

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of:

INTERIM STORAGE PARTNERS LLC

(Consolidated Interim Storage Facility)

)
) Docket No. 72-1050
)

) ASLBP No. 19-959-01-ISFSI-BD01
)

) February 18, 2020
)

**INTERIM STORAGE PARTNERS LLC’S ANSWER OPPOSING
FASKEN’S AND PBLRO’S MOTION TO REOPEN THE RECORD AND MOTION FOR
LEAVE TO AMEND CONTENTION FOUR**

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I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.309(i)(1) and 2.323(c), Interim Storage Partners LLC (“ISP”) submits this Answer opposing Fasken Oil and Ranch, Ltd’s and Permian Basin Land and Royalty Owners’ (collectively “Fasken”) “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”¹ (“Motion to Reopen”) and “Motion for Leave to Amend Contention Four Regarding [ISP’s] New Description of Groundwater Located Below the Site and the Potential Impact the Site Will Have on the Groundwater”² (“Motion for Leave”). The former Atomic Safety and Licensing Board (“Board”) terminated the above-captioned adjudicatory proceeding on December 13, 2019,

¹ 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 (Jan. 21, 2020) (ML20021A384) (“Motion to Reopen”).

² Fasken Oil and Ranch, Ltd and Permian Basin Land and Royalty Owners Motion for Leave to Amend Contention Four (Jan. 21, 2020) (ML20021A385) (“Motion for Leave”).

because no admissible contentions were pending.³ Fasken’s instant motions request that the record of the proceeding be reopened, and that a late-filed amendment to their previously-rejected Contention 4 be admitted. More specifically, Fasken argues that its Motions should be granted so that it may challenge information in an RAI Response that ISP recently provided to the NRC.

Fasken asserts that the information in the RAI Response is new, and therefore its late-filed challenge should be allowed. However, as explained in further detail below, Fasken seriously misrepresents the content of the RAI Response, and has not identified any new and materially different information that would warrant the extreme action of reopening a closed adjudicatory proceeding. As explained below, the Commission⁴ should deny Fasken’s Motions because they fail to meet the applicable requirements of Section 2.326 for motions to reopen and 2.309(c)(1) for late-filed contention amendments, and should reject Amended Contention 4 as inadmissible under Section 2.309(f)(1).

³ *Interim Storage Partners LLC* (Consolidated Interim Storage Facility), LBP-19-11, 90 NRC __ (Dec. 13, 2019) (slip op.).

⁴ Fasken indicates that it does not know whether the Commission or the Board has jurisdiction over its Motions. However, the precedent is clear that jurisdiction rests with the Commission. *See, e.g., Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (2009) (“Generally, once there has been an appeal or petition to review a Board order ruling on intervention petitions . . . jurisdiction passes to the Commission, including jurisdiction to consider any motion to reopen.”) (citing *Ne. Nuclear Energy Co.*, (Millstone Nuclear Power Station, Unit 3), CLI-00-25, 52 NRC 355, 357 (2000); *Phila. Elec. Co.*, (Limerick Generating Station, Units 1 and 2), ALAB-823, 22 NRC 773 (1985)).

II. BACKGROUND

A. Procedural History⁵

On October 29, 2018, Fasken, filed a Petition for Intervention and Request for Hearing, proffering five contentions.⁶ As relevant here, Contention 4 claimed that “ISP has failed to adequately discuss and evaluate the impact the proposed site will have on the environment and has also failed to include adverse information specifically relating to [the] potential of waste-contaminated groundwater traveling to aquifers and other groundwater formations located below and around the proposed site.”⁷ Following oral argument in Midland, Texas, on July 10-11, 2019, the Board ruled that while Fasken demonstrated standing, it failed to proffer an admissible contention.⁸ As to Contention 4, the Board found that it was inadmissible because Fasken provided no factual basis for the contention and raised no genuine dispute with the application.⁹ The Board found that Fasken failed to establish a factual basis for the contention because it did not challenge ISP’s assertion that both the dry cask storage method and the canisters preclude any credible pathway for groundwater contamination or otherwise challenge the portions of ISP’s Environmental Report (specifically, Revision 2) (“ER”) where ISP asserted that a leak of contaminants is not credible.¹⁰ And because Fasken failed to challenge ISP’s determination that the facility’s design precludes a pathway to groundwater contamination, the Board found that

⁵ A detailed procedural history of the full proceeding is set forth in LBP-19-7 and LBP-19-9. *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-7, 90 NRC __, __ (Aug. 23, 2019) (slip op. at 6-12); *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-9, 90 NRC __, __ (Nov. 18, 2019) (slip op. at 2-4).

⁶ Petition of Permian Basin Land and Royalty Organization and Fasken Land and Minerals for Intervention and Request for Hearing (Oct. 29, 2018) (ML18302A412) (“Petition”).

⁷ Petition at 26.

⁸ *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 18-20, 105).

⁹ *Id.* at __ (slip op. at 102-03).

¹⁰ *Id.*

Fasken did not raise a genuine dispute with the application.¹¹ The Board also noted that Contention 4 addressed only ISP’s Safety Analysis Report (“SAR”), but did not mention any portion of ISP’s ER, including sections evaluating groundwater impacts.¹² The Board ultimately terminated its proceeding.¹³

Fasken appealed the Board’s rejection of its contentions—including Contention 4—on September 17, 2019.¹⁴ ISP answered Fasken’s appeal on October 15, 2019.¹⁵ That appeal remains pending before the Commission. Fasken now seeks to reopen the terminated adjudicatory proceeding¹⁶ and leave to amend Contention 4.¹⁷

B. Summary of Relevant Portions of ISP’s Application Discussing Groundwater and Potential Radiological Contamination

ISP’s SAR describes the design of the CISF and how the design limits the possibility of a radiological release.¹⁸ ISP will use storage overpacks to store canisters containing SNF and greater-than-Class C (“GTCC”) waste, and only containerized SNF and GTCC are authorized for storage at the CISF.¹⁹ ISP will not open canisters, nor will it remove SNF assemblies or GTCC

¹¹ *Id.* at __ (slip op. at 103).

¹² *Id.*

¹³ *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-11, 90 NRC __, __ (Dec. 13, 2019) (slip op. at 14).

¹⁴ Fasken and PBLRO’s Notice of Appeal of LBP-19-07 (Sept. 17, 2019) (ML19260J387) and Fasken and PBLRO’s Brief on Appeal of LBP-19-07 (Sept. 17, 2019) (ML19260J386) (“Appeal”).

¹⁵ *Interim Storage Partners LLC’s Answer Opposing Fasken’s and PBLRO’s Appeal of LBP-19-7* (Oct. 15, 2019) (ML19288A283).

¹⁶ *See* Motion to Reopen. As a procedural matter, the Motion to Reopen “must be rejected” because Fasken failed to comply with the consultation requirement of 10 C.F.R. § 2.323(b). Fasken states that “communications were made” but “[n]either ISP nor NRC Staff responded.” Motion to Reopen at 11. What Fasken fails to mention is that it filed its pleading the *same day* it sent its consultation email. It did not even wait 24 hours for a response. The regulation requires movants to make a “sincere effort” to consult, not merely a “communication” of its planned filing. Fasken’s drive-by consultation can hardly be considered “sincere” by any reasonable measure.

¹⁷ *See* Motion for Leave.

¹⁸ ISP, License Application, Rev. 2, Docket No. 72-1050 ((ML18206A595) (package)) (includes Safety Analysis Report (“SAR”), Rev. 2 and Environmental Report (“ER”), Rev. 2).

¹⁹ SAR at 2-35 and 9-13.

waste from the canisters at the CISO, and the canisters will be drained of all liquid, dried, and backfilled with inert atmosphere before they are shipped to the CISO.²⁰ This means that the SNF and GTCC will be stored dry inside the canisters so that no radioactive liquid is available for release.²¹ ISP will store no liquid or process GTCC waste at the CISO,²² and ISP will not generate radioactive liquid wastes during the receipt, transfer, and storage of containerized SNF of GTCC at the CISO.²³

ISP's ER describes the location of the proposed CISO and how the natural barriers limit the impact of any release. The site region has a semi-arid climate, with low precipitation rates and minimal surface water occurrence. As a result, the potential for negative impacts on surface water resources is very low due to a lack of water presence and formidable natural barriers to any surface or subsurface water occurrences. ISP's initial analysis of maximum potential levels of radioactivity in rainwater due to surface contamination of the dry casks show that any potential levels of radioactive discharges would be well below (two orders of magnitude or more) the effluent discharge limits of 10 C.F.R. Part 20, Appendix B.²⁴

ISP's ER also describes the subsurface formations and aquifers around the site.²⁵ From a groundwater protection perspective, the ER notes that the proposed CISO benefits from a thick

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 3-3.

²³ *Id.* at 6-3. *See also id.* at 9-18 ("There are no liquid or gaseous effluent releases from the WCS CISO."); 9-30 ("As described in Section 6.1.2.1, there are no radioactive liquid radioactive wastes to monitor for the WCS CISO."); Application at 5-1 ("Operation of the WCS CISO will not create any radioactive materials or result in any credible liquid or gaseous effluent release.").

²⁴ ER at 4-31. That the Application does not consider credible a mechanism for transport of radionuclides should not be surprising at all. Indeed, the Commission reached the same conclusion in its consideration of whether to require an EPZ for away-from-reactor ISFSIs. *See* Final Rule, Emergency Planning Licensing Requirements for Independent Spent Fuel Storage Facilities (ISFSI) and Monitored Retrievable Storage Facilities (MRS), 60 Fed. Reg. 32,430, 32,431, 32,435 (June 22, 1995).

²⁵ ER at 3-24 to 3-28.

confining layer of red bed clay—which has extremely low permeability—the top of which lies approximately 45-100 feet beneath the proposed site.²⁶ The ER also includes data from several monitoring wells (extending approximately to the top of the red clay) located within and around the proposed CISF site.²⁷ The data show that most of these wells are dry, but a few contain small amounts of saturated gravel (on the order of a few inches to a few feet) perched atop the red bed clay (due to its extremely low permeability).²⁸ The ER further explains that the only regular water-bearing formations (i.e., aquifers) in the general area are the Trujillo Formation (approximately 600 feet below ground surface) and the Santa Rosa Formation (approximately 1,140 feet below ground surface).²⁹ However, the ER also notes that a few “isolated perched lenses” of water exist in certain areas,³⁰ and that the shallowest transmissive zone that contains confined groundwater is approximately “225 feet deep at the site.”³¹

Based on the design of the CISF and the site characteristics, ISP concludes that the storage system design and construction, along with environmental monitoring of the storage pad, combine to make the potential for contaminant release through this system extremely low. And because of several subsurface geological factors, including the low permeability of the red bed clay underlying the site, groundwater at the site would not likely be impacted by any potential releases.³² In summary, the method of storage (dry cask), the canisters themselves, the extremely

²⁶ ER at 3-16, 3-25, 4-28, 4-65.

²⁷ ER at 3-92 (fig. 3.3-1), 3-101 (fig. 3.4-2).

²⁸ *Id.*

²⁹ ER at 3-27.

³⁰ *Id.*

³¹ ER at 3-24. Geochemical data shows no communication with the shallow perched zones of water situated at the top of the red bed clay.

³² ER at 4-29 to 4-30.

low permeability of the red bed clay underlying the site, and the depth to groundwater beneath the site, preclude the possibility of groundwater contamination from the operation of the CISF.³³

C. ISP's November 21, 2019 RAI Response

ISP submitted RAI responses on November 21, 2019, titled “Interim Storage Partners Submission of Responses for RAIs and Associated Document Markups from First Request for Additional Information, Part 3” (“RAI Response”). The NRC uploaded ISP’s submittal to ADAMS on January 6, 2020.³⁴ In response to RAI WR-11, ISP provided a *narrative* summary of the previously-furnished data for the monitoring wells at and near the CISF site, noting that the shallowest groundwater directly below the CISF site was approximately 90 to 100 feet below the site and consisted of sediments with “a few inches to a few feet of saturation.”³⁵ This was not new information because the actual well data was already present in the ER.³⁶ Thus, no corresponding changes to the ER were necessary. On a related matter (as noted above), the ER stated that the shallowest water-bearing zone was “225 feet deep at the site.”³⁷ ISP’s RAI Response revised that statement in the ER to clarify that it pertained, more specifically, to a siltstone/sandstone lense below the neighboring WCS low-level waste facility.³⁸

In RAI WR-3, Staff requested, and ISP provided, certain clarifying information regarding water chemistry data related to surface water near the site known as “Baker Spring.”³⁹ And in RAI WR-6, Staff requested that ISP provide a simplified description of the regional stratigraphic

³³ ER at 3-25.

³⁴ ISP’s Submission of Responses for RAIs and Associated Document Markups from First Request for Additional Information, Part 3 (Nov. 21, 2019) (ML19337B502 (package)) (“RAI Response”).

³⁵ RAI Response, Encl. 3 at 59.

³⁶ ER at 3-92 (fig. 3.3-1).

³⁷ *Id.* at 3-24.

³⁸ RAI Response, Encl. 3 at 59.

³⁹ *Id.* at 33.

column illustrated in SAR figure 2-13. As part of that response, ISP noted that an earlier investigation of the area lacked sufficient boring data to distinguish the contacts between certain sands and gravels in the interlaced subsurface formations (Ogallala, Antlers, and Gatuña).⁴⁰

Fasken now asks the Commission to reopen the adjudicatory proceeding and for leave to file an amended Contention 4 based on its claim that the RAI Response contains new and material information identifying a “significant” environmental issue.⁴¹

III. LEGAL STANDARDS

A. Late-Filed New or Amended Contentions

Given the need for finality in the hearing process,⁴² the Commission “frown[s] on” the filing of new contentions at the eleventh hour of an adjudication.⁴³ Petitioners seeking to amend their original contentions must meet the “good cause” standard in 10 C.F.R. § 2.309(c)(1). Section 2.309(c)(1) states that “good cause” exists only if the petitioner can show: (1) the information upon which the amended or new contention is based was not previously available; (2) the information upon which the filing is based is materially different from information previously available; and (3) the filing has been submitted in a timely fashion based on the availability of the subsequent information.⁴⁴ The petitioner has the burden of demonstrating that any new contention meets the standards in 10 C.F.R. § 2.309(c)(1).⁴⁵

⁴⁰ *Id.* at 45.

⁴¹ *See generally*, Motion to Reopen; Motion for Leave.

⁴² *See, e.g., Private Fuel Storage, LLC*, (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 n.18 (2005) (“Obviously, ‘there would be little hope’ of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings”); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 555 (1978); Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986) (discussing “[p]rinciples of finality” and noting the purpose of the rule is to ensure that finality will attach to the hearing process because “[o]therwise it is doubtful whether a proceeding could ever be completed.”).

⁴³ *Entergy Nuclear Vt. Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 338 (2011) (citation omitted).

⁴⁴ 10 C.F.R. § 2.309(c)(1)(i)-(iii).

⁴⁵ *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260–61 (2009).

B. Reopening

The Commission considers reopening the record to be an “extraordinary” action.⁴⁶ Accordingly, the Commission imposes a “deliberately heavy” burden upon a participant seeking to reopen a closed record.⁴⁷ To meet this burden, 10 C.F.R. § 2.326(a) requires a party seeking to reopen the record to affirmatively show that its motion: (1) was timely filed, (2) concerns a significant safety issue or environmental matter, and (3) demonstrates that, had the newly proffered evidence been considered initially, the Atomic Safety and Licensing Board (“ASLB”) would have reached a materially different result.⁴⁸ As to the second requirement, a movant must affirmatively demonstrate the existence of evidence that (a) is new, (b) is significant, and (c) will paint a “seriously different picture” of the environmental landscape.⁴⁹ Finally, section 2.326(b) requires that:

The motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant’s claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.⁵⁰

⁴⁶ *Vt. Yankee*, CLI-11-2, 73 NRC at 338 (citation omitted).

⁴⁷ *Id.* (quoting *AmerGen Energy Co. LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 674 (2008)). *See also Oyster Creek*, CLI-09-7, 69 NRC at 287 (citing *La. Power & Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986)).

⁴⁸ 10 C.F.R. § 2.336(a); *see Oyster Creek*, CLI-08-28, 68 NRC at 674. *See also Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-3, 75 NRC 132, 143 (2012) (“All of the factors in [10 C.F.R. §] 2.326 must be met in order for a motion to reopen to be granted.”).

⁴⁹ *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 29 (2006) (finding that claimed additional environmental impacts were “not so significant or central to the FEIS’s discussion of environmental impacts that an FEIS supplement (and the consequent reopening of our adjudicatory record) is reasonable or necessary”).

⁵⁰ 10 C.F.R. § 2.326(b).

As the Commission recently noted, “[t]he level of support required for a motion to reopen is greater than that required for a contention under the general admissibility requirements of 10 C.F.R. § 2.309(f)(1).”⁵¹ “Bare assertions and speculation,” even those supplied by an expert in a sworn affidavit, “do not supply the requisite support” for a motion to reopen.⁵² The Commission has held that the “burden of satisfying the reopening requirements is a heavy one, [and] proponents of a reopening motion bear the burden of meeting all of [these] requirements.”⁵³

C. Contention Admissibility

10 C.F.R. § 2.309(f)(1) establishes the “basic criteria that all contentions must meet in order to be admissible.”⁵⁴ That section requires that each contention:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor’s/petitioner’s position on the issue . . . ; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.⁵⁵

⁵¹ *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-17-07, 85 NRC 111, 116 (2017).

⁵² *Oyster Creek*, CLI-08-28, 68 NRC at 674.

⁵³ *Oyster Creek*, CLI-09-7, 69 NRC at 287 (internal quotations omitted).

⁵⁴ *Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 572 (2006). *See also USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 436–37 (2006) (stating that the Commission “will reject any contention that does not satisfy the requirements”).

⁵⁵ 10 C.F.R. § 2.309(f)(1)(i)-(vi).

The Commission has strictly applied these contention admissibility requirements in NRC adjudications.⁵⁶ Failure to comply with any one of these criteria is grounds for the dismissal of a contention.⁵⁷ The requirements are intended to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”⁵⁸ The hearing process is reserved “for genuine, material controversies between knowledgeable litigants.”⁵⁹

Further, a petitioner must do more than assert generally that there are deficiencies in the application. A petitioner must identify all pertinent portions of the document it is challenging and state both the challenged position and the petitioner’s opposing view.⁶⁰ To demonstrate a genuine, material dispute, the petitioner must address the specific analysis in the document and explain how it is incorrect.⁶¹ To show that a dispute is “material,” a petitioner must show that its resolution would make a difference in the outcome of the proceeding.⁶²

IV. THE COMMISSION SHOULD DENY FASKEN’S MOTIONS AND REJECT AMENDED CONTENTION 4 AS INADMISSIBLE

A. Fasken Has Not Satisfied the Commission’s Strict Standards for Late-Filed Contention Amendments

Fasken asserts their “amended contention is based on new information arising from recently submitted ISP responses to requests for additional information (RAIs).”⁶³ Specifically,

⁵⁶ *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006) (citing *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), petition for reconsideration denied, CLI-02-1, 55 NRC 1 (2002)).

⁵⁷ *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). *See also Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016).

⁵⁸ Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

⁵⁹ *FirstEnergy Nuclear Op. Co.* Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC393, 396 (2012) (quoting *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 219 (2003)).

⁶⁰ *Millstone*, CLI-01-24, 54 NRC at 358.

⁶¹ 10 C.F.R. § 2.309(f)(1)(vi).

⁶² *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3) CLI-99-11, 49 NRC 328, 333-34 (1999).

⁶³ Motion for Leave at 1.

Fasken asserts that “ISP has completely revised its description of the groundwater located below the CISF”⁶⁴ and that “descriptions of groundwater location and depth are materially different than descriptions provided before.”⁶⁵ Further, Fasken asserts that ISP has admitted to having “insufficient boring data”⁶⁶ and therefore “[c]learly, the red bed clays [beneath the CISF] will not provide a natural barrier to the groundwater located inches below the site.”⁶⁷ As shown below, these assertions are factually incorrect and significantly mischaracterize the content of the RAI Response. Fasken’s geologist, Aaron Pachlhofer, apparently misunderstands ISP’s RAI Response (and corresponding updates to the ER) and suggests, without reasoned explanation, that they constitute material changes to ISP’s conclusion regarding the possibility of groundwater contamination. Moreover, because the information Fasken relies on is not new, the Motion for Leave is untimely. Accordingly, it should be denied.

1. The Motion for Leave Is Not Based on New and Materially Different Information

In support of its Motion for Leave, Fasken specifically points to allegedly new and materially different information in three specific discussions within the RAI Response. More specifically, Fasken relies on ISP’s discussions regarding RAIs WR-11, WR-6, and WR-3. However, as explained below, none of the information identified by Fasken in these discussions is new or materially different. Thus, its Motion for Leave should be denied.

⁶⁴ *Id.* at 6.

⁶⁵ *Id.* at 7.

⁶⁶ *Id.*

⁶⁷ *Id.* at 16.

a. RAI WR-11

ISP's discussion of Subsurface Hydrology in the ER noted that the shallowest water-bearing zone is about 225 feet deep at the site.⁶⁸ In response to Staff's RAI WR-11, ISP revised the ER to clarify that this statement pertained, more specifically, to a siltstone/sandstone lense below the neighboring WCS facility. ISP's RAI response also explained that:

The shallowest groundwater beneath the proposed CISF footprint is a few inches to a few feet of saturation in the undifferentiated Antlers/Ogallala sediments starting at the northern fence line of the Protected Area in the northeast corner. The sand and gravels containing the water at a 90- to 100- foot depth are part of the hydrostratigraphic unit termed the Antlers/Ogallala/Gatuña (OAG) by ISP joint venture member Waste Control Specialists. The OAG comprises laterally contiguous sands and gravels of the Tertiary Ogallala, Cretaceous Antlers and Cenozoic Gatuña Formations and at the Waste Control Specialists facility this unit is discontinuous and largely dry or unsaturated beneath with Waste Control Specialists facilities.⁶⁹

In its Motion for Leave, Fasken and its geologist apparently misread this statement as a new assertion that groundwater lies "a few inches to a few feet" below the surface of the proposed CISF site. But that is not what this statement says. Even so, Fasken contends that the alleged change in reported groundwater depth—from 225 feet in the ER to "a few inches to a few feet" in the RAI Response—is material to its argument that radiological contamination of groundwater is a credible scenario. As explained below, however, Fasken not only misunderstands the statement in the RAI response but entirely disregards the fact that this information (identifying the precise location, depth, and thickness of groundwater) has long been available in the ER; it has not changed.

First, Fasken repeatedly and selectively quotes the first sentence in the statement above without including the following sentence, which provides important context noting that these

⁶⁸ ER § 3.4.14 (3-24 to 3-29).

⁶⁹ RAI Response, Encl. 3 at 59.

pockets of saturated sediment (each containing a few inches to a few feet of water) are found “at a 90- to 100- foot depth” below the surface. Fasken’s selective quotation creates the misimpression that groundwater lies shovel-depth below the CISF site, which is simply not the case.

Second, this information has long been available in the ER. For example, figure 3.3-1 shows that the surface lies at ground elevation 3500.60 feet and the top of the red bed clay lies at elevation 3413.60 feet for monitoring well PZ-47.⁷⁰ And figure 3.4-2 shows that the groundwater elevation for that same well is 3416.32 feet.⁷¹ Using simple math, an individual—and especially a licensed geologist⁷²—can discern that a pocket of water 2.72 feet deep ($3416.32 - 3413.60$) begins at a depth of 87.0 feet below the surface ($3500.60 - 3413.60$). In other words, although ISP’s RAI Response includes a generalized narrative summary of this information, the *information itself* is not new.

ISP presented information on the presence of a few pockets of saturation (i.e., a few inches to a few feet thick) perched atop the red bed clay (at a depth below the site of approximately 90-100 feet) in ER figures 3.3-1 and 3.4-2,⁷³ and this information has been available to Fasken since before the original deadline for hearing requests and petitions to intervene. Furthermore, ISP revised none of this information in the RAI Response—another indication that nothing in the RAI Response in any way altered this previously-available data.

⁷⁰ ER at 3-92 (fig. 3.3-1).

⁷¹ *Id.* at 3-101 (fig. 3.4-2).

⁷² Fasken submits an Affidavit from Aaron Pachlhofer in support of its Motion to Reopen and Motion for Leave. *See* Affidavit of Aaron Pachlhofer (Jan. 21, 2020) (ML20021A386). Mr. Pachlhofer, who claims he is a licensed geologist, refers to ISP’s data regarding monitoring wells PZ-47 and PZ-57 in his Affidavit. *See id.* at 4. Even so, he inexplicably asserts that ISP’s response to RAI WR-11 presents new information about “**the presence of groundwater ‘a few inches’ beneath the CISF footprint.**” *Id.* at 3, ¶ 2.D (emphasis added).

⁷³ ISP’s RAI Response did include revised versions of these tables, but only to make unrelated changes requested by NRC Staff, such as removing depiction of a cancelled rail line. There were no changes to the well data originally provided in the ER.

ISP made no changes to the well data in figure 3.3-1, which provides data on the depth from the surface to the top of the red bed ridge at each monitoring well location.⁷⁴ ISP also made no changes to figure 3.4-2, which depicts the specific depths and locations of dry and saturated wells below the CISF—and *clearly* depicts the presence of a dry line and the limited presence of water in certain wells in the northeast corner of the CISF site. In summary, Fasken’s repeated erroneous assertion that groundwater sits a few feet to a few inches below the surface of the proposed CISF site is not supported by the RAI response. And information regarding the presence of shallow water at a few wells approximately 90 feet below the CISF site is not new.

Moreover, even if it were new, Fasken makes no attempt to explain how this information would be material to its broader assertion that ISP’s conclusion regarding groundwater impacts is somehow deficient. As the Board explained in rejecting the original Contention 4, Fasken failed to challenge the other independent bases for ISP’s conclusion that groundwater contamination was not a credible scenario.⁷⁵ The information relied on by Fasken in the Motion for Leave *still* fails to challenge these other independent bases—and thus is not material to ISP’s conclusion.

b. RAI WR-6

Fasken also erroneously asserts that ISP “admits that previous descriptions of groundwater were ‘not based on sufficient boring data.’”⁷⁶ Again, Fasken misreads the RAI Response. In fact, ISP’s response to RAI WR-6 discusses the relevance and limitations of an earlier study (specifically, Lehman and Rainwater (2000)) to the Staff’s question regarding the simplification of figures depicting the constituents of the hydrostratigraphic units underlying the

⁷⁴ Compare ER Fig. 3.3-1 to ER Rev. 3 Interim fig. 3.3-1 (submitted as Enclosure 9 to the RAI Response).

⁷⁵ *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 103).

⁷⁶ Motion for Leave at 14 (citing RAI Response at 45 (ISP’s response to RAI WR-6)).

proposed CISF site.⁷⁷ ISP notes that Lehman and Rainwater discussed their difficulty differentiating the similar sands and gravels of the Ogallala, Antlers, and Gatuña formations overlying the red bed clay of the Dockum, and that the wells used in that study were not specifically focused on the proposed CISF site.⁷⁸ This in no way suggests that numerous drillings depicted in ER figures 3.3-1 and 3.4-2 are in any way insufficient to understand the presence or absence of groundwater beneath the CISF (or the complete lack of communication between layers of groundwater, if any, separated by the impermeable red bed clays). Importantly, Fasken makes no assertion that distinguishing the names among the constituent members of the OAG makes any difference whatsoever (“ . . . a sand by any other name . . .”) to consideration of risk of radionuclide contamination of aquifers below. Accordingly, this information is neither new nor material.

c. RAI WR-3

Finally, in RAI WR-3, the Staff noted that ISP characterized a nearby surface water—specifically Baker Spring—as a seasonally intermittent surface water feature sourced by rainfall, rather than a groundwater-sourced spring. Staff requested that ISP explain its conclusion. In response, ISP noted that water chemistry samples from Baker Spring significantly differed from groundwater samples retrieved from monitoring well TP-14.⁷⁹ In its Motion for Leave, Fasken complains that ISP failed to identify the location and aquifer sources of well TP-14, and that the ER’s discussions of groundwater samples from wells are generally insufficient.⁸⁰ To begin with, Fasken’s opportunity to challenge ISP’s characterization of Baker Spring and the sufficiency of

⁷⁷ RAI Response at 45.

⁷⁸ *Id.*

⁷⁹ *See id.* at 33-36.

⁸⁰ Motion for Leave at 8.

the ER's discussion of wells and groundwater samples, generally, has long since expired. The ER, available before the original deadline for contentions, contained this information—which Fasken failed to challenge in its original Petition.

Moreover, Fasken's assertions about the lack of discussion regarding the location and aquifer sources of well TP-14 are patently false. The location of well TP-14 is specifically discussed in ISP's response to RAI WR-3, which states that "TP-14 is located in a playa with occasionally ponded water about 1000 ft east of the proposed CISF facility."⁸¹ The RAI Response also explicitly notes that the TP-14 samples were from the "undifferentiated Ogallala, Antlers and Gatuña Formations." Hence, the allegedly missing information was in fact provided. And to the extent Fasken's assertions could be interpreted as demanding more specific information (e.g., latitude and longitude), they offer no explanation as to how or why this information would make any material difference to their conclusions or undermine the conclusion of ISP's water chemistry analysis.

Ultimately, the Motion for Leave identifies no information that is new and materially different from previously-available information, and therefore should be denied.

2. The Motion for Leave Is Untimely

Fasken claims the Motion for Leave is timely because they filed the pleading within 30 days of ISP's RAI Response being posted on the NRC's ADAMS website. But Fasken confuses the date of publication of the RAI Response with the question of whether the *information* in that RAI Response was previously available. As noted above, Fasken's Motion for Leave identifies no information that is genuinely new or materially different than previously-available information. Accordingly, the Motion for Leave is untimely. This logical result should not

⁸¹ RAI Response at 34.

surprise Fasken given the Board’s ruling in LBP-19-11, in which the Board rejected another petitioner’s assertion that the republication by the Nuclear Waste Technical Review Board of previously-available information somehow met the timeliness element of good cause.⁸² Fasken’s Motion for Leave is untimely for the same reason and should be denied.

B. Fasken Has Not Satisfied the Commission’s Strict Reopening Standards

For many of the same reasons discussed above, Fasken’s Motion to Reopen fails to satisfy the Commission’s deliberately high standards for reopening a closed record. More specifically, it is untimely, fails to identify a “significant” environmental issue, and fails to demonstrate that the Board would have reached a different conclusion. Thus, it likewise should be denied.

1. The Motion to Reopen Was Not Timely Filed

As with its Motion for Leave, Fasken claims its Motion to Reopen is timely because it was filed within 30 days of ISP’s RAI Response being posted on the NRC’s ADAMS website. But, as noted above, Fasken has identified no information that is genuinely new or materially different than previously-available information. Accordingly, the Motion to Reopen is untimely and should be denied for the same reason the Motion for Leave should be denied.

2. The Motion to Reopen Fails to Identify a “Significant” Environmental Matter

In determining whether an environmental matter is “significant” for purposes of reopening a closed record, the Commission applies the same standard it uses to determine whether an Environmental Impact Statement (“EIS”) must be updated: there must be new and significant information that will “paint a ‘seriously different picture of the environmental

⁸² See ISP, LBP-19-11, 90 NRC __ (slip op. at 4-9).

landscape.”⁸³ As explained above, the information cited by Fasken in its Motion for Leave is either not new or not materially different from information previously available in this proceeding. Notably, Fasken’s Motion to Reopen relies on the same information. Thus, for the same reasons articulated in Section IV.A above, Fasken’s Motion to Reopen also fails to identify any new and significant information generally—much less does it identify new and significant information that paints a *seriously different picture of the environmental landscape*. Thus, it should be denied on the same grounds.

In addition to the arguments raised in its Motion for Leave, Fasken presses one additional claim in its Motion to Reopen. More specifically, Fasken argues that “any calculations” and “any safety and environmental reports, data, and analysis” that were based on the groundwater discussion in the ER “cannot be relied on” and should be “considered faulty.”⁸⁴ However, despite the explicit requirement in 10 C.F.R. § 2.326 that “the movant must identify *with particularity* each issue it seeks to litigate,” Fasken fails to identify any *specific* calculations, reports, data, or analysis that allegedly are defective. And to the extent ISP’s RAI Response provided clarifications to the information in the ER, Fasken offers no explanation as to how these (unspecified) calculations, reports, data, and analyses somehow remain insufficient, given that the clarifications in the RAI Response (and corresponding ER revisions) are now part of the docketed record. Ultimately, Fasken identifies no information that is both new and significant and fails to explain how such unidentified information paints a *seriously different picture of the environmental landscape*. Thus, the Motion to Reopen does not identify a “significant” environmental issue and must be rejected pursuant to 10 C.F.R. § 2.326.

⁸³ PFS, CLI-06-3, 63 NRC at 29 (finding that claimed additional environmental impacts were “not so significant or central to the FEIS’s discussion of environmental impacts that an FEIS supplement (and the consequent reopening of our adjudicatory record) is reasonable or necessary”).

⁸⁴ Motion to Reopen at 8.

3. The Motion to Reopen Fails to Demonstrate That the Board Would Have Reached a Materially Different Result

Fasken's original Contention 4 claimed that ISP failed to adequately discuss and evaluate the potential for the CISF site to contaminate aquifers and groundwater formations. However, ISP's SAR and ER explain that such a scenario is precluded on multiple independent grounds. For example, the SAR cites "[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."⁸⁵ To demonstrate a credible pathway to groundwater, *all four* of these impediments must be overcome. The Board found the original contention inadmissible, among other reasons, because Fasken failed to challenge ISP's conclusion that the method of storage and the nature of the canisters preclude any credible pathway for groundwater contamination.⁸⁶ Fasken's Motion to Reopen *still* fails to challenge these conclusions—both of which provide independent bases on which to reject the amended contention for failing to demonstrate a genuine material dispute with ISP's application. Thus, Fasken's Motion to Reopen fails to affirmatively "demonstrate" that the Board somehow would have reached a materially different conclusion regarding the admissibility of a contention that *still* fails to address the Board's original reasons for rejecting it. Accordingly, the Commission should summarily deny the Motion to Reopen.

C. Fasken's Amended Contention Four Is Inadmissible

Because Fasken's proposed amendment fails to address any of the reasons for rejecting the original contention noted by the Board in LBP-19-7, Fasken's amended Contention 4 remains inadmissible. In the proposed amendment, Fasken asserts, without elaboration, that "the red bed clays will not provide a natural barrier to groundwater located inches below the site" and that ISP

⁸⁵ ISP, LBP-19-7, 90 NRC at __ (slip op. at 102) (citing SAR at 2-21).

⁸⁶ *Id.* at __ (slip op. at 102).

must “re-analyze the impact to the actual groundwater.”⁸⁷ As noted by the Board previously, the proposed contention failed to meet the factual basis requirement of 10 C.F.R. § 2.309(f)(1)(v) in that Fasken relies on an impact from “large, fully-fueled aircrafts” as a credible initiating event. Nothing in the proposed amendment cures this deficiency.

Fasken’s amended contention also still fails to satisfy 10 C.F.R. § 2.309(f)(1)(vi).

Significantly, the Board previously noted:

Because Fasken has not challenged ISP’s determination that the facility’s design precludes a pathway to groundwater contamination, Fasken’s claims about ISP’s characterization and evaluation of groundwater formation do not raise a genuine dispute on a material issue, as required by 10 C.F.R. § 2.309(f)(1)(vi). Absent a pathway to groundwater contamination, Fasken’s claims are not material because their resolution would make no difference in the outcome of the licensing proceeding.⁸⁸

In the proposed amendment at issue here, Fasken offers nothing—whatsoever—to address this deficiency. ISP’s RAI Response did not change the SAR discussion referenced in the Board’s conclusion: “In its SAR [SAR at 2-21], ISP describes four **independent** reasons why [contamination of groundwater] should not happen: ‘[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.’”⁸⁹ Notwithstanding Fasken’s failure to identify any new or material information regarding the permeability of the red bed clay or the depth of groundwater, the amended contention also fails to address the Board’s *other* independent bases (i.e., the method of dry storage and the nature of the canisters) for rejecting the original contention. Thus, the amended contention still fails to satisfy 10 C.F.R. § 2.309(f)(1)(vi). As the Board concluded “Absent a pathway to groundwater contamination, Fasken’s claims are not material because their resolution

⁸⁷ Motion for Leave at 16.

⁸⁸ ISP, LBP-19-7, 90 NRC __ (slip op. at 103).

⁸⁹ *Id.* at __ (slip op. at 102).

would make no difference in the outcome of the licensing proceeding.” The proposed amendment does not alter this fundamental failure and is inadmissible for exactly the same reasons articulated by the Board in LBP-19-7.⁹⁰

V. CONCLUSION

For the reasons set forth above, the Commission should deny Fasken’s Motions for failure to meet the requirements of 10 C.F.R. §§ 2.326 and 2.309(c)(1) and reject Contention 4 as inadmissible under 10 C.F.R. § 2.309(f)(1).

Respectfully submitted,

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Dated in Washington, D.C.
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Executed in Accord with 10 C.F.R. § 2.304(d)

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⁹⁰ In its Motion for Leave, Fasken includes a purported “amendment” to its Appeal of LBP-19-17 (specifically on the denial of the original contention 4). See Motion to Leave at 17-22. This section of the Motion makes no logical sense and contradicts the Commission’s pleading rules. First, appeals must be based on the record underlying the challenged decision, not on any allegedly new information introduced into the record of the proceeding *after* the decision was issued. See *USEC, Inc.* (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006); *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 140 (2004). Moreover, Fasken’s purported “amendment” amounts to an untimely and unauthorized reply pleading. Accordingly, the Commission should exercise its supervisory authority to strike this portion of the Motion from the record of this proceeding.

BEFORE THE COMMISSION

February 18, 2020

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