

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

IN THE MATTER OF INTERIM)	Docket No. 72-1050-ISFSI
STORAGE PARTNERS, LLC)	
(WSC Consolidated Interim Storage)	ALSBP No. 19-959-01-ISFSI-BD01
Facility))	February 23, 2021
)	
)	

**FASKEN LAND AND MINERALS, LTD.’S AND PERMIAN BASIN LAND
AND ROYALTY OWNERS’ COMBINED NOTICE OF APPEAL AND
PETITION FOR REVIEW OF ATOMIC SAFETY LICENSING BOARD’S
DENIAL OF MOTION FOR LEAVE TO FILE NEW CONTENTION NO. 5
AND MOTION TO REOPEN THE RECORD**

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I. SUMMARY OF GROUNDS FOR APPEAL AND REVIEW

Fasken Land and Minerals, Ltd.’s and Permian Basin Land and Royalty Owners’ (collectively “Fasken” or “Joint Petitioners”), by and through undersigned counsel, hereby give notice of their appeal to the U.S. Nuclear Regulatory Commission (“NRC”) from the Atomic Safety Licensing Board’s (“ASLB”) ruling, LBP-21-02, “Memorandum and Order (Denying Motions to Reopen and for Leave to File)” (Jan. 29, 2021) in the above-captioned Interim Storage Partners, L.L.C. (“ISP”) Consolidated Interim Storage Facility (“CISF”) proceeding.¹

Fasken specifically appeals the ASLB’s factual and legal bases for the denial of its Motion for Leave², the inadmissibility of New Contention No. 5, and the denial of its Motion to Reopen the Record.³ The ASLB’s ruling, which follows the denial of each and every contention raised by any and all parties relating to ISP’s proposed CISF project, has abused its discretion in the finding of facts, and commits errors of law. Thus, Fasken’s foregoing Petition for Review should be granted and Fasken’s Motions remanded for further consideration.

Petitioners’ Contention No. 5, based on publication of the NRC’s ISP draft environmental impact statement (“DEIS”),⁴ challenges new and material conclusions and the sources relied on which materially mislead the public as to the ownership and responsibility, as well as the radiological risks and socioeconomic impacts of transporting high-level radioactive waste and spent nuclear fuel (“SNF”) from decommissioned sites across the nation to the proposed ISP site

¹ ASLB Memorandum and Order (Denying Motions to Reopen and for Leave to File), LBP-21-02, (Jan. 29, 2021) (ADAMS Accession No.ML21029A084) (hereinafter “ASLB Order”).

² Fasken and PBLO Motion for Leave to File New Contention No. 5 (July 6, 2020) (ADAMS Accession No. ML20188A390) (hereinafter “Motion for Leave”).

³ Fasken and PBLRO Motion to Reopen the Record (July 6, 2020) (ADAMS Accession No.ML20188A390) (hereinafter “Motion to Reopen”).

⁴ 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, NUREG-2239 (May 2020) (ADAMS Accession No. ML20122A220), herein after “ISP DEIS.”

(and presumably transporting again to a permanent repository). The NRC for the very first time in the IPS DEIS shifts the burden and responsibility for emergency training and equipment and infrastructure improvements to local communities, States and Tribes along undisclosed routes without fair warning and adequate notice to the public of the potential consequences and severely skewing any analyses of costs and benefits. Further, the DEIS's evaluation of cumulative transportation impacts blatantly disregard recent increases in magnitude and frequency of seismic events, the instability of geology and soils in the region and ongoing and extensive industry operations and competing uses of infrastructure. The NRC cannot willfully ignore these material facts or rely on conjecture or speculation in the calculus of transporting nuclear waste. To do so, precludes a proper analysis of the cumulative environmental impacts, socioeconomics and alternatives considered for the proposed ISP CISF license in violation of NEPA and NRC regulations.⁵

II. BACKGROUND

a. ISP's Proposed CISF Project

In 2016, ISP⁶ submitted an application for an NRC license to construct and operate a storage facility for high-level radioactive waste and SNF in Andrews County, Texas for an indeterminate amount of time.⁷ The initial ISP license application covers a period of 40 years and up to 40,000 metric ton units ("MTUs") to be stored in horizontal canisters above ground, ISP has

⁵ See Motion for Leave at 9-11 (citing e.g. 10 C.F.R. §§ 72.24, 72.40(a)(2), 72.90 – 72.108; 10 C.F.R. § 51.10(a), 51.70-71, 51.104; NUREG-1567.

⁶ The initial CISF application was submitted by Waste Control Specialist ("WCS"). A year later in 2017 WCS requested suspension of its NRC application in order to form a joint venture with Orano CIS LLC called ISP to continue pursuing the proposed CISF application.

⁷ Waste Control Specialists, LLC, Application for a License for a Consolidated Interim Spent Fuel Storage Facility. (ADAMS Accession No ML16133A100)

indicated it may seek renewals for expansion phases to store additional nuclear waste over a longer time frame.⁸ In theory, the high-level nuclear waste will be transported via railroad and/or barge from decommissioned nuclear power facilities across the nation to the proposed ISP CISF site and will be subsequently transported via railroad and/or barge to a permanent geologic (deep underground) repository.

The Board itself has acknowledged in prior ISP rulings that funding for the previously proposed Department of Energy (“DOE”) Yucca Mountain permanent geologic repository has ceased and little to no substantial progress has been made in establishing any alternative permanent geologic repository.⁹ Indeed, as have many others contemplated the very real possibility of the proposed ISP CISF site becoming a *de facto* permanent repository, without any regard to the cumulative environmental impacts or the additional safety requirements for permanent storage.¹⁰ Despite the consensus and mutually acknowledged reality that a permanent repository is not likely to be established for decades if at all, the NRC Staff’s conclusions and evaluations in the ISP DEIS are contradictorily and narrowly limited to assessing the proposed ISP CISF project for a term of 40 years, assuming a permanent facility for storage deep underground will be completed by 2048.¹¹

The location for ISP’s proposed CISF project is in the middle of the Permian Basin – a vital and irreplaceable petroleum resource for the nation’s energy, security and independence. As acknowledged in the ISP DEIS, the Permian Basin is one of the most productive oil hubs in the nation.¹² And the proposed CISF would be located within 5,666 hectares(ha) [14,000 (acres)] of

⁸ ISP DEIS at 2-1 to 2-2.

⁹ Acknowledging Yucca pending adjudication was suspended in September 2011 and “Congress has provided no new funding for a permanent repository. . .” ISP Order at 3-4.

¹⁰ See Governor Abbott Letter and other DEIS comments.

¹¹ Claiming “ultimate disposal of the spent fuel and predicted. . . repository [will] be available by 2048.” ISP DEIS at 1-3.

¹² ISP DEIS at 5-2

IPS's business partner's WCS affiliated low-level radioactive waste dump (many of the analyses in the ISP DEIS rely heavily on historical data and information from evaluations conducted in connection with the joint venture's prior low-level radioactive waste endeavor).¹³

As set forth in the Declaration of Tommy E. Taylor, Fasken and PBLRO have extensive experience and substantial oil and gas operations, leases and agricultural activities throughout the Permian Basin operate numerous substantial oil and gas operations and leases and agricultural and ranching activities throughout the Permian Basin in southeast New Mexico and Texas.¹⁴ A founding member owns land and minerals within two miles of the proposed ISP CISF.¹⁵ And Fasken owns and/or leases property related to oil and gas activities located approximately 18 miles from the ISP site.¹⁶ Additionally, Fasken owns grazing property and operates significant agricultural operations nearby with considerable acreage. This property has been in the Fasken family for over one-hundred years.

Petitioners have a multitude of mineral leases surrounding the proposed CISF site and support the development of industry infrastructure and support services throughout the region. Both PBLRO and Fasken regularly utilize rail transportation and local highways to support their industries and have individuals frequently visit the region for work related purposes and have legitimate real-world concerns regarding potential health effects of their employees, operations, and the communities in the region generally, including the costs associated with medical care and treatment of radiation-related conditions and the adverse financial impacts on property values and threats to ongoing extraction and mineral development, agricultural and ranching activities posed

¹³ ISP DEIS at 4-2

¹⁴ See Declaration of Tommy E. Taylor, Ex.1 to Motion for Leave, hereinafter "Taylor Decl."

¹⁵ *Id.*

¹⁶ *Id.*

by the proposed ISP CISF that have not been properly addressed or analyzed in the ISP DEIS.

b. Procedural Background

On August 23, 2019, the ASLB denied all petitioners' hearing requests, finding each and every contention filed at the time to be inadmissible.¹⁷ The Board subsequently denied all later filed hearing requests and closed the proceedings.¹⁸ With respect to Fasken, the ASLB specifically found that Fasken had demonstrated standing, but that its contentions, relating to allegations that the NRC's licensing of the proposed ISP project violates the Nuclear Waste Policy Act ("NWPA") and challenges to evaluations to ensure the safe storage of SNF for indefinite durations, in the vicinity of abandoned and improperly plugged wells and without regard to credible fire and airplane explosions, potential groundwater contamination or endangered and threatened species, were all found inadmissible.¹⁹ The Board initially found Fasken's Contention No. 2 admissible in so far as it challenged the impact of wells on site stability but later deemed it moot in light of ISP's subsequent responses to NRC issued requests for additional information ("RAIs"), which were only made publicly available after Fasken filed its initial Contention.²⁰

Fasken, as well as other petitioners, filed appeals relating to these decisions.²¹

In January of 2020, in response to yet another round of RAI supplemental responses submitted by ISP, Fasken filed a Motion for Leave to amend its Contention No. 4 and associated

¹⁷ ASLB Memorandum and Order (Ruling on Petitions for Intervention and Requests for Hearing), LBP-19-07, (Aug. 23, 2019) (ADAMS Accession No. ML19235A165).

¹⁸ See ASLB Memorandum and Order, LBP-19-9 (Nov. 18, 2019) (ADAMS Accession No. ML19322C599); ASLB Memorandum and Order, LBP-19-11 (Dec. 13, 2019) (ADAMS Accession No. ML19347A381).

¹⁹ See ISP ASLB Order at 98-105.

²⁰ ISP Order at 99 fn 549.

²¹ On Sept. 17, 2019 Fasken appealed the Board's decision. Fasken and PBLRO Notice of Appeal and Petition for Review (ADAMS Accession No. ML19260J386). Additionally, on Feb. 2, 2021 other intervenors filed appeals to NRC's CLI-20-16 Order, which are currently pending in the D.C. Circuit of Appeals.

Motion to Reopen the Record.²² The Board again denied Fasken’s request for hearing, finding the amended contention inadmissible, and the Board’s decision was affirmed by the Commission in December of 2020.²³

Following the NRC’s publication of the ISP draft environmental impact statement (“DEIS”) and pursuant to May 22, 2020 Order by the Secretary of the Commission, on July 6, 2020, Fasken timely filed a Motion for Leave to file New Contention No. 5, concurrently filing a Motion to Reopen the Record and supported by the Declaration of Taylor.²⁴ Fasken’s Contention challenges new and materially different conclusions and/or sources relied on in the NRC’s DEIS which for the very first time shift the burden and responsibility for emergency response efforts and infrastructure improvements to local communities without accounting for the costs and fail to independently and reliably investigate regional geologic characteristics, including seismicity, subsidence and sinkholes and the cumulative transportation impacts on industry operations surrounding the proposed ISP site in the Permian Basin. The NRC’s reliance on incomplete, uncertain and speculative assumptions and undisclosed sources of information, atop a failure to adequately assess regional characteristics, and lack of transparency in such evaluations, not only impairs public participation but precludes proper cumulative impact analyses. More specifically, Contention No. 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 CISF project, which precludes a proper analysis under NEPA, and further nullifies

²² See 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); ASLB Memorandum and Order (Ruling on Petitions for Intervention and Requests for Hearing).

²³ Commission Memorandum and Order (CLI-20-14, Dec. 17, 2020) (ADAMS Accession No. ML20352A359)

²⁴ Order (Extending Time to Intervene, Request a Hearing, and File New Contentions) Based on the Draft Environmental Impact Statement” Docket No. 72-1050 (May 22, 2020) (ADAMS Accession No. ML20143A239).

ISP's ability to satisfy NRC's siting evaluation factors now and anticipated in the future and is in further violation of NRC regulations.²⁵

On December of 2020, the Commission referred Fasken's Motions to the Board for initial consideration. ASLB's subsequent January 29, 2020 ruling denying Contention No. 5 and relating filings is the subject of the foregoing appeal to the Commission.

III. STANDARDS

a. Petition for Review

Pursuant to 10 C.F.R. § 2.341(b)(1), within 25 days after service of a full or partial decision or any other decision or action by a presiding officer with respect to which a petition for review is authorized, a party may file a petition for review with the Commission. A petition for review filed under 10 C.F.R. § 2.341(b) may be granted "in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations: (i) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding; (ii) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; (iii) a substantial and important question of law, policy, or discretion has been raised; (iv) the conduct of the proceeding involved a prejudicial procedural error; or (v) any other consideration which the Commission may deem to be in the public interest."²⁶

²⁵ See Fasken Motion for Leave. Fasken consider "ISP's application" to comprehensively include ER, SAR, DEIS, and all other documents considered in the NRC's approval of the proposed license.

²⁶ The Commission has stated: "[r]eview is particularly appropriate where the Board's ruling may have made a clear error as to a material fact, where the ruling turns on a legal conclusion that is without precedent or conflicts with existing precedent, or where the ruling raises an important policy issue that the Commission itself should consider." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-8, 61 NRC 129, 132 (2005) (emphasis added); see also *In Matter of Nuclear Innovation North America LLC* (South Texas Project, Units 3 and 4), Docket Nos. 52-012 & 52-0013 "NRC Staff Answer to Intervenors' Petition for Review of the Licensing Board's Partial Initial Decision on Contention FC-1" (May 30, 2014) (ADAMS No. ML14150A561).

On review, the Commission generally defers to the ASLB’s threshold rulings on standing and contention admissibility unless it finds an “error of law or abuse of discretion.”²⁷ The Commission has discretion to review all factual issues *de novo*,²⁸ however it is typically “disinclined to do so where a Board has weighed arguments presented by experts and rendered reasonable, record based factual findings.”²⁹ For questions of law, the Commission reviews ASLB decisions *de novo*.³⁰

b. NEPA and NRC Regulations

NRC cannot grant a license for construction or operation of the proposed CISF project until it determines that applicable regulatory requirements of the Atomic Energy Act of 1954 (“AEA”),³¹ the National Waste Policy Act (“NWPA”)³² and NEPA requirements are satisfied.³³ Any NRC licensing action must be viewed through the lenses and from the perspective of congressional intent for authorizing federal agency actions under the respective legislations.

²⁷ See, e.g., *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 710 (2012); see also *Calvert Cliffs 3 Nuclear Project LLC and Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 914 (2009); *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-16-13, 83 NRC 566, 573 (2016).

²⁸ See e.g., *Nuclear Info. Res. Serv. v. Nuclear Regulatory Comm’n*, 969 F.2d 1169, 1177 (D.C.Cir.1992) (“The AEA has been consistently read . to give the Commission broad regulatory latitude.”)

²⁹ *Pa’ina Hawaii, LLC* (Materials License Application), CLI-10-18, 72 NRC 56, 73 (2010) (internal quotation marks omitted).

³⁰ *Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 503-05 (2007); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 NRC 215, 219 (2017).

³¹ The Atomic Energy Act of 1954, as amended, 42 §§2011, *et seq.* (“AEA”).

³² The National Waste Policy Act of 1982, as amended, 42 U.S.C. §§10101, *et seq.* (“NWPA”).

³³ See 10 C.F.R. §51.10(a) (Nothing in the NRC NEPA implementing regulations alter the cardinal requirement that license applications comply with all NRC regulations. Indeed, NEPA regulations must be carried out in a “manner which is consistent with the NRC’s domestic licensing and regulatory authority under the [AEA].”

Additionally, the NRC may only issue a license upon a finding that the proposed site complies with NRC's own regulations governing siting evaluation factors.³⁴ Among these regulations, license applicants for a "proposed ISFSI or MRS must [also] be evaluated with respect to the potential impact on the environment of the transportation of spent fuel, high-level radioactive waste, or reactor-related GTCC waste within the region."³⁵

NEPA mandates that federal agencies prepare an EIS before undertaking any "major Federal actions significantly affecting the quality of the human environment."³⁶ NRC regulations implementing NEPA reflect a desire to improve regulatory efficiency in environmental reviews and to provide for "more focused and therefore more effective" NRC NEPA reviews by focusing on "significant case[-]specific concerns."³⁷ NEPA mandates the NRC take a site-specific "hard look at environmental consequences" of the proposed action, and imposes a duty upon the agency to both "consider every significant aspect of the environmental impact of a proposed action" and "inform the public" of its analysis and conclusion.³⁸ As such, the NRC's draft EIS must "state how *alternatives considered* in it and decisions based on it will or will not achieve [NEPA][] requirements,³⁹ . . . *identify any*

³⁴ See 10 C.F.R. §§ 72.40(a)(2), 72.90 – 72.108.

³⁵ 10 C.F.R. § 72.108.

³⁶ 43 U.S.C. § 4332(2)(c) (Including a detailed statement by the responsible official on "(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.")

³⁷ Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467 (Jun. 5, 1996); *id.*, 61 Fed. Reg. 66,537 (making minor clarifying and conforming changes and adding text omitted from Table B-1); Correction, 66 Fed. Reg. 39,277 (Jul. 30, 2001) (making further corrections to Table B-1).

³⁸ *Balt. Gas & Elec. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97, 103 (1983) (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 553 (1978)).

³⁹ Specifically, "Sections 101 and 102(1) of NEPA and of any other relevant and applicable environmental laws and policies."

methodologies used and sources relied upon, . . . be supported by evidence that the necessary environmental analyses have been made . . . [and that] [t]he NRC staff [] independently evaluate and be responsible for the reliability of all information used in the draft [EIS].”⁴⁰

Draft and final EISs are government-sponsored documents that will subsequently be issued to other federal agencies, state agencies, and the public. Because the government stands by the reliability of the information and conclusions in its EISs, they are often used as references for a broad array of decisions. “To casually include information that has not been independently verified for its reliability and completeness by the NRC would violate both NRC regulations and NEPA’s fundamental purpose of informing the public about environmental issues.”⁴¹ Moreover, to protect the inclusion of information in an EIS from challenge in a licensing proceeding would violate NRC regulations governing public participation requirements.⁴²

c. Reopening, Good Cause, and Contention Admissibility

Any contentions filed in a closed proceeding must meet the requirements for reopening. 10 C.F.R. § 2.326 sets forth the requirements for reopening the record: (1) a motion to reopen the record must be timely;⁴³ (2) the motion must address a significant safety or environmental issue;

⁴⁰ 10 C.F.R. § 51.70(b) (emphasis added).

⁴¹ *TVA*, Intervenor’s Reply to Responses in Opposition to Motion for Leave to File Contention 4 (Inadequate Discussion of Environmental Impacts of Spent Nuclear Fuel Pool Fires) and Contention 5 (Impermissible Discussion of Energy Alternatives and Need for The Proposed SMR), Docket No. 52-047-ESP (June 22, 2018), (ADAMS Accession No. ML18174A075).

⁴² 10 C.F.R. § 51.104

⁴³ NRC regulations do not expressly define a time period under 10 C.F.R. § 2.309(c)(1) that is considered “timely,” however, the Commission has found 30 to 60 days to be a “reasonable deadline for proposing new or amended contentions.” See *In the Matter of Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 N.R.C. 491, 491 (2012) (noting that “although ‘timely’ is not expressly defined by months or days in [NRC] regulations. . . typically [] 30 to 60 days from the initiating event [is considered] a reasonable deadline for proposing new or amended contentions.”); *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), 67 N.R.C. 460, 493 (2008) (30 days held as presumptive time frame for timeliness of late-filed contentions).

and (3) the motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially. The foregoing must also be accompanied by an appropriate affidavit.⁴⁴

NRC regulations do not expressly define a time period under 10 C.F.R. § 2.309(c)(1) that is considered “timely,” however, the Commission has found 30 to 60 days to be a “reasonable deadline for proposing new or amended contentions.”⁴⁵

Any contention filed must meet the basic admissibility requirements of 10 C.F.R. § 2.309(f)(1).⁴⁶ New or amended contentions submitted after the initial date for hearing requests must also meet the requirements of 10 C.F.R. § 2.309(c)(1). To do so, a party must demonstrate good cause by showing 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 than information previously available.⁴⁷

⁴⁴ See 10 C.F.R. § 2.309.

⁴⁵ See *In the Matter of Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 N.R.C. 491, 491 (2012) (noting that “although ‘timely’ is not expressly defined by months or days in [NRC] regulations. . . typically [] 30 to 60 days from the initiating event [is considered] a reasonable deadline for proposing new or amended contentions.”); *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), 67 N.R.C. 460, 493 (2008) (30 days held as presumptive time frame for timeliness of late-filed contentions).

⁴⁶ This 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...together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its 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. This information must include references to specific portions of the application (including the applicant’s environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner’s belief. 10 C.F.R. § 2.309(f)(1)(i-vi).

⁴⁷ The Commission has stated that “materially different” information is that which “differs significantly. . . from the information in the applicant’s documents.” Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46, 562 at 46, 572 (Aug. 3, 2012). See also, Fla. Power & Light Co. (Turkey Point Units 6 & 7), LBP-

- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information⁴⁸.

To satisfy basic contention admissibility requirements, a petitioner must “proffer at least some minimal factual and legal foundation in support of their contentions.”⁴⁹ Although a petitioner need not prove the merits of contentions at this stage, mere notice pleading of proffered contentions is insufficient.⁵⁰ Rather the NRC requires a petitioner read the pertinent portions of the license application, state the applicant’s position and the petitioner’s opposing view, and explain the disagreement.⁵¹

New or amended contentions regarding NEPA may be filed if there are data or conclusions in the NRC’s DEIS or a final EIS or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant’s documents.⁵²

If the NRC DEIS “contains data or conclusions. . . of the proposed action that differ significantly from those contained in the [ER] (an applicant’s document), the petitioner [] may file an amended contention, or an entirely new contention, to challenge the new data or conclusions.”⁵³

86 N.R.C. 37, 48, *aff’d*, CLI-17-12, 86 N.R.C. 215 (2017) (in the context of late-filed contentions, “materially different” concerns the “type or degree of difference between new information and previously available information”).

⁴⁸ See *In the Matter of Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 N.R.C. 491, 491 (2012) (noting that “although ‘timely’ is not expressly defined by months or days in [NRC] regulations. . . typically [] 30 to 60 days from the initiating event [is considered] a reasonable deadline for proposing new or amended contentions.”); *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), 67 N.R.C. 460, 493 (2008) (30 days held as presumptive time frame for timeliness of late-filed contentions).

⁴⁹ *Oconee*, CLI-99-11, 49 N.R.C. at 334.

⁵⁰ *Fansteel, Inc.*, CLI-03-13, 58 N.R.C. 195 at 203.

⁵¹ Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33, 168, 33, 170-71 (Aug. 11, 1989).

⁵² 10 C.F.R. § 2.309(f)(2). See *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 533 (2005) (“Our rules expressly allow timely amendment of NEPA contentions if there is significant new information or different conclusions in the DEIS that could not have been challenged previously”) (citing 10 C.F.R. § 2.309).

⁵³ *In the Matter of Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), 72 N.R.C. 720, 729-730, LBP-10-24 (Dec. 28, 2010) (“*Calvert*”).

The use of a disjunctive phrase here indicates a “contention may therefore challenge a DEIS even though its ultimate conclusion on a particular issue. . . is the same as that in the ER, as long as the DEIS relies on significantly different data than the ER to support the determination.”⁵⁴

IV. ARGUMENT

a. **The ASLB Erred in Refusing to Admit Fasken’s Contention No. 5 for Adjudication**

The ASLB ruling fails to address or even discuss the material factual disputes, inaccuracies and omissions identified in Fasken’s Contention No. 5 with the NRC’s purported site-specific NEPA analyses, ignores violations of NRC regulations, and creates a prejudicial atmosphere for the ISP CISF proceeding. Without discussion or consideration of the actual arguments presented, the ASLB ruling merely parrots language from earlier decisions, glossing over the nuanced and material assertions in Fasken’s Contention No. 5 and summarily dismisses same.⁵⁵ Moreover, the ruling repeatedly and mistakenly labels the Contention as identical to arguments in previously filed contentions paying no heed to identification and disputes with new and material conclusions disclosed for the very first time in the ISP DEIS, which vary significantly from ISP’s ER, as to responsibility for emergency responses and infrastructure improvements and potential for negative impacts and externalized costs of communities along transportation routes and industries in the region. Contrary to ASLB ruling and as discussed *infra*, Fasken’s Contention No. 5 is admissible, identifies specific portions of ISP’s licensing application and presents concrete and particularizes

⁵⁴ *Calvert*, 72 N.R.C. at 730 (“The reverse is also true: a significantly different conclusion in the DEIS may be challenged even though it is based on the same information that was cited in the ER.”). *See also*, *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 533 (2005) (“Our rules expressly allow timely amendment of NEPA contentions if there is significant new information or different conclusions in the DEIS that could not have been challenged previously”).

⁵⁵ *See generally* ISP Order.

challenges to the conclusions and sources relied on implicating important safety and environmental issues that are improperly analyzed in the NRC's ISP DEIS in violation of NEPA and NRC regulations.

i. *The ASLB Ruling Mischaracterizes and Improperly Conflates the Nuanced Assertions and Glosses Over New and Material Different Conclusions and Information Relied on as Presented in Fasken's Contention No. 5*

Without explanation, analysis or a justifiable basis, the ASLB improperly narrows allegations in Fasken's Contention No. 5 to a challenge to the use of representative routes in the ISP DEIS,⁵⁶ superficially comparing it to Sierra Club's Contention No. 11⁵⁷ and fundamentally mischaracterizing Fasken's challenges to recently disclosed conclusions and sources relied on in the NRC's deficient ISP DEIS investigation that differ from ISP's ER, concluding "[a]ll. . . premised on information that was available to Fasken long before the publication of the DEIS."⁵⁸ This could not be farther from the truth. The ASLB decision improperly conflates and glosses over Fasken's nuanced challenges to inadequate transportation analyses and constitutes an abuse of discretion.

Contrary to ASLB's ruling, Fasken's DEIS-based Contention pinpoints specific disputes that have only recently revealed deficiencies in the hypothetical conditions of the proposed ISP license that identify glaring omissions and inaccuracies that span much more than just

⁵⁶ See ISP Order at 14 ("Fasken's demand for an analysis of actual transportation routes is not admissible for the same reasons [as prior contentions].") and "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.")

⁵⁷The ASLB decision repeats the generic basis for denial of Sierra Club's assertions and concludes without adequate discussion or analysis that Fasken's claims are one in the same. (Fasken's claims are "similar [to] claims that were made in Sierra Club Contention 11 and fail to anticipate the Commission's affirmance (in CLI-20-15). . ." which were ruled inadmissible.) See ISP Order at 15.

⁵⁸ ISP Order at 8 (emphasis added).

representative routes in NRC’s ISP DEIS assessments. Although the ASLB concedes that “Fasken makes some related (and some perhaps marginally related) additional claims,”⁵⁹ it fails to adequately articulate or address any of them in its ruling. Most notable and significant of Fasken’s novel assertions, based on new and materially different conclusions and/or sources of information relied in the NRC’s ISP DEIS when compared to ISP’s ER, include the following:

- **ISP’s ER:** “If the DOE is the shipper, *the federal government, through DOE, is responsible for providing emergency training* to states, tribes, and local emergency responders along the transportation routes where SNF would be transported to the CISF.⁶⁰”
- **NRC’s ISP DEIS:** “. . .the NRC staff recognizes that if SNF is shipped to a CISF, *some States, Tribes, or municipalities along transportation routes may incur costs for emergency-response training and equipment* that might otherwise be eligible for funding under NWPA Section 180(c) provisions if DOE shipped the SNF from existing sites to a repository. . . *quantification of such would be speculative.*⁶¹
- **ISP’s ER:** “Potential *large positive impacts to socioeconomics* would be due to local economic tax revenue increases from the CISF.”
- **NRC’s ISP DEIS:** “[a]nother *cost factor shared by the proposed CISF and the No-Action alternative is emergency preparedness* along the SNF transportation route”⁶² [and thus not considered or evaluated the in comparison of alternatives in the NRC’s ISP EIS].
- **ISP’s ER:** “*SNF would be transported exclusively by rail.* . . The DOE or private qualified logistics company will also be responsible for coordinating with federal agencies, such as the U.S. Department of Transportation, U.S. Department of Homeland Security, U.S. Environmental Protection Agency, and the Federal Emergency Management Agency, regarding transportation of SNF from the commercial nuclear reactor sites to the CISF.”⁶³
- **NRC’s ISP DEIS:** “[Use of national rails for] *shipments of SNF could include relatively short segments of barge or heavy-haul truck transportation* as

⁵⁹ ISP Order at 8.

⁶⁰ See, Ex. 2 Facts Intended to Rely On, Fasken Motion for Leave; ISP Environmental Report at 4-8.

⁶¹ Ex. 2, Fasken Motion for Leave; DEIS at 4-74 to 4-75.

⁶² Ex. 2, Fasken Motion for Leave; ISP DEIS at 8-11.

⁶³ Ex. 2, Fasken Motion for Leave; ISP Environmental Report at 4-8.

needed to move SNF from reactor sites”⁶⁴ . . . [or] from generator sites (or ISFSIs) to the nearest rail line⁶⁵. . . *the impacts of using these other modes to supplement rail transportation . . . [and] minor radiological impacts. . . are not evaluated further in this EIS.*”⁶⁶

- **ISP’s ER:** “*All SNF would be transported* approximately 169 km (105 mi) from Monahans, Texas *to the CISF along the transportation corridor. The DOE or nuclear plant owner(s) holding title to the SNF will be responsible* for transporting SNF from existing nuclear power plants to the CISF by rail in transportation casks licensed by the NRC pursuant to 10 CFR 71. The preparation of such shipments will be conducted in accordance with written procedures prepared by the commercial nuclear power plant, the DOE, or their contractors.”⁶⁷
- **NRC’s ISP DEIS:** “During the construction stage of the *proposed CISF, ISP would use trucks to transport construction supplies and equipment. . . [via] regional and local transportation infrastructure.*”⁶⁸
- **NRC’s ISP DEIS:** “The *potential impacts of the additional SNF shipments to the local rail traffic on the Texas-New Mexico Railroad (TNMR)* traveling north from the Union Pacific connection at Monahans, Texas, to Lovington, New Mexico, *would be minor because the 170 or fewer proposed annual SNF shipments to the CISF would not be a large addition to the existing railcar traffic of 22,500 railroad carloads per year (EIS Section 3.3) and the speed of all traffic would be limited based on the class of the track, thereby limiting the potential for delays resulting from differences in the speed of travel.* On the broader national rail network, the potential traffic impacts of the additional SNF shipments would be addressed by rail industry traffic flow monitoring and routing and therefore the NRC staff expects it to be minor.”⁶⁹
- **TAYLOR DECLARATION:** “According to the DEIS, the proposed CISF would utilize the same rail lines which the oil and gas industry of the Permian Basin rel[y] upon. . . *Both Fasken and the PBLRO regularly utilize rail transportation to support their industries.* Those named in the DEIS at issue, Union Pacific (UP) and the Texas-Mexico Railroad (TNMR), *both serve the oil, gas, agricultural and ranching industries in the region of the proposed CISF.* . . . for [shipments and] associated products that are all necessary to drill and complete an oil well and bring it to production . . . *Any hazardous materials*

⁶⁴ Ex. 2, Fasken Motion for Leave; ISP DEIS at 3-13.

⁶⁵ Ex. 2, Fasken Motion for Leave; ISP DEIS at 4-6.

⁶⁶ Ex. 2, Fasken Motion for Leave; ISP DEIS at 4-10.

⁶⁷ Ex. 2, Fasken Motion for Leave; ISP Environmental Report at 4-8.

⁶⁸ Ex. 2, Fasken Motion for Leave; ISP DEIS at 4-20.

⁶⁹ *Id.*

*emergency upon the rails that interferes with energy freight poses a loss. . .in the Permian Basin.*⁷⁰

- **TAYLOR DECLARATION:** The single-track railway proposed in the DEIS for *the transport of [SNF] traverses through rural, remote areas. . .the DEIS fail[s] to determine the risks and vulnerabilities* relating to the remoteness of the majority of said rail lines. . .served mostly by volunteer fire departments or *areas lacking emergency responder resources.*⁷¹
- **TAYLOR DECLARATION:** “The CISF proposed transportation method of sharing the rail lines of the Permian Basin with the oil, gas, and agricultural industry of the region is a flawed proposal. *An integral part of the DEIS and its transportation study must include an objective, comprehensive analysis of the issues raised in this declaration and of the very real potential that the transport of spent fuel via rail through the Permian Basin could diminish or foreclose further development of oil and gas assets of Fasken, of the members of the PBLRO and of the entire Permian Basin.*”⁷²

Transportation is inextricably linked to the proposed ISP CISF project - any and all related cumulative impacts on socioeconomic, regional geology and land use are likewise indispensable and must be addressed in the NRC’s “independent and reliable” investigation. Nowhere in any prior ISP licensing documents did ISP state that the responsibility for emergency equipment and training would be the responsibility of local communities. This statement, made for the very first time in the DEIS, significantly changes the calculus of the costs and benefits of the proposed CISF. Conclusions in the NRC’s ISP DEIS that are likewise based on speculation and conjecture or complete lack of evaluation in the context of multiple rounds of transportation of the nation’s nuclear waste have no place in the NRC’s ISP DEIS. The ASLB improperly and conclusory dismissed Fasken’s Contention No. 5 and related briefing, which articulate these issues in detail, without adequate (or any) consideration / discussion at all.

⁷⁰ Taylor Decl. at ¶ 11

⁷¹ Taylor Decl. at ¶¶ 11-12.

⁷² Taylor Decl. at ¶ 17.

ii. *The ASLB Ruling Ignores Identified Violations of NEPA Regulations and NRC Siting Evaluation Regulations*

The ASLB is tasked with reviewing potential intervenor’s objections challenging the agency’s compliance with NEPA and NRC siting evaluation regulations. The ASLB’s ruling here not only ignores violations identified in Fasken’s Contention No. 5, but it also condones a lack of agency transparency and insulates vital information implicating important legal, safety and environmental impacts from the public in the ISP DEIS.

NEPA obligates the NRC take a “hard look” at the consequences of a proposed federal action and investigate and evaluate the cumulative impacts of the proposed ISP CISF before undertaking any actions that could affect “the quality of the human environment.”⁷³ NEPA does not permit an agency to act first and comply later. Similarly, NRC siting evaluation factor regulations serve to ensure that adequate inquiries are conducted as to the regional geologic suitability and land use compatibility of any proposed CISF location. As discussed in Fasken Contention No. 5 and related briefing, the NRC’s ISP DEIS negligently omits materials, lacks disclosure of integral methodologies, and fails to inform the public of decision-making basis for the conclusions, rendering it faulty at best. The ISP DEIS insufficiently considers transportation in light of regional geologic characteristics, collective and long-term impacts on regional industry, and omits and/or discounts significant interdependent variables from the socioeconomic calculus.

Contrary to the NRC Staff’s and ISP’s Oppositions, these are not merely “business decisions” outside the scope of the licensing proceeding, but directly implicate important legal, safety and

⁷³ 43 U.S.C. § 4332(2)(c)

environmental impacts that must be investigated and evaluated in any proper analysis of transportation impacts under NEPA and NRC regulations.⁷⁴

iii. *The ASLB Ruling Encourages Prejudicial Procedures and Overlooks Persuasive Precedent*

1. Evaluations in the ISP DEIS Necessarily Hinge on Hypotheticals: Whether or Not the DOE or Nuclear Power Plant Owners Will Take Title, Ownership and/or Responsibility for Transportation of Nuclear Waste Destined for ISP's CISF

In sum, the ASLB's ruling and the NRC's analyses in the ISP DEIS lack candor, rely on faulty underlying assumptions and extrapolations, improperly interpret congressional intent and agency authority under NWPA and AEA, and in turn evade obligations and mandated requirements of the agency under NEPA and NRC regulations. As acknowledged by the ASLB itself: "Congress likely did not envision this situation when it passed the [NWPA]."⁷⁵ Yet the ASLB ruling reinforces this trajectory, down an unknown and uncertain "yellow brick road," which unjustly forcing potential intervenors and interested parties to challenge hypotheticals before they occur in this CISF licensing proceeding amidst an ever-evolving backdrop of applicant responses and entirely unmoored from any known agency CISF regulations. Forcing

Both DOE and nuclear power plant owners potentially have an interest in contracting to use such a [CISF] facility. **DOE might want** to take responsibility for the nuclear plants' spent fuel, pay a private company to store it, and stop paying out damages. The nuclear plant **owners, on the other hand, might be willing** to apply their ongoing damage payments toward paying a private company to store their spent fuel offsite, so that it would no longer be their responsibility

⁷⁴ Fasken Reply to Motion for Leave at 2.

⁷⁵ ISP Order at 4.

to keep onsite and secure. Because the NWPA was drafted on the premise that DOE would not accept the spent fuel until a permanent repository becomes operational, however, as discussed *infra* only the second option would be consistent with the terms of the statute.⁷⁶ This places potential intervenors and interested parties, including Petitioners here, at a serious disadvantage, forced to guess which ending will transpire before it actually occurs.

2. ISP's Untimely (and/or Calculated and Strategic) Responses to NRC Issued RAIs

This is not the first time that ISP has failed to timely respond or ISP's delays in responding to NRC issued RAIs have prejudiced interested parties and potential intervenors. Indeed, as the ASLB aptly noted in its prior ISP CISF ruling, "ISP informed the Board and participants of *new responses to the NRC Staff's RAIs, which in turn might affect participants' proffered contentions*. . .[and] ISP advised that it had revised sections . . .of its [licensing documents] to correspond with its RAI answers."⁷⁷

Here, like in contentions previously filed in this proposed CISF license proceeding, ISP filed supplemental and/or amended responses to NRC issued RAIs dating back to 2019 that directly relate to the issues at hand.⁷⁸ Weeks after Fasken's Contention No. 5, ISP

The NRC and ASLB have unwaveringly and relentlessly placed form over substance when considering challenges by potential intervenors addressing these topics but have allowed ISP great latitude in responding to such requests for information the NRC itself deems necessary in its review of the proposed CISF license application. This creates a a Catch-22 situation and formidable wall

⁷⁶ ISP Order at 4 (emphasis added) (citing 42 U.S.C. § 10222(a)(5)(A)).

⁷⁷ See e.g., ISP Order at 11-12 (emphasis added).

⁷⁸ See ISP RAI Responses (July 21, 2020) (ADAMS Accession No. ML20203M040).

to potential intervenors for reasonable adjudication of crucial issues. This is especially true given the NRC's decision to selectively or delay publication of responses for CISF applicant's information.

The ASLB's decision is all the more disappointing in light of the lack of directly on-point precedent and its disregard for the persuasive precedent of *Calvert Cliff*.

V. CONCLUSION

The transportation of nuclear waste to the proposed ISP CISF has a clear physical, functional and temporal nexus to the project. The proposed ISP CISF would have no purpose unless it is supplied with something to store. Questions as to which entities will be taking title to the nuclear waste and which communities, states and/or business entities will be taking responsibility / liability for incidents during transport must be answered and appropriately evaluated under NEPA and NRC regulations. Reliance on conjecture and unverified and speculative information in the ISP DEIS cannot reasonably form the basis for a proper evaluation of safety risks or environmental impacts of transporting nuclear waste through countless communities across the country, who deserve fair warning and adequate notice of potential consequences. ASLB's ruling, denying without discussion, Fasken's nuanced ISP and acute DEIS-based transportation related arguments and Contention No. 5 warrants further review.

Dated: February 23, 2021

/electronically signed by Allan Kanner

Kanner & Whiteley, LLC

Allan Kanner, Esq.
Conlee S. Whiteley, Esq.
Annemieke M. Tennis, Esq.
701 Camp Street
New Orleans, Louisiana 70130

Phone: (504) 524-5777

Fax: (504) 524-5763

Attorneys for Petitioners

Fasken Oil and Ranch, Ltd. and PBLRO

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

IN THE MATTER OF INTERIM
STORAGE PARTNERS, LLC

(WCS Consolidated Interim Storage
Facility)

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Docket No. 72-1051-ISFSI

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

February 23, 2021

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I Allan Kanner certify that, on this 23rd day of February, 2021, true and correct copies of Fasken Land and Minerals, Ltd.’s and Permian Basin Land and Royalty Owners’ Combined Notice of Appeal and Petition for Review of Atomic Safety Licensing Board’s Denial of Motion for Leave to File New Contention No. 5 and Motion to Reopen the Record, and attachments were served upon the Electronic Information Exchange (the NRC’s E-Filing System) in the above-captioned proceeding.

/electronically signed by Allan Kanner

Kanner & Whiteley, LLC

Allan Kanner, Esq.
Conlee S. Whiteley, Esq.
Annemieke M. Tennis, Esq.
701 Camp Street
New Orleans, Louisiana 70130
Phone: (504) 524-5777
Fax: (504) 524-5763

*Attorneys for Petitioners
Fasken Oil and Ranch, Ltd. and PBLRO*