

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

IN THE MATTER OF
INTERIM STORAGE PARTNERS LLC

(Consolidated Interim Storage Facility)

Docket No. 72-1050

August 7, 2020

**FASKEN LAND AND MINERALS, LTD.'S AND PERMIAN BASIN LAND AND
ROYALTY OWNERS' COMBINED REPLY TO NRC STAFF'S AND INTERIM
STORAGE PARTNERS LLC'S OPPOSITIONS TO MOTION FOR LEAVE
TO FILE NEW CONTENTION AND MOTION TO REOPEN THE RECORD**

Now comes Fasken Oil and Ranch Ltd. (“Fasken”) and Permian Basin Land and Royalty Owners (“PBLRO”) (collectively “Petitioners”), by and through undersigned counsel, who respectfully submit the foregoing reply in further support of their Motion for Leave to File New Contention¹ and Motion for Leave to Reopen the Record² in the above-captioned matter, and state as follows:

I. INTRODUCTION

Petitioners filed New Contention No. 5 (“Contention”) to challenge newly disclosed material facts, information and conclusions in the Interim Storage Partners, LLC (“ISP”) draft environmental impact statement (“DEIS”),³ which significantly differ from the information relied on and conclusions drawn in the ISP Environmental Report (“ISP ER”).⁴ The ISP DEIS unfairly discounts necessary emergency and infrastructure improvement costs, skewing the socioeconomic benefits of the proposed consolidated interim storage facility (“CISF”) project, and inadequately consider regional geologic instability, land use and industry operations, and increasing trends in seismicity, which preclude a proper analysis of cumulative impacts of transportation under the National Environmental Policy Act (“NEPA”)⁵ and NRC regulations.⁶

¹ *Fasken Land and Minerals, Ltd.’s and Permian Basin Land and Royalty Owners Motion for Leave to File New Contention No. 5* (July 6, 2020) (ADAMS Accession No. ML ML20189A000), hereinafter “Motion for Leave.”

² *Fasken Land and Minerals, Ltd.’s and Permian Basin Land and Royalty Owners Motion to Reopen the Record* (May 11, 2020) (ML20189A000), hereinafter “Motion to Reopen.”

³ Environmental Impact Statement for Interim Storage Partners LLC’s License Application for a Consolidated Interim Storage Facility for Spent Nuclear Fuel in Andrews County, Texas, Draft Report for Comment, NUREG-2239 (May 2020) (ADAMS Accession No. ML20122A220), herein after “ISP DEIS.”

⁴ WCS Consolidated Interim Storage Facility Environmental Report, Docket No. 72-1050, Rev. 3, (Feb. 17, 2020) (ADAMS Accession No. ML20052E152), hereinafter “ISP ER.”

⁵ The National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*, herein after “NEPA.”

⁶ See NRC Siting Evaluation Factors 10 C.F.R. §§ 72.90-108; §72.108 (regarding necessary evaluation of transportation risks).

The transportation of spent nuclear fuel is a vital component to the proposed ISP CISO project that must be appropriately and adequately analyzed in light of all relevant costs and benefits. The ISP DEIS conclusions rely on little more than blind faith that transportation infrastructure improvements will be made, that private nuclear power plant operators will assume financial and legal responsibility for the nuclear waste during transportation and that funding will be available for emergency training and equipment in the event of an incident. Contrary to the NRC Staff's and ISP's Oppositions,⁷ these are not merely "business decisions" outside the scope of the licensing proceeding, but directly implicate important legal, safety and environmental impacts that must be investigated and evaluated in any proper analysis of transportation impacts under NEPA and NRC regulations.

Petitioners' Contention is supported by robust factual and expert evidence, which precisely identify material differences in specific sections of the ISP DEIS and clearly articulate deficiencies in the ISP DEIS's transportation related data, analyses and conclusions. Petitioners have good cause to file their Contention, it is timely, admissible, and further supported by a Motion to Reopen the Record which satisfies the requirements of 10 C.F.R. § 2.236.⁸ Alternatively, Petitioners'

⁷ *NRC Staff Answer in Opposition to Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners Motions for Leave to File Contention No. 5 and Reopen Record* (July 6, 2020) (ADAMS Accession No. ML20213C523), hereinafter "NRC's Opposition"; *Interim Storage Partners LLC'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 New Contention No. 5* (July 6, 2020) (ADAMS Accession No. ML20213C708), hereinafter "ISP's Opposition," collectively referred to as the "Oppositions."

⁸ *See Calvert* at 730-731 ("The regulations do not define or specify an exact number of days within which a new or amended contention must be filed in order to be considered 'timely,'...unless a deadline has been specified...timeliness is subject to a reasonableness standard that depends on the facts and circumstances of each situation."); *In the Matter of Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 N.R.C. 491, 491 (2012) (noting that "although 'timely' is not expressly defined by months or days in [NRC] regulations. . . typically [] 30 to 60 days from the initiating event [is considered] a reasonable deadline for proposing new or amended contentions."); *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), 67 N.R.C. 460, 493 (2008) (30 days held as presumptive time frame for timeliness of late-filed contentions).

Contention presents an exceptionally grave issue. Thus, the Board should grant Petitioners' Motions.

II. LEGAL STANDARDS

The NRC cannot grant a license for the proposed CISF project until it determines that applicable regulatory requirements of the Atomic Energy Act of 1954 ("AEA"), NEPA and NRC are satisfied.⁹ NRC regulations demand complete, accurate and reliable data to analyze site evaluation factors, including the "potential impact on the environment of the transportation of spent nuclear fuel, high-level radioactive waste or reactor-related GTCC waste within the region,"¹⁰ subsurface and geologic characteristics, and a competent technical review of natural and man-induced events based on the "current state of knowledge."¹¹ It should go without saying that all NRC license applications must be "complete and accurate in all material respects."¹²

NEPA requires the NRC focus on "the environmental consequences" of the proposed CISF project "[so] that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."¹³ NEPA's primary purpose is to inform the public of environmental issues to encourage public participation and challenges to

⁹ See 10 C.F.R. §51.10(a) (Nothing in the NRC NEPA implementing regulations alter the cardinal rule that license applications comply with all NRC regulations. Indeed, NEPA regulations must be carried out in a "manner which is consistent with the NRC's domestic licensing and regulatory authority under the [AEA].")

¹⁰ See 10 C.F.R. § 72.108.

¹¹ See 10 C.F.R. §§ 72.92, 72.94 (requiring examination of important natural phenomena and man-induced events, "based on the current state of knowledge of such events"); see also, 10 C.F.R. § 72.103(a)(1) (The NRC requires "...the results from onsite foundation and geological investigation, literature review, and *regional geological reconnaissance show no unstable geological characteristics, soil stability problems, or potential for vibratory ground motion at the site...*") (emphasis added).

¹² See 10 C.F.R. § 72.11(a) (information provided by a license applicant to the Commission must be "*complete and accurate in all material respects*") (emphasis added).

¹³ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

ensure significant issues are fully addressed on best possible record. This is especially true with respect to the transportation of highly dangerous and radioactive nuclear waste.

Pursuant to 10 C.F.R. § 2.309(f)(2), a petitioner may amend contentions based on an applicant’s environmental report or file new contentions if there are “data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the state or conclusions in the applicant’s documents.” This provision “tempers the restrictive effect of the agency’s requirement that NEPA contentions be filed based on the ER by allowing petitioners or intervenors to challenge significantly different data or conclusions.”¹⁴ The use of a disjunctive phrase here indicates a “contention may therefore challenge a DEIS even though its ultimate conclusion on a particular issue. . . is the same as that in the ER, as long as the DEIS relies on significantly different data than the ER to support the determination.”¹⁵ Likewise, a petitioner may file a contention to challenge significantly different conclusion in the DEIS even though it is based on the same information or data cited in the applicant’s licensing documents.¹⁶

III. FURTHER SUPPORT FOR NEW CONTENTION

A. *Petitioners Have Good Cause to File New Contention*

Reliance on speculative information in the ISP DEIS, by its very nature, prevents proper NEPA or NRC evaluation of environmental impacts and safety risks. Petitioners have good cause to file Contention No. 5 and meet the requirements of both 10 C.F.R. §§ 2.309(f)(2) and 2.309(c)(1). Accurate, complete, and reliable inputs and site-specific information are necessary to

¹⁴ *In the Matter of Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), 72 N.R.C. 720, 729-730, LBP-10-24 at 7, (Dec. 28, 2010) (“*Calvert*”).

¹⁵ *Calvert*, 72 N.R.C. at 730.

¹⁶ *Id.*

adequately assess and analyze the potential safety risks and cumulative environmental impacts associated with transporting nuclear waste through the Permian Basin, one of the nation's most productive oil and gas hubs, over the lifetime of the proposed ISP CISF project.

The recently published ISP DEIS offers only a distorted view of the variables and consequences relating to nuclear waste transportation absent Department of Energy ("DOE") involvement, which relies on new and materially different information and draws significantly different conclusions as to the financial costs for training first responders along transportation routes and is notably silent on the responsibility for transportation infrastructure costs. The ISP DEIS also relies on information that fails to incorporate the use of local transportation corridors near the proposed site, inappropriately disregarding unstable geologic characteristics and the prevalence of sinkholes, karst fissures substantial subsidence known to exist in the region, which present increased potential for accidents, derailment and deterioration of transportation infrastructure.

In connection with its DEIS, the NRC is independently responsible for reviewing and confirming the reliability of such information and to ensure there is adequate evidence to analyze cumulative transportation impacts. As described herein, Petitioners genuinely dispute the reliability, completeness and accuracy of the transportation related information and conclusions in the ISP DEIS.

Petitioners timely filed Contention No. 5 on July 6, 2020 pursuant to the NRC’s May 11, 2020 Order¹⁷ deeming “petitions to intervene, new or amended contentions, or hearing requests based on information in the [ISP DEIS]. . .” timely if filed on or before that date.¹⁸

A. Transportation of Nuclear Waste Implicates Multiple Important Legal, Safety and Environmental Issues

As stated publicly by the DOE, it may not take title to the vast majority of private plant companies’ nuclear waste until a permanent geologic repository is built without violating the Nuclear Waste Policy Act (“NWPA”) currently in effect.¹⁹ Indeed, ISP itself conceded this during the August 23, 2019 hearing before the NRC and it is further demonstrated by ISP’s withdrawal of its request for an exemption from NRC’s decommissioning financial assurance requirements, which inherently relied on DOE participation.

Ensuring the safe transport of nuclear waste from nuclear reactor sites will require a robust railroad and transportation infrastructure capable of withstanding oversized loads and heavy haul trucks needed to travel to the proposed ISP CISF. This transportation will inevitably involve significant costs for infrastructure improvements, mitigation measures, and proper funding for emergency training and equipment in the event of an accident along the transportation routes.²⁰ And the cumulative impacts of such transportation implicate important legal, safety and

¹⁷ISP (Consolidated Interim Storage Facility), Order of the Secretary (May 22, 2020), at 1 (unpublished) Docket No. 72-1050.

¹⁸ Fasken disputes ISP’s assertion that the Secretary’s Order was not intended to cover Motion to Reopen the Record. Although Motions to Reopen are not expressly listed in the Order, any petition to intervene in a closed proceeding such as this one would necessarily require a Motion to Reopen the Record. To the extent, notice of Fasken’s Motion to Reopen the Record was received by ISP at 12:01am on July 7, 2020, Fasken respectfully requests the Board, in its discretion, to excuse the minute delay and deem Fasken’s filing timely.

¹⁹ See Memorandum and Order (Aug 23, 2019), LBP-19-07 at 27.

²⁰ As noted in a recent letter from New Mexico Governor: “Safe transportation of spent nuclear fuel across the country and through the Permian Basin, with booming agricultural and oil and gas industry operations, “requires both well-maintained infrastructure and highly specialized emergency response equipment and personnel that can respond quickly to an incident at the facility and on transit routes.” See State of New Mexico Governor Michelle Lujan Grisham Letter to President Trump (July 28, 2020).

environmental issues that demand adequate investigations and thoughtful assessment by the agency.

i. *New and Materially Different Information in the ISP DEIS Regarding Emergency Training and Equipment Costs*

The NRC Staff's ISP DEIS for the first time states that "if SNF is shipped to a CISF, some States, Tribes, or municipalities along transportation routes may incur costs for emergency-response training and equipment *that might otherwise be eligible for funding under the NWPA*" if the DOE was responsible for transporting the nuclear waste.²¹ This is new and materially different than statements made in ISP's licensing application documents, which simply note that "[i]f the DOE is the shipper, the federal government, through DOE, is responsible for providing emergency training. . . along the transportation routes."²² ISP's ER is silent as to the financial responsibility of communities along the transportation route which may be substantial. The ISP DEIS fails to fully analyze or even consider these costs, absolutely necessary to the safe transport of nuclear waste, "[b]ecause the needs of individual municipalities along transportation routes and the costs of this training and equipment vary widely, quantification of such costs would be speculative."²³

The NRC Staff, in its independent review and analysis of cumulative transportation impacts and the socioeconomic benefits of the proposed ISP CISF project, cannot on the one hand allow ISP to rely on rampant speculation as to DOE involvement based on future changes in NWPA law and/or highly unlikely future contracts with private entities with yet-to-be determined terms, and on the other hand skirt its obligation to inform the public and improperly exclude such costs in considering alternatives and comparing costs and benefits of the ISP DEIS. Stating there would be

²¹ See ISP DEIS at 4-74 to 4-75; NWPA Section 180(c).

²² See ISP ER at 4-8.

²³ *Id.*

“a SMALL to MODERATE (beneficial) impact to socioeconomics” without accounting for the known and necessary infrastructure and emergency training and equipment costs is disingenuous and presents a biased view of actual impacts. This is unacceptable and fails to fully inform the public of the project’s impact in violation of NEPA and NRC regulations. Shielding this information prevents meaningful and well-informed challenges to evaluations of the substantive impacts of the proposed project on the human environment, circumventing NEPA and NRC fundamental purpose of public participation.

ii. *The ISP DEIS Relies on New and Materially Different Information that Fails to Account for Regional Characteristics and Inadequately Assesses Cumulative Transportation Impacts*

Unlike ISP’s calculations for a representative route traveling “from Monahans, Texas to the CISF along the transportation corridor,”²⁴ the ISP DEIS calculations rely on a representative route traveling only from Deaf Smith, Texas.²⁵ Contrary to the assertions in the Oppositions, these representative routes are materially different and fail to account for the unique regional attributes, including extensive oil and gas and agricultural industries use of the rails, historic and ongoing mineral extraction activities, trends of increasing seismicity, and well-documented existence of sinkholes, karst development and substantial subsidence in and around the proposed ISP site. In short, the use of NRC’s representative routes precludes a proper site-specific analysis of transportation impacts in violation of NEPA and NRC regulations.

As acknowledged in the ISP DEIS, sinkholes and karst fissures are common features in the rim of the Delaware Basin and new sinkholes form annually.²⁶ Two well-documented sinkholes,

²⁴ ISP ER at 4-8.

²⁵ ISP DEIS at 4-22.

²⁶ ISP DEIS at 3-19.

Wink sinkhole in Winkler County, Texas and Jal sinkhole in Jal, New Mexico, resulting from improperly cased and abandoned wells and subsurface salt mining operations are located in close proximity to the local rail lines which will be used to transport massive canisters of spent nuclear fuel to the proposed ISP site. It is well known that subsidence in the region is controlled by interdependent factors and complex mechanisms, including historical and ongoing extraction activities. These unknown and sometimes unpredictable risks frequently lead to subsurface deformation, uneven settlement and the potential for catastrophic subsidence. Such regional geologic characteristics must be incorporated in any investigation and evaluation of the risk for representative routes and the ISP DEIS transportation impacts analysis.

The transportation study and ISP DEIS also fail to account for the significant increase in rail related accidents in the Permian Basin in recent years. The Midland-Odessa Transportation Alliance (MOTRAN) reports that from 2016-2018, there were 158 rail related crashes in the very area that the spent nuclear fuel will travel through.

Petitioners and industries throughout the Permian Basin extensively rely on the Texas-New Mexico Railroad extending from Monahans, Texas to ship necessary products to bring oil and gas to production and facilitate agricultural operations.²⁷ As noted in the Declaration of Tommy Taylor, although the rail lines are a major means for industry operations, they are situated in remote desert-like areas and served mostly by volunteer fire department, lacking sufficient emergency responder resources and equipment to handle nuclear incidents. Even the most minimal transportation incident, such as derailment or collision involving spent nuclear fuel, would have the potential to interrupt or foreclose further oil and gas extraction/production activities and

²⁷ See Fasken Motion for Leave, Exhibit 1.

agricultural and ranching activities. Any hazardous materials emergency upon the rails in the region that interfere with energy freight “poses a loss of millions of dollars per day affecting multiple operators in the Permian Basin.”²⁸ Indeed, “a single hazardous materials emergency would not only have a determinantal effect upon oil and agricultural industries of the Permian Basin but would also likely overwhelm, our first responders and the small communities adjacent to the rail track.”²⁹

Regional considerations must be accounted for in the risk assessment and calculus for transporting nuclear waste through the Permian Basin, including industry operations, seismicity, geologic instability and the potential for subsidence and sinkholes negatively impacting railroad infrastructure unstable geologic features. The ISP DEIS falls short of NEPA and NRC standards as it fails to account for regional risks and attendant costs necessary for the safe transportation of spent nuclear fuel necessary to the proposed ISP CISF project.

B. CONCLUSION

Threshold admissibility requirements should not be turned into a “fortress to deny intervention.”³⁰ There is no requirement at this stage in NRC proceedings that Petitioners prove the merits of their case.³¹ Timeliness and procedural issues should not over take substance here where Petitioners have presented exceptionally grave issues relating to the transport of nuclear waste.

²⁸*Id.*

²⁹ *Id.*

³⁰ *Power Authority of the State of New York, et al.* (James FitzPatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), CLI-00-22, 52 NRC 266, 295 (2000); *Matter of Duke Energy Corp.* (Oconee Nuclear Power Plant), CLI-99-11, 49 NRC 328, 335 (1999) (quoting *Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), 8 AEC 13, 20-21 (1974), rev'd in part, CLI-74-32, 8 AEC 217 (1974), rev'd in part, *York Committee for a Safe Environment v. N.R.C.*, 527 F.2d 812 (D.C. Cir. 1975)).

³¹ *Matter of Entergy Nuclear Generation Co., et al.* (Pilgrim Nuclear Power Station), 50-293-LR (ASLB Oct. 16, 2006), 2006 WL 4801142 at (NRC) 85 (quoting *Oconee*, 49 NRC at 342)

Dated August 7, 2020

/electronically signed by Allan Kanner

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I Allan Kanner certify that, on this 7th day of August, 2020, true and correct copies of Fasken's Motion for Leave to File New Contention No. 5, and attachments were served upon the Electronic Information Exchange (the NRC's E-Filing System) in the above-captioned proceeding.

/electronically signed by Allan Kanner

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