

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

Before Administrative Judges:

Paul S. Ryerson, Chairman  
Nicholas G. Trikouros  
Dr. Gary S. Arnold

In the Matter of

INTERIM STORAGE PARTNERS LLC

(WCS Consolidated Interim Storage Facility)

Docket No. 72-1050-ISFSI

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

January 29, 2021

MEMORANDUM AND ORDER

(Denying Motions to Reopen and for Leave to File)

Before the Board in this closed proceeding are two motions by Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (collectively, "Fasken"): (1) to reopen the record;<sup>1</sup> and (2) for leave to file a new contention out of time.<sup>2</sup> Interim Storage Partners LLC (ISP) and the NRC Staff oppose.<sup>3</sup>

We deny the motions.

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<sup>1</sup> Fasken Motion to Reopen the Record (July 6, 2020) [hereinafter Motion to Reopen].

<sup>2</sup> Fasken Motion for Leave to File New and/or Amended Contention (July 6, 2020) [hereinafter Motion for Leave].

<sup>3</sup> ISP's Answer Opposing Fasken's Second Motion to Reopen the Record and Motion for Leave to File New Contention "5" (July 31, 2020) [hereinafter ISP Answer]; NRC Staff Answer in Opposition to Fasken's Motions to Reopen the Record and File New Contention (July 31, 2020) [hereinafter NRC Staff Answer]. Fasken also submitted a combined reply. Fasken Combined Reply to NRC Staff's and ISP's Oppositions to Motion for Leave to File New Contention and Motion to Reopen the Record (Aug. 7, 2020) [hereinafter Combined Reply].

I. BACKGROUND

This proceeding concerns ISP's application for a license to construct and operate a consolidated interim storage facility for spent nuclear fuel in Andrews County, Texas. The factual background and prior proceedings before this Licensing Board are set forth in our Memoranda and Orders of August 23, 2019 (LBP-19-07), November 18, 2019 (LBP-19-09), and December 13, 2019 (LBP-19-11),<sup>4</sup> in which the Board ultimately denied all hearing requests.

After the Board closed the record, and while appeals of the Board's rulings were pending before the Commission, Fasken submitted three new filings:

First, on January 21, 2020, Fasken moved to reopen the record to amend its Contention 4, which the Board had ruled inadmissible in LBP-19-07.<sup>5</sup>

Second, on February 12, 2020, Fasken appealed the NRC Staff's denial of its request for access to certain non-public information.<sup>6</sup> Fasken claimed it needed the non-public information to decide whether to try to amend a second contention that the Board had ruled inadmissible.<sup>7</sup>

Third, on July 6, 2020, Fasken again moved to reopen the record, this time to assert a new contention (Fasken New Contention 5) challenging aspects of the NRC Staff's Draft Environmental Impact Statement (DEIS).<sup>8</sup>

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<sup>4</sup> LBP-19-07, 90 NRC 31, 32 (2019); LBP-19-09, 90 NRC 181, 185–86 (2019); LBP-19-11, 90 NRC 358, 367–68 (2019).

<sup>5</sup> See LBP-19-07, 90 NRC at 93; Fasken Motion to Reopen the Record for Purposes of Considering and Admitting an Amended Contention Based on New Information Provided by ISP in Response to NRC Requests for Additional Information (Jan. 21, 2020).

<sup>6</sup> Appeal of Staff Denial of Petitioners Request for SUNSI Information Related to ISP's Responses to RAIs (Feb. 12, 2020).

<sup>7</sup> See id. at 3.

<sup>8</sup> Motion to Reopen at 4–6.

On December 4, 2020 (in CLI-20-13) and December 17, 2020 (in CLI-20-14 and CLI-20-15), the Commission affirmed the Board's rulings.<sup>9</sup> In CLI-20-14, the Commission also considered and denied the first two submissions that Fasken had filed after the Board denied its hearing request.<sup>10</sup> The Commission referred, for the Board's initial consideration, Fasken's third such submission: that is, Fasken's motions to reopen the record and for leave to file New Contention 5.<sup>11</sup>

## II. FASKEN NEW CONTENTION 5

On May 4, 2020, the NRC made the DEIS for ISP's license application publicly available.<sup>12</sup> On May 22, 2020, at Fasken's request, the Secretary of the Commission extended the deadline for filing new or amended contentions based on the DEIS until July 6, 2020.<sup>13</sup>

Hence, on July 7, 2020 at 12:01 a.m. (technically one minute after the deadline), Fasken filed a second motion to reopen the record, together with a motion for leave to file Fasken New Contention 5.<sup>14</sup> New Contention 5 states:

ISP's application fails to adequately, accurately, completely and consistently consider the cumulative impacts of transporting high-level radioactive waste and spent nuclear fuel to and the socioeconomic benefits of the proposed ... project, which precludes a proper analysis under NEPA, and further nullifies ISP's ability to satisfy NRC's siting evaluation factors now and anticipated in the future and is in further violation of NRC regulations.<sup>15</sup>

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<sup>9</sup> CLI-20-13, 92 NRC \_\_, \_\_, \_\_ (slip op. at 1, 2, 7) (Dec. 4, 2020); CLI-20-14, 92 NRC \_\_, \_\_ (slip. op. at 1, 35) (Dec. 17, 2020); CLI-20-15, 92 NRC \_\_, \_\_ (slip. op. at 1, 26) (Dec. 17, 2020). In CLI-20-14, the Commission dismissed the appeal of one ruling without reaching the merits; see CLI-20-14, 92 NRC at \_\_ n.10 (slip. op. at 3 n.10).

<sup>10</sup> CLI-20-14, 92 NRC at \_\_, \_\_ (slip op. at 11, 19).

<sup>11</sup> Id. at \_\_-\_\_, \_\_-\_\_ (slip op. at 1-2, 34-35).

<sup>12</sup> "Environmental Impact Statement for Interim Storage Partners LLC's License Application for a Consolidated Interim Storage Facility for Spent Nuclear Fuel in Andrews County, Texas" (Draft Report for Comment) (May 2020) (ADAMS Accession No. ML20122A220) [hereinafter DEIS].

<sup>13</sup> Commission Order (May 22, 2020) at 1 (unpublished) [hereinafter Commission Extension].

<sup>14</sup> Motion to Reopen at 1; Motion for Leave at 1.

<sup>15</sup> Motion for Leave at 11.

### III. MOTION TO REOPEN THE RECORD

To reopen a closed record, a petitioner must file a motion that demonstrates (1) its new contention is timely based upon the availability of new information; (2) the contention addresses a significant safety or environmental issue; and (3) a materially different result would be or would have been likely had the newly proffered evidence been considered initially.<sup>16</sup> The petitioner must attach an affidavit from “experts in the disciplines appropriate to the issues raised” or from “competent individuals with knowledge of the facts alleged” that separately addresses each of these criteria, explaining how each criterion has been satisfied.<sup>17</sup> Moreover, the evidence in any such affidavit must meet the admissibility standards in 10 C.F.R. § 2.337.<sup>18</sup> In other words, the affidavit must be of such quality as to be admissible into evidence at an evidentiary hearing.

The Commission considers “reopening the record for any reason to be ‘an extraordinary action,’”<sup>19</sup> and places “an intentionally heavy burden on parties seeking to reopen the record.”<sup>20</sup> The Commission’s rules mandate that “the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention.”<sup>21</sup> Fasken fails to carry this intentionally heavy burden.

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<sup>16</sup> 10 C.F.R. § 2.326(a)(1)–(3). An “exceptionally grave” issue may be considered at the discretion of the presiding officer even if untimely presented. Id. § 2.326(a)(1).

<sup>17</sup> Id. § 2.326(b).

<sup>18</sup> Id.

<sup>19</sup> Tenn. Valley Auth. (Watts Bar Nuclear Plant, Unit 2), CLI-15-19, 82 NRC 151, 156 (2015) (quoting Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986)).

<sup>20</sup> Id. at 155.

<sup>21</sup> Private Fuel Storage, LLC (Indep. Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005).

Both ISP and the NRC Staff assert that Fasken has not satisfied a threshold requirement. They claim that Fasken's motion to reopen the record is not accompanied by an appropriate affidavit.<sup>22</sup>

To support its motion, Fasken attaches an affidavit by its lawyer, Mr. Kanner.<sup>23</sup> But 10 C.F.R. § 2.326(b) does not generally call for the affidavit of a petitioner's lawyer. On the contrary, when the rules for reopening a closed record were proposed, commentators expressed concern that "affidavits of lawyers repeating allegations of undisclosed principals should not be sufficient."<sup>24</sup> In response, the Commission codified the requirement that the supporting affidavit must be from either "competent individuals with knowledge of the facts alleged" or "experts in the disciplines appropriate to the issues raised."<sup>25</sup>

For the most part, Mr. Kanner claims no personal knowledge. Rather, he summarizes an affidavit submitted by Mr. Taylor, Fasken's vice president, and purports to incorporate by reference the arguments in Fasken's Motion for Leave.<sup>26</sup> Neither affidavit separately addresses each criterion in 10 C.F.R. § 2.326(a), as required by 10 C.F.R. § 2.326(b).

We do not question whether Mr. Kanner is a qualified lawyer. But, because Mr. Kanner claims neither technical expertise nor personal knowledge of critical facts, we likely would not admit most or all of Mr. Kanner's affidavit as evidence at an evidentiary hearing under 10 C.F.R. § 2.337. It is questionable, therefore, whether Mr. Kanner's affidavit can properly support a motion to reopen the record under 10 C.F.R. § 2.326(b).

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<sup>22</sup> NRC Staff Answer at 30; ISP Answer at 11–12.

<sup>23</sup> Motion to Reopen, attach. 1, Aff. of Allan Kanner (July 6, 2020) [hereinafter Kanner Affidavit].

<sup>24</sup> Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,537 (May 30, 1986).

<sup>25</sup> Id.; 10 C.F.R. § 2.326(b).

<sup>26</sup> Kanner Affidavit at 8.

We need not rely on this possible pleading defect to deny Fasken's motion, however, because Fasken fails to carry the heavy burden to reopen a closed record for more substantial reasons.

Most importantly, Fasken's motion is not timely. Fasken submitted its new contention challenging the DEIS essentially within the extended deadline permitted by the Commission.<sup>27</sup> But New Contention 5 and Fasken's associated motion to reopen the record are based on statements in the DEIS that do not differ materially from information that was publicly available in ISP's application materials much earlier.<sup>28</sup> This precludes granting Fasken's motion.

Under 10 C.F.R. § 2.309(f)(2), "[o]n issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant's environmental report."<sup>29</sup> Petitioners such as Fasken have "an ironclad obligation"<sup>30</sup> to examine the relevant application documents to uncover information that might prompt a contention.

Also under 10 C.F.R. § 2.309(f)(2), the NRC expects a petitioner "to evaluate all available information at the earliest possible time to identify the potential basis for contentions and preserve their admissibility."<sup>31</sup> Fasken may not seize upon publication of the NRC staff's DEIS as an excuse to raise challenges to ISP's license application that Fasken could have timely raised in 2018, but did not.<sup>32</sup>

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<sup>27</sup> See Commission Extension at 1.

<sup>28</sup> In Exhibit 2 to its Motion for Leave, Fasken lists excerpts from the Environmental Report and the DEIS but fails to explain how they support any of the claims raised in New Contention 5. See Motion for Leave at 14.

<sup>29</sup> 10 C.F.R. § 2.309(f)(2).

<sup>30</sup> Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 338 (1999).

<sup>31</sup> Private Fuel Storage (Indep. Spent Fuel Storage Installation), LBP-99-43, 50 NRC 306, 313 (1999) (citing Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1050 (1983)).

<sup>32</sup> Hearing requests concerning ISP's license application were due October 29, 2018. LBP-19-07, 90 NRC at 43.

Fasken's fundamental claim is that the DEIS fails to adequately consider "the cumulative impacts of transporting high-level radioactive waste and spent nuclear fuel to and the socioeconomic benefits" of ISP's proposed storage facility.<sup>33</sup> For example, Fasken claims that the DEIS contains insufficient information concerning "transportation routes, safety risks[,] and environmental impacts and potential legal issues involving liabilities and responsibilities for risk in transporting the nuclear waste across the nation via rails, barges and/or heavy-haul trucks."<sup>34</sup>

But Fasken fails to show that its claims are based on new and materially different information. On the contrary, the representative route utilized in the DEIS is comparable to one of the routes analyzed in ISP's Environmental Report<sup>35</sup> and is identical to one of the representative routes analyzed in NUREG-2125, the study relied upon in the DEIS.<sup>36</sup> Indeed, other petitioners challenged the use of representative transportation routes in their 2018 hearing requests,<sup>37</sup> but Fasken did not.<sup>38</sup>

Fasken also claims that the DEIS "for the first time relies on and cites to data in the [Department of Energy (DOE)] Yucca 2008 transportation analysis" concerning the evaluation of the use of barges for spent nuclear fuel.<sup>39</sup> But Fasken does not show how the information and conclusions in the DEIS are different from the information and conclusions presented in ISP's Environmental Report. ISP's Environmental Report analyzes barge shipments as part of the

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<sup>33</sup> Motion for Leave at 11.

<sup>34</sup> Motion to Reopen at 5.

<sup>35</sup> WCS Consolidated Interim Spent Fuel Storage Facility Environmental Report, Docket No. 72-1050 (rev. 3 Nov. 2019) at 1-1, 4-11(ADAMS Accession No. ML20052E152 (package)) [hereinafter Environmental Report].

<sup>36</sup> DEIS at 4-13 (citing NUREG-2125, Spent Fuel Transportation Risk Assessment (Jan. 2014) (ADAMS Accession No. ML14031A323)).

<sup>37</sup> See LBP-19-07, 90 NRC at 87–89.

<sup>38</sup> Petition of Permian Basin Land and Royal Organization and Fasken Land and Minerals for Intervention and Request for Hearing (Oct. 29, 2018).

<sup>39</sup> Motion for Leave at 6, 18.

evaluation of the radiological impacts of transportation and concludes that “barge and heavy haul shipments were not major contributors to overall collective dose.”<sup>40</sup>

Likewise, Fasken claims that the DEIS’s cumulative transportation impact analyses fail to adequately consider (as relevant to potential accidents) the regional characteristics within a fifty-mile radius of the proposed facility and the occurrence of earthquakes in the area.<sup>41</sup> But Fasken fails to show how the analysis of accidents in ISP’s Environmental Report<sup>42</sup> differs materially from the analysis in the DEIS.<sup>43</sup>

Purportedly in support of New Contention 5, Fasken makes some related (and some perhaps marginally related) additional claims. All are premised on information that was available to Fasken long before publication of the DEIS.

For example, Fasken claims that the DEIS improperly omits an analysis of “the responsibility and costs for coordinating transportation, payments for needed infrastructure improvements and providing necessary emergency training for first responders along the unknown transportation routes.”<sup>44</sup> But ISP’s Environmental Report did not present such an analysis either. Fasken could have asserted this claim at the outset of the proceeding, but did not.

Similarly, Fasken’s claim that the DEIS fails to consider the potential impacts of terrorist attacks and sabotage<sup>45</sup> is untimely because ISP’s Environmental Report did not consider them

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<sup>40</sup> Environmental Report at 4-11; § 4.2.6.

<sup>41</sup> Motion for Leave 19–21.

<sup>42</sup> Environmental Report at 4-12 to 4-22.

<sup>43</sup> DEIS at 4-17 to 4-24.

<sup>44</sup> Motion for Leave at 15.

<sup>45</sup> Id. at 21–22.



either (because the NRC requires no such analysis for facilities outside the Ninth Circuit<sup>46</sup>). And Fasken does not attempt to explain how its criticism of ISP's site selection process<sup>47</sup> could be premised on new information. Again, Fasken asserts claims that other petitioners made at the outset of this proceeding, but Fasken did not.<sup>48</sup>

In short, Fasken fails to demonstrate that any information supporting New Contention 5 is materially new. For this reason alone, we must deny Fasken's motion to reopen the record.<sup>49</sup>

Moreover, we conclude that Fasken's motion does not address a significant safety or environmental issue. As explained infra, in our discussion of contention admissibility, New Contention 5 does not raise a genuine dispute on any material issue of fact or law. Thus, these same claims cannot possibly meet the higher standard of presenting a significant issue that must be adjudicated by reopening this closed proceeding.

Finally, Fasken does not demonstrate that, if its motion to reopen the record were granted, a materially different result would be likely. Because Fasken's New Contention 5 is not admissible, as explained infra, no materially different result would have occurred had it been considered initially.

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<sup>46</sup> AmerGen Energy Co. (Oyster Creek Nuclear Generating Station), CLI-07-08, 65 NRC 124, 129 (upheld by N.J. Dep't of Env'tl. Prot. v. U.S. Nuclear Regulatory Comm'n, 561 F.3d 132, 140–43 (3d Cir. 2009)).

<sup>47</sup> Motion for Leave at 22.

<sup>48</sup> See Petition of [Joint Petitioners] to Intervene, and Request for an Adjudicatory Hearing (Nov. 13, 2018) at 118 [hereinafter Joint Petition].

<sup>49</sup> Under 10 C.F.R. § 2.326(a)(1), the Board has discretion to consider an "exceptionally grave" issue even if untimely presented. We do not exercise that discretion here. Although, in its Combined Reply, for the first time Fasken makes passing reference to New Contention 5 presenting an exceptionally grave issue (see Combined Reply at 3, 10), it never supports that characterization. We do not entertain arguments advanced for the first time in a reply brief. Nuclear Mgmt. Co. (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006). Moreover, the Commission considers the exception a narrow one, to be granted rarely and only in extraordinary circumstances. See, e.g., Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-12-21, 76 NRC 491, 500-01 (2012).

IV. MOTION FOR LEAVE TO FILE CONTENTION OUT OF TIME

Even if we were to allow Fasken to reopen the record, we would necessarily deny its motion for leave to file New Contention 5 out of time. Fasken's motion for leave fails for the same reasons as Fasken's motion to reopen the record: it is not based on new information. Additionally, we conclude that Fasken New Contention 5 is not admissible.

Again, we agree that Fasken New Contention 5 was timely submitted in the sense that (for all practical purposes) it was filed within the timeframe prescribed by the Secretary for contentions challenging the DEIS.<sup>50</sup> But the Secretary's extension did not alter Fasken's obligation to show that New Contention 5 is based on new, previously unavailable information that differs materially from information that was previously available.<sup>51</sup> As explained supra, Fasken makes no such showing.

V. ADMISSIBILITY OF FASKEN NEW CONTENTION 5

Fasken's failure to satisfy either the requirements for reopening a closed record or for proffering a contention out of time, without more, necessarily requires us to reject Fasken New Contention 5.<sup>52</sup> In addition, the contention does not satisfy the admissibility requirements in 10 C.F.R. § 2.309(f)(1).<sup>53</sup> Fasken urges that we not attach importance to "procedural issues,"<sup>54</sup> but the Commission instructs otherwise.

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<sup>50</sup> We decline to deny Fasken's motion because it was one minute late, as ISP urges. See ISP Answer at 25. We remind counsel, however, that generally NRC filing deadlines are strictly enforced.

<sup>51</sup> 10 C.F.R. § 2.309(c).

<sup>52</sup> See Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-05, 69 NRC 115, 124 (2009).

<sup>53</sup> 10 C.F.R. § 2.309(f)(1)(i)-(vi).

<sup>54</sup> Combined Reply at 10.

Although the NRC's contention admissibility requirements are not intended to be a "fortress to deny intervention,"<sup>55</sup> they are "strict by design."<sup>56</sup> These requirements are intended to "focus litigation on concrete issues and result in a clearer and more focused record for decision."<sup>57</sup> They arise from the Commission's "conscious effort to raise the threshold bar for an admissible contention."<sup>58</sup> Rather than expend agency time and resources on litigating vague and unsupported claims, the Commission chose to provide evidentiary hearings only to those who "proffer at least some minimal factual and legal foundation in support of their contentions."<sup>59</sup> Failure to satisfy any of the NRC's pleading requirements requires a licensing board to reject a contention.<sup>60</sup>

Although a petitioner need not prove its contention at this stage, mere notice pleading of proffered contentions is insufficient.<sup>61</sup> A petitioner must read the relevant portions of the license application or amendment request, state the applicant's or licensee's position and the petitioner's opposing view, and explain why it disagrees with the applicant or licensee.<sup>62</sup>

Among other things, an admissible contention must (1) demonstrate that the issue raised in the contention is within the scope of the proceeding;<sup>63</sup> (2) demonstrate that the issue is

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<sup>55</sup> Oconee, CLI-99-11, 49 NRC at 335.

<sup>56</sup> Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

<sup>57</sup> Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,202 (Jan. 14, 2004).

<sup>58</sup> Oconee, CLI-99-11, 49 NRC at 334.

<sup>59</sup> Id.

<sup>60</sup> See Entergy Nuclear Operations, Inc. (Indian Point, Unit 2), CLI-16-05, 83 NRC 131, 136 (2016).

<sup>61</sup> Fansteel, Inc. (Muskogee, Okla. Site), CLI-03-13, 58 NRC 195, 203 (2003).

<sup>62</sup> Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170–71 (Aug. 11, 1989).

<sup>63</sup> 10 C.F.R § 2.309(f)(1)(iii).

material to the findings the NRC must make to support the action involved in the proceeding;<sup>64</sup> and (3) provide sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact.<sup>65</sup> This must include references to specific portions of the disputed document and the supporting reasons for each dispute.<sup>66</sup> If a petitioner claims that a document fails to contain relevant information that is legally required, it must identify each such alleged failure and the reason why the missing information is needed.<sup>67</sup>

Fasken New Contention 5 does not satisfy these requirements.

Fasken's principal and overarching claim is that the DEIS should identify specific transportation routes. Fasken claims that "the use of 'representative routes' simply will not do."<sup>68</sup>

Fasken argues that "the transportation of nuclear waste to the proposed [facility] has a clear physical, functional, and temporal nexus to the project"<sup>69</sup> and that storage and transportation are inextricably linked actions.<sup>70</sup> Fasken contends that an analysis of the "exact number of shipments to [the proposed facility]; expected numbers of start clean/stay clean shipments (return to sender) and the number of shipments from [the facility] to a permanent repository based on [the] operational lifespan of [the facility] is necessary to make a best estimate of risks to communities in the transportation corridor."<sup>71</sup>

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<sup>64</sup> Id. § 2.309(f)(1)(iv). To show that a dispute is "material," a petitioner must show that its resolution would make a difference in the outcome of the proceeding. See Oconee, CLI-99-11, 49 NRC at 333–34.

<sup>65</sup> 10 C.F.R. § 2.309(f)(1)(vi).

<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> Motion for Leave at 14.

<sup>69</sup> Id.

<sup>70</sup> Id.

<sup>71</sup> Id. at 25.

According to Fasken, the DEIS “materially mislead[s] the public as to the ownership and responsibility, as well as the radiological risks and socioeconomic impacts, of transporting nuclear waste from decommissioned sites to the proposed ISP site.”<sup>72</sup> As a result, according to Fasken, “extrapolations based on prior facilities and the use of ‘representative routes’... prevent[s] a proper assessment of cost and benefit scenarios in the ISP DEIS.”<sup>73</sup>

However, Fasken does not explain why, under NEPA or the NRC’s environmental regulations, the DEIS must provide a more thorough analysis of hypothetical future shipping routes. Admissible contentions must identify a deficiency in the environmental analysis and may not merely offer “suggestions” of other ways the analysis could have been done.<sup>74</sup>

Most importantly, Fasken does not explain—or even address—why the Board should reach a different result than we reached with respect to a virtually identical claim in this very proceeding, and which the Commission affirmed in CLI-20-14. In LBP-19-07, we ruled inadmissible Joint Petitioners Contention 1, which claimed that ISP’s Environmental Report’s transportation impact analysis was inadequate because it used representative routes and failed to divulge and analyze specific transportation routes.<sup>75</sup> Much like Fasken, Joint Petitioners contended that there must be “complete disclosure of all probable transportation routes, along with quantities of [spent nuclear fuel] and the likely radioisotopic contents” to be shipped.<sup>76</sup>

In LBP-19-07, we rejected Joint Petitioners’ claim that there must be complete disclosure of all probable transportation routes because petitioners failed to raise a genuine dispute

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<sup>72</sup> Id. at 12.

<sup>73</sup> Id. at 14.

<sup>74</sup> See NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1), CLI-12-05, 75 NRC 301, 323 (2012) (citation omitted).

<sup>75</sup> LBP-19-07, 90 NRC at 87–89 (ruling Joint Petitioners Contention 1 inadmissible).

<sup>76</sup> Joint Petition at 43.

concerning the adequacy of ISP's analysis of representative routes.<sup>77</sup> Moreover, we concluded that—whenever actual routes might be chosen in the future—their selection would be the responsibility of the spent fuel owners, not ISP.<sup>78</sup> We further concluded that any more specific analysis would properly be the subject of an application for a transportation license, not ISP's application to construct a storage facility.<sup>79</sup>

In CLI-20-14, the Commission affirmed our ruling. The Commission agreed with the Board that “the actual routes that may one day be used to transport waste to the proposed [facility] are not currently known and are not the subject of an NRC approval in this proceeding.”<sup>80</sup> Fasken's demand for an analysis of actual transportation routes is not admissible for the same reasons.

Fasken's related claims all depend on acceptance of its fundamental and mistaken claim that hypothetical future transportation routes must be more fully disclosed and analyzed. Some are inadmissible for other reasons as well.

For example, Fasken claims that adequate socioeconomic and cost-benefit analyses “hinge on the responsibility and costs for coordinating transportation, payments for needed infrastructure improvements and providing necessary emergency training for first responders” along actual transportation routes.<sup>81</sup> However, evaluation of the costs of emergency response and infrastructure upgrades is not even within the scope of this Part 72 proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii). Identifying actual transportation routes will eventually require separate reviews and approvals by the NRC, the Department of Transportation, and applicable

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<sup>77</sup> LBP-19-07, 90 NRC at 88–89.

<sup>78</sup> *Id.* at 60–61, 91.

<sup>79</sup> *Id.* at 88–89.

<sup>80</sup> CLI-20-14, 92 NRC at \_\_\_ (slip op. at 21).

<sup>81</sup> Motion for Leave at 15.

States or Tribes.<sup>82</sup> ISP will also need to coordinate with local law enforcement and emergency responders. Such coordination is not relevant at this point in the licensing process.

Likewise, to the extent that Fasken contends that the DEIS transportation impacts analysis must consider the possibility of “terrorist attacks” and “sabotage,” the Commission has held that, except for licensing actions within the Ninth Circuit, the NRC is not required to consider terrorism in its NEPA analysis.<sup>83</sup> Fasken’s claims concerning the possibility of a terrorist attack are therefore outside the scope of this proceeding.

Finally, Fasken’s belated claims concerning ISP’s site selection process ignore our discussion in LBP-19-07 of similar claims that were made in Sierra Club Contention 11 and fail to anticipate the Commission’s affirmance (in CLI-20-15) of our ruling that Sierra Club Contention 11 was not admissible.<sup>84</sup> As we ruled in LBP-19-07 (and as the Commission affirmed), Part 51 sets forth no specific site selection criteria.<sup>85</sup> The criteria need only be reasonable, and it is permissible for the NRC to accord substantial weight to the preference of the applicant.<sup>86</sup> Sierra Club’s criticisms of ISP’s site selection process did not raise a genuine dispute under these standards,<sup>87</sup> and Fasken’s do not either.

The various claims set forth in Fasken New Contention 5 fail to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iii), (iv), and (vi). Fasken New Contention 5 is not admitted.

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<sup>82</sup> See 10 C.F.R. Parts 71, 73; 49 C.F.R. Parts 107, 171–80, 390–97.

<sup>83</sup> CLI-20-14, 92 NRC at \_\_–\_\_ (slip op. at 33–34); Oyster Creek, CLI-07-08, 65 NRC at 129, petition for review denied, (N.J. Dep’t of Env’tl. Prot., 561 F.3d at 140–43.

<sup>84</sup> Motion for Leave at 22.

<sup>85</sup> LBP-19-07, 90 NRC at 75.

<sup>86</sup> Id.

<sup>87</sup> Id. at 76.

VI. ORDER

For the reasons stated:

- A. Fasken's motion to reopen the record is denied.
- B. Fasken's motion for leave to file its Contention 5 is denied.
- C. Fasken Contention 5 is not admitted.
- D. No contention having been admitted, and no proffered contention pending, this adjudicatory proceeding remains terminated.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD

*/RA/*

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Paul S. Ryerson, Chairman  
ADMINISTRATIVE JUDGE

*/RA/*

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Nicholas G. Trikouros  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Gary S. Arnold  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
January 29, 2021



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
 )  
INTERIM STORAGE PARTNERS LLC ) Docket No. 72-1050-ISFSI  
 )  
(WCS Consolidated Interim Storage Facility) )  
 )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Memorandum and Order (Denying Motions to Reopen and for Leave to File) (LBP-21-02)** have been served upon the following persons by the Electronic Information Exchange:

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**WCS CISF - Docket No. 72-1050-ISFSI  
Memorandum and Order (Denying Motions to Reopen and for Leave to File) (LBP-21-02)**

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Dated at Rockville, Maryland,  
this 29<sup>th</sup> day of January 2021

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Office of the Secretary of the Commission