

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

IN THE MATTER OF:)	Docket No. 72-1050
)	
INTERIM STORAGE PARTNERS LLC)	ASLB No. 19-959-01-ISFSI-BD01
)	
(Consolidated Interim Storage Facility))	October 13, 2019

**SIERRA CLUB'S BRIEF IN OPPOSITION TO ISP'S APPEAL OF ASLB
DECISION ADMITTING SIERRA CLUB CONTENTION 13**

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INTRODUCTION

Interim Storage Partners (ISP) has filed with the Commission an application for a license to construct and operate a storage facility to store high level nuclear waste and spent nuclear fuel. In conjunction with that application, ISP submitted an environmental report (ER) pursuant to 10 C.F.R. § 51.45. That section requires that an environmental report must contain a discussion of the environment affected by the proposed project and the environmental impacts of the project.

Sierra Club filed a Petition to Intervene (Accession No. ML18317A411). That Petition presented 17 contentions in support of the Petition. The Atomic Safety and Licensing Board (ASLB) issued an Order on August 23, 2019, determining that Sierra Club had standing and that Contention 13 was admitted for hearing. All other Sierra Club contentions were not admitted.

STATEMENT OF THE CASE

ISP filed its application for a license to construct and operate a storage facility for high level nuclear waste and spent nuclear fuel on August 29, 2018. The site of the proposed facility would be adjacent to an existing low-level radioactive waste facility operated by Waste Control Specialists, one of the partners forming ISP. The facility would store nuclear waste from nuclear reactors around the United States, the waste being transported primarily by rail to the ISP facility. The proposed site is in Andrews County, Texas, on the border with New Mexico. As planned, the ISP facility would ultimately store 40,000 metric tons of uranium.

Sierra Club Contention 13 stated as follows:

The ER states that two species of concern, the Texas horned lizard and the dunes sagebrush lizard, have been seen at the ISP site or may be present. But 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. Therefore, the ER is inadequate in describing the affected environment.

The ER stated that two species of concern, the Texas horned lizard and the dunes sagebrush lizard, are in the area of the ISP site. The Texas horned lizard is a state-listed threatened species and the dunes sagebrush lizard is proposed for listing as a federally protected species, according to section 3.5.2 of the ER. That same section of the ER states that both species are present in an area within a 3.1 mile radius of the ISP site. In fact, section 3.5.4 of the ER states that the Texas horned lizard has been reported as being present at the ISP site and the dunes sagebrush lizard might occur there. There was no description in the ER, however, that any current survey had been conducted to determine the presence of or impact to the species from the ISP project.

Thus, with no factual support, section 4.5.10 of the ER states that the project will have no impact on the species. In direct contradiction of the statements that both species have either been seen on the ISP site and that the dunes sagebrush lizard may be there, section 4.5.8 of the ER states that “[n]o communities or habitats that . . . support threatened and endangered species have been identified on the CISF.” Also, in contradiction to the statements about the species being present in the area, section 4.5.10 of the ER claims that the CIS project will have no impact on the species.

Therefore, the conclusions in the ER that no communities or habitats of threatened or endangered species exist at the CIS site and that the CIS project will have no impact on the species are not supported by what little information is in the ER. Because the alleged

sources for those conclusions were not available to interested parties, the conclusions in the ER could not be verified or rejected. That is why the ASLB admitted Contention 13.

In its Ruling the ASLB did not address the primary trust of the contention, that the statement of no impact in the ER was not supported by even the minimal discussion of the species and their habitat in the ER. It was important, first of all, to verify the information in the ER by requiring the sources of the information to be disclosed to the public. Amended Contention 13 renews the point that the ER's statement of no impact is not supported by the information provided by ISP.

ARGUMENT

SIERRA CLUB HAS STANDING

The ASLB determined that Sierra Club has standing to intervene. The requirements for standing are well-established. In non-reactor cases an intervenor has standing based on what has been termed proximity plus standing. *Ga. Inst. Of Tech.* (Ga. Tech Research Reactor), 42 NRC 111 (1995). In order to establish proximity plus standing, a prospective intervenor must show that he or she resides within an area where there is an obvious potential for offsite harm and that there is a plausible scenario of injury to the intervenor. *Armed Forces Radiobiology Research Inst.* (Cobalt-60 Storage Facility), 16 NRC 150 (1982); *Ga. Inst. Of Tech.* (Ga. Tech Research Reactor), 42 NRC 111 (1995); *CFC Logistics, Inc.* (Cobalt-60 Irradiator), 58 NRC 311 (2003). Plausible, even if unlikely, events that could cause injury provide standing. *Id.*

The ASLB found that Sierra Club member Shirley Henson, who lives within 6 miles of the CIS site, provided standing to Sierra Club. Ms. Henson's standing declaration

states that she was concerned that cracks or leaks could occur in the dry casks in which the radioactive waste would be stored at the CIS facility and radioactive material would enter the groundwater. She also noted that oil and gas companies were conducting fracking activities in the area of the CIS site, and that that activity has caused geologic faults that induce earthquakes. Those earthquakes could cause the storage casks to crack and leak radioactive material. Ms. Henson's declaration further states that she lives in a community through which the radioactive waste would be transported by rail. So she would be impacted by a rail accident as a train passed through her community. Ms. Hensons' declaration raises plausible scenarios of harm to her as a result of the proposed CIS facility.

ISP complains that the ASLB did not undertake a case-by-case analysis of Sierra Club's standing in this case. On the contrary, the Board reviewed Ms. Henson's declaration, the nature of the CIS project, and compared the facts of this case to other similar cases. ISP claims that comparing this case to other cases is not a case-by-case analysis, but ISP is attempting to impose an inappropriately rigorous standard. ISP wants to require a petitioner to essentially prove its contentions in order to establish standing. But that is not the standard. *Sequoyah Fuels Corp.* (Gore, Oklahoma, Site Decommissioning), 53 NRC 2 (2001).

Furthermore, relying on similar facts in other cases as precedent does satisfy the case-by-case analysis. See, *Private Fuel Storage LLC* (Independent Spent Fuel Storage Installation), 47 NRC 142, 169 (1998). The ASLB was using the facts of this case to compare it to the facts of similar cases. It is ironic that ISP claims that citing similar cases

as precedent is improper in determining the low threshold for standing, but ISP repeatedly cited what it claimed was precedent in similar cases to support its challenges to Sierra Club's contentions.

Standing is to be construed in favor of finding standing. *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4). 82 NRC 389 (2015). Unless there has been clear misapplication of facts or law, the ASLB determination of standing is entitled to substantial deference. The ASLB decision will be reversed only if it is irrational. *Ga. Inst. Of Tech.* (Ga. Tech Research Reactor), 42 NRC 111 (1995).

ISP essentially argues that the CIS facility will be perfectly safe so there is no basis for Sierra Club to say that any of its members have standing. Taken to its logical conclusion, that argument would mean that no one would ever have standing to challenge the license application in this case. As the ASLB concluded, "This seems neither realistic nor consistent with the Commission's direction to construe standing in favor of the petitioner." ASLB Ruling, p. 16.

Based on the foregoing, the ASLB decision that Sierra Club has standing should be affirmed.

THE BOARD WAS CORRECT IN ADMITTING SIERRA CLUB CONTENTION 13

ISP begins its argument with the claim that Contention 13 does not contain sufficient information to be admissible. However, the contention clearly set forth the brief statements in the ER that the Texas horned lizard and the dunes sagebrush lizard are present or could be present on the CIS site, so that the conclusory statement in the ER that there would be no impact to the species is contrary to the previous statements in the ER as

to the existence of the species on the site. That was sufficient to present a genuine dispute with a material issue in the ER. 10 C.F.R. § 2.309(f)(1)(vi). Contention 13 noted, however, that it was unable to be more precise in challenging the statements in the ER because ISP had not made the sources on which it allegedly relied for the information in the ER available to the public. That was the reason for the ASLB decision to admit Contention 13.

ISP's primary complaint, however, is that the ASLB relied on regulations of the Council on Environmental Quality (CEQ). CEQ regulations implement the requirements of the National Environmental Policy Act (NEPA). NEPA regulations provide that "[a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b). NEPA regulations further require:

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement.

40 C.F.R. § 1502.24.

The ASLB correctly found, ASLB Ruling at p. 56:

Sierra Club Contention 13 claims that ISP's sources are not described well enough for the public to access them. In opposition, ISP argues that "Petitioner cites no requirement that the ecological surveys referenced and summarized in the [environmental report] all must be publicly available." In its reply, Sierra Club cites to just such a requirement. This constitutes a legitimate amplification of the argument in its original petition.

Think about it. ISP complains that Sierra Club has allegedly not substantiated its basis for challenging the ER's statements regarding the lizard species, while struggling mightily to

prevent Sierra Club, and the ASLB, from accessing the sources that would form the basis of the contention. That is why the CEQ regulations require such information.

ISP claims that the CEQ regulations do not apply in NRC proceedings. But 10 C.F.R. § 51.10 clearly states “the Commission’s announced policy [is] to take account of the regulations of the Council on Environmental Quality published November 29, 1978 (43 FR 55978–56007) voluntarily, subject to certain conditions.” The NRC is required to comply with NEPA. The ER is the first step on the NRC’s compliance with NEPA. The requirements for an ER, 10 C.F.R. § 51.45, are in the NRC regulations implementing NEPA. It strains credulity, therefore, for ISP to assert that CEQ regulations do not apply to NRC proceedings.

ISP also claims that Sierra Club’s reference to the CEQ regulations in its Reply to ISP’s Answer to Sierra Club’s Petition went beyond the proper scope of a reply. ISP is misconstruing the purpose and scope of a motion to strike a reply and the purpose and scope of a reply. A motion to strike is the mechanism for seeking the removal of information from a pleading or other submission that is “irrelevant.” *Private Fuel Storage LLC* (Independent Spent Fuel Storage Installation), 62 NRC 187, 228 (2003). Nowhere in its Motion to Strike did ISP address the relevance of Sierra Club’s arguments.

A reply may provide “legitimate amplification” to a contention. *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 & 2), 65 NRC 281, 299-302 (2007). A party may not use the device of a motion to strike to categorically prohibit all new arguments. Although “principles of fairness mandate that a petitioner restrict its reply

brief to addressing issues raised by the Applicant's or the NRC Staff's Answers, " such a limitation:

. . . falls well short of prohibiting a petitioner from raising all new arguments. *As long as new statements are within the scope of the initial contention and directly flow from and are focused on the issues and arguments raised in the Answers, fairness is achieved through the consideration of these newly expressed arguments.* (emphasis added).

Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01 at 41 (2011).

See also, *Louisiana Energy Services LP* (National Enrichment Facility), 60 NRC 223, 225 (2004) ("The Petitioners' reply brief should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer . . .").

It is only reasonable to consider that a petitioner preparing contentions cannot anticipate, and should not be required to anticipate, the possible arguments the applicant or NRC Staff might raise as grounds for dismissing the contentions. *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), 10 NRC 521, 525 (1979) ("Before any suggestion that a contention should not be entertained can be acted upon favorably, the proponent of the contention must be given some chance to be heard in response.").

As the ASLB said in *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), ASLBP No. 11-907-01-LR-BD01 (October 11, 2012), at 3, in ruling on a motion to strike:

While FENOC is correct that Intervenors cite new legal authority and raise certain new arguments in their reply, we believe that these citations and arguments are fairly responsive to arguments proffered by FENOC in its answer. While a party may not raise new arguments in a reply that are outside the scope of the initial

contention, it may “legitimately amplify” arguments presented in its initial contention in order to fairly respond to arguments raised in the answers.

It is also important to consider that ISP’s Motion to Strike started from the flawed premise that Sierra Club Contention 13 was insufficiently supported by factual and legal arguments. In other words, ISP is arguing that Sierra Club’s Reply was improperly “curing” a deficiently drafted contention. On the contrary, Contention 13 identified the specific sections of the ER that stated the two lizard species are or might be in the area of the CIS site. The contention then specifically referred to the sections of the ER making the unsupported conclusion that there would be no adverse impact to the species. Finally, the contention pointed out that Sierra Club was unable to determine the basis for the statement of no adverse impact because the sources the ER allegedly relied on for that conclusion were not available for review.

Sierra Club’s burden was to point out a material dispute with the ER. Contention 13 did that. Sierra Club was not required at the contention admissibility stage of the proceedings to affirmatively prove that there would be an adverse impact on the species. In fact, since NEPA is only a procedural statute, Sierra Club probably does not need to prove an adverse impact, but only to show that ISP has not satisfied the procedural requirements.

In response to the point made in Contention 13 that the sources upon which the ER allegedly relied were not publicly available, ISP’s Answer, p. 109-110, claims that there is no requirement for the sources to be publicly available. Sierra Club’s Reply was therefore a proper and narrowly focused response to that allegation, stating that CEQ regulations, which the NRC has incorporated into its NEPA regulations, requires that the

public must be able to have all the information necessary to accurately and thoroughly review the NEPA documents.

The ASLB was therefore correct in admitting Contention 13.

CONCLUSION

Based on the foregoing, the Board's decision granting standing to Sierra Club and admitting Sierra Club Contention 13 was neither an error of law nor an abuse of discretion. This appeal should be dismissed.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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INTERIM STORAGE PARTNERS LLC)
)
(WCS Consolidated Interim Storage) October 13, 2019
Facility))

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, copies of Sierra Club's Brief in Opposition to ISP's Appeal of ASLB Decision Admitting Sierra Club Contention 13 were served upon the Electronic Information Exchange (the NRC's E-Filing System) in the above captioned proceeding.

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