ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 20-1187
Consolidated with Case Nos. 20-1225, 21-1104, 21-1147

BEYOND NUCLEAR, INC., *et al.*,

Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,

Respondents,

HOLTEC INTERNATIONAL,

Intervenor.

Petition for Review of Final Orders of the
United States Nuclear Regulatory Commission

PETITIONERS FASKEN LAND AND MINERALS, LTD. AND PERMIAN BASIN LAND AND ROYALTY OWNERS' FINAL REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Administrative Decisions

Regulations

Other Authorities

GLOSSARY

EIS	Environmental Impact Statement
NEPA	National Environmental Policy Act
NRC	United States Nuclear Regulatory Commission

SUMMARY OF THE ARGUMENT

The Nuclear Regulatory Commission's ("NRC") arbitrary application of its adjudicatory rules to exclude Fasken's Contentions and deny it intervention was entirely unreasonable given that the delay in filing of Fasken's Contentions derives from (1) Holtec's materially misrepresenting its control over mineral rights and development at the Site in its application and subsequent information provided to the NRC; and (2) the NRC's failure to timely and independently investigate the accuracy of Holtec's representations. When those misrepresentations were discovered via a June 2019 letter from the New Mexico Commissioner of Public Lands ("Land Commissioner Letter"), instead of correcting course and considering the merits of the issues raised by a sister agency with more expertise and direct oversight of subsurface land rights, the NRC instead chose to turn a blind eye, relying on its nearly impenetrable pleading standards to deny any intervention.[1]

The NRC's rulings prejudice not only Petitioners, but the public. Despite Fasken's timely and material Contentions, the NRC has irrationally approved a

[1] Several scholars have noted the NRC's reluctance to accept any motions to reopen the record and admit new or amended contentions. *E.g.,* Richard Webster & Julia LeMense, *Spotlight on Safety at Nuclear Power Plants: The View from Oyster Creek*, 26 Pace Envtl. L. Rev. 365 (2009). Tellingly here, of the 51 contentions submitted (many by highly sophisticated parties), not one was admitted. *See Union of Concerned Scientists v. NRC*, 920 F.2d 50, 56 (D.C. Cir. 1990) (recognizing that the NRC's rules "*could be* applied so as to prevent all parties from raising a material issue" and that such an application would be subject to judicial review) (emphasis in original).

license for "interim" (120 years) storage of up to 100,000 metric tons of highly radioactive nuclear waste, in violation of both the National Environmental Policy Act ("NEPA") and the NRC's own siting regulations.

ARGUMENT

I. FASKEN HAD "GOOD CAUSE" TO REOPEN THE RECORD AND FILE ITS CONTENTIONS.

At the core of Respondents' argument is the assertion that the information forming the basis for Fasken's Contentions was "available long before [Fasken] sought leave after the close of the intervention window to raise each of its contentions." Resp't Br. 23. As discussed herein, this assertion is erroneous. Fasken's Contentions were based on new information contained in the Land Commissioner Letter, made available only after the intervention deadline, that was materially different from information previously available. The NRC's unreasonable application of its "good cause" standard is not entitled to deference. *Carstens v. NRC*, 742 F.2d 1546, 1553 (D.C. Cir. 1984) ("[T]his court must defer to [the Board's decision to exclude evidence] so long as it is reasonable."); *Beyond Nuclear v. NRC*, 704 F.3d 12, 20 (1st Cir. 2013) ("Substantial deference is required when an agency adopts reasonable interpretations of its own regulations.").

A. The Land Commissioner Letter Was Materially Different From Previously Available Information In Holtec's Application.

It is simply irrational to say that information in the Land Commissioner Letter was not materially different from (false) statements in Holtec's application. Holtec's application stated that it "has an agreement with Intrepid Mining LLC (Intrepid) [holder of a lease from the State of New Mexico] such that *Holtec controls the mineral rights on the Site*" and that fracking at the Site would be restricted to depths greater than 5,000 feet to ensure against subsidence. Environmental Report (Rev. 6) at 3-2 (JA434) (emphasis added). The Land Commissioner Letter, written "to address several misrepresentations that Holtec has made," revealed for the first time that the "purported agreements and restrictions regarding mineral leasing at the Site [] do not exist and may very well never ever exist." *See* Contention 2 Mtn. at Exhibit 5 (JA0629, JA0632). This direct contradiction satisfies the "materially different" standard, 10 C.F.R. § 2.309(c)(1)(ii), under any reasonable reading.

Respondents repeatedly describe the underlying basis for Fasken's challenges as concerning baseline disclosures of state *ownership* of subsurface mineral rights. *See, e.g.*, Resp't Br. 24 (describing Contentions as "concerning public ownership of subsurface rights"). This mischaracterization conflates the issues of subsurface ownership with the true subject of the Land Commissioner Letter: New Mexico's *regulatory authority* and Holtec's failure to *validly contract* with third parties to *control* the mineral rights at the Site.

Respondents argue that Holtec's initial disclosure of "New Mexico's ownership interests in mineral rights" should necessarily lead to constructive knowledge of the myriad agreements that Holtec could possibly enter with private third parties to acquire "control" over subsurface mineral rights, as well as applicable interdependent land use regulations presently and over the course of Holtec's 40-year License term. Resp't Br. 40. That the latter could be inferred from the former before the intervention deadline is patently absurd. *See In the Matter of Detroit Edison Company* (Fermi Nuclear Power Plant Unit 3), 71 N.R.C. 493, 524 (2010) (Board holding putative intervenors were not expected to raise any possible quality assurance contentions before the intervention deadline or exercise such "exacting scrutiny").

Moreover, the shifting of such an oppressive onus on putative intervenors is a highly prejudicial abuse of discretion given that the NRC itself failed to timely investigate the reliability and accuracy of Holtec's application and its compliance with the NRC's siting evaluation regulations. *See* 10 C.F.R. § 72.11(a) (requiring that information from applicant "be complete and accurate in all material respects"); *id.* at § 51.70 (requiring that the NRC staff "independently evaluate and be responsible for the reliability of all information in the draft [EIS]"); *id.* at §§ 72.90-108 (requiring evaluation of siting factors for NRC-licensed facilities).

The agreements allegedly granting Holtec "control" of the Site were only disclosed in redacted form in mid-April 2019, long after the September 2018 intervention deadline. Indeed, *the NRC itself* only discovered that Holtec lacked the ability to control mineral extraction and development at and around the Site *after the intervention deadline* had passed and *after* publication of its draft Environmental Impact Statement ("EIS"). *See* Draft EIS at 4-4 (JA0667) (relying on incomplete information from Holtec, submitted after the intervention deadline, that Holtec was "in discussions" with the Public Lands Office to restrict mineral development and had "entered into an agreement" with Intrepid regarding mineral rights); *cf.* Final EIS, NUREG-2237 (July 2022), *available at*: https://www.nrc.gov/docs/ML2218/ML22181B094.pdf, at D-45 (conceding that "neither the NRC nor Holtec have the authority to restrict potash mining or oil and gas exploration and development"); *id.* at D-47 (no agreements and no ability to restrict development).

Equally arbitrary is the Atomic Safety and Licensing Board's ("Board") conclusion that the Land Commissioner Letter "collects, summarizes, and places into context previously available information." *LBP-20-6*, 91 N.R.C. 239, 255 (2020) (JA0815). It strains common sense to describe the lack of drilling restrictions or any valid agreements to control mineral rights as "placing into context" the state's

ownership of mineral rights.[2] Such reasoning arbitrarily disregards the fundamental dispute of Fasken's Contentions: Holtec's misrepresentations and the concomitant inability of its application to satisfy NRC siting regulations.

B. The Land Commissioner Letter Was Not Previously Available And Was Timely Submitted.

Respondents also describe Fasken's Contentions as "untimely." *E.g.,* Resp't Br. 23. However, both the NRC's and the Board's findings of untimeliness were premised on finding that the Land Commissioner Letter was not "materially different" from information that was previously available. *CLI-21-7*, 93 N.R.C. 215, 223 (2021) (JA1072); *LBP-20-10*, 92 N.R.C. 235, 242 (2020) (JA0839) ("Fasken's motion is not timely. . . [because it is] based on statements in the DEIS that do not differ materially from information that was publicly available in Holtec's application materials much earlier.").

[2] The Board and the NRC further justified their exclusion of Fasken's Contentions by reasoning that the Land Commissioner Letter was not materially different from a 2018 letter from Fasken's vice president to the NRC. *LBP-20-10*, 92 N.R.C. 235, 244 (2020) (JA0841); *CLI*-21-7, 93 N.R.C. 215, 223 (2021) (JA1080). But even the briefest review of Fasken's letter reveals the arbitrary nature of this determination, as the only (tangentially) related portion merely describes fracking techniques employed around the Site. *See* Fasken Letter to NRC at 2-3 (July 30, 2018), *available at*: https://www.nrc.gov/docs/ML1821/ML18219A710.pdf. Fasken's letter is silent as to Holtec's misrepresentations of control by private not-yet-disclosed agreements with third parties to proscribe mineral development at the Site, any land use restrictions, and New Mexico's regulatory authority over same.

Because the Land Commissioner Letter was written long after the intervention deadline, it cannot be disputed that it was "not previously available." *See* 10 C.F.R. § 2.309(c)(1)(i) (requiring as "good cause" that new or amended contentions be based on "not previously available" information). Likewise, there can be little dispute that if Fasken's Contentions were based on new and materially different information (they were), then they were timely submitted. *See* 10 C.F.R. § 2.309(c)(1)(iii) (requiring as "good cause" that previously unavailable information forming the basis of new or amended contentions to be "submitted in a timely fashion"). Fasken submitted the Land Commissioner Letter within the deadline permitted by the NRC for new or amended contentions (as noted by the Board, 92 N.R.C. at 242 (JA0839)), and within 60 days of the letter being sent. *See In the Matter of Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), 76 N.R.C. 491, 499 (2012) ("Although 'timely' is not expressly defined by months or days in our regulations . . . 30 to 60 days from the initiating event [is considered] a reasonable deadline for proposing new or amended contentions.") (citations omitted).

C. Fasken's Amended Contention 2.

Following the Board's dismissal of Contention 2, the NRC published its draft EIS. Because the draft EIS failed to cure deficiencies in Holtec's application (misrepresenting Holtec's control of the Site's mineral resources (Draft EIS at 4-4

(JA0667)), Fasken's Contention 2 concerning the application should have remained viable as a contention challenging the draft EIS under the NRC's "migration" practice. *See In the Matter of Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), 83 N.R.C. 566, 570 n.17 (2016) ("where the information in the [EIS] is sufficiently similar to the material in the applicant's environmental report, an existing contention based on the application can be migrated, or deemed to apply to the [EIS]"). However, Fasken sought to preserve its challenge to the draft EIS by timely submitting Amended Contention 2 and moving to reopen.[3] *See NRDC v. NRC*, 879 F.3d 1202, 1207 (D.C. Cir. 2018) ("[I]f a contention is not obviously going to be migrated, then its proponent should either seek to amend it or have it treated as a new contention . . ."); *see also* Resp't Br. 11 (if deficiencies are not cured in the draft EIS, putative intervenors may file new or amended contentions).

The Board rejected Fasken's Amended Contention 2, relying on the same arbitrary analysis it used in rejecting the original (that the Land Commissioner Letter was not "materially different" from the application's disclosure of public ownership

[3] Respondents and Holtec argue that Fasken's failure to appeal the Board's Order dismissing Contention 2 to the NRC forfeited its right to this Court's review. Resp't Br. 43-44; Intervenor Br. 44. Yet Respondents also argue that Contention 2 was rendered moot by Fasken's filing of Amended Contention 2, which Fasken did appeal to the NRC. Regardless of this confusion, Fasken believes that its filing of Amended Contention 2, which raised the same issues as Contention 2 but challenged a different document (NRC's draft EIS adopting Holtec's misrepresentations), and its subsequent appeal to the NRC regarding Amended Contention 2 preserved its right to judicial review on the issues raised in both Contentions.

of mineral rights). Additionally, Respondents argue that Amended Contention 2 was untimely because it "challenged documents contained in Holtec's application, as distinct from documents that became available after the [intervention] deadline". Resp't Br. 38; *CLI-21-7*, 93 N.R.C. at 223 (finding challenges to the EIS's description of Holtec's control of mineral rights untimely because it "claimed deficiencies in the application, rather than in the DEIS.") (JA1080). This argument is inconsistent with the migration practice discussed in *Strata Energy*, and further is based on an unreasonably narrow reading of the Contention, the substance of which clearly raises challenges to the uncured deficiencies in the draft EIS. Moreover, the Board itself admitted during oral argument that the Amended Contention clearly addresses and is "obviously in response to the DEIS." *See* Holtec Transcript (Aug. 5, 2020) (J. Ryerson) at 425-426 (JA0827-0828).

II. FASKEN'S CONTENTIONS WERE ADMISSIBLE.

Fasken's Contentions were admissible because they "provide[d] the necessary threshold support for its dispute with Holtec's purported ability to control and limit future oil drilling and mining beneath the site" and identified "material inconsistencies and potential inaccurate statements in [Holtec's] application that directly bear on the analyses required under 10 C.F.R. §§ 72.90 [general considerations for siting evaluation] and 72.103 [geological and seismological characteristics]." NRC Staff Answer at 12 (Aug. 2019) (JA0651). Fasken's

challenges concerning the draft EIS are likewise material to mandatory siting evaluation factors, *see, e.g.*, 10 C.F.R. § 72.94 (requiring examination of man-induced events in the region), as well as the NRC's required "hard look" analysis of environmental issues under NEPA,[4] which necessarily required revision considering the materially different information regarding the (lack of) control of subsurface mineral rights at the Site. Final EIS, NUREG-2237 at D-43 (noting the "NRC staff evaluates the risks of oil and gas exploration and production activities, including fracking, on the integrity and stability of the proposed CISF").

Contrary to Respondents' assertion that Fasken's Contentions "provided no evidentiary basis to contest the issuance of the license" (Resp't Br. 4), and despite the NRC's inconsistent application of its contention standards, the Land Commissioner Letter underscores genuine disputes on the material issues of mineral rights that implicate both significant safety and environmental issues that were necessary to the NRC's findings and determinations. For the same reasons, Fasken's Contentions also satisfy 10 C.F.R. § 2.326(a)(3) (requiring a motion to reopen to demonstrate that a "materially different result . . . would have been likely had the newly proffered evidence been considered initially.").

[4] Holtec argues that Fasken's arguments under NEPA are brought for the first time in this appeal and are thus barred. Intervenor Br. 48-49. Not so. NEPA issues, including alternatives analysis, were fully briefed in Fasken's Amended Contention 2. *See* Amended Contention 2 Mtn. at 9-10 (JA0744-0745).

In ignoring Fasken's timely filed Contentions based on the Land Commissioner Letter's direct contradictions of the Environmental Report and draft EIS, the NRC arbitrarily and irrationally opted to accept Holtec's self-serving statements about the proposed Site. Without conducting an independent investigation into the reliability of evidence supporting siting evaluation factors that implicate important safety and environmental issues, the NRC violated its own regulations and NEPA. The NRC's utter disregard for its own non-negotiable obligations created serious deficiencies in the draft EIS, upon which Fasken timely filed its Amended Contention 2 and motion to reopen the record.

CONCLUSION

For the reasons set forth herein, Fasken's Petition should be granted.

Dated: January 23, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of the Court's August 10, 2023, Order because it contains 2478 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and when combined with the two other consolidated Petitioners' briefs, Petitioners' briefs do not exceed 10,000 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(b) because it has been prepared using Microsoft Word in Times New Roman, 14 pt. font.

Respectfully submitted,

/s/ *Allan Kanner*
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CERTIFICATE OF SERVICE

I hereby certify that the electronic original of the foregoing "Reply Brief of Petitioners" was filed with the United States Court of Appeals for the D.C. Circuit on this 23rd day of January 2024, through the Court's CM/ECF electronic filing system, and thus also served on counsel of record.

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