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

NRC Staff's Answer in Opposition to Fasken Oil and Ranch, Ltd. and Permian Basin Land and Royalty Owners' Motions to Reopen the Record and File New Contention 3

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i)(1), the U.S. Nuclear Regulatory Commission Staff (Staff) submits this answer opposing the motion of Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (together, Fasken) to file new Contention 3 and the accompanying Motion to Reopen the Record.[1] For the reasons set forth below, the Commission should deny both motions because Fasken fails to meet the requirements of 10 C.F.R. §§ 2.326, 2.309(c)(1), and 2.309(f)(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) and Environmental Report (ER), requesting that the NRC grant

[1] Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners Motion for Leave to File New Contention No. 3 (Nov. 5, 2020) (ADAMS Accession No. ML20310A444 (package); ML20310A445) (Motion for Leave); Fasken Land and Minerals and Permian Basin Land and Royalty Owners Motion to Reopen the Record (ML20310A441 (package); ML20310A442) (Motion to Reopen).

it a license for the construction and operation of a storage facility for spent nuclear fuel.[2] 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.[3]

The NRC published a notice in the *Federal Register* regarding the acceptance and docketing of Holtec's CISF license application.[4] The NRC subsequently published a *Federal Register* notice of opportunity to request a hearing and to petition for leave to intervene.[5] Multiple petitioners filed hearing requests.[6] Rather than requesting a hearing, Fasken instead moved to dismiss the proceeding, arguing that the NRC lacked jurisdiction over the application.[7] The Secretary of the Commission denied the motion and referred it to the Board for consideration under 10 C.F.R. § 2.309.[8] In May 2019, the Board denied all petitions and terminated the proceeding, thereby closing the record.[9] Regarding Fasken, the Board held that it had demonstrated standing but had not submitted a proposed contention that met the

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2 Holtec's application materials are available at: https://www.nrc.gov/waste/spent-fuel-storage/cis/holtec-international.html. Unless otherwise specified, citations to the proposed license are to Revision 1 (ML17310A223) (Proposed License), citations to the Safety Analysis Report (SAR) are to Revision 0J (ML20295A428), and citations to the Environmental Report (ER) are to Revision 8 (ML20295A485).

3 Proposed License at 1.

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

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

6 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.

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

8 *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).

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

requirements of 10 C.F.R. § 2.309(f)(1).[10] On June 3, 2019, Fasken appealed the Board's decision.[11]

In June 2019, the New Mexico Commissioner of Public Lands issued a letter to Holtec's President and CEO regarding Holtec's CISF application.[12] Fasken then filed a new proposed Contention 2.[13] Thereafter, Fasken filed a motion to reopen, but subsequently withdrew it without withdrawing the initial motion for leave to admit new proposed Contention 2.[14]

In March 2020, the NRC Staff made the draft Environmental Impact Statement (DEIS) for Holtec's license application publicly available.[15] Due to the ongoing public health emergency, the NRC Staff twice extended the DEIS public comment period.[16]

In April 2020, the Commission issued a decision in which it ruled on Fasken's June 2019 appeal.[17] The Commission affirmed the Board's determination in LBP-19-4 that Fasken had not

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10 *Id.* at 461–62.

11 *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).

12 *Letter from Stephanie Garcia Richard, Comm'r, N.M. State Land Office, to Krishna Singh, President and CEO, Holtec* (June 19, 2019) (ML19183A429) (served on this docket on July 2, 2019).

13 *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).

14 *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).

15 *NUREG-2237, 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* (Mar. 2020) (ML20069G420); Holtec International HI-STORE Consolidated Interim Storage Facility Project, 85 Fed. Reg. 16,150 (Mar. 20, 2020).

16 Holtec International HI-STORE Consolidated Interim Storage Facility Project, 85 Fed. Reg. 23,382 (Apr. 27, 2020); Holtec *International* HI-STORE Consolidated Interim Storage Facility Project, 85 Fed. Reg. 37,964 (June 24, 2020). The comments received on the DEIS are currently under consideration by the Staff.

17 *Holtec Int'l* (HI-STORE Consolidated Interim Storage Facility), CLI-20-4, 91 NRC 167 (2020).

submitted a admissible contention.[18] But because Fasken's Contention 2 had been filed after the Board's decision and the closing of the record, the Commission remanded Fasken's Contention 2 to the Board for consideration under the standards for reopening the closed record and the admissibility standards for contentions filed after the initial intervention deadline.[19] Before the Board ruled on the remanded contention, Fasken submitted a second motion to reopen the record and amend proposed Contention 2, based in part on information presented in the DEIS.[20] Thereafter, in two separate decisions, the Board denied Fasken's first motion to reopen the record and admit proposed Contention 2, and Fasken's second motion to reopen the record and amend proposed Contention 2.[21] Fasken's appeal of LBP-20-10 is currently pending before the Commission.[22]

Fasken has now filed the instant motions to reopen the record and admit new proposed Contention 3.[23] In proposed Contention 3, Fasken claims that the "DEIS, ER and SAR inappropriately rely" on incorrect, speculative, or missing information about land and mineral rights at the proposed site, that the NRC has not met the requirements of the National Environmental Policy Act and NRC's siting regulations, and that the application and DEIS "fail to

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18 *Id.*

19 *Id.* at 210–11.

20 *Fasken Land and Minerals, LTD, and Permian Basin Land and Royalty Owners Motion for Leave to File Amended Contention No. 2* (May 11, 2020) (ML20133K111 (package)); *NRC Staff Answer in Opposition to Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners' Motions to Amend Contention 2 and Reopen the Record* (June 4, 2020) (ML20156A228).

21 *Holtec Int'l* (HI-STORE Consolidated Interim Storage Facility), LBP-20-6, 91 NRC __ (June 18, 2020) (slip op.); *Holtec Int'l* (HI-STORE Consolidated Interim Storage Facility), LBP-20-10, 92 NRC __ (Sept. 3, 2020) (slip op.).

22 *Fasken and PBLROs Combined Notice of Appeal and Petition for Review of Atomic Safety Licensing Boards Denial of Motion for Leave to File Amended Contention and Motion to Reopen the Record* (Sept. 28, 2020) (ML20273A000 (package)); *NRC Staff's Answer Opposing Fasken Oil and Ranch, LTD's and Permian Basin Land and Royalty Owners' Petition for Review of LBP-20-10* (Oct. 23, 2020) (ML20297A211).

23 Motion for Leave; Motion to Reopen.

incorporate opposing viewpoints . . . contrary to the principles of consent-based siting."[24] In support of its Motion to Reopen and its Motion for Leave, Fasken relies primarily on an affidavit by Tommy Taylor, Assistant General Manager of Fasken Oil and Ranch, Ltd. and President of the Permian Basin Coalition of Land and Royalty Owners,[25] on public comments received on the DEIS that were submitted on September 22, 2020 and made publicly available in ADAMS on October 5, 2020,[26] and on Holtec RAI responses submitted on September 16, 2020 and made publicly available on October 21, 2020.[27]

As discussed in detail below, the NRC Staff opposes the motions to reopen the record and admit proposed Contention 3. Fundamentally, the motions do not satisfy the timeliness, significance, and materiality requirements of 10 C.F.R. § 2.326(a), do not meet the good cause requirements in 10 C.F.R. § 2.309(c), and do not meet the admissibility requirements in 10 C.F.R. § 2.309(f)(1).[28]

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[24] Motion for Leave at 15.

[25] *Affidavit and Declaration of Tommy E. Taylor* (Nov. 5, 2020) (ML20310A443); *Exhibit 3 to Fasken and PBLRO Motion for Leave to File New Contention 3* (Nov. 5, 2020) (ML20310A448) (the content of the affidavits, one in support of the Motion to Reopen and one used as an exhibit in the Motion for Leave appear identical).

[26] Motion for Leave at 2.

[27] Holtec International, HI-STORE CIS (Consolidated Interim Storage Facility) License Application Responses to Requests for Additional Information - Part 5, Response Set 2 (Oct. 21, 2020) (ML20260H139 (package)).

[28] Although Fasken filed these two motions before the Atomic Safety and Licensing Board, Commission precedent makes clear that jurisdiction now rests with the Commission. *See, e.g.*, *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (2009) ("Generally, once there has been an appeal or petition to review a Board order ruling on intervention petitions . . . jurisdiction passes to the Commission, including jurisdiction to consider any motion to reopen.") (citing *Ne. Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-00-25, 52 NRC 355, 357 (2000) (observing that after a petition to review a final order has been filed with the Commission, the Board no longer has jurisdiction to consider a motion to reopen and the motion is properly filed with the Commission)).

DISCUSSION

I. Applicable Legal Standards

A. 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.[29] A motion to reopen the record accompanying a new or amended contention may be considered timely if filed within 30 days of the date upon which the new information is available.[30] 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.[31] Indeed, 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 judgment of the presiding officer, it must be considered anyway."[32]

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

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29 10 C.F.R. §§ 2.326(a)(1)–(3); *see also Va. Elec. & Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 700 n.54, 701 (2012).

30 *See Shaw AREVA MOX Servs.* (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).

31 *Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 337–38 (2011); *Holtec Int'l* (HI-STORE Consolidated Interim Storage Facility), LBP-20-10, 92 NRC __, __ (Sept. 3, 2020) (slip op. at 11–12) (finding that newly submitted letter by a third party was not new or material when application previously included relevant information).

32 Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986).

for the movant's claim that the criteria of [10 C.F.R. § 2.326(a)] have been satisfied."[33] 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."[34] Affidavits containing bare assertions or speculation and lacking technical details or analysis are insufficient to meet the reopening standards.[35]

B. Good Cause Requirements for New or Amended Contentions

New or 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 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 from information previously available; and

(iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

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).[36]

New environmental contentions based on the Staff's DEIS are permitted if data or conclusions in the Staff's environmental document differ significantly from the applicant's environmental report.[37] Nevertheless, NRC's regulations and longstanding Commission

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33 10 C.F.R. § 2.326(b); *Holtec Int'l* (HI-STORE Consolidated Interim Storage Facility), LBP-20-10, 92 NRC __, __ (Sept. 3, 2020) (slip op. at 7).

34 10 C.F.R. § 2.326(b).

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

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

37 *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 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)).

precedent make clear that for issues arising under the National Environmental Policy Act, 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.[38] A new or amended contention must be raised at the earliest possible opportunity.[39] Thus, as a general rule, environmental contentions submitted for the first time after the draft EIS is issued will be deemed untimely unless there are data or conclusions in the draft EIS that differ significantly from the data or conclusions in the applicant's documents.[40] Indeed, publication of the draft EIS alone does not provide an opportunity to renew previously filed contentions; rather, the petitioner must demonstrate that the draft EIS actually contains significantly new data or conclusions.[41]

In the context of 10 C.F.R. § 2.309(c)(1), materiality generally relates to the degree or magnitude of the difference between previously available information and currently available information.[42] As such, the information on which a new or amended contention is based must be more than merely a new interpretation or restatement of previously available information.[43]

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38 *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).

39 *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)).

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

41 *Private Fuel Storage*, CLI-00-21, 52 NRC at 264 n.6.

42 *See* Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,572 (Aug. 3, 2012) (noting that in the NEPA context "materially different" is equivalent to "differs significantly"); *Fla. Power & Light Co.* (Turkey Point Units 6 & 7), LBP-17-6, 86 NRC 37, 48 (2017), *aff'd*, CLI-17-12, 86 NRC 215, 227 (2017) (noting that "materially" in the context of 10 C.F.R. § 2.309(c)(1)(ii) is "synonymous with, for example, 'significantly,' 'considerably,' or 'importantly'") (citing *S. Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-1, 71 NRC 165, 183 n.9 (2010)).

43 *See Progress Energy Fla., Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 142 (2009) ("The fact that a party 'integrates,' consolidates, restates, or collects previously available information into a new document, does not convert it into 'previously unavailable' information.").

Rather, a new or amended contention must be based upon facts or information that were previously unavailable.[44]

C. Requirements for Contention Admissibility

In addition to meeting the requirements of 10 C.F.R. § 2.309(c)(1), new or amended contentions must also satisfy the six contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). That 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;

(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;

(v) Provide a concise statement of the alleged facts or expert opinions that support the petitioner's position and upon which the petitioner intends to rely; and

(vi) Provide information sufficient to show that a genuine dispute with the applicant/licensee exists on a material issue of law or fact.

The contention admissibility requirements are intended to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[45] In this regard, the Commission has explained that the rules governing the admissibility of contentions are "strict by design."[46] Failure to comply with any one of these criteria is grounds for the dismissal of a

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[44] *See Vermont Yankee*, CLI-11-2, 73 NRC at 344 (citing *Sys. Energy Res., Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144, 146 (2007)).

[45] Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

[46] *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016) (citing *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for recons. denied*, CLI-02-1, 55 NRC 1 (2002)).

contention.[47] An issue is inadmissible if the petitioner "'has offered no tangible information, no experts, no substantive affidavits,' but instead only 'bare assertions and speculation.'"[48]

II. Fasken has not shown that its Motion to Reopen the Record is timely, addresses a significant safety or environmental issue, and that a materially different result would have been likely had the evidence been initially considered.

Fasken's Motion to Reopen fails to satisfy the "intentionally heavy burden" of 10 C.F.R. § 2.326(a) for reopening the record.[49] As a preliminary matter, the affidavit submitted in support of the Motion to Reopen makes no attempt to tie the facts identified to the three factors of 10 C.F.R. § 2.326(a). As a result, the Motion to Reopen does not meet the plain requirements of 10 C.F.R. § 2.326(b).[50] Regardless of this error, the Motion to Reopen is untimely, does not demonstrate that the environmental and safety issues raised are significant, and does not demonstrate that a materially different result would have been likely. Accordingly, Fasken's Motion to Reopen should be denied.

A. Fasken has not demonstrated that the Motion to Reopen is based on information that was previously unavailable

Section 2.326(a)(1) requires that a motion to reopen the record "must be timely."[51] The Commission has explained that in determining whether a motion is timely, it will look not only to whether the specific evidence was previously available but to whether it is materially different from the evidence that was previously available.[52] Fasken's Motion to Reopen, based primarily on public comments submitted to the NRC in response to the DEIS, does not meet this

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47 *Indian Point*, CLI-16-5, 83 NRC at 136.

48 *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003) (citation omitted).

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

50 *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), LBP-16-6, 83 NRC 329, 337 (2016) (finding that an expert's affidavit that did not mention the reopening standards was insufficient to meet the requirements of 10 C.F.R. § 2.326(b)).

51 10 C.F.R. § 2.326(a)(1).

52 *See Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 NRC 491, 498 (2012).

threshold because the underlying information is either not new or not materially different and Fasken has failed to show that it could not have previously raised these issues.

Fasken states that its proposed contention and motion rest primarily on the comments by XTO Energy, Inc. (XTO) on the DEIS and on what it asserts are inaccuracies in Holtec's responses to Requests for Additional Information.[53] Fasken also references (1) XTO's lease terms (described in XTO's comment) and (2) a lack of agreements between Holtec and oil and gas lessees.[54] But Fasken has not demonstrated how this information is new or materially different from information available to Fasken long before the submission and availability of these comments.

Namely, Proposed Contention 3, in which Fasken asserts that Holtec lacks the ownership rights to fully restrict oil and gas development beneath the site, rests on essentially the same information and arguments on which Fasken based its earlier motions to reopen the record and introduce Proposed Contention 2.[55] In those motions, Fasken claimed that Holtec "does not own the mineral rights below the site and does not have the ability to control extraction activities adjacent to the site."[56] But the Board found these claims inadmissible because Fasken did not demonstrate good cause for raising them after the initial intervention deadline and because the issue did not identify a genuine dispute with the application on a material issue.[57] The Board found that the application, since it was first submitted, has provided

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53 Motion to Reopen ¶ 9.

54 *Id.* ¶ 12. And while the Taylor Affidavit in support of the Motion to Reopen references the comment provided by XTO, Mr. Taylor does not personally attest to the truth of the facts alleged by XTO.

55 *See Fasken Land and Minerals, LTD, and Permian Basin Land and Royalty Owners Motion for Leave to File Amended Contention No. 2*, at 2 (May 11, 2020) (ML20132F019) ("data, analyses, and conclusions in the Holtec DEIS . . . [paint] a distorted picture of subsurface mineral rights, the depths and locations of oil and gas wells, mining extraction and industry operations and geologic characteristics at and in the vicinity of the proposed Holtec CISF site.").

56 *Id.* at 13; *Fasken Oil And Ranch And Permian Basin Land And Royalty Owners Motion For Leave To File A New Contention*, at 7 (Aug. 1, 2019) (ML19213A171).

57 *Holtec Int'l*, LBP-20-6, 91 NRC at __ (slip op. at 20). The Board also found the proposed contention inadmissible for failure to include a motion to reopen as required by 10 C.F.R. § 2.326; *see also Holtec*

that the State of New Mexico owns the subsurface mineral rights and that other RAI responses had reiterated this reality.[58]

Fasken now claims that the specific lease terms, and the intent of lessees (such as XTO) to continue development of oil and gas in the vicinity of the site, are information that was previously unavailable and materially different than what was already disclosed in the application. However, just as the Board found in rejecting the prior motions to reopen, Fasken has not shown that this information is either new or materially different from what was previously available.

First, as the Board concluded in LBP-20-6 and LBP-20-10, the application, from the time of its submission in 2017, disclosed that mineral rights beneath the site are not owned by Holtec, and thus Fasken was obligated to raise a challenge based on that situation at an earlier time; a letter from the New Mexico Land Office attesting to Holtec's lack of control did not make that information new or materially different from what was originally in the application, nor did the NRC Staff's acknowledgment of that status in the DEIS.[59] For that same reason, if Fasken were concerned that absent ownership by Holtec, extraction activities, including for oil and gas, could occur beneath the site with safety or environmental implications, it could have raised the issue at the outset. Furthermore, Holtec's Environmental Report has stated from the outset that at the current site, "oil and gas production" is "currently occurring" and discloses that the surrounding area consists of significant oil and gas development.[60] The fact that—as Fasken acknowledges—the NRC Staff has issued RAIs regarding the status of oil and gas development beneath the site only highlights that the application has, since 2017, included information on

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Int'l, LBP-20-10, 92 NRC at __ (slip op. at 16) (denying Fasken's subsequent motion to reopen the record and finding that Fasken did not demonstrate good cause or raise a genuine dispute on any material issue of fact or law).

58 *Holtec Int'l*, LBP-20-6, 91 NRC at __ (slip op. at 21).

59 *Id.*; ER Rev. 1 at 3-2.

60 ER Rev. 1 at 3-7.

potential mineral development.[61] And the Board has now also held multiple times that, with respect to challenges regarding the potential depth of extraction activities at the site, Fasken did not show good cause for filing after the deadline (because it could have raised the challenges at an earlier time) and did not demonstrate why this concern is material from either an environmental or safety standpoint. These determinations underscore that Fasken had the opportunity to raise its stated concern about mineral rights well before now.

Second, even if Fasken had demonstrated that more details about a particular lessee's rights or business plans were relevant, Fasken fails to explain in its motion and associated affidavit why it could not have reasonably discovered XTO's interest in the mineral rights beneath the site in the two and a half years prior to this submission, even though New Mexico makes publicly available information on mineral rights leases.[62] Fasken does not explain why this information was unavailable to Fasken, especially given Fasken's own stated expertise and "demonstrated familiarity with drilling in the relevant region."[63] And Fasken's overarching assertion that lessees to the mineral estate can fully develop and utilize the surface estate to extract oil and gas, without regard to Holtec's own surface use, is plainly an issue that could have been raised prior to this motion.[64]

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61 *See, e.g.*, *RAIs Environmental Review and Environmental Impact Statement for Holtec CISF*, at 7 (Dec. 14, 2018) (ML18345A203).

62 *See, e.g.*, *SLO Data Portal, Lease E0-5231-0017*, http://dataaccess.nmstatelands.org/DataAccess/Lease_Information_Single.aspx?Leas e_Prefix=E0&Lease_Number=5231&Lease_Assignment=17, *also available at* https://bit.ly/3fxlaSy (last visited Nov. 30, 2020) (publicly identifying XTO Delaware Basin, LLC as the leaseholder and providing information about the lease, including its issuance on May 10, 1951, active status, ongoing royalty payments, that it is in its "extended primary term," and XTO's mailing address); *see also NMSLO Oil, Gas, Minerals Mapping Tool*, available at https://www.nmstatelands.org/maps-gis/interactive-maps/ (last visited Nov. 30, 2020) (providing mapping tool to identify, among other information, current leases).

63 *Holtec Int'l*, LBP-20-10, 92 NRC at __ (slip op. at 14); *see also* Motion to Reopen, Exhibit 1, Taylor Affidavit ¶ 10 (claiming that he is "authorized to speak to the Permian Basin oil and gas industry's opposition to the interim storage of SNF in the Permian Basin.").

64 See Motion for Leave, Exhibit 1 at 21 (citing 2008 New Mexico case law).

In other words, Fasken is belatedly expressing concern about the implications of a state law framework that was in place well before the application was submitted and that indeed was acknowledged in the application. The fact that other lessees or agencies have now mentioned these ownership concerns in comments on the DEIS does not make Fasken's challenge based on that pre-existing framework timely. As the Commission has repeatedly emphasized, petitioners have an "ironclad obligation to examine the publicly available documentary material . . . to uncover any information that could serve as a foundation for a specific contention."[65] And in keeping with this requirement, Boards have held new and amended contentions based on EIS comments to be inadmissible when the information was available at an earlier time to the petitioner.[66] Given Fasken's experience, the descriptions that have been in the application since its 2017 submission, and other publicly available information sources (such as public records maintained by New Mexico regarding mineral leases), Fasken cannot credibly assert that it was unaware of the nature and extent of mineral rights in the vicinity of the proposed site.

For similar reasons, the associated topics that Fasken seeks to raise in Contention 3 could likewise have been raised much earlier in this proceeding. For example, Fasken expresses concerns based on Holtec's siting evaluation,[67] the potential for plugged wells to collapse,[68] the potential for potash mining beneath the site,[69] the potential for shallow oil and

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65 *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002); *Shaw AREVA MOX Servs., LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 65 n.47 (2009).

66 *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-13, 53 NRC 319, 325–26 (2001) (denying contention based on a change to railcar arrangement the State of Utah claimed was first available in the DEIS when the underlying information was reflected in an earlier version of the Environmental Report); *Crow Butte Res., Inc.* (Marsland Expansion Area), LBP-18-3, 88 NRC 13, 26–29 (2018) (finding a lack of good cause for new or amended contentions based on party's filing of comments on an Environmental Assessment).

67 Motion to Reopen ¶ 13.

68 Motion to Reopen, Exhibit 1, Taylor Affidavit ¶ 10c.

69 Motion to Reopen, Exhibit 1, Taylor Affidavit ¶ 10d.

gas development,[70] the safety and environmental impacts of transportation and terrorism,[71] and a lack of consultation with oil and gas lessees.[72] But fundamentally, Fasken fails to show that these matters are actually based on new information (either in public comments or RAI responses) that is materially different than what was previously available.

As discussed above and as the Board has repeatedly held, Holtec's application, and subsequently the Staff DEIS, has consistently described that Holtec does not own the mineral rights beneath the site.[73] Accordingly, Fasken could previously have raised its asserted concerns about impacts associated with this lack of ownership, including the claimed potential for exploration and extraction at shallower depths. And Fasken's assertions about the impact of abandoned wells or the impacts of terrorism could have been raised on the initial application (and indeed were raised by Fasken or other petitioners and found inadmissible).[74] Similarly, challenges based on an asserted failure to consult with various state agencies or private parties could have been raised on the ER or promptly following publication of the DEIS.[75] For each of these issues, Fasken has provided no clear identification either of when it learned of the issue or when the underlying information was first available.[76] Accordingly, the various secondary issues raised by Fasken in its motion and proposed contention fail to meet the timeliness requirements of 10 C.F.R. § 2.326(a)(1).[77]

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70 Motion to Reopen, Exhibit 1, Taylor Affidavit ¶ 10e.

71 Motion for Leave at 35, 39.

72 *Id.* at 29.

73 *Holtec Int'l*, LBP-20-6, 91 NRC at __ (slip op. at 21).

74 *Holtec Int'l*, LBP-19-4, 89 NRC at 447–49 (2019) (denying proposed contention based on the environmental impacts of terrorism); *cf. Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-7, 90 NRC 31, 111–14 (2019) (denying Fasken's proposed contention on a contemporaneous CISF application, related to the asserted inadequacy of that application's discussion of abandoned wells).

75 *See* DEIS at 1-7 to 1-10.

76 *Holtec Int'l*, LBP-20-10, 92 NRC at __ (slip op. at 10).

77 *Id.* at __ (slip op. at 15) (finding Fasken's earlier motion to reopen inadmissible in part, because of a failure to explain when the petitioner "first became aware of" any purportedly new information.).

Ultimately, the issues the Fasken has now raised are either substantially similar to the previous challenges Fasken has asserted or are issues that Fasken could have raised earlier.[78] As such, its Motion to Reopen should be denied for failure to meet the requirements of 10 C.F.R. § 2.326(a).

B. Fasken has not demonstrated that the issues raised in its Motion to Reopen address a significant safety or environmental issue

Even if the information on which Fasken's Motion to Reopen relies, or some portion of it, were timely raised, Fasken has also failed to demonstrate that the issue raised is related to a significant safety or environmental issue, as required by 10 C.F.R. § 2.326(a)(2). At this stage, it is the petitioner's burden to demonstrate the significance of the issue, and a motion to reopen must be supported by an affidavit setting forth the factual or technical bases supporting this finding.[79]

NRC caselaw has provided standards for when an environmental issue in a motion to reopen can be considered significant, "equating it to the standards for when an environmental impact statement (EIS) is required to be supplemented."[80] In other words, the petitioner must present "a seriously different picture of the environmental impact of the proposed project from what was previously envisioned."[81] In *Private Fuel Storage*, the Commission held that this "seriously different picture" typically involves the raising of a "previously unknown environmental concern" but not "mere additional evidence supporting one side or the other of a disputed environmental effect."[82] Fasken's motion falls below this standard, providing, at most, additional

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78 Nor does Fasken seek in its motion or affidavit to assert that this is an "exceptionally grave issue" such that it is does not need to meet from the timeliness requirement of 10 C.F.R. § 2.326(a).

79 10 C.F.R. § 2.326(b).

80 *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-12-10, 75 NRC 633, 656 (2012).

81 *Id.* (quoting *Union Elec. Co.* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 167–68 (2011)).

82 *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 28 (2006).

information on potential environmental impacts of the facility (such as its generalized inferences of economic implications for lessees).[83]

Indeed, Fasken provides only a conclusory statement that these issues are significant.[84] For example, while Fasken claims that the facts raised would have affected "[t]he foundation to any siting evaluation," it does not provide an explanation why that would be so.[85] For example, Fasken has not identified specifically how the Holtec facility would necessarily impede oil and gas operations, nor has Fasken identified the asserted mechanism by which oil and gas development would impact the safety or environmental impacts of the facility, particularly given the application's analyses of canister integrity and operational control and maintenance (analyses which Fasken neither mentioned nor challenged) and the application's consistent statement that Holtec does not own the mineral rights beneath the site.[86] And other issues raised by Fasken, such as the potential for collapse of plugged wells or whether the Yates formation begins at 3,050 ft or 2,500 ft below the surface of the site, are not further explained or even referenced in the proposed contention.[87]

Fundamentally, Fasken's claim of significance rests on an unsupported assumption that operation of the facility is, by its very nature, dangerous to the surrounding community and that a license to construct and operate an interim spent fuel storage installation will impede the

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83 *See Oyster Creek*, CLI-08-28, 68 NRC at 670 (finding a "'mere showing' of a possible violation is not enough" to satisfy the significance requirement).

84 Motion to Reopen ¶ 13. Additionally, the affidavit supporting the motion makes no attempt to explain the significance of the purported issues.

85 *Id.*

86 *See, e.g.*, SAR § 4.7, Chapter 15 (summarizing the design criteria for systems, structures, and components and evaluating the structural integrity of the CISF in response to off-normal and accident events).

87 Motion to Reopen, Exhibit 1, Taylor Affidavit ¶ 12. And while this is an issue that also illustrates the untimeliness of the proposed motion, the application and the DEIS had previously identified that "relatively shallow oil and gas" production could occur "at approximately 930 to 1,524 m [3,050 to 5,000 ft]." *See* DEIS at 3-7 to 3-8. In LBP-20-10, the Board found that the Fasken's previous attempt to challenge the description of these depths was both untimely and had not been shown to be significant. *Holtec Int'l*, LBP-20-10, 92 NRC at __ (slip op. at 21–22).

ability of oil and gas lessees to exercise their property rights. The mere fact that a facility will store spent nuclear fuel does not, absent additional information to demonstrate a safety or environmental issue not already considered, mean that any potential concern raised by a petitioner is per se so significant that it justifies reopening a closed record. And while Fasken criticizes what it views as Holtec's "contempt" for third party rights, the Motion to Reopen and its affidavit fail to make clear the precise significance of that disagreement (assuming it were true) from a safety or environmental standpoint.[88] Accordingly, Fasken has failed to meet the significance requirements of 10 C.F.R. § 2.326(a)(2).

C. Fasken's Motion to Reopen does not demonstrate that a materially different result likely would have occurred if this information was previously available

Fasken claims that this allegedly new information would have affected the site selection process, a decision to recommend the No Action Alternative, or required a further examination "at the impacts and the mitigation strategies." This cursory claim falls well short of the 10 C.F.R. § 2.326(a) requirements.

Previous Commission decisions have emphasized what a petitioner must do to satisfy the "materially different result" standard. For example, in *Oyster Creek*, the Commission affirmed a Board's finding that it is the petitioner's burden to demonstrate the likelihood of a different result and that "[b]are assertions and speculation" even by the petitioner's expert were insufficient evidence to support this standard.[89] And in *Pilgrim*, the Commission emphasized that reopening should not be granted if the importance of the facts is unclear, observing that "it is insufficient merely to point to disputed facts."[90]

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88 Motion to Reopen, Exhibit 1, Taylor Affidavit ¶ 10b.

89 *Oyster Creek*, CLI-08-28, 68 NRC at 673–76.

90 *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 499 (2012).

Here, Fasken's assertion that the information it references would have affected the siting evaluation is insufficient to justify this "extraordinary" action.[91] Fasken, while pointing generally to "the site selection process," identifies no specific reference to what section of Holtec's application or the DEIS would have changed as a result of these facts.[92] And while Fasken claims that Exhibit 2 to the proposed contention provides a non-exhaustive listing of "inaccurate, incomplete, unreliable, inconsistent, and/or material omissions," neither Fasken's Motion to Reopen nor its Motion for Leave actually identify any Holtec or NRC evaluation that would be changed (or how).[93] For example, though Footnote 11 of the Motion for Leave references multiple sections of 10 C.F.R. Part 72, Fasken fails to identify (with specific references to the application or DEIS) the evaluation that addresses these requirements and how any new facts would alter any siting-related conclusion or determination.[94]

As a result, because its Motion to Reopen and the associated do not articulate, with specificity, what aspect of the application or DEIS would change as a result of this allegedly new information, Fasken has not satisfied its burden under 10 C.F.R. § 2.326(a)(3).

III. Fasken does not satisfy the good cause requirement of 10 C.F.R. § 2.309(c)

Even assuming Fasken's Motion to Reopen had met the requirements of 10 C.F.R. § 2.326, it must still meet the good cause requirements in 10 C.F.R. § 2.309(c)(1) for filing after the initial intervention deadline. To do so, Fasken must demonstrate that its proposed contention is based on information that was previously unavailable, is materially different from previously available information, and has been submitted in a timely fashion.[95]

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91 *Id.* at 497. Motion to Reopen ¶ 14.

92 Motion to Reopen ¶ 14.

93 Motion for Leave at 19.

94 *Id.* at 5. Furthermore, while the Motion for Leave contains references to the "primary principles of consent-based siting mandated by the Blue Ribbon Commission," Fasken has not shown how recommendations by the Blue Ribbon Commission are binding on the NRC Staff or applicants.

95 10 C.F.R. § 2.309(c)(1).

In its Motion for Leave to File Contention 3, Fasken states that the asserted new and previously unavailable information stems from two sources: (1) public comments received by the NRC Staff in response to the DEIS and made publicly available in September 2020 and (2) Holtec's RAI responses and application updates, made publicly available in October 2020.[96] Primarily, Fasken claims that there is a significant conflict between the information provided by XTO Energy, Inc. in response to public comments and the information in both the DEIS and Holtec's RAI response.[97] As discussed further below, although Fasken claims that this information (and thus the purported inconsistency it claims to challenge) was previously unavailable, Fasken could have asserted the same concerns earlier in the proceeding but did not do so.

A. Fasken's concerns regarding site ownership do not demonstrate good cause for filing after the initial intervention deadline

The primary issue raised by Fasken in Proposed Contention 3 is its claim that the "terms of XTO's lease, XTO's intent in terms of oil and gas development" and "Holtec's lack of any third party agreement with XTO" were unavailable "prior to NRC's publication of XTO's comment on October 5, 2020."[98] Fasken claims that this information, in combination with other public comments opposing the facility, demonstrates errors in the application and DEIS and that this information on land uses raises "important legal issues, safety risks to the proposed CISF and environmental impacts. . . ."[99] But Fasken fails to show that any of this information is new or materially different from information previously available.

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96 Motion for Leave at 2–3.

97 *Id.*

98 *Id.* at 8.

99 *Id.* at 11.

1. Fasken could previously have raised concerns regarding site access by mineral lessees at the facility

As discussed above, it is implausible for Fasken to claim that it could not have raised these challenges at an earlier stage of the proceeding. Most notably, Fasken has previously attempted to challenge the accuracy of Holtec's statements regarding its ownership interest in the site and its ability to control oil and gas development beneath the proposed facility. In LBP-20-6, the Board found that "Holtec's Environmental Report has always acknowledged that 'the subsurface mineral rights are owned by the State of New Mexico.'"[100] And as the Board found in LBP-20-10, Mr. Taylor, Fasken's Vice President and current affiant, submitted similar concerns in 2018 raising concerns regarding future oil and gas development beneath the site where he identified that "[t]he proposed site sits on top of and adjacent to oil and gas minerals to be developed by means of fracture stimulation techniques."[101] As a result, Fasken's own statements indicate its awareness, months or even years ago, that oil and gas lessees may seek to exercise their rights in the property beneath or near the site.

Similarly, Fasken expresses concern that vertical drilling is necessary to reach potential oil and gas deposits and that mineral lessees have seemingly unfettered rights to utilize the surface estate, including directly on the Holtec site, in order to effectuate those rights.[102] But even assuming these statements are true, these issues are plainly issues that could have been raised in response to the original application. While the DEIS comments by XTO and the New Mexico Commissioner of Public Lands are newly available, the legal and site access issues they raise are not. For example, XTO, as referenced by Fasken, states "it is a well-established

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100 *Holtec Int'l*, LBP-20-6, 91 NRC at __ (slip op. at 21).

101 Letter from Tommy E. Taylor, Fasken Oil and Gas Development Director, to Michael Layton, Division of Spent Fuel Management, NRC Office of Nuclear Material Safety and Safeguards (NMSS) at 2–3 (July 30, 2018) (ADAMS Accession No. ML18219A710); *Holtec Int'l*, LBP-20-10, 92 NRC at __ (slip op. at 11).

102 Motion for Leave at 27, n.83.

principle of oil and gas law in New Mexico and other oil and gas states that the mineral estate is dominant to the surface estate," citing New Mexico case law from 2008 and 1985.[103] The acknowledgment that this principle is not a recent development, in combination with the fact that Holtec previously disclosed in the application its lack of ownership of the mineral estate, demonstrates that these concerns could have been raised far earlier.

And as discussed above with respect to Fasken's Motion to Reopen, New Mexico publicly provides information on ownership of mineral rights, including ownership beneath and in the vicinity of the Holtec site.[104] Fasken has repeatedly emphasized its extensive knowledge of the region.[105] Fasken's knowledge and experience only underscores its failure to show how any of the factual information about ownership, mineral rights, and potential extraction activities on which it now relies was not already publicly available, as required to show good cause for raising these concerns after the initial deadline.[106]

The Commission, in promulgating its rules, emphasized that it is improper for petitioners to "delay filing a contention until a document becomes available that collects, summarizes and places into context the facts supporting that contention."[107] Fasken is not free to wait for other entities to articulate ownership and access concerns that it could have previously discerned itself from publicly available information as early as the initial hearing request deadline, and then

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103 Motion for Leave, Exhibit 1 at 21; Motion for Leave at 23.

104 *See supra* n.62.

105 Motion for Leave at 6.

106 *See Holtec Int'l*, LBP-20-10, 92 NRC at __ (slip op. at 14) ("Mr. Pollock does not assert, however, that he was unaware of these possibilities before March 2020. Nor would it appear he could credibly do so. Mr. Pollock is Fasken's senior geologist, and has worked for Fasken since 2003. He recently served as president of the West Texas Geological Society. He was described at oral argument by Fasken's counsel—with perhaps little or no hyperbole—as being 'more knowledgeable about this area than any other human being.' Not surprisingly, Mr. Pollock does not claim newly acquired knowledge about drilling in the Permian Basin.")

107 Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,566 (Aug. 3, 2012) (citing *N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (2010)).

attempt to utilize them as a foundation to buttress its own contentions. For example, in Exhibit 2 of its Motion for Leave, Fasken presents 62 pages of statements that it states it intends to rely on to support Proposed Contention 3, including statements from the DEIS, Holtec's Application and RAI responses, the 2012 Blue Ribbon Commission on America's Nuclear Future's Report to the Secretary of Energy, and public comments from both State officials and private entities. But Fasken does not attempt to parse what information, if any, is actually new.[108] And as described above, the central premises of proposed Contention 3 regarding ownership of the site not only could have been raised at the time of the initial application but indeed have been the subject of Fasken's previous contentions that were themselves found to lack good cause.

Put differently, the mere fact that entities other than the petitioner have additional expertise or different perspectives on the information presented in the DEIS does not automatically establish good cause for the petitioner to file a contention after the deadline. Instead, because the Commission's good cause standard focuses on when the pertinent information became available (not when the petitioner recognized its potential relevance), it is Fasken's burden to identify what new facts it is relying on, the prior availability of this information, and what material difference this information would make.[109] Absent such a showing, Fasken has failed to meet its burden under 10 C.F.R. § 2.309(c)(1).

2. Fasken has not demonstrated the information regarding site ownership is materially different from what was previously available

Even if some details regarding XTO's lease terms or its intent to further develop the property were previously unavailable, Fasken has not demonstrated the materiality of this new information.

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[108] *See Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 337–38 (2002) (emphasizing that Boards are not expected to "uncover and resolve arguments not advanced by the litigants themselves.").

[109] *Holtec Int'l*, LBP-20-10, 92 NRC at __ (slip op. at 10).

As discussed above, an ownership interest in the mineral rights beneath the estate implies the ability of the owner to take action to utilize those rights. To that end, the application has included evaluations on the cumulative environmental impact of construction and operation of the facility when viewed against the baseline of historical impacts from oil and gas development surrounding the site.[110] Holtec's Safety Analysis Report has also included site characterization information and determinations on the implications of oil and gas development in the site vicinity.[111] Aside from identifying comments that raise generalized concerns over subsidence at the site, Fasken has not made clear what, if any, safety impact it claims is likely to occur as a result of such development (nor how this would differ materially from the safety considerations already analyzed in the application).[112]

And to the extent that Fasken now claims that issuance of a license would interfere with XTO or other lessees' mineral rights, Fasken has not clearly articulated what, if any, safety or environmental implication that might have that pertains to NRC's licensing determination. For example, Fasken now states that access to some resources "usually requires vertical drilling."[113] But it fails to explain either the impact the facility may have on these property rights or in what way the application does not adequately account for such impacts. At this stage, it is the petitioner's obligation to demonstrate the significance of any asserted new information, and Fasken has not done so.

B. Fasken's other asserted concerns likewise do not demonstrate good cause for filing after the initial intervention deadline

In addition to its claims regarding ownership and control of the site, Fasken also asserts that the Staff did not adequately investigate the veracity of Holtec's representations, did not

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110 ER at Ch. 5.

111 *See* SAR § 2.1.4

112 Motion for Leave at 33; *see also Holtec Int'l*, LBP-20-10, 92 NRC at __ (slip op. at 13–14) (denying proposed contention for failure to explain the significance of a shallower drilling depth).

113 Motion for Leave at 21.

collaborate with state and local agencies, and failed to consider the viewpoints of interested parties. In support of these claims, Fasken provides a list of comments submitted by various entities on the DEIS, expressing concerns related to impacts of terrorism, lack of coordination with nearby private oil and gas interests, the impact of abandoned and plugged wells, the potential release of contaminants to shallow groundwater, the geologic suitability of the site, transportation impacts, and the lack of ability to restrict further mineral development.[114]

These concerns fail to meet the good cause requirements of 10 C.F.R. § 2.309(c). All are based on information that Fasken could have raised earlier, either in response to the Environmental Report or promptly following publication of the DEIS. Indeed, that the vast majority of sources on which Fasken seeks to rely on are public comments on the DEIS underscores that the information on which Fasken seeks to rely was previously available. For example, the DEIS provided a complete list of outreach that was performed prior to publication.[115] If Fasken believed that necessary entities or viewpoints were not represented, it could have raised those concerns based on the DEIS itself. Fasken's other claims of deficiencies in the DEIS, such as the impacts of potential terrorism at the site, impact of abandoned wells, impacts on groundwater, and transportation impacts either could have been raised earlier based on the contents of the application or were in fact raised by other petitioners (confirming that Fasken could likewise have done so but did not).[116] Similarly, Fasken claims that without mitigation measures, the CISF will impede the ability of lessees to exercise their mineral rights; as explained in detail above, Fasken could have raised such a challenge when

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114 Motion for Leave at 28–39.

115 DEIS at 1-3 to 1-10.

116 Other petitioners did proffer contentions on the environmental impacts associated with transportation, groundwater contamination, and terrorism. *See Holtec Int'l*, LBP-19-4, 89 NRC at 386–88,403–11, 447–49. And more than a year ago in a contemporaneous proceeding on a CISF application for a nearby site, Fasken did propose contentions regarding the impact of abandoned wells, highlighting its awareness of the opportunity to raise concerns about the issue. *Interim Storage Partners*, LBP-19-7, 90 NRC at 111–14.

Holtec first submitted its application acknowledging that it did not have ownership of mineral rights at the site.[117]

Fasken attempts to characterize these public comments as information it could not have previously discovered, simply because the facts have been presented by a different organization. But NRC regulations make it Fasken's obligation to file proposed contentions at the earliest possible opportunity—based on the actual availability of the facts, not when someone else's comment or concern alerted Fasken to its potential significance.[118] And because Fasken has not demonstrated that the underlying information was both previously unavailable and materially different, the Commission should deny these claims for failure to meet the requirement to demonstrate good cause.

IV. Fasken's Proposed Contention 3 does not meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1)

Fasken's failure to meet the reopening requirements of 10 C.F.R. § 2.326 and the good cause requirements of 10 C.F.R. § 2.309(c) provide sufficient reason to reject the contention. However, even if Fasken had met those requirements, the contention would still fail to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). Fasken's statement of Proposed Contention 3 is as follows:

> *The Holtec DEIS, ER and SAR inappropriately rely on misleading and speculative information and assertions and glaring material omissions as to land use, land rights and land restrictions at, under and around the proposed site; lack any independent investigation and analysis by the NRC, which preclude proper assessments under NEPA and NRC regulations, including but not limited to siting evaluation factors presently and in the foreseeable future; and fail to incorporate the major opposing viewpoints of State and local agencies and communities, contrary to the principles of consent-based siting.*[119]

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[117] And to the extent Fasken is disputing the cost-benefit analysis found in the DEIS, it does not challenge or even acknowledge that analysis. *See* 10 C.F.R. § 2.309(f)(1)(vi).

[118] *Private Fuel Storage*, CLI-00-21, 52 NRC at 264 n.6.

[119] Motion for Leave at 15.

Proposed Contention 3 raises issues related to descriptions of land use and rights and a purported lack of analysis by the NRC Staff, which Fasken claims impedes a "proper assessment under NEPA and NRC regulations, including but not limited to siting evaluations factors presently and in the foreseeable future. . . ."[120] Fasken further claims that the "DEIS, ER and SAR . . . fail to incorporate opposing viewpoints . . . contrary to the principles of consent-based siting."[121] The Commission should deny the contention because Fasken has not demonstrated how the issues raised are material to the findings the NRC must make in this action, nor has it established a genuine dispute with the application, contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(iv) and (vi).[122]

A. Fasken has not demonstrated that its claims regarding mineral rights represent a genuine dispute with the application.

The primary claim raised by Fasken in Contention 3 is that the information submitted by XTO and other commenters demonstrates that Holtec has inaccurately portrayed the possibility of future mineral development, particularly oil and gas development, beneath the site. Fasken claims that XTO's lease terms and the potential for the mineral estate to "utilize the surface area within the proposed project boundary for the duration of its lease" has environmental and safety risks that have not been analyzed.[123]

However, with respect to the safety of the facility, Fasken has not demonstrated in what way safety impacts could plausibly result from this information. For example, while Fasken claims that that future development has "safety risks," it fails to explain what those risks are, apparently assuming that oil and gas development beneath the site would necessarily prevent Holtec from meeting NRC safety requirements.[124] And though Fasken claims that this means

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120 *Id.*

121 *Id.*

122 10 C.F.R. § 2.309(f)(1)(iv), (vi).

123 Motion for Leave at 16.

124 *Id.*

that Holtec has not evaluated the hazards from external events, it does not provide specific references to specific analyses or determinations that would be impacted by further oil and gas development. Notably, Fasken does not acknowledge, let alone specifically dispute, the safety analyses in the application regarding canister integrity, subsidence, or accident scenarios. Absent such a showing, Fasken has not demonstrated a genuine dispute with the application, as required by 10 C.F.R. § 2.309(f)(1)(vi).

Furthermore, in Holtec's RAI responses referenced by Fasken, Holtec specified how it determined that further oil and gas development would only occur from drill islands, relying on Bureau of Land Management Order 3324.[125] Yet instead of explaining how these statements are incorrect, Fasken includes only a generic and unsupported assertion of its disagreement with this conclusion, simply stating that this is "falsely claimed."[126] Fasken provides no facts or expert support, aside from general statements by commenters, to specifically dispute the analysis found in the Holtec application or an explanation as to how Holtec's discussion on the implications of the Bureau of Land Management Order is incorrect.

Consequently, Fasken's proposed contention fails to meet the requirements of 10 C.F.R. § 2.309(f)(1).

B. Fasken's other claims, including the adequacy of consultation and consent-based siting, fail to articulate a genuine dispute with the application on a material issue.

Fasken further asserts in proposed Contention 3 that the NRC and Holtec have failed to adequately incorporate "major opposing viewpoints of State and local agencies and communities, contrary to the principles of consent-based siting."[127] But Fasken fails to demonstrate how this alleged failure to adequately incorporate these viewpoints is material to the findings the NRC must make or represents a genuine dispute with the application.

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[125] *Attachment 1: Responses to Requests for Additional Information* (Sept. 16, 2020) (ML20260H141).

[126] *Id.* at 25–26.

[127] *Id.* at 15.

In particular, Fasken has not demonstrated why "consent-based siting," or other recommendations by the 2012 Blue Ribbon Commission, are legally binding requirements (and thus material to the findings the NRC must make on the application) rather than simply an expression of Fasken's policy preferences.[128]

Additionally, the mere fact that the NRC received DEIS comments expressing opposition to the facility does not, without more, demonstrate that the EIS is incorrect, nor does Fasken's reference to those comments necessarily constitute a genuine dispute with the application. To the contrary, receipt of comments (including those that are critical of the proposed licensing action) after publication of the DEIS is an entirely normal step in the agency's NEPA process, and the NRC Staff must, in its preparation of the Final EIS, evaluate and examine these comments. Contrary to Fasken's implication, the publication of the DEIS, together with the collection and evaluation of these public comments, is an integral part of how the NRC solicits, considers, and incorporates the viewpoints of various stakeholders and properly evaluates the environmental impacts of the proposed action.[129] Fundamentally, the mere existence of adverse comments does not itself demonstrate a failure of the agency to comply with the requirements of 10 C.F.R. § 51.71(b) or any other NRC or NEPA requirement. And similarly, mere reference to such adverse comments is insufficient to demonstrate a genuine dispute with the application. Instead, it is Fasken's obligation, not the presiding officer's, to identify with

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[128] *Holtec Int'l*, LBP-19-4, 89 NRC at 391–92. *See also USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 470 (2006) (affirming Board decision that a "policy preference . . . does not raise a litigable issue in this proceeding.").

[129] In fact, as described in the DEIS, the Staff performed extensive outreach prior to publication of the DEIS, including six scoping meetings that included five local in-person meetings and open houses and one on-line meeting (i.e., webinar), as well as consultation with the New Mexico Environment Department as a cooperating agency. The Staff also held six public meetings following publication of the DEIS. *See Holtec International – HI-STORE CISF*, https://www.nrc.gov/waste/spent-fuel-storage/cis/holtec-international.html (last visited Nov. 30, 2020).

particularity the aspects of the application or DEIS it is contesting and why the application or DEIS is materially deficient.[130]

Accordingly, Fasken's references to comments from other stakeholders do not meet the threshold of demonstrating a genuine material dispute. For example, Fasken references complaints about the use of webinars in place of in-person meetings during the ongoing global health emergency, the safety of transportation, or the impacts of terrorism on the environment.[131] But Fasken has not articulated any specific requirement that mandates the use of in-person meetings following publication of a DEIS. And the Board and the Commission have already rejected (as outside the scope of the proceeding or otherwise unsupported) proposed contentions related to transportation safety and terrorism, based on both the regulatory framework for transportation (the distinction between a 10 C.F.R. Part 72 proceeding and the requirements in Part 71 that would ultimately govern shipments to a CISF) and NRC case law regarding whether and when to evaluate the potential impacts of terrorism on the environment.[132]

As a result, because Fasken fails to demonstrate how these other proposed claims are material to the findings the NRC Staff must make or to demonstrate a genuine dispute with the application, Fasken's proposed contention should be denied.

CONCLUSION

For the reasons set forth above, Fasken has not satisfied the criteria for reopening the record, has not shown good cause for its filing after the initial intervention deadline, and has not proffered an admissible contention. Accordingly, both Fasken's Motion to Reopen and its Motion for Leave to File Contention 3 should be denied.

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130 *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 156 (1991).

131 Motion for Leave at 18, 32, 35, 39.

132 *Holtec Int'l*, CLI-20-4, 91 NRC at 209–10.

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Dated in Rockville, MD
this 30th day of November 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. and Permian Basin Land and Royalty Owners' Motions to Reopen the Record and File New Contention 3," dated November 30, 2020, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the captioned proceeding, this 30th day of November 2020.

/Signed (electronically) by/

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Dated in Rockville, MD
this 30th day of November 2020