

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

INTERIM STORAGE PARTNERS LLC

(WCS Consolidated Interim Storage Facility)

Docket No. 72-1050

NRC STAFF'S ANSWER IN OPPOSITION TO FASKEN OIL AND
RANCH, LTD.'S AND PERMIAN BASIN LAND AND ROYALTY
OWNERS' PETITION FOR REVIEW OF LBP-21-2

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OWNERS' PETITION FOR REVIEW OF LBP-21-2**

INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), the U.S. Nuclear Regulatory Commission Staff submits its answer opposing Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners' (together, Fasken's) petition for review of LBP-21-2. In LBP-21-2, the Atomic Safety and Licensing Board ruled on Fasken's motions to reopen the record and for leave to file new Contention 5.¹ The Board determined that Fasken did not meet the requirements in 10 C.F.R. § 2.326 for reopening the record or the good cause requirements of 10 C.F.R. § 2.309(c) for contentions filed after the initial intervention deadline. Although those determinations alone provided sufficient grounds to reject new Contention 5, the Board further concluded that Fasken failed to satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). In its petition for review, Fasken has not demonstrated that the Board committed an error of law or abused its discretion. Therefore, the Commission should affirm the Board's decision.

¹ *Interim Storage Partners, LLC* (WCS Consolidated Interim Storage Facility), LBP-21-2, 93 NRC ___, __ (Jan. 29, 2021) (slip op. at 1).

BACKGROUND

In April 2016, Waste Control Specialists LLC (WCS) applied to the Nuclear Regulatory Commission (NRC) for a license to construct and operate a consolidated interim storage facility for spent nuclear fuel and greater-than-Class C waste in Andrews County, Texas.² A year later, WCS asked the NRC to suspend consideration of its application, and WCS and the NRC staff then jointly requested that the pending hearing opportunity be withdrawn.³ Thereafter, WCS created a joint venture with Orano CIS LLC to form Interim Storage Partners LLC (ISP).⁴

In June 2018, ISP submitted a revised license application,⁵ and the NRC published a *Federal Register* notice that permitted interested members of the public to request a hearing and petition to intervene.⁶ In September 2018, Fasken instead filed before the Commission a motion 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

² Waste Control Specialists LLC, Application for a License for a Consolidated Interim Spent Fuel Storage Facility (Apr. 28, 2016) (ADAMS Accession No. ML16133A100).

³ *Joint Request to Withdraw the Federal Register Notice Providing an Opportunity to Submit Hearing Requests* (Apr. 19, 2017) (ML17109A480) (attaching letter to NRC Document Control Desk from Rod Baltzer, WCS (Apr. 18, 2017)).

⁴ Interim Storage Partners LLC License Application, Docket 72-1050, Andrews County, Texas, rev. 2, at 1-1, 1-4 (July 2018) (ADAMS Accession No. ML18206A483).

⁵ Letter from Jeffery Isakson, ISP, to Document Control Desk, NRC, *Submittal of License Application Revision 2 and Request to Restart Review of Application for Approval of the WCS CISF, Docket 72-1050* (June 8, 2018) (ML18166A003); Letter from Jeffery Isakson, ISP, to Document Control Desk, NRC (July 19, 2018) (ML18206A482) (updated submittal).

⁶ Interim Storage Partners Waste Control Specialists Consolidated Interim Storage Facility, 83 Fed. Reg. 44,070, 44,070–75 (Aug. 29, 2018), corrected, 83 Fed. Reg. 44,680 (Aug. 31, 2018) (correcting the deadline date for petitioners to request a hearing to October 29, 2018). The Secretary of the Commission later extended this deadline to November 13, 2018. Order of the Secretary, at 2 (Oct. 25, 2018) (unpublished).

⁷ *Motion of Fasken Land and Minerals and Permian Basin Land and Royalty Owners to Dismiss Licensing Proceedings for HI-STORE CISF and WCS CISF*, at 1-8 (Sept. 14, 2018) (ML18257A330).

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

Fasken then also submitted a hearing request,⁹ as did several other petitioners. After briefing, the Board heard oral argument in Midland, Texas, concerning petitioners' standing and the admissibility of their contentions.¹⁰

In LBP-19-7, the Board denied Fasken's hearing request and the hearing requests of all other petitioners except Sierra Club.¹¹ Although the Board concluded that Fasken had not proffered an admissible contention, the Board found that Fasken had established standing.¹² Thereafter, the Board dismissed Sierra Club's sole admitted contention.¹³ Before the Board dismissed Sierra Club's contention, one of the other petitioners, Sustainable Energy and Economic Development Coalition, submitted a motion to file a new contention,¹⁴ which the Board denied in December 2019, thereby terminating the proceeding.¹⁵

Fasken appealed the Board's determinations in LBP-19-7 regarding three of its six proposed contentions.¹⁶ Also, in July 2020, after the Board's termination of the proceeding, Fasken filed motions to reopen the record and admit a new contention based on the release of

(ML18302A328); Memorandum from Annette Vietti-Cook to E. Roy Hawken (Nov. 8, 2018) (ML18313A298).

⁹ *Petition of Permian Basin Land and Royalty Organization and Fasken Land and Minerals for Intervention and Request for Hearing* (Oct. 29, 2018) (ML18302A412).

¹⁰ Licensing Board Notice and Order, at 1 (May 24, 2019) (unpublished) (establishing dates and location of oral argument).

¹¹ *Interim Storage Partners, LLC* (WCS Consolidated Interim Storage Facility), LBP-19-7, 90 NRC 31, 39 (2019).

¹² *Id.*

¹³ *Interim Storage Partners, LLC* (WCS Consolidated Interim Storage Facility), LBP-19-9, 90 NRC 181, 192 (2019).

¹⁴ *Motion of Intervenor Sustainable Energy and Economic Development Coalition for Leave to File Late-Filed Contention, and Contention 17* (Oct. 23, 2019) (ML19297A226).

¹⁵ *Interim Storage Partners, LLC* (WCS Consolidated Interim Storage Facility), LBP-19-11, 90 NRC 358, 368 (2019).

¹⁶ *Fasken and PBLRO's Brief on Appeal of LBP-19-7* (Sept. 17, 2019) (ML19260J386) (Fasken Initial Appeal).

NRC Staff's draft environmental impact statement (DEIS).¹⁷ In CLI-20-14, the Commission affirmed the Board's decision in LBP-19-7 to deny the hearing request of Fasken (as well as other Petitioners).¹⁸ The Commission remanded to the Board Fasken's motion to admit its new proposed contention challenging the DEIS (New Contention 5) for a threshold determination of admissibility.¹⁹ On January 29, 2021, the Board issued its decision in LBP-21-2, holding that Fasken's motion to reopen the record was untimely, that Fasken failed to demonstrate good cause for filing New Contention 5 after the initial intervention deadline, and that New Contention 5 did not meet the contention admissibility requirements.²⁰ Fasken now appeals the Board's ruling.²¹

DISCUSSION

I. Applicable Legal Standards

A. Standard of Review

This appeal is not associated with Fasken's initial intervention petition, and Fasken therefore seeks review under 10 C.F.R. § 2.341.²² On threshold matters such as contention admissibility, the Commission gives substantial deference to board rulings unless the appeal points to an error of law or abuse of discretion that might serve as grounds for reversal of the

¹⁷ *Fasken Motion For Leave to File New and/or Amended Contention* (July 6, 2020) (ADAMS Accession No. ML189A000); *Fasken Motion to Reopen the Record* (July 6, 2020) (ML20188A390).

¹⁸ *Interim Storage Partners, LLC* (WCS Consolidated Interim Storage Facility) CLI-20-14, 92 NRC __, __ (Dec. 17, 2020) (slip op. at 1, 35).

¹⁹ *Id.* at __ (slip op. at 1–2, 34–35).

²⁰ LBP-21-2, 93 NRC __, __ (Jan. 29, 2021) (slip op. at 1).

²¹ *Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners' Combined Notice of Appeal and Petition for Review of Atomic Safety Licensing Board's Denial of Motion for Leave to File New Contention No. 5 and Motion to Reopen the Record* (Feb. 23, 2021) (ADAMS Accession No. ML21054A331) (Appeal).

²² *Id.* at 7. Commission precedent confirms that § 2.341 is the appropriate vehicle for review of appeals of rulings on the admissibility of new or amended contentions after determinations on initial intervention petitions. See *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 125-26 (2006).

board's decision.²³ The Commission has maintained that "[r]ecitation of an appellant's prior positions in a proceeding or statement of general disagreement with a decision's result is not sufficient."²⁴ Rather, a valid appeal "must point out the errors in the [b]oard's decision."²⁵

B. Requirements for Reopening the Record

Pursuant to 10 C.F.R. § 2.326(a), a petitioner seeking to open a closed record must show that its motion (1) is timely, however, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented; (2) addresses a significant safety or environmental issue; and (3) demonstrates that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.²⁶ A motion to reopen the record accompanying an amended contention may be considered timely if filed within 30 days of the date upon which the new information is available.²⁷ 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.²⁸

²³ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 234 (2008). To the extent Fasken's appeal were considered under section 2.311 rather than 2.341, the standard of review for contention admissibility determinations is the same. *Luminant Generation Co. LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), CLI-12-7, 75 NRC 379, 386 (2012).

²⁴ *Florida Power and Light Co.* (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 NRC 215, 219 (2017) (citations omitted).

²⁵ *Id.*

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

²⁷ *See Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 493 (2008) (noting that "[m]any times, boards have selected 30 days as [the] specific presumptive time period" for timeliness of contentions filed after the initial deadline).

²⁸ *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 337–38 (2011). Reopening will only be allowed where "the proponent presents material, probative evidence which either could not have been discovered before or could have been discovered but is so grave that, in the judgement of the presiding officer, it must be

Additionally, 10 C.F.R. § 2.326(b) requires supporting affidavits from experts or otherwise competent individuals to accompany the motion that “set forth the factual and/or technical bases for the movant’s claim that the criteria of [10 C.F.R. § 2.326(a)] have been satisfied.”²⁹ 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.”³⁰ Affidavits containing bare assertions or speculation and lacking technical details or analysis are insufficient to meet the reopening standards.³¹

C. Good Cause Requirements for New or Amended Contentions

Amended contentions submitted after the initial date for hearing requests must meet the requirements of 10 C.F.R. § 2.309(c)(1). To do so, a petitioner must demonstrate good cause by showing that the information upon which the filing is based was not previously available, that the information upon which the filing is based is materially different from information previously available, and that the filing has been submitted in a timely fashion based on the availability of the subsequent information.³² 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).³³

New environmental contentions based on the NRC Staff’s draft environmental document (here, the DEIS) are permitted if data or conclusions in the document differ

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

²⁹ 10 C.F.R. § 2.326(b).

³⁰ *Id.*

³¹ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 670, 674 (2008).

³² 10 C.F.R. § 2.309(c)(1).

³³ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260–61 (2009).

significantly from the applicant's environmental report.³⁴ Nevertheless, NRC regulations and longstanding Commission precedent make clear that for issues arising under the National Environmental Policy Act (NEPA), a petitioner must first file contentions based on the applicant's environmental report and may amend those contentions only if the draft or final EIS differ significantly from the data or conclusions in the applicant's documents.³⁵ It is fundamental that a new or amended contention must be raised at the earliest possible opportunity.³⁶ Thus, as a general rule, environmental contentions submitted for the first time after the DEIS is issued will be deemed untimely unless there are data or conclusions in the DEIS that differ significantly from the data or conclusions in the applicant's documents.³⁷

D. Requirements for Contention Admissibility

The regulation at 10 C.F.R. § 2.309(f)(1) establishes the "basic criteria that all Contentions must meet in order to be admissible."³⁸ The Commission strictly applies these contention admissibility requirements in NRC adjudications.³⁹ Failure to comply with any one

³⁴ 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)).

³⁵ 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).

³⁶ 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)).

³⁷ *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-12-12, 75 NRC 742, 755–56 (2012).

³⁸ *Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 572 (2006); see also *USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 436–37 (2006) (stating that the Commission "will reject any contention that does not satisfy the requirements").

³⁹ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006) (citing *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied*, CLI-02-1, 55 NRC 1 (2002)).

of the criteria is grounds for the dismissal of a contention.⁴⁰ The requirements are intended to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”⁴¹ The hearing process is reserved “for genuine, material controversies between knowledgeable litigants.”⁴²

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

Fasken asserts that the Board erred in denying its motions to reopen the record and to admit its Contention 5 after the initial intervention deadline. As explained below, Fasken does not demonstrate that the Board committed an error of law or abused its discretion. The Board correctly held that Fasken failed to meet the Commission’s reopening requirements under 10 C.F.R. § 2.326(a); failed to provide good cause to satisfy § 2.309(c)(1); and failed to satisfy the contention admissibility requirements of § 2.309(f)(1). Accordingly, the Commission should affirm the Board’s decision.

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

Because the Board’s decision in LBP-19-11 terminated the proceeding, in support of its motion for leave to file new Contention 5, Fasken filed an accompanying motion to reopen the record. In LBP-21-2, the Board properly denied Fasken’s motion on multiple grounds.⁴³ Most critically, the Board correctly found that Fasken’s motion was untimely.⁴⁴ Fasken’s fundamental

⁴⁰ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *see also Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Station, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016).

⁴¹ Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

⁴² *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 396 (2012) (quoting *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 219 (2003)).

⁴³ LBP-21-2, 93 NRC at __, __ (slip op. at 9).

⁴⁴ *Id.* at __ (slip op. at 6). The Board also found that the motion did not comply with § 2.326 on the grounds that Fasken did not address a significant safety or environmental issue and did not show that, if the motion were granted, a materially different result would be likely. *Id.* The Board also expressed

assertion in Contention 5 was that the DEIS fails to adequately consider the impacts of transporting high-level waste and spent nuclear fuel to ISP's proposed facility, as well as the socioeconomic benefits of the project.⁴⁵ For example, Fasken claimed that the DEIS contained inadequate information regarding transportation routes and potential legal risks from transporting nuclear waste on rails, barges, and heavy trucks.⁴⁶ The Board rejected this argument as untimely, observing that the representative routes used in the DEIS were comparable to a route that was analyzed in ISP's Environmental Report (ER) and identical to a representative route in NUREG-2125, which the DEIS referenced.⁴⁷ Accordingly, the Board held that Fasken could have raised such challenges well before the DEIS was issued.⁴⁸

Fasken also claimed that for the first time, the DEIS relied on and cited to data from the Department of Energy's 2008 transportation analysis in evaluating the use of barges for transporting spent nuclear fuel to the proposed geologic repository at Yucca Mountain, Nevada.⁴⁹ However, the Board found that Fasken failed to identify how the information and conclusions in the DEIS related to the evaluation of the use of barges to transport spent nuclear

uncertainty as to whether the affidavit from Fasken's counsel satisfied the requirements in § 2.326(b) for supporting affidavits. Specifically, the Board noted that Fasken's affiant did not claim technical expertise in the relevant matters and did not claim personal knowledge of the critical facts. While the Board determined it did not need to reach this issue of the affiant's knowledge and expertise because of the motion's other dispositive deficiencies, Fasken's failure to meet either of these affidavit requirements constituted sufficient grounds to deny the motion to reopen. *See Entergy Nuclear Generating Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-6, 75 NRC 352, 367 (1989); *cf. Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 431-432 (1989) (rejecting reopening motion for petitioner's failure to provide an affidavit addressing the petitioner's relevant expertise or factual knowledge).

⁴⁵ Motion to Reopen at 11.

⁴⁶ *Id.* at 5.

⁴⁷ LBP-21-2, 93 NRC at ___ (slip op. at 7).

⁴⁸ *Id.* at ___ (slip op. at 6).

⁴⁹ *Id.*

fuel are different from that in ISP's ER.⁵⁰ Likewise, the Board found that Fasken failed to show how the DEIS's transportation analysis related to accidents (that Fasken claims is inadequate) materially differs from the analysis of accidents in ISP's ER.⁵¹ The Board also noted that, unlike Fasken, other petitioners had timely challenged the transportation routes in their 2018 hearing requests.⁵²

Fasken made additional claims in support of Contention 5, which the Board observed were likewise all premised on information available to Fasken long before the DEIS was published.⁵³ For example, Fasken claimed that the DEIS improperly omitted analysis that would identify who is responsible for the costs of coordinating transportation, infrastructure improvement payments, and the provision of essential emergency training for first responders on unknown transportation routes.⁵⁴ The Board found that this claim could have been asserted at the beginning of the proceeding, because ISP's ER also provided no such analysis. Having considered each of Fasken's claims, the Board ultimately determined that Contention 5 and Fasken's associated motion to reopen were untimely because the statements Fasken sought to challenge in the DEIS do not materially differ from publicly available information that was already contained much earlier in ISP's application.⁵⁵

On appeal, Fasken asserts that the Board "improperly conflates and glosses over Fasken's nuanced challenges" regarding insufficient transportation analyses, which it claims

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at __ (slip op. at 8).

⁵⁴ *Id.*

⁵⁵ *Id.* at __ (slip op. at 9).

constituted an abuse of the Board's discretion.⁵⁶ In purported support of its claim, Fasken presents a series of quotes from the ER and DEIS, which it asserts show "new and materially different conclusions and/or sources" that were relied on in the DEIS.⁵⁷

However, Fasken does nothing more than list quotes from the ER and DEIS and assert some differences in the wording; it does not explain how any of those differences are significant, much less material to the claims in Contention 5. Indeed, the listed quotes were included in Fasken's initial filing,⁵⁸ which the Board considered and rejected.⁵⁹ Fasken thus simply repeats its original claims; it does not identify any error in the Board's legal reasoning for determining that Fasken failed to demonstrate that the DEIS included information that was new and materially different relative to the ER. Recitations of an appellant's prior position and statements of general disagreement with a decision's result are not sufficient to support a valid appeal.⁶⁰ Therefore, the Commission should affirm the Board's denial of Fasken's motion to reopen the record.

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

In Contention 5, Fasken initially asserted that it satisfied the good cause requirements because it claimed the information forming the basis of Contention 5 was not available prior to the DEIS's issuance and that certain sources and conclusions in the DEIS "significantly vary in material respects" from the information included in ISP's license application documents.⁶¹ In LBP-21-2, the Board determined that Fasken's Contention 5 failed to meet the good cause

⁵⁶ Appeal at 14.

⁵⁷ *Id.* at 14-16.

⁵⁸ *Id.* at 15-16.

⁵⁹ LBP-21-2, 93 NRC at ___ (slip op. at 7-9).

⁶⁰ *Turkey Point*, CLI-17-12, 86 NRC at 219 (citations omitted).

⁶¹ Motion for Leave at 6.

requirements because it was not based on “new, previously unavailable information that differs materially from information that was previously available.”⁶² The Board’s decision thus rested principally on the same legal and factual grounds on which it rejected Fasken’s motion to reopen the record (as discussed above).⁶³

On appeal, Fasken reiterates its claim that Contention 5 is based on new information because “Fasken’s DEIS-based Contention pinpoints specific disputes that have only recently revealed deficiencies in the hypothetical conditions of the proposed ISP license that identify glaring omissions and inaccuracies that span much more than just representative routes in NRC’s ISP DEIS assessments.”⁶⁴ But as explained above, Fasken merely repeats the unsupported assertions from its initial filing, claiming “significant” differences between ISP’s ER and NRC’s ISP DEIS related to cumulative impacts from the transporting of spent nuclear fuel.⁶⁵ The Board fully considered each of Fasken’s underlying claims, describing why they were either based on information that was not new or was not materially different from information previously available.⁶⁶ It is the petitioner’s burden to demonstrate that a contention filed after the initial intervention deadline meets the requirements in 10 C.F.R. § 2.309(c)(1), and the Board found that Fasken had not carried that burden.⁶⁷ Other than conclusory statements of disagreement, Fasken has not identified any error in the Board’s reasoning. Simply reciting a prior position is insufficient to support a valid appeal.⁶⁸ As Fasken has not demonstrated that

⁶² LBP-21-2, 93 NRC at __ (slip op. at 10).

⁶³ *Id.* at __ (slip op. at 6-9).

⁶⁴ Appeal at 14-15.

⁶⁵ Appeal at 15-17.

⁶⁶ LBP-21-2, 93 NRC at __ (slip op. at 4-10).

⁶⁷ *Id.* at __ (slip op. at 10).

⁶⁸ *Turkey Point*, CLI-17-12, 86 NRC at 219 (citations omitted).

the Board committed an error of law or abuse of discretion, the Commission should affirm the Board's decision that Fasken has not shown good cause for filing Contention 5 out of time.

C. The Board Correctly Rejected Contention 5 as Inadmissible

In LBP-21-2, the Board found that Fasken's failure to satisfy the requirements for reopening the record and its failure to show good cause for proffering a contention out of time were both sufficient grounds to reject Contention 5.⁶⁹ Nevertheless, the Board also rejected Contention 5 for failing to satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1).⁷⁰ Fundamentally, the Board found that Fasken did not meet its burden to proffer an admissible contention because the issues raised in Contention 5 are either outside the scope of this proceeding, not material to the findings the NRC must make in its EIS, or fail to raise a genuine dispute with the application on a material issue of law or fact.⁷¹

In Contention 5, Fasken's overarching claim was that the ISP DEIS should identify specific transportation routes because "the use of 'representative routes' simply will not do."⁷² Specifically, Fasken asserted that transporting nuclear waste to ISP's proposed facility "has a clear physical, functional, and temporal nexus to the project and the storage and transportation activities are inextricably linked actions."⁷³ Fasken further asserted that in order to make a best estimate regarding the risks to communities within the transportation corridor, there needs to be an analysis with the "exact number of shipments to [the proposed facility]; expected numbers of start clean/stay clean shipments (return to sender) and the number of shipments from [the

⁶⁹ LBP-21-2, 93 NRC at __ (slip op. at 10).

⁷⁰ *Id.*

⁷¹ *Id.* at __ (slip op. at 15).

⁷² Motion for Leave at 14.

⁷³ *Id.*

facility] to a permanent repository based on [the] operational lifespan of [the facility].”⁷⁴ Fasken also argued that the DEIS “materially misleads the public” regarding the ownership and responsibility, radiological risks, and socioeconomic impacts of transporting nuclear waste from decommissioned sites to ISP’s proposed site.⁷⁵

The Board found that Fasken failed to explain why, under NEPA or the NRC’s environmental regulations, the DEIS must include the requested in-depth analysis of hypothetical future shipping routes. The Board noted that for a contention to be admissible it must identify a “deficiency in the environmental analysis” and may not merely offer “suggestions” of alternative ways the analysis could have been done.⁷⁶ Moreover, the Board observed that Fasken failed to acknowledge, let alone address, that finding otherwise would require the Board to reach a different result than it reached on a virtually identical claim in this same proceeding, one that the Commission explicitly affirmed in CLI-20-14.⁷⁷ Namely, in its prior ruling (LBP-19-7) rejecting a claim raised by other petitioners that there must be complete disclosure of all probable transportation routes, the Board determined that the selection of “actual routes” would be the “responsibility of the spent fuel owners, not ISP.”⁷⁸ Moreover, the Board had also concluded that a more specific analysis would be appropriate for “an application for a transportation license, not ISP’s application to construct a storage facility.”⁷⁹

⁷⁴ *Id.* at 25.

⁷⁵ *Id.* at 12.

⁷⁶ LBP-21-2, 93 NRC at ___ (slip op. at 13); see *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 323 (2012) (citation omitted).

⁷⁷ LBP-21-2, 93 NRC at ___ (slip op. at 13). In LBP-19-7, the Board rejected Joint Petitioners’ claim that there must be complete disclosure of all probable transportation routes because petitioners failed to raise a genuine dispute concerning the adequacy of ISP’s analysis of representative routes. LBP-19-7, 90 NRC at 88-89, *aff’d*, CLI-20-14, 92 NRC at ___ (slip op. at 9).

⁷⁸ LBP-19-7, 90 NRC at 88–89; LBP-21-2, 93 NRC at ___ (slip op. at 14).

⁷⁹ LBP-19-7, 90 NRC at 88–89; LBP-21-2, 93 NRC at ___ (slip op. at 14).

The Board noted that all of Fasken's related claims are dependent on its fundamental and mistaken assertion that hypothetical future transportation routes are required to be more fully disclosed and analyzed.⁸⁰ Nevertheless, the Board also addressed reasons why these claims were inadmissible on other grounds.⁸¹ For example, the Board rejected Fasken's claims that the adequacy of socioeconomic and cost-benefit analyses hinge on the responsibility and costs for transportation coordination, payments for the infrastructure improvements, and the provision of emergency training for first responders along transportation routes; the Board explained that emergency response and infrastructure are outside of the scope of this Part 72 proceeding.⁸²

On appeal, Fasken re-asserts its claims that it had identified violations of NEPA regulations and "NRC siting evaluation" regulations.⁸³ Specifically, Fasken asserts that the NRC's ISP DEIS "insufficiently considers transportation in light of regional geologic characteristics, collective and long-term impacts on regional industry, and omits and/or discounts significant interdependent variables from the socioeconomic calculus."⁸⁴ But Fasken again fails to explain or identify how the supposed omitted information violates NEPA or NRC regulations. If a petitioner claims that a document fails to contain relevant information that is legally required, it must identify each such alleged failure and the reason why the missing information is needed.⁸⁵ In any event, as discussed *supra*, the Board directly considered these arguments and explained why they did not ultimately represent a genuine dispute on a material issue.

⁸⁰ LBP-21-2, 93 NRC at ___ (slip op. at 14).

⁸¹ *Id.*

⁸² *Id.*

⁸³ Appeal at 18.

⁸⁴ *Id.*

⁸⁵ LBP-21-2, 93 NRC at ___ (slip op. at 12); 10 C.F.R. § 2.309(f)(1)(vi).

On appeal, Fasken also asserts that the Board's ruling and the NRC's analyses regarding the ISP DEIS "lack candor, rely on faulty underlying assumptions and extrapolations, improperly interprets congressional intent and NRC authority under the Nuclear Waste Policy Act and the Atomic Energy Act, and in turn evade obligations and mandated requirements" under NEPA and NRC regulations.⁸⁶ This vague complaint appears to simply repeat Fasken's Contention 5 arguments claiming that more evaluation is necessary associated with hypothetical future Department of Energy involvement in either the ownership of spent fuel or its transportation to the facility. In addition to failing to articulate how there is any material difference in this regard between the analyses in the DEIS and the ER, Fasken again proceeds from the mistaken premise that actual future transportation routes must be defined as part of this Part 72 interim storage facility application. As the Board correctly found, these claims fail to show how the issues raised are material to the findings the NRC must make in the DEIS, and do not raise a genuine dispute on a material issue of law or fact.⁸⁷ The standard for overturning the Board's contention admissibility determinations is a deferential one,⁸⁸ and Fasken does not show that the Board made a legal error or abused its discretion.

As a final matter, Fasken asserts that "delays" in ISP's responses to NRC staff requests for additional information (RAIs) have created a "formidable wall to potential intervenors for reasonable adjudication of crucial issues."⁸⁹ However, Fasken does not specify how the timing or content of ISP's RAI responses demonstrates any material deficiency in the application or DEIS, regarding the issues in Contention 5 or otherwise. In any event, the Commission has

⁸⁶ Appeal at 19.

⁸⁷ LBP-21-2, 93 NRC at ___ (slip op. at 13-15).

⁸⁸ *Seabrook*, CLI-12-5, 75 NRC at 323.

⁸⁹ Appeal at 20.

long held that “RAIs are a standard and ongoing part of NRC licensing reviews.”⁹⁰ A petitioner must do more than “rest on [the] mere existence” of RAIs as a basis for a contention.⁹¹ It remains the petitioner’s obligation to examine changes to the application and, if it seeks to raise a new contention based on such changes, to demonstrate that it meets the applicable requirements in 10 C.F.R. Part 2. In sum, because Fasken fails to demonstrate any Board error of law or abuse of discretion in determining that Contention 5 failed to meet multiple provisions of § 2.309(f)(1), the Commission should affirm the Board’s determination that Contention 5 is inadmissible.

CONCLUSION

For the reasons set forth above, Fasken has not shown that the Board’s decision in LBP-21-2 contains an error of law or an abuse of discretion. Accordingly, the Commission should affirm the Board’s decision.

/Signed (electronically) by/

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Dated this 22nd day of March 2021

⁹⁰ *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998).

⁹¹ *Id.* at 350.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

INTERIM STORAGE PARTNERS LLC

(WCS Consolidated Interim Storage Facility)

Docket No. 72-1050

Certificate of Service

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing “NRC STAFF’S ANSWER IN OPPOSITION TO FASKEN OIL AND RANCH, LTD.’S AND PERMIAN BASIN LAND AND ROYALTY OWNERS’ PETITION FOR REVIEW OF LBP-21-2,” dated March 22, 2021, has been served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the captioned proceeding, this 22nd day of March 2021.

/Signed (electronically) by/

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Dated this 22nd day of March 2021