

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

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| IN THE MATTER OF HOLTEC |) | Docket No. 72-1051 |
| INTERNATIONAL |) | |
| (Consolidated Interim Storage Facility) |) | November 2, 2020 |
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**FASKEN LAND AND MINERALS, LTD.'S AND PERMIAN BASIN LAND
AND ROYALTY OWNERS' COMBINED REPLY TO OPPOSITIONS TO
THEIR 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**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), Fasken Land and Minerals, Ltd.’s and Permian Basin Land and Royalty Owners (“Fasken”) files the foregoing Reply.¹ Contrary to the Atomic Safety Licensing Board’s (“ASLB” or “Board”) September 3, 2020 decision in LBP-20-10² and related Oppositions,³ Fasken has good cause to file Amended Contention No. 2 (“Contention”), it is admissible, presents genuine disputes of material facts and law, and was timely filed with an appropriate Motion to Reopen based on new and materially different information and conclusions in the Holtec International (“Holtec”) draft environmental impact statement (“DEIS”).⁴ The Board abused its discretion, making prejudicial procedural errors in denying Fasken’s expert an opportunity to correct misleading statements and omissions in response to questions posed by the Board at the August 5, 2020 hearing, and further abused its discretion in making clear errors of law and finding of material facts at the core of Fasken’s Contention. New information recently disclosed in opposition to the Holtec DEIS and not previously available reveals a moving target of false information and misconceptions created by Holtec’s speculation as to land use and land restrictions at and below the proposed site that further support the admissibility and timeliness of Fasken’s Contention. Thus, reversal of the Board’s decision is warranted and the Commission should grant Fasken’s Petition for Review.

¹ The standards for appeals under 10 C.F.R. §§ 2.341 and 2.311 are essentially the same. On September 8, 2020 the NRC (Herald Speiser) referred Fasken to 10 C.F.R. § 2.341 for the time requirements to submit an appeal to the NRC regarding a decision of the ASLB. As such, Fasken timely filed its appeal and the foregoing Reply pursuant § 2.341.

² ASLB Memorandum and Order (Denying Motions to Reopen and for Leave to File), LBP-20-10 (Sept. 3, 2020), hereinafter “ASLB Order.”

³ NRC Staff’s Answer in Opposition to Fasken’s Petition for Review of LBP-20-10 (Oct. 23, 2020), herein after “NRC Staff Opposition”; Holtec International’s Answer in Opposition to Fasken’s Appeal of LBP-20-10 (Oct. 26, 2020), collectively “Oppositions.”

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), herein after “Holtec DEIS”; Commission “Order (Granting Motion for Extension of Time to File)” Docket No. 72-1051 (April 7, 2020) (ADAMS Accession No. ML20098F515).

II. FASKEN'S CONTENTION CHALLENGES NEW AND MATERIALLY DIFFERENT INFORMATION AND CONCLUSIONS IN THE HOLTEC DEIS

The basis for Fasken's Contention is not a "mere recitation of [the] original contention," but new and materially different conclusions in the Holtec DEIS as to the cumulative impacts on land use and geology and soils based on the NRC's lack of independent investigation into the reliability and accuracy of information supporting its conclusions, its blind acceptance of misinformation provided by Holtec as to speculative agreements and materials notably missing from the NRC's consideration and analyses given Holtec's refusal to answer outstanding requests for additional information ("RAIs")⁵ that fundamentally mischaracterize past, present and reasonably foreseeable future oil and gas and mineral extraction operations. It is hard to imagine how the NRC could possibly take a "hard look" at the cumulative impacts of this unprecedented project, as required by NEPA, without reliable information as to present and future land use activities? Perhaps most importantly without transparency in the process and with such heavy reliance on the license applicant's speculation absent any independent fact-checking?

The Opposition concedes DEIS-based contentions may be deemed timely if there are data or conclusions in the DEIS that differ significantly from those in the applicant's documents.⁶ The difference between a finding of MODERATE and SMALL (or minimal) cumulative impact to geology and soils is significant. The Board's decision misleadingly characterizes this divergence as one of mere semantics by focusing on "the expected incremental impact of the proposed facility,"⁷ but this glosses over the material differences between conclusions as to both the impacts

⁵ It has been nearly one year since the NRC issued RAIs, information the NRC itself deems "necessary" to the review of Holtec's application and licensing. To date, Holtec has yet to provide responses to this crucial information. *See* NRC Letter to Holtec RAIs, Part 5 (Nov. 14, 2019), (ADAMS Accession No. ML193322C260).

⁶ NRC Staff Opposition at 8.

⁷ ASLB Order at 12.

of the proposed action and the potential *cumulative impacts* to geology and soils, giving consideration to other “past, present, and reasonably foreseeable future actions.”⁸

- Holtec ER: “*Proposed Action would not cause any notable impacts for. . . geology and soils. As a result, there is minimal potential cumulative impacts for these resources.*”⁹ “There are no known significant new projects in the project area, and for purposes of this cumulative impact assessment, the existing activities . . . are assumed to continue at current levels, with no significant impact on geology and soils.”¹⁰
- Holtec DEIS: “[P]roposed project is projected to have a *SMALL incremental effect. . . resulting in an overall MODERATE cumulative impact* to geology and soils.”¹¹

The Board disregards Fasken’s identification of these material differences, and also improperly discounts its identification of Holtec DEIS’s reliance on significantly different and misinformed assumptions as to drilling depths, subsurface rights and future industry operations at and around the proposed site,¹² recently de-bunked by knowledgeable parties, as a basis to arrive at its conclusions on cumulative impacts on geology and soils and land use.¹³

III. ASLB COMMITTED PREJUDICIAL PROCEDURAL ERROR

In addition to allowing substantial omissions and mere speculation stand in for material facts, the ASLB committed prejudicial procedural error and abused its discretion in denying Fasken’s expert an opportunity to correct the misleading record at the August 5, 2020 hearing.¹⁴ Contrary to assertions that the hearing was limited to “the Board’s order concerning oral

⁸ Holtec DEIS at 5-1. Fasken Motion for Leave to File Amended Contention No. 2 (May 11, 2020) at 12.

⁹ See Holtec ER at 5-3, Section 5.2 Potential Cumulative Impacts (emphasis added).

¹⁰ *Id.*

¹¹ Holtec DEIS at 5-11 (emphasis added).

¹² As discussed herein, these underlying assumptions have been de-bunked by knowledgeable parties.

¹³ Fasken objects to the use of a 6-mile radius, employed for the first time by the NRC Staff for assessing land use cumulative impacts in the Holtec DEIS. It remains unclear if land uses within a 6-mile radius or a 50-mile radius were considered in the cumulative impact analysis for geology and soils (which was allegedly assessed within a 50-mile radius).

¹⁴ See 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).

argument,”¹⁵ presiding officers are afforded great discretion in conducting hearings.¹⁶ As such, the Board chose to initiate questioning outside of the order.¹⁷

JUDGE TRIKOUROS: So the conclusion in the DEIS that below 3,050 feet, you’re safe with respect to subsidence concerns seems to directly contradict the ER and the SAR, which would state explicitly that 5,000 feet would be necessary to avoid subsidence. Am I reading that correctly?

MS. LEIDICH: I would say that the – it’s not quite as simple a link between the depths of drilling and subsidence.¹⁸

JUDGE TRIKOUROS: The inconsistency that’s identified is what I’m trying to understand. The 3,050 number appears to be associated with the project area, which I assume would include these islands, the drill islands and the Salado formation, but not the site necessarily itself, whereas the 5,000 feet in both the SAR and the ER seems to be more related to potash and more related to beneath the site. So I was just trying to understand how those relate to each other and how that integrates in with either the Bureau of Land Management or the state land office issuing a lease to someone to do drilling. It’s not clear to me what the safe drilling depth is, and I’m just trying to understand what that is.¹⁹

In response, Holtec incorrectly suggested that all oil and gas would occur below the Salado Formation “through the BLM on drill islands,” that the State Land Office lacks “the ability to even approve an oil and gas well”²⁰ and that potash mining at the site was restricted by agreement. Fasken stood ready, willing and able to correct and clarify the record but was denied the chance, as the Board opted to adopt Holtec’s conclusions without rationale or justification, leaving lingering unanswered questions and acknowledged inconsistencies and discrepancies. The Board cannot duck its head in the sand when presented with such genuine disputes of material facts.

Denying Fasken’s expert the opportunity to speak, while allowing Holtec to meanwhile update its license application, puts Petitioners at a severe disadvantage to file a subsequent timely

¹⁵ NRC Staff Opposition at 19.

¹⁶ See, e.g. 10 C.F.R. §§ 2.309 and 2.333.

¹⁷ Pursuant to 10 C.F.R. § 2.341(b)(5), a matter raised *sua sponte* by a presiding officer is deemed to have been raised for the purposes of filing an appeal. Thus, the Board’s *sua sponte* questioning at the hearing should be considered part of the appeal.

¹⁸ August 5, 2020 Hearing Transcript at 448.

¹⁹ *Id.* at 452-453.

²⁰ *Id.* at 451.

contention based on this information under NRC regulations. This prejudicial procedural error denial constitutes an abuse of discretion by the Board and warrants review.

IV. NEWLY DISCLOSED INFORMATION, NOTE PREVIOUSLY AVAILABLE, FURTHER SUPPORTING FASKEN'S AMENDED CONTENTION AND THE ERRORS IN FACT FINDING WHEN RELYING ON SPECULATION AND OMISSIONS

The Board cannot duck its head in the sand when presented with genuine disputes of material facts – or worse, hear one side and refuse to allow Fasken to respond. Recently disclosed information further pulls back the curtain on the fundamental flaws with the underlying assumptions relied on in the Holtec DEIS and highlights the relevance of Holtec's nearly one year delay in responding to NRC issued RAIs with overlapping topics that span both environmental and safety issues and the pitfalls of relying on Holtec's speculation and omissions with respect to this unprecedented project:

- Holtec claims that it “is in discussions with the New Mexico State Land Office regarding an agreement to retire potash leasing and mining within the proposed ... project area,” DEIS at 4-4, 5-24. This statement is false. The DEIS does not indicate any analysis by NRC of actual control of mineral resources at the Site, instead simply accepting Holtec's misrepresentation as true. . .
- Holtec has falsely claimed to have secured agreements from oil and gas operators at or around the site to restrict these activities, specifically assuring the NRC that oil and gas drilling will only occur at depths greater than 5,000 feet. However, there are no such agreements containing these restrictions in place with oil and gas lessees at the project site or the State Land Office. One agreement has been made with Intrepid Mining LLC, a potash mining company, but that agreement has not been approved, as required by that company's lease terms, by the New Mexico State Land Office.²¹
- Given the State Land Office's mineral ownership of the land and the lack of restrictions on mineral development at the site, any claim that activities at the site have been limited is incorrect.
- The State Land Office leases the Site's mineral estate for oil and gas development. Holtec does not own, lease, or have any control whatsoever over the development of the mineral estate. The State Land Office has active oil and gas leases in the project area, which contain provisions that are intended to facilitate the extraction of oil and gas resources and generate royalties for the public schools.

²¹ Public Comments in Opposition to the Holtec DEIS, New Mexico Land Commissioner (Sept. 22, 2020) (ADAMS Accession No. ML20269A003)

Dated: November 3, 2020

Respectfully submitted,

/signed electronically by/
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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
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INTERNATIONAL

(Consolidated Interim Storage Facility)

Docket No. 72-1051

November 3, 2020

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I Allan Kanner certify that, on this 3rd day of November, 2020, true and correct copies of Fasken's Combined Reply To Oppositions to 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 was served upon the Electronic Information Exchange (the NRC's E-Filing System) in the above-captioned proceeding.

/s/electronically signed by Allan Kanner

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