

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**BEFORE THE COMMISSION**

In the Matter of

HOLTEC INTERNATIONAL

(HI-STORE Consolidated Interim  
Storage Facility)

Docket No. 72-1051

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NRC STAFF'S ANSWER IN OPPOSITION TO FASKEN OIL AND  
RANCH, LTD.'S AND PERMIAN BASIN LAND AND ROYALTY  
OWNERS' PETITION FOR REVIEW OF LBP-20-10

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**NRC Staff's Answer in Opposition to Fasken Oil and Ranch, Ltd.'s and Permian Basin  
Land and Royalty Owners' Petition for Review of LBP-20-10**

**INTRODUCTION**

Pursuant to 10 C.F.R. § 2.311(b), the U.S. Nuclear Regulatory Commission Staff submits its answer opposing Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners' (together, Fasken's) petition for review of LBP-20-10. In LBP-20-10, the Atomic Safety and Licensing Board ruled on Fasken's motions to amend its Contention 2 and reopen the record.<sup>1</sup> The Board determined that Fasken did not meet the good cause requirements of 10 C.F.R. § 2.309(c) for contentions filed after the initial intervention deadline or the requirements in 10 C.F.R. § 2.326 for reopening the record. Although those determinations alone provided sufficient grounds to reject Amended Contention 2, the Board further concluded that Fasken failed to satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). In its Appeal, Fasken has not demonstrated that the Board committed an error of law or abused its discretion. Therefore, the Commission should affirm the Board's decision.

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<sup>1</sup> *Holtec Int'l* (HI-STORE Consolidated Interim Storage Facility), LBP-20-10, 92 NRC \_\_ (Sept. 3, 2020) (slip op. at 1).

## BACKGROUND

This proceeding concerns Holtec International's (Holtec) HI-STORE license application to construct and operate a consolidated interim storage facility (CISF) pursuant to the NRC's regulations in 10 C.F.R. Part 72. On March 30, 2017, Holtec submitted an application, including a Safety Analysis Report (SAR), Environmental Report (ER), and proposed license, requesting that the NRC grant Holtec a license for the construction and operation of a CISF for spent nuclear fuel.<sup>2</sup> The proposed CISF would be located in Lea County, New Mexico. In its license application, Holtec requests authorization to store up to 8,680 metric tons of uranium in up to 500 canisters for a license period of 40 years.<sup>3</sup>

The NRC published a notice in the *Federal Register* regarding the acceptance and docketing of Holtec's CISF license application.<sup>4</sup> The NRC subsequently published a *Federal Register* notice of opportunity to request a hearing and to petition for leave to intervene.<sup>5</sup> Multiple petitioners filed hearing requests and petitions to intervene.<sup>6</sup> Rather than filing a petition to intervene, Fasken instead filed before the Commission a motion to dismiss the proceeding, arguing that the NRC lacked jurisdiction over the application.<sup>7</sup> The Secretary of the Commission denied the motion and referred it to the Board for consideration under 10 C.F.R.

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<sup>2</sup> Holtec's application materials are available at: <https://www.nrc.gov/waste/spent-fuel-storage/cis/holtec-international.html>. Citations to the proposed license are to Revision 1 (ML17310A223) (Proposed License), citations to the Safety Analysis Report (SAR) are to Revision 0H (ML19163A062), and citations to the Environmental Report (ER) are to Revision 7 (ML19309E337).

<sup>3</sup> Proposed License at 1.

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

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

<sup>6</sup> The other petitioners are: Alliance for Environmental Strategies; Beyond Nuclear, Inc.; NAC International Inc.; Sierra Club; and a group of joint petitioners led by Don't Waste Michigan.

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

§ 2.309.<sup>8</sup> In May 2019, the Board denied all petitions and terminated the proceeding, thereby closing the record.<sup>9</sup> Regarding Fasken, the Board held that it had demonstrated standing but had not submitted a proposed contention that met the requirements of 10 C.F.R. § 2.309(f)(1).<sup>10</sup> On June 3, 2019, Fasken appealed the Board's decision.<sup>11</sup>

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

On March 10, 2020, the NRC made the draft Environmental Impact Statement (DEIS) for Holtec's license application publicly available.<sup>15</sup> Subsequently, on April 2, 2020, Fasken filed an unopposed motion to extend by 30 days the deadline for any interested party to file petitions to

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

<sup>9</sup> *Holtec Int'l* (HI-STORE Consolidated Interim Storage Facility), LBP-19-4, 89 NRC 353, 461–63 (2019).

<sup>10</sup> *Id.* at 461-62.

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

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

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

<sup>14</sup> See *Fasken Oil and Ranch and Permian Basin Land and Royalty Owners Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019* (Sept. 3, 2019) (ML19246B809); *Fasken and PBLRO's Withdrawal of Their "Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019"* (Sept. 12, 2019) (ML19255G616).

<sup>15</sup> "Environmental Impact Statement for the Holtec International's License Application for a Consolidated Interim Storage Facility for Spent Nuclear Fuel and High Level Waste" (Draft Report for Comment), NUREG-2237 (Mar. 2020) (ML20069G420) (DEIS).



intervene, new or amended contentions, or hearing requests based on the DEIS due to the COVID-19 public health emergency.<sup>16</sup> The Secretary of the Commission granted Fasken's motion, setting May 11, 2020, as the new deadline for such filings.<sup>17</sup>

On April 23, 2020, the Commission issued a decision in which it ruled on Fasken's June 3, 2019, appeal.<sup>18</sup> The Commission affirmed the Board's determination in LBP-19-4 that Fasken had not submitted a proposed contention that met the requirements of 10 C.F.R. § 2.309(f)(1). But because Fasken's Contention 2 had been filed after the Board's decision and the closing of the record, the Commission remanded Contention 2 to the Board for a threshold consideration under the standards for reopening the closed record and the admissibility standards for contentions filed after the initial intervention deadline.<sup>19</sup> While Fasken's original Contention 2 was pending before the Board on remand, Fasken filed a motion to amend Contention 2 and an accompanying motion to reopen the record based on the issuance of the DEIS.<sup>20</sup>

Subsequently, on June 18, 2020, the Board issued its decision in LBP-20-6, denying Contention 2, as originally filed, based on Fasken's failure to address the reopening standards and its failure to demonstrate that the contention is based on new and materially different information.<sup>21</sup> However, at that time, the Board reserved consideration of Fasken's Amended

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

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

<sup>18</sup> *Holtec Int'l* (HI-STORE Consolidated Interim Storage Facility), CLI-20-4, 91 NRC \_\_ (Apr. 23, 2020) (slip op.).

<sup>19</sup> *Id.* at \_\_ (slip op. at 31–32).

<sup>20</sup> *Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners Motion for Leave to File Amended Contention No. 2* (May 11, 2020) (ML20132F019) (Motion to Amend); *Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners Motion to Reopen the Record* (May 11, 2020) (ML20132E724) (Motion to Reopen).

<sup>21</sup> *Holtec Int'l* (HI-STORE Consolidated Interim Storage Facility), LBP-20-6, 91 NRC \_\_ (June 18, 2020) (slip op.).

Contention 2 for a subsequent order.<sup>22</sup> Thereafter, the Board heard oral argument on Fasken's Amended Contention 2 and motion to reopen the record on August 5, 2020.<sup>23</sup> On September 3, 2020, the Board issued its decision in LBP-20-10, holding that Fasken's motion to reopen the record was untimely, that Fasken failed to demonstrate good cause for filing Amended Contention 2 after the initial intervention deadline, and that Amended Contention 2 did not meet the contention admissibility requirements.<sup>24</sup> Fasken now appeals the Board's ruling.<sup>25</sup>

## DISCUSSION

### I. Applicable Legal Standards

#### A. Standard of Review

The NRC's regulation at 10 C.F.R. § 2.311(c) provides an appeal as of right on the question of whether a petition to intervene or request for hearing should have been granted. However, Fasken here seeks review under 10 C.F.R. § 2.341.<sup>26</sup> Where an appeal arguably could be considered under either § 2.341 or § 2.311, the Commission has determined that § 2.311(c) should apply based on considerations of fairness to the appellant. This is so because denial of an intervention petition is usually subject to an appeal as of right, while review under § 2.341 is discretionary.<sup>27</sup>

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<sup>22</sup> *Id.* at \_\_ (slip op. at 23).

<sup>23</sup> *See Holtec Int'l* (HI-STORE Consolidated Interim Storage Facility), Order (Scheduling Oral Argument) (Jun. 25, 2020), at 1 (unpublished) (ML20177A577); Transcript of August 5, 2020, Oral Argument (ML20220A688).

<sup>24</sup> *Holtec Int'l*, LBP-20-10, 92 NRC at \_\_ (slip op. at 8, 16).

<sup>25</sup> *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* (Sep. 28, 2020) (ADAMS Accession No. ML20273A001) (Appeal). The Appeal was served via the Electronic Information Exchange (the NRC's E-Filing System) on September 29, 2020, at 12:04 AM, four minutes after the deadline.

<sup>26</sup> *Id.* at 7.

<sup>27</sup> *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 NRC 215, 219 (2017). In any event, the standard of review for contention admissibility determinations is the same whether an appeal lies under § 2.341 or § 2.311. *Luminant Generation Co. LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), CLI-12-7, 75 NRC 379, 386 (2012).

On threshold matters such as contention admissibility, the Commission gives substantial deference to board rulings unless the appeal points to an error of law or abuse of discretion that might serve as grounds for reversal of the board's decision.<sup>28</sup> The Commission has maintained that "[r]ecitation of an appellant's prior positions in a proceeding or statement of general disagreement with a decision's result is not sufficient."<sup>29</sup> Rather, a valid appeal "must point out the errors in the [b]oard's decision."<sup>30</sup>

## **B. Requirements for Reopening the Record**

Pursuant to 10 C.F.R. § 2.326(a), a petitioner seeking to open a closed record must show that its motion (1) is timely, however, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented; (2) addresses a significant safety or environmental issue; and (3) demonstrates that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.<sup>31</sup> A motion to reopen the record accompanying an amended contention may be considered timely if filed within 30 days of the date upon which the new information is available.<sup>32</sup> Reopening the record is "an extraordinary action," and thus, the Commission imposes a "deliberately heavy" burden upon a petitioner who seeks to supplement the evidentiary record after it has been closed, even with respect to an existing contention.<sup>33</sup>

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<sup>28</sup> *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 234 (2008).

<sup>29</sup> *Turkey Point*, CLI-17-12, 86 NRC at 219 (citations omitted).

<sup>30</sup> *Id.*

<sup>31</sup> 10 C.F.R. §§ 2.326(a)(1)–(3); see also *Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 700 n.54, 701 (2012).

<sup>32</sup> See *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 493 (2008) (noting that "[m]any times, boards have selected 30 days as [the] specific presumptive time period" for timeliness of contentions filed after the initial deadline).

<sup>33</sup> *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 337–38 (2011). Reopening will only be allowed where "the proponent presents material, probative evidence which either could not have been discovered before or could have been discovered but is so grave that, in the judgement of the

Additionally, 10 C.F.R. § 2.326(b) requires supporting affidavits from experts or otherwise competent individuals to accompany the motion that “set forth the factual and/or technical bases for the movant’s claim that the criteria of [10 C.F.R. § 2.326(a)] have been satisfied.”<sup>34</sup> The affidavits must address each criterion of 10 C.F.R. § 2.326(a) “separately . . . with a specific explanation of why it has been met.”<sup>35</sup> Affidavits containing bare assertions or speculation and lacking technical details or analysis are insufficient to meet the reopening standards.<sup>36</sup>

### **C. Good Cause Requirements for New or Amended Contentions**

Amended contentions submitted after the initial date for hearing requests must meet the requirements of 10 C.F.R. § 2.309(c)(1). To do so, a petitioner must demonstrate good cause by showing that the information upon which the filing is based was not previously available, that the information upon which the filing is based is materially different from information previously available, and that the filing has been submitted in a timely fashion based on the availability of the subsequent information.<sup>37</sup> The petitioner has the burden of demonstrating that any new or amended contention meets the standards in 10 C.F.R. § 2.309(c)(1).<sup>38</sup>

New environmental contentions based on the NRC Staff’s DEIS are permitted if data or conclusions in the NRC Staff’s environmental document differ significantly from the applicant’s environmental report.<sup>39</sup> Nevertheless, NRC regulations and longstanding Commission

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presiding officer, it must be considered anyway.” Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986).

<sup>34</sup> 10 C.F.R. § 2.326(b).

<sup>35</sup> *Id.*

<sup>36</sup> *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 670, 674 (2008).

<sup>37</sup> 10 C.F.R. § 2.309(c)(1).

<sup>38</sup> *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260–61 (2009).

<sup>39</sup> See 10 C.F.R. § 2.309(f)(2) (“Participants may file new or amended environmental contentions after the deadline in [§ 2.309(b)] (e.g., based on a draft or final NRC environmental impact statement, environmental assessment, or any supplements to these documents) if the contention complies with the requirements in [§ 2.309(c)].”); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage

precedent make clear that for issues arising under the National Environmental Policy Act (NEPA), a petitioner must first file contentions based on the applicant's environmental report and may amend those contentions only if the draft or final EIS differ significantly from the data or conclusions in the applicant's documents.<sup>40</sup> It is fundamental that a new or amended contention must be raised at the earliest possible opportunity.<sup>41</sup> Thus, as a general rule, environmental contentions submitted for the first time after the DEIS is issued will be deemed untimely unless there are data or conclusions in the DEIS that differ significantly from the data or conclusions in the applicant's documents.<sup>42</sup>

#### **D. Requirements for Contention Admissibility**

The regulation at 10 C.F.R. § 2.309(f)(1) establishes the “basic criteria that all contentions must meet in order to be admissible.”<sup>43</sup> The Commission strictly applies these contention admissibility requirements in NRC adjudications.<sup>44</sup> Failure to comply with any one of the criteria is grounds for the dismissal of a contention.<sup>45</sup> The requirements are intended to “focus litigation

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Installation), CLI-00-21, 52 NRC 261, 264 n.6 (2000) (citing former 10 C.F.R. § 2.714(b)(2)(iii), currently § 2.309(f)(2)).

<sup>40</sup> See 10 C.F.R. § 2.309(f)(2) (“On issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant's environmental report.”); *Tenn. Valley Auth.* (Clinch River Nuclear Site Early Site Permit Application), CLI-18-5, 87 NRC 119, 122–23 (2018).

<sup>41</sup> See *Clinch River*, CLI-18-5, 87 NRC at 122–23 (citations omitted); *Crow Butte Res., Inc.* (Marsland Expansion Area), LBP-18-3, 88 NRC 13, 26 (2018) (citing *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-1, 81 NRC 1, 7 (2015)).

<sup>42</sup> *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-12-12, 75 NRC 742, 755–56 (2012).

<sup>43</sup> *Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 572 (2006); see also *USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 436–37 (2006) (stating that the Commission “will reject any contention that does not satisfy the requirements”).

<sup>44</sup> *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006) (citing *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied*, CLI-02-1, 55 NRC 1 (2002)).

<sup>45</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); see also *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016).

on concrete issues and result in a clearer and more focused record for decision.”<sup>46</sup> The hearing process is reserved “for genuine, material controversies between knowledgeable litigants.”<sup>47</sup>

## **II. The Commission Should Affirm the Board’s Decision Because Fasken Has Not Identified Any Legal Error or Abuse of Discretion**

### **A. The Board Properly Denied Fasken’s Motion to Reopen the Record as Untimely**

In support of its motion for leave to file Amended Contention 2, Fasken filed an accompanying motion to reopen the record. In LBP-20-10, the Board properly denied Fasken’s motion to reopen. As an initial matter, the Board expressed skepticism as to whether the affidavit from Fasken’s counsel satisfied the requirements in 10 C.F.R. § 2.326(b) for supporting affidavits.<sup>48</sup> Specifically, the Board noted that Fasken’s affiant did not claim technical expertise in the relevant matters and did not claim personal knowledge of the critical facts.<sup>49</sup> Fasken’s failure to meet this requirement would be sufficient grounds to deny the motion to reopen. However, the Board also correctly found that, in any event, Fasken’s motion to reopen must be denied because it is untimely.<sup>50</sup> First, the Board determined that to the extent Amended Contention 2 asserts deficiencies in “Holtec’s application,” the motion to reopen is clearly untimely because such challenges to Holtec’s application could have been raised years ago.<sup>51</sup>

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<sup>46</sup> Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

<sup>47</sup> *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 396 (2012) (quoting *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 219 (2003)).

<sup>48</sup> *Holtec Int’l*, LBP-20-10, 92 NRC at \_\_ (slip op. at 8).

<sup>49</sup> *Id.* at \_\_ (slip op. at 7–8).

<sup>50</sup> *Id.* at \_\_ (slip op. at 8).

<sup>51</sup> *Id.* at \_\_ (slip op. at 10). In its Appeal, Fasken states that it “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.” Appeal at 13 n.51. However, the Part 2 regulation that Fasken relies on elsewhere in its Appeal (§ 2.309(f)(2)) distinguishes environmental contentions raised on the NRC Staff’s environmental review documents from those originally filed on the applicant’s ER. And as explained *infra*, regardless of whether Fasken intended Amended Contention 2 to refer to the DEIS, the Board found the motion to reopen untimely because of Fasken’s failure to support its motion to reopen with information or conclusions in the DEIS that are new and materially different from the information that was previously available.

Next, the Board considered the assertedly “new” information supplied by Fasken in support of its motion to reopen and ultimately found it was not materially different from information previously available. For example, the Board held that the June 2019 letter from New Mexico’s Commissioner of Public Lands concerning subsurface mineral rights was not new because the information contained in the letter was available in Holtec’s application materials and in a letter from Fasken’s own Vice President, which was submitted to the NRC nearly a year before Fasken’s original Contention 2 was filed.<sup>52</sup> Further, the Board determined that Fasken failed to identify how the difference in terminology between Holtec’s application and the DEIS regarding the incremental and cumulative impacts analysis for geology and soils is material or is otherwise based on information that was not previously available.<sup>53</sup> The Board also found that the DEIS’s use of a six-mile radius for assessing the cumulative impacts on land use was neither new nor materially different because the information relied upon in the DEIS was based on a subset of information included in Holtec’s Environmental Report.<sup>54</sup> Similarly, the Board concluded that Fasken’s claims concerning the DEIS’s description of oil and gas operations in the vicinity of the proposed site (including specific drilling depths and an active oil and gas well near the site) are not based on information that is new or materially different. Rather, the Board found that the descriptions in the DEIS are based on information cited in Holtec’s application materials and that Fasken did not articulate how any purported difference is material to the analyses presented in the DEIS.<sup>55</sup>

Finally, in LBP-20-10 the Board also declined for several reasons to exercise its discretion under 10 C.F.R. § 2.326(a)(1) to consider Amended Contention 2 under the “exceptionally grave issue” exception to timeliness. Specifically, the Board found that Fasken

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<sup>52</sup> *Holtec Int’l*, LBP-20-10, 92 NRC at \_\_ (slip op. at 11).

<sup>53</sup> *Id.* at \_\_ (slip op. at 11–12).

<sup>54</sup> *Id.* at \_\_ (slip op. at 12).

<sup>55</sup> *Id.* at \_\_ (slip op. at 13–15).

invoked the “exceptionally grave issue” exception for the first time at oral argument and that Fasken did not proffer an admissible contention, much less one that raises an exceptionally grave issue.<sup>56</sup>

In its Appeal, Fasken asserts that its motion to reopen was timely filed pursuant to the Secretary’s May 11, 2020, order extending the deadline to file petitions to intervene, new or amended contentions, or hearing requests based on the DEIS, and Fasken states that its motion to reopen “raises significant and serious environmental impacts and safety concerns.”<sup>57</sup> Fasken further states that the Board’s decision is “misguided and inappropriate and warrants review by the Commission.”<sup>58</sup> However, Fasken does nothing more than repeat its original claims that Amended Contention 2 is based on information that is new and materially different. Nowhere does Fasken point to any error in the Board’s thorough analysis of each of those underlying claims. Recitations of an appellant’s prior position and statements of general disagreement with a decision’s result are not sufficient to support a valid appeal.<sup>59</sup> Therefore, the Commission should affirm the Board’s denial of Fasken’s motion to reopen the record.

Fasken further requests that the Commission exercise its discretion to consider Amended Contention 2 under the “exceptionally grave issue” exception to timeliness in 10 C.F.R. § 2.326(a)(1).<sup>60</sup> In declining to exercise such discretion in the first instance, the Board appropriately emphasized that the “exceptionally grave issue” exception is a narrow one that is

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<sup>56</sup> *Id.* at \_\_ (slip op. at 15). The Board noted that Fasken’s failure to satisfy the timeliness requirement in 10 C.F.R. § 2.326(a)(1) is sufficient reason alone to deny Fasken’s motion to reopen. Nonetheless, the Board also addressed the other requirements in 10 C.F.R. §§ 2.326(a)(2)-(3). In particular, the Board found that Fasken had not raised a significant issue that must be adjudicated by reopening the closed proceeding, nor had Fasken demonstrated that a materially different result would be likely. *Holtec Int’l*, LBP-20-10, 92 NRC at \_\_ (slip op. at 16).

<sup>57</sup> Appeal at 26.

<sup>58</sup> *Id.*

<sup>59</sup> *Turkey Point*, CLI-17-12, 86 NRC at 219 (citations omitted).

<sup>60</sup> Appeal at 27–28.



to be granted “rarely and only in truly exceptional circumstances.”<sup>61</sup> And indeed, the Board declined to consider whether Amended Contention 2 raises an “exceptionally grave issue” on multiple grounds. First, the Board appropriately found that Fasken advanced this position for the first time at oral argument.<sup>62</sup> The Board further held that because Fasken failed to proffer an admissible contention, Fasken also necessarily failed to raise an exceptionally grave issue.<sup>63</sup> In its Appeal, Fasken has not demonstrated that the Board committed an error of law or abuse of discretion in either respect. In fact, Fasken does not even acknowledge, much less specifically refute, any of the grounds on which the Board based its ruling on this issue. Moreover, Fasken’s Appeal fails to provide any information that would support finding that an exceptionally grave issue exists here; the Appeal simply reiterates Fasken’s earlier unsupported assertions (which were rejected by the Board) that the project’s location in the Permian Basin inherently raises “important safety and environmental issues” related to transportation and storage of spent nuclear fuel.<sup>64</sup> As such, the Commission should affirm the Board’s decision that the issues raised by Amended Contention 2 do not meet the “exceptionally grave issue” exception.

Lastly, Fasken asserts that it satisfied the affidavit requirements in 10 C.F.R. § 2.326(b) because the affidavit submitted by its counsel in support of the motion to reopen “confirmed, attached and incorporated by reference the statements” from two of Fasken’s other affiants.<sup>65</sup> Fasken further claims that nothing in NRC’s regulations prohibits a lawyer from filing an affidavit in support of a motion to reopen the record.<sup>66</sup> But the Board did not rely on Fasken’s deficient

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<sup>61</sup> *Holtec Int’l*, LBP-20-10, 92 NRC at \_\_\_ (slip op. at 15) (citing *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 NRC 491, 500–01 (2012)).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Appeal at 14.

<sup>65</sup> *Id.* at 26–27.

<sup>66</sup> *Id.*

affidavit as a necessary, independent basis for denying Fasken's motion to reopen.<sup>67</sup>

Nevertheless, in LBP-20-10 the Board correctly noted that the Commission already directly addressed the insufficiency of an affidavit provided by a petitioner's lawyer when the rules for reopening the record were first codified. Indeed, the Commission adopted the requirement that affidavits supporting a motion to reopen must be from either "competent individuals with knowledge of the facts alleged" or from "experts in the disciplines appropriate to the issues raised."<sup>68</sup> In its Appeal, Fasken has not identified any error in the Board's reliance on the relevant regulatory history, nor has Fasken demonstrated any error in the Board's interpretation of the affidavit requirement in § 2.326(b). Therefore, Fasken has not demonstrated grounds for reversal of the Board's decision.

**B. The Board Correctly Found that Fasken Failed to Satisfy the Good Cause Requirements in 10 C.F.R. § 2.309(c)**

In its motion for leave to file Amended Contention 2, Fasken asserted that it satisfied the good cause requirements because the information forming the basis of Amended Contention 2 was not available prior to the DEIS's issuance and that certain sources and conclusions in the DEIS "vary in material respects" from the information contained in Holtec's license application documents.<sup>69</sup> In LBP-20-10, the Board determined that Fasken did not meet its obligation to show that Amended Contention 2 is based on "new, previously unavailable information that differs materially from information that was previously available."<sup>70</sup> The Board's conclusion

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<sup>67</sup> *Holtec Int'l*, LBP-20-10, 92 NRC at \_\_ (slip op. at 8) (finding it "questionable" whether Mr. Kanner's affidavit can properly support a motion to reopen the record, but stating that the Board need not rely on this possible pleading defect to deny Fasken's motion to reopen).

<sup>68</sup> *Id.* at \_\_ (slip op. at 7) (citing Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,537 (May 30, 1986)).

<sup>69</sup> Fasken Motion to Amend at 5.

<sup>70</sup> *Holtec Int'l*, LBP-20-10, 92 NRC at \_\_ (slip op. at 16–17).

relied on the same reasons undergirding its rejection of Fasken’s motion to reopen (as described above).<sup>71</sup>

In doing so, the Board applied the correct legal standard in evaluating whether Amended Contention 2 meets the good cause requirements in 10 C.F.R. § 2.309(c). In its Appeal, Fasken incorrectly states that “[m]ultiple avenues exist to establish good cause.”<sup>72</sup> Fasken claims that the Board “misapplies precedent by mandating reliance on ‘new information’ under the good cause standard [in] 10 C.F.R. § 2.309(f) and largely ignor[es] the governing precedent of *Calvert Cliffs*,” which provides an “alternative test for good cause.”<sup>73</sup> But Fasken’s claim that there is an “alternative test” for good cause is erroneous and its reliance on *Calvert Cliffs* is both misplaced and a misreading of the Board’s basis for denying Fasken’s motion.<sup>74</sup> In 2012, the Commission promulgated a final rule in which it clarified that new or amended environmental contentions may be filed after the initial intervention deadline if the contention complies with the good cause requirements in 10 C.F.R. § 2.309(c).<sup>75</sup> In the statement of considerations for the 2012 final rule, the Commission noted that the similarities between former §§ 2.309(c)(1) and 2.309(f)(2) had resulted in doctrinal confusion concerning the proper way to evaluate pleadings filed out of time.<sup>76</sup> The 2012 final rule resolved the ambiguity and clearly eliminated any “alternative” approaches to evaluating new or amended environmental contentions filed after the

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<sup>71</sup> *Id.* at \_\_ (slip op. at 17).

<sup>72</sup> Appeal at 10.

<sup>73</sup> *Id.* at 16 (citing *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-10-24, 72 NRC 720, 729–30 (2010)).

<sup>74</sup> *Calvert Cliffs* is a licensing board decision. Unreviewed licensing board decisions do not create binding legal precedent. *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-16-8, 83 NRC 463, 469 (2016).

<sup>75</sup> Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,572 (Aug. 3, 2012).

<sup>76</sup> *Id.* at 46,571.

initial deadline.<sup>77</sup> Recognizing that under § 2.309(f)(2) amended environmental contentions filed after the initial deadline must satisfy the requirements in § 2.309(c), the Board properly evaluated Amended Contention 2 under the good cause criteria, including whether the information (data or conclusions) upon which Amended Contention 2 is based was previously available and whether the information (data or conclusions) is materially different from what was previously available. As such, Fasken has not identified an error of law in the Board's decision.

Fasken further asserts that the Board's "decision and its conclusions are based on clear errors in factual findings."<sup>78</sup> But Fasken merely repeats the assertions in its original filing regarding the cumulative impacts for geology and soils, ownership of subsurface mineral rights, and the description of past, present, and future oil and gas operations.<sup>79</sup> The Board fully considered and engaged with each of Fasken's underlying claims, explaining why they were based on information that was either not new or was not materially different from previously available information.<sup>80</sup> It is the petitioner's burden to demonstrate that an amended contention meets the requirements in 10 C.F.R. § 2.309(c)(1), and the Board found that Fasken had not carried that burden.<sup>81</sup> Other than conclusory statements of disagreement, Fasken has not identified any error in the Board's reasoning. Simply reciting a prior position is insufficient to support a valid appeal.<sup>82</sup> Because Fasken has not demonstrated an error of law or an abuse of

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<sup>77</sup> *Id.*; see also *Fermi*, CLI-15-1, 81 NRC at 7 n.29 ("The standard for admitting a new or amended contention, however, was simplified rather than overhauled [when the rules of practice were amended in 2012]. Both before and after the 2012 amendment, proponents of new or amended contentions were, and are, required to demonstrate 'good cause' for their filing, which includes a demonstration that the information on which the new or amended contention is based is materially different from information previously available.") (citations omitted).

<sup>78</sup> Appeal at 20.

<sup>79</sup> *Id.* at 20–23.

<sup>80</sup> *Holtec Int'l*, LBP-20-10, 92 NRC at \_\_ (slip op. at 10–15).

<sup>81</sup> *Id.* at \_\_ (slip op. at 17).

<sup>82</sup> *Turkey Point*, CLI-17-12, 86 NRC at 219 (citations omitted).

discretion, the Commission should affirm the Board's determination that Fasken has not shown good cause for filing Amended Contention 2.

### **C. The Board Correctly Rejected Amended Contention 2 as Inadmissible**

In LBP-20-10, the Board found sufficient grounds to reject Amended Contention 2 based either on Fasken's failure to satisfy the requirements for reopening the record or its failure to show good cause for proffering a contention out of time.<sup>83</sup> Nevertheless, the Board also rejected Amended Contention 2 for failing to satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1).<sup>84</sup> Fundamentally, the Board found that Fasken did not meet its burden to proffer an admissible contention because the issues raised in Amended Contention 2 are either not material to the findings the NRC must make in the DEIS, fail to raise a genuine dispute on a material issue of law or fact, or both.<sup>85</sup>

The Board systematically examined Fasken's claims against the contention admissibility standards. For instance, the Board held that Fasken did not show that the DEIS's cumulative impacts analysis for geology and soils is materially different from the information in Holtec's application materials, nor did Fasken explain what aspect of the DEIS's conclusions it disputes.<sup>86</sup> Regarding subsurface mineral rights, the Board likewise concluded that Fasken failed to raise a genuine dispute on a material issue because the DEIS acknowledges that the State of New Mexico and the Bureau of Land Management own the subsurface property rights beneath and surrounding proposed site and because Fasken did not explain how ownership and control of subsurface mineral rights would affect, much less contradict, the DEIS.<sup>87</sup> Further, the Board determined that Fasken's claim concerning the DEIS's use of a 6-mile radius to

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<sup>83</sup> *Holtec Int'l*, LBP-20-10, 92 NRC at \_\_ (slip op. at 17).

<sup>84</sup> *Id.*

<sup>85</sup> *See id.* at \_\_ (slip op. at 18).

<sup>86</sup> *Id.* at \_\_ (slip op. at 19).

<sup>87</sup> *Id.* at \_\_ (slip op. at 20).

evaluate cumulative land use impacts does not raise a genuine dispute because Fasken did not articulate how the NRC Staff's approach violates NEPA, which "gives agencies broad discretion to keep their inquiries within appropriate and manageable boundaries."<sup>88</sup> Concerning the DEIS's description of oil and gas operations in the region, the Board held that Fasken failed to raise a genuine dispute on a material issue because Fasken failed to (1) identify any statement in the DEIS that is inaccurate, (2) explain how the DEIS's partial reliance on a 1978 study is at all impacted by advancements in drilling technologies, and (3) show that the existence of wells at any depth is material to the NRC Staff's environmental assessment.<sup>89</sup> The Board also held that Fasken's claims related to a recent earthquake do not raise a genuine dispute with the DEIS because the DEIS provides a discussion of seismicity in the region, which Fasken did not acknowledge or address.<sup>90</sup> Finally, the Board determined that Fasken's assertions related to several outstanding safety Requests for Additional Information (RAIs) do not raise a genuine dispute with the DEIS because, as Commission case law instructs, "[p]etitioners must do more than rest on the mere existence of RAI's as a basis for their contention," and in any event, Fasken did not identify any section of the DEIS that relies on information that Holtec may provide in responses to the outstanding RAIs.<sup>91</sup>

On appeal, Fasken does little more than repeat in a conclusory fashion that it made the requisite showings in its original filing, asserting that it had identified differences between the DEIS and the application materials and identified the existence of RAIs to which Holtec had not yet responded. But as noted above, the Board directly considered each of these arguments and

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<sup>88</sup> *Id.* at \_\_ (slip op. at 20–21) (quoting *La. Energy Servs, L.P.* (Nat'l Enrichment Facility), CLI-98-3, 47 NRC 77, 103 (1998)).

<sup>89</sup> *Id.* at \_\_ (slip op. at 21–22).

<sup>90</sup> *Id.* at \_\_ (slip op. at 22).

<sup>91</sup> *Id.* at \_\_ (slip op. at 22–23) (quoting *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 & 2), CLI-15-08, 81 NRC 500, 506 n.47 (2015)). Indeed, all of the pending RAIs that Fasken relies on pertain to the NRC Staff's *safety* review, not the NRC Staff's *environmental* review.

explained why they did not ultimately represent a genuine dispute on a material issue. In connection with its claims about drilling depths in the vicinity of the site, Fasken appears to also assert that questions posed during oral argument from a Board judge about that issue (and the applicant's comment that it may revise certain statements in its ER) illustrate the materiality of the contention.<sup>92</sup> However, the Board's written decision specifies why the Board ultimately determined that Fasken had not shown a material dispute with the DEIS, and speculation about future revisions to the application does not provide a basis for an admissible contention. Accordingly, Fasken's assertions are insufficient to support a valid appeal.<sup>93</sup> Here, it is Fasken's burden to proffer an admissible contention that meets the requirements in § 2.309(f)(1), and the Board found that Fasken has not done so. Because Fasken has failed to demonstrate error of law or abuse of discretion, the Commission should affirm the Board determination that Amended Contention 2 is inadmissible.

#### **D. The Board Did Not Err in Limiting Statements from Fasken's Affiant During Oral Argument**

During oral argument, the Board properly applied the NRC's rules of practice and appropriately exercised its discretion to decline statements from Fasken's affiant. In its Appeal, Fasken asserts that the Board abused its discretion in "denying Fasken's expert[ ] [Mr. Stonnie Pollock] an opportunity to address discrepancies and disputes at the August 5, 2020 hearing."<sup>94</sup> However, as provided in NRC's rules of practice, a person may appear in an adjudication in a representative capacity only upon filing a written notice of appearance.<sup>95</sup> Mr. Pollock did not enter a notice of appearance in this proceeding. Furthermore, as was apparent based on the stage of the proceeding and from the Board's order concerning oral argument, the August 5,

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<sup>92</sup> Appeal at 21–22.

<sup>93</sup> *Turkey Point*, CLI-17-12, 86 NRC at 219 (citations omitted).

<sup>94</sup> Appeal at 23.

<sup>95</sup> 10 C.F.R. § 2.314(b).

2020, oral argument was an opportunity to answer the Board’s questions on the legal and procedural aspects of Fasken’s motions, not an evidentiary hearing to receive expert testimony.<sup>96</sup> As such, the Board appropriately exercised its authority in limiting Mr. Pollock’s statements at oral argument.<sup>97</sup> To be sure, the Board has discretion to permit a person who is not a party—including persons who are affiliated with a petitioner, as is Mr. Pollock—to make a limited appearance.<sup>98</sup> But Fasken has not articulated in what way the Board abused its discretion by disallowing oral statements from Mr. Pollock concerning extraction activities in the vicinity of the proposed CISF site. Indeed, Mr. Pollock already provided written statements on such topics in his “declaration” submitted in support of Amended Contention 2.<sup>99</sup>

In addition, Fasken asserts that its counsel was denied the right to consult with Mr. Pollock during oral argument.<sup>100</sup> This is false. The Board did not deny Fasken’s counsel the opportunity to *consult or confer* with Mr. Pollock (nor is it clear how the Board could have effectuated such a denial). Rather, the Board limited Mr. Pollock’s ability to *make oral statements* directly to the Board during the oral argument.<sup>101</sup> Beyond its own bare assertion, Fasken does not explain in what way this amounts an abuse of discretion. As noted above, the Board’s order concerning oral argument indicated that the argument was a focused opportunity for the Board to ask questions regarding the participants’ positions on Fasken’s pending motions, not an open-ended forum for the participants to present witnesses or new evidence.<sup>102</sup> Without more, Fasken has failed to demonstrate an error of law or abuse of discretion, and thus, has not provided valid grounds for reversal of the Board’s decision.

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<sup>96</sup> See Order (Concerning Oral Argument) (Jul. 20, 2020), at 1–2 (unpublished) (ML20202A053).

<sup>97</sup> Tr. at 456–57.

<sup>98</sup> 10 C.F.R. § 2.315(a).

<sup>99</sup> See Tr. at 456; Motion to Amend, Ex. 4 at 3–4.

<sup>100</sup> Appeal at 23–24.

<sup>101</sup> See Tr. at 456.

<sup>102</sup> See Order (Concerning Oral Argument) (Jul. 20, 2020), at 1–2 (ML20202A053) (unpublished).



## CONCLUSION

For the reasons set forth above, Fasken has not shown that the Board's decision in LBP-20-10 contains an error of law or an abuse of discretion. Accordingly, the Commission should affirm the Board's decision.

Respectfully submitted,

**/Signed (electronically) by/**

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Dated this 23rd day of October 2020

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**BEFORE THE COMMISSION**

In the Matter of

HOLTEC INTERNATIONAL

(HI-STORE Consolidated Interim  
Storage Facility)

Docket No. 72-1051

**CERTIFICATE OF SERVICE**

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing “NRC Staff’s Answer in Opposition to Fasken Oil and Ranch, Ltd.’s and Permian Basin Land and Royalty Owners’ Petition for Review of LBP-20-10,” dated October 23, 2020, have been served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned proceeding, this 23rd day of October 2020.

**/Signed (electronically) by/**

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Dated this 23rd day of October 2020