

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

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NRC STAFF ANSWER TO FASKEN'S LETTER "APPEAL OF STAFF DENIAL OF  
PETITIONERS' REQUEST FOR SUNSI INFORMATION RELATED TO ISP'S  
RESPONSES TO RAIS"

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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) Appeal of Staff Denial of Petitioners' Request for SUNSI information related to ISP's responses to RAIs.<sup>1</sup> Fasken seeks to challenge the Staff determination on its request for access to proprietary information in the Interim Storage Partners license application. For the reasons set forth below, Fasken's challenge should be dismissed.

**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

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<sup>1</sup> Letter from Timothy Laughlin, Counsel for Fasken, to the Board and Commission, *Appeal of Staff Denial of Petitioners' Request for SUNSI Information Related to ISP's Responses to RAIs* (Feb. 12, 2020) (ADAMS Accession No. ML20043F076) (Fasken SUNSI Request Appeal).

for spent nuclear fuel and greater-than-Class C waste in Andrews County, Texas.<sup>2</sup> 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of its application, and WCS and the NRC staff then jointly requested that the pending hearing opportunity be withdrawn.<sup>3</sup> Thereafter, WCS created a joint venture with Orano CIS LLC to form Interim Storage Partners LLC (ISP).<sup>4</sup>

In June 2018, ISP submitted a revised license application,<sup>5</sup> and the NRC published a *Federal Register* notice that permitted interested members of the public to request a hearing and petition to intervene.<sup>6</sup> The *Federal Register* notice contained an “Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation.” (Access Order) The Access Order provided that a “potential party” may request access to SUNSI within 10 days of the publication of the notice.<sup>7</sup> Fasken submitted a timely hearing request,<sup>8</sup> as did several other petitioners. Fasken did not seek access to SUNSI at that time.

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

<sup>3</sup> *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)).

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

<sup>5</sup> 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).

<sup>6</sup> Interim Storage Partners Waste Control Specialists Consolidated Interim Storage Facility, 83 Fed. Reg. 44,070, 44,070–75 (Aug. 29, 2018) (ISP CISF), 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) at 2.

<sup>7</sup> ISP CISF, 83 Fed. Reg. at 44,073.

<sup>8</sup> *Petition of Permian Basin Land and Royalty Organization and Fasken Land and Minerals for Intervention and Request for Hearing* (Oct. 29, 2018) (ML18302A412).

In LBP-19-7, the Board denied Fasken's hearing request and the hearing requests of all other petitioners except Sierra Club.<sup>9</sup> Although the Board concluded that Fasken had not proffered an admissible contention, the Board found that Fasken had established standing.<sup>10</sup> Thereafter, the Board dismissed Sierra Club's sole admitted contention.<sup>11</sup> 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,<sup>12</sup> which the Board denied, resolving the last issue pending before the Board and thereby terminating the proceeding.<sup>13</sup> Fasken's appeal of LBP-19-7, as well as the appeals of other petitioners (including Sierra Club and SEED) and ISP, is now pending with the Commission.<sup>14</sup>

On November 21, 2019, ISP submitted to the NRC its responses to certain Staff Requests for Additional Information (RAIs).<sup>15</sup> Because ISP indicated that portions of the responses contained proprietary information, those portions were designated as Sensitive Unclassified Non-Safeguards Information (SUNSI) and were accordingly profiled as non-public. On January 16, 2020, Fasken submitted a letter seeking access to proprietary information contained in those RAI responses, stating that its request for access was pursuant to the

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<sup>9</sup> *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-7, 90 NRC \_\_, \_\_ (Aug. 23, 2019) (slip op. at 2, 106).

<sup>10</sup> *Id.* (slip op. at 20, 106).

<sup>11</sup> *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-9, 90 NRC \_\_, \_\_ (Nov. 18, 2019) (slip op. at 1, 5).

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

<sup>13</sup> *Interim Storage Partners* (WCS Consolidated Interim Storage Facility), LBP-19-11, 90 NRC \_\_, \_\_ (Dec. 13, 2019) (slip op. at 14).

<sup>14</sup> 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-19-7* (Oct. 15, 2019) (ML19288A224).

<sup>15</sup> See Interim Storage Partners Submission of Responses for RAIs and Associated Document Markups from First Request for Additional Information, Part 3 (ML19337B502 (package)), <https://www.nrc.gov/docs/ML1933/ML19337B502.html>.

Access Order contained in the notice of opportunity to request a hearing.<sup>16</sup> On January 27, 2020, the Staff responded, stating that the Access Order only applied prior to the Board's ruling on the initial intervention petitions (and granting the Sierra Club's), and that, in any event, the applicability of the Access Order had ceased with the termination of the proceeding.<sup>17</sup> On February 12, 2020, Fasken submitted a letter in which it asked the Commission to consider its correspondence as an appeal of the Staff determination.<sup>18</sup>

## Discussion

### I. Applicable Legal Standards

The SUNSI access procedures are discretionary procedures developed by the Commission in 2007 to facilitate access to SUNSI information that potential parties might need in order to meet the requirements to intervene in an adjudicatory proceeding.<sup>19</sup> The procedures include specified milestones and associated deadlines, intended to minimize the potential for

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<sup>16</sup> See Letter from Timothy Laughlin, Counsel for Fasken, to NRC, *Request for Sensitive Unclassified Non-Safeguards Information (SUNSI) regarding Interim Storage Partner's Waste Control Specialist Consolidated Interim Storage Facility* (Jan. 16, 2020) (ML20016A453) (Fasken SUNSI Request).

<sup>17</sup> See Letter from Sara Kirkwood, Counsel for NRC Staff, to Timothy Laughlin, Counsel for Fasken, *Request for Sensitive Unclassified Non-Safeguards Information (SUNSI) regarding Interim Storage Partners Waste Control Specialists Consolidated Interim Storage Facility* (Jan. 27, 2020). (ML20024D860) (Staff Determination).

<sup>18</sup> See Fasken SUNSI Request Appeal. Under the terms of the Access Order, a requestor's challenge to an adverse Staff determination is to be filed, within 5 days, with the applicable presiding officer. See Access Order, 83 Fed. Reg. at 44074. If that presiding officer's order upholds the Staff determination, interlocutory appeals to the Commission are then governed by 10 C.F.R. §2.311(a)(3) ("an appeal to the Commission may also be taken from an order of an officer designated to rule on information access issues"). As explained further below in Section II.B, even assuming the Access Order applies to Fasken's request, Fasken did not comply with the deadlines established in the Order.

<sup>19</sup> *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), CLI-10-24, 72 NRC 451, 454–55 (2010) (citing Proposed Rule: Interlocutory Review of Rulings on Requests by Potential Parties for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information, 72 Fed. Reg. 32,018, 32,018 (June 11, 2007) (comment period reopened and proposed procedures issued for comment in 72 Fed. Reg. 43,569 (Aug. 6, 2007)); Availability for Comment of Proposed Procedures to Allow Potential Intervenors to Gain Access to Relevant Records that Contain Sensitive Unclassified Non-Safeguards Information or Safeguards Information (July 31, 2007) (ML071910149)).

delay in the admission of contentions.<sup>20</sup> The procedures are applied to individual proceedings through orders imposing the access procedures; they are published alongside the notice of opportunity to request a hearing.

Consistent with that Commission policy, the Access Order was imposed for the *ISP* proceeding.<sup>21</sup> The Access Order provided that requests for access to SUNSI must be filed within 10 days of the publication of the notice of opportunity to request a hearing. In its foundational decision interpreting the scope and applicability of the access procedures, the Commission held in *South Texas Project* that once a petition to intervene has been granted, issues involving access to documents for use in the proceeding are governed by discovery rules (rather than by the Access Order).<sup>22</sup> The Commission further held that, pursuant to the Access Order, a request for SUNSI must demonstrate how the information would assist in formulating a contention, but it does not require a showing that the contention would be admissible if formulated.<sup>23</sup>

In the context of a request for proprietary information (as Fasken requests here), the Commission has held that its role is to balance the applicant's interest in protecting proprietary information with the petitioner's legitimate interest in obtaining information that is necessary to allow meaningful participation in the adjudicatory proceeding.<sup>24</sup> Furthermore, 10 C.F.R. § 2.390(b)(6) provides that the Commission may require that proprietary information be subject to inspection under a protective order by the parties to a proceeding.

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<sup>20</sup> Proposed Rule: Interlocutory Review of Rulings on Requests by Potential Parties for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information, 72 Fed. Reg. 32,018, 32,019 (June 11, 2007).

<sup>21</sup> *ISP CISF*, 83 Fed. Reg. at 44,073.

<sup>22</sup> *South Texas Project*, CLI-10-24, 72 NRC at 462.

<sup>23</sup> *Id.* at 467.

<sup>24</sup> *Susquehanna Nuclear, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-17-4, 85 NRC 59, 67 (2017) (citing 10 C.F.R. § 2.390(b)(2)).



## **II. The Commission Should Deny Fasken's Request Because the Access Procedures Expired with the Board's Ruling on the Initial Intervention Petitions.**

Fundamentally, because Fasken's Request for Access to SUNSI was submitted after the Access Order expired, it must be denied. But even assuming *arguendo* the Access Order remains applicable as Fasken asserts, Fasken's "appeal" by its own terms fails to follow the strict prescribed deadlines in the Access Order and is thus inexcusably late. Furthermore, Fasken's attempt to challenge the proprietary nature of the requested documents is an issue that would, in any event, be outside the scope of the SUNSI access procedures.

### **A. The SUNSI Access Procedures have no further applicability once a ruling has been made on an intervention petition.**

The purpose of the Access Order is to allow potential parties early access to SUNSI material at the beginning of an adjudication in order to timely file adjudicatory contentions in an initial intervention petition.<sup>25</sup> The Access Order is fundamentally adjudicatory in nature. It requires a showing of standing to ensure that access is being used for that targeted adjudicatory purpose, allowing members of the public who have a likelihood of becoming parties to a proceeding early access to SUNSI material. The Access Order avoids the potential delay in a proceeding that could result if access to SUNSI was only allowed after an entity is granted party status. When a notice of opportunity for hearing is first published, any person who can demonstrate standing and proffer an admissible contention may become a party to a proceeding, and the Commission's policy reflects the desired efficiency of allowing those members of the public access to SUNSI to timely file contentions challenging the application at issue as the agency makes its threshold determination on whether a hearing should be granted.

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<sup>25</sup> A "Potential party" is defined in 10 C.F.R. § 2.4 as "any person who has requested, or who may intend to request, a hearing or petition to intervene in a hearing under 10 CFR part 2."

Once initial petitions to intervene have been denied and a proceeding is terminated, however, that access opportunity has been provided and the threshold adjudicatory determination has been made. In the *ISP* proceeding, where all petitions to intervene have been denied, a petitioner would have to successfully meet not only the late-filed contention standards but also the standards for reopening the record—a higher showing than at the pre-intervention stage of the proceeding for which the SUNSI access procedures were formulated. In short, the access procedures were not intended to provide a person seeking intervention with a perpetual opportunity to seek access to SUNSI material once that person's request for hearing has in fact been denied.

The Commission made clear in the *South Texas Project* proceeding that it intended for the procedures to only apply prior to an intervention petition being granted. In that case, a request to intervene had been granted, and the intervenor sought access to a document pursuant to the Access Order. The Commission held that the Access Order did not apply once a petition to intervene had been granted, because after that determination any questions regarding access to documents were governed by the discovery procedures in Part 2.<sup>26</sup> It would be incongruous for the Commission to direct admitted parties not to use the Access Order, but allow those whose requests for party status have been denied to do so indefinitely.

Fasken's argument for why it should be allowed access to SUNSI pursuant to the Access Order is unclear. Fasken appears to assert that not allowing it access to proprietary information at this stage in the proceeding violates its "due process" rights, citing to federal discovery rules.<sup>27</sup> As an initial matter, to the extent the federal discovery rules have any applicability to NRC proceedings, it is only in the context of a party to an adjudicatory

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<sup>26</sup> *South Texas Project*, CLI-10-24, 72 NRC at 462.

<sup>27</sup> Fasken SUNSI Request Appeal at 3.

proceeding. There is no provision in the federal rules or NRC rules for a non-party, such as Fasken, to obtain discovery of proprietary material. Fasken also appears to find it irrational that only parties would have access to proprietary material.<sup>28</sup> However, this restriction is fully consistent with NRC rules found in 10 C.F.R. § 2.390(b)(6), which provide that proprietary material may be shown to parties under a protective agreement.<sup>29</sup>

Similarly, Fasken apparently views its previous filing of a proposed contention as creating a right of ongoing access to proprietary documents in order to confirm whether or not this rejected contention needs to be amended.<sup>30</sup> Fasken appears to imply that if it had access to the proprietary documents, it would be able to form an admissible contention. However, the Board found Fasken's Contention 2 to be inadmissible for several reasons unrelated to any proprietary information, specifically that it had failed to acknowledge or address the relevant portions of the application, or provide legal or factual support for its claims.<sup>31</sup> Fasken accordingly does not articulate how the requested information would assist it in formulating a contention, let alone meet the further procedural standards (like reopening) to which the contention would be subject at this stage.

#### **B. Fasken's Challenge to the Staff Determination is Inexcusably Late.**

As stated above, the Access Order in the *ISP* proceeding expired with the Board's ruling on the initial intervention petition. However, assuming *arguendo* that the Access Order

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<sup>28</sup> Fasken SUNSI Request Appeal.

<sup>29</sup> The Commission's policy choice to provide such access to potential parties under the narrowly specified conditions of the SUNSI access procedures does not make unfettered access to such information a requirement of "due process." Furthermore, Fasken's statement that only the Sierra Club could have utilized the SUNSI Access Procedures during the time they were a party is incorrect. The Commission in *South Texas Project* specifically held that once a party was admitted to a proceeding, the Access Order no longer applied. See *South Texas Project*, CLI-10-24, 72 NRC at 462.

<sup>30</sup> Fasken SUNSI Request Appeal at 3.

<sup>31</sup> *ISP*, LBP-19-7, 90 NRC at \_\_\_ (slip op. at 99).

continued to apply, Fasken's challenge fails to comply the Access Order's strict timetable and is inexcusably late. The Access Order provides that a "requestor may challenge the NRC staff's adverse determination with respect to access to SUNSI or with respect to standing or need to know for SGI by filing a challenge within 5 days of receipt of that determination."<sup>32</sup> Here, the NRC Staff provided its response to the SUNSI Access Request to Fasken on January 27, 2020.<sup>33</sup> However, Fasken did not file its challenge until February 12, 2020, 16 days after its receipt of the Staff determination and 11 days after the Access Order's deadline to challenge the determination. Fasken does not acknowledge, much less articulate good cause for, its failure to meet that deadline. Thus, even if the Access Order were applicable in this circumstance, Fasken's challenge to the Staff determination is inexcusably late.<sup>34</sup>

**C. Fasken's Challenge to the Proprietary Designation of the Documents is Outside the Scope of This Proceeding.**

It appears that in seeking access to these documents, Fasken is actually seeking to dispute the proprietary determination of the documents themselves. In its initial request for access, Fasken stated that "details on oil and gas wells, including the name, location, depth, orientation, perforations, taking point and production from the well, among other things, are all a matter of public information under the Texas Government Code (Chapter 552), with few exceptions. This data is required by law to be recorded with and maintained by the Texas Rail Road Commission, whose jurisdiction over this data is established in the Texas Natural

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<sup>32</sup> ISP CISF, 83 Fed. Reg. at 44,074.

<sup>33</sup> Staff Determination.

<sup>34</sup> The Access Order provides the Staff with 5 days to reply to a motion to reverse the staff determination. See ISP CISF, 83 Fed. Reg. at 44,075. Out of an abundance of caution, the Staff has complied with this deadline.

Resources Code (Sec 81.051)".<sup>35</sup> In its February 12 challenge, Fasken states that "Petitioners criticize the proprietary nature of the information withheld."<sup>36</sup> The Access Order is not a vehicle for a petitioner to challenge a proprietary determination. Rather, it is to allow access, pursuant to a protective order, where a requester has shown that "publicly available versions of the information requested would not be sufficient to provide the basis and specificity for a proffered contention."<sup>37</sup> Thus, even if the Access Order applied here, Fasken's desire to dispute whether the documents are appropriately designated is a complaint outside the scope of the access procedures and of this proceeding, and in any event not a valid basis for a challenge to the Staff's access determination.

### **Conclusion**

Because the Access Order ceased to apply once the Board ruled on the intervention petitions and terminated this proceeding, and because, even if it applied, Fasken's challenge is untimely, the Commission should deny this appeal, as well as Fasken's request for access to proprietary information.

Respectfully submitted,

**/Signed (electronically) by/**

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

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<sup>35</sup> Fasken SUNSI Request at 3–4. Assuming Fasken is correct, the information to which it seeks access to in these RAI responses is a matter of public record. If so, it is unclear why Fasken would need access to the proprietary version of the RAI response in order to form a contention.

<sup>36</sup> Fasken SUNSI Request Appeal at 3.

<sup>37</sup> ISP CISF, 83 Fed. Reg. at 44,073.

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**CERTIFICATE OF SERVICE**

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing “NRC Staff Answer to Fasken’s Letter ‘Appeal of Staff Denial of Petitioners’ Request for SUNSI Information Related to ISP’s Responses to RAIs,’” dated February 18, 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.

**/Signed (electronically) by/**

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Dated in Rockville, MD  
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