

August 26, 2019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of)
) Docket No. 72-1051
Holtec International)
)
(HI-STORE Consolidated Interim Storage)
Facility))

**HOLTEC INTERNATIONAL'S ANSWER OPPOSING FASKEN'S
LATE-FILED MOTION FOR LEAVE TO FILE A NEW CONTENTION**

Erin E. Connolly
Corporate Counsel
HOLTEC INTERNATIONAL
Krishna P. Singh Technology Campus
1 Holtec Boulevard
Camden, NJ 08104
Telephone: (856) 797-0900 x 3712
e.connolly@holtec.com

Jay E. Silberg
Timothy J. V. Walsh
Anne R. Leidich
Sidney L. Fowler
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street, NW
Washington, DC 20036
Telephone: 202-663-8707
Facsimile: 202-663-8007
jay.silberg@pillsburylaw.com
timothy.walsh@pillsburylaw.com
anne.leidich@pillsburylaw.com
sidney.fowler@pillsburylaw.com

August 26, 2019

Counsel for HOLTEC INTERNATIONAL

TABLE OF CONTENTS

I. Introduction.....	1
II. Background.....	2
III. Legal Standards.....	6
A. Requirements to Reopen Record (10 C.F.R. § 2.326)	6
B. Standards for Late-filed Contentions (10 C.F.R. § 2.309(c)(1)).....	8
C. Substantive Requirements for Petition to Intervene (10 C.F.R. § 2.309(f)(1))	9
IV. Fasken’s Motion and New Contention Should Be Rejected by the Commission for Lack of Standing and Failing to Meet the Requirements of 10 C.F.R. §§ 2.326, 2.309(c)(1) and 2.309(f)(1).....	11
A. Fasken’s Motion Fails to Even Address the Requirements to Reopen the Record Under 10 C.F.R. § 2.326.....	12
1. Fasken’s Motion Does Not Meet the Timeliness Requirement of 10 C.F.R. § 2.326.....	13
2. Fasken’s Motion Does Not Meet the Significance Requirement of 10 C.F.R. § 2.326.....	21
3. Fasken’s Motion Does Not Meet the Requirement of 10 C.F.R. § 2.326 to Demonstrate that There Will Be a Materially Different Result.....	24
B. Fasken’s Motion and New Contention Do Not Meet the Late-filed Standards of 10 C.F.R. § 2.309(c)(1).....	26
C. Fasken’s New Contention Does Not Meet the Substantive Requirements for Contention Admissibility Under 10 CFR § 2.309(f)(1).....	27
V. Conclusion	29

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of)	
)	Docket No. 72-1051
Holtec International)	
)	
(HI-STORE Consolidated Interim Storage Facility))	

**Holtec International’s Answer Opposing Fasken’s
Late-Filed Motion for Leave to File a New Contention**

I. Introduction

Pursuant to 10 C.F.R. § 2.309(i)(1), Holtec International (“Holtec”) submits this answer opposing the Motion for Leave to File a New Contention (“Motion”) filed by Fasken Oil and Ranch and Permian Basin Land and Royalty Owners (collectively, “Fasken”) on August 1, 2019.¹ The motion should be dismissed because Fasken has failed to meet: (1) the standards for reopening the record under 10 C.F.R. § 2.326; (2) the requirements for late-filed contentions under 10 C.F.R. § 2.309(c)(1)(i)-(iii); and (3) the criteria for an admissible contention under 10 C.F.R. § 2.309(f)(1). The Commission should also deny Fasken’s motion based on Fasken’s lack of standing, as shown in Holtec’s Opposition to Fasken’s Appeal, currently pending before the Commission.²

¹ Fasken Oil and Ranch and Permian Basin Land and Royalty Owners Motion for Leave to File a New Contention (Aug. 1, 2019) (NRC ADAMS Accession No. ML19213A171) (hereinafter, “Motion”). Included in the Motion is Fasken’s Contention 2 (the “New Contention”). Attached to the Motion are five Exhibits: (1) the Declaration of Stonnie Pollock (July 30, 2019) (the “Pollock Report”); (2) a Site Radius Map of the Holtec HI-STORE CISF; (3) Wellbore Count Tables; (4) the Resume of Stonnie Pollock; and (5) a Letter of New Mexico Commissioner of Public Lands Stephanie Garcia Richard (June 19, 2019) (the “Land Commissioner’s Letter”).

² Holtec International’s Brief in Opposition to Fasken and Permian Basin Land and Royalty Owners’ Appeal of LBP-19-4 at 2, 14-19 (June 28, 2019) (NRC ADAMS Accession No. ML19179A328) (“Holtec Opposition to Fasken Appeal”).

II. Background

Holtec submitted its application (the “Application”) to construct and operate the CISF on March 30, 2017.³ The NRC Staff conducted a sufficiency review and found the Application acceptable for docketing.⁴ On July 16, 2018, the NRC published notice in the Federal Register of an opportunity to request a hearing and petition to intervene by September 14, 2018.⁵

Instead of timely filing a petition to intervene, on September 14, 2018, Fasken filed a Motion to Dismiss the proceeding.⁶ The Motion to Dismiss set out Fasken’s standing arguments and then “incorporate[d] by reference the arguments and authorities in the Beyond Nuclear Inc. Motion to Dismiss at sections IV, V and VI.”⁷ Holtec and the NRC Staff filed answers opposing the Motion to Dismiss,⁸ to which Fasken filed its replies.⁹ On October 9, 2018, Holtec filed an

³ Holtec International HI-STORE CISF License Application (Mar. 30, 2017) (NRC ADAMS Accession No. ML17115A431) (“Application”).

⁴ Holtec International’s HI-STORE CISF for Interim Storage of Spent Nuclear Fuel, Docketing License Application, 83 Fed. Reg. 12,034–35 (Mar. 19, 2018).

⁵ Holtec International’s HI-STORE CISF for Interim Storage of Spent Nuclear Fuel, Order for Opportunity to Request a Hearing and to Petition for Leave to Intervene, 83 Fed. Reg. 32,919–24 (July 16, 2018).

⁶ Motion of Fasken Land and Minerals and Permian Basin Land and Royalty Owners to Dismiss Licensing Proceedings for HI-STORE Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility (Sept. 14, 2018) (NRC ADAMS Accession No. ML18257A330) (“Motion to Dismiss”).

⁷ *Id.* at 7. Beyond Nuclear, Inc. argued that issuing a license to Holtec would violate the Nuclear Waste Policy Act because Holtec allegedly assumed that the Department of Energy would take ownership of the spent fuel. *See generally* Beyond Nuclear, Inc.’s Motion to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility for Violation of the Nuclear Waste Policy Act (Sept. 14, 2018) (NRC ADAMS Accession No. ML18257A318).

⁸ Holtec International’s Answer Opposing Fasken Land and Minerals and Permian Basin Land and Royalty Owners Motion to Dismiss Licensing Proceeding for HI-STORE Consolidated Interim Storage Facility (Sept. 24, 2018) (NRC ADAMS Accession No. ML18267A402) (“Holtec September 24 Answer”); NRC Staff’s Response to Motions to Dismiss Licensing Proceedings (Sept. 24, 2018) (NRC ADAMS Accession No. ML18267A313).

⁹ Motion of Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners for Leave to Reply to NRC Staff’s Response and Holtec International’s Answer and Opposition to Motions to Dismiss (Sept. 28, 2018) (NRC ADAMS Accession No. ML18271A243); Reply of Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners to Holtec International’s Response to Motion to Dismiss (Sept. 28, 2018) (NRC ADAMS Accession No. ML18271A239); Reply of Movants Fasken and PBLRO to Staff’s Response to Motions to Dismiss (Sept. 28, 2018) (NRC ADAMS Accession No. ML18271A238).

answer opposing Fasken's motion for leave to reply.¹⁰

On October 29, 2018, the Secretary of the Commission denied Fasken's Motion to Dismiss on procedural grounds but referred the Motion to the Atomic Safety and Licensing Board ("Board") to be considered under 10 C.F.R. § 2.309.¹¹ In response to an order by the Board,¹² on December 3, 2018, Holtec and the NRC Staff filed supplemental responses opposing Fasken's standing and its claim that the NRC could not issue a license for the Holtec facility because of the potential for DOE ownership of the spent fuel.¹³ Fasken filed replies on December 10, 2018,¹⁴ as well as a motion for permission to file a supplemental declaration of standing.¹⁵ Holtec filed an answer on December 17, 2018, opposing Fasken's motion to file a supplemental declaration of standing.¹⁶

The Board heard oral argument on January 23 and 24, 2019, in Albuquerque, New Mexico. On February 6, 2019, Fasken and Beyond Nuclear jointly filed a motion to file amended

¹⁰ Holtec International's Answer Opposing Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners' Motion for Leave to Reply to Holtec International and NRC Staff Responses to Motion to Dismiss (Oct. 9, 2018) (NRC ADAMS Accession No. ML18282A449).

¹¹ Holtec International & Interim Storage Partners LLC, Order of the Secretary (Oct. 29, 2018) (NRC ADAMS Accession No. ML18302A328) ("Order of the Secretary"); Memorandum from Secretary to Chief Administrative Law Judge (Oct. 29, 2018) (NRC ADAMS Accession No. ML18302A355).

¹² Board Order (Granting Joint Motion to Establish Schedule) (Nov. 8, 2018) (NRC ADAMS Accession No. ML18312A196).

¹³ Holtec International's Answer Opposing Fasken Land and Minerals and Permian Basin Land and Royalty Owners' Motion/Petition to Intervene on Holtec International's HI-STORE Consolidated Interim Storage Facility Application (Dec. 3, 2018) (NRC ADAMS Accession No. ML18337A443); NRC Staff's Supplemental Response to Motion to Dismiss by Permian Basin Land and Royalty Organization and Fasken Land and Minerals (Dec. 3, 2018) (NRC ADAMS Accession No. ML18337A415) ("NRC Staff December 3 Response").

¹⁴ Reply of Fasken and PBLRO to Holtec's Answer Opposing Movants' Motion to Dismiss/Petition to Intervene (Dec. 10, 2018) (NRC ADAMS Accession No. ML18344A682); Reply of Fasken and PBLRO to NRC Staff's Supplemental Response and Opposition to Motion to Dismiss (Dec. 10, 2018) (NRC ADAMS Accession No. ML18344A683).

¹⁵ Motion for Permission to File Supplemental Standing Declaration of Tommy E. Taylor (Dec. 10, 2018) (NRC ADAMS Accession No. ML18344A681) ("Fasken Supplemental Standing Motion").

¹⁶ Holtec International's Answer Opposing Fasken Land and Minerals and Permian Basin Land and Royalty Owners' Motion for Permission to File Supplemental Standing Declaration of Tommy E. Taylor (Dec. 17, 2018) (NRC ADAMS Accession No. ML18351A372) ("Holtec Answer Opposing Supplemental Standing").

contentions challenging the legality of the Holtec facility under the Nuclear Waste Policy Act,¹⁷ and on February 19, 2019, Holtec filed its opposition to the motion to amend.¹⁸ The NRC Staff filed an answer supporting the amendment in part, without taking a position on the underlying merits of the contention.¹⁹

On May 7, 2019, the Board issued its Memorandum and Order (Ruling on Petitions for Intervention and Requests for Hearing) (“LBP-19-4”).²⁰ The Board found that Fasken had demonstrated standing in accordance with 10 C.F.R. § 2.309(d), but had failed to submit an admissible contention, and could not incorporate Beyond Nuclear’s arguments and authorities in the absence of its own admissible contention.²¹ The Board also found that Beyond Nuclear’s contention was inadmissible.²² Therefore, in accordance with Commission precedent and the Order of the Secretary to consider Fasken’s Motion to Dismiss under 10 C.F.R. § 2.309, the Board determined not to admit Fasken’s contentions, denied Fasken’s Motion to Dismiss, and dismissed Fasken from this proceeding.²³ The Board also found that “no petitioner [] both demonstrated standing and proffered an admissible contention.”²⁴ As a result, the Board ruled that the “proceeding [was] terminated,”²⁵ and thus closed the record.

¹⁷ See Motion by Petitioners Beyond Nuclear and Fasken to Amend Their Contentions Regarding Federal Ownership of Spent Fuel to Address Holtec International’s License Application (Feb. 6, 2019) (NRC ADAMS Accession No. ML19037A127).

¹⁸ Holtec Opposition to Beyond Nuclear and Fasken Motion to Amend Their Contentions Regarding Federal Ownership of Spent Fuel to Address Holtec International’s License Application (Feb. 19, 2019) (NRC ADAMS Accession No. ML19052A359).

¹⁹ NRC Staff Answer to Motions to Amend Contentions Regarding Federal Ownership of Spent Fuel (Feb. 19, 2019) (NRC ADAMS Accession No. ML19050A376).

²⁰ *Holtec International* (HI-STORE Consolidated Interim Storage Facility), LBP-19-4, 89 N.R.C. ___, slip op. (May 7, 2019) (NRC ADAMS Accession No. ML19127A026).

²¹ LBP-19-4 at 34 n.172, 125.

²² *Id.* at 34 n.172.

²³ *Id.* at 34 n.172, 123-25.

²⁴ *Id.* at 2.

²⁵ *Id.*

On June 3, 2019, Fasken filed a Notice of Appeal and Petition for Review²⁶ appealing the Board's decision denying Fasken's contention and dismissing Fasken from the proceeding. Holtec filed an opposition to Fasken's appeal on June 28, 2019, supporting the Board's denial of Fasken's contention and Fasken's dismissal from the proceeding.²⁷ In addition, Holtec requested that the Commission reverse the Board's determination and deny Fasken standing.²⁸

In short, Fasken never became a party to this proceeding, the proceeding is now terminated, and the record for the contested portion of this proceeding is closed, subject of course to the outcome of the appeal.

On August 1, 2019, Fasken's filed its new Contention 2. The contention asserts that Holtec's Application included statements as to "'control' over mineral rights below the site" which statements were "materially misleading and inaccurate" and that those statements "nullif[y] Holtec's ability to satisfy the NRC's siting evaluation factors."²⁹

According to Fasken, the bases for the new contention are a June 17, 2019 letter from the New Mexico Commissioner of Public Lands ("Letter")³⁰ and a declaration by Stonnie Pollack.³¹ Fasken claims that the Letter was previously unavailable to Fasken before it was served on Fasken and others by the Office of the Secretary on July 2, 2019. The Letter states that "'the State of New Mexico, through the New Mexico State Land Office, owns the mineral estate' below the site."³² Fasken then alleges that "[s]tatements in Holtec's Safety Analysis Report (SAR) and Facility

²⁶ Fasken and PBLRO Notice of Appeal and Petition for Review of LBP-19-4 (June 3, 2019) (NRC ADAMS Accession No. ML19154A455) ("Appeal").

²⁷ Holtec Opposition to Fasken Appeal.

²⁸ *Id.* at 2.

²⁹ Motion at 2.

³⁰ Motion, Exhibit 5.

³¹ Motion, Exhibit 1.

³² Motion at 2.

Environmental Report (FER) regarding ‘control’ over mineral rights below the site are materially misleading and inaccurate. Reliance on these statements nullifies Holtec’s ability to satisfy the NRC’s siting evaluation factors.”³³ Fasken claims that this is a violation of 10 C.F.R. § 72.11(a),³⁴ that it undermines Holtec’s ability to comply with the requirements in 10 C.F.R. § 72.90 to design the ISFSI to withstand natural or man-made events (because there may be oil and gas extracted on or near the site),³⁵ that it demonstrates Holtec’s inability to comply with the requirements in 10 C.F.R. § 72.103(a)(1) to design for site geological characteristics (because there are abandoned wells on or near the site),³⁶ and that it evidences deliberate misconduct on behalf of Holtec.³⁷ Also in support of Contention 2, Fasken appends a declaration from Stonnie Pollock, an employee of Fasken Oil and Ranch, Ltd.

III. Legal Standards

A. Requirements to Reopen Record (10 C.F.R. § 2.326)

The Board denied all six petitions to intervene in this proceeding, including Fasken’s.³⁸ Thus, the record is closed. In order to submit a new or amended Fasken *must* file a motion to reopen the record and address the standards for such a motion under 10 C.F.R. § 2.326.³⁹ This is true notwithstanding the appeals pending before the Commission.⁴⁰

³³ Motion at 3.

³⁴ Motion at 4.

³⁵ Motion at 6-8.

³⁶ Motion at 8-10.

³⁷ Motion at 10-11.

³⁸ LBP-19-4, slip op. at 2.

³⁹ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3) CLI-09-5, 69 N.R.C. 115, 120 (2009) (“The Board correctly determined that because it had already denied the intervention petition, a motion to file new or amended contentions must address the motion to reopen standards.” (quotations omitted)).

⁴⁰ *See id.*

The Commission considers “reopening the record for any reason to be ‘an ‘extraordinary’ action,’”⁴¹ and places “an intentionally heavy burden on parties seeking to reopen the record.”⁴² Indeed, “a party seeking to reopen a closed record to raise a new matter faces an elevated burden to lay a proper foundation for its claim. Commission practice holds that the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention.”⁴³ “Obviously, ‘there would be little hope’ of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings.”⁴⁴ A party seeking to reopen the record must include a motion that:

- (1) is timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
- (2) addresses a significant safety or environmental issue; and
- (3) demonstrates that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.⁴⁵

The motion must also be accompanied by an affidavit that separately addresses each of the applicable criteria in Section 2.326(a), with a specific explanation of why each criterion has been satisfied for each of petitioner’s allegations.⁴⁶ In addition, a motion to reopen that relates to a new contention must also satisfy the 10 C.F.R. § 2.309(c) standards for a new or amended contention.⁴⁷

⁴¹ *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-15-19, 82 N.R.C. 151, 156 (2015).

⁴² *Id.* at 155.

⁴³ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 N.R.C. 345, 350 (2005) (citing *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523-24 (1973)).

⁴⁴ *PFS*, CLI-05-12, 61 N.R.C. at 350 n.18 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 555 (1978)).

⁴⁵ 10 C.F.R. § 2.326(a).

⁴⁶ 10 C.F.R. § 2.326(b).

⁴⁷ 10 C.F.R. § 2.326(d).

B. Standards for Late-filed Contentions (10 C.F.R. § 2.309(c)(1))

The Commission’s regulations explicitly prohibit the consideration of contentions filed after the initial deadline, absent a finding of good cause for the late filing. Contentions filed after the intervention deadline “*will not be entertained* absent a determination by the presiding officer that a participant has demonstrated good cause” for the late filing.⁴⁸ The good cause demonstration requires a petitioner to show that:

- (i) The information upon which the filing is based was not previously available;
- (ii) The information upon which the filing is based is materially different from information previously available; and
- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.⁴⁹

This means that “previously available information cannot be used as the basis for a new or amended contention filed after the deadline,” including previously available information that is compiled for the first time in a new document.⁵⁰ A document that collects, summarizes, and places into context the facts or previously available information does not make that information new or materially different.⁵¹ “To conclude otherwise would turn on its head the regulatory requirement that new contentions be based on information . . . *not previously available*,”⁵² and also be “inconsistent with [the Commission’s] longstanding policy that a petitioner has an *iron-clad obligation* to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention.”⁵³

⁴⁸ 10 C.F.R. § 2.309(c)(1) (emphasis added).

⁴⁹ 10 C.F.R. § 2.309(c)(1)(i)-(iii).

⁵⁰ Final Rule, Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,566 (Aug. 3, 2012).

⁵¹ *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 N.R.C. 481, 496 (2010) (footnote omitted).

⁵² *Id.* (quotation omitted) (emphasis in original).

⁵³ *Id.* (emphasis added) (quotation and footnote omitted).

“There simply would be no end to NRC licensing proceedings if petitioners could disregard [the Commission’s] timeliness requirements and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding.”⁵⁴

C. Substantive Requirements for Petition to Intervene (10 C.F.R. § 2.309(f)(1))

Even if a petitioner is able to show the requisite good cause for the late filing, the late-filed contentions must still meet the Commission’s admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1). Specifically, contentions must:

- (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 and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
- (vi) In a proceeding other than one under 10 CFR 52.103, 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 that 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.⁵⁵

⁵⁴ *Id.* (quoting *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 271-72 (2009) (footnotes and internal quotation marks omitted)).

⁵⁵ 10 C.F.R. § 2.309(f)(1)(i)-(vi).

These standards are enforced rigorously. “If any one . . . is not met, a contention must be rejected.”⁵⁶ A licensing board is not to overlook a deficiency in a contention or assume the existence of missing information. Under these standards, a petitioner “is obligated to provide the [technical] analyses and expert opinion showing why its bases support its contention.”⁵⁷ Where a petitioner has failed to do so, “the [Licensing] Board may not make factual inferences on [the] petitioner’s behalf.”⁵⁸

Further, admissible contentions “must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application].”⁵⁹ In particular, this explanation must demonstrate that the contention is “material” to the NRC’s findings and that a genuine dispute on a material issue of law or fact exists.⁶⁰ The Commission has defined a “material” issue as meaning one where “resolution of the dispute *would make a difference in the outcome* of the licensing proceeding.”⁶¹

Furthermore, a statement “that simply alleges that some matter ought to be considered” does not provide a sufficient basis for a contention.⁶² Similarly, “[m]ere reference to documents

⁵⁶ *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 N.R.C. 149, 155 (1991) (citation omitted); *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 N.R.C. 433, 437 (2006) (“These requirements are deliberately strict, and we will reject any contention that does not satisfy the requirements.” (footnotes omitted)).

⁵⁷ *Georgia Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 N.R.C. 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 N.R.C. 1 (1995), *aff’d in part*, CLI-95-12, 42 N.R.C. 111 (1995).

⁵⁸ *Id.* (citing *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 N.R.C. 149 (1991)). See also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 N.R.C. 142, 180 (1998) (explaining that a “bald assertion that a matter ought to be considered or that a factual dispute exists . . . is not sufficient;” rather, “a petitioner must provide documents or other factual information or expert opinion . . . to show why the proffered bases support [a] contention” (citations omitted)).

⁵⁹ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 N.R.C. 349, 359-60 (2001).

⁶⁰ 10 C.F.R. § 2.309(f)(1)(iv), (vi).

⁶¹ Final Rule, Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989) (emphasis added).

⁶² *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 N.R.C. 200, 246 (1993), *review declined*, CLI-94-2, 39 N.R.C. 91 (1994).

does not provide an adequate basis for a contention.”⁶³ Rather, NRC’s pleading standards require a petitioner to read the pertinent portions of the license application, including the safety analysis and the environmental report, state the applicant’s position and the petitioner’s opposing view, and explain why it has a disagreement with the applicant.⁶⁴ If the petitioner does not believe these materials address a relevant issue, the petitioner is “to explain why the application is deficient.”⁶⁵ “[A]n allegation that some aspect of a license application is ‘inadequate’ or ‘unacceptable’ does not give rise to a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect.”⁶⁶ Likewise, mere speculation is not sufficient to raise a genuine dispute with the application.⁶⁷

Finally, Commission regulations expressly provide that contentions “*must* be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee”⁶⁸

IV. Fasken’s Motion and New Contention Should Be Rejected by the Commission for Lack of Standing and Failing to Meet the Requirements of 10 C.F.R. §§ 2.326, 2.309(c)(1) and 2.309(f)(1).

In order to successfully introduce a new contention at this late stage, Fasken must meet the requirements of 10 C.F.R. §§ 2.326, 2.309(c)(1) and 2.309(f)(1). Fasken has ignored the

⁶³ *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 348 (1998).

⁶⁴ Final Rule, Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170-171 (Aug. 11, 1989); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 N.R.C. 349, 358 (2001).

⁶⁵ 54 Fed. Reg. at 33,170. *See also Palo Verde*, CLI-91-12, 34 N.R.C. at 156.

⁶⁶ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 N.R.C. 257, 358 (2006) (citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 N.R.C. 509, 521 & n.12 (1990)).

⁶⁷ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 N.R.C. 215, 225 (2017).

⁶⁸ 10 C.F.R. § 2.309(f)(2) (emphasis added).

requirements of 10 C.F.R. § 2.326 and has not even attempted to justify reopening of the record. Fasken’s motion has also failed to meet the requirements for late-filed contentions and the substantive contention admissibility standards.

In addition, Fasken must also establish that it has standing to intervene in this proceeding. While the Board found that Fasken had standing to participate in this proceeding, Holtec respectfully submits that its appeal demonstrates that Fasken has failed to demonstrate standing.⁶⁹ In addition to the Motion’s numerous other failings, Fasken’s lack of standing is an independent reason for the Commission to deny Fasken’s Motion.

A. Fasken’s Motion Fails to Even Address the Requirements to Reopen the Record Under 10 C.F.R. § 2.326.

Fasken’s Motion to admit Contention 2 should be denied for failing to even address the requirements of 10 C.F.R. § 2.326. The Commission has ruled that after a petition to intervene has been denied, “a motion to file new or amended contentions *must* address the motion to reopen standards.”⁷⁰ Fasken must also provide an affidavit substantively addressing the reopening criteria.⁷¹ Fasken made no attempt to address any of the factors in 10 C.F.R. § 2.326, nor did it include the required affidavit in support. Failing to address these standards by itself is sufficient grounds to deny a motion for new contentions after the record has closed.⁷² Fasken’s Motion

⁶⁹ We would also point out that “Fasken Oil and Ranch” was not the party that the Atomic Safety and Licensing Board determined had standing. The named party was “Fasken Land and Minerals, Ltd.” See LBP-19-4, slip op. at 1. All of the prior pleadings identified the party as Fasken Land and Minerals, Ltd. See, e.g., Motion of Fasken Land and Minerals and Permian Basin Land and Royalty Owners to Dismiss Licensing Proceedings for HI-STORE Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility (Sept. 14, 2018); Fasken and PBLRO Notice of Appeal and Petition for Review (June 3, 2019) (identifying “Fasken Land and Minerals, Ltd” as the party).

⁷⁰ *Millstone*, CLI-09-5, 69 N.R.C. at 120 (emphasis added) (quotations omitted).

⁷¹ 10 C.F.R. § 2.326(b). See also *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-3, 75 N.R.C. 132, 138 (2012).

⁷² See *Millstone*, CLI-09-5, 69 N.R.C. at 124 (“Even had [petitioner’s] contentions passed muster under 10 C.F.R. § 2.309(f)(1), *its motion would still fail for failing to address, let alone meet, our reopening standards.*” (emphasis added)).

should be denied for this reason alone. In addition, aside from totally ignoring the requirements of 10 C.F.R. § 2.326, the following analysis demonstrates that Fasken has also failed to meet the individual requirements of that provision.

1. Fasken’s Motion Does Not Meet the Timeliness Requirement of 10 C.F.R. § 2.326.

Fasken would not be able to meet the reopening standards even if it had addressed them. First, its filing is not timely. To determine if a filing is timely for the purposes of a motion to reopen, the Commission looks at “whether the contention could have been raised earlier—that is, whether the information on which it is based was previously available or whether it is materially different from what was previously available, and whether it has been submitted in a timely fashion based on the information’s availability.”⁷³ As the Commission has stressed, “proceedings would be incapable of attaining finality if contentions—that could have been raised at the outset—could be added later at will, regardless of the stage of the proceeding.”⁷⁴

As an initial matter, while the Land Commissioner’s Letter was published to the docket on July 2, it was available prior to that date. Fasken argues that its filing is timely because the Letter was uploaded to the adjudicatory docket on July 2, and, according to Fasken, “[p]rior to July 2, 2019, the Letter was not previously available to Petitioners,”⁷⁵ and Fasken filed its contention within 30 days of the Letter being uploaded to the docket.⁷⁶ However, the timeliness of Fasken’s new contention is not based on when Fasken heard of the information on which the contention is based. The Commission has explained that “a petitioner must show that the information on which the new contention is based was not *reasonably available to the public*, not merely that the

⁷³ *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 N.R.C. 491, 498 (2012).

⁷⁴ *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 N.R.C. 479, 483 (2012).

⁷⁵ Motion at 2.

⁷⁶ Motion at 3.

petitioner recently found out about it.”⁷⁷ Here, the Land Commissioner’s Letter was available to the public on June 19, 2019, and was published in a variety of newspapers and media outlets as well as mentioned in a press release published on the Land Commission website on that date.⁷⁸ For example, the *Las Cruces Sun News* and the *Carlsbad Current Argus* both ran stories about the Letter and included a copy of the full letter in the articles.⁷⁹ Therefore, the Land Commissioner’s Letter was at the very least “reasonably available” to the public nearly two weeks prior to it being uploaded to the docket. Applying the 30-day standard relied on by Fasken,⁸⁰ Fasken filed its Motion nearly two weeks late.

Fasken then alleges that the application “[i]ncorrectly characterize[d] ownership of the mineral interest” at the site as compared to the Letter and thus the Land Commissioner’s Letter constitutes new information.⁸¹ Specifically, Fasken alleges that “the application operates on the false premise that Holtec can prevent oil and gas extraction on and near the site,”⁸² and “it is

⁷⁷ *Millstone*, CLI-09-5, 69 N.R.C. at 126.

⁷⁸ See, e.g., Adrian Hedden, *New Mexico State Land Office: Holtec mislead federal government on nuclear waste site near Carlsbad*, *Carlsbad Current Argus* (June 19, 2019), available at <https://www.currentargus.com/story/news/local/2019/06/19/new-mexico-state-land-office-opposes-nuclear-waste-site-near-carlsbad/1505426001/>; Adrian Hedden, *New Mexico State Land Office: Holtec mislead federal government on nuclear waste site near Carlsbad*, *Las Cruces Sun News* (June 19, 2019), available at https://www.lcsun-news.com/story/news/local/2019/06/19/new-mexico-state-land-office-opposes-nuclear-waste-site-near-carlsbad/1505426001/?cid=twitter_CrucesSunNews#; Land Commissioner: Press Release, *Commissioner Garcia Richard: Holtec Int’l Misrepresentations Raise Serious Safety Concerns for Proposed Nuclear Storage Facility* (June 19, 2019), available at http://www.nmstatelands.org/uploads/PressRelease/284e45d4c69e494ca120ca42c44fdb79/6.19.19_SLO_Letter_to_Holtec_Intl.pdf.

⁷⁹ Adrian Hedden, *New Mexico State Land Office: Holtec mislead federal government on nuclear waste site near Carlsbad*, *Carlsbad Current Argus* (June 19, 2019), available at <https://www.currentargus.com/story/news/local/2019/06/19/new-mexico-state-land-office-opposes-nuclear-waste-site-near-carlsbad/1505426001/>; Adrian Hedden, *New Mexico State Land Office: Holtec mislead federal government on nuclear waste site near Carlsbad*, *Las Cruces Sun News* (June 19, 2019), available at https://www.lcsun-news.com/story/news/local/2019/06/19/new-mexico-state-land-office-opposes-nuclear-waste-site-near-carlsbad/1505426001/?cid=twitter_CrucesSunNews#.

⁸⁰ Motion at 3.

⁸¹ Motion at 2.

⁸² Motion at 7.

inappropriate for Holtec to conclude that it may limit oil and gas extraction.”⁸³ Fasken subsequently argues that “the application inevitably fails to evaluate how ‘man[-]induced events,’ specifically oil and gas extraction, may impact the safe operation of the site.”⁸⁴ The Fasken Motion focuses solely on the possibility of future oil and gas extraction, and does not mention potash rights or mining beyond quoting Holtec’s Environmental Report.⁸⁵

Regardless of when the Letter was uploaded to the docket or when it was “reasonably available” to Fasken, it is clear that the information underpinning Contention 2 has been available since the inception of this proceeding and in many cases, long before. Mr. Tommy Taylor, Fasken’s affiant in this proceeding as Vice President of Fasken Management, LLC,⁸⁶ filed a comment in this CISF proceeding on July 30, **2018**, claiming that:

The proposed site sits on top of and adjacent to oil and gas minerals to be developed by means of fracture stimulation techniques. Currently, drilling techniques used to extract minerals in the Permian Basin involve drilling horizontally into deep underground formations up to two miles beneath the earth's surface. High pressure fluids are pumped into the wells, in some cases exceeding twelve thousand pounds per square inch. This pressure is power enough to fracture the surrounding rock thus releasing the oil and gas. The pressure create’s [sic] fissures and cracks beneath the surface. And, at this time, there are oil and gas operators testing a new technique of simultaneously drilling and fracturing up to 49 horizontal wellbores in a single section of land. Either the traditional or new and unproven drilling technique, involving more than 20,000,000 bbls of water and sand, *could conceivably be utilized to inject into and withdraw from the rock formation beneath and surrounding the Holtec site. Hydraulic fracturing beneath and around Holtec should give the NRC pause and is sufficient reason not to proceed.*⁸⁷

⁸³ Motion at 7.

⁸⁴ Motion at 7.

⁸⁵ See generally Motion.

⁸⁶ See Motion of Fasken Land and Minerals and Permian Basin Land and Royalty Owners to Dismiss Licensing Proceedings for HO-STORE Consolidate Interim Storage Facility and WCS Consolidated Interim Storage Facility (Sept. 14, 2018) (attaching Declaration of Tommy E. Taylor, “vice president of Fasken Management, LLC”).

⁸⁷ Letter from Tommy E. Taylor (Fasken) to M. Layton (NRC-NMSS), USNRC Docket No. 72-1051 and 72-1052, Proposed Holtec High Level Nuclear Waste Storage Facility, Lea and Eddy County, NM at 2 (July 30, 2018) (NRC ADAMS Accession No. ML18219A710). Mr. Taylor signed this letter as Director of Oil and Gas Development, Fasken Oil and Ranch, Ltd.

Since Fasken was aware of the possibility of oil and gas drilling and extraction beneath the Holtec site in July 2018, it could have raised a contention on those grounds when it filed its initial pleadings in this case. This is particularly true given that Holtec’s Application considered the possibility of oil and gas drilling beneath the CISF site. Indeed, the Application specifically acknowledges that *there may be “future oil drilling or fracking beneath the Site.”*⁸⁸ Additionally, it is inconceivable that a company that “owns and/or leases property directly related to oil and gas activities that is/are located approximately 2 (two) miles from the proposed Holtec CISF site”⁸⁹ would not have an understanding of how mineral leases work, including the limitations on Holtec’s control that are a matter of public record.

The information on which Contention 2 was based (that “the State of New Mexico, through the New Mexico State Land Office, owns the mineral estate’ below the site”) has long been public information. The land is clearly identified by its grid number in the Holtec Environmental Report, and the status of the mineral estate (including the lease information and land ownership) is publicly available information that can be found on the New Mexico State Land Office website, as shown in Figures 1 and 2 below. Ownership information for the subsurface and surface estate is also available via the New Mexico State Land Office Data Access site. This website also shows that currently the subsurface estate owner is the State of New Mexico,⁹⁰ the potash lease is held by Intrepid Potash,⁹¹ and the oil and gas leases for Section 13 are held by COG Operating LLC and XTO Delaware Basin, LLC.⁹² This is consistent with Holtec’s characterization of the state of the

⁸⁸ Environmental Report, Rev. 6 at 3-2 (ML19163A146) (“ER”).

⁸⁹ See Fasken Supplemental Standing Motion at 2-3 (quotations omitted).

⁹⁰ New Mexico State Land Office Data Access. The information for Section 13 of Township 20S / Range 32E (where the CISF will be built) is available at:

http://dataaccess.nmstatelands.org/dataaccess/Land_Details.aspx?Section=13&Township=20S&Range=32E.

⁹¹ *Id.*

⁹² *Id.*

mineral rights at the site in its Application, which states that: 1) “Holtec has an agreement with Intrepid Mining LLC (Intrepid) such that Holtec controls the mineral rights [i.e. potash rights⁹³] on the Site and Intrepid will not conduct any potash mining on the Site”;⁹⁴ 2) there may be “future oil drilling or fracking beneath the Site”;⁹⁵ and 3) “subsurface minerals are owned by the state of New Mexico.”⁹⁶ Indeed, the ELEA report referenced by the Environmental Report further clarifies that “[t]he minerals (including oil and gas) beneath the Site are owned by the state of New Mexico and are leased to production companies for development (See Appendix 2A, Maps 10 and Figure 2.1.2-2).”⁹⁷

⁹³ Because Intrepid Mining holds the potash lease, *see* Safety Analysis Report Rev. 0H Fig. 2.1.19 (NRC ADAMS Accession No. ML19163A062) (“SAR”), it is implied that the mineral rights in the agreement with Intrepid are the potash rights. The SAR cited in this filing is the SAR revision published prior to the hearing that has been available for many months.

⁹⁴ ER, Rev. 6 at 3-2.

⁹⁵ ER, Rev. 6 at 3-2. In light of this acknowledgement, the erroneous statement in the SAR that oil drilling activities have been proscribed at an around the site is irrelevant. *See* ER, Rev. 6 at 2-19.

⁹⁶ *See, e.g.*, ER, Rev. 6 at 3-2 (“The surface estate is privately owned (ELEA 2007, Section 2.1.1.1), and the subsurface minerals are *owned by the state of New Mexico.*” (emphasis added)); Holtec License Application Responses to Requests for Supplemental Information (Apr. 9, 2019) (NRC ADAMS Accession ML19081A083) Attachment 9, Potash Mining Lease Partial Relinquishment Agreement at 1 (Oct. 5, 2016) (NRC ADAMS Accession ML19081A080).

⁹⁷ 2007 Eddy Lea Siting Study at 2.1-9 (NRC ADAMS Accession No. ML102440738) (“ELEA 2007”).

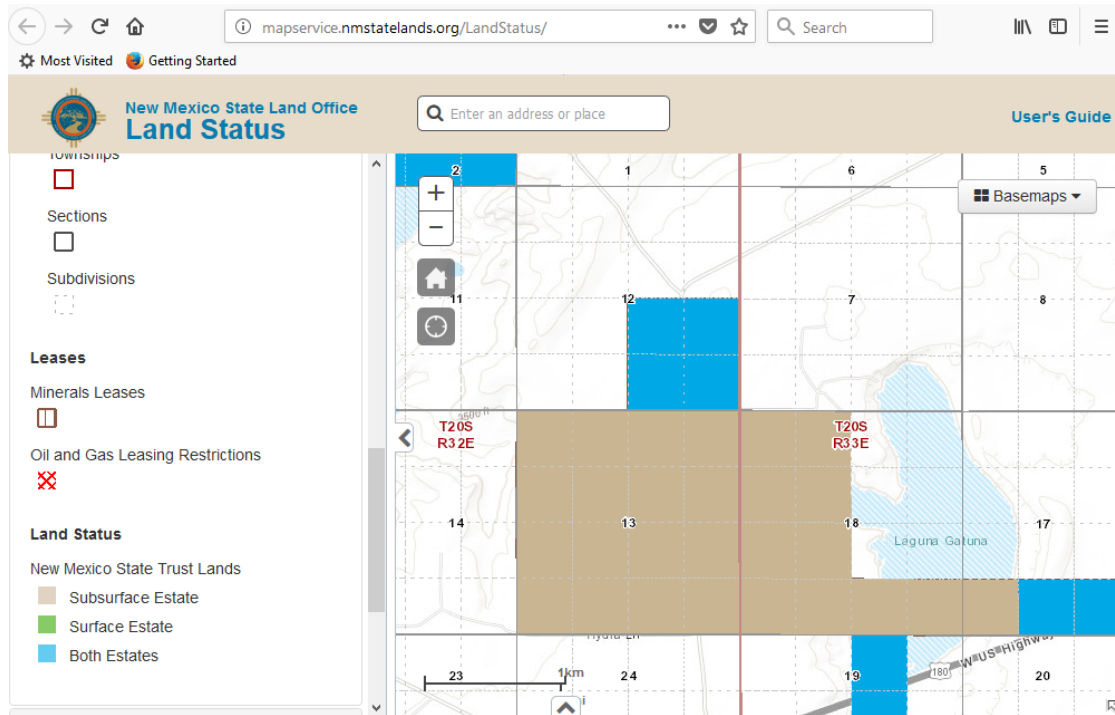


Figure 1. New Mexico State Land Office Map of Holtec Site Identifying Land Ownership⁹⁸

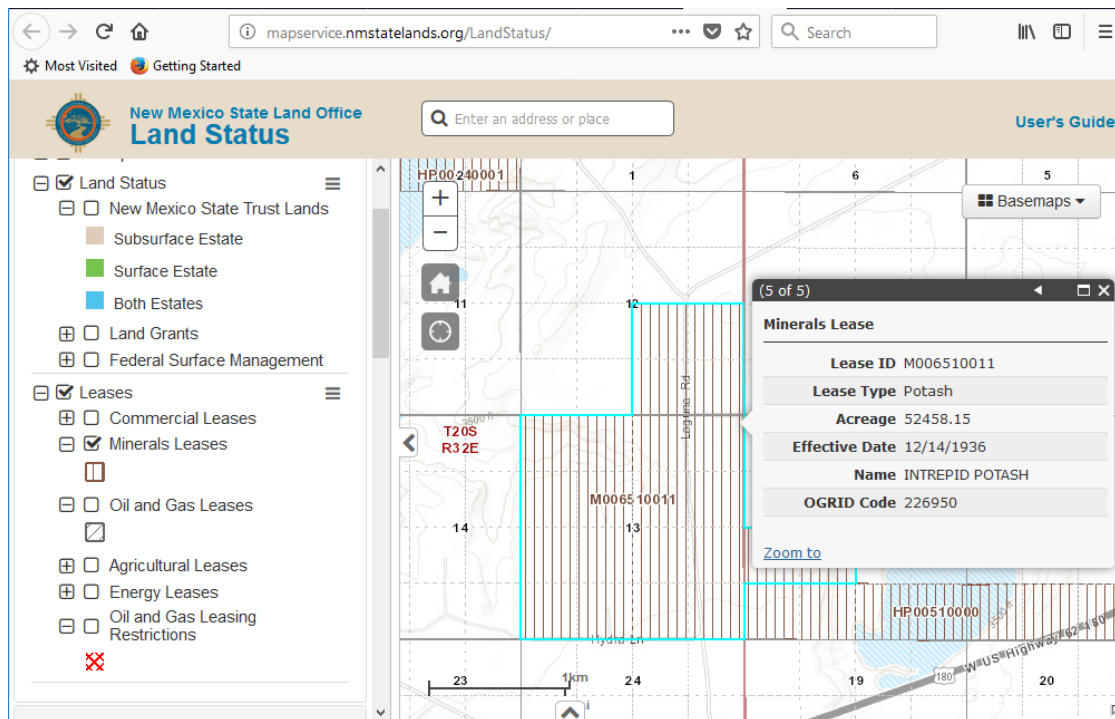


Figure 2. New Mexico State Land Office Map of Holtec Site Identifying Potash Lease⁹⁹

⁹⁸ New Mexico State Land Office, Land Status, available at <http://mapservice.nmstatelands.org/LandStatus/>. (Select Layers, Locations, Public Land Survey System to see Township, Range, and Section numbers when zoomed in.)

⁹⁹ *Id.*

In short, New Mexico’s ownership of the mineral estate beneath the site and the potential for oil and gas development is recognized in the Application and is not new information.

Perhaps the most obvious demonstration that Fasken’s Contention 2 is untimely is the fact that the mineral rights below the Holtec site have already been the subject of a contention timely submitted in this proceeding by another petitioner, Don’t Waste Michigan, et al.¹⁰⁰ and rejected by the Atomic Safety and Licensing Board.¹⁰¹ Don’t Waste Michigan’s Contention 5 specifically references the potash and oil and gas leases in and around the Holtec site and includes a claim that “[t]he mineral interests are inadequately disclosed, and the realistic prospects for mineral development immediately surrounding and underneath the Holtec site, and their implications for inducing or expediting geological problems and groundwater movement beneath the site, are inadequately disclosed in the ER.”¹⁰² It is ironic that the Don’t Waste Michigan petition specifically cites to Fasken’s July 30, 2018 letter discussed above.¹⁰³ If Don’t Waste Michigan was able to generate a similar contention in 2018 using a map of oil and gas rights at the site,¹⁰⁴ Fasken cannot use the same underlying information—available to it a year ago—to justify a late-filed contention or motion to reopen at this late stage.

In addition, contrary to the requirements of 10 C.F.R. §§ 2.326 and 2.309(c)(1), Fasken’s substantive safety claims in Contention 2, and its appended “expert” report, are also not new, and

¹⁰⁰ Petition of Don’t Waste Michigan, Citizens’ Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace and Nuclear Issues Study Group to Intervene and Request for an Adjudicatory Hearing at 49-55 (Sept. 14, 2018) (NRC ADAMS Accession No. ML18257A334) (“DWM Petition”).

¹⁰¹ The Licensing Board rejected the admission of Don’t Waste Michigan’s Contention 5. LBP-19-4, slip op. at 105-108. Is it worth noting that Don’t Waste Michigan chose not to appeal the Licensing Board’s rejection of that contention. *See* Notice of Appeal of LBP-19-4 by Petitioners Don’t Waste Michigan [et al.] and Brief in Support of Appeal (June 3, 2019) (NRC ADAMS Accession No. ML19154A764).

¹⁰² DWM Petition at 49.

¹⁰³ *Id.* at 51, n. 25.

¹⁰⁴ *Id.* at 52 and Attachment to Don’t Waste Michigan Petition: CEHMM, Eddy Lea Alliance Site Mineral Conflict Analysis 9-16-15 (NRC ADAMS Accession No. ML18257A336).

indeed are discussed in the Application. Fasken alleges that the application fails to consider how oil and gas wells in the area may contribute to natural or man-made events and impact safe operation of the site¹⁰⁵ and that orphaned wells in the area “may have unstable characteristics.”¹⁰⁶ These claims are unrelated to the ownership or control of the land at the Holtec site and were explicitly dealt with in the Application. Therefore, such claims could have been raised when Fasken filed its initial pleading almost a year ago. Indeed, the Holtec Environmental Report and Safety Analysis Report describe the wells in the area¹⁰⁷ and orphaned wells at the site.¹⁰⁸ Thus, Fasken’s safety challenges on these grounds are impermissibly late.

The Pollock declaration (Exhibit 1 to the Motion) is equally untimely. Fasken uses the declaration as support for the following assertions in Contention 2: that there are oil and gas well bores near the CISF site,¹⁰⁹ that those wells are of variable depths and horizontally drilled,¹¹⁰ that oil and gas may be extracted near the CISF site regardless of who owns the mineral rights below the site,¹¹¹ that Holtec has failed to identify well bores within a 5-mile radius,¹¹² and that local abandoned wells may have unstable characteristics and integrity issues.¹¹³ None of these assertions

¹⁰⁵ See Motion at 6-8.

¹⁰⁶ See Motion at 8-10.

¹⁰⁷ Safety Analysis Report, Rev. 0H at 2-37, 2-39 (Fig. 2.1.18 Potash Core Holes near the CIS Facility Site, Fig. 2.1.20 Oil and Gas Activity near the CIS Facility Site).

¹⁰⁸ ER, Rev. 6 at 4-2 (“[T]he Site has been associated with oil and gas exploration and development with at least 18 plugged and abandoned oil and gas wells located on the property.”); SAR, Rev. 0H at 2-3.

¹⁰⁹ Motion at 6 (“There are presently 253 oil and gas well bores still in production within a 5-mile radius of the CISF.”).

¹¹⁰ Motion at 6-7.

¹¹¹ Motion at 7.

¹¹² Motion at 8. This assertion is demonstrably false. Potash core holes within six miles of the site are identified in SAR, Rev. 0H Figure 2.1.18, while oil and gas activity (including wells) is identified in SAR, Rev. 0H Figure 2.1.20.

¹¹³ Motion at 8-9.

are new, and all could have been raised previously based on the information in Holtec's Application. As such, the Pollock declaration does not support the timeliness of Contention 2.

2. Fasken's Motion Does Not Meet the Significance Requirement of 10 C.F.R. § 2.326.

Nor does Fasken's filing meet the requirement in Section 2.326(a)(2) to proffer a contention that raises a "significant safety or environmental issue."¹¹⁴ Fasken was required to provide an affidavit with "sufficient information to support a *prima facie* showing that (1) a deficiency exists in the [application], and (2) the deficiency presents a significant safety [or environmental] issue."¹¹⁵ Fasken has met neither requirement.

In making its two substantive safety claims described above, Fasken argues that oil and gas extraction activities may occur on or near site and this "may" impact safe operation of the site.¹¹⁶ But the Environmental Report already specifically addresses "any future oil drilling or fracking beneath the site."¹¹⁷ Indeed, "[o]ne gas well is present on the Site along with numerous plugged and abandoned wells."¹¹⁸ Holtec also describes the oil and gas activities that occur nearby, explaining:

The oil and gas industry is well established in the area surrounding the Site, with producing oil and gas fields, support services, and compressor stations. Nearly all phases of oil and gas activities have occurred in the locality. These phases include seismic exploration, exploratory drilling, field development (comprised of production and injection wells) and other sundry activities associated with hydrocarbon extraction.¹¹⁹

¹¹⁴ 10 C.F.R. § 2.326(a)(2).

¹¹⁵ *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), LBP-08-12, 68 N.R.C. 5, 17 (2008).

¹¹⁶ Fasken motion at 7.

¹¹⁷ ER, Rev. 6 at 3-2; *see, also* LBP-19-4, slip op. at 105.

¹¹⁸ ER, Rev. 6 at 3-2 (emphasis added).

¹¹⁹ ER, Rev. 6 at 3-2.

The Application also addresses the presence of potash mines in the area,¹²⁰ and provides graphs showing the presence of numerous potash mines,¹²¹ potash core holes,¹²² and oil and gas wells¹²³ in the vicinity of the Holtec site. Contrary to Fasken’s claim that “Holtec has not evaluated the potential impact these regional wells may have on the site’s stability,”¹²⁴ Holtec also includes seismicity from wells in its earthquake hazards analysis,¹²⁵ and reviewed the site for subsidence concerns.¹²⁶ Fasken cites to the identification of the abandoned wells on the site but ignores the analysis of potential subsidence at the site.¹²⁷ Given the extent of the analysis presented in the Application, Fasken is simply incorrect in claiming that the “application operates on the false premise that Holtec can prevent oil and gas extraction activity on and near the site”¹²⁸ and “Holtec has not evaluated the potential impact these regional wells may have on the site’s stability.”¹²⁹ These incorrect claims are not enough to demonstrate that there is any deficiency, let alone a *prima facie* deficiency, in the Application.

¹²⁰ ER, Rev. 6 at 3-2 to 3-3; SAR, Rev. 0H at 2-8 to 2-10.

¹²¹ SAR, Rev. 0H at 2-36 (Figure 2.1.17).

¹²² SAR, Rev. 0H at 2-37 (Figure 2.1.18).

¹²³ SAR, Rev. 0H at 2-39 (Figure 2.1.20).

¹²⁴ Motion at 9.

¹²⁵ SAR, Rev. 0H at 2-109 to 2-110; ER, Rev. 6 at 3-17; *see, also* LBP-19-4, slip op. at 108.

¹²⁶ SAR, Rev. 0H at 2-110 to 2-112 (“There are no surface, drillhole, or mining indications that subsidence and collapse chimneys occur at the Site or surrounding area. These features are associated with the front of the Capitan reef, which is south of the Site, and with a hydraulic environment that is not known to exist at the Site.”); ER at 3-19 (“A number of oil wells were drilled along the west flank of Laguna Gatuna beginning in the early 1940’s. Most of the wells were abandoned by 1975 and well monuments were installed; several of the well monuments were identified during site reconnaissance. None of the monuments displayed evidence of tilting that might be associated with local earth movements (ELEA 2007, Section 2.3.4.2).”). The ELEA 2007 report referenced in the ER and included on the docket also includes a detailed analysis of the possibility of subsidence at the CISF site. ELEA 2007 at 2.3-48 to 2.3-52. *See also* LBP-19-4, slip op. at 108.

¹²⁷ *See* Motion at 9 n. 34 (claiming that “Holtec *merely* states that ‘there are no plans to use any of the plugged and abandoned wells on the Site’” (quoting ER section 4.1.1 and SAR section 2.1.2)).

¹²⁸ Motion at 7.

¹²⁹ Motion at 9.

Fasken also fails to present a significant safety issue.¹³⁰ The Safety Analysis Report addresses the safety of an oil recovery facility and abandoned wells at the site¹³¹; potash mining and subsidence¹³²; casing corrosion and well collapse¹³³; and wells surrounding the site.¹³⁴ The Safety Analysis Report also addresses the CISF’s engineering solutions for subsidence and earthquakes (whether natural or man-made), including: the support foundation pad, which is “designed to minimize long-term settlement” and support the modules during earthquakes¹³⁵; the subgrade, which provides support during earthquakes¹³⁶; and the HI-STORM UMAX System, which is independently certified and qualified for the Design Basis Earthquake of the CISF site.¹³⁷ Fasken fails to address any of these engineering solutions presented in the Safety Analysis Report. This falls far short of the standard which requires a *prima facie* showing of a significant safety issue.

The remainder of Fasken’s allegations (that Holtec presented false information in the Application and failed to notify the state land office or list it as a required permit in Table 1.4.1) fail to raise any significant safety or environmental concerns or even a matter within the scope of this proceeding. In addition to being immaterial, Fasken’s allegations are also incorrect: Holtec disagrees with the assertion that it needs to obtain any approvals from the New Mexico State Land Office for its agreement with Intrepid. Moreover, as discussed below, ownership of the Holtec site

¹³⁰ Fasken also fails to present any environmental issue, let alone a *significant* environmental issue. While the Fasken filing cites to the Environmental Report, *see, e.g.*, Motion at 4, it does not allege any environmental *impacts* from the CISF and it does not challenge any of the environmental impact conclusions in the Environmental Report. Instead, the Fasken filing focuses on the alleged safety impacts to the CISF. As such, this response focuses on Fasken’s claims as safety claims.

¹³¹ SAR, Rev. 0H at 2-3, 2-111, 6-42.

¹³² SAR, Rev. 0H at 2-8 to 2-10, 2-36 to 2-38, 2-40, 2-111.

¹³³ SAR, Rev. 0H at 2-11 to 2-12.

¹³⁴ SAR, Rev. 0H at 2-11, 2-39.

¹³⁵ SAR, Rev. 0H at 1-15.

¹³⁶ SAR, Rev. 0H at 1-15 to 1-16.

¹³⁷ SAR, Rev. 0H at 1-11 to 1-12; Table 4.3.3.

and mineral rights is a matter outside the scope of the Environmental Report and the Safety Analysis Report in this proceeding as it is *not* one of the findings that the NRC must make.

3. Fasken’s Motion Does Not Meet the Requirement of 10 C.F.R. § 2.326 to Demonstrate that There Will Be a Materially Different Result.

In order to support a motion to reopen, Fasken was also required to “show that the evidence supporting their contention would likely have materially affected the outcome of the licens[ing] proceeding. That is, they must show a likelihood that their contention would be resolved in their favor such that [the Application] would be denied or conditioned.”¹³⁸ Fasken cannot meet this requirement as control over the Holtec CISF site is not relevant to the findings that the NRC must make and would not affect NRC decisionmaking on the Application in any way.

Contrary to Fasken’s contention, no statute or regulation requires the applicant for an NRC license for a CISF or other NRC-licensed facility to own or control a site before an application for a nuclear facility may be considered or the license granted.¹³⁹ Nor do the applicable NRC guidance documents and regulations require that ownership of the site be included in the Application.¹⁴⁰ As stated by the United States District Court in *Concerned Citizens*, the NRC has a “settled practice” of permitting docketing and review of nuclear power reactor applications before the applicant acquires ownership or control of the site.¹⁴¹ Rather, the real test is whether the applicant can

¹³⁸ *Oyster Creek*, LBP-08-12, 68 N.R.C. at 22 (citing *PFS*, CLI-05-12, 61 N.R.C. at 350 (to reopen a closed record to introduce a new issue, the movant has the burden of “showing that the new information will ‘likely’ trigger a ‘different result’”)).

¹³⁹ See, e.g., *Concerned Citizens of Rhode Island v. NRC*, 430 F. Supp. 627, 632-33 (D. R.I. 1977); *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 N.R.C. 1125, 1136 (1981); *New England Power Company* (NEP, Units 1 and 2), LBP-78-9, 7 N.R.C. 271, 277 (1978).

¹⁴⁰ See, e.g., 10 C.F.R. §§ 72.24, 72.34, 51.41, 51.61; Regulatory Guide 3.50, *Standard Format and Content for A Specific License Application for an Independent Spent Fuel Storage Installation or Monitored Retrievable Storage Facility* (NRC 2014a); NUREG-1748, *Environmental Review Guidance for Licensing Actions Associated with NMSS Programs* (NRC 2003).

¹⁴¹ *Concerned Citizens*, 430 F. Supp. at 632 n.9. *Accord North Coast Nuclear Plant*, ALAB-662, 14 N.R.C. at 1136; *NEP, Units 1 and 2*, LBP-78-9, 7 N.R.C. at 281.

produce the information required by regulation and necessary for an effective hearing; if it can, site ownership is irrelevant.¹⁴² While the focus of a hearing must be on a specific site, the site is no less specific because the applicant does not yet own it.¹⁴³ This conclusion is equally applicable to the licensing of an ISFSI.

Indeed, in a similar contention in a proceeding very similar to this one, the intervenor State of Utah alleged that Private Fuel Storage (“PFS”) failed to list all of the Federal permits, licenses, approvals or other entitlements that it needed to obtain, or otherwise update the PFS environmental report with the status of those approvals. Specifically, Utah alleged that PFS failed to show “that it [was] entitled to use the land for the ISFSI site and if it [did] have such right whether there are any legal constraints imposed on the use and control of the land,” and that PFS was required to disclose the provisions of its lease with the Skull Valley Band to show that it was entitled to use the site.¹⁴⁴ Notwithstanding the requirement that PFS obtain approval from the Bureau of Indian Affairs for its lease with the Skull Valley Band, the Atomic Safety and Licensing Board nonetheless rejected the State’s contention. Instead, the Board found the contention inadmissible for “fail[ing] to establish with specificity any genuine dispute and impermissibly challeng[ing] the Commission’s regulatory processes, regulations or rulemaking-associated generic determinations, including those relating to site ownership.”¹⁴⁵ Indeed, at the time that the NRC issued the license to PFS in 2006, the lease between PFS and the Skull Valley Band had yet to be approved.¹⁴⁶

¹⁴² *Concerned Citizens*, 430 F. Supp. at 632-33; *North Coast Nuclear Plant*, ALAB-662, 14 N.R.C. at 1136; *NEP, Units 1 and 2*, LBP-78-9, 7 N.R.C. at 277.

¹⁴³ *Concerned Citizens*, 430 F. Supp. at 633 n.11; *NEP, Units 1 and 2*, LBP-78-9, 7 N.R.C. at 277.

¹⁴⁴ *PFS*, LBP-98-7, 47 N.R.C. at 198.

¹⁴⁵ *PFS*, LBP-98-7, 47 N.R.C. at 198.

¹⁴⁶ *See Skull Valley Band of Goshute Indians v. Davis*, 728 F. Supp. 2d 1287, 1287, 1306 (D. Utah 2010) (overturning the Bureau of Indian Affairs rejection of the PFS-Skull Valley Band lease). Even today, PFS still lacks approval from BIA for the lease, but the NRC license remains in effect.

Whether or not Holtec has established “control” of the CISF site, such control is not required in order for the NRC to consider and (if appropriate) grant the licensing application. As described above, Holtec supplied the information required by regulation and necessary for the NRC Staff’s review in part by conservatively assuming that there will be oil and gas drilling and subsidence beneath the site and addressing these assumed conditions by building in engineered solutions to them. Fasken has failed to even address these solutions, let alone demonstrate how its claims regarding the site ownership would undermine them. Thus, Fasken’s proposed Contention 2 must be rejected as a challenge to the basic structure of the Commission’s regulatory process and an impermissible collateral attack on the Commission’s rules.

B. Fasken’s Motion and New Contention Do Not Meet the Late-filed Standards of 10 C.F.R. § 2.309(c)(1).

Fasken’s proposed Contention 2 does not meet the late-filed contention standards under 10 C.F.R. § 2.309(c)(1) for the same reasons that it does not meet the timeliness requirements of 10 C.F.R. § 2.326. As Fasken recognized, new contentions are generally considered timely if filed within 30 days after the new information upon which the contention is based becomes available.¹⁴⁷ Here, even if the Land Commissioner’s Letter is considered the basis for the new contention, the contention is still not timely. As described above, the Letter was “reasonably available” on June 19, and thus Fasken’s filing is beyond the 30-day window.

Information regarding the mineral rights ownership and the leasehold was publicly available, and Holtec has openly addressed its agreement with Intrepid in the Application.¹⁴⁸ Moreover, the information on which Fasken’s safety allegations are based (i.e. the presence of oil and gas drilling in the locale) is not only not new, but it was publicly available and was explicitly

¹⁴⁷ *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 N.R.C. 460, 493 (2008); *see* Motion at 3.

¹⁴⁸ ER, Rev. 6 at 3-2.

addressed in the Application, as described above. Fasken's declarant, Mr. Pollock, also acknowledged that Fasken has access to commercial petroleum industry software that includes additional information on oil and gas drilling in the area.¹⁴⁹

In short, while the specific document from the New Mexico Land Office is arguably new, as of June 19, the information in the Letter and the information upon which the Contention is based is not. Thus, the Contention fails to meet the late-filed standards under 10 C.F.R. § 2.309(c)(1) and is not timely. The declaration filed in support of Contention 2 must also be rejected as untimely for the same reason, as it is based on 1) the possibility of oil and gas extrication beneath the site and 2) the presence of wells near the site, both facts that are not new and were openly addressed by Holtec in its Application.

C. Fasken's New Contention Does Not Meet the Substantive Requirements for Contention Admissibility Under 10 CFR § 2.309(f)(1).

Fasken's proposed Contention 2 also fails to meet the basic contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). As described previously, the safety concerns raised by Fasken and Mr. Pollock are already addressed, along with their resolutions, in Holtec's SAR. By Fasken's failing to address these portions of the Application, Fasken fails to raise a genuine dispute with the Application on a material issue of law or fact.¹⁵⁰

Fasken has also failed to address a matter that is material to the findings the NRC must make and within the scope of the proceeding. As described previously, the ownership or control over the site is not a matter for NRC review; the NRC has a settled practice of reviewing an application even though an applicant's ownership or control over the site at issue has not yet been

¹⁴⁹ Pollock Declaration at 1.

¹⁵⁰ We note that the NRC Staff would find Contention 2 is admissible in part to the extent that it identifies inconsistencies in the description of the mineral rights in the Application documents. NRC Staff Answer at 12. However, neither the NRC Staff nor Fasken explains how these alleged inconsistencies are material and would result in a material safety concern or environmental impact. See *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 N.R.C. 43, 62 (2008).

established. Even if Fasken is correct that Holtec has not addressed the ownership or control of the site, Fasken has failed to show why this is a material issue. In other words, Fasken has failed to allege any valid challenges to the safety analysis or environmental impacts analysis in the SAR and ER, respectively.

Finally, Fasken has also failed to support its non-safety allegations with any alleged facts or expert statements. Fasken merely quotes the Land Commissioner's Letter to claim that the Application is inaccurate and to allege that this is evidence of deliberate misconduct under 10 C.F.R. § 72.12 on the part of Holtec. This is not enough to support an admissible contention.

Additionally, under the deliberate misconduct standard, an applicant may not “[d]eliberately submit to the NRC, . . . information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC.”¹⁵¹ However, nothing in the Application constitutes a misrepresentation of the ownership of the mineral estate at the site. As the Application and referenced documents explain: 1) Intrepid is the leaseholder for potash mining, and Holtec has an agreement with Intrepid to control the rights for potash mining;¹⁵² 2) there may be oil and gas mining below the site in the future;¹⁵³ and 3) New Mexico owns the mineral estate of the land.¹⁵⁴ Whether or not the State Land Office has to approve an agreement between Intrepid and Holtec¹⁵⁵ does not eliminate the existence of an agreement between the two parties. Moreover, as explained above, the ownership of the site is not a finding material to the findings that the NRC must make, and thus cannot be the topic of a *material* false statement.

¹⁵¹ 10 C.F.R. § 72.12(a)(2).

¹⁵² ER, Rev. 6 at 3-2.

¹⁵³ ER, Rev. 6 at 3-2.

¹⁵⁴ See, e.g., ER, Rev. 6 at 3-2; Holtec License Application Responses to Requests for Supplemental Information Attachment 9, Potash Mining Lease Partial Relinquishment Agreement, at 1; ELEA 2007 at 2.1-9.

¹⁵⁵ Letter at 2 (“an agreement that has yet to be approved by the State Land Office”).

Indeed, because the Land Commissioner’s authority is an issue of state law, Fasken’s Contention 2 is not only immaterial, it is also outside the scope of this proceeding. In a similar case, *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), LBP-08-24, 68 N.R.C. 691, 754 (2008), petitioners alleged that the mineral and real estate licenses held by Crow Butte Resources, Inc. were void under the Nebraska Alien Ownership Act due to an issue of foreign ownership. The Licensing Board rejected this aspect of the contention, finding that the “lease and proposed issues related to Nebraska laws on alien ownership of property are outside the scope of these proceedings and outside the jurisdiction of the NRC.”¹⁵⁶ The same rationale applies here.

In summary, Fasken’s Contention 2 is not material to the findings that the NRC must make, outside the scope of the proceeding, and insufficiently supported. Thus, it fails to meet the requirements of 10 C.F.R. § 2.309(f)(1) and must be rejected.

V. Conclusion

For the reasons set forth above, Holtec respectfully requests that the Commission deny Fasken’s Motion for Leave to File a New Contention.

¹⁵⁶ *Id.* at 754, rev’d in part on other grounds, CLI-09-9, 69 N.R.C. 331 (2009).

Respectfully submitted,

/Signed electronically by Anne R. Leidich/

Erin E. Connolly
Corporate Counsel
HOLTEC INTERNATIONAL
Krishna P. Singh Technology Campus
1 Holtec Boulevard
Camden, NJ 08104
Telephone: (856) 797-0900 x 3712
e.connolly@holtec.com

Jay E. Silberg
Timothy J. V. Walsh
Anne R. Leidich
Sidney L. Fowler
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street, NW
Washington, DC 20036
Telephone: 202-663-8707
Facsimile: 202-663-8007
jay.silberg@pillsburylaw.com
timothy.walsh@pillsburylaw.com
anne.leidich@pillsburylaw.com
sidney.fowler@pillsburylaw.com

August 26, 2019

Counsel for HOLTEC INTERNATIONAL

August 26, 2019

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of)	
)	Docket No. 72-1051
Holtec International)	
)	
(HI-STORE Consolidated Interim Storage)	
Facility))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Answer Opposing Fasken's Late-Filed Motion for Leave to File a New Contention has been served through the EFiled system on the participants in the above-captioned proceeding this 26th day of August, 2019.

/signed electronically by Anne R. Leidich/

Anne R. Leidich