January 6, 1997

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22
	)	
(Private Fuel Storage Facility)	)	ASLBP No. 97-732-02-ISFSI

APPLICANT'S SUPPLEMENTAL ANSWER TO THE STATE OF UTAH'S CONTENTIONS Z TO DD

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I. INTRODUCTION

In its December 31, 1997 Order (Granting Leave to File Response to Contentions and Schedule for Responses to Late-Filed Contentions), the Atomic Safety and Licensing Board ("Licensing Board" or "Board") granted Applicant Private Fuel Storage L.L.C.'s ("Applicant" or "PFS") motion for leave to file a response to contentions Z through DD filed by the State of Utah ("State"). In accordance with the Board's Order, Applicant submits the following answers to the State's contentions Z through DD. For the reasons set forth with respect to each of the contentions, Applicant respectfully submits that the contentions be denied.

II. APPLICANT'S RESPONSE TO UTAH CONTENTIONS Z TO DD

A. Utah Contention Z: No Action Alternative

1. The Contention

The State alleges in Contention Z that:

> The Environmental Report does not comply with NEPA because it does not adequately discuss the "no action" alternative.

State Petition at 169. The asserted bases for the contention are set forth on pages 169-170. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

> The Environmental Report does not comply with NEPA because it does not adequately discuss the "no action" alternative in that:
>
> a) Applicant's consideration of the no build alternative fails to provide a balanced comparison of environmental consequences among alternatives because the Applicant focuses solely on the perceived disadvantages of the no build alternative.
>
> b) The analysis of the no build alternative improperly fails to consider the advantages of:
>
> (i) not transporting so many casks from various locations across the country to a centralized location;
>
> (ii) not enhancing the potential for sabotage at a centralized storage facility;
>
> (iii) not increasing the risk of accidents from additional

cask handling;

(iv) considerable safety advantages of storing spent fuel near the reactors, whose spent fuel pools will be available for transfers or inspections of degraded fuel; and

(v) the expansion of onsite storage capability compared to the environmental impacts at the remote desert site chosen by Applicant.

c) Reliance on Applicant's inadequate discussion of the no build alternative will cause the NRC to violate NEPA's requirement to address all sides of the no action alternative.

2. Applicant's Response to the Contention

The State raises a number of issues in Contention Z, which Applicant addresses in turn below.

a) Inadequate Consideration of No Build Alternative

The State alleges that the Applicant's discussion of the no action alternative fails to provide the balanced comparison of environmental consequences among alternatives required by NEPA because "the Applicant focuses solely on the perceived disadvantages of the no build alternative." State Petition at 169. (emphasis in original). The State, however, ignores relevant information in the Environmental Report, which considers the "no action" alternative (see ER at 8.1-2 to 8.1-4) and evaluates the environmental impacts of building and operating the PFSF (see ER Chapters 4, 5, & 7) which necessarily identifies the disadvantages of the build scenario and the advantages of the no-build alternative.

As Applicant has previously set forth in its response to Castle Rock Contention 13,[1] the "no-action" alternative means that the project will not take place. In the context of a licensing decision, there are two alternatives: to grant the license or to deny the license. The costs and benefits of granting the license will be reversed if the license is denied.[2] Since the Applicant has comprehensively identified and evaluated the environmental impacts of proceeding with the proposed action[3] it has ipso facto identified the benefits or advantages of the no build alternative.

Additionally, 10 C.F.R. Part 51 requires "the discussion of alternatives" in an Environmental Impact Statement (EIS) to "take into account[ ], without duplicating, the environmental information and analyses included" in other sections of the EIS. 10 C.F.R. Part 51, Subpt. A, App. A, § 5 (emphasis added). This same analysis would necessarily apply to the Applicant's Environmental Report. The State's assertion is, however, contrary to 10 C.F.R. Part 51. If the State's assertion were implemented, Applicant's analysis of the "no-action" alternative would duplicate the analysis of the environmental impacts or costs associated with building the facility already addressed in Chapters 4, 5

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[1] See Applicant's Answer to Petitioners' Contentions at 411-12 (hereinafter "Applicant's Answer").

[2] In addition to the authority cited at Applicant's Answer at 411-12, see also Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 198 n.7 (1990), cert. denied, 502 U.S. 994 (1991) ("the discussion of the socioeconomic and environmental impacts of inaction is the flipside of the discussion of the impacts of action") (emphasis in original).

[3] See Chapter 4 of the Environmental Report. Also, Chapter 5 of that report addresses the environmental effects of accidents and Chapter 7 discusses economic and social effects of installation, construction and operation.

and 7 of the Environmental Report, since the absence of those environmental costs are the environmental benefits of the no-action alternative.

In short, the State has ignored relevant information in the Environmental Report and has merely advocated additional discussion of issues. Accordingly, the contention must be dismissed. See Applicant's Answer, Section II.C at 15-16.

b) Ignoring Advantages in No Build Alternative

The State alleges that "[t]he Environmental Report does not comply with NEPA because it does not adequately discuss the 'no action' alternative," in that the "inadequate and one-sided" analysis of the no build alternative fails to consider "the advantages of not transporting 4,000 casks of spent fuel rods thousands of miles across the country, not enhancing the potential for sabotage at a centralized storage facility, not increasing the risk of accidents from additional cask handling, etc.," and "fails to discuss the considerable safety advantages of storing spent fuel near the reactors, whose spent fuel pools will be available for transfers or inspections of degraded fuel." State Petition at 169-170. The State also claims that the Applicant fails to compare the environmental advantages of the expansion of on-site storage capacity to that caused by building the PFSF at a remote desert site. Id. This part of the contention must be rejected for the reasons set forth below.

(i) Moving the Casks Across Country

Here, the State asserts that the Environmental Report is inadequate in that the analysis of the no build alternative fails to consider "the advantages of not transporting 4,000 casks of spent fuel rods thousands of miles across the country. . ." State Petition at 169.

This contention must be dismissed as an impermissible collateral attack on the Commission's regulations in 10 C.F.R. Part 72 which expressly limit (as discussed in Applicant's Response to Utah Contention V, subpart a) the evaluation of the environmental effects of transporting spent fuel to the region of the ISFSI. 10 C.F.R. §§ 72.34, 72.108. See Applicant's Answer at 295-97. The Commission has expressly considered in promulgating those regulations the extent to which the environmental impacts of transporting spent fuel to and from an ISFSI are to be considered, and it has determined that the transportation environmental impacts to be assessed are those "within the region" where the ISFSI will be located. Id. (emphasis added); see also, 45 Fed. Reg. 74,693, 74,695 (1980). As a result, the State's contention and its related bases, which argue that "the application does not consider the advantages of not transporting 4,000 casks of spent fuel rods thousands of miles across the country. . ." (State Petition at 169), are barred as a matter of law from being litigated in this licensing proceeding. See 10 C.F.R. § 2.758.

Additionally, the environmental effects of such shipments have been evaluated using the NRC's generic determination of the environmental impact of shipping spent fuel and this contention must be rejected on that basis as well. See Table S-4 and the discussion of Radioactive Material Movement at § 4.7 of the Environmental Report as well as § 5.2 which discussed Transportation Accidents. To the extent that the State challenges Applicant's analysis of the environmental impact of transporting spent fuel, Applicant addresses the allegations in Applicant's Response to Utah Contention V. See Applicant's Answer at 292-310.

(ii) Sabotage at Centralized Facility

The State asserts that the Environmental Report is inadequate in that the analysis of the no build alternative fails to "consider the advantages of . . . not enhancing the potential for sabotage at a centralized storage facility." State Petition at 169. However, as set forth in Applicant's response to Utah Contention U (Applicant's Answer at 291-92) and Utah Contention V (id. at 309), the "environmental report for a facility need not include the environmental effects from the risk of sabotage." Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 697, 701 (1985). Thus, this contention must be dismissed as having no basis and beyond the scope of NEPA.

(iii) Risk of Cask Handling Accidents

The State asserts that the Environmental Report is inadequate in that the analysis of the no build alternative fails to "consider the advantages of . . . not increasing the risk of accidents from additional cask handling." State Petition at 169. This contention must be rejected for ignoring relevant information in the License Application, for lack of an adequate factual basis and as a collateral attack on Commission regulation.

First, the State ignores information in the License Application that not building the PFSF is likely to increase the number of ISFSIs built at individual reactor sites. See ER § 1.2 and § 8.1.2. The storage of spent fuel in on-site ISFSIs will have the potential for cask handling accidents in similar respects (other than off-site transportation discussed below) as storage of spent fuel at the PFSF.

Further, depending on the type of cask storage technology used for such on-site ISFSIs, the risk of accidents in the handling of spent fuel and spent fuel casks could be lower at the PFSF than at an on-site ISFSI. The Environmental Report §8.2, "Facility Design Alternatives," describes the "five types of system technologies available or under development for the dry storage of spent nuclear fuel." ER at 8.2-1. As discussed there, the multi-purpose canister technology chosen for use at the PFSF minimizes risk in handling spent fuel since there is "[n]o opening of canisters and exposing or handling of individual spent fuel assemblies" (ER at 8.2-16), as compared to the single purpose canister or cask systems that are currently in use at most ISFSIs located at reactor sites.

Further, as discussed in Applicant's response to Utah Contention D, the use of a multi-purpose canister, such as that chosen by PFSF, provides for one-time packaging of spent fuel for all phases of transportation, storage and disposal and allows for shipment to the ultimate disposal site without the need to repackage that fuel in different casks. See Applicant's Answer at 61; see also ER at 1.2-2. Again this approach used at the PFSF reduces the risk of handling accidents compared to other technologies which would require repackaging of the spent fuel for off-site shipment.

In addition to ignoring this relevant information in the License Application, the State fails to provide any factual basis in the Contention or the referenced Affidavit to support its claim of increased risk of cask handling accidents involved with the storage of spent fuel at the PFSF. It simply makes the bald assertion of increased risk which cannot support an admissible contention. See Applicant's Answer, Section II.C at 12-13.

Finally, any claim by the State of increased risk of cask handling accidents with respect to the transportation of spent fuel in shipping casks to the PFSF must be rejected as an impermissible collateral attack on Commission regulations. As set forth in Applicant's response to Utah Contention J and Utah Contention Q, the NRC has made the generic determination that spent fuel can be safely handled and transported in shipping casks certified pursuant to 10 C.F.R. Part 71. See Applicant's Answer at 143-44 and 214-15.

In sum, this subcontention must be dismissed for the above reasons.

(iv) Safety of On-site Reactor Storage

The State asserts that the Environmental Report is inadequate in that the analysis of the no build alternative "fails to discuss the considerable safety advantages of storing spent fuel near the reactors, whose spent fuel pools will be available for transfers or inspections of degraded fuel." State Petition at 170. The State ignores, however, that, as discussed in Applicant's responses to Utah Contention J and Utah Contention Q, the spent fuel at PFSF will be stored in welded stainless steel canisters which the NRC has determined provides sufficient confinement for degraded fuel such that neither inspection nor transfer of degraded fuel will be required at the PFSF. See Applicant's Answer at 134 and 209-210. This contention must therefore be rejected for failing to establish a sufficient basis for an admissible contention.

(v) Environmental Advantages of On-Site Reactor Storage

The State also charges the Applicant with "tunnel vision" for concluding in the Environmental Report that the "construction of additional onsite ISFSIs at plant sites will result in more sites disturbed and greater environmental impact than constructing one site in a remote, desert environment." State Petition at 169-70. According to the State, "[i]n contrast to expansion of onsite storage capacity within the reactor basin and any environmental disturbance that may entail, the 'remote desert site' chosen by Applicant is an undisturbed site used primarily for grazing and an area of cultural and historical significance to a number of groups, including Native Americans." Id. at 170. This

contention that the Applicant ignores the environmental advantages which the State claims are implicitly inherent in the "expansion of onsite storage capacity within the reactor basin" (id.) must be rejected for a host of reasons.

First, as discussed in subpart a above, the Applicant discusses in Chapters 4, 5 and 7 of the Environmental Report the environmental impacts of building the proposed ISFSI in a "remote desert site." As discussed in subpart a, the absence of these impacts are the benefit of the no-action alternative and therefore are not ignored by the Applicant as claimed by the State.

Second, the State ignores relevant information in the License Application concerning the environmental impacts of on-site storage. For example, as set forth in Section 1.2 of the Environmental Report, some reactors "have reached their maximum spent fuel pool capacity because of structural or other physical limitations" and for such reactors expansion of on-site storage capacity within the reactor basin is not an available option. ER at 1.2-1. Absent the PFSF, separate ISFSIs at each such reactor site with their related environmental impacts would need to be constructed. As further discussed in Section 1.2, construction of the PFSF will allow permanently shut down reactors to complete decommissioning and thus obtain the concomitant environmental benefits of such decommissioning.

Third, other than mere rhetoric, the State provides no factual basis either in the contention or the referenced affidavit to support its claim of the environmental

advantages of the expansion of on-site storage capability in lieu of building the PFSF. Such bald conclusory allegations are insufficient to support an admissible contention. See Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 376 (1992).

Thus, this contention both ignores relevant information in the Environmental Report concerning the environmental advantages and disadvantages of on-site reactor storage and fails to provide a sufficient factual basis for an admissible contention. See Applicant's Answer Section II.C at 11-16. Furthermore, the essence of the State's complaint is not a failure to evaluate the environmental pros and cons of the PFSF in the Environmental Report, but the decision to proceed with the PFSF in lieu of expanding on-site storage capability. It is well established, however, that NEPA "does not mandate particular results but simply prescribes the necessary process" for the evaluation of environmental effects. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). Thus, mere disagreement with the ultimate choice does not raise any issues under NEPA.

c) Reliance on No Build Alternative

The State alleges that the NRC cannot rely on Applicant's discussion of the no action alternative because of the asserted failure of that discussion to "address all sides of the no action alternative." State Petition at 170. The State cites four cases in support of its position.

The cases cited by the State do not provide any basis for its claim that the NRC cannot rely on the Applicant's discussion of the no build alternative. The rulings in three of these cases are premised on a party's total failure to consider the no-action alternative. See City of Tenakee Springs v. Clough, 915 F.2d 1308, 1312 (9th Cir. 1990); Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1230 (9th Cir. 1988); Getty Oil Co. v. Clark, 614 F. Supp. 904, 920 (D. Wyo. 1985). In the fourth case, the agency relied on inaccurate data, which was challenged, and made no attempt to resolve or investigate the inconsistencies in considering alternatives, including the no-action alternative. See Van Abbema v. Fornell, 807 F.2d 633, 642 (7th Cir. 1986).

Here, Applicant's Environmental Report does address the "no action alternative" in Section 8.1.2, "No Build Alternative" (ER at 8.1-2 to 8.1-4), and further the State does not claim that the Applicant has utilized any inaccurate data in its Environmental Report. Further, as discussed in greater detail in response to Contention AA infra, the NRC is entitled to rely upon the goals of the project as enunciated by an applicant and is not to second guess the business choices of an applicant, here the choice to build a centralized storage facility as opposed to relying on the expansion of onsite storage capability. See Citizens Against Burlington Inc. v. Busey, supra, 938 F.2d at 196-99. Hence, this contention must be dismissed for lack of basis.

B. Utah Contention AA: Range of Alternatives

1. The Contention

The State alleges in Contention AA that:

> The Environmental Report fails to comply with the National Environmental Policy Act because it does not adequately evaluate the range of reasonable alternatives to the proposed action.

State Petition at 172. The assorted bases for the contention are set forth in three pages of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases.

> The Environmental Report fails to comply with the National Environmental Policy Act because it does not adequately evaluate the range of reasonable alternatives to the proposed action in that:
>
> a) The Applicant's "overarching criteria" in its original list of sites (phase 1) was whether the site was a willing jurisdiction.
>
> b) There is no discussion or tabulation of the results from phase 2 screening and no mention of whether the Applicant sent the subject questionnaire to all 38 site owners or just to the Skull Valley Band of Goshutes.
>
> c) It is a mystery how the Applicant narrowed the selection to two sites located almost next to each other on the Skull Valley Reservation from the 38 candidate sites because the factors in 10 C.F.R. Subpart E § 72.90-108 are not discussed in the ER. Major omissions include failure to consider the adequacy of transportation corridors as well as accident and risk analysis.
>
> d) The Applicant's site selection criteria has not been applied at all levels of screening.

2. Applicant's Response to the Contention

The State raises a number of issues under Contention AA, which we address in turn below.

a) Phase 1 Selection of Potential Sites.

The State alleges that the "overarching criterion" used by the Applicant in selecting the 38 candidate sites for evaluation and the choosing of Skull Valley reservation as the ultimate site "seems to [have been] a willing jurisdiction." State Petition at 174. This subcontention must be dismissed because it ignores relevant material submitted by the Applicant and for lack of basis.

The criteria in the phase 1 selection of sites (national screening) was not limited to a willing jurisdiction but, as expressed in Environmental Report Section 8.1.3.1, included locating a site where natural phenomena would not create an unfavorable storage location and one which had favorable transportation access. Specifically, the Environmental Report states that ". . . [t]he key requirements of a candidate site in this phase included: a willing jurisdiction, public acceptability, reasonable distance to known capable seismic faults and reasonable known ground accelerations, reasonable site flooding conditions, and favorable proximity to transportation access." Also, any jurisdictional restriction that would prohibit the facility was used as an exclusion factor. ER at page 8.1-4.

As evidenced by the State's own opposition, it should not be surprising that jurisdictions would oppose the location of such a facility in their area. A willing jurisdiction is, therefore, clearly a reasonable siting criterion but was not the only

criterion considered by the Applicant. Further, in this regard, the potential host communities or entities evaluated by the Applicant included the original list of applicants to the Nuclear Waste Negotiator for the voluntary siting of a federal MRS as well as other entities which directly contacted PFS. ER at 8.1-2. The State has provided no basis, legal or factual, to challenge the sufficiency of the 38 candidate sites identified by Applicant by this process for the siting of the PFSF. Moreover, even if a willing jurisdiction were the "overarching criterion," the State provides no reason why that should invalidate PFS's alternatives analysis.

Hence, this subcontention must be dismissed for ignoring relevant material submitted by the Applicant and for failing to establish a sufficient basis for an admissible contention. See Applicant's Answer, Section II.C at 11-16.

b) Phase 2 Area/Site Overview Screening.

The State contends that there is no discussion or tabulation of the results from the phase 2 screening and no mention of whether the Applicant sent the site selection questionnaire to all 38 site owners or just to the Skull Valley Band. State Petition at 173. This subcontention must be dismissed because it ignores relevant material submitted by the Applicant. The Environmental Report states in Section 8.1.3.1 that the Applicant performed further screening using a process that included NRC rules and regulations for siting a spent fuel storage facility (i.e., 10 C.F.R. 72, Subpart E and 10 C.F.R. 100, Appendix A). ER at 8.1-5. The Applicant also applied criteria developed specifically for

the project to reflect cost, geological, seismic, demographic, hydraulic and environmental factors. These criteria are identified in ER Table 8.1-3. Hence, this subcontention must be dismissed for ignoring relevant material submitted by the Applicant. See Applicant's Answer, Section II.C at 15-16.

This subcontention must also be dismissed as being mistaken in that it states that there is no mention whether the Applicant sent the questionnaire to all 38 site owners. The Application does state that the questionnaire was sent only to three candidate sites. ER at 8.1-5. The State has cited to no NRC regulation or NEPA case law which would require that the questionnaire be sent to all 38 site owners.

Moreover, the Applicant's business decision not to send the questionnaire to all the potential host sites is acceptable based on the well-tested principal that an agency "may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project," City of Grapevine v. DOT, 17 F.3d 1502, 1506 (D.C. Cir.) (Ginsburg, J.) cert. denied, 115 S. Ct. 635 (1994) quoting Citizens Against Burlington, Inc. v. Bussey, 938 F.2d 190 (D.C. Cir.), cert. denied, 502 U.S. 994 (1991). In Citizens Against Burlington, Inc. v. Bussey, the United States Court of Appeals for the District of Columbia Circuit found that while Congress expected agencies to consider an applicant's wants when formulating the goals of the proposed action, "Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be." 938 F.2d at 199 (citations omitted). "When an agency is asked to sanction a

specific plan . . ., the agency should take into account the needs and goals of the parties involved in the application." Id. at 196 (citations omitted). In that case, the court emphasized that the FAA should not second guess the business choices made by an applicant when it decided to leave one city for another. The court stated that "the agency has neither the expertise nor the proper incentive structure" to make such an inquiry. Id. at 197, n.6. The court further noted that "while Congress clearly wanted NEPA to extend federal agencies' range of vision to environmental concerns, it did not, so far as we can tell, aim at agencies' acquiring the skills of successful entrepreneurs. NEPA is supposed to make agencies more sensitive -- but only, by definition, to matters environmental." Id.

The NRC has explicitly recognized the trend of current NEPA case law which allows an agency to consider an applicant's wants. 59 Fed. Reg. 37,724, 37,726 (July 25, 1994) (Statement of Considerations for License Renewal Rule). Hence, this subcontention must also be dismissed for advocating stricter requirements than those imposed by the regulations. See Applicant's Answer, Section II.B. at 5-6.

c) Phase 3 Candidate Area Selection

The State claims that it is a mystery how the Applicant narrowed the selection to two sites on the Skull Valley Reservation from the 38 initial candidate sites. State Petition at 174. This subcontention must be dismissed because it completely ignores the discussion and analysis in the Environmental Report that explains the process by which the Applicant selected among the candidate sites and narrowed that preliminary list of

choices. See ER Section 8.1.3, "Siting Alternatives," ER Table 8.1-1, "Potential Host Sites," ER Table 8.1-2, "Site Selection Questionnaire" and ER Table 8.1-3, "Evaluation Criteria." The list of candidate sites was narrowed to three in phases 1 and 2. Then, as Section 8.1.3.1 of the Environmental Report explains, a list of detailed questions (ER Table 8.1-2) intended to determine site suitability was sent to the owners/promoters of the remaining three candidate sites. Also, a major engineering firm familiar with nuclear construction issues was engaged to conduct a field evaluation visit to each of the three sites. ER at 8.1-5. Based on these evaluations and application of other criteria (such as host community preferences, additional transportation infrastructure needs, cost factors and environmental concerns), the Applicant selected the Skull Valley Reservation as the host site. Id. In so doing, the Applicant complied with the requirements of 10 C.F.R. Subpart E, § 72.90-108. Hence, this subcontention must be dismissed as mistaken and for failure to ignore relevant material submitted by the Applicant.

d) Application of Site Selection Criteria to all Phases

The State claims that the NRC cannot rely on the Applicant's screening criteria because it has not been used at all levels of screening. State Petition at 174. This subcontention must be dismissed because it is mistaken and ignores relevant material submitted by the Applicant. See, e.g., Vogtle, LBP-91-21, 33 NRC at 424; Rancho Seco, LBP-93-23, 38 NRC at 247-248. NUREG-1567, Appendix B, Section B.5.8 calls for an applicant to consider "appropriate siting factors . . . at national, regional and local

screening levels." As demonstrated in the Environmental Report (ER § 8.1.3; Tables 8.1-1, 8.1-2 and 8.1-3), the Applicant has appropriately applied site selection factors on national, regional and local levels. Naturally, each site selection criteria would not be applied to all levels of screening because within each level, a number of potential sites are "screened out" and, therefore, will not be included in the next level of screening. The process included consideration, as appropriate at each phase of screening, of the relevant environmental effects, economic, technical, and other factors, including political concerns. Hence, this subcontention must be dismissed for being mistaken and failing to ignore relevant material submitted by the Applicant. See Applicants' Answer, Section II.C.

C. Utah Contention BB. Site Selection and Discriminatory Effects

1. The Contention

The State alleges in Contention BB that:

> The Applicant's site selection process does not satisfy the demands of the President's Executive Order No. 12898 or NEPA and the NRC staff must be directed to conduct a thorough and in-depth investigation of the Applicant's site selection process.

State Petition at 175. The asserted bases for the contention are set forth in three pages of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

The Applicant's site selection process does not satisfy the demands of the President's Executive Order No. 12898 or NEPA and the NRC staff must be directed to conduct a thorough and in-depth investigation of the Applicant's site selection process in that:

a) The NRC has agreed to implement Executive Order 12898.

b) Both the Executive Order and NEPA require the NRC to evaluate an applicant's siting process to ensure the site selection is free from discrimination.

c) The Applicant's site selection process, which started with 38 sites of which 20 were located on Indian reservations and ended up with two closely located sites on the Skull Valley Reservation, raises an inference of discrimination.

2. Applicant's Response to the Contention

None of the specific issues raised by the State in Contention BB provide sufficient basis for the admission of this contention. First, Executive Order 12898 is intended solely for the internal management of federal agencies and therefore it cannot be made applicable to NRC licensing proceedings, as discussed in subpart a below. Second, neither the Executive Order nor NEPA mandate an evaluation or investigation of an applicant's site selection process for discrimination, as discussed in subpart b below. Third, the State ignores the extensive discussion in the License Application which reflects that the Skull Valley Band initiated contacts with PFS and has actively and voluntarily pursued locating -- and has voted in favor of building -- a spent fuel storage facility on

the reservation, as discussed in subpart c below. Thus, no legal or factual basis exists for this contention and it must be rejected.

a) Reliance on Executive Order 12898

The State asserts that the Commission has agreed to implement Executive Order 12898 and seeks to rely on that Order to claim that the NRC must evaluate Applicant's site selection process for potential racial discrimination. The State's reliance is misplaced, however, for the same reasons as those set forth in Applicant's response to OGD Contention O at pages 594-97 of Applicant's Answer. As explained there, Executive Order 12898 is intended solely for the internal management of federal agencies and by its terms expressly does not create new substantive rights or obligations that are subject to judicial review. Because it does not create new law, the provisions of Executive Order 12898 are not applicable to the licensing of facilities and activities under the Atomic Energy Act, for such application would result in the implementation of Executive Order becoming subject to judicial review contrary to the express provisions of the Order.

(i) Evaluation of the Siting Process for Racial Discrimination

The State claims that any discriminatory effects in the site selection process must be evaluated under both NEPA and Executive Order 12898. State Petition at 175-76. The State cites Section 2.2 of the Executive Order, general provisions of NEPA, Calvert Cliffs Coordinating Comm. v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971), and

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), 2 BP-97-9, 45 NRC 367 (1997) ("LES") as the basis for this claim. Id. However, as discussed below, the State misinterprets both the Executive Order (even assuming it applies to licensing proceedings) and NEPA. Further, the LES decision (which is in no way binding on the Board) is wrongly decided.

(ii) Section 2.2 of the Executive Order

The State cites to Section 2.2 of the Executive Order 12898 as the basis for its assertion that discriminatory effects in the site selection process must be evaluated under the Executive Order. State Petition at 175-76. Even assuming the Executive Order were applicable in the context of NRC licensing proceedings, the State both misinterprets and misapplies Section 2.2 of the Executive Order.

Section 2.2 provides as follows:

> Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities, because of their race, color, or national origin.

EO § 2-2 (emphasis added).

Nothing in Section 2.2 suggests any intent (or provides any authority) to review the racial motivation of an applicant's site selection procedures. The scope of this section

-- federal programs, policies and activities -- cannot reasonably be construed to include the selection of a site for a fuel storage facility by a private party. Rather, this section of the Order is simply a recapitulation of Title VI of the 1964 Civil Rights Act, which prohibits discrimination in any program or activity receiving federal financial assistance.[4] This intent of Section 2.2 is confirmed by the President's Memorandum accompanying the Executive Order, which expressly references Title VI of the Civil Rights Act in the context of federal agencies ensuring that "all programs or activities receiving Federal financial assistance that affect human health or the environment do not . . . discriminate on the basis of race, color or national origin." Memorandum on Environmental Justice (emphasis added). 30 Weekly Comp. Pres. Doc. 279 (Feb. 11, 1994). In contrast, in discussing the obligations of federal agencies under NEPA, the President's Memorandum does not address discrimination, but instead directs Federal agencies to analyze "the environmental effects . . . including effects on minority communities and low-income communities when such analysis is required by [NEPA]." Id.

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[4] Title VI provides as follows:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d (1994) (emphasis added).

Thus, Section 2.2 of the Executive Order is a directive to Federal agencies to enforce Title VI of the Civil Rights Act with respect to programs or activities affecting the human health or the environment that receive Federal financial assistance. The courts have expressly found that Title VI's prohibition of "discrimination under any program or activity receiving Federal financial assistance" does not extend to federal licensing activities.[5]

Therefore, Section 2.2 of the Order can only be applicable to activities receiving Federal financial assistance, and does not establish any new standard for NRC licensing actions or NEPA reviews. It is well established that executive orders lacking a statutory basis or some other Congressional delegation of authority cannot create enforceable rights or obligations. See e.g., Chrysler Corp. v. Brown, 441 U.S. 281, 303-08 (1979) (Executive orders must be authorized by statute in order to have substantive, legal effect); Chen v. INS, 95 F.3d 801, 805 (9th Cir. 1996) ("the Executive Order lacked the force and effect of law because it was never grounded in a statutory mandate or congressional delegation of authority"). Here, Congress has clearly defined the scope of activities subject to protection under Title VI, and has excluded federal licensing activities from

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[5] See, e.g., Gottfried v. FCC, 655 F.2d 297, 312-13 (D.C. Cir. 1981), cert. denied, 454 U.S. 1144 (1982); Jacobson v. Delta Airlines, Inc., 742 F.2d 1202, 1212 (9th Cir. 1984), cert. dismissed, 471 U.S. 1062 (1985); Paralyzed Veterans of America v. Civil Aeronautics Bd., 752 F.2d 694, 707-08 (D.C. Cir. 1985), rev'd and remanded, 477 U.S. 597 (1986).

Title VI's prohibition. The President could not, even if that were the purpose, use the Executive Order to rewrite Title VI to now include licensing.

Further, the President has no authority to expand the NRC's substantive statutory authority. It has long been held that an intervenor in an NRC proceeding has standing to raise issues only within the zone of interests protected by the Atomic Energy Act or NEPA. Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). The prevention of discrimination has never been recognized as an interest protected by either of these statutes, and the Executive Order cannot be construed as authority to inject this new issue into NRC proceedings.

(iii) NEPA

No provision in NEPA requires or authorizes an agency to review siting criteria for racial motivation. Rather, as reflected by the President's Memorandum, NEPA is focused on analyzing the "environmental impact" of "major Federal actions significantly affecting the quality of the human environment," and is not directed at addressing potential racial bias. See 42 U.S.C. § 4332(2)(C). As stated by the Supreme Court in Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983)

> The theme of [NEPA] is sounded by the adjective "environmental": . . . . NEPA was designed to promote human welfare by alerting governmental actors to the effect of their proposed actions on the physical environment.

460 U.S. at 772. Accord, Glass Packaging Inst. v. Regan, 737 F.2d 1083, 1091 (D.C. Cir.), cert. denied, 469 U.S. 1035 (1984) (the policies of NEPA "are too important to be diluted" by consideration of asserted environmental impacts "well beyond any reasonable interpretation of the 'natural and physical environment' encompassed under NEPA").

Thus, NEPA is concerned with impacts on the physical environment and related secondary socio-economic effects, and not the motivations of any of the individuals involved. There is no requirement in the NRC's regulations implementing NEPA (10 C.F.R. Part 51), or the CEQ Guidelines on which they are based (40 C.F.R. Part 1500), for any sort of discriminatory motivation review.

The general provisions of NEPA and the Calvert Cliffs decision cited by the State are not to the contrary. The provisions of NEPA cited by the State simply set forth the general policy goals of NEPA to provide all Americans a healthful environment and the general requirements, among others, to prepare environmental impact statements for major federal actions significantly affecting the quality of the human environment. They do not mandate -- and have never been interpreted to mandate -- the sort of discriminatory motivation review sought by the State here. Similarly, the issues in Calvert Cliffs involved the extent to which the NRC is obligated to evaluate in good faith without prejudgment environmental impacts under NEPA. In no way can that case be interpreted as involving any obligation by the NRC to investigate under NEPA claims of racial bias or discrimination by an applicant.

Indeed, NEPA has never been interpreted in its 28 years of its existence to require any such investigation by federal agencies, and for good reason. The purpose of NEPA is procedural, to make sure that the federal agency has identified the potential environmental impacts of a proposed action so that this information is available to the federal agency in making those judgments. See e.g., Andrus v. Sierra Club, 442 U.S. 347, 350 (1979) ("The thrust of [NEPA] is thus that environmental concerns be integrated into the very process of agency decision-making"); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) ("NEPA itself does not mandate particular results, but simply prescribes the necessary process"). The intent or motivation of a private applicant does not alter the potential environmental impacts that a federal agency must evaluate and consider in this decision-making process. Moreover, the evaluation of the intent and motivation of an applicant would introduce issues far afield from the evaluation of environmental impacts of a proposed course of action, the fundamental purpose of NEPA.

No agency interpreting and applying NEPA, nor the Council for Environmental Quality in its guidelines, nor federal courts in their review of the federal government's implementation of NEPA have ever concluded that NEPA requires the investigation of claims of racial bias or discrimination. Such a conclusion does not mean that racial discrimination is to be condoned. There are a host of statutes that strike at illegal discrimination. NEPA, however, is not one, and never has been one.

(iv) The LES Decision

The LES decision relied upon by the State is currently under review by the Commission and does not constitute final NRC action. The Applicant believes that LES is wrongly decided for the reasons set forth in the briefs to the Commission filed by the applicant for the Claiborne Enrichment Center and the Nuclear Energy Institute.

b) Applicant's Site Selection Process

The State claims that the fact that the Applicant's site selection process "started . . . with 38 sites, over 20 of which were located on Indian Reservations, and ended up with two closely located sites on the Skull Valley reservation . . . raises an inference of discrimination in the site selection process." State Petition at 177. The State, however, ignores relevant information in the License Application and, even assuming alleged discrimination were properly an issue in this licensing proceeding -- which as set forth in subparts a and b above it is not -- the State has failed to set forth a sufficient factual basis to litigate such issues here.

At the outset, the State's claim that the fact that 20 of 38 candidate sites were located on Indian Reservations raises an inference of discrimination ignores information in the License Application explaining that the 38 potential host communities or entities evaluated by the Applicant for the location of the PFSF included the original list of applicants to the Nuclear Waste Negotiator for the voluntary siting of a federal MRS as well as other entities who directly contacted PFS "with an expression of interest in

hosting the fuel storage facility." ER at 8.1.2. Two of the key requirements in the initial phases of the site selection process included "a willing jurisdiction" and "public acceptability," ER at 8.1-4, and, as discussed above, such requirements were clearly reasonable. Certainly, the fact that the Applicant focused its site selection process on those jurisdictions and entities that had expressed an interest in hosting the facility cannot raise an inference of racial discrimination as suggested by the State. The State has ignored this information.

Further, as set forth in Section 2.7.3.3 of the Environmental Report, the Skull Valley Band -- not the Applicant -- took the initiative in considering the reservation as a site for a spent fuel storage facility, all of which is explained in the License Application. ER at 2.7-10 to 12. Beginning in 1992, the Skull Valley Band closely examined the potential for hosting a federal MRS on the reservation to store spent nuclear fuel at the reservation. Id. at 2.7-10, 11. This examination included visits by the Band to nuclear generating facilities, existing spent fuel storage facilities, including trips to Japan, France, Great Britain and Sweden to visit existing storage facilities, as well as attendance at conferences on the environment and nuclear waste. Id. at 2.7-11. An October 15, 1993 DOE Preliminary Site Assessment of the Skull Valley Indian Reservation concluded that the proposed siting areas within the reservation met the DOE site requirements and were suitable for proceeding with the voluntary siting process. Id. And in February 1994, the

Skull Valley Band voted to approve the building of a storage facility for spent nuclear fuel on the reservation. Id.

Following the end of DOE's siting program, the Band initiated contact with the utilities who later formed PFS as to whether they were interested in siting an ISFSI on the Skull Valley Reservation. Id. at 2.7-11 to 12. Following negotiations, the Band and the Applicant reached an agreement for the location of the proposed ISFSI on the Skull Valley reservation. Id. at 2.7-12. See Lease Agreement between Applicant and Band (Exhibit 15 to the State's Petition).

Thus, the Band has actively and voluntarily pursued locating a spent fuel storage on its Reservation and has decided in favor of building a spent fuel storage facility on the Reservation. The State has completely ignored these facts set forth in the License Application and accordingly its contention must be dismissed. See Applicant's Answer, Section II.C at 15-16. Further, in light of these facts set forth in the License Application, the State's contention must be dismissed for lack of factual basis. The State has set forth no facts -- as indeed it could not -- on which to challenge the Band's voluntary initiatives and subsequent contract with PFS for the location of the PFSF on the Reservation as a product of racial discrimination on the part of the Applicant. Indeed, if the State could successfully claim discrimination in such circumstances, it could effectively override a lawful determination made by the Skull Valley Band, a sovereign entity independent of

the State. Such a result could not be countenanced under well established principles of Indian sovereignty and this contention must therefore be rejected.

D. Utah Contention CC: One-Sided Cost-Benefit Analysis.

1. The Contention

The State alleges in Contention CC that:

> Contrary to the requirements of 10 CFR. § 51.45(c), the Applicant fails to provide an adequate balancing of the costs and benefits of the proposed project, or to quantify factors that are amenable to quantification.

State Petition at 178. The asserted bases for the contention are set forth on pages 178-179. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

> Contrary to the requirements of 10 C.F.R. § 51.45(c), the Applicant fails to provide an adequate balancing of the costs and benefits of the proposed project, or to quantify factors that are amenable to quantification in that:
>
> a) Applicant's Environmental Report makes no attempt to objectively discuss the costs of the project.
>
> b) Applicant fails to weigh the numerous adverse environmental impacts discussed, for example, in Contentions H through P, against the alleged benefits of the facility.
>
> c) Applicant fails to compare the environmental costs of the proposal with the significantly lower environmental costs of the no-action alternative.

d) Applicant fails to weigh the benefits to be achieved by alternatives that could reduce or mitigate accidents, environmental contamination, and decommissioning costs, such as inclusion of a hot cell in the facility design.

e) Applicant makes no attempt to quantify the costs associated with the impacts of the facility, many of which are amenable to quantification in that:

(i) costs related to accidents and contamination may be quantified in terms of health effects and dollar costs;

(ii) decommissioning impacts can be quantified;

(iii) visual impacts can be quantified in terms of lost tourist dollars; and

(iv) emergency response costs can be quantified based on the cost of those services.

2. Applicant's Response to the Contention

The State raises a number of issues in Contention CC, which Applicant addresses in turn below.

a) No Attempt to Objectively Discuss Project Costs

The State alleges that the Applicant has violated NRC regulations, specifically 10 C.F.R. § 51.45(c), because the "Environmental Report makes no attempt to objectively discuss the costs of the project." State Petition at 178. In particular, the State asserts that:

> "[o]ther than the financial costs incurred by the Applicant in constructing and operating the facility, the sum and

substance of the Applicant's discussion of costs are as follows:

> The indirect costs, which are derived from the socioeconomic and environmental impacts of the facility, are minimal due to the remote location and small size of the actual storage area.

ER at 7.3-1. This brief discussion is completely inadequate to satisfy the requirements of 10 CFR. 51.45(c).

Id.

Subsection (c) of 10 C.F.R. § 51.45 states that

> The environmental report shall include an analysis that considers and balances the environmental effects of the proposed action, the environmental impacts of alternatives to the proposed action, and alternatives available for reducing or avoiding adverse environmental effects . . . . [T]he analysis in the environmental report should also include consideration of the economic, technical, and other benefits and costs of the proposed action and of alternatives. . . . The environmental report should contain sufficient data to aid the Commission in its development of an independent analysis.

10 C.F.R. § 51.45(c). This contention must be dismissed for two reasons. First, the State mistakenly claims that Applicant's Environmental Report fails to address the required topics of discussion mandated by the above regulation. Second, the State fails to provide any basis for its generalized allegation that the Applicant has not complied with the requirements of §51.45(c). Specifically, the State fails to explain in what respects the information contained in the application is insufficient to "aid the Commission in its development of an independent analysis." Id.

The statement of the indirect socioeconomic and environmental costs in Section 7.3 of the Environmental Report, which the State claims is "completely inadequate" (State Petition at 178), is based on the evaluation of socioeconomic and environmental impacts in chapters 4 and 5 of the Environmental Report. The State does not take issue or attempt to explain why the evaluation of socioeconomic and environmental impacts in chapters 4 and 5 are inadequate. Id. The State merely states that "[t]his brief discussion [in section 7.3] is completely inadequate to satisfy the requirements of 10 CFR. 51.45(c)" (id.), without providing the "supporting reasons for the petitioner's belief" (as required by 10 C.F.R. § 2.714(b)(2)(iii)) that Section 7.3 is inadequate and ignoring its basis in chapters 4 and 5 of the Environmental Report. A petitioner alleging that part of an application is inadequate has the obligation to specify how the application is inadequate to demonstrate a litigable contention. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-82-75, 16 NRC 986, 993 (1982). The State has not done so here, so this subcontention must be dismissed.

b) Failure to Weigh the Numerous Adverse Environmental Impacts Against the Alleged Benefits of the Facility

The State alleges that "[t]he Applicant fails to weigh the numerous adverse environmental impacts discussed, for example, in Contentions H through P above, against the alleged benefits of the facility." State Petition at 178. This subcontention must be dismissed because it provides neither a concise statement of the alleged facts or expert opinion in its support nor references to specific sources and documents to establish the

facts or expert opinion. 10 C.F.R. § 2.714(b)(2)(ii). The State refers to no facts, expert opinion, or documents to support a claim that the Applicant's analysis is inadequate or that any environmental effects would result from its alleged flaws even assuming its assertions in Contentions H through P were valid. See State Petition at 178. Accordingly, this subcontention is devoid of a factual basis and must be dismissed. See Applicant's Answer, Section II.C at 11-13.[6]

This subcontention must also be dismissed for containing neither a specific statement of the issue of law or fact to be raised nor references to the specific portions of the application that the petitioner disputes. 10 C.F.R. §§ 2.714(b)(2), (b)(2)(iii). The State fails to specify either the environmental impacts that the Applicant has allegedly failed to address or the parts of the analysis that are allegedly defective. See State Petition at 178. Thus, the subcontention is nonspecific and must be dismissed.

This subcontention must be also dismissed because it mistakenly claims that the Applicant failed to address a relevant issue in the Application. The Application contains a cost-benefit analysis and addresses the environmental impacts of accident factors such

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[6] To the extent the State alleges issues previously identified in Utah Contentions H through P, Applicant responds to these allegation in its responses to Utah Contention H through P. See Applicant's Response to Utah Contention H through P. Although the Applicant did not challenge the admission of Contentions L and M, the State has failed, as set forth in the text above, to provide any factual basis in the present Contention to show any adverse environmental effects flowing from the defieciencies alleged in those contetions. Accordingly, this contention must be dismissed regardless of the admission of Contentions L and M.

as those referred to in Utah Contentions H through P. See ER Chapter 5, "Environmental Effects of Accidents." The State ignores this information and provides no basis for challenging any of this information. Accordingly, the subcontention must be dismissed. See Applicant's Answer, Section II.C at 15-16.

c) Failure to Compare the Environmental Costs of the Proposal with the Significantly Lower Environmental Costs of the No-Action Alternative

The State alleges that "[t]he Applicant fails to compare the environmental costs of the proposal with the significantly lower environmental costs of the no-action alternative." State Petition at 178. As discussed in Applicant's Response to Utah Contention Z, the State ignores relevant information in the Environmental Report, which considers the "no action" alternative (see ER at 8.1-2 to 8.1-4) and considers the environmental impacts of the facility (see ER Chapters 4, 5, & 7). Thus, this contention must be dismissed. See Applicant's Answer, Section II.C at 15-16.

Additionally, the State does not specify either the environmental costs that the Applicant has allegedly not addressed nor the parts of the Application that are allegedly defective. See State Petition at 178. The State only makes a broad, general allegation that the "Applicant fails to compare the environmental costs of the proposal with the significantly lower environmental costs of the no-action alternative." Id. Thus, the subcontention is nonspecific and must be dismissed.

Finally, this subcontention must be dismissed because it does not include "sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact." 10 C.F.R. § 2.714(b)(2)(iii). The State does not provide any facts or "supporting reasons for [its] belief" (id.) that the Applicant's cost comparison is inadequate. State Petition at 178. If a petitioner believes that an application has omitted required material, it must "explain why the application is deficient." 54 Fed. Reg. 33,168, 33,170 (1989) (emphasis added). The State has not done so here. Therefore, this subcontention must be dismissed.

d) Failure to Weigh Benefits Achievable by Alternatives that could Reduce or Mitigate Accidents, Environmental Contamination, and Decommissioning Costs

The State asserts that the "Applicant fails to weigh the benefits to be achieved by alternatives that could reduce or mitigate accidents, environmental contamination, and decommissioning costs, such as inclusion of a hot cell in the facility design." State Petition at 178. This subcontention must be dismissed because the State ignores relevant information in the Environmental Report which weighs the advantages and disadvantages of five facility alternatives, two of which include a hot cell facility design.

Section 8.2 in the Environmental Report presents "five types of system technologies available or under development for the dry storage of spent nuclear fuel" that are possible PFS facility design alternatives. ER at 8.2-1. The section presents a general description of each system, its operational concept, and the resulting advantages

and disadvantages of each system, including specifically the potential for radiological contamination arising from the use of each system. See ER § 8.2. These advantages and disadvantages were weighed in selecting the preferred alternative - - the multi-purpose canister system. The reasons for selecting the multi-purpose canister system are discussed in Section 8.2.6 of the Environmental Report. See ER at 8.2-21. The State provides no facts, expert opinion, or documents to dispute the Applicant's analysis. Since the State ignores relevant information in the Environmental Report and provides no factual basis to dispute the analysis in the Environmental Report, this contention must be dismissed. See Applicant's Answer at 15-16.

To the extent the State alleges that Applicant's facility requires a hot cell, Applicant responds to this allegation in its response to Utah Contention J. See Applicant's Response to Utah Contention J.

e) Failure to Quantify Costs Associated with Impacts of the Facility

The State asserts that "the Applicant makes no attempt to quantify the costs associated with the impacts of the facility," including "costs [that] are amenable to quantification . . . ." State Petition at 179. The State identifies several factors, accident costs in terms of health effects and dollar costs, decommissioning costs, visual impact costs - - specifically lost tourist dollars, and emergency response costs, all of which it considers quantifiable. Id.

Subsection (c) of 10 C.F.R. § 51.45 states that:

> The analyses for environmental reports shall, to the fullest extent practicable, quantify the various factors considered. To the extent that there are important qualitative considerations or factors that cannot be quantified, those considerations or factors shall be discussed in qualitative terms.

10 C.F.R. § 51.45(c). This subcontention must be dismissed due to lack of basis. The State refers to no facts, expert opinion, or documents to support a claim that the identified costs are quantifiable or that the Applicant's analysis is inadequate. See State Petition at 179. Accordingly, this subcontention is devoid of a factual basis and must be dismissed.

This subcontention must also be dismissed because it ignores the License Application. The Application contains a cost-benefit analysis, which quantifies cost to the extent practicable, and addresses the environmental impacts of any factors that cannot be quantified in qualitative terms. See ER Chapters 4, 5, and 7. This approach is in accordance with the NRC's regulation above as well with judicial precedent under NEPA. That precedent holds that, under the rule of reason employed in implementing NEPA, the objective is not the invariable monetary quantification of impacts and benefits, as sought by the State, but rather the furnishing of such "information as appears to be reasonably necessary under the circumstances for the evaluation of the project." Britt v. United States Army Corps of Eng'rs, 769 F.2d 84, 91 (2d Cir. 1985) (EIS not deficient because it failed "to quantify the dollar value of the impact on traffic problems"); see also Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1360 (9th Cir. 1994) (an EIS "need not quantify every risk, particularly less likely risks").

Here, the State has provided no basis for challenging the appropriateness of the quantitative and qualitative discussion of costs and benefits as set forth in the Environmental Report, and this susbcontention must be dismissed.

The Applicant addresses the State's more specific points below.

(i) Quantification of Costs Related to Accidents and Contamination

The State asserts that "the Applicant makes no attempt to quantify the costs associated with the impacts of the facility," including "costs [that] are amenable to quantification: for instance, costs related to accidents and contamination may be quantified in terms of health effects and dollar costs. . . ." State Petition at 179. The Applicant has indeed addressed the costs related to accidents and contamination in terms of health effects and dollar costs to the extent practicable, and where not practical, has discussed them in qualitative terms. ER at 5.1-1 to 5.1-6, 5.2-1 to 5.2-3. Because the State ignores this material and for the reasons specified in subpart (e), this subcontention must be dismissed.

(ii) Quantification of Decommissioning Impacts

The State asserts that "the Applicant makes no attempt to quantify the costs associated with the impacts of the facility," including "costs [that] are amenable to quantification: for instance . . . decommissioning impacts can be quantified . . . ." State Petition at 179. Contrary to the State's bald assertion, the Applicant has both addressed

and quantified the costs related to decommissioning impacts. See LA Appendix B Chapter 4, "Decommissioning Cost Estimate," ER § 4.6, "Cost of Decommissioning and Funding Method," and ER Table 7.3-1, "Private Fuel Storage Facility Life Cycle Costs / Benefits" (with footnote 2 stating "Operating expenses include decommissioning costs."). Because the State ignores this material and for the reasons specified in subpart (e), this subcontention must be dismissed.

(iii) Quantification of Visual Impacts

The State asserts that "the Applicant makes no attempt to quantify the costs associated with the impacts of the facility," including "costs [that] are amenable to quantification: for instance . . . visual impacts can be quantified in terms of lost tourist dollars . . . ." State Petition at 179. The State does not provide the "supporting reasons for [its] belief" (10 C.F.R. § 2.714(b)(2)(iii)) that the Applicant's facility would affect the tourist industry in the area causing lost tourist dollars. The statement of socioeconomic and environmental costs in Chapter 7 is based on the evaluation of the socioeconomic and environmental impacts in Chapter 4 of the Environmental Report. The Applicant evaluates the visual impact of the facility in the area and determines that facility would not present a significant impact on the area's scenic resources. See ER at 4.1-19, 4.2-7 to 4.2-9, 4.3-8 to 4.3-9, 4.4-5 to 4.4-6.

Since the facility will have minimal visual impacts, there is no reason to believe that the visual aspects of the facility could cause tourist dollars to be lost. The State does

not take issue with the analysis in Chapter 4. The State merely states that "visual impacts can be quantified in terms of lost tourist dollars" without providing facts, expert opinion, or documents of its own to show that tourist dollars would be lost due to the existence of the facility or that such possible impacts could be quantified. State Petition at 179. Because the State has failed to provide any factual evidence or supporting reasons that demonstrate that tourist dollars would be lost or to cast doubt on a specified portion of the Application, this subcontention must be dismissed.

(iv) Quantification of Emergency Response Costs

The State asserts that "the Applicant makes no attempt to quantify the costs associated with the impacts of the facility," including "costs [that] are amenable to quantification: for instance . . . emergency response costs can be quantified based on the cost of those services." State Petition at 179. The Applicant has indeed addressed the emergency response costs as part of the facility operating expenses costs, which are included in Environmental Report Table 7.3-1, "Private Fuel Storage Facility Life Cycle Costs / Benefits." ER at Table 7.3-1. Because the State ignores this material and for the reasons specified in subpart (e), this subcontention must be dismissed.

E. Utah Contention DD: Ecology and Species

1. The Contention

The State alleges in Contention DD that:

> The Applicant has failed to adequately assess the potential impacts and effects from the construction, operation and decommissioning of the ISFSI and the transportation of

spent fuel on the ecology and species in the region as required by 10 CFR §§ 72.100(b) and 72.108 and NEPA.

State Petition at 180. The asserted bases for the contention are set forth in eight pages of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

> The Applicant has failed to adequately assess the potential impacts and effects from the construction, operation and decommissioning of the ISFSI and the transportation of spent fuel on the ecology and species in the region as required by 10 CFR §§ 72.100(b) and 72.108 and NEPA in that:
>
> a) The License Application does not discuss the long term impacts of construction activities on the overall ecological system in Skull Valley.
>
> b) The License Application fails to address adverse impacts of contaminated ground or surface waters on various species, and fails to provide for sampling of the retention pond for contaminants.
>
> c) The License Application fails to include both protective and mitigation plans in conjunction with appropriate authorities for Horseshoe Springs, Salt Mountain Springs, Timpie Springs Waterfowl Management Area, and raptor nests.
>
> d) The License Application has not estimated potential impacts to ecosystems and "important species" in that:
>
> (i) The License Application does not discuss the importance of the variety of species found in the Skull Valley ecological system, including aquatic organisms, and does not discuss the interdependence of various

species on one another or impact on the ecological system as a whole.

(ii) The License Application fails to assess the individual and collective impacts on various species, including wetland species, aquatic organisms, plants, fish, and birds from additional traffic, fugitive dust, radiation and other pollutants.

(iii) The License Application fails to address all possible impacts on federally endangered or threatened species, specifically the peregrine falcon nest in the Timpie Springs Waterfowl Management Area.

(iv) PFS failed to perform a survey of pocket gopher mounds prior to submitting the License Application.

(v) The License Application fails to determine whether "culturally or medically (scientific) significant" plant species may be impacted by the PFSF.

(vi) The License Application fails to identify aquatic plant species which may be adversely impacted by the proposed action.

(vii) The License Application has not adequately identified plant species that are adversely impacted or adequately assessed the impact on those identified, specifically the impact on two "high interest" plants, Pohl's milkvetch and small spring parsley.

(viii) License Application does not identify, nor assess the adverse impacts on, the private domestic animal (livestock) or the domestic plant (farm produce) species in the area.

e) License Application fails to assess the potential impacts on Horseshoe Springs, Timpie Springs Waterfowl Management Area, the Great Salt Lake, and Salt Mountain Springs.

f) License Application fails to include the results of detailed site-specific surveys and analyses to determine species in the vicinity of the PFSF. 10 CFR §§ 72.100(b) and 72.108 require that detailed surveys of species plus mitigation or prevention plans be prepared now.

2. Applicant's Response to the Contention

The State raises a number of issues under its Contention DD. We address in turn below each of the specific allegations raised by the State in Contention DD as set forth above.

a) Long Term Impacts of Construction Activities on the Overall Ecological System in Skull Valley

The State alleges that the License Application "does not discuss the long term impacts [of construction activities on] the overall ecological system in Skull Valley." See State Petition at 180 (emphasis added). The State asserts that the License Application only "indicates that construction activities will 'temporarily disturb resident wildlife species,'" and fails to assess the impact of "ongoing construction for over twenty years." Id. The State's contention ignores pertinent portions of the License Application that explicitly address the long-term ecological impacts of PFSF construction over 20 years. Section 4.1.2, "Site Preparation and Facility Construction - Effects on Ecological Resources," of the Applicant's Environmental Report explicitly assesses the impact of construction activities on the ecological system near the site both in the near term (first

construction phase, 2000-2001), and in the long term (second and third construction phases, 2002-2011 and 2012-2021) respectively. See ER at 4.1-4 to 6.

The analysis in the Applicant's Environmental Report determines that "[t]he proposed construction activities that will be likely to cause the most disturbance to wildlife . . . will occur mostly in the first construction phase (January 1, 2000 to December 31, 2001 . . .)" (ER at 4.1-4), and that during "[s]ubsequent construction activities in the second and third construction phases (March 1, 2002 to November 30, 2011, and March 1, 2012 to November 30, 2021 . . .) . . . [t]he impacts on wildlife will lessen as the level of construction related activities is reduced and wildlife should repopulate the area shortly thereafter" (ER at 4.1-4 to 5). In addition, the Environmental Report discusses the reduced traffic effects during the latter two construction phases. ER at 4.1-5.

The State's contention neither addresses, nor challenges the validity of, these sections of the Environmental Report assessing the ecological impacts from PFSF long-term construction activities over a period of 20 years. See generally, State Petition at 180. A contention, such as the contention here, which mistakenly claims that the applicant did not address a relevant issue in the license application must be dismissed for lack of a material factual dispute that warrants further inquiry. See Section II.C of Applicant's Answer at 15-16. Further, because the State fails to provide any reason why

the discussion in the License Application is deficient, the contention must be dismissed for lack of factual basis. Id. at 11-16.

b) Contaminated Ground or Surface Water and Sampling of Retention Pond for Contaminants

The State alleges that the License Application fails to address adverse impacts "as a potential result of contaminated ground or surface waters, including contaminated puddles and ponds, on various species," specifically "water born radioactive, chemical, or heavy metal contaminants that may be absorbed by wildlife, aquatic organisms, or vegetation." State Petition at 180-81. For support, the State references its Contention O on hydrology. Id. at 180. As set forth in Applicant's response to Contention O, the State provides no facts, expert opinion or documents to support its identical contention there that the proposed licensing action will result in contamination of ground or surface water by radioactive, chemical or heavy metal contaminants. See Applicant's Answer to Utah Contention O, subpart a at 174-79. The State likewise provides no such factual support in this contention, and, like Utah Contention O, this contention must be dismissed for lack of basis.

The State also asserts that "[t]he Applicant has not indicated an intent to sample the retention pond or prevent the retention pond from draining in the event contaminants are present" and that therefore "the Applicant cannot support [its] argument that '[s]urface runoff is not contaminated and will not adversely affect vegetation or wildlife.'" State Petition at 180-81. This bald conclusory assertion, however, again

provides no facts, expert opinion or documents to controvert the conclusions set forth in the numerous sections in the License Application that there is no potential to contaminate "ground or surface waters" at the PFSF, and no need or requirement to sample or monitor water in the retention pond on the PFSF site. In addition to Applicant's Response to Utah Contention O, this issue has already been addressed in Applicant's Response to Castle Rock Contention 10 ("Retention Pond"), subparts a and b, Applicant's Answer at 387-89, Castle Rock Contention 11 ("Radiation and Environmental Monitoring"), subpart b, id. at 393-96 and Applicant's Response to Subpart (d) of Utah Contention P ("Failure to Indicate Whether Rain Water and Melted Snow from the Storage Pads will be Handled as Radioactive Waste"), id. at 195-98.

In short, the State's contention concerning effects of "contaminated ground or surface waters, including contaminated puddles and ponds, on various species" must be rejected for failing to address pertinent portions of the Applicant's License Application and for failing to establish a sufficient basis for an admissible contention. See Applicant's Answer, Section II.C at 11-16.

c) Failure to Propose and Develop Protective and Mitigation Plans

The State alleges that the License Application fails to include protective and mitigation plans in conjunction with appropriate authorities for Horseshoe Springs, Salt Mountain Springs, Timpie Springs Waterfowl Management Area, and raptor nests. See State Petition at 181. The State's contention acknowledges that:

> The Applicant's plans include a mitigation plan for Horseshoe Springs and protective plan for Salt Mountain Springs developed with the U.S. Bureau of land Management, mitigation plans for Timpie Springs Waterfowl Management Area and protection of raptor nests developed with the Utah Division of Wildlife Resources.

See State Petition at 181. The sole focus of the State's contention is that "[t]he protective and mitigative measures must be identified now so they can be evaluated and the feasibility of the proposed ISFSI site determined." Id. The State's contention, however, does not provide any basis whatsoever, regulatory or otherwise, to indicate that these mitigation and protection plans must be developed and evaluated at this time and submitted as part of the License Application. Nor does the State provide any factual basis to claim that appropriate protection and mitigation plans could not be developed for any adverse environmental impacts associated with the proposed licensing action. Accordingly, the State's contention must be rejected for failing to establish a sufficient basis for an admissible contention. 10 C.F.R. § 2.714(b).

d) Potential Impacts to Ecosystems and "Important Species"

The State alleges that the License Application "has not estimated potential impacts to ecosystems and 'important species'" in various respects to which Applicant responds in turn below. See State Petition at 181-85.

(i) Potential Impacts to Ecosystems and "Important Species"

The State asserts that the License Application "does not discuss and acknowledge the importance of the variety of species found in the Skull Valley ecological system, including aquatic organisms," and "does not discuss the interdependence of various species on one another" or "the collective impact of the proposed action on the ecological system as a whole." State Petition at 182. The State's contention overlooks and fails to identify any specific deficiencies in the substantial pertinent portions of the License Application that discuss the variety, importance and interdependence of species found in the Skull Valley ecological system, including aquatic organisms.

Section 2.3, "Ecology," of the Environmental Report includes over 23 pages of text and two detailed tables which identify and discuss the types and importance of the variety of species found in the Skull Valley ecological system. See ER at 2.3-1 to 23, Tables 2.3-1 and 2.3-2. This evaluation analyzes species of vegetation (ER Section 2.3.1.1), wildlife (ER Section 2.3.1.2), and aquatic resources (ER Section 2.3.1.3) in the vicinity of the PFSF. The Environmental Report also includes specific evaluation of threatened, endangered, and sensitive species of both plants and animals. See ER Section 2.3.1.4. The same analysis is done for ecological resources along the transportation corridor, including specific assessments of the ecological communities at Timpie Springs and Horseshoe Springs. See ER Section 2.3.2. The State's contention does not address, or challenge the validity of, this assessment of the types, variety, and importance of

species in the License Application, stating only that "the Applicant discusses, to a limited extent, the anticipated short term impact on mammals, raptors, snakes, fish, and a few plant species . . .." See State Petition at 182. The State, however, fails to specify what species the Applicant has failed to discuss, and does not provide any factual basis on which to challenge the Applicant's discussion of the ecology, vegetation, wildlife, aquatic resources, plans, and animals, contained in Section 2.3 of the ER, as being deficient.

Similarly, the State's contention that the License Application fails to address the "interdependence of various species on one another" (State Petition at 182) does not acknowledge, address, or dispute the "Life History Information" in Appendix 2B of the Environmental Report which describes the habitat, diet (including predator/prey relationships), breeding, and range of certain species. See ER, Appendix 2B. Likewise, the State's contention that the License Application "does not discuss the collective impact of the proposed action on the ecological system as a whole" (State Petition at 182) does not acknowledge, address, or dispute the assessment of "Effects on Ecological Resources" in Sections 4.1.2, 4.2.2, 4.3.2, and 4.4.2 of the Applicant's Environmental Report. See ER §§ 4.1.2 (site preparation and facility construction), 4.2.2 (facility operation), 4.3.2 (construction and operation of road transport alternative), 4.4.2 (construction and operation of railroad spur alternative).

In short, the State's contention neither addresses the sections of the Applicant's Environmental Report that identify the types, variety, and importance of species in the

vicinity of the PFSF and the impact of the proposed action on these species nor provides any factual basis on which to challenge the sufficiency of that discussion. Accordingly, this contention must be dismissed for failing to provide a sufficient basis for an admissible contention. See Applicant's Answer, Section II.C at 11-16.

(ii) Impacts on Various Species, Including Wetland Species, Aquatic Organisms, Plants, Fish, and Birds from Additional Traffic, Fugitive Dust, Radiation and Other Pollutants

The State contends that the License Application "does not discuss the impact of additional traffic, fugitive dust, radiation, and other pollutants on various species" and fails to "assess the individual and collective impacts on each species." See State Petition at 182 (emphasis added). The State's contention notes that "[i]mpact on wetland species, aquatic organisms, plants, fish, and birds are vastly different." Id. The State's contention, however, provides no further information and fails to identify what species the License Application "has failed to assess." Moreover, the State's contention neither addresses, nor challenges the validity of, the pertinent portions of the license application which address the ecological effects of construction and operation of the PFSF and the regional transportation corridor. See ER §§ 4.1.2, 4.2.2, 4.3.2, 4.4.2. The State's contention does not address any of this information in the License Application nor does it provide any factual basis on which to challenge the sufficiency of that discussion in any respect.

First, the State provides no facts, expert opinion, or documents of any kind to support its allegations that "additional traffic, fugitive dust, radiation, and other pollutants" will have an impact on "various species" of "wetland species, aquatic organisms, plants, fish, and birds." See State Petition at 182. Further, the subcontention neither identifies what these "various species" of "wetland species, aquatic organisms, plants, fish, and birds" are nor discloses where they are located. Id. It also provides no basis or transport path for how this "fugitive dust, radiation, and other pollutants" could originate from the facility and be transported to reach the (undefined) location of the "wetland species, aquatic organisms, plants, fish, and birds." Id. The State provides no basis for believing that such a connection exists. Such a conclusory allegation of dispute is not sufficient to admit a contention; the petitioner must show that "facts are in dispute," thereby demonstrating that an "inquiry in depth" is appropriate. Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 376 (1992). Because its subcontention contains no more than conclusory, unsupported allegations, the contention must be rejected for failing to provide a sufficient basis for an admissible contention. See Applicant's Answer, Section II.C at 11-16.

(iii) Impacts on Federally Endangered or Threatened Species, Specifically the Peregrine Falcon Nest at Timpie Springs

The State contends that the License Application fails to "address all possible impacts on federally endangered or threatened species," including specifically the peregrine falcon nest in the Timpie Springs Waterfowl Management Area. See State

Petition at 183 (emphasis in original). The peregrine falcon is the only "federally endangered or threatened species" identified in the State's contention. Id. The State's contention is therefore too vague, insufficient, and unsupported with respect to any species other than the peregrine falcon.

With respect to the peregrine falcon, the State alleges that "[t]he Applicant argues that the proposed action is unlikely to have any impact on peregrine falcons, . . . [but] [t]he Applicant ignores that the peregrine falcon nest on the Timpie Springs Waterfowl Management Area is adjacent to the proposed intermodal transfer station at Rowley Junction." See State Petition at 183 (emphasis added). The State's contention is mistaken and overlooks pertinent portions of the Applicant's license application. The Applicant's License Application both recognizes that "the peregrine falcon nest on the Timpie Springs Waterfowl Management Area" is adjacent to the transportation corridor and the intermodal transfer location (see ER § 2.3.2), and assesses the impact on the peregrine falcons at Timpie Springs from the construction and operation of the "road transport alternative," which includes the intermodal transfer point (see ER § 4.3).

Section 2.3.2.2 of the Environmental Report states that "[p]eregrine falcons, nesting at Timpie Springs, hunt within 10-miles of their nest, including at Horseshoe Springs (BLM, 1992)." ER at 2.3-19. Section 2.3.2.4, "Threatened and Endangered Species," of the Environmental Report explicitly addresses the peregrine falcon nest at Timpie Springs, stating:

> As mentioned previously, the federally endangered peregrine falcon nests at Timpie Springs Waterfowl Management Area. Although the transportation corridor begins at Timpie [at the intermodal transfer point, see ER at 4.3-2], the hacking tower and nest are not located in the vicinity of the proposed intermodal location. However, the hunting area of the falcons includes the northern 10 miles of the transportation corridor.

ER at 2.3-20 (emphasis added). Section 4.3 of the Environmental Report then explicitly evaluates the impact of construction and operation of the "road transport alternative," which includes the intermodal transfer point, on the peregrine falcons nesting at Timpie Springs. See ER at 4.3-4 to 5.

The State's contention neither addresses, nor challenges the validity of, these sections explicitly assessing the impact of transportation and the intermodal transfer point on the peregrine falcons nesting at Timpie Springs; it refers only to the section of the Environmental Report that discusses the impacts of the construction of the PFSF (Section 4.1 of the ER). See State Petition at 182-83. The State's assertion that "[t]he Applicant ignores that the peregrine falcon nest on the Timpie Springs Waterfowl Management Area is adjacent to the proposed intermodal transfer station at Rowley Junction" is therefore clearly mistaken. Id. at 183 (emphasis added). A contention that mistakenly claims that the applicant did not address a relevant issue in the license application must be dismissed for failing to provide a sufficient basis for an admissible contention. See Applicant's Answer, Section II.C. at 15-16.

(iv) Survey of Pocket Gopher Mounds Prior to Submitting the License Application

The State asserts that the License Application is deficient because PFS has failed to perform a survey of pocket gopher mounds. See State Petition at 183. The State acknowledges that Applicant has committed to perform a survey of pocket gopher mounds prior to construction, but the State contends that the Applicant "must conduct the survey now . . . ." Id. (emphasis added). The State, however, cites to no regulation or any other basis that indicates such a survey must be performed now, prior to review of the License Application, or that such a survey is even required.

The License Application specifically addresses the survey of pocket gopher mounds, stating, inter alia:

> Although the species is not protected, UDWR [Utah Division of Wildlife Resources] (1997) requests that a survey of gopher mounds be conducted and surface disturbance within 100 feet of any burrow be avoided to protect this species. To accommodate the UDWR request, surveys will be conducted shortly before construction in consultation with UDWR.

ER at 4.1-7 (emphasis added). Nothing in the License Application or the State's petition indicates that such a survey is required, much less that this survey must be performed now. Further, the State provides no information to challenge the sufficiency of Applicant's discussion of the pocket gophers. Accordingly, this contention must be rejected for lack of basis. 10 C.F.R. § 2.714(b).

(v) Failure to Identify "Culturally or Medically (Scientific) Significant" Plant Species Impacted by the PFSF

The State alleges that the License Application is deficient because it does not "identif[y] any plant species that may be culturally or medicinally (scientific) significant to various individuals." State Petition at 183 (emphasis added). The only "various individuals" identified by the State is the "Confederated Tribes of Goshute Reservation" which the State says "gather plants in the vicinity of the Skull Valley Reservation." Id.

The State's contention does not identify any alleged "culturally or medically (scientific) significant" plant species that the License Application fails to discuss, nor does it even define what the term means. Nor does the State indicate why the discussion of plant species provided in the License Application is deficient. See ER § 2.3.1.1, § 2.3.1.4.1, § 2.3.2.1 and Appendix D (various subsections of § 2.3, "Ecology," which discuss vegetation and plant species in the vicinity of the PFSF site and the transportation corridor). Further, the State provides no regulatory basis, or any other basis, whatsoever to support its assertion. An unsupported statement "that simply alleges that some matter ought to be considered" does not provide a sufficient basis for an admissible contention. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993). Accordingly, the State's unsupported assertion must be rejected for failing to provide a sufficient basis for an admissible contention. 10 C.F.R. § 2.714(b).

(vi) Failure to Identify Aquatic Plant Species That May be Adversely Affected

The State contends that the License Application "has not identified aquatic plant species which may be adversely impacted by the proposed action and upset fragile ecological systems of wetlands." State Petition at 184. The State, however, identifies no aquatic plant species or wetlands area that the Application fails to address. The License Application states that [t]here are no stream or wetland impacts associated with the development of the facility site." ER at 9.1-4. The State provides no factual basis on which to challenge that conclusion.

The Environmental Report does state that "[u]nlike the area within the 5-mile radius or the PFSF, there is some wetland/riparian habitat along the transportation corridor . . . at Timpie Springs, Horseshoe Springs, Muskrat Springs, and Salt Mountain." ER at 2.3-17. The Application identifies the "[t]ypical riparian/wetland [plant] species" located in these wetlands areas. Id. The State fails to identify any additional species which it claims that the Environmental Report fails to take into account. Further, the Environmental Report evaluates potential impacts on wetlands areas in the transportation corridor and provides that sediment and erosion control and other protective measures will be taken to ensure that no adverse impacts on aquatic resources will occur. ER § 4.3.2. Again the State provides no factual basis on which to challenge the sufficiency of the discussion in the Environmental Report.

In sum, the State's bald one-sentence assertion that the "Applicant has not identified aquatic plants which may be adversely impacted by the proposed action and upset the fragile ecological system of wetlands" must be rejected for lack of basis. See Applicant's Answer, Section II.C.

(vii) Failure to Identify Plant Species Adversely Affected and to Adequately Assess Impact on Two "High Interest" Plants, Pohl's Milkvetch and Small Spring Parsley

The State quotes from the License Application that "'[n]o federal or state-listed threatened or endangered plant species are known to occur within the site or access road,'" but notes that the Application does acknowledge that two "high interest plants," Pohl's milkvetch and small spring parsley, may occur in the area. State Petition at 184 (emphasis in original). With no further support or analysis the State asserts that "[t]he Applicant has not adequately assessed plant species and impact on those identified." Id.

The State fails to identify any plant species, other than Pohl's milkvetch and small spring parsley, which may be endangered or of high interest that may be affected by the proposed action. Thus, the State's contention is far too vague, insufficient and unsupported with respect to any species other than Pohl's milkvetch and small spring parsley.

Although the State claims the License Application "has not adequately assessed" the impact on "Pohl's milkvetch and small spring parsley," the State identifies no respect in which the assessment in the Environmental Report of these two species is in any way

deficient. The Environmental Report specifically identifies Pohl's milkvetch as a "'high interest' plant species which [could] potentially occur within a 5-mile radius of the PFSF." ER at 2.3-10. The Environmental Report indicates that "[t]he nearest known population of Pohl's milkvetch to the project area is . . . approximately 6 miles away from the PFSF." Id. The Environmental Report also specifically identifies small spring parsley as a "'high interest' plant species which [could] potentially occur within a 5-mile radius of the PFSF." ER at 2.3-10. The Environmental Report states that "[w]hile this species could occur within the 5-mile radius from the PFSF, it has not been documented." Id. at 2.3-11. Both Pohl's milkvetch and small spring parsley are also included on the list of "Species of Concern that Occur in Skull Valley, Utah as Identified by the Agencies" in Table 2.3-2 of the Environmental Report. Id., table 2.3-2 (sheet 1 of 4).

Regarding potential impacts on these two plant species, the Environmental Report states:

> No federal or state-listed threatened or endangered plant species are known to occur within the site or access road areas (letters from R.D. Williams, Assistant Field Director, Utah Field Office, USFWS to N.T. Georges, SWEC, February 10, 1997, and February 27, 1997, and UDWR, 1997). . . . Two state "high interest" plant species, Pohl's milkvetch and small spring parsley, potentially occur within the site and/or access road area. Although they are not protected, UDWR (1997) requested a survey to identify the occurrence of these plant species within the project area. To accommodate UDWR's request and to prevent impacts on any sensitive plant species, surveys for these species will be conducted shortly before construction within the areas identified for earthwork.

ER at 4.1-3 to 4 (emphasis added).

The State completely fails to address the content of the Applicant's assessment or to explain how the assessment of Pohl's milkvetch and small spring parsley in the License Application is deficient. See State Petition at 184. The State provides absolutely no factual or legal support of any kind for its contention and it must be rejected. See 10 C.F.R. § 2.714(b).

(viii) Assessment of Private Domestic Animal (Livestock) or Domestic Plant (Farm Produce) Species in the Area

The State alleges that the License Application does not identify, nor assess the adverse impacts on, the "private domestic animal (livestock) or the domestic plant (farm produce) species in the area." See State Petition at 184. The State admits that the Environmental Report in fact "broadly describes and estimates the number of domestic livestock grazing on U.S. Bureau of Land Management property in the area. ER 2.2-2" and that "the Applicant acknowledges, but does not identify the private domestic animal (livestock) or the domestic plant (farm produce) species in the area." Id. (emphasis added) The State's contention does not explain the materiality of this asserted difference.

The License Application specifically addresses the raising of livestock (e.g., cattle and sheep) in the vicinity of the PFSF (see ER at 2.2-2) and addresses vegetation on which this livestock grazes (see ER at 2.3-3 to 4). The License Application then discusses the effects that facility and transportation corridor construction and operation will have on the rangeland used for grazing vegetation and to raise livestock, and

determines that these activities will affect such a small portion of the total rangeland in Skull Valley that the PFS activities "will not have a significant effect on grazing activity in the Skull Valley area." See ER at 4.1-2. See also ER at 4.2-1 (same); 4.3-2 (same); 4.4-2 (same). The State does not explain why the identification and assessment of livestock and supporting vegetation in the Environmental Report are deficient.

The States also makes a one-sentence broad-brush assertion that adverse impacts of the PFSF "may include impacts on livestock and plants from the radiological, chemical, heavy metal, noise, or visual pollution due to the proposed action." See State Petition at 184-85 (emphasis added). The State provides absolutely no facts, expert opinion, document or basis of any kind to support its allegation of the presence of "radiological, chemical, heavy metal, noise, or visual pollution." Id. Nor does it provide any factual basis to show how such claimed pollution would reach areas with domestic livestock or farm produce, or the significance of the level or intensity of the pollution should it reach such areas, or what effect such pollution would have on domestic livestock or farm produce (for example, what is the effect of noise on plants or visual pollution on livestock). As stated by the Commission in Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 262 (1996), the Commission's amended pleading requirement "places an initial burden on Petitioners to come forward with reasonably precise claims rooted in fact, documents or expert opinion

in order to proceed past the initial stage and toward a hearing." The State has not done so here and this contention must be rejected.

In short, the State provides no factual or other basis for this contention, and does not explain why the portions of the License Application addressing the potential impact of the facility on livestock and plants is deficient. This contention must be rejected for failing to provide a sufficient basis for an admissible contention. See Applicant's Answer, Section II.C at 11-16.

e) Failure to Assess the Potential Impacts on Horseshoe Springs, Timpie Springs Waterfowl Management Area, the Great Salt Lake, and Salt Mountain Springs

The State asserts that the License Application fails to assess the potential impacts on four "specific habitats": Horseshoe Springs, Timpie Springs Waterfowl Management Area, the Great Salt Lake, and Salt Mountain Springs, and on the dependent species in these habitats. See State Petition at 185-86. With the exception of "the speckled dace, a state protected indigenous fish" (id. at 186), the State's contention does not identify any plant or animal species at any of these habitats that it claims the Applicant has failed to assess. Furthermore, the State acknowledges that the License Application does address the speckled dace. Id. The Applicant's Environmental Report explicitly addresses the speckled dace, stating:

> UDWR (1997a), identifies the speckled dace (*Rhinichthys osculus*), a state-protected indigenous fish species known to inhabit the wetlands of cold desert and sub-montane

> ecological associations, as occurring within the Salt Mountain Springs (See Figure 2.3-12). The speckled dace is not a high interest species, is found in a variety of aquatic habitats, and it is more often found in waters less than three ft deep.

ER at 2.3-19 (emphasis added); see also ER at Figure 2.3-12; ER at 4.3-4 (discussing the speckled dace at Salt Mountain Springs and stating that "[a]ppropriate erosion and sediment control measures will be taken to ensure expansion of Skull Valley Road would not affect any aquatic resources."). Although the State claims that the Applicant fails to discuss impacts on the speckled dace from "radiation or other pollution," State Petition at 186, as with its claims concerning domestic livestock and produce above, the State provides no factual basis on which to assert that radiation or other pollution would impact the speckled dace or any other unidentified species.

Further, the State does not explain why each of these habitats must be addressed separately beyond the discussion already found in the Environmental Report. The Applicant's Environmental Report includes a description of the plant, wildlife, and aquatic species (including any threatened, endangered, and sensitive species) in the region around the PFSF site and transportation corridor. See ER § 2.3. Further, the Environmental Report evaluates the impact on these ecological resources from the construction and operation of both the PFSF and the transportation corridor. See ER §§ 4.1.2, 4.2.2, 4.3.2, 4.4.2. These sections of the Environmental Report specifically address several "specific habitats" in the region of the PFSF and the transportation corridor,

including Horseshoe Springs (see, e.g., ER at 2.2-3, 2.3-17, 2.3-22 to 23, 4.1-6 to 7, 4.3-3), Timpie Springs (see, e.g., ER at 2.3-17, 2.3-20, 2.3-21, 4.3-3, 4.3-4 to 5), and Salt Mountain Springs (see, e.g., ER at 2.3-17, 2.3-19, 4.3-4). Except for the speckled dace, discussed and refuted above, the State provides no specific basis for its contention and fails to explain why the pertinent portions of the Environmental Report, which address the impacts in the region, are deficient.

The Great Salt Lake is different from the other three habitats in the State's contention because it is not directly adjacent to PFSF-related construction projects. The State provides no facts, expert opinion, or documents of any kind to support its allegation that "the proposed ISFSI site" or the "proposed intermodal transfer station" or the "eastern transportation routes" will have an impact on "the Great Salt Lake and its dependent species." See State Petition at 185-86. The State notes that the "Great Salt Lake is a unique body of water . . . [that supports] [s]eventy-five percent of Utah's vital wetlands . . . [and] is a western hemisphere shorebird reserve," but utterly fails to show any connection between these statements and "the proposed ISFSI site" or "proposed intermodal transfer station" or the "eastern transportation routes." Id. Such a conclusory allegation of dispute regarding this enormous body of water is not sufficient to admit a contention; the petitioner must show that "facts are in dispute," thereby demonstrating that an "inquiry in depth" is appropriate. Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 376 (1992). Accordingly,

the State's contention must be rejected for failing to provide a sufficient basis for an admissible contention. 10 C.F.R. § 2.714(b).

Furthermore, the State's claim that the "likely eastern transportation routes will follow closely the southern and eastern shorelines of the Great Salt Lake" (State Petition at 185) addresses the environmental effects of transporting spent fuel to the region of the ISFSI, and must be rejected as an impermissible challenge to the Commission's regulations. This subcontention is a direct challenge to the Commission's regulations in 10 C.F.R. Part 72 which expressly the evaluation of the environmental effects of transporting spent fuel to the region of the ISFSI. 10 C.F.R. §§ 72.34, 72.108. See Applicant's Answer at 295-97. Here, the transportation within the region begins with the transfer from the national railroad network to the local or regional means of transport at Rowley Junction. As a result, the State's contention and its related bases, which argue that the Application "failed to assess the impact on the Great Salt Lake and its dependent species" from the "likely eastern transportation routes" (State Petition at 185), are barred as a matter of law from being litigated in this licensing proceeding. See 10 C.F.R. § 2.758.

Additionally, the environmental effects of such shipments have been evaluated using the NRC's generic determination of the environmental impact of shipping spent fuel and this contention must be rejected on this basis as well. See Table S-4 and the discussion of Radioactive Material Movement at § 4.7 of the Environmental Report as

well as § 5.2 which discussed Transportation Accidents. To the extent that the State challenges Applicant's analysis of the environmental impact of transporting spent fuel, Applicant has addressed this at Applicant's Answer at 292-310.

f) Failure to Conduct Detailed Site-Specific Surveys and to Complete Mitigation or Prevention Plans

The State contends that the License Application is deficient because it fails to include the results of detailed site-specific surveys and analyses to determine species in the vicinity of the PFSF, and fails to include completed mitigation or prevention plans for any adverse impacts on such species. See State Petition at 186-87. The State asserts that these "surveys . . . and plans [must be] prepared now." Id. at 187. For support the State refers to 10 C.F.R. §§ 72.100(b) and 72.108. Id. Neither of these two provisions, however, supports the State's assertion that such surveys and plans must be completed and included as part of the License Application for an ISFSI.

The first provision cited by the State, 10 C.F.R. § 72.100(b), states:

> Each site must be evaluated with respect to the effects on the regional environment resulting from construction, operation, and decommissioning for the ISFSI or MRS; in this evaluation both usual and unusual regional and site characteristics must be taken into account.

10 C.F.R. § 72.100(b) (emphasis added). The other provision cited by the State, 10 C.F.R. § 72.108, states:

> The proposed ISFSI or MRS must be evaluated with respect to the potential impact on the environment of the

transportation of spent fuel or high-level radioactive waste within the region.

10 C.F.R. § 72.108 (emphasis added). Taken together, these two provisions require the License Application to include an evaluation of the impact of the facility and related-transportation on the environment in the region of the facility. Neither of these provisions say anything about including the results of detailed site-specific surveys or completed mitigation or prevention plans in the License Application, as the State asserts. The State provides no other regulatory, or any other, basis to indicate that the results of such surveys and plans are required to be completed now and included in the License Application.

Thus, the State in this contention "advocate[s] stricter requirements than those imposed by 10 C.F.R. §§ 72.100(b) and 72.108 and the contention must be rejected as "an impermissible collateral attack on the Commission's rules" and must be rejected. See Applicant's Answer, Section II-B at 5-7.

Additionally, the State does not specifically state why more should be required than is already included in the License Application. The State, in its contentions, has identified no other plant or animal species of concern affected by the proposed ISFS that are not discussed in the Environmental Report, nor has it come forward with any basis to claim that the impacts on those plant and animal species of concern cannot be protected or mitigated as the Applicant has committed to do in the Application. In these

circumstances, the State's contention must also be dismissed for lack of basis. See Applicant's Answer, Section II.C at 11-13.

III. CONCLUSION

For the reasons set above with respect to each of the contentions, the Applicant respectfully submits that Utah Contention Z through DD should denied.

Respectfully submitted,

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Dated: January 6, 1998

535280-2

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22
	)	
(Private Fuel Storage Facility)	)	ASLBP No. 97-732-02-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Supplemental Answer to the State of Utah's Contentions Z to DD "dated January 6 1998 were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by US mail, first class, postage prepaid, this 6th day of January 1998.

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* Adjudicatory File
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