

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Christopher T. Hanson, Chairman
Jeff Baran
Annie Caputo
David A. Wright

In the Matter of

INTERIM STORAGE PARTNERS LLC

(WCS Consolidated Interim Storage Facility)

Docket No. 72-1050-ISFSI

CLI-21-09

MEMORANDUM AND ORDER

This order addresses the petition for review of Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (together, Fasken), in which Fasken appeals the Board's denial of its motions to reopen the proceeding and to admit a new Contention 5.¹ For the reasons stated below, we deny the petition for review.

I. BACKGROUND

This proceeding involves the application of Interim Storage Partners LLC (ISP) for a license to construct and operate a consolidated interim storage facility (CISF) in Andrews County, Texas. ISP is a joint venture between Waste Control Specialists LLC (WCS) and

¹ LBP-21-2, 93 NRC __ (Jan. 29, 2021) (slip op.).

Orano CIS LLC formed to design, build, and operate the WCS CISF.² The proposed CISF would be located within the existing Waste Control Specialists site in Andrews County, Texas.³

The NRC Staff published notice of the opportunity to request a hearing on ISP's application and Fasken timely filed a hearing request in October 2018.⁴ The Board denied Fasken's hearing request because although Fasken had standing to intervene, it had not submitted an admissible contention.⁵ On appeal, we affirmed the Board's decision and referred to the Board Fasken's motions to reopen the proceeding and to admit a new Contention 5, which Fasken filed while its appeal was pending and after the Board had terminated the proceeding.⁶ We instructed the Board to consider whether Fasken's motions met our standards for reopening a closed proceeding, whether Fasken had good cause for filing Contention 5 after the deadline, and whether Contention 5 was admissible.⁷

The Board found that Fasken's motions did not meet the standards for reopening a closed proceeding, filing a new contention after the initial deadline, or setting forth an admissible

² "WCS Consolidated Interim Storage Facility System Safety Analysis Report," rev. 2 (July 2018), at 1-2 (ADAMS accession no. ML18221A408 (package)).

³ *Id.*

⁴ See Interim Storage Partners Waste Control Specialists Consolidated Interim Storage Facility, 83 Fed. Reg. 44,070 (Aug. 29, 2018), as corrected by 83 Fed. Reg. 44,680 (Aug. 31, 2018); *Petition of Permian Basin Land and Royalty Organization and Fasken Land and Minerals for Intervention and Request for Hearing* (Oct. 29, 2018; dated Sept. 28, 2018).

⁵ LBP-19-7, 90 NRC 31, 39 (2019).

⁶ See *Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners Motion to Reopen the Record* (July 6, 2020); *Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners Motion for Leave to File New and/or Amended Contention* (July 7, 2020; dated July 6, 2020) (Contention 5). The Staff and ISP opposed Fasken's motions to reopen the proceeding and to admit Contention 5. See *Interim Storage Partners LLC's Answer Opposing Fasken's and PBLRO's Second Motion to Reopen the Record and Motion for Leave to File New Contention "5"* (July 31, 2020); *NRC Staff's Answer in Opposition to Fasken Oil and Ranch, Ltd.'s and Permian Basin Land and Royalty Owners' Motions to Reopen the Record and File New Contention 5* (July 31, 2020).

⁷ CLI-20-14, 92 NRC __, __ (Dec. 17, 2020) (slip op. at 35).

contention.⁸ Fasken petitioned for review of the Board's decision.⁹ The Staff and ISP oppose the petition for review.¹⁰

II. DISCUSSION

Fasken's filing is not associated with its initial hearing request; therefore, we treat it as a petition for discretionary review under 10 C.F.R § 2.341 and not an appeal as of right under 10 C.F.R. § 2.311.¹¹ When considering whether to grant a petition for review of a Board decision on contention admissibility and whether to reopen a closed proceeding, we give the Board's judgment substantial deference.¹² We will defer to the Board's decision where we find no error of law or abuse of discretion.¹³ As discussed below, Fasken has not shown that the Board erred or abused its discretion and therefore has not raised a substantial question warranting review.

A. Legal Standards

To prevail on a motion to reopen, the movant must show that: (1) the motion is timely; (2) the motion 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

⁸ LBP-21-2, 93 NRC at ___ (slip op. at 4-15).

⁹ *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* (Feb. 23, 2021) (Petition).

¹⁰ *Interim Storage Partners LLC's Answer Opposing Fasken's Petition for Review of LBP-21-2* (Mar. 22, 2021); *NRC Staff's Answer in Opposition to Fasken Oil and Ranch, Ltd.'s and Permian Basin Land and Royalty Owners' Petition for Review of LBP-21-2* (Mar. 22, 2021).

¹¹ See *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-7, 75 NRC 379, 385 (2012).

¹² See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 119 (2009).

¹³ See *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 220 (2011); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260 (2009).

considered initially.¹⁴ The movant must also meet the standards for contention admissibility as well as the standards for filing new contentions after the initial deadline for hearing requests.¹⁵ Together, these requirements impose a higher standard for admitting a new contention after the Board has terminated a proceeding than would otherwise apply.¹⁶

B. LBP-20-10

Fasken moved to reopen this proceeding based on information in the Staff's Draft Environmental Impact Statement (DEIS).¹⁷ Fasken claimed that the DEIS contained new information that, when compared to ISP's application, justified a new Contention 5:

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 [the National Environmental Policy Act (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.¹⁸

The Board noted that the "principal and overarching claim" of Contention 5 is that the analysis of representative transportation routes for the shipment of waste to and from the proposed CISF "prevent[s] a proper assessment of cost and benefit scenarios" and is, therefore, inadequate under NEPA.¹⁹

¹⁴ 10 C.F.R. § 2.326(a)(1)-(3). "[A]n exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented." *Id.* § 2.326(a)(1).

¹⁵ *See id.* § 2.309(c)(1), (f)(1)(i)-(vi).

¹⁶ *See DTE Electric Co. (Fermi Nuclear Power Plant, Unit 2)*, CLI-17-7, 85 NRC 111, 116 (2017); *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-05-12, 61 NRC 345, 350 (2005).

¹⁷ "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) (ML20122A220) (DEIS).

¹⁸ Contention 5 at 11.

¹⁹ LBP-21-2, 93 NRC at __ (slip op. at 12-13) (quoting Contention 5 at 14).

The Board found that Fasken's challenge to the use of representative routes was not based on new and materially different information in the DEIS.²⁰ Further, Fasken could have raised it at the outset of the proceeding because ISP's environmental report, like the DEIS, used representative waste shipment routes to evaluate the impacts of waste transportation.²¹ The Board noted that our hearing standards required Fasken to file this NEPA challenge in its initial hearing request based on ISP's environmental report, however, Fasken did not do so.²² Therefore, the Board found that Fasken's challenge to the use of representative transportation routes was untimely.

The Board found that the remaining aspects of Contention 5 were also untimely because they could have been raised based on information in ISP's environmental report. For example, Fasken claimed that the DEIS did not adequately evaluate the environmental impacts of waste transportation via barges or heavy haul trucks.²³ However, the Board found that ISP's environmental report analyzed those impacts and Fasken did not challenge ISP's analysis in its hearing request.²⁴ Fasken claimed that the DEIS did not address the costs that States, Tribes, and local governments might incur for emergency-response training and equipment if waste is

²⁰ *Id.* at ___ (slip op. at 6-9).

²¹ *Id.* The Board's decision refers to Revision 3 of ISP's environmental report. We refer instead to Revision 2 of ISP's environmental report, published in August 2018, because it was available to Fasken in advance of the October 2018 deadline for submitting its initial hearing request. Like Revision 3, Revision 2 of ISP's environmental report includes the analyses and information Fasken sought to challenge in Contention 5. See ISP, "WCS Consolidated Interim Spent Fuel Storage Facility Environmental Report," rev. 2 (July 2018), § 4.2.6 (ML18221A405 (package)) (2018 Environmental Report).

²² LBP-21-2, 93 NRC at ___ (slip op. at 6) (citing 10 C.F.R. § 2.309(f)(2)).

²³ Contention 5 at 18.

²⁴ See LBP-21-2, 93 NRC at ___ (slip op. at 7-8); 2018 Environmental Report § 4.2.6 at 4-12, 4-13, 4-22, tbl.4.2-8.

shipped to the proposed CISF.²⁵ But the Board found that ISP's environmental report also omitted that information and Fasken did not challenge the omission.²⁶ Fasken further claimed that the DEIS failed to adequately consider how regional characteristics within a fifty-mile radius of the proposed CISF, such as the occurrence of sinkholes and earthquakes, might relate to accident analyses.²⁷ However, the Board found that ISP's environmental report evaluated accident scenarios and Fasken did not challenge the adequacy of that analysis.²⁸ Because Fasken could have raised these challenges in its October 2018 hearing request, the Board found that Contention 5 was untimely.²⁹

The Board further found that Contention 5 did not raise a significant safety or environmental issue.³⁰ According to the Board, Contention 5 was "virtually identical" to a contention that the Board had previously found inadmissible.³¹ That contention, like Contention 5, asserted that reliance on representative transportation routes was inadequate under NEPA.³² The Board previously found such assertions did not state a genuine dispute with ISP's application or raise an issue within the scope of the proceeding, and we affirmed those findings on appeal.³³ The Board concluded that Contention 5, insofar as it raised similar claims, was

²⁵ Contention 5 at 15-16.

²⁶ LBP-21-2, 93 NRC at ___ (slip op. at 8).

²⁷ Contention 5 at 19-21.

²⁸ See LBP-21-2, 93 NRC at ___ (slip op. at 8); 2018 Environmental Report §§ 4.2.6.2, 4.2.8.

²⁹ LBP-21-2, 93 NRC at ___ (slip op. at 8-10).

³⁰ *Id.* at ___ (slip op. at 9).

³¹ *Id.* at ___ (slip op. at 13).

³² *Id.*

³³ CLI-20-14, 92 NRC at ___ (slip op. at 21-22).

also inadmissible and therefore could not meet the higher standards for reopening a proceeding.³⁴

The Board found that Contention 5 would be inadmissible for other reasons as well. According to the Board, Fasken's claim that the costs of transportation-related emergency response and infrastructure upgrades had been inadequately described in ISP's environmental report and the DEIS was not only untimely, but it also fell outside the scope of the proceeding.³⁵ The Board also found that Fasken's claim that the DEIS must consider the possibility of terrorist attacks fell outside of the scope of the proceeding because we do not require an environmental analysis of terrorist attacks for facilities located outside the jurisdiction of the United States Court of Appeals for the Ninth Circuit.³⁶ And the Board found that Fasken's claims pertaining to ISP's site selection were similar to another inadmissible contention raised by a different petitioner at the outset of the proceeding and did not raise a genuine dispute with ISP's application.³⁷ Accordingly, the Board concluded that Contention 5 did not meet our contention admissibility or reopening standards.³⁸

C. Fasken's Petition for Review

Fasken claims that the Board erred in finding that Contention 5 was not based on new and materially different information in the DEIS; abused its discretion by narrowing and comparing Contention 5 to other contentions previously found inadmissible in the proceeding;

³⁴ LBP-21-2, 93 NRC at __ (slip op. at 9).

³⁵ *Id.*, 93 NRC at __ (slip op. at 6, 14-15).

³⁶ *Id.*, 93 NRC at __ (slip op. at 15) (citing CLI-20-14, 92 NRC at __ (slip op. at 33-34); *AmerGen Energy Co. (Oyster Creek Nuclear Generating Station)*, CLI-07-8, 65 NRC 124, 129 (2007), *review denied*, *N. J. Dep't of Env'tl. Prot. v. NRC*, 561 F.3d 132, 140-43 (3d Cir. 2009)). The proposed CISF would be located in Andrews County, Texas, outside of the jurisdiction of the Ninth Circuit.

³⁷ LBP-21-2, 93 NRC at __ (slip op. at 15).

³⁸ *Id.* at __ (slip op. at 6, 15).

ignored violations of NEPA regulations and NRC siting regulations; and encouraged “prejudicial procedures.”³⁹ We find each of these claims unpersuasive.

Fasken argues that the Board erred in finding that Contention 5 was not based on materially new and different information and cites differences in wording between the DEIS and ISP’s environmental report.⁴⁰ However, Fasken does not explain how the differences it cites are significant under our contention admissibility or reopening standards or address the Board’s reasons for finding those differences insufficient to justify Fasken’s untimely filing of Contention 5.⁴¹ Accordingly, we find no Board error on this basis.

Fasken asserts that the Board improperly narrowed Contention 5 to a claim about representative transportation routes, then “glosse[d] over Fasken’s nuanced challenges to inadequate transportation analyses.”⁴² The Board’s close examination of each supporting basis for Contention 5 undercuts this assertion.⁴³ We also disagree with Fasken’s claim that the Board abused its discretion when it compared the admissibility of Contention 5 to other contentions found inadmissible in this proceeding.⁴⁴ The Board’s comparisons followed our instruction to consider the admissibility of Contention 5 consistent with our ruling on similar contentions.⁴⁵

³⁹ Petition at 13-21.

⁴⁰ *Id.* at 14-17.

⁴¹ See LBP-21-2, 93 NRC at ___ (slip op. at 6 n.28).

⁴² Petition at 14.

⁴³ See LBP-21-2, 93 NRC at ___ (slip op. at 6-15)

⁴⁴ Petition at 13-14, 14 n.57.

⁴⁵ See CLI-20-14, 92 NRC at ___ (slip op. at 34-35).

Fasken next claims that the Board ignored violations of NEPA and NRC siting regulations by finding Contention 5 inadmissible.⁴⁶ Fasken does not point to specific legal standards that the Board failed to follow or consider; rather, Fasken repeats its claim that the DEIS does not comport with NEPA and NRC siting regulations without explaining how the Board erred in finding the claim inadmissible.⁴⁷ Fasken's reiteration of a claim considered and dismissed by the Board, without more, is insufficient to show Board error.⁴⁸

Fasken also claims that the Board improperly interpreted "congressional intent and agency authority under [the Nuclear Waste Policy Act] and [the Atomic Energy Act]" and asserts that uncertainty regarding whether the Department of Energy or private entities might store spent fuel at the CISF places Fasken at a disadvantage in framing its contentions.⁴⁹ These assertions do not point to any specific legal standards the Board failed to follow or otherwise show error in the Board's application of our contention admissibility or reopening standards. Accordingly, we find no Board error on this basis.

Finally, Fasken claims that the Board prejudicially favored ISP in this proceeding. Fasken does not claim that the Board acted prejudicially in the specific decision for which Fasken requests review. Rather, Fasken states that the Board has generally allowed ISP "great latitude" in updating its application in response to requests for information by the Staff yet "relentlessly placed form over substance when considering challenges by potential intervenors."⁵⁰ This claim includes no factual or legal support and mistakenly rests on the

⁴⁶ Petition at 18-19.

⁴⁷ *See id.* at 2, 18-19.

⁴⁸ *See Florida Power & Light Co. (Turkey Point Nuclear Generating Units 6 and 7)*, CLI-17-12, 86 NRC 215, 219 (2017).

⁴⁹ Petition at 19-20.

⁵⁰ *Id.* at 20.

inaccurate premise that ISP required the Board's approval to update its application.⁵¹ Further, it shows no error in the Board's application of our hearing standards. We therefore find it without merit.

III. CONCLUSION

For the reasons described above, we *deny* Fasken's petition for review.

IT IS SO ORDERED.

For the Commission



Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 22nd day of June 2021.

⁵¹ See *Holtec International* (HI-STORE Consolidated Interim Storage Facility), CLI-21-7, 93 NRC __, __ (Apr. 28, 2021) (slip op. at 17-18).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-21-09)** have been served upon the following persons by the Electronic Information Exchange:

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COMMISSION MEMORANDUM AND ORDER (CLI-21-09)**

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Dated at Rockville, Maryland,
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Office of the Secretary of the Commission