

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

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

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GLOSSARY

APA	The Administrative Procedure Act
DOE	Department of Energy
EIS	Environmental Impact Statement
ISP	Interim Storage Partners, LLC
NEPA	The National Environmental Policy Act
NRC	The United States Nuclear Regulatory Commission

INTRODUCTION

The NRC abused its discretion and acted in violation of the law, including NEPA and NRC regulations, in denying Fasken's Motions. *Reopen Mtn.*, REC. 208 (JA_); *Contention Mtn.*, REC. 209 (JA_). Fasken's proposed Contention challenged the major shift in financial responsibility and liability to local communities for emergency preparedness and infrastructure improvements, without any corresponding "hard look" at the resulting risks or costs within the Permian Basin as required by NEPA. *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983) (demanding full disclosure of costs in objective cost-benefit analyses). This information was first brought to light by the NRC in its purported "*site-specific*" draft EIS. The NRC's delayed disclosure of these key factors (months *after* it closed the ISP adjudicatory proceeding), subsequent omission of highly relevant costs in its cost-benefit calculus, and its persistent refusal to objectively evaluate transportation risks and impacts warrant reversal.

ARGUMENT

A. The NRC's Violations of NEPA and NRC Regulations Eviscerated Public Transparency

While the NRC has the right to expedite its proceedings, consistent with fairness (*Resp. Br.* at 43-44), it cannot wholesale preclude interested parties from challenging new and material issues that do not appear in applicant's documents

and were further subverted through agency untimely public disclosures. *See Union of Concerned Scientists v. NRC*, 920 F.2d 50, 56 (D.C. Cir. 1990) (suggesting in dicta that “NRC rules of course *could be* applied so as to prevent *all* parties from raising a material issue”) (emphasis in original). This is what occurred here.

Contrary to the NRC’s assertions (*Resp. Br.* at 44), its untimely disclosures and heightened pleading requirements worked great injustices on interested parties filing NEPA challenges, creating an “impenetrable fortress” and precluding public scrutiny of the NRC’s refusal to address regional issues and emergency preparedness within the Permian Basin that impact the costs and risks involved with nuclear waste transport for ISP’s facility. *Power Authority of N.Y.*, 52 N.R.C. 266, 295 (2000); *Sigler*, 695 F.2d 957 at 978-79.

As Fasken asserted, the NRC failed to analyze the costs and benefits on a site-specific basis, omitted key operational differences, failed to meaningfully consider the regional transportation leg of spent fuel shipments, disregarded regional sinkholes, subsidence and seismicity in transport, and evaluation of terrorist attack. *Contention Mtn.* at 20-25, REC. 209 (JA_). And the NRC’s disregard for risks and costs runs contrary to common defense and security and its statutory objectives, given the extensive oil and gas, mineral resources, agricultural and ranching activities in the vicinity of the ISP facility, placing the nation’s nuclear waste for interim storage in the Permian Basin puts a target on the nation’s

back in terms of national security. *Id.* at 22. As a result, the NRC failed to comply with its own regulations and fulfill its NEPA obligations to the “fullest extent possible” and in a transparent manner. 10 C.F.R. § 72.108 (requiring transportation evaluation), §§ 72.90-72.108 (requiring siting factors evaluation), § 72.11 (requiring accurate and reliable information); 42 U.S.C. § 4332(C) (requiring consideration of siting evaluation factors) (quoting *New York v. NRC*, 81 F.3d 471, 481 (D.C. Cir. 2012)); 10 C.F.R. § 51.10; *Balt. Gas & Elec. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97, 103 (1983) (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 553 (1978)). The NRC failed on all accounts here.

The NRC’s *post hoc* rationalization for omitting key factors in its cost-benefit analysis and comparison of alternatives, deeming the issues “outside of the scope,” does not excuse its violations of NEPA and NRC regulations or lack of transparency (*Resp. Br.* at 35, 38), particularly when it failed to apprise the public of the relevant issues in play for its EIS until October 2019 – *over one year after* the NRC’s deadline for timely NEPA based contentions. *Scoping Summary Report, generally*, REC. 307 (JA_); *LBP-19-11*, 90 NRC at 368, REC. 185 (JA_); *Notice*, 85 Fed. Reg. 27447 (May 8, 2020), REC. 324 (JA_). Delays in providing the public with the relevant scope, given the substantial differences presented in the NRC’s post-proceeding determinations, unfairly prejudiced interested parties from

bringing timely contentions before the October 2018 deadline. *Resp. Br.* at 38 (arguing Fasken’s contention is untimely).

The goal of informed decision making can only take place if agencies “take the required hard look *before* taking [the proposed] action.” *Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 532 (D.C. Cir. 2018) (emphasis in original). Allowing the NRC to obscure key factors influencing the realized risks and costs for the proposed project and closing its proceeding without an evidentiary hearing entirely insulates its decision-making contrary to NEPA and NRC requirements. These are precisely the extenuating circumstances of inequity and unfairness that *Union of Concerned Scientists* advised against. 920 F.2d at 56.

B. Fasken Timely Filed Its Contention Based on New and Materially Different Information Contained in the NRC’s Draft EIS

The NRC essentially concedes that the information regarding the local communities’ responsibility for emergency response costs and training was not contained in ISP’s Environmental Report in arguing that the explicit statement in the draft EIS regarding assumptions of costs for emergency training was “ascertainable” from the Environmental Report (*Resp. Br.* at 37) and it was simply stated in another way (*id.* at 36). This argument is unconvincing given the stark

contrasts in comparable language of the two documents, hinging on the ultimate determination of the title holder for spent fuel.¹

ISP's Environmental Report lacks any indication that local communities would be responsible for providing emergency services along routes where spent fuel will be transported. *ER (Rev. 3)* at 4-8, REC. 318 (JA_) (solely suggesting DOE would be responsible for providing emergency preparedness). The draft EIS is materially different, exclusively suggesting local communities' responsibilities for same, and could not have reasonably been surmised from the Environmental Report, which says nothing about costs to the region for these necessary services. *DEIS* at 4-74 to 4-75, REC. 327 (JA_). This new and material information is the proper subject for a new or amended contention. 10 C.F.R. §§ 2.309(c)(1), (f)(1).

And even assuming *arguendo* that Fasken could have anticipated this (it could not have), the NRC's conclusion that the ISP facility would have "beneficial impact[s] on local finances because of increased taxes and revenues. . ." was unreasonable. *DEIS* at 9-12, REC. 327 (JA_). The skewed result was reached only by ignoring the increased costs and risks for local communities in providing

¹ The NRC's allowance for an unlawful license term with DOE as title holder prior to establishment of a permanent repository "defies' both the text and underlying purpose of the Nuclear Waste Policy Act as currently enacted." *Beyond Nuclear Petition*, Doc. #1940307 at 22 (citing *In re Aiken County*, 725 F.3d 255, 266 (D.C. Cir. 2013)).

emergency response services, which it inexplicably found were costs shared by the proposed CISF and the No-Action alternative. . .” *Id.* at 8-11.

The NRC’s argument that the Board correctly concluded that regional transportation issues are “outside of the scope” and not required for the cost-benefit analysis (*Resp. Br.* at 38) is contrary to its regulations and applicable law. *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984) (finding NRC could not dispense with review of emergency preparedness before authorizing a renewal license); *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 574 (D.C. Cir. 2016) (finding 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).

The NRC provides no rational basis for ignoring required evaluation of these key factors or excluding related costs in its analysis, which, not surprisingly, concluded the ISP facility will have only beneficial socioeconomic impacts in the region, given the omission. NRC’s argument that socioeconomic impacts of its late disclosures “could be evaluated in the context of the separate review and approval process” does not negate the agency’s clear obligations to timely present information to the public on highly relevant factors influencing costs and benefits. *Resp. Br.* at 35; *Contention Mtn.* at 24-25, REC. 209 (JA_); *id.* at 26 (noting the

NRC's lack of transparency and independent review "necessary to ensure public participation in the ISP license proceedings").

C. The NRC Mischaracterized Fasken's Unique Contention as "Substantially Similar" to Prior Contentions

Arguing Fasken's Contention was untimely and "substantially similar" because prior Board decisions dismissed earlier contentions that "challenged the applicant's evaluation of transportation-related issues," is a strained, oversimplification of all contentions to support dismissal. *Resp. Br.* at 31-33. The prior contentions focused on deficient environmental justice analyses, segmentation of nationwide transport, potential for radiological incidents and omission of costs for cleanup, which differ from Fasken's Contention focused on regional transportation.

Sierra Club's contention 4 asserted that consequences and likelihood of a rail accident were underestimated based on ISP's Environmental Report, which explicitly stated that *DOE is responsible* for the costs of emergency preparedness and was supported by an alternative analysis for the cost of decontamination in Las Vegas, Nevada based on a *prior DOE* assessment.² *Resp. Br.* at 31, 51; *Sierra Club Contention Mtn.* at 34-38, REC. 57 (JA_). Don't Waste Michigan's contention 1, questioned the use of representative transportation routes, alleging improper

² Sierra Club's contention mentioned nothing about the burden for costs of emergency preparedness falling on local communities because ISP's Environmental Report explicitly stated *DOE is responsible* for the costs of same. This same logic also applies to Fasken's infrastructure improvement costs challenges.

segmentation and demanding disclosure of all transportation routes. *Resp. Br.* at 31, 35 43-54. By comparison, Fasken disputes the NRC's failure to consider site-specific differences and omitted heightened risks within the local leg of transport within the Permian Basin (i.e., from Deaf Smith to the ISP facility) in conjunction with a shift in responsibility for emergency preparedness costs. *Contention Mtn.* at 18-19, REC. 209 (JA_); *id.* REC. 110, Ex. 1 Taylor Decl. at 13, 22, 25 (JA_). These are not the same.

Further, the NRC's primary rationale for dismissal was that they failed to "question the transportation analysis that was actually provided" or "point to specific portions of the application where alleged deficiencies exist" with reasoning for same. *Resp. Br.* at 53, 57. This rationale does not apply to Fasken's *Contention* (*Resp. Br.* at 40), which is supported by ample factual support challenging materially different statements in the draft EIS relating to emergency preparedness and infrastructure improvement costs and the NRC's material omission of those costs in its cost-benefit evaluation.³

³ See, e.g., *Contention Mtn.*, Ex. 2, REC. 211 (JA_); *id.* at 15-16, REC. 209 (JA_) (identifying new and significant disclosures that "hinge on the responsibility and costs for coordinating transportation, payments needed for infrastructure improvements and providing necessary emergency training for first responders") (citing differences in *ER (Rev. 3)* at 4-8 and *DEIS* at 4-74 and 8-11); *id.* (identifying unreasonable justification that "[a]nother cost factor shared by the proposed [consolidated interim storage facility] and the No-Action alternative is emergency preparedness along the [spent fuel] transportation route.") (citing *DEIS* at 8-11); *id.* (asserting NRC failed to conduct independent investigation of

The NRC further argues that ISP is not required to analyze “hypothetical transportation routes” but its reliance on *Suffolk County v. Secretary of Interior*, 562 F.3d 1368, 1379 (2nd Cir. 1977) is distinguishable and misses the point of Fasken’s argument. *Resp. Br.* at 42. *Suffolk County* dealt with unnecessary evaluation under NEPA of hypothetical and unknown probable pipeline destinations for oil and gas not yet discovered.

Unlike there, here, Fasken is not challenging the need for, but the actual use of, a hypothetical representative route and inadequacies in analysis of regional impacts for same. *Contention Mtn.* at 23, REC. 209 (JA_) (describing the NRC’s “shallow and superficial assessment” of “the potential negative impacts and externalized costs” for communities within the region of interest). Second, unlike there, here the locations of reactor sites and potential shippers of spent fuel in conjunction with existing rail lines are readily ascertainable⁴ and the rail route within the Permian Basin and vicinity of the ISP site is undoubtedly certain. *E.g.*, *DEIS* at 2-11, REC. 327 (JA_) (describing exclusive means of transport along Texas-New Mexico rail line to ISP’s rail spur).

cumulative transportation impacts given its omission of emergency response costs) (citing *DEIS* at 4-75).

⁴ Indeed, ISP initially included a nationwide map of rail routes, which was removed in the draft EIS (likely in connection with the NRC’s decision to rely on 2008 DOE analysis using only three representative routes as bounding in its subsequent determinations for transportation impacts). *See ER (Rev. 2)* at 2-71, REC. 261 (JA_); *DEIS* at 2-12, REC. 327 (JA_).

It is clear that Fasken's new contention is different from prior contentions previously denied, and the NRC wrongly denied Fasken's Motion on that basis.

As discussed by this Court in *Union of Concerned Scientists*, “[w]hen a [NRC] staff document reveals new material, the NRC undoubtedly must take that new material into account internally and courts will certainly consider it in determining on review whether a licensing decision is supported by substantial evidence or is arbitrary and capricious because the NRC failed to take into account a relevant factor.” 920 F.2d at 56. Emergency preparedness and infrastructure improvements are relevant factors that should have been considered in the NRC's cost-benefit analyses and assessment of transportation impacts, particularly in the context of site-specific geologic instability and extensive industry use of regional rails near the ISP site. *See, Fort Worth Br.*, Doc. #1940701 at 12-13 (concern for terrorist attacks and inevitable taxpayers' burden for radiologic incidents given the NRC's untimely disclosures).

Given the exceptionally grave issues associated with the regional transport of spent fuel and the NRC's failure to timely publicly disclose relevant factors influencing the costs or risks for same, the NRC must reopen the record, and the NRC's arbitrary and capricious comparisons and rationale for dismissing Fasken's Contention must be set aside.

CONCLUSION

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

Dated: July 20, 2022

Respectfully submitted,

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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 2,354 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 10,000 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 Revised Opening Brief of Petitioners was filed with the United States Court of Appeals for the D.C. Circuit on this 20th day of July 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