

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board
and
The Commission**

In the Matter of)	Docket No. 72-1050
)	
Interim Storage Partners, LLC)	January 21, 2020
)	
(Waste Control Specialists Consolidated)	
Interim Storage Facility))	

**FASKEN OIL AND RANCH, LTD AND PERMIAN BASIN LAND AND ROYALTY
OWNERS MOTION TO REOPEN THE RECORD FOR PURPOSES OF CONSIDERING
AND ADMITTING AN AMENDED CONTENTION BASED ON NEW INFORMATION
PROVIDED BY INTERIM STORAGE PARTNERS IN RESPONSE TO NRC
REQUESTS FOR ADDITIONAL INFORMATION**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.326, Fasken Oil and Ranch, Ltd and Permian Basin Land and Royalty Owners (hereinafter “Petitioners”) hereby move to reopen the record of this proceeding for consideration by the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) of Interim Storage Partner’s (ISP’s) licensing application to build and operate a centralized interim storage facility (CISF) for spent fuel in Andrews County, Texas. This motion supplements Petitioners’ “Motion for Leave to Amend Contention Four Regarding Interim Storage Partner’s New Description of Groundwater Located Below the Site and the Potential Impact the Site Will Have on the Groundwater” (“Motion to Amend”). Petitioners’ Motion to Amend challenges the Environmental Report (ER) and its failure to scrupulously evaluate the environmental impacts the proposed CISF will have on the environment based on new information.

In Section II of this Motion, Petitioners address the jurisdictional question raised by the incompatibility of 10 C.F.R. § 2.318(a) with the Atomic Safety and Licensing Board’s (Board’s) order terminating this proceeding, *Interim Storage Partners LLC* (WCS Consolidated Interim

Storage Facility) LBP-19-11, _N.R.C._ (December 13, 2019) (“LBP-19-11”). In light of this question, this Motion is being filed before both the Board and the Commission. In Section III, Petitioners provide factual background used to support this motion. In Section IV, Petitioners address the NRC’s standard for reopening the record. In Section V, Petitioners’ counsel provides a declaration pursuant to 10 C.F.R. § 2.326(b).

II. JURISDICTION

On August 23, 2019, the Board ruled that Petitioners had demonstrated standing but that all of Petitioners’ contentions were inadmissible.¹ While Petitioners’ contentions were deemed inadmissible, LBP-19-07 found that Sierra Club had proffered an admissible contention. For this reason, the proceedings were left open and Sierra Club’s admitted contention was set to be adjudicated under the procedures set forth in 10 C.F.R. Part 2, Subpart L.² On October 23, 2019, while Sierra Club’s contention was being adjudicated, intervenor, Sustainable Energy and Economic Development Coalition (SEED), submitted a motion to file a late-filed contention.³ On November 18, 2019, before the Board made a decision on SEED’s Motion, the Board approved ISP’s motion to dismiss Sierra Club’s admitted contention as moot and denied Sierra Club’s motion to amend the contention.⁴ On December 13, 2019, the Board denied SEED’s Motion and terminated the proceedings.⁵ Thus, LBP-19-11 appears to have ended the Board’s jurisdiction

¹ *Interim Storage Partners* (WCS Consolidated Interim Storage Facility), LBP-19-07 at 20 & 106, _N.R.C._ (August 23, 2019) (“LBP-19-07”).

² *Id.* at 106.

³ Motion of Intervenor Sustainable Energy and Economic Development Coalition for leave to File Late-Filed Contention and Contention 17 (October 23, 2019) (ADAMS #ML19297A226) (“SEED’s Motion”).

⁴ *Interim Storage Partners* (WCS Consolidated Interim Storage Facility), LBP-19-9 at 1, _N.R.C._ (November 18, 2019) (“LBP-19-9”).

⁵ *Interim Storage Partners* (WCS Consolidated Interim Storage Facility), LBP-19-11 at 1, _N.R.C._ (December 13, 2019) (“LBP-19-11”).

over any new or supplemental hearing requests, including the instant matter. However, Petitioners have appealed LBP-19-07 to the NRC Commissioners and no final decision has been issued. Therefore, 10 C.F.R. § 2.318(a) appears to retract the Board's jurisdiction to consider amended contentions and gives the Presiding Officer continuing jurisdiction with authority to consider such up until the time of a final decision has been made by the Commissioners.⁶ Given these circumstances, Petitioners file this motion before both the Board and the Commission in order to ensure its consideration.

III. FACTUAL BACKGROUND

In April 2016, Waste Control Specialists, LLC (WCS) submitted its initial license application to construct and operate a CISF for a term of forty years. One year later, WCS requested that the NRC suspend its license and any public participation concerning their application. During that time, WCS and Orano CIS, LLC formed Interim Storage Partners (ISP). On August 29, 2018, after receiving a revised license application from ISP, the NRC issued Federal Register Notice 44,070, 44,070-75 which notified the public that ISP's proposed CISF application in Andrews County, TX was active. The notice allowed the public to request a hearing and file petition to intervene no later than October 29, 2018.

On September 28, 2018, Petitioners filed a motion to dismiss the proceeding. The motion to dismiss was based on the application's reliance on the U.S. Department of Energy (DOE) taking title to the spent nuclear fuel and the Nuclear Waste Policy Act and the Administrative

⁶ 10 C.F.R. § 2.318(a) states that "[t]he presiding officer's jurisdiction in each proceeding terminates when the period within which the Commission may direct that the record be certified to it for final decision expires, when the Commission renders a final decision, or when the presiding officer withdraws from the case upon considering himself or herself disqualified, whichever is earliest."

Procedure Act both prohibiting the DOE from taking title to high level waste and/or spent fuel until a permanent repository is established. On October 29, 2018, Petitioners filed a Petition to Intervene and Request for a Hearing which included Contention Four; the contention that Petitioners now seek to amend.

Contention Four challenged ISP's license application on the ground that ISP "failed to adequately discuss and evaluate the impact the proposed site will have on the environment and...failed to include adverse information specifically relating to potential of waste-contaminated groundwater."⁷ Specifically, Contention Four criticized ISP's ability to fully evaluate the impact that the CISF will have on the environment because ISP's descriptions of the subsurface and hydrological formations and aquifers located below the CISF were vastly different than those provided in Contention Four. Before submitting responses to RAIs, ISP's Environmental Report (ER) claimed that "[t]he shallowest water bearing zone is about 225 ft deep at the site."⁸ The ER also stated that "[t]he Ogallala Formation, if present, is not water bearing in the Waste Control Specialists permitted area."⁹ Contention Four challenged the application's description of the subsurface and depth to groundwater stating that "the Ogallala formation is present along the North and East sides of the WCS-Flying "W" Ranch at a depth of 45-105 feet."¹⁰ Contention Four's description of subsurface hydrology also concluded that "cross-formational groundwater is known to exist between the Ogallala and the Antler Formations."¹¹ The Antler Formation, which spans the entire WCS area and supplies potable

⁷ Petition of Fasken and PBLRO at 26 (ADAMS #ML18302A412) (hereinafter "Petition").

⁸ ER, Sec. 3.4.14 at 3-24; *See also* ER Sec. 4.4 at 4-29 "water resources at the site are virtually nonexistent...and appreciable groundwater resources are at depths greater than approximately 340 m (1,115 ft)."

⁹ ER, Sec. 3.4.14 at 3-26.

¹⁰ Petition at 28 (citing Declaration of Aaron Pachlhofer at 4 n. 3).

¹¹ *Id.* (citing Declaration of Aaron Pachlhofer at 4).

water to the City of Midland, Texas, is in some areas located “within a few feet” of the surface of the CISF.¹²

On August 23, 2019, the Atomic Safety and Licensing Board (Board) ruled that Petitioners demonstrated standing, but that none of Petitioners’ five proffered contentions were admissible.¹³ The Board found that Petitioners failed to raise a genuine dispute on a material issue based on Petitioners’ theory that a large, fully-fueled aircraft crash could cause a pathway to groundwater contamination.¹⁴ The Board found that Petitioners failed to contradict four independent reasons why the proposed facility could not contaminate aquifers and other groundwater formations that underlie and surround the CISF. The four reasons include “[t]he method of storage (dry casks), the nature of the canisters, the extremely low permeability of the red clay and the depth to groundwater.”¹⁵

On September 17, 2019, Petitioners appealed the Board’s order.¹⁶ The appeal defended Contention Four’s challenge of the application, specifically, how the Board abused its discretion by failing to address a material issue of fact.¹⁷ Rather than focus on Contention Four’s argument that ISP failed to adequately describe the subsurface, environment, and the impact the proposed CISF would have on the environment pursuant to 10 CFR § 51.45, the appeal stated that the Board turned a blind eye to the differing descriptions of the subsurface when the Board found

¹² *Id.*

¹³ LBP-19-07 at 20 & 106.

¹⁴ *Id.* at 103.

¹⁵ *Id.* at 102 (citing ISP Safety Analysis Report at 2-21).

¹⁶ Fasken and PBLRO’s Notice of Appeal of LBP-19-07 (September 17, 2019) (ADAMS # ML19260J386) (hereinafter “Petitioners’ Appeal”).

¹⁷ Petitioners’ Appeal at 19.

that “[a]bsent a pathway to groundwater contamination, [Petitioners’] claims are not material because their resolution would make no difference in the outcome of the licensing proceeding.”¹⁸

On January 6, 2020, the “package” titled “Interim Storage Partners Submission of Responses for RAIs and Associated Document Markups from First Request for Additional Information, Part 3” was uploaded to the NRC’s ADAMS Public Library portal.¹⁹ ISP’s Response to RAIs included documents containing new descriptions of the subsurface located below and around the proposed CISF.

IV. PETITIONERS SATISFY MOTION TO REOPEN STANDARDS

A. Petitioners Have Standing

In addition to filing a motion to reopen, an amended contention must also meet the applicable contention admissibility requirements of 10 C.F.R. § 2.309(f).²⁰ When a party has already satisfied the requirements for standing in the same proceeding in which an amended contention is filed, “it does not need to do so again.”²¹

On August 23, 2019, the Board determined that Petitioners demonstrated standing.²²

B. Motion to Reopen Standards

To successfully file a motion to reopen, the motion must:

1. be timely
2. address a significant safety or environmental issue; and
3. demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

¹⁸ LBP-19-07 at 103.

¹⁹ Hereinafter (“ISP Response to RAIs”) (ADAMS # ML19337B502).

²⁰ 10 C.F.R. § 2.309(c)(4).

²¹ *Id.*

²² LBP-19-07 at 20

10 C.F.R. § 2.326(a). A motion to reopen must also be “accompanied by affidavits that set forth the factual and/or technical bases” for a movant’s claim that they have satisfied the above requirements. 10 C.F.R. § 2.326(b).

i. This Motion is Timely

The NRC judges timeliness of motions to reopen the record by the same standards as contentions.²³ An amended contention generally is considered timely if it is filed within 30 days of the date upon which the new information became available.²⁴ ISP’s Response to RAIs “package” was not uploaded to the NRC’s ADAMS Public Library portal until January 6, 2020 (15 days from the time this Motion is filed).

ii. This Motion Addresses a Significant Environmental Issue

To ensure the safety of the environment and of the public health in general, it is crucial that descriptions of the environment located below the proposed CISF—specifically the location of potable groundwater formations—and the impacts that the proposed CISF will have on the environment are accurate and meet the NRC’s regulatory requirements. Upon consideration of ISP’s Responses to RAIs, it is clear that any calculations based on previous substrata and hydrological information in ISP’s Environmental Report (ER) cannot be relied on because the new descriptions seriously contradict the ER.

In the attached affidavit, Mr. Aaron Pachlhofer points out that ISP’s response to RAI WR-6 supports Contention Four’s argument that groundwater, contrary to the requirements of 10

²³ 10 C.F.R. § 2.326(d) (A motion to reopen “must also satisfy the § 2.309(c) requirements for new or amended contentions....”).

²⁴ *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 493 (2008) (“Many times, boards have selected 30 days as [the] specific presumptive time period” for timeliness of contentions filed after the initial deadline).

C.F.R. § 51.45, was not properly described.²⁵ In fact, the erroneous descriptions in ISP’s ER report a lack of groundwater below the site.²⁶ Prior descriptions²⁷ of groundwater were “not based on sufficient boring data to distinguish the contacts between the Antlers and the Ogallala in the proposed CISF area, nor between the Antlers and the Gatuna on the south side of the ridge.”²⁸ In their responses, ISP further admitted that its previous description of the site’s shallowest water bearing zone of 225 ft was actually the depth to groundwater “at the neighboring Waste Control Specialists facility.”²⁹ ISP’s response now concludes “[t]he shallowest groundwater beneath the proposed CISF footprint is a few inches to a few feet of saturation in the undifferentiated Antlers/Ogallala sediments” in the northern portion of the CISF site.³⁰

Though inaccurate and erroneous, information and descriptions of the environment, as described in the original ER, were used to conclude that the CISF site would not have an impact on the environment nor contaminate surface and groundwater.³¹ Without a proper description of the affected environment, an applicant cannot properly conduct a realistic impact analysis. Therefore, any safety and environmental reports, data, and analysis based on the previously faulty descriptions should also be considered faulty. Until ISP reevaluates the environmental impact that the site will have based on the new information on the presence of groundwater, the

²⁵ See Affidavit of Aaron Pachlhofer, Sec. III(1)(A) (hereinafter “Pachlhofer Affd.”).

²⁶ *Id.* at I(1)(A).

²⁷ Including ER, Sec. 3.4.14 “[t]he shallowest water bearing zone is about 225 ft deep at the site”; ER, Sec. 3.4.14 “[t]he Ogallala Formation, if present, is not water bearing in the Waste Control Specialists permitted area.”

²⁸ ISP Response to RAIs, Enclosure 3 at 45.

²⁹ *Id.* at 59.

³⁰ *Id.*

³¹ Pachlhofer Affd. II(1)(A) (citing to ER Section 4.4).

licensing process will remain flawed and the site will continue to pose a serious contamination risk to groundwater, and ultimately, a significant threat to the environment.

iii. *This Motion Demonstrates that Contention Four Would Have Likely Been Admitted Had the Newly Proffered Evidence Been Considered Initially*

As stated above, the Board found Contention Four to be inadmissible because it purportedly failed to contradict four independent reasons why the proposed facility could not contaminate aquifers and other groundwater formations that underlie and surround the CISF: “[t]he method of storage (dry casks), the nature of the canisters, the extremely low permeability of the red clay and the depth to groundwater.”

Given that new information reveals the shallowest groundwater beneath the CISF is “a few inches to a few feet” from the surface, the Board’s reasoning for denying Contention Four based on depth to groundwater and the presence of inhibitive red clay no longer applies. According to the new information, groundwater is present beneath the site within a few inches to a few feet of the surface, whereas, red clays are “covered with about 6.7 to 16 m (22 to 54 ft) of silty sand, sand, sand and gravel, and alluvium that are part of the Gatuna and/or Antlers Formation.”³² Furthermore, ISP claims that “potential source[s] of low-level radioactivity that could enter runoff” are present, but that the potential levels of radioactive runoff would be “well below” the effluent discharge limits.³³ Their ER supports this claim, reporting that this potential for negative impact on surface water resources is very low, because there is a “lack of water presence” and a presence of “formidable natural barriers” to prevent such occurrences.³⁴ Such is no longer the case. Given that ISP has now revealed that groundwater is in fact “within inches”

³² ER, Sec. 4.3 at 4-28.

³³ Pachlhofer Affd. at II(1)(A) (citing ER, Sec. 4.4).

³⁴ *Id.*

of the surface at the CISF and is situated both above and below the purported natural barriers, the reasoning that both surface and groundwater will not be negatively impacted by radioactive runoff fails. ISP can no longer rely on natural barriers and nonexistent groundwater to support claims that contamination from their radioactive runoff will be harmless.

The new information derived from ISP's responses to RAIs calls into question the grounds for dismissal of Petitioner's original Contention Four. Therefore, based upon new information, the grounds for dismissal, including the validity of the method of storage (dry casks), the nature of the canisters, the extremely low permeability of red clay and the depth to groundwater, must be revisited and, we assert that Contention Four would likely be admitted had this new information been considered initially.³⁵

V. DECLARATION PURSUANT TO 10 C.F.R. § 2.326(b)

Pursuant to 10 C.F.R. §§ 2.304(d) and 2.326(b), and under penalty of perjury, I, Timothy J. Laughlin, and I, Monica Perales, certify that the factual statements in this motion are true and correct to the best of our knowledge, and the legal conclusions are based on our best understanding of applicable regulations and judicial precedents as they apply to the new information provided by ISP in response to NRC RAIs. We further certify that we are competent to make these representations as Petitioners' attorneys.

_____/signed electronically by/_____
Timothy J. Laughlin

_____/signed electronically by/_____
Monica Perales

VI. CONCLUSION

For the foregoing reasons, the Board or the Commission should reopen the record of this proceeding and admit Amended Contention Four.

³⁵ See Pachlhofer Affd. at III(1) (A-C).

Respectfully submitted,

/signed electronically by/
Timothy J. Laughlin
PO Box 481582
Kansas City, MO 64148
(913) 662-1274
tijay1300@gmail.com
Counsel for Petitioners

/signed electronically by/
Monica Perales
6101 Holiday Hill Road
Midland, TX 79707
(432) 687-1777
monicap@forl.com
Counsel for Petitioners

January 21, 2020

CERTIFICATE OF CONSULTATION

Undersigned certifies that communications were made to counsel for ISP and NRC Staff regarding the above Motion to Reopen and Motion to Amend Contention Four. Neither ISP nor NRC Staff responded to the consultation request.

/signed electronically by/
Timothy J. Laughlin
Counsel for Petitioners

/signed electronically by/
Monica Perales
Counsel for Petitioners

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board
and
The Commission**

In the Matter of)	Docket No. 72-1050
)	
Interim Storage Partners, LLC)	January 21, 2020
)	
(Waste Control Specialists Consolidated)	
Interim Storage Facility))	

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2020, the foregoing FASKEN OIL AND RANCH, LTD AND PERMIAN BASIN LAND AND ROYALTY OWNERS MOTION TO REOPEN THE RECORD FOR PURPOSES OF CONSIDERING AND ADMITTING AN AMENDED CONTENTION BASED ON NEW INFORMATION PROVIDED BY INTERIM STORAGE PARTNERS IN RESPONSE TO NRC REQUESTS FOR ADDITIONAL INFORMATION was deposited by me in the NRC's Electronic Information Exchange system.

/signed electronically by/
Timothy J. Laughlin
Counsel for Petitioners

/signed electronically by/
Monica Perales
Counsel for Petitioners