UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DON'T WASTE MICHIGAN, *et al.*, Petitioners, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents.	Case No. 21-1048 Consolidated with Case Nos. 21-1055, 21-1056, 21-1179

UNDERLYING DECISIONS FROM WHICH PETITION ARISES

Petitioners in Case No. 21-1179, Fasken Land and Minerals, Ltd. ("Fasken") and Permian Basin Land and Royalty Owners ("PBLRO"), have attached copies of the underlying decisions of the United States Nuclear Regulatory Commission ("NRC") in *Interim Storage Partners, LLC* (NRC Docket No. 72-1050) from which their petition of review arises:

- Secretary of NRC Order (unpublished), issued on October 29, 2018;
- NRC Memorandum and Order CLI-20-14, issued on December 17, 2020; and
- NRC Memorandum and Order CLI-20-04, issued on June 22, 2021.

Dated: November 8, 2021

Respectfully submitted by:

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of INTERIM STORAGE PARTNERS LLC (WCS Consolidated Interim Storage Facility)	)	Docket No. 72-1050

ORDER

On January 30, 2017, the NRC provided notice in the *Federal Register* of the receipt of a license application from Waste Control Specialists, LLC (WCS), requesting authorization to construct and operate a consolidated interim storage facility (CISF) for spent nuclear fuel in Andrews County, Texas.[1] That notice informed members of the public of the opportunity to file a request for a hearing and petition for leave to intervene in the proceeding. In July 2017, the notice was withdrawn, following WCS's request that the NRC temporarily suspend all review activities associated with its application.[2] Over one year later, the NRC Staff published in the *Federal Register* a new notice of opportunity to request a hearing, after receiving a revised license application from Interim Storage Partners, LLC (ISP)—a joint venture between WCS and Orano CIS, LLC.[3] The due date for the submission of a hearing request is currently October 29, 2018.

[1] Waste Control Specialists LLC's Consolidated Interim Spent Fuel Storage Facility Project, 82 Fed. Reg. 8773 (Jan. 30, 2017).

[2] Waste Control Specialists LLC's Consolidated Interim Spent Fuel Storage Facility Project, 82 Fed. Reg. 33,521 (July 20, 2017); *see also* CLI-17-10, 85 NRC 221 (2017) (granting WCS and NRC Staff joint request to withdraw hearing notice and directing Staff to publish a new notice of opportunity to request a hearing if and when WCS requested that Staff resume its review).

[3] Interim Storage Partners Waste Control Specialists Consolidated Interim Storage Facility, 83 Fed. Reg. 44,070 (Aug. 29, 2018), *as corrected by* 83 Fed. Reg. 44,680 (Aug. 31, 2018).

On October 2, 2018, pursuant to 10 C.F.R. § 2.307, a number of organizations and individuals (Joint Requesters) submitted a consolidated request for an extension of the hearing request deadline.[4] Specifically, the request asks (1) that the NRC Staff and ISP provide a Spanish translation of the application and related documents; (2) for the establishment of a new deadline, to be set 180 days from the date those translated documents are made publicly available, for the submission of hearing requests and for the submission of scoping comments on the NRC Staff's Environmental Impact Statement (EIS) for the proposed CISF; and (3) that the NRC hold additional public scoping meetings in certain communities in Texas and throughout the country along likely transportation routes to the CISF. ISP has filed an answer opposing the request.[5]

After reviewing these filings, I hereby grant, in part, the request by extending the deadline an additional fifteen days for the Joint Requesters to file a hearing request. Any of the Joint Requesters may file a hearing request no later than Tuesday, November 13, 2018.[6]

With respect to all other requests for relief included in this filing, such requests are denied, as they are outside the scope of the opportunity provided by the August 29, 2018, *Federal Register* notice to request a hearing based on the sufficiency of the CISF application. The Secretary notes that the Joint Requesters have separately submitted their request directly to the NRC Staff,[7] and the NRC Staff has separately responded to the remaining requests.[8]

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[4] *Request for Extension on Deadline for Intervention* (Oct. 2, 2018) (ADAMS Accession No. ML18276A066).

[5] *Interim Storage Partners LLC's Answer Opposing Request for Extension of Intervention Deadline* (Oct. 8, 2018) (ML18281A012).

[6] This extension of the hearing request deadline does not apply to Beyond Nuclear, Inc., which has already filed a hearing request and petition to intervene in this proceeding, and in its filing stated that its inclusion as one of the Joint Requesters was an inadvertent error. *Beyond Nuclear, Inc.'s Hearing Request and Petition to Intervene* (Oct. 3, 2018) (ML18276A242).

[7] *Comment E-mail regarding WCS-CISF EIS Scoping* (ML18288A147) (Oct. 3, 2018).

[8] Letter from Cinthya I. Román, NRC, to Karen Hadden, Sustainable Energy & Economic Development (SEED) Coalition (Oct. 24, 2018) (ML18289A662). The NRC Staff has also extended the deadline for the receipt of EIS scoping comments. Interim Storage Partners LLC's Consolidated Interim Storage Facility, 83 Fed. Reg. 53,115 (Oct. 19, 2018).

This order is issued under my authority in 10 C.F.R. § 2.346(b) and (j).

IT IS SO ORDERED.

For the Commission

NRC SEAL

/RA/

_____
Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 25th day of October, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
INTERIM STORAGE PARTNERS LLC	)	Docket No. 72-1050-ISFSI
	)	
(WCS Consolidated Interim Storage Facility)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order of the Secretary** have been served upon the following persons by the Electronic Information Exchange:

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[Original signed by Herald M. Speiser]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 25th day of October, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of INTERIM STORAGE PARTNERS LLC (WCS Consolidated Interim Storage Facility)	Docket No. 72-1050-ISFSI

CLI-20-14

MEMORANDUM AND ORDER

This proceeding involves the application of Interim Storage Partners LLC (ISP) for a license to construct and operate a consolidated interim storage facility (CISF) in Andrews County, Texas. Today we address the appeals of an Atomic Safety and Licensing Board decision from petitioners Beyond Nuclear, Inc. (Beyond Nuclear); Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (together, Fasken); and a coalition of petitioners known as the "Joint Petitioners."[1] We also refer Fasken's motion to admit a new

[1] LBP-19-7, 90 NRC 31 (2019). Joint Petitioners are a coalition of Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Louis Obispo Mothers for Peace, Sustainable Energy and Economic Development Coalition (SEED Coalition), and Leona Morgan, individually.

contention based on the Staff's draft environmental impact statement to the Board for consideration.[2]

I. BACKGROUND

ISP is a joint venture between Waste Control Specialists LLC (WCS) and Orano CIS LLC formed to design, build, and operate the WCS CISF.[3] The proposed CISF would be located within the owner-controlled area of the existing WCS site in Andrews, Texas, which currently includes two separate low-level radioactive waste (LLRW) disposal facilities.[4] ISP has applied for a forty-year license to store 5,000 metric tons of spent nuclear fuel (SNF), mixed oxide fuel, and Greater than Class C LLRW in the proposed CISF.[5] If the license is granted, ISP anticipates that it will request license amendments for seven expansion phases over the next twenty years, and the CISF may ultimately store up to 40,000 metric tons of waste.[6]

The Board found that although Beyond Nuclear, Fasken, and at least one member of the Joint Petitioners had established standing, none proffered an admissible contention.[7] Beyond Nuclear, Fasken, and Joint Petitioners have appealed the denial of their hearing requests, and

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[2] *See Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners Motion for Leave to File New and/or Amended Contention* (July 6, 2020) (Fasken Motion for Contention 5); *see also NRC Staff's Answer in Opposition to Fasken Oil and Ranch, Ltd.'s and Permian Basin Land and Royalty Owners' Motion to Reopen the Record and File New Contention 5* (July 31, 2020); *Interim Storage Partners LLC's Answer Opposing Fasken's and PBLRO's Second Motion to Reopen the Record and Motion for Leave to File New Contention "5"* (July 31, 2020).

[3] WCS Consolidated Interim Storage Facility System Safety Analysis Report (Public Version), Docket No. 72-1050, rev. 2 (Aug. 9, 2018), at 1-2 (ADAMS accession no. ML18221A408 (package)) (SAR).

[4] *Id.* at 1-2.

[5] WCS Consolidated Interim Spent Fuel Storage Facility Environmental Report, Docket No. 72-1050, rev. 2 (Aug. 9, 2018), at 1-1 (ML18221A405 (package)) (Environmental Report).

[6] Environmental Report at 1-1.

[7] LBP-19-7, 90 NRC at 39.

our decision today addresses those appeals. We also address Fasken's request for access to sensitive unclassified non-safeguards information (SUNSI) relating to one of the contentions the Board rejected in its ruling.[8]

Also, the Board initially found that Sierra Club had demonstrated standing and proposed an admissible contention.[9] Sierra Club's contention has since been dismissed as moot, and we will address Sierra Club's appeals separately.[10] On December 13, 2019, the Board rejected a late-filed contention proposed by Joint Petitioners and terminated the proceeding.[11]

II. DISCUSSION

A. Standard of Review

Our regulations allow a petitioner whose hearing request has been wholly denied to appeal.[12] We generally defer to the Board on matters of contention admissibility and standing unless an appeal demonstrates an error of law or abuse of discretion.[13]

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[8] *Appeal of Staff Denial of Petitioners' Request for SUNSI Information Related to ISP's Responses to RAIs* (Feb. 12, 2020) (Fasken SUNSI Appeal); *see also Request for Sensitive Unclassified Non-Safeguards Information (SUNSI) regarding Interim Storage Partner's Waste Control Specialist Consolidated Interim Storage Facility* (Jan. 16, 2020) (Fasken SUNSI Request).

[9] *See* LBP-19-7, 90 NRC at 50, 78-80.

[10] *See* LBP-19-9, 90 NRC 181 (2019); *Sierra Club's Brief in Support of Appeal from Atomic Safety and Licensing Board Rulings Denying Admissibility of Contentions in Licensing Proceeding* (Dec. 13, 2019). The Board's dismissal of Sierra Club's contention has mooted ISP's appeal of the decision granting Sierra Club a hearing, and we therefore dismiss ISP's appeal without addressing its merits.

[11] *See* LBP-19-11, 90 NRC 258 (2019), *affirmed*, CLI-20-13, 92 NRC __ (Dec. 4, 2020) (slip op.).

[12] 10 C.F.R. § 2.311(c)

[13] *See, e.g.*, *Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 13-14 (2014); *Strata Energy, Inc.* (Ross *In Situ* Uranium Recovery Project), CLI-12-12, 75 NRC 603, 608-13 (2012).

B. Beyond Nuclear's Appeal

Beyond Nuclear proposed one contention in which it asserted that the application must be denied because "the central premise of ISP's application" is that the U.S. Department of Energy (DOE) will take ownership of the waste and contract with ISP to store it until a permanent repository is available and this arrangement would violate the Nuclear Waste Policy Act (NWPA).[14] The contention is substantially similar to the claim raised by Beyond Nuclear and other petitioners in the Holtec International CISF application proceeding, and we affirm the Board here for the reasons explained in our recent decision in that proceeding.[15]

The Staff, ISP, and the Board all recognize that the NWPA does not authorize DOE to take title to SNF at this time.[16] ISP's proposed license would include a license condition requiring that, before ISP could begin operations, it must have storage contracts in place assuring that ISP's clients would fund operations.[17] And the proposed wording of the license provides that DOE could be that client.[18] Specifically, the proposed license condition states that ISP must have contracts in place "with [DOE] or other SNF title holder(s) stipulating that the DOE or the other SNF title holder(s) is/are responsible for funding operations required for

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[14] *Beyond Nuclear, Inc.'s Hearing Request and Petition to Intervene* (Oct. 3, 2018) (Beyond Nuclear Petition).

[15] *See Holtec International* (HI-STORE Consolidated Interim Storage Facility), CLI-20-4, 91 NRC 167, 173-76 (2020); *Beyond Nuclear, Inc.'s Hearing Request and Petition to Intervene* (Sept. 14, 2018), at 10-11 (ML18257A324).

[16] *See* LBP-19-7, 90 NRC at 57; *Interim Storage Partners LLC's Response to the Atomic Safety and Licensing Board's Questions Regarding the U.S. Department of Energy's Authority Under the Nuclear Waste Policy Act* (June 28, 2019) (ISP Response to Board Questions) (acknowledging that DOE may not take title under current law).

[17] *See* Interim Storage Partners LLC, License Application (Aug. 9, 2018) (License Application), Attach. A, License for Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste, at 3 (ML18221A397 (package)).

[18] *Id.*

storing the material" prior to commencing operations.[19] In other words, the proposed license would be conditioned on ISP contracting either with the nuclear power plant operators who generated the spent nuclear fuel, consistent with current law, or with DOE, which would require statutory amendment.

ISP acknowledges that it hopes Congress will change the law to allow DOE to enter storage contracts prior to the availability of a repository.[20] Thus, if the proposed license were to be issued, ISP could take advantage of a future change in the law by bidding for a DOE contract without having to first amend its license.

The Board found that Beyond Nuclear's proposed contention did not raise a genuine dispute with the application.[21] The Board reasoned that rather than being centrally premised on ISP contracting with DOE in violation of the NWPA, the application also includes the option of contracting with nuclear plant owners, which is consistent with existing law, and whether that option will prove commercially viable was not an issue before it.[22]

On appeal, Beyond Nuclear argues that the Board erred by "reframing" the contention to eliminate its central premise and thereby "failed to judge the contention by its own terms."[23] Beyond Nuclear further argues that the proposed license condition would, contrary to law, give "ISP and/or DOE . . . rights under the license" to enter storage contracts.[24] Along the same lines, it claims that the license would "allow DOE to be an owner of spent fuel during

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[19] *Id*.

[20] ISP Response to Board Questions at 3.

[21] LBP-19-7, 90 NRC at 57-58.

[22] *Id*.

[23] *Beyond Nuclear's Brief on Appeal of LBP-19-07* (Sept. 17, 2019), at 11 (Beyond Nuclear Appeal).

[24] *Id.* at 12.

transportation and storage" at the CISF.[25] Beyond Nuclear misunderstands the nature of the proposed license and its conditions.

As an initial matter, the Board agreed with Beyond Nuclear's central argument that the NWPA prevents DOE from taking title to SNF at this time. But this does not mean that the application must automatically be rejected. The proposed license would not "authorize" ISP to enter into illegal contracts. Rather, the proposed license would require that, before it can begin operations, ISP must have contracts in place to ensure it has a flow of operating funds. Because an illegal contract is unenforceable, ISP plainly could not rely on such contracts to ensure its operating funds.[26] Moreover, granting a license to ISP would not effect or allow a change of spent fuel ownership as between two parties unrelated to ISP (the nuclear plant owners and the DOE). Similarly, issuing a license to ISP would not grant any rights to DOE. We therefore are not persuaded by Beyond Nuclear's arguments that the proposed license would authorize illegal activity.

Beyond Nuclear also asserts that issuance of the license would violate the Administrative Procedure Act's prohibition against agencies acting unlawfully, because "the license application contains provisions which, if implemented, would violate the NWPA."[27]

Similarly, it argues that issuing the license would exceed our statutory authority because we have no statutory authority to violate the NWPA.[28] It argues that its challenge to the license was dismissed based on the hope for a change in the law or an expectation that DOE and ISP would not violate the law.[29] But as we have explained above, the proposed license would not

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[25] *Id.* at 2, 16.

[26] *See, e.g.*, *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77-78 (1982).

[27] Beyond Nuclear Appeal at 13-14 (citing 5 U.S.C. §§ 706(2)(A), (C)).

[28] *Id*. at 13.

[29] *Id*. at 13-16.

authorize ISP to enter storage contracts with DOE and the proposed license is not premised on illegal activity because there is a lawful option by which ISP could fulfil the proposed license condition.

Beyond Nuclear has not shown error in the Board's interpretation of the legal force of the disputed license condition. The Board's conclusion that Beyond Nuclear had raised no genuine dispute with the application was reasonable. We therefore affirm its decision to dismiss this contention.

C. Fasken's Appeal

Fasken appeals the Board's determinations regarding three of its six proposed contentions.[30]

1. Fasken's Contention 2 (Abandoned Oil and Gas Wells) and SUNSI Access Request

In Contention 2, Fasken argued that the application failed to account for "unstable geological characteristics" and "soil stability problems" of the site attributable to abandoned and "orphan" oil and gas wells in the region.[31] Fasken supported this contention with the declaration of a geologist, Aaron Pachlhofer, who described the hydrogeology of the region and oil development in the area.[32] Fasken asserted that there were 4,579 well bores within a ten-mile radius of the proposed site.[33] Fasken further claimed that the abandoned wells could provide a path for contaminants to reach the groundwater.[34] It argued that the application did not address

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[30] *Fasken and PBLRO's Brief on Appeal of LBP-19-07* (Sept. 17, 2019) (Fasken Appeal).

[31] *See Petition of Permian Basin Land and Royalty Organization and Fasken Land and Minerals for Intervention and Request for Hearing*, at 15-17 (Oct. 29, 2018) (Fasken Petition).

[32] Fasken Petition, Ex. 3, Declaration of Aaron Pachlhofer (Oct. 29, 2018), at 4-7 (Pachlhofer Declaration).

[33] *See* Fasken Petition at 16; Tr. at 324 (Mr. Laughlin) (providing revised figure for number of wells).

[34] Fasken Petition at 17; *see also* Pachlhofer Declaration at 3-5.

this information and therefore "failed to analyze regional geography" and could not meet the requirements of 10 C.F.R. § 72.103(a)(1).[35]

ISP opposed the contention in its entirety, but the Staff initially supported its admission in part.[36] In its response to Fasken's hearing request, the Staff acknowledged that Fasken had raised an issue of whether the presence of a large number of improperly abandoned wells could impact site stability.[37] The Staff changed its position and considered the issue moot after Fasken's response to a Staff Request for Additional Information (RAI) confirmed that the proposed site itself contains only a single dry hole, which has been properly plugged and abandoned.[38]

The Board dismissed the contention because it was factually unsupported and did not address portions of the application that discuss site stability matters.[39] In particular, the Board pointed out that ISP's safety evaluation acknowledged that oil and gas wells are in the general vicinity of the site and addressed soil stability, induced seismicity, and vibratory ground motion.[40] The Board found that unless Fasken could show some reason why the offsite wells would cause "unstable geological characteristics, soil stability problems or potential for vibratory

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[35] Fasken Petition at 15-17.

[36] *Interim Storage Partners LLC's Answer Opposing Hearing Request and Petition to Intervene filed by Permian Basin Land and Royalty Organization and Fasken Land and Minerals* (Nov. 20, 2018), at 34-41 (ISP Answer to Fasken Petition); *NRC Staff's Response to Petitions to Intervene and Requests for Hearing Filed by Permian Basin Land and Royalty Organization and Fasken Land and Minerals* (Nov. 23, 2018), at 15-16 (Staff Answer to Fasken Petition).

[37] Staff Answer to Fasken Petition at 16.

[38] *See* Letter from Jeffery D. Isakson, ISP, to NRC Document Control Desk, "Submittal of Partial Response to First RAI" (May 31, 2019) (ML19156A048 (package)) (First RAI Response Package), Encl. 3, RAI Responses (Public Version), at 3 (First RAI Responses); *see* Tr. at 328 (Mr. Gillespie).

[39] LBP-19-7, 90 NRC at 112-13 (citing SAR §§ 2.1, 2.6.2; SAR, Attach. D § 4.3 (proprietary)).

[40] *Id*. at 112 & n.544.

ground motion at the site," ISP was not required to provide more information.[41] The Board further found that the claims that the wells could provide a conduit for contaminants to the groundwater did not dispute relevant portions of the application, which explained why groundwater contamination from spent fuel dry storage is unlikely at the site.[42] The Board concluded that Fasken had shown no plausible impact from the existence of wells up to ten miles from the site when there is only a single dry hole within the site's boundary.[43] It therefore dismissed the contention because it did not present a genuine dispute with the application and for lack of factual support.

We defer to the Board's finding that the contention is not supported in fact. Fasken's appeal renews its critique that the application does not adequately discuss the presence of nearby wells, but the appeal does not address the Board's ruling that its contention did not show how abandoned or orphaned wells outside the boundary of the site and up to ten miles away could affect the soil stability of the site.[44] Mr. Pachlhofer's declaration does not contend that abandoned or active wells five, ten, or even one mile from the proposed CISF would cause soil subsidence at the site.[45]

On appeal, Fasken also argues that the plain language of 10 C.F.R. § 72.103(a)(1) requires ISP to analyze the entire region in which the proposed site is located for "unstable

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[41] *Id.* at 112 (quoting 10 C.F.R. § 72.103(a)(1)).

[42] *Id.* at 113 (citing SAR § 2.7 ("The method of storage (dry cask), the nature of the storage casks, the extremely low permeability of the red bed clay and the depth to groundwater beneath the CISF preclude the possibility of groundwater contamination from the operation of the WCS CISF.")).

[43] *Id.*

[44] Fasken Petition at 4-12.

[45] *See* Pachlhofer Declaration at 6-7.

geological characteristics."[46] But Fasken's suggestion that ISP must discuss soil stability throughout the entire region of the facility without regard to the potential impacts to the proposed facility is unpersuasive. The regulation Fasken cites lists several investigative methods to ensure site stability, only one of which mentions the region: sites east of the Rocky Mountains such as the proposed site "will be acceptable if the results from onsite foundation and geological investigation, literature review, and regional geological reconnaissance show no unstable geological characteristics, soil stability problems, or potential for [excessive] vibratory ground motions *at the site*."[47] Although the regulation directs "regional geological reconnaissance," it is clear that the purpose of all these investigative methods is to determine the stability of the proposed site, not the region in general.[48] We therefore affirm the Board' s interpretation of 10 C.F.R. § 72.103(a)(1).

On January 16, 2020, Fasken submitted to the NRC Staff a request for access to the non-publicly available portion of an RAI response released on January 6, 2020. Fasken stated that it needed the information to support Contention 2.[49] The Staff denied the request on January 27, 2020, and Fasken submitted an appeal on February 12, 2020.[50]

Fasken argues that it needs the information in order to participate meaningfully in the licensing proceeding. The information Fasken requests is detailed information about the

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[46] Fasken Appeal at 5-6.

[47] 10 C.F.R. § 72.103(a)(1) (emphasis added).

[48] Fasken additionally challenges the Board's ruling that it failed to dispute relevant portions of the application because it did cite portions of the SAR in its petition. Fasken Appeal at 5-6. But given that the contention lacked factual support, whether it provided cites to certain SAR sections is irrelevant. We additionally find no merit to Fasken's argument that the Staff should not have changed its position concerning the contention's admissibility.

[49] Fasken SUNSI Request at 3.

[50] Letter from Sara Kirkwood, NRC, to Timothy Laughlin, Counsel for Fasken (Jan. 27, 2020) (Denial of Fasken SUNSI Request) (ML20024D860); *see also* Fasken SUNSI Appeal.

location, type, and status of oil, gas, and water wells within a 10-kilometer radius of the proposed CISF site, which Fasken argues is relevant to its Contention 2. But as described above, the Board found Contention 2 inadmissible principally because Fasken did not show that wells located away from the site could affect soil stability on the site. Nothing in Fasken's SUNSI appeal contravenes that analysis. We therefore deny Fasken's request for access to the non-public portions of ISP's RAI response.

2. Fasken's Contention 3 (Airplane Crash)

In Contention 3, Fasken claimed that ISP's emergency response plan for the facility was deficient in failing to account for aircraft crashes and other hazards: "The Applicant's Emergency Response Plan (ERP) fails to address how licensee will protect the facility from credible fire and explosion effects including those that are caused by aircraft crashes."[51] Fasken argued that the ERP does not conform to the requirements of 10 C.F.R. § 72.122(c), which requires that structures, systems, and components important to safety (SSCs) "must be designed and located so that they can continue to 'perform their safety functions effectively under credible fire and explosion exposure conditions'" or to 10 C.F.R. § 72.24(d)(2), which requires that the application evaluate SSCs designed to prevent and mitigate accidents.[52] Fasken reasoned that ISP had identified an airplane crash as a "credible accident" because it is listed in the ERP.[53] Fasken

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[51] Fasken Petition at 18; *see* Consolidated Emergency Response Plan (Mar. 15, 2017) (ML17082A054) (ERP).

[52] Fasken Petition at 18-26 (quoting Final Report, Standard Review Plan for Spent Fuel Dry Storage Facilities," NUREG-1567 (Mar. 2000), § 6.4.5 (ML003686776) (Dry Storage SRP) (emphasis removed)).

[53] *Id.* at 19; *see* ERP, app. C, Facility Emergency Action Levels.

further argued that the ERP must take into account the "size, velocity, weight and fuel loads" of various aircraft "when assessing the hazards" of such a crash.[54]

The Board held that the contention did not dispute relevant portions of the application and therefore did not raise a genuine issue of material fact concerning emergency planning.[55] The Board found that the contention mistakes matters that are to be addressed in the emergency plan with matters that are addressed elsewhere in the application. The Board explained that § 72.122(c) is a design requirement, compliance with which is addressed in the SAR, chapter 12, "Accident Analysis," rather than in the emergency plan.[56] The Board further found that air crash accidents are not among the credible events listed.[57] Indeed, the emergency response plan explicitly states that it discusses responses to various posited scenarios, including those that have not been found to be credible.[58]

On appeal, Fasken argues that the Board should have admitted its contention. First, it argues that aircraft crashes are credible accidents because there are three airports within fifty miles of the proposed facility.[59] Second, Fasken asserts that the Standard Review Plan for dry

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[54] Fasken Petition at 22 (citing Dry Storage SRP § 2.5.2). Fasken further claimed in Contention 3 that the ERP "relies on outside assistance to handle catastrophic fires and explosions and does not specify how their current suppression systems will effectively mitigate fires and explosions until help arrives." *Id.* at 19, 22-23. It argued that emergency responders are located many miles from the site although "time is of the essence" in mitigating radiation exposure. *Id*. at 22-25. These arguments appear to have been abandoned on appeal.

[55] LBP-19-7, 90 NRC at 114-15.

[56] *Id.* at 114.

[57] *Id.* at 115. The Board observed that Fasken "appears to assume that all events that could trigger an emergency alert are necessarily credible events for which the facility must be designed to survive with its safety functions intact." *Id*.

[58] SAR § 13.5, "Emergency Response Planning," provides: "The [ERP] planning basis includes credible events as well as hypothetical accidents whose occurrence is not considered credible, so as not to limit the scope of Emergency Response Planning."

[59] Fasken Appeal at 13.

storage facilities requires an assessment of aircraft crashes regardless of whether such crashes are deemed "credible."[60] Third, Fasken argues that the Board abused its discretion because it was inconsistent in its use of staff guidance documents in evaluating contention admissibility.[61]

With respect to Fasken's argument that an aircraft crash is credible because the facility is within fifty miles of three airports, we first observe that Fasken offers no factual or expert support for this argument. This argument is new on appeal.[62] In addition, Fasken does not address the analysis ISP provided regarding the probability of such an accident, namely, that it is less than one in a million per year.[63] Fasken does not question ISP's analysis specifically or support its contention factually with anything other than the claim that airports are located within a fifty mile radius.

We also disagree with Fasken's argument that the Standard Review Plan for spent fuel facilities, § 2.5.2, requires an analysis of aircraft crash impacts without regard to whether such a crash is credible. Section 2.5.2, by its own terms, directs the Staff reviewer to ensure that the "methods used by the applicant to quantify offsite hazards are consistent with the guidance in chapter 15," which in turn directs that the reviewer ensure that credible events have been

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[60] *Id.* at 13 (citing Dry Storage SRP § 2.5.2). The quoted section directs staff reviewers to "review potential hazards associated with nearby facilities [including airports and consider] aircraft size, velocity, weight and fuel load in assessing the hazards of aircraft crashes on an installation near an airport."

[61] *Id.* at 13-14.

[62] We do not permit a participant to raise new arguments on appeal. *See Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 546 (2009).

[63] *See* First RAI Responses at 1; First RAI Response Package, Encl. 6, SAR Changed Pages (rev. 3 interim), at 4-12 (unnumbered). According to its RAI response, ISP used guidance in the "Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants: LWR Edition," NUREG-0800, rev. 4 (Mar. 2010) § 3.5.1.6 (ML100331298).

analyzed.[64] A facility need not be designed to withstand "every conceivable accident," but it must be designed to withstand those found to be credible.[65]

We find unavailing Fasken's argument that the Board applied Staff guidance documents inconsistently in its analysis because the Board treated guidance documents as controlling in rejecting other contentions.[66] Regulatory Guides describe approaches to compliance that have been deemed acceptable by the Staff in the past, but they do not create new regulatory requirements.[67] Where an applicant follows an applicable guidance document, the burden is on the petitioner to show that the application nonetheless falls short of regulatory requirements. Fasken, however, has not identified an inconsistency in the Board's ruling on Contention 3 or an abuse of discretion by the Board in its application of the guidance documents.

We therefore affirm the Board's decision to dismiss Fasken Contention 3.

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[64] *See* Dry Storage SRP § 15.5.

[65] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 259 (2001). In *Private Fuel Storage*, we ruled that the threshold probability for a design basis event (that is, whether an event is credible) should be one in one million for a spent fuel storage installation. *Id.* at 265. The *Private Fuel Storage* decision specifically addressed the probability of an aircraft crash into the facility. *Id*. at 263.

[66] Fasken Appeal at 13-14. Fasken specifically cites the Board's rejection of Sierra Club's proposed Contention 15. But the Board did not find that the guidance document was legally binding; it found that Sierra Club did not show how ISP had violated NEPA or NRC regulations in its environmental justice analysis. *See* LBP-19-7, 90 NRC at 84; *see also* "Environmental Review Guidance for Licensing Actions Associated with NMSS Programs" (Final Report), NUREG-1748 (Aug. 2003), at 6-25 (ML032450279).

[67] *See Private Fuel Storage*, CLI-01-22, 54 NRC at 264; *International Uranium (USA) Corp*. (Request for Materials License Amendment), CLI-00-1, 51 NRC 9, 19 (2000) ("NRC Guidance Documents are routine agency policy pronouncements that do not carry the binding effect of regulations.").

3. Fasken's Contention 4 (Groundwater and Aquifers); Motion to Reopen; Motion to Amend Contention 4 Based on New Information

In its proposed Contention 4, Fasken argued that both the Environmental Report and SAR failed to consider the adverse effect the CISF will have on groundwater.[68] Specifically, Fasken argued that the Environmental Report did not comply with 10 C.F.R. § 51.45 and that the SAR did not "contain 'adequate information for an independent review of all subsurface hydrology-related design bases and compliance with dose radiological exposure standards'" to ensure compliance with 10 C.F.R. § 72.122(b)(4).[69] Fasken's expert Mr. Pachlhofer asserted that four aquifers are in Andrews county at or near the WCS site.[70] Fasken also claimed that water within one of these, the Antler Formation, is used for drinking and the formation is present within a few feet of the surface on the WCS site.[71] However, the only support Fasken supplied for the claim that the proposed CISF could contaminate the groundwater was the assertion that ISP has conceded that an airplane crash into the facility is a credible event that could cause the release of radionuclides.[72]

On January 21, 2020, Fasken filed a motion to reopen the proceeding and to admit an amended Contention 4 based on ISP's response to an RAI from the Staff.[73] Fasken's motion

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[68] Fasken Petition at 26-31.

[69] *Id.* at 27 (quoting Dry Storage SRP § 2.4.5).

[70] Pachlhofer Declaration at 4.

[71] Fasken Petition at 30, Pachlhofer Declaration at 4.

[72] Fasken Petition at 27-28.

[73] *Fasken Oil and Ranch, LTD and Permian Basin Land and Royalty Owners Motion to Reopen the Record for Purposes of Considering and Admitting an Amended Contention Based on New Information Provided by Interim Storage Partners in Response to NRC Requests for Additional Information* (Jan. 21, 2020) (Fasken Motion to Reopen); *Fasken Oil and Ranch, LTD and Permian Basin Land and Royalty Owners Motion for Leave to Amend Contention Four Regarding Interim Storage Partner's New Description of Groundwater Located below the Site and the Potential Impact the Site Will Have on the Groundwater* (Jan. 21, 2020) (Fasken Motion to Amend Contention 4); *see also* Letter from Jeffery D. Isakson, ISP, to NRC Document

argues that ISP's RAI response provided a materially different description of the subsurface environment at the site.

The Board dismissed the original contention because Fasken had not raised a material dispute identifying a plausible pathway to the groundwater from the CISF. For the reasons it provided in analyzing Fasken Contention 3, the Board was unpersuaded by the argument that an aircraft accident presented a credible scenario that could result in a contamination release.[74] It found that Fasken did not challenge the finding in the SAR that four factors "preclude the possibility of groundwater contamination": the canister design, the method of storage, the extremely low permeability of the red clay underlying the site, and the depth to the groundwater beneath the facility—about 225 feet to the shallowest water bearing zone.[75] In addition, the Board found that because the only portions of the application Fasken specifically challenged were in the SAR, not the Environmental Report, the contention failed as an environmental contention.[76]

Fasken's appeal challenges the Board's ruling rejecting its claim concerning aircraft crashes.[77] For the reasons the Board explained and as described above, ISP never conceded that an aircraft crash was a credible event, and Fasken has not challenged ISP's analysis

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Control Desk, "Submission of ISP Responses for RAIs and Associated Document Markups from First Request For Additional Information, Part 3" (Nov. 21, 2019), Encl. 3 (ML19337B502 (package)) (Part 3 RAI Response). Although the documents were received in November 2019, they were not publicly released until January 6, 2020.

[74] LBP-19-7, 90 NRC at 116.

[75] *Id.*; *see* SAR § 2.5, at 2-21.

[76] LBP-19-7, 90 NRC at 116.

[77] Fasken Appeal at 15-16. On appeal, Fasken also argues that its failure to cite portions of the Environmental Report should not preclude the contention's admission as an environmental contention because the hydrology sections of the Environmental Report are repeated verbatim in the hydrology sections of the SAR. *Id.* at 15. However, Fasken's challenge to the SAR was also unsupported.

concluding that such a crash is not a credible event.[78] Fasken's petition provided no other theory by which the canisters could release radionuclides to the environment. In addition, Fasken did not challenge the Environmental Report's conclusion that the proposed facility provides "no potential for a liquid pathway because the spent fuel contains no liquid component and the casks are sealed to prevent any liquids from contacting the spent fuel assemblies."[79]

Fasken next argues that it presented a genuine dispute "regarding the presence, location, and permeability of aquifers and formations below the proposed site."[80] Fasken's proposed amendment to Contention 4 also pertains to a claimed mischaracterization of the site. But neither Fasken's original nor its amended Contention 4 identifies a significant disparity between the information in the SAR and the information in Mr. Pachlhofer's declaration and the report on which he primarily relies.[81] The report on which Mr. Pachlhofer relies acknowledges that groundwater "is not present continuously beneath" the WCS site.[82] Moreover, Fasken's argument does not acknowledge the difference between a geologic formation and a water-saturated aquifer. While Mr. Pachlhofer's declaration states that the Antlers Formation underlies the site and contains groundwater used for drinking water in Midland Texas, it does not claim that the Antlers Formation is saturated beneath the CISF site.[83] ISP's application

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[78] *See supra* § II.C.2; LBP-19-7, 90 NRC at 115.

[79] *See* Environmental Report § 6.2, at 6-1.

[80] Fasken Appeal at 16.

[81] *See* Fasken Petition, Ex. 4, Thomas M. Lehman & Ken Rainwater, "Geology of the WCS–Flying 'W' Ranch, Andrews County, Texas" (April 2000) (Lehman and Rainwater Report). The Lehman and Rainwater Report focused on the Flying "W" Ranch area, immediately south of the proposed CISF, where there is currently a hazardous waste disposal site.

[82] *See* Lehman and Rainwater Report at 16; *see also id*. at 30 (Fig. 10).

[83] Pachlhofer Declaration at 4; *see also* Fasken Appeal at 18.

acknowledges that the Antlers Formation is under its site.[84] Moreover, even if there are minor disagreements between the SAR and Fasken's materials, Fasken does not show how these relate to the underlying premise of its contention that the CISF would cause groundwater contamination.

Fasken's proposed amendment to Contention 4 focuses on the argument that the application misrepresented the depth of groundwater at the site. In its proposed Amended Contention 4, Fasken argues that ISP has acknowledged in its RAI response that groundwater exists at the site only "a few inches to a few feet" below the surface.[85] But Fasken's argument for amending Contention 4 is based on a misreading of ISP's RAI response.

In RAI WR-11, the Staff asked ISP to identify the shallowest groundwater located beneath the "proposed CISF footprint." ISP responded:

> The shallowest groundwater beneath the proposed CISF footprint is a few inches to a few feet of saturation in the undifferentiated Antlers/Ogallala sediments starting at the northern fence line of the Protected Area boundary in the northeast corner. The sands and gravels containing the water at a 90- to 100-foot depth are part of a hydrostratigraphic unit termed the Antlers/Ogallala/Gatuña (OAG) by ISP joint venture member Waste Control Specialists.[86]

Therefore, the RAI response did not state that groundwater was present a few feet or a few inches below the surface. Instead, it states that the depth of the groundwater is 90 to 100 feet below the surface and the saturated thickness is a few inches to a few feet. Fasken misinterprets the response.

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[84] SAR at 2-22 to 2-23.

[85] *See* Fasken Motion to Reopen at 8; Fasken Motion to Amend Contention 4 at 7-8.

[86] Part 3 RAI Response at 59. ISP also acknowledged in its response that the SAR's statement that shallowest water bearing zone was at a depth of 225 feet was measured at the neighboring WCS facility. *Id*.

The remainder of Fasken's proposed amended argument turns on the claim that groundwater is present on the site no more than a few feet underground.[87] For example, Fasken argues that the Board erred in finding that the red clay layer under the site would form a natural barrier to the spread of any contamination.[88] Fasken reasons that the red clay layer cannot possibly overlie the shallowest aquifer because the Environmental Report states that the red clay layer is overlain by twenty-two to fifty-four feet of sand, gravel and alluvium, and "the red bed clays will not provide a natural barrier to the groundwater located inches below the site."[89] Because there is no basis to conclude that groundwater exists "inches" below the surface, this argument is without merit.[90]

We deny Fasken's request to amend Contention 4 because it lacks factual support. We therefore do not consider whether Fasken has satisfied the standards necessary to prevail on a motion to reopen. We affirm the Board's ruling on Fasken Contention 4.

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[87] Fasken Motion to Amend Contention 4 at 3, 7-8, 13 n.40, 16, 19, 21. Fasken also argues that the RAI response "admits that previous descriptions of groundwater were 'not based on sufficient boring data.'" Fasken Motion to Amend at 14, 19 (citing Part 3 RAI Response at 45). But the Part 3 RAI Response makes a different point when it states that the Lehman and Rainwater Report, which Mr. Pachlhofer cites in his declaration, "was not based on sufficient boring data to distinguish the contacts between the Antlers and the Ogallala in the proposed CISF area." Part 3 RAI Response at 45.

[88] Fasken Motion to Amend Contention 4 at 16, 21; *see also* LBP-19-7, 90 NRC at 116.

[89] Fasken Motion to Amend Contention 4 at 21 (citing Environmental Report § 4.3, at 4-28).

[90] *See also NRC Staff's Answer in Opposition to Fasken Oil and Ranch, Ltd and Permian Basin Land and Royalty Owners' Amended Contention 4 and Accompanying Motion to Reopen the Record*, at 7-8 (Feb. 13, 2020); *Interim Storage Partners, LLC's Answer Opposing Fasken's and PBLRO's Motion to Reopen the Record and Motion for Leave to Amend Contention Four*, at 13-14 (Feb. 18, 2020). Fasken submitted a reply to ISP's answer. *See Fasken Oil and Ranch, Ltd.'s and Permian Basin Land and Royalty Owners' Reply to Interim Storage Partners, LLC's Answer Opposing Motion of Leave to Reopen the Record and Associated Motion for Leave to Amend Contention Four* (Feb. 25, 2020). However, NRC regulations do not provide a right to reply to answers to a motion without prior permission from the Secretary of the Commission, and therefore Fasken's reply has not been considered. *See* 10 C.F.R. § 2.323(c).

D. Joint Petitioners' Appeal

The Board found that only one of the Joint Petitioners had demonstrated standing based on the standing of SEED Coalition and SEED Coalition's member Beatrice Gardiner-Aguilar.[91] But the Board did not admit any of Joint Petitioners' fifteen proposed contentions, and Joint Petitioners have appealed its decision with respect to seven of them.[92] Joint Petitioners have additionally appealed the Board's finding that its other members did not demonstrate standing.[93] Because we find the Board properly rejected the appealed contentions, we do not reach the standing issue.

1. Joint Petitioners' Contention 1 (NEPA Analysis of Transportation Impacts)

Joint Petitioners argued in proposed Contention 1 that the environmental impacts of waste transportation and storage at the proposed CISF must be assessed together as part of a "single, integrated project" under NEPA.[94] Joint Petitioners asserted that ISP's Environmental Report is lacking because it did not include "details and environmental impacts of a planned [twenty-year] shipping campaign involving at least 3,000 deliveries of SNF and GTCC waste to ISP."[95] Specifically, they claimed that the Environmental Report did not include "complete

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[91] LBP-19-7, 90 NRC at 50-51.

[92] *Notice of Appeal of LBP-19-07 by Petitioners Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, Sustainable Energy and Economic Development Coalition, and Leona Morgan, Individually, and Brief in Support of Appeal* (Sept. 17, 2019) (Joint Petitioners Appeal).

[93] *Id.* at 4-18.

[94] *Petition of Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, Sustainable Energy and Economic Development Coalition, and Leona Morgan, Individually, to Intervene, and Request for an Adjudicatory Hearing* (Nov. 13, 2018), at 4 (Joint Petitioners Petition).

[95] *Id.* at 41.

disclosure of all probable transportation routes, along with quantities of SNF and the likely radioisotopic contents" to be shipped.[96]

The Board ruled that proposed Contention 1 was inadmissible because it did not raise a genuine dispute of material fact or law with the application, was outside the scope of this proceeding, and amounted to an impermissible attack on the NRC's licensing regulations in 10 C.F.R. Parts 51 and 72.[97] The Board found that ISP's application included an evaluation of the environmental impacts of waste transportation to the proposed CISF along several representative routes and that Joint Petitioners had not disputed any part of that evaluation.[98] The Board also noted that the actual routes that may one day be used to transport waste to the proposed CISF are not currently known and are not the subject of any NRC approval in this proceeding. According to the Board, Joint Petitioners did not provide legal authority to suggest additional or unknown routes must be evaluated now.[99]

On appeal, Joint Petitioners reiterate their claim that ISP's application did not sufficiently address the environmental impacts of transporting waste to the proposed CISF.[100] But as the Board found, this proceeding does not include NRC review and approval of waste transportation routes; rather, its scope is confined to ISP's application for a license to build and operate a proposed CISF. Further, ISP's application includes an evaluation of the environmental impacts that would be expected along representative waste transportation routes to the proposed CISF from twelve different potential facilities; the Board found Joint Petitioners did not dispute any

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[96] *Id.* at 43.

[97] LBP-19-7, 90 NRC at 88-89.

[98] *Id.* (citing Environmental Report § 4.2, at 4-3 to 4-28).

[99] *Id.*

[100] Joint Petitioners Appeal at 19-20.

part of that evaluation.[101] Joint Petitioners did not claim error in the Board's findings or reasoning and we see none. Accordingly, we affirm the Board's dismissal of Contention 1.

2. Joint Petitioners' Contention 4 (Underestimation of LLRW Volume)

Joint Petitioners argued in proposed Contention 4 that ISP's application underestimated the volume of LLRW that will be generated by the proposed CISF.[102] They claim that the application does not account for LLRW that would be generated during repackaging of spent fuel from the casks and canisters at the CISF into "uniformly-constructed transportation, aging, and disposal canisters" that DOE may one day deploy to move waste from the proposed CISF to a permanent repository.[103] They argued that the application also "omit[s] mention of disposal of radioactively activated and radioactively contaminated concrete" resulting from decommissioning of "the concrete and subgrade materials that will be bombarded for from 60 to 100 years with neutron radiation" at the proposed CISF.[104] As a result, Joint Petitioners claimed, "there is a significant underestimate of the quantities of LLRW to be generated by long-term operations and of the associated price tag."[105]

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[101] *See* LBP-19-7, 90 NRC at 89; *see also* Environmental Report § 4.2.7 (identifying twelve decommissioned reactor sites from which waste shipment impacts were analyzed). The use of representative routes to evaluate transportation impacts where actual routes are unknown is well-established under our regulatory framework and consistent with NEPA's "rule of reason." *See, e.g.*, "Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel," NUREG-2157, vol. 1, at 5-52 (ML14196A105) (Continued Storage GEIS); "Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah," NUREG-1714, vol. 1, at 5-39 (ML020150217); *see also* 10 C.F.R. § 51.52, Table S-4 (deriving generic effects of transportation and fuel waste for one power reactor based on a survey of then-existing power plants).

[102] Joint Petitioners Petition at 64-76.

[103] *Id*. at 66-69.

[104] *Id.* at 72-73.

[105] *Id.* at 75.

The Board ruled proposed Contention 4 inadmissible because it raised issues outside the scope of this proceeding.[106] The Board found the environmental impacts of spent fuel repackaging beyond the scope of this proceeding because ISP has not requested authorization to repackage spent fuel from its waste canisters into other packages.[107] The Board also found the impacts of repackaging resulting from any separate, future DOE waste disposal campaign "necessarily outside the scope of this proceeding as well."[108]

Further, the Board determined that proposed Contention 4 impermissibly challenged the Continued Storage Rule, 10 C.F.R. § 51.23, insofar as it would have ISP describe the impacts of spent fuel repackaging in its Environmental Report. The Board found that spent fuel repackaging is not an activity that would be authorized during the initial license term, and the Continued Storage Rule explicitly excuses an applicant from providing a site-specific description of environmental impacts related to spent fuel storage that may occur after the initial forty-year license term.[109]

The Board also rejected Joint Petitioners' argument that ISP had grossly underestimated the volume of concrete LLRW that the proposed CISF would generate. The Board found that the environmental impacts resulting from disposal of concrete casks and storage pads from an ISFSI are generically described in the Continued Storage GEIS, which is incorporated into the Continued Storage Rule.[110] The Board ruled that Joint Petitioners' claim that ISP

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[106] LBP-19-7, 90 NRC at 91-93.

[107] *See id.* at 92.

[108] *Id.*

[109] *Id.*; 10 C.F.R. § 51.23(b).

[110] *See* LBP-19-7, 90 NRC at 92-93; Continued Storage GEIS; 10 C.F.R. § 51.23.

underestimated the volume of LLRW at the proposed CISF was therefore an impermissible attack on that rule.[111]

On appeal, Joint Petitioners argue that the Board's decision wrongly excluded from environmental-impact consideration any future planned expansions of the proposed CISF as well as decommissioning activities that would occur beyond the initial license term.[112] We disagree. The Continued Storage Rule provides that the environmental impacts of an ISFSI beyond the term of its initial license are described generically in the Continued Storage GEIS.[113] The Continued Storage GEIS describes the environmental impacts associated with spent fuel repackaging, concrete disposal, and facility decommissioning for spent fuel storage facilities.[114] The Board recognized that the environmental impacts associated with the continued storage of spent fuel had already been generically determined by the Commission through the rulemaking process. Accordingly, we affirm the Board's dismissal of proposed Contention 4.

4. Joint Petitioners' Proposed Contention 5 (Environmental Justice Effects of Transportation)

Joint Petitioners argued in Proposed Contention 5 that ISP, by stating that transportation of waste from reactors to the proposed CISF is not part of the license application, improperly "segmented" evaluation of the environmental effects of transportation from the environmental effects of waste storage.[115] As a result, Joint Petitioners claim, "Environmental Justice . . . compliance" will not be possible because "identification and analysis of potentially affected

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[111] *See* LBP-19-7, 90 NRC at 92 (citing 10 C.F.R. § 2.335).

[112] Joint Petitioners Appeal at 23.

[113] 10 C.F.R. § 51.23(b).

[114] *See* Continued Storage GEIS, chs. 4-6.

[115] Joint Petitioners Petition at 76.

populations along the anticipated rail, truck and barge routes will be improperly excluded from disclosure in the NEPA document."[116]

The Board ruled that proposed Contention 5 did not raise a material dispute with the application. The Board found the proposed action is construction and operation of the proposed CISF and that the area for assessment of environmental justice impacts is based on the location of the proposed facility, not the location of possible transportation routes.[117] Although the Board agreed with the petitioners that "transportation routes will eventually need to be established, and impacts from those routes will need to be analyzed, should ISP's proposed facility be licensed and become operational," it held that the proposed action is for a license to build and operate a facility to store waste, not transport it.[118] Therefore, by asserting that ISP's Environmental Report omits environmental justice information regarding as-yet-unknown transportation routes, the Board explained, "Joint Petitioners have not raised an issue that is material to the findings the NRC must make in this proceeding."[119]

On appeal, Joint Petitioners cite no authority to suggest the Board erred or abused its discretion in finding that proposed Contention 5 did not raise a material issue. Joint Petitioners argue that the Board's ruling would improperly segment evaluation of the environmental impacts of waste transportation from environmental impacts of waste storage. As the Board found, actual waste transportation routes are not under review in this licensing proceeding. We see no merit to Joint Petitioners claim that reviewing the impacts that may result from the proposed action in this case—construction and operation of the proposed CISF—also requires an

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[116] *Id.* at 76-77.

[117] LBP-19-7, 90 NRC at 94.

[118] *Id.* at 94.

[119] *Id*.

environmental justice evaluation of communities along as-yet-unknown transportation routes. Accordingly, we affirm the Board's dismissal of proposed Contention 5.

5. Joint Petitioners' Proposed Contention 6 (Effects of Oil and Gas Drilling)

In proposed Contention 6, Joint Petitioners asserted that fracking is occurring nearby the proposed CISF site but that "[t]here is no indication in the Environmental Report or Safety Analysis Report of legal controls over present or potential oil and gas drilling directly beneath the site."[120] Joint Petitioners further asserted that "the realistic prospects for mineral development immediately surrounding and underneath the WCS site" are unknown.[121] As a result, Joint Petitioners asserted, there are unknown "seismic, groundwater flow, and water consumption implications" posed by potential fracking that have not been addressed in the application.[122]

The Board found that Joint Petitioners "fail[ed] to acknowledge (much less dispute) relevant portions of ISP's application that address their concerns."[123] The Board noted, for example, that the SAR includes a proprietary analysis of seismic hazards, to which Joint Petitioners did not seek access and which they did not review.[124] Having found that Joint Petitioners had not met their burden to review the application and point out specific sections that were deficient, the Board dismissed proposed Contention 6 because it did not raise a genuine dispute with the application.[125] The Board also rejected Joint Petitioners' argument, raised for

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[120] Joint Petitioners Petition at 98.

[121] *Id.*

[122] *Id.*

[123] LBP-19-7, 90 NRC at 96.

[124] *Id*.

[125] *Id.*

the first time in a reply brief, that the application should consider future, possibly "intensified" fracking.[126] The Board found that this argument was not supported by any authority.[127]

On appeal, Joint Petitioners repeat their argument that "there must be an accounting of prospective drilling trends and density in the immediate region of the CISF" or otherwise there will be a "failure to investigate, project and disclose prospective geological changes" that will occur during the expected operations of the facility.[128] They further argue that the Board "missed Joint Petitioners' point" that the "omission of information about legal title to subsurface mineral rights . . . means that there is no certainty that fracking and possibly waste well injection activities will be prohibited underneath the WCS site."[129]

Joint Petitioners have shown no error in the Board's decision that proposed Contention 6 did not raise a material dispute with the license application. As required by our regulations, the license application includes information about site geology and seismology, including induced seismicity related to petroleum recovery.[130] The application discusses the corrosive properties of site soils, analyzes the potential for and severity of human-induced events at the site, and investigates other site characteristics. Joint Petitioners' assertion that additional analysis of prospective drilling trends is required is neither supported by legal authority nor explained as a specific deficiency in any of the analyses already provided. We therefore agree with the Board

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[126] *Id.*; *see also Combined Reply of Don't Waste Michigan, Citizen's Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, Sustainable Energy and Economic Development Coalition and Leona Morgan to ISP/WCS and NRC Answers* (Dec. 17, 2018), at 38.

[127] LBP-19-7, 90 NRC at 96.

[128] Joint Petitioners Appeal at 26.

[129] *Id.* at 25.

[130] *See* 10 C.F.R. § 72.103.

that Joint Petitioners did not meet their burden to identify sections of the application that they believed to be inadequate and provide supporting law, facts, or expert opinion to explain each asserted inadequacy described in proposed Contention 6. Accordingly, we affirm the Board's dismissal of proposed Contention 6.

6. Joint Petitioners' Proposed Contention 8 (Inadequate Consideration of Alternatives)

In proposed Contention 8, Joint Petitioners asserted that ISP's Environmental Report is inadequate because there are "alternatives to the proposed CISF project which are neither recognized nor addressed in the Environmental Report, contrary to NEPA requirements."[131] They argued that these alternatives include variants on the proposed facility.[132] Joint Petitioners also asserted that ISP's evaluation of the no-action alternative was deficient because ISP made "no demonstration of the overall benefits and costs of leaving the waste at the reactor site compared to the benefits and costs of sending waste from many reactors" to the proposed CISF.[133]

The Board ruled the contention inadmissible because it did not raise a genuine dispute on a material issue of fact or law.[134] The Board found that Joint Petitioners had identified five potential alternatives to the proposed action but had not explained what authority required ISP to evaluate any of them.[135] It noted that of the five alternatives suggested by Joint Petitioners, four "do not appear to be alternatives to constructing ISP's proposed facility at all, but rather suggestions for how to improve it" and the fifth alternative—hardened storage of spent fuel at

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[131] Joint Petitioners Petition at 107.

[132] *Id.* at 107-08, 111.

[133] *Id.* at 111.

[134] LBP-19-7, 90 NRC at 98.

[135] *Id.*

existing reactor sites—has not been licensed or implemented.[136] The Board found that Joint Petitioners had not shown why hardened on-site storage of spent fuel at existing reactors would be necessary to an evaluation of the no-action alternative.[137] The Board also rejected Joint Petitioners' claim that a cost-benefit analysis of the no-action alternative was omitted because "the alleged missing information" was provided in Chapter 7 of the Environmental Report.[138]

On appeal, Joint Petitioners argue that the Board was wrong to require further explanation of why the five project alternatives they propose are required to be addressed by ISP. Those five alternatives include "(1) establishment of a dry transfer system; (2) modification of ISP's emergency response plan to include preparations for emissions mitigation; (3) CISF design modification to prevent 'malevolent' acts; (4) Federal Government control of the ISP facility; and (5) implementation of hardened onsite storage . . . at reactor sites."[139] Joint Petitioners, citing the decision of the United States Court of Appeals for the First Circuit in *Dubois v. U.S. Department of Agriculture,* assert that they "do not have to explain" why these alternatives must be considered because "the existence of reasonable but unexamined alternatives renders an EIS inadequate."[140]

In *DuBois,* the First Circuit found that the United States Forest Service failed to meet its NEPA obligations because it did not address *at all* a reasonable alternative identified by commenters on its draft environmental impact statement.[141] The U.S. Environmental Protection

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[136] *Id.*

[137] *Id.*

[138] *Id.* at 99. Joint Petitioners do not pursue this claim on appeal.

[139] Joint Petitioners Appeal at 26-27.

[140] *Id.* at 27 (citing *DuBois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1287 (1st Cir. 1996)).

[141] The Forest Service had granted a permit to allow a ski resort to increase its withdrawal of water from an unusually pristine mountain pond for artificial snowmaking. The permit allowed a fifteen-foot drop in the pond's water level from the resort's water use, which was far greater than

Agency had judged that the permitted option would have serious adverse environmental consequences to an "outstanding" water resource, and the alternative urged by the commenters would involve an option that had been approved in other similar situations.[142] But the Forest Service did not respond to the suggested alternative.[143] The Court found that NEPA required the Forest Service, faced with evidence of serious adverse consequences associated with the proposed action, to consider the "reasonably thoughtful" alternative proposal "and to explain its reasoning if it rejected the proposal."[144] But this decision does not require an agency to conduct an environmental analysis of every suggestion proposed by a commenter.

Here, unlike in *DuBois*, Joint Petitioners have not shown that their proposed alternatives are reasonable, and the Board sufficiently explained its rejection of them. Two of the proposed alternatives—Federal ownership of the proposed CISF and implementation of hardened, on-site storage of spent fuel at current reactor sites—would not meet the applicant's purpose to construct a privately-owned, centralized storage facility.[145] The other three alternatives call for design and procedure changes at the proposed facility—including consideration of design features not required by our safety regulations—without explaining why those changes would be needed to avoid or mitigate an environmental impact.

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the previously approved limit of eighteen inches. The alternative presented by commenters was to build artificial water storage ponds. *Dubois*, 102 F.3d at 1278-79.

[142] *Id*. at 1277-78.

[143] *Id*. at 1279.

[144] *Id.* at 1288-89.

[145] As a licensing agency charged with enabling the safe and secure use of nuclear materials, we "accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project." *In re Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 55 (2001) (quoting *Citizens Against Burlington v. Busey*, 938 F.2d 190, 197 (D.C. Cir. 1991)). We may also legitimately consider the "economic goals of the project's sponsor." *Id.* (quoting *City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994)).

Under our contention-pleading rules, it is the petitioner's burden to explain why a contention should be admitted. As the Board found, Joint Petitioners have not met that burden in their proposal of project alternatives. We therefore affirm the Board's dismissal of proposed Contention 8.

7. Joint Petitioners' Proposed Contention 11 (Lack of a Dry Transfer System)

Joint Petitioners asserted in proposed Contention 11 that ISP's application must include plans for a dry transfer system—a facility that could be used to repackage spent fuel—or "other technological means of handling problems with damaged, leaking or externally contaminated SNF canisters or damaged fuel in the canisters."[146] The omission, according to Joint Petitioners, "contradicts the expectations of the Continued Storage GEIS" and indicates that "[t]here is no plan for radiation emissions mitigation or radioactive releases at the CISF site."[147] Joint Petitioners asserted the omission "violates the Atomic Energy Act obligation to protect the public" and that the "unanalyzed risks . . . must be addressed in the Environmental Impact Statement."[148]

The Board found the contention inadmissible for three independent reasons. First, Joint Petitioners focused on the possibility that canisters would be damaged and a dry transfer system would be required. But contrary to our requirements, Joint Petitioners did not address ISP's relevant safety analyses, aging management plans, and quality assurance programs.[149] Second, under our prior decision in *Private Fuel Storage*, several safety evaluations for waste packages have led the NRC to conclude that accidental canister breaches are not credible

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[146] Joint Petitioners Petition at 118.

[147] *Id.*

[148] *Id.* at 118-19.

[149] LBP-19-7, 90 NRC at 102.

scenarios.[150] Therefore Joint Petitioners' claim that canister damage could somehow occur "fail[ed] to raise a plausible scenario."[151] Third, contrary to Joint Petitioners' characterizations, "neither the GEIS nor NRC regulations require ISP to construct a dry storage system during the initial 40-year license for its proposed facility," and "the Continued Storage Rule makes clear that ISP's Environmental Report is not required to evaluate the impacts of storage beyond the term of the license it is requesting."[152]

On appeal, Joint Petitioners do not dispute the Board's rulings directly but again assert that it would be better to have a dry transfer system in place at the start of CISF operations, rather than in the long-term and indefinite timeframes contemplated by the Continued Storage GEIS.[153] Joint Petitioners also assert that, if DOE at some future time begins a campaign to move spent fuel from existing sites to a permanent repository, repackaging will be required, given "the current posture of the DOE's canister repackaging policy."[154] The Board considered and rejected these arguments, and we see no basis in Joint Petitioners' appeal to disturb the Board's decision.[155]

We agree with the Board that NRC regulations do not require a dry transfer system to be in place during the period of licensed operation. Moreover, NRC regulations do not require a

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[150] *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 136-37 (2004)).

[151] LBP-19-7, 90 NRC at 102-03 (citing *Private Fuel Storage*, 60 NRC at 136-37).

[152] *Id.* at 103.

[153] *See* Joint Petitioners Appeal at 29; *see also* Continued Storage GEIS § 2.1.4 (reflecting the assumption that a dry transfer system would be constructed not during the period of facility operations but in the long-term and indefinite timeframes of continued waste storage following the operating license term).

[154] Joint Petitioners Appeal at 29.

[155] *See* LBP-19-7, 90 NRC at 103.

license applicant to describe in its Environmental Report the impacts of building and operating a dry transfer system after the period of licensed operation. Rather, the impacts of continued spent fuel storage after the period of licensed operation—including the impacts associated with construction and operation of a dry transfer system—are already described generically in the Continued Storage GEIS, which is incorporated by reference into the Continued Storage Rule.[156] Accordingly, we affirm the Board's dismissal of proposed Contention 11.

8. Joint Petitioners' Proposed Contention 14 (NEPA Analysis of Security Risks)

Joint Petitioners asserted in proposed Contention 14 that ISP's application should include an analysis of the environmental impacts resulting from (among other things) a terrorist attack on spent nuclear fuel shipments to the proposed CISF.[157] The Board found the contention inadmissible based on our precedent, which was upheld by the United States Court of Appeals for the Third Circuit.[158] In *AmerGen Energy*, we held that terrorist attacks are too far removed from the natural or expected consequences of agency action to require environmental analysis in an NRC licensing proceeding.[159]

On appeal, Joint Petitioners argue that the Board's rejection of proposed Contention 14 rested "on the unlawful segmenting of the CISF from the transportation component" and that "[w]ere transportation properly included within the scope of the project, the hundreds of SNF cargoes coming from states within the geographical Ninth Circuit, as part of the project, would have to be analyzed" under the Ninth Circuit's ruling in *San Luis Obispo Mothers for Peace v.*

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[156] *See* Continued Storage GEIS § 2.2.2, at 2-31 to 2-35, chs. 4-5; 10 C.F.R. § 51.23.

[157] Joint Petitioners Petition at 142-43.

[158] LBP-19-7, 90 NRC at 108; *see AmerGen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124 (2007), *review denied*, *N. J. Dep't of Envtl. Prot. v. NRC*, 561 F.3d 132 (3d Cir. 2009).

[159] *AmerGen Energy*, CLI-07-8, 65 NRC at 129.

NRC.[160] The Board explicitly considered and rejected this argument and noted that in *AmerGen Energy,* we declined to apply the ruling in *San Luis Obispo Mothers for Peace* outside of the Ninth Circuit.[161] The Board found that because the proposed CISF would be in Texas—outside the Ninth Circuit—no terrorist-attack analysis under NEPA is required.[162]

Joint Petitioners have shown no error in the Board's decision. As the Board addressed in its rulings on proposed Contentions 1 and 5, which we affirmed above, actual waste transportation routes are not currently known and have not they been proposed. Thus, review and approval of actual transportation routes to the proposed CISF is an issue outside the scope of this proceeding.[163] And Joint Petitioners have offered no argument persuading us that the likelihood of a terrorist attack is a reasonably foreseeable consequence of licensing this facility. The Board correctly applied our prior ruling in *AmerGen Energy*, and we affirm its decision to deny admission of proposed Contention 14.

E. Fasken's Motion for New Contention

On July 6, 2020, Fasken filed a motion to reopen the record of this proceeding and admit a new contention challenging the discussion of transportation impacts in the Staff's draft Environmental Impact Statement.[164] Although we have jurisdiction to consider whether to reopen this proceeding and admit the contention, we refer Fasken's motion to the Board for

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[160] 449 F.3d 1016, 1032 (9th Cir. 2006).

[161] LBP-19-7, 90 NRC at 108.

[162] *Id.*

[163] *See supra* §§ II.D.1, II.D.4.

[164] *See* Fasken Motion for Contention 5; *see also* "Environmental Impact Statement for Interim Storage Partners LLC's License Application for a Consolidated Interim Storage Facility for Spent Nuclear Fuel in Andrews County, Texas" (Draft Report for Comment), NUREG-2239 (May 2020) (ML20122A220).

consideration of these matters initially.[165] We remand Fasken's Proposed Contention 5 to the Board for consideration of the contention's admissibility, good cause for filing after the deadline, and ability to meet the reopening standards, consistent with our ruling here with respect to the similar issues raised in Joint Petitioners' Contention 1.[166]

II. CONCLUSION

For the foregoing reasons, we *affirm* the Board's decision denying the hearing requests and *remand* Fasken's Contention 5 to the Board for consideration.

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook

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Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of December 2020

[165] *See, e.g.*, *Holtec*, CLI-20-4, 91 NRC at 191, 211; *Virginia Electric & Power Co*. (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 701-02 (2012).

[166] The motion was timely under 10 C.F.R. § 2.326(a)(1) based on an order by the Secretary extending the deadline for filing new contentions based on the draft environmental impact statement. *See* Order (May 22, 2020).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
INTERIM STORAGE PARTNERS LLC	)	Docket No. 72-1050-ISFSI
	)	
(WCS Consolidated Interim Storage Facility)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-20-14)** have been served upon the following persons by the Electronic Information Exchange:

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Office of the Secretary of the Commission

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, 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-20-04

MEMORANDUM AND ORDER

Today we address five separate appeals of the Atomic Safety and Licensing Board's denial of requests to intervene in the proceeding regarding Holtec International's application to construct and operate a consolidated interim storage facility (CISF) in Lea County, New Mexico.[1] For the reasons described below, we affirm the Board in part and reverse and remand in part. We also remand to the Board two contentions filed after the deadline.

I. BACKGROUND

Holtec submitted its license application in March 2017.[2] The proposed license would allow Holtec to store up to 8680 metric tons of uranium (MTUs) (500 loaded canisters) in the

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

[2] *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)). By the time the Board ruled, Holtec had updated its application documents. The application revisions referenced in the Board's

Holtec HI-STORE CISF for a period of forty years.[3] Holtec's safety analysis currently encompasses only the canisters and contents approved under the generic docket 72-1040 for the HI-STORM UMAX canister storage system.[4] According to its application, Holtec plans up to nineteen subsequent expansion phases over the course of twenty years, with each expansion requiring a license amendment.[5] Holtec's environmental report (ER) anticipates operation of its proposed facility for up to 120 years (a forty-year initial licensing period plus eighty years of potential renewal periods) with up to 100,000 MTUs stored after all expansions.[6]

The Staff published a notice of opportunity to request a hearing on Holtec's application in July 2018.[7] Petitions to intervene were filed by Sierra Club; Beyond Nuclear, Inc. (Beyond Nuclear); Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (together, Fasken); Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, and Nuclear Issues Studies Group (together, Joint Petitioners); Alliance for Environmental Strategies (AFES); and NAC International Inc. (NAC). The Board heard oral argument on January 23 and 24, 2019.

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decision are: Environmental Report on the Holtec International HI-STORE CIS Facility, rev. 5 (Mar. 2019) (ML19095B800) (ER); and Holtec, Licensing Report on the HI-STORE CIS Facility, rev. 0F (Jan. 31, 2019) (ML19052A379) (SAR). References in this decision refer to the same revisions unless otherwise noted.

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

[4] SAR § 1.0 at 1-2; *see* 10 C.F.R. § 72.214 (list of approved spent fuel storage casks).

[5] *See* ER § 1.0.

[6] *Id.*

[7] *See* Holtec International's HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919 (July 16, 2018).

The Board rejected all the hearing requests for either lack of standing, failure to offer an admissible contention, or both. The Board found that three petitioners—Beyond Nuclear, Sierra Club, and Fasken—had demonstrated standing but had not offered an admissible contention.[8] The Board concluded that Joint Petitioners and NAC had neither demonstrated standing nor offered an admissible contention.[9] The Board did not rule on AFES's standing—which it found to be a close call—but rejected AFES's petition because the organization had not proposed an admissible contention.[10]

All petitioners except for NAC have appealed. The Staff and Holtec oppose the appeals, as described below.

II. DISCUSSION

A. Standard of Review

Our regulations allow a petitioner whose hearing request has been wholly denied to appeal as of right.[11] We generally defer to the Board on matters of contention admissibility and standing unless an appeal demonstrates an error of law or abuse of discretion.[12] Similarly, we generally defer to the Board on questions pertaining to the sufficiency of factual support for the admission of a contention.[13]

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[8] *See* LBP-19-4, 89 NRC at 358.

[9] *Id.*

[10] *Id.* at 358, 370-71.

[11] 10 C.F.R. § 2.311(c).

[12] *See, e.g.*, *Crow Butte Resources, Inc*. (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 13-14 (2014); *Strata Energy, Inc.* (Ross *In Situ* Uranium Recovery Project), CLI-12-12, 75 NRC 603, 608-13 (2012).

[13] *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-16-9, 83 NRC 472, 482, *Crow Butte*, CLI-14-2, 79 NRC at 13-14.

B. Beyond Nuclear/Sierra Club Contention 1/Fasken

Beyond Nuclear and Fasken each proposed a single contention, and Sierra Club proposed its Contention 1, all questioning whether it is lawful to issue the proposed license at all.[14] These petitioners contend that the application must be rejected outright because it contemplates storage contracts with the U.S. Department of Energy (DOE) and such contracts would be illegal under the Nuclear Waste Policy Act (NWPA).[15] Holtec envisions that its customers will either be nuclear plant operators or DOE, depending on which entity holds title to the spent nuclear fuel.[16]

Beyond Nuclear, Fasken and Sierra Club all argued that it would violate the NWPA for DOE to take title to spent nuclear fuel before it builds a permanent geological repository. Section 123 of the NWPA provides that DOE will take title to the spent fuel when the Secretary

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[14] *See Petition to Intervene and Request for Adjudicatory Hearing by Sierra Club* (Sept. 14, 2018), at 10-17 (Sierra Club Petition). Fasken entered this proceeding through a motion "to dismiss the licensing proceeding" filed directly before us relating to this facility and another CISF proposed in Texas. *See Motion of Fasken Land and Minerals and Permian Basin Land and Royalty Owners to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility* (Sept. 14, 2018). Beyond Nuclear filed a similar motion, which it attached as an exhibit to its hearing request and petition to intervene. *See Beyond Nuclear, Inc.'s Hearing Request and Petition to Intervene* (Sept. 14, 2018) (Beyond Nuclear Petition); *Beyond Nuclear, Inc.'s Motion to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility for Violation of the Nuclear Waste Policy Act* (Sept. 14, 2018). Beyond Nuclear also submitted a letter after filing its appeal. *See* Letter from Mindy Goldstein and Dianne Curran, Counsel for Beyond Nuclear, to the Commissioners (Apr. 7, 2020). The letter does not affect our analysis below.

[15] *See* Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C §§ 10101-10270 (2012). Because our regulations do not provide for a "motion to dismiss" an application, the Secretary of the Commission referred Beyond Nuclear's and Fasken's motions to be considered as hearing requests and as proposed contentions in each licensing proceeding. *See* Order of the Secretary (Oct. 29, 2018) (unpublished) (issued in this proceeding and in *Interim Storage Partners,* LLC (WCS Consolidated Interim Storage Facility)).

[16] *See, e.g.*, Proposed License at 2, ¶ 17 ("[T]he construction program will be undertaken only after a definitive agreement with the prospective user/payer for storing the used fuel ([DOE] and/or a nuclear plant owner).").

of Energy accepts delivery of it.[17] Section 302 of the NWPA provides that the Secretary of Energy will enter contracts with the spent fuel generators (nuclear power plant owners) that "shall provide that" the Secretary will take title to the spent fuel "following commencement of operation of a repository."[18] And a "repository" is defined in the NWPA as a system intended for "permanent deep geological disposal of high-level radioactive waste and spent nuclear fuel."[19]

During oral argument on the petitions, Holtec's counsel acknowledged that the NWPA would prevent DOE from taking title to spent nuclear fuel and therefore (except for a relatively small quantity of waste it already owns) DOE could not be a CISF customer.[20] Holtec also acknowledged that it hopes Congress will change the law to allow DOE to enter into temporary storage contracts with Holtec.[21] But Holtec argued that because the application also contemplates that nuclear plant owners might be potential customers, the petitioners have not raised a litigable contention.

The Board rejected the argument that the "mere mention of DOE renders Holtec's license application unlawful."[22] The Board observed that Holtec "is committed to going forward with the project" by contracting directly with the plant owners.[23] The Board held that whether that option is "commercially viable" was not an issue before the Board.[24] And it noted that

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[17] 42 U.S.C. § 10143.

[18] *Id.* § 10222(a)(5)(A).

[19] *Id.* § 10101(18).

[20] Tr. at 249-50.

[21] Tr. at 248, 250.

[22] LBP-19-4, 89 NRC at 381.

[23] *Id.*

[24] *Id.* (citing *Louisiana Energy Services, LP*. (National Enrichment Facility), CLI-05-28, 62 NRC 721, 726 (2005); *Hydro Resources, Inc*. (P.O. Box 15910, Rio Rancho, N.M. 87174) CLI-01-4, 53 NRC 31, 48-49 (2001)). In *Hydro*, we observed that the NRC "is not in the business of regulating the market strategies of licensees." *Hydro,* CLI-01-4, 53 NRC at 48-49. In *Louisiana*

Holtec had committed not to "contract unlawfully" with DOE.[25] The Board further pointed to DOE's publicly taken position that it cannot lawfully provide interim storage before a repository is operational.[26] The Board found that the NRC can safely assume that DOE would not enter unlawful contracts because federal agencies enjoy a "presumption of regularity" that they will "act properly in the absence of evidence to the contrary."[27] The Board concluded that Holtec "seeks a license that would allow it to enter into lawful customer contracts today, but also permit it to enter into additional customer contracts if and when they become lawful in the future."[28]

Beyond Nuclear argues that the NRC cannot issue the proposed license because the Administrative Procedure Act prohibits agency action that is "not in accordance with the law" or "in excess of statutory jurisdiction, authority, or limitation."[29] Beyond Nuclear frames the question as whether the NRC "may approve a license application containing provisions that would violate NWPA if implemented."[30] Similarly, Sierra Club argues that "the Holtec project cannot be licensed if there is a possibility that the financial arrangements would be illegal."[31] Fasken argues that Holtec's license application is "outside of the ASLB's and the NRC's

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Energy Services, we denied review of the Board's decision to reject a portion of a contention that questioned the commercial viability of the proposed project, and we held that the license applicant did not have to "demonstrate the potential profitability of the proposed facility." *Louisiana Energy Services,* CLI-05-28, 62 NRC at 725.

[25] *See* LBP-19-4, 89 NRC at 381.

[26] *Id.* at 382.

[27] *Id*. (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *United States v. Chem. Found. Inc.*, 272 U.S. 1, 14-15 (1926)); *see also FCC v. Schrieber*, 381 U.S. 279, 296 (1965).

[28] LBP-19-4, 89 NRC at 382.

[29] *Beyond Nuclear's Brief on Appeal of LBP-19-04* (June 3, 2019), at 7 (Beyond Nuclear Appeal) (quoting Administrative Procedure Act, 5 U.S.C § 706(2)(A), (C)).

[30] *Id.*

[31] *Sierra Club's Petition for Review of Atomic Safety and Licensing Board Decision Denying Admissibility of Contentions in Licensing Proceeding* (June 3, 2019), at 5 (Sierra Club Appeal).

subject-matter jurisdiction" because approval would authorize a facility that violates the NWPA.[32] The Staff and Holtec oppose the appeals.[33]

The three appellants' characterization largely restates arguments already advanced to the Board.[34] As the Board observed, "Holtec seeks a license that would allow it to enter into lawful customer contracts today, but also permit it to enter into additional customer contracts if and when they become lawful in the future."[35] The proposed license would authorize Holtec to take possession of the spent nuclear fuel in its CISF; the license itself would not violate the NWPA by transferring the title to the fuel, nor would it authorize Holtec or DOE to enter into storage contracts.[36] Holtec and DOE acknowledge that it would be illegal under NWPA for DOE to take title to the spent nuclear fuel at this time, although Holtec states that it hopes that Congress will amend the NWPA in the future.[37] We disagree with the assertions that the license

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[32] *Fasken and PBLRO Notice of Appeal and Petition for Review* (June 3, 2019), at 3-4 (Fasken Appeal).

[33] *See NRC Staff Answer in Opposition to Beyond Nuclear's Appeal of LBP-19-4* (June 28, 2019); *Holtec International's Brief in Opposition to Beyond Nuclear's Appeal of LBP-19-4* (June 28, 2019); *NRC Staff Answer in Opposition to Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners' Appeal of LBP-19-4* (June 28, 2019); *Holtec International's Brief in Opposition to Fasken and Permian Basin Land and Royalty Owners' Appeal of LBP-19-4* (June 28, 2019) (Holtec Opposition to Fasken Appeal); *NRC Staff's Answer in Opposition to the Sierra Club's Appeal of LBP-19-4* (June 28, 2019), at 5-7 (Staff Opposition to Sierra Club Appeal); *Holtec International's Brief in Opposition to Sierra Club's Appeal of LBP-19-4* (June 28, 2019), at 6-9 (Holtec Opposition to Sierra Club Appeal). Holtec challenges the Board's ruling on Fasken's standing as well, which we discuss in section II.F.1 below. *See* Holtec Opposition to Fasken Appeal at 14-19.

[34] *Florida Power & Light Company* (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 NRC 215, 219 (2017) (rejecting an appeal that only restated arguments previously raised before the board).

[35] LBP-19-4, 89 NRC at 382.

[36] *See* Proposed License at 2, ¶ 17.

[37] *See* LBP-19-4, 89 NRC at 381-82.

would violate the NWPA.[38] The NWPA does not prohibit a nuclear power plant licensee from transferring spent nuclear fuel to another private entity. We therefore affirm the Board's decision to reject this contention.

C. Sierra Club Appeal

The Board found that Sierra Club had shown standing but that none of its twenty-nine proposed contentions were admissible. Sierra Club has now appealed with respect to ten of those contentions in addition to its Contention 1 discussed above.[39] On October 23, 2019, Sierra Club also moved to admit a new contention concerning transportation risks.[40]

1. Sierra Club Standing

As an initial matter, Holtec challenges the Board's finding that Sierra Club has standing in this proceeding.[41] Although in matters involving construction or operation of a nuclear power reactor we allow a "proximity presumption" of standing to persons living within fifty miles of the proposed site, in non-power reactor cases, standing is examined on a case-by-case basis considering the petitioner's proximity to the site in addition to other factors.[42] This

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[38] To the extent Sierra Club argues that we should grant its appeal on Contention 1 because Holtec will use the license as "leverage to encourage Congress to change the law," we also reject that line of argument for the reasons discussed below in response to Sierra Club's appeal of Contention 26 and the Joint Petitioners' appeal of their Contention 14. Sierra Club Appeal at 9. Fasken suggests that the Secretary of the Commission improvidently referred its motion to dismiss to the Board for consideration as a legal contention. Fasken Appeal at 1-4. But our regulations do not provide for a motion to dismiss, and Fasken has not demonstrated how consideration of its arguments under our contention admissibility standards negatively impacted its position. In any event, the Board's finding that Holtec's application does not violate the NWPA addressed the gravamen of Fasken's motion to dismiss.

[39] Sierra Club Appeal at 5-7.

[40] *Sierra Club's Motion to File a New Late-Filed Contention* (Oct. 23, 2019), (Sierra Club Motion for New Contention 30); Attach., Contention 30 (Sierra Club Contention 30).

[41] Holtec Opposition to Sierra Club Appeal at 27-30.

[42] *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 71 NRC 111, 116-17 (1995).

"proximity-plus" standard takes into account both the nature of the proposed activity and significance of the radioactive source.[43]

Sierra Club based its standing on declarations of its members who live and work near the proposed site.[44] The Board observed that one of Sierra Club's declarants, Daniel Berry, lives less than ten miles from the site and owns and operates a ranch just three miles away from the site.[45] Mr. Berry stated that he, his wife, and his ranch hands spend time every day traversing the ranch on foot, horseback, and ATV, while managing their cattle.[46]

The Board found that Sierra Club had established standing based on the proximity of its member Mr. Berry. It observed that the distances of his home and activities are "well within the limits that have been found to confer standing to challenge much smaller storage facilities."[47] It rejected Holtec's argument that an individual "who lives sufficiently close to a potentially massive facility for storing much of the nation's spent nuclear fuel must first demonstrate with specificity how radiation might reach them."[48]

On appeal, Holtec claims that the Board erred by granting Sierra Club standing even though its "pleadings lacked meaningful explanation as to how the activities at the CISF might lead to a

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[43] *Id.*

[44] Sierra Club Petition at 6.

[45] LBP-19-4, 89 NRC at 12-13. Mr. Berry submitted two declarations in this proceeding, one authorizing Sierra Club and the other authorizing Beyond Nuclear to represent his interest in this proceeding. Although the declaration submitted with the Sierra Club Petition stated that his home and ranch lie "less than 10 miles from the site," the declaration submitted with Beyond Nuclear's Petition was more detailed. In that declaration, Mr. Berry explained that his ranch, the T Over V ranch, consists of privately owned land and leased land, and he provided a map showing that a portion of the ranch lies about 3.2 miles away from the proposed CISF site. *See* Beyond Nuclear Petition, Attach. Ex. 2, Declaration of Daniel C. Berry III (Sept. 11, 2018) (Berry Beyond Nuclear Declaration).

[46] Berry Beyond Nuclear Declaration at ¶¶ 4-5.

[47] LBP-19-4, 89 NRC at 366.

[48] *Id.* at 367.

release which could affect any of their members."[49] Our standing precedents require petitioners "to show a specific and plausible means" for how the licensed-activities will affect them in the absence of "'obvious' potential for offsite harm."[50] We generally defer to a Board's ruling on standing in the absence of clear error or an abuse of discretion.[51] In this case, the Board's finding of standing is reasonable given the size of the facility and Mr. Berry's activities in close proximity to that facility. We therefore reject Holtec's argument that Sierra Club failed to establish standing.

2. Sierra Club Contention 4 (Transportation Risks)

Sierra Club asserted in Contention 4 that section 4.9 of the ER inadequately addressed risks associated with transporting radioactive waste from the reactor sites to the CISF.[52] It argued that the ER fails to account for severe rail accidents that could release radiation. In support of its argument, Sierra Club relied on an analysis performed by its expert, Dr. Marvin Resnikoff, of the radiological consequences of a spent fuel canister subject to the conditions of a rail tunnel fire similar to one that took place in the Howard Street Tunnel in Baltimore in 2001 (Baltimore Tunnel Analysis).[53] The Baltimore Tunnel Analysis concluded that in a similar accident, a spent fuel cask would fail and the fuel rods would burst within eleven hours.[54] The

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[49] Holtec Opposition to Sierra Club at 28.

[50] *Nuclear Fuel Servs., Inc.* (Erwin, Tenn.), CLI-04-13, 59 NRC 244, 248 (2004).

[51] *See, e.g., Strata Energy,* CLI-12-12, 75 NRC at 608-13 (2012) (deferring to board's finding of standing based on dust from project employees driving near petitioner's house).

[52] Sierra Club Petition at 22-27.

[53] Matthew Lamb & Marvin Resnikoff, *Radiological Consequences of Severe Rail Accidents Involving Spent Nuclear Fuel Shipments to Yucca Mountain: Hypothetical Baltimore Rail Tunnel Fire Involving SNF* (Sept. 2001), available at http://www.state.nv.us/nucwaste/news2001/nn11459.htm (last visited Nov. 7, 2019). According to the report, the Baltimore Tunnel Fire burned for three days or more at temperatures of at least 1500°F. *Id*. at 9.

[54] *Id.* at 8-9.

study also provided estimates for the population exposed and latent cancer fatalities.[55] According to Sierra Club, Dr. Resnikoff has updated his 2001 Baltimore Analysis and now estimates that a major rail accident could release 20 million person-rem, 1250 times Holtec's estimate.[56] Sierra Club also claimed that Holtec underestimates the likelihood of a severe rail accident because Holtec relies on the Department of Energy's 2008 Yucca Mountain Final Supplemental Environmental Impact Statement (FSEIS), which Sierra Club claims is outdated and does not account for recent information about increased rail traffic, derailments, and fires.[57]

Holtec argued in its answer and at oral argument that because its ER incorporated specific portions of the DOE 2008 Yucca Mountain FSEIS, Sierra Club must specifically dispute the analysis in the DOE Supplemental Environmental Impact Statement (SEIS) in order to show a genuine dispute.[58] Holtec's ER accident analysis "tiered from" section 6.3.3.2 of the Yucca Mountain FSEIS.[59] In that section DOE responded to a 2001 study by Matthew Lamb and Dr. Resnikoff that claimed that the latent cancer fatalities resulting from a severe accident in an urban area of Nevada could be between 13 and 40,868 (Nevada Accident Analysis).[60] DOE

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[55] *Id.* at 13; Sierra Club Petition at 24-25.

[56] Sierra Club Petition at 25.

[57] *Id.* at 25-26; *see* U.S. Department of Energy, Office of Civilian Radioactive Waste Management, "Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada," (June 2008), vol. 1, § 6.3.3 (ML081750191 (package)) (Yucca Mountain FSEIS).

[58] *See Holtec International's Answer Opposing Sierra Club's Petition to Intervene and Request for Adjudicatory Hearing on Holtec International's HI-STORE Consolidated Interim Storage Facility Application* (Oct. 9, 2018), at 28-29 (Holtec Answer to Sierra Club); Tr. at 258 ("The DOE analysis specifically addressed the higher estimates provided by Lamb and Resnikoff.").

[59] *See* ER § 4.9.3.2 (transportation accident impacts).

[60] Matthew Lamb, et. al, *Worst Case Credible Nuclear Transportation Accidents: Analysis for Urban and Rural Nevada* (Aug. 2001). The Yucca Mountain FSEIS refers to this document as DIRS 181756.

stated that this estimate was unrealistic because Mr. Lamb and Dr. Renikoff had used conservative or bounding values for multiple parameters in their computer analysis, resulting in "unrealistically high yields."[61]

The Board rejected the contention on various grounds. The Board agreed with Holtec and found that Sierra Club had not shown a genuine dispute with the application because it had "not address[ed] or disput[ed]" the criticisms of the Lamb and Resnikoff Study contained in the Yucca Mountain FSEIS on which Holtec's ER had relied.[62] The Board further found that the contention posed a "worst case scenario," the consequences of which need not be discussed under NEPA.[63] The Board observed that the intensity of the Baltimore Tunnel Fire was caused by the flammable contents of the railcars, and, according to statements by Holtec's counsel during oral argument, shipments to the CISF will be in dedicated trains without such contents.[64] It concluded that a scenario similar to the Baltimore Tunnel Fire would be "extraordinarily unlikely."[65] It further found that Sierra Club had offered no facts or expert opinion to support its argument that Holtec failed to account for recent information about increased rail traffic and oil tanker rail cars.[66]

On appeal, Sierra Club reasserts its claim that the application has underestimated the consequences of an accident and argues that the Baltimore Tunnel Analysis was sufficient to

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[61] Yucca Mountain FSEIS at 6-23.

[62] LBP-19-4, 89 NRC at 387.

[63] *Id.* at 387-88 (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 352 (2002)).

[64] *Id.* (citing Tr. at 256-57).

[65] *Id.* at 388.

[66] *Id.* (citing Sierra Club Petition at 25-26).

raise a factual dispute.[67] It does not reassert its arguments about the likelihood of a rail accident. Nor does it address the Board's conclusion that the proposed contention sought an analysis of an "extraordinarily unlikely" worst case analysis.

We conclude that Sierra Club identifies no Board error in rejecting the contention. The Board is correct that NEPA does not require a "worst case" analysis for potential accident consequences.[68] In addition, the Board correctly found that Sierra Club offered no expert opinion or documentary support for its assertions about increased rail traffic or railroad fires. And although Sierra Club argues that the Yucca Mountain FSEIS is out of date, the Baltimore Tunnel Analysis, on which Sierra Club relies, predates the Yucca Mountain FSEIS by several years.[69] Moreover, the NRC has studied what would happen to various spent fuel transportation packages if they were subjected to the conditions of the Baltimore Tunnel Fire and concluded that the potential consequences are negligible.[70] And contrary to the assertions in Sierra Club's contention, Dr. Resnikoff's declaration provided no updated information on the subject except for a general statement that he "reviewed" and endorsed the claims in Sierra Club's contentions.[71] This is insufficient factual support for a contention. We therefore affirm the Board's decision to reject the contention.

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[67] Sierra Club Appeal at 9-11.

[68] *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354 (1989).

[69] *See* Yucca Mountain FSEIS vol. 1, § 6.3.3.2.

[70] *See* "Spent Fuel Transportation Package Risk Assessment" (Final Report), NUREG-2125, at 127 (Jan. 2014) (ML14031A323); "Spent Fuel Transportation Package Response to the Baltimore Tunnel Fire Scenario" NUREG/CR-6886, rev. 2, § 8.3 (Feb. 2009) (ML090570742).

[71] Sierra Club Petition, Attach., Declaration of Marvin Resnikoff (Sept. 13, 2018).

3. Sierra Club Contention 8 (Decommissioning Funds)

Sierra Club argued in Contention 8 that Holtec's application does not set forth a plan to provide adequate funds for decommissioning.[72] Sierra Club argued that the amount that Holtec intends to set aside for decommissioning the site is "completely inadequate" to cover Holtec's $23 million estimated decommissioning costs.[73] In addition, Sierra Club argued that Holtec's decommissioning cost estimate only covers the first phase of the project and the application should explain how Holtec will fund decommissioning the site following the ensuing twenty phases.[74]

According to its application, Holtec plans to provide financial assurance for decommissioning by establishing a sinking fund coupled with a surety, insurance, or other guarantee as described in 10 C.F.R § 72.30(e)(3). Specifically, Holtec intends to set aside $840 per MTU stored at the facility and counts on a 3% rate of return.[75] In its answer to Sierra Club's hearing request, Holtec argued that Sierra Club's calculations were incorrect for two reasons. First, Sierra Club had assumed that Holtec would only accept up to 5000 MTU in its initial phase and therefore set aside only $4,200,000 for future decommissioning. But Holtec's application is for a license to store up to 8680 MTU, which would require Holtec to provide up to $7,291,200 for future decommissioning.[76] Second, Holtec claimed that Sierra Club did not account for the 3% rate of return Holtec expects to earn on the funds set aside.[77] Holtec also pointed out that

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[72] *See* Sierra Club Petition at 35-37.

[73] *Id.* at 36 (citing Holtec International & Eddy Lea Energy Alliance (ELEA) Underground CISF - Financial Assurance & Project Life Cycle Cost Estimates, Holtec Report No. HI-2177593 (undated), at 6 (ML18345A143) (Decommissioning Cost Estimate)).

[74] *Id.*

[75] Decommissioning Cost Estimate § 2.2.

[76] Holtec Answer to Sierra Club at 44.

[77] *Id.* at 44-45; *see* Decommissioning Cost Estimate § 2.2.

its decommissioning funding plan will have to be updated and resubmitted every three years.[78] Further, it argued, "even if there were some shortfall in Holtec's calculation of the amount of funds needing to be set aside (which there is not), it would be covered by the surety" and therefore the contention raised no genuine material dispute with the application.[79]

Sierra Club responded to Holtec by questioning its reliance on compound interest.[80] Sierra Club pointed out that if Holtec's fund were to earn only a 2% rate of return rather than the 3% upon which it relies, it would have only $10,941,921 after forty years, "far below" the $23 million estimate in the Decommissioning Funding Plan.[81] It further argued that it was "doubtful" that any surety company would issue a bond for Holtec's facility.[82] Holtec responded with a motion to strike the arguments concerning the rate of return and its ability to obtain a surety bond because these arguments were raised for the first time in the reply and therefore unjustifiably late.[83]

The Board found that Sierra Club's proposed Contention 8 had not raised a genuine dispute with the application. The Board rejected the argument that Holtec's decommissioning plan must show how it would fund decommissioning of all future expansions of the project because the application only covers the first phase and Holtec will have to update its plan for

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[78] Holtec Answer to Sierra Club. at 45-46; *see* 10 C.F.R. § 72.30(c).

[79] Holtec Answer to Sierra Club at 46.

[80] *Sierra Club's Reply to Answers Filed by Holtec International and NRC Staff* (Oct. 16, 2019), at 28 (Sierra Club Reply).

[81] *Id.*

[82] *Id.* at 29-30.

[83] *Holtec International's Motion to Strike Portions of Replies of Alliance for Environmental Strategies, Don't Waste Michigan et al., NAC International Inc., and Sierra Club* (Oct. 26, 2018), at 10-11.

any future expansions.[84] The Board further rejected Sierra Club's arguments that Holtec could not rely on a "reasonable rate of return" of 3% and that a surety bond is "doubtful" because those arguments were impermissibly late and factually unsupported.[85]

In its appeal, Sierra Club reiterates that the plan must provide for decommissioning all twenty phases of the project without identifying an error in the Board's analysis.[86] The Board correctly explained that any future expansion of the facility will require a license amendment and an update to the decommissioning plan. Because Sierra Club does not point to a Board error, there is no basis for us to reverse the Board; it is not sufficient for an appellant merely to repeat the arguments it made before the Board.[87] Sierra Club also reasserts its argument that Holtec provided no assurance that it will earn a 3% rate of return on the funds set aside for decommissioning.[88] Sierra Club does not address the Board's finding that the argument was impermissibly late. The 3% figure was included in Holtec's Decommissioning Cost Estimate at the time Sierra Club filed its contentions, and therefore Sierra Club could have challenged it then.[89] Moreover, Sierra Club does not counter the Board's finding that its argument was unsupported. In short, Sierra Club points to no Board error in rejecting this contention, and we affirm the Board.

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[84] LBP-19-4, 89 NRC at 393.

[85] *Id.* at 393-94.

[86] Sierra Club Appeal at 12-13.

[87] *Turkey Point*, CLI-17-12, 86 NRC at 219.

[88] Sierra Club Appeal at 12-13.

[89] *See* Decommissioning Cost Estimate § 2.2.

4. Sierra Club Contention 9 (Impacts from Beyond Design Life and Service Life of Storage Containers)

Sierra Club argued in Contention 9 that the application must consider the risk that the storage canisters will be left on the CISF beyond their design life of 60 years and expected service life of 100 years.[90] Sierra Club pointed out that the HI-STORE UMAX canisters designated to be used at the site have only a 60-year design life and 100-year service life, whereas the ER states that the CISF may operate up to 120 years until a permanent repository is available to take the waste.[91] Moreover, Sierra Club argued that the ER should consider the possibility that a permanent repository never becomes available, making the Holtec site a *de facto* permanent repository.[92] Sierra Club further argued that the Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel (Continued Storage GEIS) is not applicable to the proposed Holtec facility.[93] Sierra Club argued that the analysis in the Continued Storage GEIS assumes that an away-from-reactor spent fuel storage facility will have a dry transfer system (DTS) to repackage damaged or leaking canisters whereas the Holtec facility will have no DTS.[94] Therefore, Sierra Club argued, the proposed Holtec facility is not like the hypothetical facility discussed in the Continued Storage GEIS.

The Board found that the contention presented both environmental and safety aspects, neither of which was admissible. It found that the environmental aspect of this contention impermissibly challenged the Continued Storage Rule and the Continued Storage GEIS

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[90] *See* Sierra Club Petition at 38-42.

[91] *Id.* at 38-39 (citing ER § 1.0).

[92] *Id.* at 40.

[93] *Id.* at 40-41.

[94] *Id.*; *see* "Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel" (Final Report), NUREG-2157, vol. 1, ch. 5 (Sept. 2014) (ML14196A105) (Continued Storage GEIS).

because Sierra Club did not seek a rule waiver.[95] To the extent that proposed Contention 9 raised safety issues, the Board found that it did not raise a genuine dispute with the application because it "ignore[d] the SAR's discussion of retrievability, inspection, and maintenance activities."[96]

Sierra Club's appeal essentially reasserts its arguments before the Board without confronting the Board's findings. The Continued Storage Rule provides that long term environmental effects associated with spent fuel storage are set forth in the Continued Storage GEIS and need not be reiterated in individual license proceedings. On appeal, Sierra Club does not address the Board's finding that it must request a rule waiver in order to argue that the Continued Storage Rule should not apply in this proceeding.[97] Additionally, Sierra Club repeats the argument that the Continued Storage Rule does not apply to the proposed Holtec facility because the Continued Storage GEIS assumes the presence of a DTS.[98] However, its factual premise is mistaken. The Continued Storage GEIS assumes that a DTS would be built in the "long-term storage" and indefinite timeframes.[99] The Continued Storage GEIS assumes that a DTS will not be present initially and that is consistent with Holtec's proposed facility. The application therefore does not need to discuss the effects of a DTS (or the consequences of not

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[95] LBP-19-4, 89 NRC at 395; *see* 10 C.F.R. § 51.23 (Continued Storage Rule); 10 C.F.R. § 2.335 (no Commission regulation is subject to challenge in an individual licensing proceeding except when a waiver of the rule is sought and granted on the basis that application of the rule to the particular situation would not serve the purpose for which the rule was adopted).

[96] LBP-19-4, 89 NRC at 395 (citing provisions of the SAR relating to monitoring, maintenance, and aging management).

[97] *See* 10 C.F.R. § 2.335(b).

[98] Sierra Club Appeal at 13-14.

[99] Continued Storage GEIS § 1.8.2 at 1-14, § 5.0 at 5-2.

having a DTS). If Holtec receives a license and decides to build a DTS, then it would need to seek an amendment to its license.

Next, Sierra Club argues that the Board relied on Holtec's "unsupported conclusory statement that it will somehow monitor and retrieve the waste in the future" and reasserts its claim that "once a crack starts in a canister, it can break through and cause a leak in [sixteen] years."[100] But Holtec's statements are not unsupported or conclusory—its SAR discusses plans for inspection, maintenance, retrieval, and aging management.[101] The SAR specifically discusses the issue of stress corrosion cracking and concludes that, due to the low halide content of the air at the proposed CISF site, chloride-induced stress corrosion cracking is a remote possibility.[102] The SAR also describes how it will monitor the canisters to detect any stress corrosion cracking in its aging management program.[103]

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[100] Sierra Club Appeal at 14. Sierra Club points to a YouTube video which it claims depicts Holtec's President Krishna Singh acknowledging that Holtec canisters "cannot be inspected, repaired or repackaged." *Id.*; *see also* Sierra Club Petition at 41. But Dr. Singh does not say that the canisters cannot be inspected or repackaged. The video clip appears to show Dr. Singh at an October 14, 2014 meeting, in which he stated that should a canister develop a through-wall hole, it would not be practical to repair it, and the solution would be to isolate the canister in a cask. *See* www.youtube.com/watch?v=euaFZt0YPi4 (last visited Oct. 21, 2019). In its petition, Sierra Club cited an NRC Staff meeting summary where this statement was made, but it does not acknowledge that this discussion pertained to the specific phenomenon of chloride-induced stress corrosion cracking. *See* Sierra Club Petition at 41 (citing Memorandum from Kristina Banovac, Office of Nuclear Material Safety and Safeguards, to Anthony Hsia, Office of Nuclear Material Safety and Safeguards, "Summary of August 5, 2014, Public Meeting with Nuclear Energy Institute on Chloride Induced Stress Corrosion Cracking Regulatory Issue Resolution Protocol" (Sept. 9, 2014) (ML14258A081)).

[101] *See, e.g.*, SAR §§ 3.1.4.1 (inspection of incoming casks), 3.1.4.4 (surveillance during storage), 5.4.1.2 (the HI-STORM UMAX cask system allows retrieval "under all conditions of storage"); *see generally*, *id.* ch. 18, Aging Management Program.

[102] *See* SAR §§ 17.11, 18.3.

[103] *See* SAR §§ 18.3, 18.5.

The Board found that Sierra Club Contention 9 did not acknowledge or discuss these sections of the SAR or challenge the application's conclusion.[104] On appeal, Sierra Club does not address the Board's finding that it had failed to dispute relevant portions of the SAR.

We agree with the Board's conclusion that Sierra Club's petition did not challenge these discussions in the SAR.

We therefore conclude that Sierra Club's appeal does not identify Board error in rejecting its proposed Contention 9, and we affirm the Board.

5. Sierra Club Contention 11 (Earthquakes)

Sierra Club argued in Contention 11 that the ER and SAR had inadequately discussed earthquake risks to the facility, including seismic activity induced by oil and gas recovery operations.[105] Sierra Club asserted that the information in Holtec's SAR and in its ER used "historical data that does not take into account the recent increase in drilling for oil and natural gas that creates induced earthquakes."[106] It attached to its petition a 2018 scientific study (the "Stanford Report"), which it claimed "documented the existence of prior earthquakes in southeast New Mexico" and "the existence of numerous faults in the area in and around the proposed Holtec site."[107] It also claimed that "the oil and gas industry" is concerned that the Holtec facility would impact oil and gas operations in the area and cited the scoping comments

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[104] LBP-19-4, 89 NRC at 395.

[105] *See* Sierra Club Petition at 44-48.

[106] *Id.* at 45-46; *see also* ER § 3.3.2; SAR § 2.6.

[107] Sierra Club Petition at 44-45 (citing Jens-Erik Lund Snee and Mark D. Zobeck, *State of Stress in the Permian Basin, Texas and New Mexico: Implications for Induced Seismicity*, The Leading Edge, Feb. 2018, at 127-32 (Stanford Report)).

that Fasken Oil and Ranch, Ltd. and PBLRO Coalition submitted to NRC with respect to the Holtec application.[108]

The Board rejected Sierra Club's contention because it presented no genuine dispute with the application.[109] The Board observed that the ER and SAR both used data from the 2016 U.S. Geological Survey, the latest available at the time of its 2017 application.[110] It found that Sierra Club had not provided evidence of any "significant seismic events around the proposed project site" since 2016 and therefore rejected the claim that the application was outdated.[111] The Board observed that both the ER and the SAR specifically discuss the effects of "fracking."[112] Finally, the Board found that there was "no dispute between the Stanford Report and the SAR's seismic analyses" and noted that the illustrations provided in the report appeared to confirm the SAR's claim that the closest Quaternary fault (active within the last 1.6 million years) is approximately seventy-five miles away and the nearest fault of any kind is forty miles from the site.[113]

On appeal, Sierra Club reasserts its claims that Holtec's information is out of date and that the Stanford Report contradicts information in the application. But the Sierra Club adds a new claim with respect to the Stanford Report—that the report "document[s] that due to

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[108] *Id.* at 47-48, Ex. 7, Letter from Tommy E. Taylor, Fasken Oil and Ranch, Ltd. to Michael Layton, NRC (July 30, 2018).

[109] LBP-19-4. 89 NRC at 398.

[110] *Id.*

[111] *Id.*

[112] *Id.* Holtec's ER and SAR discuss fluid injection and induced seismicity from the oil and gas industry. *See* SAR § 2.6.2; ER § 3.3.2.1. The Stanford Report does not use the term "fracking," but it discusses fluid or wastewater injection. *See, e.g.*, Stanford Report at 127 (noting that "[f]luid injection and hydrocarbon production have been suspected as the triggering mechanisms for numerous earthquakes that have occurred in the Permian Basin since the 1960s").

[113] LBP-19-4, 89 NRC at 398-99; *see* SAR § 2.6.2 at 2-108.

increased fracking for oil and gas, new geologic faults are being induced, coming nearer to the Holtec site."[114]

We deny the appeal for many of the same reasons outlined by the Board. First, we agree with the Board that Holtec's use of 2016 USGS data was not "out of date" and Sierra Club provided no evidence of recent seismic activity near the site. The Board reasonably concluded that the maps included in the Stanford Report seemed to confirm, rather than contradict, the SAR's statements that there were no Quaternary faults within the immediate area of the Holtec site.[115] And although the Stanford Report discusses earthquakes occurring "since 2017," there is no indication that these are stronger earthquakes than previously seen or that they occurred particularly near the site of the proposed Holtec facility.[116]

We are not persuaded by Sierra Club's argument that the Stanford Report shows that oil and gas activities are inducing "new geologic faults . . . coming nearer to the Holtec site."[117] This argument is new on appeal; the original contention did not claim that fracking is causing new faults to form near the Holtec site.[118] The claim also appears to be unsupported by the

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[114] Sierra Club Appeal at 15.

[115] LBP-19-4, 89 NRC at 398-99.

[116] *See* Stanford Report at 127. The report mentions that since January 2017, "at least three groups of earthquakes, surrounded by more diffusely located events, have occurred in the southern Delaware Basin, near Pecos, Texas. A fourth group of events occurred mostly in mid-November 2017, farther to the west in northeastern Jeff Davis County [Texas]. In addition, a group of mostly small (M_L < 2) earthquakes occurred between Midland [Texas] and Odessa [Texas], in the Midland Basin." *Id.* The Holtec site is in the northern Delaware Basin.

[117] Sierra Club Appeal at 15.

[118] We do not consider on appeal new arguments or new evidence that the Board had no opportunity to consider. *See USEC Inc*. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006).

Stanford Report, which does not indicate that new faults or earthquakes are getting closer to the Holtec site.[119]

We therefore find no error in the Board's determination that Sierra Club had not raised a genuine dispute with the application in Contention 11.

6. Sierra Club Contentions 15-19 (Groundwater Impacts)

Sierra Club's Contentions 15-19 all concerned potential impacts to groundwater from the CISF.[120] Contention 15 argued that the ER had not adequately determined whether there is shallow groundwater at the site and therefore could not adequately assess the impact of a radioactive leak from the site.[121] Contention 16 argued that the ER had not considered whether brine from a previous underground brine disposal operation was still present on the site and whether that brine could corrode the UMAX waste containers.[122] Contention 17 argued that the ER and SAR did not consider the presence and effects of fractured rock beneath the site, which could allow radioactive leaks into groundwater from the cask or allow the aforementioned brine to enter the casks and corrode the canisters.[123] Contention 18 argued that the ER had not discussed the possibility that "waste-contaminated groundwater" could reach the nearby Santa Rosa Formation aquifer, which is an important source of drinking water.[124] Contention 19

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[119] The Stanford Report is generally about new measurements of stress orientation and how that information might be used to predict and prevent slip on mapped faults due to fluid injection or extraction. Stanford Report at 127. Sierra Club did not point out where the document provided information in support of its claim. A board is expected to examine the documents provided in support of a proposed contention to verify that the material says what a party claims it does, but we do not expect a board to search through a document for support for a party's claims. *USEC Inc.*, CLI-06-10, 63 NRC at 457.

[120] *See* Sierra Club Petition at 60-67.

[121] *Id.* at 60-62.

[122] *Id.* at 62-63.

[123] *Id.* at 63-65.

[124] *Id.* at 65-66.

argued that Holtec may have improperly conducted tests for hydraulic conductivity between the site and the Santa Rosa Formation.[125]

a. Groundwater Contentions as Challenge to Certified Design

The Board rejected all the groundwater contentions. It found that they failed to dispute the application's conclusion that there is no potential for groundwater contamination because spent nuclear fuel contains no liquid component to leak out, and it is not credible that groundwater could leak into the canisters.[126] The Board observed that the canisters are contained within a steel cavity enclosure container that has no penetrations or openings on the bottom, thereby preventing outside liquids from contacting the canisters or the spent nuclear fuel within them.[127] The Board further found that Sierra Club had failed to dispute Holtec's conclusion that the canisters would not be breached during normal operations or any "credible off-normal event" or accident.[128] The Board cited our holding in *Private Fuel Storage* that "[t]o show a genuine material dispute, [a petitioner's] contention would have to give the Board reason to believe that contamination from a defective canister could find its way outside a cask."[129]

The Board rejected Sierra Club's argument that the material Sierra Club supplied in connection with its proposed Contentions 9, 14, 20, and 23 showed various mechanisms through which a canister could be breached. In doing so, the Board held that those contentions

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[125] *Id.* at 66-67.

[126] LBP-19-4, 89 NRC at 404-05 (citing ER § 1.3 at 1-8).

[127] *Id.* at 407.

[128] *Id.* at 404, 408; *see* ER § 4.13 (off-normal operations and accidents).

[129] LBP-19-4, 89 NRC at 405 (quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 138-39 (2004)).

did not adequately support the groundwater contentions because they were also inadmissible.[130]

On appeal, Sierra Club argues that in rejecting its Contentions 9, 14, 20, and 23, the Board did not "conclusively" find that the information supporting them was "incorrect."[131] Therefore, Sierra Club argues, its petition to intervene did controvert Holtec's "assertion that the containers are impervious to leaking."[132]

While it is true that in rejecting these contentions, the Board did not make a factual finding that the claims in them were "incorrect," Contentions 9, 14, 20, and 23 were not rejected on mere pleading technicalities, as Sierra Club appears to suggest. The Board found that each of those contentions was inadmissible because (among other reasons) they challenged the certified design of the HI-STORM UMAX system. Because certified designs are incorporated into our regulations, they may not be attacked in an adjudicatory proceeding except when authorized by a rule waiver.[133]

A contention cannot attack a certified design without a rule waiver because this would challenge matters already fully considered and resolved in the design certification review. For example, Sierra Club Contention 14 argued that the HI-STORM UMAX casks are susceptible to overheating because the air intake and exhaust vents are both located at the top of the cask and that overheating could cause cladding degradation and corrosion.[134] The Board noted that the SAR "fully incorporates by reference the HI-STORM UMAX design and thermal analysis

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[130] *Id.* at 404.

[131] Sierra Club Appeal at 18.

[132] *Id.* at 17.

[133] 10 C.F.R. § 2.335.

[134] Sierra Club Petition at 56-60.

conducted in the HI-STORM UMAX's own Final Safety Analysis Report" and that therefore, "any challenge to the HI-STORM UMAX system design characteristics that are already deemed compliant with Part 72, including those Sierra Club designates in Contention 14 . . . are barred in this proceeding by sections 2.335 and 72.46(e)."[135] We agree with the Board's conclusion that Sierra Club's disagreement with the HI-STORM UMAX certified design cannot be used to support its claim that the CISF might leak.

To the extent that the groundwater contentions seek to raise design issues with the HI-STORM UMAX canister system, the Board correctly found that they challenged our regulations without seeking a waiver and are not admissible. Therefore, to the extent that the groundwater contentions are predicated on the argument that the system could leak, we affirm the Board's ruling that Sierra Club had not presented a sufficient factual basis for that claim and the contentions are not admissible.

b. Groundwater Contentions as Challenges to Site Characterization

Sierra Club next argues that its groundwater contentions challenge the ER's characterization of the affected environment, which the ER must provide regardless of whether the canisters could leak.[136] The Staff acknowledges that the ER must characterize the site, but it argues that impacts need "'only be discussed in proportion to their significance.'"[137] Similarly, relying on the same passage in *Private Fuel Storage* quoted by the Board, Holtec argues that

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[135] LBP-19-4, 89 NRC at 402. Similarly, Sierra Club Contention 20 argued that the canisters stored at the facility would likely contain high burnup fuel, which, according to Sierra Club, can lead to thinned, embrittled or damaged cladding. Sierra Club Petition at 67-70. Sierra Club Contention 23 argued that high burnup fuel could damage the spent fuel cladding during transportation or storage and that damaged fuel would not be accepted at a permanent repository. *Id.* at 73-75. But the Board rejected the contentions because the HI-STORM UMAX canister storage system is approved for storage of high burnup fuel, and therefore, the contentions are barred by regulation. *See* LBP-19-4, 89 NRC at 412, 416-17.

[136] Sierra Club Appeal at 17.

[137] Staff Opposition to Sierra Club Appeal at 18 (quoting 10 C.F.R. § 51.45(b)(1)).

Sierra Club's claims about groundwater characterization are not "material" to the outcome of this proceeding because Sierra Club has not shown that radionuclides could make their way outside the cask.[138]

Of the five groundwater contentions, only Contention 18 was based entirely on the premise that leaks from the facility would contaminate the groundwater. The other contentions all raised specific arguments about the adequacy of the hydrogeological site characterization, were supported by expert opinion, and identified the portions of the application in question. In proposed Contention 15, Sierra Club questioned Holtec's claim that there is no shallow groundwater at the site and argued that Holtec relies on data from a single well in the 1040-acre site, which has apparently not been checked since 2007.[139] According to the declaration of Sierra Club's expert, George Rice, there are various reasons why a saturated condition may not have been encountered during drilling even though the "materials are saturated."[140] In Contention 16, Sierra Club argued that Holtec should determine whether brine in the groundwater could contact the facility and what effect brine could have on its structures. It pointed to ER § 3.5.2.1, which acknowledges that as of 2007 "saturations of shallow groundwater brine" have been created in the region due to brine disposal.[141] And in support of Sierra Club Contention 19, Mr. Rice identified three specific flaws that he claims undermine the reliability of Holtec's hydraulic conductivity tests.[142]

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[138] Holtec Opposition to Sierra Club Appeal at 24 (quoting *Private Fuel Storage*, CLI-04-22, 60 NRC at 138-39).

[139] *See* Sierra Club Standing Declarations and Expert Declarations, Declaration of George Rice (Sept. 10, 2018), at 2 (ML18257A226 (package)) (Rice Declaration).

[140] *Id.* at 3.

[141] Sierra Club Petition at 62.

[142] According to Mr. Rice, the report from Holtec's contractor did not confirm that it cleaned the well holes prior to the tests, used clean water, or took three or more readings at five-minute

Our regulations require an admissible contention to show a "genuine dispute exists with the applicant/licensee on a material issue of law or fact."[143] A "dispute at issue is 'material' if its resolution would 'make a difference in the outcome of the licensing proceeding.'"[144] Moreover, in the NEPA context we have warned, "[o]ne can always flyspeck an [Environmental Impact Statement (EIS)] to come up with more specifics and more areas of discussion that could have been included."[145]

The Supreme Court has explained that to fulfill NEPA's mandate, for certain major Federal actions such as this one, an agency must prepare an EIS, which "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts" and that such information will be available to the public.[146] It is possible that, to the extent Sierra Club's groundwater contentions are purely site-characterization disputes, they fail to show a material dispute with the application because they do not indicate how Sierra Club's groundwater concerns would affect the ultimate discussion of environmental impacts.[147]

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intervals as recommended by the U.S. Bureau of Reclamation's field manual. *See* Rice Declaration at 8.

[143] 10 C.F.R. § 2.309(f)(1)(vi).

[144] *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-34 (1999) (quoting Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,168, 33,172 (1989)).

[145] *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 71 (2001).

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

[147] While not binding precedent, licensing boards have generally considered site characterization claims under NEPA that explained why the site characterization was necessary to fully understand the impacts of the proposed action. *E.g., Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), LBP-15-3, 81 NRC 65, 89-92 (2015) (responding to a site characterization claim by noting, "[a]t the crux of this contention is the issue of whether, to comply with NEPA's requirement to make an adequate prelicensing assessment of environmental impacts, more extensive monitoring. . . is required"); *Powertech (USA) Inc.*

But initial determinations of contention admissibility rest with the Board, and the Board did not discuss whether any of the groundwater contentions contained a genuine issue *apart* from the claims that radioactive leaks from the canisters could contaminate the groundwater. Within the context of the need to determine whether the groundwater concerns would affect the ultimate discussion of environmental impacts, we remand Contentions 15, 16, 17, and 19 to the Board for further consideration of their admissibility with respect to the site characterization.

7. Sierra Club Contention 26 (Material False Statement) Joint Petitioners' Contention 14 (Material False Statement)

Sierra Club submitted its new Contention 26, and Joint Petitioners their Contention 14, after Holtec amended its license application to provide that its clients would *either* be the DOE or nuclear plant owners.[148] As the Board observed, the two contentions are "substantially identical."[149] Sierra Club and Joint Petitioners argued that even though Holtec's application represents that nuclear plant owners may be its future customers, in reality Holtec still intends to go forward with the project only if it is able to secure a contract with DOE. They argued that various public statements by Holtec officials "show that Holtec's intention has always been to rely on DOE, not the nuclear plant owners, taking title to the waste."[150] For proof, Sierra Club

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(Dewey-Burdock In Situ Uranium Recovery Facility), LBP-13-9, 78 NRC 37, 47-51 (2013) (allowing site characterization issues to migrate "to the extent" they challenged applicants demonstration of aquifer confinement and impacts to groundwater).

[148] *See Sierra Club's Motion to File a New Late-Filed Contention* (Jan. 19, 2019) (Sierra Club Motion for Late Contention); Attach., Contention 26 (Jan. 19, 2019) (Sierra Club Contention 26); *Motion by Petitioners Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace and Nuclear Issues Study Group for Leave to File a New Contention* (Jan 17, 2019) (Joint Petitioners Motion for Late Contention); *DWM's Contention 14* (Jan. 17, 2019) (Joint Petitioners' Contention 14).

[149] LBP-19-4, 89 NRC at 451.

[150] Sierra Club Contention 26 at 3 (unnumbered); Joint Petitioners Contention 14 at 2 (unnumbered).

and Joint Petitioners cited a Holtec public email that stated that deployment of the CISF "will ultimately depend on the DOE and the U.S. Congress."[151]

Sierra Club and Joint Petitioners argued that this email shows that representations in the application that nuclear plant owners may be Holtec's future customers are therefore "materially false." They argue that this "material false statement" should be reason enough to deny an application because the Atomic Energy Act of 1954, section 186, expressly provides that a license may be revoked over a "material false statement."[152]

The Board found the contentions inadmissible because the statements in the email did not indicate that there was a "willful misrepresentation" in Holtec's application.[153] The Board found that Holtec "readily acknowledges that it hopes Congress will change the law" to allow DOE to contract directly with Holtec and that Holtec itself pointed out that the need for the project could be reduced or eliminated if DOE were to build a permanent waste repository.[154] In short, the Board determined that Holtec has been transparent that deployment of this project may depend to some extent on actions of DOE and Congress as well as on the NRC's licensing decision.

Moreover, the Board found that whether Holtec would use its license if Congress does not change the law is not an issue material to the license proceeding: "[T]he business decision of whether to use a license has no bearing on a licensee's ability to safely conduct the activities the license authorizes."[155]

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[151] *See* Sierra Club Motion for Late Contention, Exhibit 11, Holtec Highlights, Holtec Reprising 2018 (Jan. 2, 2019) (also attached to Joint Petitioners Contention 14 as Ex. 1).

[152] *See* Sierra Club Contention 26; Joint Petitioners Contention 14; 42 U.S.C. §§ 2011, 2236.

[153] LBP-19-4, 89 NRC at 421, 452.

[154] *Id.* at 421.

[155] *Id.* at 422.

On appeal, Sierra Club and Joint Petitioners principally repeat the arguments the Board rejected. But Sierra Club further argues that "Holtec is attempting to obtain a license on the false premise that nuclear plant owners will retain title to the waste. Then, once Holtec obtains the license, it will use that fact as leverage to persuade Congress to change the law to allow DOE to hold title to the waste."[156] Even assuming Sierra Club's characterization of Holtec's intent were accurate, we agree with the Board that the statements in the application are not false. We further agree that the material issue in this license proceeding is whether Holtec has shown that it can safely operate the facility, not its future political activity or business intentions. We therefore affirm the Board with respect to Sierra Club Contention 26 and Joint Petitioners Contention 14.

8. Sierra Club Contention 30

Sierra Club filed its new proposed Contention 30 in response to a report by DOE's Nuclear Waste Technical Review Board (NWTRB) that discusses technical issues presented by transportation of nuclear waste and spent nuclear fuel.[157] Sierra Club argues that the NWTRB report shows that various assumptions in the ER are invalid and that there are "barriers to the implementation of the Holtec CIS project" that must be discussed in the ER.[158]

Sierra Club filed this contention after the Board's jurisdiction terminated—that is, after all contentions had been dismissed, the record closed and jurisdiction to consider the motion passed to the Commission. Although we have reopened the record for the limited purpose of

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[156] Sierra Club Appeal at 20-21.

[157] *See* Sierra Club Motion for New Contention 30, Attach., DOE, Preparing for Nuclear Waste Transportation—Technical Issues that Need to Be Addressed in Preparing for a Nationwide Effort to Transport Spent Nuclear Fuel and High-Level Radioactive Waste (Sept. 2019); *see also Holtec International's Answer Opposing Sierra Club New Contention 30* (Nov. 18, 2019); *NRC Staff Opposition to Sierra Club New Contention 30* (Nov. 18, 2019).

[158] Sierra Club Contention 30, at 1 (unnumbered).

determining the admissibility of Sierra Club's groundwater contentions, the record remains closed for any other purpose.[159] Therefore, Sierra Club's motion for a new contention must also meet the standards for reopening a closed record.[160]

Even where jurisdiction to consider reopening has passed to the Commission, however, we frequently remand such motions to the Board to consider the reopening standards in conjunction with contention admissibility, where appropriate.[161] We find this action appropriate here. Therefore, we remand Sierra Club's proposed Contention 30, including the issue of whether the reopening standards are met, to the Board.

D. AFES Appeal

Alliance for Environmental Strategies (AFES) is an environmental group with members located near the proposed Holtec storage site in Lea and Eddy County.[162] It proposed three contentions, all dealing with environmental justice concerns.[163] The Board rejected all three contentions, and AFES has appealed.[164]

1. AFES Contention 1: Environmental Justice Analysis Includes Insufficient Consideration of Alternative Sites

AFES' proposed Contention 1 raised environmental justice concerns with Holtec's site alternatives analysis. It claimed that Holtec, "as a matter of law," had not investigated enough

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[159] *See, e.g.*, *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-11-20, 74 NRC 65, 76 (2011), *review denied*, CLI-12-10, 75 NRC 479 (2012).

[160] *See, e.g.*, *Virginia Electric & Power Co*. (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 699-700 (2012); *Entergy Nuclear Generation Co*. (Pilgrim Nuclear Power Station), CLI-12-3, 75 NRC 132, 140-41 (2012); *Dominion Nuclear Connecticut, Inc*. (Millstone Nuclear Power Station), CLI-09-5, 69 NRC 115, 124 (2009).

[161] *North Anna*, CLI-12-14, 75 NRC at 702.

[162] *Petition to Intervene and Request for Hearing* (Sept. 12, 2018), at 1 (AFES Petition).

[163] *Id.* at 11-24.

[164] *Petition for Review by Alliance for Environmental Strategies* (May 31, 2019) (AFES Appeal).

sites "to support a finding by the Nuclear Regulatory Commission that the selected site will not have a disparate impact on the minority population of Lea and Eddy County."[165] Accordingly, proposed Contention 1 called for a new ER "that both studies and addresses alternative sites nationwide, why such sites are rejected, and what impact the selected site will have on minority and low-income local populations."[166]

The Board ruled proposed Contention 1 inadmissible because Holtec's ER complied with applicable NRC guidance on environmental justice evaluations in licensing actions.[167] The Board found that Holtec's ER "describes the social and economic characteristics of the 50-mile region of influence (ROI) around Holtec's proposed facility" and "identifies percentages of minority and low-income communities within the Holtec facility's ROI" that would be subject to the impacts of the facility, as recommended by NRC guidance.[168] The Board observed that according to applicable guidance, a difference of twenty percent or more in the percentage of minority or low-income population, when compared to the rest of the county and state, is a significant difference requiring further investigation.[169] But the Board found that Holtec did not identify differences greater than twenty percent and therefore did not discuss environmental justice concerns any further.[170] The Board also found that the ER "contains an analysis of location alternatives" including "six other potential sites that were analyzed and considered for

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[165] AFES Petition at 11.

[166] *Id.* at 21.

[167] *See* Final Report, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs, NUREG-1748 at 6-25 (Aug. 2003) (NUREG-1748); *see also Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions,* 69 Fed. Reg. 52,040 (Aug. 24, 2004).

[168] LBP-19-4, 89 NRC at 455.

[169] *Id.* (citing NUREG-1748 at C-5).

[170] *Id.*

suitability of the Holtec HI-STORE consolidated interim storage facility's characteristics."[171] The Board declined to admit proposed Contention 1 because "AFES has not shown any legal requirement for Holtec to conduct a more in-depth inquiry into alternatives to the proposed action (i.e., the siting of the facility) or environmental justice analyses in its Environmental Report"; therefore, the contention failed to show a genuine dispute with the application regarding a material issue of law or fact.[172]

On appeal, AFES argues that Holtec's environmental justice evaluation was insufficient because it failed to compare the population near the proposed site to the population of the United States as a whole.[173] AFES argues the Board was wrong "as a matter of law" to credit the ER's discussion of alternative sites because "Holtec merely re-hashed a prior investigation by a third party, with regard to a previously abandoned site for a different facility" that includes "no discussion of *any* environmental justice concerns," resulting in a "precipitous narrowing of potential alternatives to a single site in southeastern New Mexico . . . directly contrary to the NRC's Policy Statements."[174]

By way of background, Holtec acknowledges that it relied on a previous study by the Eddy-Lea Energy Alliance (ELEA) for much of the environmental information in its ER. The ER explains that in 2006, DOE sought bids for locating a spent fuel recycling center and developed a set of criteria for an ideal site.[175] Eddy, New Mexico and Lea, New Mexico formed the ELEA

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[171] *Id.*

[172] *Id.* (internal citations omitted).

[173] AFES Appeal at 17.

[174] *Id.* at 5, 13-15.

[175] ER § 2.3.

to find a site within their jurisdiction and propose it to DOE.[176] The ELEA 2007 report analyzed six sites within the two counties with emphasis on the DOE's site selection criteria, which included low population density in the surrounding area, adequate size, low flood risk, and seismic stability. These factors also correspond to Holtec's needs for a waste storage facility.[177] Holtec states that it reviewed ELEA's analysis and determined that the selected site is the best for its own project.[178]

The pertinent NRC Policy Statement in this case is the NRC's Environmental Justice Policy Statement.[179] That Policy Statement provides that NRC will identify minority and low-income populations near proposed nuclear sites so that it can determine whether the environmental impacts associated with a given site will be different for those populations when compared to the general population of the surrounding area, not the country as a whole.[180] An objective of the Policy Statement is that minority and low-income communities "affected by the proposed action are not overlooked in assessing the potential for significant impacts unique to those communities."[181]

The Board found that Holtec provided information about the impacts to minority and low-income populations within the geographic region of the proposed action, that the demographics did not show a disproportionate number of minorities or low-income people in the vicinity of the

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[176] *Id.* *See* Letter from Johnny Cope, Chairman, ELEA, to Debbie Swichkow, DOE (Apr. 28, 2007), Encl. "GNEP Final Detailed Siting Report for the Consolidated Fuel Treatment Center and Advanced Recycling Reactor" (ML17310A225, ML17310A227, ML17310A230) (ELEA 2007).

[177] ER § 2.3.

[178] *Id.* at 2-16.

[179] *See* Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040 (Aug. 24, 2004).

[180] *See id.* at 52,048.

[181] *See id.*

site, and that AFES had not disputed the information provided.[182] But on appeal, AFES argues that other sites "[o]utside of these isolated, low-income communities" need to be analyzed, including sites "outside of New Mexico," because "the targeting of rural, impoverished, low-income communities in a border state is precisely the sort of *de facto* result of the institutional racism embedded in prevailing dump site selection processes nationwide that was decried over thirty years ago . . . by the Licensing Board in [*LES*]."[183]

However, we reversed on appeal the board decision in *LES*, upon which AFES relies, which admitted a contention claiming racial bias in the applicant's site-selection process.[184] In doing so, we explicitly rejected the idea that NEPA requires "an elaborate comparative site study" to explore whether an applicant's siting criteria "might perpetuate institutional racism."[185] The Board's rejection of AFES's proposed Contention 1 in this case accords with our stated environmental justice policy. We therefore affirm the Board's holding that environmental justice does not require consideration of a wider range of alternative sites.[186]

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[182] AFES repeatedly asserts that Holtec's evaluation of alternative sites is deficient because it relies on information developed by third parties. *See, e.g.*, AFES Appeal at 5, 8. AFES does not point out any factual error or omission in the third-party information relied upon, however, and reliance on prior studies is commonplace in environmental impact analysis. The Board was therefore correct in its conclusion that AFES presented no genuine factual or legal dispute with this argument.

[183] *Id.* at 15-16 (citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-97-8, 45 NRC 367 (1997)).

[184] *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation) CLI-98-13, 48 NRC 26, 36 (1998) (cautioning the Licensing Board that a contention not focused on disparate environmental impacts on minority or low-income populations but instead seeking "a broad NRC inquiry into questions of motivation and social equity in siting" would "lay outside NEPA's purview.").

[185] *Louisiana Energy Services*, CLI-98-3, 47 NRC at 104.

[186] Our guidance for NEPA reviews of materials license applications provides limited guidance regarding how wide an area should be examined in identifying potential alternative sites for a proposed project. *See* NUREG-1748 § 5.2. Although Holtec elected to limit its evaluation to six sites in two counties within the same state, the Staff is not limited to considering only those sites

2. AFES Contention 2: Disparate Impacts of Siting Process

In proposed Contention 2, AFES asserted that "New Mexico has been targeted for the dumping of nuclear waste, resulting in a *per se* discriminatory impact on New Mexico's minority population, in comparison with the rest of the country."[187] It included an affidavit of Professor Myrriah Gomez entitled, "Environmental Racism an Active Factor in the Siting and White Privilege Associated with the Holtec International HI-STORE Consolidated Interim Storage Facility Project."[188] According to AFES, "[t]his *de facto* discrimination is exacerbated by both the historical failure to include members of the minority population in decision making regarding the location of nuclear sites in New Mexico, and the specific failure . . . to include members of the local Lea and Eddy County minority population in decision making" regarding the siting of Holtec's proposed CISF.[189]

The Board found proposed Contention 2 inadmissible because it did not show a genuine dispute with the application on a material issue of law or fact: "Holtec addressed environmental justice matters to the depth recommended by NRC guidance, and neither AFES's petition nor Dr. Gomez's affidavit challenge the information in Holtec's Environmental Report."[190]

On appeal, AFES does not challenge the Board's finding that Holtec's ER comports with NRC policy and guidance on environmental justice evaluations. AFES reiterates its position that

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proposed by Holtec in its environmental impact statement. *See, e.g.*, Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, NUREG-1714 (Dec. 2001), at 7-1 to 7-6 (ML020150217) (site selection process entailed evaluation of thirty-eight potential sites across fifteen states) (Private Fuel Storage EIS).

[187] AFES Petition at 22.

[188] *Id.*

[189] *Id.*

[190] LBP-19-4, 89 NRC at 456.

Holtec's environmental justice analysis was insufficient because it did not include "an effective scoping process and an independent review of the impact—including the cumulative impact—of the site on minority and low-income populations along the border."[191] But AFES provides no further information in support of that position, which the Board rejected. This is insufficient to sustain an appeal, and we find no error in the Board's decision to deny the admission of proposed Contention 2.

3. AFES Contention 3: Community Support

AFES's proposed Contention 3 claimed that there is no factual basis for Holtec's assertions in its ER that there is community support for the project.[192] Although AFES conceded that community support is not normally material to the findings NRC must make to issue a license, it argued that it should nevertheless be considered material in this case because Holtec had referred to community support in its siting analysis.

The Board ruled the contention inadmissible "because the issue of public support for the proposed facility is not material to the findings the NRC must make in this licensing proceeding," and "[a]ssertion of community support or opposition in a license application does not lend any weight to the environmental justice analysis to be conducted by the applicant."[193]

On appeal, AFES argues that proposed Contention 1 and proposed Contention 3 are linked, such that if the latter is inadmissible, the former must be admitted.[194] It argues that if community support was an adequate reason to narrow Holtec's site selection to only the Eddy-Lea county area, then Holtec should have to show that community support actually exists. We

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[191] AFES Appeal at 18.

[192] AFES Petition at 23.

[193] LBP-19-4, 89 NRC at 457.

[194] AFES Appeal at 18-19.

disagree. Holtec explained that community support was but one of many siting factors—including seismic stability, low population density, and low flooding risk—that it used in its site selection process.[195] Holtec did not discuss community support in its environmental justice analysis—nor did it "substitute" community support for an environmental justice analysis, as AFES claims.[196] The Board reasonably evaluated the proposed contentions against the admissibility standards in our regulations, and its decisions on each were, in our view, clear, well-reasoned, and with ample support in the record and in accordance with our established precedents.

E. Joint Petitioners Appeal

The Board rejected the Joint Petitioners' hearing request on both standing and contention admissibility grounds. It found that the Joint Petitioners based their standing not on their individual members' proximity to the proposed facility but on the members' proximity to transportation routes, which, it held, is too remote and speculative an interest to confer standing.[197] Moreover, it examined each of Joint Petitioners' fourteen proposed contentions (except two) and found them inadmissible.[198] Joint Petitioners have appealed the Board's

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[195] ER §§ 2.3, 2.4.2; *see Holtec International's Brief in Opposition to Alliance for Environmental Strategies' Appeal of LBP-19-4* (June 25, 2019), at 10-11.

[196] *See* ER § 3.8.5.

[197] *See Petition of Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternative to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace and Nuclear Issues Study Group to Intervene and Request for an Adjudicatory Hearing* (Sept. 14, 2018) (Joint Petitioners Petition); LBP-19-4, 89 NRC at 367 (citing *U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 364 n.11 (2004); *EnergySolutions, LLC* (Radioactive Waste Import/Export Licenses), CLI-11-2, 73 NRC 613, 623 (2011); *Pacific Gas and Electric Co*. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 434 (2002)).

[198] *See* LBP-19-4, 89 NRC at 426-52. Joint Petitioners' proposed Contention 8 was withdrawn and its proposed Contention13 was a motion to adopt Sierra Club's contentions, which the Board rejected because a petitioner must establish standing and sponsor its own admissible contention before it can adopt another party's contentions. *Id*. at 451.

rulings with respect to standing as well as the admissibility of eight of its proposed contentions.[199] As explained below, the Board correctly found that none of those eight contentions were admissible. Therefore, we need not reach the issue of Joint Petitioners' standing.

1. *Joint Petitioners Contention 1: Redaction of Historic and Cultural Properties Precludes Public Consultation and Participation*

Joint Petitioners argued in their proposed Contention 1 that Holtec violated section 106 of the National Historic Preservation Act (NHPA) by redacting 144 pages of the ER that contain information about two historic or cultural properties that will be destroyed to make way for the proposed CISF.[200] The Board found that Holtec did *not* redact its ER. The Board explained that the Staff, having reached a preliminary conclusion that disclosure of Appendix C to the ER might risk harm to a potential historic resource, temporarily redacted it to comply with the NHPA, which requires withholding information from the public where public disclosure could risk such harm.[201]

On appeal, Joint Petitioners do not dispute the Board's findings that the Staff "redacted Appendix C in accordance with the NHPA," or that the Staff would, after completing consultation with the Keeper of the National Register of Historic Places, "make available to the public any information that would not harm any potential historic properties."[202] Rather, Joint Petitioners explain why they did not request access to the sensitive information in Appendix C even though

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[199] *Notice of Appeal of LBP-19-4 by Petitioners Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Louis Obispo Mothers for Peace and Nuclear Issues Study Group, and Brief in Support of Appeal* (June 3, 2019) (Joint Petitioners Appeal).

[200] *See* Joint Petitioners Petition at 27-31.

[201] LBP-19-4, 89 NRC at 427; *see also* 54 U.S.C. § 307103(a) (requiring an agency to withhold information that may cause harm to a historic place).

[202] LBP-19-4, 89 NRC at 427.

they had the opportunity to do so.[203] That explanation has no bearing on whether the Board abused its discretion or otherwise committed an error in denying the contention. We therefore see no basis to disturb the Board's ruling that proposed Contention 1 was inadmissible.

2. Joint Petitioners Contention 2: Insufficient Assurance of Financing

Joint Petitioners argued in proposed Contention 2 that Holtec cannot provide reasonable assurance that it has or will obtain the necessary funds to build, operate, and decommission the CISF.[204] Joint Petitioners argued that Holtec's application "states that it will solely finance the CISF from internal resources, but inconsistently states at the same time that it must have definite contractual arrangements with the U.S. DOE and the outside funding that would come with those arrangements in order to undertake the CISF."[205] Therefore, Joint Petitioners argued, Holtec's financial assurance depends on contracts that are not lawful.[206]

Joint Petitioners moved to amend their contention twice. The first amendment responded to Holtec's revision of the application to provide that nuclear power plant owners might be its customers and argued that the application is unlawful until all references to DOE are stricken from it.[207] The Board allowed the first amendment but rejected the substance of the claim.[208] Joint Petitioners do not appeal that ruling.

Joint Petitioners attempted to amend the contention a second time after Holtec's counsel conceded at oral argument on January 24, 2019, that DOE cannot currently contract with Holtec

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[203] *See* Joint Petitioners Appeal at 20-21; LBP-19-4, 89 NRC at 427.

[204] *See* Joint Petitioners Petition at 31-36.

[205] *Id.* at 32.

[206] *Id.* at 32-33.

[207] *Motion by [Joint Petitioners] to Amend Their Contention 2 Regarding Federal Ownership of Spent Fuel in the Holtec International Revised License Application*, (Feb. 6, 2019) at 8.

[208] LBP-19-4, 89 NRC at 428-29.

to store nuclear power companies' spent fuel.[209] The Board denied Joint Petitioners' second requested amendment because it sought to add arguments that could have been submitted with the original petition.[210] The Board found the second requested amendment was therefore not based upon new information.[211] Accordingly, the Board denied the amendment request because it did not satisfy the requirements for contentions filed after the deadline set forth in 10 C.F.R. § 2.309(c)(1).

The Board turned next to the timely aspects of proposed Contention 2, which claimed that Holtec would not have sufficient funds to build, operate, and decommission the CISF because its funding plans depended on illegal contracts with DOE. The Board found that while Holtec would prefer that Congress change the law to permit a contract with DOE, Holtec would attempt to negotiate storage contracts with nuclear power plant owners.[212] The Board also found that Holtec would not begin construction until it has sufficient contracts established.[213] The Board determined that an evidentiary hearing on Holtec's intent would not be useful and found Joint Petitioners' proposed Contention 2 inadmissible for failure to raise a genuine dispute with the application.[214]

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[209] *See Motion of [Joint Petitioners] to Amend Their Contention 2 Regarding Holtec's Proposed Means of Financing the Consolidated Interim Storage Facility* (Feb. 25, 2019) (Joint Petitioners Second Motion to Amend).

[210] LBP-19-4, 89 NRC at 429-432.

[211] *Id.* at 430. The Board reached its decision after analyzing the sworn declaration of Joint Petitioners' expert, which was submitted in support of the motion to amend proposed Contention 2. *See id.* at 429-32. The Board found the declaration "fails to analyze any specific provision in Holtec's application" and included "virtually nothing that purports to relate directly to Holtec counsel's January 24, 2019 concession." *Id.* at 430.

[212] *Id.* at 433.

[213] *Id.*

[214] *Id.*

The Board further rejected Joint Petitioners' argument that Holtec must provide financial assurance for periods beyond the license term. Joint Petitioners argued that 10 C.F.R. § 72.22(e) requires that Holtec "must possess the necessary funds, have reasonable assurance of obtaining the necessary funds, or by a combination of the two, have the funds to undertake the CISF as a 20-year storage-construction program, *and to operate it securely for 100 years total.*"[215] The claim appeared again in Joint Petitioners' second motion to amend proposed Contention 2, which cited the AEA and our financial assurance regulations at 10 C.F.R. § 72.22(e) for the argument that "Holtec has not adequately estimated the operating costs over the planned life of the CISF."[216] The Board rejected the claim and noted that "Joint Petitioners' claims about financial assurances for later phases or for storage beyond the license term are . . . outside the scope of this proceeding" and thus, inadmissible.[217]

On appeal, Joint Petitioners argue that this ruling improperly "dispense[d] with full and thorough consideration of all aspects of the Holtec CISF plan under NEPA to a later time."[218] This NEPA argument is raised for the first time on appeal and is therefore untimely.[219] In addition, Joint Petitioners do not provide legal or factual support for this argument. Joint Petitioners cite no regulation, case, or other legal authority suggesting NEPA requires Holtec to provide more financial assurance information than it did nor do they point to any part of Holtec's ER as inadequate. In fact, Holtec's ER includes an analysis of the environmental effects expected from all twenty phases of its planned CISF activities, which undercuts Joint

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[215] Joint Petitioners Petition at 34 (emphasis added).

[216] Joint Petitioners Second Motion to Amend, Encl. at 10-11.

[217] LBP-19-4, 89 NRC at 432.

[218] Joint Petitioners Appeal at 22.

[219] *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 235, 260 (1996).

Petitioners' argument that dismissal of proposed Contention 2 improperly avoids consideration of reasonably foreseeable environmental impacts associated with potential future phases of the CISF project.[220]

Our Part 72 regulations govern the financial assurance information Holtec must include in its CISF application. Holtec must provide "information sufficient to demonstrate to the Commission the financial qualification of the applicant to carry out . . . the activities for which the license is sought."[221] The Board found that Holtec had provided financial assurance information for the first phase of the CISF project—the phase involving "activities for which the license is sought"—and that the information was not genuinely disputed by proposed Contention 2.[222]

While Holtec anticipates that there may be future, additional phases of its project, each phase would require a license amendment. Any application to amend the license to expand the capacity or extend the term of the license would in turn require updated financial assurance information. We therefore affirm the Board's dismissal of proposed Contention 2.

3. Joint Petitioners Contention 3: Underestimation of Low-Level Radioactive Waste Volume

Joint Petitioners' proposed Contention 3 asserted that Holtec's ER provides "a seriously inaccurate picture of the true costs of constructing, operating, and decommissioning" the proposed CISF because it grossly underestimates the amount of low-level radioactive waste (LLRW) that the project will generate.[223] Specifically, proposed Contention 3 alleged the ER was deficient because it does not consider that the tons of concrete used at the site for

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[220] *See* ER §§ 1.0, 4.0.

[221] 10 C.F.R. § 72.22(e).

[222] *Id.*

[223] Joint Petitioners Petition at 36-37.

foundations and casks will become "radioactively activated" and that "replacement of the canisters themselves during the operational life of the CISF" will generate LLRW.[224]

In response to proposed Contention 3, both the Staff and Holtec argued that Joint Petitioners had not offered any specific facts or expert opinion to support the contention. Holtec explained that the storage casks and pads are not expected to have any residual radioactive contamination because (a) the spent nuclear fuel canisters will remain sealed while in the CISF; (b) the canisters will be surveyed at the originating reactor and again when they arrive at the CISF to ensure that there is no radiological contamination; and (c) the neutron flux levels generated by the spent nuclear fuel would be so low that any activation of the storage casks and pads would produce negligible radioactivity.[225] The Staff argued that the Joint Petitioners had offered no facts or expert opinion to support their "claims that millions of tons of material will be activated" and become LLRW.[226] With respect to the canisters, Holtec pointed out that the packaged canisters will be delivered to Holtec's site, ready for storage, and that fuel will be transported off-site in the same canister when a repository becomes available, such that no canisters would be opened at the facility.[227] The Board agreed with Holtec and the Staff and

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[224] *Id.* at 36.

[225] *Holtec International's Answer Opposing the Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, and Nuclear Issues Study Group Petition to Intervene and Request for an Adjudicatory Hearing on Holtec International's HI-STORE Consolidated Interim Storage Facility Application* (Oct. 9, 2018), at 41 (Holtec Answer to Joint Petitioners) (citing ER § 4.12.2).

[226] Staff Consolidated Response at 36.

[227] Holtec Answer to Joint Petitioners at 41 (citing ER § 4.12.2). *See also* ER § 4.12.4 (stating that all canisters of SNF would be removed and transported to a permanent repository prior to decontamination and decommissioning of the facility).

rejected proposed Contention 3 because Joint Petitioners had not met their burden in proffering facts or expert opinion supporting their claims.[228]

The Board also found that Holtec had addressed the impacts from spent fuel repackaging and cask disposal by appropriately relying on the description of those impacts contained in the Continued Storage GEIS, which is incorporated by reference into 10 C.F.R. § 51.23.[229] Holtec referred to the Continued Storage GEIS in its discussion of environmental impacts of decontamination and decommissioning.[230] The Continued Storage GEIS found that the potential environmental impacts from LLRW from decommissioning a large scale ISFSI after long term storage would be "small."[231] The Board therefore found that aspects of proposed Contention 3 dealing with "the topics of repackaging of spent fuel and disposal of the spent fuel casks after repackaging" were an impermissible attack on the NRC's regulations under 10 C.F.R. § 2.335, because they challenged the adequacy of ISFSI decommissioning analyses contained in the Continued Storage GEIS.[232]

On appeal, Joint Petitioners assert there exists "evidence of significant volumes of unremediable concrete, soil and canisters," but do not point to any specific evidence.[233] Joint Petitioners claim that during oral argument on contention admissibility the Board unreasonably "required [Joint Petitioners] to explain why [the concrete] cannot all be decontaminated."[234] But it does not appear to us that the Board imposed an undue burden on the Joint Petitioners.

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[228] LBP-19-4, 89 NRC at 434.

[229] *Id.* at 435 (citing Continued Storage GEIS at 5-48).

[230] *See* ER § 4.9.5.

[231] *See* Continued Storage GEIS at 5-48.

[232] LBP-19-4, 89 NRC at 435.

[233] Joint Petitioners Appeal at 23.

[234] *Id.*

Rather, the Board asked whether Joint Petitioners had any factual support for their assertions that concrete at the CISF would become activated or that concrete decontamination would not be possible.[235] In response, counsel for Joint Petitioners offered only "common sense" as an explanation for how concrete would become radioactive and took no position on whether decontamination of concrete would be possible.[236] The Board reasonably found that these unsupported assertions were insufficient to support an admissible contention.

Joint Petitioners further argue that the Board erred in relying on the Continued Storage Rule because the rule "does not alter any requirements to consider environmental impacts of spent fuel storage during the term . . . of a license for an ISFSI in an ISFSI licensing proceeding."[237] However, with respect to the environmental effects during the life of the CISF, the Board found that Joint Petitioners had not proffered any evidentiary support for their claim that the concrete pads and casks will become contaminated or for their claim that the canisters will need to be replaced during the operating life of the facility.[238] The portion of the Continued Storage GEIS that the Board discusses refers to the expected consequences of temporary storage in an large scale ISFSI—a facility like the proposed facility—and found that the expected consequences of replacing concrete pads, casks, canisters and the DTS would be small.[239] Therefore, even assuming these materials did need to be replaced during the life of the proposed facility, the impacts have been studied and set forth in the Continued Storage

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[235] Tr. at 161-62; *see* 10 C.F.R. § 2.309(f)(5).

[236] Tr. at 161-62. In answering the Board's questions, counsel for Joint Petitioners stated that it is arguing that "the initial quantification [of LLRW] is tremendously off base," but provided no factual or expert support for that assertion. *Id.*

[237] Joint Petitioners Appeal at 24.

[238] LBP-19-4, 89 NRC at 434.

[239] *Id.* at 435 (citing Continued Storage GEIS at 5-48).

GEIS, which are codified in the Continued Storage Rule. Joint Petitioners' appeal provides no basis to overturn those Board findings.

In short, the Board found proposed Contention 3 failed to include support for its assertions of inadequacy regarding Holtec's evaluation of LLRW impacts. Joint Petitioners' appeal does not dispute the Board's finding that the contention lacked evidentiary support. Accordingly, we affirm the Board's rejection of proposed Contention 3.

4. Joint Petitioners Contention 4: Holtec Does Not Qualify For Continued Storage GEIS Presumptions

Joint Petitioners argued in proposed Contention 4 that Holtec cannot rely on the Continued Storage GEIS's generic environmental analysis of transportation and operational accidents because the proposed CISF differs from the type of facilities contemplated by the Continued Storage GEIS, particularly with respect to its lack of a DTS.[240] The Board dismissed proposed Contention 4, ruling that Holtec's ER does not rely on the Continued Storage GEIS to avoid discussion of site-specific accidents but rather "contains a site-specific impact analysis for the period of the proposed activity" as the GEIS anticipates.[241] The Board further found that "[n]either the Continued Storage GEIS nor NRC regulations require an analysis of a [DTS] at this time"; therefore, proposed Contention 4 failed to raise a genuine dispute with the application on a material issue of law or fact.[242]

On appeal, Joint Petitioners do not dispute the Board's finding that Holtec's ER addresses site-specific environmental effects (including effects from transportation and

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[240] Joint Petitioners Petition at 46-49. Joint Petitioners provided three other bases for Contention 4, each of which the Board addressed in denying its admission. *See* LBP-19-4, 89 NRC at 437. Joint Petitioners raise none of those three bases on appeal. *See* Joint Petitioners Appeal at 24-25.

[241] LBP-19-4, 89 NRC at 437.

[242] *Id.*

operational accidents) during the period of expected facility construction and operation; rather, they continue to argue that the CISF must have a DTS during the current license period. Joint Petitioners argue that "Holtec cannot consider the probability of leaking or contaminated canisters or casks arriving at the CISF to be zero; it cannot discount the need for a DTS well before the end of the first 100 years of operations for emergencies, remediation and repackaging."[243] Joint Petitioners assert the Board's dismissal of proposed Contention 4 was wrong because "the ASLB may not segment consideration of environmental effects," and "Holtec may not avoid NEPA or AEA . . . scrutiny of its decision to not have a [DTS] available before the end of the first 100 years of operation because of the Continued Storage GEIS."[244]

The Continued Storage GEIS generically analyzes the environmental impacts of spent fuel storage after the operational life of a reactor or ISFSI in the short-term (60 years after cessation of operations), long-term (60 to 100 years), and indefinite timeframes.[245] It generically assumes that a DTS would be built "in the long-term and indefinite timeframes," which occur beyond the initial 40-year license term for the Holtec CISF, so that "the environmental impacts of constructing a reference DTS" can be considered, thus providing a "complete picture of the environmental impacts of continued storage."[246] But as the Board correctly held, this assumption does not impose a requirement that any particular facility build a DTS.

We agree with the Board that if the proposed CISF is licensed, built, and operated and Holtec later decides to construct and operate a DTS, a separate licensing action would be

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[243] Joint Petitioners Appeal at 25.

[244] Joint Petitioners Appeal at 24. Joint Petitioners' argument regarding NEPA segmentation is new on appeal and will not, therefore, be considered. *See USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006).

[245] Continued Storage GEIS § 1.8.2.

[246] *Id.* § 2.1.4.

required, which would entail additional environmental review.[247] For now, Holtec has evaluated the site-specific environmental effects associated with the construction and operation of the proposed CISF (as required by the Continued Storage Rule). Joint Petitioners do not challenge that facility- and site-specific evaluation of the effects of transportation and operational accidents.[248] We thus find no error in the Board's conclusion that proposed Contention 4 stated no genuine dispute with the application and was therefore inadmissible.

5. *Joint Petitioners* Contention *7: Holtec's "Start Clean/Stay Clean" Policy Is Unlawful and Directly Causes a Public Health Threat*

In their proposed Contention 7, Joint Petitioners argued that Holtec's "start clean/stay clean" policy is illegal and unsafe because "leaky and/or contaminated canisters" might arrive at the proposed CISF, which Holtec "intends to return . . . to their points of origin," thus risking "immediate danger to the corridor communities through which they would travel back to their nuclear power plant or site of origin, likely violating numerous additional NRC and DOT regulations."[249]

Holtec's answer explained that its "start clean/stay clean" plan would mean that a defective canister would be shipped back in an approved transportation cask, which is lawful as long as applicable radiation standards are met.[250] Holtec also pointed to our decision in *Private Fuel Storage,* wherein we noted that a similar contention's "assertion that shipping [a defective] canister back inside the approved transportation casks is not safe can be seen as an

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[247] LBP-19-4, 89 NRC at 437.

[248] *See* ER §§ 4.9.3.2, 4.13.2. Holtec assumes for purposes of its environmental analysis that "[spent nuclear fuel] could be stored at the CIS Facility for approximately 120 years (40 years for initial licensing plus 80 years for life extensions)," which "could be reduced if a final geologic repository is licensed and operated . . .". ER § 1.0.

[249] Joint Petitioners Petition at 61.

[250] Holtec Answer to Joint Petitioners at 63-64 (citing 10 C.F.R. § 71.47).

impermissible attack on NRC regulations and rulemaking-related generic determinations that the transportation cask is sufficient to prevent the leakage of any radioactive material."[251]

The Board found the contention lacked factual or expert support, specifically finding that Joint Petitioners had not shown:

> (1) how the spent fuel, when packaged at the reactor site, would leave the site leaking or damaged notwithstanding NRC-approved quality assurance programs; (2) how the spent fuel canister, within its transport overpack cask, would become credibly damaged in an accident scenario that results in an exceedance of dose rates while in transit; and (3) how the sequestration sleeve, as outlined in Holtec's SAR at the time the petitions were due in this proceeding, is an inadequate remedy should the cask and canister somehow become damaged.[252]

The Board agreed that our decision in *Private Fuel Storage* would require the proponent of a similar contention to posit a credible scenario where a canister is breached in transport.[253]

On appeal, Joint Petitioners attempt to distinguish *Private Fuel Storage* by suggesting that accidental canister breaches should be considered credible in this case because Holtec's "start clean/stay clean" policy necessarily supposes some breaches will occur.[254] The Board already considered and rejected that argument, however, noting that *Private Fuel Storage* (like this case) also involved a policy "to ship back a leaking or defective canister to its point of origin," and that the petitioner in that case (like this case) had failed to contest "those very programs that provide that a transportation accident or breach of canister is not credible."[255]

We find that the Board appropriately relied on *Private Fuel Storage* in finding this contention inadmissible. Mere existence of Holtec's "start clean/stay clean" policy is not

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[251] *Id.* at 63 (citing *Private Fuel Storage*, CLI-04-22, 60 NRC at 138 n.53).

[252] LBP-19-4, 89 NRC at 444.

[253] *Id.* (citing *Private Fuel Storage,* CLI-04-22, 60 NRC at 136-37).

[254] Joint Petitioners Appeal at 26.

[255] LBP-19-4, 89 NRC at 444.

sufficient to undermine the requirements and safety analyses that have generically established the integrity of approved spent fuel canister designs.

6. Joint Petitioners Contention 9: Incomplete and Inadequate Disclosure of Transportation Routes

Joint Petitioners argued in proposed Contention 9 that Holtec should disclose the transportation routes for the thousands of cask deliveries that are anticipated over the first twenty years of Holtec's proposed license.[256] According to Joint Petitioners, the application only shows two probable routes, one from the site of the former Maine Yankee plant and another from the former San Onofre Nuclear Generating Station in California.[257] Joint Petitioners argued that complete transportation information is necessary for their own participation in the NEPA process as well as for emergency response officials to understand the scope of Holtec's proposal.[258]

The Board found that Joint Petitioners failed to raise a genuine dispute with the application because they did not demonstrate that either NEPA or our regulations require a specific assessment of possible transportation routes.[259] The Board found that Holtec's ER evaluated three representative routes—one from San Onofre to the proposed CISF, one from Maine Yankee to the proposed CISF, and one from the proposed CISF to Yucca Mountain—and that "the use of representative routes is in keeping with past NRC practice to evaluate transportation impacts."[260] The Board further found Joint Petitioners' concerns that emergency

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[256] Joint Petitioners Petition at 66-68.

[257] *Id.* at 66.

[258] *Id.* at 67.

[259] LBP-19-4, 89 NRC at 445.

[260] *Id.* at 446 (citing Continued Storage GEIS at 5-49 to 5-54; Private Fuel Storage EIS at 5-39; 10 C.F.R. § 51.52, tbl. S-4).

response officials would need disclosure of transportation routes to be outside the scope of this licensing proceeding. The Board explained that the NRC reviews and approves spent nuclear fuel transportation routes separately, in conjunction with the Department of Transportation, including consultation with applicable States or Tribes, and coordination with local law enforcement and emergency responders.[261]

On appeal, Joint Petitioners largely repeat their arguments before the Board.[262] However, the Board correctly found that determining exact transportation routes is an issue outside the scope of this licensing proceeding. Furthermore, the use of representative routes in an environmental-impacts analysis to address the uncertainty of actual, future spent fuel transportation routes is a well-established regulatory approach, the foundations of which Joint Petitioners have not challenged.[263] Therefore, we affirm the Board's decision to deny admission of proposed Contention 9.

7. Joint Petitioners Contention 11: NEPA Requires Significant Security Risk Analysis

Joint Petitioners asserted in proposed Contention 11 that Holtec's application should include an analysis of the environmental impacts resulting from a terrorist attack on the

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[261] *Id.*; *see also* 10 C.F.R. §§ 71.97, 73.37 (requiring advanced planning and coordination of spent fuel shipments with State and Tribal officials).

[262] Joint Petitioners Appeal at 27. Joint Petitioners also raise a new argument on appeal that the Board's ruling effectively "segments a single project into smaller projects" by "[s]eparating consideration of the transportation component from the storage component," and thus "defies effective analysis and public understanding as required by NEPA." *Id.* That argument, which does not account for the evaluation of transportation impacts contained in ER section 4.9, is raised for the first time on appeal and therefore will not be considered. *See South Carolina Electric & Gas Company* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 5 (2010).

[263] *See, e.g.*, Continued Storage GEIS § 5.16 (evaluating impacts of spent fuel transportation to an away-from-reactor ISFSI based on shipments over a representative route); Private Fuel Storage EIS § 5.7.2 (selecting one of the longest possible routes passing through some of the most populated regions of the country).

proposed CISF and on spent nuclear fuel shipments to the CISF.[264] The Board found the contention inadmissible based on the policy decision we expressed in *AmerGen Energy*, which was upheld by the United States Court of Appeals for the Third Circuit.[265] In *AmerGen Energy*, we held that terrorist attacks are too far removed from the natural or expected consequences of agency action to require environmental analysis in an NRC licensing proceeding.[266] In *AmerGen Energy*, we specifically declined to follow a contrary ruling from the United States Court of Appeals for the Ninth Circuit for any facility located outside that Circuit.[267]

The Board found that because the proposed CISF would be in New Mexico, which is not within the Ninth Circuit, no terrorist analysis under NEPA is required.[268]

On appeal, Joint Petitioners reassert that "the ER should contain an analysis of terrorist attacks as an environmental impact" and cite the Ninth Circuit's decision that we declined to follow in *AmerGen Energy*.[269] But Joint Petitioners do not articulate a reason for us to reconsider our policy here. The Board correctly applied our prior rulings, and we affirm its decision to deny admission of proposed Contention 11.

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[264] Joint Petitioners Petition at 70-88. Proposed Contention 11 included twenty-eight "sub-contentions" that the Board found "[fell] short of the Commission's contention admissibility standards." LBP-19-4, 89 NRC 448-49. Joint Petitioners did not appeal that ruling.

[265] LBP-19-4, 89 NRC 448; *see AmerGen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124 (2007), *review denied*, *N. J. Dep't of Envtl. Prot. v. NRC*, 561 F.3d 132 (3d Cir. 2009).

[266] *AmerGen Energy*, CLI-07-8, 65 NRC at 129.

[267] *Id.* at 128-29 (declining to follow *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006)).

[268] LBP-19-4, 89 NRC at 448 (observing that New Mexico is in the Tenth Circuit).

[269] Joint Petitioners Appeal at 28.

F. Fasken Motion to Admit New Contention

On August 1, 2019, Fasken filed a motion for leave to file a new contention claiming that Holtec does not control mineral rights beneath the proposed site as represented in its application.[270] Fasken bases its contention on a June 19, 2019, letter from the State of New Mexico Commissioner of Public Lands to Krishna Singh, President and CEO of Holtec, a copy of which was sent to NRC and served on the parties in this proceeding on July 2, 2019.[271] Both the Staff and Holtec opposed the motion on various grounds, including that Fasken had failed to file a motion to reopen the proceeding or address the standards for doing so.[272] Thereafter, Fasken filed a motion to reopen, but it subsequently withdrew that motion without withdrawing its initial motion for leave to admit a new contention.[273]

Although we could determine the admissibility of Fasken's new proposed contention ourselves, we decline to do so in this instance. The Board is the agency's expert in contention admissibility, and typically, the parties have the opportunity for oral argument before the Board on matters of contention admissibility. We therefore remand the contention to the Board for consideration of the contention's admissibility, timeliness, and capacity to meet the reopening standards.

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

[271] Letter from Stephanie Richard, New Mexico Public Lands Commissioner, to Krishna Singh, President of Holtec International (June 19, 2019) (ML19183A429) (attached to Fasken Motion for New Contention as Ex. 5) (New Mexico Letter).

[272] *See NRC Staff Answer in Opposition to Fasken Oil and Ranch, Ltd. and Permian Basin Land and Royalty Owners' Motion to File New Contention* (Aug. 26, 2019), at 9-10 (Staff New Contention Response); *Holtec International's Answer Opposing Fasken's Late-Filed Motion to File a New Contention* (Aug. 26, 2019), at 12-13 (Holtec New Contention Response).

[273] *See Fasken Oil and Ranch and Permian Basin Land and Royalty Owners Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019* (Sept. 3, 2019); *Fasken and PBLRO's Withdrawal of Their "Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019*" (Sept. 12, 2019); *Holtec International's Answer Opposing Fasken's Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019* (Sept. 13, 2019).

III. CONCLUSION

For the foregoing reasons, we *affirm in part* and *reverse* and *remand in part* the Board's ruling denying the petitions. We further *remand* to the Board Fasken's new proposed contention and Sierra Club Contention 30 for determination of their admissibility.

IT IS SO ORDERED.

For the Commission

NRC SEAL

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of April 2020.

Chairman Svinicki, Dissenting in Part

I join my colleagues' disposition of the many appeals in this proceeding with one exception: the majority's decision to remand portions of Sierra Club's Contentions 15, 16, 17, and 19 (the "groundwater contentions"). Generally, these contentions asserted that Holtec inadequately characterized groundwater on site and therefore the environmental impacts could be greater than acknowledged should the storage canisters become compromised and contaminate the groundwater.[1] However, the Board concluded that challenges to the integrity of the storage canisters effectively sought to litigate our regulations certifying the designs of those canisters and were therefore outside the scope of this proceeding.[2] The majority does not disturb this finding, but instead remands the limited question of whether these contentions could stand as challenges to Holtec's site groundwater characterization on their own.[3]

In my view, the Board correctly dismissed the entirety of the groundwater contentions upon concluding that Sierra Club's claim that the canisters could leak was inadmissible. Without that component, the groundwater contentions no longer challenge the discussion of environmental impacts in the application and therefore fail to raise a material, genuine dispute with the application.[4] While I would certainly disagree with an open-ended remand to the Board on this issue, here the majority has instead focused this remand on the material (although in my view already resolved) issue of whether the challenges to groundwater characterization could impact the analysis of environmental impacts in this proceeding. On balance, however, I find even this narrow remand to be an exercise in elevating form over substance.

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[1] Sierra Club Petition at 60-67.

[2] LBP-19-4, 89 NRC at 404-05.

[3] Order at 29.

[4] 10 C.F.R. § 2.309(f)(1)(iv), (vi).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
	)	
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-20-04),** have been served upon the following persons by Electronic Information Exchange (EIE).

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Dated at Rockville, Maryland,
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