

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

IN THE MATTER OF
HOLTEC INTERNATIONAL

(Consolidated Interim Storage Facility)

Docket No. 72-1051

December 7, 2020

**FASKEN LAND AND MINERALS, LTD.'S AND PERMIAN BASIN LAND AND
ROYALTY OWNERS' COMBINED REPLY TO NRC STAFF'S AND HOLTEC
INTERNATIONAL'S OPPOSITIONS TO MOTION FOR LEAVE
TO FILE NEW CONTENTION NO. 3 AND MOTION TO REOPEN THE RECORD**

Contents

I. INTRODUCTION.....	1
II. LEGAL STANDARDS	4
A. NRC and NEPA	4
B. Reopening, Good Cause, and Contention Admissibility	6
III. FURTHER SUPPORT FOR CONTENTION NO. 3.....	8
A. Petitioners Meet the Requirements to Reopen the Record and Have Good Cause to File Contention No. 3	8
B. The Oppositions Mistakenly Conflate and Overgeneralize the Factual Basis for Petitioners’ Contention No. 3	11
C. Recent Comments Pull Back the Curtain on Speculative and Incomplete Information Provided by Holtec and Improperly Relied on By the NRC in the Holtec DEIS and Review of Holtec’s License Application	14
i. Recent XTO Comments Reveal a Lack of Any Agreement(s) to Restrict Oil and Gas Exploration or Future Development and Holtec’s Subservient Rights at the Proposed Location Where the Spent Nuclear Fuel Will Be Stored - <i>Painting A Very Different Picture of the Site- Specific Environmental Landscape</i>	15
ii. Holtec’s October 2020 RAI Responses and Recent ER and SAR Revisions Mischaracterize the Viability and Feasibility of Shallow Vertical Drilling Within the Proposed Site Boundaries - <i>Painting A Very Different Picture of the Site-Specific Environmental Landscape</i>	17
D. Petitioners Have Presented Material Disputes with Robust Factual Support Warranting a Different Outcome in the Holtec Proceeding.....	19
IV. CONCLUSION	21

Authorities

Cases

<i>Balt. Gas & Elec. v. Nat. Res. Def. Council, Inc.</i> , 462 U.S. 87, 97, 103 (1983).....	5
<i>Commonwealth Edison Co.</i> (LaSalle County Nuclear Station, Units 1 & 2), ALAB-153, 6 A.E.C. 821 (1973).....	7, 18
<i>Fla. Power & Light Co.</i> (Turkey Point Units 6 & 7), LBP-17-6, 86 N.R.C. 37, 48 (2017)	7
<i>Georgia Power Co.</i> (Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 N.R.C. 404 (1975)	7
<i>In the Matter of Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), 72 N.R.C. 720, LBP-10-24 (Dec. 28, 2010)</i>	3
<i>In the Matter of Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.</i> (Pilgrim Nuclear Power Station), CLI-12-21, 76 N.R.C. 491 (2012)	3, 7
<i>In re Matter of TVA Intervenors’ Reply to Responses in Opposition to Motion for Leave to File Contention 4 and Contention 5 Docket No. 52-047-ESP (June 22, 2018)</i>	5
<i>Nextera Energy Seabrook, LLC</i> (Seabrook Station, Unit 1), LBP-17-07, 75 N.R.C. 301 (2017)	19
<i>Northern Indiana Public Service Co.</i> (Bailly Generating Station, Nuclear-1), CLI-74-39, 8 A.E.C. 631 (1974).....	7
<i>Oglala Sioux Tribe v. NRC</i> , 896 F.3d 520 (D.C. Cir. 2018).....	10
<i>Robertson v. Methow Valley Citizens Council</i> , 490 U.S. 332, 349 (1989)	5
<i>Shaw AREVA MOX Services</i> (Mixed Oxide Fuel Fabrication Facility), 67 N.R.C. 460, 493 (2008).....	3, 8
<i>Tennessee Valley Authority</i> (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 N.R.C. 341, 352 (1978).....	7
<i>U.S. Dept. of Energy</i> , CLI-09-14, 69 N.R.C. 580, 588 (2009)	19
<i>Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council</i> , 435 U.S. 519, 553 (1978).....	4

Statutes

Atomic Energy Act, 42 U.S.C. § 2011..... 4

National Environmental Policy Act, 42 U.S.C. § 4321 passim

Other Authorities

NUREG-1567-"Standard Review Plan for Spent Fuel Dry Storage Facilities" 20

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" 2

Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46, 562
(Aug. 3, 2012) 7

Regulations

10 C.F.R. § 2.309 7, 12

10 C.F.R. § 2.236 3, 6

10 C.F.R. § 51.10 4

10 C.F.R. § 51.70 5

10 C.F.R. § 51.71 6

10 C.F.R. § 51.104 5

10 C.F.R. § 72.11 9

10 C.F.R. § 72.12 9

10 C.F.R. § 72.24 20

10 C.F.R. § 72.40 20

10 C.F.R. § 72.90-72.108 2, 4, 13, 20

10 C.F.R. § 72.94 4

10 C.F.R. § 72.98 9

10 C.F.R. § 72.103 4

40 C.F.R. § 1508.7 6

Now comes Fasken Oil and Ranch Ltd. (“Fasken”) and Permian Basin Land and Royalty Owners (“PBLRO”) (collectively “Petitioners”), by and through undersigned counsel, who respectfully submit the foregoing reply in further support of their Motion for Leave to File New Contention No. 3¹ and Motion for Leave to Reopen the Record² before the Atomic Safety Licensing Board (“ASLB”)³ and/or U.S. Nuclear Regulatory Commission (“NRC”) in the above-captioned matter, and state as follows:

I. INTRODUCTION

Petitioners filed New Contention No. 3 (“Contention”) to elucidate newly disclosed material facts relating to the existence of dominant property rights at the surface of the proposed Holtec International (“Holtec”) consolidated interim storage facility (“CISF”) site and the lack of any purported land use restrictions or effective agreements to restrict or limit mineral extraction activities at, beneath and adjacent to the proposed site that paint a seriously different picture of the environmental landscape and highlight the unsuitability and overwhelming opposition to placing the entire nation’s nuclear storage waste in the Permian Basin in the middle of one of the most active and productive oil hubs in the nation. This newly disclosed information substantially differs

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), hereinafter “Motion for Leave.”

² Fasken Land and Minerals, Ltd.’s and Permian Basin Land and Royalty Owners Motion to Reopen the Record (Nov. 5, 2020) (ADAMS Accession No. ML20310A441 (package); ML20310A442), hereinafter “Motion to Reopen.”

³ See NRC Staff’s Answer in Opposition to Fasken’s Motions to Reopen the Record and File New Contention No. 3 (Nov. 30, 2020) at 5 (ADAMS Accession No. ML20335A361), hereinafter “NRC Staff Opposition” (noting that jurisdiction may now rest with the Commission as opposed to the ASLB) (citing *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 N.R.C. 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)).

from information previously publicly available and aptly demonstrates the gross mischaracterizations in information provided by the applicant, in Holtec’s Environmental Report (“ER”) and Safety Analysis Report (“SAR”)⁴, and the faulty underlying assumptions in the Holtec draft environmental impact statement (“DEIS”)⁵ that improperly rely on such mischaracterizations.

Under NRC regulations, a license applicant is required to provide complete and accurate information in all material respects.⁶ And the NRC, in turn, is required to conduct an independent investigation into the reliability of information provided, take a “hard look” at the cumulative environmental and land use impacts, as well as the costs and benefits of the proposed project, under the National Environmental Policy Act (“NEPA”)⁷ and further evaluate siting factors and potential safety concerns under NRC regulations.⁸ As discussed herein, this clearly has not happened here.

Not only has the NRC failed to adequately consider the cumulative environmental and land use impacts and potential safety risks of locating the proposed CISF in southeast New Mexico, amidst extensive mineral extraction activities, it has also failed to consider serious legal risks and ramifications of same. Contrary to Holtec’s recent responses to NRC-issued requests for additional

⁴ Holtec Environmental Report on the HI-STORE CIS Facility, Rev. 7, Docket No. 72-1051 (August 2019) (ADAMS Accession No. ML19309E337), herein after “Holtec ER” and Holtec Safety Analysis Report, Rev. H (March 2020) (ADAMS Accession No. ML19163A062), hereinafter “Holtec SAR.”

⁵ 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.”

⁶ See 10 C.F.R. § 72.11(a) (information provided by a license applicant to the Commission must be “*complete and accurate in all material respects*”) (emphasis added).

⁷ The National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*, herein after “NEPA.”

⁸ See 10 C.F.R. §§ 72.40(a)(2), 72.90 – 72.108.

information (“RAI”),⁹ which fundamentally misconstrue the legal rights of oil and gas lessees at and beneath the proposed CISF site,¹⁰ and the ill-informed conclusions in the Holtec DEIS, future vertical drilling and well completion at the surface of the proposed location where the spent nuclear fuel would be stored is a reasonably foreseeable action – within a lessee’s dominant surface property rights and a reasonably foreseeable action that has not been proscribed or limited in any way by agreement or any land use restrictions, as suggested by Holtec.¹¹ Holtec’s purported claims of surface ownership and alleged land use restrictions for drilling and the NRC’s preliminary determinations and recommendation to allow the proposed CISF to be constructed and operated as proposed over the lifetime of the project not only violate NRC and NEPA regulations but would amount to a taking.¹² These substantial issues must be noticed, disclosed and appropriately reviewed and addressed in the licensing of the proposed Holtec CISF project.

Petitioners’ Contention clearly articulates genuine disputes with Holtec’s application¹³ that implicate important legal issues, safety risks and environmental impact; Petitioners have good cause to file New Contention No. 3, it is timely, admissible, and further supported by a Motion to Reopen the Record which satisfies the requirements of 10 C.F.R. § 2.236.¹⁴ As such, Petitioners’

⁹ See Holtec International, HI-STORE CIS License Application Responses to Requests for Additional Information (“RAI”) – Part 6, Response Set 2 (Oct. 21, 2020) (ADAMS Accession No. ML20260H139), RAI Responses (ADAMS Accession No. ML20260H141); herein after “Holtec Responses to RAIs.”

¹⁰ See Ex. 3, Motion for Leave, T. Taylor Affidavit.

¹¹ See Ex. 1, Motion for Leave, Public Comment in Opposition to the Holtec DEIS from XTO Energy, Inc. (D. Archuleta) (Sept. 22, 2020) *uploaded to ADAMS on Oct. 5, 2020 (ADAMS Accession No. ML20268C261), herein after “XTO Letter”; Ex. 3, Motion for Leave, T. Taylor Affidavit; see also Holtec DEIS; Holtec Responses to RAIs.

¹² Under New Mexico law, a lessee has a superior right to use the surface, therefore, lessees such as XTO have a right to the surface where the proposed nuclear waste is to be stored at the proposed Holtec site.

¹³ Petitioners references to “Holtec’s application” herein include Holtec’s responses to RAIs, as well as, its ER and SAR and the Holtec DEIS.

¹⁴ See *In the Matter of Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), 72 N.R.C. 720, 730-731, LBP-10-24 (Dec. 28, 2010) (“The regulations do not define or specify an exact number of days within which a new or amended contention must be filed in order to be considered ‘timely,’...unless a deadline has been specified...timeliness is subject to a reasonableness standard that

Contention should be admitted, the record reopened and an investigation launched into the credibility of the underlying information and conclusions in Holtec's application and the Holtec DEIS.

II. LEGAL STANDARDS

A. *NRC and NEPA*

The NRC cannot grant a license for the proposed CISF project until it determines that applicable regulatory requirements of the Atomic Energy Act of 1954 ("AEA"), NEPA and NRC are satisfied.¹⁵ NRC regulations demand license applications be complete, accurate and reliable information in all material respects¹⁶ and further require appropriate data to analyze site evaluation factors,¹⁷ including subsurface and geologic characteristics and a competent technical review of natural and man-induced events based on the "current state of knowledge."¹⁸

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

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

¹⁵ See Holtec DEIS at 4-102; see also 10 C.F.R. §51.10(a) (Nothing in the NRC NEPA implementing regulations alter the cardinal rule that license applications comply with all NRC regulations. Indeed, NEPA regulations must be carried out in a "manner which is consistent with the NRC's domestic licensing and regulatory authority under the [AEA].")

¹⁶ See 10 C.F.R. § 72.11(a) (information provided by a license applicant to the Commission must be "*complete and accurate in all material respects*") (emphasis added).

¹⁷ See 10 C.F.R. §§ 72.40(a)(2), 72.90 – 72.108.

¹⁸ See 72.92. , 72.94 (requiring examination of important natural phenomena and man-induced events, "based on the current state of knowledge of such events"); see also, 10 C.F.R. § 72.103(a)(1) (The NRC requires "...the results from onsite foundation and geological investigation, literature review, and *regional geological reconnaissance show no unstable geological characteristics, soil stability problems, or potential for vibratory ground motion at the site....*") (emphasis added).

conclusions.¹⁹ The NRC must focus on “the environmental consequences” of the proposed CISF project “[so] that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.”²⁰ Indeed, NEPA’s primary purpose is to inform the public of the environmental issues to encourage public participation and challenges to ensure optimal results based on the best possible record.

Draft and final EISs are government-sponsored documents that will subsequently be issued to other federal agencies, state agencies, and the public. Because the government stands by the reliability of the information and conclusions in its EISs, they are often used as references for a broad array of decisions. “*To casually include information that has not been independently verified for its reliability and completeness by the NRC would violate both NRC regulations and NEPA’s fundamental purpose of informing the public about environmental issues.*”²¹ Moreover, to protect the inclusion of information in an EIS from challenge in a licensing proceeding would violate NRC regulations governing public participation requirements.²²

Pursuant to NRC regulations, a DEIS must “state how alternatives considered in it and decisions based on it will or will not achieve [NEPA] requirements,²³ . . . *identify any methodologies used and sources relied upon, . . . be supported by evidence that the necessary environmental analyses have been made . . . [and that] [t]he NRC staff [] independently evaluate*

¹⁹ *Balt. Gas & Elec. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97, 103 (1983) (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 553 (1978))

²⁰ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

²¹ *In re Matter of TVA*, Intervenors’ Reply to Responses in Opposition to Motion for Leave to File Contention 4 (Inadequate Discussion of Environmental Impacts of Spent Nuclear Fuel Pool Fires) and Contention 5 (Impermissible Discussion of Energy Alternatives and Need for The Proposed SMR), Docket No. 52-047-ESP (June 22, 2018), (ADAMS Accession No. ML18174A075).

²² 10 C.F.R. § 51.104.

²³ Specifically, “sections 101 and 102(1) of NEPA and of any other relevant and applicable environmental laws and policies.”

and be responsible for the reliability of all information used in the draft [EIS].”²⁴ In completing a DEIS, the NRC is encouraged to cooperate with State and local agencies and “include consideration of major points of view concerning the environmental impacts of the proposed action and the alternatives, and contain an analysis of significant problems and objections raised by other Federal, State, and local agencies, by any affected Indian Tribes, and by other interested parties.”²⁵

Additionally, a DEIS must include discussion of the cumulative effects for a proposed project, defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”²⁶ Cumulative effects, synonymous with cumulative impacts, can result from individually minor but collectively significant actions taking place over a period of time. Per the Holtec DEIS, other past, present and future actions considered in the analysis include “potash mining, oil and gas production, other nuclear facilities, and wind and solar farms.”²⁷

B. *Reopening, Good Cause, and Contention Admissibility*

10 C.F.R. § 2.326 sets forth the requirements for reopening the record: (1) a motion to reopen the record must be timely; (2) the motion must address a significant safety or environmental issue; and (3) the motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially. A motion to reopen

²⁴ 10 C.F.R. § 51.70(b) (emphasis added).

²⁵ 10 C.F.R. § 51.71(b).

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

²⁷ *Id.*

must also be accompanied by an appropriate affidavit.²⁸ Hearings may be reopened when a significant environmental issue is involved, where factual disclosures reveal a need for further development of an evidentiary record and where changed circumstances involve a hotly contested issue.²⁹

In addition to meeting the general admissibility requirements of 10 C.F.R. § 2.309(f)(1),³⁰ any 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 party must demonstrate good cause by showing the following three conditions are met:

- (i) The information upon which the filing is based was not previously available.
- (ii) The information upon which the filing is based is materially different than information previously available.³¹

²⁸ See 10 C.F.R. § 2.236(b) (motion must be accompanied by affidavit by competent individuals with “knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised” and set forth evidence explaining how each criteria has been met and the particular issues raised).

²⁹ See, *Georgia Power Co.* (Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 N.R.C. 404 (1975) (hearing may be reopened when a significant environmental issue is involved); *Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 N.R.C. 341, 352 (1978) (where factual disclosures reveal a need for further development of an evidentiary record, the record may be reopened for the taking of supplemental evidence); *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), CLI-74-39, 8 A.E.C. 631 (1974) (reopening has been ordered where the changed circumstances involved a hotly contested issue); see also, *Commonwealth Edison Co.* (LaSalle County Nuclear Station, Units 1 & 2), ALAB-153, 6 A.E.C. 821 (1973) (Board may reopen the record when it becomes aware, from any source, of a significant safety issue or of possible changes in facts material to the resolution of a major environmental issue).

³⁰ This section requires 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 which support the requestor’s/petitioner’s position on the issue...together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant’s environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner’s belief.

³¹ The Commission has stated that “materially different” information is that which “differs significantly. . . from the information in the applicant’s documents.” Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46, 562 at 46, 572 (Aug. 3, 2012). See also, *Fla. Power & Light Co.* (Turkey Point Units 6 & 7), LBP-

- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.³²

III. FURTHER SUPPORT FOR CONTENTION NO. 3

A. *Petitioners Meet the Requirements to Reopen the Record and Have Good Cause to File Contention No. 3*

Petitioners have established good cause to file Contention No. 3 and it meets the requirements to reopen the record. Holtec and the NRC cannot back their way into arguments here by relying on layers of speculation as to future contracts purportedly limiting extraction activities and hypothetical land use restrictions without consultation with regional entities, expertise and interested parties or defend their respective positions for storing the nation's nuclear waste in the Permian Basin without analyzing actual cumulative land use impacts now and in the reasonable future at the proposed site. As noted in recent comments opposing the proposed Holtec project, oil and gas and mineral extraction industries are essential to the region and "economic engines" that fund public education and other regional infrastructure, which Holtec intends to rely on during the proposed construction and operation of its CISF. Yet the potential impacts to extraction activities and competing land uses in the vicinity of the site are heavily discounted or materially omitted in the Holtec DEIS cost-benefit analyses and evaluation of potential alternatives. The NRC cannot shirk its NEPA mandated responsibilities and should not value form over substance when dealing with the transportation and potential storage of the entire nation's nuclear waste.

17-6, 86 N.R.C. 37, 48, *aff'd*, CLI-17-12, 86 N.R.C. 215 (2017) (in the context of late-filed contentions, "materially different" concerns the "type or degree of difference between new information and previously available information").
³² See *In the Matter of Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 N.R.C. 491, 491 (2012) (noting that "although 'timely' is not expressly defined by months or days in [NRC] regulations. . . typically [] 30 to 60 days from the initiating event [is considered] a reasonable deadline for proposing new or amended contentions."); *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), 67 N.R.C. 460, 493 (2008) (30 days held as presumptive time frame for timeliness of late-filed contentions).

Holtec, as the applicant, was not forthcoming and did not provide complete and accurate information in connection with its application,³³ raising considerable doubt about its ability to operate the facility consistent with NRC rules. In clear violation of NRC regulations, Holtec fraudulently misrepresented, purposefully omitted and/or calculatingly shielded vital information regarding existing property rights, reasonably foreseeable future land uses and absence of land restrictions within the boundaries of the proposed site from the NRC (and the public).³⁴ In turn, the NRC, contrary to NRC and NEPA regulations, failed to conduct an independent investigation into the reliability of such information to ensure its accuracy and completeness, allowing Holtec to delay its responses to RAIs that directly relate to the status of reasonably foreseeable future oil and gas and mineral extraction operations and associated impacts for nearly a year, officially releasing Holtec's RAI responses and corresponding revisions to its ER and SAR on October 21, 2020 (nearly a month after the deadline for public comments on the Holtec DEIS). The NRC's publication of Holtec's long overdue responses and most recent updates to its ER and SAR, after the close of the DEIS comment period, underscores the lack of transparency here and the importance of Petitioners' New Contention. Relying on inaccurate and incomplete information as to land uses and industry operations eliminates any opportunity for a proper site evaluation as required by NRC regulations and has resulted in a wholly deficient DEIS in violation of NEPA regulations. Furthermore, the perpetually moving targets created by the NRC's timing and official

³³ Violation of 10 C.F.R. § 72.11 (“[i]nformation provided to the Commission by . . . an applicant. . . must be complete and accurate in all material respects” and “must notify the Commission . . . of information. . . having, for the regulated activity, a significant impact for public health and safety or common defense and security.”)

³⁴ Violation of 10 C.F.R. §§ 72.11; 72.12; 72.98 (requiring identification of “regional extent of external phenomena, man-made or natural, that are used as a basis for design of the ISFSI); 72.90(d) (siting evaluation factors, under NRC regulations, require the “[p]roposed sites with design basis external events for which adequate protection cannot be provided through ISFSI or MRS design shall be deemed unsuitable for the location of the ISFSI or MRS”); 72.90(a) (“Site characteristics that may directly affect the safety or environmental impact of the ISFSI or MRS must be investigated and assessed.”); 72.100 (“Defining potential effects of the ISFSI or MRS on the region”)

release of Holtec’s ER and SAR revisions and Holtec’s RAI responses, which contain materially different, erroneous and speculative descriptions of competing land uses at, beneath and around the proposed Holtec site, prejudice potential intervenors, robbing them of a meaningful opportunity to file contentions and timely dispute the ever-changing facts and information that allegedly serve as the underlying bases for the NRC’s DEIS review and preliminary recommendations for the approval of Holtec’s license application.³⁵

Petitioners timely filed Contention No. 3 on November 5, 2020, well within the 30-day presumptive time period, based on new and materially different information, not previously available, contained in Holtec’s long-awaited RAI responses and concurrently released revisions to its ER and SAR (notably published by the NRC on October 21, 2020 after the submission deadline for comments in response to the NRC’s Holtec DEIS) and recent comments submitted in opposition to the Holtec CISF project by XTO and others (made publicly available on the NRC website on October 5, 2020).³⁶ Holtec’s latest responses to NRC-issued RAIs (information deemed “necessary” by the NRC itself in the review of Holtec’s license application) and Holtec’s corresponding revisions to previously provided information in its ER and SAR, by their very nature, inherently implicate important safety and/or environmental issues, are material and within the scope of the proceedings.

More specifically, the NRC published October comments submitted in opposition to the proposed Holtec project, reveal glaring omissions, discrepancies and deficiencies in the underlying assumptions of the Holtec DEIS and directly contradict information in Holtec’s most recent RAI

³⁵See *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018) (emphasizing NEPA requirements of federal agencies and noting the “classic Catch-22” scenarios embedded in NRC’s “settled practice” in allowing licenses to remain in effect while NEPA violations were being corrected).

³⁶ See generally Motion for Leave.

responses and accompanying corrections and modifications to Holtec's ER and SAR. As discussed in Petitioners' Motions and herein, these information updates and implicated issues cannot be ignored under NRC and NEPA regulations. Had complete and accurate information on competing land uses and the unsuitability of the site been provided and considered earlier, it is likely that the NRC would have altered its preliminary recommendation to allow the Holtec project to move forward as proposed. Had accurate and complete information been discovered earlier, the NRC may have opted for another more suitable site location and/or determined that the No Action alternative would be more desirable. At the very least, the NRC must consider the discrepancies and deficiencies in previously provided information in its technical analyses for the facility layout and design bases, in its assessment of cumulative environmental and land use impacts, in its cost-benefits and socioeconomic analyses, and in determining if mitigation measures are necessary for the proposed Holtec CISF project. Thus, Petitioners have met the requirements to reopen, have good cause and have timely filed Motions supporting Contention No. 3.

B. *The Oppositions Mistakenly Conflate and Overgeneralize the Factual Basis for Petitioners' Contention No. 3*

The NRC Staff's Opposition and Holtec's Opposition mistakenly conflate and overgeneralize the factual basis for Petitioners' Contention No. 3 as "repurpose[d]" or materially the same as previously filed contentions.³⁷ The Oppositions also unfairly shift the burden to Petitioners for timeliness, tasking Petitioners with the responsibility of anticipating and predicting how Holtec and/or the NRC would modify its previously speculative disclosures and prior publication of incorrect information and how the NRC's lack of engagement with regional

³⁷ See Holtec's Answer Opposing Fasken's Motion to Reopen the Record and Motion for Leave to File New Contention No. 3 (Nov. 30, 2020) (ADAMS Accession No. ML20335A570) at 11, hereinafter "Holtec Opposition"; see also, NRC Staff's Opposition.

agencies and other interested parties would play out.³⁸ No such burden exists and this improperly places form over substance. The Oppositions also inappropriately attempt to shift the burden of timeliness into *when Fasken became aware* or should have known.³⁹ But as stated in the NRC Staff’s prior opposition, “[t]he determination of timeliness under 10 C.F.R. § 2.309(c)(1)(iii) is based on when the factual information giving rise to the contention *was reasonably available to the public.*”⁴⁰ Petitioners have timely raised and presented disputes with Holtec’s ever-evolving application based on the reasonable availability of public information that must be addressed and resolved in a legitimate NRC review of Holtec’s proposed license.

Early on in the above-captioned license proceedings, Holtec falsely misrepresented (without any justification) that it had “complete control” of all mineral extraction activities below and in the vicinity of the proposed site.⁴¹ Later Holtec recanted, and the NRC blindly accepted, without a reasonable basis or apparent consultation with regional entities, speculation that Holtec was “in discussions” with the State Land Office to limit extraction activities at the proposed site.⁴² Recent comments in opposition to the proposed Holtec CISF project paint a very different picture – one based in reality – where an oil and gas lessee with dominant property rights at the proposed site has not entered into any agreements with Holtec to limit or restrict its rights, where neither Holtec nor the NRC has provided any showing of land use restrictions that currently exist at the proposed site and where extractable minerals are available at depths shallower than 3,050 feet via

³⁸See generally, NRC Staff’s Opposition; Holtec Opposition.

³⁹ NRC Staff’s Opposition at 14-19; Holtec Opposition at 11-15.

⁴⁰ NRC Staff’s Answer in Opposition to Fasken’s Motion to Reopen the Record and File Amended Contention No. 2 June 4, 2020) (ADAMS Accession No.ML20156A228) at 16 (citations omitted).

⁴¹ See Ex. 3, Motion for Leave, T. Taylor Affidavit at ¶¶ 10(a)-(b).

⁴² Holtec DEIS at 4-4 (according to Holtec RAI responses “[t]he New Mexico State Land Office is currently in discussions with Holtec International regarding an agreement in principle to retire any potash, unencumbered by regulatory restrictions in perpetuity.”).

vertical drilling and well completion at the surface of the proposed site.⁴³ Contrary to the Oppositions, intimate details of XTO's lease and the status of its discussions and internal decision to refuse to enter into any limiting agreements with Holtec were not made publicly available before the NRC's publication of its October comments. Likewise, Petitioners could not have possibly predicted how Holtec would respond to the NRC's November 2019 RAIs in late October 2020 with misleading information, related to overlapping issues, prior to the NRC officially releasing Holtec's RAI comments and revisions.

Indeed, had this information been reasonably available to the public prior to the NRC's issuance of determinations and conclusions in the Holtec DEIS, one would expect the NRC's required independent investigation into the reliability of such information and review of Holtec's licensing application would have surely uncovered same. However, this information is glaringly missing and/or falsely stated in the underlying assumptions and conclusions of the Holtec DEIS in violation of NRC and NEPA regulations requiring a "hard look" into the cumulative environmental and land use impacts, as well as the costs and benefits of the proposed project.⁴⁴ For example, Holtec's application is completely devoid of any discussion of the reasonably foreseeable future extraction activities and vertical well completion within the proposed site boundary. This very real possibility for future oil and gas development, brought to light by recent comments and outlined in the Affidavit of T. Taylor in Petitioners' Motion for Leave, is materially omitted and not accounted for in the potential cumulative impacts on land use, not accounted for in terms of the

⁴³ See generally, Motion for Leave; Motion to Reopen; see also, Ex. 1, Motion for Leave, XTO Letter; Ex. 3, Motion for Leave, T. Taylor Affidavit; Ex. 4, Motion for Leave, New Mexico State Land Office Letter (A. Biernoff) to U.S. Nuclear Regulatory Commission (Sept. 22, 2020) (ADAMS Accession No. ML20269A003) ("Had the State Land Office been properly consulted as a part of this process, it would have provided NRC Staff with accurate information relating to the project site and existing and potential mineral estate activities.").

⁴⁴ See e.g., NEPA regulations at 42 U.S.C. § 4321 *et seq.*; NRC regulations at 10 C.F.R. §§ 72.40(a)(2), 72.90 – 72.108.

number of potential transient employees in the vicinity, not accounted for in the cost and benefit analyses or in the socioeconomic context of the potential loss of royalty revenues supporting public education and infrastructure, and not accounted for or even considered in the facility design layout or potential impacts to safety, structure or components of the proposed CISF project.⁴⁵

The timing of Fasken's New Contention also speaks volumes as to the distinctions with previously filed contentions. Only after local and State agencies, departments, regional entities and governmental representatives filed comments in opposition to the Holtec CISF project did it become apparent that the NRC, in violation of its own regulations, NEPA regulations and the consent-based siting recommendations of the Blue Ribbon Commission, had not consulted and incorporated the major viewpoints of interested parties in the Holtec DEIS. Holtec's October 2020 responses to November 2019 NRC-issued RAIs and Holtec's recent updates to its ER and SAR revisions further demonstrate how Holtec's lack of forthrightness has created a perpetually moving target for potential intervenors. Holtec's unfounded representations and speculation regarding land uses in the vicinity of the proposed Holtec site and the NRC's willingness to accept them have prejudiced the timely filing of contentions by potential intervenors.

C. *Recent Comments Pull Back the Curtain on Speculative and Incomplete Information Provided by Holtec and Improperly Relied on By the NRC in the Holtec DEIS and Review of Holtec's License Application*

Recently submitted comments paint a very different picture of the environmental and legal landscapes at the proposed site that were improperly excluded from consideration in the Holtec

⁴⁵ See Motion for Leave; Ex. 3, Motion for Leave, T. Taylor Affidavit; Ex. 4, Motion for Leave; Holtec DEIS at 4-6 (finding "proposed CISF would have *no impact on oil and gas exploration and development* in the proposed project area because extraction will continue to occur at depths greater than 930 m [3,050 ft]. Therefore, the NRC staff concludes that the land use impacts during the construction stage for the proposed action (Phase 1) would be SMALL, and potential impacts for Phases 2-20 would also be SMALL.") (emphasis added).

DEIS. These comments, submitted in opposition to the proposed Holtec CISF project, directly contradict unsubstantiated conjectures regarding potential future land use restrictions, negotiations and unapproved agreements with third parties and the development and reasonably foreseeable future mineral and oil and gas exploration at the proposed site contained in Holtec's most recent October 2020 RAI responses and also information relied on in the Holtec DEIS.⁴⁶ Holtec's misleading statements and refusal to timely reply to the NRC's RAIs (initially issued nearly one year prior), precluded a fulsome NRC review and the "hard look" and agency analysis of cumulative environmental and land use impacts required under NEPA. Holtec's newly released RAI responses and related revisions to its ER and SAR contain false information that is directly contradicted by recent statements made by XTO and other regional entities, information previously unavailable to the public, which further supports Petitioners' Contention No. 3 and the proposition that the NRC failed to conduct an independent investigation into the reliability of the information underlying its determinations in the Holtec DEIS in violation of NRC and NEPA regulations.

i. Recent XTO Comments Reveal a Lack of Any Agreement(s) to Restrict Oil and Gas Exploration or Future Development and Holtec's Subservient Rights at the Proposed Location Where the Spent Nuclear Fuel Will Be Stored - *Painting A Very Different Picture of the Site-Specific Environmental Landscape*

Contrary to the Oppositions' assertions that Holtec's application already conclusory acknowledges that the State owns the mineral estate and that Fasken's prior contentions regarding discrepancies and deficiencies in the license application's as to descriptions of drilling depths have been resolved, XTO's most recent comments and factual basis for Fasken's New Contention,

⁴⁶ See Motion for Leave at 25; Ex. 1, Motion for Leave, XTO Letter at 4 (XTO claims Holtec has "[n]o legal authority . . .to decide how XTO may develop its lease" and the Holtec DEIS "shortchange[s] impacts to XTO's paramount lease rights to both produce subsurface oil and gas and utilize the surface as necessary for such development"); Holtec Responses to RAIs; Holtec ER; Holtec SAR.

reveal for the first time publicly, that XTO has dominant surface property rights within the proposed Holtec CISF project boundary. XTO's comments also disclose, for the first time, that it has not entered into any agreements with Holtec or the NRC to restrict or otherwise limit in any way its rights to "both produce subsurface oil and gas and utilize the surface as necessary for such development."⁴⁷ The impingement of XTO's lease rights and reasonably foreseeable oil and gas development at the proposed Holtec site were not adequately considered (or even considered at all) in the context of the proposed project's potential cumulative impacts on land use in the NRC's review of Holtec's license application. XTO's recent comments also implicate potentially serious legal issues involving property rights and socioeconomic ramifications for the region and surrounding communities should the proposed Holtec CISF project move forward as recommended.

This newly disclosed information is materially different and at odds with information in Holtec's recent RAI responses and latest modifications to its ER and SAR, further highlighting deficiencies in the Holtec DEIS's reliance on applicant provided information. Indeed, XTO's comments are in stark contrast to Holtec's October 21, 2020 responses to NRC-issued RAIs asserting "[n]o new oil and gas wells will be constructed within the Facility boundaries because new drill islands will not be permitted on the privately owned land"⁴⁸ and misinformed conclusions in the Holtec DEIS that the proposed project will have "no impact on oil and gas exploration not have any impact on oil and gas exploration and development in the proposed project area because extraction will continue to occur at depths greater than 930 m [3,050 ft]."⁴⁹

⁴⁷ XTO Letter at 3.

⁴⁸ See Holtec Response to RAI 2-8.

⁴⁹ See Holtec DEIS at 4-7.

ii. Holtec’s October 2020 RAI Responses and Recent ER and SAR Revisions Mischaracterize the Viability and Feasibility of Shallow Vertical Drilling Within the Proposed Site Boundaries - *Painting A Very Different Picture of the Site-Specific Environmental Landscape*

Unlike the cases cited by the Oppositions that focus on safety aspects in the context of the NRC’s review of renewal license proceedings, Petitioners’ Contention deals with the obligation of a license applicant to provide “complete and accurate” information and the obligation of the NRC to conduct an independent investigation into the reliability of such information in an initial license proceeding and the evidence undergirding NEPA and NRC mandated *site-specific* analyses. Such site-specific considerations must include the property rights of those in and around the proposed location, adequate assessment of cumulative impacts on land use and a proper weighing of the costs and benefits and potential safety risks to communities and security over the lifetime of the project. And it must involve a complete picture of the site-specific landscape now and in the future.

Both Holtec, as the applicant, and the NRC, as the agency, have blatantly disregarded their responsibilities to assess site evaluation factors, ignoring reasonably foreseeable future land uses and development rights (and potential beneficiaries), failing to contact or consult with the State Land Office, oil and gas lessees, and other regional entities in the context of the proposed Holtec CISF project.⁵⁰

⁵⁰ See, Motion for Leave at 31 (“These entities represent significant sources of revenue for the region, a major source of employment and fund indispensable services, like housing, public education and transportation infrastructure in the region”); Ex. 4 to Motion for Leave, New Mexico State Land Office Letter (A. Biernoff) to U.S. Nuclear Regulatory Commission (Sept. 22, 2020) (ADAMS Accession No. ML20269A003) (“the proposed location, in one of the world’s top producing oil and gas regions [and Holtec’s proposed CISF] could have an adverse impact on one of New Mexico’s key economic engines.”); New Mexico Governor Michelle Lujan Grisham Letter to U.S. Nuclear Regulatory Commission (John Tappert) (Sept. 22, 2020) (ADAMS Accession No. ML20269A025); New Mexico Senator Steinborn et al. Letter to the U.S. Nuclear Regulatory Commission (Sept. 22, 2020) (ADAMS Accession No. ML20275A333) *posted to NRC website on Oct. 5, 2020.

As stated in the Affidavit of T. Taylor, an expert in the field of oil production and extraction with knowledge of the facts alleged herein, the revised and updated statements in Holtec’s most recent RAI responses are false. “The truth is that the Yates formation beneath and surrounding the proposed CISF occurs at shallower depths than is being reported by Holtec. . .[it is] (usually found at 2500ft) and is best reached vertically and not horizontally, which vertical wells would be located directly above, at the surface, and not required to be situated at the drilling islands as claimed by Holtec. . . but instead within the confines of the CISF site.”⁵¹ Given the uncertainties as to the lasting economic impacts of the COVID-19 pandemic, the cost efficiencies of potential vertical wells are all the more alluring. A plausible fact that Holtec and the NRC has entirely dismissed from any investigation or analyses at the proposed site. According to Taylor, there is renewed interest in exploring the Yates formation below the CISF given advances in drilling technologies and because “the drilling and completion of vertical wells and wells at shallow depths is much less costly with less mechanical risk as compared to drilling deep targets.”⁵² Much like the recently disclosed unrestricted dominant property rights of the lessee at the proposed site, the cost efficiencies of drilling in this area through vertical well completion were also not considered.⁵³ Vertical wells, which would require well completion at the surface of the precise location where Holtec proposes storing nuclear waste, are “more affordable than horizontal wells, more affordable than deeper geologic wells and more appealing during the unprecedented pandemic.”⁵⁴

⁵¹ See Ex. 3, Motion for Leave, T. Taylor Affidavit at ¶10(e).

⁵² *Id.*

⁵³ *In the Matter of Commonwealth Edison Co.* (La Salle County Nuclear Station Units 1 and 2) (Oct. 19, 1973), 6 A.E.C. 821, ALAB-153 Memorandum and Order (remanding board decision to make additional findings related to agricultural need for land and land use impacts), hereinafter “*Edison.*”

⁵⁴ See Ex. 3, Motion for Leave, T. Taylor Affidavit at ¶10(e).

This is an unprecedented situation - where true parallels cannot be drawn. However, if one were to try – the most on point decision would be *Edison*, where a reopening of the record was deemed warranted, to gather additional information to supplement the evidentiary record as to the need for agricultural land for a proposed nuclear facility. Similar to the situation in *Edison*, it is not proper to resolve a major environmental issue and land use impacts “on the basis of a set of facts existing in the past if there is good reason to believe that there may have been an appreciable, and material, change in the factual situation.”⁵⁵ The reasonable prospects for oil and gas development and land uses at and around the proposed Holtec site, like in *Edison*, has evolved and the agency’s analyses of same cannot be based on “old facts in a rapidly changing world.”⁵⁶

Yet, the NRC has fundamentally disregarded future development in the Permian Basin and the vital economic role mineral extraction activities and associated royalties play in local communities, as well as the importance of such industries in the safety and security of the nation. Much like the NRC also ignored major viewpoints of regional parties in its recent Holtec DEIS.

D. *Petitioners Have Presented Material Disputes⁵⁷ with Robust Factual Support Warranting a Different Outcome in the Holtec Proceeding*

Petitioners have pinpointed falsehoods and disputes with material facts and underlying premises and determinations in specific sections of Holtec’s application. Petitioners’ New Contention is based on new and materially different factual evidence that challenge the moving

⁵⁵ See *Edison* at 6 A.E.C. at 824.

⁵⁶ *Id.* at 823.

⁵⁷ See, *U.S. Dept. of Energy*, CLI-09-14, 69 NRC 580, 588 (2009) (demonstrating a genuine dispute of fact or law requires a petitioner to show “specific ties to NRC regulatory requirements, or to safety in general”); *Nextera*, LBP-17-07, 75 NRC 301 (finding “sufficient information” to demonstrate a genuine dispute to require inclusion of references to specific portions of the application that a petitioner disputes and for deficient applications, identification of alleged areas of deficiencies with supporting beliefs).

targets that Holtec has created with the countless revisions to its application documents.⁵⁸ This information should have been considered by the NRC in its DEIS evaluations and warrants a different outcome in the above-captioned proceeding. Petitioners are experienced and knowledgeable in the field, are challenging material issues and have put forth concrete evidence to back it up. The NRC cannot reasonably consider alternative sites or approaches, implement mitigation strategies or alterations to facility design or safety structures and components, without accurate and complete underlying information. Because Holtec failed to provide such information and the NRC failed to independently review or confirm the reliability of such information, the Holtec DEIS falls short of NRC and NEPA standards.

Risks and impacts and interdependent and collective - they interact with other risks and cannot be properly assessed in isolation. The XTO issues outlined herein must be analyzed as they impact (1) site integrity (2) future geophysical changes (3) site security given XTO's right of access and (4) any proper evaluation of costs and benefits for the chosen site location in the middle of the Permian Basin. Without reliable information as to the present and foreseeable future oil and gas and mineral extraction operations at the proposed site location, a proper assessment of cumulative impacts on land use, geology and soils and cost-benefit analyses cannot be done. Nor can a proper NRC assessment ignore the major viewpoints in opposition to the proposed Holtec CISF project. The absence of such considerations here violates NRC regulations requiring an assessment of man-made and natural phenomena impacting the project, as well as general siting

⁵⁸ See Petitioners Motion to Amend at 12 (“Holtec’s application misleads the NRC and the public regarding subsurface mineral rights, ongoing oil and gas and mining extraction operations, geologic characteristics and the cumulative impacts the proposed CISF [] and regional activities will have on the environment, land use, and surrounding populations.”); *see also*, Exhibit 2 (listing facts and information Petitioners intend to rely on in support of Amended Contention No. 2).

evaluation factors, and further violates NEPA regulations requiring consideration of alternative actions.⁵⁹

IV. CONCLUSION

Timeliness and procedural issues should not overshadow substance of legal, environmental, potential safety, sabotage and terrorism issues here. The massive undertaking of the proposed project deserves reciprocal analyses and cumulative impacts. Petitioners' New Contention warrants a reopening of the record, at the very least, so additional information and evidence can supplement the record to allow for adequate consideration and evaluation of the issues that the NRC and NEPA regulations require.

WHEREFORE, Petitioners pray the ASLB and/or Commission allow Petitioners' Motion to Reopen the Record and admit Contention No. 3 for full adjudication.

Dated: December 7, 2020

/electronically signed by Allan Kanner

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⁵⁹ See 10 C.F.R. §§ 72.40(a)(2), 72.90 – 72.108; see also 10 C.F.R. § 72.24(a); NUREG-1567 § 2.4.2; 42 U.S.C. § 4321 *et seq.*

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

IN THE MATTER OF
HOLTEC INTERNATIONAL

(Consolidated Interim Storage Facility)

Docket No. 72-1051

December 7, 2020

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I Allan Kanner certify that, on this 7th day of December, 2020, true and correct copies of Fasken's Reply to NRC Staff's and Holtec International's Oppositions to Motion for Leave to File New 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.

/electronically signed by Allan Kanner

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