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NUCLEAR REGULATORY COMMISSION

Title: Oral Arguments In the Matter of Interim Storage Partners, LLC

Docket Number: 72-1050-ISFSI

Location: Midland, Texas

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NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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ORAL ARGUMENTS

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In the Matter of: : Docket No.

INTERIM STORAGE : 72-1050-ISFSI

PARTNERS LLC : ASLBP No.

(WCS Consolidated : 19-959-01-ISFSI-BD01

Interim Storage :

Facility) :

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Wednesday, July 10, 2019

Commissioner's Courtroom

Midland County Courthouse

500 N. Loraine Street

Midland, Texas

BEFORE:

PAUL S. RYERSON, Chair

NICHOLAS G. TRIKOUROS, Administrative Judge

DR. GARY S. ARNOLD, Administrative Judge

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Citizens Environmental Coalition

Citizens for Alternatives to Chemical Contamination

Nuclear Energy Information Service

Public Citizen, Inc.

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P R O C E E D I N G S

8:30 a.m.

JUDGE RYERSON: Well, again welcome. Welcome again. We're here on the matter of an application by Interim Storage Partners, LLC, which we'll generally call ISP, if that's okay with the Applicant. And ISP's application is for a license from the Nuclear Regulatory Commission to construct and operate an interim storage facility for nuclear waste in Andrews County, Texas.

I'm Judge Ryerson. I'm trained as a lawyer. I chair the Atomic Safety and Licensing Board that the NRC has assigned to this particular proceeding.

On my right is Judge Arnold. Judge Arnold is a nuclear engineer. Dr. Arnold is a nuclear engineer. And no my left is Judge Trikouros, who's also a nuclear engineer.

At the outset, I very much want to thank the county commissioners and particularly Commissioner Prude who extended an offer to us to use this facility today so that we could be much closer than Rockville, Maryland, to the affected population by this application. I want to thank everyone in the courtroom, staff, for assisting us here. We very much

appreciate their hospitality.

Today's proceeding concerns four requests for an evidentiary hearing on ISP's application that have been filed by a variety of different petitioners, and I think we'll list them by name when we get to the appearances of counsel.

But before that, I'd like to summarize how we intend to proceed today. I think most of this was set forth in the order we issued on June 7, but for the benefit of everyone who's here, this is how we're going to move forward.

Our purpose is a limited one today. It's not to take appearances from the public and hear from local governments or anything like that today. Today's purpose is to hear arguments from the lawyers who have filed petitions opposing the application and from the lawyers for the Applicant and also lawyers for the NRC staff on the sufficiency, the legal sufficiency, of the petitions that have been filed in opposition to ISP's application.

And our purpose is to determine whether they have satisfied the NRC's legal requirements for proceeding to essentially the next phase of an adjudicatory proceeding, which would be in most cases an evidentiary hearing. And if there were such a

hearing, it would take place at a later time.

All members of the Board, I know, have read the petitioners' and all the parties' pleadings which total literally several hundred pages, and as it turns out, the same three judges constituted a board that heard arguments in an arguably similar proceeding, a similar application, in New Mexico, maybe all of 40 miles from here for an interim storage site in the state of New Mexico.

But even though the sites are fairly close, they are not the same. The applications are certainly not the same. And so what we'd like to do starting today as the first order of business is to address the participants' views of how these applications differ.

And so unlike our usual practice of basically getting to the judges' questions right away -- we may have some questions to interrupt your presentations, but we'd like to start with longer than usual presentations by the participants' counsel, encouraging you to focus on how you -- what you see as the significant differences between the Holtec application in New Mexico and the ISP application here in Texas.

After -- we're going to allow up to 45

minutes for each participant -- each petitioner to address that issue. And then after we hear from the petitioners, we'll allow an equal time for ISP, and then we will allow some time -- we have been fortunate in the past that the NRC staff is usually quite crisp and responsive in its comments, so we will not put a time limit on them, but I imagine their comments will be considerably less than 45 minutes.

Again, we may have some questions during this phase, but this first phase of the proceeding is primarily for the participants to address these issues of how these somewhat similar cases may, in fact, differ.

Tomorrow, we will have -- tomorrow or later today, as it turns out, we will have more focused questions from the Board to various participants, and I think we might as well talk then at that time about what the best rules would be to proceed with that phase.

Let me talk a little bit before we begin or take appearances about logistical matters. Please silence your cell phones, if anyone has a cell phone on.

While we're grateful for the County's hospitality, we have provided water ourselves for

everyone, so feel free to find a bottle of water -- when I say, everyone -- I'm sorry -- I mean the counsel for the participants, not the entire audience, but we have provided, I hope, enough water even to deal with the temperature that we're enjoying here in West Texas in July.

We'll take at least one short break in the morning, maybe two and try to do the same in the afternoon. We will probably stop at a convenient opportunity around noon for lunch, and I don't believe there's a cafeteria in this building, so we'll probably allow at least 90 minutes so people can get out and get some lunch if they so choose and also make it back in time through the security here in order to begin an afternoon session.

I'd like to finish by five o'clock today. I don't know if we'll have to go to a second day. My guess is that we will, but if we could finish today, we will certainly do that. But my guess is that we will need at least part of the day tomorrow.

So before we take appearances, any other -- my other judges, members of the Board, have any comments? Judge Trikouros?

JUDGE TRIKOUROS: No.

JUDGE RYERSON: Judge Arnold? Okay.

Well, let's go through the four petitioners first, and ask you to introduce yourselves. Also if you have any questions about how we're proceeding today, this would be a good time to ask those. So starting with Beyond Nuclear --

MS. CURRAN: Good morning. My name is Diane Curran. I am appearing on behalf of Beyond Nuclear, and with me this morning is Mindy Goldstein, my co-counsel of the Turner Environmental Law Clinic. And we're the only petitioners' counsel sitting by a mike, so maybe I'll stand up -- or maybe they can go to --

JUDGE RYERSON: Oh, do we have a small mike? I'm not sure that will work for the reporter. The reporter needs to be able to record everything as well, so let's see how that works.

So next we would go to the Sierra Club. And welcome to you, Ms. Curran.

MS. CURRAN: Thank you.

JUDGE RYERSON: And Ms. Goldstein.

MR. TAYLOR: Wallace Taylor for the Sierra Club. I do have a procedural question.

JUDGE RYERSON: Yes, sir.

MR. TAYLOR: You said 45 minutes for the Applicants. Is that their total, or 45 minutes for

each of the --

JUDGE RYERSON: No. What I said was 45 minutes for each petitioner.

MR. TAYLOR: Right.

JUDGE RYERSON: And then the Applicant will have an equal time. If, for example, Ms. Curran -- and she doesn't have to take less than 45 minutes, but she has one contention, and one might even say it's more of a generic issue than a site-specific issue. I don't know. She'll tell us that. She takes ten minutes. I don't think ISP will want 45 minutes, but they're certainly not going to get 45 minutes. But then it will be each time. Yes. They get to respond to each petitioner. Each time after ISP responds, then the NRC staff, if it wishes may make a comment or two as well.

MR. TAYLOR: Thank you.

JUDGE RYERSON: Thank you. And welcome to you, Mr. Taylor.

And next we have what we're going to call Joint Petitioners. There are seven or eight of them, I think, and let me list them first and see if I get them correct before you introduce yourself, Mr. Lodge.

We have Don't Waste Michigan, Citizens Environmental Coalition, Citizens for Alternatives to

Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc.; San Luis Obispo Mothers for Peace; Sustainable Energy and Economic Development Coalition, which we might abbreviate as SEED, I think, if we talk about them individually; and then one individual, Leona Morgan. Do I have it correct, sir?

MR. LODGE: You have it correct, sir.

JUDGE RYERSON: Thank you.

MR. LODGE: I'm Terry Lodge, and I represent all of those organizations and people.

JUDGE RYERSON: Okay.

MR. LODGE: Thank you.

JUDGE RYERSON: Thank you, Mr. Taylor. Welcome to you.

And then we have two organizations, Fasken Land and Minerals, and also the Permian Basin Land and Royalty Organization, of which, I believe, Fasken would be a member -- is a member. And who is speaking for Fasken?

MR. EYE: Good morning. My name is Robert Eye. I represent Fasken and PBLRO, along with my co-counsel, Timothy Laughlin.

JUDGE RYERSON: Thank you. Welcome to you.

JUDGE RYERSON: Next to the Applicant,

Interim Storage Partners, LLC.

MR. MATTHEWS: Good morning, members of the Board. My name's Tim Matthews from Morgan, Lewis & Bockius. I appear today on behalf of the Applicant, Interim Storage Partners. With me at counsel table today are my colleagues, Paul Bessette and Ryan Lighty. I also have with us members of the Applicant's staff, the joint venture partners of Interim Storage Partners, Orano and Waste Control Specialists.

I have Jeff Isakson, the president and CEO of Interim Storage Partners; Elicia Sanchez, the senior vice president of Waste Control Specialists; Jack Boshoven, the chief engineer and manager of engineering and licensing for the NRC project. I have Jenny Caldwell, Waste Control Specialists geologist; and Ben Mason, WCS's chief engineer, to assist us.

JUDGE RYERSON: Okay. Thank you, and welcome to all of you, and -- pardon me.

MR. MATTHEWS: I did have one question.

JUDGE RYERSON: Yes, sir.

MR. MATTHEWS: With respect to the record in the proceeding, the application for 72-1051 is not part of the record in this proceeding. We understood the Board's order, recognizing the similarity and the

contentions between the two proceedings, and the pleadings.

Applicant has looked at those and the Board's order in LBP 19-4, and we are prepared to respond to how the contentions as pled are similar or different here, and how they would apply or not apply to the ISP application in docket 72-1050. But we wanted to make sure that we understand correctly that the Board does not intend to incorporate the record from 72-1051 into this proceeding.

JUDGE RYERSON: That is correct. That is correct. I mean, the decision in that case is a matter of public record clearly, but we're not incorporating that proceeding into this.

NRC staff.

MS. KIRKWOOD: Sara Kirkwood for the NRC staff, and I'm accompanied by my co-counsel, Alana Wase, Joe Gillespie, and Thomas Steinfeldt. I also have several members of the NRC staff with me.

I have project manager John-Chau Nguyen and safety project manager/environmental project manager Jim Park. I have branch chief John McKirgan and Christopher Regan who's the deputy director for the Division of Spent Fuel Management.

JUDGE RYERSON: Thank you, Ms. Kirkwood,

and welcome to you.

MS. KIRKWOOD: My only question is: Would it be possible for that smaller microphone to come at our table? Can you hear this?

JUDGE RYERSON: No.

JUDGE ARNOLD: That's the microphone for the court reporter.

JUDGE RYERSON: Okay. Yes. I -- before we begin with the presentations, I should have mentioned, too. For the benefit of the court reporter, we can hear you very easily, I think, but the court reporter is recording this, and so it is very helpful if you speak fairly close to a microphone.

VOICE: The audience cannot hear well, so if everyone could please speak in a microphone, it would be very much appreciated.

JUDGE RYERSON: Okay. Thank you for that comment. Yes. All right. We were not aware -- can everyone hear me in a normal voice towards the back?

VOICE: It's not bad.

JUDGE RYERSON: All right. If anyone can't hear me, raise your hand. Right.

(General laughter.)

JUDGE RYERSON: All right. We will try to

be as clear and reasonably loud as possible. And, again, everybody can get as close to the microphone as possible. Does that work better? Sounds to me like it works better.

VOICES: Yes.

JUDGE RYERSON: Yes. Okay. Great.

All right. Any further comments? Judge Arnold? Judge Trikouros?

Let's begin with Ms. -- Ms. Curran will be beginning, I assume, for Beyond Nuclear.

MS. CURRAN: Good morning again. Thank you very much for the opportunity to address the admissibility of Beyond Nuclear's contention and our standing.

Regarding admissibility, there is no significant difference between the violations of the Nuclear Waste Policy Act and Administrative Procedure Act set forth in our contention in the Holtec proceeding and our contention in this proceeding.

As we have demonstrated previously, to approve or even consider a license application with knowledge that it contains provisions that would allow illegal conduct under the Nuclear Waste Policy Act violates the APA. We are not going to repeat all the arguments we made about those points before, but there

is new information that we could have not addressed in the Holtec proceeding.

And the first is, of course, the Holtec decision that was issued by this panel in May.

The second is that the fact that the existence of two similar cases raising the same legal issues establishes a pattern, and we want to address the significance of that pattern.

So first to LBP 19-04, your decision. In that decision, this Board found that no harm would be caused by considering and potentially approving a license application that contained illegal provisions, because both the Department of Energy and the license applicant, in that case, Holtec, could be trusted to follow the law. They simply would not implement or act upon an illegal license application or license if it was granted.

But shouldn't that reasoning apply to NRC in the first instance? Why is there no presumption that the NRC would not entertain or approve a license application that contains illegal provisions? Why doesn't the presumption that an agency will act in accordance with the law apply to the NRC?

We'd like to assert here that it does. The NRC cannot avoid its own obligation to act in

accordance with the law by saying that down the road, whoever is allowed -- whoever is granted the license that would allow, you know -- technically, legally allow that violation won't do it. The buck must stop with the NRC. Indeed, the APA requires it.

And in the case of the license applicant, whether Holtec or ISP, why should it be necessary or appropriate to assume that they will not implement an unlawful license provision? We should never have to get to that point.

Here we are at the point where the NRC has been asked to say and must say, under the APA, we will not take action that violates the law. The APA simply requires that federal agencies must follow the law.

To hold that illegal license provisions are acceptable because a private licensee may be trusted not to implement them is completely inconsistent with the APA, and it affronts the dignity of the APA-based licensing process by turning licensing into a gentlemen's agreement, made with a wink and a nod to the actual law but not conformance.

Most seriously, approving illegal provisions on the ground that they may sometime and somehow become legal in the future has two detrimental effects on the integrity of the NRC's licensing

process.

First, it turns the licensing process into a guessing game. Participants in a hearing process are asked to assume that the law may change in the future, without knowing exactly how that might be. In order to challenge the license application, they must, without knowing what the future holds, challenge with specificity -- that's an NRC requirement. They must challenge with specificity the license application.

That puts participants in the position of doing the impossible. A hypothetical cannot be challenged for lack of veracity or reliability or support for the very reason that it's hypothetical. In other words, the Holtec decision puts petitioners like Beyond Nuclear in the impossible position of challenging hypothetical, of meeting -- of having to satisfy NRC procedural requirements, requiring great precision in pleading that address an application that has no such precision. And that really turns the NRC licensing process on its head.

The second point I want to make about admissibility relates to the pattern here. The Holtec application wasn't a one-off, and I heard Judge Ryerson say at the very beginning, Again, welcome. We're in a pattern that's happened again. It's not

just one time that one license applicant has a hypothetical in their application. This is something that now is -- could be said perhaps to be regular.

We think it's a Pandora's box that this licensing board has opened. In both of these cases, we now have circumstances requiring local citizens to muster their resources, to challenge an application that is based on future changes to the law that may never happen. Who knows how many more hypotheticals the industry may dream up out of their eagerness to get a business advantage by becoming the first in line, so that their position to have the license in hand after the law -- just in the law should change the way they want it to change?

Allowing such hypothetical applications to be considered and approved is an incredible waste of the NRC's and the public's limited resources.

JUDGE RYERSON: Ms. Curran, if I can just stop you there for a moment, I think where we may differ is on your statement that this is an application based on changes in the law.

MS. CURRAN: Uh-huh.

JUDGE RYERSON: I think one can fairly read the Holtec decision as saying -- at least I think this is what we tried to say, is that when you look at

the record as developed in that adjudicatory proceeding, it is clear that what the NRC is saying is that if a license is granted, it would be a license to engage in lawful sales, and that might change in the future the scope of lawful sales.

I suppose a state could have a 21-year-old drinking age and change it to 18. But that doesn't mean normally, I think, that everyone who has a liquor license has to go out and get a new liquor license to sell to people between 18 and 21, that the thrust of the application is to sell to all lawful applicants, of which there are -- customers, rather, of which there are potentially two kinds.

There would be utilities themselves or to sell interim storage to DOE, if that were lawful, if that becomes lawful, which, as you know, is a realistic possibility. We're not saying it has to happen, and as far as I can tell, the application does not purport, at least, to be dependent on that. But there's certainly a possibility that DOE -- Congress could make DOE a lawful customer here.

So do you have a response to that view?

MS. CURRAN: Yes. Well, I can't imagine that in, say, a liquor licensing context, that the -- a county government would give a liquor license that

allows a company to sell to 15-year-olds, and then says, Well, we assume that you would never carry that out unless the law were changed to allow 15-year-olds to buy liquor.

Very similar situation. I can't imagine that this agency would issue a license to an applicant or a nuclear power plant to, instead of storing spent fuel on the site, to reprocess spent fuel, just in the event that maybe reprocessing would one day become permitted. It's just -- it's something that's not allowed.

It shouldn't be in the license, because it creates -- you know, just imagine yourself in the position of the public, that a license has been issued by a government agency that says, You may do something illegal, that's currently illegal, in the event that -- you know, in the event that it should become legal in the future. We assume that you won't carry it out until it becomes legal in the future.

It puts a burden -- it puts a burden of vigilance on the public to be watching to see, will someone try to get away with something because it's in the license. You can do it. And here you say, well, it's the DOE that has to act; it's the applicant that has to act in concert. It's very unlikely that this

would ever happen.

But this is a principle of licensing that just shouldn't be breached. It shouldn't be breached on practical grounds that, oh, well, this is -- how could this ever happen. It should be dealt with when it comes up. Licensing should not be issued for activities that are known to be illegal under currently law. Otherwise, it just turns the process into a free-for-all.

Who couldn't now come in with a license application that speculated on some nice things that if they come to pass, I would like to be first in line to take advantage of them. It puts an incredible burden on the public. Look at all the people who are here. We don't know if this is going to come to pass.

And certainly the very first application that WCS filed, which was, I think, in 2016 had nothing about private ownership of spent fuel. It was clearly planned that this liability and ownership of the fuel would be turned over to the DOE. And then they changed the application and put this alternative language in.

Well, is that just -- to us, it looks like a fig leaf. I mean, we don't -- it's possible, I guess, that ISP will decide that they're going to

contract with individual licensees who are willing or going to be willing to take the liability of transportation and storage for an indefinite period, but it seems pretty unlikely to us.

So this just creates -- the Federal Government shouldn't be in the business of propping up a project like this that's based on speculation about the future. We should be dealing with reality, and that is what the intervenor groups get told all the time. Don't speculate about what might happen with this application.

How many times have you seen that in an NRC decision, where a petition for a hearing is rejected because it speculated about future events that might or might not occur, and the decision was, this case has to be about the real facts, what's in the application, what is really planned, and we have to, you know, go on good faith that what is planned is actually going to happen.

JUDGE RYERSON: There's also a line of cases from the Commission, though, Ms. Curran -- I'm sure you're familiar with them -- that basically says, This is a license in this particular instance to construct and operate. And the NRC's interest in the commercial inviability of the operation is limited or

nonexistent.

The NRC has a huge interest, primary interest, in, is this constructed and operated safely, but whether it is commercially viable, whether there are, in fact, private entities out there that want to contract with this facility, that's not primarily our concern, as long as the NRC is assured that this will be constructed safely, and if operated, operated safely.

But does the Agency have to second-guess the commercial liability of the option that's being proposed, which is, at the moment, to deal with private entities?

MS. CURRAN: Absolutely not. I agree with you. If this application only consisted of an application to deal with private entities and to contract with them for transportation, storage, financial assurance was demonstrated through private entities, we would say, Fine, that's a commercial business decision of the company; let them get their license, and then they can decide, are they actually going to act on it or not.

But that's not what we've got here. What we've got here is, in addition, there's an illegal provision that's included there as an alternative.

And we saw arguments where -- I think it may have been in the letter that ISP wrote -- well, there's cases where there's two alternative roads considered. It might have been in a PFS project. Take this road or that road. Well, those are two legal roads.

This is -- the alternatives are there's a legal alternative and an illegal alternative. And I don't think that you should be in the business of allowing an unlawful alternative, because it's a possible business -- you know, would be advantageous from a business standpoint. Your obligation is to make sure that you're not dealing with approving illegal provisions.

So we believe the appropriate thing to do would be to say, Yes, go ahead with this application, but we're not going to consider the illegal provisions. And if you want to consider federal ownership of spent fuel, if and when the law changes, come back and amend your application, and we'll deal with it then.

JUDGE RYERSON: What is ISP simply didn't say who their customers were going to be, they just filed an application and said, We'd like to construct and operate a facility, and they didn't specify who the customers would be?

MS. CURRAN: Well, I think what they have to do is they have to show some -- provide some information for financial assurance purposes, and so I'm not sure the degree to which they'd have to do it, but they probably have to show where they're going to get the money to take care of this facility over the licensing proceeding -- the course of that proceeding. So they'd have to say something about having contracts. Okay?

JUDGE RYERSON: Yes. But would that necessarily limit them? I mean, could they have crafted this application in a way that would have allowed private contracts or whatever sources they were using for financial assurances, and just didn't address the possibility of Congress creating a new lawful option, which is a realistic possibility.

I think we have to recognize that. There's been legislation, I think, every year for the last several years proposing that. It may or may not pass, but it's certainly not an unrealistic possibility. I mean, are we just arguing about the way they drafted their application is, I guess, what I'm a little concerned about?

MS. CURRAN: No, I don't think so, Judge Ryerson, because they would have had to say something

about, We are going to have contracts and -- for instance, I think they say the money is going to be provided through the contract damage lawsuits that the licensee has filed against the DOE for these fees that those --

JUDGE RYERSON: But that's money that the private companies, which is the option -- the option you don't challenge --

MS. CURRAN: Right.

JUDGE RYERSON: -- is the private companies. Those are the ones who are receiving money now from DOE, because DOE did not honor its commitment to start taking the nuclear waste back in 1998. So, I mean, that would be solely on the private side, would it not?

MS. CURRAN: Right. And they have -- in order to get a license, I believe, the NRC staff would have to, in a safety evaluation report, look at the question of where are the funds going to come from to maintain this facility over the course of the license term. So they would be looking at who -- what entities are going to contract with this company.

And if the DOE were not included as -- were not named as a potential owner, then I think the only recourse that the Applicant would have would be

to say, We plan to contract with X, Y and Z utilities, and that they will provide the -- you know, we will -- they will be financing the cost of storing this material.

JUDGE RYERSON: Yes. We'll go through --

MS. CURRAN: The other thing is, okay, from the public's point of view -- this is a very important part of it. Once something goes into a license, then it precludes the public from challenging anything later.

So in other words, if DOE -- later on, legislation passes, and DOE is allowed to take title to the spent fuel, we are very much restricted in what we can say and concerns that we could raise about that enormous change, because you will have already approved DOE as the owner.

And so even though it's going to raise a host of issues if that happens, it makes it very difficult for the public to come back in, because you approved a hypothetical based on a guess, and then when the guess happens to come true, it turns out, Well, that was decided ten years ago; where were you, to anybody who wants to come in and say, We're concerned about what this looks like with DOE ownership.

It's really not good decision-making. Look at all the people in this room. All these people want to be able to engage in a real proceeding and a real decision-making process. They want to know, who's going to be responsible for this fuel, because this concerns us. So please don't give us a decision that says, That all is going to be decided down the road, and we're not going to let you have anything to say about it because it's a hypothetical. It's really -- it's quite unfair to the public who is affected by this to do this kind of hypothetical decision-making.

And then finally, I just -- one more point about this is that there is a serious separation of powers issue here. An executive agency is limited to executing he legislation of Congress. And here Congress has spoken without ambiguity. DOE cannot take title to spent fuel without a permanent repository in operation.

A decision by the NRC to act outside the confines of Congress and congressional authorization is arbitrary and capricious, because it exceeds the authority of Congress, a separate branch of the government.

Then I'd just like to turn to standing for

a moment, because there is a slight difference with respect to standing, although we would submit that -- well, it's different people, a different place, slightly different distances from the reactor or from the proposed storage facility. We have two standing declarants, one who owns property and has business interests within four miles, and one who lives within seven miles of the proposed facility.

As this panel recently recognized in the Holtec decision, there is no magic number for when the proximity standing presumption applies. While it is likely less than 50 miles, which is the number for operating reactors, other ASLB panels have found proximity standing for individuals living within 17 and ten miles of the storage facilities that -- and facilities that were actually much smaller than this one.

And in NEI versus EPA, which is a D.C. Circuit decision reported at 373 F.3d. 1251, from 2004, the Court of Appeals found that someone living and working 18 miles from the proposed Yucca Mountain repository had standing. Given that, the Nuclear Waste Policy Act has a preference for repositories over above-ground storage as a safer means of storing or disposing of spent reactor fuel.

If you're comparing 18 miles from a proposed repository with four and seven miles from an above-ground storage facility, we are well within the scope that was found to confer standing in the NEI case.

And we also have shown traditional standing, which is, I think, something that has been raised, that in the Holtec case, the Applicant is continuing to raise the standing issue in its appeal to the Commissioner, so we just want to emphasize that we think our pleadings show that we have standing under traditional concepts of standing, in other words, injury, causation and redressability.

Our people live and travel along transportation routes. There are, you know, just regular emissions along transportation routes. Normal emissions could affect them. And then I just want to point out that in the NEI case, the Court did go through a traditional standing analysis and said that one cannot have 100 percent confidence that the containers and repository will not leak.

And they were looking at thousands of years, and they found that the petitioners had standing based on potential for leakage of containers into the environment over thousands of years.

Well, we have -- the situation here is no different. There's no guarantee that there will never be leakage or an accident from these containers, and this is a very large quantity of spent fuel. It's 40,000 metric tons. That's half the existing inventory of spent fuel in the United States. So if --

JUDGE RYERSON: But not for thousands of years. At least, that's what one would hope.

MS. CURRAN: That's what one would hope. But one doesn't know, and it's very interesting that when Congress passed the Nuclear Waste Policy Act, one of the rationales for prohibiting the transfer of ownership from private licensees to the Federal Government until a repository was open was to make sure that everybody was together and had a motivation to find a repository.

So there's a really good policy-based question of whether, if Congress should say, Okay, we're going to transfer; we're going to let the DOE take ownership of spent fuel during storage, then all the air goes out of that tire of motivating these licensees to find -- to help Congress to get together with state and local governments and agree on X or Y as a good location for a repository.

And it's very possible under those circumstances that this site in West Texas could be there for a long, long time if that motivation is lost. So I don't think you can say with certainty that this will never -- this fuel will never be moved -- or will be moved. It's possible that it will not.

So in conclusion about standing, while there are a multitude of tests for standing in spent fuel storage cases, they all get to the same point, that you can't say with certainty that containers holding a large quantity of highly radioactive material will never leak or be susceptible to acts of eventual leaks of radioactivity, and therefore, people who live as close as a few miles should have the right to challenge the proposed action of locating this very highly radioactive material in their neighborhood, in their community. And Beyond Nuclear has shown through its members' declarations that we do need that standing.

Thank you. I don't have anything more. I'm glad to answer questions later.

JUDGE RYERSON: Thank you, Ms. Curran. I have a question that probably will go more to the NRC staff when it's their turn, but I'll let you comment

if you want to. I'll alert them to it.

My understanding would be that the staff, in terms of their concern of financial assurances, is focusing solely on the lawful option, which would be at the moment the only possible option, and that is based on ISP contracting with private utilities.

So, I mean, I don't think -- I'm guessing, and they'll tell us later, but I'm guessing they are not relying in any way on the possibility which everybody seems to agree at the moment is unlawful of ISP dealing directly with DOE, and so that's not -- I don't see how it could be part of the financial assurances package.

Do you -- I mean, am I wrong about that from your standpoint? We'll hear from them later, but --

MS. CURRAN: Well, as a practical matter, Judge Ryerson, if the DOE owns the fuel, then what is the -- I mean, it's the taxpayers paying for it, so what are you going to say about whether there's sufficient funds? Yes. There's infinite amount of money to pay for it if the DOE owns it, so it's not really -- it's a whole different ball game if the DOE actually owns it.

JUDGE RYERSON: Right. But not the one

they're examining right now, because they're examining, I assume -- they'll tell us. But I assume they're examining the lawful option as a basis for going forward or not going forward.

MS. CURRAN: It still doesn't answer the question that -- I hear an implicit question, if we have a lawful alternative in this license, who cares if there's an unlawful one, too, because we'll just focus on the lawful part.

But then we just keep raising the same question, as why, why are you allowing, if it's perfectly permissible -- if they have the information they need to issue a license based on lawful provisions, then why, why allow consideration of an application that contains provisions that concededly, as all the applicants -- both Applicants have conceded, they could not be implemented lawfully were they granted.

So why should this agency start out by entertaining or proposing to affirm unlawful license provisions? Why not test it out and say, We're not going to consider these; we're going to strike them from the application. And if you want to go forward with your application, then go ahead, but do it in an appropriate and lawful way.

JUDGE RYERSON: Thank you, Ms. Curran.

JUDGE ARNOLD: Not quite done.

JUDGE RYERSON: Not quite done.

JUDGE ARNOLD: You're not running this alone.

JUDGE RYERSON: That's obviously true.

MS. CURRAN: I thought I could escape.

JUDGE ARNOLD: It has to do with the standing. And one of your individuals is a D.K. Boyd.

MS. CURRAN: Yes.

JUDGE ARNOLD: D.K. Boyd also has authorized Fasken to represent his interests. Do you know of anything in the NRC regulations that allows an individual to authorize two different organizations to represent him?

MS. CURRAN: Judge Arnold, I am not 100 percent sure, but I believe that has been done in the past. I can't see any reason why that person could not be -- I think that Mr. Boyd has business interests that are involved with Fasken and also has personal interests that Beyond Nuclear represents, and I don't see why there would be any reason to preclude him from serving as a standing declarant for both petitioners. But I'm not 100 percent sure if there's a case on that. I don't know.

JUDGE RYERSON: Actually the Commission has spoken to that and at the very least discouraged that. I think here we have representatives for groups that if we treat Mr. Boyd for one but not for you, you'd still have someone who lives within six or seven miles.

MS. CURRAN: Yes. Mr. Boyd is within four miles --

JUDGE RYERSON: It's an interesting issue, and the Commission has spoken to it, but I think in this instance, it's moot. It really would not adversely affect you.

MS. CURRAN: Okay. Yes. And, again, as you say, the Commission has discouraged it, but I don't know if they've permitted it. Thank you.

JUDGE RYERSON: Judge Trikouros, did you have anything?

JUDGE TRIKOUROS: Well, this was going to be discussed more tomorrow, I think. But do you see a distinction between the DOE situation that you've just outlined and the other hypothetical situation which is that some third party will take over to the decommissioning of a plant in the future and become the owner of that spent fuel, but in order to do that, they would have to get approval from the Commission?

Do you see a difference between that and the DOE situation in the future? If, in fact, this third party doesn't get the NRC license, then they will not be owners of the fuel. If the DOE -- if the law is not changed by Congress, then DOE will not become owners of the fuel. Both basically hypothetical situations that might occur. I don't -- do you see a difference there?

MS. CURRAN: The difference here is that DOE is being put into the license now without it being lawful. In your hypothetical, the third party comes in later, wants to become the owner of the facility or the spent fuel, and submits an application for transfer of the license.

That's the way it should be done, is that if there's going to be something that happens in the future, then it's dealt with at that point. It would not be appropriate, for instance, in the initial license to say, The owner of the nuclear plant is going to be A, B or C, and we don't know if it's going to be -- it wouldn't be C unless the license -- unless the law changed sometime in the future, but we're going to write C into the license.

The hypothetical that you raised is that a license amendment application is filed at the time

when it becomes appropriate, at the time when it's factually verifiable that this company wants to buy this thing and is going to be the owner and has a lawful right to own it.

JUDGE TRIKOUROS: If the license application has said, current or future owners of the spent fuel, would that be any different?

MS. CURRAN: It would be too vague, because you don't want to have it unknown who is the owner of the spent fuel. You want to know, who is it and what are their qualifications.

JUDGE ARNOLD: One other thing. In your contention, you argue that this contention is not within the scope of these proceedings. Do you still believe that?

MS. CURRAN: Yes.

JUDGE ARNOLD: Okay.

MS. CURRAN: But we -- we noticed you didn't address it in your decision, but we figured it was because you thought it was. And for us, the most important thing is the -- we were looking for your ruling on the validity of the Nuclear Waste Policy Act claim and the APA claim, and that we do think that this is an -- the NWPA compliance isn't within the scope of issues that the licensing board is tasked to

evaluate. But we think we're going to end up before the Commission on the substantive issue.

JUDGE RYERSON: I think we regard -- at least, I did -- the Commission's decision to have us treat your motion to dismiss as a contention seemed to me to resolve that issue from the Commission's standpoint, but it's not the issue on the merits that you're really concerned about, I don't believe.

MS. CURRAN: Yes.

JUDGE RYERSON: Okay. Any other questions, gentlemen?

(No response.)

JUDGE RYERSON: Thank you, Ms. Curran.

MS. CURRAN: Thank you.

JUDGE RYERSON: Let's see. Oh, we haven't been going for an hour yet, so unless I see a overwhelming need for a break, let's begin with Mr. Matthews. And I think, yes, about 45 minutes actually.

MR. MATTHEWS: Judge Ryerson, I don't believe we'll need 45 minutes.

JUDGE RYERSON: Okay.

MR. MATTHEWS: Would the Board prefer that we address it from the podium or --

JUDGE RYERSON: I would -- we would prefer

that. Yes. Thank you.

MR. MATTHEWS: Good morning again. Thank you. So as to the specific question that the Board asked as to the differences between the contentions presented in this proceeding and that in docket 72-1051, ISP notes that it is the same contention. It is the same pleading, in fact, that presented the contention, the same arguments for it.

The difference here is that the petitioner Beyond Nuclear did not seek to amend the contention in this proceeding as it did in the other proceeding where it sought that more limiting language, suggesting surgical changes to the application. That wasn't presented in the record here. It's being advanced to the Board for the first time in this proceeding today.

The arguments advanced by the parties were the same. Both Holtec and ISP agreed with petitioners that the contention was inadmissible for the reasons that it had nothing to do with the authority sought by the respective applicants under their licenses.

I think the Board made clear in LBP 17-4 that the license that the Applicant sought there and we seek here does nothing to authorize DOE to use such a facility. There's nothing that the NRC staff, this

Board or the Commission can do that will change the DOE's authority under the Nuclear Waste Policy Act.

The Board invited ISP to provide its opinion with respect to DOE's authority on that question, the merits question, if you will, and we agreed that DOE may not, absent statutory change, make use of our facility. So the positions of the parties are the same, and the Board's holding in LBP 17 would be identical here.

We point out -- and this is probably the right place to do it -- as to standing, since petitioners have advanced it. ISP articulated a different basis by which petitioners, BN included, would not have standing -- Beyond Nuclear here would not have standing either, and that is the proximity plus issue.

My colleague Ryan Lighty will address that at the time that the Board would like to entertain that, but that question, as to whether it has been resolved by Commission direction as to away from reactor dry storage was not presented in the other proceeding. It is presented in our responses to the contention, and we think it appropriate that the Board address that.

The -- I guess, the final point, as we

seem to be moved into the merits of it -- and that's probably appropriate in this contention -- and that is that the Board observed, as the Commission has already decided in Hydro Resources and PFS, that Applicant here is not asking for anything unusual or different.

To the extent that petitioners disagree with Commission policy, it's exactly that, a disagreement with Commission policy about whether an application can be issued priori to receiving all applicable authorizations, state, federal or local, or whether the NRC has to be the final gatekeeper, and the Commission has concluded that in the negative. It does not. That's well established case law as the Board cited and followed. So --

We would read through all the arguments, inappropriate to address here. There were some arguments, impassioned arguments about the public being cut out if the NRC does not address the NWPA issue. I'd just point out that, you know, perhaps that's new here, that Congress decided where NWPA challenges should be had. It's 119 of the Act. It's in the Circuit Courts of Appeals. It didn't ask NRC to be the arbiter of DOE's authority under the Nuclear Waste Policy Act, so --

I'm happy to answer any questions.

JUDGE RYERSON: Okay. Just a procedural one. I'm trying to decide when -- your position -- I saw your position differed somewhat from the Holtec position on standing, and we probably -- that really applies to all the petitions here.

Would you -- ISP -- and this was the case with Holtec as well. ISP would not acknowledge standing on the part of any petitioner in this proceeding. I think you articulated a slightly different reason for that, and I'm just wondering the best time to address that.

Maybe we should hold that, because it's going to apply to everybody, and figure out a good time to do it, and we'll continue now with the -- after we have questions from you, we'll continue with the NRC staff on the Beyond Nuclear issue, its sole contention, and then we'll probably take a break, and we'll figure out when we want to talk about standing per se, which, as I said, really applies -- your argument applies to all of the petitioners here.

Okay. Let's do that. Judge Arnold, do you have questions of Mr. Matthews?

JUDGE ARNOLD: Yes, I have a question. Are you aware of any spent fuel or greater than class C waste that is currently held by the Department of

Energy?

MR. MATTHEWS: Yes, Dr. Arnold. In our briefings, we cited to a Nuclear Waste Technical Review Board report that quantified the holdings that DOE had of commercial spent nuclear fuel, I think was the question you were asking about. And it did have a very limited quantity of special nuclear material and reactor-related TTCC that it held from several reactors.

JUDGE ARNOLD: Now, if you received your license, would it be a violation of the Nuclear Waste Policy Act for the Department of Energy to repackage that fuel, put it in a certified cask, and ship it off to your storage facility?

MR. MATTHEWS: In order for us to put it into a cask that's already identified in our license --

JUDGE ARNOLD: Uh-huh.

MR. MATTHEWS: If it were not a cask that's already identified in our license, we would need a license amendment. It would not be a violation of the ISP license, presuming it met all of its license conditions including the contract to provide for decommissioning funding, the financing for it that's all part and parcel.

I expect that if DOE tried to do it as a federal action, it would take action, and there would be opportunity elsewhere for interested members of the public to challenge if they thought that the Department's pre-NWPA authority did not allow it. And that's a question that has not been answered, whether the -- Holtec went to this Agency's pre-NWPA authority. I think that question is open.

JUDGE ARNOLD: I agree. Like the other things do, but would it be a violation of the Nuclear Waste Policy Act, since the DOE already holds title to it?

MR. MATTHEWS: I'm not aware of any federal case that's been cited, and I'm not aware of any DOE position on that question which would be entitled to Chevron deference in the first instance. So it is -- it's an interesting case that I think that ISP cannot answer today.

JUDGE ARNOLD: Thank you.

JUDGE RYERSON: Judge Trikouros.

JUDGE TRIKOUROS: No.

JUDGE RYERSON: Thank you, Mr. Matthews.

Well, let's hear from the NRC staff, and then we will probably take a short break.

MS. KIRKWOOD: Do you want us --

JUDGE RYERSON: Please. I believe only that mike is hooked in with the court reporter, so we have to live with the physical surroundings. Thank you.

MS. KIRKWOOD: Your Honor, I am assuming you would like us to address the question that you asked about how the staff is reviewing the application.

JUDGE RYERSON: Thank you.

AUDIENCE VOICES: We can't hear.

MS. KIRKWOOD: Can you hear me now? And the answer is that the staff reviews the application as it's presented to them. So to the --

VOICE: If you could speak slower, that would help.

MS. KIRKWOOD: To the extent that the Applicant is relying on any particular entity for their financial qualifications, the staff will look at that. We are still in the process of doing that review, but we do take the application as it's presented. We don't just -- if the Applicant's assuming -- I mean, the Applicant has included it. We assume that it's something that we need to look at.

JUDGE RYERSON: But, I mean, that seems strange to me, because everybody agrees that one

option is not presently a realistic option, so you're looking at that as a hypothetical option. Tell me -- explain what you're really -- what the staff is doing with that.

MS. KIRKWOOD: So I would note the staff has not reached a conclusion on that, issue one. Two, I would note that in a PFS proceeding for their financial qualifications, they did not indicate who the customer was. The financial qualifications was based on a contract with spent fuel owners.

JUDGE RYERSON: So it's the conditions in the contract that are material to you, regardless of who the contract might ultimately be with.

MS. KIRKWOOD: Correct.

JUDGE RYERSON: Okay.

MS. KIRKWOOD: Well -- correct. Here, ISP has chosen to indicate who those contract holders might be, so the staff is looking at that to determine whether or not it's relevant to our review.

JUDGE RYERSON: Okay. All right. Let me ask you another question that comes up. Initially, when -- several months ago when you responded to the petitions, at the same time as ISP, the staff's position was that Beyond Nuclear's sole contention was admissible.

Two things have happened since then. ISP has withdrawn its application, its request for an exemption from financing requirements, based upon DOE, so that issue appears to have been taken off the table.

And secondly, in response to our request, they took the option to respond in writing before this proceeding, so their position is absolutely clear that as the law now stands, they agree that -- with Ms. Curran that ISP cannot contract with DOE to take title to nuclear waste.

So what is the staff's position today on the admissibility of Ms. Curran's, Beyond Nuclear's contention?

MS. KIRKWOOD: The staff had originally thought this contention was admissible.

JUDGE RYERSON: Correct.

MS. KIRKWOOD: Beyond Nuclear responded by saying that they thought the staff had made an error and that it was not admissible. And so the staff is a little -- the staff is not trying to waste a contention on someone who doesn't want to litigate it. I -- the staff --

JUDGE RYERSON: I think she wants to litigate it, but maybe not in front of us, maybe

elsewhere. But I'm sorry. Yes. Continue.

MS. KIRKWOOD: There's a lot of aspects to this the staff thinks are inadmissible. We think that any speculation regarding the likelihood of any entity wanting to enter into a contract with ISP is inadmissible. You know, speculation over their potential market strategies, we think that's inadmissible.

We think that the remedy that the application has to be dismissed and renoticed, which I think more came up in Holtec than in this proceeding, is inadmissible, that that's not admissible.

To go back to what I earlier stated, the staff takes the application as it's come, and in this case, even if they didn't need to, ISP has included the option that DOE be the ultimate contract holder. So to the extent --

JUDGE RYERSON: As an option that everyone, Ms. Curran, Mr. Matthews, I believe the Board, all agrees would be unlawful today unless Congress changes the law. So I -- let me rephrase my question to you.

At the end of the day, we have to decide whether a contention is admissible, admissible in

part, or not admissible. Where is the staff on that? What would you do if you were sitting on the -- well, not what you would do, but what's the staff's position on the admissibility of the contention today?

MS. KIRKWOOD: The staff views the contention as narrow to whether it is legally permissible to include DOE as a potential customer, as an admissible contention.

JUDGE RYERSON: Okay. Which, as I recall, was your position ultimately in Holtec.

MS. KIRKWOOD: Yes.

JUDGE RYERSON: Okay. So you have not changed your -- well, I won't say you haven't changed your position, but you still would regarding Ms. -- Beyond Nuclear's contention as admissible in part.

MS. KIRKWOOD: If it -- if that aspect of it is what they want to litigate.

JUDGE RYERSON: Okay. All right. I'm sorry. Did you have some other comments that you wanted to make?

MS. KIRKWOOD: Only if the Court has other questions.

JUDGE RYERSON: Any questions?

JUDGE TRIKOUROS: Just a clarification. Regardless of who takes title to the spent nuclear

fuel, whether it be DOE in the future or some third party, once they decommission the plant, that the NRC has to approve -- right? -- whether it be DOE or a third party.

MS. KIRKWOOD: Of who takes title to it?

JUDGE TRIKOUROS: Right. Ownership of it.

MS. KIRKWOOD: That's not necessarily part of this licensing procedure. So as a -- the Part 72 license would not -- it would authorize ISP to possess it, but they wouldn't actually transfer title.

JUDGE TRIKOUROS: Okay.

JUDGE RYERSON: Do you have more to follow?

JUDGE TRIKOUROS: No. That's fine.

JUDGE RYERSON: Okay. Are we done? Thank you, Ms. Kirkwood.

Let's take a ten-minute break and reconvene at 10:20. Thank you.

(Whereupon, a short recess was taken.)

JUDGE RYERSON: We're back on the record.

Resuming our discussion, I believe we are up to Sierra Club, Mr. Taylor, and you have up to 45 minutes.

MR. TAYLOR: Thank you. Thank you for allowing us to make a presentation this morning.

VOICE: Can't hear you.

MR. TAYLOR: Thank you for allowing us to make a presentation this morning. I want to begin by making sure the record is clear about Sierra Club's position, considering the procedure for this hearing, if I may.

The Board has asked us to, in our case, differentiate ten contentions that we had in Holtec with similar contentions in this case.

JUDGE RYERSON: Yes. If I may interrupt you, we are encouraging you to pick the contentions that you think would be helpful to focus on. We are not directing that you have to do that. You have 45 minutes to do whatever you want --

MR. TAYLOR: Okay.

JUDGE RYERSON: -- but I think, given our decision in Holtec, you might be well advised to focus on contentions that superficially may seem similar, the language may seem similar, but you may feel there are differences factually, based on the sites, based on the applications. But we're just encouraging to that. You have 45 minutes to say whatever you think is most useful.

MR. TAYLOR: Okay. But just to continue, I guess what you just said makes our point, that

you've already made a decision, and the impression that's given is you've already made a decision in this case, and that puts us in the position of an extra burden, so to speak.

JUDGE RYERSON: Well, we're trying to do the opposite. We were trying to give you every opportunity to tell us what differences there are.

MR. TAYLOR: And I'll try to do that, but I just wanted to make the record that by complying with the Board's order, we're not conceding in any way that we agree with the Board's decision in the Holtec case.

JUDGE RYERSON: That's perfectly understood. Thank you.

MR. TAYLOR: The first contention I wanted to address is our contention number 6 in this case regarding earthquakes. This is, of course, a different location than the Holtec site, and it seems to me that the question of earthquake potential is almost by definition site-specific.

And we have a study that's particular to this situation that we did not have in the Holtec case. It's a study by the University of Texas and Southern Methodist University, documenting seismic impact of recent oil and gas drilling in the West

Texas area. And I hoped to use an easel over there, but I can't manage two microphones, so if I can just do it from here.

This is a figure from the Texas-Southern Methodist study, and it shows that --

JUDGE RYERSON: Is that part of your petition, or is this --

MR. TAYLOR: Yes.

JUDGE RYERSON: -- a new document?

MR. TAYLOR: It's part of the exhibits.

JUDGE RYERSON: Great.

MR. TAYLOR: And it shows that in the West Texas area, particularly in the area of this WCS site, that since 2000 at least, the earthquake -- the numbers have gone up, and since 2010, almost exponentially. And so that, I think, is important.

MR. MATTHEWS: Is there a citation for that exhibit, just so we --

MR. TAYLOR: It's the University of Texas study.

JUDGE RYERSON: It probably had an exhibit designation in your petition.

MR. MATTHEWS: It's in the --

MR. TAYLOR: It's in the petition, and I gave the URL. It's titled, Historical review of

induced earthquakes in Texas, by Frohlich and others.

MR. MATTHEWS: Sorry about that.

MR. TAYLOR: Secondly, in that same study, there's a chart that shows the increase in injection wells in recent times, and you can see the cluster of -- it's almost solid -- of injection wells in the area of the WCS site. So that's information that was not pertinent to the Holtec case that shows the earthquake potential.

And the point of the Texas study was that induced earthquakes from the oil and gas drilling increase because of the oil and gas drilling in the area.

The ER in section 3.3.3 claims only minimal risk of faulting with seismicity. There's no mention of seismicity induced by oil and gas exploration. That section refers to a seismic hazard evaluation, but we don't know what is in that evaluation. It was listed as proprietary.

If I can just take a moment, I know in the Holtec case, the Board said, well, we could use the SUNSI procedure. But to be clear there and again here in this case, the SUNSI procedure is really a very, very difficult procedure to use. You have to know what your issues are.

You have to know what your evidence is almost within ten days after the start of the 60-day period for filing your contentions. Then you have to make the application to the NRC staff who are going to determine whether you even have standing or whether the contention might be admissible. And then there may be restrictions even then on what you can get.

It just doesn't really allow the intervenor an appropriate opportunity to get that information. And, frankly, I'm not sure why that study, which is so pertinent to the conclusion that was made in the ER would be proprietary. It would be a study that certainly anybody should be able to have in order to evaluate the ER.

There are numerous statements in the ER in section 3.3.3, but we're just not clear if the statements are from the seismic hazard evaluation or simply unsupported assertions.

The contention also again relies on a study from Stanford University, and there are charts in that study that show the -- what they call the slip potential in the area. That's these green lines, and the slip potential, as I understand it, means that there's an increased possibility of faulting, and thus it can increase possibility of earthquakes. And you

can see that they're right there in the area of the WCS site.

Also in that same Stanford study is a chart that shows what they call the orientation of the faulting, and you can see again right there in the area of the WCS site, there is some shifting of the orientation that would lead to an increased potential for earthquakes.

So I think with all of that, we have shown that there is a difference in the facts. There are additional facts in this case that were not present in the Holtec decision that make this contention admissible in terms of the ER and the SAR in this case not adequately addressing the earthquake potential.

The next one I wanted to address is the one you discussed with Ms. Curran, violation of the Nuclear Waste Policy Act, which is our contention 1. Ms. Curran has done an excellent job of covering most of that, but a couple of things I wanted to add.

First of all, in the Holtec case, the initial documentation Holtec presented, other than the ER, did list the nuclear plant owners as possible owners of the title to the waste once it got to the site. They just did not put it in their ER, and so we argued, of course, that the addition of the nuclear

plant owners was simply to make the proposal more palatable, but not necessarily verifying or assuring that the nuclear owners would want to retain ownership.

Here, however, ISP, in their initial documentation, never once in any of the documents mentioned the nuclear plant owners. It was always DOE, until Ms. Curran raised the issue. Then they came up with revision 2 of their documentation, and added the nuclear plant owners.

So I think here we have a much clearer case that the addition of the nuclear plant owners is simply a fig leaf to give the impression that this project would be legal. But there's still no assurance that the nuclear plant owners would want to retain title. In fact, you know, the inference in the documentation is that they want to get rid of it. That's the point. But --

JUDGE RYERSON: Is that really an issue, Mr. Taylor, in front of us? In other words, if ISP constructs this facility and finds that there are no takers, is that the NRC's concern? If it's constructed safely and there are adequate assurances it would be operated safely, if anybody wanted to send their waste there but no one did, I mean, is that a

bad thing? Is that something that we're supposed to be concerned about?

MR. TAYLOR: I believe it is, because as we said and as Ms. Curran said, it would be illegal, and certainly you can't license an illegal --

JUDGE RYERSON: No. It wouldn't be illegal if no one sent their waste there. Am I correct?

MR. TAYLOR: Well, as proposed by ISP, though, it would be illegal. They -- what it seems to me they're doing is saying, We don't know what's going to happen; give us a license anyway.

You know, in talking to Ms. Curran, you raised the hypothetical of a liquor store owner and the age of being able to buy liquor being changed. But I think another analogy that may be closer is if I'm still a law student and I say, Give me my law license, and then if I graduate from law school and pass the bar, then I'll be a lawyer, and I've already got my license. That's kind of what we're looking at here, it seems to me.

JUDGE RYERSON: Well, the analogy that occurs to me is if you're a law student and you go to a law firm and you say, Would you please hire me as a law clerk until and when and if I get my -- I pass the

bar, and then please hire -- we agree you'll hire me as an associate. But there is a lawful option meanwhile, and maybe that lawful option would go on for a while if you fail the bar three times.

MR. TAYLOR: But in that case, Judge, you are not getting paid for being an associate. You don't get any of the other benefits, which is what really ISP is asking for here. They're asking for a license to be able to operate, and that's not the same as if they said, Come to -- if they came in and said, Well, if we get a license and we get the legal right to store this waste, then we'll apply for a license.

That's kind of what this associate example would be. But they aren't doing that. They're saying, Give us a license now, and then later on, we hope that we will be able to do it legally.

JUDGE TRIKOUROS: As a practical matter, isn't it true that ISP is not going to lift a finger to construct this facility unless they have signed contracts from whoever is the spent nuclear fuel title holder? I believe they went so far as to say that directly at least once or twice in their documentation. So there won't be a facility built here if there aren't signed contracts.

So it's not hypothetical at all. It's

very clear that it will only be built -- now, that's their decision to do that. They could have done it any way they wanted, but I don't think the NRC cares one way or the other. But that is the reality.

MR. TAYLOR: But, I guess, my feeling is that if it's illegal, the NRC can't license it. Even though if theoretically, although we don't think so, it would be safe and environmentally appropriate, if it's illegal, they still can't license it, it doesn't seem to me. I don't see how you can license something that would be illegal.

And we don't know whether or not the nuclear plant owners are even interested in doing this. It seems to me at least if ISP proposes one alternative of the nuclear plant owners taking title, they should at least have something in the documentation from nuclear plant owners that, yes, we would be interested in doing that.

They don't need a signed contract or any firm commitment, just some assurance or some indication from nuclear plant owners that, yes, we'd be interested in doing that. They don't even have that much.

And so, I think, because of the way the application was made here initially, with only DOE and

then adding nuclear plant owners only as an afterthought, after an issue was raised, it seems to me it is just a fig leaf and that the real intent here is for the DOE to take title, and that ISP would use the license if it's issued as leverage to Congress to say, well, look, we've got a license from the NRC, so change the law for us. I think that's probably what's going on.

I also wanted to talk about the decommissioning funding. ISP lists only two sources of funding, the DOE, which I think we all agree is illegal, and reactor owners again. But ISP has provided no plan that I could see in their documentation as to how this would be funded, how it complies at all with 72.30.

In Holtec, at least Holtec had a plan, although we asserted that the numbers didn't add up. At least they had a plan. ISP doesn't even have a plan.

NUREG-1757, volume 3, which talks about decommissioning, lists only specific acceptable funding mechanisms: a trust fund, surety bond, letter of credit, insurance policy, parent guarantee -- a parent company guarantee, self guarantee, external sinking funds which, I believe, is more or less what

Holtec had proposed, a statement of intent from a licensee that's a government entity, special arrangements with a government entity, and standby trust funds.

I don't see any of that in ISP's decommissioning plan. Well, there is no plan. Their proposal.

And then they say they're going to request a waiver from the requirements of 72.30, but they cite no regulation or other authority that would allow that waiver. There is authority in Chapter 72 for a waiver of certain requirements, but I don't believe the conditions for those waivers would be present here, and certainly ISP has not suggested any.

They just make the unsupported statement they're going to ask for a waiver, but there's no indication that they would get that waiver or how it would work. So I think there is a distinction here between the decommissioning funding plan from Holtec and ISP.

JUDGE RYERSON: I'm sorry. Are we talking about the waiver that -- there was a withdrawal of the waiver request. Are we talking about something different?

MR. TAYLOR: I didn't know that they had

withdrawn it. I'm looking at Appendix D in their application, which is their decommissioning proposal, and --

JUDGE RYERSON: There's a subsequent letter, I think, June 3 -- yes. There's a June 3 letter. Mr. Matthews will probably address that.

MR. TAYLOR: Okay. I wasn't aware of that.

JUDGE RYERSON: The request for an exemption has been, I understand, withdrawn.

MR. TAYLOR: But anyway, there's just no real plan presented that would satisfy 72.30. Then I want to -- I talk about geology and groundwater, which again seems to me to be quite site-specific.

First of all, here -- our submission has shown that this site is over the Ogallala Aquifer. The ISP documentation asserts that it is not, but in the maps that we presented in our expert's report, the Ogallala Aquifer would extend down to the site that's being proposed for this -- for the CIS project.

Also, we disagree with the statement in the environmental report about the depth of the groundwater. The evidence we presented in our contention shows that the groundwater is at a much shallower level than indicated in the ER.

The NRC standard review plan, which we cited in our contention, says there's no evidence that cladding of high burnup fuel will remain undamaged during the licensing period. This is relevant, because ISP and, I believe, the Board in the Holtec decision relied to some extent on the allegation that, well, the containers won't leak, so there's no issue as far as groundwater or geology.

But here, as near as I can tell, there's no discussion in the ER or the SAR about high burnup fuel. You know, there's a reference in ER 4.2.6 to a RADTRAN study that does not specifically address high burnup fuel, and furthermore, that talks about transportation issues and not issues at the site once it's being stored.

And I think Judge Trikouros made a very important point in the Holtec hearing that we had, is that irrespective of whether there's a path from the containers to the groundwater for any impact to the groundwater or the containers, the ER is required to make a thorough, accurate review of the site, including geology and groundwater.

And so I think that even beyond the point of whether or not there's a pathway, the ER fails to adequately describe or address the condition of the

geology and the groundwater in this area. And we've shown that, and to the extent there's any disagreement, I think that's a factual disagreement that needs to be fleshed out at a hearing.

Our contention 14 dealt with the safety of storage containers. In this case, the SAR at section 1.1 states that the containers to be stored at the ISP facility are licensed for 20 years, and that the hope is for them to be licensed for an additional 40 years. That 60-year licensing period would be less than the 60- to 100-year life of the facility.

Furthermore, this scenario does not account for the possibility that a permanent repository may never be opened, and the CIS facility would be a de facto permanent facility or a permanent repository.

The container storage rule I don't believe applies here because the container storage rule as I read it and the GEIS that went along with it did not really address specific containers. It was more of a generic analysis, and each case would require a determination of the appropriateness of the containers for storage beyond the licensing period.

ISP, I believe, probably hopes that they'll get licenses beyond the 60-year period they

put in their documentation, but there's certainly no assurance of that, and there's no assurance that this site or this facility would be capable of storing waste beyond that period.

And even so, they say the life of the facility would be 60 to 100 years, so there's absolutely no indication that they plan to license it beyond that stated period that they've put in their documentation.

And we believe -- and I think most of the intervenors believe -- that if this facility and the Holtec facility are licensed, that takes the political pressure off to find a permanent repository, because a permanent repository, as we've seen, is very difficult to site. And there's absolutely no indication that that siting would come anytime soon, if it comes at all.

So we believe that the SAR in this case does not adequately address the safety of the containers beyond the licensing period, and certainly beyond the stated life of the facility.

But to the extent that this is also different than the Holtec case, in Holtec our contention 9 was different in that it was focused on the design and service lives of the Holtec containers,

not the licensing period.

ISP has not described any design or service life with the containers to be used in their facility here, so we don't have anything to go on there. We're just -- all we have is the licensing period and the licensing of the containers.

Transportation issues is the next thing I'd like to address, unless there are questions. In the Holtec case, our contention 4 also dealt with transportation issues, and there was some discussion about the study that we relied on there by Dr. Marvin Resnikoff and Matthew Lamb concerning a train derailment into Baltimore that resulted in a fire and whether that was pertinent to this case or not -- that case, I should say, the Holtec case.

And here, however, we're relying on the study that was done again by Dr. Resnikoff for Yucca Mountain, and although in the Holtec case, this Board criticized us for allegedly not disputing Holtec's reliance on the Yucca Mountain EIS and not countering that EIS as criticism of Dr. Resnikoff's report, that's not an issue here.

In the Yucca Mountain report, what happened was that the DOE, which, of course, had a vested interest in seeing Yucca Mountain go forward --

JUDGE RYERSON: It was the Applicant, as I recall.

MR. TAYLOR: It was the Applicant. You bet. And so they had a vested interest in criticizing Dr. Resnikoff's report. It wasn't exactly an independent, objective criticism of Dr. Resnikoff's report. So that's why -- and we didn't think it was going to be relied on to the extent that it was, and we didn't challenge it.

But in this case --

JUDGE TRIKOUROS: Dr. Resnikoff's analysis, if I remember correctly, used RADTRAN as well as ISP. Correct?

MR. TAYLOR: Yes, yes. But he came up with a different result, and we explain why, or at least we tried to in our contention. In this case, ISP does not rely on the Yucca Mountain EIS but had its own evaluation in ER 4.2.

Our contention 4 in this case set forth Dr. Resnikoff's specific criticisms of that evaluation and challenged the conclusions of that study, so that's something that was not in the Holtec case. And whether or not you agree with Dr. Resnikoff's criticism, at least we put it out there, and it creates a factual issue that I think is appropriate

for a full hearing.

We also had a declaration from Dr. Gordon Thompson in this case that we didn't have in the Holtec case, expressing some concerns about the transportation of the waste. So those are all items that were not present in the Holtec case that are present here.

Contention 2 in this case that criticized the ISP documentation for saying that CIS was safer and more secure than on-site storage. We again cite the container storage rule and the rule of decommission report, both saying that on-site storage is safe indefinitely.

And there was some indication that an ER would not deal with safety, but if you read NUREG-1748, section 6.3.11, which is the NRC guidance for the licensing -- well, for ERs and EISs in waste cases, it says that safety is an issue in terms of public health and safety. So it is appropriate to address that in the ER.

Dr. Thompson in his declaration points out the alleged reasons that ISP lists for attempting to justify this project are wants and not desires -- not -- they're wants or desires and not needs.

And, again, the NRC guidance for ERs

specifically says that the ER has to present needs and not simply a justification for the project.

And the ER here, in setting out what they call their purpose and need, are simply things that are desired but are not needed.

We also noted that on-site storage doesn't mean that nothing is done. We're suggesting that the ER should look at hardened on-site storage, because that would increase the safety of on-site storage, and may be even more safe than the CIS.

So just because we're saying that on-site storage should be better evaluated doesn't mean that on-site storage would be just, you know, putting it in an unsafe container. We're saying you can bulk up that on-site storage to make it safe. And the ER has not adequately looked at the on-site storage.

JUDGE RYERSON: Just to alert you, Mr. Taylor, I think we can give you about ten more minutes.

MR. TAYLOR: Okay.

JUDGE RYERSON: Up to ten minutes.

MR. TAYLOR: And I think we already noted that in this case, it doesn't appear that ISP has adequately addressed the issue of high burnup fuel that we set forth in contention 16.

I would also note finally that the site selection alternative -- or the site selection process for alternatives as we've described in our contention 11 is not adequate. The site selection is not about purpose and need. It's about the range of alternatives.

And here, although ISP claims they've gone through a rigorous site selection procedure, going through several states and looking at various cities and the 15 criteria, they amazingly came up with the perfect site right next to their adjacent -- or their existing low-level site on land already owned by WCS.

So we've explained in detail in our contention why that site selection process was inadequate and should not be allowed to qualify for an adequate review of alternatives. NEPA is clear. The regulations are clear that alternatives are a part of the NEPA process, and without doing that, they have not done a proper job.

If I still have a few minutes left, contention 13 concerns the protected species of lizards. And the -- we've shown how the ER says these species are in the area. One has been sighted on the site, and the other is likely in the area, but there's been no study showing that they've done a proper job

of surveying to see if those species are there, and if they would be impacted.

And, finally, environmental justice, we take issue with the hard and fast four-mile rule or radius that was used. You know, we're not challenging the regulation. That's simply guidance, and the guidance itself says that that four-mile radius is -- well, flexible and only advisory.

And we've shown here how there are -- the adjacent counties are majority minority and that that was not properly taken into consideration, and that, in fact, the area -- the region of interest that is set forth in Appendix A, which is the socioeconomic issues section, is 30 miles. And we have definitely minority populations in the 30-mile region of interest. So that hasn't been adequately addressed.

Thank you.

JUDGE RYERSON: Judge Arnold, do you have any questions at this time?

JUDGE ARNOLD: On that last contention, contention 13, I see actually two claims in the statement of contention. One has to do with an endangered species. The other one is there is no discussion of any of the studies or surveys used to determine if a species are present.

So is part of your claim that that section 3.5.16, description of ecological studies, is inadequate?

MR. TAYLOR: Yes.

JUDGE ARNOLD: Okay.

JUDGE RYERSON: Thank you, Mr. Taylor.

I think what we'll do is take another break till -- a short one, till 11:15. Then we'll hear from ISP's counsel and the NRC staff in response to Mr. Taylor. Then we'll have lunch.

And I think when we take a break, the Board will consider maybe how to handle the issue of standing, the argument on standing that cuts across all of the petitioners. We might do that today or maybe tomorrow, depending on how we're doing.

But let's convene again at 11:15. Thank you.

(Whereupon, a short recess was taken.)

JUDGE RYERSON: All right. We are back on the record.

Before we hear from ISP's counsel in response to Mr. Taylor, the Board has been talking about this issue of standing -- I'll say, the argument of standing that cuts across all petitioners. And I'm pretty sure that we're going to need all of today for

presentations. We'll finish today -- this morning around lunchtime. Then we still have two petitioners to address in the afternoon.

So I'm thinking -- we are thinking that maybe the first thing we do tomorrow is address the standing argument that ISP would like to make that cuts across all petitioners.

Do you have a sense of how long that would be?

MR. LIGHTY: Your Honor, I think it would be five, ten minutes, unless you have specific questions, and then we will certainly be willing to answer those.

JUDGE RYERSON: Okay. I mean, we're not holding you strictly to that. This is kind of outside of what we planned with the June 7 order. I think since it goes to all petitioners, we would hear, if need be, from everybody on the standing issue, but it might be a good idea if overnight, after today's session or at lunch, the petitioners' counsel might agree on someone who takes a lead in response to the argument.

I assume it's a variation of the argument that was presented in their opposition, and Mr. Lodge is standing up, because he wants to say something.

MR. LODGE: No. I have a question, Judge

Ryerson.

JUDGE RYERSON: Yes.

MR. LODGE: Part of my presentation this afternoon, given the fact that a similar group of petitioning intervenors in the Holtec case were denied standing, part of my presentation is going to address in detail our particular case for legal standing here.

I am just asking if I am going to be allowed to proceed this afternoon to do that, or if that gets bundled into what's you're talking about.

JUDGE RYERSON: You may use your 45 minutes as you see fit.

MR. LODGE: Thank you.

JUDGE RYERSON: Again, as I said earlier, we suggested, given the result in Holtec, that you might find it most useful to use that time telling us how this case is different. But it's entirely up to you, however you wish to use your 45 minutes.

And, again, we'll let all the petitioners -- all petitioners have an interest in standing. This is an argument that cuts against the standing of every petitioner, and so we'd let you all speak. I just think it might, from your standpoint, be most effective if you agree upon a lead on that. But we'll deal with that then tomorrow. It doesn't

sound like it's an unduly lengthy argument.

But we'll probably, unless we move very rapidly this afternoon, we'll count on that as our opening for tomorrow, and then we'll go to the phase of the Judges' specific questions, some of which I think are being answered in the course of these presentations, so we may have fewer questions than we otherwise would have had.

All right. So with that, Mr. Matthews, are you responding to Mr. Taylor?

MR. MATTHEWS: Judge Ryerson, the three of us, we have split the contentions by subject matter.

JUDGE RYERSON: Okay.

MR. MATTHEWS: So each of us have some of these that Mr. Taylor --

JUDGE RYERSON: Well, that's fine. I think if you move to the lectern, then you'll be picked up by the court reporter, so that's the best place to do it.

MR. MATTHEWS: We'll do that. Ryan Lighty will go first and discuss the seismicity issue, and then to avoid jumping up and down, he will address the other contentions that he's responsible for, and Mr. Bessette and I will then address the ones that we're responsible for.

JUDGE RYERSON: Right. And I certainly don't want to tell you how to conduct your argument, but I think all the Board members were interested in, I think it is, Sierra Club number 4, whatever deals with the transportation aspect, so I hope someone is dealing with that.

MR. MATTHEWS: We are, Your Honor.

JUDGE RYERSON: Okay. Thank you.

MR. LIGHTY: Thank you, Your Honor. Ryan Lighty for the Applicant. As Mr. Matthews mentioned, I'm going to start off responding regarding Sierra Club contention 6 on earthquake potential. Sierra Club's counsel noted that there was a difference between the pleadings in the two proceedings in that the petition here referenced a University of Texas study.

However, the statement of the contention in the two proceedings is verbatim identical, except for the name of the applicant. And the addition of the UT study does not add anything material to the arguments advanced. It merely stands for the assertion that petroleum recovery activities may cause induced seismicity, and that's a duplication of the Stanford study, although with different geographic areas, but the concept being that the petroleum

recovery may cause induced seismicity.

There's no dispute with the application on that point. The application explicitly recognizes that possibility and analyzes it.

Second, Your Honor, a significant difference between the Holtec proceeding and this is that Sierra Club's arguments on earthquake potential in the Holtec proceeding cited to the analysis that was conducted. Here they simply complain that the SAR and the attachment with the analysis is a SUNSI document, so we're going a step further in their failure to challenge the relevant content of the application, and that is a significant difference between the two proceedings that we think the Board should be aware of.

If you have any questions on Sierra Club 6, I would be happy to answer those. Otherwise, I can move on to --

JUDGE RYERSON: Judge Arnold, any questions at this point?

JUDGE ARNOLD: No.

JUDGE RYERSON: Judge Trikouros?

JUDGE TRIKOUROS: No.

JUDGE RYERSON: Okay. Proceed.

MR. LIGHTY: Turning now to Sierra Club

contention 4 regarding the transportation analysis, again the statement of the contention is identical between the two proceedings but for the name of the applicant.

But in the ISP proceeding, there is a different Lamb and Resnikoff study that was cited in the petition. The title of that study is, Worst case credible nuclear transportation accidents, analysis for urban and rural Nevada.

Now, in the Holtec proceeding, there may have been some question as to whether the report cited was a worst case analysis. Here there can be no doubt. The title of the document itself tells you what it is.

More importantly, this analysis does not challenge the sufficiency of ISP's RADTRAN analysis. This document challenges and criticizes the DOE RADTRAN analysis, and so to lodge arguments against an analysis that's not in this application simply doesn't dispute the application.

The closest that petitioners got to doing so was simply copying and pasting some charts from the Resnikoff analysis and saying, These are lower values. But the ISP -- excuse me. The ISP analysis has lower values. But it does not explain why that makes the

application deficient.

Merely citing to a worst case analysis and saying there's a discrepancy does not identify a genuine dispute with the application. It doesn't explain what that dispute is, why the analysis that was conducted may have been deficient somehow.

JUDGE TRIKOUROS: In -- however, in your analysis, you seem to go to great lengths to show that various other studies agree with you, one of which, I think, was the DOE study that we're talking about. And, therefore, to some extent, then, Dr. Resnikoff's challenge to the DOE RADTRAN study, which got the same basic answers that your RADTRAN study got, has a measure of validity, wouldn't you say?

MR. LIGHTY: Perhaps in an attenuated fashion. I don't believe the ISP application gives significant analysis to the DOE report. It's certainly cited as a reference, and it is noted that ISP's RADTRAN is consistent with the NRC's conclusions in NUREG-2125, in the PFS analysis, in the DOE analysis.

But still we don't have any explanation for why the Lamb and Resnikoff report criticizing the DOE analysis somehow presents a challenge to ISP's analysis, even though ISP's conclusions may be similar

to what all of the other studies have concluded.

JUDGE TRIKOUROS: I also wanted to just point out that for further discussion tomorrow, that the staff only recently identified a bunch of RAIs regarding this subject and, you know, needed a significant amount of additional information so that they could understand the details of the RADTRAN study that ISP conducted.

Therefore, it would be hard for me to understand how Sierra Club could understand the details and present an argument if they weren't available even to the NRC.

MR. LIGHTY: I would first note that the petition doesn't attempt to challenge the information that was provided in the ISP RADTRAN analysis, and to the extent that the new RADTRAN analysis that was recently submitted -- and I believe there was -- that was submitted on June 28 and notification to the Board and all the parties was sent out regarding that.

The new RADTRAN analysis essentially was a regeneration under the TN Americas quality assurance plan, but it didn't reach any different conclusions. The methodology was the same. It was just a rerun of the RADTRAN, and so, you know, to the extent that there may have been some additional information that

was presented there, petitioner didn't seek to challenge the absence of that information in the first instance, and so they didn't identify that as their purported dispute with the allocation.

JUDGE TRIKOUROS: The enclosures that were provided in that, I think you mentioned, June 28 letter, notification letter, there were numerous enclosures apparently. I don't think we saw more than one or two of those, but those were not publicly available?

MR. LIGHTY: I believe that there was a proprietary attachment to the document with some information about the actual calculation, but all of the information was described in the publicly available attachment to the Board notification.

JUDGE TRIKOUROS: You apparently provided RADTRAN input files, pretty much anything you would need to independently verify the calculation. But that was not available to anyone else. I'm asking.

MR. LIGHTY: Yes. I believe that is correct. The actual files are proprietary information, and no petitioner sought to obtain SUNSI authorization to view proprietary information in this proceeding when they had the opportunity to do so.

MR. LIGHTY: If the Board has no other

questions on Sierra Club 4, I'm happy to move on very briefly to Sierra Club contention 11.

JUDGE ARNOLD: I do have a question, and it has to do with the details of the shipping casks being used in the transportation accident analysis. And you may not be able to answer this. But I'm wondering how important the actual structural details of the casks are.

For instance, if you did a detailed finite element analysis of the cask, putting it through the accident transient, the details would be very important. Alternatively, if you just used the design criteria, you know, that the NRC says, these are the things that the cask must survive and the analysis just looks to see that the temperature's under that temperature, the, you know, G forces are within it, then there's no failure, in that type of analysis, the details of the specific cask are not important because it covers all the certified casks.

Which type of analysis are your accident analysis? Do you know?

MR. LIGHTY: Unfortunately, that's not something that I can answer regarding the details of a finite element analysis inputs. You know, I would note that any transportation cask is going to have to

be NRC-approved, according to performance criteria, and so I'm not sure that any difference would be material.

But more importantly, petitioners didn't present any information, any support for an argument that there is a material difference. Any unsupported speculation simply would not be enough for an admissible contention.

JUDGE ARNOLD: Thank you.

JUDGE TRIKOUROS: The -- I got the impression that the assumptions on the loss of shielding transportation accident was sort of nonmechanistic in the sense that basically said, the cask loses a certain amount of shielding, and that was it. It wasn't -- the cask itself didn't seem to me to be analyzed. Can you comment on that?

MR. LIGHTY: That also is not something I'm intimately familiar with. No. I would note that the analysis, however, did use conservative bounding in that all of the canisters that would be received at ISP, stored at ISP, would be welded inert canisters, and for the sake of conservatism, it was assumed that welded inert canister would not be used.

In other words, I think the proper term would be bolted canisters, which have a greater

probability of leaks.

And so the analysis that was is very conservative, very bounding analysis in that regard.

JUDGE TRIKOUROS: We'll pursue this more --

MR. LIGHTY: Sure.

JUDGE TRIKOUROS: -- tomorrow.

MR. LIGHTY: Okay. Very good.

JUDGE TRIKOUROS: Or later today.

MR. LIGHTY: Okay. If there are no further questions on Sierra Club 4, I will move on very briefly to Sierra Club 11. This is the site selection contention.

This was not a specific contention raised in the Holtec proceeding. It is new here. But the bottom line is that the petitioners provide no explanation of how the process used here for site selection circumvents reasonable consideration of alternatives or is somehow less than what the NRC requires in an environmental report.

The petitioners have a laundry list of complaints about the issues that are discussed in the ER, but it doesn't identify any legal deficiency, anywhere the application's somehow deficient as a matter of regulation or law. And so for the reasons

that we discussed in our pleadings, we continue to believe that contention is inadmissible.

And if there are no questions on Sierra Club 11, I will move on to Sierra Club 15 very briefly also. This is the environmental justice contention. The Board in LBP 19-4 considered three environmental justice related contentions from AFES, and the conclusion for those contentions is entirely applicable here.

The bottom line is that Sierra Club has not pointed to any legal requirement for a more in-depth EJ analysis. ISP addressed EJ to the depth recommended by NRC guidance, and petitioners offer nothing to explain why compliance with the guidance in this case is somehow deficient.

They offer what they believe would be their preferred radius for an EJ analysis, but they don't offer any support for why that would demonstrate a genuine dispute with the application. And so the contention is inadmissible on those grounds.

And if there are no questions on that contention, I will turn it over to my colleague Tim Matthews.

MR. MATTHEWS: Thank you, sir. I will start with Sierra Club 1. Sierra Club 1 is its

version of the Nuclear Waste Policy Act --

VOICE: Can you speak louder, please.

MR. MATTHEWS: Thank you. Sierra Club 1 is its rendition of the Beyond Nuclear Nuclear Waste Policy Act contention. Sierra Club in its filing of this contention argued only standing and adopted Beyond Nuclear's pleadings. In that regard, it is no different than Beyond Nuclear. It was not amended as it was in the other CISF proceeding, so all the discussion we had earlier about Beyond Nuclear 1 hold here, and we have not further to address on that specific allegation.

There was a suggestion, though, here today that is somewhat different from the pleadings that went to the timing of ISP's revised application, I think, and suggesting that the Board should read some inference into it and suggest a fig leaf.

ISP's application was submitted after the WCS version of the application had been suspended. The joint venture parties formed Interim Storage Partners, decided on a new business model or an amended business model to incorporate both DOE and private storage, and revised the application and submitted it that way. It's that simple. There's no reason for the Board to draw any untoward inference

from it. It's that on Sierra Club 1.

Sierra Club 9 is similar and more, a little bit. In fact, the staff's original reason for suggesting that Beyond Nuclear and Sierra Club 1 were admissible was that ISP had an exemption request that relied on the Nuclear Waste Policy Act in their view, and therefore, the contention would be admissible.

As the Board noted, the Applicants have withdrawn that exemption request. It's no longer part of the application. I think that was discussed in the questions with respect to Sierra Club 9.

The Board's ruling in the similar decommissioning funding or financial qualification funding in Sierra Club 8 in the other proceeding, the basis is similar. Here the fault of the petitioner is different in that they failed to read the application, and they assert that there is no decommissioning plan, and appear to continue to assert that today, despite it being answered in the briefs.

We point to the section in the application and the attachment entitled, Decommissioning Plan. So we think that answer is fully briefed, and we think the Board's logic in Sierra Club 8 in the other proceeding would apply fundamentally here as well.

There were two other contentions that I

want to address briefly here with you today. I suspect that they're ones that the Board may be interested in discussing further. Did you have a question, Judge?

JUDGE TRIKOUROS: Yes. I just wanted to make sure that I understand the sequence. Originally you were relying upon the DOE entirely for decommissioning funds. Is that correct?

MR. MATTHEWS: The WCS application originally submitted relied exclusively on DOE as the only customer.

JUDGE TRIKOUROS: Okay. And the revision basically took the DOE out of the picture and said that you were going to meet the requirements of 72.13 -- .10.

MR. MATTHEWS: No. Not exactly. The application as originally submitted for financial qualification indicated that ISP would have a contract with DOE as a customer, and it would -- in fact, the license condition was there, that it would have an external sinking fund and a contract with DOE.

It was modeled on the PFS application, so that funds recovered from the customer would be deposited in the external sinking fund, and the surety would make the difference between the balance in the

fund and the decommissioning cost estimate.

When Interim Storage Partners reactivated the application, they amended it to include -- so not to remove DOE, but to include -- let me step back. It also had an alternative by which WCS would use an exemption, based on other Part 70 facilities where DOE would assume the financial obligation for decommissioning the facility, so one of the other listed provisions of 72.30.

Those two provisions were left in, so DOE as a customer with the external sinking fund, or the DOE exemption were left in the application in Rev. 2 when ISP reactivated it. But ISP added a third, and that was that private customers would use that 72.30 external sinking fund combined with surety bonds.

So regardless of who the customer was, when ISP recently, on June 3, removed that exemption request, those two alternatives still exist. Regardless of who the customer is, ISP will recover those funds, deposit them into the external sinking fund and make up delta with a surety bond.

JUDGE TRIKOUROS: And you appropriately modified the license conditions as per --

MR. MATTHEWS: That's correct, Judge Trikouros. We modified that amendment, modified

everywhere the exemption was addressed and removed the exemption request in 1.71.

JUDGE ARNOLD: I do have a simple question. The petitioners have expressed doubts as to whether or not it is credible that utilities owning fuel might be willing to pay you to store their fuel. Let's assume for a moment that they're correct and they have cold feet and they will not allow you to store the fuel, and the DOE just can't by law.

What, in that case, would your decommissioning costs be? I mean, because you've never gotten any fuel.

MR. MATTHEWS: There'd be even no construction, Judge Arnold. It would be similar to the status of the PFS license today. There's a license that exists that hasn't been used.

JUDGE ARNOLD: So if petitioners are 100 percent correct, then there's no problem really.

MR. MATTHEWS: Petitioners assert that there is a problem. They somehow believe that we will have decommissioning expenditures prior to receipt of fuel for storage. It's the opposite that you point out, enshrined in the license conditions, that we won't have the fuel absent the contract, so there will be assurance of decommissioning funding prior to

receipt of any fuel for storage. And that was specifically modeled on the PFS precedent.

JUDGE ARNOLD: Thank you.

MR. MATTHEWS: The remaining two contentions that -- the first that I have is the location of the Ogallala Aquifer seems to be how the petitioners style it and would have the Board think about it. But it is a contention about the CISF adversely affecting groundwater.

And in that regard, it is no different than Sierra Club 15 in the other proceeding. The location of the Ogallala Aquifer or Ogallala -- the OAG Aquifer, the OAG Formation. Whether there's water in that formation and where under the proposed CISF site, we recognize that petitioners disagree with our application, and we recognize that their expert disagrees with the location of what Dr. Bobek believes is the Ogallala Aquifer.

ISP has indicated where the water is, regardless of what label any petitioner wants to put on it. What petitioners have not shown here is the same as what petitioners didn't show in the other proceeding, and that is why dry pelletized fuel inside clad has some risk, whether it be high burnup or other, how somehow that radiological material could

move from outside the clad to outside the welded can, what medium there is to transport it from that dry can onto a pad, and then how it would penetrate that layer of ground to reach whatever water is there.

What ISP has shown in its applications is that there is not water under the pad where it intends to store the fuel. Petitioners have not shown that there is water under the pad. They have shown that there's water in the nearby vicinity, and they would have the Board look at very large scale maps with large dots that would cover many square miles on a question that is very local. So --

JUDGE RYERSON: Yes. If I may interrupt you, Mr. Matthews, it seemed to me, if I recall, you made an argument that because of the lack of a pathway for liquid, that the geology was therefore not material to the outcome of whether there could be liquid contamination.

But isn't -- doesn't ISP have an independent obligation to analyze the geology and the water structure per se, and isn't their argument that they have raised at least, whether you agree with them or not, they have at least raised an issue for a hearing on that, regardless of whether there could be groundwater contamination?

MR. MATTHEWS: So separate from the safety issue of groundwater, the NEPA issue of whether ISP adequately analyzed the --

JUDGE RYERSON: Correct.

MR. MATTHEWS: -- the groundwater status at the site.

JUDGE RYERSON: Correct. Does the contention cover that?

MR. MATTHEWS: We know of no site that has been more studied, more analyzed and more documented with respect to groundwater. The fact that there are petitioners' studies that they have found or commissioned to identify groundwater in one place or another does not somehow suggest that ISP has failed to adequately assess the groundwater WCS, the partner, has failed to assess.

In fact, it has been the subject of extensive review in other proceedings that the petitioners cite they say are still disputed, but don't say where or by whom. And they cite the Texas Water Development Board for being authoritative of where the aquifers are, and even the Board doesn't show the water there.

So, yes, they disagree, but they have not shown how ISP's analysis is somehow inadequate from a

NEPA perspective.

JUDGE RYERSON: Okay.

MR. MATTHEWS: From either a safety or a NEPA perspective. And my last is high burnup fuel, in this proceeding, Sierra Club 16. In the other proceeding, this same issue was spread across several different contentions. I believe they were Sierra Club 20 through 23 in that proceeding, but presented the same issues.

There are opinions about high burnup fuel might react, and cite to DOE and NRC references for concerns about high burnup fuel, but they don't point to deficiency in the application, how the application assessed high burnup fuel.

They say that we haven't, but failed to address those sections of the application that do, as it relates to the facility, and failed to address or seek to go beyond the scope of this licensing proceeding with the facility and get into the licensing of the canisters themselves, the dry storage systems that are subject of separate NRC licensing process.

Those are incorporated by reference in the CISF application. WCS commits, as in the other application, that any high burnup fuel will be canned

inside the canister. And petitioners haven't suggested any reason why that is inadequate.

So the analysis that the Board applied in those contentions 20 through 23 in the other proceeding, that applies equally well here to the reformulated contention 20 here -- I'm sorry -- contention 16.

JUDGE ARNOLD: When you load spent fuel, is there a limit on the decay heat that can be within one specific fuel assembly?

MR. MATTHEWS: ISP won't load spent fuel.

JUDGE ARNOLD: When the -- it's probably in the certification --

MR. MATTHEWS: The certification for each of those dry canister systems that are incorporated by reference into the ISP application would be in chapter 12 of the application for each system. Each of the eight systems are listed there, and those technical specifications and requirements for those canisters apply the same as they do today at the WCS CISF.

So, yes. There are limitations that apply to each of the different designs as to -- and this is where I get out in front of my headlights. It's burn and temperature that they manage with the system.

JUDGE ARNOLD: But I'm thinking, for a

specific canister design that has a limit on the decay heat, the burnup that can be in it, if this canister can take either low burnup or high burnup fuel, do they require that the high burnup fuel that has greater decay heat decayed longer in a spent fuel pool before it's loaded?

MR. MATTHEWS: So, again, I'm not --

JUDGE ARNOLD: I'm just saying, is there one thermal limit that is approved for all fuel, regardless whether it's high or low burnup?

MR. MATTHEWS: I don't believe there's one thermal limit that applies to every dry cask storage system. They each have their own --

JUDGE ARNOLD: For a specific system.

MR. MATTHEWS: Each specific system has its own licensing basis, and --

JUDGE ARNOLD: Okay. You just don't have the --

MR. MATTHEWS: I don't have the --

JUDGE ARNOLD: -- expertise --

MR. MATTHEWS: -- answers for that, but they carry over in the CISF -- so they don't change in this application. They're incorporated by reference, and the site application has a condition that is specific, defining high burnup at 45,000. So if a

canister wasn't loaded -- if it were somehow allowed to be loaded with a higher burnup without canisters and didn't meet the 45 in the ISP license, it wouldn't be acceptable for receipt. Am I answering your question?

JUDGE ARNOLD: No, no. I understand that you don't have the technical expertise to answer what I'm asking.

MR. MATTHEWS: I've proven that. Thank you, Judge Arnold. I'll turn it over to my colleague, Paul Bessette.

JUDGE RYERSON: Thank you, Mr. Matthews.

MR. BESSETTE: Good morning, Your Honor. This is Paul Bessette, and I think I can be fairly quick in our wrap-up on the remaining Sierra Club contentions. And I'm going to start with general categories.

First is Sierra Club's contentions regarding purpose and need of the application. And there's three contentions that generally are somewhat repetitive and overlap, Sierra Club 2, which asserted a lack of support in the ER for comparative safety and security claims and that the application must examine hardened on-site storage; Sierra Club 3, that there's no need for the CISF and that it conflicts with

container storage rule; and Sierra Club 8, that the application is not supported by the Blue Ribbon Commission.

Overall, all three of those contentions are very similar or are identical to the Board's decision in Sierra Club 2 and 3 in Holtec, which addressed the comparative safety of fuel on site to the continuous CISF; Sierra Club 6, which addressed hardened on-site storage; and Sierra Club 7, which addressed the Blue Ribbon Commission. We believe those contentions are identical, and the Board's decision applies to all of those.

Moving along, Sierra Club no-action alternative, Sierra Club 7. Again, very similar. Must discuss safer on-site storage of hardened on-site storage, and the fact that fuel can be stored safely and indefinitely on site. It must discuss the costs and benefits.

The Board decision in Holtec 6 applies equally here, and I would note that that was not appealed in Holtec, nor was Sierra Club 2, 3, or 8. The Board's decision applies here. The cost benefit is discussed in the ER, particularly in our application section 7.2 and 7.3. The no-action alternative is maintaining the status quo. There's no

need to evaluate alternate means of storing fuel at a licensee's site.

The failure to discuss how HOSS is relevant to the no-action alternative, it's not licensed or implemented at any site, and the Continued Storage Rule does not include any comparative safety analysis of on-site to CISF storage. So, again, Sierra Club 7, Board decision applies here as well.

There was another category of contentions on the duration of the license, the de facto repository, and for Sierra Club, that was Sierra Club contention 5. It said ER must address the purpose, need and environmental impacts if a permanent repository is not found and the CISF become the de facto permanent repository.

The Board decision in Sierra Club 5 and also in Joint Petitioners 10 applies equally here, and none of those were applied. Like the Holtec application, the CISF -- the ISP application is only for 40 years. Possible renewals are irrelevant. They will be separate licensing actions.

The CISF continuous storage rule includes the impact determinations from the continued storage GEIS, which considers the environmental impacts beyond the terminal license. That's a challenge to the

Continued Storage Rule which is barred in this proceeding without a waiver, which has not been applied.

With regard to the container licensing period, Sierra Club 14, which was discussed by Mr. Taylor, says they have a 20-year licensing period, and by the time that they get to the CISF, many of them will already have been in service for many years. It said we must evaluate the environmental impacts of the containers beyond the 20-year period. They also assert as part of that that it is a de facto repository.

The Board's decision in Holtec, Sierra Club 9, applies equally here for the same reasons. And the Continued Storage Rule -- per the Continued Storage Rule, we are not required to consider the environmental impacts beyond 40 years. And it's not relevant to this proceeding that extensions to the cask life or the CISF are possible, as that is governed by the Continued Storage Rule.

There is one different contention here, Sierra Club 12. They assert the actual minimum cooling time for a boiling water reactor fuel in new homes MP-187 which is one of the casks in the ISP application is greater than calculated through TN or

Orano. Thus, the cladding will exceed the allowable limits.

That is actually just a error in the pleading. That cask, which is cited in our application, does not allow storage of boiling water reactor fuel, so that is a different contention, but it's just a factual error. In addition, any challenge -- even if it were allowed, that would be a challenge to the CFC for that cask and beyond the scope of this proceeding.

Finally, Sierra Club 13, which you discussed earlier by Mr. Taylor, is a challenge to the discussion of endangered species, particularly the Texas horned lizard and the dune sagebrush lizard. They say they have or may be present on the site, and there is no discussion of any studies or surveys to determine if the species are present or impact the project.

I would note that the entirety of that contention is one-and-a-half pages of double-spaced pages, and they really on cite two statements in it. We believe the Board decision in Sierra Club 12 applies equally here, although that was restricted to the dune lizard.

Differently in that case, they provided

maps and surveys, trying to show the presence of the dune lizard on the Holtec site. Here they provided no maps, no data, no citations to anything wrong in the multiple sections of Section 3.5 or 4.5 of the environmental report, so we believe the Board's decision that it was unsupported applies equally here.

JUDGE RYERSON: Mr. Bessette --

MR. BESSETTE: Yes.

JUDGE RYERSON: -- if I recall, part of petitioner's argument in contention 13 was that ISP did cite authorities, studies that were not cited in a way that anyone could find. Didn't they make that argument?

MR. BESSETTE: They said the reports were not available, but the reports are actually -- the results of the reports and the findings of the reports are thoroughly discussed throughout the application in Section 3.5 and 4.5. So although they said they couldn't put their hands on the reports, they never challenged the multiple sections of the ER that actually the results of all of those studies.

JUDGE RYERSON: Okay. But the application discusses the results of those studies, but the studies themselves were privately done, and they're not available. Is that basically the state of

affairs?

MR. BESSETTE: They were not included as reference in the application. Yes, Your Honor.

JUDGE RYERSON: Okay.

MR. BESSETTE: But if you look at ER Section 3.5, ER 4.5.4, ER 4.5.10, they are thoroughly summarized, and petitioners haven't challenged any of that information. They brought forth no public data, no studies, nothing to challenge that information.

JUDGE RYERSON: Thank you.

JUDGE TRIKOUROS: And I think that is something we want to just discuss when we get to questions, I guess, in the morning or whenever we get there. But that's not the end of it, at least not for me anyway.

MR. BESSETTE: Yes, Your Honor. We'll be available to discuss that in more detail. And that's the summary of the remaining Sierra Club contentions, Your Honors.

JUDGE RYERSON: Anything further, Judge Arnold?

JUDGE ARNOLD: No.

JUDGE RYERSON: Judge Trikouros?

JUDGE TRIKOUROS: Not now.

JUDGE RYERSON: Thank you, Mr. Bessette.

MR. BESSETTE: Thank you.

JUDGE RYERSON: And the NRC staff? And I know at the start, I have one question for you about Sierra Club, I think it would be, 9. Originally the NRC staff thought -- took a position that Sierra Club 9 was admissible in part -- oh, you're switching personnel out there. I must have struck a nerve perhaps.

Initially the staff's position was that, yes, Sierra Club 9 is admissible in part, but I was wondering, in light of the withdrawal of the exemption request by ISP, whether you have changed your position.

MS. KIRKWOOD: Yes, Your Honor. Yes. The exemption request was withdrawn, and so the challenge to that is now moot, and Sierra Club did not amend their contention.

JUDGE RYERSON: So in the staff's view, Sierra Club contention 9 is now not admissible at all.

MS. KIRKWOOD: Correct.

JUDGE RYERSON: Thank you.

MR. GILLESPIE: Your Honor, Joe Gillespie with the NRC staff. With the exception of your question just now and contentions 4 and 16, the staff --

VOICE: We can't hear.

MR. GILLESPIE: The staff has nothing further to add beyond its initial answer, which we believe represents our positions. However, with respect to contention 4, the staff originally stated that it was admissible in part. However, based on the additional information provided in the June 28 RAI response, the staff believes this issue has been superseded, as it's unclear what the precise dispute that the petitioner has with the updated application.

Again, also a statement was made with respect to contention 16, high burnup fuel. There was a statement made that the issues related -- at least there was a potential that all the designs of the facility have an approved COC and are out of scope under 72.46(e). However, that said, there is one design of the facility -- I just wanted to point this out -- that is not -- does not have an approved COC under 72.14 with respect to storage, and --

VOICE: We can't understand you. You need to --

JUDGE RYERSON: I think if you move the mike slightly more directly --

MR. GILLESPIE: Is that better?

VOICE: Oh, yes.

MR. GILLESPIE: That said, regardless of whether it is out of scope of the hearing with respect to that one design, the lack of specificity with the dispute with the application and the lack of dispute with the provisions in the application related to high burnup fuel are still dispositive of this issue.

JUDGE RYERSON: So you're saying that is -- we're talking about 16 now. The staff's view is that is not admissible.

MR. GILLESPIE: Yes, Your Honor.

JUDGE RYERSON: But your position has changed on Sierra Club contention 4. Correct?

MR. GILLESPIE: Yes, Your Honor. As it stands today, this --

JUDGE RYERSON: Okay. We're here today. So you have changed your position. You urged -- had urged that Sierra Club 4 should be admitted in part, and as we stand here or sit here today, your position -- the NRC staff's position is that Sierra Club 4 should not be admitted.

MR. GILLESPIE: Yes, Your Honor. Based on the application as it stands today, because it's unclear that we've -- the tables have changed such that it's unclear exactly what particular section is being disputed in the contention as originally

written.

JUDGE RYERSON: Okay. Is there any contention -- is there any Sierra Club contention the NRC staff asserts is -- currently is admissible?

MR. GILLESPIE: No, Your Honor.

JUDGE RYERSON: Okay. Thank you. That's it? Thank you, Mr. Gillespie.

MR. GILLESPIE: Thank you so much.

JUDGE TRIKOUROS: I have --

JUDGE RYERSON: Oh, I'm sorry. I keep cutting off my colleagues here who have better questions than I have.

JUDGE TRIKOUROS: The original basis for the staff recommending this admission of contention 4 in part was, I thought, that there was a rather large discrepancy between the Dr. Resnikoff analysis and the analysis in the ER.

MR. GILLESPIE: Yes, Your Honor.

JUDGE TRIKOUROS: All right. Now the -- in response to an RAI, the transportation radiological analysis was redone. From what I can see is that it was done over again the same way but in accordance with a quality assurance program that wasn't in place in the first analysis.

But Dr. Resnikoff's study hasn't changed

at all. It's still there, just as it was. The results of the new analysis in the ER are no different than the first analysis. So what is it that had made you change your mind?

MR. GILLESPIE: Your Honor, specifically there was a table in the original application that was referenced by --

VOICE: Can't hear you.

MR. GILLESPIE: There was a table in the original application that was referenced by the petitioner that identified maximum dose for an individual nearby and these different consequences.

JUDGE TRIKOUROS: Table 4-2.9, I think you're talking about.

MR. GILLESPIE: Yes. Yes, Your Honor.

JUDGE TRIKOUROS: Yes.

MR. GILLESPIE: And I believe that's been -- there's most clearly links to table 4-2.11 now where it links a maximally exposed individual to different levels of losses of shielding.

And in this case, it's unclear exactly how that original dispute with that one number correlates to the table now, because there's information on different levels of shielding and what that would entail. And there was no discussion of exactly

what level of shielding was lost in the original study.

JUDGE TRIKOUROS: So the Dr. Resnikoff study is no basis at all in --

MR. GILLESPIE: I'm not sure the staff would go that far. We haven't made a determination at this stage as to what a reasonable value for these individuals are at this stage.

JUDGE TRIKOUROS: Say that again. I'm sorry.

MR. GILLESPIE: At this stage we have not made a determination as to what exactly the consequences of a transportation accident might be as part of the RAI. It's under more review at this time.

JUDGE TRIKOUROS: Right. In fact, you asked for just the very piece of information you could ask for to independently verify it, and it hasn't been done yet. So I was just curious. But at this point, you've made the decision to -- that it's not admissible any longer.

MR. GILLESPIE: Your Honor, it's not admissible because the table that they disputed has changed so significantly that we're not clear what the dispute is at this stage. Instead of having a six-value table, now there's a 50-value table, and it's

just not clear to us.

JUDGE RYERSON: Are you suggesting, Mr. Gillespie, you're going to come back to the Board and say, Surprise, this is now an admissible contention? I'm confused as to what you think the process is here.

MR. GILLESPIE: Well, the issue has -- at this stage, I mean, for an admissible contention, it has to provide a dispute with the application and point to specific sections of the application. Our position is that with respect to the original application and that one -- it is admissible in part with respect to that issue. But with respect to the application as it stands today, there's no clear dispute with it, and as a result, it would be inadmissible as it stands today.

JUDGE RYERSON: Okay. But my question was: As you -- as the staff continues its work, is there a possibility you're going to change your mind?

MR. GILLESPIE: No, Your Honor.

JUDGE RYERSON: Okay. Thank you. Any other questions, gentlemen, at this -- we may get back to this issue tomorrow.

MR. GILLESPIE: Understood.

JUDGE RYERSON: Thank you, Mr. Gillespie.

All right. We're going to take a lunch

break, and we will resume -- we will try to resume promptly at 1:45. Thank you.

(Whereupon, at 12:15 p.m,. the oral arguments in the above-entitled matter were recessed, to reconvene at 1:45 p.m., this same day, Wednesday, July 10, 2019.)

A F T E R N O O N S E S S I O N

(1:45 p.m.)

JUDGE RYERSON: Well, we are back on the record, and I believe it is Mr. Lodge's turn. And I should say before you begin, we were talking about the standing issue, and you mentioned that you might want to deal with that quite a bit. You have a number of different clients who have different standing positions. So feel free to say whatever you want, but on the generic issue of -- the generic argument, if you will, we will address that tomorrow. You can address it now as well. That's up to you, but we will address that tomorrow.

MR. LODGE: I'm fine. Can you hear me?

JUDGE RYERSON: It really matters whether you turn right into that microphone and get close to it.

MR. LODGE: Okay. Thank you. May it please the panel and opposing counsel, other intervenors, the Joint Petitioners have a number of things to talk about today. However, I do feel compelled to mention that we feel, my clients, that is, feel that this is being conducted sort of as a show-cause why contentions related to WCS should not be dismissed if they are not sufficiently

differentiated from similar contentions in Holtec. And that isn't how it works.

The burden for admission of a contention isn't on how it creates an issue of fact with the Holtec application, but how it does so with the WCS application. As the Board realizes, you're required to arrive at an independent conclusion as to each distinct license application.

What troubles me is the distinct possibility that you will be put in the situation where you might have to overrule, in effect, the similar holdings in Holtec and will constrain yourselves from doing that so as to not see intervenors raise those in the appeal of the Holtec license case. I'm very troubled by the appearance of the posture of the licensing board at this point.

JUDGE RYERSON: I must say, you know, you, in effect, raised that argument early on with the motion for recusal which was denied and affirmed by the Commission. So, I mean, we're aware of that position, but frankly, boards and courts all the time consider similar cases, and they just have to differentiate them.

And I will say again what I said earlier. Our intent in structuring the argument the way we did,

giving you this opportunity in addition to responding to our questions, this opportunity to differentiate the cases, is solely for your benefit. I mean, you don't have to do that. You could talk to us about something else for 45 minutes.

But we thought it might be constructive to do it that way, but you don't have to do it that way. That's up to you.

MR. LODGE: Well, I thank you for that. We took the Board's order of June 7 as a clear suggestion as to what the Board wants to hear about, and so I'm going to turn to that matter of responding to the June 7 priorities, but I want it clear that the Joint Petitioners are not waiving their objections by doing that.

JUDGE RYERSON: Understood.

MR. LODGE: Thank you. So the first issue I'm going to talk about is our contention 4, which is analogous to contention number 3 in Holtec. That pertains to low-level radioactive waste volumes which we believe are grossly ignored, understated or completely unmentioned in the application by WCS.

The circumstance that we see are that there are two major streams of potentially low-level radioactive waste. Now, I'm aware that the GEIS

divides the notices that there may be something on the order of, I believe, 639 cubic yards of low-level radioactive waste that generically may be expected to be generated by the CISF.

But the numbers are staggering the other direction. For instance, there are going to be eight concrete pads. I did my own political science major simplistic mathematical calculations as to their dimensions and came up with the fact that probably gross amount of about 104,000 cubic meters of concrete will ultimately be involved in the build-out of the pads.

Now, I realize that not 100 percent of this will be irradiated perhaps. That gets me to another problem, though. That is that there's no disclosure in the application nor discussion of low-level radioactive waste irradiation potential, and while, as I recall in Holtec, basically the burden was put on the intervenors to scientifically show or suggest that this phenomenon would even take place. I think that's a ridiculous and legally misplaced obligation.

It is the burden of the Applicant to disclose and discuss its calculations as to what level of irradiated concrete might be generated. Now, I

also sat here this morning and I'm figuring this room is about 45 feet side. The ceiling's about 12 feet tall, and 600 cubic yards or 640 cubic yards is going to run out maybe 30 feet. So half this room is all the low-level radioactive waste that is anticipated in the GEIS to be generated after perhaps a hundred years and thousands of tons of SNF storage.

104,000 meters, cubic meters, or pick a fraction, 80 percent of that, 60 percent of that if irradiated would mean more than a hundred times the volume I just described. It'd be 50 times the size of this room in terms of the volume of concrete irradiated low-level radioactive waste.

The numbers are staggeringly at odds. There's a considerable issue of difference between our position and what is stated in the application. But wait. Don't answer yet, because there is the additional completely unmentioned, undiscussed huge problem, the huge what we'll call the zombie in the living room of the TADs, the transportation, aging and disposal canister problem.

In approximately 2006, Department of Energy announces to the world that they are going to insist that there be a standardized canister used for deep repository storage, and for efficiency's sake,

that they'll have to come up with a standard design, but upstream of the repository is when the radioactive waste has to be loaded into the canisters.

But what's happened in the interceding dozen or so years is that the radioactive waste is getting loaded into a bunch of different canisters, most of which aren't even fit for transport usage at this time, so they are rapidly becoming LLRW in their own right. But they're sitting at reactor sites.

The problem is when does the material get reloaded dangerously into transport canisters. Does it happen at the reactor sites, when you have a dozen sites that are closed and have no dry transfer or other storage -- DTS or other capability, or does it happen at WCS, which is saying, We are not planning on having a DTS system for the first century.

There is also the question of what happens if that occurs at DTS. You then are generating untold volumes of metallic canisters that undoubtedly will be irradiated. I realize that part of the mitigation could be some sort of remediation and possible reuse of the concrete or the metallurgical steel, but these are huge quantities of low-level radioactive waste. That latter is not mentioned anywhere in the application. It's not discussed. It's not a problem

apparently, even though it is a major, major issue.

So there is this entire problem of low-level radioactive waste that is at -- considerably controverted, let's say, by the prospects. Again, I repeat. I don't believe it is the burden of intervenors to have to prove beyond a reasonable doubt that there will be a ton more than is projected in the GEIS. I believe that the environmental and health and safety aspects, the AEA and NEPA problems that this posers, do have to be disclosed, and it isn't.

Now, we turn to contention 10, which is also number 10 in Holtec. It's the matter of operation of the facility beyond 120 years. There is considerable evidence suggesting and, in fact, growing evidence suggesting that WCS may operate beyond that, I guess, presumed design basis.

As recently as late March or early April this year, former Texas governor, now Department of Energy Secretary Rick Perry indicated to a congressional committee with considerable alacrity that it was anticipated and more or less something he was not uncomfortable with that there's a distinct possibility that the operators of WCS and Holtec would possibly at some future point just walk away, and these two facilities become de facto permanent sites

for disposal of spent nuclear fuel.

That's a kind of a stunning revelation, notwithstanding the fact that -- I guess it's simply surprising, since the promise, the pledge, the marketing being peddled to the public says something quite different, that it's interim, that we'll deal with this. This is only to buy a little bit more time.

And as Ms. Curran indicated this morning, the NWPA policy as it exists on the books definitely ties interim storage to the fate of a real repository. So, again, this is a very, very serious problem. There are indications in the record that we provided in our petition, which, of course, was filed well before Secretary Perry's comments, that even Holtec had admitted the possibility that a facility should expect to operate for perhaps 300 years.

But there are other problems. There's a swap-out of the canisters, no matter if they're TADs or other types of storage canisters. There is the growing problem of accidents, of leakage, of contamination, and no DTS system occurring in that first hundred years.

The problem is that this is an evolving plan. It's a moving target. It is not nailed down to

paper. There are changes that are being made in the plan even as we speak. It's a very troubling situation. That is a contention that differs from the Holtec one insofar as the fact that Secretary Perry was talking with a certain degree of knowing and personal experience as governor of the WCS facility being one that could be walked away from.

Moving on to contention WCS -- our contention WCS case number 12, which was number 4 in Holtec. We contend that the GEIS simply does not apply here, because of the fact that there are so many design differences so far between WCS and the theoretical facility described in the generic environmental impact statement.

The GEIS, as I understand it, was more or less taken from the model of private fuel storage earlier this century. The WCS design doesn't employ a spent fuel pool or other -- and I'm quoting -- other bare fuel handling capability. The cask handling building is designed to handle canisterized material and does not have the capability to handle bare fuel.

A recovery method for the unlikely loss of confinement event is independent of any bare fuel handling facilities. Additionally, the WCS CISF does not have a spent nuclear fuel pool or any associated

waste generated as a result of pool operations or pool maintenance.

The WCS emergency response plan does not include arrangements and procedures for omissions mitigation such as reduction -- that is to say, reduction of emissions to the surrounding environment of radiation or radioactive material from spent nuclear fuel as a result of damage to SNF assemblies or containers.

So we have another very large set of distinctions that we believe mean that the WCS proposal has to be treated as less -- as not a generic proposal with the insularity of these critical distinctions unresolved issues.

Turning to our contention 13, which was comparable to -- roughly comparable to number 6 in the Holtec case, reprocessing. There's been -- there have been and are continuing to be new developments in reprocessing. This panel sitting as the Holtec Judges ruled that the reprocessing contention was inadmissible because there isn't a hard enough -- hardened enough plan or intention that we were able to find and put into the record.

We believe that, number one, legally speaking, we're not required to show a hardened

printed completed application or plan. We believe that there are very considerable pieces of evidence from a variety of sources as to the intentions of several of the parties and several of the moving parts of both Holtec and WCS.

There have been a number of pronouncements widely publicized, nationally, as it were, by Holtec officials and ELEA officials of -- pardon me -- not Holtec officials, but ELEA, the Eddy-Lea Environmental Alliance, which is the New Mexico sponsor, of course, of the Holtec facility site.

They would love to see and believe for a variety of economic reasons that New Mexico would be a fine site for a plutonium reprocessing type of facility. In Texas, his name comes up again. Former Texas Governor Rick Perry, now Secretary of Energy, in 2014 a report from his Texas Council on Environmental Quality was issued that said reprocessing is a fine idea; the assets can be easily put in place. There needs to be some type of arrangement made for this sort of reclamation of plutonium.

And the sponsor of the WCS proposal is Orano. Orano is a surviving entity, I guess, of AREVA. AREVA has a demonstrated history of being perhaps the largest corporate plutonium reprocessing

company in the world, was a large promoter of GNEP, the Global Nuclear Energy Partnership, in the early part of this century, about ten or eleven years ago, which was an initiative that went nowhere ultimately but has not been forgotten nor apparently abandoned.

Moreover, under Secretary of Energy Rick Perry, last fall the DOE issued notice in the Federal Register, asking for comments. It wasn't a rulemaking, but it was sort of an interesting inquiry, asking for comments on what -- whether there was any strong feeling about deregulating the waste generated from nuclear reprocessing down to the level of low-level radioactive waste, so they would not have to be as expensively isolated and contained as high-level nuclear waste.

I don't know what the status of that inquiry is, but it happened on the watch of former Governor Perry, who is a -- apparently a reprocessing booster, as we know.

So beyond that, in the congressional hearings in both houses just in the past three or four weeks, discussing the Nuclear Waste Policy Act as amended by 2019 proposals, the Nuclear Energy Institute CEO has been -- or other officers have been testifying before congressional committees about the

desirability of reopening the reprocessing can of worms via statutory changes.

And there's a history of statutory changes. Back in the early part of this century, approximately 2004, waste incident to reprocessing statutorily became low-level radioactive waste for a couple of sites. There has been at least one other legislative attempt to expand it from, I believe it was, Savannah Research site and another one, but to expand it to include now Hanford and West Valley.

So there was considerable legislative -- there's some success in making that kind of change, apparently relatively easily. And there's contemporary discussion going on about nuclear reprocessing in Congress. We believe you don't need a hardened plan. We believe that the installation of a CISF in West Texas would enable and facilitate reprocessing. It is the missing ingredient, in fact, that would ultimately gel the rest of a plan.

We believe that NEPA requires cumulative impacts analysis of this strong possibility, that a NEPA coverage of this proposal absolutely needs to include serious identification and analysis of reprocessing as an alternative.

Now, I'd like to switch -- I'd like to

move the microphone, if I may, for a few minutes and talk about standing. Is this thing still working?

On behalf of seven different groups and an individual, we submitted a couple of dozen declarations in support of our petition to intervene in this. I want to talk about approximately ten of them. And I'm going to be responding to the critique of the Nuclear Regulatory Commission staff in their opposition to the Joint Petitioners having any recognizable standing.

JUDGE RYERSON: And if I can just interrupt here for a moment --

MR. LODGE: I'm sorry.

JUDGE RYERSON: -- Mr. Lodge. These are all part of your petition. Am I correct?

MR. LODGE: Well, they're either referred to in our petition or they are lifted from -- they're within the discussion of rail transportation within the application.

JUDGE RYERSON: Okay. I mean, these are not new documents, in other words.

MR. LODGE: No, no, no.

JUDGE RYERSON: Okay.

MR. LODGE: And let me sort of --

JUDGE RYERSON: I'm sorry. I said

initially your petition. But you said some are from the application itself.

MR. LODGE: They're all from the environmental report.

JUDGE RYERSON: Okay. All right.

MR. LODGE: But first I want to talk about what the declaration said. The NRC sort of derided the declarations as being templated and essentially not reflecting sufficient proximity or danger, as it were, to the transportation routes. These all -- all of the petitioners have manifested some serious concerns about transportation.

The petitioners -- pardon me -- the declarants identified routine radioactive emissions as something that they were concerned about, as well as nonroutine. And in our petition, we discuss the standard for Yucca Mountain that was referenced for purposes of the zone of influence, I believe is the name, or pardon me, the region of influence, the ROI, as being 50 miles for serious accidents, and approximately 800 meters either side of a transportation route for routine radioactive emissions.

The problem that we have identified is that apparently it would be helpful to illustrate on

maps the principal means of transportation that is going to be used for the radioactive waste.

So obviously this is a national map. This appears in the application -- pardon me -- in the environmental report WCS submitted. The circle -- let's see if I can point to things. It's not cooperating.

The circle that you see in the lower left-hand side is the region where WCS would be located, and as you can also see, there's kind of a funneling effect. The vast majority of the radioactive -- the spent nuclear fuel is going to come from eastern reactors. There is some that will come mainly down the West Coast and across Arizona.

But there's a funneling effect that occurs. The waste will come across from New England, from the Central States, as it were, the Piedmont, I guess, and ultimately from the Southeast, will generally head west through major rail corridor areas. As you can see, by the time things get to Dallas, the -- we're down to only a couple of major railroad routes from the East.

So there's a funneling effect. If there are as many as 80,000 trips, 30,000 of which are bound for WCS, we're talking certainly about three-quarters

or more of those transport trips coming from the East and an awful lot of them coming from the Northeast and also in the Southeast, so just to give the Board that idea as to what the national map looks like.

MR. MATTHEWS: I'm sorry to interrupt.

MR. LODGE: Yes.

MR. MATTHEWS: May I ask, for the benefit of the record, what either page or figure number --

MR. LODGE: Sure.

MR. MATTHEWS: -- that is from the application, just so those reading the transcript know what we're all looking at.

MR. LODGE: Yes. Thank you. See that Figure 2-2-4. I believe it's -- it may be page 2 -- I think I turned it on its side. Page 2-71, I think, from the first ER.

JUDGE RYERSON: There's a date on there. I don't know if that's helpful.

MR. LODGE: Yes. 11/18/16. Good. Thank you. All right.

Then there is this, and we'll identify it. Figure 2-6-1. That's page 2-78 from revision 2 of the ER. And I just want to point out a couple of facets here. One of them is that my Citizens Environmental Coalition group from Upstate New York has posited

declarations that indicate geographical proximity to that blue route, that rail route that's identified, and that the Nuclear Energy Information Service declarants are in Chicago, which is clearly traversed by that same route.

As you can see again, there's about a approximately, roughly 50-mile stretch of rail that goes up to and a little bit past WCS. Also there's an obvious trunk route. I believe that's from the San Onofre, but probably is a share of the trunk route that would come down from maybe the Trojan plant as well as Rancho Seco and Diablo Canyon and Mesa Verde. I don't know.

Also, there's this interesting phenomenon, and this all assumes, of course, that Yucca Mountain is the repository site, but there's kind of a double whammy of transport here. Initially the waste would go to WCS for some period of time, then backtrack -- and this would be duplicative of a route probably traversed by many thousands of canisters, but up into Oklahoma and near to Kansas. You would have duplication of the route, and then an entirely new route taken out to Nevada.

So there would be -- you're moving the waste twice, and you're moving it, if Yucca is the

ultimate goal, you're moving it quite far. So -- and this, of course, this route is going to be the same for every storage canister that finds its way to WCS.

Finally I'd like to show you more of a localized regional view of the rail system in Texas. There's only one -- once you get off the main east-west line -- and incidentally, this east-west line goes through El Paso very clearly.

But once you get off of this route and turn north, essentially 100 percent of the spent nuclear fuel that's being delivered to WCS is going to travel this route, the blue line, all the way up to WCS. And it's all going to go through the small towns nearby.

It's -- a lot of it is going to go past -- well, I'll start naming names in a minute, but the circumstance that I want to point out is that the funnel ultimately funnels everything down to this route, and if we can demonstrate that -- what? -- 30,000 separate trips are likely to be made on that particular rail line and that there are people living, recreating, working in proximity to it, we should -- our petitioners should be accorded some standing.

Up in Eunice, New Mexico, which is about four or five miles from the WCS, one of the declarants

for the SEED coalition is Brigitte Gardner-Aguilar, who essentially lives near, within perhaps a couple of blocks, of one or two Sierra Club declarants.

The NRC has recommended standing be granted to the Sierra Club but when we have demonstrated evidence at more than adequate evidence of Ms. Gardner-Aguilar's presence in the same zone, if you will, the NRC staff opposes.

JUDGE RYERSON: Excuse me. In the staff's defense, did you mention that in your pleadings, or did they have to ascertain that solely from knowing where Eunice is and looking at the declaration?

MR. LODGE: I would have expected the NRC staff to read the declaration --

JUDGE RYERSON: I understand. My question was whether you brought it to their attention.

MR. LODGE: In rebuttal, yes.

JUDGE RYERSON: In -- I know in rebuttal, but that was after they filed. We will get to asking them whether they've changed their mind on that. Thank you.

MR. LODGE: Very good. Thank you. We also have SEED member Elizabeth Padilla who lives in Andrews, which is about 37 miles from the WCS site -- it's the county seat in the same county as WCS -- and

who attests to frequently traveling, often with family members, directly past and adjacent to WCS, ultimately down to El Paso, and I believe she mentions that she crosses the rail line there at Monahans in route to El Paso. Monahans is the intersection of the yellow and blue.

Patricia Mona Golden, who is another SEED declarant, lives a little bit west or to the left of the blue line in Van Horn, Texas, which is between Monahans and El Paso. And as I indicated, that appears to be likely a prime route for spent nuclear fuel moved from western power plants. So it is very likely that hundreds of shipments will pass by her town.

She lives a block from the rail line and works a hundred feet from the rail line, also in Van Horn. And I would incidentally like to point out that with routine emissions -- I realize that there's a lot of discussion about how close can you stand and how dangerous can it get. The thing is that there's a direct relationship. The farther you are from the canister, the lower the radiation.

The DOE apparently believes that out to about 800 yards, that there can be detectable radiation levels from a spent nuclear fuel or a high-

level radioactive waste canister, and any amount of radioactive exposure that is involuntary can have both medically and scientifically have implications. But it also is something to which the general public should not be exposed.

JUDGE RYERSON: A question and also just to alert you, you have about ten minutes, Mr. Lodge.

MR. LODGE: Yes. Very good. Thank you.

JUDGE RYERSON: But what -- to what level of assurance do we have that these transportations would, in fact, be used? I mean, this is a -- would be perhaps ultimately a 40,000 metric ton facility. That is far less than the current amount of spent nuclear fuel, and so presumably it's not taking all of the nation's nuclear fuel. How do we even know that there would be any fuel from the West going to this facility?

MR. LODGE: If -- this gets into the thing that troubles me the most about the controversy over taking title and DOE involvement. If DOE is involved, DOE is the aggregator. They are the customer of WCS or Holtec. And if they are aggregating the waste, then they're picking the routes.

But I, first of all, would observe that -- I don't know if I can bring a map up again. The last

map I showed you, the 50 or -- that. There's 100 percent certainty that that blue line is going to be -- it's going to see possibly tens of thousands of shipments, 100 percent, if the WCS business model reaches that which is not -- attains the success that is not statutorily allowed right now.

So how can I predict it? I can predict that stretch of it with very high confidence. I can also suggest that WCS is proposing 40,000 metric tons, which represents roughly 40 percent of the current inventory of spent nuclear fuel.

And if they are successful in lining up customers, whether it's one or many separate private utilities, they are going to undoubtedly be using the northern route that I showed you in the map from San Onofre.

They undoubtedly -- assuming that they are going to get customers from the northeastern corridor -- I think that the problem here is that this is an unprecedented, absolutely globally unprecedented transportation scheme, that it has not been well thought out even close, that it is not something that legitimately can be kicked down the road eight or ten years until the eve of when the shipments begin because of the vast amount of emergency coordination

and understanding and communication, and for that matter, consent of communities through which the waste is going to be transported.

I think that there are many unworked-out problems that the Applicant is able to hide from by saying, Oh, well, nothing's concrete, pardon the pun. Nothing is set to paper. Nothing is firm yet. I think what is firm is that there is a very high probability that most of the major rail trunk lines will be involved, and they will not be involved a couple of times. They'll be involved hundreds of times.

I want to show you another one. I want to talk about Michigan. I want to talk about the Fermi II Nuclear Power Plant, which is roughly halfway between -- it's on the green or bluish line between Detroit and -- you can't really see it very well, but Toledo at the Ohio border. Monroe is about roughly -- the Fermi plant's about 20 miles north of the state line.

There's only one rail route. There's one rail spur that goes into the Fermi installation. It comes out, and the only way, the only direction in which SNF will be transported is north through heavily urban, downtown area Detroit, on out, as you can see

with the -- sort of the tan rail line, on out to western Michigan and on down through the Chicago region.

I have three declarations from people living six miles or less from Fermi II who all attest there's only one rail line in and out, and where it goes. Two of those three declarants are within about 2.5 miles of the Fermi plant.

It is very clear to me that there's a 100 percent probability, if the stuff goes by rail, that it's going through Detroit. And, again, I can't predict with 100 percent certainty as to the entire national rail grid, but when you are getting into the possibility of tens of thousands of shipments, separate canister shipments, it is, it seems to me, very inevitable that there will be an awful lot of those transportation corridors ultimately put to use in the service of transporting spent nuclear fuel.

JUDGE RYERSON: And you have approximately five minutes.

MR. LODGE: Thank you. I will be wrapping up. The petitioners base their claim for standing on proximity plus standing. And you have to have an inherently dangerous radioactive material, in combination with some sort of geographical proximity.

I believe in many, many cases, we have demonstrated that. A question, of course, is what is -- how far away is safe? And that's why we have advanced the argument that a 50-mile radius in the event of serious accident ought to be used. The DOE thinks so, so far, and we believe that in -- and that's for nonroutine problems that occur in transportation.

Just the routine emissions of radiation are problematic enough. The declarants state that they have concerns about driving by or driving on highways parallel and close to rail lines, so they have thought about, consciously taken into account the facts of potential exposure to unwanted minor amounts of radiation.

We believe that because of the inherent dangerousness of this material, that our situation, the situation of my clients, is very distinguishable from the cases that were cited by this panel sitting as the Holtec panel. The cases that were cited talked about a few one-shot or few transports of low-level radioactive waste, which is deemed not to be so dangerous and pervasive.

They weren't cases that addressed the possibility of thousands, of tens of thousands of

shipments. And as you work things through the funnel, you get a smaller and smaller, more definite routing population that is possibly exposed to serious problems, or at least routine emissions.

I'd just like to also point out with respect to Diablo Canyon -- I'm not going to move the map around to focus on Southern California. But again, we have declarants, two of them, who identified their proximity and location to rail and highway routes, the only routes coming out of the Diablo Canyon complex, and that they were within about four or five miles, I think, for each of them.

With respect to Cervelle de Aslan [phonetic], who is a public citizen declarant -- she lives in El Paso -- stated that she lives within, I believe, a block of the major rail line that we're talking about that goes through El Paso. Rev. James Caldwell of Houston, which is another funneling point across the southern tier of states, lives about a mile from a major funneling rail line.

If you saw on the map, the closer you get to the Dallas-Fort Worth area, the greater the funneling effect there. Dallas-Fort Worth seems to become the zone through which a vast majority of the waste will ultimately travel.

We believe that we've made a very compelling case for standing, at least of some of the petitioning organizations, and that that needs to be closely scrutinized. I apologize to the extent that perhaps we should have relied more on the maps in our written arguments, but the maps were there. The information in the declarations was always there to be laid and scrutinized alongside the maps. It is certainly time for that to happen.

I am reserving the right to give any further presentations or answers respecting the other contentions I haven't talked about. Thank you.

JUDGE RYERSON: Okay. Thank you. I have one question. If hypothetically we were to conclude that SEED has standing but not your other many, many clients, would you be continuing this proceeding on behalf of SEED?

MR. LODGE: Certainly would.

JUDGE RYERSON: Okay. Judge Arnold, do you have --

JUDGE ARNOLD: No.

JUDGE RYERSON: -- any questions? Judge Trikouros?

JUDGE TRIKOUROS: No.

JUDGE RYERSON: Thank you, Mr. Lodge.

Let's see. Mr. Bessette.

MR. BESSETTE: Yes, sir. Good afternoon. I'm -- as we've done before, we're going to be discussing groups of Joint Petitioners' contentions.

As a preliminary matter, Mr. Lodge kept referring to WCS as the Applicant. I just want to make sure we're clear that it's not WCS. It is Interim Storage Partners.

VOICE: Can you speak a little louder, please.

MR. BESSETTE: Yes. It is Interim Storage Partners, not WCS.

I'm going to go through several of the contentions, but I'd like to start in order of what Mr. Lodge addressed. On contention 4 related to low-level rad waste, he stated that there's no discussion of the low-level rad waste potential for contamination on the application. That is demonstrably false.

It is throughout the application, including in ER Chapter 4, but more importantly, it's discussed in the license application, Appendix B, the decommissioning -- preliminary decommissioning plan; in Appendix D, the decommissioning funding plan. And the decommissioning funding plan very conservatively assumes that 20 percent of all the pad surfaces are

contaminated and go to low-level rad waste.

Importantly, Joint Petitioners never even referenced Appendix B or Appendix D of the license application.

With regard -- he had some discussion of burden. We hear this complaint a lot, but at this point in the proceeding, intervenors absolutely have the burden to propose inadmissible contention. And fundamentally they have a burden to review the application and dispute it. So if there's entire sections of the application that discuss the information they're looking for and they don't challenge it, that is a fundamental failure.

With regard to Joint Petition 4, I refer the Board to their decision in JP-3, and that equally applies here. The continued storage rule GEIS discusses low-level rad waste generated during decommissioning and cites small impacts. Any challenges to decommissioning activities, which are well beyond the license term of the facility, are challenges to the Continued Storage Rule.

And petitioners only speculate about the volumes and causes of the low-level rad -- the gross volumes of low-level rad waste that they estimate. So I refer the Board to their decision in Joint Petition

3.

With regard to Joint Petition contention 10, Mr. Lodge referred to some statements by Secretary Perry. Those statements are not in the record. They're not part of the petition, and frankly, no one even knows what he's talking about. We're not familiar with those statements. So we'd seek to strike any discussion of that.

If he thought it was important, he could have amended his petition, and he certainly did not do that.

With regard to Joint Petition 10, the indefinite length of interim storage requires a NEPA evaluation beyond 60 years. We refer the Board to their decision in Joint Petition 10 in the Holtec proceeding. That applies here.

The license application is only for 40 years, and so possible renewals are -- anything environment -- environmental impacts beyond that period are beyond this proceeding. The Continued Storage Rule incorporates impact determinations from the GEIS, which considers environmental impacts well beyond this period, and NRC regulations bar impermissible challenges to Continued Storage Rule without waiver.

With regard to their arguments regarding cherry-picking of containers, we would note that is pure speculation. They've cited zero examples of how such a container could even exist at a plant site, and further, there's nothing anywhere in our application that suggests we would cherry-pick and leave containers behind.

With regard to Joint Petition 12, where they said the Continued Storage Rule does not apply here, it was unclear the differences he was trying to cite to the Holtec petition. The fact is the Continued Storage Rule evaluates a similar facility, the PFS facility, which has the same ultimate capacity of 40,000 metric tons uranium, and the same footprint.

So there really are no differences, and the Continued Storage Rule acknowledges there may be site-specific differences of particular ISFSI locations, but those differences are to be evaluated as part of the site-specific license, which we entirely did here in the environmental report.

With regard to Joint Petition 12, I refer the Board to their decision in Joint Petition 4 in the Holtec proceeding. It included issues regarding no need to consider a dry transfer facility at this time, and again, the GEIS acknowledges that not all storage

facilities will match the assumed generic facility. Site-specific impacts are analyzed as a licensing action.

With regard to a few other contentions, Your Honor, we'd like to -- on Joint Petition 8, which was no-action alternative must discuss the hardened on-site storage and at least four other alternatives, including dry transfer of storage, modifications to the emergency plan, modifications to the ISFSI design, and ownership by the U.S. Government, we'd refer the Board to the decision in Holtec 6 where they discuss, among other things, HOSS is not relevant to the no-action alternative.

With regard to Joint Petition contention 2, cherry-picking of canisters, we've already discussed that as it was raised earlier. And Joint Petitioners 11, which is no plans for a dry transfer system to handle damaged, leaking or contaminated systems, which we would refer the Board to their Joint Petition 7 which applies here.

There is no facts or expert opinion that canisters will arrive damaged to the interim storage facility, and we cite to the PFS decision that an accidental canister breach is not a credible scenario. The Board cited to that decision in CLI 04-22, and we

cite to that as well.

If you have no other questions, Your Honor, I'll pass it on to one of my colleagues.

JUDGE RYERSON: Thank you. Any questions, Judge Arnold? Or Judge Trikouros?

JUDGE ARNOLD: No.

JUDGE TRIKOUROS: No.

J U D G E R Y E R S O N :

Thank you, Mr. Bessette.

MR. LIGHTY: Thank you, Your Honor. Just very briefly, one additional contention here that we heard about earlier from Joint Petitioners is Joint Petitioners 13 regarding reprocessing. I would note that counsel didn't note any distinctions in terms of the applications, the facts, the proceedings at issue.

He simply noted the Board's citation in the other proceeding to NEPA case law, that noted that NEPA doesn't require analysis of potential actions that are merely contemplated. Joint Petitioners' argument was, quote, "We disagree legally," end quote. That's not a distinction between the proceedings, and the Board's decision in the other proceeding is fully applicable here on the reprocessing contention.

Very briefly, I would like to discuss a couple of the comments from Joint Petitioners on

standing. I know we will talk about standing, the more global issue, proximity plus presumption standing at a later point. But just a couple of items for the Board to keep in mind.

The maps that counsel referred to from the environmental report were there for the purposes of NEPA. This was to identify information, to provide representative routes, to provide information, because there are no specific transportation routes identified at this point. There are no specific transportation routes requested to be approved in this proceeding. And so a proper understanding of those maps is important for understanding what they do and the story they do and do not tell.

For example, counsel spent a few minutes speaking about Fermi up in Michigan. As noted in our pleadings, the spent fuel at Fermi is not in a type of canister that could even be accepted at ISP pursuant to this application, so again, the maps and the routes in the ER simply don't stand for likely routes to ISP. And that's important to keep in mind.

As to counsel's statement that any amount of radiation provides a basis for standing, that's simply an incorrect statement of the law. We've cited case law in our answer, noting that radiation that's

four or five orders of magnitude below background levels clearly falls below the level that could be considered substantial enough for standing purposes. So I think it's important to correct the record as to the current state of the law on that issue.

And then finally, I would note, as the Board correctly pointed out, Joint Petitioners raised an entirely new theory of standing as to their SEED individuals in the reply. It's inappropriate to raise an entirely new theory of standing in a reply, and that cannot be the basis for their standing argument.

They submitted their petition, relying entirely on alleged proximity to hypothetical transportation routes, and the Commission has spoken clearly on this, that -- and noted, for example, in CLI 04-17, mere geographic proximity to potential transportation routes is insufficient to confer standing.

In other words, we're out of the proximity zone here. We're talking about going to traditional standing, if you want to claim standing based on a transportation route. And Joint Petitioners offer no information that would establish traditional standing in their argument.

JUDGE RYERSON: But the declaration from

Ms. Gardner-Aguilar established that she lives within five or six miles of the proposed facility, doesn't it?

MR. LIGHTY: It provided an address. It did not provide any distance to any particular facility, transportation route, the ISP facility. It --

JUDGE RYERSON: It's not a big place, though. If she lives there, she has to be within a few miles of the facility.

MR. LIGHTY: It's possible. It wasn't pled. In other words, it wasn't demonstrated. Again, the burden here is on --

JUDGE RYERSON: Well, the facts are there. The facts are there. Granted, I believe that the principal theory -- there are eight Joint Petitioners or something like that, and the vast majority, probably all of them, were talking about transportation routes. But the facts are -- you'd have to admit, the facts are there in the declaration.

If -- now, I know you disagree. But if one thought that being within six miles of the proposed facility gave you standing, they have established that, haven't they?

MR. LIGHTY: I certainly agree that Ms.

Gardner's petition gave her home address. If it was incumbent on the Board and the parties and the staff to go and Google and do their own research to determine whether there is standing, then I would say, yes, that's --

JUDGE RYERSON: But that was explicitly clarified in the reply, was it not?

MR. LIGHTY: Raising a new theory of standing in the reply, yes.

JUDGE RYERSON: Well --

MR. LIGHTY: Yes.

JUDGE RYERSON: I guess we're -- we have to decide whether that's a new theory or not. It would be impermissible, but a fact was clarified in the reply.

MR. LIGHTY: Yes. And if you read the declaration itself, it says, I live within a certain distance of a transportation route. It does not say, I live within a certain distance of a facility. So the declaration, I think, speaks for what the theory being advanced in the declaration was.

JUDGE RYERSON: I'm sorry. Continue, Mr. Lighty.

MR. LIGHTY: And one final point of clarification here. ISP will not be the shipper of

spent fuel in this application. It's not requesting authorization to do that. It does not contemplate doing that in the future. That's something that someone else would do, an activity that someone else would do that's not within the scope of this proceeding.

This proceeding won't approve any transportation routes. It won't approve any rail routes, any road routes, any barge routes. There's no request to approve the specific places that spent fuel would travel. And so I think that's again one more important point to keep in mind here in terms of the scope of this proceeding as noticed in the Federal Register.

JUDGE RYERSON: Any questions, gentlemen? Is that it? Thank you, Mr. Lighty.

MR. LIGHTY: Thank you very much.

MR. MATTHEWS: Good afternoon, panel. Tim Matthews. There were a few other contentions that Mr. Lodge did not address, and to address the Board's question about what's different between this proceeding and the contentions in the Holtec proceeding, I wanted to very briefly touch on those.

In the -- with respect to the NWPA, the Joint Petitioners filed an objection, which seems to

be most analogous to the motion to dismiss, and it would, therefore, fall within the same discussion that we talked about earlier with respect to the NWPA issues and the APA, NWPA-specific lack of NRC jurisdiction to consider the application or that allegation.

JUDGE RYERSON: Now, I -- this may not be directly relevant, but when you talk about the NRC jurisdiction to consider, I mean, in Yucca Mountain, DOE moved to withdraw its application, and the Board -- I was actually on the Board -- at the direction of the Commission determined whether or not that was lawful under the Nuclear Waste Policy Act. I mean, is that inconsistent with the position you're taking? I'm confused on that.

MR. MATTHEWS: Petitioners have asserted that because of the NWPA, the NRC lacks authority here. That was not the question --

JUDGE RYERSON: Correct.

MR. MATTHEWS: -- before the Board at Yucca Mountain.

JUDGE RYERSON: But we were asked to adjudicate the lawfulness of actions under the Nuclear Waste Policy Act, of DOE's actions, a sister government agency. In any event --

MR. MATTHEWS: I can't speak to that, Judge Ryerson.

JUDGE RYERSON: -- it may not be directly relevant to your argument, but I was --

MR. MATTHEWS: That would be our view.

JUDGE RYERSON: That's your view. Okay.

MR. MATTHEWS: With respect to Joint Petitioners 3, which is financial assurance, that is very similar to the Sierra Club contention 9 that we discussed earlier here today, and the financial qualifications petition by Joint Petitioners in the other proceeding, very similar, and the bases would be the same.

There are two contentions in this proceeding that are not -- don't have an analog in Holtec. One was the foreign ownership, and we don't have anything to add beyond our pleadings there. And then -- that was JP-7 here.

And then Joint Petitioners 9 here was the alleged misrepresentation of financial benefits under the NEPA, essentially saying that we considered only the benefits and not the costs. And, again, we point to our pleadings there, but note that there is, on this contention and several others that we'll be addressing today and tomorrow, there are pending

motions to strike, and I presume the Board will take those in due course.

JUDGE RYERSON: We will decide everything at one time, in a timely fashion. We'll get to that at the end. Thank you. Oh, I'm sorry. Any questions before we -- okay. Thank you, Mr. Matthews.

Before the staff people get up, I am going to have two questions. It may affect who gets up. My two questions to start will be: Have you -- you took the position that Joint Petitioners did not have standing, none of them had standing, was your position. And I'm going to ask whether you have reconsidered that as to SEED.

And my other question would be: You felt, the staff felt, that contention 3, Joint Petitioners contention 3 was admissible, at least in part, and I believe that part related to the exemption request which has been withdrawn.

So my question is: Have you changed the staff's position on either of those -- on either that standing matter and the admissibility of that contention?

MS. KIRKWOOD: Can we have just one minute?

JUDGE RYERSON: You may confer.

(Pause.)

MR. GILLESPIE: Hello again. With respect to Joint Petitioners contention 3, we consider that issue moot, and see it as an inadmissible contention --

JUDGE RYERSON: Okay.

MR. GILLESPIE: -- at this stage.

VOICE: Louder, please.

JUDGE RYERSON: Yes. If you would say that again.

MR. GILLESPIE: Yes. At this stage, because the exemption was withdrawn, we see this issue as moot and inadmissible for that reason.

JUDGE RYERSON: Inadmissible. And if my count is correct, the staff would then not find any Joint Petitioners contention admissible at this point. Is that correct?

MR. GILLESPIE: That is correct.

JUDGE RYERSON: That is correct. The question -- you could argue it's moot, but the question of standing then of SEED, what's your view on that?

MR. GILLESPIE: Yes, Your Honor. As we stated in the legal background section in our answer, the mere fact that radioactive material transportation

may occur in an area is insufficient to grant standing.

With respect to SEED and Ms. Brigitte Gardner-Aguilar specifically, the issues that she alleged arise from the transportation of material to the nuclear site. She doesn't allege any issues with the facility.

JUDGE RYERSON: Well, she alleged she lives -- not in these words, but she alleged that she lives within six miles maximum or so of the proposed facility. And the staff does not consider that, those facts, sufficient to base standing on?

MR. GILLESPIE: As originally placed in the declaration, she did not identify a distance, and to contrast that with Ms. Rose Gardner alleges issues related to the site, accidents that could occur, things like that, which make her distinct from Ms. Brigitte Aguilar.

JUDGE RYERSON: Okay.

MR. GILLESPIE: That being said, given her proximity to the site, we would likely not have an objection if standing was found on that basis.

JUDGE RYERSON: So you're -- excuse me. You're saying you're not objecting if the Board were to find standing, but you're not --

MR. GILLESPIE: Yes, Your Honor.

JUDGE RYERSON: -- changing your position on it.

MR. GILLESPIE: Yes. Based on proximity, if the Board found that the address there was sufficient --

JUDGE RYERSON: Was sufficient. Okay.

MR. GILLESPIE: -- information to find that, then --

JUDGE RYERSON: Particularly with clarification in the reply. We can argue whether that reaches beyond the proper scope of a reply, but it was explicitly made as an argument in the reply.

MR. GILLESPIE: Yes, Your Honor.

JUDGE RYERSON: All right. Those are my two up-front questions, and now anything else you'd like to talk about on this topic?

MR. GILLESPIE: No, Your Honor.

JUDGE RYERSON: Okay. Thank you.

Why don't we take a relatively short break right now, and we'll resume -- I think we're now up to the last set, the Fasken set. Right? Other than the standing issue, which we'll probably get to tomorrow, so why don't we take a break until 3:10, and then we will resume at that point.

(Whereupon, a short recess was taken.)

JUDGE RYERSON: Mr. Eye, I see you're in the right location already. Welcome, and we will begin with your presentation on behalf of Fasken. I'll call both your clients Fasken collectively if that's okay.

MR. EYE: Very well, Your Honor. Thank you. Can I be heard?

VOICES: Yes.

MR. EYE: Okay. Good. We it please the panel, we are glad to be here to present our case or at least the case that we will summarize in front of you that is also contained in our pleadings, in opposition to the application to construct and operate the CISF that ISP has advanced.

My name is Robert Eye, and along with my co-counsel, Tim Laughlin, we represent Fasken Oil Ranch and the Permian Basin Land and Royalty Owners. Sometimes we call them PBLRO, and as Judge Ryerson noted, we'll probably refer to them collectively as Fasken, if that's not too confusing.

Fasken is representative of the ranching and oil and gas industry located in the Permian Basin, which turns out to be the most prolific oil and natural gas production area in the world.

As the panel is aware, in the Holtec case, Fasken advanced a motion to dismiss as our sole issue. As the panel will also recall, procedurally, when that was filed, it was circuitously -- ended up at the NRC secretary's office, which dismissed the motion, but then referred it back to you to process as a contention, which you then addressed in the Holtec order.

So with that just brief background and recollection, I want to get into some of the issues that we believe are pertinent regarding the ISP application.

But just before I do that, I want to note the attendance today of a number of people associated with Fasken and PBLRO. That include Fasken's management and staff, and a number of PBLRO supporters. And thank you for being here. It's much appreciated.

If there are questions about contentions 2 and 4 that come up later during our presentation, I would ask leave to defer those questions or to rather refer those questions to my colleague Mr. Laughlin, and then if there are questions concerning the motion to dismiss or contentions 1, 3 and 5, I will do my best to address those questions.

Fasken opposes the licensing of the ISP CISF because, among other reasons, there is a real prospect here that this facility will become a de factor permanent disposal facility. And I'll say more about this in just a moment. But it's important to realize the magnitude of the radioactive materials that will be placed or anticipated to be placed at this facility. It would represent the largest concentration of radioactive materials ever amassed on earth.

The opposition to the ISP proposal, therefore, is based on its failure to meet the very crucial requirements that pertain to these facilities that are contained in the NRC regulations and its guidance documents.

Now, the reality of amassing this magnitude of radioactive materials should make strict compliance with the application requirements a foregone conclusion, but as we know, in any proceeding, it's frequently arguable whether compliance has been achieved or not. It's frequently a nuanced question rather than a stark black and white determination. We recognize that.

But it's important from our view to keep in mind the stakes. The reality of this quantity of

radioactive materials placed in the middle of the Permian Basin raises the stakes considerably. It could undermine our country's capacity to meet its own energy needs if the Permian Basin was ever taken out of production as a result of an accident and a radiological release at the ISP facility.

A brief word about standing. Now, I know that this is the favorite topic in many regards, but I do want to just note that as determined in the Holtec proceeding, Fasken/PBLRO has met the requirements of standing based on the proximity plus presumption.

In the current proceeding, NRC staff agrees that PBLRO/Fasken have been that -- those requirements and should be recognized as having standing in this proceeding.

Given the similarity and proximity of Fasken and Fasken's declarants related to standing in the Holtec case and the ISP case, we think that it is prudent and correct to handle the standing question related to Fasken the same way in ISP as it was addressed in the Holtec matter.

It was mentioned earlier there is a prospect that this proposed facility will become, by default, by default, the final and permanent

disposition point of our country's commercial high-level waste stream. A CISF is not a substitute for a deep geological repository. They are different species of facilities for good reason.

And any representation that somehow a CISF can function, either in a quantitative sense for controlling the release of radiation or over a long duration of time as effectively as a deep geologic repository flies in the face of the science that supports deep geologic repositories as final disposition points for high-level waste.

The availability of a CISF would effectively relieve the pressure to establish a permanent deep geologic repository. That is precisely why the authors of the Nuclear Waste Policy Act recognized that a CISF without a functioning permanent repository would be a sitting duck to become a permanent repository by default.

ISP has made no attempt, nor could it, to show that its CISF would move our country any closer to establishing a deep geologic repository.

Let me address some of our contentions. The first contention we raise dovetails with our motion to dismiss and is based in interpretations and applications of the Nuclear Waste Policy Act. The so-

called waste confidence contention includes an assertion that the Applicant has failed to establish a need for away-from-reactor high-level waste storage.

It posits that the preferences of reactor owners for away-from-reactor storage are not the same -- or we argue, rather, that the preferences of reactor owners are not the same as the needs that are the predicate for establishing away-from-reactor storage. ISP has failed to prove that its CISF is any safer than existing at-reactor storage facilities, even though it does assert this in a conclusory fashion.

It never supports with evidence why it believes its facility is safer than at-reactor storage. It simply concludes such. To accept this requires a rejection of the findings by the -- that underpin the Continued Storage Rule that were developed in the waste confidence proceedings Blue Ribbon Commission that specifically determined current at-reactor storage is a safe and secure method to manage the high-level waste stream for an indefinite duration of time. That fact has not been undermined in this proceeding. It's the premise from which we should begin.

Does ISP base its assertion that a CISF

would be safer because it is proposed to be built in a less densely populated part of our country? If so, such an assertion ignores the fact, for example, that the cities of Midland and Odessa have a combined population of around 300,000 people.

And simply because other areas in the vicinity of the proposed facility may not have the population densities that -- of their urban counterparts, people living there are no less deserving of protection that their urban counterparts would expect.

Further, building this CISF in the Permian Basin invites the possibility that the most productive oil and gas production field in the world is put needlessly at risk. In sum, ISP has not established that there is a need for this CISF to safely manage the high-level waste stream, let alone to do so in an area that is crucial to the capacity of our country to meet its energy needs.

In fact, under International Atomic Energy Agency standards, which I understand don't apply, but I think it's important to note that under IAEA standards, this facility could not be built anywhere near energy-related facilities. And that, I think, is telling, and it shows that there are higher standards

out there to which facilities in other parts of the world would have to meet compared to this facility.

Our second contention argues that ISP has failed in a rather spectacular way to fully evaluate and characterize the region surrounding the CISF and the unstable characteristics of the geology surrounding the site, specifically the effect that over 3,800 abandoned and temporarily abandoned wells, including any number of unaccounted for orphan wells, may have on the site.

As our declarant Tommy Taylor, an upper management person for Fasken, said in his declaration, the Applicant has understated the number of wells that are within the vicinity of this particular site.

Staff agrees that this contention should advance to adjudication, and we find that to be a significant decision on the part of staff, because we know they are by practice and by indications in the Holtec proceeding and in this one, they are reluctant to give any kind of an endorsement to a petitioner's contentions, but they did this one, and we think that that was a correct decision by staff.

Our third contention argues that ISP has failed to address how its CISF will mitigate the damage and release of radioactive materials in the

event of a plausible malicious or accidental airplane crash into the facility. ISP's dismissive attitude about this contention is based on a probabilistic risk assessment that says that there's less than a one in a million chance on an annual basis of such an event happening.

Now, it's interesting because ISP's assertion in that regard doesn't cite to the NUREG guidance that relates to CISFs. It cites instead to a NUREG that addresses power reactors. I believe it's light water power reactors specifically. Why the difference? If one in a million chance of such an event happening at a power reactor is the standard, why should it be different under the NUREG that addresses CISF events such as this?

Well, that difference is not -- it's not clear why there's the difference, but let me posit a potential reason. And it would be that the quantity of radioactive materials at a PWR, a light-water reactor, rather, is vastly smaller than that which would be found at a fully subscribed CISF. So we find it inappropriate for the Applicant to go to a NUREG that relates to power reactors to determine the probabilistic risk assessment for an airplane crash into one of these facilities, rather than going to

source document, the NUREG source document that actually discusses CISFs.

And we discuss this extensively in our pleadings. The Applicant does not explain -- or I should say, doesn't address why it doesn't recognize the NUREG that discusses CISFs, rather than its preference for a light-water power reactor NUREG.

Now, this one in a million -- yes.

JUDGE TRIKOUROS: Yes. Just let me interrupt you for a second. You're talking about the initiating event frequency. Right? You're not talking about a risk. You're talking about event frequency. Right?

MR. EYE: I am. But as a practical matter, they seem to be very close in terms of the kind of assessment that should be made in terms of whether we're allowing an inordinate risk or an unreasonable risk to occur. But, yes. It is related to the triggering event.

So ISP's position that this is only a one in a million chance on an annualized basis, you know, may be quite satisfying in an abstract statistical sense, but it defies common sense in our contemporary world. There are three major airports within 50 miles of the WCS site, raising the possibility of short

flight times from those airports to the ISP site.

So at the very least, it seems that ISP should, instead of relying on what we consider to be an irrelevant NUREG related to light-water reactors, ought to at least back up and consider what the NUREG that addresses CISFs has to say about airplane crashes, and there it's quite unequivocal. It says those incidents need to be analyzed and considered in the context of an application.

But instead of doing that, they point us over to a light-water reactor NUREG in this probabilistic risk assessment which doesn't appear in the CISF NUREG.

Our fourth contention contends that ISP has failed to include adverse information regarding the presence of groundwater formations beneath and proximate to the ISP site, because our expert witnesses have developed credible, scientifically based information to indicate that there are, in fact, aquifers and other water-bearing formations located directly beneath the proposed site and proximate to it, among other things these formations provide potable water to the city of Midland and just about every rancher pumping water between Andrews and Midland.

Now, these formations, including the Santa Rosa Aquifer, are routinely used also by the oil and gas industry in their exploration and extraction activities. All this flies in the face of ISP's evaluation of the hydrological formations and aquifers below the site.

Furthermore, when considered in conjunction with ISP's failure to identify the presence of approximately 4,579 wells within ten miles of the site that on a daily basis produce approximately 10,100 barrels of oil and 85,000 MCF of natural gas per day, ISP has also failed to discuss how these might end up as vectors to groundwater formations.

These factual disputes about the presence, the extent and the nature of substrata water formations below and proximate to the ISP site must be resolved through an adjudicatory process. There are too many issues of fact, and I might add that other petitioners have raised these and similarly find that there are contradictions between that which ISP has advanced about the nature and extent of water formations beneath and proximate to the site.

This is a classic example. This is a Rule 56 civil procedure question about summary judgment.

We have conflicting evidence, conflicting credible evidence, that has to be resolved in some way other than a summary disposition proceeding such as the one we are in now.

The fifth contention argues that ISP has failed to adequately characterize its proposed facility's effect on the areas' threatened and endangered species and undermines the extensive conservation efforts made in recent years by the energy and ranching industries in an effort to conserve the habitats of threatened and endangered species.

We're down to the protected lizard species specifically, but I want to make one mention about the lesser prairie chicken. It's worth noting that one of the reasons why its conservation effort was successful was because it was spearheaded by the oil and gas industry and the ranching interests in that area.

And while this may be counterintuitive, they were successful. They took that commitment on. They do not want to see it undone, their efforts, their resources that they poured into that project. They don't want to see it undone by the presence of ISP's proposed CISF.

From the outset in this matter,

Fasken/PBLRO has asserted that ISP's application was fatally flawed, because it depends on the Department of Energy taking title to and liability for high-level waste. This is, as the panel knows, the underlying premise or one of the underlying premises of our motion to dismiss, and it also is tied to our first contention, our so-called waste confidence contention.

But for DOE to take title to the high-level waste stream, there must be a deep geologic repository that is able to receive high-level waste. Of course, no such facility presently exists in the United States. Despite ISP's refusal to acknowledge this legal reality until just about two weeks ago, when on June 28, it issued a letter that acknowledged this legal barrier that it is now forced to confront, ISP now agrees this requirement must be met before a CISF may be used for high-level storage, high-level waste storage.

ISP evidently recognizes that for its proposal to be viable, the Nuclear Waste Policy Act must be amended to allow use of a CISF without the availability of a functioning deep geologic repository. But such an amendment has not materialized, and whether ISP will be rescued by an act of Congress is utterly speculative.

This proceeding should not continue based on an act of Congress that may never materialize, and I would note in rather stark contrast, a petitioner that depends on nonexistent legislation to support a contention would likely not be well received by this panel. The same standard should apply to ISP's application.

It is this panel's duty to determine whether an Applicant has satisfied each of the requirements that pertain to this CISF proposal, and if they are not going to follow the NUREGs that pertain directly to it, have some good reason why they are deviating from that. These NUREGs are kind of a moving target. They're cited when they favor ISP, but not when they don't. They should be held to a higher standard.

When an application is riddled with issues of fact and that the Applicant has failed to satisfy its essential burdens, this panel should deny the application or at least advance the contentions to final adjudication. And, of course, we think that the motion to dismiss that we advanced early on in this matter should be granted, and the application rejected on that basis.

Finally, the concept of consent-based

siting is being used apparently to convince the public that their consent is an essential element for licensing this facility. Legally, of course, that is not the case.

But if consent-based siting is going to be more than a ruse, it should be codified and defined what consent means and a methodology adopted to determine who should give what consent and at what level, because to do otherwise sends a false message to the public that their input can somehow be weighed just as significantly as other evidence that the panel considers.

Thank you, and we'll do our best to respond to any questions that the panel may have.

JUDGE ARNOLD: Well, I have some questions concerning standing. Now, the proximity assumption normally involves a person who lives within 50 miles of a commercial power plant. Proximity plus, I assume, should mean you've got somebody who lives within some proximity to the plant. So between Tommy Taylor and D.K. Boyd, which one lives closest to the ISP facility, and how far away is that?

MR. EYE: I think it's D.K. Boyd that lives closer, and his exact -- the exact distance of his residence from his ranch, I do not know. But

proximity standing doesn't depend on residential location -- let me put it this way. It can depend on residential location, but it can also be tied to somebody's occupation.

And D.K. Boyd's occupation is ranching. He goes to his property on a regular basis, and it's close to the proposed facility, and that provides a basis for standing. Likewise Mr. Taylor, who in his occupation has reasons to visit the area on a regular basis as well.

So it's -- I think that the idea of proximity is residential, but it also includes occupational or other uses of property that are proximate to a proposed facility.

JUDGE ARNOLD: According to D.K. Boyd's statement, his brother runs the cattle operations, so just the fact that he has a ranch there doesn't tell me that he's there often enough to have a proximity standing. How often is he there? And although part of the ranch is within four miles of the CIS, looking at a map of it, it looks like an awful lot of the ranch isn't within four miles.

MR. EYE: He signed a declaration under penalty of perjury that said his ranch is four miles -- approximately four miles from the facility.

JUDGE ARNOLD: The closest point.

MR. EYE: That's correct. And if we're quibbling about four miles or five miles --

JUDGE ARNOLD: No. We're quibbling about --

MR. EYE: -- that's really a distinction --

JUDGE ARNOLD: -- four miles and 20 miles.

MR. EYE: Well, he --

JUDGE ARNOLD: I don't know the ranch.

MR. EYE: His ranching operation obviously is something that he has a concern about not only himself but his brother out there working it.

JUDGE RYERSON: Is his brother formally an employee of his, or is it simply his brother works it, and they somehow work that out?

MR. EYE: I think that they both have interests in that ranching operation.

JUDGE RYERSON: I was curious. You know, those of us from the East have a hard time with the distances here in Texas. Unless it was a typo, I think it said that the ranch is 137,000 acres.

MR. EYE: Yes. That was a typo. Yes.

JUDGE RYERSON: Pardon? That's a typo. Okay.

MR. EYE: That's a typo. I --

JUDGE RYERSON: I thought that a little corner with four miles could be pretty far from part of the ranch, so that's an error of probably at least ten. Okay. Well, that answered my question.

Did you have some more, Judge Arnold, at this point? We can get back to -- we'll be talking about standing tomorrow in the context of the generic issue that ISP is raising, and so we might have some more individual questions at that point.

Judge Trikouros, are you --

JUDGE TRIKOUROS: Well, I have questions, but I'm going to ask them tomorrow. I don't think I want to ask them today.

JUDGE RYERSON: Okay. All right. Well, thank you, Mr. Eye.

We're going to take a brief break right now before we hear from ISP and the NRC staff. Why don't we reconvene at four o'clock, and we will probably finish up for the day after those two and start again tomorrow, but we'll see you again at 4:00. Thank you.

(Whereupon, a short recess was taken.)

JUDGE RYERSON: Mr. Matthews, are you ready? Mr. Eye, did you have something to say?

MR. EYE: Yes. I just would like to correct the record, if I could, on --

JUDGE RYERSON: Certainly.

MR. EYE: In response to the question about the dimensions of the ranch, actually the declaration's correct. It is 137,599 acres, which by quick calculation is about 250 square miles. So that's correct, that he owns --

JUDGE RYERSON: 250. Yes. I did my own calculation with things I'm more familiar with, and it occurred to me that the ranch is about ten times the size of Manhattan Island.

(General laughter.)

JUDGE RYERSON: And so --

MR. EYE: And easier to get around.

JUDGE RYERSON: While I have you, I think we are going to -- we're going to be talking about standing in a generic way tomorrow, and I did have some questions about the affidavits on standing in the case of Fasken.

We're not taking evidence tomorrow. You do not have to bring your clients in, and I think there would be objections if we did do that. But I am, just to alert you, I'm going to ask some clarifying questions about some of the more general statements.

And so to the extent you are quite familiar with the facts that are sort of underlying the more general statements, fine. I don't know if you want to contact either of those gentlemen.

but the nature of my questions would be more in the case to compare with Holtec. I believe -- what was the gentleman's -- not Mr. Boyd, but --

MR. EYE: Taylor.

JUDGE RYERSON: Mr. Taylor?

MR. EYE: Tommy Taylor.

JUDGE RYERSON: Thomas Taylor, yes. Another Taylor. Thomas Taylor had reasons to go to the facility specifically, as I recall. Here the sort of more general statements and it almost seems to come down to his saying, Well, I drive on highways in that area.

So I'm not limiting my questions to that specific one, but those are the sorts of questions I think I might have about fleshing out perhaps some of those declarations as to exactly what they mean.

MR. EYE: I understand, and we'll do our best to respond.

JUDGE RYERSON: Okay. Thank you.

MR. EYE: Thank you.

JUDGE RYERSON: Now, Mr. Matthews.

MR. MATTHEWS: Thank you, Judge Ryerson. I want to set this where I can still see my notes. Are you able to hear me in the room?

VOICE: No. Microphone's not working. It might need new batteries.

JUDGE RYERSON: Have you tried it really close?

MR. MATTHEWS: Will that work?

JUDGE RYERSON: That certainly works for us.

MR. MATTHEWS: I intend to address three issues, and my colleagues will address the remaining three of Fasken's issues and contentions.

The first, not a surprise, would be the motion to dismiss on the NWPA basis. What's different here that's sort of a procedural matter, I suppose, in that the motion was styled for both CISF proceedings, but there was a failure of service on it. It was not served to the parties. I understand that the boards have great leeway in how they interpret these, but a failure of standing -- a failure of service -- there are cases where failure of service, the Board has taken note, and we just want to note that.

JUDGE RYERSON: Was this in your response? Was that ever raised?

MR. MATTHEWS: I'll confirm that, Your Honor.

JUDGE RYERSON: Okay.

MR. MATTHEWS: I believe there was in our initial objection, once it was referred -- we didn't have a chance to respond to it. It wasn't served to us, so it first landed on our point once the Secretary referred it to the Board. So --

JUDGE RYERSON: So normally the Secretary would be responsible for serving you. I mean, once it's treated as a contention, they should have served it.

MR. MATTHEWS: The Secretary did send it to us, when the Secretary referred it to both dockets and we received it then.

JUDGE RYERSON: Okay.

MR. MATTHEWS: But when it was initially served on the other applicant, it was not served on us as well.

JUDGE RYERSON: You have it.

MR. MATTHEWS: I'm merely preserving it, Your Honor.

JUDGE RYERSON: You have it.

MR. MATTHEWS: We have it.

JUDGE RYERSON: Okay.

MR. MATTHEWS: We have actual notice.

JUDGE RYERSON: You've had actual notice.

MR. MATTHEWS: At this point, we have actual notice.

JUDGE RYERSON: Okay. You've made the point.

MR. MATTHEWS: We have a lot of contentions here, Your Honor. With respect to Fasken 3, there's been sort of a crab walk as to what this contention is about, and that's what I wanted to bring this -- there's not an analogous contention in the Holtec proceeding.

This contention as styled was that the application failed to meet the 72.122 design requirements for protection of components important to safety, in that if there was a credible accident, specifically an aircraft impact, a fully loaded aircraft, that somehow ISP had conceded was credible and had failed to meet the 122 requirements for protection.

In our response, ISP noted that it had never conceded or considered an aircraft impact as a credible accident. It did consider it in alert classifications as required in the emergency planning provisions, and those both derive from staff guidance

requirements, separately for protection components important to safety and for what needs to be considered in an emergency response plan.

But the application, as noted in our brief, clearly stated that just because it's in the emergency response plan doesn't mean Applicant considers it credible. And Applicant didn't consider it credible. And that was the answer.

It seems now and in the reply, petitioners want to point to guidance for the staff review that says you must consider hazards in the area, including airports and consider those and the guidance on how to consider airports.

We've come a long way from physical fire protection systems on the site being adequate from a 72.122 perspective. Nonetheless, petitioners haven't asserted why ISP must conduct an aircraft crash analysis. They point to a staff guidance document, not a Commission requirement.

Nonetheless, ISP has done that analysis and supplemented the application. It wasn't subject of notification because it was outside the scope of the contention, but it's there. It's in ADAMS. It exists, and it concluded that the likelihood of an aircraft crash, the probability of the initiating

event was less than one times ten to minus 6, which is the standard established in PFS, the Commission's standard.

Petitioners might disagree with that standard, but it is the standard that the Commission has set for this Board and others to follow, as the Board noted in the 19-4. So we make that point.

And then separately with respect to -- pause for a second, if there's anything about that.

JUDGE ARNOLD: I do have a question on that. Your emergency response plan is the consolidated emergency response plan. What is being consolidated?

MR. MATTHEWS: Thank you, Judge Arnold. The consolidated interim storage facility sits on the WCS site. The WCS site is also the home for TCEQ license low-level radioactive waste facilities. Those facilities under the TCEQ regulation require an emergency response plan.

Both the NRC and TCEQ recognize that the licensee -- their respective licensees needs an emergency response plan, and the NRC's guidance indicates that where it makes those sense, those plans ought to be consolidated, such that you can actually carry them out.

At the time of an event, you may not know where it initiated. You want to be able to respond to the plan appropriately, notifying law enforcement agencies and the like, first responders.

So the plan recognizes that, and it specifically delineates which portions are applicable to the CISF.

JUDGE ARNOLD: So this consolidated plan evolved from an existing plan for the whole site, or --

MR. MATTHEWS: I wouldn't quibble with "evolved." There was an existing plan for the site, and then ISP, WCS before it, began working on what else needs to be included in this plan in order to address the NRC requirements that may be different from the TCEQ requirements.

JUDGE ARNOLD: Do you know if the airplane crash alert was added to the existing plan as consolidation, or did it already exist?

MR. MATTHEWS: I'll check on that, Judge Arnold. I don't know off the top of my head. There is NRC staff guidance that -- the REG guide for review of a 72 facility that drives you to an ANSI standard that includes a list of initiating events that need to be considered, and aircraft is in there. So that's the why it's there, but whether it preexisted, I will

check and come back to the Board.

JUDGE ARNOLD: Thank you.

MR. MATTHEWS: Last is the groundwater contention, and just a couple points on that. We've addressed that today earlier in the context of Sierra Club 10, and noting that it's not different materially from Sierra Club 15 in the Holtec proceeding. Those arguments still apply here. The Applicant -- or sorry. The petitioner has not explained why any radionuclide could ever get to groundwater if it exists there, and there are a couple points to make.

The contention bootstraps this idea of a fully loaded aircraft landing unintentionally on the CISF. It doesn't somehow suggest that that's plausible or probable. Just it relates back to the other contention, saying, well, ISP has conceded that. As we just talked about, that's not the case.

There is nothing that indicates there is some initiating event that could cause fission product to leave the clad, to leave the canister, to have a transport mechanism to leave the pad and to reach the groundwater. That didn't exist and doesn't exist.

JUDGE RYERSON: And just to clarify, the possibility of an airplane intentionally landing is beyond the scope of what we may consider, given the

Commission's position on --

MR. MATTHEWS: We are still beyond the Ninth Circuit. Yes, Judge Ryerson.

And with respect to the location of the aquifer or aquifers as petitioners allege, there are some significant deficiencies noted in our pleadings that the Board may want to consider. That is, the various petitioners don't agree as to where or which water is under the site.

ISP has presented extensive analysis about where groundwater or formations are, the geologic structure, and where it has actually found water and where it has not.

Petitioner has a supporting affidavit of geologist Pachlhofer, who opines on many things, one of which is geology. But for his assertions about geology, he relies on Lehman and Rainwater, which was one of the references in the ISP application.

Geologist Pachlhofer asserts that, with reasonable scientific certainty, the Ogallala Aquifer exists underneath the site of the proposed CISF. The problem with the Pachlhofer assertion is it relies only on Lehman and Rainwater, which comes to the opposite conclusion. It says there is no Ogallala Aquifer there. It says there's an Antlers Formation

and, further in Exhibit 10 of Lehman and Rainwater, says it's dry.

It says where the site is is between two zero water level gradients. So it's completely consistent with the application that ISP filed. Where the expert's opinion is different from the sources upon which he relies, it is not entitled to deference from the Board, and there is nothing else, no independent evaluations that geologist Pachlhofer asserts that he conducted.

I'll stop there. I understand there may be further questions today or tomorrow or whenever the Board would like.

JUDGE RYERSON: Apparently no questions now.

MR. MATTHEWS: Then I will turn over the mike to my colleague Ryan Lighty.

JUDGE RYERSON: Okay. Thank you, Mr. Matthews.

MR. LIGHTY: Thank you, Your Honor. I'm just going to be speaking about Fasken and PBLRO contention number 2 regarding oil and gas wells. I would first note that the petitioner's argument here is really twofold, asserting that the SAR fails to, number one, mention and, number two, investigate what

it asserts are thousands of wells within ten miles of the site.

But it points to no requirement in Part 72 to list wells within any particular radius of the site, and it provides no explanation for why the radius that it has selected without explanation of ten miles is a requirement that has not been met here.

To the second part of the argument that the application does not investigate, the petitioner simply has not looked at the appropriate portions of the application. If you look at SAR section 2.6, 2.6.1 is a discussion of the basic geologic and seismic information; in 2.6.2, vibratory ground motion; 2.6.3, surface faulting; so on and so forth.

They don't challenge any of that information, and more importantly, they don't challenge the attachments to the SAR. Attachment D is the probabilistic seismic hazards evaluation. That document is a proprietary document that they did not even attempt to request to access to dispute information in that evaluation.

And Attachment E is the geotechnical investigation. That document is public. It's also not disputed, so to the extent petitioners argue that there is no investigation of the geotechnical

information here, it's simply incorrect. It's in the application. It just has not been disputed here.

I would note that recently on May 31, we did submit an RAI response that contains some additional information regarding oil and gas wells in the region. We still maintain that that disclosure is not required under the regulation cited by petitioners, 72.103(a)(1), but we did provide the Board notification and the notice to the parties, because it is generally relevant to the discussion here. So even if there was some obligation to include that information, that omissions has now been cured, and there's no longer a live contention on this.

And importantly, the information as provided shows that there are no active wells at the site or within a mile of the site. And petitioners haven't explained why the presence of thousands of wells ten miles away from the site is material to their contention when there's not any active wells within a mile of the site. That's a sharp drop-off, and there's no explanation of why that additional information that they demand is material here.

And so for those reasons, we believe and continue to believe that contention 2 is inadmissible.

JUDGE RYERSON: Thank you. Any questions

on -- that's the sole contention you are dealing with?

MR. LIGHTY: Yes. Thank you, Your Honor.

JUDGE RYERSON: Thank you, Mr. Lighty.

MR. BESSETTE: Almost have clean-up for the day, Your Honor, so hopefully I'll be short.

JUDGE RYERSON: We'll get with the NRC staff yet.

MR. BESSETTE: I'm going to address Fasken contentions 1 and 5.

VOICE: Pull down the microphone, please. Thank you.

MR. BESSETTE: I did listen carefully to Mr. Eye's discussion of Fasken 1, which discusses that the CISF is not needed to ensure safe storage of spent nuclear fuel, and also his arguments regarding a de facto repository.

One issue I did hear that was new was that we do not -- the siting would not meet international siting standards for such a repository. That is a new issue, not included in this pleading at all, so similarly, that should be ignored.

Simply, Your Honor, I believe this is identical, almost word for word, for Sierra Club 2 and 3, so the Board's decision on that applies equally. And with regard to a de facto repository, the Board's

decision on Joint Petition 10 and Sierra Club 5.

So if you have no questions, I'll move on.

JUDGE RYERSON: No questions at this point.

MR. BESSETTE: All right. The next item, Your Honor, is on Fasken item 5, challenging -- let me find it -- the discussion in the environmental report of endangered and threatened species. I did acknowledge that Mr. Eye acknowledged currently -- the original petition challenged that there was no discussion of the lesser prairie chicken and dunes sagebrush lizard as threatened or endangered.

Neither of those are threatened or endangered under Texas or U.S. law, and Mr. Eye admitted that, noting that the only species threatened and endangered species is the Texas horned lizard, which is endangered under Texas law only.

I would note that the contention itself never mentions the Texas horned lizard. It's completely silent on that. The only mention of the Texas horned lizard is in the Pachlhofer declaration on one page where he asserts that it would be affected by radiation for the facility. So there's no connection between the conservation efforts and the Texas horned lizard in their petition or their expert

reports.

The main consensus or main concern is that the conservation efforts, to the extent they are even relevant to this contention on the remaining species, somehow are undermined by the efforts of the interim storage project. But there is zero information on what those conservation efforts are and how the project would undermine them. They don't include that as a reference. They don't cite what's being done, and therefore, we don't -- it's unclear to us, besides just simple construction, how we would undermine those efforts.

As they assert to us that these studies are outdated or we need more, we need more from them. They have the burden to state how their conservation efforts are somehow undermined by the project.

With regard to the assertion that these studies are out of date somehow, this is very similar to the Sierra Club petition on those studies. I would note there is no law that requires us to do updated studies if the discussion in the environmental report provides an appropriate environmental baseline.

In addition, the environmental report does discuss 2015 data from the U.S. Fish and Wildlife Service regarding the status of threatened and

endangered species, which they don't challenge.

That's all I have on Fasken 5.

JUDGE RYERSON: Okay. Any questions?

JUDGE ARNOLD: No questions.

MR. BESSETTE: All right. Thank you, Your Honor.

JUDGE RYERSON: Thank you, Mr. Bessette.

You may -- well, as usual, I'm going to have a question or two. You may want to hear what they are. Let's see. Actually, yes. I'm going to talk a little bit about or have some questions on Fasken contention 2. I don't know if that affects who would like to start. Mr. Gillespie.

MR. GILLESPIE: Yes, Your Honor.

JUDGE RYERSON: Yes. I mean, I don't want to preempt what you're going to say, but I -- it did seem to me -- this is a contention that the staff proposed that we should admit, Fasken contention 2, as I recall, in part.

And the staff's explanation of that -- I know you have less time than we get to write these things up, but it was fairly brief and seemed to spend most of its time on why the contention should not be admitted as to groundwater issues, but spent very little time on the conclusion that it should be

admitted as to geologic stability issues.

And I was just wondering -- well, let me finish a related question, and that is whether you've looked at RAI response, I think it is, 2.2-2 that was recently filed that provided some additional information that bears on this contention.

Having said all that, my question is: Has the staff's position changed? And if it -- well, first, has the staff's position changed?

MR. GILLESPIE: Yes, it has, Your Honor.

JUDGE RYERSON: And what is the staff's position today?

MR. GILLESPIE: The position today is that the contention is inadmissible. It's been rendered moot by the updated information provided in the application.

VOICE: We can't hear you.

JUDGE RYERSON: Yes. I think some of the people would like to hear that more clearly.

MR. GILLESPIE: That we see the contention as moot, based on the updated information provided in the RAI response.

JUDGE RYERSON: Okay. I think that moots my second question, so okay. Having said that, what else would you like to address about the Fasken?

MR. GILLESPIE: I believe my colleague has something further to say.

JUDGE RYERSON: Ms. Kirkwood. And I perhaps should have asked this to Mr. Gillespie. But that means, unless you've changed some other views, that means the staff would urge that no contention submitted by Fasken is admissible.

MS. KIRKWOOD: That is correct.

JUDGE RYERSON: Although the staff has maintained the staff supports the standing of the Fasken petitioners.

MS. KIRKWOOD: Yes. That is correct, Your Honor.

JUDGE RYERSON: Okay. Thank you.

MS. KIRKWOOD: Your Honor, I just -- the staff just wanted to speak briefly to the discussion regarding what NRC guidance required with respect to aircraft crash probability. We thought there might have been some confusion.

And we wanted to state that NUREG 1567, Section 2.5.2, calls for potential hazards to be reviewed that are nearby the site, and that includes that for an installation near an airport, to consider whether an aircraft -- consider aircraft size, velocity, weight and fuel load in assessing the

hazards of aircraft crashes. But it does not say that it is ergo a credible event.

The Applicant also mentioned this, but the Commission established the threshold for considering the aircraft crash to be a credible event in the PFS proceeding for ISFSIs and at one times ten to the minus 6, which would apply to this proceeding.

And then the staff uses the guidance in NUREG 0800 which applies directly to light-water reactors in order to assess whether or not the -- in order to assess the methodology for determining the probability of an aircraft crash at a particular installation because the guidance in that document is more detailed, but it is not changing the standard from that set by the Commission.

So that's the only thing that we wanted to --

JUDGE RYERSON: Okay.

MS. KIRKWOOD: -- add to that response.

JUDGE RYERSON: While I have you --

MS. KIRKWOOD: Sure.

JUDGE RYERSON: -- and your answers are subject to what you may hear tomorrow in response to the Board's questions or the arguments about standing as a more generic issue. But I think, as you've

acknowledged, the staff's position has changed on a few issues since the staff's original written responses to the petitions.

And it might be useful to summarize, just so we're clear, as of right now, the staff's position is that Beyond Nuclear has established standing, and the staff would urge the admission of Beyond Nuclear's sole contention, at least in part.

MS. KIRKWOOD: Correct.

JUDGE RYERSON: With respect to Sierra Club, the staff would find standing, I believe, but would not find an admissible contention.

MS. KIRKWOOD: Correct.

JUDGE RYERSON: With respect to the Joint Petitioners, the staff would not find standing but would not object to the Board's finding standing for SEED, but would find no admissible contentions.

And with respect to Fasken, the two Fasken entities, the staff would find standing. That was your written position. That has not yet changed.

MS. KIRKWOOD: Right.

JUDGE RYERSON: But would not find an admissible contention. So if we were holding a hearing today -- put aside motions for summary disposition. If we were holding a hearing today, the

staff's position would be we should have a hearing on Beyond Nuclear's contention.

MS. KIRKWOOD: Correct.

JUDGE RYERSON: But the issue -- but let me parse through one more thing, if I can. Is the staff's view that we should have -- well, maybe it's not a hearing. Maybe it's a legal issue contention and doesn't require a factual hearing. Would that be the staff's view?

MS. KIRKWOOD: Your Honor, I think there is a good chance that that would not be -- that that would not require an evidentiary hearing.

JUDGE RYERSON: An evidentiary hearing. That we should perhaps have further briefing on the question that you say is admissible. But if I'm hearing you correctly, what you're saying is admissible is not the issue of the lawfulness of DOE taking title today. I think the Board thinks that's not lawful. ISP has acknowledged that's not lawful. But petitioners urged everyone that that's not lawful, and I think the staff is agreeing, are you not, that it's not lawful?

MS. KIRKWOOD: Staff hasn't taken a position.

JUDGE RYERSON: The staff is not taking a

position. Okay. I wasn't sure if you agreed it was not lawful, but it was not clear to you whether it would be a good thing to have it in the application, even though you think it's not lawful.

MS. KIRKWOOD: Yes. Even --

JUDGE RYERSON: But you're not taking a position on either.

MS. KIRKWOOD: We're not -- I want to be very clear on this.

JUDGE RYERSON: Okay.

MS. KIRKWOOD: Even if you -- admitting the contention assumes that there is at least a plausible argument that it's not lawful, and which appears to be obvious --

JUDGE RYERSON: Yes.

MS. KIRKWOOD: And so I think you could sort of jump to the second part of that, which is thus, is it acceptable to have it still in the license application or not. And that's the part that we think is an inadmissible contention.

JUDGE RYERSON: Okay. And you think further briefing on that issue, beyond the hundreds of pages we already have, would be helpful?

MS. KIRKWOOD: Your Honor, I don't think -- the staff has not taken a position on that.

We have an obligation to review the application and to issue a license that we think is appropriate.

JUDGE RYERSON: Okay.

MS. KIRKWOOD: And I don't think actually -- I think that the briefing thus far has focused on the admissibility of the contention, not on the merits of whether or not it's appropriate to include that option in the --

JUDGE RYERSON: Yes. I mean --

MS. KIRKWOOD: -- license.

JUDGE RYERSON: -- when you're talking about a legal issue contention, I think of necessity sometimes the admissibility of the contention and the outcome of a legal issue contention seemed often to be very close. But I understand your position. I appreciate it. Thank you.

Anything else?

MS. KIRKWOOD: Just to clarify slightly our position on the SEED standing with the Joint Petitioners, we don't object to SEED having standing based on proximity to the facility. We do object to SEED having standing based on transportation, based on the transportation routes.

JUDGE RYERSON: Oh, I -- the statement was -- so you slightly changed your position on that.

MS. KIRKWOOD: I hope not.

JUDGE RYERSON: Well, at least you've changed my understanding of your position. In other words, you would agree -- does the staff agree that SEED has presented facts that are sufficient for the Board to find standing for SEED, based not -- on the basis of Ms. Gardner-Aguilar's proximity of her residence to the proposed facility?

MS. KIRKWOOD: Yes. But that's not exactly what she said in the affidavit. I think you could read --

JUDGE RYERSON: Oh, I know, I know.

MS. KIRKWOOD: -- it to include that.

JUDGE RYERSON: Okay. All right. I -- we understand your position. Or I won't go quite that far, but I think we've reached as far down that road as we can get.

MS. KIRKWOOD: Okay.

JUDGE RYERSON: Thank you. Anything else?

MS. KIRKWOOD: I have nothing further.

JUDGE RYERSON: Okay. So we will convene again tomorrow at nine o'clock. We'll begin with the explanation of your views on the generic issue, why nobody has standing, and we'll have a response to that from petitioners, all the petitioners if they want to,

but again, I encourage the petitioners to consider a joint -- at least a lead by somebody on that issue.

We did offer -- I didn't mention it this morning. We did offer in our order, the June 7 order, the opportunity for very brief concluding statements by everybody. I think many of you may feel you've talked enough by the end of tomorrow morning or whenever we finish tomorrow. But if there's a sense that people would like to do that, you know, I think we'll probably have time to allow that.

So you might want to think about whether you want to give a brief summary statement, probably five minutes for everyone, maybe a few more minutes for the Applicant. It's four to one, but I'm not sure how much one can do in five minutes versus seven minutes, but we'll do something on that nature.

And I don't know if Ms. Curran is here. Is she here? Oh, over here. That's why I didn't see you. Sorry. I know that you -- last time we made that as a possible offer, you were enthusiastically accepting, and I assume you are again, that you would like to have five minutes at the end to --

MS. CURRAN: Yes, if possible. But we hope to be done by the lunch break.

JUDGE RYERSON: That's our hope as well.

Okay. Well, I mean, we'll see how it goes. I think we can probably do that. If there really isn't a strong sense that that would be productive after a day and a half, we don't -- certainly don't have to do it.

I see you, Mr. Matthews. You were eager to say something.

MR. MATTHEWS: Thank you, Judge Ryerson. I just wanted to -- we had a response to Judge Arnold's question about the emergency plan --

JUDGE RYERSON: Oh, okay. Great.

MR. MATTHEWS: -- and that is, yes, today the WCS emergency plan includes aircraft crash as a site area emergency. It is one of the alerts.

JUDGE ARNOLD: Okay. So it's carried over.

MR. MATTHEWS: Yes, Judge Arnold.

JUDGE RYERSON: All right. Thank you, Mr. Matthews. Anything else, anyone?

We will resume at nine o'clock tomorrow. Thank you.

(Whereupon, at 4:40 p.m., the oral arguments in the above-entitled matter were recessed, to reconvene at 9:00 a.m., Thursday, July 11, 2019.)