UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Christopher T. Hanson, Chairman
Jeff Baran
Annie Caputo
David A. Wright

In the Matter of HOLTEC INTERNATIONAL (HI-STORE Consolidated Interim Storage Facility)	Docket No. 72-1051-ISFSI

CLI-21-07

MEMORANDUM AND ORDER

Today we address an appeal by Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (together, Fasken) of the Atomic Safety and Licensing Board's decision denying Fasken's motion to reopen the record and admit an amended contention.[1] We also address Fasken's motion to reopen the record and admit its proposed Contention 3.[2] For the reasons described below, we deny both the appeal and the motion to reopen.

[1] *See Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners' Combined Notice of Appeal and Petition for Review of Atomic Safety Licensing Board's Denial of Motion for Leave to File Amended Contention and Motion to Reopen the Record* (Sept. 28, 2020) (Fasken Appeal); *Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners' Combined Reply to Oppositions to Their Notice of Appeal and Petition for Review of Atomic Safety Licensing Board's Denial of Motion for Leave to File Amended Contention and Motion to Reopen the Record* (Nov. 3, 2020) (Fasken Reply); LBP-20-10, 92 NRC __ (Sept. 3, 2020) (slip op.). Fasken has also participated in this proceeding under the name Fasken Oil and Ranch; because both the parties and the Board have made no distinction between these entities, we refer to them simply as "Fasken."

[2] *See Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners Motion to Reopen the Record* (Nov. 5, 2020) (Third Motion to Reopen); *Fasken Land and Minerals Ltd.'s*

I. BACKGROUND

Holtec International (Holtec) has applied for a license to build and operate a consolidated interim storage facility (CISF) in southeastern New Mexico.[3] The proposed license would allow Holtec to store up to 8,680 metric tons of uranium (MTUs) (500 loaded canisters) in the Holtec HI-STORE CISF for a period of forty years.[4] The Environmental Report analyzes the environmental impacts of possible future expansions of the project of up to 100,000 MTU storage capacity.[5]

A. Earlier Rulings

At the outset of this proceeding, six different petitioners or groups of petitioners sought to intervene and requested a hearing. In May 2019, the Board denied the hearing requests and terminated the proceeding after concluding that the petitioners had not met our hearing

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and Permian Basin Land and Royalty Owners Motion for Leave to File New Contention No. 3 (Nov. 5, 2020) (Contention 3).

[3] *See* Letter from Kimberly Manzione, Holtec International, to Michael Layton, NRC (Mar. 30, 2017) (enclosing application documents including safety analysis report and environmental report) (ADAMS accession no. ML17115A431 (package)). We note that the application has been revised several times since it was first submitted, and Fasken does not specify to which versions of the application it references. In this order we cite the current revisions, Environmental Report on the HI-STORE CIS Facility, rev. 8 (Aug. 2020) (ML20295A485) (ER); and Licensing Report on the HI-STORE CIS Facility, rev. 0J (Sept. 15, 2020) (ML20295A428) (SAR), unless otherwise noted. Because the sections and subsections where information is located stays the same across versions while page numbers change, we cite these documents by section number.

[4] *See* Proposed License for Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste SNM-1051, at 1 (ML17310A223) (Proposed License).

[5] ER § 1.0.

standards.[6] In that ruling, the Board found that Fasken had demonstrated standing but its proposed contention was not admissible.[7] Fasken appealed.[8]

On August 1, 2019—while its appeal was pending—Fasken filed a motion for leave to file a new contention, Contention 2, concerning the mineral rights to the site of the proposed facility.[9] Fasken argued in Contention 2 that both the safety and environmental sections of Holtec's application included materially misleading and inaccurate statements suggesting that Holtec could control or restrict mineral development at the site.[10] Fasken argued that a June 19, 2019, letter from New Mexico Public Lands Commissioner Stephanie Garcia Richard to Holtec shows that these statements are not true.[11] Fasken further argued that because Holtec cannot restrict mineral development, it cannot satisfy the Part 72 siting evaluation factors, including the requirement to examine the frequency and severity of natural and anthropogenic events that could affect the facility's safe operation.[12]

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[6] *See* LBP-19-4, 89 NRC 353, 358 (2019).

[7] *Id.* at 366-67, 383-426.

[8] *Fasken and PBLRO Notice of Appeal and Petition for Review* (June 3, 2019).

[9] *See Fasken Oil and Ranch and Permian Basin Land and Royalty Owners Motion for Leave to File a New Contention* (Aug. 1, 2019) (Original Contention 2).

[10] Original Contention 2 at 4-5 (citing SAR § 2.1.4, 2.6.4; ER §§ 2.4.2, 3.1.1, 8.1.3). Fasken did not include a motion to reopen the proceeding with its original Contention 2. Fasken later filed a motion to reopen on September 3, 2019, but withdrew it without explanation on September 12, 2019. *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); *Fasken and PBLRO's Withdrawal of Their "Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019"* (Sept. 12, 2019).

[11] *See* Letter from Denise McGovern, NRC, to Stephanie Garcia Richard, New Mexico Commissioner of Public Lands (July 2, 2019), Attach., Letter from Stephanie Garcia Richard, New Mexico Commissioner of Public Lands, to Krishna P. Singh, Holtec International (June 19, 2019) (ML19183A429) (stating that New Mexico owns the mineral estate under Holtec's site and does not agree to limit mineral extraction).

[12] Original Contention 2 at 6-10; *see also* 10 C.F.R. § 72.90(b).

In April 2020, we affirmed the Board's ruling with respect to Fasken's original hearing request, and we remanded Contention 2 to the Board.[13] Shortly before the remand, in March 2020, the NRC Staff released its draft environmental impact statement (DEIS).[14] In May 2020, Fasken moved to reopen the record and amend Contention 2 based on the DEIS.[15]

In June 2020, the Board issued LBP-20-6, which, among other rulings, dismissed Contention 2 as Fasken had originally submitted it.[16] The Board found that Fasken did not meet the reopening standards in its original Contention 2 and, moreover, Fasken would not have been able to meet the less stringent requirements for filing a late contention even had the record been open when the contention was filed.[17] Specifically, the Board found that the motion was not timely because the Environmental Report acknowledged that New Mexico owned mineral rights at the site.[18] The Board also pointed to Holtec's response to a Staff request for additional information (RAI) available months before Fasken filed its new contention, which stated that

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[13] CLI-20-4, 91 NRC 167, 176, 210-11 (2020). In CLI-21-4, 93 NRC __ (Feb. 18, 2021) (slip op.), we affirmed the Board with respect to its rulings related to another petitioner, Sierra Club.

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

[15] *Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Motion for Leave to File Amended Contention No. 2* (May 11, 2020) (Amended Contention 2); *Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Motion to Reopen the Record* (May 11, 2020) (Second Motion to Reopen); *see also* Order of the Secretary (Apr. 7, 2020) (unpublished) (granting extension of time to file contentions based on the DEIS until May 11, 2020).

[16] LBP-20-6, 91 NRC 239 (2020). Most of LBP-20-6 related to rulings on Sierra Club's contentions.

[17] *Id*. at 255-56.

[18] *Id*.; *see also* Environmental Report on the Hi-Store CIS Facility, rev. 6 (Jan. 2019), § 3.1.2 at 3-2 (ML19163A146) (revision current when Fasken filed its original Contention 2).

New Mexico held mineral rights to the site.[19] The Board deferred ruling on the recently filed Amended Contention 2.[20]

B. LBP-20-10

In September 2020, the Board dismissed Amended Contention 2, in which Fasken argued that:

> Holtec's application fails to adequately, accurately, completely and consistently describe the control of subsurface mineral rights and oil and gas and mineral extraction operations beneath and in the vicinity of the proposed Holtec CISF site, which precludes a proper analysis under NEPA and further nullifies Holtec's ability to satisfy NRC's siting evaluation factors now and anticipated in the future and is in further violation of NRC regulations.[21]

Fasken argued that the DEIS relies on insufficient data, omits material information, reaches improper conclusions, and misrepresents the extent to which Holtec can control or limit mineral development on the site.[22] Fasken further argued that outstanding RAIs concerning oil and gas production, potash mining, subsidence, sinkholes, and seismicity near the site warranted suspension of the license review until Holtec provided its response.[23]

The Board found that Amended Contention 2 was not timely and therefore did not meet the reopening standards. In addition, it held that, even had Fasken met the reopening standards, Amended Contention 2 was inadmissible because Fasken did not show that there

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[19] LBP-20-6, 91 NRC at 256; *see also* Letter from Kimberly Manzione, Holtec International, to Jill Caverly, NRC (Mar. 15, 2019), Attach. 9, Potash Mining Lease Partial Relinquishment Agreement (Dec. 6, 2016) (ML19081A083).

[20] LBP-20-6, 91 NRC at 256.

[21] Amended Contention 2 at 10-11; s*ee* LBP-20-10, 92 NRC at __ (slip op. at 24). Fasken states that it does not challenge LBP-20-6. *See* Fasken Appeal at 5.

[22] Amended Contention 2 at 13-14.

[23] *Id.* at 20-28.

was a genuine dispute over an issue material to the findings that the NRC must make in considering the application.[24]

In its appeal, Fasken argues that it either met the reopening standards, or in the alternative, the reopening standards should be waived because Fasken raises an "exceptionally grave" issue.[25] Fasken also claims that the Board erred in fact and law and abused its discretion. The NRC Staff and Holtec oppose the appeal.[26]

C. Third Motion to Reopen and Contention 3

Fasken filed its third motion to reopen on November 5, 2020, while its appeal of LBP-20-10 was pending. Fasken argues that new and materially different information has come to light in the form of recently submitted public comments on the DEIS from oil and gas developers, New Mexico Public Lands Commissioner Richard, and other entities concerning the effect of the project on mineral development in the vicinity of the CISF.[27] Among the commenters is XTO Energy, Inc., which asserts that it holds an oil and gas lease from New Mexico for 2,120.6 acres of land, including the proposed site, and that Holtec's proposed project would interfere with XTO's contractual rights to use the surface to develop minerals at the site.[28]

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[24] LBP-20-10, 92 NRC at __ (slip op. at 18-20) (citing 10 C.F.R. § 2.309(f)(1)(iv), (vi)).

[25] *See* Fasken Appeal at 25-27.

[26] *NRC Staff's Answer in Opposition to Fasken Oil and Ranch, Ltd.'s and Permian Basin Land and Royalty Owners' Petition for Review of LBP-20-10* (Oct. 23, 2020); *Holtec International's Answer in Opposition to Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners' Appeal of LBP-20-10* (Oct. 26, 2020) (Holtec Answer).

[27] *See* Contention 3 at 1-2, Ex. 1 at 19-23 (Exhibit 1 consists of several documents including Letter from David R. Scott, XTO Energy, Inc. to Office of Nuclear Material Safety and Safeguards, NRC (Sept. 22, 2020) (ML20268C261) (XTO Comments on DEIS)). The Staff publicly released the comments on October 4, 2020, thirty-one days prior to Fasken's motion.

[28] Contention 3, Ex. 1, XTO Comments on DEIS at 2. *See also* e-mail from Deanna Archuleta, XTO Energy, Inc. to Holtec-CISFEIS Resource, NRC, Attach., Oil and Gas Lease (May 10, 1951) (Oil and Gas Lease).

Fasken also claims that the RAI responses referenced in Amended Contention 2, which were publicly released in October 2020, contain new information supporting Contention 3.[29]

II. DISCUSSION

A. Reopening Standards

A motion to reopen the record to admit a new contention must satisfy both the standards of 10 C.F.R. § 2.326 relating to motions to reopen and the standards of 10 C.F.R. § 2.309(c) for admitting new contentions filed after the deadline stated in the notice of opportunity to request a hearing.[30] The reopening standard provides that a new contention must be timely, but the standard for admitting new contentions after the deadline is more specific and requires that the contention's proponent establish "good cause" for why the contention was not raised at the outset of the proceeding. Section 2.309(c) provides that "good cause" requires that a new contention must be based on information that was "not previously available," which is "materially different" from previously available information, and that the contention is timely based on when the new, materially different information became available.[31] With respect to environmental contentions, our regulations specify that participants "shall file [environmental] contentions based on the applicant's environmental report" and that new or amended environmental contentions may be filed on a DEIS where that document contains information that is "materially different from information previously available."[32]

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[29] *See* Letter from Kimberly Manzione, Holtec International, to Jose Cuadrado, NRC (Sept. 16, 2020) (ML20260H139 (package)) (RAI Part 5, Response Set 2) (public release date Oct. 21, 2020).

[30] *See* 10 C.F.R. § 2.326(d), *see also Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 338 (2011) (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668 (2008)).

[31] *See* 10 C.F.R. § 2.309(c).

[32] *See id.* § 2.309(f)(2).

> When determining whether a new contention is timely for the purposes of reopening a record, we look to whether the contention could have been raised earlier—that is, whether the information on which it is based was previously available or whether it is materially different from what was previously available, and whether it has been submitted in a timely fashion based on the information's availability.[33]

To be admitted for hearing, a proposed contention must set forth with particularity the matters to be raised, be within the scope of the hearing, be material to the findings the agency must make in taking the requested action, be factually supported, and show that a genuine dispute exists with the application.[34] We generally defer to a board as to whether a contention has sufficient factual support to be admitted for hearing and review contention admissibility rulings only where an appeal points to an error of law or abuse of discretion.[35]

B. Appeal of LBP-20-10

1. Motion to Reopen

a. Timeliness of Motion

In remanding Contention 2, we directed the Board to consider whether the reopening standards were met.[36] Fasken argues that its motion to reopen was timely, or, in the alternative, that it raised exceptionally grave environmental and safety issues.[37]

In Amended Contention 2, Fasken argued that it had good cause for late filing because the data relied on and conclusions drawn in the DEIS differed from that in the Environmental

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[33] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc*. (Pilgrim Nuclear Power Station), CLI-12-21, 76 NRC 491, 498 (2012).

[34] *See* 10 C.F.R. § 2.309(f)(1)(i)-(vi).

[35] *See* CLI-20-4, 91 NRC at 173; *Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-20-1, 91 NRC 79, 85 (2020).

[36] *See* CLI-20-4, 91 NRC at 211.

[37] Fasken also argues that its motion to reopen was accompanied by an appropriate affidavit, as required by regulation. *See* Fasken Appeal at 26-27; 10 C.F.R. § 2.326(b). But the Board, while expressing skepticism whether the affidavit executed by Fasken's lawyer accompanying

Report.[38] Specifically, Fasken claimed that whereas the Environmental Report stated that the proposed CISF would have "minimal potential" for cumulative impacts to geology and soils, the DEIS found a "small cumulative impact" to geology and soils and that the project would have a "moderate cumulative impact" to the environment.[39] Fasken further argued that the DEIS inaccurately states that any oil and gas production near the site would be 3,050 feet deep or deeper.[40] Fasken pointed out that this statement contradicts Holtec's Safety Analysis Report, which stated that drilling would occur at depths greater than 5,000 feet, and the Environmental Report, which Fasken characterizes as representing that Holtec could prevent any mineral extraction under the site.[41]

The Board found that Amended Contention 2 and the associated motion to reopen were not timely. To the extent Amended Contention 2 challenged the DEIS's description of the ownership and control of mineral rights, mineral development, and geology, the Board held that the contention was not based on new information.[42] The Board pointed out that the contention claimed "material omissions, inadequacies and inconsistencies contained in Holtec's licensing application documents" and thus by its own terms claimed deficiencies in the application, rather

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its motion met the requirements, did not rest its reopening ruling on the absence of an adequate affidavit. *See* LBP-20-10, 92 NRC __ (slip op. at 7-8). We therefore need not consider whether Fasken's affidavit was sufficient to support a motion to reopen.

[38] Amended Contention 2 at 4-5; *see also* Fasken Appeal at 6, 11.

[39] Amended Contention 2 at 12; *see* ER § 5.2.1; DEIS at 5-10 to 5-11.

[40] Amended Contention 2 at 14-15, Ex. 4, Amended Declaration of Stonnie Pollock (May 11, 2020), at 2 (Pollock Declaration).

[41] *Id.* at 17; *see* SAR § 2.6.4; ER § 2.4.2 ("By agreement with the applicable third parties, the oil drilling and phosphate extraction activities have been proscribed at and around the site and would not affect the activities at the site.").

[42] LBP-20-10, 92 NRC at __ (slip op. at 8-15).

than in the DEIS.[43] The Board observed that the "closest Fasken comes" to providing new information was its reference to Commissioner Richard's June 19, 2019, letter concerning New Mexico's ownership of the mineral rights.[44] But the Board concluded that Commissioner Richard's letter did not provide new information and pointed to a letter that Fasken's vice president had sent to the NRC on the same subject nearly a year before it filed its original Contention 2.[45]

To the extent that Amended Contention 2 challenged the DEIS's analysis of cumulative impacts to geology and soils, the Board held that the Staff's cumulative impacts determination did not constitute new information relating to the issues the contention raised.[46] The cumulative impacts analysis concluded that the proposed project would have a small incremental effect on geology and soils, which when added to the impact from other past, present, and reasonably foreseeable future activities, would result in a moderate impact.[47] The Board observed that the DEIS's estimate of the CISF's incremental impact to geology and soils was the same as Holtec's evaluation in the Environmental Report—that is, that the impact would be "minimal," or small.[48] Fasken could have challenged the Environmental Report's conclusion that the CISF's

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[43] *Id.* at __ (slip op. at 9).

[44] *Id.* at __ (slip op. at 10).

[45] *Id.* at __ (slip op. at 10-11).

[46] *Id.* at __ (slip op. at 11-12).

[47] DEIS § 5.4. The DEIS explains that "cumulative effects . . . can result from individually minor but collectively significant actions taking place over a period of time." DEIS at 5-1. The DEIS considers potash mining, oil and gas production, other nuclear facilities, wind and solar farms, and other facilities in its cumulative impact analysis. *Id*. at 5-2 to 5-2.

[48] LBP-20-10, 92 NRC at __ (slip op. at 11-12). The Board found no material difference between Holtec's use of the term "minimal" and the Staff's term "small" in the characterization of the project's impact to geology and soils. *Id*.

impact to geology and soils would be minimal, but it did not.[49] Therefore, the Board found that the DEIS conclusion regarding cumulative effects made no material difference to Fasken's contention.[50]

Fasken's appeal points to no Board error in its finding that the motion to reopen and amended contention were untimely. First, we are not persuaded by Fasken's argument that it established good cause under an alternative test articulated in a 2010 Board decision, *Calvert Cliffs 3*.[51] Fasken argues that *Calvert Cliffs 3* holds that either new data or new conclusions in the DEIS would constitute materially different information justifying raising a new contention and the Holtec DEIS did both.[52] However, the *Calvert Cliffs 3* Board did not establish a new timeliness test; it was simply quoting the language in the regulation at that time.[53] The relevant language was revised in 2012 to clarify that good cause is "the sole factor to be considered when evaluating whether to review the admissibility of a new or amended contention"[54] and that the three factors now found in 2.309(c) are the standard for establishing good cause.[55] In the statements of consideration for the 2012 final rule, the Commission noted that the similarities

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[49] *Id.* at __ (slip op. at 12).

[50] *Id.*

[51] *Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-10-24, 72 NRC 720, 729-30 (2010).

[52] Fasken Appeal at 11-12, 17-19.

[53] *See* Changes to Adjudicatory Process, Final Rule, 69 Fed. Reg. 2182, 2240 (Jan. 14, 2004). We observe that as an unreviewed Board decision, *Calvert Cliffs 3* would not constitute binding precedent on other boards. *See Southern California Edison Co*. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-9, 78 NRC 551, 558 (2013); *Baltimore Gas & Electric Co*. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 343 n.3 (1998).

[54] Amendments to Adjudicatory Process Rules and Related Requirements, Proposed Rule, 76 Fed. Reg.10,781, 10,783 (Feb. 28, 2011).

[55] *See* Amendments to Adjudicatory Process Rules and Related Requirements, Final Rule, 77 Fed. Reg. 46,562, 46,572 (Aug. 3, 2012).

between former § 2.309(c)(1) and 2.309(f)(2) had resulted in doctrinal confusion concerning the proper way to evaluate pleadings filed out of time.[56] The 2012 final rule resolved the ambiguity and eliminated any alternative approaches to evaluating new or amended environmental contentions filed after the initial deadline.[57]

On appeal, Fasken reiterates its timeliness claims without confronting the Board's rulings. For example, Fasken argues that the DEIS used a six-mile radius around the site to discuss cumulative impacts rather than the fifty-mile radius used in the application and that it could not have anticipated that the Staff would limit the area in which impacts are discussed before the DEIS was released.[58] The Board found, however, that the application used a six-mile radius to discuss land use around the site and a larger fifty-mile radius in its cumulative impacts analysis.[59] The Board found that the DEIS therefore used a subset of information already provided, and it found that Fasken identified no new information related to cumulative impacts.[60] On appeal, Fasken does not challenge the Board's explanation and accordingly does not demonstrate that the Board erred. We therefore defer to the Board's finding.

Further, Fasken insists that its "underlying briefs supporting Amended Contention 2 . . . identify with particularity material differences in both information reliance and conclusions drawn when compared with Holtec's [Environmental Report], [Safety Evaluation Report] and/or outstanding RAI responses."[61] But aside from generally pointing to its filings before the Board,

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[56] *Id*. at 46,571.

[57] *Id.*

[58] Fasken Appeal at 6, 17, 19, 26.

[59] *See* LBP-20-10, 92 NRC at __ (slip op. at 12).

[60] *Id*.

[61] Fasken Appeal at 15.

Fasken does not explain what these specific disputes are, how the Board erred in addressing its arguments or whether it claims that the Board failed to respond to them, or why these disputes could not have been raised earlier.[62]

b. Exceptionally Grave Issue

We are not persuaded by Fasken's argument that it raised an exceptionally grave issue with the application, which would warrant waiving the timeliness requirement.[63] Fasken first raised this claim during oral argument, apparently in response to the Board's question in a pre-hearing order.[64] The Board denied Fasken's argument and found that the contention was not admissible.[65]

On appeal, Fasken asserts that its contention comprises exceptionally grave issues of "national economics and security, regional employment, sinkholes[,] subsidence, and seismicity."[66] But Fasken does not explain how the facility could have an exceptionally grave impact on national economics, national security, or regional employment. In addition, it does not point to any information in its contention concerning sinkholes, subsidence, or seismicity that is materially different from information already considered by the Staff in the DEIS.[67]

Whether to waive the timeliness requirement for an exceptionally grave issue is up to the discretion of the Presiding Officer.[68] We have cautioned that this exception is a narrow one, to

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[62] *See id.* at 15 & n.59.

[63] *See* 10 C.F.R. § 2.326(a)(1).

[64] *See* Tr. at 423 (Mr. Kanner); *see also* Order (Concerning Oral Argument) (Jul. 20, 2020), at 2 (unpublished).

[65] LBP-20-10, 92 NRC at __ (slip op. at 15).

[66] *See* Fasken Appeal at 27-28.

[67] *See Pilgrim*, CLI-12-21, 76 NRC at 501.

[68] *See* 10 C.F.R. § 2.326(a)(1).

be granted "rarely and only in truly extraordinary circumstances."[69] In our view, the Board's decision was reasonable and not an abuse of discretion.

2. Admissibility of Amended Contention 2

We further find that Fasken has not shown that the Board erred in ruling that Amended Contention 2 was not admissible. Exhibit 2 to Fasken's motion to admit Amended Contention 2 is a list of "Facts Petitioners Intend to Rely On to Support New and Amended Contentions", which included cites and excerpts from the DEIS, Holtec's Safety Analysis Report and Environmental Report, and from several outstanding RAIs.[70] But this list did not include an explanation of whether Fasken was contesting the accuracy of the excerpted information or relying on the information to support its contention. Fasken also attached the declaration of a petroleum geologist, Stonnie Pollock, who provided his opinion on the potential for mineral extraction within the vicinity of the site, the possibility that oil and gas could occur at depths shallower than 3,050' below the surface, and the dangers of improperly plugged and abandoned wells.[71]

The Board concluded that Amended Contention 2 was inadmissible for lack of a genuine dispute over an issue material to the findings that the NRC must make in considering the application.[72] The Board found that Fasken did not specify which of the Staff's conclusions in the DEIS that it disputed, did not identify any misleading statement in the DEIS, and did not

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[69] *Pilgrim*, CLI-12-21, 76 NRC at 501 n.67 (quoting Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,536 (May 30, 1986)).

[70] *See* Amended Contention 2, Ex. 2, Facts Petitioners Intend to Rely On to Support New and Amended Contentions (May 11, 2020).

[71] *See* Pollock Declaration.

[72] LBP-20-10, 92 NRC at __ (slip op. at 18-20) (citing 10 C.F.R. § 2.309(f)(1)(iv), (vi)).

explain how alleged inaccuracies might affect a material issue.[73] With respect to Fasken's claim that the DEIS misstates the mineral ownership under the site, the Board found that the DEIS acknowledges that the State of New Mexico and the Bureau of Land Management own the mineral rights beneath and surrounding the site.[74] With respect to its claim that oil and gas could be extracted from a shallower depth than stated in the DEIS, the Board found that Fasken's expert did not explain "how the existence of wells at any depth is material to the NRC Staff's assessment of environmental and cumulative impacts."[75]

The Board also denied Fasken's arguments that the DEIS was necessarily deficient because there were several RAIs still outstanding that related to regional drilling activities, orphaned and abandoned wells, potash mining, and seismicity.[76] The Board found that the outstanding RAIs pertained to the safety review, rather than the environmental review, and none of the conclusions in the DEIS was based on information that Holtec had not yet provided.[77] The Board found that petitioners "must do more than rest on the mere existence of RAIs as the basis for their contention."[78]

We are not persuaded by Fasken's claim on appeal that Amended Contention 2 raised a genuine dispute of material fact. First, Fasken argues that its Amended Contention 2 disputed

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[73] *Id.* at __ (slip op. at 19-21).

[74] *Id.* at __ (slip op. at 20) (citing DEIS § 3.2.1 and DEIS Figure 3.2-2).

[75] *Id.* at __ (slip op. at 22).

[76] *Id.* at __ (slip op. at 23).

[77] *Id*. (citing *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), at 22).

[78] *Id.* (citing *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-15-8, 81 NRC 500, 506 n.47 (2015); *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336 (1999)).

the DEIS's supposed reliance on "a proposed but not-yet-accepted 'land use restriction of condition' at the Holtec site."[79] Although Fasken made such an argument in Amended Contention 2, neither Fasken's appeal nor the contention cites to where the DEIS relied on such an agreement. On the contrary, the DEIS acknowledged at several points—including in the sections cited in Fasken's Exhibit 2—that continued mineral development was possible near and even underneath the site.[80] Fasken asserts that it raised "multiple genuine disputes of material facts," while citing generally to its motion, supporting exhibits, and reply brief.[81] This argument is not sufficient to show Board error. The Board explained why it found that none of Fasken's assertions raised a material dispute and Fasken has not shown with specificity where the Board erred.

3. Whether the Board Abused its Discretion

Fasken makes two claims that the Board abused its discretion and made prejudicial procedural errors regarding Amended Contention 2.

First, Fasken argues that the Board abused its discretion and made a prejudicial procedural error when it declined to hear testimony from Fasken's expert during oral argument on Fasken's motions to reopen and admit Amended Contention 2.[82] Fasken's expert affiant, Stonnie Pollack, was present online during oral argument, but the Board declined to hear

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[79] Fasken Appeal at 20 n.65 (citing Amended Contention 2 at 14).

[80] *See, e.g.*, DEIS § 3.2.4, "Mineral Extraction Activities;" § 4.2.1.1 at 4-4 to 4-5 ("All oil and gas production zones in the area of the proposed CISF occur beneath the Salado Formation at depths greater than 914m [3,000 ft] . . . Future oil and gas development (e.g., drilling and fracking) beneath the proposed project area will likely continue to occur at depths greater than 930 m [3,050 ft.].").

[81] Fasken Appeal at 21.

[82] *See id.* at 23-24, Fasken Reply at 3-5.

testimony from him.[83] The Board's order scheduling oral argument stated that the argument was intended to address legal and procedural aspects of Fasken's motions and was not an evidentiary hearing.[84] Accordingly, the Board only allowed attorneys representing the parties to speak.

As we have held previously, oral argument is an opportunity for the Board to ensure it understands the participants' legal positions, and participants do not have a right to oral argument on contention admissibility.[85] Fasken does not claim that either Holtec or the Staff were allowed to present expert evidence during oral argument or that the Board treated it differently from the other participants. We therefore find that the Board did not abuse its discretion by declining to hear testimony from Mr. Pollack at oral argument.

Fasken next argues that the Board prejudiced Fasken by allowing Holtec to update its Environmental Report after the issuance of the DEIS.[86] We are not persuaded by this claim. As an initial matter, this argument is new on appeal and we could reject it on that ground alone.[87] But more substantively, Fasken does not cite any regulation or case law that holds that it is improper for the applicant to update the Environmental Report after the DEIS is released.[88]

In addition, the Board has no control over whether or when an applicant updates its application. The Staff, rather than the Board, determines whether an application is accepted for

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[83] *See* Tr. 456-57.

[84] *See* Order (Concerning Oral Argument) (July 20, 2020) (unpublished); *see also* Order (Scheduling Oral Argument) (June 25, 2020) (unpublished).

[85] *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-08-7, 67 NRC 187, 191 (2008).

[86] Fasken Appeal at 24-25.

[87] *See, e.g.*, *USEC Inc*. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006).

[88] *See* Holtec Answer at 22-23.

review, and the Board does not supervise the Staff's review.[89] And updating and revising an application is a normal part of our dynamic licensing process.[90] For these reasons, we disagree with Fasken's argument that the Board abused its discretion by allowing Holtec to update its application.

For the foregoing reasons, we deny Fasken's appeal of LBP-20-10.

C. Contention 3

After the Board dismissed the last pending contention in LBP-20-10, jurisdiction over this matter, including jurisdiction over Fasken's third motion to reopen, passed to the Commission.[91] Although we often refer motions to reopen to the Board we will rule on them where appropriate.[92] Due to the similarity between Contention 3 and its corresponding motion to reopen and the motions and contentions currently before us on appeal, we find that a referral here is unnecessary.

In proposed Contention 3, Fasken makes three claims. Its principal argument in Contention 3, as in Contention 2 and Amended Contention 2, is that the project will interfere with mineral development and that mineral development cannot proceed safely alongside the CISF. Fasken also claims in Contention 3 that the Staff did not independently investigate information in the application to verify its reliability before including it in the DEIS. Finally,

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[89] *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004).

[90] The Commission follows a "dynamic" licensing process that allows an application to be modified or improved as the Staff goes forward. *See Baltimore Gas & Electric Co*. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349-50 (1998); *The Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 395 (1995).

[91] *See Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 701 (2012).

[92] *See, e.g*., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 23-24 (2006).

Fasken claims that the Staff did not adequately consult with and include the viewpoints of State and local governments, industry, and communities. Specifically, proposed Contention 3 states:

> The Holtec DEIS, [Environmental Report,] and [Safety Analysis Report] 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[s] 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.[93]

Fasken argues that these claims are supported by new information that only came to light in the public comments on the DEIS, which were published on October 5, 2020, and in Holtec's RAI responses that were released October 21, 2020.[94] The Staff and Holtec oppose the motion to reopen.[95]

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[93] Contention 3 at 15. The contention and motion to reopen was accompanied by the affidavit and declaration of Tommy E. Taylor, a petroleum engineer who is the Assistant General Manager of Fasken Oil and Ranch, Ltd. and Senior Vice President of Fasken Management, LLC. *See* Contention 3, Ex. 3, Affidavit and Declaration of Tommy E. Taylor (Nov. 5, 2020), at 1-2 (Taylor Affidavit). We deny the motion because it is untimely and does not raise a significant environmental issue, and therefore we do not consider whether the affidavit met the reopening standards.

[94] *Id.* at 2-6.

[95] *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* (Nov. 30, 2020) (Staff Answer to Contention 3); *Holtec International's Answer Opposing Fasken Land and Minerals, Ltd's and Permian Basin Land and Royalty Owners' Motion to Reopen the Record and Motion for Leave to File New Contention No. 3* (Nov. 30, 2020) (Holtec Answer to Contention 3). Fasken filed a reply to the Staff's and Holtec's Answers. *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 Motions for Leave to File New Contention No. 3 and Motion to Reopen the Record* (Dec. 7, 2020). However, our rules do not allow for a reply except where expressly permitted by the Secretary or presiding officer, and we do not consider Fasken's reply further. *See* 10 C.F.R. § 2.323(c).

We find that these claims are untimely because Fasken does not point to information in the public comments or RAI responses that is materially different from previously available information. We further find that Contention 3 does not raise a significant environmental issue that would make a material difference in this proceeding.

1. Timeliness of Mineral Rights and Development Claims

Fasken's claims in Contention 3 about mineral rights and mineral development are not based on or supported by any previously unavailable information that is materially different from information available in the application and DEIS. As the Board held with respect to Amended Contention 2, the DEIS acknowledges that New Mexico owns the mineral rights under the site and the DEIS accounts for the effects of future development. In fact, the Environmental Report has acknowledged New Mexico's ownership of the mineral rights since its first iteration in March 2017.[96] Holtec's first Environmental Report also stated that "[f]urther oil and gas development is not allowed by the New Mexico Oil Conservation Division due to the presence of potash ore on the [s]ite."[97] Holtec clarified this statement in the fifth revision of its Environmental Report in March 2019 to state that the site is within the Secretary of the Interior's Designated Potash Area, which precludes drilling through the potash deposits to reach underlying oil and gas deposits.[98] The time for Fasken to dispute these specific assertions in the application or the

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[96] *See* Environmental Report on the HI-STORE CIS Facility, rev. 0 (Mar. 2017), § 3.1.2 (ML17139C535).

[97] *Id.*

[98] Environmental Report on the HI-STORE CIS Facility, rev. 5 (Mar. 2019), § 3.1.1 (ML19095B800). Because drilling for oil and gas through potash deposits is harmful to the potash and dangerous to miners, the Secretary of the Interior has established by order "drill islands" which enable oil and gas developers to drill around the potash deposits within the designated area. *See* Department of the Interior, Oil, Gas, and Potash Leasing and Development Within the Designated Potash Area of Eddy and Lea Counties, NM, 77 Fed. Reg. 71,814 (Dec. 4, 2012). Section 8 of the order provides the legal description of the Designated Potash Area, which includes public and non-public lands.

DEIS—such as the effect of the site's location within the Designated Potash Area—was when those assertions were made.

The public comments on which Fasken relies also provide no materially different information to support Contention 3 than information previously available. Fasken points to XTO's comments that XTO has the right to use as much of the surface of the site as is reasonably necessary to produce its minerals because, under New Mexico law, the surface estate is subordinate to the mineral estate.[99] Fasken argues that it did not know XTO's identity, the terms of its lease, or its "intent in terms of oil and gas development" around the property before it saw XTO's public comment.[100] But as XTO's comments show, and Fasken's own pleadings acknowledge, the right of subsurface-estate leaseholders to use the surface estate is not new information, it is a general principle of New Mexico oil and gas law.[101] Further, as Commissioner Richard's comments indicate, the terms of New Mexico Land Office leases are established by statute.[102] The principles of New Mexico oil and gas law are not new information,

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[99] *See* Contention 3, Ex. 1, XTO Comments on DEIS at 3 (citing *McNeill v. Burlington Res. Oil & Gas Co*., 143 N.M. 740, 748 (N.M. 2008)). Under the terms of XTO's lease from New Mexico, a copy of which was attached to its comments, XTO may use the surface for "pipelines, telephone and telegraph lines, tanks, power houses, stations, gasoline plants, and fixtures for producing, treating, and caring for [oil and gas], and housing and boarding employees." XTO Comments on DEIS at 3 (quoting Oil and Gas Lease at 1 (unnumbered)).

[100] *See* Contention 3 at 8. We note that Fasken also does not show why it could not have discovered XTO's identity before the public comments were released, given that the names of leaseholders of New Mexico minerals is public information.

[101] *See, e.g*., Contention 3 at 22; Taylor Affidavit at 4; Contention 3, Ex. 1, XTO Comments on DEIS at 3; *see also* Contention 3, Ex. 4 (Nov. 5, 2020). Exhibit 4 consists of public comments on the DEIS and includes letters from the New Mexico State Legislature, the New Mexico Department of Homeland Security and Emergency Management, the New Mexico Environment Department, New Mexico Governor Michelle Lujan Grisham, Commissioner Richard of the New Mexico Department of Public Lands, and COG Operating LLC, which operates an oil well on the site.

[102] *See* Contention 3, Ex. 4, Commissioner Richard's Comments at 4.

and Fasken does not claim that there is anything unusual in the terms of XTO's lease that was not available to Fasken prior to seeing XTO's comments.[103]

Public comments arguing that there are no legal impediments to shallow drilling do not constitute new information that is materially different from information previously available. Both XTO and Commissioner Richard argued that the DEIS relies on supposed "depth restrictions" that would prevent oil and gas extraction from shallower than 930 meters (3,050 feet).[104] These comments mischaracterize the DEIS, which does not rely on legal or contractual depth restrictions for its conclusion that oil and gas development will only occur, if at all, thousands of feet beneath the surface.[105] And even if the DEIS had made such a statement, the time for Fasken to challenge it would have been when the DEIS was released, not after other entities identified it in public comments.

We are also not persuaded by Fasken's arguments that Holtec's September 2020 RAI responses contain information that is materially different from information previously available. The only information Fasken cites from the RAI response that is plausibly new is that Holtec for the first time in its RAI response (and in contemporaneous revisions of its environmental report and safety analysis report) identifies the uppermost oil-and-gas bearing formation under the site as the Yates formation.[106] Fasken argues that this is significant because the Yates formation "usually requires vertical drilling."[107] But the only support Fasken provides for the claim that the

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[103] *See* Taylor Affidavit at 2, Contention 3 at 6 (stating that members of PBLRO have been drilling and extracting oil in the region for more than eighty years).

[104] *See* Contention 3, Ex. 4, Commissioner Richard's Comments at 4; Contention 3, Ex. 1, XTO Comments on DEIS at 4 (citing DEIS at 4-4, 4-5, 4-6, 4-7).

[105] *See* DEIS at 3-6 to 3-9, 4-4 to 4-5.

[106] Contention 3 at 21; *see also* RAI Part 5, Response Set 2 at 29, 49; ER § 3.1.1; SAR §§ 2.1.4 at 2-11, 2.6.4 at 2-127.

[107] Contention 3 at 21; *see id*. Ex. 3, Taylor Affidavit at 4.

Yates formation must be drilled vertically is the statement of its affiant, Mr. Taylor, who testifies that "vertical wells . . . are more affordable than horizontal wells."[108] However, Fasken does not explain why the identification of the formation as the "Yates formation" is materially different information from what was in the DEIS. In addition, Holtec points out that the Yates formation is part of the larger Artesia Group, which has been identified in the environmental report since the fifth revision of that document in March 2019.[109] Further, nothing in Mr. Taylor's affidavit suggests that the Yates formation's presence above 3,050 feet is new information that could not have been raised upon publication of the DEIS.

2. Significant Environmental Issue

Fasken's claims regarding mineral development at the site do not meet the reopening requirement to present a significant environmental or safety issue.[110] As previously stated, XTO's and Commissioner Richard's comments that the DEIS relies on depth restrictions that would prevent oil and gas extraction from shallower than 930 meters (3,050 feet) are incorrect.[111] Neither Fasken nor the public comments cite any portion of the DEIS that states that mineral development is limited by depth restrictions imposed by law or contract. Rather, the DEIS considers that future mineral development will take place in the strata where the minerals are known to exist. That is, the DEIS discusses the likelihood that potash will be developed, if at all, in the Salado formation, and oil and gas will be developed, if at all, in deeper

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[108] *See* Contention 3, Ex. 3, Taylor Affidavit at 4. (Yates is "best reached vertically and not horizontally" because "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.")

[109] *See* Holtec Answer to Contention 3 at 10; *see also* Environmental Report on the HI-STORE CIS Facility (Mar. 2019), Fig. 3.3.11 (ML19095B800).

[110] 10 C.F.R. § 2.326(a)(2).

[111] *See* Contention 3, Ex. 4, Commissioner Richard's Comments at 4; Contention 3, Ex. 1, XTO Comments on DEIS at 4 (citing DEIS at 4-4, 4-5, 4-6, 4-7).

strata where those resources are known to exist.[112] The Staff's environmental analysis appropriately discusses reasonable outcomes, rather than theoretical possibilities such as the discovery of oil and gas at shallower depths.[113]

Fasken does not show such drilling presents any hazard to the facility (or vice versa) that has not been analyzed in the Safety Evaluation Report or the DEIS. Although Mr. Taylor testifies that the Yates formation "occurs between the surface and 3050 [feet] (usually found at 2500 [feet])" he does not state that the Yates formation occurs between the surface and 3,050 feet under the proposed CISF, and he does not opine that oil and gas exist in paying quantities in shallower strata or above the potash.[114] Therefore, his affidavit simply raises the possibility that oil extraction could take place several hundred feet closer to—but still thousands of feet below—the surface. Fasken has not shown what difference it would make to the environmental analysis if oil and gas were extracted from shallower depths.

Fasken also does not show how new information in Holtec's RAI responses supports its proposed contention.[115] On the contrary, the RAI responses support and clarify the information in Holtec's environmental report. In RAI 2-8, the Staff asked Holtec to explain "why having oil and gas exploration and production activities near the proposed facility would not pose a hazard" as Holtec claimed in its safety analysis report.[116] The Staff observed that, according to

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[112] *See* DEIS at 3-6 to 3-9, 4-4 to 4-5.

[113] *See Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005) ("NEPA . . . does not call for certainty or precision, but an ***estimate*** of anticipated (not unduly speculative) impacts.").

[114] Contention 3, Ex. 3, Taylor Affidavit at 4.

[115] Contention 3 at 5; *see also* RAI Part 5, Response Set 2.

[116] Letter from Jose Cuadrado, NRC to Kim Manzione, Holtec International (Nov. 14, 2019), Attach., First Request for Additional Information, Part 5 (Nov. 14, 2019), at 3-4 (citing SAR § 2.1.4) (ML19322C260).

the SAR, two "drill islands" are located within 400 meters and 800 meters of the proposed site, from which horizontal drilling beneath the site could potentially induce subsidence or sinkholes in the event of casing failure.[117] Holtec's response explained why drilling under the site, at the anticipated depth of 3,050 feet, would not create any hazard to the CISF:

> Currently, there are no horizontal wells that travel beneath the Site. Any new wells with horizontal legs that travel beneath the site would first be drilled offsite vertically to a depth greater than 3,050 ft, as this is the shallowest oil or gas formation in the vicinity of the site. Once a wellbore starts travelling horizontally, it stays within its own strata (within the production zone). Because of this, horizontal drilling does not create any additional risk of fluid transfer across multiple strata which is the greatest concern for dissolution of salts and land subsidence. If a horizontal well were to collapse at a depth greater than 3,050 ft, there would be no noticeable effect at the ground surface. Therefore, as long as the vertical portion of the wellbore is maintained properly and in accordance with the current regulations (described above), a well with horizontal legs does not create any additional hazards to the Facility when compared with vertical wells.[118]

Rather than supporting Fasken's contention, this RAI response supports the Staff's findings that potential future mineral development does not present a hazard to the facility.

3. Public Comments in Opposition to the Project

Fasken does not demonstrate that consideration of the comments on the DEIS showing public opposition to the CISF would result in a materially different result to the proceeding, as required by the reopening standards.[119] Fasken argues that various comments "highlight the unsuitability of the proposed site" and raise "technical issues that the NRC must resolve to properly review and analyze the environmental impacts."[120] Fasken also argues that the high

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[117] *See id.*

[118] *See* RAI Part 5, Response Set 2, Attach. 1 at 25.

[119] 10 C.F.R. § 2.326(a)(3).

[120] *See* Contention 3 at 3-4.

volume of public comments in opposition to the project shows that the project violates the concept of consent-based siting, as recommended by the Blue Ribbon Commission for nuclear waste management facilities.[121] But there is no legal requirement to follow a consent-based siting process for Holtec's proposed CISF, nor is Holtec required to show public support for the project to get its license. And Fasken did not show how the comments could lead to a materially different result. The DEIS describes the scoping process and public participation activities that the Staff conducted at the outset of its environmental review.[122] The receipt of comments is a normal step in the NRC's NEPA process, and the Staff must address all public comments in preparing the Final EIS. We therefore conclude that this portion of Fasken's new contention does not meet the reopening standards.

4. Consultation and Independent Investigation Claims

In addition, Fasken argues that other public comments show that the NRC did not consult adequately with state and local agencies[123] and that it should have consulted with the oil and gas industry.[124] Fasken also claims that the Staff did not conduct an "independent investigation" of the matters discussed in the DEIS but relied too much on the information in the application.[125] But Fasken has not pointed to any new information that is materially different from what was available when the Staff issued the DEIS. Fasken could have raised its argument that the Staff should consult with the oil and gas industry when the DEIS was released, if not sooner. Similarly, its claim that the Staff did not independently investigate the

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[121] *Id.* at 5 (citing Blue Ribbon Commission on America's Nuclear Future, Report to the Secretary of Energy (Jan. 2012) (ML120970375)), 18, 28-29, 32.

[122] DEIS § 1.4.1.

[123] Contention 3 at 4-5.

[124] *Id.* at 33-34.

[125] *Id.* at 28; *see* 10 C.F.R. § 51.70(b).

application material before incorporating it into the DEIS was ripe when the DEIS was released. Furthermore, the numerous RAIs the Staff posed to Holtec during its review on both environmental and safety matters belies Fasken's claim that the Staff uncritically relied on the information in Holtec's application.

Therefore, we conclude that Fasken has not met the reopening standards for the claims it seeks to raise in Contention 3 and we deny its motion.

III. CONCLUSION

For the foregoing reasons, we deny Fasken's appeal of LBP-20-10, and we deny its motion to reopen the record.

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook Digitally signed by Annette L. Vietti-Cook Date: 2021.04.28 14:34:38 -04'00'

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 28th day of April 2021.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
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	)	
HOLTEC INTERNATIONAL	)	Docket No. 72-1051-ISFSI
	)	
	)	
(HI-STORE Consolidated Interim Storage Facility)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-21-07)** have been served upon the following persons by Electronic Information Exchange (EIE).

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-16B33
Washington, DC 20555-0001
E-mail: ocaamail.resource@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop: O-16B33
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, DC 20555-0001

Paul S. Ryerson, Chair
Administrative Judge

Nicholas G. Trikouros
Administrative Judge

Dr. Gary S. Arnold
Administrative Judge

E-mail: paul.ryerson@nrc.gov
nicholas.trikouros@nrc.gov
gary.arnold@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop - O-14A44
Washington, DC 20555-0001

Sheldon Clark, Esq.
Joe Gillespie, Esq.
Sara B. Kirkwood, Esq.
Mauri Lemoncelli, Esq.
Patrick Moulding, Esq.
Carrie Safford, Esq.
Thomas Steinfeldt, Esq.
Alana M. Wase, Esq.
Brian Newell, Senior Paralegal
Stacy Schumann, Paralegal
E-mail: sheldon.clark@nrc.gov
joe.gillespie@nrc.gov
sara.kirkwood@nrc.gov
mauri.lemoncelli@nrc.gov
patrick.moulding@nrc.gov
carrie.safford@nrc.gov
thomas.steinfeldt@nrc.gov
alana.wase@nrc.gov
brian.newell@nrc.gov
stacy.schumann@nrc.gov

Ian Curry, Law Clerk
Molly Mattison, Law Clerk
E-mail: ian.curry@nrc.gov
molly.mattison@nrc.gov

Counsel for Holtec International
Pillsbury Winthrop Shaw Pittman LLP
1200 Seventeenth Street, NW
Washington, DC 20036
Meghan Hammond, Esq.
Anne Leidich, Esq.
Michael Lepre, Esq.
Jay Silberg, Esq.
Timothy Walsh, Esq.
Sidney Fowler, Esq.
E-mail: meghan.hammond@pillsburylaw.com
anne.leidich@pillsburylaw.com
michael.lepre@pillsburylaw.com
jay.silberg@pillsburylaw.com
timothy.walsh@pillsburylaw.com
sidney.fowler@pillsburylaw.com

Counsel for Beyond Nuclear
Harmon, Curran, Spielberg & Eisenberg LLP
1725 DeSales Street NW
Suite 500
Washington, DC 20036
Diane Curran, Esq.
E-mail: dcurran@harmoncurran.com

Turner Environmental Law Clinic
1301 Clifton Road
Atlanta, GA 30322
Mindy Goldstein, Esq.
E-mail: magolds@emory.edu

Counsel for Alliance Environmental Strategies
Law Office of Nancy L. Simmons
120 Girard Boulevard SE
Albuquerque, NM 87106

Nancy L. Simmons, Esq.
E-mail: nlsstaff@swcp.com

Eddy-Lea Energy Alliance
102 S. Canyon
Carlsbad, NM 88220

John A. Heaton
E-mail: jaheaton1@gmail.com

Counsel for Don't Waste Michigan
316 N. Michigan Street, Suite 520
Toledo, OH 43604-5627
Terry J. Lodge, Esq.
E-mail: tjlodge50@yahoo.com

Counsel for Sierra Club
4403 1st Avenue SE, Suite 402
Cedar Rapids, IA 52402
Wallace L. Taylor, Esq.
E-mail: wtaylor784@aol.com

Counsel for NAC International Inc.
Robert Helfrich, Esq.
NAC International Inc.
3930 E Jones Bridge Rd., Ste. 200
Norcross, GA 30092
E-mail: rhelfrich@nacintl.com

Hogan Lovells LLP
555 13th Street NW
Washington, DC 20004
Sachin S. Desai, Esq.
Allison E. Hellreich, Esq.
E-mail: sachin.desai@hoganlovells.com
allison.hellreich@hoganlovells.com

Counsel for Fasken Land and Oil and Permian Basin Land and Royalty Owners
Monica R. Perales, Esq.
6101 Holiday Hill Road
Midland, TX 79707
E-mail: monicap@forl.com

Kanner & Whiteley, LLC
701 Camp Street
New Orleans, LA 70130
Allan Kanner, Esq.
Elizabeth Petersen, Esq.
Cynthia St. Amant, Esq
Annemieke M. Tennis, Esq.
Conlee Whiteley, Esq .
E-mail: a.kanner@kanner-law.com
e.petersen@kanner-law.com
c.stamant@kanner-law.com
a.tennis@kanner-law.com
c.whiteley@kanner-law.com

Eddy County, NM*
101 W. Greene Street
Carlsbad, NM

~~Rick Rudometkin~~
E-mail: ~~rrudometkin@co.eddy.nm.us~~
* Eddy County not served due to no representative for the County assigned at the time of Mr. Rudometkin's departure.

Lea County, NM
100 N. Main
Lovington, NM 88260

Jonathan B. Sena
E-mail: jsena@leacounty.net

City of Hobbs, NM
2605 Lovington Highway
Hobbs, NM 88242

Garry A. Buie
E-mail: gabuie52@hotmail.com

City of Carlsbad, NM
1024 N. Edward
Carlsbad, NM 88220

Jason G. Shirley
E-mail: jgshirley@cityofcarlsbadnm.com

Herald Speiser Digitally signed by Herald Speiser
Date: 2021.04.28 14:36:35 -04'00'

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 28th day of April 2021