

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman

Nicholas G. Trikouros

Dr. Gary S. Arnold

In the Matter of

HOLTEC INTERNATIONAL

(HI-STORE Consolidated Interim Storage
Facility)

Docket No. 72-1051-ISFSI

ASLBP No. 18-958-01-ISFSI-BD01

June 18, 2020

MEMORANDUM AND ORDER

(Ruling on Remanded Contentions and Denying Motion to Reopen)

This proceeding concerns requests for a hearing on a license application by Holtec International (Holtec) to construct and operate a consolidated interim storage facility for spent nuclear fuel in Lea County, New Mexico. The factual background and prior proceedings before this Licensing Board are set forth in our Memorandum and Order of May 7, 2019, in which the Board denied all hearing requests.¹

On April 23, 2020, in response to petitioners' appeals, the Commission substantially affirmed the Board's rulings in LBP-19-04, but reversed in part and remanded for further consideration four contentions (Sierra Club Contentions 15, 16, 17, and 19).² Also, the Commission remanded, for the Board's ruling on admissibility, two contentions that were proffered several months after we had initially terminated this proceeding at the Licensing Board

¹ LBP-19-04, 89 NRC 353, 358 (2019).

² CLI-20-04, 91 NRC __, __, __-__ (slip op. at 1, 23-29) (Apr. 23, 2020).

level (Sierra Club Contention 30 and Fasken Land and Minerals Ltd. and Permian Basin Land and Royalty Owners (Fasken) Contention 2).³

On May 4, 2020, Sierra Club moved to reopen the record to allow consideration of its Contention 30.⁴ Sierra Club asserts that, in CLI-20-04, the Commission “implicitly rejected” arguments that it should have moved to reopen the record when it initially proffered Sierra Club Contention 30 in October 2019.⁵

On May 11, 2020, Fasken moved to reopen the record to allow consideration of an amended version of Fasken Contention 2 that is based on the NRC Staff’s March 2020 Draft Environmental Impact Statement.⁶

In this Order, on further consideration, the Board determines that Sierra Club Contentions 15, 16, 17, and 19 are not admissible. We deny Sierra Club’s motion to reopen the record, and we also deny Sierra Club’s motion to late-file Sierra Club Contention 30 for separate and independent reasons. We deny Fasken’s motion for leave to file Fasken Contention 2 as originally submitted.

The Board will address Fasken’s motion to amend Fasken Contention 2, and the associated motion to reopen the record, in a subsequent Order.

I. SIERRA CLUB CONTENTIONS 15, 16, 17, AND 19

In CLI-20-04, the Commission determined that Sierra Club Contentions 15, 16, 17, and 19 all appear to raise claims about the hydrogeologic characterization of the site for Holtec’s proposed facility that are independent of Sierra Club’s claim that leaks from the facility would

³ Id. at __, __ (slip op. at 3, 55).

⁴ Sierra Club’s Motion to Reopen the Record (May 4, 2020) at 1–2.

⁵ Id. at 3.

⁶ Fasken Motion to Reopen the Record (May 11, 2020) at 1; Fasken Motion for Leave to File Amended Contention No. 2 (May 11, 2020) at 1.

contaminate groundwater.⁷ (The Commission agreed that concerns about leaks from spent fuel storage containers that are separately approved and licensed by the NRC may not be adjudicated in this proceeding.⁸) The Commission therefore remanded these four contentions for the Board's further consideration of their admissibility "[w]ithin the context of the need to determine whether the groundwater concerns would affect the ultimate discussion of environmental impacts."⁹

Under 10 C.F.R. § 51.45(b), Holtec's Environmental Report must describe the affected environment and discuss environmental impacts "in proportion to their significance."¹⁰ As explained infra, we conclude that Sierra Club's contentions do not set forth any admissible challenge to Holtec's site characterization. Moreover, in light of the required assumption that Holtec's NRC-approved storage containers will not leak, Sierra Club fails to show why Holtec's Environmental Report must address hydrogeologic issues in any more detail.

A. Sierra Club Contention 15

Sierra Club Contention 15 stated:

The [Environmental Report] fails to adequately determine whether shallow groundwater exists at the site of the proposed [consolidated interim storage] facility. It is important to make this determination in order to assess the impact of a radioactive leak from the [consolidated interim storage] facility on the groundwater.¹¹

Insofar as Sierra Club Contention 15 purports to challenge Holtec's site characterization, separate and apart from concerns about leaks from the storage facility, on further consideration

⁷ CLI-20-04, 91 NRC at __ (slip op. at 27).

⁸ Id. at __–__ (slip op. at 50–51).

⁹ Id. at __ (slip op. at 29).

¹⁰ 10 C.F.R § 51.45(b)(1).

¹¹ Petition to Intervene and Request for Adjudicatory Hearing by Sierra Club (Sept. 14, 2018) at 60 [hereinafter Sierra Club Pet.].

the Board concludes it raises no concerns that affect Holtec's ultimate discussion of environmental impacts.

As Holtec points out,¹² Sierra Club Contention 15 and the accompanying declaration of George Rice fail to set forth an admissible claim that Holtec's discussion of groundwater is inadequate. As explained in Holtec's Environmental Report, pursuant to Holtec's Radiological Environmental Monitoring Program samples of media and effluents, including gases and vapor, air particulates, soil, sediment, fauna, vegetation, surface water, waste waters, and groundwater, are and will continue to be collected and analyzed.¹³ None of this is controverted.

What Sierra Club does challenge is the conclusion in Holtec's Environmental Report that, "[b]ased upon information obtained from the onsite drilling, shallow alluvium is likely non-water bearing at the Site."¹⁴ However, Sierra Club neither acknowledges nor disputes the information in Holtec's license application that supports this conclusion.

Sierra Club posits that Holtec's conclusion is based entirely on the absence of water in a single monitoring well observed in 2007. Mr. Rice claims that more recent wells installed at the site "are completed entirely in the Dockum" and "[t]hus, they cannot be used to determine whether [any] groundwater exists at the alluvium/Dockum interface."¹⁵

¹² Holtec International's Answer Opposing Sierra Club's Petition to Intervene and Request for Adjudicatory Hearing on Holtec International's HI-STORE Consolidated Interim Storage Facility Application (Oct. 9, 2018) at 80–81 [hereinafter Holtec's Answer Opposing Sierra Club's Petition to Intervene].

¹³ Holtec International's Environmental Report on the HI-STORE CIS Facility (rev. 6 May 2019) at 40–50 (ADAMS Accession No. ML19163A146) [hereinafter ER]. Generally, the Board cites to the versions of Holtec's application documents that were available at the time contentions were proffered.

¹⁴ ER at 3-40.

¹⁵ Declaration of George Rice, Comments on Proposed Facility (Sept. 6, 2018) at 3 [hereinafter Rice Decl.].

But that is not correct. Mr. Rice overlooks the Work Plan in Holtec's 2017 Geotechnical Data Report.¹⁶

Holtec drilled five groundwater monitoring wells.¹⁷ Although wells were only completed below the alluvium, in fact as wells were drilled the borings were regularly monitored to determine the appropriate depth.¹⁸ As explained in Holtec's Work Plan, it was expected that the actual depth of wells would "be adjusted in the field based on the soil, rock, and groundwater conditions encountered."¹⁹ The Work Plan provided that "[i]f groundwater is not encountered in a boring planned for monitoring well installation, the borehole may be backfilled with cement-bentonite grout with no monitoring well installed."²⁰

Thus, as reflected in Holtec's Work Plan, the personnel performing the geotechnical exploration were regularly monitoring for groundwater conditions encountered during drilling. The boring logs for Holtec's drilling in 2017 contain extensive data and observations supporting its conclusion concerning the absence of groundwater in the shallow alluvium.²¹ Sierra Club fails to address this information.

¹⁶ GEI Consultants, Geotechnical Data Report, HI-STORE CISF Phase 1 Site Characterization (Dec. 2017) (ADAMS Accession No. ML18023A958) [hereinafter Geotechnical Data Report].

¹⁷ Holtec's Answer Opposing Sierra Club's Petition to Intervene at 84–85.

¹⁸ Id. at 9, 88.

¹⁹ Letter from Kimberly Manzione, Holtec Licensing Manager, to Jose Cuadrado, Project Manager, Division of Spent Fuel Management, Office of Nuclear Material Safety and Safeguards (NMSS) (Dec. 21, 2017) (ADAMS Accession No. ML17362A093), attach. 5 Geotechnical Data Report, attach. A at 53 (GEI Consultants, GEI Work Plan 1, HI-STORE CISF Site Characterization – Phase 1 (rev. 3 Nov. 2017) [hereinafter GEI Work Plan]).

²⁰ GEI Work Plan at 53.

²¹ See, e.g., Geotechnical Data Report, attach. C at 72–73 (Final Boring Log for Boring No. B-101); id. at 88–89 (Final Boring Log for Boring No. B-101A (specifically noting "groundwater not encountered" at the interface of the residual soil and the Chinle)); id. at 95 (Final Boring Log for Boring No. B-102 (observing that the sample at the interface of the residual soil and the Chinle was "dry")); id. at 102 (Final Boring Log for Boring No. B-105, p.2, observing that the sample at the interface was dry); id. at 110 (Final Boring Log for Boring No. B-105A, p. 2, specifically noting "groundwater not encountered" at the interface of the residual soil and the Chinle); id. at 128 (Final Boring Log for Boring No. B-109 (observing that the sample at the interface of the residual soil and the Chinle was "dry"))).

Contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(vi), Sierra Club Contention 15 fails to raise a genuine dispute with Holtec's license application. Therefore Sierra Club Contention 15 is not admitted.

B. Sierra Club Contention 16

Sierra Club Contention 16, as considered by the Board,²² stated:

The [Environmental Report] does not contain any information as to whether brine continues to flow in the subsurface under the Holtec site.²³

Insofar as Sierra Club Contention 16 purports to challenge Holtec's site characterization, separate and apart from concerns about leaks from the storage facility, on further consideration the Board concludes it raises no concerns that affect Holtec's ultimate discussion of environmental impacts and thus is not material.

Sierra Club Contention 16 does not set forth an admissible claim that brine might be present in shallow groundwater below Holtec's proposed facility. The supporting declaration of Mr. Rice relies solely on a 2007 Eddy Lea Siting Study.²⁴ As the Siting Study shows in Figure 2.11.3-2, the seeps and springs in which brine was located are on the eastern side of the site, near the Laguna Gatuna,²⁵ where multiple facilities discharged brine produced from oil and gas production.²⁶ As both Holtec's Environmental Report and the Siting Study acknowledge, "saturation of shallow groundwater brine have been created in a number of areas associated

²² As explained in LBP-19-04, 89 NRC at 407–10, the Board denied Sierra Club's motion to amend Contention 16 for failure to demonstrate good cause.

²³ Sierra Club Pet. at 62.

²⁴ Rice Decl. at 6 & nn.29–31.

²⁵ Eddy Lea Energy Alliance, LLC, Final Detailed Siting Report and Final Communications Report (Apr. 28, 2007) at 2.11-5 (Fig. 2.11.3-2) (ADAMS Accession No. ML102440738) [hereinafter ELS].

²⁶ ER at 3-40; ELS at 2.4-3.

with the playa lakes.”²⁷ The proposed storage facility, however, is located on the western side of the site, away and upgradient from the Laguna Gatuna.²⁸

Rather than providing factual support for concluding that brine might exist below the proposed facility, Mr. Rice’s declaration merely asks questions (e.g., do the seeps and springs continue to flow, could brine come in contact with the canisters?). Merely asking questions, however, does not raise a genuine dispute with a license application.²⁹ Contrary to the requirements of 10 C.F.R. §§ 2.309(f)(1)(v) and (vi), Sierra Club Contention 16 fails to set forth an adequate factual basis or raise a genuine dispute with Holtec’s license application. Therefore Sierra Club Contention 16 is not admitted.

C. Sierra Club Contention 17

Sierra Club Contention 17 stated:

The [Environmental Report] and [Safety Analysis Report] do not discuss the presence and implications of fractured rock beneath the Holtec site. These fractures could allow radioactive leaks from the [consolidated interim storage] facility to enter groundwater or for the brine described in Contention 16 to corrode the containers contain[ing] the radioactive material.³⁰

Insofar as Sierra Club Contention 17 purports to challenge Holtec’s site characterization, separate and apart from concerns about leaks from the storage facility, on further consideration the Board concludes it raises no concerns that affect Holtec’s ultimate discussion of environmental impacts.

Sierra Club Contention 17 claims that Holtec’s Environmental Report and Safety Analysis Report (SAR) fail to note the presence of fractured rock. But that is not correct. Both

²⁷ ER at 3-41; ELS at 2.4-3.

²⁸ See Holtec International’s HI-STORE CIS Facility Safety Analysis Report at 81 (Fig. 2.1.6(a)) and 146 (Fig. 2.4.7) (rev. 0F Jan. 2019) (ADAMS Accession No. ML19052A379) [hereinafter SAR].

²⁹ PPL Susquehanna, LLC (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-04, 65 NRC 281, 324 (2007) (referencing the standard under 10 C.F.R. § 2.309(f)(1)(vi)).

³⁰ Sierra Club Pet. at 63–64.

documents acknowledge that the water-bearing zone measured in well ELEA-2 consists of either fractures or tight sandy loams between the depths of 85 and 100 feet, and reference the 2007 Eddy Lea Siting Study.³¹ As Mr. Rice acknowledges, fractures are also reported in the logs of the monitoring well drillings for the 2007 Siting Study and the 2017 Geotechnical Data Report.³² Apart from Sierra Club's inadmissible concerns about leaks from the proposed facility, Sierra Club Contention 17 sets forth no significant dispute regarding the presence of fractured rock.

Contrary to the requirements of 10 C.F.R. §§ 2.309(f)(1)(v) and (vi), Sierra Club Contention 17 fails to set forth an adequate factual basis or raise a genuine dispute with Holtec's license application.³³ Therefore Sierra Club Contention 17 is not admitted.

D. Sierra Club Contention 19

Sierra Club Contention 19 stated:

Holtec performed two sets of packer tests in the Santa Rosa Formation to estimate the hydraulic conductivity (permeability) of the formation. These tests were conducted in conjunction with the preparation of the [Environmental Report]. It does not appear from the report of Holtec's consultant that these tests were conducted properly. Therefore, the [Environmental Report] has not presented an adequate evaluation of the affected environment.³⁴

Insofar as Sierra Club Contention 19 purports to challenge Holtec's site characterization, independent of concerns about leaks from the storage facility, on further consideration the Board concludes it raises no concerns that affect Holtec's ultimate discussion of environmental impacts.

³¹ ER at 3-40; SAR at 151.

³² See Rice Decl. at 6 & nn.34–35.

³³ In addition to challenging whether the description of fractured rock in Holtec's Environmental Report satisfies 10 C.F.R. § 51.45(b), Sierra Club raises a safety challenge under 10 C.F.R. § 72.103 to Holtec's analysis of geologic characteristics of the site. This claim fails for the same reasons.

³⁴ Sierra Club Pet. at 66.

Sierra Club Contention 19, which alleges that two sets of packer tests in the Santa Rosa Formation do not appear to have been conducted properly,³⁵ is inadmissible. Although Mr. Rice claims, citing the Geotechnical Data Report, that the test hole does not appear to have been cleaned before conducting the packer tests,³⁶ in fact the Geotechnical Data Report is silent on this point and thus does not provide grounds to assume that the test was performed improperly.³⁷

Moreover, the 2017 geotechnical work was performed under a nuclear quality assurance program,³⁸ and the design of the field and laboratory program was based on NRC guidance.³⁹ Mr. Rice's mere speculation that acceptable procedures may not have been followed raises no genuine dispute. Similarly, while Mr. Rice states that there is no description of the water used in the tests,⁴⁰ that does not show that the tests were improperly performed.

Contrary to 10 C.F.R. § 2.309(f)(1)(v) and (vi), Sierra Club Contention 19 fails to set forth an adequate factual basis or raise a genuine dispute with Holtec's license application. Therefore Sierra Club Contention 19 is not admitted.

II. SIERRA CLUB CONTENTION 30

Sierra Club proffered its Contention 30, together with a motion to file a late-filed contention, on October 23, 2019—more than five months after we issued LBP-19-04, which

³⁵ Id.

³⁶ See Rice Decl. at 8 & n.49.

³⁷ Indeed, Holtec expressly denies that the test was performed improperly, although at this stage of the proceeding we do not rely on Holtec's denial. See Holtec's Answer Opposing Sierra Club's Petition to Intervene at 90. As Holtec explained in its answer, although the page of the Geotechnical Data Report cited by Mr. Rice (Rice Decl. at 8 n.48 (citing 2017 Geotechnical Data Report at 12)) does not discuss whether the hole was cleaned, GEI's procedures for the packer tests do require the borehole to be flushed with clean water for at least 2 minutes and until return water is visually clear. According to Holtec, this is simply detail beyond that discussed in the report.

³⁸ Geotechnical Data Report at 5–6.

³⁹ Id. at 49.

⁴⁰ Rice Decl. at 8.

initially terminated this proceeding before the Board. Holtec and the NRC Staff both opposed,⁴¹ and Sierra Club did not file a reply.

Sierra Club Contention 30 states:

The [Environmental Report] submitted by a license applicant must evaluate the potential impact on the environment of the transportation of the nuclear waste. A report issued by the Department of Energy's Nuclear Waste Technical Review Board (NWTRB) identifies 18 technical issues regarding transportation of nuclear waste. These issues remain unresolved and pose barriers to the implementation of the Holtec [consolidated interim storage] project. The issues identified in the NWTRB report are not discussed in Holtec's [Environmental Report]. The [Environmental Report] therefore does not adequately evaluate the environmental impact of the transportation of the nuclear waste from various reactor sites to the proposed [consolidated interim storage] facility.⁴²

Sierra Club Contention 30 is similar to a contention (Sustainable Energy and Economic Development Coalition (SEED) Contention 17) that was proffered in an adjudication concerning another application for a license to construct an interim storage facility (the Interim Storage Partners LLC (ISP) proceeding).⁴³ The two contentions were filed the same day. Each was accompanied by a motion to file a late-filed contention. Each was based on the same NWTRB Report.⁴⁴ Each was supported by the same expert's declaration. Indeed, Sierra Club

⁴¹ Holtec International's Answer Opposing Sierra Club's Motion to File Late-Filed Contention 30 (Nov. 18, 2019) at 1 [hereinafter Holtec's Answer Opposing Contention 30]; NRC Staff Answer in Opposition to Sierra Club New Contention 30 (Nov. 18, 2019) at 1 [hereinafter NRC Staff's Answer].

⁴² Sierra Club's Motion to File a New Late-Filed Contention (Oct. 23, 2019) at 5 [hereinafter Sierra Club Motion].

⁴³ Interim Storage Partners LLC (WCS Consolidated Interim Storage Facility), LBP-19-11, 90 NRC 358, 359-360 (2019).

⁴⁴ U.S. Nuclear Waste Technical Review Board, "Preparing for Nuclear Waste Transportation: Technical Issues that Need to Be Addressed in Preparing for a Nationwide Effort to Transport Spent Nuclear Fuel and High-Level Radioactive Waste," (Sept. 23, 2019) (ADAMS Accession No. ML19297D146) [hereinafter NWTRB Report].

mistakenly submitted the substantively identical declaration of Robert Alvarez in this proceeding under the caption of the ISP proceeding.⁴⁵

As explained infra, we deny Sierra Club's motion to late-file Contention 30 for substantially the same reasons that the ISP Board rejected SEED Contention 17 in that proceeding.⁴⁶ But here we deny Sierra Club's motion for an additional reason. Because Sierra Club submitted Contention 30 after this proceeding had already been terminated, as directed by the Commission,⁴⁷ we must first consider whether Sierra Club has satisfied the requirements for reopening a closed record. It has not.

A. Reopening a Closed Record

To reopen a closed record, a petitioner must file a motion demonstrating that its new contention (1) is timely; (2) addresses a significant safety or environmental issue; and (3) demonstrates that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.⁴⁸ The petitioner must attach an affidavit that separately addresses each of these criteria, with a specific explanation of why each criterion has been satisfied.⁴⁹

The Commission considers "reopening the record for any reason to be 'an extraordinary action,'"⁵⁰ and places "an intentionally heavy burden on parties seeking to reopen the record."⁵¹ The Commission does not favor never-ending adjudications. On the contrary, the Commission

⁴⁵ Declaration of Robert Alvarez in Support of Motion of Intervenor Sustainable Energy and Economic Development Coalition for Leave to File Late-Filed Contention (Oct. 23, 2019) at 1 [hereinafter Alvarez Decl.].

⁴⁶ LBP-19-11, 90 NRC at 359–360.

⁴⁷ CLI-20-04, 91 NRC __, __ (slip op. at 32) (Apr. 23, 2020).

⁴⁸ 10 C.F.R. § 2.326(a)(1)-(3). However, an "exceptionally grave" issue may be considered in the discretion of the presiding officer even if the contention is found untimely. Id. § 2.326(a)(1).

⁴⁹ Id. § 2.326(b).

⁵⁰ Tenn. Valley Authority (Watts Bar Nuclear Plant, Unit 2), CLI-15-19, 82 NRC 151, 156 (2015).

⁵¹ Id. at 155.

has cautioned that “[o]bviously, ‘there would be little hope’ of completing administrative proceedings if each newly arising allegation required an agency to reopen hearings.”⁵²

When it proffered Contention 30 in October 2019, Sierra Club did not address, much less satisfy, the requirements for reopening a closed record. Nor did Sierra Club submit the necessary affidavit demonstrating compliance. This alone is sufficient reason not to reopen the record.⁵³

Like the NRC Staff and Holtec,⁵⁴ the Board does not read CLI-20-04 as inviting Sierra Club to submit, in May 2020, a motion to reopen the record that should have accompanied its motion to late-file Contention 30 in October 2019.⁵⁵ If that were the Commission’s intent, given the Commission’s position that reopening a closed record should be “an extraordinary action,” we assume the Commission would have said so explicitly.

Rather, the Commission’s language suggests just the opposite. In remanding Sierra Club Contention 30 for the Board’s initial ruling on admissibility, the Commission clarified that “Sierra Club’s motion for a new contention” must “meet the standards for reopening a closed record.”⁵⁶ We interpret the Commission’s remand as a direction to make that determination

⁵² Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 n.18 (2005) (quoting Vt. Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 555 (1978)).

⁵³ See Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-05, 69 NRC 115, 124 (2009) (“Even had [petitioner’s] contentions passed muster under 10 C.F.R. § 2.309(f)(1), its motion would still fail for failing to address, let alone meet, our reopening standards.”)

⁵⁴ NRC Staff Answer in Opposition to Sierra Club’s Motion to Reopen the Record (May 13, 2020) at 3–4; Holtec International’s Answer Opposing Sierra Club’s Motion to Reopen the Record (May 14, 2020) at 4–5.

⁵⁵ In reaching this conclusion, the Board has considered the unauthorized reply that Sierra Club submitted on May 18, 2020. Sierra Club’s Joint Reply to Holtec’s and NRC Staff’s Answer to Sierra Club’s Motion to Reopen the Record (May 18, 2020) at 1. Under 10 C.F.R. § 2.323(c), replies in support of most motions (including motions to reopen a closed record) may not be filed as of right, but only by leave upon a demonstration of “compelling circumstances.” We have nonetheless reviewed Sierra Club’s reply and find it unpersuasive.

⁵⁶ CLI-20-04, 91 NRC at __ (slip op. at 32).

based on the existing record. Sierra Club clearly fails, because it did not even mention, much less satisfy, the reopening standards when it moved to late-file Contention 30 in October 2019.

Moreover, as discussed below, even if it were the Commission's intent to allow Sierra Club to move to reopen the record at this late date, we would necessarily deny the motion in any event. Sierra Club's recent motion to reopen fails for the same reasons that Sierra Club's original motion failed to demonstrate good cause for filing out of time. Additionally, we conclude that Sierra Club Contention 30 is not admissible.

B. New or Amended Contentions

In addition to meeting the requirements for reopening a closed record (where applicable), a petitioner that proffers a new or amended contention after the initial deadline for hearing requests must demonstrate good cause for doing so.⁵⁷ To establish good cause, a petitioner must show that (1) the information upon which the new or amended contention is based was not previously available; (2) the information upon which the contention is based is materially different from information previously available; and (3) the contention has been submitted in a timely fashion after the new information on which it is based becomes available.⁵⁸

Sierra Club satisfied the third requirement by proffering Contention 30 within thirty days of publication of the NWTRB Report on which Contention 30 relies.⁵⁹ Both Holtec and the NRC Staff have argued, however, that the information in the NWTRB Report was either previously available or not materially different from information that was previously available.⁶⁰ We agree.

The NWTRB Report does not purport to document any new scientific or engineering

⁵⁷ 10 C.F.R. § 2.309(c)(1).

⁵⁸ *Id.* at §§ 2.309(c)(1)(i)–(iii).

⁵⁹ NWTRB Report at 107–17.

⁶⁰ Holtec's Answer Opposing Contention 30 at 23; NRC Staff's Answer at 5–7.

research. Rather, as required by the Nuclear Waste Policy Amendments Act of 1987,⁶¹ the purpose of the NWTRB Report is to review the DOE's preparedness to transport spent nuclear fuel and high-level radioactive waste.⁶²

In undertaking this review, the NWTRB Report relies on and cites approximately 150 earlier references.⁶³ Indeed, the report explicitly acknowledges that, in identifying the issues that its recommendations address, the NWTRB drew upon these earlier sources. These included both issues that the NWTRB itself had previously identified "during past Board public meetings, technical workshops, and Board reports" (spanning 2012-2018) and "[a]dditional relevant technical issues" that had been previously "identified and documented" in reports and presentations by DOE, the United States nuclear industry, and researchers in other countries.⁶⁴ All or virtually all of these original sources were publicly available before the report's issuance in September 2019.⁶⁵

Sierra Club's Contention 30 also claims that Holtec's Environmental Report is deficient because it does not include the issues regarding transportation of nuclear waste that were presented in the NWTRB Report.⁶⁶ For example, the Environmental Report states that 100,000 metric tons of uranium (MTU) will be transported to and stored at the proposed facility in the first 20 years after a license is issued.⁶⁷ Sierra Club states that the NWTRB concluded that there

⁶¹ Nuclear Waste Policy Amendments Act of 1987, Pub. L. No.100-203, § 5051, 101 Stat. 1330-248 (1987), 2 U.S.C. §§ 10261–10270.

⁶² NWTRB Report at xxi.

⁶³ Id. at 107–17.

⁶⁴ Id. at 23.

⁶⁵ See id. at 107–17.

⁶⁶ Sierra Club Motion at 6.

⁶⁷ ER at 4-49. The petitioners' originally-filed contentions in this proceeding are based on the earlier version of Holtec's Environmental Report. See Holtec International's Environmental Report on HI-STORE CIS Facility Environmental Report (rev. 1 Dec. 2017) (ADAMS Accession No. ML18023A904).

are technical issues that will “make the transportation of nuclear waste to a proposed facility in the 20-year time frame infeasible.”⁶⁸

As the NWTRB Report acknowledges, however, these same conclusions were first presented at an NWTRB public workshop in 2013.⁶⁹ Because this information was publicly available years ago, Sierra Club fails to show good cause for failing to raise this aspect of Contention 30 earlier.

For the most part, the Declaration of Sierra Club’s expert, Mr. Alvarez, merely repeats conclusions in the NWTRB Report. But his Declaration also demonstrates that Sierra Club Contention 30 is based on facts and theories that were available long before the contention was filed. For example, Mr. Alvarez states that the NWTRB “concluded in 2016 that the Nuclear Regulatory Commission and the Energy Department lack a technical basis in support of the safe transport of high burnup [spent nuclear fuel].”⁷⁰ Indeed, Mr. Alvarez cites his own work in 2013 for the proposition that “[h]igh burnup fuel temperatures make the used fuel more vulnerable to damage from handling.”⁷¹

Sierra Club fails to demonstrate that Contention 30 is based on new and materially different information, as required by 10 C.F.R. § 2.309(c)(1).

⁶⁸ ER at 4-49.

⁶⁹ NWTRB Report at 77. The Report cites as authority a November 2013 presentation at a public NWTRB technical workshop by Jeffrey Williams, the director of DOE’s Nuclear Fuels Storage and Transportation Planning Project. Mr. Williams’ discussion of the timeframe for transporting all spent nuclear fuel from reactor sites appears at page 54 of the workshop transcript, which is publicly available at <https://www.nwtrb.gov/docs/defaultsource/meetings/2013/november/13nov18.pdf?sfvrsn=9>.

⁷⁰ Alvarez Decl. at 1.

⁷¹ Id. at 6 n.26.

C. Contention Admissibility

Even if Sierra Club had demonstrated good cause for proffering Contention 30 after the initial deadline for filing a hearing petition, Contention 30 would also have to satisfy the NRC's requirements for contention admissibility.⁷²

Among other things, an admissible contention must (1) show that a genuine dispute exists on a material issue of law or fact by referring to specific portions of the application that the petitioner disputes; and (2) state the alleged facts or expert opinions that support the petitioner's position.⁷³ Moreover, a contention must raise an issue that is within the scope of the proceeding.⁷⁴

Sierra Club fails to raise a genuine dispute with Holtec's application, as required by 10 C.F.R. § 2.309(f)(1)(vi). Contrary to Sierra Club's claims, the findings of the NWTRB Report do not contradict Holtec's plans.

While the NWTRB concludes that some technical issues must be resolved "before the nation's entire inventory of waste can be transported,"⁷⁵ it agrees that not all such issues "must be resolved before the first of the waste can be transported."⁷⁶ Contrary to 10 C.F.R. § 2.309(f)(1)(v), therefore, the NWTRB Report does not support Sierra Club's suggestion that 100,000 MTU could not possibly be moved to Holtec's facility within the first 20 years of operation. It most certainly does not support the conclusion that 8,680 MTU could not be moved during the term of the license Holtec is initially requesting.⁷⁷

⁷² See 10 C.F.R. § 2.309(f)(1).

⁷³ Id. § 2.309(f)(1)(v)–(vi).

⁷⁴ Id. § 2.309(f)(1)(iii).

⁷⁵ NWTRB Report at xxiii.

⁷⁶ Id.

⁷⁷ See ER at 14. Holtec seeks to store 8,680 MTU in two different models of Holtec canisters, up to 500 canisters in total, for a license period of 40 years.

As we stated in LBP-19-04, the NRC in any event is not concerned with the commercial viability of the facilities it licenses because the business decision whether to use a license has no bearing on a licensee's ability to safely conduct the activities the license authorizes.⁷⁸ Sierra Club claims that the NWTRB Report identified issues that could affect the availability of spent fuel for storage at Holtec's facility.⁷⁹ But the NWTRB has no role in the NRC's licensing process.

As explained supra, the NWTRB's responsibility under the Nuclear Waste Policy Amendments Act of 1987 is to "evaluate the technical and scientific validity of activities undertaken by the Secretary [of Energy] . . . including activities relating to the packaging or transportation of high-level radioactive waste or spent nuclear fuel."⁸⁰ The NWTRB does not license private spent fuel transportation systems; the NRC does. The NWTRB has no ability to revise the scope of Holtec's project or of this adjudication.

Holtec's Environmental Report states that spent nuclear fuel will be transported to Holtec's proposed facility only in transportation packages that are approved and certified as safe by the NRC under 10 C.F.R. Part 71.⁸¹ Holtec's license application lists the specific, currently approved packages it proposes to accept for storage.⁸² Holtec's application, however, is for a storage facility under Part 72, not for a transportation system under Part 71. A challenge to the safety of NRC-approved transportation packages is outside the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii), as the ISP Board ruled in LBP-19-11.⁸³

⁷⁸ See LBP-19-04, 89 NRC at 386.

⁷⁹ Sierra Club Motion at 1–2.

⁸⁰ NWTRB Report at 1.

⁸¹ ER at 1-8.

⁸² See Letter from Kimberly Manzione, Holtec Licensing Manager, to Michael Layton, Director, Division of Spent Fuel Management, NMSS (Mar. 30, 2017) (ADAMS Accession No. ML17362A093).

⁸³ LBP-19-11, 90 NRC at 367.

As we ruled in LBP-19-04, although 10 C.F.R. § 72.108 requires consideration of transportation impacts in Holtec's Environmental Report, section 72.108 "does not require that the environmental report prove the safety of transportation packages," because 10 C.F.R. Part 71 separately addresses these issues.⁸⁴ Sierra Club fails to address, much less challenge, the parts of Holtec's Environmental Report that do, in fact, analyze the potential environmental impacts associated with transportation of spent nuclear fuel.⁸⁵ Likewise, Sierra Club fails to acknowledge or dispute any safety analyses, aging management plans or quality assurance programs described in Holtec's application.

Sierra Club instead claims that such safety-related transportation issues as moving high burnup spent nuclear fuel and when to require "repackaging to [different] sized canisters"⁸⁶ must be addressed in the Environmental Report for a consolidated interim storage facility under Part 72.⁸⁷ Sierra Club makes such claims even though Holtec has committed to accepting at its facility only transportation packages that have been approved by the NRC and licensed under Part 71. Such claims would improperly expand a Part 72 application process into a dispute over the adequacy of the NRC's Part 71 requirements. Plainly, these claims are outside the scope of this Part 72 proceeding, in contravention of 10 C.F.R. §2.309(f)(1)(iii). And, insofar as they attack Commission regulations without seeking a waiver, Sierra Club's claims violate 10 C.F.R. § 2.335 as well.

Sierra Club Contention 30 is not admitted.

⁸⁴ LBP-19-04, 89 NRC at 415.

⁸⁵ ER 4-49.

⁸⁶ Sierra Club Motion at 1.

⁸⁷ Id. at 6, 9.

III. FASKEN CONTENTION 2

Fasken submitted Fasken Contention 2, together with a motion for leave to file, on August 1, 2019⁸⁸—more than twelve weeks after we issued LBP-19-04, terminating this proceeding at the Licensing Board level.

Fasken Contention 2 states:

Statements in Holtec’s SAR and Facility Environmental Report (FER) regarding “control” over mineral rights below the site are “materially different” and inaccurate. Reliance on these statements nullifies Holtec’s ability to satisfy the NRC’s siting evaluation factors.⁸⁹

Fasken submitted Contention 2 in response to a June 19, 2019 letter from Stephanie Garcia Richard, State of New Mexico, Commissioner of Public Lands, to Krishna P. Singh, President and CEO of Holtec International.⁹⁰ In that letter, Ms. Richard expresses concern that Holtec has characterized the site of its proposed facility as under Holtec’s control. In fact, Ms. Richard states, although Holtec may control the surface estate, “the State of New Mexico, through the New Mexico State Land Office, owns the mineral estate.”⁹¹ She asserts that “in its filings with the NRC, Holtec appears to have entirely disregarded the State Land Office’s authority over the Site’s mineral estate.”⁹²

⁸⁸ Fasken Motion for Leave to File a New Contention (Aug. 1, 2019) [hereinafter Fasken Motion].

⁸⁹ Id. at 2.

⁹⁰ See Fasken Motion, ex. 5 (Letter from NRC Acting Secretary Denise McGovern to Stephanie Garcia Richard, Commissioner of Public Lands, State of New Mexico, unnumbered attach. (July 2, 2019) (Letter from Stephanie Garcia Richard, Commissioner of Public Lands, State of New Mexico, to Krishna P. Singh, Holtec President and CEO (June 19, 2019) (ADAMS Accession No. ML19183A429) [hereinafter Richard Letter]).

⁹¹ Richard Letter at 2.

⁹² Id.

On August 26, 2019, both the NRC Staff and Holtec opposed Fasken's motion.⁹³ On September 3, 2019—apparently in response to the Staff's and Holtec's arguments that it failed to submit a timely motion to reopen the record—Fasken did so belatedly.⁹⁴ On September 12, 2019, however, without explanation Fasken abruptly withdrew its motion to reopen the record.⁹⁵

Although Fasken withdrew its motion to reopen, and did not reply to the NRC Staff's and Holtec's oppositions, it never withdrew its initial motion for leave to file Fasken Contention

2. We therefore address that motion and deny it.

First, as explained supra, Fasken's failure to address the reopening requirements and to submit the necessary affidavit is, by itself, sufficient grounds not to reopen a closed record.⁹⁶ Here, we confront the extraordinary situation of a petitioner who not only failed to move to reopen, as required by the NRC's regulations, but has actually refused to do so.

Second, Fasken fails to show that Contention 2 satisfies the requirements for late filing. As discussed supra, any petitioner that proffers a new or amended contention after the initial deadline for hearing requests must demonstrate good cause for doing so.⁹⁷ To establish good cause, a petitioner must show that (1) the information upon which the new or amended contention is based was not previously available; (2) the information upon which the contention is based is materially different from information previously available; and (3) the contention has been submitted in a timely fashion after the new information on which it is based becomes

⁹³ NRC Staff Answer in Opposition to Fasken's Motion to File a New Contention (Aug. 26, 2019); Holtec International's Answer Opposing Fasken's Late-Filed Motion for Leave to File a New Contention (Aug. 26, 2019).

⁹⁴ Fasken Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019 (Sept. 3, 2019).

⁹⁵ Fasken and PBLRO's Withdrawal of Their "Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019" (Sept. 12, 2019).

⁹⁶ Millstone, CLI-09-05, 69 NRC at 120.

⁹⁷ See 10 C.F.R. § 2.309(c)(1).

available.⁹⁸

The creation of a document that collects, summarizes, and places into context previously available information does not make that information new or materially different.⁹⁹ Fasken fails to satisfy 10 C.F.R. § 2.309(c)(1)(i) because the information on which Contention 2 is based was previously available in Holtec's Environmental Report and in its responses to the NRC Staff's requests for additional information (RAIs).

Pointing to Ms. Richard's letter, Fasken claims that Holtec failed to disclose to the NRC the New Mexico State Land Office's authority over mineral rights at the proposed site.¹⁰⁰ But that is not so. Holtec's Environmental Report has always acknowledged that "the subsurface mineral rights are owned by the State of New Mexico."¹⁰¹ More recently (but months before Fasken proffered Contention 2), Holtec clarified in an RAI response that "[t]he mineral rights for Section 13 [the proposed site] and certain adjacent areas are held in trust by the New Mexico Commissioner of State Lands."¹⁰² Fasken Contention 2 is based on information that was available in Holtec's application materials long before Fasken moved for leave to file it.

⁹⁸ See *id.* §§ 2.309(c)(1)(i)–(iii).

⁹⁹ N. States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-10-27, 72 NRC 481, 496 (2010).

¹⁰⁰ Fasken Motion at 4 n.7 (citing Richard Letter at 2).

¹⁰¹ ER at 58 (Fig. 3-2).

¹⁰² Holtec License Application Responses to Requests for Supplemental Information (Apr. 9, 2019) at 1.

Fasken therefore did not meet the requirements for reopening the record and late filing Contention 2 when it was submitted. For that reason (and also because Fasken has recently proffered a substantially amended version of Contention 2), we do not address its admissibility under 10 C.F.R. § 2.309(f)(1).

IV. ORDER

For the reasons stated:

- A. On further consideration, as directed by the Commission, Sierra Club Contentions 15, 16, 17, and 19 are not admitted.
- B. Sierra Club's motion to reopen the record is denied.
- C. Sierra Club's motion to late-file Sierra Club Contention 30 is denied. Sierra Club Contention 30 is not admitted.
- D. There being no admitted Sierra Club contention pending, Sierra Club's petition is again dismissed.
- E. Fasken's motion for leave to file Fasken Contention 2 (as originally submitted) is denied. Fasken Contention 2 (as originally submitted) is not admitted.

F. Briefing having only recently been completed on Fasken's May 11, 2020 motion for leave to file an amended Fasken Contention 2 and associated motion to reopen the record,¹⁰³ those motions will be addressed in a subsequent Order.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 18, 2020

¹⁰³ See supra note 6. The NRC Staff and Holtec filed answers opposing those motions on June 4 and 5, 2020, respectively, and Fasken filed a reply on June 11, 2020. See NRC Staff Answer in Opposition to Fasken's Motions to Amend Contention 2 and Reopen the Record (June 4, 2020) at 1; Holtec International's Answer Opposing Fasken Motion to Reopen the Record and Motion for Leave to File Amended Contention No. 2 (June 5, 2020) at 3-4; Fasken's Combined Reply to NRC Staff's and Holtec International's Oppositions to Motion for Leave to File Amended Contention and Motion to Reopen the Record (June 11, 2020) at 1-2.

MEMORANDUM AND ORDER (Ruling on Remanded Contentions and Denying Motion to Reopen) (LBP-20-06)

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Holtec International - Docket No. 72-1051-ISFSI

MEMORANDUM AND ORDER (Ruling on Remanded Contentions and Denying Motion to Reopen) (LBP-20-06)

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 18th day of June 2020