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

Docket Number: 72-1050-ISFSI

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1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

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4 ATOMIC SAFETY AND LICENSING BOARD PANEL

5 + + + + +

6 ORAL ARGUMENTS

7 -----x

8 In the Matter of: : Docket No.

9 INTERIM STORAGE : 72-1050-ISFSI

10 PARTNERS LLC : ASLBP No.

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

12 Interim Storage :

13 Facility) :

14 -----x

15 Thursday, July 11, 2019

16 Commissioner's Courtroom

17 Midland County Courthouse

18 500 N. Loraine Street

19 Midland, Texas

20 BEFORE:

21 PAUL S. RYERSON, Chair

22 NICHOLAS G. TRIKOUROS, Administrative Judge

23 DR. GARY S. ARNOLD, Administrative Judge

24

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P R O C E E D I N G S

9:00 a.m.

JUDGE RYERSON: Well, day two. Again, a few logistical issues. If people, I hope, would remember to silence your cell phones. I see we have fewer people who might have cell phones. And once again, we have provided water for the petitioners, the Applicant, the staff, so feel free, if you don't have a bottle of water near you, to grab one if there's some down there. There should be plenty down there.

I think our plan today -- I'll just say a few words about that. We're going to begin with, I think it is, probably Mr. Lighty will be presenting the Applicant's views on kind of some generic issues of standing, to which all the petitioners are free to respond, but if you've agreed on one lead, that would be terrific, probably more efficient, but that's up to you. We'll get to that.

After that, we will have questions from the Board. I think all of us feel that a lot of our questions were answered yesterday. Even though that was not the primary purpose of yesterday, we really got a lot of questions and we got a lot of answers. So we are hopeful that this will be a relatively short session today.

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1 We'll certainly take a break, but our
2 thinking is that if there's an excellent chance of
3 finishing in the morning, we'll take whatever time we
4 need to finish and have lunch afterwards, and indeed,
5 we might not even get that close to noon. We'll just
6 have to see how it goes, but -- no guarantees, but I
7 think we're all quite hopeful that we will finish this
8 morning.

9 So with that, Mr. Lighty, would you like
10 to begin -- or Mr. Matthews.

11 MR. MATTHEWS: Judge Ryerson, if I might,
12 I just wanted to make a correction to the record
13 for --

14 JUDGE RYERSON: Certainly.

15 MR. MATTHEWS: Tim Matthews for Interim
16 Storage Partners. I want to make a correction to the
17 record. I erroneously indicated yesterday with
18 respect to Fasken's motion related to the Nuclear
19 Waste Policy Act, I made a point about failure of
20 service, and that's incorrect. It was -- their
21 initial motion was not, in fact, served on Interim
22 Storage Partners, but they did resubmit the motion two
23 weeks later, and it was served on us, and we did not
24 argue failure of service in the response, so --

25 JUDGE RYERSON: Great. Thank you for --

1 MR. MATTHEWS: -- I just wanted to clarify
2 that.

3 JUDGE RYERSON: -- that clarification.

4 MR. LIGHTY: Good morning, Your Honors.
5 Ryan Lighty for ISP.

6 I know we're here to talk about standing
7 first thing, and I think it may be helpful to begin
8 with a brief discussion, a high-level overview of the
9 three types of standing, just to set the stage for
10 what we're going to talk about today.

11 There are three types of standing in NRC
12 proceedings. On one end of the spectrum is
13 traditional standing, and there is also, on the other
14 end of the spectrum, proximity standing in reactor
15 licensing cases, and then in the middle, between them,
16 is the hybrid of proximity-plus standing. That
17 applies to this proceeding.

18 As to traditional standing, it would be
19 helpful to think of these three types in terms of a
20 map. Visualize a map. For traditional standing, a
21 petitioner needs to show that a harm would accrue at
22 a particular point on a map, and that they have
23 interests at that point on a map.

24 In the reactor proximity presumption,
25 however, the Commission has generically determined

1 that the potential for consequences is assumed at a
2 radius of 50 miles, and the only demonstration a
3 petitioner need make is that they have an interest
4 within that 50-mile radius.

5 But with the hybrid proximity-plus
6 standing, a petitioner needs to show that there will
7 be an obvious potential for off-site consequences at
8 a radius certain, not a point certain as in
9 traditional standing.

10 So when we talk about the three different
11 types of standing, the proximity-plus is a
12 presumption. There still must be a showing of harm in
13 proximity-plus, unlike reactor standings where the
14 Commission has generically determined that there is an
15 obvious potential, and it exists at a radius of 50
16 miles.

17 So there are really two showings that
18 we're talking about here that petitioners need to meet
19 for proximity-plus, that is, that there is an obvious
20 potential for off-site harm, and what the radius is
21 for that potential. And none of the petitioners in
22 this proceeding have made either of those
23 demonstrations.

24 The Commission has generically determined
25 as well that the type of activity for which ISP is

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1 seeking a license falls into a category of ultra-safe
2 activities that do not require off-site emergency
3 planning, because the potential for off-site harm is
4 not plausible.

5 This type of proceeding is different from
6 other ISFSI or Part 72 applications that may involve
7 at-reactor ISFSIs, spent fuel storage pools, or other
8 applications that have fuel handling operations. And
9 the reason is that the risk profiles are very
10 different in those types of proceedings.

11 We discussed this a bit in our pleadings,
12 and it really goes back to the Part 72 emergency
13 planning rulemaking where the Commission made that
14 distinction. They discussed at-reactor ISFSIs wet
15 fuel handling operations, and they recognized that the
16 risk profile is significantly different for the type
17 of activity that ISP is seeking a license for here,
18 and that is dry storage, away from reactor, with no
19 fuel handling operations.

20 So the risk profile is very different here
21 and falls into a category of activities that the
22 Commission has generally determined to be ultra-safe
23 and to not require off-site emergency planning.

24 JUDGE RYERSON: Isn't there a difference,
25 Mr. Lighty, beyond what is a reasonable requirement

1 for emergency planning, which is something I assume
2 involves a lot of effort and cost and a standard for
3 whether somebody who lives across the street from a
4 facility is allowed to at least file a petition.

5 Put aside the Commission's views about
6 strict standards on contentions, but on standing,
7 hasn't the Commission said -- I hate to use the word
8 "lenient" -- we should be less strict than when it
9 comes to contention admissibility, that we should be
10 open and welcoming to petitions by people who at least
11 perceive a risk, even if, you know, in your view it's
12 not really a substantial risk? What's your response
13 to that?

14 MR. LIGHTY: Well, I think that's
15 absolutely right. The Commission has acknowledged
16 that, you know, that there is some leniency in
17 standing. However, it is a statutory requirement,
18 Section 189(a) of the Atomic Energy Act, to
19 demonstrate an actual interest that may be affected by
20 the proceeding. The perception of an interest that
21 may be affected wouldn't satisfy the statute.

22 In proximity-plus presumption, though,
23 that is a Commission policy, to create a shortcut to
24 show standing. And so when we're talking about
25 meeting the requirements that the Commission has

1 established to invoke that shortcut, what we're
2 talking about is a very wide gap between the
3 Commission's scientific determination that there is no
4 plausible possibility of off-site harm -- right?
5 There's no plausible possibility of it, and the
6 proximity-plus presumption requirement of a showing of
7 an obvious potential for off-site consequences.

8 There's an enormous gap between an obvious
9 potential and a scientific determination that there is
10 no plausible possibility of off-site radiological
11 consequences. And so I think that gap is what we're
12 really talking about here, the gap between the
13 Commission's scientific determination and the standard
14 in the Commission policy that you have to jump over
15 that hurdle to get the shortcut.

16 Now, this has nothing to do with
17 traditional standing. Petitioners could make their
18 own arguments in traditional standing space. But this
19 is the obligation that the Commission has imposed for
20 the privilege of invoking the shortcut to
21 demonstrate --

22 JUDGE RYERSON: But understood. The
23 Commission also at the same time cautions Boards that
24 we should not conflate merits determinations with
25 standing determinations. And, granted, the Commission

1 has created a shortcut, to say, but in applying that
2 shortcut, aren't you urging us to basically come back
3 to your contentions and say that -- and examine
4 whether there is a plausible possibility of a release
5 of radioactivity from these casks when, let us say,
6 intuitively or obviously the petitioners feel there
7 could be. And isn't that enough for them to at least
8 get in the door to argue the admissibility of their
9 contentions?

10 MR. LIGHTY: In a reactor licensing
11 proceeding, I would say yes. But because the
12 Commission has imposed the additional hurdle in
13 proximity-plus of a demonstration of the obvious
14 potential and the basis for the radius to be used --
15 I think the Board's decision in LBP 19-4 on the AFES
16 standing is instructive here.

17 The Board, I take it, had some difficulty
18 in determining --

19 JUDGE RYERSON: It was a nondecision, as
20 I recall or understand.

21 MR. LIGHTY: Correct. Correct. In
22 determining the radius to be used, and that's because
23 none of the petitioners provided any basis for a
24 determination that there is a radius at which harm
25 could accrue. And I think the absence of that

1 demonstration is exactly what we have in the petitions
2 here.

3 None of the petitioners have demonstrated
4 an obvious potential for off-site consequences at any
5 particular radius. If we look back to the emergency
6 planning rulemaking, a commenter in that rulemaking
7 suggested that the Commission adopt very small,
8 compact, one- to five-mile radius for off-site
9 emergency planning. The Commission rejected even
10 that, so if there is some plausible possibility of
11 off-site harm, it resides somewhere short of a mile
12 from the site.

13 The case law that many of the petitioners
14 cited for 17 miles in other proceedings again was wet
15 fuel storage at reactor operations. We're talking
16 about exposed fuel.

17 JUDGE RYERSON: What about the D.C.
18 Circuit decision in the NEI case where there was 18
19 miles, I believe, and that was not wet storage. That
20 was Yucca Mountain.

21 MR. LIGHTY: Yes. Yucca Mountain -- a
22 million years of storage, I believe, was the licensing
23 action there. Again, I think that's very different.
24 If I recall as well, the Yucca proceeding did involve
25 some fuel handling operations next to the site as

1 well. And so, again, very different risk profiles,
2 very different licensing actions.

3 And as the Commission has stated with
4 proximity-plus, the determination must be case by
5 case. You have to take into account the specific
6 facts of the licensing action that's being proposed.
7 And so I think that case is inapplicable here.

8 Again, what the petitioners have alleged
9 in the petitions is that the quantity of the proposed
10 storage alone is enough to demonstrate an obvious
11 potential, and that's just not the case. As the
12 Commission stated in the Schoffield Barracks case, in
13 CLI 10-20, even an extraordinary volume, to quote the
14 Commission, extraordinary volume is not enough to
15 demonstrate an obvious potential for off-site
16 consequence.

17 You must go an additional step to show
18 that there's some plausible mechanism for off-site
19 release. And the Commission again has also made clear
20 in CLI 04-13 that, quote, "conclusory allegations
21 about potential radiological harm," end quote, are
22 insufficient to satisfy that burden.

23 The petitions here do not offer anything
24 other than conclusory allegations about potential
25 radiological harm. And that's -- it's just not

1 enough. There must be some demonstration, some
2 demonstration of plausibility. And the petitions
3 don't meet that burden.

4 Again, this is a type of activity that
5 falls into what the Commission has determined to be an
6 ultra-safe category of activity, very different than
7 wet storage, fresh fuel, at an on-site operation.

8 JUDGE RYERSON: I'm a little concerned
9 about the practical consequences of the standard you
10 are proposing. You hint at the possibility that maybe
11 if someone lived within a mile of the proposed, you
12 wouldn't necessarily object or at least object as
13 strenuously. But, I mean, who would have standing?

14 I supposed if you were building this on
15 top of a Native American burial ground, they would
16 have standing. But who would -- who in your view
17 would have standing to challenge the movement of much
18 of the nation's nuclear waste to a lot across the
19 street from them? Who would have standing under your
20 theory?

21 MR. LIGHTY: Sure. I would note that all
22 we're talking about here is the privilege of invoking
23 the shortcut to standing, for proximity-plus
24 presumption. We're not talking about any
25 determination applicable to traditional standing. So

1 the avenue of traditional standing is wide open. The
2 Commission's determination doesn't necessarily weigh
3 on that.

4 And so what I would say is it's possible
5 that in terms of radiological harm, perhaps someone
6 with on-site interests could raise a standing claim.
7 Workers at the site, contractors, businesses with
8 equipment that's leased at the site, whatever the case
9 may be. On-site radiological harm has not been carved
10 out by the Commission's generic determination.

11 And, second, off-site nonradiological harm
12 has not been precluded by the Commission's generic
13 determination. And so I think the only thing that's
14 carved out is this narrow area of off-site
15 radiological harm being used to invoke the privilege
16 of the shortcut in proximity-plus. And I think that's
17 a fairly narrow area that's been precluded by the
18 scientific determination that the Commission has
19 adopted.

20 The fact that the petitioners here haven't
21 sought any other grounds for standing here, even
22 though the conclusion applying the law correctly may
23 seem harsh, that's not a basis to abandon the law
24 here. The alternative, however, is discretionary
25 standing.

1 Discretionary standing is permitted under
2 2.309(e) where petitioners have not met the legal
3 requirements for standing. The Board at their
4 discretion could admit petitioners with standing.

5 JUDGE RYERSON: Has the Commission ever
6 sustained a finding of discretionary standing?

7 MR. LIGHTY: That I don't know the answer
8 to, Your Honor.

9 JUDGE RYERSON: I don't either, but I --
10 but it hasn't happened often.

11 MR. LIGHTY: I'm not familiar. But it is
12 codified in the regulation. 2.309(e) makes it
13 explicit, and there are criteria that must be
14 satisfied, such as a demonstration in the initial
15 petitions that petitioners would create a meaningful
16 contribution to the proceeding and so forth.

17 But again, here, none of the petitioners
18 attempted to make that demonstration.

19 JUDGE RYERSON: Uh-huh. Right.

20 MR. LIGHTY: That was their choice to do
21 so. It was their choice not to address those criteria
22 as a back-up to their standing argument. And, again,
23 you know, even though the outcome may seem harsh, it's
24 not a basis to abandon the legal requirements for
25 standing, because it is, again, in the Atomic Energy

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1 Act.

2 Petitioners must demonstrate an interest
3 that may be affected by the proceeding, and the
4 Commission has wide latitude to set the criteria for
5 who may invoke the shortcut. And we would urge the
6 Board to consider those criteria.

7 JUDGE RYERSON: Judge Arnold, did you have
8 questions?

9 JUDGE ARNOLD: Curiosity. Could the
10 proximity-plus criteria be used based upon an
11 environmental impact? I mean, you've addressed
12 safety.

13 MR. LIGHTY: Yes. I -- my understanding
14 of the proximity-plus presumption is that the shortcut
15 is for a demonstration of an obvious potential of off-
16 site radiological consequences. Certainly in a
17 traditional standing showing, something within the
18 realm of NEPA could be a basis for standing. But I'm
19 not aware of any cases where a NEPA allegation has
20 been allowed as a basis for a proximity-plus shortcut
21 invocation.

22 JUDGE ARNOLD: And in your case, if I
23 remember correctly, all of your environmental impacts
24 were either small or nonexistent, so they would have
25 to actually challenge that finding as well.

1 MR. LIGHTY: Yes. For example, let's say
2 that a petitioner alleged that construction dust had
3 not been adequately analyzed in the environmental
4 report, and showed that they had an interest that was
5 within a radius where that construction dust could
6 cause them harm. I think that may be a scenario where
7 you've got a nonradiological off-site consequence that
8 would be sufficient for showing of standing.

9 JUDGE ARNOLD: But the petitioners haven't
10 done that.

11 MR. LIGHTY: But the petitioners have not
12 done that here.

13 JUDGE ARNOLD: Thank you.

14 JUDGE RYERSON: Judge Trikouros, any
15 questions?

16 JUDGE TRIKOUROS: No.

17 JUDGE RYERSON: Thank you, Mr. Lighty.

18 MR. LIGHTY: Thank you.

19 JUDGE RYERSON: How have petitioners
20 decided they wish to proceed? Individually or with a
21 single presentation? Ms. Curran?

22 MS. CURRAN: Good morning.

23 JUDGE RYERSON: Good morning.

24 MS. CURRAN: The petitioners have decided
25 we're each going to proceed on our own, because we

1 each have made different standing arguments, and I'm
2 sure we won't be completely repetitive, but we're not
3 going to designate one person.

4 JUDGE RYERSON: This argument affects all
5 of you, and so that's fine. I do urge all of you to
6 try to be crisp and efficient if you can be.

7 MS. CURRAN: We certainly will. With all
8 due respect, I'd like to correct a couple of things
9 that Mr. Lighty said. First, Beyond Nuclear did claim
10 traditional standing. It's in our hearing request.
11 We claimed traditional standing through the frequent
12 contacts of people -- of our standing declarants with
13 transportation, transportation routes, you know, the
14 railroad yards where spent fuel would be stored. So
15 that is something that was in our hearing request.

16 We also --

17 VOICE: We can't hear very well. Sorry.

18 MS. CURRAN: Oh, sure.

19 JUDGE RYERSON: I think if you slightly
20 move that mike it --

21 MS. CURRAN: Is that better?

22 JUDGE RYERSON: Much better.

23 VOICE: Much better.

24 MS. CURRAN: So I will repeat and say that
25 we did claim traditional standing. It is in our

1 hearing request. We also would argue to you that NEI
2 versus EPA is to a degree a traditional standing case,
3 because the Court talked about how the effects could
4 harm the standing declarant in that case.

5 And I would also say that the distinction
6 that Mr. Lighty makes between the NEI case and our
7 case is not a distinction of importance here, that
8 there is, as in the Yucca Mountain repository case,
9 there is also a potential here for casks to remain for
10 a lengthy period at this site, and there is a
11 potential for them to release radioactivity.

12 And just, you know, to get back to the
13 central point here -- and I think it gets to your
14 question, Judge Ryerson, of when would anybody have
15 standing to participate in a case like this. If the
16 basic presumption for -- and used by the NRC to assess
17 standing is that casks will be operated in complete
18 conformance with the regulations for only the license
19 term that is being sought here, and that everything
20 will go well. Then no one will ever have standing.

21 But the issue is that as in all aspects of
22 life, there are risks. There are risks that casks
23 will not maintain their integrity. There are risks
24 that there will be an accident. There is the
25 potential that the cladding inside a spent fuel

1 storage cask is flammable.

2 We haven't even talked about the risk of
3 an attack on a spent fuel storage cask. We know that
4 that -- in this Circuit, that that can't be addressed
5 in a NEPA case, but you can't rule that out for
6 purposes of standing, because standing is a broader
7 inquiry and it is a much different test.

8 And with that, I would like to get to the
9 relevance of the emergency planning rule that ISP
10 relies on. The Commission in that case did not say
11 that the potential for off-site harm is not plausible.
12 They just didn't say that. They said there was not a
13 significant potential for off-site harm in the context
14 of emergency planning, which is an immediate response
15 to an accident.

16 It doesn't say anything at all about what
17 if an accident resulted in longer term release of
18 radioactivity that didn't require -- didn't rise to
19 the level of an evacuation, but that contaminated the
20 environment. They didn't address that, and that is
21 certainly a relevant concern for purposes of standing.

22 The standing for -- the standard for the
23 proximity-plus presumption is whether there's an
24 obvious potential, potential, for off-site
25 consequences. It doesn't mean that it has to be

1 significant or likely. It's an obvious potential, and
2 if you look at the --

3 There's a case decided by the licensing
4 board in 1996, Yankee Atomic Electric Company, LBP
5 96-2, 43 NRC 61, which says that the licensing board
6 said, We don't find ourselves in a position at this
7 threshold stage to rule out as a matter of certainty
8 the existence of a reasonable possibility that, in
9 that case, decommissioning might have an adverse
10 impact to petitioners' members who live nearby or
11 recreate nearby.

12 So we're talking about whether the NRC can
13 rule out the potential for off-site consequences, and
14 we think that with a facility that would store in one
15 single place half of the existing inventory of spent
16 fuel in the United States, 40,000 metric tons, you
17 cannot rule out the potential that in such a large
18 quantity of spent fuel storage casks, you may have an
19 accidental release.

20 I also -- I think we dealt with this in
21 our reply to the oppositions to our hearing request,
22 but the Schoffield Barracks case is not helpful in
23 this case, because Schoffield Barracks dealt with low-
24 level radioactive material that was widely disbursed
25 over a large area. That's just not what we're talking

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1 about here. We're talking about a highly concentrated
2 collection of highly radioactive spent fuel, not
3 comparable at all.

4 And I just, in closing, I want to read you
5 a quotation from the emergency planning rule that I
6 think is helpful. The citation to the emergency
7 planning rule is 61 Federal Register 32430, and this
8 is at page 32439.

9 It says -- and this is in the context of
10 emergency planning. "At this age, spent fuel has a
11 heat generation rate that is too low to cause
12 significant particulate disbursement in the unlikely
13 event of a cask confinement boundary failure.
14 Therefore, the consequences of worst case accidents
15 involving an ISFSI located on a reactor site would be
16 significantly less than those accidents involving the
17 reactor."

18 So they're looking at the unlikely event
19 of a cask confinement boundary failure. They don't
20 rule it out. They just say it's unlikely. So for
21 purposes of this proceeding, at this stage, we don't
22 think that you have the basis to rule out an accident
23 that would involve a radiological release from a cask,
24 and therefore, you would not have a basis for denying
25 our standing. Thank you.

1 JUDGE RYERSON: Any questions?

2 JUDGE TRIKOUROS: No.

3 JUDGE RYERSON: Thank you, Ms. Curran.

4 Mr. Taylor, welcome.

5 MR. TAYLOR: Thank you. It's always an
6 advantage to follow Ms. Curran's argument, so I don't
7 have to say very much. The Sierra Club has two bases
8 for standing in this case. One is we have two
9 declarants who live in Eunice, six miles from the
10 site. I might just note parenthetically that ISP has
11 objected to Rose Gardner because apparently she also
12 signed a declaration for Beyond Nuclear.

13 I don't know that the Commission has
14 specifically said that a declarant cannot be
15 representative of two organizations. But in any
16 event, we have a declaration from Shirley Henson, who
17 also lives in Eunice, so I think that's probably a
18 nonexistent question in terms of standing.

19 But -- so we have a standing based on
20 residence within six miles of the site. We also have
21 standing based on proximity to the transportation
22 route, again in Eunice, and we also have some
23 declarations from the Dyer family in Hobbs.

24 And if you recall, one of the maps Mr.
25 Lodge showed yesterday showed definitely that there is

1 a transportation route north and south that goes
2 through Hobbs and Eunice, and there's a little spur
3 that goes directly to the proposed waste site. So
4 that's definitely going to be a transportation route.

5 The Commission has made it clear that
6 proximity-plus standing applies to waste sites or
7 similar projects that are not reactors, where standing
8 was accorded to petitioners up to 17 or 18 miles away.

9 I guess I find it a little bit ironic that
10 the petitioners yesterday were required -- not
11 required -- were asked to distinguish this case from
12 the Holtec decision that this Board rendered a few
13 months ago.

14 But apparently ISP is not being asked to
15 distinguish the standing issue between the two,
16 because clearly the standing issues are the same here,
17 and the Board accorded standing, noting these cases
18 that allowed standing for 17 or so miles away. And I
19 haven't heard ISP make any argument about
20 distinguishing this Board's decision in Holtec from
21 the facts in this case.

22 In terms of plausible harm or plausible
23 connection between this project and the standing
24 allegations of the declarants, the declarants
25 specifically identified what their concerns were, why

1 they had the concerns, and in our petition, we also
2 referred to our contentions concerning the safety and
3 environmental impacts that we felt would be created by
4 this project.

5 And as Judge Ryerson noted a little bit
6 ago, the standard for admissibility of contentions is
7 not the same as the standard for finding standing, so
8 the fact that we have at least presented some
9 plausible concern that these declarants would have
10 based on our contentions, I think that that is
11 something the Board can and should consider.

12 So based on all the cases Ms. Curran
13 mentioned and the cases that are in our petition and
14 our response, our reply, we believe that we do have
15 standing, just as we had standing in the Holtec case.

16 JUDGE RYERSON: Any questions? Judge
17 Arnold?

18 JUDGE ARNOLD: No questions.

19 JUDGE RYERSON: Judge Trikouros?

20 JUDGE TRIKOUROS: No.

21 MR. TAYLOR: Thank you.

22 JUDGE RYERSON: Thank you, Mr. Taylor.

23 Mr. Lodge.

24 MR. LODGE: Thank you and good morning.

25 In the interest of crisp efficiency, I would like to

1 indicate that the Joint Petitioners adopt the
2 arguments that were advanced by Beyond Nuclear's
3 attorneys. I'd like to supplement that, however, with
4 a number of points.

5 We believe -- and I'd just like to remind
6 the Board of a major distinction between most of the
7 Joint Petitioners and other putative intervenors here,
8 that being the fact that we're talking about
9 grassroots organizations with members who have
10 provided declarations of proximity to what we believe
11 are known and/or readily identifiable rail routes and
12 other transfer routes to -- in route to WCS, Texas.

13 We believe that there's an obvious
14 potential for off-site radiological harm that is
15 admitted in the environmental report. There's
16 discussion at -- on tables 4-18, -19, and -20, within
17 the environmental report of radiation emissions from
18 routine incident-free transport.

19 There's also the return to sender, what I
20 call the return to sender, policy enunciated by the
21 Applicant here, whereby if contaminated, leaking,
22 troublesome canisters or casks arrive, they will in
23 some sense, I guess, be patched up, remediated enough
24 to put back on the road home. They will be returned.
25 So there will be a knowing send-back of spent nuclear

1 fuel.

2 We also would point out that the TAD
3 reloading issue, which is gapingly unresolved for
4 purposes of consideration of this application,
5 certainly raises some interesting questions. As I sat
6 listening to the WCS presentation, it occurred to me
7 that it's a -- by denying any possibility, by claiming
8 that this will be a perfectly executed business plan
9 for generations, you get to knock all of the
10 intervenors out because they just don't have enough to
11 show for standing.

12 The -- as Mr. Ryerson indicated, Judge, a
13 little while ago, I have to agree with what you were
14 saying. I think that there's an enormous attempt to
15 conflate merits with the much different and lower
16 thresholds for standing, because of the fact that they
17 don't get into -- this explains the preposterous
18 notion that in the 2120s will be the first appearance
19 of a dry transfer system.

20 It explains why there would be a return to
21 sender policy, because outwardly the Applicant
22 maintains that this is all low risk, effectively a
23 perfect conceived idea. What could possibly go wrong?

24 So you have several different modes of
25 potential off-site consequences. You have a given of

1 off-site radiological consequences to and from the
2 facility. And I would like to discuss the traditional
3 standing that we believe the Joint Petitioners, not
4 just Ms. Aguilar -- Gardner-Aguilar, but the people I
5 consider to be at considerably further distances away
6 from the facility along the routes.

7 As I pointed out, Patricia Mona Golden,
8 Van Horn, Texas, works a hundred feet away from the
9 only apparent east-west rail line between El Paso and
10 Monahans. She lives a block away from that same rail
11 line. We have people who have demonstrated that they
12 are certainly within the zone where one might conceive
13 of routine incident-free transport radiation
14 emissions.

15 The -- WCS claims that effectively we have
16 only made a -- raised a generalized grievance. We
17 believe that that's quite incorrect. The term
18 "generalized grievance" doesn't just refer to the
19 number of people who are allegedly injured. It refers
20 to the diffuse abstract nature of the injury itself.

21 So just because, let's say, hundreds,
22 thousands or most likely millions of people live
23 proximate enough to probably rail corridors that they
24 will be subject involuntarily to radiation emissions,
25 just because there's millions doesn't mean that if a

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1 handful of them file declarations, that they have
2 identified this as a concern, that they were actually
3 following in the path of the adjudicated fact from the
4 Savannah River case, the MOX Fuel Facility case, that
5 noted the possibility of incidental emissions of
6 radiation, incident exposures.

7 The fact that a few people are raising it
8 and are invoking a statutory procedure that is
9 purported to protect public health and safety is
10 significant, and it takes this out of the class of
11 dismissible generalized grievances.

12 We also would point out that the logic of
13 the Savannah River case -- I call it the Duke Cogema
14 Stone & Webster case, but the Savannah MOX Fuel case
15 is sort of interesting on its facts. We're talking
16 about finished fuel being delivered to two recipient
17 reactors, a total of 550 contemplated shipments, and
18 spent nuclear fuel presumably contains a good many
19 more radiological poisons which are in a less stable
20 circumstance than MOX Fuel.

21 The fact that a mere 550 shipments was
22 contemplated in the Savannah River case is sort of
23 glaring in the shadow of potentially tens of thousands
24 of shipments to the Texas site. But the logic of that
25 licensing panel, which unfortunately this panel

1 considers to be an outlier type of decision, but the
2 logic of it lays out very well the same logic that we
3 propose be applied to our situation as Joint
4 Petitioners.

5 "As the intervention petitions indicate,
6 incident-free shipping of plutonium provides a dose of
7 ionizing radiation, albeit small, to anyone next to
8 the transport vehicle and a minor exposure to
9 radiation, even when within regulatory limits is
10 sufficient to state and injury in fact." And that
11 cites to the Yankee Atomic Electric Company case.

12 "Further, the asserted harm here, injury
13 to the health and safety of petitioners' members from
14 ionizing radiation, is clearly encompassed by the
15 health and safety interests protected by the Atomic
16 Energy Act. Nor is there any doubt that the injury
17 alleged by the petitioners' members is fairly
18 traceable to the production and subsequent manufacture
19 and shipping of MOX Fuel.

20 "Because the transport of MOX Fuel to the
21 mission reactors over public highways on which
22 petitioners' members travel cannot take place without
23 construction of the facility, it can't be fairly
24 argued that the threatened injury to the petitioners'
25 members is not caused by the challenged licensing

1 action.

2 "Indeed, the unique circumstances
3 surrounding the transportation of MOX Fuel over
4 unannounced routes, with unannounced schedules, in
5 unmarked trucks, precludes the petitioners' members
6 from being able to avoid the asserted harm to their
7 health from the shipment of plutonium over the
8 highways.

9 "Additionally and most obviously, the
10 asserted injury to the health of petitioners' members
11 would be redressed by a decision favorable to the
12 petitioners, denying the construction authorization
13 for the MFFS" -- pardon me -- "MFFF.

14 "Finally, the interests that the
15 petitioners seek to protect by challenging the
16 construction authorization are germane to the purposes
17 of the environmental organizations."

18 We believe that that constitutes in a very
19 concise fashion our arguments here, and that the Board
20 should grant all the Joint Petitioners standing.
21 Thank you.

22 JUDGE RYERSON: Any questions? Judge
23 Arnold?

24 JUDGE ARNOLD: No.

25 JUDGE RYERSON: No questions. Thank you,

1 Mr. Lodge.

2 Mr. Eye, before you begin, just a -- well,
3 come on. But I mentioned yesterday, I think, when we
4 get to the next phase and we have questions from the
5 Board, I will have some questions about the specifics
6 of the declarations that you submitted on behalf of
7 your clients. So if you could try to focus your
8 comments, since I'll be -- we will be dealing with the
9 specifics of the declarations later.

10 So if you would try to focus your comments
11 primarily on the more generic issue that's been raised
12 by Mr. Lighty, I'd appreciate that. Thank you.

13 MR. EYE: Yes, sir. With that assurance,
14 that we'll be able to speak --

15 JUDGE RYERSON: Absolutely.

16 MR. EYE: -- in response to some of the
17 criticisms of the declarations, I'll try to focus on
18 the broader issue regarding standing.

19 I want to disabuse the panel of the idea
20 that there is no proximity-based standing for IFSFIs.
21 There are at least three cases in which that
22 proximity-based standing has been found for such
23 facilities. There's a Private Fuel Storage case, of
24 course, 1998. That's 47 NRC 142. There's the Pacific
25 Gas and Electric case, a 2002 case, and that is cited

1 at 56 NRC 413. And, of course, there's the Holtec
2 case from earlier this year, and that's LBP 19-04.

3 So certainly those cases are examples
4 where proximity-based standing for ISFSIs has been
5 validated. Now, there are other non-reactor cases in
6 which proximity-based standing has been found, but
7 those are less specific to our claims here, and so I
8 think it's important to recognize that there is
9 precedent for ISFSIs having a basis for proximity
10 standing.

11 Second, there's the argument that somehow
12 the emergency planning rule negates proximity-based
13 standing. Well, that is also, I think, refuted by the
14 precedent that I just mentioned and the fact that the
15 emergency planning rule was adopted in 1995.
16 Subsequent to 1995, in Private Fuel Storage, Pacific
17 Gas and Electric, and Holtec, we have instances where
18 in the context of those cases, the emergency planning
19 rule did not preclude proximity-based standing.

20 And I think that that precedent stands as
21 a basis for this Board to find that under the facts
22 that have been advanced, that there is a basis for
23 proximity-based standing, and it's not undercut by
24 this emergency-based -- or rather emergency planning
25 rule.

1 And with that, I would ask the panel to
2 allow me to also adopt by reference and incorporation
3 the arguments that have been made by Ms. Curran
4 previously this morning.

5 JUDGE RYERSON: Of course. Any questions,
6 Judge Arnold?

7 JUDGE ARNOLD: Are we going to get into
8 specifics now or --

9 JUDGE RYERSON: I think later, specifics
10 on the declarations.

11 JUDGE ARNOLD: No.

12 JUDGE RYERSON: Okay. Thank you, sir.

13 MR. EYE: Thank you.

14 JUDGE RYERSON: The NRC staff. Mr.
15 Gillespie, and I have a comment or question before you
16 begin.

17 MR. GILLESPIE: Okay.

18 JUDGE RYERSON: Just to recap, in your --
19 in the staff's initial filings, you did not oppose the
20 standing of Beyond Nuclear. You did not oppose the
21 standing of Sierra Club, and you did not oppose the
22 standing of Fasken, the two entities, one individual
23 and one entity collectively called Fasken. Initially
24 you opposed the standing of the Joint Petitioners, but
25 as of yesterday, I assume today, you do not oppose the

1 standing of SEED, one of the Joint Petitioners.

2 So from that, I take it that you disagree
3 with Mr. Lighty's analysis of what is necessary to
4 show an obvious potential. So that's the itch that
5 you might try to scratch, if you would address that
6 question specifically.

7 MR. GILLESPIE: Yes, Your Honor.
8 Frankly -- well, we disagree with the Applicant's
9 position, interpreting our EP requirements to apply to
10 standing. The AEA sets forth who the Commission must
11 give standing to. It doesn't give a floor as to who
12 may be granted standing.

13 Additionally, the case that they mention,
14 the Ross ISR case at CLI 12-12 mentioned by the
15 Applicant, is not fully dispositive of this issue.
16 While the Commission said that the 50-mile proximity
17 presumption roughly corresponds to EPZ ingestion
18 pathways, they said it's -- the Commission stated that
19 it's an application-specific determination as to what
20 might be a particular radius for individual
21 application.

22 VOICE: I'm sorry; I can't understand you.

23 JUDGE RYERSON: Yes. If you'd move the
24 mike -- that mike is very sensitive to direction.

25 MR. GILLESPIE: Yes, it is. Yes.

1 JUDGE RYERSON: Yes. I think that's
2 better. Would you like me to repeat, or did you -- I
3 think -- well, it'll be on the written record. Just
4 continue at this point. Thank you.

5 MR. GILLESPIE: Additionally we wanted to
6 answer your question about discretionary intervention.
7 There were nine cases we've identified where
8 discretionary intervention was granted that were not
9 overturned by the Commission.

10 These are, not in a particular order,
11 Pebble Springs in ALAB-362; CLI 93-3; LBP 91-38; CLI
12 82-15; ALAB-670; ALAB-363; ALAB-397; LBP 79-1; and
13 then LBP 09-6, in which NEI was granted discretionary
14 intervention in the Yucca Mountain proceeding, but was
15 also found to have standing as a matter of right.

16 JUDGE RYERSON: You know, it shows I'm
17 getting too old. We did that. Yes. That's right.
18 But there hasn't been one probably since then. Right?
19 That --

20 MR. GILLESPIE: No, Your Honor.

21 JUDGE RYERSON: -- was ten years ago.

22 MR. GILLESPIE: There has not.

23 JUDGE RYERSON: Thank you.

24 MR. GILLESPIE: And that is all, unless
25 there were any specific questions.

1 JUDGE RYERSON: Any questions?

2 JUDGE ARNOLD: No.

3 JUDGE RYERSON: Any questions? No.

4 We'll take a short -- thank you, Mr.
5 Gillespie. We'll take our first -- we'll take a
6 short -- very short break, if we can, and convene
7 promptly at ten o'clock. Thank you.

8 (Whereupon, a short recess was taken.)

9 JUDGE RYERSON: We are now into our third
10 and final phase of this proceeding, which is the
11 opportunity for the Board, individual members of the
12 Board, to ask questions about aspects of the
13 particular petitions that concern us.

14 Generally as we do this, if a Board member
15 wants an answer from a particular individual, we will
16 say so, and if we want an answer from two people,
17 we'll direct the question to two people. If you do
18 not have a question directed to you and you have an
19 overriding desire to comment immediately, raise your
20 hand and we'll probably recognize you. We're fairly
21 informal here, but generally better to wait your turn
22 and follow up sort of at the end.

23 I think -- the way we intend to proceed --
24 and the logistics here are a little difficult, but I
25 think we're going to go through petition by petition.

1 Ms. Curran, you are in luck. We have no questions for
2 Beyond Nuclear. So I think physically the easiest way
3 to do this would be to have us in a position to ask
4 questions simultaneously of the petitioner who's at
5 that, the NRC staff, and the Applicant.

6 I hate to put a burden to stand on the
7 petitioners, but I think it will work best because the
8 Applicant will always be up here, so you get to take
9 a table for the time being, if you would like. The
10 NRC staff can take the table. No, no -- the staff
11 can't be at the podium. The staff at the podium the
12 whole time?

13 JUDGE ARNOLD: Sure. You said your
14 questions were for the staff.

15 JUDGE RYERSON: I have two questions. In
16 any event -- we need to confer briefly.

17 (Pause.)

18 JUDGE RYERSON: Okay. We have conferred.
19 We know the petitioners are in excellent shape and do
20 not mind standing briefly, so we're going to allow the
21 NRC staff to take a table. The Applicant has a table,
22 and the Applicant and the staff will stay in those
23 places, and we will have the petitioners come up, the
24 three remaining petitioners, one at a time, and we
25 will ask our questions.

1 So if, Mr. Taylor, I could ask you to come
2 up to the podium, and I apologize for making you
3 stand, but we don't have enough tables, I'm afraid.

4 MR. TAYLOR: If I can use part of the
5 table here --

6 JUDGE RYERSON: You may use -- you are
7 welcome to use part of the NRC's table. And let me
8 start then, and I think my first and probably only
9 question -- yes. My only question actually is for the
10 staff, and this is a question on Sierra Club's
11 question -- contention number 1.

12 That's a multi-part contention, I believe,
13 but one aspect of it challenges having -- I believe,
14 having the option in the application to either have
15 DOE as a customer or to have a private energy company,
16 power company as a customer.

17 Now, when Beyond Nuclear made that
18 assertion, the staff still says that's an admissible
19 contention. Why does the staff not find Sierra Club's
20 contention 1 admissible, at least as to that issue?
21 Who would like to address that?

22 MS. KIRKWOOD: Your Honor, I will. Can I
23 have just a minute to pull up the right document?

24 JUDGE RYERSON: Yes, yes.

25 (Pause.)

1 MS. KIRKWOOD: Your Honor, Sara Kirkwood
2 for the NRC staff. The answer is because we read the
3 Sierra Club contention to be focused on the idea that
4 the inclusion of nuclear plant owners was a fig leaf
5 and that what they were trying to litigate was that
6 that was not a likely outcome that anyone other than
7 DOE would be willing to take title to this waste. And
8 we view that argument as precluded in part by the
9 Holtec ruling that the NRC is not in the business of
10 regulating the market strategies of licensees --

11 VOICE: I'm sorry. We can't hear you.

12 MS. KIRKWOOD: -- or determining
13 whether --

14 JUDGE RYERSON: Can you speak a little
15 more slowly might help and directly into the
16 microphone.

17 MS. KIRKWOOD: I think I'm practically
18 eating the microphone. That they were focused on the
19 idea that the -- the Sierra Club noted that the
20 application had changed, that they were now including
21 nuclear plant owners, but that that was a fig leaf,
22 that they -- and that is not admissible, because an
23 application's allowed to change and because the
24 Commission does not regulate the market strategies of
25 licensees.

1 So the staff did not see in their
2 contention a concern about including DOE as an option.
3 Rather we saw a contention that was trying to litigate
4 the idea that the inclusion of nuclear plant owners
5 was a ruse, so that's why we didn't see it as
6 admissible.

7 JUDGE RYERSON: I see. Okay. I
8 understand the staff's argument, and you're welcome to
9 make a comment, Mr. Taylor, but I think I understand
10 what the staff was doing anyway. Let's leave it at
11 that. And if you could move your microphone a tad,
12 too, a little more directly in front of you. That's
13 a very sensitive one. It works at a certain angle and
14 not at others.

15 MR. TAYLOR: Let's try that.

16 JUDGE RYERSON: It's fine for us. I'm
17 concerned about people in the back.

18 (Pause to adjust microphones.)

19 JUDGE RYERSON: We'll try to articulate as
20 best we can, but let's continue. Thank you.

21 MR. TAYLOR: I guess I didn't see that
22 particular distinction between our contention 1 and
23 Beyond Nuclear's contention. We certainly are
24 continuing to assert that having DOE take title is
25 illegal and cannot be licensed and that the nuclear

1 plant owner, an alternative, was an afterthought, and
2 we believe that the panel should consider that in
3 determining whether or not that's an appropriate
4 alternative.

5 And I thought Beyond Nuclear made that --
6 a similar argument, so I'm not quite sure what the
7 distinction is.

8 JUDGE RYERSON: Yes. I think I understand
9 that this was an intentional act by the staff. I may
10 agree with you. I think they're similar. But in any
11 event, I think that answers the question.

12 Those are the only questions I had with
13 respect to Sierra Club. Judge Trikouros?

14 JUDGE TRIKOUROS: Well, yes. I have
15 questions regarding, to begin with, contention 4.
16 The -- in your petition, you refer to table 4.2-9 of
17 the environmental report, and you contrast the doses
18 associated that are presented in that table with --
19 this is the loss of shielding accident, transportation
20 accidents. And you state that the doses are far
21 smaller than those that appear in table 1 of your
22 petition.

23 And I just wanted to affirm that it's the
24 difference between that analysis that you refer to in
25 your contention 4 and the ER analysis were basically

1 the same thing. That is the basis for your
2 contention.

3 MR. TAYLOR: Yes.

4 JUDGE TRIKOUROS: All right. And I would
5 like to hear from the Applicant as to why they feel
6 that that doesn't constitute an admissible contention.

7 MR. LIGHTY: Thank you, Your Honor. Ryan
8 Lighty for ISP. The presentation of an alternative
9 conclusion does not show a defect in the application.
10 There's no explanation as to why the application's
11 analysis is somehow deficient. In other words, simply
12 saying, I have a different study -- that study is
13 admittedly a worst-case analysis which is not required
14 by NEPA -- does not show a genuine dispute on a
15 material issue of law or fact with the application.

16 So simply saying, Here's a table that has
17 some numbers in it, and there's a table in the
18 application that has different numbers in it, doesn't
19 explain a defect in the application, the analysis or
20 the methodology.

21 JUDGE TRIKOUROS: So what you're saying is
22 that the Sierra Club would have had to go into all the
23 details of the input and assumptions and calculation
24 method of the environmental report, find defects in
25 that, and then present those as contentions.

1 MR. LIGHTY: What I'm suggesting is that
2 the petition says, You're wrong. It does not say,
3 You're wrong because. The absence of the because
4 explanation is what renders the contention
5 inadmissible. The -- there's --

6 JUDGE TRIKOUROS: Which is what I -- I
7 think is what I just said, that you have an analysis
8 and the analysis has inputs, an analysis has
9 assumptions, and an analysis has a calculational
10 method.

11 If the analysis is wrong, it has to be
12 wrong in one or more of those three areas. Therefore,
13 one would have to have those three areas -- the
14 information from those three areas available to be in
15 a position to argue that they're wrong.

16 You know, that really wasn't the -- isn't
17 the case in the environmental report. Now, don't get
18 me wrong. Some of the information is available in the
19 environmental report, but it seems to me that an
20 alternative is to present an analysis that says, you
21 know, we did an analysis the same way you did or the
22 same methodology you did, and got a significantly
23 different answer.

24 Now, I can understand if the answer is 5
25 percent, 10 percent, 20 percent different. But in

1 this particular case, the analysis that's represented
2 is significantly different, I mean, multiples of --

3 MR. LIGHTY: Yes. I agree. And that's
4 not surprising, given that it is a worst-case analysis
5 that's not required by NEPA. But to the extent we're
6 talking about the methodology that's described in the
7 ER, they still don't challenge what pieces of the
8 descriptions of the methodology that they disagree
9 with. They simply present an alternative analysis
10 without explanation.

11 And so it's not necessary to have all of
12 the proprietary computer files. That's not what we're
13 saying. That's not necessary. But you must challenge
14 what is in the application, and the description of the
15 methodology is in the application, and there's no
16 requirement to go further to do a worst-case analysis
17 which is what they're attempting to present as having
18 different conclusions.

19 JUDGE TRIKOUROS: So what's the basis
20 for -- what's your basis for saying that unless you,
21 you know, can be very specific with respect to the ER
22 analysis, that unless you can do that, having an
23 alternative analysis is not acceptable? That piece
24 I'm not getting.

25 The end result of all of this, as I see

1 it, is that a member of the public has to know what
2 kind of dose they're getting from a nonincident and an
3 accident, transportation of, let's say, a number of
4 casks that carry radioactive materials. That's the
5 bottom line. Is the public confident that we know the
6 answer to that?

7 MR. LIGHTY: Well, to the extent we're
8 talking about data that's in the proprietary files,
9 that petitioners didn't request access to, that was
10 their choice not to request access. Judge Trikouros,
11 as you may recall from the Seabrook proceeding, a
12 Board that you were on, there was a contention
13 regarding the unavailability of SUNSI information and
14 the Board there rejected that as a contention because
15 it is incumbent upon petitioners to request access to
16 proprietary information if they feel it's necessary
17 for a contention.

18 To the extent they wish to dispute that
19 information, they had the opportunity to do so in this
20 proceeding and elected not to do so.

21 JUDGE TRIKOUROS: All right. Well, you
22 know, we've dealt various times with contentions that
23 involve doing the same calculation with different
24 methodologies, so, you know, one and the other have
25 different inputs, et cetera. And the contention was

1 based on the fact that one methodology, a credible
2 methodology, gave a different answer than the one in
3 question, without going into the details of the
4 calculation in question.

5 So --

6 MR. LIGHTY: I think --

7 JUDGE TRIKOUROS: -- it's not clear to me
8 that it's -- unless you can explain to me why it's an
9 absolute requirement that an alternate calculation
10 method cannot be utilized as a basis for a contention,
11 I'm confused.

12 MR. LIGHTY: I would refer you to our
13 answer pleading to Sierra Club, on pages 46 and 47.
14 We included an extension block quote from the
15 Commission's decision in CLI 12-5. And I'll read just
16 a brief excerpt from it.

17 "A contention proposing alternative inputs
18 or methodologies must present some factual or expert
19 basis for why the proposed changes in the analysis are
20 warranted, for example, why the inputs or the
21 methodology used is unreasonable, and the proposed
22 changes to the methodology would be more appropriate.
23 Otherwise, there is no genuine material dispute with
24 the analysis that was done, only a proposal for an
25 alternative NEPA analysis that may be no more accurate

1 or meaningful."

2 JUDGE TRIKOUROS: Yes. In this particular
3 case, the analysis methodology that we're talking
4 about is, I believe, identical. We're talking about
5 RADTRAN, perhaps RADTRAN 6. I don't remember. So
6 they're using the same methodology and coming up with
7 different answers. So what you had read doesn't
8 directly apply to this situation.

9 MR. LIGHTY: I see.

10 JUDGE TRIKOUROS: Okay. That's fine. So
11 I understand your position on this.

12 MR. LIGHTY: If I may, just one brief
13 additional point. So the methodology and the inputs
14 are described in Chapter 4, in attachment 4-1 of the
15 ER. And in a nutshell, the inputs to the RADTRAN
16 analysis are directly from the regulations in Part 71.
17 So those are not hidden from public view. Those
18 inputs are the NRC's standard inputs versus the Lamb
19 and Resnikoff analysis which used different inputs,
20 worst-case scenario inputs which are not required by
21 NEPA.

22 JUDGE TRIKOUROS: Understood. And,
23 indeed, it is specifically identified as a worst-case
24 analysis in the title. Okay. Go ahead.

25 MR. TAYLOR: May I respond?

1 JUDGE TRIKOUROS: Sure.

2 MR. TAYLOR: First of all, regarding the
3 title as worst case, I think that when --

4 JUDGE TRIKOUROS: Talk -- see if you can
5 put that closer to your --

6 MR. TAYLOR: With regard to the worst-case
7 argument, I think under NEPA worst case means the
8 impact, the overall impacts that are being addressed.
9 Here as -- like you indicated, Judge Trikouros, what
10 we're looking for is what can the public expect as a
11 dose that they be exposed to, and certainly they would
12 want to know what the worst case would be. I think
13 that's what this is referring to in the study, rather
14 than the NEPA definition of worst case.

15 But beyond that, I think what the
16 Applicant is suggesting here is an analysis or an
17 exposition in the contention that goes beyond what's
18 required for a contention. Now, you don't have to
19 present an entire case in your contention, and we
20 certainly have in this contention set forth Dr.
21 Resnikoff's analysis. We've referred to his report,
22 gave the citation to it, and explained why he
23 disagrees with the result from ISP's analysis. And I
24 think that's all that's required.

25 JUDGE TRIKOUROS: I mean, this is a fairly

1 complicated situation, because it's very clear to me
2 that unless you do specify particular inputs or
3 particular problems with the analysis, it would be
4 incredibly difficult to litigate an entire analysis
5 that involved hundreds or thousands of inputs and
6 assumptions. So clearly in order to be able to
7 litigate something, you would have to have something
8 specific to have a hearing on, let's say.

9 But, again, we do have the question that
10 the result is significantly different than another
11 analysis, so, you know, I guess we have to deal with
12 that. Does the staff have any comments on this? You
13 initially admitted the contention. We went through
14 this yesterday in part.

15 MR. GILLESPIE: Your Honor, the staff does
16 not have any further input unless you have a specific
17 question.

18 JUDGE TRIKOUROS: Say it into --

19 MR. GILLESPIE: I apologize. The staff
20 does not have further input on this unless there's a
21 specific question.

22 JUDGE TRIKOUROS: And your position is
23 it's not admissible at this time.

24 MR. GILLESPIE: Yes, Your Honor.

25 JUDGE TRIKOUROS: And I will also point

1 out that the staff, in doing their analysis, their
2 review of this, felt obliged just recently to ask for
3 input information, assumption information, input, so
4 clearly if they needed to ask for all that -- and I
5 mentioned this yesterday -- if they needed to ask for
6 all of that, it wasn't available in the environmental
7 report, and clearly it wasn't because they did ask and
8 received all of that.

9 So I think that's the difficult question
10 that we have to deal with.

11 MR. LIGHTY: If I may, Your Honor, just
12 very briefly, I would note that if the petitioners had
13 the same concerns that the staff raised in their RAI,
14 they had the opportunity to raise those concerns in
15 their petition but did not. And so the fact that the
16 staff could envision some omission from the ER doesn't
17 mean that the petitioners alleged that in their
18 petition.

19 We're here to talk about satisfaction of
20 the 2.309 pleading requirements, and so I don't think
21 it's appropriate to incorporate the staff's questions
22 in an RAI to the petitioner's petition.

23 And one final point as to the inputs. I
24 agree there may be hundreds of inputs into a
25 calculation. Our position is not that petitioners

1 would need to challenge every single one, but just a
2 challenge to a single input, one explanation of why it
3 was inappropriate to use the NRC regulation in Part 71
4 as the basis for the inputs into RADTRAN calculations.

5 There's no explanation of why the inputs
6 that Lamb and Resnikoff used are somehow better than
7 the Part 71 inputs. There's just no explanation for
8 why there's a difference in the inputs, why it's
9 material here.

10 JUDGE TRIKOUROS: Yes. And I think one
11 other complicating factor is that in the letter that
12 was sent to the Board, notifying us of the reanalysis
13 that was done, that reanalysis did point to other
14 studies, other credible studies, of the same thing
15 that resulted in answers that were very similar to
16 what you were getting in your analysis.

17 So the question then becomes: Is the
18 Resnikoff study an outlier or does it represent a more
19 conservative analysis that should be seriously
20 considered? I don't think we have any other -- I
21 would love to have other people comment on this, but
22 I think we're done.

23 MR. LIGHTY: If I may, Your Honor, one
24 other brief point while we're talking about
25 transportation analysis. I know Mr. Lodge earlier

1 made a number of references to there being something
2 on the order of 30,000 shipments to the facility. We
3 would just like to correct the record that that is
4 orders of magnitude different than what the
5 application proposes, which is something on the order
6 of 500 casks total.

7 So assuming that there were only a single
8 cask per shipment, that would be orders of magnitude
9 different. I'm not sure where Mr. Lodge was coming up
10 with 30,000 transportation shipments, just to correct
11 the record.

12 JUDGE TRIKOUROS: In the analysis of the
13 shielding -- of the loss of shielding accident, the
14 reanalysis references 40,000 -- an exposure of burnup
15 of more than -- of 40,000 megawatt-days per metric
16 ton. Was that -- do you know if that was a change
17 from the way it was originally done? And the other
18 question is: Why 40,000? The boundary for high
19 burnup fuel is, as I understand it -- and it's
20 somewhat subjective or arbitrary -- is 45,000
21 megawatt-days per metric ton.

22 But on the other hand, I believe the fuel
23 in your facility is at 45,000 megawatt-days is canned.
24 Would that be an argument for utilizing -- not
25 utilizing 45- but utilizing 40-, since the 40- would

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1 not be canned?

2 MR. LIGHTY: If I may have a moment, Your
3 Honor --

4 JUDGE TRIKOUROS: Okay.

5 (Pause.)

6 MR. LIGHTY: Thank you, Your Honor. So
7 there was no change in the analysis on that basis.
8 The value comes from the design basis for the MP197
9 cask. That is considered a conservative analysis, and
10 so that's why that value was used.

11 JUDGE TRIKOUROS: All right. And the
12 reason I asked the question is there was a confusing
13 change. The reanalysis included changes to the ER,
14 and there was a change to the ER that took out the
15 statement that the dose that was assumed for the casks
16 in transport were -- was the maximum dose that would
17 be allowable to transport, as per Part 71.

18 That was removed, and it appears that the
19 40,000 megawatt-days per metric ton was put in there.
20 Now, my understanding of this is that for non-incident
21 transportation doses, the maximum Part 71 dose from
22 the cask is assumed at a meter or two meters. I
23 forgot what it is. And, therefore, the loss of
24 shielding accident, which would result in a release of
25 radioactivity from the gap of the fuel cladding gap,

1 would -- exposure or burnup would be appropriate to
2 use there, you know, a conservative exposure. Does
3 that make sense?

4 MR. LIGHTY: I think -- am I getting too
5 much into the weeds of this thing?

6 MR. LIGHTY: A little bit, Your Honor.
7 The design basis of the MP187 is what was used, and
8 that is a conservative analysis. And maybe I'll turn
9 it over to Mr. Matthews.

10 MR. MATTHEWS: Thank you, Judge Trikouros.
11 I'm jumping in, because this was my part of the
12 contention response, and I did review the RAI
13 response.

14 The source term was used only for release.
15 Part 71 limits were used for exposure, and I'd note
16 that the transportation cask exposure limit is --
17 governs, regardless of whether it's 40- or above 45-.
18 Whether it's high burnup or not, you're still limited
19 by the transportation --

20 JUDGE TRIKOUROS: Right. And that -- I
21 assume that's for the nonaccident analysis, the non --
22 what they call nonincident transportation evaluation.
23 No?

24 MR. MATTHEWS: So we did not use those
25 source terms incident-free. We did not.

1 JUDGE TRIKOUROS: Okay, because as I said,
2 the -- originally in the ER it said that the maximum
3 Part 71 assumption was made. Those were crossed out,
4 and 40,000 megawatt-days per metric ton was added in
5 the update. That's the --

6 MR. MATTHEWS: At the risk of having to
7 correct another misstatement, Judge Trikouros, we will
8 be happy to get back to the Board, but note that this
9 is an interesting aspect of the RAI but somewhat far
10 afield from --

11 JUDGE TRIKOUROS: That's fine. It's not
12 critical that I get an answer right now.

13 MR. GILLESPIE: Your Honor, if I could
14 maybe perhaps give some input, the dose rate in Part
15 71.47 for external radiation standards for all
16 packages, 71.47(b)(3) is 10 millirem per hour at two
17 meters away from the outer lateral surface of the
18 vehicle.

19 JUDGE TRIKOUROS: Right.

20 MR. GILLESPIE: And RAI response in page
21 26 of their updated ER page references a 14 millirem
22 per hour dose rate at one meter, which they claim is
23 based on an estimate from the 10 millirem per hour at
24 two meters from the external surface, away from the
25 vehicle.

1 JUDGE TRIKOUROS: Now, with respect to the
2 staff, they're in the process of doing an independent
3 evaluation of this. And I say that because I just
4 asked for the input at the end of June, so we're not
5 that far away from that. And yesterday you had said
6 that you don't anticipate any change to your position
7 on admissibility, but --

8 MR. GILLESPIE: That is correct.

9 JUDGE TRIKOUROS: -- we don't know what
10 the outcome is of the independent evaluation at this
11 point. Right?

12 MR. GILLESPIE: That is correct. The
13 staff is still undergoing its review. However, the
14 RAI response and the regulations specify the external
15 dose rates, and I believe that was your question.

16 JUDGE TRIKOUROS: Okay. That's fine.

17 JUDGE RYERSON: Judge Arnold.

18 JUDGE ARNOLD: Yes. On page 31 of your
19 petition, you cite 10 CFR 71.108 as requiring a
20 nuclear waste storage facility be evaluated with
21 respect to the potential impact on the environment of
22 the transportation of the radioactive waste. But if
23 you look at that 106, it consists of one sentence, and
24 you left out the final part of the sentence that
25 requires this evaluation to be within the region.

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1 Considering that this application is for
2 a materials license and doesn't authorize any shipping
3 or any shipping routes, what do you see is the
4 appropriate interpretation of "within the region"?

5 MR. TAYLOR: It sounds like a trick
6 question. The Sierra Club's position is that our
7 interest is for the person's within what ISP calls the
8 region of interest. Certainly it seems to me also
9 that, although I don't represent Mr. Lodge's clients,
10 I think they certainly have an interest, because
11 this -- the storage facility would not even exist if
12 not for the transportation of all the waste from
13 different parts of the country.

14 So I think wherever that waste is being
15 transported and stored, anywhere that persons would be
16 exposed to safety concerns or there may be
17 environmental impacts, I think that that would be the
18 region that would be necessary to evaluate for the ER.

19 JUDGE ARNOLD: Given that they've done
20 this evaluation for specific transportation routes, do
21 you have some reason to believe that the environmental
22 impacts would be different on different transportation
23 routes, other than correcting for population?

24 MR. TAYLOR: Yes. I could foresee that if
25 there are certain areas where perhaps the rail

1 infrastructure is not as good as it might be other
2 places, that would be a concern. If there are routes
3 where there may be more trips than other routes -- for
4 example, there are many reactors in the Northeast and
5 the Southeast area, so there may be much more
6 transportation risk from the East coming west toward
7 this site than there would be from the two or three
8 reactors in California, for example.

9 JUDGE ARNOLD: On page 43 of your
10 petition, you assert that, "The specific details of
11 the cask system are important in evaluating the
12 impacts transporting radioactive waste."

13 MR. TAYLOR: Uh-huh.

14 JUDGE ARNOLD: But I don't see anything in
15 the discussion that supports that assertion. What do
16 you have to support your assertion that the different
17 type of casks -- being that they're all certified, why
18 does the type of cask make a difference?

19 MR. TAYLOR: Well, I think that the
20 statements or the declarations of Dr. Resnikoff and
21 also Dr. Gordon Thompson indicate that they are
22 looking at the specific casks involved, and certainly
23 the documentation that we referred to of the NUREGs,
24 I think, are based on particular casks.

25 And it just seems, I guess, sort of common

1 sense that different casks might have different
2 factors that would go into whether certain acts need
3 to be done in order to make them safe. You know, each
4 cask is evaluated by the NRC individually. They
5 don't -- there's no generic cask certification, so I
6 think the NRC itself acknowledges that different casks
7 have different aspects that need to be evaluated.

8 JUDGE ARNOLD: Okay. Thank you. The rest
9 of my questions are for the Applicant. In your answer
10 to the petition, you, in fact, pointed out that they
11 had -- that petitioners had given no justification for
12 their assertion. Do you have any support for the
13 implication that the type of cask evaluated for the
14 transportation analysis, in fact, really is not
15 significant in that analysis?

16 MR. LIGHTY: Off the top of my head, I'm
17 not familiar with that as a technical matter, but as
18 a legal argument, I would note that the burden is on
19 the petitioner to demonstrate the materiality of their
20 contention, and they have not done so. They haven't
21 even attempted to do so, and I think that's
22 dispositive here.

23 JUDGE ARNOLD: Also, the Sierra Club
24 faults your analysis for not considering the increased
25 traffic of oil tanker cars and the fact that these can

1 cause higher fire temperatures. Why do you not
2 consider oil fires important?

3 MR. LIGHTY: For the reason that we intend
4 to ship by dedicated train, and as the Board noted in
5 LBP 19-4, there will be no flammable oil cars with the
6 shipments that would come to the facility.

7 JUDGE ARNOLD: I just needed to hear that
8 for this. Okay. Sierra Club asserts that the
9 railroad infrastructure is deteriorating. Could such
10 deterioration be cause to question the applicability
11 of the earlier transportation studies?

12 MR. LIGHTY: No. The infrastructure would
13 be evaluated separately in the Part 71 transportation
14 route selection and approval process. It's not part
15 of this application. It will be considered, and the
16 FRA has to approve those routes, so we -- we have to
17 assume that they're not going to allow shipment over
18 routes that are unsafe.

19 JUDGE ARNOLD: And would this maybe
20 provide some support for your assertion that analyzing
21 a specific route can be representative of other
22 routes, because whatever route is chosen is going to
23 be verified to be of decent quality?

24 MR. LIGHTY: Correct. That's an approach
25 that the NRC has used for many decades to analyze

1 representative routes, and as noted in LBP 19-4,
2 that's a sufficient basis for a NEPA analysis.

3 JUDGE ARNOLD: And do you have any
4 responses --

5 MR. TAYLOR: Yes, I do. This is our one
6 chance to challenge the licensing of this project, and
7 to have the Applicant say, well, the safety of the
8 rail will be decided later, then we don't have any
9 chance to have this kind of input and ability to
10 challenge of the licensing at that point. So I think
11 this is our one chance to do that, and we've done the
12 best we can with the information we have available
13 right now.

14 And I think that it's not the NRC's policy
15 to do this kind of piecemeal approach that this is our
16 one chance to challenge the license, and that's what
17 we're doing.

18 JUDGE ARNOLD: Thank you. That's all of
19 the questions I have on that contention.

20 JUDGE RYERSON: Judge Trikouros, do you
21 have more questions?

22 JUDGE TRIKOUROS: I just had one more
23 contention, Sierra Club contention 13. In your
24 petition -- I think it's on page 79 -- you state that
25 the ER 3.4.16 cites several sources, but the sources

1 are not described well enough to allow members of the
2 public to access the sources.

3 Well, first of all, I think you meant
4 3.5.16. Right?

5 MR. TAYLOR: Yes. That's right.

6 JUDGE TRIKOUROS: Just wanted to make
7 sure. And --

8 MR. TAYLOR: The computer made a typo.

9 JUDGE TRIKOUROS: And can you explain that
10 a little bit further, please.

11 MR. TAYLOR: Sure. If you look at that
12 section, at the end they cite their alleged references
13 that they were using, but there are no -- there's no
14 URL to go to, there's no citation of a journal that
15 you can go to, and I Googled all of those, and I
16 couldn't find anything. And the NEPA regs certainly
17 say that the Applicant has to at least show that
18 they've provided a thorough analysis and the sources
19 so that the public can comment and be advised of what
20 the ER relies on, and that wasn't done there.

21 JUDGE TRIKOUROS: And, now, the
22 Applicant -- from the point of view of the Applicant,
23 you included them. I think there were five of them,
24 and they were rather cryptic. Is there any reason --
25 and, however, they were quoted in the ER very

1 prominently. But in the -- but what was quoted were
2 the result -- ostensibly the results of these studies.

3 Is there any reason why you didn't include
4 them as formal references or provide some -- even the
5 titles of the reports are not there, so it would be
6 rather hard to Google something like that. Is there
7 any reason for this?

8 MR. BESSETTE: Your Honor, I can't speak
9 to why the precise language was used in the original
10 ER describing the reports. The fact of the matter is
11 there is no requirement that a reference -- contrary
12 to what Mr. Taylor said, that a reference be publicly
13 available. And in response to the questions, we did
14 look to whether they're publicly available, and at the
15 time of the petition, they were not.

16 But the real issue focuses on what's in
17 the ER itself, and the ER describes the conclusions of
18 those reports in extensive detail, so what Mr. Taylor
19 had the opportunity to do, as any petitioner, is to
20 look at that detailed information and challenge that
21 information as cited in the ER.

22 And I would remind the Board to look at
23 the very contentions, Sierra Club 13. It really
24 contains two sentences on all of that information.
25 "There does not appear to have been an adequate survey

1 conducted to determine if the species are resident in
2 the area." That's it.

3 And then it says, "The sources are not
4 described well enough to allow members of the public
5 to access the sources, so the public and the NRC are
6 left with only unsupported statements in the ER."
7 That's the entirety of their contention.

8 They had every opportunity to go through
9 the multiple sections and select multiple chapters in
10 ER section 3, 4 and 5, and challenge any of that
11 information, provide studies, expert report. So the
12 issue is what's in the ER, not what's in those cited
13 resources, and they've done nothing.

14 JUDGE TRIKOUROS: Well, they are
15 challenging the conclusions by saying that there are
16 no adequate surveys, because you didn't provide any
17 surveys. You -- it's almost like you and I having a
18 conversation, and I say, Well, I read this somewhere,
19 you know, and give you some facts. It doesn't help --
20 you know, there's not much you can do regarding that.
21 You might just shake your head and not believe it, but
22 you have no basis for anything else.

23 MR. BESSETTE: Well, Your Honor, as Mr.
24 Ryan said and as we've noted, it's their -- there's no
25 basis to assert what we've said in the ER is

1 inadequate or incomplete or somehow inaccurate. They
2 provided no information on that. And it's their
3 burden at this point to say what is in the ER is
4 somehow inaccurate.

5 In addition, as I noted yesterday, we do
6 reference a 2015 response from the U.S. Fish and
7 Wildlife Service that is included as an attachment ER
8 3.3 to the ER that discusses endangered or threatened
9 species. And that was not reviewed or even
10 referenced.

11 Further, just as a reminder, neither of
12 the sand dune lizard or the dunes sagebrush lizard is
13 not even a threatened or endangered species in this
14 proceeding.

15 MR. TAYLOR: May I respond?

16 JUDGE TRIKOUROS: Yes. Of course.

17 MR. TAYLOR: Sure. Well, first of all,
18 the discussion, if you want to call it that, in the ER
19 regarding these two species was pretty limited and not
20 very lengthy. And with respect to the Fish and
21 Wildlife Service, these two species that we're
22 concerned about here are state species, either
23 threatened or of concern. And the Fish and Wildlife
24 Service is going to be just dealing with federally
25 listed species, so that's kind of a red herring, which

1 is not an endangered species apparently.

2 And I still say that if they're going to
3 rely on these sources, they have to at least give us
4 some way to go and find them and review them and
5 comment on whether those sources were adequate to
6 reach the conclusions that they made in the ER.

7 JUDGE TRIKOUROS: Was the staff able to
8 find these cryptic studies?

9 MR. STEINFELDT: Your Honor, Thomas
10 Steinfeldt, the NRC staff. No, Your Honor. The
11 staff's not able to find them.

12 VOICE: We can't understand.

13 MR. STEINFELDT: No. The staff was not
14 able to find these studies. However, our response to
15 this contention is that it is inadmissible, because
16 the Sierra Club does not explain how this creates a
17 material dispute with the application. It doesn't --
18 their contention does not meet the 2.309(f)(1)(vi) to
19 form an admissible contention.

20 JUDGE ARNOLD: Let me ask you a question.
21 Here's one of the 3.5.16 descriptions. The first
22 one: "The ecology group conducted an ecological
23 assessment in 1997." Can you tell me from that
24 description how many people performed the survey, what
25 their qualifications were, and how much time they

1 spent on the site?

2 MR. STEINFELDT: No, Your Honor.

3 JUDGE ARNOLD: Wouldn't you need to know
4 that in order to determine that the information from
5 that survey is credible?

6 MR. STEINFELDT: May I have a moment to
7 consult, Your Honor, to consult with staff?

8 JUDGE ARNOLD: I did not understand that.

9 MR. STEINFELDT: I'm sorry. Your Honor,
10 may I have a moment to consult with staff?

11 JUDGE ARNOLD: Yes.

12 MR. STEINFELDT: Thank you.

13 (Pause.)

14 MR. STEINFELDT: Thank you, Your Honor.
15 The staff has requested more information on this in an
16 RAI, and based on that response will determine if more
17 information is necessary.

18 JUDGE ARNOLD: The information provided in
19 the environmental report provides the staff baseline
20 information from which they can start and do their
21 environmental study. Right?

22 MR. STEINFELDT: Correct.

23 JUDGE ARNOLD: Is it not useful to the
24 staff to know that the information provided is
25 credible, so that they really have a base point to

1 start their study from?

2 MR. STEINFELDT: Yes.

3 JUDGE ARNOLD: Okay. Let me ask the
4 Applicant. Do you think that the information you
5 provided on the surveys is adequate for the staff to
6 say, Oh, yes, those survey results are credible?

7 MR. BESSETTE: Your Honor, I believe the
8 information in the environmental report fully complies
9 with Part 51, NEPA, and the NMSS guidance on
10 environmental reports for ISFSIs. And contrary to
11 what Mr. Taylor said that there's scant information,
12 I would refer the Board to sections 3.5, 3.5.33,
13 3.5.4, 3.5.56, 4.5.8, and ad nauseam we talk about the
14 habitat, the environment, the area of a five-kilometer
15 area around the CISF. We talk about species found in
16 the CISF.

17 That is all that's required of the
18 Applicant. I understand that Mr. Taylor would like or
19 prefer to go find the source information, but he has
20 cited no information, no regulation, no case law that
21 requires the Applicant to do so.

22 JUDGE TRIKOUROS: Yes. But that
23 information has to have a basis. Right? I can't just
24 say, This is the habitat of this animal, and it's not
25 present here, without some basis for that, some study,

1 some reference somewhere that supports that statement.
2 This can't be a battle of opinions. This has to be a
3 scientific, technical process. Correct?

4 MR. BESSETTE: I understand what you may
5 be discussing is perhaps what NRC may want for its
6 review. But what here we were talking about, has
7 Sierra Club provided a basis for a contention. And it
8 is our opinion that they have the burden to somehow
9 prove -- I mean, there's a presumption of what we
10 provided on the signed application by a company
11 representative is complete and accurate. They
12 provided nothing to assert that that is not complete
13 and accurate.

14 There should not be a presumption that we
15 are wrong in this information unless -- they could
16 have provided a study somehow saying what we provided
17 is wrong. They provided two sentences. That's it.

18 JUDGE TRIKOUROS: Well, you quote five
19 studies, and it was -- and this was a technical
20 analysis. Correct? This is a reputable organization
21 that you hired to do this, and they say, I got this
22 information from these five studies. I don't
23 understand why it's such a big deal, so to speak, to
24 provide a reference of those studies that one can
25 access.

1 You know, in the legal world, you know,
2 they're citing, you know, a hundred cites per, you
3 know, page. They don't say anything without a cite.
4 The same standard really should apply to this, I would
5 think. I just don't understand why -- to me, it's
6 valid to say that the statement is not supported. If
7 it's a simple statement with reference to a study that
8 hasn't been properly identified.

9 MR. BESSETTE: Well, I mean, from the ER,
10 we know that those studies were part of the Waste
11 Control System's low-level rad waste license
12 application. So we know that's evident from the ER.
13 I don't have the citation right now. So it was part
14 of another proceeding. It has legitimacy. And I
15 understand, Your Honor, I understand your point.

16 But there's -- to presume the information
17 in a signed application by an applicant is somehow
18 incomplete or inadequate without more, I think, is an
19 invalid assumption and it's not -- it's their burden
20 to prove that.

21 JUDGE RYERSON: Let me see if I understand
22 the availability or nonavailability of these studies.
23 Obviously if you had decided as a matter of your
24 discretion to attach them all to the application, they
25 would have been available. Short of attaching the

1 studies, are they publicly available? I mean, is
2 there any reference you could be giving that would
3 allow Mr. Taylor to go find those studies, or are
4 there not?

5 MR. BESSETTE: Your Honor, I would have to
6 confer. These were studies prepared by Waste Control
7 Solutions as part of a low-level rad waste facility.
8 I suspect we could find -- excuse me.

9 (Pause.)

10 MR. BESSETTE: Your Honor, as I said, they
11 were part of the low-level rad waste facility
12 application, and they are referenced in that
13 application, and that application could be available.

14 JUDGE RYERSON: But you say the studies
15 were referenced in that application.

16 MR. BESSETTE: Right.

17 JUDGE RYERSON: But would they have been
18 attached to that application or --

19 MR. BESSETTE: As I was not involved with
20 that application, Your Honor, I can't say.

21 JUDGE RYERSON: Okay. Your colleague is
22 nodding. If you want to make that as a representation
23 of counsel --

24 MR. BESSETTE: So the answer is yes.

25 JUDGE RYERSON: -- they would be

1 available. All right. So --

2 MR. BESSETTE: To be honest, Your -- I
3 mean, to be clear, Your Honor, we did not in our
4 answer say they were publicly available because they
5 were part of an application that was not readily
6 accessible online.

7 JUDGE RYERSON: Right. Thank you.

8 MR. BESSETTE: But, again, I want to
9 emphasize. There was not a presumption that the
10 information we prepared and presented is somehow
11 incomplete or inaccurate. And they have not
12 provided -- they provided not a scintilla of evidence
13 that that's true.

14 MR. TAYLOR: If I can respond, I don't
15 believe, as I recall, that there was any reference in
16 this ER to the low-level rad waste document that the
17 counsel refers to, so how am I supposed to know that
18 I should go to that document to find these sources?

19 I'd also point out, just in terms of our
20 pointing out the portions of the ER that we are taking
21 issue with, on page 78 of our petition, we note that
22 the horned lizard and sagebrush lizard are in the area
23 of the ISP site. And that was -- that comes directly
24 from the ER.

25 But then, with no factual support in

1 section 4.5.10 of the ER, they claim that the project
2 will have no impact on the species. That just seems
3 like a contradiction that is not explained, and the
4 reason I said no adequate survey was conducted is
5 because they haven't set forth any factual information
6 as to what kind of survey, if any, was done.

7 MR. BESSETTE: Your Honor, if I may
8 address that, I think they're misinterpreting the
9 application. In section 3 -- chapter 3, we talk about
10 the survey results in the CISF area, which is a five-
11 kilometer radius around it. The -- and it talks about
12 the general habitat and the sightings of those species
13 in very detailed information around that area.

14 Chapter 4 talks about the impact of the
15 actual CISF facility, which is a much smaller size.
16 So there's no discrepancy there. I believe that
17 they're just misreading the application.

18 JUDGE TRIKOUROS: Yet in reading that
19 section of the ER, it struck me that the conclusions
20 that were reached were sort of left hanging with
21 respect to sources as indicated in the contention.
22 For example, if you say that the study found that
23 these were not -- these -- the dunes sagebrush lizard
24 was not present within one mile of the site in the
25 study, it just says, the study.

1 It doesn't say, you know, the study of
2 this title, this chapter or this page of the study.
3 There's no more than just a bare conclusion, you know,
4 and, you know, bare conclusions are no less unliked in
5 the technical world than they are in the legal world.

6 JUDGE RYERSON: I'm not sure that was a
7 question, Judge Trikouros, but --

8 JUDGE TRIKOUROS: No. My question was:
9 Why didn't you refer more to the study in depth when
10 you reached a conclusion in the ER? You reached many
11 conclusions, but you didn't -- even if I had the study
12 in front of me, your conclusion in the ER wouldn't
13 have told me where to go in the study to find it.

14 MR. BESSETTE: Your Honor, I understand
15 your point, but we believe we fully complied with
16 NRC's guidance in Part 51, NEPA, and the applicable
17 NUREGs regarding describing the environmental
18 baseline. We did describe the environmental baseline,
19 and we believe we complied fully with NRC's
20 requirements on that.

21 JUDGE RYERSON: Any more? Judge Arnold,
22 do you have more questions?

23 JUDGE ARNOLD: Not on this contention.

24 JUDGE RYERSON: More questions on other
25 contentions?

1 JUDGE ARNOLD: Sure. Going back to
2 contention 8, having to do with ISP mischaracterizing
3 the Blue Ribbon Commission's report, the first
4 sentence of your basis is, quote, "ISP takes the
5 position in its ER Rev. 2, 1.1 and 2.1, that the
6 purpose and need for the CIS project is dictated to a
7 great extent by the BRC report."

8 Well, I read over those sections, and I
9 really didn't find anything that sounded like that, so
10 could you be more specific. What were the words that
11 they said?

12 MR. TAYLOR: I don't have it right in
13 front of me, Your Honor, but the -- it's at various
14 places, in fact, even in other portions of their
15 documentation that this CIS would carry out or comply
16 with the recommendations of the Blue Ribbon
17 Commission. And I think that's pretty explicit in all
18 of the -- in a number of areas of the documentation.

19 JUDGE ARNOLD: Well, let me just ask
20 Applicant. To what extent does your application rely
21 on the Blue Ribbon Commission and its report?

22 MR. BESSETTE: Your Honor, we do reference
23 the Blue Ribbon Commission. But it's -- nowhere that
24 it states -- our application states that -- or even
25 implies that the project is dictated by the Blue

1 Ribbon Commission. There are seven purposes of the
2 proposed project, and we simply are referencing that
3 the CISF is consistent with one of the goals.

4 JUDGE ARNOLD: On Sierra Club contention
5 10 about the aquifer, on page 66 of your petition
6 regarding high burnup fuel you state, quote, "The
7 damage to the cladding likely leads to leakage of
8 radioactive material from the storage container."

9 Now, that doesn't seem clear to me, I
10 mean, especially since it's also a can. So do you
11 have any support that the leakage is likely?

12 MR. TAYLOR: I referenced two publications
13 on page 67 that I believe supported those allegations,
14 and we also have, I think it is, contention 16
15 concerning high burnup fuel, and it -- the ER in
16 discussing the groundwater did not address any of that
17 risk from high burnup fuel.

18 JUDGE ARNOLD: I didn't see anything that
19 addressed how the leakage would get through the can.
20 I just -- basically it seemed to be a jump from, fuel
21 leaks, so it's going to get out.

22 We'll move to having to do with Sierra
23 Club contention 11. This was about the site selection
24 criteria. Can you direct me to any legal requirement
25 that the site be selected based upon environmental

1 considerations?

2 MR. TAYLOR: Well, what you have to
3 understand is that this whole discussion about site
4 selection is under the section of the ER regarding
5 alternatives, and so certainly the ER has to discuss
6 the various alternatives, how they were chosen, and
7 whether they're reasonable alternatives, and then to
8 discuss the impacts regarding each alternative.

9 So that's the point here. It's -- the NRC
10 staff thought we were talking about purpose and need,
11 but we're not. We're talking about the selection of
12 alternatives.

13 JUDGE ARNOLD: Okay. On page 71 of your
14 petition, you state, quote, "The ER contends that no
15 contamination of any kind has been detected from the
16 adjacent LLRW site" -- low-level rad waste site --
17 "near the proposed CISF site. There's nothing in the
18 ER, however, to substantiate this allegation."

19 When I read over that section in the ER,
20 I saw that the previous sentence right before what you
21 cited was, quote, "The Waste Control Specialist site
22 has been under a monitoring plan to detect the release
23 of trace amounts of radiological and hazardous
24 chemical constituents since it was permitted and
25 licensed in 1997."

1 It seems to me when they say it's been
2 under constant monitoring and no leakage has been
3 detected, that, in fact, substantiates the claim that
4 there's been none detected. And I don't understand
5 why you say there's nothing in the ER to substantiate
6 the allegation. Do you want a list of dates and
7 below-detectible activity? You know, would that -- is
8 that what you're looking for?

9 MR. TAYLOR: It didn't appear to me that
10 there was enough information there to support their
11 statement. But the bottom line with that particular
12 point A on page 71 is that contamination or leakage
13 from the low-level site is irrelevant to what we're
14 talking about here. We're talking about leakage or
15 pollution or contamination from the proposed site out
16 to the groundwater.

17 JUDGE ARNOLD: Okay. Let me ask
18 Applicant. On page 72 of the petition, the Sierra
19 Club notes that you state, The facility is not within
20 the 500-year flood plan. And then the Sierra Club
21 goes on to assert that you need to address the impacts
22 associated with the 100-year flood plan.

23 The question to me is: Isn't the 100-year
24 flood plan -- plain completely encompassed by the 500-
25 year flood plan, so that your statement that the

1 facility is not in the 500-year floodplain
2 explicitly -- or implicitly says it's not within the
3 100-year.

4 MR. LIGHTY: I believe it would be
5 bounding, but I would also point you to ER page 3-20
6 which says that it's not within the 100-year
7 floodplain. It explicitly addresses the 100-year
8 floodplain.

9 JUDGE ARNOLD: Great. I'm done with
10 Sierra Club.

11 JUDGE RYERSON: Thank you, Judge Arnold.
12 Judge Trikouros?

13 JUDGE TRIKOUROS: No.

14 JUDGE RYERSON: Thank you, Mr. Taylor.

15 MR. TAYLOR: Thank you.

16 JUDGE RYERSON: Thanks for standing for
17 that period of time.

18 Well, let's take another break, and resume
19 at 11:30.

20 (Whereupon, a short recess was taken.)

21 JUDGE RYERSON: Despite contrary
22 indications a few minutes ago, we're still optimistic
23 that we might be able to finish this before lunch.
24 I'm guessing we might go on past 12:30 a little bit,
25 but I think most people would prefer to do that and

1 break for lunch, rather than -- break before lunch,
2 rather than have lunch and come back.

3 I think part of that assumes -- we talked
4 a little bit about it yesterday -- whether the parties
5 after a day and a half really feel it would be
6 productive to have five minutes to say something. And
7 I'm guessing that if we can finish before lunch, there
8 might be a sense that that's not really necessary.
9 You can think about that and make an argument if
10 somebody feels that we need to do that.

11 But otherwise, we have two more petitions
12 to handle. I think we're going to try to be as crisp
13 and efficient as we expect you to be, and I see a
14 question from the Office of General Counsel.

15 MR. STEINFELDT: Yes, Judge Ryerson. Tom
16 Steinfeldt with the NRC staff. I'd like to correct
17 something I said earlier regarding the RAI related to
18 Judge Arnold's question on Sierra Club contention 15.

19 JUDGE RYERSON: Yes.

20 MR. STEINFELDT: So the RAI that has been
21 issued is to -- is seeking studies, the most recent
22 studies, as required for the licensing condition of
23 the WCS site for the studies that Texas requires.
24 It's not to request the studies listed in 3.5.16.

25 JUDGE RYERSON: Okay. Thank you.

1 All right. Mr. Lodge, I have no further
2 questions for you. And we'll start perhaps this time
3 with Judge Arnold.

4 JUDGE ARNOLD: On contention 1 -- or
5 actually this is a contention 1 question for the
6 Applicant. On page 42 of their petition, Joint
7 Petitioners claim, quote, "ISP has thus segmented the
8 indispensable transportation component of the project
9 proposal from the storage component."

10 Now, did you choose to do this
11 segmentation, or is this basically how the rules of
12 the NRC require you to do it?

13 MR. LIGHTY: Your Honor, the
14 transportation analysis is analyzed as a connected
15 action, and in fact, that's explicitly what the
16 petitioner demand be done. They say that
17 transportation should be considered as a connected
18 action. The title of the very section in the ER,
19 section 4.2.4.1, is titled, Connected transportation
20 impacts, for example. And so that's how it's
21 analyzed, because it is not part of the proposed
22 action, but, in fact, could be reasonably foreseeable,
23 and so it's analyzed as a connected action exactly as
24 they demand.

25 JUDGE ARNOLD: What you've applied for is

1 a materials license. Is it possible by NRC
2 regulations to obtain a material license that both
3 authorizes you possession of the material and
4 transportation of that material to your site?

5 MR. LIGHTY: Your Honor, I believe those
6 would have to be separate licenses. The application
7 here is for a Part 72 license. Transportation route
8 approval happens under Part 71 licensing criteria.

9 JUDGE ARNOLD: Now let me ask the Joint
10 Petitioners. Do you know of any way that NRC rules
11 allow this licensing action to also authorize
12 transportation?

13 MR. LODGE: What I know is that the --
14 this may not be on. Oh, yes. Is it? Can you hear
15 me?

16 JUDGE RYERSON: Yes.

17 MR. LODGE: What I know is that the NRC
18 regs don't constrict NEPA. NEPA predominates when
19 there's a conflict with NRC regulations and that the
20 scope of the project must be addressed in the NEPA
21 documents.

22 JUDGE ARNOLD: Okay.

23 MR. LODGE: And -- pardon me. And to
24 conclude, we believe that the scope of the project
25 includes -- pardon me if I butcher the

1 pronunciation -- but the sine qua non, without which
2 element the CISF cannot exist without transportation,
3 and the entirety of the project thus includes
4 transportation.

5 JUDGE RYERSON: Strictly speaking, though,
6 at this point, we're talking about compliance with
7 Part 51, not compliance with the statutory mandate of
8 NEPA, which will ultimately be the staff's
9 responsibility.

10 MR. LODGE: Yes.

11 JUDGE RYERSON: They're very similar,
12 perhaps identical, but --

13 MR. LODGE: Yes.

14 JUDGE RYERSON: -- technically at this
15 point, we're talking about compliance with NRC
16 regulations, not compliance with the statute.

17 MR. LODGE: But it is the burden of the
18 public intervenors to raise the issue at the very
19 earliest part --

20 JUDGE RYERSON: Correct.

21 MR. LODGE: -- of the proceeding.

22 JUDGE ARNOLD: Contention 2 concerning the
23 Start Clean-Stay Clean policy, question for the
24 Applicant again. Joint Petitioners claim that,
25 "Aggressive implementation of this policy will mean

1 that problematic canisters will accumulate at reactor
2 sites." Do you consider this to be an inevitable
3 consequence of your Start Clean-Stay Clean policy?
4 Will you often reject casks?

5 MR. BESSETTE: No, Your Honor. I believe
6 the parties -- Joint Petitioners misrepresent the
7 Start Clean-Stay Clean policy. It's the same as
8 described in the Holtec proceeding, the general
9 philosophy that all parties along the loading,
10 transportation, and storage route will comply with
11 quality assurance program and NRC regulations.

12 The fuel from canisters that the Applicant
13 will take are outlined in our application, and there's
14 no reason to believe that there's any cherry-picking
15 involved in that. Joint Petitioners have provided
16 zero indications of any types of casks that would
17 somehow be left abandoned.

18 JUDGE ARNOLD: Do you have any comment on
19 that?

20 MR. LODGE: I'm not sure what you're
21 asking me to comment on.

22 JUDGE ARNOLD: Well, the Applicant is
23 essentially saying that's not a policy that's going to
24 be leaving some spent fuel behind. It's an
25 infrequent, you know, quality control. Do you have

1 anything to add to your -- that isn't in the petition
2 already? Well, I shouldn't ask that.

3 MR. LODGE: Possibly not, but --

4 JUDGE ARNOLD: Any reinterpretation of
5 what you put in the application?

6 MR. LODGE: I think that, in effect, there
7 will be process of cherry-picking, because quality
8 control requirements at the reactor sites are going to
9 certainly exert a limiting effect on what are
10 acceptable canisters for shipment.

11 That becomes really problematic, but in
12 any event, if during transit, contamination or leakage
13 or breach or some type of malfunction is noted in a
14 canister, there will certainly be a time, which may be
15 a significant period of time -- it's not really amply
16 discussed -- during which canisters will sit at the
17 site.

18 And because of the difficulties of their
19 design, there may be problems in accurately diagnosing
20 what the technical problem is, which may cause further
21 delays. Speculation builds upon speculation, but the
22 problem is I don't see in the application, I don't see
23 an ample discussion of risk, of quality control that
24 happens at the site once there is a problem, don't see
25 site safety procedures, in the event that there is a

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1 serious ongoing problem that requires a little bit
2 more, perhaps having a dry transfer system for
3 remediation or something like that.

4 JUDGE ARNOLD: Moving on to contention 11
5 having to do with no dry transfer system, question for
6 Applicant. On page 119 of the petition, the
7 petitioners claim, "Emergency response plan for the
8 CISF contains no provisions for emissions mitigations,
9 i.e., reduction of emissions or releases to the
10 surrounding environment of radiation and/or
11 radioactive material from SNF as a result of damage to
12 SNF assemblies and/or SNF containers."

13 Is it true that if you detect leakage from
14 some container, that you have no means of handling it?

15 MR. BESSETTE: No, Your Honor. I'll have
16 to look up the exact section of the environmental
17 report. Give me a minute. There is discussion of
18 that.

19 (Pause.)

20 MR. BESSETTE: I would particularly -- and
21 also in the SAR, Chapter 7.2, the discussion of
22 confinement, if there's any events aren't identified,
23 particularly upon receipt, there's corrective --
24 they'll enter the corrective action program, evaluate
25 the NRC. There's provisions for isolation. So we do

1 have provisions for addressing those issues.

2 JUDGE ARNOLD: If this leak -- if you put
3 a canister out on the pad and it's been sitting out
4 there and after a few years, for some reason,
5 degradation occurs and it starts to leak, do you have
6 some means of mitigating that leakage?

7 MR. BESSETTE: It would be entered. It
8 would be reviewed accordingly, addressed with a
9 corrective action program, and coordinated with NRC.
10 And it is discussed in the application, Your Honor.
11 The precise means of dealing with it would have to be
12 based on the actual situation, but there are ways of
13 isolating, including putting them back into a
14 transport cask.

15 JUDGE ARNOLD: Much of this contention
16 appears to be based upon Dr. Gordon Thompson's
17 assertion that, quote, "It is likely that some spent
18 nuclear fuel assemblies and/or spent nuclear fuel
19 containers would be damaged at the site as a result
20 of, one, accident; two, attack; and/or, three, slow
21 degradation."

22 Now, is this opinion of his consistent
23 with the evaluations in the SAR?

24 MR. BESSETTE: No, Your Honor. The SAR
25 discusses there's no degradation mechanisms through

1 the life of the casks. Once the casks are renewed,
2 there has to be aging management programs. There are
3 license conditions requiring the aging management
4 programs.

5 JUDGE ARNOLD: On page 125 of the petition
6 regarding the opinion of Dr. Gordon Thompson,
7 petitioners state, quote, "He foresees that likely
8 modes of attack would include initiation of a cask
9 fire involving sustained burning in air of Zircaloy
10 cladding of spent nuclear fuel."

11 Within your storage system, is the
12 Zircaloy clad normally exposed to air?

13 MR. BESSETTE: No, Your Honor. All the
14 casks are welded, sealed, and are in an inert
15 environment.

16 JUDGE ARNOLD: Okay. So there's no normal
17 circumstances in which air would come in contact with
18 the clad.

19 MR. BESSETTE: Unless my experts behind
20 correct me and shake their head, my answer is no.

21 MR. LODGE: Judge Arnold, I'd like to
22 point out one thing. That is that in their
23 application, WCS essentially says that they see no
24 return to sender problem because they've never allowed
25 problematic casks to come to WCS in the first place.

1 They now today are admitting that, yes,
2 there could be some problems and here's our answer to
3 it. And we would consult with the NRC and we would do
4 this or that. And we're not sure what specific
5 remediation or other types of protective steps we'd
6 take. I think that there's -- WCS has created their
7 own material problem in conflict with their own
8 application.

9 JUDGE ARNOLD: Thank you. I'm done.

10 JUDGE RYERSON: Thank you, Judge Arnold.
11 Judge Trikouros?

12 JUDGE TRIKOUROS: Yes. Some of my
13 questions got answered, so that's good. The safety
14 analysis report specifically says that greater than
15 class C waste that's shipped to the facility will only
16 be in solid form. Is that correct?

17 MR. BESSETTE: Your Honor, in my 30-plus
18 years of working in the nuclear field, I've only known
19 of storage of greater than class C in a dry cask and
20 solid form, so -- but I believe my colleague wants to
21 address that.

22 JUDGE TRIKOUROS: Okay. Well, I think
23 you've just answered my next question. Is there any
24 greater than class C that's in liquid form? You're
25 saying there isn't.

1 MR. MATTHEWS: Judge Trikouros, the
2 proposed license specifies the form. It's only solid.

3 JUDGE TRIKOUROS: Right. And it excludes
4 liquid form. So I was asking a follow-up question,
5 was: Is there such a thing as greater than class C
6 liquid waste at the facilities -- at the reactors?

7 MR. BESSETTE: Your Honor, I'm not aware
8 of anything. Any highly radioactive liquid waste at
9 the reactors tends to be run through resins and it
10 turns into waste that's disposed of elsewhere. So
11 unless there's some -- there might be some Department
12 of Energy type waste that's processed, but I'm not
13 aware of anything from a commercial nuclear plant of
14 liquid greater than class C waste.

15 JUDGE TRIKOUROS: So the likelihood that
16 there would be greater than class C liquid waste
17 stranded at the reactors is not viable?

18 MR. BESSETTE: I'm -- of the currently
19 decommissioned sites, which the reactors have been
20 knocked down, and greater than class C waste is
21 currently stored on the ISFSI pads, it is all in solid
22 form.

23 JUDGE TRIKOUROS: Okay. Does the staff
24 have any comment on that at all?

25 MS. KIRKWOOD: The staff is not aware of

1 any greater than class C waste at a reactor in liquid
2 form.

3 JUDGE TRIKOUROS: Okay. I just want to
4 make sure that -- ISP will not be associated at all
5 with what goes on at the reactor sites in terms of
6 their preparation of these canisters for shipment?

7 MR. BESSETTE: That's my understanding,
8 Your Honor. I mean, the sites are responsible for the
9 loading, the quality assurance, the conformance with
10 the certificates of compliance, and the Applicant is
11 not involved with that -- those processes. They will,
12 of course, review the quality assurance records, all
13 the records that are required, to ensure the contents
14 meets the requirements of the COC.

15 And also anyone who packs fuel into a dry
16 storage canister will have to meet the Department of
17 Energy's standard contract for recordkeeping
18 requirements, and I imagine ISP will also review those
19 records. But it will really -- it'll be a record
20 review and not anything to do with the actual packing.

21 JUDGE TRIKOUROS: There won't be like an
22 on-site inspector at any of these sites at all.
23 Right?

24 MR. BESSETTE: Unless -- it's not my
25 understanding. During the loading process, no, Your

1 Honor. The loading process is extremely strictly
2 controlled and also observed by NRC during dry runs
3 and quality assurance highly controlled evolutions.

4 MR. LODGE: Judge Trikouros, if I may
5 supplement that answer, I think that the fact that WCS
6 is a partner with a firm called NorthStar that has
7 entered into arrangements at Vermont Yankee for the
8 readying and transport of material to WCS, it looks to
9 me as though WCS may be wading into that field, and --

10 JUDGE TRIKOUROS: Can you speak a little
11 louder, please.

12 MR. LODGE: Yes. Sorry. It seems to me
13 that WCS may be wading into the tier of actually being
14 much more involved from a proprietary standpoint in
15 the preparation and transport of casks, canisters.

16 MR. BESSETTE: Your Honor, WCS, again to
17 Mr. Lodge, not the Applicant here. It's Interim
18 Storage Partners. To the extent that there's certain
19 different commercial entities that have combined to
20 conduct decommissioning of the utilities, that is not
21 part of this application and not the Applicant here.

22 JUDGE TRIKOUROS: The staff has
23 indicated -- let's see; I think it's in the answer to
24 Don't Waste -- Joint Petitioners' petition --
25 indicates -- I think it's on page 21 to 22. "In other

1 words, even if the application does contemplate some
2 canisters may not meet the criteria of this license,
3 that does not demonstrate why it is likely the
4 canisters will not meet NRC regulations, and licensees
5 cannot bring these canisters into compliance or that
6 oversight of those canisters entails significant
7 environmental impacts."

8 So do I read -- why don't you just let me
9 know what you meant by that.

10 MR. GILLESPIE: Yes, Your Honor.
11 Specifically, I think, our -- we have a reference on
12 the sentences to the Commission's decisions in Private
13 Fuel Storage, CLI 04-4 and CLI 04-22. And those cases
14 stand for the proposition that to allege some sort of
15 risk or violation of Part 71 associated with
16 transportation and Start Clean-Stay Clean, that there
17 need to be facts alleged that would provide a
18 plausible scenario or allege QA deficiencies at
19 individual sites, as to why it's likely that that
20 would occur.

21 JUDGE TRIKOUROS: All right. I think all
22 of my other questions have been answered.

23 JUDGE RYERSON: Anything further, Judge
24 Arnold?

25 JUDGE ARNOLD: No.

1 MR. LODGE: If I may, I'd like to make a
2 couple of comments. I'd like to respond to the ISP
3 affiliation or nonaffiliation with NorthStar. The
4 fact is that these are interlocking corporations.
5 It's a --

6 VOICES: We can't hear you.

7 MR. LODGE: It's difficult for me to
8 imagine that NorthStar would not in some official
9 business way have to be in contact, in communication
10 with the WCS site in terms of coordinating the
11 transport and delivery. I think that now -- to hear
12 now that there's simply no relationship of relevance
13 to this application is very difficult to handle.

14 JUDGE RYERSON: Do you have any contention
15 that addresses that issue, Mr. Lodge?

16 MR. LODGE: No, sir -- well, insofar as we
17 were talking about the other thing that I wanted to
18 make comment on, yes. The DTS, the lack of dry
19 transfer system, is of considerable concern, and I
20 would like to explain my mathematics as to my
21 references to possibly 30,000 different shipments.
22 This will be my last comment, so I'll keep it crisp.

23 Robert Alvarez, we cite him at pages 70
24 and 121 of our original petition, as noting that the
25 transport -- the TAD canister policy enunciated by DOE

1 suggests that there may be overall as many as a total
2 of 80,000 canisters that would -- the fuel basically
3 would be broken into smaller quantities at some point,
4 either the reactor site or the CISF site.

5 Working backwards from a total of 80,000
6 and apportioning WCS's portion as 40 percent of a
7 rough 100,000 MTU total, you get 40,000 that either
8 comes as 3,000 shipments, not 500 as is suggested in
9 WCS's own application, or you end up with 80,000
10 shipments, 40 percent of which --

11 The 40 percent going to WCS would total
12 32,000 in some form or fashion, either 32,000
13 shipments coming from the reactor customers they
14 develop or at the CISF.

15 In some way you would have to break the
16 fuel quantities down into 32,000 canisters. So I
17 think it's a very reasonable, foreseeable, predictable
18 number. And I repeat. This is a big problem that no
19 one is addressing in the application in any fashion.
20 And it bespeaks the whole difficulty that the
21 petitioners have with the denial of any need until
22 2125 or so to even have a DTS system around.

23 There'll have to be swap-outs of whatever
24 storage units are used. There will have to be --
25 there may be -- I think we finally know today for sure

1 that there's some conceded possibility that something
2 just might go wrong, even in the first hundred years
3 where DTS might be a handy thing to have.

4 If I may have one more moment --

5 (Pause.)

6 MR. LODGE: The claim that was made
7 earlier when Mr. Taylor was up here that nuclear waste
8 will only travel in dedicated trains, the problem
9 is --

10 JUDGE TRIKOUROS: People can't hear you.

11 MR. LODGE: I'm sorry. My apologies. The
12 claim that -- the voluntary offer of the company, of
13 the Applicant that they will only transport in
14 dedicated trains, number one, is not going to be
15 enforceable, because it's not a requirement.

16 Number two, I think we're learning a lot
17 coming to Midland that West Texas is for some time to
18 come and maybe a very significant time to come, the
19 site of the most enormous petroleum and gas
20 development on the face of the planet. That includes
21 Andrews County. It includes the immediate vicinity of
22 Eunice and the actual CISF site.

23 In looking at the railroad maps up close,
24 I've noticed that there are several intersections
25 with -- in very heavy trafficked, otherwise rural-

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1 seeming oil patch land of oil trucks by the thousands,
2 of oil trains, certainly in large numbers. This is
3 the wrong place for this very partially developed,
4 half-baked idea.

5 Unless there are other questions, I'm
6 done.

7 JUDGE RYERSON: Thank you, Mr. Lodge.

8 MR. LODGE: Thank you.

9 JUDGE RYERSON: Mr. Eye. All right. I do
10 have a few questions for you, I think. As I mentioned
11 a couple times, I've looked at the declarations that
12 have been submitted by Mr. Taylor, Mr. Tommy Taylor,
13 and Mr. Boyd.

14 The declaration of Mr. Taylor is on behalf
15 of Fasken, who is actually Fasken management, I guess,
16 which is a petitioner, and in addition, his
17 declaration, Mr. Taylor's declaration, supports
18 Fasken's representation in the Permian Basin Land and
19 Royalty Owners Association.

20 And then in addition, there is a
21 declaration from Mr. Boyd who is individually a member
22 of the Permian Basin association. And I'm familiar,
23 I remember the declaration of Mr. Taylor in the Holtec
24 case where he represented that he had to go in the
25 area of the proposed facility to engage in work for

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1 his employer.

2 It's a little less clear to me from the
3 declaration. It admits to that possibility, but I
4 don't think says it quite as explicitly as was said in
5 the declaration in Holtec. And so my first question
6 is really what -- whether -- what duties, employment
7 duties or personal reasons take Mr. Taylor to the area
8 of the proposed facility, and how often does he go
9 there.

10 MR. EYE: As Mr. Taylor says in his
11 declaration, he says that his employment duties and
12 personal reasons require him to travel to and to spend
13 time in the area of the proposed CISF. Mr. Taylor's
14 an upper management person for Fasken. He's an expert
15 in drilling. He's an engineer.

16 He oversees and is involved in various of
17 the Fasken activities, really from start to finish of
18 their production. That requires him to go to the
19 various sites where Fasken is engaged in exploration
20 and extraction, and to make sure that the operations
21 are going consistent with the company's expectations.

22 The frequency that he goes there is
23 somewhat variable. It depends on the nature of the
24 activity that's going on and whether there's a
25 particular need for him to be there. However, it's

1 not unusual for him to go dozens of times during the
2 course of a year to a particular site, and it may even
3 be more than that -- well, I should -- let me clarify
4 one thing.

5 The particular highway that runs closest
6 to the ISP site has been under some reconstruction,
7 rebuilding due to very heavy oil and gas activity on
8 it, and that has recently caused Mr. Taylor to have to
9 take a detour. So recently he has not used that
10 particular highway as frequently, but once it's back
11 in a useable fashion, he would be using it again.

12 But historically, it's not unusual for him
13 to be in the area of the ISP site dozens of times in
14 the course of a year.

15 JUDGE RYERSON: But his contacts with the
16 site would involve more than merely using the road, I
17 take it. You're saying that he would go to the
18 facility, his Fasken facilities that are quite close
19 to the site in that area, and he would get out and do
20 things. Or does he just drive on the highway?

21 MR. EYE: Well, really both --

22 JUDGE RYERSON: Okay.

23 MR. EYE: -- I think it's fair to say,
24 because Fasken's closest oil and gas facility
25 currently to the ISP site is 18 miles, 18 miles from

1 the ISP proposed site. So certainly he goes that
2 close on a regular basis, to see Fasken's operations.

3 And it's -- but one has to remember that
4 he has to go to also the New Mexico holdings of Fasken
5 which require him to go, you know, essentially in the
6 immediate vicinity of the proposed facility. And it's
7 also not unusual that Mr. Taylor's called upon to do
8 site evaluations, to determine whether a particular
9 activity ought to go forward, which requires more than
10 just driving there. It requires him to do some, I
11 guess you would call them, sort of a field study.

12 JUDGE RYERSON: The 18-mile location, that
13 is not like his office where he is on a regular basis.
14 He is there sporadically. Is that fair to say?

15 MR. EYE: It is fair to say that that is
16 not his office, and the frequency of him visiting
17 those, I think, again is dependent upon the operations
18 and the nature of what may be going on with them on a
19 day-to-day basis.

20 JUDGE RYERSON: Right. And he speaks in
21 his declaration of being familiar with other employees
22 who go to the area of the proposed facility. But I
23 take it no Fasken operation is closer than 18 miles.
24 Is that correct?

25 MR. EYE: It's -- the closest Fasken

1 facility is 18 miles.

2 JUDGE RYERSON: Is 18 miles.

3 MR. EYE: Currently.

4 JUDGE RYERSON: And so these other
5 employees would either be 18 miles away from time to
6 time, or they might be using the highways that go
7 closer than that. Is that --

8 MR. EYE: I would agree with both of
9 those.

10 JUDGE RYERSON: Okay. Let me ask you a
11 little bit about Mr. Boyd's declaration. We've talked
12 about the size of the ranch, which still amazingly
13 impresses me, 137,599 acres. As we said yesterday,
14 that's about ten Manhattan Islands. A corner of that
15 ranch is four miles away from the proposed facility.
16 And I know Mr. Boyd's -- he owns part of the ranch.
17 He ranches the ranch, but part of it he leases.

18 But how much time would he personally be
19 spending in the corner of this ten Manhattan Island
20 ranch that is near the proposed facility?

21 MR. EYE: Hard to say. I mean, again,
22 it's contingent on the needs of his operations and the
23 requirement that he be there to be a part of those.
24 But I would add that in a more intimate way, the New
25 Mexico-Texas railroad that is proposed to bring waste

1 to the ISP site, for 5.5 miles runs through his ranch.
2 He uses the crossing of that to get across that
3 railroad to do his various ranching operations.

4 So it's not quite as remote as just
5 talking about the relationship of the four-mile point,
6 because this railroad crosses his property. He uses
7 the crossings to get across the railroad, and that
8 gives him a special kind of relationship to the ISP
9 facility.

10 JUDGE RYERSON: A question for the
11 Applicant: Is there any uncertainty that this
12 railroad line would be used for the transportation of
13 the waste? Is that pretty clear?

14 MR. LIGHTY: I certainly wouldn't say it's
15 a certainty. No transportation routes have been
16 identified as certain to be used here. Speculative
17 routes, bounding routes, representative routes, are
18 presented in the application for need analysis
19 purposes. But, again, no specific customers have
20 been identified, and transportation infrastructure
21 certainly could change between now and the time that
22 actual transportation happens, so --

23 JUDGE RYERSON: But as of today, given how
24 close we are at this point -- I can understand that
25 rails perhaps in Michigan might not be decided yet or

1 the Northeast, but this close to the proposed
2 facility, is there another railroad that would not go
3 through the Fasken property, that might be an option
4 as of today? Or is this really the only realistic
5 options?

6 MR. LIGHTY: If I may confer for a
7 moment --

8 JUDGE RYERSON: Certainly.

9 MR. EYE: Just for clarity of the record,
10 it's the Boyd property, not the Fasken property.

11 JUDGE RYERSON: I'm sorry. The Boyd --
12 yes. Through the Frying -- what's the name of --

13 MR. EYE: Frying Pan Ranch.

14 JUDGE RYERSON: Frying Pan Ranch.

15 (Pause.)

16 MR. LIGHTY: So the spur to the current
17 WCS site does connect to the rail line that I believe
18 counsel's referring to, and is used today for
19 deliveries. It's foreseeable that that route would be
20 used.

21 JUDGE RYERSON: Okay. Thank you. And a
22 question for the staff. The staff would urge us to
23 find standing or at least not oppose standing, both
24 for Fasken, the company, and for the Permian Basin
25 group.

1 And I'm curious whether, I suppose --
2 well, the -- you must have found the Taylor
3 declaration persuasive, because there's no other
4 source of a representative for Fasken. I guess both
5 Mr. Taylor and through Fasken -- or Fasken through Mr.
6 Taylor, and Mr. Boyd as an individual member, both are
7 representative of the Permian Basin.

8 Could you tell us whether you found both
9 those affidavits persuasive, or whether you relied on
10 one? What was the staff's position on that?

11 MR. GILLESPIE: Your Honor, in particular,
12 the affidavit by Mr. Boyd would be the one we relied
13 on primarily.

14 JUDGE RYERSON: Primarily. Okay. Did you
15 rely in part on the Taylor declaration? Or you relied
16 entirely on the Boyd declaration?

17 MR. GILLESPIE: Entirely on the Boyd
18 declaration.

19 JUDGE RYERSON: Entirely. Thank you. I
20 think that's the scope of my questions. You may have
21 some more in the area, Judge Arnold.

22 JUDGE ARNOLD: No. You covered
23 everything.

24 JUDGE RYERSON: Any other questions?

25 JUDGE ARNOLD: Not on standing.

1 JUDGE RYERSON: No, no. Any other
2 questions?

3 JUDGE ARNOLD: Oh, of course.

4 JUDGE RYERSON: Of course.

5 MR. EYE: And, again, if this goes to
6 contentions 2 or 4, I'd like to request that my
7 colleague Mr. Laughlin be able to respond to those.

8 JUDGE RYERSON: Okay. Contentions 2 and
9 4.

10 MR. EYE: 2 and 4. Yes, sir.

11 JUDGE RYERSON: Certainly.

12 JUDGE ARNOLD: Let's see. So you would be
13 3 and 5.

14 MR. EYE: 1, 3 and 5.

15 JUDGE ARNOLD: 1, 3, and 5. No questions
16 on 1.

17 JUDGE RYERSON: If I can interrupt you and
18 sort through this, if you're relying totally on the
19 Boyd -- and this is a question directed to the NRC
20 staff -- that would go to the Permian Basin group, but
21 that does not go to Fasken management or Fasken,
22 because only the Taylor declaration would support that
23 standing. Am I wrong?

24 MR. GILLESPIE: No, Your Honor. That is
25 correct.

1 JUDGE RYERSON: So you are opposing the
2 standing of Fasken but not the standing of Permian
3 Basin, who we're calling Fasken. But is that clear in
4 your -- I don't think it is.

5 MR. GILLESPIE: Your Honor, our pleading
6 may not have been the most artfully worded.

7 JUDGE RYERSON: Your position today is
8 that the Permian Basin organization, through its
9 individual member Mr. Boyd, has standing, but that
10 Fasken itself does not have standing.

11 MR. GILLESPIE: That is correct.

12 JUDGE RYERSON: Thank you.

13 MR. EYE: Your Honor, may I comment on
14 that?

15 JUDGE RYERSON: You may comment on that.
16 That's kind of new.

17 MR. EYE: It is quite new. Number one, it
18 disregards the relative proximity of Fasken's
19 facilities, 18 miles from the ISP facility, which, you
20 know, comes within the zone that is generally
21 considered as being supportive of standing.

22 JUDGE RYERSON: But no one resides there,
23 and possibly there's not even an office there where
24 people work eight hours a day, five days a week.

25 MR. EYE: True. But the economic impact

1 of diminished -- that diminished value of that
2 property as a result of the ISP facility and its
3 operation would also provide a basis for standing.
4 And it's -- if you read staff's response to the answer
5 to the petition, they don't differentiate.

6 And so for them to do so now without
7 explaining away the facts that we have laid out in the
8 petition and in Mr. Taylor's affidavit leaves us
9 wondering precisely exactly how they arrived at the
10 conclusion that they did today.

11 JUDGE RYERSON: I agree with you, sir.

12 MR. EYE: Thank you.

13 JUDGE RYERSON: But -- I'm sorry. We
14 should let the staff respond to that.

15 MR. GILLESPIE: Your Honor, I mean, the
16 fundamental distinction is that 18 miles is outside
17 the 17 miles that has been found in previous NRC
18 cases. That being said, the staff would not see it as
19 abuse of discretion to -- or a legal error for
20 standing to be found for 18 miles versus 17 miles.

21 JUDGE RYERSON: Okay. But your position,
22 as I understood it ten minutes ago, is the same as
23 now, that you have concluded, on further thought
24 perhaps, that Fasken management, Fasken, does not have
25 standing, because your only reliance on that would be

1 the Taylor declaration. You can't use the Boyd
2 declaration for that. He's not associated with
3 Fasken. So Fasken does not have standing in your
4 view.

5 MR. GILLESPIE: Yes, Your Honor.

6 JUDGE RYERSON: Okay. But you continue to
7 believe, based on the Boyd declaration, that the
8 Permian Basin group has standing -- organization has
9 standing.

10 MR. GILLESPIE: Yes.

11 JUDGE RYERSON: We should probably change
12 the name of combined group, but that's their position,
13 and we understand that's just the staff's position.

14 MR. EYE: One thing I would comment on,
15 Your Honor, is that the 17-mile perimeter or range --
16 I believe the case law would reflect that this is --
17 the determinations are on a case-by-case basis. And
18 in that regard, it seems to us that if we have a
19 strict adherence to 17 miles and exclude something at
20 18 miles, it might appear as if there's an attempt to
21 just be far too attenuated in determinations of
22 standing.

23 JUDGE RYERSON: Yes. Eighteen miles was,
24 as we talked earlier, an NAI case in the D.C. Circuit
25 was deemed to be sufficient. But they were talking

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1 about residences. I mean, there's some balancing.
2 There's one case -- I forget where it was, in
3 Connecticut or somewhere -- where ten miles was
4 considered sufficient where someone had a second home,
5 so they spent substantial time there, but they didn't
6 live there. And so there seems to be some balancing
7 in the distances.

8 But in any event, we have the staff's
9 position. I'm glad we fleshed out that it's changed,
10 and so we are aware of that.

11 MR. EYE: I would point out that the
12 facility in question at the 18-mile point is one that
13 does require some employees of Fasken to be at some
14 portion of each day for monitoring and to make sure
15 that the operations are going consistent with their
16 expectations. So there is a regular, daily presence
17 of Fasken at that facility.

18 JUDGE RYERSON: Okay. All right. Well,
19 thank you. And I'm sorry to interrupt, Judge Arnold.

20 MR. LIGHTY: Your Honor, if I may just ask
21 for a point of clarification from the Board. Are we
22 taking new evidences to standing here, or -- I just
23 want to be clear.

24 JUDGE RYERSON: You know, I was waiting
25 for you to comment on that.

1 MR. LIGHTY: I apologize. Just to
2 clarify.

3 JUDGE RYERSON: Because what -- as I said
4 yesterday, we are not bringing in these declarants and
5 having an evidentiary hearing based on their
6 declarations. We are taking the representations of
7 counsel to the extent that they may appropriately
8 flesh out the declarations, and we'll have to look at
9 those -- at that fleshing out as we read the
10 transcript and decide what we may permissibly
11 consider.

12 I take it you would object to anything
13 that we shouldn't permissibly consider, and we're
14 aware of that position.

15 MR. LIGHTY: Thank you, Your Honor.

16 JUDGE RYERSON: Thank you. Judge Arnold.

17 JUDGE ARNOLD: For Mr. Eye, I have a
18 couple of questions on contention 5. Can you cite to
19 any specific information provided in the ER concerning
20 either the dunes sagebrush lizard or the lesser
21 prairie chicken for which you have provided actual
22 evidence that is contradictory to what's in the ER?

23 MR. EYE: No. And -- but this contention
24 is really one more of omission, so we -- the basis of
25 that contention is there's an omission of material

1 information rather than contradicting that which has
2 actually been presented.

3 JUDGE ARNOLD: And every so often, when I
4 go through these petitions, I have a thought which I
5 later wish I never had, and I came across one of those
6 in this contention.

7 Now, early in the petition when you
8 describe the Permian Basin group, you say that they
9 are specifically organized to oppose Waste Control
10 Specialists. And then I read this about the Permian
11 Basin organization's attempt to repopulate the -- what
12 is it? -- the lesser prairie chicken.

13 And I'm wondering. Were they -- was that
14 repopulation motivated by them being good citizens and
15 wanting to, you know, repopulate this chicken, or was
16 it because they wanted to make it harder for Waste
17 Control Specialists to use their land?

18 MR. EYE: Well, at the time that it
19 happened -- let me make one clarification. To the
20 extent that it was the Permian Basin organization, it
21 was acting strictly through Fasken. So it was really
22 Fasken's participation in the collective efforts of
23 other oil and gas entities plus the ranching industry
24 to try to protect the habitat of the lesser prairie
25 chicken, which happened before the ISP application had

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1 materialized.

2 So the answer is, no, it wasn't to just be
3 obstructionist and frustrate the efforts of ISP. It
4 was to protect the habitat of the lesser prairie
5 chicken.

6 JUDGE ARNOLD: Great. Thank you very
7 much.

8 MR. EYE: You're welcome.

9 JUDGE ARNOLD: My other questions are on
10 contention 2 and 4.

11 MR. EYE: We'd take those up now then?

12 JUDGE ARNOLD: Yes.

13 MR. EYE: Okay.

14 MR. LAUGHLIN: Thank you, Your Honors.

15 JUDGE ARNOLD: Contention 2 has to do with
16 the information concerning borings on or near the
17 site, and I'm wondering: How would the SAR containing
18 an enumeration of wells near the site actually affect
19 the suitability of the site?

20 MR. LAUGHLIN: Well, as our expert
21 indicated, especially for wells that are older, past
22 the 1967, they have integrity issues associated with
23 them, and ISP does not indicate the presence of those
24 wells and how that instability would affect the site,
25 which is required, a requirement by 72.103.

1 They are required to investigate the
2 region for unstable geological characteristics, and
3 they do not do that with these unstable geological
4 characteristics, meaning the abandoned or potential
5 for orphan wells near the site.

6 JUDGE ARNOLD: You're saying there's some
7 sort of a seismic activity analysis method that would
8 use actual boring location and characteristics in the
9 evaluation of the stability? Is there a computer
10 program, for instance, that uses input? There's a
11 hole there. It's so deep.

12 MR. LAUGHLIN: Yes, Your Honor. And
13 that's how we came to that number. And, in fact, at
14 this point, the total number that we provided has
15 actually decreased, so I was going to ask this Board,
16 just for clarity, to take administrative notice of
17 that number. We cited 4,947 wells within the ten-mile
18 radius. Now it's actually 4,579, so I -- is it
19 appropriate to ask for administrative notice of this
20 change? Will the Board --

21 JUDGE RYERSON: We'll note that.

22 MR. LAUGHLIN: Okay. Thank you. And you
23 bring -- so, yes, there is. And our clients actually
24 refer to it in the declaration from Aaron Pachlhofer.
25 They use the Petra software, which is used by the

1 industry, to identify the location of these wellheads.

2 JUDGE ARNOLD: Let me just ask Applicants.
3 Are you aware of methods that use the actual location
4 and characteristics of borings to evaluate seismic
5 stability?

6 MR. LIGHTY: I'm not personally familiar
7 with software packages that would do that. I think
8 counsel was referring to software that simply shows
9 the location of wells, not a particular computer code
10 that would analyze those in a geotechnical
11 investigation.

12 But I would note that ISP's geotechnical
13 investigation is included in the application as
14 Attachment E. And I'm not sure what they seek to
15 challenge from it. They don't acknowledge that
16 investigation and specifically say, This -- here's the
17 defect in the attachment. They just ignore the
18 relevant analysis in the application, as well as the
19 probabilistic seismic hazards evaluation in Attachment
20 E.

21 MR. LAUGHLIN: May I respond?

22 JUDGE ARNOLD: Yes.

23 MR. LAUGHLIN: So potential from vibratory
24 ground motion is one of the three characteristics that
25 72.103 requires of the Applicant, but it also requires

1 them to look for unstable geological characteristics.
2 It's not just limited to seismicity. It also
3 encompasses the potential presence of unstable
4 geological characteristics.

5 And I will note that -- I talked about how
6 especially for wells drilled pre-1967, there are
7 integrity issues associated with that, mostly because
8 the industry back then had fewer regulations as far as
9 how to properly plug a well and things like that.

10 And if you look at -- if you break it
11 down -- and we'll break it down within a five-mile
12 radius -- there are 645 wells within a five-mile
13 radius. Of those 160 were drilled pre-1967. So of
14 these wells, we have 160 within the five-mile
15 vicinity, and we have no idea what the integrity of
16 those wells are.

17 And it is not our burden to determine
18 whether these wells have integrity issues. It is the
19 Applicant's burden pursuant to 72.103 to determine
20 whether these wells' unstable geological
21 characteristics will influence the site. Maybe they
22 won't, but it is a requirement by 72.103, and they
23 have not done that.

24 JUDGE ARNOLD: Thank you. The only other
25 question I have is on contention 4. On page 30 of

1 your petition, you state that the water from the
2 Antler Formation is used as potable water in Midland.

3 MR. LAUGHLIN: Correct, Your Honor.

4 JUDGE ARNOLD: I think I noticed that same
5 in the water at the hotel.

6 MR. LAUGHLIN: I noticed it in the water
7 fountain out there, so --

8 JUDGE ARNOLD: On that same page, you
9 infer that the Antler Formation is exposed in the
10 excavation walls of the WCS low-level rad waste
11 facility. Is that correct?

12 MR. LAUGHLIN: Correct, Your Honor.

13 JUDGE ARNOLD: To your knowledge, is the
14 low-level rad waste facility experiencing water
15 intrusion from the Antler Formation?

16 MR. LAUGHLIN: There is evidence -- and we
17 do not discuss this in our petition, so I'm just
18 answering a question -- that the low-level site has
19 water contained on the surface of the site that has to
20 be regularly pumped. Whether that -- we don't know
21 which formation that water comes from, but, yes.
22 There is evidence that shows that there has been water
23 at the low-level site.

24 JUDGE ARNOLD: Do Applicants have anything
25 to say on that?

1 MR. MATTHEWS: The joint venture
2 participant WCS that runs the low-level waste disposal
3 facility has no indication of groundwater leakage into
4 the facility, and clearly rainwater collects in the
5 site, and the facility is designed to remove that
6 rainwater.

7 JUDGE ARNOLD: Thank you. I'm done with
8 my questions.

9 MR. LAUGHLIN: Thank you, Judge Arnold.

10 JUDGE RYERSON: Judge Trikouros?

11 JUDGE TRIKOUROS: Yes. Many of mine got
12 covered once again, which is very good. I wanted to
13 ask about the response to the RAI, I think it is,
14 2.2-2, regarding this contention 2. The staff
15 originally had admitted this contention. Now that we
16 have that response to the RAI, are you changing your
17 position on that? I think we discussed this a little
18 bit.

19 MR. GILLESPIE: Yes, Your Honor. As you
20 said yesterday, we see this issue now as moot, based
21 on the response that there are no working wells on the
22 site.

23 JUDGE TRIKOUROS: And do you -- yes. Do
24 you have any comments --

25 MR. LAUGHLIN: May I respond?

1 JUDGE TRIKOUROS: Yes.

2 MR. LAUGHLIN: Yes. So as mentioned and
3 as staff just stated, there are no orphan wells found
4 on the site. That may be correct. We don't know
5 that. But the requirements of 72.103 pertain to
6 investigating the region, not just the site, not just
7 one mile from the site.

8 And, in fact, the NUREGs indicate that a
9 region is typically five miles. It could be more. It
10 could be less, but if we look to the NUREGs -- let me
11 just look at my notes here real quick and cite it for
12 you.

13 The NUREGs talk about vicinities and
14 applicants needing to identify nearby industrial
15 activity within five miles and identifying any
16 potential hazards to an ISFSI from activities or
17 materials at facilities that should be discussed.

18 So let's just say it's five miles. It's
19 not limited to the site. And if I may just address
20 the RAI response briefly, it's six sentences, so the
21 Applicant provides six sentences that made staff
22 change its position. And if I may just go through the
23 sentences really quick --

24 So, first, discusses that regionally the
25 CISF is located in the Permian Basin, which is one of

1 the most important petroleum-producing regions in the
2 United States. So that doesn't really address the
3 unstable characteristics of the pre-1967 or any other
4 wells that may be improperly plugged.

5 Secondly, however, significant petroleum
6 storage, petroleum storage, not wells that may be
7 improperly plugged, is not located within five miles.
8 So they're talking about petroleum storage here, not
9 about the existence of 160 wells drilled pre-1967,
10 which could potentially provide or be unstable.

11 So then we go on to their discussion of
12 the dry hole that is in the immediate area of WCISF,
13 but failed to discuss the producing well which is
14 within one mile of their site. So, I guess, my point
15 here is that the RAI is misleading. It talks about
16 wells on the site, not wells located in the region.

17 And that's kind of our problem with the
18 Applicant's analysis, is, one, it doesn't take into
19 account the region. They mostly focus on wells
20 located on site, and also they focus here in the RAI
21 on petroleum storage, which has nothing to do with the
22 analysis required by 72.103, which requires them to
23 investigate unstable geological characteristics.

24 And one more point. They discuss that if
25 they do find any orphan wells, that they will be

1 properly assessed and remediated, but this implies
2 that this will occur after a license. And a license
3 cannot be issued until the Applicant properly
4 investigates unstable geological characteristics as
5 required by 72.103. And to identify an orphan well
6 afterwards would run in the face of those requirements.

7 JUDGE TRIKOUROS: Does ISP want to respond
8 to this or --

9 MR. LIGHTY: Just a couple of comments.
10 First, as to potential orphan wells, I would note that
11 if during the construction of the facility an orphan
12 well was discovered, ISP would have an obligation
13 under existing Part 72 regulations to take appropriate
14 action. This is an ongoing compliance issue that's
15 required under the terms of the license and the
16 regulation itself.

17 So if a new hazard is discovered, it must
18 be analyzed and considered. So to the extent that
19 counsel speculates that something may happen in the
20 future, there's a mechanism for dealing with that
21 imposed by the regulations themselves.

22 MR. LAUGHLIN: I would agree with that
23 statement, Your Honors, but we're talking about an
24 analysis that needs to occur before a license is
25 granted.

1 MR. LIGHTY: To the extent counsel
2 believes that there is a duty to excavate everywhere
3 within ten miles of the site to determine whether some
4 hidden hazard exists, I simply don't see that
5 requirement in Part 72.

6 MR. LAUGHLIN: I do.

7 MR. LIGHTY: In addition, the RAI NP2.6.1
8 also addressed wells in the area, and additionally,
9 again, I would note that the application thoroughly
10 considers induced seismicity from petroleum recovery
11 operations. It's in Attachment D to Chapter 2 to the
12 SAR. That's a proprietary document that Fasken and
13 PBLRO did not dispute. They don't dispute a single
14 word in that document, and so they haven't disputed
15 the application here.

16 MR. LAUGHLIN: So in their response in
17 opposition to our petition, Applicants do indicate
18 that we did not seek SUNSI admission or access to
19 Attachment D. But while that talks -- that document
20 discusses induced seismicity from horizontal drilling,
21 it does not discuss the potential for abandoned and
22 potential for orphan wells within the vicinity of the
23 site.

24 And if it did, the Applicants have failed
25 to mention that in their response. And Mr. Lighty

1 discusses Section 2.6.1 discussing oil and gas
2 presence within the area, but if I may quote that
3 section, the statement is limited to the Applicant's
4 stating that, Drilling for and production of oil and
5 gas are land uses within a few miles of the WCS CISF.
6 And that's it.

7 They don't discuss the presence of any of
8 these unstable geological characteristics that are
9 associated with abandoned and orphan wells. So it's
10 a little misleading to say that that section discusses
11 to the extent required by 72.103 meets that burden.

12 MR. GILLESPIE: Your Honor --

13 JUDGE TRIKOUROS: Yes.

14 MR. GILLESPIE: Your Honor, if I could
15 say, just a point. 72.103 states that sites will be
16 acceptable if the results from on-site foundation
17 geologic investigation, literature review, and
18 regional geologic reconnaissance show no unstable
19 geological characteristics, as well as building
20 problems or potential for vibratory ground motion.

21 I would highlight in there the on-site
22 foundation geologic investigation, and point to the
23 Pachlhofer declaration does not indicate how orphan
24 wells off site could lead to an impact on site. And
25 because of that, it does not meet the standards in

1 2.309(f)(1) for admissibility of a contention, without
2 providing exactly the mechanism as to how those off-
3 site wells, orphan wells, may impact the soil
4 stability on the site.

5 JUDGE TRIKOUROS: Okay. I understand.

6 MR. LAUGHLIN: May I quickly address that,
7 Your Honor?

8 JUDGE TRIKOUROS: Yes.

9 MR. LAUGHLIN: So the ISP staff talks
10 about orphan wells, and that is one of the issues.
11 The other issue is the presence of abandoned and
12 temporary plugged wells. And to the extent that these
13 wells have any integrity issues, which can include
14 case collapse or leakage of these wells, that is
15 something that is required to be analyzed by 72.103,
16 and Applicant's failed to address the presence of the
17 over 160 that were drilled pre-1967.

18 JUDGE TRIKOUROS: Okay. That's all I have
19 on contention 2. With respect to 5, contention 5 --

20 MR. LAUGHLIN: That's Mr. Eye's
21 contention.

22 JUDGE TRIKOUROS: Yes.

23 MR. LAUGHLIN: Yes. Do you have any
24 questions, Judge Trikouros, about contention 4?

25 JUDGE TRIKOUROS: No.

1 MR. LAUGHLIN: Okay. Thank you, Judges.

2 JUDGE TRIKOUROS: There's a statement made
3 in your contention that relevant conservation efforts
4 may be undermined by the proposed facility. What's
5 your basis for that?

6 MR. EYE: It's a commonsense basis. You
7 have a big disruptive construction project. It
8 requires earth moving, civil engineering. Just by the
9 force of those particular activities, has the
10 potential to disrupt the habitat.

11 JUDGE TRIKOUROS: You're not trying to say
12 that the habitat of that region is being destroyed or
13 anything like that. This is just the construction
14 noise and et cetera. That's what your focus is.

15 MR. EYE: It's a prospective disturbance
16 of the habitat. And I might add to that that our
17 declarant, Mr. Pachlhofer, does note that operation of
18 this facility, to the extent that there are
19 radiological impacts, would -- to the vicinity would,
20 per force of logic, impact species that happened to be
21 in the vicinity.

22 JUDGE TRIKOUROS: You also say that the
23 Applicant does not address ongoing conservation
24 efforts for either the dunes sagebrush lizard or
25 lesser prairie chicken, in addition to whether it

1 would interfere with those. The -- when you say,
2 ongoing conservation efforts, are you referring then
3 to the conservation that we've been discussing
4 regarding the oil and gas industry efforts? Is that
5 what you're referring to?

6 MR. EYE: It is, Your Honor. And this was
7 all as a result of, like I said, collective efforts
8 amongst the oil and gas industry and ranching
9 industry, to try to protect these habitats.

10 JUDGE TRIKOUROS: All right. So you're
11 saying they didn't comment in the application that
12 this was going on, and that they would or wouldn't be
13 affecting it at all. So it's an omission --

14 MR. EYE: Yes.

15 JUDGE TRIKOUROS: -- statement.

16 MR. EYE: Yes, sir.

17 JUDGE ARNOLD: Let me just ask Applicant.
18 What's the footprint area of your site?

19 MR. BESSETTE: The actual site is, I
20 believe, 332 acres.

21 JUDGE ARNOLD: 332, so that's what
22 compared to the ranch? That's --

23 MR. EYE: Small.

24 MR. BESSETTE: I did that on my calculator
25 last night. I think it's .0002.

1 JUDGE ARNOLD: Okay. Given the difference
2 in areas, if you were to really want to affect
3 ecology, would you try to change what Interim Storage
4 Partners is doing or what D.K. Boyd is doing?

5 MR. EYE: D.K. Boyd doesn't have to follow
6 the requirements of 10 CFR Part 72 or Part 50. That's
7 the difference there. Moreover, D.K. Boyd isn't
8 building a CISF or any other massing facility to my
9 knowledge. So the answer is it needs to be focused on
10 ISP, not D.K. Boyd.

11 JUDGE TRIKOUROS: The Board was notified
12 both May and June. I can't remember which was which,
13 but one of those notifications indicated that the ER
14 was being updated to list the lesser prairie chicken
15 as under review. Can you comment on the implications
16 of that.

17 MR. EYE: Well, to the extent that it's
18 potentially going to be delisted or taken off of a
19 threatened and endangered list, then it would
20 certainly reflect the current status of the protection
21 of that habitat, that it is now in a satisfactory
22 status to support that particular species' life and
23 continuance.

24 But this does not necessarily go to
25 disruption of that habitat during construction

1 operation of a CISF. So, yes. And when it's under
2 review, it certainly raises the prospect that its
3 status might not change as a result of that particular
4 review.

5 And although I don't know the intricacies
6 of that review at this point because I don't know that
7 it's actually been made public, the results of the
8 review, but I would anticipate that a comprehensive
9 review would take into account the potential for the
10 presence of a CISF, both in terms of its construction
11 and operation, or I would think that that would be a
12 germane topic for that review to consider.

13 MR. BESSETTE: Your Honor, I might clarify
14 if there's any confusion. The lesser prairie chicken
15 is currently delisted, so the review is whether to
16 list it. It's not under review of whether to keep it
17 on the current list. It is currently delisted.

18 MR. EYE: I agree with that. I mean,
19 it's --

20 JUDGE TRIKOUROS: In other words, under
21 review to mean that it may end up on the list?

22 MR. BESSETTE: It will, but I just wanted
23 to clarify. I thought his statement was that it was
24 under review for delisting, and it is not.

25 MR. EYE: I may have misspoken.

1 JUDGE TRIKOUROS: That's correct.

2 MR. EYE: But the -- of course, the
3 implication of it being under review means there is
4 some effort to determine whether its ongoing status is
5 satisfactory.

6 Given the extensive efforts of Fasken and
7 its coalition partners in terms of trying to protect
8 this species, I think that that is a prudent thing to
9 do, particularly in light of this proposal to build
10 the CISF in that region.

11 JUDGE TRIKOUROS: And whether or not a
12 species is on the endangered species list, does that
13 really matter with respect to the ER and conservation
14 efforts?

15 MR. EYE: Well, to the extent that they do
16 have to take into account impacts on species in the
17 area, I think it is a relevant consideration.

18 JUDGE TRIKOUROS: So even if it's not on
19 any list, if it's the subject of conservation efforts
20 in the region, you're saying the ER has to address
21 that.

22 MR. EYE: Well, I think it's only prudent
23 to do so, unless there is some ironclad assurance that
24 the vulnerability of a particular species, let's say,
25 the lesser prairie chicken, is not going to be

1 affected in any way, shape or form by the construction
2 or operation of the CISF.

3 JUDGE TRIKOUROS: Any comment on that?

4 MR. BESSETTE: Your Honor's question is
5 very good, because the issue is moot. The ER
6 thoroughly discusses lesser prairie chicken habitat,
7 the occurrence -- actually the absence of occurrence
8 of any lesser prairie chicken since 2007, and that was
9 only an anecdotal sighting. So it is thoroughly
10 discussed. And NEPA is not action enforcing. This
11 idea that there has to be an ironclad prevention of
12 any impact on a species that's not listed, there's no
13 such thing.

14 MR. EYE: Your Honor, I might add that
15 there is the state-listed species that also, I think,
16 are germane to this contention as well.

17 JUDGE TRIKOUROS: Does the staff have any
18 comments on that?

19 (No response.)

20 JUDGE TRIKOUROS: All right. Then that's
21 the end of my questions.

22 JUDGE RYERSON: Anything further, Judge
23 Arnold?

24 JUDGE ARNOLD: No.

25 JUDGE RYERSON: Thank you.

1 MR. EYE: Thank you.

2 JUDGE RYERSON: All right. Well, I think
3 that concludes what we want to do today. I don't see
4 a show of hands of enthusiasm for very short final
5 statements. I think everyone has had a very good
6 opportunity to state their positions on what's at
7 issue.

8 The Board's job now is the take all of
9 this information and particularly, of course, as we
10 said yesterday, there are hundreds of -- literally
11 hundreds of pages of filings on these issues, and
12 they, of course, are also a very important part of
13 what need to consider to reach a decision.

14 The Commission has milestones or goals for
15 our doing that, which we very much try to comply with.
16 We know we ask the parties to comply with deadlines,
17 so we try to comply with our own deadlines. Assuming
18 there are no further filings, our deadline would be 45
19 days from today, which I think is August 26, so we
20 would either have a decision then or have a notice as
21 to when a decision would be expected.

22 In the past, sometimes there've been
23 filings afterwards, after an argument, and we have to
24 make a decision whether that's a reason to postpone
25 the decision in order to deal with those other issues

1 separately. But as matters now stand, our target is
2 a decision by August 26.

3 Really on behalf of the Board, I want to
4 thank all the counsel really for all the petitioners,
5 the Applicant, the staff. These have been very
6 helpful presentations. They've been very
7 professional, and they make our job easier.

8 And again I want to thank the county
9 commissioners and everyone here at the Court who has
10 gone out of their way to make this, first of all,
11 possible in this facility, and secondly, to make it at
12 least for us and, I hope, for everyone, as easy as
13 possible.

14 Any comments further?

15 JUDGE ARNOLD: No.

16 JUDGE RYERSON: Judge Arnold? Judge
17 Trikouros?

18 JUDGE TRIKOUROS: No.

19 JUDGE RYERSON: Thank you. We stand
20 adjourned.

21 (Whereupon, at 12:45 p.m., the oral
22 arguments in the above-entitled matter were
23 concluded.)
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25