fasken's arguments do not demonstrate any material issue which would support admissibility of its Amended Contention 2, and so must be rejected.

### 3. Fasken's Arguments With Respect to Outstanding Requests for Additional Information Do Not Raise a Material Issue

As its final attack on the Application and DEIS, Fasken makes numerous claims that Holtec has "refuse[d]" to provide various information requested by NRC Staff's RAIs, and without this information "[t]he NRC cannot feasibly conduct an independent review and analysis."[205] Fasken then goes on to quote various RAIs, concluding that the Application is incomplete without Holtec's responses. Fasken's arguments here, too, fail to raise a genuine dispute, fail to explain their claim with sufficient specificity, and fail to show a material issue. In order to raise a contention based on an omission of information, Fasken is obligated "to review the application and to identify **what** deficiencies exist and to explain **why** the deficiencies raise material safety concerns."[206] This Fasken has not done, and thus its arguments regarding the fact that Holtec has not yet responded to some RAI's cannot support its Amended Contention.

In its first claim regarding the RAI responses, Fasken alleges that several of the RAI responses relate to "interdependent factors" which relate to the possibility of subsidence, sinkholes, or geological instability.[207] According to Faksen, the Holtec SAR and DEIS is unreliable and inaccurate without this information, and the information is material "because it implicates the design basis for external man-induced events."[208] Fasken never explains *how* the SAR or DEIS are currently unreliable or inaccurate and never describes how the current unavailability of some RAI responses (all relating to the SER) raises a material safety concern

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[205] *Id.* at 21.

[206] *Oconee*, CLI-99-11, 49 N.R.C. at 337 (emphasis in the original).

[207] Motion for Leave at 22.

[208] *Id*.

where the Staff's safety review is still on-going. Instead, Fasken merely quotes the RAIs and then offers conclusory assertions that the DEIS or Application is deficient. Moreover, the Application and the DEIS discuss these "interdependent factors" regarding subsidence,[209] yet Fasken never addresses these discussions. Nor does Fasken explain how these discussions are insufficient without the information requested in the RAIs. These arguments therefore fail to describe any material dispute or show any material safety concern with the Application or DEIS.

Next Fasken claims that statements in the DEIS about the Green Frog Café Drill Island indicate it is no longer proposed, making the DEIS "materially inconsistent with the underlying factual premises" of RAI 2-8 and Holtec's SAR, as these documents, along with information on the New Mexico Oil Conservation Division website, indicate some wells have been drilled in this area.[210] However, Fasken's argument contains no explanation whatsoever as to why the existence of the Green Frog Café Drilling Island makes any difference to any material safety concern in the Application or the DEIS. Again, Fasken fails to state its position with sufficient specificity, raise any material safety concern, or indeed even show a genuine dispute exists, and so its arguments must be rejected.

Fasken goes on to argue that older wells in the region of the CISF may be susceptible to corrosion and leakage, claiming the Application and DEIS are inadequate because they "fail[] to incorporate responses to NRC deemed necessary RAIs and information relating to abandoned drill holes and the potential for casing corrosion."[211] Although Fasken insists that the Application and DEIS fail to account for the possibility that seepage in improperly cased wells could lead to subsidence, sinkholes, or karst formation, both the Application and the DEIS in fact

[209] SAR at § 2.1.4; DEIS at 2-27, 4-26 to 4-27, 5-24.
[210] Motion for Leave at 24.
[211] *Id.* at 25

address this issue. The Holtec SAR already addresses the safety of an oil recovery facility and abandoned wells at the site,[212] casing corrosion and well collapse,[213] and wells surrounding the site.[214] Moreover, the DEIS also expressly addresses the possibility of subsidence resulting from improperly cased abandoned oil and water wells in the vicinity of the project area, first discussing the relationship between sinkholes or subsidence and improperly cased or abandoned wells,[215] and later discussing the subsidence, sinkhole, and karst risk presented by the possibility of improperly cased abandoned oil and water wells in the vicinity of the CISF.[216] The DEIS found that:

> numerous plugged and abandoned oil and gas wells are present within the proposed project area (Holtec, 2019a,b). However, none of these oil and gas wells are located within the 133.5-ha [330-ac] storage and operation area or where any land would be impacted by construction and operation activities. . . . In addition, the subsurface geologic conditions at the proposed project area are not conducive to karst development or subsidence. . . . Therefore, because the subsurface geologic conditions and because the proposed CISF project operations do not produce any liquid effluent that could facilitate dissolution of halite and gypsum, the NRC staff does not anticipate that the proposed CISF would lead to the development of sinkholes or subsidence.[217]

Fasken does not address or even acknowledge this analysis and does not show how the information to be provided in the outstanding RAIs could materially affect the conclusions reached in the DEIS. Fasken's only reason offered for rejecting this finding is that the Staff requested additional information related to these issues, and Holtec has not yet finished providing its response. Such a conclusory assertion cannot hope to meet the NRC's standards to show a material issue. In addition, all these RAIs are addressed to Holtec's SAR, not to the ER,

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[212] SAR at 2-3, 2-111, 6-42.
[213] *Id.* at 2-11 to 2-12.
[214] *Id.* at 2-11, 2-39.
[215] DEIS at 3-27.
[216] *Id.* at 4-26.
[217] *Id.*

and Fasken never addresses the inconsistency of justifying a contention ostensibly triggered by the issuance of the DEIS by RAIs addressed to the Staff's safety review, not its environmental review.

Fasken's next concern, that the RAI responses are required to evaluate "the cumulative impacts of regional activities and potash mining on sinkholes and subsidence" in the vicinity of the CISF,[218] also fails to state a genuine dispute. Fasken merely asserts that the information in the RAIs is necessary and insists that under NEPA Holtec must provide this information.[219] However, Fasken never provides any explanation, other than quoting from the RAIs. "The extent to which an RAI might help support a contention must be considered on a case by case basis, but the Commission expects that in almost all instances a petitioner must go beyond merely quoting an RAI to justify admission of a contention into the proceeding."[220] Accordingly, Fasken's citing to the "mere existence of [the] RAIs"[221] is insufficient to support the admission of their Amended Contention.

Finally, Fasken's argument regarding outstanding RAIs relating to seismicity also fails to establish with specificity any genuine dispute. Fasken does no more than allege that the RAI is outstanding, and then claims that the confidential nature of Holtec's "confidential probabilistic hazard analysis analyzing potential seismic risks prevents interested parties from meaningfully reviewing and commenting on same."[222] However, Fasken never shows, or attempts to show, any material safety impact. Rather, Fasken only objects that it is unable to evaluate the risk.

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[218] Motion for Leave at 26.

[219] *Id.*

[220] *Oconee*, CLI-99-11, 49 N.R.C. at 341.

[221] *Id.* at 328.

[222] Motion for Leave at 27-28. As noted above, Fasken never provides any basis for the existence of the "confidential probabilistic hazard analysis analyzing potential seismic risks" for the CISF. Such a document does not exist.

Accordingly, none of Fasken's arguments regarding RAI responses raise a material issue.

## VII. Conclusion

For the reasons set forth above, Holtec respectfully requests that the Licensing Board deny Fasken's Motion to Reopen the Record and Motion for Leave to File Amended Contention No. 2.

Respectfully submitted,


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June 5, 2020

**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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| In the Matter of | ) | |
| | ) | Docket No. 72-1051 |
| Holtec International | ) | |
| | ) | |
| (HI-STORE Consolidated Interim Storage Facility) | ) | |
| | ) | |

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Holtec International's Answer Opposing Fasken Land and Minerals, Ltd's and Permian Basin Land and Royalty Owners Motion to Reopen the Record and Motion for Leave to File Amended Contention No. 2 have been served through the E-Filing system on the participants in the above-captioned proceeding this 5th day of June 2020.

/signed electronically by Anne R. Leidich/
Anne R. Leidich