November 30, 2020

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 LAND AND MINERALS, LTD'S AND PERMIAN BASIN LAND AND ROYALTY OWNERS' MOTION TO REOPEN THE RECORD AND MOTION FOR LEAVE TO FILE NEW CONTENTION NO. 3

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I. Introduction

On November 5, 2020, Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (collectively "Fasken") filed two motions, a Motion to Reopen the Record ("Motion to Reopen") and a Motion for Leave to File New Contention No. 3 ("Motion for Leave").[1] This purportedly new contention seeks to rehash Fasken's previous issues regarding the control of subsurface mineral rights and the oil and gas mineral extraction operations beneath and in the vicinity of the site of the proposed HI-STORE Central Interim Storage Facility ("CISF") of Holtec International ("Holtec").

It has been over a year and a half since the Atomic Safety and Licensing Board ("Licensing Board" or "Board") closed the record of this proceeding with its decision denying

[1] Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners Motion to Reopen the Record (Nov. 5, 2020) (ADAMS Accession No. ML20310A442) ("Motion to Reopen"); Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners Motion for Leave (Nov. 5, 2020) (ADAMS Accession No. ML20310A445) ("Motion for Leave").

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intervention by all six petitioners (including Fasken).[2] To raise a new contention at this juncture, Fasken must therefore meet the standards for reopening the record, the criteria for late-filed contentions, as well as the requirements for contention admissibility. Fasken has met none of these.

For the reasons set forth in detail below, the Commission should reject Fasken's Motion to Reopen and Contention 3.

II. Background

The complete factual background and prior proceedings before the Board and the Commission are set forth in the Board's decisions in LBP-19-4,[3] LBP-06-10,[4] and LBP-20-10,[5] and the Commission's decision in CLI-20-4.[6]

On May 7, 2019, the Licensing Board issued LBP-19-4, which rejected all of the intervention petitions filed in this proceeding, including the intervention petition filed by Fasken, and terminated the proceeding.[7] Fasken then petitioned the Commission for review of LBP-19-4.[8] While its petition for review was pending before the Commission, Fasken on August 1, 2019, filed a motion to raise a new Contention 2, relating to oil, gas, and mineral extraction, and

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[2] *Holtec International* (HI-STORE Consolidated Interim Storage Facility), LBP-19-4, 89 N.R.C. 353, 461-63 (May 7, 2019). Although the Licensing Board's decision terminated the proceeding (and none of the subsequent decisions by the Board or the Commission reopened the proceeding), Fasken has improperly filed the Motion to Reopen and Motion for Leave with the Board, rather than with the Commission. We assume that the Commission or the Secretary will address Fasken's jurisdictional error.

[3] *Holtec International* (HI-STORE Consolidated Interim Storage Facility), LBP-19-4, 89 N.R.C. 353 (2019).

[4] *Holtec International* (HI-STORE Consolidated Interim Storage Facility), Memorandum and Order (Ruling on Remanded Contentions and Denying Motion to Reopen), LBP-20-6, 91 N.R.C. __, slip op. (June 18, 2020) (ADAMS Accession No. ML20170A558) ("LBP-20-6").

[5] *Holtec International* (HI-STORE Consolidated Interim Storage Facility), Memorandum and Order (Denying Motions to Reopen and for Leave to File), LBP-20-10, 92 N.R.C. __, slip op. (Sept. 3, 2020) (ADAMS Accession No. ML20247J549) ("LBP-20-10").

[6] *Holtec International* (HI-STORE Consolidated Interim Storage Facility), CLI-20-4, 91 N.R.C. __ (slip op.) (Apr. 23, 2020) (ADAMS Accession No. ML20114E150).

[7] *Holtec*, LBP-19-4, 89 N.R.C. at 358.

[8] Fasken and PBLRO Notice of Appeal and Petition for Review (June 3, 2019) (ADAMS Accession No. ML19154A455).

control of subsurface mineral rights at the site.[9] Fasken's Contention 2 alleged that Holtec's application mischaracterized the mineral rights at the CISF site.[10] In violation of 10 C.F.R. § 2.326, Fasken failed to accompany this filing with the required motion to reopen the record. Eventually, on September 3, 2019, Fasken belatedly filed a motion to reopen,[11] but nine days later (and without explanation) withdrew this motion to reopen.[12] The Board on June 18, 2020, nevertheless considered—and ultimately rejected—Fasken's late-filed Contention 2, finding that Fasken not only failed to address the requirements for reopening the record, but also failed to show how its Contention met the requirements for filing out of time.[13]

Prior to the Board's decision in LBP-20-6, Fasken on May 11, 2020, submitted an Amended Contention 2 along with a second motion to reopen the record.[14] Fasken stated that its Amended Contention 2 was filed in response to the NRC Staff's publication of the Draft Environmental Impact Statement ("DEIS")[15] concerning the CISF. Fasken claimed that its Amended Contention 2 was intended to "contest newly disclosed and highly pertinent

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[9] Fasken Oil And Ranch And Permian Basin Land And Royalty Owners Motion For Leave To File A New Contention (Aug. 1, 2019) (ADAMS Accession No. ML19213A171) ("Fasken Aug. 1, 2019 Contention 2").

[10] Specifically, Fasken's Contention No. 2 was that "Statements in Holtec's Safety Analysis Report (SAR) and Facility 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." Fasken Aug. 1, 2019 Contention 2 at 3.

[11] Fasken Oil and Ranch And Permian Basin Land and Royalty Owners Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019 (Sept. 3, 2019) (ADAMS Accession No. ML19246B809).

[12] Fasken And PLBRO's Withdrawal of Their "Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019" (Sept. 12, 2019) (ADAMS Accession No. ML19255G616).

[13] LBP-20-6, 91 N.R.C. at __ (slip op. at 19-22).

[14] Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners Motion to Reopen the Record (May 11, 2020) (ADAMS Accession No. ML20132E724) ("May 11, 2020 Motion to Reopen"); Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners Motion for Leave to File Amended Contention No. 2 (May 11, 2020) (ADAMS Accession No. ML20132F019) ("Fasken May 11, 2020 Amended Contention 2").

[15] *See* Holtec International HI-STORE Consolidated Interim Storage Facility Project, 85 Fed. Reg. 16,150 (Mar. 20, 2020); *see also* NUREG-2237, *Environmental Impact Statement for the Holtec International's License Application for Consolidated Interim Storage Facility for Spent Nuclear Fuel and High Level Waste*, Draft Report for Comment (Mar. 2020) (ADAMS Accession No. ML20069G420) ("DEIS").

information," and to challenge differences between the CISF Application and the DEIS.[16] However, Amended Contention 2 focused on Fasken's allegation that Holtec's application failed to accurately describe the subsurface mineral rights beneath and the oil and gas and mineral operations in the vicinity of the proposed CISF site.

On September 3, 2020, following oral argument, the Board rejected Fasken's Amended Contention 2.[17] The Board found that Fasken failed to meet its burden to reopen the record because its Amended Contention 2 was not based on new information unavailable prior to publication of the DEIS and instead was based on "information that was publicly available in Holtec's application materials much earlier."[18] In fact, as the Board noted, Fasken's Amended Contention 2 "[b]y its terms . . . alleges deficiencies in 'Holtec's application' and does not even mention the DEIS."[19] The Board also rejected Fasken's claim (raised for the first time at oral argument) that its Amended Contention 2 raised an "exceptionally grave issue,"[20] and found that Fasken failed to demonstrate good cause for filing out of time.[21] Finally, the Board found that apart from these deficiencies, Fasken's Amended Contention 2 did not meet the admissibility requirements in 10 C.F.R. § 2.309(f)(1).[22]

On September 29, 2020, Fasken filed its appeal regarding Contention 2 with the Commission, which remains pending.[23]

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[16] Fasken May 11, 2020 Amended Contention 2 at 1-2.

[17] *See* LBP-20-10.

[18] *Id.* at 8.

[19] *Id*. at 9.

[20] *Id.* at 15.

[21] *Id.* at 16-17.

[22] *Id.* at 17.

[23] 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 Amended Contention and Motion to Reopen the Record (Sept. 29, 2020) (ADAMS Accession No. ML20273A001).

On November 3, 2020, Fasken filed its Motion for Leave and Motion to Reopen for Fasken's new Contention 3, repeating Fasken's claims regarding the control of subsurface mineral rights and the oil and gas mineral extraction operations beneath and in the vicinity of the site of the proposed CISF.

III. Standing

Holtec will not address standing as the Licensing Board previously ruled on that issue in LBP-19-4 and the Commission did not address Holtec's appeal[24] of that decision in CLI-20-4.[25]

IV. Fasken's Motion to Reopen, and Motion for Leave to File Contention 3 Should Be Denied

Even a casual reading of Fasken's Motion to Reopen, and Motion for Leave to File Contention 3 makes it clear why Fasken's Motions should be denied: Fasken's latest filings are little more than an attempt to recycle the same arguments that Fasken has previously presented, and that the Board has already rejected in Contention 2. None of these repeated arguments is new or timely. For example:

- The information about XTO's Energy Inc.'s lease is neither new nor materially different from information that was already available to Fasken.
- There is nothing new about the fact that mineral rights beneath the site will be available through horizontal drilling from federal Bureau of Land Management ("BLM") drill islands.

[24] Following Fasken's filing of its appeal of LBP-19-4, Holtec cross-appealed the Licensing Board's determination that Fasken had adequately demonstrated its standing. *See* Holtec International's Brief in Opposition to Fasken and Permian Basin Land and Royalty Owners' Appeal of LBP-19-4 at 14-19 (Jun. 28, 2019) (ADAMS Accession No. ML19179A328).

[25] Footnote 33 of the Commission's Order, CLI-20-4, stated, "Holtec challenges the Board's ruling on Fasken's standing as well, which we discuss in section II.F.1 below." However, this reference was struck in the June 3, 2020 Errata to the Order.

- There is nothing new about the fact that drilling will occur in the Yates formation and below the Salado formation (i.e. the potash formation) which extends to 3,050 feet.

Nonetheless, in addition to being untimely, Fasken's various claims are also inadmissible. While Fasken's filings refer to unspecified technical and environmental issues,[26] the filings never identify what those might be or how they would result in an impact requiring Staff review. Something more than such generalized claims is needed. Fasken must affirmatively raise a specific issue of law or fact (with an explanation of the bases), material to the Staff's findings, supported by a concise statement of facts, and raising a genuine dispute on a material issue of law or fact.[27] Contention 3 fails to meet these standards, and thus should be summarily rejected.

Having failed to meet both the standards for timeliness and those for admissibility. Fasken's filings also fail to meet the requirements to reopen the record. Not only is Fasken's Motion to Reopen unjustifiably late, as it is based entirely on previously available information, but it also fails to even attempt to explain how it raises a significant issue or how consideration of the evidence Fasken seeks to admit could lead to a materially different result. Further, despite Fasken's repeated filings in this proceeding, Fasken again disregards the Commission's requirements for the affidavit which must accompany a motion to reopen. This failure also merits the dismissal of Fasken's motions.

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[26] *See, e.g.*, Motion to Reopen at ¶ 13 (alleging unspecified environmental impacts and potential safety risks); Motion for Leave at 22, 24, 28, 29-39 (alleging vague impacts to "land use, geology and soils and cost-benefit analysis," "lease rights," and unspecified "legal, safety and environmental issues" and violation of "consent-based siting" without any corresponding link to the environmental or safety impacts material to an NRC Staff review).

[27] *See* 10 C.F.R. § 2.309(f)(1).

A. Fasken's Claims in Contention 3 Are Untimely and Either Echo Claims in Contention 2 or Could Have Been Raised Earlier in this Proceeding

Fasken, once again, has provided myriad claims in support of its Contention 3, in both the Motion to Reopen[28] and the Motion for Leave. However, most are repetitive of claims previously included in Fasken's attempts at Contention 2. As an example, Fasken previously argued in Contention 2 that: there is a risk of oil drilling shallower than 3,050 feet beneath the surface[29]; Holtec does not hold the mineral rights beneath the site[30]; and there will be no State Land Office restrictions on drilling or mining.[31] This alone is clear evidence of the untimeliness of these claims as repeated in Contention 3. As a petitioner, Fasken is required to raise its contentions at the first possible instance,[32] and because Fasken previously attempted (albeit unsuccessfully) to raise these issues, they are clearly not new.[33] Fasken does not keep getting

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[28] Fasken's Motion to Reopen sets forth a more limited version of the timeliness claims otherwise contained in Fasken's Motion for Leave to File Contention 3. In fact, the Motion to Reopen simply references the Motion for Leave for greater detail on its timeliness claims. Motion to Reopen at ¶ 12, n.18-19. As such, this Answer focuses on responding to the timeliness claims raised in Fasken's Motion for Leave.

[29] *See* Fasken May 11, 2020 Amended Contention 2 at 16-18.

[30] *See* Fasken Aug. 1, 2019 Contention 2 at 4 ("Holtec's application has misled the NRC and Petitioners to believe that it has full control over the mineral estate below the Holtec HI-STORE CISF.").

[31] *See Id.* at 11 ("The State Land Office has made it clear that Holtec does not, and will not, own the mineral estate below the CISF…"). *See also* Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Mineral Owners' Combined Reply to NRC Staff's and Holtec International's Oppositions to Motion for Leave to File Amended and Motion to Reopen the Record at 5 n. 18 (June 11, 2020) (ADAMS Accession No. ML20163A728) ("In addition to misstating its control over the Site, Holtec also treats as a foregone conclusion the State Land Office's ability and desire to restrict oil and gas drilling on the Site. . .[including] proposed. . .land use restriction or condition on all mineral development on the Site. . [a] ban on oil and gas development between the surface and a depth of 3,000 feet, and a prohibition on any directional or horizontal wells bottomed beneath the site that Holtec believes might 'disturb or conflict' with its use of the site." (quoting Letter from Stephanie Garcia Richard to Holtec (June 19, 2019) (ML19183A429))).

[32] *See Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-12-13, 75 N.R.C. 681, 687 n. 31 (2012) ("[O]ur rules require the filing of contentions as early as possible." (quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-4, 59 N.R.C. 31, 45 (2004)); *see also Duke Power Co.* (Catawaba Nuclear Station, Units 1 and 2), CLI–83–19, 17 N.R.C. 1041, 1050 (1983) ("[I]ntervenors are expected to raise issues as early as possible.").

[33] *See Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-12-12, 75 N.R.C. 742, 755-56 ("Although NRC regulations provide that petitioners may file amended contentions [based on the DEIS,] . . . this does not mean that the publication of the DEIS simply provides an opportunity to renew previously filed (and rejected) contentions.").

new bites at the apple simply because its prior attempts to raise an admissible contention on a topic were unsuccessful.

Nonetheless, each of the individual topics raised by Fasken are all untimely, as described below.

1. Legal Standards for Timeliness

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.[34] 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.[35]

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.[36] A document that collects, summarizes, and places into context previously available information does not make that information new or materially different.[37] "To conclude otherwise would turn on its head the regulatory requirement

[34] 10 C.F.R. § 2.309(c)(1) (emphasis added).

[35] *Id.* § 2.309(c)(1)(i)-(iii).

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

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

that new contentions be based on 'information . . . *not previously available*,'"[38] 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.'"[39] "'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.'"[40]

2. Fasken's Claims as to Drilling Depth Are Untimely

Fasken once again claims that drilling will occur below the site at depths shallower than 3,050 feet. Among the permutations of this claim, Fasken alleges that Holtec's recent RAI responses are wrong because the Yates formation, with oil and gas targets, occurs (allegedly) between the surface and 3,050ft and usually at 2,500 feet deep.[41] Fasken also alleges that the recent comments by XTO Energy Inc. ("XTO") about land rights somehow belie claims that there would only be fracking at depths greater than 3,050 feet.[42]

However, neither of these claims is truly timely, as they could have been raised months or years ago. The Holtec RAI response (supporting the Staff's safety evaluation) relied on by

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[38] *Id.* (quoting 10 C.F.R. § 2.309(f)(2)(i)) (emphasis in original).

[39] *Id.* (emphasis added) (quoting *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 N.R.C. 135, 147 (1993)).

[40] *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)).

[41] Nov. 5, 2020 Declaration of Tommy E. Taylor at ¶10(e) (Hereinafter "Taylor Declaration").

[42] *See, e.g.*, Motion for Leave at 20, 26-27; Taylor Declaration at ¶10(e). XTO submitted public comments to the NRC on September 22, 2020, which were later published to ADAMS on October 5, 2020 and appended in Exhibit 1 to Fasken's Motion for Leave to File Contention 3 and Motion to Reopen. *See* Comments on NRC Draft Environmental Impact Statement (DEIS) for Holtec International's (Holtec) License Application for a Consolidated Interim Storage Facility (CISF) for Spent Nuclear Fuel and High-Level Waste (Sept. 22, 2020) (ADAMS Accession No. ML20268C261) (Hereinafter "XTO Sept. 22, 2020 Letter").

Fasken as "new" information is no different than the existing analysis in the DEIS which places the potash-bearing Salado formation at a depth of 1,800 to 3,000 feet, and states that oil and gas targets (i.e. the Yates formation) exist below 3,050 feet deep.[43] Holtec's Environmental Report for the CISF ("ER") also contains the same information. As can be seen in ER Fig. 3.3.11 Supplementary Regional Geologic Cross Section[44]—which has been available since ER Rev. 4 in March 2019, and which Fasken has never addressed—the potash-bearing Salado formation[45] is above the Artesia Group (which includes the Yates formation[46]). If Fasken wanted to raise the depth of the Yates formation as a litigable issue, it could have done so long ago based on the ER description of the Salado formation and Artesia group. Fasken has no excuse for again attempting to raise this issue at this time.

Moreover, even without going into the depths of specific formations and as the Board already found, Fasken still could have raised the exact same contention against the ER based on the initial drilling depth of 5,000 feet listed in Rev. 0 of that document.[47] As the Board in this proceeding previously asked, "[i]f Fasken—which has 'been drilling and extracting oil in the region for over 80 years'—now asserts that petroleum activities might occur even closer to the surface than 3,050 feet, *why did it not timely challenge Holtec's initial representation they would*

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[43] DEIS at 3-7 to 3-8.

[44] Environmental Report (ER), Rev. 7 at 3-31 fig. 3.3.11 (Aug. 2019) (ADAMS Accession No. ML19309E337).

[45] DEIS at 3-9 ("The potash in these mines is extracted from the Permian Salado Formation at depths of approximately 1,800 to 3,000 ft.") The Taylor Declaration claims that the Yates formation occurs between the surface and 3,050 feet deep, usually at a depth of 2,500 feet. Taylor Declaration at ¶10(e). However, Taylor's claims as to this point are unsupported and contrary to the existence of potash reserves in the Salado formation (occurring above the Yates formation) beneath the CISF. *See, e.g.*, DEIS at § 3.2.4 ("Potash is a major resource in the area of the proposed project. . . . potash . . . is extracted from the Permian Salado Formation at depths of approximately 1,800 to 3,000 ft.").

[46] *See* National Geologic Map Database, Geologic Unit: Artesia ("Artesia Group. Proposed to replace terms Whitehorse Group, Chalk Bluff Formation, and Bernal Formation in eastern New Mexico and west Texas. Group includes (in descending order) Tansill, Yates, Seven Rivers, Queen, and Grayburg Formations."), *available at* https://ngmdb.usgs.gov/Geolex/UnitRefs/ArtesiaRefs_6558.html

[47] *See* Environmental Report on the HI-STORE CIS Facility, Rev. 0 at 3-2 (Mar. 2017) (ADAMS Accession No. ML17139C535).

occur no closer to the surface than 5,000 feet?"[48] Fasken has never answered this question. If Fasken wanted to assert that the Yates formation is closer to the surface than 3,050 feet, why did it not timely challenge Holtec's initial representation that oil drilling would occur no closer to the surface than 5,000 feet?

Fasken also repurposes its depth arguments to fit the DEIS comments by claiming that "there are presently no drilling depth *restrictions* beneath and around the proposed site."[49] But even this restatement of its drilling depth claim is not timely. The June 19, 2019 letter from Commissioner Garcia Richard (Exhibit 5 to Fasken's August 1, 2019 Contention 2) said, over a year ago, that "[t]he State Land Office's oil and gas leases on and adjacent to the Site *do not impose any depth restrictions* on drilling activities."[50] Thus, if Fasken wanted to raise the absence of New Mexico drilling depth restrictions as a contention, it should have done so in 2019 at the latest.

3. Fasken's Remaining Claims Based on the XTO Comments Are Untimely

In addition to drilling depth issues, Fasken relies on the XTO Comments to support a number of other claims in Contention 3, including that XTO has mineral rights beneath the site,[51] which are supposedly superior rights to the site's surface rights,[52] and that Holtec does not have an agreement with XTO to limit drilling.[53] However, Fasken has failed to affirmatively demonstrate the timeliness of these claims, even though it bears the burden of establishing

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[48] LBP-20-10 at 13 (footnote omitted, emphasis added).

[49] Motion for Leave at 16.

[50] "Letter from NRC Acting Secretary Denise McGovern to Commissioner Richard" at 3 (July 2, 2019) (ADAMS Accession No. ML19183A429).

[51] *See, e.g.*, Taylor Declaration at ¶ 10(g); Motion for Leave at 22-23.

[52] Taylor Declaration at ¶ 10(g), 11; *see* Motion for Leave at 22-24.

[53] Taylor Declaration at ¶ 13; *see* Motion for Leave at 25-27.

timeliness.[54] Indeed, Fasken could not establish timeliness (if it were to try), because these claims could have been made years ago. Since XTO is not the only lessee with mineral rights beneath the site, even if Fasken just learned about XTO's rights (though that cannot be the case), it certainly knew of the rights of others that were essentially the same as XTO's.

Moreover, it is inconceivable that Fasken was unaware of XTO's mineral rights on a portion of the site, particularly since leasehold information is all publicly available and Holtec already referenced XTO's mineral rights in its Answer to Fasken's first attempt to file Contention 2.[55] Nor can Fasken credibly claim to be unaware of XTO's alleged "superior rights to utilize the surface area" of its lease,[56] which XTO asserts based on New Mexico caselaw from the 1920s and 1940s.[57] It is even more inconceivable that an oil company like Fasken—actively operating in the Permian Basin for 70 years and in the vicinity of the site since 1977[58]—would be unaware of relevant state law as to mineral leases and property rights. And, in any event, caselaw from the 1920s and 1940s cannot credibly be considered "new information."

Fasken also cannot credibly claim ignorance of the state of oil and gas drilling near the Holtec site. Indeed, it is undeniable that Fasken has been aware of the BLM drill islands and XTO's potential to use the drill islands to access the oil resources beneath the site, since Fasken was invited to BLM meetings on the topic.[59] Nor could Fasken claim surprise that the Holtec

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[54] *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-10, 32 N.R.C. 218, 221 (1990).

[55] Holtec International's Answer Opposing Fasken's Late-Filed Motion for Leave to File a New Contention at 16 (Aug. 26, 2019) (ADAMS Accession No. ML19238A343) ("August 26 Answer").

[56] Motion for Leave at 16.

[57] *See* XTO Sept. 22, 2020 Letter at 3 (in Fasken's Exhibit 1).

[58] Taylor Declaration, ¶ 8.

[59] On July 2, 2019 BLM sent a meeting notice to a Fasken representative (as well as to XTO and Holtec) with the following information: "You are being notified of a tentative drilling island onsite on July 24th, 2019, 730am. I will confirm onsite on Monday, July 8th, with a calendar invite. XTO is proposing to formalize nominated drill islands along the northern section line of Section 24 in 20S 32E (purple polygons). You are being notified

CISF might interfere with vertical access to mineral rights through the CISF site since Fasken raised the same issue in its first version of Contention 2 in August 2019.[60]

It is also not timely for Fasken to raise a claim on the premise that Holtec and XTO do not have any agreements as to the mineral rights beneath the site. As the 2019 Garcia Richards letter said, "the State Land Office's oil and gas lessees, meanwhile, *confirm they have not entered into agreements with Holtec to suspend or limit their oil and gas development to accommodate Holtec's planned nuclear waste disposal facility*."[61] As such, Fasken cannot credibly claim that it has only now learned that XTO does not have an agreement with Holtec to limit its oil or gas development.[62]

Finally, the Taylor Declaration makes clear that PBLRO members have ownership interests in minerals directly beneath the CISF site, just as does XTO. Mr. Taylor asserts in his Declaration that PBLRO includes corporations and companies "involved in the extraction and production of oil and gas in the Permian Basin with *ownership interest of materials immediately beneath the proposed Holtec CISF* and the surrounding area."[63] Thus, Fasken should be deemed to be aware of the status of mineral lessees beneath the site that are members of PBLRO, and are

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because your leases are within two miles of the proposed locations. A railroad spur is also being proposed immediately south of the proposed drill islands to access the Holtec Site. XTO is using the drill islands to access leases to the north and will have the corners of the drill island and individual pad corners staked with surveyors onsite. If other operators intend to use the drill island going south, you are invited to also stake your pads within the corridor of the drill island which extends east-west 660' from northern section line in Section 24." (Section 24 20S 32E is directly south of the Section on which the CISF will be built. ER, Rev. 7 at Fig. 3.1.2.) *See* Attachments 1 and 2 (available upon request from BLM).

[60] Fasken Aug. 1, 2019 Contention 2 ("Because the application operates on the false premise that Holtec can prevent oil and gas extraction activity on and near the site, the application inevitably fails to evaluate how 'man[-]induced events,' specifically oil and gas extraction, may impact the safe operation of the site.").

[61] *Id.*, Exhibit 5 at 3 (June 19, 2019 Letter from S. Garcia Richard to K. Singh at 2) (emphasis added).

[62] Taylor Declaration at ¶ 10(b).

[63] *Id.* at ¶ 3 (emphasis added).

in the same position as XTO. Indeed, because Fasken has never identified the members of PBLRO, it is at least possible that XTO is a member of PBLRO.[64]

4. Fasken's Remaining Claims Are Untimely

Most of Fasken's claims are either related to prior Contention 2 topics or information from the XTO Comments that was previously available. However, Fasken in passing raises other miscellaneous claims that are also untimely. As an example, Fasken relies on a variety of DEIS comments to claim that NRC Staff did not perform enough consultations in support of its environmental analysis.[65] However, Fasken could have raised the same claim earlier based on the DEIS, considering the consultation correspondence was listed in DEIS Appendix A.

Fasken also relies on the DEIS comments to complain about a lack of consensus-based siting.[66] This is no different than one of the contentions previously proposed (and rejected) in September 2018: Alliance for Environmental Solutions' Contention 3 ("There Is No Factual Support for Holtec's Primary Site Selection Criterion, which Is Community Support").[67] If Alliance was capable of raising this issue in 2018, then it cannot be timely two years later.

Finally, Fasken fails to demonstrate the timeliness of any claims where it merely copied various DEIS comments into its contention. Fasken must address the late-filing factors of 10 C.F.R. § 2.309(c)(1) and demonstrate that it has good cause for its late-filing. Merely parroting text from a DEIS comment into the Contention without any explanation as to the timeliness of

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[64] To our knowledge, Fasken has never identified the members of PBLRO, instead identifying it as an association at one point (Fasken Sept. 14, 2018 Motion), and later as a non-profit corporation with 65 founding members (Taylor Aff. Para. 3).

[65] *See* Motion for Leave at 28-39.

[66] *See Id.* at 29 ("Statements made in the XTO letter with superior property rights at the proposed site also assert that oil and gas lessees were not appropriately involved or considered in the Holtec DEIS. This is unacceptable and violates the primary principles of consent-based siting mandated by the Blue Ribbon Commission.").

[67] Alliance for Environmental Solutions' Petition to Intervene at 23-24 (Sept. 12, 2018) (ADAMS Accession No. ML18255A234).

the claims versus information that was previously available is insufficient. Copying old information from a new document does not make a contention based on the new document timely.

B. Fasken's Contention 3 Is Inadmissible

In addition to being inexcusably late, Contention 3 is also inadmissible under the Commission's admissibility standards in 10 C.F.R. § 2.309(f)(1). Indeed, many of Fasken's claims were already rejected by the Board as inadmissible in Contention 2 and Fasken has done nothing to cure the defects which made these claims inadmissible. Nonetheless, we will again demonstrate why Fasken's claims as to drilling depth and related to the XTO comments or other mineral rights issues are inadmissible, as are its other miscellaneous claims purportedly based on DEIS comments.

1. Legal Standards for Contention Admissibility

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;
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> (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.[68]

These standards are enforced rigorously. "If any one . . . is not met, a contention must be rejected."[69] 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."[70] Where a petitioner has failed to do so, "the [Licensing] Board may not make factual inferences on [the] petitioner's behalf."[71]

Further, admissible contentions "must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]."[72] 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.[73] The Commission has defined a "material" issue as

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[68] 10 C.F.R. § 2.309(f)(1)(i)-(vi).

[69] *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)).

[70] *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).

[71] *Id*. (citing *Arizona Pub. Serv. 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)).

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

[73] 10 C.F.R. § 2.309(f)(1)(iv), (vi).

meaning one where "resolution of the dispute *would make a difference in the outcome* of the licensing proceeding."[74]

Furthermore, a statement "that simply alleges that some matter ought to be considered" does not provide a sufficient basis for a contention.[75] Similarly, "[m]ere reference to documents does not provide an adequate basis for a contention."[76] 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.[77] If the petitioner does not believe these materials address a relevant issue, the petitioner is "to explain why the application is deficient."[78] "[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."[79] Likewise, mere speculation is not sufficient to raise a genuine dispute with the application.[80]

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

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[74] 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).

[75] *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).

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

[77] 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).

[78] 54 Fed. Reg. at 33,170. *See also Palo Verde*, CLI-91-12, 34 N.R.C. at 156.

[79] *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)).

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

application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee . . . ."[81]

2. Fasken's Claims as to the Depth of Drilling Remain Inadmissible

As the Board previously found in response to Fasken's claims as to the potential for shallower drilling depths:

> Fasken must show some reason why "resolution of the dispute would make a difference in the outcome of the licensing proceeding." For example, as discussed supra, Fasken's petroleum geologist, Mr. Pollock, asserts that recent technological advances make drilling at shallower depths and revisiting existing wells a "real possibility." *But Fasken does not explain how the existence of wells at any depth is material to the NRC staff's assessment of environmental and cumulative impacts.* Therefore, Fasken does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv) and (vi).[82]

Fasken's Contention 3 does not remedy this continuing failure. Fasken does not allege an environmental impact or a cumulative impact resulting from a change in drilling depth from the 3,050 feet listed in the DEIS, to the 2,500 feet newly proposed in the Taylor Declaration.[83] While Fasken has tossed in some unspecified claims of materiality, i.e. asserting that "[t]his is material information"[84] or "the materiality . . . is also evidenced by Holtec's unsuccessful attempt to lobby the State Land Office for a restriction,"[85] it still fails to demonstrate how its proposed 2,500 foot drilling depth is material to the NRC Staff's environmental review.

As an example, Fasken does not assert that subsidence (or any other safety or environmental impact) will occur with drilling at a 2,500-foot depth versus a 3,050-foot depth. Nor could it. As Holtec explained in its safety-evaluation RAI response, local sinkholes were

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[81] 10 C.F.R. § 2.309(f)(2) (emphasis added).

[82] LBP-20-10 at 22 (footnotes omitted, emphasis added).

[83] Taylor Declaration at ¶ 10(e).

[84] Motion for Leave at 27.

[85] *Id.* While Fasken argues that the inability to drill for oil at the CISF may result in a change in cumulative impacts (another inadmissible claim as described in subsequent sections), that claim has no apparent relation to Fasken's arguments regarding the depth of drilling.

caused by inappropriate borehole management practices (i.e. the use of explosives for well realignment, ineffective cement jobs, and removal of casings prior to plugging) coupled with excessive water control practices (i.e. oilfield brine extraction and freshwater extraction for waterflood operations).[86] These issues are independent of well depth and would require XTO to engage in inappropriate borehole management below the CISF site. Fasken has not alleged such a set of facts.[87] Nor could it plausibly do so without alleging that XTO will engage in behavior potentially violative of current regulations for drilling, operations, and plugging of wells referenced in Holtec's RAI response.[88]

Of note, Fasken also fails to reconcile its latest claims regarding 2,500-foot vertical drilling at the site with its prior claims about the prevalence of horizontal drilling.[89] Fasken's own conflicting statements on the likelihood of horizontal versus vertical drilling in the locale further cast doubts on the accuracy of Fasken's assertions.

3. Fasken's Remaining Claims Based on the XTO Comments or Mineral Rights Are Inadmissible

Fasken also bases other aspects of Contention 3 on the (allegedly new) information in the XTO comments, including raising the specter of a potential property dispute with XTO as to land access, alleging that there will be greater cumulative impacts than acknowledged in the DEIS if XTO cannot drill on the CISF site, and pointing towards the lack of drilling restrictions from the

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[86] Attachment 1 to Holtec Letter 5025058 HI-STORE RAI Part 5 Responses at 19-26 (Sept. 2020) (Hereinafter "RAI Responses") (ADAMS Accession No. ML20260H141).

[87] *See generally* Motion for Leave.

[88] RAI Responses at 24 ("Current state regulations set much stricter requirements for drilling and completion of wells when compared to the processes that have been used historically in the area. All new wells near the Facility will follow the latest regulations for drilling, operations, and eventual plugging or abandonment of wells.").

[89] T. Taylor (Fasken) to M. Layton (NRC) at 2 (July 30, 2018) ("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.") (ADAMS Accession No. ML18219A710).

State Land Office. However, none of these claims is sufficient to form the basis of an admissible contention.

In terms of potential property disputes between subsurface mineral lease holders and ELEA (as the current surface landowner) or Holtec, Fasken fails to demonstrate how the mere possibility of such a property dispute would create genuine dispute with the DEIS or impact the Staff environmental impact analysis in the DEIS. First, there is no genuine factual dispute here: the DEIS openly acknowledges that there is a "split estate" at the site (i.e., "where property rights (or ownership) to the surface and the subsurface are split between two parties").[90] Fasken only raises the possibility that this already acknowledged split estate might lead to some future dispute over the land because of the surface owner's purportedly "subservient estate."

However, it is not clear how the "subservient estate" distinction would alter the Staff's environmental analysis. If Fasken is alleging the possibility of legal challenges to the use of the site, that is both irrelevant and outside of the scope of this proceeding. The Commission does not require that ownership must be settled prior to review,[91] and a site is no less specific (and ready for environmental review) due to questions of ownership.[92] Indeed, the proposed Private Fuel Storage interim spent fuel storage facility was licensed notwithstanding an unresolved site lease dispute.[93]

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[90] DEIS, Section 3.2.1 ("Split estate occurs on privately-owned land within and surrounding the proposed CISF project area. Split estate is an estate where property rights (or ownership) to the surface and the subsurface are split between two parties. The State of New Mexico owns subsurface property rights within the proposed [storage facility] project area, and BLM or the State of New Mexico owns subsurface property rights on privately-owned land surrounding the proposed [storage facility] project area ([D]EIS Figure 3.2-2).").

[91] *Concerned Citizens of Rhode Island v. NRC*, 430 F. Supp. 627, 632 n.9 (D.R.I. 1977). *Accord Puerto Rico Elec. Power Auth.* (North Coast Nuclear Plant), ALAB-662, 14 N.R.C. 1125, 1136 (1981); *New England Power Co.* (NEP, Units 1 and 2), LBP-78-9, 7 N.R.C. 271, 281 (1978).

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

[93] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 N.R.C. 142, 198 (1998).

In addition, any potential claims under New Mexico state law on the rights of mineral lessees against the surface estate owner (currently ELEA) are outside the scope of this proceeding. As the Board previously found, "claims under New Mexico law against an entity that is not seeking a license from the NRC are plainly outside the scope of this proceeding."[94] Finally, to the extent that Fasken is arguing that some additional approval is required from the State of New Mexico to resolve any potential disputes regarding the mineral estate, that is also outside the scope of this proceeding. As precedent dictates, it is not proper for the Commission to determine the necessity of permits from other regulatory bodies through the use of contentions and NRC adjudication: to find otherwise would result in duplicative (and potentially contradictory) regulation.[95]

To the extent that Fasken is challenging the Staff's analysis of impacts to oil and gas exploration, there is also no genuine dispute with the DEIS. As the DEIS found, extraction of oil and gas can "continue to occur at depths greater than 930 m [3,050 ft]" from the mineral estate beneath the site through the use of the BLM drill islands.[96] Fasken has provided nothing to the contrary. Indeed, Holtec is aware that XTO discussed this possibility with BLM in 2019.

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[94] *HI-STORE Consolidated Interim Storage Facility*, LBP-19-4, 89 N.R.C. at 457, *aff'd* CLI-20-4 at 39.

[95] *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 N.R.C. 119, 120 (1998) ("Whether non-NRC permits are required is the responsibility of bodies that issue such permits, such as the Federal Environmental Protection Agency, the Navajo nation, or state and local authorities. To find otherwise would result in duplicate regulation as both the NRC and the permitting authority would be resolving the same question, i.e., whether a permit is required. Such a regulatory scheme runs the risk of Commission interference or oversight in areas outside its domain. Nothing in our statute or rules contemplates such a role for the Commission.").

[96] DEIS at xxiv-xxv, 4-6, 4-7. As the DEIS explains in more detail,

> The Belco Tetris Shallow and Belco Deep drill islands are located approximately 0.4 km [0.25 mi] and 0.8 km [0.5 mi] west of the proposed project area, respectively, and the Anise Tetris drill island is south of the proposed project area. . . These drill islands were established by the BLM in consideration of appropriate oil and gas technology, such that wells can be drilled from the drilling islands to effectively extract oil and gas resources, while managing the impact on underground potash resources (77 FR 71814; December 4, 2012).

DEIS at 3-8.

In addition, Fasken provides no basis as to how the potential prevention of vertical drilling on Holtec's relatively small 283-acre site,[97] would have a measurable environmental impact. Most of the site's mineral rights do not even belong to XTO,[98] and the site is only a small portion of this particular XTO 2,120.6 acre lease-hold.[99] Nor does Fasken demonstrate how limiting vertical drilling on a 283-acre site would translate to any measurable impact on oil and gas exploration and development in the region overall or even the immediate vicinity of the site. To provide context, a company such as Chevron has approximately 2.2 million net acres of mineral rights in the Permian Basin area,[100] Exxon (the parent of XTO) is reported to have 1.8 million net acres of mineral rights,[101] and Fasken itself is reported to own 165,000 acres of land in the Permian Basin, including the mineral rights.[102] Holtec's 283-acre protected area is inconsequential by comparison.

In addition, Fasken does nothing to otherwise dispute the findings of the DEIS as it relates to XTO's mineral rights. Fasken's only attempt at establishing a dispute relating to the XTO lease (aside from repetitive claims as to drilling depth) is to vaguely reference the active well on the Southwest corner of Section 13 outside the CISF site and claim that the DEIS "does

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[97] *Id.* at 4-4.

[98] As public records and XTO's map and lease in Fasken's Exhibit 1 demonstrates, the XTO lease in Section 13, Township 20S, Range 32E (where the CISF will be built) is limited to the Northeastern quarter of the section (lease ID E052310017).

[99] XTO Sept. 22, 2020 Letter at 2.

[100] Chevron, *The Permian Basin* (last accessed Nov. 30, 2020), available at https://www.chevron.com/projects/permian ("chevron acreage ~2.2 million net acres in the Permian Basin").

[101] ExxonMobil, *2019 Annual Summary Report* at 12, available at https://corporate.exxonmobil.com/-/media/Global/Files/investor-relations/annual-meeting-materials/annual-report-summaries/2019-Summary-Annual-Report.pdf ("[O]ur Permian Basin development includes standardized, modular facility designs applied across our 1.8 million net acres.").

[102] A. Weinstein, *He Paid $1.50 an Acre for Barren Texas Land Now Worth $7 Billion*, BLOOMBERG (Sept. 10, 2019) available at https://www.bloomberg.com/news/features/2019-09-10/he-paid-1-50-an-acre-for-barren-texas-land-now-worth-7-billion

not indicate this is XTO"[103]—for the record the well belongs to another entity[104]—but even that attempt does not indicate how ownership of the active well would change the DEIS analysis.[105]

It is also not clear how Fasken's claims regarding the potential for State Land Office restrictions on drilling or mining raise a genuine dispute with the Application or DEIS. Fasken fails to point to any reference in the Application or the DEIS to State Land Office restrictions on drilling depths at the site. Without such a reference, Fasken fails to clearly establish what is in dispute. Indeed, Holtec is not relying on any depth restrictions from the State Land Office. Drilling will occur at the anticipated depths because that is the depth at which the oil is located (i.e., beneath the Salado formation).[106] The location of the oil and gas is independent of restrictions from the State Land Office.

As a final flaw, Fasken's claims based on the XTO comments are also insufficiently supported. While Fasken appends voluminous information and purports to rely on that information, it still makes simple errors in the Contention itself. The location of XTO's mineral interest is a good example: XTO comments and lease clearly demonstrate that XTO's mineral interest is limited in Section 13 (where the CISF will be built) to the northeast quadrant of the Section.[107] Yet, Fasken's Contention 3 then alleges (incorrectly) that XTO has the mineral rights to the southwest portion of Section 13,[108] contrary to Fasken's own documentation.

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[103] Motion for Leave at 23.

[104] The information for Section 13 of Township 20S / Range 32E (where the CISF will be built) can be searched and viewed at https://mapservice.nmstatelands.org/OilGasMinerals/. In addition, information on the two oil and gas leases located in Section 13 can be found on the New Mexico State Land Office Data Access site at http://dataaccess.nmstatelands.org/dataaccess/lease_information.aspx?lease_prefix=E0&lease_number=5231&lease_assignment=17 and http://dataaccess.nmstatelands.org/dataaccess/lease_information.aspx?lease_prefix=V0&lease_number=2770&lease_assignment=2.

[105] Motion for Leave at 23.

[106] DEIS at 3-7 to 3-8.

[107] XTO Sept. 2, 2020 Letter at 5, 10.

[108] Motion for Leave at 23.

This is not the only claim in Fasken's Contention 3 that is unmoored from what Fasken purports to be its documentary support. Fasken claims that Holtec is wrong in asserting that the local drill islands are outside the site or that all future wells would be on drill islands[109] based on XTO's statement that "[n]either NRC nor Holtec has legal authority to unilaterally restrict production . . . ."[110] However, the drill island requirement comes from the federal Bureau of Land Management,[111] and neither the NRC nor Holtec has any involvement in that restriction.

In sum, none of Fasken's claims based on the XTO comments or XTO's mineral rights can form the basis of an admissible contention under 10 C.F.R. § 2.309(f)(1). They are either outside the scope of this proceeding, immaterial, fail to raise a genuine dispute with the Application, lack factual or expert support, or suffer from several of the above failings.

4. Fasken's Remaining Claims Are Not Admissible

Fasken's remaining claims that are unrelated to the XTO comments or mineral rights are also inadmissible under the Commission's admissibility standards. Fasken claims that the Staff should have consulted with and incorporated the "major viewpoints of NMED, the State Land Office, the NM Mineral Development Division, and other [unnamed] entities with extensive and superior regional knowledge of the proposed site in violation of NEPA."[112] Fasken also alleges that the Staff discounted opposition from "the governor of New Mexico, senators and representatives, tribal nations, counties and cities of the region."[113] Fasken claims that this "is

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[109] *Id.* at 25-26.

[110] *Id.* at 26.

[111] *See e.g.*, U.S. Secretary of the Interior issued Order 3324, "Oil, Gas, and Potash Leasing and Development Within Designated Potash Area of Eddy and Lea Counties, NM" (77 FR 71814) (Dec. 2012); DEIS at 4-5, ER Rev.7 at 3-2 ("The CIS Facility is located in Section 13, Township 20 South, Range 32 East, which is part of the Secretary's Potash Area (see Figure 3.1.5 below).").

[112] Motion for Leave at 28-29.

[113] *Id.* at 29.

unacceptable and violates the primary principle of consent-based siting mandated by the Blue Ribbon Commission."[114]

Aside from Fasken's ignoring that the relevant nearby counties have not only consented to the siting, but were directly involved in the site selection, consent-based siting is not a requirement in the NRC regulations or any relevant statute. The Blue Ribbon Commission Report cited by Fasken is not, nor never was, binding on the NRC or on any other body. As the Board has already found, and Fasken ignores, "the issue of public support for the proposed facility is not material to the findings the NRC must make in this licensing proceeding."[115] Nor does the NRC select the site for the Holtec project. Holtec, as the applicant, chooses the site of the project, and Holtec's preferences are accorded "substantial weight."[116] In addition, Fasken has not "'offer[ed] tangible evidence' of an 'obviously superior site' sufficient to call for a more thorough site-by-site NEPA review" of site selection.[117] Nor has Fasken identified any statute, regulation or NRC guidance that requires the kind of consultation and site-selection process that it has set forth. In sum, this aspect of the Fasken contention is not material to the findings that the Staff must make to support this proceeding.

Finally, Fasken's remaining miscellaneous claims are inadmissible where they are buried in the voluminous documentation appended to Contention 3 or are otherwise copied verbatim from DEIS comments into Contention 3 without any supporting analysis. Fasken's contention

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[114] *Id.*

[115] *HI-STORE Consolidated Interim Storage Facility*, LBP-19-4, 89 N.R.C. at 457.

[116] Louisiana Enrichment Serv. (Claiborne Enrichment Center), CLI-98-3, 47 N.R.C. 77, 104 (1998) (*citing City of Grapevine v. DOT*, 17 F.3d 1502, 1506 (D.C. Cir. 1994)).

[117] Claiborne Enrichment Center), CLI-98-3, 47 N.R.C. at 104 (*citing Roosevelt Campobello International Park Commission v. EPA*, 684 F.2d 1041, 1047 (1st Cir.1982)).

must be specific,[118] concisely supported,[119] and with a brief explanation of the basis.[120] Fasken's Contention 3, with 61 pages of "supporting" "facts," extensive verbatim quotes, incomplete citations to supporting information, and excessive and meandering bases, meets none of these requirements. Fasken "may not simply incorporate massive documents by reference as the basis for or a statement of [its] contentions."[121] Instead Fasken is required "to clearly identify the matters on which they intend to rely with reference to a specific point."[122] "The Commission cannot be faulted for not having searched for a needle that may be in a haystack."[123] Nor is it even permissible for the Board to create a contention for Fasken by searching through pleadings or other materials to uncover arguments and support never advanced by Fasken itself or inferring unarticulated bases for its contention.[124] This alone is sufficient reason to reject Contention 3.

C. Fasken Fails to Meet the Requirements for a Motion to Reopen

From the above, one thing should be clear. Fasken's latest attempt to recast and refile its previous claims relabeled as Contention 3 does not meet the timeliness or admissibility requirements for a late-filed contention. Having failed to meet either of these basic requirements, Contention 3 also cannot meet the heightened standard of reopening the record. Reopening the record is an extraordinary step. It is not warranted by Fasken's third attempt to put forward an admissible contention on a single topic, and Fasken's Motion to Reopen does nothing to support reopening the record.

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[118] 10 C.F.R. § 2.309(f)(1)(i) (requiring Fasken to "[p]rovide a *specific* statement of the issue of law or fact to be raised or controverted").

[119] *Id.* § 2.309(f)(1)(v) (requiring Fasken to "[p]rovide a *concise* statement of the alleged facts or expert opinions which support the requestor's/petitioner's position").

[120] *Id.* § 2.309(f)(1)(ii) (requiring Fasken to "[p]rovide a *brief* explanation of the basis for the contention").

[121] *Pub. Serv. Co. of NH* (Seabrook Station, Units 1 and 2), CLI-89-03, 29 N.R.C. 234, 240-41 (1989).

[122] *Id.* at 241.

[123] *Id.*

[124] *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 N.R.C. 451, 457 (2006).

1. Legal Standards for a Motion to Reopen

The Commission considers "reopening the record for any reason to be 'an 'extraordinary' action,'"[125] and places "an intentionally heavy burden on parties seeking to reopen the record."[126] 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."[127] "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."[128] "Obviously, 'there would be little hope' of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings."[129]

The standards Fasken must meet to justify reopening the record are set forth in 10 C.F.R. § 2.326(a).

1. The motion must be timely, but the Board has discretion to consider an untimely issue if it is "exceptionally grave";
2. The motion must address a significant safety or environmental issue;
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.

In addition, the motion must be accompanied by an affidavit setting forth the factual and/or technical basis for the claim that these three criteria have been met.[130] "Each of the criteria must be separately addressed, with a specific explanation of why it has been met."[131]

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[125] *Tennessee Valley Auth.* (Watts Bar Unit 2), CLI-15-19, 82 N.R.C. 151, 156 (2015) (quoting *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 N.R.C. 333, 337-38 (2011) (citing Final Rule: Criteria for Reopening Records in Formal Licensing Proceedings, 51 FR 19,535, 19,538 (1986))).

[126] *Id.* at 155.

[127] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 N.R.C. 345, 350 (2005).

[128] *Id.*

[129] *Id.* at n. 18 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 555 (1978)).

[130] 10 C.F.R. § 2.326(b).

[131] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 287 (2009).

The affidavit must be from "competent individuals with knowledge of the facts alleged," or from "experts in the disciplines appropriate to the issues raised."[132] And since the motion to reopen is for the purpose of "consider[ing] additional *evidence*,"[133] the "[e]vidence contained in affidavits must meet the admissibility standards of this subpart." [134] The Motion to Reopen must meet all of these standards. It meets none of them. Thus, it should be rejected.

2. The Motion to Reopen Is Unjustifiably Late

10 C.F.R. § 2.326(a)(1) states that a motion to reopen the record will not be granted unless it is timely. Where the motion to reopen relates to a contention not previously in controversy, as is the case here, 10 C.F.R. § 2.326(d) requires the motion to "also satisfy the § 2.309(c) requirements for new or amended contentions filed after the deadline in § 2.309(b)."[135] This includes the requirements in § 2.309(c)(1)(i) & (ii) that the "information upon which the filing is based was not previously available" and is "*materially different* from information previously available."[136]

Although Fasken's Motion to Reopen purportedly relies on information which was unavailable prior to NRC publication of XTO's letter and Holtec's RAI responses, Fasken fails to explain how or why any of the actual information in those documents is new. Indeed, that information is not new, as described in extensive detail above. As such, its Motion to Reopen fails to meet the timeliness requirement of 10 C.F.R. § 2.326(a)(1).

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[132] *Id.*
[133] 10 C.F.R. § 2.326(a) (emphasis added).
[134] *Id.* at (b).
[135] *Id.* at (d).
[136] 10 C.F.R. § 2.309(c)(ii) (emphasis added).

3. The Issues that Fasken Seeks to Raise Are Not Exceptionally Grave

Given that the issues raised in Contention 3 are untimely, Fasken can only support reopening the record by establishing that the issues are "exceptionally grave" pursuant to 10 C.F.R. § 2.326(a)(1).[137] As an example, the Commission explained that "exceptionally grave" matters may include "potential harm to an endangered species" if it is "likely to occur." [138] The exceptionally grave criterion is intended to be used "only in truly extraordinary circumstances."[139]

Fasken's Motion to Reopen does not claim to raise exceptionally grave issues, or address truly extraordinary circumstances. Nor could it. Fasken fails to even address materiality, or identify a precise environmental or safety impact, let alone establish one that is exceptionally grave. Fasken's conclusory assertion that the "site is not geologically suitable for the proposed CISF project" is vague and lacks any meaningful basis. Indeed, Fasken alleges no imminent, or even particularized, environmental harm, providing no additional justification for reopening the record, in the absence of a timely filing.

4. Fasken Does Not Raise a Significant Safety or Environmental Issue

Fasken's Motion to Reopen falls short of the Section 2.326 requirement that it raise a significant safety or environmental issue. To justify reopening the record for an environmental issue, "there must be new and significant information which will 'paint a *seriously* different picture of the environmental landscape.'"[140] "[A]djudicatory proceedings are not 'EIS editing

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[137] 10 C.F.R. § 2.326(a)(1).

[138] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 N.R.C. 491, 501 (2012).

[139] *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc*. (Pilgrim Nuclear Power Station), CLI-12-10, 75 N.R.C. 479, 497 (2012).

[140] *Entergy Nuclear Generation* (Pilgrim Nuclear Station), LBP-12-1, 75 N.R.C. 1, 14 (2012) (quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3,63 N.R.C. 19, 28 (2006) (emphasis in original)).

sessions.'"[141] "Bare assertions and speculation … do not supply the requisite support" to meet the criteria to reopen the record.[142] Fasken must provide some level of detailed explanation as to exactly what safety risks or environmental impacts it believes it raises which justify reopening the record.

The claims in Fasken's Motion to Reopen do not rise to this level. Instead, Fasken repeats prior claims about mineral rights.[143] Holtec has previously and repeatedly addressed this argument by Fasken, showing that (1) ownership of mineral rights is accurately portrayed in the Application; (2) Fasken mischaracterizes Holtec's Application; and (3) ownership of mineral rights is immaterial to the safety and environmental findings that the NRC must make regarding the Application.[144] As Holtec has explained, no statute or regulation requires Holtec to own or control the site before the CISF Application may be considered or the license granted.[145] Neither NRC regulations, decisions nor guidance documents require that ownership of the site be demonstrated in the Application, and the NRC has a "settled practice" of permitting docketing

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[141] *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-6, 75 N.R.C. 352, 368 (2012) (quoting *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 N.R.C. 419, 431 (2003)).

[142] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 287 (2009) (quoting *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-08-28, 68 N.R.C. 658, 674 (2008) (internal quotations omitted)).

[143] *See, e.g.*, Fasken Oil and Ranch and Permian Basin Land and Royalty Owners Motion for Leave to File a New Contention at 3 (Aug. 1, 2019) (ADAMS Access No. ML19213A171) (submitting as Contention 2 that "Statements in Holtec's Safety Analysis Report (SAR) and Facility Environmental Report (FER) regarding 'control' over mineral rights below the site are materially misleading and inaccurate."); Fasken Oil and Ranch and Permian Basin Land and Royalty Owners Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019 at 6 (Sept. 3, 2019) (ADAMS Accession No. ML19246B809) ("This motion to reopen presents an exceptionally grave issue because Holtec . . . does not own the mineral rights located below its proposed site"); Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners Motion for Leave to File Amended Contention No. 2 at 10-11 (May 11, 2020) (ADAMS Accession No. ML20132F019) (submitting as part of Amended Contention 2 that "Holtec's application fails to adequately, accurately, completely and consistently describe the control of subsurface mineral rights").

[144] *See* August 26 Answer at 14-19, 22-23, 24-26; Holtec International's Answer Opposing Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners Motion to Reopen the Record and Motion for Leave to File Amended Contention 2 at 11, 30-45.

[145] August 26 Answer at 24-26.

and review of nuclear power reactor applications before the applicant acquires ownership or control of the site.[146] Moreover, and critical to Fasken's attempt to satisfy the Section 2.326 requirements, while mineral rights beneath the site may implicate issues under New Mexico state law, local state property law does not infer any safety or environmental concern.

Thus, a contention over ownership of mineral rights does not generate a genuine dispute with the Application. This applies both to Fasken's specific claims about XTO, and Fasken's generic claims regarding "third-party agreements." Despite repeatedly raising this issue, Fasken has never presented and cannot now present any legal authority to the contrary.

Fasken's other attempts to satisfy this requirement similarly fail. The Motion to Reopen alleges that "new evidence" concerns "significant environmental impacts and potential safety risks, left by the wayside in the recent Holtec DEIS analysis."[147] However, this bald conclusion wholly lacks explanation. So, too, do Fasken's attempts to find support in other similarly vague allegations. For example, Fasken quotes from a DEIS comment that "there are 'grave concerns about the inadequacy of the technical analysis,'"[148] but Fasken never even explains what those concerns are. Rather, Fasken offers "bare assertions and speculation," stating that "[t]he NRC licensing proceeding cannot move forward without resolving these [undefined] issues," and that the "site is not geologically suitable for the proposed CISF project."[149] Accordingly, Fasken's Motion to Reopen fails to raise any significant safety or environmental issue and should be rejected.

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[146] *Concerned Citizens of Rhode Island v. NRC*, 430 F. Supp. 627, 632 n.9 (D.R.I. 1977); *id.* at n. 9 ("The Court is informed that the NRC has on numerous occasions docketed applications and commenced review prior to the acquisition by applicant of ownership or 'control' over the contemplated site."). *Accord Puerto Rico Elec. Power Auth.* (North Coast Nuclear Plant), ALAB-662, 14 N.R.C. 1125, 1136 (1981); *New England Power Co.* (NEP, Units 1 and 2), LBP-78-9, 7 N.R.C. 271, 281 (1978).

[147] Motion to Reopen at ¶ 13.

[148] *Id.* (quoting New Mexico Environment Department Letter to John Tappert, NRC (Sept. 22, 2020)).

[149] *Id.* at ¶ 13, 15.

5. Fasken Fails to Demonstrate that a Materially Different Result Would Have Been Likely Were Contention 3 Initially Considered

The Motion to Reopen fails to meaningfully address the requirement that a materially different result would have been likely if Contention 3 had been considered initially. Speculations about possible outcomes are insufficient to meet this standard.[150] A petitioner must offer more than speculation that additional analysis or information "might" result in a different outcome.[151] A petitioner must say what outcome would have occurred, and why.

By contrast, Fasken's Motion to Reopen never attempts to describe what different result would have occurred, vacillating between arguing that "the outcome in terms of the site selection process" would have been "affected" (possibly laboring under the mistaken belief that the NRC selected the site[152]), "*or* [the NRC would have] opt[ed] for the 'No Action' Alternative," or that the NRC would have "*at the very least* tak[en] a 'hard look' at the impacts and implementing [unspecified] mitigation strategies."[153] However, assertions that something "likely" or "probably" would have affected the analysis "do not supply the requisite support" to meet this standard.[154]

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[150] *See, e.g.*, *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-08-28, 68 N.R.C. 658, 674 (2008) (finding that speculations such as "'[i]t is . . . *likely* that an analysis that complies with the ASME Code would predict that the [cumulative usage factor] would become greater than one during the proposed period of extended operation,' and that 'the environmental factors in the [license renewal application] and the [request for additional information] are probably non-conservative,' do not supply the requisite support" to show a materially different outcome (emphasis in the original, footnotes omitted)).

[151] *See, e.g.*, *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 N.R.C. 461, 486 (2008).

[152] *See* Taylor Declaration at ¶ 13 ("Had the lack of control and absence of any effective third-party agreements with XTO and other oil and gas lessee with rights at the Holtec site been disclosed earlier . . . the NRC would have chosen a different location . . . .").

[153] Motion to Reopen at ¶ 14 (emphasis added).

[154] *Oyster Creek*, CLI-08-28, 68 N.R.C. at 674.

Fasken is required to demonstrate that "consideration of [its] evidence will materially affect the outcome of this proceeding"[155] or, in other words, to "show a likelihood that consideration of [its] new contention would result in the *denial or conditioning*" of Holtec's CISF Application.[156] Fasken does not attempt to meet that standard. Nor could it, for the reasons already explained in the entirety of this Answer.

6. The Motion to Reopen Is Not Accompanied by an Appropriate Affidavit

Not only does Fasken fail meet the requirements of 10 C.F.R. § 2.326(a), it also fails to meet the independent requirements of 10 C.F.R. § 2.326(b).

First, the Taylor Declaration fails to meet the requirement of 10 C.F.R. § 2.326(b), that a motion to reopen the record be accompanied by affidavits that *specifically address* the criteria of 10 C.F.R. § 2.326(a) and explain why each has been met. "The affidavit must contain specific factual and/or technical bases for the movant's argument that the three criteria of subpart (a) are satisfied."[157] "*Each of the criteria must be separately addressed*, with a specific explanation of why it has been met."[158]

The Taylor Declaration wholly lacks any attempt to separately address these Section 2.326(a) standards, and so is inadequate to support the Motion to Reopen. The Declaration contains no explanation as to why the assertedly new information Fasken seeks to admit is timely, why that information was previously unavailable, or how it differs materially from previously available information. The Declaration never alleges an "exceptionally grave" concern (nor does it even describe any particular safety or environmental concern), and never

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[155] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-08-12, 68 N.R.C. 5, 23, *aff'd* CLI-08-28, 68 N.R.C. 658 (2008).

[156] *Oyster Creek*, CLI-08-28, 68 N.R.C. at 673 (emphasis added).

[157] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 291 (2009).

[158] 10 C.F.R. § 2.326(b) (emphasis added).

alleges any concerns that are "significant." Lastly, the Declaration never establishes that a materially different outcome would result from consideration of the proffered evidence. Instead, the Taylor Declaration provides the baffling (and vague) assertion that "the NRC would have chosen a different location, selected 'No Action Alternative' or at the very least implemented [unspecified] mitigation measures."[159] Given this complete failure to meet the standards of Section 2.326(b), the Taylor Declaration does not fulfill the requirements for an affidavit supporting a motion to reopen.

In addition, much of the Taylor Declaration consists of unsupported and inaccurate assertions, such as his claim that "old wellbores beneath their site are known to those of us in the oil and gas industry as posing a potential threat of collapse due to deficient plugging"[160] (contrary to Figure 2.1.20 of the SAR,[161] demonstrating that wellbores are not under the CISF) and his assertion that "the Yates formation . . . is best reached vertically and not horizontally"[162] (contrary to his own assertions in 2018 that "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"[163]).

The Taylor Declaration is also replete with demonstrable errors. This alone should be sufficient justification to discredit the Declaration. Examples include,

- Subsurface Mineral Rights: The Taylor Declaration asserts that "Holtec fails to *acknowledge* or have any regard for the interests of the mineral owners and lessees of minerals directly beneath and adjacent to their proposed CISF."[164] On

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[159] Taylor Declaration ¶ 13.

[160] *Id.* ¶ 10(c).

[161] Safety Analysis Report, Rev. 0C at 2-38 (ADAMS Accession No. ML19318G865). Figure 2.1.20 was included in Rev. 0C from May 2018, before contentions were first due in this proceeding.

[162] *Id.* ¶ 10(e).

[163] Comment of Tommy E. Taylor, on behalf of Fasken Oil and Ranch, Ltd. and PBLRO at 2 (July 30, 2018) (emphasis added) (ADAMS Accession No. ML18219A710).

[164] Taylor Declaration ¶ 10(b) (emphasis added).

the contrary, the Application specifically discusses the fact that other parties have interests in the mineral rights at the site.[165] The Application acknowledges the possibility of "future oil drilling or fracking beneath the Site," thereby acknowledging that some party must hold subsurface mineral interest at the CISF Site.[166] Holtec also previously named the mineral rights holders on the docket.[167] Given this, it is inconceivable for Mr. Taylor to allege that Holtec has failed to acknowledge these mineral rights.

- Plugged Wells: The Taylor Declaration alleges that Holtec claims that plugged wells "are not important to safety" and that Holtec's findings regarding plugged wells "[are] made . . . without data or evidence," and are "unsubstantiated [and] . . inaccurate."[168] Even a cursory reading of the Application and Holtec's recent RAI responses completely undermines this notion.[169] Holtec addressed abandoned wells at the site, casing corrosion and well collapse; and wells surrounding the site.[170] The Application explained how "none of these plugged and abandoned oil and gas wells are located within the area where the ISFSI would be located or where any land would be disturbed and they are not expected to affect the construction and operation of the CIS Facility."[171] And the RAI responses further detail the data and evidence supporting Holtec's conclusions.[172]

- Potash Mining: The Taylor Declaration alleges that Holtec did not acknowledge the existence of potash beneath the site.[173] On the contrary, Holtec extensively discussed the existence of potash beneath the site. Nowhere did Holtec suggest that potash was not present beneath the site.

The Taylor Declaration is also unfortunately tarnished by inappropriate and unwarranted characterizations, labelling the Application and Holtec's other submissions to the Commission as "misrepresentation," "falsehoods," filings that have "misled" government agencies and the public, "mischaracterizations," "materially false statements [that] should be investigated for

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[165] *See, e.g.*, Safety Analysis Report, Rev. 0C at 2-42 ("One active oil/gas well on the southwest portion of Section 13 operates at minimum production to maintain mineral rights.").

[166] ER, Rev. 3 at 3-2 (ADAMS Accession No. ML19016A493).

[167] *See supra* n 54; August 26 Answer at 16 ("[T]he oil and gas leases for Section 13 are held by COG Operating LLC and XTO Delaware Basin, LLC.").

[168] Taylor Declaration ¶ 10(c).

[169] *See, e.g.*, August 26 Answer at 20-23; Holtec June 5, 2020 Answer at 36 n. 168, 46-48.

[170] *See, e.g.*, SAR Rev. 0H at 2-3, 6-42, 2-11 to 2-12, and 2-39 (ADAMS Accession No. ML19163A062).

[171] *Id.* at 2-3.

[172] *See* RAI Responses at 19-26, 29-30.

[173] Taylor Declaration at ¶ 10(d).

possible [criminal] violations," and so on.[174] Yet, looking at the allegations and the repeated and rejected claims again put forward by Fasken and the Taylor Declaration, it is clear that Fasken documents contain the inaccuracies, and Fasken has again failed to meet the standards required for a motion to reopen.

In conclusion, for the reasons provided above, Fasken failed to submit an affidavit sufficient to meet the requirements set forth in 10 C.F.R. § 2.326(b). For this reason alone, its Motion to Reopen should be rejected.

V. Conclusion

For the reasons set forth above, Holtec respectfully requests that the Commission deny Fasken's Motion to Reopen the Record and Motion for Leave to File New Contention No. 3.

Respectfully submitted,

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November 30, 2020

[174] *Id.* ¶ 10(a).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

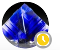
In the Matter of	)	
	)	Docket No. 72-1051
Holtec International	)	
	)	
(HI-STORE Consolidated Interim Storage Facility)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Holtec International's Answer Opposing Fasken Land and Minerals, Ltd's and Permian Basin Land and Royalty Owners Motion to Reopen the Record and Motion for Leave to File New Contention No. 3 have been served through the E-Filing system on the participants in the above-captioned proceeding this 30th day of November 2020.

/signed electronically by Anne R. Leidich/
Anne R. Leidich

Sent It... tetris anise onsite



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Tentative Drilling Island Onsite - July 24th 730am

Rutley, James S <JRutley@blm.gov>
Tue 7/2/2019 8:32 AM

To: Walla, Jeff <Jeff.Walla@dvn.com>; Randall Mark Trainer <randall@trainerpartners.com>; Charles E. Moran <Charles_Moran@eogresources.com>; Allison Holcomb <aholcomb@concho.com>; Cory Frederick <coryf@forl.com>; Hall, Brian (MRO) <bhall@marathonoil.com>; Maunder, Susan B <susan.b.maunder@conocophillips.com>; Terri Stathem <TStathem@cimarex.com>; kristine_kuse@oxy.com <kristine_kuse@oxy.com>; Ryan D DeLong <rdelong@titusoil.com>; Mike Hayes <mhayes@rubiconoilandgas.com>; MEADE, TODD J <TODDMEADE@chevron.com>; bhughes@lucid-energy.com <bhughes@lucid-energy.com>

Cc: Robertson, Jeffery L <jlrobertson@blm.gov>; John Heaton <jaheaton1@gmail.com>; Travis Casey <travis.casey@cehmm.org>; Emily Wirth <emily.wirth@cehmm.org>; Khalsa, Niranjan <nkhalsa@slo.state.nm.us>; Rabadue, Stephanie <stephanie_rabadue@xtoenergy.com>; Scott, James /c <James_Scott@xtoenergy.com>; Sedillo, Isaiah T <isedillo@blm.gov>; Ponder, Katrina L <kponder@blm.gov>; Cisneros, Tessa L <tcisnero@blm.gov>

1 attachments (910 KB)

Tetris Anise DI Onsite - 2019-07-24 730am.jpg;

Good Morning,

You are being notified of a tentative drilling island onsite on July 24th, 2019, 730am. I will confirm onsite on Monday, July 8th, with a calendar invite.

XTO is proposing to formalize nominated drill islands along the northern section line of Section 24 in 20S 32E (purple polygons). You are being notified because your leases are within two miles of the proposed locations. A railroad spur is also being proposed immediately south of the proposed drill islands to access the Holtec Site. XTO is using the drill islands to access leases to the north and will have the corners of the drill island and individual pad corners staked with surveyors onsite. If other operators intend to use the drill island going south, you are invited to also stake your pads within the corridor of the drill island which extends east-west 660' from northern section line in Section 24.

We will meet at the Laguna Road & Hobbs Highway at 730am, July 24th. A calendar invite will come on Monday, July 8th when the date is confirmed.

If you have any questions, please feel free to contact me.

Need Help?

SECTION 13

TOWNSHIP 20 SOUTH, RANGE 32 EAST
NEW MEXICO PRIME MERIDIAN
PRIVATE OWNER:
ENERGY
ALLIANCE LLC.

CENTER OF PAD
2,650' FEL & 359' FNL
SECTION 24,
T-20-S, R-32-E

LAT= 32.565925°N
LONG= 103.728344°W

LAT= 32.566749°N
LONG= 103.729320°W

LAT= 32.566751°N
LONG= 103.719757°W

LAT= 32.565926°N
LONG= 103.719757°W

LAT= 32.565922°N
LONG= 103.711136°W

LAT= 32.566746°N
LONG= 103.710166°W

SW/4 SW/4
SE/4 SW/4
SW/4 SE/4
SE/4 SE/4

PROPOSED – (SURVEYED BY OTHERS) EOG PAD

PROPOSED – (SURVEYED BY OTHERS) EOG PAD

14
23
18
19

2" FOUND IRON PIPE W/ BRASS CAP

2" FOUND IRON PIPE W/ BRASS CAP

300'
2954.83'
2645.59'
2656.14'
1319.91'
720.00'
720.00'
1319.92'

PROPOSED – (SURVEYED BY OTHERS) EOG PAD

PROPOSED – (SURVEYED BY OTHERS) TITUS PAD

PROPOSED – (SURVEYED BY OTHERS) EOG PAD

PROPOSED 87.32 ACRES DRILLING ISLAND

PROPOSED – (SURVEYED BY OTHERS) TITUS PAD

PROPOSED – (SURVEYED BY OTHERS) EOG PAD

NE/4 NW/4
SW/4 NE/4

PROPOSED – (SURVEYED BY OTHERS) EOG PAD

NW/4 NW/4

LAT= 32.563945°N
LONG= 103.721164°W

PROPOSED – (SURVEYED BY OTHERS) EOG PAD

LAT= 32.563945°N
LONG= 103.719555°W

PROPOSED – (SURVEYED BY OTHERS) EOG PAD

300'

2211.10'
508.11'
2596.66'
458.03'
458.03'
300'

WATER WELL

PROPOSED – (SURVEYED BY OTHERS) TITUS PAD

2176.64'
2563.96'

LAT= 32.563121°N
LONG= 103.729313°W

RESTRICTED BUILD AREA – BURROWING OWL NEST

LAT= 32.563118°N
LONG= 103.710149°W

NE/4 NE/4

EXISTING INTREPID WATER LINE (POSSIBLY RELOCATED)

LAT= 32.563121°N
LONG= 103.722248°W

660'

LAT= 32.563120°N
LONG= 103.718471°W

LAT= 32.563946°N
LONG= 103.728341°W

LAT= 32.563943°N
LONG= 103.711127°W

SW/4 NW/4
SE/4 NW/4
SE/4 NE/4
SE/4 NE/4

SECTION 24

TOWNSHIP 20 SOUTH, RANGE 32 EAST
NEW MEXICO PRIME MERIDIAN
OWNER: U.S.A.

LAT= 32.562264°N
LONG= 103.720360°W

GENERAL NOTES

1. BEARINGS AND COORDINATES SHOWN HEREON ARE MERCATOR GRID AND CONFORM TO THE NEW MEXICO COORDINATE SYSTEM "NEW MEXICO EAST ZONE" NORTH AMERICAN DATUM 1983.
2. LATITUDE AND LONGITUDE VALUES SHOWN HEREON ARE RELATIVE TO THE NORTH AMERICAN DATUM (NAD83).

I, MARK DILLON HARP, NEW MEXICO PROFESSIONAL SURVEYOR NO. 23786, DO HEREBY CERTIFY THAT THIS SURVEY PLAT AND THE ACTUAL SURVEY ON THE GROUND UPON WHICH IT IS BASED WERE PERFORMED BY ME OR UNDER MY DIRECT SUPERVISION; THAT I AM RESPONSIBLE FOR THIS SURVEY, THAT THIS SURVEY MEETS THE MINIMUM STANDARDS FOR SURVEYING IN NEW MEXICO, AND THAT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

MARK DILLON HARP
REGISTERED PROFESSIONAL LAND SURVEYOR
STATE OF NEW MEXICO NO. 23786

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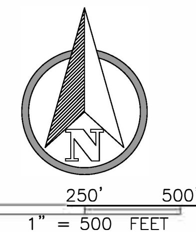
EXHIBIT OF:
OVERALL PAD LAYOUT FOR:
XTO ENERGY, INC.
TETRIS ANISE DRILLING ISLAND
SITUATED IN SECTION 24
TOWNSHIP 20 SOUTH, RANGE 32 EAST,
NEW MEXICO PRIME MERIDIAN,
LEA COUNTY, NEW MEXICO



0 250' 500'
1" = 500 FEET

LEGEND
SECTION LINE
PROPOSED DRILLING ISLAND
PROPOSED PAD EXPANSION
PROPOSED PAD
EXISTING WATER LINE

FSC INC
SURVEYORS+ENGINEERS
550 Bailey Ave., 205 - Fort Worth, TX 76107
Ph: 817.349.9800 - Fax: 979.732.5271
TBPE Firm 17957 | TBPLS Firm 10193887
www.fscinc.net

DATE:	8-5-2019
DRAWN BY:	AI
CHECKED BY:	DH
FIELD CREW:	RE
PROJECT NO:	2019081434
SCALE:	1" = 500'
SHEET:	1 OF 1
REVISION:	NO

P:\PROJECTS\2019\2019072434-XTO-TETRIS_ANISE_DI_LEASE-LEA\DWG\EXHIBITS\2019072434-XTO-TETRIS_ANISE_DI_OVERALL_LAYOUT.dwg