

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 OPENING BRIEF**

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

In accordance with D.C. Cir. Rule 28(a)(1), Petitioners submit the foregoing certificate of parties, rulings and related cases.

A. Parties and Amici

Petitioners

The Petitioners in this matter are Fasken Land and Minerals, Ltd. and the Permian Basin Land and Royalty Owners, collectively referred to herein as Fasken.

Respondents

The Respondents are the United States Nuclear Regulatory Commission and the United States of America.

Intervenor

The Intervenor is Holtec International.

B. Rulings Under Review

Fasken seeks review of the United States Nuclear Regulatory Commission's ("NRC") Memorandum and Order CLI-20-04, 91 NRC 167 (2020) (JA0676), Memorandum and Order CLI-21-07, 93 NRC 215 (2021) (JA1072), and the Order of the Secretary, *Holtec International and Interim Storage Partners LLC*, Docket Nos. 72-1051 and 72-1050 (Oct. 29, 2018) (JA0392).

C. Related Cases

The undersigned counsel is aware of a currently pending case in the United States Court of Appeals for the Fifth Circuit involving challenges to the NRC's issuance of the Holtec license and record of decision. *Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners v. Nuclear Regulatory Commission and United States of America*, Docket No. 23-60377 (5th Cir.).¹

Respectfully submitted,

/s/ Allan Kanner

Allan Kanner

¹ Opening briefs are currently scheduled to be filed on October 2, 2023.

PETITIONERS' RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. Rule 26.1, Petitioners make the following disclosures:

Petitioner Fasken Land and Minerals, Ltd., is a for-profit nongovernmental limited partnership organization existing under the laws of the State of Texas engaged in oil and gas extraction and production activities. Fasken Land and Minerals, Ltd., has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

Petitioner Permian Basin Land and Royalty Owners is a nongovernmental registered 501(c)(4) non-profit, organized and existing under the laws of the State of Texas, is based in Midland, Texas, and is a public welfare organization dedicated to protecting the interests of the Permian Basin and informing the public about threats and risks of spent nuclear fuel in regions ill-suited to the activity. Permian Basin Land and Royalty Owners has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

Respectfully submitted,

/s/ Allan Kanner

Allan Kanner

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GLOSSARY

APA	The Administrative Procedure Act
EIS	Environmental Impact Statement
NEPA	The National Environmental Policy Act
NRC	The United States Nuclear Regulatory Commission

STATEMENT OF JURISDICTION

The NRC instituted an adjudicatory proceeding regarding Holtec International's ("Holtec") license application pursuant to the Atomic Energy Act, 42 U.S.C. § 2011, and its procedural regulations under 10 C.F.R. Part 2. On April 28, 2021, the NRC affirmed the Atomic Safety Licensing Board's ("Board") denial of Fasken's Motions to Reopen the Record and Motions for Leave to File Amended and New Contentions concerning mineral rights and development beneath and surrounding the site and the NRC's preparation and publication of its draft Environmental Impact Statement. *CLI-21-07*, 93 NRC 215 (2021) (JA1072). This was the final NRC Order denying Fasken's requests for intervention and constitutes a final order for purposes of Hobbs Act jurisdiction. *Adenariwo v. Fed. Maritime Comm'n*, 808 F.3d 74, 78 (D.C. Cir. 2015) ("An agency order is final for purposes of 28 U.S.C. § 2342 'if it imposes an obligation, denies a right, or fixes some legal relationship, usually at the consummation of an administrative process.'") (quoting *Natural Res. Def. Council, Inc. v. Nuclear Reg. Comm'n*, 680 F.2d 810, 815 (D.C. Cir. 1982)); *Blue Ridge Env'tl. Def. League v. Nuclear Reg. Comm'n*, 668 F.3d 747, 753 (D.C. Cir. 2012) ("[I]n the context of administrative adjudications, 'a final order is [normally] one that disposes of all issues as to all parties.'") (quoting *Citizens for a Safe Env't v. Atomic Energy Comm'n*, 489 F.2d 1018, 1021 (3d Cir. 1973)); *Thermal Ecology Must Be Preserved v. Atomic Energy*

Comm'n, 433 F.2d 524, 526 (D.C. Cir. 1970) (“An order denying intervention would be reviewable.”).

The NRC’s final Order is reviewable by this Court under 42 U.S.C. § 2239(b), 28 U.S.C. § 2342(4), and 5 U.S.C. § 702. Pursuant to 28 U.S.C. § 2344, Fasken timely filed their Petition for Review on June 25, 2021, within sixty days of the NRC’s final Order. No. 21-1147, Doc. #1904236.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- Whether the NRC erred in denying Fasken’s Motions and Contentions that presented new and material information creating a genuine dispute as to dominant land surface rights and reasonably anticipated future mineral extraction operations beneath and surrounding the Holtec site.
- Whether the NRC acted arbitrarily, capriciously and without reasoned decision-making in approving selection of the Holtec site without conducting an independent investigation into the reliability or accuracy of land use information necessary to make important environmental and safety determinations.

STATUTES AND REGULATIONS

See attached Addendum.

STATEMENT OF THE CASE²

A. Several Petitioners Sought to Intervene in the Holtec Adjudicatory Proceeding

Fasken, among other petitioners, sought to timely file contentions and to seek intervention in the Holtec proceeding. *Holtec International*, Docket No. 72-2051. In total over fifty contentions were filed in the proceeding.³ Fasken first filed a Motion to Dismiss Licensing Proceedings on September 14, 2018, noting the NRC's lack of jurisdiction to review consolidated interim storage facility applications premised on a license condition that would be prohibited under the Nuclear Waste Policy Act of 1982. *Fasken Mtn.* (JA0221). The Secretary of the NRC denied Fasken's motion and referred it for review under NRC's contention admissibility standards. *Order of the Secretary* (JA0392).

² Petitioners believe the recent opinion in *Texas v. NRC*, Case No. 21-60743, 2023 WL 5498874 (5th Cir. Aug. 25, 2023) renders a decision on this Petition moot. Nonetheless, Petitioners file the foregoing to preserve all rights, claims and interests in this matter.

³ *Alliance for Environmental Solutions Petition* (JA0059); *Sierra Club Petition* (JA0060); *NAC International, Inc. Petition* (JA0184); *Beyond Nuclear Motion to Dismiss* (JA0185); *Fasken Mtn. to Dismiss* (JA0213); *Don't Waste Michigan Petition* (JA0221); *Sierra Club Motion to file Contention* (JA0418); *Don't Waste Michigan Motion to File New Contention* (JA0424); *Sierra Club's Motion to File New Contentions* (JA0425, JA0426); *Fasken Motion to File New Contention* (JA0606); *Sierra Club's Motion to File New Contention* (JA0656); *Fasken Motion to File New Contention* (JA0732).

B. Termination of the Holtec Adjudicatory Proceeding

On May 7, 2019, the Board, in unprecedented fashion, terminated the Holtec adjudicatory proceeding, finding each and every of the fifty-one contentions filed to be inadmissible. *LBP-19-4*, 89 NRC 353 (2019) (JA0436). The adjudicatory proceeding was terminated without a hearing, without a single party gaining intervenor status and prior to the NRC's issuance of the draft Environmental Impact Statement ("EIS"). *Id.* The NRC affirmed the Board's denial under a discretionary standard. *CLI-20-4*, 91 NRC 167 (2020) (JA0676).

C. Fasken Moved to Reopen the Record Based on New and Material Information Disputing Holtec's Alleged "Control" of Mineral Rights at the Proposed Site

Following termination of the Holtec proceeding, Fasken moved to file New Contention 2 based on new and material disclosures in the New Mexico Land Commissioner's June 19, 2019, letter to Holtec that directly contradicted misleading and inaccurate statements contained in Holtec's license application. Therein, Holtec claimed that it controlled existing mineral rights and proscribed all prospective mineral development beneath and surrounding the proposed Holtec site. *Contention 2 Mtn.* (JA0606-18). Subsequently, Fasken moved to reopen the record and amend its Contention 2 based on significantly different conclusions and new sources relied on in the NRC's preparation of its March 20, 2020, draft EIS, that inaccurately described current and reasonable future prospects for mineral

development and entirely disregarded opposing viewpoints of the New Mexico Land Commissioner and the State Land Office's authority over the mineral estate beneath and surrounding the Holtec site. *Reopen Mtn.* (JA0723); *Amended Contention 2 Mtn.* (JA0732).⁴

On August 5, 2020, the Board heard oral argument on Fasken's Amended Contention 2 alleging "inaccurate and inconsistent statements in Holtec's application le[d] to faulty premises and conclusions' in the NRC Staff's DEIS." *Board Order re Oral Argument* (July 20, 2020) at 1-2 (JA0818-19). During oral argument Fasken's expert geologist requested, but was denied, the opportunity to address the Board's unanswered questions on the technical issues raised and on the merits of Fasken's motions. *See Letter of Protest* (JA0829). Both Holtec and Fasken offered to submit additional filings from their respective experts, and it was left an open question as to whether or not additional briefing or additional submissions would be necessary. Shortly thereafter on September 3, 2020, the Board denied Fasken's Amended Contention 2.

⁴ Fasken's Amended Contention 2 was filed after the NRC had remanded its review of Contention 2 to the Board. The Board's subsequent ruling on Contention 2 referenced information provided in Holtec's Responses for Additional Information (provided only *after* the initial deadline to intervene) that purportedly clarified "that '[t]he mineral rights for Section 13 [the proposed site] and certain adjacent areas are held in trust by the New Mexico Commissioner of State Lands.'" *LBP-20-06*, 91 NRC 239 at 256 (JA0816). The Board deferred its ruling on admissibility of Contention 2 given "Fasken [] recently proffered a substantially amended version of Contention 2." *Id.*

While its appeal on its Amended Contention 2 was pending before the NRC, in November 2020, Fasken again moved to reopen the record to file New Contention 3 based on recent material disclosures of superior land surface rights that would further preclude the selected location from satisfying NRC siting regulations and render the siting of the Holtec facility an unlawful taking. *See Contention 3 Mtn.* (JA0852); *id.* at Exhibit 1 (JA0904). The NRC affirmed the Board's denial of Fasken's Amended Contention 2 and in the same order denied the admissibility of Fasken's New Contention 3 and dismissed Fasken's motions to reopen the closed adjudicatory proceeding. *See CLI-21-07*, 93 NRC 215 (2021) (JA1072).

SUMMARY OF ARGUMENT

The NRC abused its discretion, acted arbitrarily, capriciously, without reasoned decision-making and contrary to the evidence before it, and erred in denying Fasken's Motions and Contentions in violation of: (i) NRC siting evaluation regulations, including but not limited to, 10 C.F.R. §§ 72.11, 72.40(a)(2), 72.90 – 72.108; (ii) the Administrative Procedures Act, 5 U.S.C. §§ 706(2)(A) and (C) ("APA"); (iii) the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.* ("NEPA"); and (iv) the Atomic Energy Act, 42 U.S.C. §§ 2011, *et seq.* Fasken's Motions and Contentions present genuine disputes as to material facts vital to mandated site-specific analyses implicating important safety and

environmental issues in the siting of the Holtec facility. Fasken's Contentions disputing Holtec's and the NRC's mischaracterizations of reasonably foreseeable mineral extraction operations beneath and surrounding the site were supported by abundant factual support (including input from a state agency with pertinent regional expertise and authority on such matters) and the requisite affidavits in accordance with NRC standards. *Contention 2 Mtn.* at Exhibits 1-5 (JA0619-32); *Amended Contention 2 Mtn.* at Exhibits 1-4 (JA0766-98); *Contention 3 Mtn.* at Exhibits 1-4 (JA0903-1059); 10 C.F.R. § 2.309. The NRC erred in denying Fasken's Contentions.

STANDING

Fasken's standing is addressed in the Docketing Statement and attached standing declarations of Tommy Taylor, Vice President of Fasken Management, LLC, the general partner of Petitioner Fasken; Daniel Berry, member of PBLRO; and Stonnie Pollock, Exploration Manager of Fasken Management, LLC, which have been submitted to the Court. No. 20-1187, Doc. #2008038. Fasken and members of PBLRO own and/or lease property related to oil and gas activities and grazing and agricultural operations near the Holtec site. They, along with their personnel, regularly travel in the vicinity of the site for work-related and/or personal purposes, using local, state and federal highways, and they regularly use the regional rail transportation to support their industries, which they will be forced

to share with regular shipments of spent nuclear fuel in and out of the Permian Basin. They also have concerns regarding adverse health effects and impacts to their employees and business operations, as well as communities in the region generally, including medical care costs, adverse financial impacts on property, and threats to extensive ongoing business activities.

In the proceedings below, Petitioner Fasken was found to have standing and Petitioner PBLRO was found to have associational standing based on the declarations of Tommy Taylor and Stonnie Pollock. *LBP-19-4*, 89 NRC at 369 (JA0452) (“Fasken has demonstrated standing.”); *CLI-20-4*, 91 NRC at 172 (JA0681). The Board and NRC conclusions that Fasken has standing are consistent with this Court’s precedents. *See Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004); *Center for Sustainable Econ. v. Jewell*, 779 F.3d 588 (D.C. Cir. 2015).

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews the NRC’s decision under the arbitrary and capricious standard. *Blue Ridge Env’tl. Def. League v. Nuclear Regulatory Comm’n*, 716 F.3d 183, 195 (D.C. Cir. 2013); 5 U.S.C. § 706.

II. THE NRC ARBITRARILY AND CAPRICIOUSLY DENIED FASKEN'S MOTIONS TO REOPEN AND MOTIONS FOR LEAVE TO FILE AMENDED AND NEW CONTENTIONS

Fasken's Motions should have been granted and the record should have been reopened to address the exceptionally significant safety, environmental and regional mineral extraction issues raised by Fasken. Hearings may be reopened, in appropriate situations, either upon motion of any party or *sua sponte*. *In the Matter of Vermont Yankee Nuclear Power Corp.*, 6 A.E.C. 358, 362 (1973); *In the Matter of Georgia Power Co.*, 2 NRC 404, 409 (1975) (hearing may be reopened when a significant safety or environmental issue is involved).

Fasken's Motions to Reopen were filed with relevant supporting affidavits addressing factual and legal concerns with the impacts of siting the Holtec facility amidst extensive oil and gas and mineral extraction operations that were materially misrepresented or omitted entirely in Holtec's application and the NRC's draft EIS. *Reopen Mtn.* at 6-8 (Affidavit of Allan Kanner) (JA0728-30); *Amended Contention 2 Mtn.* at Exhibit 1 (Declaration of Tommy Taylor) (JA0767); *id.* at Exhibit 4 (Amended Declaration of Stonnie Pollock) (JA0791); *Contention 3 Mtn.* at Exhibit 3 (Affidavit and Declaration of Tommy Taylor) (JA0989). The new and materially different information and conclusions identified by Fasken forming the bases of Fasken's efforts to reopen the record were timely filed based on the availability of the information. Fasken's Motions highlighted fundamentally flawed assumptions

and conclusions as to mineral development that implicated serious safety issues and unaccounted regional industry impacts material to NRC's findings that warranted a reopening of the record. As such, Fasken's Motion were timely filed, they had good cause for filing same, and they warranted remand and agency consideration of geologically stable alternative locations unencumbered by valuable mineral rights.

The Board and NRC wrongly denied Fasken's Motion and Contention 2, maintaining that the unique comments made by the New Mexico Land Commissioner as to its authority and decision not to restrict mineral development could have been gleaned from Holtec's application materials. *See LBP-20-06*, 91 NRC 239 at 255 (claiming Contention 2 was based on previously available information in Holtec's Environmental Report and clarifications made in its responses to the NRC Staff's requests for additional information concerning mineral rights).

Timely contentions could not have been filed prior to the deadline to intervene based on Holtec's Environmental Report which misleadingly stated "Holtec controls the mineral rights at the Site" and it could effectively restrict any mineral extraction activities beneath and surrounding the site. Environmental Report (Rev. 6) at 2-19, 3-2 (JA0432, JA0434). Nor could it have been gleaned from Holtec's clarifications and first-time public production of its private

agreement with Intrepid Potash – New Mexico, LLC just months before Fasken’s Contention 2, which merely suggested uncertain relinquishment at future date unknown. *See LBP-20-6*, 91 NRC at 256 (JA0815) (citing Holtec License Application Responses to Requests for Supplemental Information (Apr. 9, 2019) at 1); *CLI-21-07*, 93 NRC at 219 (JA1076) (citing Potash Mining Lease Partial Relinquishment Agreement (Dec. 6, 2016) (ML19081A083) made publicly available on April 9, 2019). Holtec’s lack of candor and delay in disclosing agreements with applicable third parties and the lack of approval for any such agreements precluded timely contentions before the hearing deadline. It was not until the Land Commissioner’s June 2019 letter that it became clear that Holtec did not have the ability to restrict or proscribe mineral extraction at the site and thus, it could not possibly satisfy the NRC’s siting evaluation regulations or fully examine events that could affect the facility’s safe operation. *See Contention 2 Mtn.* at Exhibit 5 (JA0629). Similarly, Fasken could not have discerned the lack of any private agreement between XTO Energy, Inc. and Holtec proscribing mineral activities beneath and surrounding the site prior to the additional information identified in Fasken’s Contention 3.

In denying Fasken’s Amended Contention 2 based on the draft EIS, the NRC wrongly discarded “the [draft] EIS’s supposed reliance on ‘a proposed but not-yet-accepted ‘land use restriction’ at the Holtec site,’” contradictorily maintaining that

the draft EIS acknowledges continued mineral development. *CLI-21-07*, 93 NRC at 227 (JA1084). This is untrue as the draft EIS blindly accepted Holtec's late-filed Responses for Additional Information asserting an agreement in principle to proscribe and restrict mineral extraction and ignored evidence to the contrary from the New Mexico Land Office. *See* Draft EIS at 4-4 (JA0667). *See infra* at § III(B).

The NRC further erred in finding any identified inaccuracies in the potential for future mineral development insignificant and immaterial to its findings. *CLI-21-07*, 93 NRC at 220, 227-228 (JA1084-85). The issues raised by Fasken's Motions and Contentions are undoubtedly material to the NRC's findings and within the scope and had Holtec been more forthcoming with this information it would have made a material difference in the Holtec proceeding as it implicates important safety and environmental determinations mandated by NEPA and NRC siting regulations as discussed *infra*. Indeed, it would defy common sense to conduct such analyses without understanding the applicable property rights and land uses at the proposed site, particularly in a region where interdependent variables have the potential for catastrophic subsidence and sinkholes.

III. THE NRC ARBITRARILY AND CAPRICIOUSLY REJECTED FASKEN'S CONTENTIONS

Fasken's Contentions satisfied 10 C.F.R. § 2.309(c)(1)'s conditions for good cause. As discussed herein, the material information forming the bases for the Contentions was not previously available and was materially different than that in

Holtec's application documents. Fasken's Motion associated with its Amended Contention 2 was timely filed, pursuant to the April 7, 2020, Order of the NRC Secretary. *Reopen Mtn.* (JA0723); *Amended Contention 2 Mtn.* (JA0732); *Order Extending Time to Intervene Based on Draft EIS* (JA0671). Fasken's Motion associated with its New Contention 3 was likewise timely filed after information was first made publicly available that painted a substantially different picture of mineral rights and development. *Reopen Mtn.* (JA0723); *Contention 3 Mtn.* (JA0859).

The NRC has recognized that piecemeal disclosures of new and material information can delay when the foundation for a contention becomes reasonably available. *See In the Matter of Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), 44 NRC 8, 26 (1996). Initial misleading misrepresentations and subsequent piecemeal disclosures as to alleged agreements impacting mineral rights and reasonably anticipated mineral development expected at the Holtec site created a perpetually evolving target here that prevented timely filed contentions. *See, e.g.,* Environmental Report (Rev. 3) at 3-2 (JA0406) (Holtec "controls the mineral rights on the Site" and any drilling beneath the Site would be at depths greater than 5,000 feet with no subsidence concerns); Draft EIS at 4-4 (JA0667) (relying on Holtec responses to requests for additional information to conclude agreements in principle to relinquish mineral rights beneath the Site and further

finding the Holtec facility would have “no impact on oil and gas exploration and development” because drilling would continue at depths greater than 3,050 feet); *Contention 2 Mtn.* at Exhibit 5 (JA0629-32) (confirming absence of any drilling depth restrictions or agreements to proscribe mineral extraction operations); *Contention 3 Mtn.* at Exhibit 3 (JA0989) (disputing Holtec’s late filed responses regarding real potential for shallower depth drilling and potash mining beneath the site). Under these circumstances, Fasken timely filed its Motions and Contentions when new and materially different information was presented that warranted a reopening of the record.

Fasken’s Contentions also satisfied 10 C.F.R. § 2.309(f)(1)’s standards for admissibility. Fasken’s Contentions raised serious and grave concerns regarding the NRC’s failure to determine existing land use rights or account for extensive historic, current and reasonable future mineral extraction operations at the Holtec site. The issues raised by Fasken fell squarely within the scope of the proceeding and were material to the NRC’s necessary safety findings and its siting evaluation regulations. Fasken’s concerns presented contrary evidence and raised genuine disputes of material issues highlighting the NRC’s violations of the APA, NEPA, NRC siting regulations and the Atomic Energy Act. As set forth herein, the NRC’s rejection of Fasken’s Contentions was arbitrary, capricious, contrary to law and should be reversed.

A. Fasken's Contention No. 2 is Based on New and Material Information Concerning Land Use Rights and Mineral Development Beneath and Surrounding the Holtec Site

Fasken demonstrated good cause for filing its Contention 2 after the initial deadline for hearing requests. *See* 10 C.F.R. §§ 2.309(c)(1)(i)-(iii). On August 1, 2019, Fasken timely presented the New Mexico Land Commissioner's letter to Holtec expressing grave concerns and revealing material misrepresentations in the Holtec license application concerning mineral rights and the absence of any land use restrictions beneath or surrounding the proposed Holtec site.⁵ This new and material information was erroneously discarded by the Board and the NRC.

The disclosures in the Land Commissioner's June 19, 2019, letter were vastly different from any information previously available and were published for the first time after the initial hearing deadline. Pulling back the curtain on the misrepresentations and misleading statements in Holtec's application, the letter brought to light that the Land Office's "oil and gas lessees [] 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"

⁵ *See In the Matter of Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), 76 NRC 491, 491 (2012) (noting that "although 'timely' is not expressly defined by months or days in [NRC] regulations . . . typically [] 30 to 60 days from the initiating event [is considered] a reasonable deadline for proposing new or amended contentions"); *In the Matter of Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), 67 NRC 460, 493 (2008) (30 days held as presumptive time frame for timeliness of late-filed contentions).

and further confirmed that the State Land Office had not approved any “land use or condition” on mineral development at the Holtec site or enforced any depth or drilling restrictions. *See Contention 2 Mtn.* at Exhibit 5 (JA0629-32). In stark contrast, every iteration of Holtec’s Environmental Report prior to June 2019 asserted that “[b]y agreement with the applicable third parties, the oil and drilling and phosphate extraction activities have been proscribed at and around the site and would not affect the activities at the site.” *See, e.g.,* Environmental Report (Rev. 6) (May 2019) at 2-19 (JA0432). The various revisions of Holtec’s Environmental Report also consistently and misleadingly conveyed that “Holtec controls the mineral rights on the Site . . . and] any future oil drilling or fracking beneath the Site would occur at greater than 5,000 feet depth, which ensures there would be no subsidence concerns.” *Id.* at 3-2 (JA0434).

This information was material to the required findings needed to satisfy the NRC’s siting evaluation regulations. *See, e.g.,* 10 C.F.R. § 72.98 (requiring identification of “regional extent of external phenomena, man-made or natural, that are used as a basis for design of the ISFSI”); *id.* at § 72.90(d) (siting evaluation factors, under NRC regulations, require the “[p]roposed sites with design basis external events for which adequate protection cannot be provided through ISFSI or MRS design shall be deemed unsuitable for the location of the ISFSI or MRS”); *id.* at § 72.90(a) (“Site characteristics that may directly affect the safety or

environmental impact of the ISFSI or MRS must be investigated and assessed.”); *id.* at § 72.100 (“Defining potential effects of the ISFSI or MRS on the region”).

Fasken’s Contention 2 was based on new and materially different information, was timely filed, and the NRC erred in denying same.

B. Fasken Moved to Admit Amended Contention No. 2 Based on New and Materially Different Conclusions and Sources Relied on in the NRC’s Preparation of its Draft EIS

The NRC has found that a new or amended contention may be filed if the draft EIS contains data or conclusions that differ significantly from those in the applicant’s documents. *In the Matter of Calvert Cliffs 3 Nuclear Project*, 72 NRC 720, 729-30 (2010); *In the Matter of Louisiana Energy Services*, 62 NRC 523, 533 (2005) (“Our rules expressly allow timely amendment of NEPA contentions if there is significant new information or different conclusions in the DEIS that could not have been challenged previously.”) (citing 10 C.F.R. § 2.309). *See In the Matter of DTE Electric Company* (Fermi Nuclear Power Plant, Unit 3), 81 NRC 1, 4 (2015) (citing 10 C.F.R. § 2.309(c), (f)(2)) (NRC’s “rules of practice require a material difference between the information on which the contention is based and the information that was previously available – for example, a difference between the environmental report and the draft EIS . . .”); *see also, In the Matter of Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), 75 NRC 479, 488-89 (2012); *In the Matter of Pa’ina Hawaii, LLC*, 72 NRC 56, 87-88 (2010). Fasken

cited specific and material information, as well as significant distinctions regarding the anticipated mineral development beneath and surrounding the site implicating serious safety and environmental issues between the draft EIS and Environmental Reports that the NRC erroneously discarded.

For example, the draft EIS mistakenly concluded for the first time that oil and gas production zones “occur beneath the Salado Formation” and the Holtec facility “would have no impact on oil and gas exploration and development . . . because oil and gas extraction will continue to occur at depths greater than 930 m [3,050 ft].” Draft EIS at 4-7 (JA0670). Holtec’s Environmental Report, in stark contrast, claimed extraction activities were proscribed but also expressed concerns with subsidence at drilling depths less than 5,000 feet and inaccurately alleged that any drilling beneath and surrounding the Holtec site would occur at depths greater than 5,000 feet. *See Amended Contention 2 Mtn.* at 16-17 (JA0751-0752). These are material differences with potential to impact design bases, mitigation efforts, and geological stability in a region riddled with subsidence and susceptible to sinkholes.

Relying on Holtec’s recently updated responses to the NRC’s requests for additional information (*i.e.*, new source of information), and ignoring available information contradicting Holtec’s responses from the New Mexico Land Commissioner, the draft EIS, without adequate justification or an independent

investigation, refers to agreements in principle to relinquish subsurface mineral rights at the site. *See* Draft EIS at 4-4 (JA667) (relying on discussions between Holtec and the New Mexico Land Office regarding “an agreement in principle to retire any potash [beneath the site] . . . in perpetuity”). These are remarkably different conclusions when compared to Holtec’s Environmental Report which affirmatively concluded that “oil drilling and phosphate extraction activities have been proscribed at and around the site and would not affect activities at the site.” Environmental Report (Rev. 6) at 2-19 (JA0432). Statements in the draft EIS also materially differ from the Land Commissioner’s June 2019 confirmations as to the absence of any such agreements or land use restrictions. *See Contention 2 Mtn.* at Exhibit 5 (JA0631) (“State Land Office has not approved any such restriction, which would likely trigger legal challenges from businesses that are already conducting operations. . .”); *see also, id.* (noting the International Atomic Energy Agency recommendation for “adequately controlled single-use land area to accommodate storage facilities”).

It was arbitrary and capricious for the NRC to rely on the license applicant’s self-serving responses while disregarding opposing viewpoints of the state agency with vastly superior technical expertise and authority raising legitimate risks and concerns that render the draft EIS deficient. *See Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973) (“[W]here comments from responsible experts or sister agencies

disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored.”); *see also*, *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1192 (9th Cir. 2002) (noting that failure to adequately address concerns of a sister agency “weighs as a factor pointing toward the inadequacy of the EIS”); *Davis v. Mineta*, 302 F.3d 1104, 1123 (10th Cir. 2002) (noting that “[w]hile it is true that NEPA ‘requires agencies preparing [EISs] to consider and respond to the comments of the other agencies, not to agree with them,’ it is also true that a reviewing court ‘may properly be skeptical as to whether an EIS’s conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of other agencies having pertinent expertise’”) (quoting *Custer Cnty. Action Ass’n v. Garvey*, 256 F.3d 1024, 1038 (10th Cir. 2001)); *Sierra Club v. U.S. Army Corps of Eng’rs*, 701 F.2d 1011, 1030 (2d Cir. 1983).

Moreover, NRC’s failure to conduct an independent investigation into the reliability and accuracy of applicable land use rights and land uses for the affected environment while eliminating each and every other alternative location violated its NEPA implementing and siting evaluation regulations. *See* Draft EIS at 2-25 (JA0665) (eliminating consideration of alternative sites based in large part on “fact that Site [] is the only site that is *entirely privately owned land*”) (emphasis added); 10 C.F.R. §§ 51.70(b), 51.104; *id.* at §§ 72.90-108.

Fasken's Amended Contention 2 identified significant differences in the draft EIS conclusions as to mineral rights and development, new and material information sources provided by Holtec and otherwise disputed information material to the NRC's findings that were improperly ignored.

C. Fasken's Contention No. 3 is Based on New and Material Disclosures as to Mineral Leases and Superior Land Surface Rights that Would Render Selection of the Holtec Site an Unlawful Taking and Further Mischaracterization of Mineral Extraction Operations

Fasken had good cause to reopen the record and file New Contention 3 based on new and materially different information submitted in response to the draft EIS and requests for additional information from Holtec that were not previously available. Fasken's New Contention 3 identified novel disclosures revealing unaccounted for mineral impacts and the existence of superior mineral lessees' surface rights at the proposed location that would render the site selection an unlawful taking. *Contention 3 Mtn.* (JA0859-901); *id.* at Exhibit 1 (JA0921) (“dominant subsurface mineral estate . . . cannot be encumbered by an after-the-fact approval of a surface use like Holtec seeks here”); *id.* (neither XTO nor any affiliated entities has an agreement with Holtec to prohibit or limit in any way oil and gas operation activities on the Lease”). This new and material information also belied and negated statements in the draft EIS claiming there would be “no impact on oil and gas exploration and development in the proposed project area because

extraction would continue to occur at depths greater than 930 m [3,050 ft]” and the proposition that the area of land disturbance for construction of the Holtec facility would not encompass an operating oil or gas well or former decommissioned wells. Draft EIS at 4-4, 4-6 (JA0667, JA0669).

These important considerations are materially different from previously available information that grossly misrepresented the potential for mineral development beneath and surrounding the site. Moreover, this new and material information raised exceptionally grave issues implicating facility design, geotechnical inputs, and security considerations within the controlled boundary area, among other regional safety concerns, and was wrongly discarded. Fasken’s Contentions demonstrate the absence of any adequate investigation into important site characteristics and further that the proposed site cannot provide adequate protection against external events and should be deemed an unsuitable location. *See* 10 C.F.R. § 72.90(d).

CONCLUSION

For these reasons, Fasken’s Motions to Reopen should be granted and their Contentions submitted for further consideration of the “No Action Alternative” or consideration of an alternative more geologically stable location, with single land-

use area consistent with the International Atomic Energy Agency recommendations, unencumbered by subsurface mineral rights.⁶

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Respectfully submitted,

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⁶ International Atomic Energy Agency, Selection of Away-From-Reactor Facilities for Spent Fuel Storage: A Guidebook, IAEA-TECDOC-1558 (Sept. 7, 2007) at 3.2.2 (pp. 23-24).

**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 5000 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 20,000 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

Allan Kanner

CERTIFICATE OF SERVICE

I hereby certify that the electronic original of the foregoing “Initial 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.

Respectfully submitted,

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