

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

INTERIM STORAGE PARTNERS LLC

(WCS Consolidated Interim Storage Facility)

Docket No. 72-1050

NRC STAFF'S ANSWER IN OPPOSITION TO FASKEN OIL AND RANCH, LTD AND
PERMIAN BASIN LAND AND ROYALTY OWNERS' AMENDED CONTENTION 4 AND
ACCOMPANYING MOTION TO REOPEN THE RECORD

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February 13, 2020

TABLE OF CONTENTS

Table of Contents	ii
Table of Authorities.....	iii
Introduction	1
Background	2
Discussion.....	4
I. Applicable Legal Standards	4
A. Legal Requirements for New or Amended Contentions	4
B. Legal Requirements for Contention Admissibility	4
C. Legal Requirements for Motions to Reopen.....	5
II. The Commission Should Deny Fasken's Amended Contention and Motion to Reopen the Record Because it is Untimely, Fails to Meet the Standards of Contention Admissibility, and Fails to Meet the Reopening Standards	6
A. Fasken's Amended Contention is Inexcusably Late.....	6
B. Fasken Fails to Demonstrate Amended Contention 4's Admissibility.....	8
C. Fasken's Reopening Motion Fails to Satisfy the Requirements to Reopen a Closed Record.....	12
1. Fasken's Reopening Motion Is Untimely	12
2. Fasken's Reopening Motion Does Not Address a Significant Environmental Issue...	12
3. Fasken's Reopening Motion Does not Demonstrate that a Materially Different Result Would be Likely	13
Conclusion	13

TABLE OF AUTHORITIES

Commission Decisions

<i>AmerGen Energy Co. (Oyster Creek Nuclear Generating Station),</i> CLI-06-24, 64 NRC 111 (2006).....	5
<i>AmerGen Energy Co. (Oyster Creek Nuclear Generating Station),</i> CLI-09-7, 69 NRC 235 (2009)	4
<i>Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3),</i> CLI-01-24, 54 NRC 349 (2001)	5
<i>Dominion Nuclear Connecticut, Inc. (Millstone Power Station, Unit 3),</i> CLI-09-5, 69 NRC 115 (2009)	6
<i>Entergy Nuclear Operations, Inc. (Indian Point, Unit 2),</i> CLI-16-5, 83 NRC 131 (2016)	6
<i>Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.</i> (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333 (2011)	6
<i>Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation),</i> CLI-99-10, 49 NRC 318 (1999).....	6
<i>Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation),</i> CLI-04-22, 60 NRC 125 (2004)	12
<i>USEC Inc. (American Centrifuge Plant),</i> CLI-06-9, 63 NRC 433 (2006).....	5
<i>Virginia Electric and Power Co. (North Anna Power Station, Unit 3),</i> CLI-12-14, 75 NRC 692 (2012)	4, 12
<i>Yankee Atomic Elec. Co. (Yankee Nuclear Power Station),</i> CLI-96-1, 43 NRC 235 (1996)	10

Atomic Safety and Licensing Board Decisions

<i>Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station),</i> LBP-06-14, 63 NRC 568 (2006)	5
<i>Florida Power & Light Company (Turkey Point Nuclear Generating Plant, Units 3 & 4),</i> LBP-16-6, 83 NRC 329 (2016).....	12
<i>Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, GA),</i> LBP-95-6, 41 NRC 281(1995).....	11
<i>Interim Storage Partners LLC (WCS Consolidated Interim Storage Facility),</i> LBP-19-07, 90 NRC __ (Aug. 23, 2019) (slip op.).....	<i>passim</i>
<i>Interim Storage Partners LLC (WCS Consolidated Interim Storage Facility),</i> LBP-19-9, 90 NRC __ (Nov. 18, 2019) (slip op.).....	3

<i>Interim Storage Partners</i> (WCS Consolidated Interim Storage Facility), LBP-19-11, 90 NRC __ (Dec. 13, 2019) (slip op.).....	3
<i>Shaw AREVA MOX Services</i> (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460 (2008).....	6

Regulations

10 C.F.R. § 2.309(c)(1).....	1, 4
10 C.F.R. § 2.309(f)(1)	1, 5
10 C.F.R. § 2.326.....	passim

Other Authorities

Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004)	5
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Introduction

The U.S. Nuclear Regulatory Commission Staff (Staff) hereby answers Fasken Oil and Ranch, LTD and Permian Basin Land and Royalty Owners' (Fasken) Request to Amend Fasken's Contention 4 along with the accompanying Motion to Reopen.¹ For the reasons set forth below, the Amended Contention and accompanying Motion fail to meet the contention admissibility standards set forth in 10 C.F.R. §§ 2.309(c)(1) and § 2.309(f)(1), and the requirements of 10 C.F.R. § 2.326 for reopening the record in this proceeding.

¹ Fasken Oil and Ranch, LTD and Permian Basin Land and Royalty Owners Motion for Leave to Amend Contention Four Regarding Interim Storage [Partners'] New Description of Groundwater Located Below the Site and the Potential Impact the Site Will Have on the Groundwater (Jan. 21, 2020) (Adams Accession No. ML20021A385) (Amended Contention); 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); *see also* Affidavit of Aaron Pachlhofer (Jan. 21, 2020) (ML20021A386) (Pachlhofer Affidavit).

Background

In April 2016, Waste Control Specialists LLC (WCS) applied to the Nuclear Regulatory Commission (NRC) for a license to construct and operate a consolidated interim storage facility (CISF) for spent nuclear fuel and greater-than-Class C waste in Andrews County, Texas.² A year later, WCS asked the NRC to suspend consideration of its application, and WCS and the NRC staff then jointly requested that the pending hearing opportunity be withdrawn.³ Thereafter, WCS created a joint venture with Orano CIS LLC to form Interim Storage Partners LLC (ISP).⁴

In June 2018, ISP submitted a revised license application,⁵ and the NRC published a *Federal Register* notice that permitted interested members of the public to request a hearing and petition to intervene.⁶ Fasken submitted a timely hearing request,⁷ as did several other

² Waste Control Specialists LLC, Application for a License for a Consolidated Interim Spent Fuel Storage Facility (Apr. 28, 2016) (ML16133A100).

³ Joint Request to Withdraw the *Federal Register* Notice Providing an Opportunity to Submit Hearing Requests (Apr. 19, 2017) (ML17109A480) (attaching letter to NRC Document Control Desk from Rod Baltzer, WCS (Apr. 18, 2017)).

⁴ Interim Storage Partners LLC License Application, Docket 72-1050, Andrews County, Texas, (rev. 2 July 2018) at 1-1, 1-4 (ML18206A483).

⁵ Letter from Jeffery Isakson, ISP, to Document Control Desk, NRC, *Submittal of License Application Revision 2 and Request to Restart Review of Application for Approval of the WCS CISF, Docket 72-1050* (June 8, 2018) (ML18166A003). Letter from Jeffery Isakson, ISP, to Document Control Desk, NRC (July 19, 2018) (ML18206A482) (updated submittal).

⁶ Interim Storage Partner's Waste Control Specialists Consolidated Interim Storage Facility, Revised License Application; Opportunity to Request a Hearing and to Petition for Leave to Intervene; Order Imposing Procedures, 83 Fed. Reg. 44,070, 44,070–75 (Aug. 29, 2018), corrected, 83 Fed. Reg. 44,680 (Aug. 31, 2018) (correcting the deadline date for petitioners to request a hearing to October 29, 2018). The Secretary of the Commission later extended this deadline to November 13, 2018. Order of the Secretary (Oct. 25, 2018) (ML18298A335) at 2 (unpublished).

⁷ *Petition of Permian Basin Land and Royalty Organization and Fasken Land and Minerals for Intervention and Request for Hearing* (Oct. 29, 2018)(ML18302A412).

petitioners. After briefing, the Board heard oral argument in Midland, Texas, concerning the petitioners' standing and the admissibility of their contentions.⁸

In LBP-19-07, the Board denied Fasken's hearing request and the hearing requests of all other petitioners except Sierra Club.⁹ Although the Board concluded that Fasken had not proffered an admissible contention, the Board found that Fasken had established standing.¹⁰ Thereafter, the Board dismissed Sierra Club's sole admitted contention.¹¹ Before the Board dismissed Sierra Club's contention, one of the other petitioners, Sustainable Energy and Economic Development Coalition (SEED), submitted a motion to file a late-filed contention,¹² which the Board denied, thereby terminating the proceedings.¹³ Fasken's appeal of LBP-19-07, as well as the appeals of other petitioners (including Sierra Club and SEED) and ISP, is now pending with the Commission.¹⁴

On November 21, 2019, ISP submitted its responses to Staff requests for additional information (RAIs), which included ISP's descriptions of the subsurface located below and

⁸ Licensing Board Notice and Order (Establishing Dates and Location of Oral Argument) (May 24, 2019)(ML19144A114) at 1 (unpublished).

⁹ *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-07, 90 NRC ___, ___ (Aug. 23, 2019) (slip op. at 2).

¹⁰ *Id.* (slip op. at 20, 106).

¹¹ *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-9, 90 NRC ___, ___ (Nov. 18, 2019) (slip op. at 1, 5).

¹² Motion of Intervenor Sustainable Energy and Economic Development Coalition for Leave to File Late-Filed Contention, and Contention 17 (Oct. 23, 2019) (ML19297A226).

¹³ *Interim Storage Partners* (WCS Consolidated Interim Storage Facility), LBP-19-11, 90 NRC ___, ___ (Dec. 13, 2019) (slip op. at 1, 90).

¹⁴ See e.g. Fasken And PBLRO's Brief on Appeal of LBP-19-07 (Sept. 17, 2019) (ML19260J386); see also NRC Staff's Answer in Opposition to the Appeal of Fasken Land and Minerals, Ltd, and the Permian Basin Land and Royalty Owners of LBP-19-07 (Oct. 15, 2019) (ML19288A224).

around the proposed CISF.¹⁵ Fasken now seeks to reopen the record and amend its previously rejected Contention 4 based on ISP's most recent response to RAIs.¹⁶

Discussion

I. Applicable Legal Standards

A. Legal Requirements for New or Amended Contentions

New or amended contentions submitted after the initial date for hearing requests must meet the requirements of 10 C.F.R. § 2.309(c)(1). To do so, a party must demonstrate good cause by showing that the following three conditions are met:

- (i) The information upon which the filing is based was not previously available;
- (ii) The information upon which the filing is based is materially different from information previously available; and
- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

The petitioner has the burden of demonstrating that any new contention meets the standards in 10 C.F.R. § 2.309(c)(1).¹⁷

B. Legal Requirements for Contention Admissibility

10 C.F.R. § 2.309(f)(1) establishes the “basic criteria that all contentions must meet in order to be admissible.”¹⁸ Pursuant to that section, a contention must:

¹⁵ Interim Storage Partners Submission of Responses for RAIs and Associated Document Markups from Request for Additional Information, Part 3 (November 21, 2019) (ML19337B502) (Nov 2019 RAI Responses). While the responses were submitted to the NRC Staff on November 21, 2019, the package containing the responses was not publicly available until January 6, 2020.

¹⁶ Amended Contention; Motion; *see also* Pachlhofer Affidavit. Fasken expresses uncertainty as to whether it should be filing before the Board or the Commission. Motion at 2. When the Board denied the last remaining contention, its jurisdiction terminated. Thus, the filing is properly before the Commission. *See Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 701 (2012).

¹⁷ *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260–61 (2009).

¹⁸ *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 571–72 (2006); *see also USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 436–37

- (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, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and
- (vi) provide information sufficient to show that a genuine dispute with the applicant/licensee exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case of an application that is asserted to be deficient, the identification of such deficiencies and supporting reasons for this belief.¹⁹

The Commission has strictly applied these contention admissibility requirements in NRC adjudications.²⁰ Failure to comply with any one of these criteria is grounds for the dismissal of a contention.²¹ The requirements are intended to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”²²

C. Legal Requirements for Motions to Reopen

Pursuant to 10 C.F.R. § 2.326(a), a petitioner seeking to open a closed record must show that its motion:

(1) is timely, however, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented; (2) addresses a significant safety or

(2006) (stating that the Commission “will reject any contention that does not satisfy the requirements”).

¹⁹ 10 C.F.R. § 2.309(f)(1).

²⁰ *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 recons. denied*, CLI-02-1, 55 NRC 1 (2002)).

²¹ *Private Fuel Storage, LLC* (Independent 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).

²² Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

environmental issue; and (3) demonstrates that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.²³

A motion to reopen the record must also meet the contention admissibility requirements of 10 C.F.R. § 2.309(f).²⁴ Thus, a motion to reopen the record supported by a new or amended contention may be considered timely if filed within 30 days of the date upon which the new information is available.²⁵ Reopening the record is “an extraordinary action” and thus the Commission imposes a “deliberately heavy” burden upon an intervenor who seeks to supplement the evidentiary record after it has been closed, even with respect to an existing contention.²⁶

II. The Commission Should Deny Fasken’s Amended Contention and Motion to Reopen the Record Because it is Untimely, Fails to Meet the Standards of Contention Admissibility, and Fails to Meet the Reopening Standards

Fasken’s Amended Contention and supporting Motion must be denied because they are (A) inexcusably late; (B) fail to meet the contention admissibility standards; and (C) fail to meet the reopening standards.

A. Fasken’s Amended Contention is Inexcusably Late

Fasken’s attempt to amend its contention should be denied because it is inexcusably late. Fasken asserts that ISP’s November 2019 RAI Responses contained new information because they included different “descriptions of the subsurface” below ISP’s proposed CISF. Specifically, Fasken claims that ISP’s Environmental Report (ER) is insufficient because the ER

²³ 10 C.F.R. § 2.326(a).

²⁴ See *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-09-5, 69 NRC 115, 124 (2009).

²⁵ See *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).

²⁶ *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 337–38 (2011).

previously stated that the shallowest water-bearing zone at the WCS site is at a depth of 225 feet. In Fasken's view, ISP now "admits" in its RAI responses that the "shallowest groundwater" beneath the CISF is "a few inches to a few feet," and that the previous boring descriptions were "not based on sufficient boring data."²⁷ Fasken's Amended Contention is untimely because it is not based on information that is materially different from what was previously available, as required by 10 C.F.R. § 2.309(c)(1)(ii).

Fasken's Amended Contention is not based on materially different information because the applicable subsurface and hydrological formation information included in ISP's November 2019 RAI Responses is the same information that has been in ISP's ER and Safety Analysis Report (SAR) since 2016. For example, in the 2016 ER, Figure 3.4-2 provides the elevation of the water levels in the area, and Figure 3.3.1 provides monitoring well data showing the relevant saturated level of "a few inches to a few feet" of water, *at a depth of between eighty and one hundred feet below the ground surface*.²⁸ This information is also consistent with ISP's RAI responses provided to the NRC in June 2019.²⁹ Fasken attempts to portray the information as new, implying that the statement "a few inches to a few feet" is referring to the distance from the surface to the groundwater. But this rests on an inaccurate reading of the application; that

²⁷ Amended Contention at 13 n.40, 14 (citing SAR 2-21, Nov 2019 RAI Responses, Enclosure 3, WR-6 at 45-46, WR-11 at 59 (ML19337B505)).

²⁸ Waste Control Specialists, LLC, Consolidated Interim Spent Fuel Storage Facility Environmental Report, Rev. 0, Chapter 3, 2 of 2. (Apr. 28, 2016) Figure 3.4-2 at 3-99 (ML16133A141); Waste Control Specialists, LLC, Consolidated Interim Spent Fuel Storage Facility Environmental Report, Rev. 0, Chapter 3, 1 of 2. (Apr. 28, 2016) Figure 3.3-1 at Page 3-90 (ML16133A139); *see also* Waste Control Specialists, Consolidated Interim Storage Facility System Safety Analysis Report, Rev. 0, Chapter 2, Part 1 of 21 (Apr. 28, 2016), Figure 2-10 at 2-50 (ML16133A109) (same as ER Figure 3.4.2; Waste Control Specialists, Consolidated Interim Storage Facility System Safety Analysis Report, Rev. 0, Chapter 2, Part 2 of 21 (Apr. 28, 2016), Figure 2-15 at 2-61 (ML16133A110) (same as ER Figure 3.3.1).

²⁹ WCS Consolidated Interim Storage Facility Safety Analysis Report, Rev. 3, Enclosure 5 to E-54422, (June 28, 2019), Figure 2-10 at 2-77, Figure 2-37 at 2-110 (ML19190A187) (Figure 2-37 in the June 2019 response is identical to Figure WR 6-1 in the 2019 November RAI Responses stating that there is a saturation of one to five feet of water, at a depth 90-100 feet below the surface).

statement is describing the extent of the water saturation, not its depth from the surface.

Consistent with ISP's 2016 ER and SAR and June 2019 RAI Responses, the November 2019 RAI Response demonstrates that the shallowest groundwater near the ISP site is found at a depth of "90 to 100 feet below the northeast part of the ISP boundary" and contains "a few inches to a few feet of water" saturation.³⁰

Further, ISP has not changed its description in the application that the shallowest aquifer in the area is located at a depth of approximately 225 feet below the surface.³¹ Fasken appears to misunderstand the difference between the depth to the "shallowest groundwater," which is located around 90 feet below the surface in a mostly unsaturated layer of gravel and sand, and the depth to the shallowest "water bearing zone" which refers to an aquifer, here located at around 225 feet below the surface and separated from the small pocket of groundwater by a layer of impermeable clay that water does not pass through. Because the site characterization information Fasken claims is "new" in the November 2019 RAI Responses does not differ from what was in the ER and SAR as early as 2016, Fasken has not shown that the information is materially different from that previously available and has therefore failed to meet the section 2.309(c) standard.

B. Fasken Fails to Demonstrate Amended Contention 4's Admissibility

In Fasken's Amended Contention 4, Fasken reiterates many of its concerns about ISP's asserted failure to adequately evaluate the potential for radiological and other environmental

³⁰ November 2019 RAI Responses, Enclosure 3, WR-11 at 59 (ML19337B505).

³¹ *Compare* Waste Control Specialists, LLC, Consolidated Interim Spent Fuel Storage Facility Environmental Report, Rev. 0, Chapter 3, 1 of 2. (Apr. 28, 2016) § 3.4.14 at 3-24 (ML16133A139) (shallowest water bearing zone is about 225 feet deep at the WCS CISF) *with* November 2019 RAI Response, Enclosure 9 - Environmental Report Changed Pages, § 3.4.14 at 3-27 (ML19337B517) (same).

impacts.³² These claims were part of Fasken's original contention and have already been considered by the Board and found inadmissible.³³ For example, Fasken reiterates its concerns about the release of contamination from an airplane crash, and that a fracture in the impervious clay "may provide a direct pathway" to groundwater.³⁴ However, the Board already found that these claims are not material because Fasken failed to show that the release of contamination from an airplane crash is a credible scenario, and because Fasken failed to challenge ISP's assessment that (1) the dry cask storage method, (2) the nature of the canisters, (3) the extremely low permeability of the red clay, and (4) the depth of the groundwater each independently precluded any credible pathway for groundwater contamination.³⁵

In its Amended Contention, Fasken also claims that ISP's ER is insufficient to satisfy 10 C.F.R. § 51.45 because, in Fasken's view, ISP's November 2019 RAI Responses stated that the shallowest groundwater beneath the CISF is "present within a few inches to a few feet" of the northern portion of the site and that previous groundwater descriptions are "not based on sufficient boring data."³⁶ Furthermore, Fasken claims that ISP's response to RAI WR-2 provides new details regarding playas and that ISP's response to RAI WR-5 demonstrates that some wells near the site may draw groundwater from formations less than 200 feet deep.³⁷ (Playas

³² Amended Contention at 11.

³³ *Interim Storage Partners LLC*, LBP-19-07, 90 NRC __ (slip op. at 102).

³⁴ Amended Contention at 15.

³⁵ *Interim Storage Partners LLC*, LBP-19-07, 90 NRC __ (slip op. at 102-03).

³⁶ Amended Contention at 15-16. To the extent Fasken is also seeking to amend its pending appeal of the Board's rejection of its original Contention 4, see Amended Contention at 19, such a request is impermissible, as the proposed revisions are manifestly based on factual claims that were not raised before the Board. See *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 235, 260 (1996) (rejecting an argument raised for the first time on appeal, which did not satisfy the factors for admission of late-filed contentions, on that basis alone).

³⁷ Affidavit at 4; see November 2019 RAI Responses, Enclosure 3, WR-2 at 32, WR-5 at 41. While these claims are mentioned in the Pachlhofer Affidavit, they are not directly explained in the Amended Contention or Motion. In any event, because neither claim disputes the application's bases for concluding that there is no credible pathway to groundwater contamination, they provide no basis for

are small internally-drained basins that occasionally hold water after relatively large precipitation events; however, the ponded water rapidly dissipates through infiltration, evaporation, and plant-uptake.)³⁸

Fundamentally, each of these asserted bases for amending the contention relies on Fasken's mistaken premise that ISP's November 2019 RAI Responses entail materially different information regarding the depth of groundwater at the site. As explained above, ISP's reference to "few inches to a few feet" of groundwater in the northern area surrounding the ISP site is describing saturation located at a depth of between ninety and one hundred feet, not a few inches to a few feet from the surface. Similarly, ISP's RAI response regarding playas is consistent with the application's explanation of playas, it states that "[w]hen precipitation rates exceed infiltration capacity, there is occasional ponding in the small, closed-drainage playas, which are typically a few acres or less in size. Ponded water depth in the playas is between a few inches and a few feet, with the water evaporating and infiltrating normally within a few days or weeks. The playas are typically dry throughout the year."³⁹ Fasken's misunderstanding of ISP's RAI responses cannot support an admissible contention.⁴⁰

Fasken also asserts that ISP has stated that previous descriptions of groundwater "were not based on sufficient boring data."⁴¹ In fact, the RAI response from ISP simply explains that more boring wells would be needed to distinguish between the Antlers and Ogallala geologic

an admissible contention for the same reasons the Board gave when it rejected Contention 4 in LBP-19-07.

³⁸ ISP Environmental Report, Rev. 2, page 3-19 (July 19, 2018)(ML18206A519).

³⁹ November 2019 RAI Responses WR-2.

⁴⁰ See *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, GA), LBP-95-6, 41 NRC 281, 300 (1995) (a petitioner's imprecise reading of a reference document, or typographical errors in that document, cannot serve to generate an issue suitable for litigation).

⁴¹ Amended Contention at 14.

formations around the proposed CISF site because the formations “most likely interfinger.”⁴² Setting aside that Fasken has misunderstood (and thus failed to show a material dispute with) ISP’s description of the depth at which groundwater may occur at the site, Fasken does not demonstrate why its complaint about well boring data, regardless whether the Antlers and Ogallala formations intersect, could represent a credible pathway to groundwater contamination. But, as the Board found in LBP-19-07, ISP provided information on well borings and multiple explanations as to why there is no credible pathway for groundwater contamination at the site, and Fasken has not addressed those portions of the application. As a result, Fasken’s claim presents nothing to alter the logic of the Board’s previous determination that Contention 4 fails to identify a material dispute with the application.

In summary, Fasken’s Amended Contention is not admissible because, even assuming *arguendo* that Fasken was correct regarding what the RAI responses stated, Fasken still has failed to raise a material dispute with ISP’s assessment that its dry cask storage method and nature of the canisters preclude any credible pathway for groundwater contamination.⁴³

⁴² November 2019 RAI Responses, WR-8 at 53.

⁴³ *Interim Storage Partners LLC*, LBP-19-07, 90 NRC ___, __ (slip op. at 102-03). Fasken appears to assert for the first time in the Pachlhofer Affidavit that the spent fuel storage containers could be affected by chloride stress corrosion cracking, and that “WCS/ISP has no way of inspecting the canisters once installed in the CISF.” Affidavit at 5-6. These claims are not otherwise explained in the Amended Contention or Motion, but in any event are unquestionably both untimely and otherwise inadmissible. Fasken does not even attempt to argue how either claim is based on previously unavailable information and could not have been raised at the outset of the proceeding. The Affidavit does not specify the factual basis for several of the assertions supporting these claims, and the only referenced sources for which the Affidavit identifies a date are from 2012, years before the intervention deadline. Nor does the Affidavit reference any portion of the application that it disputes regarding canister integrity and inspection. Further, the Commission has already determined that cracked canisters are not a credible scenario, and the Board has already found that such a claim is outside the scope of this proceeding as an improper challenge to the NRC Part 72 cask certificates of compliance. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125,136–37 (2004); *Interim Storage Partners LLC*, LBP-19-07, 90 NRC at __ (slip op. at 57-58).

C. Fasken's Reopening Motion Fails to Satisfy the Requirements to Reopen a Closed Record

Fasken's Motion fails to satisfy the requirements in 10 C.F.R. § 2.326(a)(1), (2), and (3), for reopening the record.⁴⁴ Specifically, it is (1) untimely, (2) fails to address a significant safety issue, as required by 10 C.F.R. § 2.326(a)(2), and (3) fails to demonstrate that a "materially different result would be or would have been likely" as required by 10 C.F.R. § 2.326(a)(3).

1. Fasken's Reopening Motion Is Untimely

As discussed above in Section II.A, Fasken's Amended Contention and supporting Motion are untimely because the groundwater description on which they are based is not materially different from what was publicly available in ISP's application in 2016. While the Commission may excuse untimeliness for an "exceptionally grave issue,"⁴⁵ Fasken does not address that standard and has not provided information that would support such a finding. Accordingly, Fasken's Motion should be rejected as untimely.

2. Fasken's Reopening Motion Does Not Address a Significant Environmental Issue

As discussed above, Fasken has failed to show there is a potential pathway for groundwater contamination and therefore has not established the existence of a significant environmental issue. While Fasken asserts that ISP's November RAI responses provide new groundwater data that place into doubt the ER's analysis of groundwater impact, Fasken's claim is based on a misreading of the application. As explained above, and as stated in the 2016 ER, as well as the November RAI responses, ISP stated that the shallowest groundwater is 90 – 100

⁴⁴ See *North Anna*, CLI-12-14, 75 NRC at 701-03.

⁴⁵ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-16-6, 83 NRC 329, 332-33 (2016).

feet below surface level in the northern section of the ISP boundary, not “a few inches to a few feet” from the surface.

Moreover, as explained above, Fasken has not articulated a plausible scenario in which damage to stored casks would result in releases of contaminants, or in turn contamination of groundwater. Accordingly, Fasken has not demonstrated that it has raised a material dispute, let alone a significant environmental issue, and the Motion should be rejected.

3. Fasken’s Reopening Motion Does not Demonstrate That a Materially Different Result Would be Likely

Fasken has failed to demonstrate how granting its Motion would likely result in a material change in the outcome of the proceeding as required by 10 C.F.R. § 2.326(a)(3). As demonstrated above, its Amended Contention either depends on its inaccurate reading of the application or reiterates arguments that the Board already considered and found to be unsupported, immaterial, or entirely outside the scope of the proceeding.

For these reasons, Fasken’s Motion fails to satisfy the requirements of 10 C.F.R. § 2.326(a).

Conclusion

In sum, Fasken’s Amended Contention Four and accompanying Motion fail to satisfy the 10 C.F.R. § 2.326 criteria for reopening the record, the 10 C.F.R. § 2.309(c)(1) criteria for contentions filed after the time for filing initial petitions has passed, and the 10 C.F.R. § 2.309(f)(1) criteria for contention admissibility. Therefore, the Amended Contention and Motion should be dismissed.

Respectfully submitted,

/Signed (electronically) by/

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

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Dated in Rockville, MD
this 18th day of February 2020

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

INTERIM STORAGE PARTNERS LLC

(WCS Consolidated Interim Storage Facility)

Docket No. 72-1050

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC Staff's Answer in Opposition to Fasken's Amended Contention 4 and Motion to Reopen the Record," dated February 13, 2020, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the captioned proceeding, this 18th day of February 2020.

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Dated in Rockville, MD
this 18th day of February 2020