

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

IN THE MATTER OF HOLTEC)	Docket No. 72-1051
INTERNATIONAL)	
)	
(Consolidated Interim Storage Facility))	September 28, 2020
)	

**FASKEN LAND AND MINERALS, LTD.'S AND PERMIAN BASIN LAND
AND ROYALTY OWNERS' COMBINED NOTICE OF APPEAL AND
PETITION FOR REVIEW OF ATOMIC SAFETY LICENSING BOARD'S
DENIAL OF MOTION FOR LEAVE TO FILE AMENDED CONTENTION
AND MOTION TO REOPEN THE RECORD**

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I. SUMMARY OF GROUNDS FOR APPEAL AND REVIEW

Fasken Land and Minerals, Ltd.’s and Permian Basin Land and Royalty Owners’ (collectively “Fasken” or “Joint Petitioners”), by and through undersigned counsel, hereby give notice of their appeal to the U.S. Nuclear Regulatory Commission (“NRC”) from the Atomic Safety Licensing Board’s (“ASLB”) ruling, LBP-20-10, “Memorandum and Order (Denying Motions to Reopen and for Leave to File)” (Sept. 3, 2020) in the Holtec International (“Holtec”) Consolidated Interim Storage Facility (“CISF”) proceeding.¹

Fasken specifically appeals the ASLB’s denial of its Motion for Leave², the admissibility of Amended Contention No. 2, and its Motion to Reopen the Record.³ The ASLB ruling, which follows the denial of every contention raised by any and all parties relating to the Holtec’s unprecedented CISF project and proceedings, commits errors of law and finding of facts and further constitutes an abuse of discretion. Thus, Fasken’s foregoing Petition for Review should be granted.

II. FACTUAL AND PROCEDURAL BACKGROUND

a. The Proposed Holtec CISF Project

The unprecedented nature of the proposed Holtec CISF project here cannot be understated. Holtec is seeking an NRC license to construct and operate a storage facility for spent nuclear fuel (“SNF”) and high-level radioactive waste at a site in Lea County, New Mexico, which could easily be the world’s largest aggregation of SNF in a single place. The initial license term is for a period of 40 years, covering up to 500 canisters and as much as 8,680 metric ton units (“MTUs”),

¹ ASLB Memorandum and Order (Denying Motions to Reopen and for Leave to File), LBP-20-10, (Sept. 3, 2020) (ADAMS Accession No. ML202471J549) (hereinafter “ASLB Order”).

² Fasken and PBLO Motion for Leave to File Amended Contention No. 2 (May 11, 2020) (ADAMS Accession No. ML20132F019) (hereinafter “Motion for Leave”).

³ Fasken and PBLRO Motion to Reopen the Record (May 11, 2020) (ADAMS Accession No. ML20132E724) (hereinafter “Motion to Reopen”).

however, Holtec has repeatedly indicated that it intends to “seek to renew the license for two additional renewal periods of up to 40 years each for a total of up to 120 years,”⁴ to cover up to 10,000 canisters and between 100,000 to 173,6000 MTUs at the proposed site in southeastern New Mexico. To put this in context - Holtec’s proposed CISF project would be accepting more than double the total volume of SNF tagged for disposal at the previously proposed Department of Energy (“DOE”) Yucca Mountain permanent geologic repository. Given the lack of substantial progress in establishing the previously proposed Yucca and/or any alternative permanent repository, many have acknowledged the real possibility of the proposed Holtec CISF site becoming a *de facto* permanent repository, without any regard to the additional safety requirements for possible permanent storage.

The location for Holtec’s massive CISF project is in the middle of the Permian Basin – a vital and irreplaceable petroleum resource for the nation’s energy, security and independence. As acknowledged in the Holtec DEIS, the Permian Basin is one of the most productive oil hubs in the nation.

PBLRO is an association of oil and gas producers, ranchers, and royalty owners and operators formed specifically in response to the proposed Holtec CISF project. PBLRO consists of 12 entities with substantial operations and leases throughout the Permian Basin in southeast New Mexico and Texas. Members of PBLRO have mineral leases beneath and surrounding the proposed CISF site and graze cattle within 5-miles of the site. More specifically, Fasken is a member of PBLRO and it owns and/or leases property related to oil and gas activities located approximately 2 miles from the Holtec site. Fasken’s acreage (over 2,000 acres) is located directly

⁴ See Environmental Impact Statement for the Holtec International’s License Application for a Consolidated Interim Storage Facility for Spent Nuclear Fuel and High-Level Waste, Draft for Comment, NUREG-2237 (March 2020) (ADAMS Accession No. ML20069G420), (hereinafter “Holtec DEIS”) at 2-2.

west and adjacent to the proposed Holtec CISF site and it has four producing wells on this acreage. Additionally, Fasken owns grazing property and operates significant agricultural operations nearby consisting of 160,000 acres. This property has been in the Fasken family for over one-hundred years.

b. Procedural Background

On May 7, 2019, the Commission denied all petitioners' hearing requests, finding each and every contention filed to be inadmissible.⁵ With respect to Fasken, the ASLB specifically found that Fasken had demonstrated standing, but that its converted contention, relating to allegations that the NRC's licensing of the proposed Holtec project violates the Nuclear Waste Policy Act ("NWPA"), was inadmissible.⁶ Fasken, as well as other petitioners, filed appeals relating to this decision.⁷

Shortly thereafter on August 1, 2019, Fasken filed Contention No. 2, based on new information and material misrepresentations made by Holtec relating to control of mineral rights at the proposed Holtec site.⁸ More specifically, the basis for Fasken's Contention No. 2 was:

Statements in Holtec's Safety Analysis Report (SAR) and Facility Environmental Report (FER) regarding "control" over mineral rights below the site are materially misleading and inaccurate. Reliance on these statements nullifies Holtec's ability to satisfy the NRC's siting evaluation factors.⁹

The Board denied Fasken's Contention No. 2. Fasken appealed the Board's decision on June 3, 2019.¹⁰ On April 23, 2020, in response to these appeals, the Commission reversed in part

⁵ ASLB Order, LBP-19-4, 89 NRC 353 (May 7, 2019) (ADAMS Accession No. ML19127A026).

⁶ *Id.*

⁷ On June 3, 2019 Fasken appealed the Board's decision. Fasken and PBLRO Notice of Appeal and Petition for Review (June 3, 2019) (ADAMS Accession No. ML19154A455) Additionally, Fasken and others have filed related appeals and Motions to Intervene which are currently pending in the D.C. Circuit of Appeals.

⁸ *See* Fasken and PBLRO Motion for Leave to File a New Contention No. 2 (Aug. 1, 2019) ("Initial Motion for Leave")

⁹ *Id.* at 3.

¹⁰ Fasken and PBLRO Notice of Appeal and Petition for Review (June 3, 2019) (ADAMS Accession No. ML19154A455).

and remanded several of the Board's rulings for additional consideration, including the admissibility of Fasken's original Contention No. 2.¹¹

On May 11, 2020, in compliance with the NRC Secretary's Order¹² for filing contentions relating to the Holtec DEIS, published in March of 2020, Fasken timely filed its Motion for Leave to File Amended Contention No. 2 along with its Motion to Reopen the Record.¹³ Fasken's Amended Contention addresses new and materially different information and conclusions in the Holtec DEIS made for the first time. The basis for Amended Contention No. 2 is as follows:

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 [Consolidated Interim Storage] Facility site, which precludes a proper analysis under NEPA¹⁴ 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.¹⁵

No one seriously disputes that this was and is a true statement.¹⁶ Unfortunately, the ASLB and NRC have allowed Holtec to engage in aspirations instead of facts to support its massive CISF project, and then faulted Fasken (and other putative intervenors) that facts relating to Holtec's ever evolving project were known or should have been known by all in the past.

¹¹ Holtec Int'l (HI-STORE Consolidated Interim Storage Facility), CLI-20-04, (slip op. at 1, 23–29) (Apr. 23, 2020)

¹² NRC Secretary Order (Granting Motion for Extension of Time to File), Docket No. 72-1051 (Apr. 7, 2020) (ADAMS Accession No. ML20098F515) (granting an extension of approximately 30 days due to the COVID-19 public health emergency). *See also*, ALSB Memorandum and Order (Denying Contention), (Sept. 3, 2020) at 17 (Board does not dispute that "Fasken Amended Contention 2 was timely submitted in the sense that it was filed within the timeframe prescribed by the Secretary for contentions challenging the DEIS.")

¹³ *See* Motion for Leave, Motion to Reopen and Holtec DEIS.

¹⁴ The National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*, herein after "NEPA."

¹⁵ Motion for Leave at 10-11.

¹⁶ *See, e.g.*, 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); New Mexico Environment Dep't Letter to NRC Div. Rulemaking, Env. and Financial Support re Holtec – NRC DEIS – NMED Review and Comment (Dec. 16, 2019).

Subsequent to Fasken its filing Amended Contention No. 2, on June 18, 2020, the Board denied Fasken's Initial Motion for Leave to file Contention No. 2.¹⁷ In its decision, the ASLB indicated that it would separately address Fasken's Amended Contention No. 2. Fasken's instant appeal relates solely to its Amended Contention.

On June 25, 2020, the Board issued an order establishing an August 5, 2020 teleconference hearing and oral argument for the parties to further address issues relating to Fasken's Motions.¹⁸ Thereafter, on July 20, 2020, the Board issued list of questions and topics to be covered.¹⁹ During the August 5, 2020 the Board-issued topics, as well as others raised, were discussed. Fasken's expert geologist was on the call and counsel requested that the Board allow him to speak in response to technical issues raised, but the Board denied the request. During the hearing both parties, Fasken and Holtec, offered to submit additional filings from their respective technical experts. Following the hearing, it was left an open question as to whether or not additional briefing on such topics or any further submissions by the parties would be necessary (or even considered) by the Board in its decision-making process.

On September 3, 2020, the ASLB issued an Order and Memorandum rejecting Fasken's Motion for Leave, finding Amended Contention No. 2 inadmissible, and further denying Fasken's associated Motion to Reopen.²⁰

III. ARGUMENT

Contrary to the ASLB decision, Fasken has good cause to file Amended Contention No. 2, based on *Calvert Cliffs*, as Fasken identifies multiple material differences in the data and

¹⁷ ASLB Memorandum and Order (Ruling on Remanding Contentions and Denying Motion to Reopen) (ADAMS Accession No. ML20170A558), LBP-20-06 (June 18, 2020).

¹⁸ ASLB Order (Scheduling Oral Arguments), (June 25, 2020) (ADAMS Accession No. ML20177A577).

¹⁹ ASLB Order (Concerning Oral Argument) (July 20, 2020) (ADAMS Accession No. ML202A053).

²⁰ ASLB Order.

information relied on, as well as the conclusions drawn in the Holtec DEIS when compared to Holtec's ER and SAR. The Holtec DEIS, for the very time, discloses significant differences including but not limited to: (i) the difference between finding MODERATE cumulative impacts on geology and soils versus MINIMAL impacts, (ii) the difference between the use of a 6-mile radius versus a 50-mile radius to evaluate land use cumulative impacts, (iii) the difference between Holtec having complete control of the mineral rights below the proposed site and speculative statements regarding potash mining and other land use restrictions for unknown time frames, (iv) new and unjustified reliance on a 1978 historical reference to support evaluation of past, present and reasonable future drilling operations in the Permian Basin, (v) new reliance on remote imagery studies to support conclusions as to subsidence in the region, (vi) new reliance on information to support seismicity evaluations, (vii) material differences in estimated drilling depths and (viii) present and reasonable future subsidence.

Fasken's Amended Contention is admissible as it presents genuine disputes with respect to these material differences, backed by factual and expert support, citing to specific sections of the Holtec DEIS and Holtec's SAR, ER and outstanding RAI responses, which demonstrate that Holtec's application²¹ fails to adequately, completely and reliably describe the control of subsurface mineral rights, industry operations and geologic characteristics. This renders Holtec's application, including the Holtec DEIS, deficient in violation of NRC siting evaluation factors and NEPA regulations.

Fasken's Motion for Leave was timely filed in conjunction with its Motion to Reopen with appropriate accompanying affidavits, outlining the important, if not exceptionally grave, safety

²¹ Fasken considers the Holtec DEIS to be encompassed in Holtec's application since the Holtec DEIS (and final EIS) are required to issue a license under the agency's applicable rules and regulations.

concerns and environmental impact issues implicated by these differences given the proposed site location in the Permian Basin.

The ASLB erred in denying Fasken's Motions and the Commission should grant Fasken's Petition for Review and reverse the ASLB decision.

A. STANDARDS

a. Petitions for Review

Pursuant to 10 C.F.R. § 2.341(b)(1), within 25 days after service of a full or partial decision or any other decision or action by a presiding officer with respect to which a petition for review is authorized, a party may file a petition for review with the Commission. A petition for review filed under 10 C.F.R. § 2.341(b) may be granted "in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations: (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding; (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; (iii) A substantial and important question of law, policy, or discretion has been raised; (iv) The conduct of the proceeding involved a prejudicial procedural error; or (v) Any other consideration which the Commission may deem to be in the public interest."²²

On review, the Commission generally defers to the ASLB's threshold rulings on standing and contention admissibility unless it finds an "error of law or abuse of discretion."²³ The

²² 10 C.F.R. § 2.341(b)(4). The Commission has stated that The Commission has stated: Review is particularly appropriate where the Board's ruling may have made a clear error as to a material fact, where the ruling turns on a legal conclusion that is without precedent or conflicts with existing precedent, or where the ruling raises an important policy issue that the Commission itself should consider. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-8, 61 NRC 129, 132 (2005) (emphasis added); *see also In Matter of Nuclear Innovation North America LLC* (South Texas Project, Units 3 and 4), Docket Nos. 52-012 & 52-0013 "NRC Staff Answer to Intervenors' Petition for Review of the Licensing Board's Partial Initial Decision on Contention FC-1" (May 30, 2014) (ADAMS No. ML14150A561).

²³ *See, e.g., Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 N.R.C. 704, 710 (2012); *see also Calvert Cliffs 3 Nuclear Project LLC and Nuclear Project, LLC and*

Commission has discretion to review all factual issues *de novo*,²⁴ however it is typically “disinclined to do so where a Board has weighed arguments presented by experts and rendered reasonable, record based factual findings.”²⁵ For questions of law, the Commission reviews ASLB decisions *de novo*.²⁶

b. NEPA and NRC Regulations

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.²⁷

The overarching goal of the NRC is to avoid avoidable risks of harms. Its regulations promote that goal. As such, the NRC regulations proper assessment of siting evaluation factors and demand complete, accurate and reliable data to analyze site evaluation factors, including subsurface and geologic characteristics and a competent technical review of natural and man-induced events based on the “current state of knowledge.”²⁸

NEPA requires agencies to take a “hard look at environmental consequences” of the proposed action, and imposes a duty upon the agency to both “consider every significant aspect of the environmental impact of a proposed action” and “inform the public” of its analysis and

Unistar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 914 (2009); *Strata Energy, Inc.* (Ross *In Situ* Uranium Recovery Project), CLI-16-13, 83 NRC 566, 573 (2016).

²⁴ See e.g., *Nuclear Info. Res. Serv. v. Nuclear Regulatory Comm’n*, 969 F.2d 1169, 1177 (D.C.Cir.1992) (“The AEA has been consistently read . to give the Commission broad regulatory latitude.”)

²⁵ *Pa’ina Hawaii, LLC* (Materials License Application), CLI-10-18, 72 NRC 56, 73 (2010) (internal quotation marks omitted).

²⁶ *Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 503-05 (2007); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 N.R.C. 215, 219 (2017).

²⁷ See Holtec DEIS at 4-102; see also 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].”)

²⁸ 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).

conclusion.²⁹ NRC regulations implementing NEPA reflect amendments designed to improve regulatory efficiency in environmental reviews and to provide for “more focused and therefore more effective” NRC NEPA reviews by focusing on “significant case[-]specific concerns.”³⁰

Additionally, a draft EIS must include discussion of the cumulative effects for a proposed project, defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”³¹ The NRC is encouraged to cooperate with State, Indian Tribes, local agencies and interested parties in completing a draft EIS and “include consideration of major points of view concerning the environmental impacts” of the proposed action.³²

“To casually include information that has not been independently verified for its reliability and completeness by the NRC would violate both NRC regulations and NEPA’s fundamental purpose of informing the public about environmental issues.”³³ Moreover, to protect the inclusion of information in an EIS from challenge in a licensing proceeding would violate NRC regulations governing public participation requirements.³⁴

c. Good Cause

²⁹ *Balt. Gas & Elec. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97, 103 (1983) (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 553 (1978)).

³⁰ Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467 (Jun. 5, 1996); *id.*, 61 Fed. Reg. 66,537 (making minor clarifying and conforming changes and adding text omitted from Table B-1); Correction, 66 Fed. Reg. 39,277 (Jul. 30, 2001) (making further corrections to Table B-1).

³¹ 40 C.F.R. § 1508.7 (emphasis added); Council on Environmental Quality (“CEQ”) Regulations.

³² 10 C.F.R. § 51.71(b).

³³ *TVA*, Intervenor’s Reply to Responses in Opposition to Motion for Leave to File Contention 4 (Inadequate Discussion of Environmental Impacts of Spent Nuclear Fuel Pool Fires) and Contention 5 (Impermissible Discussion of Energy Alternatives and Need for The Proposed SMR), Docket No. 52-047-ESP (June 22, 2018), (ADAMS Accession No. ML18174A075).

³⁴ 10 C.F.R. § 51.104.

Multiple avenues exist to establish good cause. Under 10 C.F.R. § 2.309(c)(1), new or amended contentions submitted after the initial date for hearing requests, a party can demonstrate good cause by showing the following three conditions are met:

- (i) The information upon which the filing is based was not previously available.
- (ii) The information upon which the filing is based is materially different than information previously available.³⁵
- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.³⁶

Alternatively, for new or amended contentions relating to NEPA, good cause may be shown and contentions may be filed if there are data or conclusions in an NRC DEIS or final EIS or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents.³⁷ As demonstrated by *Calvert Cliff*, if the NRC DEIS "contains data or conclusions. . .of the proposed action that differ significantly from those contained in the [ER] (an applicant's document), the petitioner [] may file an amended contention, or an entirely new contention, to challenge the new data or conclusions."³⁸ The use of a disjunctive phrase here indicates a "contention may therefore challenge a DEIS even though its ultimate conclusion on a

³⁵ The Commission has stated that "materially different" information is that which "differs significantly. . . from the information in the applicant's documents." Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46, 562 at 46, 572 (Aug. 3, 2012). See also, *Fla. Power & Light Co.* (Turkey Point Units 6 & 7), LBP-17-6, 86 N.R.C. 37, 48, *aff'd*, CLI-17-12, 86 N.R.C. 215 (2017) (in the context of late-filed contentions, "materially different" concerns the "type or degree of difference between new information and previously available information").

³⁶ See *In the Matter of Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 N.R.C. 491, 491 (2012) (noting that "although 'timely' is not expressly defined by months or days in [NRC] regulations. . . typically [] 30 to 60 days from the initiating event [is considered] a reasonable deadline for proposing new or amended contentions."); *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), 67 N.R.C. 460, 493 (2008) (30 days held as presumptive time frame for timeliness of late-filed contentions).

³⁷ 10 C.F.R. § 2.309(f)(2). See *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 533 (2005) ("Our rules expressly allow timely amendment of NEPA contentions if there is significant new information or different conclusions in the DEIS that could not have been challenged previously") (citing 10 C.F.R. § 2.309).

³⁸ *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 (Dec. 28, 2010) ("*Calvert*").

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.”³⁹

As set forth more fully below, good cause exists under *Calvert Cliff* precedent, because Fasken’s Amended Contention No. 2 challenges multiple material differences disclosed for the first time in the Holtec DEIS. In other words, the basis for Fasken’s Amended Contention are material differences between the information relied on / sources cited to and conclusions drawn in the Holtec DEIS when compared to Holtec’s ER,⁴⁰ SAR⁴¹ and outstanding requests for additional information (“RAIs”) issued by the NRC.⁴² These differences could not have been identified prior to the publication of the Holtec DEIS, and Fasken timely filed its Motion for Leave relating to same in accordance with the NRC Secretary’s Order by May 11, 2020.

d. Contention Admissibility

In addition to meeting the requirements of 10 C.F.R. § 2.309(c)(1), any new or amended contentions must also satisfy the basic standards for admissibility under 10 C.F.R. § 2.309(f)(1).

This section requires that each contention:

- i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- ii) Provide a brief explanation of the basis for the contention;
- iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

³⁹ *Calvert*, 72 N.R.C. at 730 (“The reverse is also true: a significantly different conclusion in the DEIS may be challenged even though it is based on the same information that was cited in the ER.”). *See also*, *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 533 (2005) (“Our rules expressly allow timely amendment of NEPA contentions if there is significant new information or different conclusions in the DEIS that could not have been challenged previously”).

⁴⁰ Holtec ER, Rev. 7, Docket No. 72-1051 (August 2019) (ADAMS Accession No. ML19309E337).

⁴¹ Holtec SAR, Rev. 0H, Docket No. 72-1051, (March 30, 2019) (ADAMS Accession No. ML19163A062)

⁴² *See* Motion for Leave at 20-28 (detailing Holtec’s refusal to provide information necessary for the NRC to conduct an appropriate review and evaluation of its CISF licensing application, relevance of outstanding RAI responses, and more specifically, outstanding RAI responses and information regarding interdependent regional activities – orphaned and abandoned wells, past, present and future potash mining operations, on site and nearby oil and gas operations, and subsidence and seismicity); *see also*, NRC Letter to Holtec RAIs, Part 5 (Nov. 14, 2019), (ADAMS Accession No. ML193322C260).

- 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;⁴³
- v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue...together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;⁴⁴ and
- vi) 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 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.⁴⁵

10 C.F.R. § 2.309(f)(1)(i-vi).

A contention may state an “issue of law or fact.” A purely legal issue contention need not necessarily address every requirement of 10 C.F.R. § 2.309(f)(1), such as the requirement to provide “a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue.”⁴⁶

To satisfy basic contention admissibility requirements, a petitioner must “proffer at least some minimal factual and legal foundation in support of their contentions.”⁴⁷ A petitioner need

⁴³ Requires a significant link between the claimed deficiency in the application and the agency's ultimate determination whether the applicant will adequately protect the health and safety of the public and the environment. *Nextera Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP-17-07, 75 NRC 301 (2017) (citing *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179-80 (1998), *Aff'd*, CLI-98-13, 48 NRC 26 (1998)). *See also, Oconee*, CLI-99-11, 49 N.R.C. at 333-34 (to show that a dispute is “material” a petitioner must show that its resolution would make a difference in the outcome of the licensing proceeding).

⁴⁴ However, at the contention admissibility stage, petitioners are not required to prove their case on the merits. *Fansteel, Inc.* (Muskogee, Okla. Site), CLI-03-13, 58 N.R.C. 195, 203 (2003).

⁴⁵ *See, U.S. Dept. of Energy*, CLI-09-14, 69 NRC 580, 588 (2009) (demonstrating a genuine dispute of fact or law requires a petitioner to show “specific ties to NRC regulatory requirements, or to safety in general”); *Nextera*, LBP-17-07, 75 NRC 301 (finding “sufficient information” to demonstrate a genuine dispute to require inclusion of references to specific portions of the application that a petitioner disputes and for deficient applications, identification of alleged areas of deficiencies with supporting beliefs).

⁴⁶ 10 C.F.R. § 2.309(f)(1)(v). *See U.S. Dep't of Energy*, CLI-09-14, 69 NRC 580 at 588–91. (“We agree, for example, with the Boards' view in this proceeding that requiring a petitioner to allege ‘facts’ under section 2.309(f)(1)(v) or to provide an affidavit that sets out the ‘factual and/or technical bases’ under section 51.109(a)(2) in support of a legal contention—as opposed to a factual contention—is not necessary.”)

⁴⁷ *Oconee*, CLI-99-11, 49 N.R.C. at 334.

not prove the merits of contentions at this stage..⁴⁸ Rather the NRC requires a petitioner read the pertinent portions of the license application, state the applicant's position and the petitioner's opposing view, and explain the disagreement.⁴⁹

Threshold admissibility requirements should not be turned into a "fortress to deny intervention."⁵⁰ As interpreted in *Vermont Yankee v. NRC*, 435 U.S. 519, a contention should simply make a sufficient showing to require reasonable minds to inquire further.

As set out more fully herein, Fasken's Amended Contention No. 2 identifies specific portions of the Holtec DEIS and application,⁵¹ raises multiple genuine disputes of material facts and conclusions of law, and the basis for disputes is robustly supported with factual information and expert affidavits. Further, the disputes are within the scope and material to the proceedings. Thus, Fasken's Amended Contention No. 2 is admissible.

e. Motions to Reopen

10 C.F.R. § 2.326 sets forth the requirements for reopening the record: (1) a motion to reopen the record must be timely; (2) the motion must address a significant safety or environmental issue; and (3) the motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.⁵² Motions to reopen the record must be accompanied by affidavit(s) from "experts in the disciplines appropriate to the

⁴⁸ See also, *Fansteel, Inc.*, CLI-03-13, 58 N.R.C. 195 at 203.

⁴⁹ Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33, 168, 33, 170-71 (Aug. 11, 1989).

⁵⁰ *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)).

⁵¹ Fasken considers the Holtec DEIS to be encompassed in Holtec's application since the Holtec DEIS (and final EIS) are required to issue a license under the agency's applicable rules and regulations.

⁵² 10 C.F.R. § 2.326 (a)(1)-(3).

issues raised” or from “competent individuals with knowledge of the facts alleged” that address the aforementioned criteria.⁵³

Additionally, an “exceptionally grave” issue may be considered in the discretion of the presiding officer even if untimely presented.⁵⁴

As set out more fully below, reopening should be granted because Fasken’s Motion was timely filed in conjunction with its Motion for Leave, was accompanied by appropriate affidavits and not only raises important safety and environmental issues⁵⁵ relating to subsurface mineral rights and industry operations, land use and geologic stability. Given the proposed Holtec site location in the middle of the Permian Basin, these issues are exceptionally grave. Had the actual facts been presented and truth known, a different site would have been chosen, reasonable alternatives considered, and/or mitigation measures taken.

B. THE ASLB IMPROPERLY AND UNJUSTLY REFUSED TO ADMIT FASKEN’S AMENDED CONTENTION NO. 2 FOR ADJUDICATION

a. Contrary to ASLB Conclusions, Fasken Has Good Cause to File Amended Contention No. 2 and It Is Admissible

Fasken’s Amended Contention No. 2 addresses materially different conclusions and new reliance on sources of data and information, disclosed for the very first time in the Holtec DEIS, which Fasken asserts contain glaring omissions, inaccuracies and inconsistencies relating to the control and ownership of subsurface mineral rights, abandoned wells, the status of mineral extraction (potash) and oil and gas operations, and the potential cumulative impacts of Holtec’s proposed project and such operations over time, and which further misrepresent the local geologic characteristics in the region.

⁵³ 10 C.F.R. § 2.326(b).

⁵⁴ 10 C.F.R. § 2.326(a)(1).

⁵⁵ Indeed, the NRC itself has deemed related information requested in its outstanding RAIs to Holtec as “necessary” to the review of Holtec’s application and licensing.” *See* NRC Letter to Holtec RAIs, Part 5 (Nov. 14, 2019), (ADAMS Accession No. ML193322C260).

Reliance on such inaccurate, incomplete, unreliable and speculative information in the Holtec DEIS cannot reasonably form the basis for proper analyses of safety risks or cumulative environmental impacts the proposed CISF project will have on the environment, land use, and surrounding populations under NEPA or NRC regulations.⁵⁶

Both NEPA and NRC regulations require site-specific analyses. The Holtec DEIS not only fails to take a “hard look” at the regional characteristics of the proposed site, violating NEPA requirements, which the State of New Mexico has separately noted, but further fails to appropriately address siting evaluation factors, side-stepping requirements for an independent review, evaluation and analysis of information, in violation of NRC’s own NEPA implementing and other NRC regulations.⁵⁷ Fasken’s underlying briefs supporting Amended Contention No. 2 meticulously point to specific disputes with the Holtec DEIS and sections of Holtec’s application⁵⁸ and further identify with particularity material differences in both information reliance and conclusions drawn when compared to Holtec’s ER, SAR and/or outstanding RAI responses.⁵⁹

In sum, Fasken has shown the Holtec DEIS contains material differences, has presented factual and expert testimony in support of its disputes and has further demonstrated that the Holtec DEIS is deficient in independently reviewing, evaluating, and assessing subsurface mineral rights,

⁵⁶ See Motion for Leave at 12.

⁵⁷ See Motion for Leave at 8-10 (For example, *See generally* 10 C.F.R. §§ 72.11(a), 72.40(a)(2), 72.90 – 72.108. *See e.g.*, 10 C.F.R. § 72.90(b) (NRC regulations require that proposed sites “be examined with respect to the frequency and the severity of external natural and man[-]induced events that could affect [] safe operation”); 10 C.F.R. § 72.103(a)(1) (applications for dry cask modes of storage east of the Rocky Mountain Front will be accepted by the NRC only if “...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....*”); 10 C.F.R. § 72.11(a) (information provided by a license applicant to the Commission is “complete and accurate in all material respects.”); 10 C.F.R. § 72.24(a) (NRC regulations require a description and safety assessment of the site on which the ISFSI is to be located, “with appropriate attention to the design bases for external events.”); NUREG-1567 § 2.4.2 (requires applicants to identify products or materials produced, stored, or transported by nearby industries, and discuss “any potential hazards to the ISFSI from activities or materials” produced by nearby industries)).

⁵⁸ Fasken considers the Holtec DEIS to be encompassed in Holtec’s application since the Holtec DEIS (and final EIS) are required to issue a license under the agency’s applicable rules and regulations.

⁵⁹ See Motion for Leave and Exhibit Facts Intended to Rely On.

industry operations and the cumulative impacts on land use, geology and soils, and fails to comply with both NRC and NEPA regulations. Moreover, Holtec's outstanding responses to NRC issued RAIs and ever-evolving assertions as to subsurface mineral rights, speculative contracts and land-use restrictions below and surrounding the proposed Holtec site, improperly shield information and preclude the public and interested parties from meaningfully participating in the proceedings, contrary to the primary purpose of a DEIS. As such, good cause exists to file Fasken's Amended Contention No. 2, it is admissible and the Commission should consider review and reversal of the ASLB's decision.

b. The ASLB Decision Largely Ignores Governing Precedent of Calvert Cliffs

The ASLB decision improperly places form over substance and misapplies precedent by mandating reliance on "new information" under the good cause standard 10 C.F.R. § 2.309(f) and largely ignoring the governing precedent of *Calvert Cliff*. As discussed herein, contrary to ASLB conclusions, Fasken's Motion for Leave and Reply poignantly identify (and dispute) both new and materially different data relied on and conclusions drawn in the Holtec DEIS, as compared to Holtec's ER, SAR and/or outstanding RAIs, demonstrating good cause under *Calvert Cliff*.

The ASLB in its Order, misconstrues the legal standard and improperly describes "the dispositive issue [to] not [be] whether there are differences between Holtec's [ER] and the DEIS, but whether Fasken Amended Contention No. 2 is 'based on new facts' not previously available."⁶⁰ This misses the point and is contrary to the alternative test for good cause outlined in *Calvert Cliffs*. The NRC, as a federal agency is tasked with conducting an independent analysis of unprecedented projects – like the proposed Holtec CISF here. Meaning the NRC is tasked with independently reviewing Holtec's ER, SAR and RAI responses, independently evaluating and verifying such

⁶⁰ ASLB Order at 12 citing *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 N.R.C. 479, 493 n.70 (2012) (emphasis in original).

information and data contained in same to ensure reliability and completeness in order to effectively assess the environmental impacts and safety concerns, and further present that information to the public to allow for participation and commenting prior to NRC licensing.

Because an NRC DEIS is an agency authored document, relied on for an array of government decisions and which form the basis for civic participation, it makes sense that any significant differences in the underlying information relied on and/or conclusions drawn in a DEIS would be fair game for new and/or amended contentions. This result is consistent with *Calvert Cliffs* and preserves / maintains agency transparency and congressional intent in authorizing agency authority.

As discussed below, with respect to the Holtec DEIS, it is clear that: (1) the NRC did not independently verify regional information relating to subsurface mineral rights, oil and gas operations, mineral extraction and potash mining, seismicity, geologic characteristics or subsidence – which implicate both important environmental impacts and safety concerns; (2) the NRC relied on new and materially different sources to come to significantly different conclusions as to safety concerns and cumulative environmental impacts on geology and soils and land use; and (3) the NRC made agency decisions in limiting the analysis for cumulative environmental impacts on land use from a 50-mile radius in Holtec’s ER to a 6-mile radius in the Holtec DEIS and finding MODERATE cumulative impacts on geology and soils for a license application that proposes to store more nuclear waste than any other facility or permanent geologic repository in the history of the U.S. located in the middle of the Permian Basin.

ASLB tries to flip the script, turning governing precedent on its head, asserting that Fasken has not “identified any new information, much less new information that is materially different” and there is “no regulation that prevents the NRC staff from using only some of the information in

Holtec's [ER]."⁶¹ This is false and also misses the point. First, it is the NRC's job, pursuant to NRC siting evaluation related regulations and NRC regulations implementing NEPA, to independently review and assess information and consider major viewpoints of interested parties (including regional experts) to ensure that environmental impacts and safety concerns for the massive proposed Holtec project are properly investigated and analyzed. Second, as discussed herein, Fasken has clearly identified significant differences in conclusions and with respect to the information and data relied on in the Holtec DEIS.

Furthermore, the ASLB misapplies the appropriate legal standard as to material and significant differences by claiming that the difference of degree from SMALL (or "minimal") to the Holtec DEIS finding of MODERATE cumulative impacts to geology and soils "surely . . . could [not] be material to Fasken, which had the opportunity to challenge Holtec's characterization of 'minimal' impacts in September 2018, but did not."⁶² This again conflates the standards for good cause under *Calvert Cliffs* and seems to suggest that materiality should be judged from the perspective of the potential intervening parties. By contrast, NRC regulations imply materiality relates to the differences between the sources relied on and the conclusions drawn in the applicant's ER and SAR versus the NRC's alleged independent review and DEIS. Moreover, here, the NRC's own guidance documents imply that such a difference between SMALL (or minimal) and MODERATE represents a degree of significance.⁶³

As thoroughly outlined in Fasken's underlying briefing and further discussed during the August 5, 2020 hearing with the ASLB, Fasken has identified numerous conclusions and sources relied on in the Holtec DEIS that significantly differ from Holtec's documents. The Fasken

⁶¹ ASLB Order at 12.

⁶² *Id.*

⁶³ See Holtec DEIS describing three qualitative descriptions and significant degrees of distinction in NRC assessment of DEIS (i.e. SMALL, MODERATE and LARGE).

identified and significantly different conclusions, disclosed for the first time in the DEIS, include but are not limited to, issues relating to oil and gas operations, potash mining, drilling depths, cumulative impacts on geology and soils, the appropriateness of a 6-mile radius to evaluate land use impacts, and assessment of the current and future status of seismicity and subsidence in the region. Additionally, Fasken has identified sections of the Holtec DEIS that for the first time rely on significantly different sources and information, including but not limited to, 1978 historical reference to support assertions as to present and future oil and gas operations in the Permian Basin, recently added remote imagery studies and information to describe the current and future status of seismicity and subsidence in the region, and unknown and undisclosed sources as to the status of onsite oil and gas operations, speculative contracts with unknown terms and uncertain time frames and future land use restrictions.

Furthermore, even if the Board correctly applied the good cause standard under 2.309, its conclusory assertions that Fasken's Contention based on information relating to oil and gas operations in the region is untimely also misses the point. NRC precedent defines "new information" and the clock for a timely submission of contention related to same based on when such information became "reasonably publicly available." Fasken's disputes and identification and description of drilling depths and abandoned wells highlighting differences from public information disclosed in the Holtec DEIS and application documents was derived from commercial and proprietary software (i.e. non-public information) that was obtained by Fasken, specifically in response to false statements and misrepresentations in the Holtec DEIS and application documents relating to the proposed CISF project. The Boards' assertions that Fasken should have brought this information sooner⁶⁴ – that Fasken should have somehow predicted the

⁶⁴ The ASLB Order repeatedly states that Fasken's Contention is based on prior information that could have been filed earlier because it references "Holtec's application" and fails to even mention the DEIS. As clarified herein, Fasken

future as to what misinformed sources of information and/or flawed conclusions would be contained in the Holtec DEIS or application documents is preposterous.

Fasken timely filed its Amended Contention with respect to the material differences it identified in the publication of the Holtec DEIS and Fasken's Motion for Leave not only identifies significant differences in the information relied on and conclusions drawn, it also presents genuine disputes with opposing factual and expert support as to the sources, conclusions and underlying assumptions stated therein. Thus, Fasken has good cause to file Amended Contention No. 2, the ASLB's decision is contrary to the governing precedent of *Calvert Cliffs* and warrants review and reversal by the Commission.

c. The ASLB Made Clear Errors in Factual Findings - Fasken's Amended Contention No. 2 Raises Multiple Genuine Disputes of Material Facts

The ASLB decision and its conclusions are based on clear errors in factual findings. Pursuant to 10 C.F.R. § 2.341, a petition for review is warranted where "a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding."

Fasken's Motion for Leave outlines the gross mischaracterizations made in the Holtec DEIS as to the ownership of subsurface mineral rights, speculative land use restrictions,⁶⁵ present and future drilling depths, potash mining, subsidence and sinkholes and collective impacts of the

considers the licensing application (and basis for NRC approval) to include Holtec's ER, SAR and RAI responses (including those outstanding), as well as the Holtec DEIS. Moreover, proper analysis under NEPA and multiple references throughout Fasken's Amended Contention make it crystal clear that Fasken is basing its Contention on the DEIS. The judges at the ASLB hearing acknowledged such. *See* Hearing Transcript at 425 ("[Fasken's] contention is *obviously* in response to the DEIS. . . ." (emphasis added))

⁶⁵ *See* Motion for Leave at 14 (Petitioners further dispute statements made for the first time in the Holtec DEIS, speculating on a proposed but not-yet-accepted "land use restriction or condition" at the Holtec site and prospective future contractual relationships between oil and gas lessees and the State Land Office. As stated in the Commissioner's Letter it is not a "foregone conclusion" that the State Land Office has the "ability and desire to restrict oil and gas drilling on the Site." The Holtec DEIS does not provide any concrete evidence to suggest otherwise. Indeed, the State Land Office presently "does not impose any depth restrictions on drilling activities" at or adjacent to the proposed Holtec site and has not approved such restrictions on oil and gas lessees because it "would likely trigger legal challenges from businesses that already are conducting operations on the Site pursuant to their existing mineral leases." Furthermore, as stated in the attached Declaration of Stonnie Pollock, oil and gas may still be extracted "anywhere within 330 – 660 feet from Holtec's site without impacting the correlative rights of those who actually own the minerals below the site.") (internal citations omitted).

proposed Holtec CISF project when combined with present and future industry operations to the geologic stability in the region. Holtec has repeatedly made false statements to the ASLB and the Commission and continues to misrepresent information as to these material facts. The applicants' shortcomings with regard to the truth and the NRC's failure to conduct an independent review and evaluation of such information, alone render the Holtec DEIS deficient in violation of NEPA and NRC regulations.

Contrary to ASLB's conclusions that Fasken "does not. . . identify any statement in the DEIS that is inaccurate or misleading, or explain how any alleged inaccuracies might affect a material issue,"⁶⁶ Fasken raises multiple genuine disputes of material facts relating to drilling depths, geologic characteristics and the collective impacts of historical, present and future industry operations that directly implicate important safety concerns and cumulative environmental impacts. Indeed, Fasken's underlying briefs painstaking detail the materially false, incomplete, unreliable and incomplete misrepresentations, which span a breadth of topics, in the Holtec DEIS and application.⁶⁷

No one disputes the materiality of these issues as demonstrated by the Commission's inquiries into same at prior hearings, the ASLB initiated related line of questioning at the most recent hearing, and Holtec's August 5, 2020 admission that it would be revising its ER to address discrepancies as to drilling depths and related topics.⁶⁸ Moreover, the NRC issued RAIs and

⁶⁶ ASLB Order at 21.

⁶⁷ See Fasken Reply in Further Support of Motion for Leave at Exhibit X (chart documenting just a few of the material differences between Holtec's SAR, ER, outstanding RAIs and the Holtec DEIS); see also Fasken Motion for Leave at Exhibit 1 (Declaration of Tommy Taylor); Exhibit 2 (Facts Intended to Rely On); Exhibit 4 (Declaration of Stonnie Pollock).

⁶⁸ See Exhibits 1 and 2 attached hereto (excerpts containing contradictory and inconsistent statements from January 2019 and August 2020 Holtec hearing transcripts); see also Hearing Transcript at 453 (Holtec itself admits the materiality of such statements and the inconsistencies and contradiction in its application, stating "we intend to revise that in the environmental report" and Holtec "believe[s] [the amendment from 5,000 to 3,050] will happen after the RAI responses.").

Holtec's still outstanding responses cover similar and overlapping topics of information that the NRC, by its own admission, deem "necessary" to its review of Holtec's licensing application.⁶⁹

As pointed out during the August 5, 2020 hearing by Judge Trikouros, Holtec's answers on drilling depth, industry operations and the status of potash mining and subsidence issues remain "*very nebulous.*"⁷⁰ Nebulous assertions in the context of housing an unprecedented amount of the nation's nuclear waste in one of the nation's most productive oil hubs is unacceptable. Nebulous responses to important questions that directly influence cumulative impacts to geology and soils and land uses in the Permian Basin will not suffice. Nor will such hazy responses and assertions satisfy NEPA or NRC siting evaluation factors, which require site-specific investigations and evaluations of human and man-made events impacting the facility, the environment and surrounding populations.

Such inconclusive and contradictory statements and at this stage of the game in a federal agency proceeding of this gravity is beyond concerning and suggests a captured agency with pre-determined outcomes, unwilling to independently verify let alone analyze data and information, or an agency that may or may not do the work if not pointed out by interested parties.

Fasken challenges Holtec's misrepresentations regarding material facts as to drilling depths, industry operations and geologic characteristics in and around the proposed Hotlec site. Fasken further contests the NRC Staff's new reliance on 1978 historical resource purportedly describing how present and future drilling is done in the Permian Basin as unsupportable, in addition to flawed reliance on an out-dated 2007 ELEA report claiming the impossibility of

⁶⁹ See NRC Letter to Holtec RAIs, Part 5 (Nov. 14, 2019), (ADAMS Accession No. ML193322C260).

⁷⁰ Hearing Transcript at 453 (emphasis added).

subsidence at the site.⁷¹ no subsidence. Fasken's underlying briefs and expert declarations illustrate in multiple ways how these statements, information and conclusions are false and misleading. Yet the Board unjustifiably relies on same in the Holtec DEIS.

The Holtec DEIS also improperly narrows the evaluation of land use impacts, not based on an independent investigation and analyses, but by its own admission, entirely based on information submitted by the applicant (which Fasken has shown to be false, inaccurate, incomplete and/or unreliable).⁷² And Holtec's refusal to timely provide accurate, complete and reliable information to the NRC further precludes a proper DEIS analysis and shields information from public review and transparency in violation of NRC and NEPA regulations.

Fasken's Motion for Leave raises genuine disputes as to material facts, is fully supported by factual and expert evidence, pointing to specifics in the Holtec DEIS and application, and is therefore admissible. As such, the NRC should review and reverse the ASLB decision.

d. The ASLB Abused Its Discretion in Denying Fasken's Expert an Opportunity to Address Discrepancies and Disputes

The ASLB abused its discretion in denying Fasken's experts an opportunity to address discrepancies and disputes at the August 5, 2020 hearing and Holtec's alleged ability to update its ER after publication of the Holtec DEIS constitute prejudicial procedural errors. Such actions cripple Fasken and other interested parties in bringing admissible contentions.

When the Board inquired as to factual evidence and information regarding unidentified wells in the DEIS at the hearing, Fasken asked to consult with its technical expert but was denied

⁷¹ 2007 ELEA subsidence study most notably fails to consider the large sinkhole caused by historical potash mining outside of Carlsbad. Further, such conclusory statements and qualitative analysis of subsidence, which are caused by complex and multiple interdependent factors require more thorough investigations and evaluations.

⁷² NRC Staff Opposition notes that it used the land-use description within 6 mile radius which Holtec had previously used to extrapolate to 50-mile radius for land-use impact. The NRC did no independent analysis, did not gather additional information, but relied on land-use information provided by the applicant (which has been proven flat out false and wrong in the past). This type of moving target cannot reasonably form the basis for proper and independent federal agency NEPA analysis.

such a right.⁷³ Contrary to the ALSB Order,⁷⁴ Fasken did timely object to the ASLB's decision denying Fasken's expert an opportunity to speak. Just days following the hearing, Fasken submitted a letter⁷⁵ objecting to the preliminary silencing. However, Fasken was not made aware of this ultimate denial until the issuance of the September 3, 2020 ASLB Order, as the Board at the hearing indicated that it may issue subsequent order(s) requesting information from the various parties, which both implied (or explicitly stated they would like to submit additional information related to the topics raised at the hearing and relevant to Amended Contention No. 2).⁷⁶

The Board's ruling also allows prejudicial errors in terms of Holtec's intent to update its ER documents after publication of the Holtec DEIS. Allowing Holtec to update its ER after-the-fact prejudices the ability of interested parties to timely file contentions under NRC regulations and precedent. Such action also shows why alternative precedents, such as *Calvert Cliffs*, are warranted to allow for contentions based on material differences in information or conclusions in the publication of a DEIS. This was aptly noted by Judge Trikouros during the hearing:

JUDGE TRIKOUROS: "**Well the fact that the ER is starting to be updated adds a bit of confusion to the process.** And I'm not sure what we can do about that. Would it be possible for the Board to think about that and issue an Order regarding any supplemental information?"
JUDGE RYERSON: We can do that. We can decide whether we need any further information. And if so, we can issue an Order and obviously invite both sides to comment. So let's leave it at that. Nobody is under an

⁷³ See Hearing Transcript at 466 (JUDGE: "I would like to know if you have factual support in the form of an example of a well missing from that figure?" FASKEN COUNSEL: "I would have to ask my technical expert that exact question. I believe that – we believe that Fasken believes this is more of a comprehensive list than appears there. *But I was told I couldn't really ask [Fasken's expert] that question or ask him to speak to that question earlier.*") (emphasis added).

⁷⁴ ASLB Order at fn 29 ("During the argument, Fasken's counsel asked whether its expert geologist, Mr. Pollock, might respond to some of the Board's questions directly. Tr. at 456. The Board has considered Mr. Pollock's Amended Declaration, which was submitted as Exhibit 4 to Fasken's Amended Motion for Leave. However, the Board declined (without timely objection from Fasken) to permit Mr. Pollock to present information orally. Tr. at 456–57, 470.")

⁷⁵ See attached Exhibit 3, Letter from M. Perales to NRC Chairwoman K. Svincki (Aug. 12, 2012) ("writing to register . . . *strongest* protest in regard to the manner in which the subject hearing was conducted.") (emphasis in original).

⁷⁶ See Hearing Transcript at 456-457 ("[W]e've had at least two offers for some further filings. . . so why don't we deal at the very end with that. . .")

obligation to do anything further at this point until we decide if we do that we want to direct a few further questions to folks in an Order.”⁷⁷

Significantly, the Board’s inconsistent policies and procedures here and the very fact that Holtec intends on revising its ER, after publication of the Holtec DEIS and notably after Holtec’s long-awaited and still outstanding responses to NRC issued RAIs (information requested by the NRC nearly a year ago), puts potential intervenors at a serious disadvantage - it unfairly creates a catch-22 situation for filing contentions. How are potential intervenors supposed to respond, let alone pro-actively challenge, such moving targets? These prejudicial procedural errors prevent meaningful public participation and further violate NRC regulations.⁷⁸

C. MOTION TO REOPEN

a. **Contrary to ASLB’s Conclusions, Fasken’s Motion To Reopen Was Timely Filed, Raises Exceptionally Grave Environmental and Safety Issues and Should be Admitted**

Fasken Motion to Reopen addresses serious and significant environmental impacts and safety concerns relating to the proposed Holtec CISF project being located in the Permian Basin. Given Holtec’s lack of candor and forthrightness in providing information and the NRC’s lack of independent review and analyses, Fasken seeks intervention in the above-referenced matter to address these critical issues and other issues in the NRC’s most recent analyses and the Holtec DEIS.

i. **Contrary to ASLB Findings, Fasken’s Motion to Reopen was Timely Filed and Raises Significant Environmental and Safety Issues**

Fasken’s Motion to Reopen is based on new and materially different information and/or conclusions in the Holtec DEIS that were not available prior to its publication. Petitioner’s so-

⁷⁷ Hearing Transcript at 467.

⁷⁸ *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission*, 2018 U.S. App. LEXIS 20215 (D.C. Cir. July 2018) (noting NRC practices placed Indian Tribe in ‘classic Catch-22’ because the NRC required the tribe to show irreparable harm to stay the license, but such harm could only be shown through NEPA-compliant cultural surveys, which could occur too late in time to enable the tribe to halt the project.”).

called “ironclad obligation” to file contentions based on ER is tempered by *Calvert Cliffs*. Joint Petitioners timely filed its Motions pursuant to the NRC’s Secretary’s Order by May 11, 2020 and it raises significant and serious environmental impacts and safety concerns with placing the proposed Holtec CISF project in the Permian Basin. Fasken went through hundreds of pages of DEIS, conducted its own research and fully briefed the pertinent issues in very short time frame to achieve a timely filing.

Contrary to the Board’s suggestion that “Fasken may not seize upon the publication of the NRC staff’s DEIS. . .as an excuse to raise challenges to Holtec’s license application that Fasken could have timely raised in September 2018, but did not,”⁷⁹ the information forming the basis of Fasken’s Amended Contention is new and materially different. Fasken could not have contested these newly cited sources or the NRC Staff’s conclusions as to cumulative impacts on geology and soils or decision to limit land use impact evaluation to a 6-mile radius prior to publication of the Holtec DEIS. While Fasken did indeed challenge Holtec’s assertions relating to mineral ownership early on, the NRC’s first time reliance on 1978 drilling operations, first time and materially different conclusion that MODERATE v SMALL impact on geology and soils, newly disclosed information as to the lack of certainty of subsurface mineral rights and speculative terms of future contracts and land use restrictions at and around the site. As discussed herein, and acknowledged herein, these material disputes clearly raise both important safety and environmental issues.

The ASLB’s denial of Fasken’s Motion to Reopen is misguided and inappropriate and warrants review by the Commission.

ii. Fasken’s Motion to Reopen Was Filed with Appropriate Affidavits

⁷⁹ ASLB Order at 9.

Fasken's Motion to Reopen was accompanied by appropriate affidavits by Allan Kanner,⁸⁰ Tommy Taylor and Stonnie Pollock,⁸¹ which appropriately and properly support such a motion in accordance with 10 C.F.R. 2.326(b). Mr. Kanner's affidavit confirmed, attached and incorporated by reference the statements of Mr. Taylor and Mr. Pollock, based on their knowledge and expertise of the facts alleged in Fasken's Motions. Mr. Taylor and Mr. Pollock are both considered experts in their respective fields. Furthermore, neither Holtec or the Board formally lodged objections to same.

There is nothing explicit in the language of NRC regulations that prohibits a lawyer from filing an affidavit incorporating expert affidavits, nor should it be required here. The Board should not place form over substance, especially in light of the gravity of the concerns raised and unprecedented project proposed here, which implicate important, if not exceptionally grave, issues.

iii. Fasken's Motion Raises Exceptionally Grave Regional Issues in the Permian Basin

Pursuant to 10 CFR Part 2, the Board and the Commission are permitted broad discretion in NRC related proceedings and licensing actions. Fasken respectfully requests the Commission exercise such discretion here in review of the ASLB ruling under the circumstances presented. Fasken has raised both important environmental and safety issues relating to transporting and storing potentially 1000,000 metric tons of highly radioactive material in this region, in the Permian Basin, must be adequately studied, investigated based on reliable information and applicable methodologies and results fully disclosed to ensure meaningful public engagement. Such exceptionally grave issues relating to the proposed Holtec site in the Permian Basin

⁸⁰ As explained during the hearing, Mr. Kanner's affidavit is consistent with Louisiana law and an attorney's oath in court of law generally.

⁸¹ Although Mr. Taylor and Mr. Pollock statements are styled as "Declarations," they serve the same purpose and function as affidavits.

encompass national economics and security, regional employment, sinkholes subsidence and seismicity.

A materially different result would occur if complete, accurate and reliable information was provided to the NRC and incorporated into the Holtec DEIS. Such different results may include consideration of reasonable alternatives, appropriate mitigation measures, changes to safety designs, and/or an entirely different choice of venue and location for the proposed Holtec project.

These are exceptionally grave issues that warrant review by the Commission.

IV. CONCLUSION

Fasken's foregoing Petition for Review should be granted because it raises substantial and material disputes and questions as to ASLB erroneous findings of facts, it raises issues as to ASLB ignoring governing precedent of *Calvert Cliffs*, it raises prejudicial procedural errors as to Holtec updating its ER as to discrepancies of such material facts disputes after publication of the Holtec DEIS and finally, given the unprecedented proposed Holtec CISF project – in the discretion of the Commission and in the favor of public interest.

Dated: September 28, 2020

/electronically signed by Allan Kanner

Kanner & Whiteley, LLC

Allan Kanner, Esq.
Conlee S. Whiteley, Esq.
701 Camp Street
New Orleans, Louisiana 70130
Phone: (504) 524-5777
Fax: (504) 524-5763

*Attorneys for Petitioners
Fasken Oil and Ranch, Ltd. and PBLRO*

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

IN THE MATTER OF HOLTEC
INTERNATIONAL

(Consolidated Interim Storage Facility)

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Docket No. 72-1051

September 28, 2020

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I Allan Kanner certify that, on this 28th day of September, 2020, true and correct copies of Fasken Land and Minerals, Ltd.’s and Permian Basin Land and Royalty Owners’ Combined Notice of Appeal and Petition for Review of Atomic Safety Licensing Board’s Denial of Motion for Leave to File Amended Contention and Motion to Reopen the Record, 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

Kanner & Whiteley, LLC

Allan Kanner, Esq.
Conlee S. Whiteley, Esq.
701 Camp Street
New Orleans, Louisiana 70130
Phone: (504) 524-5777
Fax: (504) 524-5763

*Attorneys for Petitioners
Fasken Oil and Ranch, Ltd. and PBLRO*