

ORAL ARGUMENT NOT YET SCHEDULED

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**Case No. 21-1048
Consolidated with Case Nos. 21-1055, 21-1056,
21-1179, 21-1227, 21-1229, 21-1230, 21-1231**

DON'T WASTE MICHIGAN, *et al.*,

Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,

Respondents,

INTERIM STORAGE PARTNERS, LLC,

Intervenor.

Petition for Review of Final Order of the
United States Nuclear Regulatory Commission

**OPENING BRIEF OF PETITIONERS FASKEN LAND AND MINERALS,
LTD. AND PERMIAN BASIN LAND AND ROYALTY OWNERS**

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

In accordance with D.C. Cir. Rule 28(a)(1), Petitioners submit the foregoing certificate of parties, rulings and related cases.

A. Parties and Amici

Petitioners

The Petitioners in this matter are Fasken Land and Minerals, Ltd. and the Permian Basin Land and Royalty Owners, collectively referred to herein as “Fasken.”

Respondents

The Respondents are the United States Nuclear Regulatory Commission and the United States of America.

Intervenor

The Intervenor is Interim Storage Partners, LLC.

B. Rulings Under Review

Fasken seeks review of the United States Nuclear Regulatory Commission’s (“NRC”) Memorandum and Order CLI-21-09 (June 22, 2021), REC. 230 (JA_).

C. Related Cases

The undersigned counsel is not aware of any other case pending in this Circuit related to this one within the meaning of D.C. Cir. Rule 28(a)(1)(C), which is not currently consolidated herewith.

Undersigned counsel is aware of currently pending cases in the United States Courts of Appeals for the Fifth Circuit and the Tenth Circuit involving challenges to the NRC's issuance of the ISP license and record of decision. *State of Texas; Greg Abbott, Governor of the State of Texas; Texas Commission on Environmental Quality; Fasken Land and Minerals, Ltd.; and Permian Basin Land and Royalty Owners v. Nuclear Regulatory Commission and United States of America*, Docket No. 21-60743 (5th Cir.); *State of New Mexico, ex rel. Hector H. Balderas, Attorney General and the New Mexico Environment Department*, Docket No. 21-9593 (10th Cir.).¹

Respectfully submitted,

/s/ Allan Kanner

Allan Kanner

¹ Opening briefs in these matters were filed on February 7, 2022, and March 10, 2022, respectively.

PETITIONERS' RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. Rule 26.1, Fasken makes the following disclosures:

Petitioner Fasken Land and Minerals, Ltd., is a for-profit nongovernmental limited partnership organization existing under the laws of the State of Texas engaged in oil and gas extraction and production activities. Fasken Land and Minerals, Ltd., has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

Petitioner Permian Basin Land and Royalty Owners is a nongovernmental registered 501(c)(4) non-profit, organized and existing under the laws of the State of Texas, is based in Midland, Texas, and is a public welfare organization dedicated to protecting the interests of the Permian Basin and informing the public about threats and risks of spent nuclear fuel in regions ill-suited to the activity. Permian Basin Land and Royalty Owners has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

Respectfully submitted,

/s/ Allan Kanner

Allan Kanner

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES	i
A. Parties and Amici.....	i
B. Rulings Under Review.....	i
C. Related Cases.....	i
PETITIONERS’ RULE 26.1 DISCLOSURE STATEMENT.....	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES	vi
GLOSSARY.....	viii
STATEMENT OF JURISDICTION.....	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW	2
STATUTES AND REGULATIONS.....	2
STATEMENT OF THE CASE.....	3
A. The NRC Denied All Administrative Challenges Regarding the ISP License Application and Terminated Its Administrative Proceeding Prior to Publishing Its DEIS	3
B. Fasken Moved to Reopen the Record and to File a New Contention Based on New Information in the DEIS	5
C. ASLB and NRC Denied Fasken’s Motions.....	6
SUMMARY OF THE ARGUMENT	6
STANDING	7
ARGUMENT	9

I. STANDARD OF REVIEW.....9

II. THE NRC ARBITRARILY AND CAPRICIOUSLY REJECTED FASKEN’S
CONTENTION9

 A. Fasken’s Contention is Based on New and Material Information
 Regarding the Responsibility and Costs for Coordinating
 Transportation, Infrastructure Improvements, and Emergency
 Response10

 B. Fasken’s Contention is Based on New and Material Information
 Regarding Regional Transportation Impacts and the DEIS’ Omission
 of an Evaluation of Regional and Site-Specific Impacts Leads to
 Serious Safety and Environmental Issues.....13

III. THE NRC ARBITRARILY AND CAPRICIOUSLY DENIED FASKEN’S
MOTION TO REOPEN AND MOTION FOR LEAVE TO FILE NEW
CONTENTION20

CONCLUSION.....22

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS24

CERTIFICATE OF SERVICE25

ADDENDUM OF STATUTES AND REGULATIONS STATUTORY ADD 1

STANDING ADDENDUM..... STANDING ADD 1

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Adenariwo v. Fed. Maritime Comm’n</i> , 808 F.3d 74 (D.C. Cir. 2015).....	1
<i>Blue Ridge Env’tl. Def. League v. Nuclear Reg. Comm’n</i> , 668 F.3d 747 (D.C. Cir. 2012).....	1
<i>Blue Ridge Env’tl. Def. League v. Nuclear Regulatory Comm’n</i> , 716 F.3d 183 (D.C. Cir. 2013).....	9
<i>Center for Sustainable Econ. v. Jewell</i> , 779 F.3d 588 (D.C. Cir. 2015).....	8
<i>Citizens for a Safe Env’t v. Atomic Energy Comm’n</i> , 489 F.2d 1018 (3d Cir. 1973)	1
<i>In the Matter of Calvert Cliffs 3 Nuclear Project</i> , 72 N.R.C. 720, 2010 WL 9007226 (2010)	10
<i>In the Matter of Georgia Power Co.</i> , 2 N.R.C. 404, 1975 WL 20090 (1975)	20
<i>In the Matter of Louisiana Energy Services</i> , 62 N.R.C. 523, 2005 WL 4131570 (2005)	10
<i>In the Matter of Vermont Yankee Nuclear Power Corp.</i> , 6 A.E.C. 358, 1973 WL 18107 (1973)	20
<i>Natural Res. Def. Council v. U.S. Nuclear Reg. Comm’n</i> , 680 F.2d 810 (D.C. Cir. 1982).....	1
<i>New York v. NRC</i> , 681 F.3d 471 (D.C. Cir. 2012).....	14
<i>Nuclear Energy Inst., Inc. v. EPA</i> , 373 F.3d 1251 (D.C. Cir. 2004).....	8
<i>Sierra Club v. Sigler</i> , 695 F.2d 957 (5th Cir. 1983)	12

Thermal Ecology Must Be Preserved v. Atomic Energy Comm'n,
433 F.2d 524 (D.C. Cir. 1970).....1

Union Neighbors United, Inc. v. Jewell,
831 F.3d 564 (D.C. Cir. 2016).....16

Statutes

5 U.S.C. § 702.....2

5 U.S.C. § 706.....9

28 U.S.C. § 2342.....1

28 U.S.C. § 2342(4).....2

28 U.S.C. § 2344.....2

42 U.S.C. § 2011.....1

42 U.S.C. § 2239(b).....2

42 U.S.C. § 4332(C)..... 13, 19

Regulations

10 C.F.R. § 2.309.....7, 10

10 C.F.R. § 2.309(c)(1).....9

10 C.F.R. § 2.309(f)(1).....9

10 C.F.R. §§ 72.90-72.108.....13

10 C.F.R. § 72.100(b).....19

GLOSSARY

AEA	The Atomic Energy Act
APA	The Administrative Procedure Act
ASLB	The Atomic Safety and Licensing Board
CISF	Consolidated Interim Storage Facility
DEIS	Draft Environmental Impact Statement
EIS	Environmental Impact Statement
ER	Environmental Report
ISFSI	Independent Spent Fuel Storage Installation
ISP	Interim Storage Partners, LLC
MRS	Monitored Retrievable Storage
NEPA	The National Environmental Policy Act
NRC	The United States Nuclear Regulatory Commission
NWPA	The Nuclear Waste Policy Act
PBLRO	Permian Basin Land and Royalty Owners
RAI	Request for Additional Information
SNF	Spent Nuclear Fuel

STATEMENT OF JURISDICTION

The NRC instituted an adjudicatory proceeding regarding ISP's license application pursuant to the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.* ("AEA"), and its procedural regulations under 10 C.F.R. Part 2. On June 22, 2021, the NRC affirmed the Atomic Safety Licensing Board's ("ASLB") denial of Fasken's Motion to Reopen the Record and Motion for Leave to File New Contention concerning NRC's preparation and publication of its draft Environmental Impact Statement ("DEIS"). *CLI-21-09*, REC. 230 (JA_). This was the final NRC Order denying Fasken's requests for intervention and constitutes a final order for purposes of Hobbs Act jurisdiction. *Adenariwo v. Fed. Maritime Comm'n*, 808 F.3d 74, 78 (D.C. Cir. 2015) ("An agency order is final for purposes of 28 U.S.C. § 2342 'if it imposes an obligation, denies a right, or fixes some legal relationship, usually at the consummation of an administrative process.'") (quoting *Natural Res. Def. Council, Inc. v. U.S. Nuclear Reg. Comm'n*, 680 F.2d 810, 815 (D.C. Cir. 1982)); *Blue Ridge Envtl. Def. League v. Nuclear Reg. Comm'n*, 668 F.3d 747, 753 (D.C. Cir. 2012) ("[I]n the context of administrative adjudications, 'a final order is [normally] one that disposes of all issues as to all parties.'") (quoting *Citizens for a Safe Env't v. Atomic Energy Comm'n*, 489 F.2d 1018, 1021 (3d Cir. 1973)); *Thermal Ecology Must Be Preserved v. Atomic Energy Comm'n*, 433 F.2d 524, 526 (D.C. Cir. 1970) ("An order denying intervention would be reviewable.").

The NRC's final Order is reviewable by this Court under 42 U.S.C. § 2239(b), 28 U.S.C. § 2342(4), and 5 U.S.C. § 702. Pursuant to 28 U.S.C. § 2344, Fasken timely filed their Petition for Review on August 20, 2021, within sixty days of the NRC's final Order. No. 21-1179, Doc. #1911677.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- Whether the NRC erred in denying Fasken's Motions and Contentions based on new and material agency impact determinations and sources relied on in the DEIS that differed significantly from those contained in ISP's application documents.
- Whether the NRC erred in failing to conduct an evaluation of site-specific impacts relating to the regional transport of spent nuclear fuel ("SNF") to and from the ISP CISF.

STATUTES AND REGULATIONS

Relevant statutes and implementing regulations are included in the Addendum.

STATEMENT OF THE CASE²

A. The NRC Denied All Administrative Challenges Regarding the ISP License Application and Terminated Its Administrative Proceeding Prior to Publishing Its DEIS

Fasken, like other petitioners, filed a petition for intervention and request for hearing. *Fasken Petition*, REC. 51 (JA_). Fasken submitted a total of six contentions, drawing on regional expertise and decades of collective knowledge gained through extensive energy and agriculture operations within the Permian Basin, identifying concerns with misleading, inaccurate, inconsistent, or incomplete characterizations in ISP's application documents. *Id.* In total, forty contentions were filed in the proceeding. *Beyond Nuclear Petition*, REC. 39; *Fasken Petition*, REC. 51; *Sierra Club Petition*, REC. 57; *Don't Waste Michigan Petition*, REC. 61; *SEED Mtn. to File Late Contention*, REC. 172; *Fasken Contention Mtn.*, REC. 209 (JA_).

In truly unprecedented fashion, the ASLB rejected each and every contention proffered. *LBP-19-07*, 90 NRC 31, REC. 126; *LBP-19-09*, 90 NRC 181, REC. 178; *LBP-19-11*, 90 NRC 358, REC. 185 (JA_). It officially terminated the adjudicatory proceeding and closed the administrative record five months before the NRC published its DEIS and issued notice soliciting public comments pursuant to NEPA

² The Statutory and Factual Background in Petitioner Beyond Nuclear's opening brief outlines the development of federal law regarding the storage of SNF and the background regarding ISP's license application, which Fasken adopts and incorporates herein.

in May 2020. *LBP-19-11*, 90 NRC at 368, REC. 185 (JA_); *Notice*, 85 Fed. Reg. 27447 (May 8, 2020), REC. 324 (JA_). The NRC subsequently affirmed the rejection of all contentions. *CLI-20-13*, 92 NRC 457, REC. 218; *CLI-20-14*, 92 NRC 463, REC. 221; *CLI-20-15*, 92 NRC 491, REC. 222 (JA_).

Throughout this process, the NRC has issued numerous requests for additional information (“RAIs”), allowing ISP to supplement its application documents, even after publication of the DEIS. *See, e.g., RAI Resp.* (July 21, 2020), REC. 331; *RAI Resp.* (Jan. 27, 2021), REC. 353 (JA_). Much of the information submitted by ISP was kept from the public by claims of confidentiality. *E.g., CLI-20-14*, 92 NRC at 472, REC. 221 (denying Fasken’s SUNSI request); *RAI Resp.*, REC. 290 (including response to RAI-2.2-2 submitted as confidential) (JA_). However, the supplemental information was the basis for denying various contentions as moot. *E.g., LBP-19-07*, 90 NRC at 113 n.549, REC. 126 (JA_) (noting that the NRC Staff originally argued for partial admission of Fasken Contention 2 but changed its position during oral argument and considered the contention moot in light of ISP’s response to RAI-2.2-2).

In January 2020, Fasken filed a motion to reopen the closed record along with a motion to amend a previously filed contention relating to ISP’s mischaracterizations of groundwater based on new information provided in responses to NRC’s RAIs. *Mtn. to Reopen*, REC. 193; *Mtn. to Amend*, REC. 194

(JA_). The NRC denied Fasken's motion to amend its contention and did not consider the motion to reopen. *CLI-20-14*, 92 NRC at 478, REC. 221 (JA_).

B. Fasken Moved to Reopen the Record and to File a New Contention Based on New Information in the DEIS

After reviewing the DEIS, Fasken filed a second Motion to Reopen the proceeding and a Motion for Leave to File a New Contention. *Reopen Mtn.*, REC. 208; *Contention Mtn.*, REC. 209 (JA_). Fasken's Contention was based on new and materially different conclusions and/or sources relied on in the DEIS, which for the first time shifted the burden and responsibility for emergency response efforts and infrastructure improvements to local communities without accounting for the costs. *Contention Mtn.* at 14-17, REC. 209 (JA). In addition, Fasken's Contention focused on the use of representative transportation routes, which failed to properly analyze regional transportation impacts in light of the site-specific conditions and those of the 50-mile radius surrounding the site. *Id.* at 17-26 (JA_). Fasken asserted that an appropriate site-specific analysis was absent from the DEIS, which: (1) relied on representative routes to Deaf Smith, Texas, that ignored the regional transportation leg cutting through the Permian Basin from Monahans, Texas to the ISP facility that is also used by regional oil and gas and agricultural industries; (2) disregarded the geological characteristics of the area including seismicity, subsidence, sinkholes, along with ongoing oil and gas and mining extraction operations effecting transportation infrastructure, safety risks and environmental impact; and (3) failed

to analyze the costs and benefits on a site-specific basis, given that rural, remote communities along the transportation route would be responsible for training, equipping and financing emergency first responders. Fasken argued that by omitting this analysis, the DEIS analysis of environmental impacts fell short of the requirements of NEPA and NRC regulations.

C. ASLB and NRC Denied Fasken's Motions

The ASLB denied Fasken's Motions, primarily on the ground that the Motions and Contention were not based on information that was materially new. *LBP-21-02* at 6-7, 93 NRC _ (slip op.), REC. 224 (JA_). Further, the ASLB rejected Fasken's Contention finding it did not satisfy the admissibility requirements. *Id.* at 10-15. (JA_).

The NRC affirmed the ASLB's decision, under the substantial deference standard of review. *CLI-21-09*, REC. 230 (JA_).

Fasken's petition for review followed.

SUMMARY OF THE ARGUMENT

The NRC abused its discretion, acting arbitrarily and capriciously in denying Fasken's Motions and Contention relating to site-specific impacts and serious and significant regional transportation issues addressed for the first time in the NRC's DEIS. Applying a heightened standard for pleading, the NRC summarily dismissed Fasken's challenges by transforming them into previously dismissed contentions

based on ISP's Environmental Report ("ER"). In doing so, the NRC overlooked the timeline of production of information at issue and more importantly, overlooked the site-specific nature of Fasken's arguments identifying concerns with NRC's newly disclosed findings and its reliance on faulty and inapplicable prior evaluations relating to emergency and first responder services, the omission of consideration of infrastructure funding in the calculus of costs and benefits, as well as adverse impacts on regional industries and serious safety risks of transporting SNF in and out of the Permian Basin.

Fasken's Contention raises mixed environmental and safety issues with abundant factual support and requisite affidavits in accordance with NRC standards. *Contention Mtn.* at Exhibits 1 and 2, REC. 209 (JA_); 10 C.F.R. § 2.309. The NRC erred in denying the Contention. It failed to independently investigate the issues identified and to take a "hard look" at the impacts. The NRC is required to offer a contemporaneous rational basis for its impact determinations and the DEIS findings to ensure transparency and informed decision-making.

STANDING

Fasken's standing is addressed in the Docketing Statement and attached standing declarations of Tommy Taylor, Vice President of Fasken Management, LLC, the general partner of Petitioner Fasken; D.K. Boyd, member of PBLRO; and Grant Huckabay, Health, Safety and Environmental Coordinator of Fasken Oil and

Ranch, Ltd., which have been submitted to the Court. No. 21-1048, Doc. #1921497. Fasken and members of PBLRO own and/or lease property related to oil and gas activities, grazing, and agricultural operations near the ISP CISF site. They, along with their personnel, regularly travel in the vicinity of the site for work-related purposes, using local, state, and federal highways, and they regularly use the regional rail transportation to support their industries, which they will be forced to share with regular shipments of SNF in and out of the Permian Basin. They also have concerns regarding adverse health effects and impacts to their employees and business operations, as well as the communities in the region generally, including medical care costs, adverse financial impacts on property, and threats to ongoing business activities.

In the proceeding below, Petitioner Fasken was found to have standing and Petitioner PBLRO was found to have associational standing based on the declarations of Tommy Taylor and D.K. Boyd. *LBP-19-07*, 90 NRC at 51-52, REC. 126; *CLI-20-14*, 92 NRC at 466, REC. 221 (JA_). The ASLB's and NRC's conclusions that Fasken has standing are consistent with this Court's precedents. *See Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004); *Center for Sustainable Econ. v. Jewell*, 779 F.3d 588 (D.C. Cir. 2015).

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews the NRC's decision under the arbitrary and capricious standard. *Blue Ridge Envtl. Def. League v. Nuclear Regulatory Comm'n*, 716 F.3d 183, 195 (D.C. Cir. 2013); 5 U.S.C. § 706.

II. THE NRC ARBITRARILY AND CAPRICIOUSLY REJECTED FASKEN'S CONTENTION

Fasken's Contention satisfies 10 C.F.R. § 2.309(c)(1)'s conditions for good cause. As discussed herein, the information forming the basis for the Contention was not available prior to publication of the DEIS in May 2020 and was materially different than that in ISP's application documents. Fasken's Motions associated with its Contention were timely filed, pursuant to the May 22, 2020, Order of the NRC Secretary. *Reopen Mtn.*, REC. 208; *Contention Mtn.*, REC. 209; *Order*, REC. 207 (JA_). Fasken's Contention also satisfies 10 C.F.R. § 2.309(f)(1)'s standards for admissibility. Fasken's Contention raises serious and grave concerns regarding NRC's failure to account for costs of necessary emergency response services and infrastructure improvements, as well as its failure to evaluate heightened adverse consequences from site-specific transportation impacts within the Permian Basin. Fasken's concerns fall squarely within the scope of the proceeding and raise genuine disputes of material issues highlighting the NRC's violations of NEPA and NRC

regulations. As set forth herein, the NRC's rejection of Fasken's Contention was arbitrary and capricious and should be reversed.

A. Fasken's Contention is Based on New and Material Information Regarding the Responsibility and Costs for Coordinating Transportation, Infrastructure Improvements, and Emergency Response

The NRC has found that a new or amended contention may be filed if the DEIS contains data *or* conclusions that differ significantly from those in the applicant's documents. *In the Matter of Calvert Cliffs 3 Nuclear Project*, 72 N.R.C. 720, 729-30, 2010 WL 9007226 (2010); *In the Matter of Louisiana Energy Services*, 62 N.R.C. 523, 533, 2005 WL 4131570 (2005) ("Our rules expressly allow timely amendment of NEPA contentions if there is significant new information or different conclusions in the DEIS that could not have been challenged previously.") (citing 10 C.F.R. § 2.309). Fasken cited specific and material new information that the NRC and ASLB erroneously discarded.

New disclosures regarding the responsibility and costs for coordinating transportation, infrastructure improvements and necessary emergency training appeared for the first time in the DEIS. ISP's ER states, "DOE or private qualified logistics company will also be responsible for coordinating with federal agencies . . . regarding transportation of SNF . . . *If DOE is the shipper, the federal government, through DOE, is responsible* for providing emergency training to states, tribes, and local emergency responders along the transportation routes where SNF would be

transported to the CISF.” *ER (Rev. 3)* at 4-8 (emphasis added), REC. 318 (JA_). In contrast, the DEIS for the first time asserts that “if SNF is shipped to a CISF, some States, Tribes, or municipalities along transportation routes may incur costs for emergency-response training and equipment that might otherwise be eligible for funding under NWPA Section 180(c) provisions if DOE shipped the SNF from existing sites to a repository.” *DEIS* at 4-74 -75, REC. 327 (JA_). The DEIS also states that “States are recognized as responsible for protecting health and safety during radiological transportation accidents.” *Id.* at 8-11 (JA_).

In addition, ISP’s ER suggests DOE would be responsible for infrastructure upgrades required to transport the SNF to a storage cite. *ER (Rev. 3)* at 3-8 -9, REC. 318 (JA_). However, the DEIS states that some decommissioned reactor sites “may require local transportation infrastructure upgrades to remove the SNF from the site” for example, “installing or upgrading rail track, roads, or barge slips necessary to transfer SNF offsite.” *DEIS* at 4-10, REC. 327 (JA_).

However, despite the shift in responsibility and particularly in costs, the DEIS did not reach any quantifiable or qualitative determination on these regional transportation impacts, risks and costs, and it did not include them in its cumulative impact analysis, claiming the issues “would be speculative” and “beyond the scope” of the EIS. *DEIS* at 4-75, REC. 327 (JA_). Likewise, despite infrastructure improvement costs being necessary to transport SNF to the ISP CISF, the DEIS did

not quantify these costs. *Id.* at 8-11 (JA_). Without factoring in the risks and costs to be borne by state and local governments, the NRC concluded that the socioeconomic impacts resulted in a small to moderate beneficial impact for local finance. *Id.* at 4-75, 5-46 (JA_). The failure to factor in these costs is unreasonable, arbitrary, and capricious and does not provide a complete picture of the actual impacts of the project. *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983) (“Simple logic, fairness, and the premises of cost-benefit analysis, let alone NEPA, demand that a cost-benefit analysis be carried out objectively. There can be no ‘hard look’ at costs and benefits unless all costs are disclosed.”).

The ASLB and NRC summarily found that the evaluation of these risks and costs was beyond the scope of the proceeding. *LBP-21-02* at 14-15, REC. 224 (JA_). The conclusion that the project would have a small to moderate beneficial impact on local finance is incomplete at best, and it is arbitrary and capricious to conduct such an analysis by including only beneficial impacts and omitting significant costs. Under this standard, the NRC could conceivably show any project as having a beneficial financial impact. This does not equate to the “hard look” required by NEPA. *Sigler*, 695 F.2d at 979 (noting that if an agency were permitted to cite possible benefits to promote a project but avoid citation of accompanying costs, the cost-benefit analysis would be a sham).

Fasken's Contention raises serious and significant safety and environmental issues dealing with site-specific impacts in the Permian Basin and genuine disputes with the NRC's consideration of same that fall squarely within the scope of the proceeding. Both NEPA and NRC's own implementing regulations require consideration of siting evaluation factors in determining impacts on the human environment of a proposed project. 42 U.S.C. § 4332(C); 10 C.F.R. §§ 72.90-72.108. Indeed, the DEIS is a self-declared site-specific assessment. *DEIS* at 1-6, 5-13, REC. 327 (JA_). NRC's Scoping Summary Report concedes that these issues are material and within the scope. *Scoping Summary Report* at A-8 -10, B-20, B-35, REC. 307 (JA_). As such, the NRC is wrong to claim that such regional transportation issues are "outside of the scope" of the proceedings or that such impacts affecting cost and benefit analyses are "unquantifiable."

B. Fasken's Contention is Based on New and Material Information Regarding Regional Transportation Impacts and the DEIS' Omission of an Evaluation of Regional and Site-Specific Impacts Leads to Serious Safety and Environmental Issues

ISP's ER states that "SNF would be transported exclusively by rail." *ER (Rev. 3)* at 4-8, REC. 318 (JA_). However, the DEIS for the first time relies on a 2008 DOE Yucca Mountain analysis which discloses supplemental modes of transportation, including segments of barge or heavy-haul trucks to move the SNF from generator sites to rail lines. *DEIS* at 3-9, 4-6, REC. 327 (JA_). The DEIS did not evaluate the environmental or safety impacts from transportation of SNF via

barges or heavy-haul trucks; rather it relied on the DOE 2008 analysis and concluded that the supplemental mode of transportation did not significantly change the minor radiological impacts from a national mostly rail SNF transportation campaign. *Id.* at 4-10 (JA_).

Moreover, the NRC relied on representative transportation routes from the 2008 DOE Yucca Mountain FEIS and prior impact analysis from NUREG-2125 (NRC 2014) for purposes of its evaluation of transportation impacts. *Id.* at 3-9 (JA_). When facilities differ in operational characteristics that influence impact determinations, the NRC must conduct and publicly disclose site-specific evaluations. NUREG-2157 at 5-2 (acknowledging that not all storage facilities will necessarily match the “assumed generic facility” and therefore when it comes to “size, operational characteristics and location of the facility, the NRC will evaluate the site-specific impacts of the construction and operation of any proposed facility as part of that facility’s licensing process”).³ Fasken’s Contention asserts that in relying on these prior analyses, the NRC failed to consider regional transportation issues and site-specific impacts in its analysis. It is well-established that whether the NRC’s “analysis is generic or site-by-site, it must be thorough and comprehensive.” *New York v. NRC*, 681 F.3d 471, 481 (D.C. Cir. 2012).

³ *Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel (NUREG-2157)*, <https://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr2157/index.html>.

The representative routes in NUREG-2125 involve shipment of SNF to Deaf Smith, Texas, which is outside the Permian Basin. *DEIS* at 4-13, REC. 327 (JA_); *see also* NUREG-2125 at 23, 28, <https://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr2125/index.html>. This representative route is not representative of the regional transportation risks involved with transporting and storing SNF in the Permian Basin. The representative routes in the 2008 DOE Yucca Mountain FEIS only reach Monahans, Texas, and the NRC did not meaningfully consider impacts associated with regional transportation from Monahans, Texas, to the ISP facility, as discussed further below. *DEIS* at 2-11, REC. 327 (JA_). By relying on the representative routes, the NRC failed to analyze impacts associated with the regional transportation leg of any transport of nuclear materials to the ISP CISF facility.

NRC's reliance on NUREG-2125 also does not account for key differences between the facilities. The ISP CISF does not propose a dry cask storage transfer facility and has no repackaging or reprocessing capabilities, adopting a "return to sender" policy instead, unlike that in NUREG-2125. *EIS* at D-33, 57-58, REC. 355 (JA_). The NRC did not do the site-specific analysis required. Instead, the NRC adopted DOE's impact analysis despite the lack of "contracts and arrangements for storage of SNF . . . the specific characteristics of the SNF, the origins of shipments, the routes of travel, shippers and carriers, and specific plans and other details have

not yet been clarified”, and it found similar impact determinations for ISP and the facilities in NUREG-2125 despite substantial differences in repackaging and reprocessing capabilities and the presence of dry cask storage transfer facilities. *EIS* at D-33, 57-58, REC. 355 (JA_). NRC’s omission of any consideration for these key operational differences and the relevant impacts on transportation is arbitrary and capricious. *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 574 (D.C. Cir. 2016) (an agency acts arbitrarily or capriciously if it has relied on factors which Congress has not intended it to consider or entirely failed to consider an important aspect of the problem) (internal quotation omitted).

Next, as set forth in Fasken’s Contention and supporting affidavit, the regional rail lines for transport of SNF to the ISP site are also regularly used by the oil and gas and agricultural industries in the region. *Contention Mtn.* at 21, REC. 209 (JA_). Every single transport of SNF will travel along the Texas-New Mexico Railroad to the ISP facility. *Contention Mtn.* Ex. 1 at ¶ 11, REC. 209; *DEIS* at 2-11, REC. 327 (JA_). As demonstrated in Fasken’s supporting affidavit, even the most minimal transportation incident has the potential to interrupt or foreclose regional oil and gas and agricultural and ranching activities with substantial adverse economic impacts to property interests and assets of Fasken and industries within the Permian Basin. *Contention Mtn.* Ex. 1 at ¶¶ 9-10, REC. 209 (JA_). Fasken’s supporting affidavit further highlights the vital importance of local rail transportation to energy freight:

local rails are necessary to ship components “to drill and complete an oil well and bring it to production” and “[a]ny hazardous materials emergency upon the rails that interferes with energy freight poses a loss of millions of dollars per day affecting multiple operators in the Permian Basin.” *Id.* at ¶ 12 (JA_). The affidavit further notes that the single-track railway proposed for use in the DEIS traverses remote and rural areas “lacking emergency responder resources” and is “served mostly by volunteer fire departments.” *Id.* at ¶ 13 (JA_).

In addition, the NRC’s analysis failed to consider regional geographic characteristics such as sinkholes, subsidence and seismicity, which present a threat to both the regional transportation and storage of SNF at the ISP site. *Contention Mtn.* at 20-21 and Ex. 1 at ¶ 14 (referencing the increased rate of rail accidents in the region and areas prone to subsidence, sinkholes and seismicity through which SNF will be transported), REC. 209 (JA_).⁴ Further, the ongoing and extensive oil and gas and mining operations in the region, combined with the real potential for terrorist attack or sabotage, are legitimate issues that should be included in the impacts analysis. With respect to terrorism, the ASLB relied on the NRC’s prior conclusion

⁴ Fasken has extensive experience and expertise operating in the Permian Basin. On the other hand, the NRC is not an expert in this area and should not be afforded limitless deference for failing to analyze or consider meaningful impacts in the region, as identified by industries in the region.

that it need not consider terrorism in its NEPA analysis outside the Ninth Circuit, which itself is arbitrary and capricious. *LBP-21-02* at 15, REC. 224 (JA_).

In denying Fasken's Contention, the ASLB and the NRC ignored the specific regional issues raised in the Contention and broadly construed it as a challenge to the use of three representative national transportation routes, similar to contentions previously brought and denied. *Id.* at 12-14 (improperly characterizing Fasken's Contention as "the DEIS should identify specific transportation routes") (JA_).⁵ As discussed above, Fasken's argument is based on the NRC's lack of consideration of regional transport routes, geographic considerations and adverse impacts to regional industries' use of same rails and roads within 50-mile radius. *Contention Mtn.*, REC. 209 (JA_). The NRC oversimplified and misrepresented the underlying basis, factual support and evidence presented by Fasken, which focused on the differences between the DEIS and ISP's ER and the material omission of site-specific and regional impacts of nuclear transport into and out of the Permian Basin. *Contention Mtn.*, REC. 209; *Reply*, REC. 215; *NRC Petition for Review*, REC. 225 (JA_).

The DEIS insufficiently considered regional transportation issues in light of the above issues and erroneously deemed the transportation impacts, as well as the

⁵ Although the ASLB characterized Fasken's regional transportation contention as "virtually identical" to previously dismissed contentions, the opinion dismissing the prior contentions was issued in 2019 and involved contentions filed in 2018 based on ISP's early application documents that have since been revised multiple times.

land use impacts, to be small. *DEIS* at 4-4, 4-9, 4-21, 5-20, REC. 327 (JA_). However, NEPA requires the NRC to take a “hard look” at the consequences of a proposed federal action and to investigate and evaluate cumulative impacts of the proposed action before undertaking any action that could affect the quality of human environment. 42 U.S.C. § 4332(C). The issues raised by Fasken in its Contention implicate important legal, safety, and environmental impacts that must be investigated and evaluated under NEPA and NRC regulations. *See, e.g.*, 10 C.F.R. § 72.100(b) (“Each site must be evaluated with respect to the effects on the regional environment resulting from construction, operation, and decommissioning for the ISFSI or MRS; in this evaluation both usual and unusual regional and site characteristics must be taken into account.”).

Further, transportation is undeniably a key factor in considering impacts on the human environment, including land uses, geology and soils, and the costs and benefits of the ISP CISO. Given ISP’s location in the middle of the Permian Basin, surrounded by extensive ongoing oil and gas extraction and agricultural operations, the NRC must consider site-specific and regional characteristics in not only its evaluation of cumulative impacts, but also heightened safety and socioeconomic risks and graver consequences of locating a CISO in the heart of the nation’s most productive oil hub. The NRC cannot deny that transportation issues here are “hotly contested” and transportation of nuclear waste, by its very nature, implicates

important safety and environmental issues warranting a reopening of the ISP proceeding for a proper evidentiary hearing on the underlying facts and evidence missing from the record and decision-making process here.

III. THE NRC ARBITRARILY AND CAPRICIOUSLY DENIED FASKEN'S MOTION TO REOPEN AND MOTION FOR LEAVE TO FILE NEW CONTENTION

Fasken's Motions should have been granted and the record should have been reopened to address the significant safety and environmental issues raised by Fasken, discussed above. Hearings may be reopened, in appropriate situations, either upon motion of any party or *sua sponte*. *In the Matter of Vermont Yankee Nuclear Power Corp.*, 6 A.E.C. 358, 362, 1973 WL 18107 (1973); *In the Matter of Georgia Power Co.*, 2 N.R.C. 404, 1975 WL 20090, at *4 (1975) (hearing may be reopened when a significant safety or environmental issue is involved).

Fasken's Motion to Reopen was filed with not one, but two, relevant supporting affidavits addressing the adverse regional socioeconomic impacts transportation poses on oil and gas and agricultural industries as well as other site-specific cumulative impacts overlooked and discounted in the NRC's preparation of the DEIS. The new and material information and conclusions identified by Fasken were disclosed for the first time in the DEIS and substantially differed from ISP's application documents. As such, Fasken's Motions were timely filed, they had good

cause for filing same, and they warranted remand and appropriate agency consideration as discussed herein.

By closing the record prior to publication of the DEIS, the NRC has effectively insulated its failure to take a “hard look” at the effects of the ISP CISF on the human environment and to independently investigate cumulative impacts, among others, by foreclosing new issues from being raised unless a heightened pleading standard is met. In this way, the NRC has obscured its decision-making process and shielded its findings on environmental impacts from public scrutiny, contrary to the core objectives of NEPA.

Here, the ASLB’s decision severely prejudiced Fasken by improperly applying a heightened pleading standard unfairly requiring Fasken to file any potential NEPA-based challenges at the outset based on ISP’s ER, before ISP submitted all of its supplemental documentation. This heightened standard cannot be reconciled with the rationale of ASLB’s decision, which is based on and repeatedly references information and conclusions in ISP’s third round of substantial revisions to its ER—a document that was only made publicly available in February 2020, long after the initial 2018 hearing deadline, and after the NRC officially terminated and closed the ISP proceeding in December 2019. *LBP-21-02* at 7-8, REC. 224; *ER (Rev. 3)*, REC. 318 (JA_). The application of such a heightened standard here, requiring petitioners to anticipate conclusions and information in yet-

to-be-published documents, creates an impenetrable fortress and merely illusory avenue to scrutinizing agency decision-making, contrary to the core objectives of NEPA and NRC transparency requirements.

ASLB's opinion summarily states that "Fasken may not seize on the publication of the NRC staff's DEIS as an excuse not to raise challenges to ISP's license application that Fasken could have timely raised in 2018 but did not." *LBP-21-02* at 6, REC. 224 (JA_). Yet, Fasken's claims relate to the NRC's lack of independent investigation in its preparation of the DEIS that differ substantially from ISP's third (and even earlier rounds) of ER revisions and could not have been reasonably brought in 2018. The application of a heightened pleading standard here runs contrary to the NRC's policies of transparency and NEPA's core objective of public disclosure and meaningful participation in the process and further forecloses the opportunity for interested and knowledgeable parties to intervene on new issues raised in the NRC's DEIS for the first time.

CONCLUSION

For the foregoing reasons, Fasken respectfully requests that the Court reverse NRC Order CLI-21-09 regarding Fasken's Motion to Reopen and Motion for Leave to File a New Contention and remand this matter to the NRC for a full evidentiary hearing on the merits of Fasken's Contention.

Dated: March 18, 2022

Respectfully submitted,

/s/ Allan Kanner

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS AND
TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of the Court's February 15, 2022, Order because it contains 4,989 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and when combined with the other consolidated Petitioners' briefs, Petitioners' briefs do not exceed 20,000 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(b) because it has been prepared using Microsoft Word in Times New Roman, 14 pt. font.

Respectfully submitted,

/s/ Allan Kanner _____

Allan Kanner

CERTIFICATE OF SERVICE

I hereby certify that the electronic original of the foregoing “Initial Brief of Petitioners” was filed with the United States Court of Appeals for the D.C. Circuit on this 18th day of March 2022, through the Court’s CM/ECF electronic filing system, and thus also served on counsel of record.

Respectfully submitted,

/s/ Allan Kanner

Allan Kanner

ADDENDUM OF STATUTES AND REGULATIONS

TABLE OF CONTENTS

National Environmental Policy Act, 42 U.S.C. §4332(C).....STATUTORY ADD 2
10 C.F.R. § 2.309(c)(1)STATUTORY ADD 3
10 C.F.R. § 2.309(f)(1), (2).....STATUTORY ADD 4

National Environmental Policy Act, 42 U.S.C. § 4332(C)

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

- (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--
 - (i) the environmental impact of the proposed action,
 - (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
 - (iii) alternatives to the proposed action,
 - (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
 - (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

10 C.F.R. § 2.309 (c)(1) – Hearing requests, petitions to intervene, requirements for standing, and contentions.

(c) Filings after the deadline; submission of hearing request, intervention petition, or motion for leave to file new or amended contentions—

(1) Determination by presiding officer. Hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the deadline in paragraph (b) of this section will not be entertained absent a determination by the presiding officer that a participant has demonstrated good cause by showing that:

(i) The information upon which the filing is based was not previously available;

(ii) The information upon which the filing is based is materially different from information previously available; and

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

10 C.F.R. § 2.309(f)(1), (2) - Hearing requests, petitions to intervene, requirements for standing, and contentions.

(f) Contentions.

(1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted, provided further, that the issue of law or fact to be raised in a request for hearing under 10 CFR 52.103(b) must be directed at demonstrating that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;

(vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information

on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief; and

(vii) In a proceeding under 10 CFR 52.103(b), the information must be sufficient, and include supporting information showing, prima facie, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety. This information must include the specific portion of the report required by 10 CFR 52.99(c) which the requestor believes is inaccurate, incorrect, and/or incomplete (i.e., fails to contain the necessary information required by § 52.99(c)). If the requestor identifies a specific portion of the § 52.99(c) report as incomplete and the requestor contends that the incomplete portion prevents the requestor from making the necessary prima facie showing, then the requestor must explain why this deficiency prevents the requestor from making the prima facie showing.

(2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant's environmental report. Participants may file new or amended environmental contentions after the deadline in paragraph (b) of this section (e.g., based on a draft or final NRC environmental impact statement, environmental assessment, or any supplements to these documents) if the contention complies with the requirements in paragraph (c) of this section.

STANDING ADDENDUM

TABLE OF CONTENTS

Exhibit 1: Declaration of Tommy Taylor STANDING ADD 2

Exhibit 2: Declaration of D.K. Boyd STANDING ADD 15

Exhibit 3: Declaration of Grant Huckabay STANDING ADD 23

ADDENDUM EXHIBIT #1

Declaration of Tommy Taylor (11/8/2021)

**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

DECLARATION OF TOMMY TAYLOR

1. My name is Tommy E. Taylor and my business address is 6101 Holiday Hill Road, Midland, Texas 79707. I reside at 4100 Timberglen Circle, Midland, Texas 79707. My position with Fasken Management, LLC (Fasken) is Vice President and Director of Oil and Gas Development. I am authorized by Fasken to execute this declaration on its behalf and on behalf of the Permian Basin Coalition of Land and Royalty Owners and Oil & Gas Operators (PBLRO) of which Fasken is a member and of which I am an officer.

2. This declaration is in support of the Petition for Review of Fasken and PBLRO in the above-captioned docket. I, on behalf of Fasken, previously authorized PBLRO to protect its interests by representing it in the prior Motion to Dismiss and petitions to intervene filed with the NRC alleging ISP's license application is inadequate and

illegal as written. I, on behalf of Fasken, further authorized PBLRO to appeal those decisions to this Court.

3. Fasken Land and Minerals, of which Fasken Management, LLC is its General Partner, is engaged in ranching as well as oil and gas extraction and production activities in the Permian Basin and in the vicinity of the Interim Storage Partners, LLC (ISP) consolidated interim storage facility (CISF) in Andrews County, Texas and the proposed Holtec International (Holtec) CISF in Eddy County and Lea County, New Mexico. Fasken owns property and currently operates active oil and gas properties within eighteen miles of the ISP CISF site in Andrews County, Texas.

4. PBLRO is an association with long-term economic, social and environmental interests in the Permian Basin that formed in response to ISP's and Holtec's CISF applications to construct and operate CISFs.

5. PBLRO presently has substantial land and mineral interests, and active leases throughout Andrews County, Texas, with a founding PBLRO member owning land used for oil and gas operations, cattle operations, and living quarters within four miles of the ISP CISF site.¹

6. I am personally familiar with other members of PBLRO of which there are 65 individual members, with multiple ranchers engaged in agricultural activities and owning land in the area for over a century and at least three members being publicly

¹ See e.g., Ex. 2, Declaration of D.K. Boyd, Petition of PBLRO and Fasken for Intervention and Request for Hearing (Sept. 28, 2018) (ADAMS ML18302A412).

traded corporations (two integrated and one large independent oil and gas operator), as well as numerous private companies involved in the extraction and production of oil and gas in the Permian Basin and in close proximity to the proposed transport of spent nuclear fuel and storage of spent nuclear fuel at ISP and Holtec CISFs.

7. I am personally familiar with the agricultural use of the land within the vicinity of the ISP CISF site and of the members of the PBLRO that live, work and travel along proposed transportation routes, graze their animals within four miles of the ISP CISF and draw water from wells that are fed by shallow groundwater from formations that are present beneath the ISP CISF.

8. Both my employment duties and personal reasons require me to travel to and spend time in the area of the ISP CISF. I generally use State Highway 176 when I am in the area for travel purposes. At its closest point, State Highway 176 is approximately 1 mile from the ISP CISF site. Additionally, I am personally aware of other Fasken employees who regularly travel for employment and personal reasons to the area and use State Highway 176 as well.

9. As the Director of Oil and Gas Development for Fasken, I am personally familiar with ongoing oil and gas activities in the vicinity of the ISP CISF and throughout the Permian Basin. Fasken has owned the land and minerals within the vicinity of the ISP CISF for over a century and drilled its first well in the Permian Basin approximately 70 years ago.

10. I also have personal knowledge of the activities of other oil and gas entities that are members of the PBLRO, one of which began drilling in the Permian Basin approximately 80 years ago and has extensive interests within close proximity to the ISP CISF. Neither Fasken nor any member of PBLRO has relinquished control of their interests for the ISP CISF.

11. There are approximately 4,579 wellbores within a 10-mile radius of the proposed CISF of which 1,066 were drilled and plugged prior to 1967 thus posing a potential risk of contamination. There are thousands of active oil and gas wells within a 50-mile radius of the proposed rail and road routes that will transport radioactive materials to the ISP CISF.

12. It is well-established and acknowledged that the Permian Basin is home to one of the most productive oil and gas hubs in the world. The Basin contains billions of barrels of hydrocarbons and millions of acre-feet of groundwater. It is the largest and most important hydrocarbon producing basin in the United States. It produces 50% of domestic hydrocarbons and 5% of global oil (EIA, 2020). These hydrocarbon and groundwater resources ensure domestic energy needs and global security.

13. According to the Permian Basin Petroleum Association, the Permian Basin, which includes Andrews County, produced approximately 5 million barrels of oil per day in 2019 and anticipates an increase to as much as 8 million barrels per day by 2023. The region produced 6,668 million cubic feet (MMcf) of natural gas per

day in 2017; 9,076 MMcf per day in 2018; 11,874 MMcf per day in 2019; 12,934 MMcf per day in 2020; and 12,658 MMcf per day through July in 2021.²

14. According to the Texas Railroad Commission, the Permian Basin accounts for approximately one-third of the nation's oil production.

15. I understand that a radiation release from the ISP CISF or during transportation of spent nuclear fuel through or near the Permian Basin or during any intermodal transferring functions may contaminate the areas in which Fasken and other members of the PBLRO have oil and gas property interests and/or extraction and production facilities. Such a release of radiation would cause contamination that would interfere or preclude the continued production of oil and gas in the Permian Basin. A radiological contamination event has the potential to interrupt or foreclose further oil and gas extraction/production activities and thereby diminish or eliminate the economic value of the oil and gas assets of Fasken and other members of PBLRO.

16. Likewise, I understand a radiation release from the ISP CISF or during transportation of spent nuclear fuel through or near the Permian Basin may contaminate the areas in which Fasken and other members of PBLRO have land interests and agricultural or cattle operations. A radiological contamination event

² Source: Texas Railroad Commission Production Data Query System (PDQ), *Texas Permian Basin Average Daily Natural Gas Production 2008 Through July 2021*, available at: <https://www.rrc.texas.gov/media/t3plr20l/gas-production.pdf>.

also has the potential to interrupt agricultural and ranching operations and thereby diminish or eliminate the economic value of real property values and related assets of Fasken and other members of PBLRO.

17. I am concerned that radiological contamination also has potential human health effects that may cause death, radiation related ailments and/or genetic defects. This potential, in addition to the adverse impacts on human mortality and morbidity rates, also has substantial economic costs associated with medical care and treatment of radiation related conditions that affect Fasken and other members of PBLRO.

18. I understand that even the most minimal transportation incident, such as a derailment or collision involving spent nuclear fuel, would amount to a dangerous materials emergency that has the potential to interrupt or foreclose further oil and gas extraction/production activities within the area of the incident, as well as adversely affecting the recipients of oil commodities which are regularly transported by rail. A transportation incident involving either of the two rail lines, identified as the proposed transportation routes for shipments of spent nuclear fuel in the ISP final Environmental Impact Statement (EIS), the Union Pacific Railroad or the Texas-New Mexico Railroad, would likely diminish or has the potential to eliminate the economic value of oil and gas assets belonging to Fasken and other members of PBLRO.

19. Even the most minimal transportation incident involving spent nuclear fuel has the potential to interrupt or foreclose agricultural and ranching activities in the Permian Basin, thereby diminishing or eliminating the economic value of the real property interests and assets of Fasken and other members of PBLRO.

20. Both Fasken and PBLRO regularly utilize rail transportation to support their industries and extensive and ongoing operations. Those named in the ISP EIS, Union Pacific Railroad and the Texas-Mexico Railroad, both serve the oil, gas, agricultural and ranching industries in the region of the ISP CISF. According to Union Pacific, two of its four key operating segments are the agricultural and energy industries. Union Pacific reported revenue from energy freight in 2019 as \$3.8 billion. It reports that railroads are the most efficient and cost-effective means of transportation of crude, frac sand, and petroleum by-products and transported 1.4 million carloads of energy freight shipments in 2019. In fiscal year 2019, agricultural commodities accounted for 18% of Union Pacific's shipments and energy freight accounted for 22%. The Texas-New Mexico Railroad extends from a Union Pacific connection at Monahans, Texas. It is one of two lines owned by Watco that primarily serve the Permian Basin. Watco reports oilfield commodities as its primary shipments on the Texas-New Mexico Railroad and agricultural commodities as primary on its Lubbock and Western Railways shipments.

21. With regard to energy freight, Fasken relies upon the rail lines of the Permian Basin primarily for transporting sand, acid, casing and tubing, cement, gel, and various liquid and dry chemical components that are used for blending associated products that are all necessary to drill and complete an oil well and bring it to production. PBLRO members utilize the Permian Basin rail lines primarily for materials similar to that of Fasken but also for water, additional frac chemicals, and acid. According to the ISP EIS, the ISP CISF would utilize the same rail lines which the oil and gas industry of the Permian Basin heavily relies upon. Any hazardous materials emergency upon the rails that interferes with energy freight poses a loss of millions of dollars per day affecting multiple operators in the Permian Basin, including Fasken and other members of PBLRO. Likewise, any deterioration of the existing rail lines as a result of transport of oversized railcars transporting spent nuclear fuel, dedicated single-use shipments of spent nuclear fuel or other infrastructure improvements necessary to accommodate shipments of spent nuclear fuel will cause substantial delays for industries throughout the Permian Basin. As an example, a typical Fasken horizontal multi-well drilling project cannot be completed until the staging of materials is achieved. Rail delays amount to potential lost production totals of approximately 5,800 barrels of oil per day and 3,500 million cubic feet of gas daily, per multi-well horizontal drilling pad. This equates to a loss of \$350,000 daily and \$10.6 million monthly in lost production from a single multi-

well pad. A delay on the rails that results in standby costs on a frac job amount to \$115,000 per day, per well and drilling rig operation standby costs amount to \$50,000 per day, per drilling rig. Additionally, leases are susceptible to termination under Texas' rules on nonproducing wells. In the event such a loss occurs, an operator such as Fasken, or one of the members of PBLRO, stands to lose a capital investment of \$10 to \$14 million per well. Possible remedies, including lease extensions, are onerous and expensive. As a representative of the industry, one must look to the risks posed by sharing the same rail lines that have primarily and historically been transporting oil commodities with spent nuclear fuel and high-level radioactive waste over the course of at least the next forty years (and likely longer).

22. The single-track railway proposed in the ISP EIS for the transport of spent nuclear fuel traverses through rural, remote areas. Although the rail lines in the Permian Basin are a major means of transportation, they are situated in desert-like areas served mostly by volunteer fire departments or areas lacking emergency responder resources. In consulting crane operators regarding the ISP EIS, there are real logistical problems in situating a crane capable of resetting a spent nuclear fuel transport cask and rail car in some of the more remote areas of the Permian Basin. Also, a single hazardous materials emergency would not only have a detrimental effect upon the oil and agricultural industries of the Permian Basin but would also

overwhelm our first responders and healthcare facilities which are not equipped to cope with the challenges of a release, exposure or disaster nor are the small, rural communities adjacent to the rail track equipped to respond to an incident on any scale.

23. Not including derailments, the Permian Basin region has experienced a highly significant increase in rail related crashes in recent years. In fact, the Midland-Odessa Transportation Alliance (MOTRAN) reports that from 2016-2018, there were 158 rail related crashes in the Texas Department of Transportation Odessa District with just over half of those accidents occurring in Midland and Ector Counties. This is the very area through which the spent nuclear fuel would be transported via rail. MOTRAN reports that during that same period, other Permian Basin counties also experienced drastic increases: Ector County saw a 55% increase, Reeves saw a 266% increase, and Ward County saw a 700% increase in rail related crashes.

24. I am personally familiar with oil and gas activity in the vicinity of the ISP CISF and of the approximately 120 individual persons required to facilitate the completion of each individual oil and gas well in the vicinity of the ISP CISF. The potential harm to those individuals in the oil and gas industry, the potential harm to the ranchers and livestock, the potential impacts upon agriculture and, especially, upon human mortality and morbidity rates, and the economic costs associated with

medical care and treatment of radiation related conditions would also adversely impact Fasken and other members of PBLRO, as well as their employees and families.

25. As a resident of Texas and given Fasken's work throughout the Permian Basin and familiarity with those in governance of the States of Texas and New Mexico, I have firsthand knowledge of the overwhelming opposition of the majority of the communities and elected representatives throughout Texas, as well as New Mexico, and of their shared health, safety, economic and environmental concerns in response to the egregious siting of the ISP and Holtec CISFs within the Permian Basin at locations that clearly do not qualify nor do they consent to hosting either of the CISFs.

Under penalty of perjury, the above is true and correct to the best of my knowledge and understanding.

Handwritten signature of Tommy G. Taylor in blue ink, written over a horizontal line.

Declarant: Fasken Land and Minerals Ltd.
By Fasken Management, LLC, its General Partner
Tommy Taylor, Sr. Vice President

ADDENDUM EXHIBIT #2

Declaration of D.K. Boyd (11/8/2021)

**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

DECLARATION OF D.K. BOYD

1. My name is D.K. Boyd and I reside at 4200 Tanforan Avenue, Midland, Texas, 79707.

2. I am a member of the Permian Basin Land and Royalty Owners (PBLRO). The PBLRO is an association comprised of businesses, organizations and individuals that formed in response and opposition to the proposed consolidated interim storage facilities (CISFs) to be located in Andrews County, Texas, and Lea County New Mexico. PBLRO members have substantial long-term economic, social and environmental interests in the Permian Basin in the vicinity of the CISFs. *See* Attachment A. Fasken Land and Minerals (Fasken) also has substantial land and mineral interests in the Permian Basin in the vicinity of the CISFs and is a member of PBLRO. *Id.*



3. I am authorized to execute this declaration on behalf of the PBLRO to express collective concerns about the economic, social and environmental risks posed by the construction, operation, transportation to and storage of high-risk and high-level radioactive waste and spent nuclear fuel at the CISFs located within the Permian Basin.

4. PBLRO has 65 individual members and at least three publicly traded corporations, as well as numerous private companies with substantial oil and gas operations and leases and agricultural and ranching activities throughout the Permian Basin in southeast New Mexico and Texas.

5. PBLRO members have been drilling and extracting oil in the region for over 80 years and presently have lands, mineral interests, and active leases throughout Andrews County.

6. PBLRO members regularly utilize rail transportation and local highways to support their industries and frequently visit the region for work-related and personal reasons, including routine checks and maintenance on oil and gas production equipment monitoring operations.

7. I own and ranch the Frying Pan Ranch, most of which I own by deed and some of which I lease from New Mexico. The Frying Pan Ranch is located on 137,599 acres in southeastern New Mexico and western Texas. The closest part of the Frying Pan Ranch to ISP's CISF is only four miles away. I have attached a map identifying

the location of this part of the Frying Pan Ranch in relation to ISP CISF. *See* Attachment A.

8. I have mineral interests and working interests in oil and gas operations on the Frying Pan Ranch. I also lease some of the Frying Pan Ranch to companies conducting oil and gas operations.

9. My brother and his employees frequently and regularly spend time within 15 miles of the ISP CISF because my brother runs cattle and agricultural operations on the Frying Pan Ranch. One of my brother's employees lives on Frying Pan Ranch in New Mexico in Township 23S, Range 38E, Section 8 located within 7.5 miles of CISF.

10. I also frequently and regularly spend time on the local roads near ISP CISF and proposed transportation routes for ISP CISF. For instance, about once a week, I drive on State Highway 18 south of Eunice, New Mexico. State Highway 18 is the regional road I have to travel for business, between different parts of my ranch, and between my residences. When I am on this Highway, I have noticed rail cars traveling next to me on the Texas and New Mexico Railway because this railroad parallels Highway 18 within a couple hundred feet for almost 40 miles. It is my understanding that ISP plans to transport spent nuclear fuel to ISP CISF on this railroad. I further understand that this railroad currently provides the only route of rail access to ISP CISF.

11. The Texas and New Mexico Railway also runs through approximately 5.5 miles of the Frying Pan Ranch. My family and I frequently and regularly cross this railroad via car or horse to conduct our cattle and agricultural operations.

12. I am concerned about the radiation risks posed by the construction, operation, ISP CISF to my property, my health and safety. the health and safety of my family and employees, and my environment, by living and working next to a facility housing such an enormous inventory of radioactive material, and by transportation of spent nuclear fuel to ISP CISF.

13. I am also concerned that an accident involving spent nuclear fuel at the ISP CISF will harm the health and safety of my family and property due to radiological exposure. I am also concerned that such an accident will harm the value of my mineral and working interests in gas and oil production or make them functionally inaccessible due to radiological exposure.

14. I am equally concerned about the impact the ISP CISF will have on the value of the Frying Pan Ranch and its operations. It is my understanding that property values near a nuclear facility can be reduced as early as when it receives its license to operate due to real and/or perceived risks of exposure to radiation releases from the nearby facility. It is also my understanding that property values will continue to decrease as the ISP CISF is constructed and operating.



15. I am also concerned that the licensing, construction, and operation of the ISP CISF, in addition to the proposed Holtec CISF, will profoundly impact the economic prosperity of the counties where I live and own land. It is my understanding that the Permian Basin in New Mexico and Texas is the largest oil and gas producer in the United States and the second largest in the world. I am concerned that construction and operation of CISFs on top of the Permian Basin will impact the ability to continue drilling so successfully here and therefore have a negative effect on the economy. This could harm local businesses and the value of my property. I am also concerned that construction and operation of the ISP CISF and Holtec CISF will limit the domestic production of oil and gas in the United States.

16. I am also concerned that I will not be able to avoid small doses of unwanted radiation from frequently and regularly driving next to rail cars carrying shipments of spent nuclear fuel, which will harm my health and safety.

17. I am also concerned with the impacts to my interest and right to travel near my home and business operations posed by ISP's proposed transportation of spent nuclear fuel on the Texas and New Mexico Railway. In order to assure myself and my family, as well as my employees, travel on the safest roads to avoid unwanted doses of radiation or potential accidents involving transportation of spent nuclear fuel, we would have to avoid the regional highways and roads that are our primary routes to access business and everyday necessities.



18. Finally, I am concerned that the environmental impacts and safety risks of ISP CISF have not been adequately reviewed or evaluated, are unfairly discounted and not appropriately considered with respect to oil and gas and agricultural operations located in the Permian Basin near both CISFs.

19. The issuance of the ISP CISF license disregards and ignores the long-standing history, existing and future land uses within the Permian Basin and the overwhelming opposition of PBLRO among many other local communities in the region.

20. I previously authorized Fasken and PBLRO to protect my interests and express concerns in opposition to ISP CISF and have authorized petitioners' counsel to appeal decisions relating to the ISP CISF to this court.

21. It is my understanding that the NRC had found Fasken and PBLRO established standing to express their concerns in prior proceedings because of members' properties and operations in the Permian Basin being in close proximity to the CISFs and because its members' and members' employees regularly and frequently drive to and visit areas in close proximity to CISFs for maintenance, monitoring and operational functions as part of their routine business.

Under penalty of perjury, the above is true and correct to the best of my knowledge and understanding as executed on the date of this Declaration.



A handwritten signature in black ink, appearing to read 'D.K. Boyd', written over a horizontal line.

D.K. Boyd

11-08-21

Date

ADDENDUM EXHIBIT #3

Declaration of Grant Huckabay (11/8/2021)

**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

DECLARATION OF GRANT HUCKABAY

1. My name is Grant Huckabay and I have a degree in natural resource management, legal studies, and urban development. Since May 3, 2021, I have been employed by Fasken Oil and Ranch, Ltd. (Fasken), located at 6101 Holiday Hill Road, Midland, Texas 79707, as Health, Safety, & Environmental Coordinator. I am duly authorized to execute this affidavit on behalf of Fasken.

2. I have personal knowledge of the information as stated herein.

3. Fasken presently has lands and mineral interests within eighteen miles of the Interim Storage Partners, LLC (ISP) consolidated interim storage facility (CISF) located in Andrews County, Texas. Fasken is a member of Permian Basin Land and Royalty Owners (PBLRO). PBLRO presently has lands and mineral interests

throughout Andrews County, Texas as well with the nearest member holding land and minerals within four miles of the proposed ISP CISF.

4. In my capacity as Fasken's Health, Safety, & Environmental Coordinator, my duties include primary management of all environmental policies, procedures, and programs for air, soil, and water concerns. My specific duties include coordination and oversight of all spill incidents, air permitting and air compliance, management of radiation issues, all regulatory interaction and notification, as well as management and oversight of environmental vendors. I have knowledge of, interpret, and prepare comments on and ensure compliance with all new and current federal, state, and local regulations under the U.S. Environmental Protection Act (EPA), the U.S. Bureau of Land Management (BLM), the Texas Railroad Commission (RRC), the Texas Commission on Environmental Quality (TCEQ), the New Mexico Environment Department (NMED), and the State of New Mexico Oil Conservation Division (NMOCD), among others. Additionally, I monitor legislation, regulations and ensure compliance with any protected, threatened and endangered species and habitat program requirements. I also ensure compliance with all Occupational Safety and Health Administration (OSHA) regulations

5. As part of my responsibilities at Fasken, I frequently travel in the vicinity of the ISP CISF along regional transportation infrastructure. I am generally familiar with the natural resources of the area, including the air, geology, and soils throughout

the Permian Basin Region and have personal knowledge of the geology and soils encompassing Fasken's land and mineral interests in the vicinity of the ISP CISF.

6. The ISP CISF site is situated in the approximate geographic center of the Permian Basin Region. The Permian Basin produces the largest volume of oil and gas in North America and recently surpassed Saudi Arabia in petroleum production. The Permian Basin region encompasses a relatively large region in Texas and southeastern New Mexico and has a population of more than half-a-million people.

7. The ISP CISF represents a threat to Fasken: personnel, private property, real property, mineral and water interests, oil and gas leases and agricultural interests. It also represents a threat to numerous communities throughout Texas and New Mexico.

8. The Permian Basin Region is comprised of fifty-five counties in west Texas, and south-eastern New Mexico. The counties in the Permian Basin considered to be most imminently threatened by the ISP CISF site include some of the most prolific oil producing counties, including Andrews, Crane, Dawson, Ector, Gaines, Glasscock, Howard, Loving, Martin, Midland, Reeves, Upton, Ward, and Winkler Counties in Texas and Eddy and Lea Counties in New Mexico. These imminently threatened counties have a population of nearly 500,000 and collective area of over 20,000 square miles in the Permian Basin. A radiological event within any of these counties could be devastating to the nation's oil and gas industry and would decimate

the economies of Texas and New Mexico. By way of comparison, the 1,835 square mile Chernobyl Exclusion Zone would comprise 13.2% of the highest oil producing region in the Americas, the Permian Basin.

9. Any pressurized release, dry cask rupture, explosion, or fire involving spent nuclear fuel will release radioactive particles and fragments into the air. This is a direct threat to both PBLRO and Fasken personnel, private property, real property, oil and gas reserves and leases as well as agricultural interests. Currently, the closest Fasken oil and gas wells are approximately 18 miles due east of the ISP CISF (Fasken Monterrey University and Lowe University leases). Dozens of other Fasken oil and gas wells are present in all directions from the site. Fasken's private property, the C-Ranch, begins 38 miles nearly due east (northwestern property line) of the site and continues south to the Midland city limits. This broad expanse of land has a high probability of receiving airborne radioactive contaminants from the ISP CISF as a result of typical wind patterns in the area.

10. Public data from the National Weather Service and the Texas Commission on Environmental Quality (TCEQ) indicates that regional winds around the ISP CISF blow to the southeast approximately 25% of the time on an annual basis. On average, the Permian Basin Region has higher winds than much of the rest of Texas and the United States. According to the ISP application seeking a CISF license, the average windspeed is 11.0 miles per hour. It fails to account for the frequency of

high-wind gusts in the area of the proposed CISF. In comparison Houston, Texas winds vary from 8.3 mph to 6.7 mph, depending on the season. Any release of radioactive material might arrive in the Midland-Odessa metropolitan area (with a population of more than 260,000) in a matter of hours with no warning. The most dominant direction of wind is from south to north, placing the town of Hobbs, New Mexico (population 38,000), which is less than 20 miles away from the proposed ISP CISF, in direct danger in the event of a release. Also, imminently threatened is the town of Eunice, New Mexico (population 2,900), which is approximately 5 miles from the proposed site.

11. The broader perspective is that the Permian Basin Region's winds are highly variable and change direction frequently throughout a given day. With the ISP CISF site's geographically central location in the Permian Basin, any release carried by winds in any direction risks contaminating large areas of the most productive oil and gas region in North America. Depending on wind direction and speed, hundreds of thousands of people could be affected, including personnel of Fasken and other members of PBLRO.

12. And any radiological incident in the Permian Basin poses a serious threat to regional industries and economies. A Department of Energy Report found that an accident involving only one dry cask where only a small amount of waste was released in a rural setting would contaminate a 42-square mile area with clean-up

costs exceeding \$620 million dollars. A similar release in an urban setting might cost \$9.5 billion per square mile.

13. The ISP CISF is also a direct threat to regional groundwater usage. Several aquifers or geologic formations containing groundwater exist in Andrews County, including the Ogallala aquifer with potable water, shown to be present and at a great thickness beneath the ISP site itself.

14. Water usage from wells near the ISP site are from the Ogalla / Antler / Gatuna and are crucial for domestic, stock, irrigation, and commercial purposes, including the operations of Fasken and other members of PBLRO.

15. Any threat of radiological contamination of these important water resources poses a threat to regional land uses, a threat to the assets and property value of Fasken and PBLRO, a threat to ongoing regional industry operations generally, as well as threats to the environment and health and safety of nearby residents and those working or traveling through the area. Knowing that any radiological contamination would be virtually impossible to recover and would continue to emit radiation for decades until the half-lives are expended, those threats and adverse health, safety and environmental impacts could last for decades.

16. Without proper groundwater monitoring, the ISP CISF poses unacceptable and imminent threats to the environment, the health and safety of water supplies to nearby communities and extensive industry operations.

17. In addition to the presence of groundwater in the subsurface directly below and in the vicinity of the ISP CISF site, the location is also situated over Permian aged halite formations (rock salt) and other easily dissolved evaporite mineral formations leading to the potential for substantial ground movement issues, sinkhole formation and subsurface instability. For example, there is historical evidence of extensive sinkhole formation in the Permian Basin Region, including the very well known "Wink Sinks" outside of Wink, Texas, a large area of subsidence beneath the city in Carlsbad, New Mexico, and sinkholes and karst features north and east of Carlsbad, New Mexico. There are also numerous documented ground movement issues in Pecos, Crane, Monahans, Imperial, and Kermit, Texas where shipments of spent nuclear fuel will travel on over-sized railcars to the ISP CISF alongside and share rail lines with the transport of oil and gas industry materials.

18. The WCS/ISP facility is located within 26,000 square miles of the Salado Salt Formation that is replete with surface salt lakes and salt formation outcrops that critically contain magnesium chloride salts ($MgCl_2$) that are the most reactive salt species for the induction and propagation of Chloride induced stress corrosion cracking (CI-SCC). The proposed CISF location is increasingly experiencing the "haboob" sandstorm phenomena that translocate tons of surface sediments for tens of miles. The historical paths of haboobs have included sweeping storms across the Salado surface salt flats in eastern New Mexico and West Texas.

19. Additionally, persistent fog and mist conditions are prevalent during the fall and winter in this region of the country. When combined, a single “salt deposition” event from a haboob, along with a sufficient amount of fog/mist event, could easily create the conditions that would initiate CI-SCC.

20. CI-SCC pose a critical and imminent threat to the integrity of canisters and increase the potential for radiological contamination and radiation in the region. In the U.S. NRC draft report, “Identification and Prioritization of the Technical Information Needs Affecting Potential Regulation of Extended Storage and Transportation of Spent Nuclear Fuel,” the federal government recognizes the potential risk for monitoring dry casks and the “pitting and crevice corrosion” of the stainless steel canisters, which affect the safety functions of confinement, criticality, retrievability (of fuel from the dry storage canister), shielding (of radiation from people and the environment), and thermal (degradation of the fuel, potentially leading to fuel fires).

21. I personally travel in the region of the ISP CISF as part of my responsibilities at Fasken. The area around the ISP CISF site is still under active exploration and active production. Within a 10-mile radius of the site, there have been a total of 4,947 well bores drilled in Texas and New Mexico. Presently 3,656 of these well bores are still in production. 905 wells are shown as a dry hole. Of the total of nearly five thousand wells within ten miles of the facility, only 386 have been recorded as

permanently plugged and abandoned. Regardless of the current volume of oil produced within the vicinity of the proposed ISP site, there are hundreds of active oil and gas wells, tank batteries, gas plants, and other petroleum production facilities within reasonable vicinity of the site, each requiring frequent and regular visits from personnel for maintenance and monitoring. Some facilities, such as gas plants, are staffed 24-hours a day, seven days a week. I have concerns for personnel of Fasken and personnel of other members of PBLRO, who by the very nature of their profession will be in close proximity to the ISP CISF and be exposed to doses of radiation.

22. State Highway 176 serves as a main motor vehicle access to the ISP site. It is also a major artery for the travel of both private citizens and oil and gas industry traffic, including Fasken and PBLRO personnel in the region. I personally utilize State Highway 176 routinely for projects relating to my responsibilities at Fasken, which include monitoring the several dozen wells that Fasken operates in the area, and for personal reasons. At present, State Highway 176 between Andrews and Eunice is completing a widening project to accommodate the large volume of heavy oil industry traffic that utilizes this regional highway and Fasken is contributing land to accommodate an overpass at the intersection of State Highways 176 and 1788 in Andrews County, Texas.

23. I have personal knowledge of the use of regional rail lines and can attest that the rail transport of oil commodities is the most prevalent in this region with the second highest use of regional rail lines being agricultural commodities. It is a risk to share these same regional rail lines with nuclear waste destined for the ISP CISF as any delay or disruption in rail transport caused by said waste would devastate the oil and agricultural industry as I have personal knowledge of studies that show that even one 24-hour period of interruption of rail transport would cost millions of dollars in losses to the oil and agricultural industries.

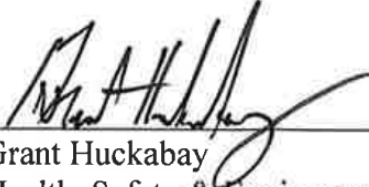
24. I also have concerns about the ISP CISF adverse impacts and threats to surrounding environment. The ISP CISF site is entirely within the known range of the Dune Sage Brush Lizard and a portion of the site lies within the known range of the Lesser Prairie Chicken. I have personal knowledge of the extensive conservation efforts in both Texas and New Mexico by the oil and gas and ranching industries, including Fasken and other members of the PBLRO, with respect to the Dune Sage Brush Lizard and the Lesser Prairie Chicken. Specifically, participation in conservation programs has prevented both species from being currently listed as endangered. Fasken is an active participant conservation programs for these and other species that will be threatened by the ISP CISF. The Lesser Prairie Chicken in particular is highly sensitive to surface disturbances such as construction activities, fences, power lines, and permanent structures that will be placed in and around the

ISP CISF site and the failure of the Nuclear Regulatory Commission to participate in conservation programs and engage the United States Fish and Wildlife Service on this matter is an offence to state and federal regulations.

25. Any release of radioactive material or any amount of radiation or contamination to the environment will become a direct threat to the survivability of both species, as well as the Texas Horned Lizard, which is protected under Texas law and is the State reptile.

26. The ISP CISF also poses an imminent threat to surrounding playas, which according to Texas Parks and Wildlife, serve as the most important wetland habitat for waterfowl. Playas are a direct connection to groundwater and nexus for contamination from the surface to groundwater beneath the ISP CISF site which could decimate known and historic migrating bird populations. ISP CISF lacks proper identification of playas and recharge to aquifers and without proper conservation practices in place, will further harm important butterflies and pollinators vital to regional ecosystems.

I declare under penalty of perjury that the forgoing affidavit and the matters stated herein are true and correct to the best of my knowledge, information, and belief.



Grant Huckabay
Health, Safety & Environmental Coordinator
Fasken Oil and Ranch, Ltd.

11-8-21
Date