UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	Docket No. 72-1050-ISFSI
INTERIM STORAGE PARTNERS LLC	)	ASLBP No. 19-959-01-ISFSI-BD01
(Consolidated Interim Storage Facility)	)	September 17, 2019

INTERIM STORAGE PARTNERS LLC'S NOTICE OF APPEAL OF LBP-19-7

Pursuant to 10 C.F.R. § 2.311, Interim Storage Partners LLC files this Notice of Appeal of the Atomic Safety and Licensing Board's ("Board's") August 23, 2019 Memorandum and Order LBP-19-7.[1] In that decision, the Board granted a petition to intervene and request for adjudicatory hearing filed by Sierra Club ("Petition").[2] The Board concluded that Sierra Club demonstrated standing and proffered one admissible contention (Contention SC-13), and admitted that contention for litigation.[3] As shown in the accompanying Brief in Support of Interim Storage Partners LLC's Appeal of LBP-19-7, the Board's conclusions are based on an error of law or abuse of discretion, and the Petition should have been wholly denied.

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1 *Interim Storage Partners LLC* (Consolidated Interim Storage Facility), LBP-19-7, 90 NRC __ (Aug. 23, 2019) (slip op.) (ML19235A165). Under 10 C.F.R. § 2.311(b), appeals of Board orders on hearing requests and petitions to intervene are due within 25 days after the service of the order. Thus, this appeal is timely.

2 Petition to Intervene and Request for Adjudicatory Hearing by Sierra Club (Nov. 13, 2018) (ML18317A411).

3 *ISP*, LBP-19-7, 90 NRC __, __ (slip op. at 16-17, 54-56, 105-06).

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated in Washington, D.C.
this 17th day of September 2019

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BRIEF IN SUPPORT OF INTERIM STORAGE PARTNERS LLC'S APPEAL OF LBP-19-7

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.311, Interim Storage Partners LLC ("ISP") files this Brief in Support of ISP's Appeal of the Atomic Safety and Licensing Board's ("Board's") August 23, 2019 Memorandum and Order LBP-19-7.[1] In that decision, the Board granted a petition to intervene and request for adjudicatory hearing filed by Sierra Club ("Petition").[2] The Board concluded that Sierra Club demonstrated standing and proffered one admissible contention (Contention SC-13), and admitted that contention for litigation.[3] As explained further below, the Board's decision granting Sierra Club standing[4] and admitting SC-13 is based on several legal errors and an abuse of discretion. Accordingly, the Petition should have been wholly denied and the proceeding terminated.

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1 *Interim Storage Partners LLC* (Consolidated Interim Storage Facility), LBP-19-7, 90 NRC __ (Aug. 23, 2019) (slip op.) (ML19235A165).

2 Petition to Intervene and Request for Adjudicatory Hearing by Sierra Club (Nov. 13, 2018) (ML18317A411).

3 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 16-17, 54-56, 105-06).

4 The Board denied the other hearing requests submitted in this proceeding for failure to proffer an admissible contention, but the Board's finding of standing as to other petitioners is affected by the same legal error.

The Board's conclusion that Sierra Club demonstrated standing is based on several legal errors requiring reversal. First, the Board concluded that Sierra Club was entitled to standing under the "proximity plus" presumption, but failed to make explicit findings regarding the required legal elements of that presumption.[5] Second, to the extent LBP-19-7 could be read to include implied conclusions regarding those legal elements, such conclusions are contrary to controlling law (as further explained below). Accordingly, the Board's determination as to Sierra Club's standing should be reversed as legally erroneous.

With regard to admission of Sierra Club's admitted contention, SC-13 asserts that ISP's Environmental Report ("ER") did not append to the application or otherwise make publicly-available certain underlying studies or surveys referenced by ISP in the ER's discussion of two species of concern—the Texas horned lizard and the dunes sagebrush lizard.[6] But the Board's decision to admit SC-13 is also based on several legal errors requiring reversal. First, the Board's conclusion that SC-13 identified a material issue appropriate for a hearing was based on new legal argument and authority improperly provided by Sierra Club for the first time in its Reply pleading.[7] It was legal error and an abuse of discretion for the Board to deny[8] ISP's Motion to Strike that new supplementation,[9] and to rely on it for its admissibility determination.[10] Second, it was legal error for the Board to conclude that CEQ regulations apply to ISP[11]—they apply only to federal agencies, not private applicants for NRC licenses. And

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5 *See ISP*, LBP-19-7, 90 NRC at __ (slip op. at 16-17).

6 *Id*. at __ (slip op. at 54-56); Petition at 78-79.

7 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 55).

8 *Id*. at __ (slip op. at 56).

9 [ISP's] Motion to Strike Portions of the Reply Filed by Sierra Club (Dec. 27, 2018) (ML18361A921) ("Motion to Strike").

10 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 55).

11 *Id*.

finally, even assuming *arguendo* CEQ regulations somehow impose substantive obligations on NRC license applicants, the Board's interpretation of CEQ's regulations is contrary to their plain text, and therefore legally erroneous. For these reasons, the Commission should reverse the Board's decision to grant standing and admit SC-13, and terminate this proceeding.

II. PROCEDURAL HISTORY

On August 29, 2018, ISP (a joint venture of Waste Control Specialists, LLC and Orano CIS, LLC) submitted a revised license application to construct and operate a consolidated interim storage facility ("CISF") for a term of forty years.[12] After receiving ISP's revised license application, the NRC issued a *Federal Register* notice allowing members of the public to request a hearing by submitting a petition to intervene by October 29, 2018.[13] The Secretary subsequently extended the deadline to submit petitions to intervene to November 13, 2018.[14]

Sierra Club filed its Petition on November 13, 2018. On December 10, 2018, the NRC Staff and ISP filed answers thereto.[15] Sierra Club replied on December 17, 2018.[16] On December 27, 2018, ISP filed a motion seeking to strike portions of Sierra Club's reply regarding SC-13.[17] The Board heard oral arguments on standing and contention admissibility on

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12 Letter from Jeffery D. Isakson, ISP, to NRC Document Control Desk (June 8, 2018) (ML18166A003). The application is to construct and operate a CISF on about 100 acres in Andrews County, Texas.

13 Interim Storage Partners Waste Control Specialists Consolidated Interim Storage Facility, 83 Fed. Reg. 44,070, 44,070-75 (Aug. 29, 2018), corrected, 83 Fed. Reg. 44,680 (Aug. 31, 2018) (correcting the deadline for petitioners to request a hearing to Oct. 29, 2018).

14 Order of the Secretary at 2 (Oct. 25, 2018) (ML18298A335).

15 NRC Staff Consolidated Answer to Petitions to Intervene and Requests for Hearing (Dec. 10, 2018) (ML18344A594); ISP's Answer Opposing Hearing Request and Petition to Intervene Filed by Sierra Club (Dec. 10, 2018) (ML18344A684) ("ISP Answer").

16 Sierra Club's Reply to Answers filed by [ISP] and NRC Staff (Dec. 17, 2018) (ML18351A531).

17 *See* Motion to Strike. *See also* Sierra Club's Answer to [ISP's] Motion to Strike Portions of Sierra Club's Reply (Jan. 2, 2019) (ML19002A472).

July 10 and 11, 2019.[18] The Board issued its Memorandum and Order LBP-19-7 on August 23, 2019. Among other things, LBP-19-7 granted Sierra Club's Petition, admitted SC-13 in part, and denied ISP's Motion to Strike.

III. LEGAL STANDARDS

A. Standard of Review

Section 2.311 "permits an appeal as of right on the question of whether an initial intervention petition should have been wholly denied, or alternatively, was granted improperly."[19] The Commission generally defers to Board decisions on standing and contention admissibility, but will reverse a Board's ruling if there has been an "error of law or abuse of discretion."[20] The Commission reviews questions of law *de novo*,[21] and will "reverse a licensing board's legal rulings if they are 'a departure from, or contrary to, established law.'"[22] Under the abuse of discretion standard, the appellant must persuade the Commission "that a reasonable mind could reach no other result" in order to prevail.[23]

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[18] *See* Transcript ("Tr.") at 1-207 (July 10, 2019) (ML19198A218), and 208-342 (July 11, 2019) (ML19198A219).

[19] *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), CLI-12-7, 75 NRC 379, 385 (2012) (citing *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998) ("Adjudicatory Policy"); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 125 (2006)).

[20] *Tenn. Valley Auth.* (Clinch River Nuclear Site Early Site Permit Application), CLI-18-5, 87 NRC 119, 121 (2018) (citing *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-16-9, 83 NRC 472, 482 (2016); *Crow Butte Res., Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 13-14 (2014)).

[21] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 259 (2009).

[22] *See id*. (citation omitted).

[23] *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-952, 33 NRC 521, 532 (1991), *aff'd*, CLI-91-13, 34 NRC 185 (1991).

B. Standing

As the Board correctly noted, the affirmative burden of *demonstrating* standing rests squarely with the petitioner.[24] A petitioner may satisfy this burden either through a demonstration of traditional standing,[25] or by establishing that it is entitled to invoke a Commission-established standing shortcut known as a "proximity presumption."[26] Under such a presumption, individuals who reside or have frequent contacts within a geographic zone of potential harm related to the proposed action are presumed to have standing.

For proceedings that involve certain licensing actions for power reactors, a pure "proximity" presumption applies, and the geographic zone of potential harm is established at a radius of 50-miles from the site.[27] But in other proceedings such as this one, not involving a power reactor, a "proximity plus" standard is applicable.[28] The difference between these standards is significant. Under a pure "proximity" standard, petitioners need only demonstrate that they reside within a certain distance of the facility that is the subject of the proposed action. But under "proximity plus," petitioners have the affirmative burden of demonstrating three things: (1) the existence of an "obvious" potential for offsite radiological consequences from the proposed action, (2) the radius at which such radiological consequences purportedly could

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[24] *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 13) (citing *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-00-5, 51 NRC 90, 98 (2000)).

[25] *See id*. (noting "This requires a showing that a person or organization has suffered or might suffer a concrete and particularized injury that is: (1) fairly traceable to the challenged action; (2) likely redressable by a favorable decision; and (3) arguably within the zone of interests protected by the governing statutes," citing *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009)).

[26] *See id*.

[27] *See id.* (citing *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 138–39 (2010)).

[28] *See id*. (citing *Ga. Inst. of Tech.* (Ga. Tech Research Reactor, Atlanta, Ga.), CLI-95-12, 42 NRC 111, 116-17 (1995)).

accrue, and (3) that they reside or have frequent contacts within that radius.[29] The Commission has instructed presiding officers to evaluate these elements of "proximity plus" standing on a "*case-by-case* basis, taking into account the nature of the proposed action and the significance of the radioactive source."[30]

C. Contention Admissibility

The Commission's rules on contention admissibility are "strict by design."[31] The rules were "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.'"[32] The Commission has emphasized that the "contention pleading rules are designed to ensure . . . that only well-defined issues are admitted for hearing."[33] Failure to comply with any one of the six admissibility criteria in 10 C.F.R. § 2.309(f)(1) is grounds for rejecting a proposed contention.[34]

IV. THE BOARD'S DETERMINATION THAT SIERRA CLUB DEMONSTRATED STANDING IS LEGALLY ERRONEOUS AND SHOULD BE REVERSED

In LBP-19-7, the Board concluded that Sierra Club demonstrated standing, but did not articulate the factual basis supporting that conclusion.[35] The apparent foundation for the Board's finding was that the residence of one of Sierra Club's members is within 6 miles of the WCS CISF.[36] The Board's introductory discussion in the standing section of LBP-19-7 correctly described the legal standard for the "proximity plus" presumption. However, it failed to *apply*

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29 *See id.* (citing *Sequoyah Fuels Corp.* (Gore, Okla. Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994)).

30 *See id*. (citing *Ga. Tech*, CLI-95-12, 42 NRC at 116-17 (emphasis added)).

31 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

32 *Id*. (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 334 (1999)).

33 *Crow Butte Res., Inc.* (N. Trend Expansion Project), CLI-09-12, 69 NRC 535, 552 (2009) (citations omitted).

34 *USEC Inc.* (Am. Centrifuge Plant), CLI-06-9, 63 NRC 433, 436-37 (2006).

35 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 17).

36 *Id*. at __ (slip op. at 16-17).

that standard (or to apply it correctly) in its analysis of Sierra Club's standing. More specifically, and as explained below, LBP-19-7 effectively disregarded the "plus" part of the standard because it failed to reach explicit conclusions for each of the required legal elements. In effect, the Board applied an automatic distance-based presumption to Sierra Club's standing claim. As a matter of law, the automatic proximity presumption does not apply in materials licensing proceedings such as this one.[37] Thus, the Board's analysis is legally erroneous.

Alternatively, even if LBP-19-7 could be read to include some *implied* conclusions regarding the "plus" elements of the presumption, such conclusions are contrary to, and thus improperly disregard, controlling law. For example, one of the "plus" elements of the presumption requires petitioners to demonstrate a "plausible mechanism" through which offsite radiological harm could occur. But Sierra Club *proffered no arguments* alleging such a mechanism. Thus, if LBP-19-7 could be read to include an implied conclusion that Sierra Club demonstrated proximity plus standing, that conclusion is based on error of law. In either case, the Board's conclusion that Sierra Club demonstrated standing is legal error and should be reversed.

A. The Board Failed to Reach Explicit Conclusions Regarding the Elements of "Proximity Plus" Standing

The sole basis provided by the Board for concluding that Sierra Club demonstrated standing is that "[o]ne member . . . states that she lives about six miles away" from ISP's proposed CISF.[38] The Board expressly stated that "an individual who lives that close to a potentially massive facility for storing much of the nation's spent nuclear fuel [need not]

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[37] *Nuclear Fuel Services, Inc.* (Erwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004).

[38] *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 16).

demonstrate more."[39] But contrary to the Board's statement—as a matter of law—petitioners *are*, in fact, required to "demonstrate more." They must demonstrate an "obvious" potential for offsite radiological consequences from the WCS CISF, and they must demonstrate the distance from the WCS CISF at which such radiological consequences purportedly could accrue. Thus, the Board's conclusion is legally erroneous[40] because it declined to consider two of the three legally-required elements to establish proximity plus standing. In essence, the Board improperly disregarded the "plus" part the standard. Thus, as a matter of law, the Board's determination as to Sierra Club's standing should be reversed as legally erroneous.

B. To the Extent LBP-19-7 Could Be Read to Contain *Implied* Conclusions Regarding the Elements of "Proximity Plus" Standing, Those Conclusions Improperly Disregard Controlling Law and the Case-Specific Facts At Issue Here

The Board's standing analysis makes observations regarding the quantity of material that could eventually be stored at the WCS CISF, and the "distances that have been found to confer standing" in *other* proceedings.[41] The Board concludes that, since these other proceedings involve "smaller storage facilities," Sierra Club has demonstrated standing because its member lives within a distance of the WCS CISF found sufficient for "proximity plus" standing in those proceedings. But to the extent such statements could be construed as implied conclusions as to *this* proceeding, which does not involve an "obvious" potential for offsite consequences, the Board fails to undertake the required "case-by-case" analysis, and otherwise fails to acknowledge or account for controlling case law.

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39 *Id*. at __ (slip op. at 17).

40 *See Bell Bend*, CLI-10-7, 71 NRC at 138-39.

41 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 16-17).

1. As a Matter of Law, Material Quantity Alone Is Insufficient to Establish an "Obvious" Potential for Offsite Radiological Consequences

LBP-19-7 mentions that ISP's application entails "the storage of potentially up to 40,000 metric tons of spent fuel."[42] And it concludes that Sierra Club's standing is appropriate here because standing has been conferred in *other* proceedings involving "much smaller storage facilities."[43] Even if these assertions regarding material quantity could be construed as an implied conclusion that an "obvious" potential for offsite radiological consequences exists as to the WCS CISF, this conclusion would be contrary to law. Quantity of material, alone, does not create an "obvious" potential for offsite radiological consequences.[44]

Sierra Club argued that "[t]he enormous quantity of radioactive waste proposed to be stored at the ISP facility, by itself, establishes a sufficiently 'obvious' potential for offsite harm, establishing a proximity presumption."[45] But as ISP explained in its Answer, Sierra Club's assertion misstates the law:

> The Commission has explained that the mere existence of a source of radiation—even a significant one—does not, itself, demonstrate an "obvious potential for offsite consequences." To demonstrate proximity-plus standing, Petitioner bears the further burden of demonstrating "a plausible mechanism" through which those materials could cause offsite harm. Petitioner simply has not done so . . . .[46]

LBP-19-7 neither acknowledges the correct legal standard (*i.e.*, that something more than a discussion of material *quantity* is required to demonstrate an "obvious" potential for offsite

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42 *Id*. at 16.

43 *Id*. at 17.

44 *U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), CLI-10-20, 72 NRC 185, 188-89 (2010).

45 Petition at 7 (citing *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 428-29 (2002)).

46 *See* ISP Answer at 8 (citing *Schofield Barracks*, CLI-10-20, 72 NRC at 189).

radiological consequences), nor does it conclude that Sierra Club made the required further demonstration (*i.e.*, a "plausible mechanism") as to the WCS CISF. Nor could it—because Sierra Club made no further claims in this regard. This was legal error.

2. As a Matter of Law, a Case-By-Case Analysis Is Prerequisite to Establishing the Existence of an "Obvious" Potential for Offsite Radiological Consequences

The Commission has instructed that "proximity plus" standing is to be evaluated on a "*case-by-case* basis, taking into account the nature of the proposed action and the significance of the radioactive source."[47] The Commission fully expects that this analysis may require "complicated 'parsing' of asserted harms."[48] But LBP-19-7 fails to undertake the required facility-specific analysis here, much less attempt to parse any alleged harms. Moreover, as ISP noted in its Answer, a prior Commission generic determination—based on scientific research—casts serious doubt on the notion that a potential for offsite radiological consequences is in any way "obvious" in this proceeding.[49]

In promulgating its Part 72 emergency planning rule (declining to impose any offsite emergency planning requirements on away-from reactor ISFSIs), the Commission determined there simply is no objective basis for a claim that offsite radiological harm can accrue from

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47 *Ga. Tech*, CLI-95-12, 42 NRC at 116-17 (emphasis added).

48 *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-12-12, 75 NRC 603, 610 n.32 (2012).

49 *See* ISP Answer at 8-10, 13-14. Notably, LBP-19-7 somewhat misconstrues ISP's arguments below as asserting that standing may not be conferred "unless a petitioner resides within a facility's required offsite emergency planning zone." *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 15). But ISP's argument was not so deterministic. Rather, ISP argued that the 50-mile presumptive radius for reactor proceedings "corresponds" to the reactor EPZ (*see Ross ISR*, CLI-12-12, 75 NRC at 610 n.32) and thus it is a "relevant" consideration here (ISP Answer at 8), and that the Commission's technical basis for the EP rule casts serious doubt on any suggestion that offsite radiological consequences from the WCS CISF are plausible, much less "obvious," even at a 1-mile radius (ISP Answer at 8-10, 13-14). But ISP's legal position has always been simply that Sierra Club failed to offer *anything* beyond conclusory assertions to *demonstrate* some purportedly "obvious" potential for radiological harm, much less one that could travel *six miles* to its member's residence. *See id*. at 14.

facilities such as the WCS CISF (*i.e.*, away-from-reactor ISFSIs storing only dry, cooled fuel with no fuel handling operations).[50] As the Commission explained:

> To be a potential radiological hazard to the general public, radioactive materials must be released from a facility and dispersed offsite. For this to happen:
>
> - The radioactive material must be in a dispersible form,
> - There must be a mechanism available for the release of such materials from the facility, and
> - There must be a mechanism available for offsite dispersion of such released material.
>
> Although the inventory of radioactive material contained in 1000 MTHM of aged spent fuel may be on the order of a billion curies or more, *very little is available in a dispersible form*; there is *no mechanism* available for the release of radioactive materials in significant quantities from [the] facility; and the *only* mechanism available for offsite dispersion is atmosphere dispersion.[51]

The Commission generically concluded that: (1) "[t]here exists *no significant dispersal mechanism* for the radioactive material contained within a storage cask";[52] and (2) "the postulated *worst-case* accident involving an ISFSI has *insignificant consequences to the public health and safety*."[53] This objective, research-based conclusion stands in stark contrast to Sierra

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[50] *See, e.g.*, Emergency Planning Licensing Requirements for Independent Spent Fuel Storage Facilities (ISFSI) and Monitored Retrievable Storage (MRS); Final Rule, 60 Fed. Reg. 32,430, 32,439 (June 22, 1995) ("ISFSI EP Rule").

[51] *Id*. at 32,431 (citing NUREG-0575, Final Generic Environmental Impact Statement on Handling and Storage of Spent Light Water Power Reactor Fuel, Vol. 1 § 4.2.2, "Safety and Accident Considerations" (Aug. 1979) (ML022550127)) (emphasis added).

[52] *Id*. at 32,439.

[53] *Id*. at 32,431 (citing NUREG-1140, A Regulatory Analysis on Emergency Preparedness for Fuel Cycle and Other Radioactive Material Licensees (Jan. 1988) (ML12174A320)).

Club's subjective, conclusory claim that offsite radiological consequences are even possible, much less "obvious."[54]

Here, the Board failed to scrutinize Sierra Club's claim, or to evaluate the case-specific factors necessary to demonstrate an "obvious" potential for offsite consequences, such as: (1) whether the material is in a *dispersible form*; (2) whether there exists any *release mechanism* from the storage canister or cask; (3) whether there exists any *dispersal mechanism* that could transport such released material offsite; and (4) whether such offsite dispersal would be in a *form or concentration* capable of causing harm.[55] Thus, the Board failed to conduct the "case-by-case" analysis required by law.[56] Moreover, elsewhere in LBP-19-7, the Board *rejected* Sierra Club's conclusory assertions of offsite radiological harm as entirely unsupported.[57] Its failure to do so here—*i.e.*, the Board's uncritical acceptance of Sierra Club's conclusory standing assertions—constitutes further legal error.[58]

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[54] Given that other boards also have requested clarification from the Commission regarding application of the "proximity plus" presumption in materials proceedings (*see ISP*, LBP-19-7, 90 NRC at __ (slip op. at 19 n.107); *Ross ISR*, CLI-12-12, 75 NRC at 610 n.32), the Commission should consider leveraging its existing research as to the potential for offsite consequences from away-from-reactor ISFSIs to establish the appropriate radius on a generic basis, or to determine that the "proximity plus" presumption should not apply to this class of facilities, because "the postulated *worst-case* accident involving an ISFSI has *insignificant consequences to the public health and safety*." ISFSI EP Rule at 32,431 (citing NUREG-1140).

[55] *See* ISFSI EP Rule, 60 Fed. Reg. at 32,431 (explaining that these are appropriate considerations for any "potential radiological hazard to the general public" from an ISFSI). *See also Diablo Canyon ISFSI*, LBP-02-23, 56 NRC at 428 (concluding that alleged radiological exposures "four or five orders of magnitude below average natural background radiation levels . . . clearly falls below the level that can be considered substantial enough for standing purposes.")

[56] *Ga. Tech*, CLI-95-12, 42 NRC at 116-17.

[57] *See, e.g.*, *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 48) ("Sierra Club offers no . . . plausible facts" to support its claim that a cask could rupture or that radioactive material could migrate offsite via groundwater).

[58] *NFS*, CLI-04-13, 59 NRC at 248 ("conclusory allegations about potential radiological harm" are insufficient to demonstrate standing).

3. As a Matter of Law, Comparisons to Dissimilar Facilities Alone are Insufficient to Establish the Appropriate Presumptive Radius

The Board's discussion of standing as to Beyond Nuclear (cross-referenced in its discussion of Sierra Club's standing) provides a string cite of four cases examining the presumptive "distance that has been found sufficient in other proceedings that involved spent fuel facilities."[59] To the extent this could be read as an implied conclusion that Sierra Club demonstrated the appropriate presumptive radius *here*—thereby satisfying the third element of the "proximity plus" standard—such a conclusion would be contrary to law and factually unsupported. The Board's string cite (which only refers only to other proceedings with *dissimilar facilities*) fails to supply the required "case-by-case" analysis.[60] Thus, any implied conclusion in LBP-19-7 regarding an appropriate presumptive radius rests on legal error.

More specifically, the Board's string cite refers to proceedings involving spent fuel pool expansions and at-reactor ISFSIs.[61] Given that the WCS CISF is an *away-from-reactor* ISFSI, the Board is comparing apples to oranges. Spent fuel pools and at-reactor ISFSIs entail wet storage, "fresh" spent fuel, and cask-loading or fuel-handling operations, whereas the WCS CISF entails only dry storage of longer-cooled fuel, and does not involve cask-loading or fuel-handling operations. These differences are relevant and material. The Commission has *explicitly*

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59 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 15).

60 *See id*. (citing *Ga. Tech.*, CLI-95-12, 42 NRC at 116-17).

61 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 15 n.83) (citing *Diablo Canyon*, LBP-02-23, 56 NRC at 429 (at-reactor ISFSI); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29-31 (1999) (spent fuel pool expansion); *Ne. Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-00-2, 51 NRC 25, 28 (2000) (re-racking and expansion in capacity of a spent fuel pool); and *Fla. Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 454–55 (1988) (high-density re-racking of a spent fuel pool)).

acknowledged the distinction between the radiological hazards for these two types of facilities.[62] Yet LBP-19-7 does not attempt any "parsing" of those differences here.[63]

Ultimately, the presumptive distance determinations in cases involving at-reactor ISFSIs and spent fuel pool expansions, which entail vastly different potential radiological harms, are inapt for the "case-by-case" analysis required here.[64] Thus, the Board's reliance on these cases—without any further analysis or explanation—constitutes legal error.

V. THE BOARD'S DECISION TO ADMIT SC-13 IS LEGALLY ERRONEOUS AND SHOULD BE REVERSED

In its Petition, Sierra Club acknowledged that ER § 3.5.16 describes "two species of concern, the Texas horned lizard and the dunes sagebrush lizard," that have been seen or may be present at the proposed WCS CISF site. But it argued, in SC-13, that the ER is deficient because allegedly "there is no discussion of any studies or surveys to determine if the species are present and the impact of the project on those species."[65] Sierra Club claimed that the following "facts"

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62 *See, e.g.*, ISFSI EP Rule, 60 Fed. Reg. at 32,439 ("In the case of an operating nuclear power plant, the dispersal mechanism for radioactive material in the spent fuel is either derived from the heat produced during the fission process or the decay heat which exists in the short period immediately following shutdown. During these times, the potential exists for an accident that could cause the fuel cladding to fail. . . . On the other hand, spent fuel stored in an ISFSI is required to be cooled for at least one year. . . . At this age, spent fuel has a heat generation rate that is too low to cause significant particulate dispersal in the unlikely event of a cask confinement boundary failure").

63 *Cf. Ross ISR*, CLI-12-12, 75 NRC at 610 n.32.

64 Although not relied on by the Board in LBP-19-7, Sierra Club cited other case law for the proposition that "proximity plus" standing has been granted in an away-from-reactor ISFSI proceeding. *See* Reply at 6 (citing *Private Fuel Storage, LLC* (Indep. Spent Fuel Installation), LBP-98-7, 47 NRC 142 (1998)). However, the *PFS* board evaluated standing on traditional grounds. It did not evaluate *or even mention* the proximity-plus presumption, articulate its associated legal standards, or conclude such standards had been satisfied. Moreover, the decision provides no basis—technical or otherwise—regarding any distance at which a plausible harm could accrue offsite. The Commission affirmed that decision as to the board's evaluation of frequent contacts (on traditional standing grounds), considering case-specific facts, but did not (and was not requested to) review the board's determination of appropriate distances for its injury-in-fact analysis. *See Private Fuel Storage, LLC* (Indep. Spent Fuel Installation), CLI-98-13, 48 NRC 26, 31-32 (1998)). Therefore, to the extent that the *PFS* precedent could be construed to establish some "presumptive" radius of harm applicable to other away-from-reactor facilities with different storage systems at other locations, such application would be arbitrary as unsupported by any identifiable basis.

65 Petition at 78-79.

support the contention: (1) "there does not appear to have been an adequate survey conducted," and (2) "the sources described [in the ER] are not described well enough to allow members of the public to access the sources."[66]

Sierra Club provided nothing more to support its contention. Indeed, the entirety of Sierra Club's discussion of SC-13 in the Petition is comprised of approximately 1.5 pages of double-spaced type. But after ISP filed its Answer and identified the complete absence of support for SC-13, Sierra Club purported to provide supplemental support in its Reply—namely, citation to regulations from the Council on Environmental Quality ("CEQ"). Because this alleged support for the contention was not provided in the Petition, ISP moved to strike it as untimely.

In LBP-19-7, the Board denied ISP's Motion to Strike and (based on the alleged materiality of the CEQ regulation cited by Sierra Club in its Reply) admitted SC-13 "solely as a contention of omission," insofar as none of the references in ER § 3.5.16 "is either sufficiently described to judge its technical adequacy or made publicly available."[67]

As detailed below, the Board's decision to admit SC-13 should be reversed for three reasons. First, it was legal error and an abuse of discretion for the Board to disregard controlling Commission precedent expressly prohibiting the use of reply briefs to provide the necessary threshold support for contentions. Second, it was legal error for the Board to conclude that CEQ regulations apply to ISP—they apply only to federal agencies, not private NRC applicants. And finally, even assuming *arguendo* CEQ regulations somehow impose substantive obligations on NRC license applicants, the Board's interpretation of those regulations is contrary to their plain

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66 *Id.* at 79.

67 *Id*.

text, and therefore legally erroneous. Thus, for any or all of these reasons, the Board's decision to admit SC-13 should be reversed.

A. The Board Erred and Abused Its Discretion by Denying ISP's Motion to Strike the References to CEQ Regulations in Sierra Club's Reply

In its Answer to Sierra Club's Petition, among other things, ISP noted that Sierra Club cited no legal requirement for its assertion that *underlying source materials* must be made publicly available, and therefore Sierra Club had neither provided the requisite support for its contention nor raised a genuine, material issue appropriate for a hearing.[68] In its Reply, Sierra Club cited—for the first time—a general regulation from the CEQ for the proposition that "public scrutiny [is] essential to implementing NEPA," which Sierra Club claimed provided the legal basis for its argument.[69] ISP filed a Motion to Strike this belated attempt by Sierra Club to cure its clear (and now dispositive) defect in the original Petition.[70] ISP explained that controlling law prohibits the use of reply briefs to supply—for the first time—the necessary threshold support for a contention. In denying ISP's Motion to Strike, the Board disregarded this controlling law without basis or explanation. Rather, the Board simply said that the belated curative information was a "legitimate amplification" of Sierra Club's original arguments.[71] But this conclusion is an abuse of discretion and improperly disregards controlling law.

The Commission has conclusively held that new substantive arguments and alleged support, raised for the first time in a reply, are improper because answering parties are "entitled

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68 ISP Answer at 109.

69 Reply at 38-39.

70 Motion to Strike at 9-11.

71 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 56).

to be told at the outset, *with clarity and precision*, what arguments are being advanced."[72] The Commission likewise has categorically held that "using reply briefs to provide, for the first time, the *necessary threshold support* for contentions" is impermissible.[73] Here, it is indisputable (*i.e.*, a "reasonable mind" could reach no other conclusion[74]) that: (1) Sierra Club did not identify those CEQ regulations as a basis for SC-13 until it filed its Reply, and (2) the Board relied on those CEQ regulations for its conclusion that Sierra Club provided the "necessary threshold support" for SC-13. As a result, ISP and the NRC Staff were improperly denied any opportunity to respond to Sierra Club's dubious claim that CEQ regulations somehow apply to ISP, and somehow demonstrate a deficiency material to the findings the NRC Staff must make to grant the application. This is precisely the scenario the Commission's limitations on reply pleadings are intended to prevent.

As the Commission has explained, "if the contention as originally pled did not cite adequate documentary support, a petition cannot remediate the deficiency by introducing in the reply documents that were available to it during the time frame for initially filing contentions."[75] And a reply cannot be used to "reinvigorate thinly supported contentions."[76] Nevertheless, despite the Board's recognition that Sierra Club's original contention was "rather thin,"[77] the Board disregarded well-settled Commission precedent and allowed Sierra Club to proffer a new untimely theory and support for its contention at the reply stage. Thus, the Board's decision to

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[72] *Kan. Gas & Elec. Co. & Kan. City Power & Light Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 576 (1975) (emphasis added).

[73] *La. Energy Servs. LP* (Nat'l Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004) (emphasis added).

[74] *See Turkey Point*, ALAB-952, 33 NRC at 532 (explaining the "abuse of discretion" standard).

[75] *Nuclear Mgmt. Co. LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

[76] *La. Energy Servs. LP* (Nat'l Enrichment Facility), CLI-04-32, 60 NRC 223, 224 (2004).

[77] *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 54).

deny ISP's Motion to Strike was an abuse of discretion and constitutes error of law and should be reversed by the Commission.

B. The Board's Conclusion that CEQ Regulations Impose Obligations on NRC License Applicants Is Legally Erroneous

In admitting SC-13, the Board relied on CEQ regulations cited by Sierra Club in its Reply for the proposition that "public scrutiny [is] essential to implementing NEPA."[78] Furthermore, the Board relied on CEQ regulations for its conclusion that ISP's failure in ER § 3.5.16 either to use publicly-available source materials, or to append the underlying source materials to the application, was an omission material to some finding the NRC Staff allegedly must make to grant ISP's application.[79] But the Board's ruling misses a critical point—NEPA and CEQ regulations apply only to "agencies of the Federal Government and do[] not apply to *applicants for NRC licenses*."[80] Further, as the Board properly recognized, CEQ regulations *do not* impose legal obligations on the NRC, which at best treats them as mere "guidance."[81]

NEPA requires the NRC to prepare an Environmental Impact Statement ("EIS"), while Part 51 requires ISP to submit an ER.[82] Different standards apply to these two related but legally distinct documents. Part 51 governs the "adequacy of the ER . . . not NEPA."[83] And although "the ER is not the EIS,"[84] LBP-19-7 seeks to impose NEPA and CEQ requirements on ISP.

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78 *Id*. at __ (slip op. at 55).

79 *Id*. at __ (slip op. at 54-56).

80 *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 & 2), LBP-09-10, 70 NRC 51, 87 (2009) (citations omitted) (emphasis added); *see also Sierra Club v. U.S. Envtl. Prot. Agency*, 995 F.2d 1478, 1485 (9th Cir. 1993) ("NEPA does not regulate the conduct of private parties . . . [i]t regulates the federal government") *abrogated on other grounds* 630 F.3d 1173 (9th Cir. 2017).

81 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 55) (citing *Pac. Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-11-11, 74 NRC 427, 443–44 & n.95 (2011)).

82 *Compare* 10 C.F.R. §§ 51.20 and 51.21 *with* 10 C.F.R. § 51.45.

83 *Levy County*, LBP-09-10, 70 NRC at 87.

84 *Id.* at 88.

More specifically, the Board's decision finds fault in the ER because purportedly "no interested member of the public could access any of [the underlying studies referenced in ER § 3.5.16], or learn how many people performed them, what their qualifications were, or how much time they spent."[85] But the Board cites no corresponding provision in Part 51 for the proposition that ISP is obligated by law to provide information regarding, for example, "how much time" someone spent preparing an underlying study that ISP examined and summarized when preparing its ER. Nor is there such a requirement in Part 51. Ultimately, the Board's strained reading of CEQ regulations as imposing a substantive obligation on ISP as to the content of an ER is a clearly-erroneous new requirement and contrary to law.

C. The Board's Conclusion that CEQ Regulations Require Source Materials to Be Appended to Environmental Documents Is Contrary to the Plain Language of the Regulations and Thus Constitutes Error of Law

Assuming *arguendo* CEQ regulations somehow imposed substantive obligations on NRC license applicants, the ER fully complies with the CEQ provision regarding the proper treatment of underlying source materials. As noted by the Board, CEQ regulations provide that environmental documents must "make explicit reference by footnote to the scientific and other sources relied upon for conclusions."[86] It is entirely undisputed in this proceeding that the ER makes "explicit reference" to the "sources relied upon for conclusions" in the ER. Thus, the ER is fully compliant with this standard.

The Board then extends this standard (without an articulated rationale) into a purported further requirement that "surely some of [the underlying sources] must be [publicly available], or must be appended to" the document.[87] But the Board cites no such explicit requirement even in

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[85] *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 54-55).

[86] *Id*. at __ (slip op. at 55) (citing 40 C.F.R. § 1502.24).

[87] *Id*. at __ (slip op. at 55-56).

CEQ regulations (much less in Part 51)—nor is there one. And its conclusion that failing to append or make the underlying source materials publicly available somehow is material to a finding the NRC Staff must make to grant the application is factually unsupported, particularly when the results of the underlying source materials are presented in the ER itself.[88] Ultimately, despite the Board's unfounded concern that the references were not publically available or searchable by Google,[89] nothing in CEQ's (or the NRC's) regulations require them to be. Thus, the Board's contrary interpretation of CEQ regulation is legally erroneous, and its decision to admit SC-13 should be reversed.

VI. CONCLUSION

For all the reasons explained above, the Commission should reverse the Board's decision to grant standing and admit SC-13, and terminate this proceeding.

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88 *See, e.g.*, ER § 3.5.

89 Tr.at 274. In fact, ISP has since provided all of the cited references to the parties and the Board, two of which were already in ADAMS. *See* Letter from P. Bessette, Counsel for ISP, to the Board, Licensing Board Notification Regarding ISP Letter E-55041 (Sept. 5, 2019) (ML19248C912)

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated in Washington, D.C.
this 17th day of September 2019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	Docket No. 72-1050-ISFSI
INTERIM STORAGE PARTNERS LLC	)	ASLBP No. 19-959-01-ISFSI-BD01
(Consolidated Interim Storage Facility)	)	September 17, 2019

CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of "Interim Storage Partners LLC's "Notice of Appeal of LBP-19-7" and "Brief in Support of Interim Storage Partners LLC's Appeal of LBP-19-7" was filed through the E-Filing system.

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