

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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In the Matter of: )  
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Private Fuel Storage, L.L.C., )  
(Independent Spent Fuel Storage )  
Installation) )  
\_\_\_\_\_)

Docket No. 72-22

REPLY OF PETITIONERS CASTLE ROCK LAND & LIVESTOCK, L.C.,  
SKULL VALLEY CO., LTD, AND ENSIGN RANCHES OF UTAH, L.C. TO THE  
RESPONSES OF THE NRC STAFF AND THE APPLICANT

INTRODUCTION

In its Memorandum and Order dated January 5, 1998 (the "Order"), the Licensing Board granted the motion of Petitioners Castle Rock Land & Livestock, L.C., a Utah limited liability company and Skull Valley Co., Ltd., a Utah limited partnership (collectively, "Castle Rock")<sup>1</sup> for leave to submit a reply to NRC Staff's Response to the Contentions Filed By . . . (4) Castle Rock Land and Livestock L.C., *et al.* ("Staff Response") and the Applicant's Answer to Petitioners' Contentions ("PFS Response") to the extent such responses relate to the Castle Rock's Contentions filed on November 21, 1997 (the "Contentions").<sup>2</sup> In addition, the Licensing Board ordered that Castle Rock (i) address the propriety of adopting other intervenor's

<sup>1</sup> Petitioner Ensign Ranches of Utah, L.C. joins with Castle Rock in its responses regarding redrafting of the Contentions to include subcontentions, adoption of other parties' contentions by reference, and all other matters affecting Ensign Ranches of Utah, L.C.

<sup>2</sup> Unless otherwise defined herein, capitalized words in the Reply have the same definitions as in Castle Rock's Contentions filed with the NRC on November 21, 1997.

contentions by reference (ii) address PFS's suggestion for redrafting the contentions into subcontentions, and (iii) classify each Contentions into one of four specified categories.

## DISCUSSION

### I. Response to Certain Specific Requirements of the Order.

#### A. The Adoption by Reference of Other Participant's Contentions.

Castle Rock's incorporation of the contentions of the State of Utah is both permissible under the rules and sensible. Section 2.714(b)(2) requires that each contention "consist of a specific statement of the issue of law or fact to be raised or controverted," and that such statement be supported by (i) a brief explanation of the bases of the contention; (ii) a concise statement of the alleged facts or expert opinion which support the contention, together with references to supporting sources or documents, and (iii) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact, including references to specific portions of the application which a petitioner disputes or believes are incomplete. See 10 C.F.R. § 2.714(b)(2). Section 2.714(b)(2) contains no requirement that an intervenor have personally conceived of, drafted, researched, commissioned, or produced each contention or related evidence. It merely requires that the information be there. Section 2.714(b) certainly does not require that separate intervenors do redundant research and writing, needlessly wasting thousands of dollars having lawyers down the street from each other simultaneously produce almost identical contentions. In fact, in response to a challenge to contentions that seemed to be a word-for-word copy from another intervenor in a prior proceeding, the Commission explained:

We decline the invitation to penalize the alleged lack of originality in framing contentions. . . . Originality is not a pleading requirement. If fatal defects result from

this alleged method of pleading contentions, they can be addressed in specific objections to the discrete contentions.

Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2) 12 NRC 683, 198-NRC LEXIS 4, \*12 (1980). When an intervenor incorporates by reference contentions, explanations, and supporting documents submitted by another intervenor, the Licensing Board, Staff and applicant obtain all of the information they need to ascertain whether a material dispute of fact or law exists between the intervenor and Applicant.<sup>3</sup> Because Castle Rock's incorporation of the State of Utah's Contentions satisfies all of the pleading requirements of 10 C.F.R. § 2.714(b)(2), such contentions should be considered on the merits and admitted.

In addition, permitting Castle Rock to incorporate by reference the State of Utah's contentions will facilitate a thorough and complete exploration of all issues in this Proceeding. As an abutting landowner, resident of the Skull Valley, and private organization, Castle Rock will bring additional evidence, supplemental arguments, and its unique viewpoint to the issues raised in the State of Utah's contentions. In its attempt to evaluate the adequacy of the Application, the Licensing Board only stands to benefit from such additional evidence, arguments and viewpoints. Any potential for duplication or confusion can be solved by orders requiring coordinated discovery.

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<sup>3</sup> Castle Rock could have at the time of filing the Contentions, could now, and upon request from the licensing board will, simply download the State of Utah's contentions, physically incorporate them into Castle Rock's Contentions, attach the State of Utah's exhibits (and possibly an affidavit certifying that one of its lawyers or experts has in fact read all of the relevant information), and file them as Castle Rock's own. Castle Rock believes that, in a proceeding where the pleadings are hundreds of pages in length, avoiding unnecessary duplication of already existing information is the best interest of all.

The caselaw cited by the Staff is inapposite. The Staff cites Consumers Power Co. (Big Rock Point Plant), LBP-80-4, 11 NRC 117, 112 (1980) for the proposition that a contention incorporating others by reference "fails to present a litigable issue." A close reading of Consumers Power Co., however, indicates that the contention at issue in that case redundantly incorporated all of the same intervenor's previous contentions by reference, and thus, "is not a contention in itself." Id. Castle Rock has not inserted a contention redundantly incorporating its twenty-three previous Contentions; rather, it has attempted to conserve the resources of all parties involved by incorporating the State of Utah's contentions by reference—as opposed to—unnecessarily duplicating the State of Utah's arguments and evidence. Castle Rock should be permitted to pursue each of the incorporated contentions.<sup>4</sup>

**B. PFS' Suggestions Regarding Subcontentions.**

Castle Rock does not object in principle to the redrafting of its Contentions to include subcontentions. However, Castle Rock objects to PFS's descriptions or summaries of Castle Rock's Contentions. In PFS's attempt to re-draft the Contentions to include subcontentions, PFS often entirely or partially omits important arguments, theories, or bases. In addition, PFS sometimes summarizes the flow of the argument (necessarily omitting essential information), rather than merely identifying the legal theories or bases that comprise the contention. Several of the Contentions cannot be divided into subcontentions because all of the evidence and

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<sup>4</sup> Castle Rock concedes that its ability to actively pursue, and interest in, the following contentions of the State of Utah in: (i) Contention C (dose limits); (ii) Contention F (training of personnel); (iii) Contention H (inadequate thermal design); (iv) Contention I (lack of procedure for verifying helium); (v) Contention J. (safety components, including canisters and cladding); (vi) Contention L (Geotechnical); (vii) Contention P. (inadequate control of exposure to radiation); (viii) Contention EE (Cask-Pad Stability); and (ix) Contention FF (radiation shielding).

arguments are so interrelated as to preclude outlining. Consistent with its agreement with the concept of subcontentions and objection to the form of subcontention proposed by PFS, Castle Rock hereafter restates each contention to include subcontention, to the extent appropriate, in order to focus discussion on distinct supporting bases and theories. Each subcontention, however, incorporates all relevant text of the Contention and this Reply, and the identification of subcontentions does not preclude Castle Rock from fully pursuing any argument, basis, or set of facts identified in the Contentions or this Reply.

C. Classification into Categories.

In connection with each reply below, Petitioners identify each Contention as either Safety, Environmental, Emergency Planning, or Other.

II. Legal Standards Governing the Admission of Contentions.

Pursuant to 10 C.F.R. § 2.714(b)(1), a petitioner for leave to intervene is required to file a list of the contentions it seeks to have litigated in the proceeding. As explained by the Staff and PFS, section 2.714(b)(2), as amended, requires that each contention "consist of a specific statement of the issue of law or fact to be raised or controverted," and that the following information must be provided in support of the contention:

- (i) A brief explanation of the bases of the contention.
- (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.
- (iii) Sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the

application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report.

10 C.F.R. § 2.714(b)(2).

Although 10 C.F.R. Section 2.714(b)(2) requires the petitioner to come forward with sufficient information to show that a genuine dispute exists on a material issue of law of fact, "it does not shift the ultimate burden of proof from the applicant to the Petitioner." Yankee Atomic Electric Company (Yankee Nuclear Power Station, 43 N.R.C. 235, 1996 NRC LEXIS 32, \*28 (1996). As further explained in Yankee Atomic:

Nor does section 2.714 require a petitioner to prove its case at the contention stage. For factual disputes a petitioner need not proffer facts in "formal affidavit or evidentiary form" sufficient to withstand a summary judgment motion.

Id.; see also Rules of Practice for Domestic Licensing Proceedings, 54 Fed. Reg. 33,168, 33171 (1989)("The revised rule does not shift the ultimate burden of persuasion on the question of whether the permit or license should be issued; it rests with the applicant."). The intervenor's burden of alleging a factual basis for a contention is especially light in situations where the essential information is entirely in the hands of the applicant or Staff. See York Committee for a Safe Environment v. N.R.C., 527 F.2d 812, 815-16 n.12 (D.C. Cir. 1975) ("Since the information necessary . . . will be readily accessible and comprehensible to the license applicant and the Commission staff but not to petitioners, placing the burden of going forward on petitioners appears inappropriate.").

Furthermore, where the applicant has filed incomplete documents or failed to supply necessary information, it "will be sufficient for the intervenor to explain why the application is deficient." 54 Fed. Reg. 33,168, 33170 (1989); 10 C.F.R. § 2.714(b)(2)(iii)(providing that "if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons" is sufficient); Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), 12 N.R.C. 683, 1980 NRC LEXIS 4, \*20-21 (1980)(explaining that it is "normal to allow an intervenor to plead the inadequacy of documents or responses which have not yet been made available to the parties."). In such a case, the Licensing Board should admit the contention, "subject to later refinement and specification when the additional information has been furnished or the relevant documents have been filed." Atomic Edison, 12 N.R.C. 681, 1980 LEXIS, at \*20-21.

### III. Castle Rock's Replies Regarding Its Contentions.

- A. **Contention 1: Absence of NRC Authority (Category: Other)**. The Application is defective because NRC does not have authority to license a large-scale, off-site facility for the long-term storage of spent nuclear fuel such as the proposed PFSF, in that:
1. licensing the proposed PFSF exceeds the authority delegated to NRC by Congress;
  2. licensing the proposed PFSF is manifestly inconsistent with the express language and unambiguous purpose of the NWPA;
  3. licensing the proposed PFSF is not reasonable and consistent with the purposes of the NWPA;
  5. because the July 31, 1997 Notice of Opportunity for Hearing commencing this licensing proceeding interpreted the 10 C.F.R. Part 72 to countenance the Application, such Notice and the regulations it interprets is subject to challenge within the proceeding.

**Reply:**

1. Issues of Law: Castle Rock agrees with the Staff that Contentions 1, 2, 3 and 5 constitute pure issues of law and should be decided absent an evidentiary hearing. Castle Rock's 3-8 page discussion of each of these contention does not represent a complete discussion of all relevant arguments, caselaw, and administrative or legislative history; accordingly, Castle Rock requests that the Licensing Board establish a briefing schedule following the January 27-29, 1998 hearings with respect to such Contentions.

2. Contention 1 is Not an Impermissible Challenge to 10 C.F.R. Part 72. The Staff and PFS's assertion that Contention 1 is an impermissible challenge to the NRC regulations is without merit. Section 2.758(a) generally bars contentions challenging NRC regulations as part of the licensing process. See 10 C.F.R. 2.758(a). It is well established, however, that "to the extent an agency's action 'necessarily raises' the question of whether an earlier action was lawful, review of the earlier action for lawfulness" is not barred. Public Citizen v. Nuclear Regulatory Com'n, 901 F.2d 147, 152 (D.C. Cir. 1990)(quoting Environmental Defense Fund v. EPA, 852 F.2d 316, 1325 (D.C. Cir. 1988)). In Geller v. F.C.C., 610 F.2d 973 (D.C. Cir. 1979), an individual challenged rules promulgated by the Federal Communications Commission ("FCC") years after promulgation on the ground that, since the factual underpinnings for the rule--a consensus agreement designed to facilitate passage of legislation--no longer existed after the relevant legislation had passed, the rules needed to be reexamined. The FCC claimed that such a challenge was jurisdictionally barred. Id. at 977. The Geller Court first pointed out that "unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny

many parties ultimately affect by a rule an opportunity to question its validity.'" Id. at 978 (citation omitted). Then, explaining that "an agency cannot sidestep a reexamination of particular regulation when abnormal circumstances make that course imperative," id. at 979, the court held that the radical change in factual circumstances justified a review of the regulations that would otherwise be barred by jurisdictional barriers. Id. at 979-981; see also Raton Gas Transmission Co. v. F.E.R.C., 852 F.2d 612 (D.C. Cir. 1988)(holding that the release announcing a sharp fee increase could be challenged outside of the normal rulemaking appeal process years after promulgation of the underlying regulations because the sharp increase created a previously non-existent challenge).

With regard to the challenge of a regulation in a context other than a rulemaking proceeding, courts have explained:

Were we to hold in this case that [petitioner's] challenge to the lawfulness of the NRC's action was untimely, [petitioner] could file a petition for rulemaking and then raise its claim of unlawfulness when the Commission denied the petition. Such a requirement would be waste of everyone's time and resources. We believe the law to be that where an agency's reiterates a rule or policy in such a way as to render the rule or policy subject to renewed challenge on any substantive grounds, a coordinate challenge that the rule or policy is contrary to law will not be held untimely . . . .

Public Citizens v. Nuclear Regulatory Com'n, 901 F.2d 147, 152-53 (D.C. Cir. 1990)(emphasis added).

In this case, the July 31, 1997 Notice of Opportunity for Hearing, 62 Fed. Reg. 41,099 (July 31, 1997) (the "Notice") created a new factual situation justifying a challenge to NRC's authority to license a private, off-site 40,000 MTU ISFSI. The Notice indicated that the Commission was considering the Application "under the provision of 10 C.F.R. Part 72. (62 Fed. Reg. 41,099). The Application is for a license to operate an independent, off-site, private

facility storing up to 40,000 MTU of spent nuclear fuel. (Emergency Plan 1.1). Thus, by means of the Notice, the NRC for the first time notified the public that--despite the absence of specific authorization in the AEA and numerous provisions in the NWPA outlining a contrary Congressional intent--NRC was interpreting the provisions of 10 C.F.R. Part 72 to countenance an application for a private, off-site 40,000 MTU storage facility. Like the agencies' actions in Raton and Geller, the NRC's action in publishing the Notice created a novel interpretation and factual situation, that did not previously exist, and thus was not subject to prior challenge. The first opportunity Castle Rock has had to challenge the Notice's interpretation of "ISFSI" and 10 C.F.R. Part 72 before NRC is by means of this licensing proceeding. In order to avoid the "waste of everyone's time and resources" that would be involved in a rule making proceeding or section 2.758(b) petition for waiver, the Licensing Board should consider the issues raised by the Notice as part of this proceeding. Alternatively, the Licensing Board should certify Contentions 1 to the Commission pursuant to 10 C.F.R. § 2.718.<sup>5</sup>

3. NRC Does Not Have Authority to License the an Private, Off-Site, 40,000 MTU ISFSI. Whether or not the AEA could at one time have been interpreted to permit NRC to license a private, off-site, 40,000 MTU spent fuel storage facility under tangentially related provisions in the AEA, Congress's clear expression of its contrary intent in the comprehensive

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<sup>5</sup> Certification to the Commission under section 2.718(i) is appropriate if the question "affects the basic structure of the proceeding in a pervasive or unusual manner" or "threatens the party adversely affected by it with immediate and serious irreparable impact." 10 C.F.R. 2.786(g)(2). Castle Rock is challenging the NRC's authority to license the PFSF as an ISFSI, or even to conduct this proceeding under 10 C.F.R. Part 72 (rather than regulations governing permanent repositories). Such a question clearly affects the structure of the proceeding in a pervasive manner and, if not answered early in the proceeding, affects all parties expending substantial resources on this proceeding with significant, irreparable harm.

scheme for the storage of spent nuclear fuel set out in the NWPA made it clear that such authority does not presently exist. The statutory basis for the regulations purportedly authorizing NRC to license the PFSF is Section 53(a) of the AEA, which authorizes NRC to "issue licenses to transfer . . . possess, own, receive possession or title to . . . spent nuclear material." 42 U.S.C. § 2071. Neither Section 53(a), nor any other statutes cited by the Staff or PFS, expressly authorize NRC to license the storage of spent nuclear fuel. Moreover, no such statutory provisions purport to enumerate federal policy regarding storage of spent nuclear fuel, discuss limitations on NRC's or DOE's ability to store or license storage of spent nuclear fuel, or direct NRC or DOE to take action with respect to storage of spent nuclear fuel. That is because the AEA is not the means by which Congress expressed its will and intent with regard to storage of spent nuclear fuel. In fact, when the AEA was passed in the 1950s, Congress and the nuclear energy industry anticipated that spent nuclear fuel would be reprocessed. See House Report No. 97-491 (1982), reprinted in 1982 U.S.C.C.A.N 3792, 3793-94.

In stark contrast to the silence of the AEA regarding storage or disposal of spent nuclear fuel, the NWPA expressly provides that its purposes include "establish[ing] the Federal responsibility, and a definite Federal policy, for the disposal of such waste and spent fuel . . . ." 42 U.S.C. §10131(b)(emphasis added). The "definite federal policy" regarding disposal of spent nuclear fuel includes, without limitation (1) construction by DOE of a permanent repository capable of storing up to 70,000 MTU of spent nuclear fuel; 42 U.S.C. 10131 et seq., (2) consolidated interim storage in a DOE-operated 15,000 MTU monitored retrievable storage facility; 42 U.S.C. § 10161 et seq, and (3) dispersed interim storage through the effective use

of available or additional storage capacity on the site of nuclear power reactors and through DOE-sponsored off-site storage programs. 42 U.S.C. 10151 et seq.

Moreover, contrary to the Staff's assertion that the NWPA "does not address . . . away-from-reactor ISFSIs," the NWPA expressly provides that "nothing in this chapter<sup>6</sup> shall be construed to . . . authorize the private use . . . of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government." 42 U.S.C. § 10155(h). The Staff correctly notes that the interim storage section of the NWPA does not list private, off-site storage among the numerous storage options it articulates. See Staff Response, at 10-11; 42 U.S.C. § 101559(a). That is precisely Castle Rock's point. The NWPA is Congress's comprehensive and exclusive program for the storage of spent nuclear fuel. As part of this comprehensive program, numerous provisions facilitate and emphasize the importance of efficient on-site storage; other provisions provide for a DOE-sponsored 15,000 MTU monitored retrievable storage facility and 1,900 MTU of DOE-sponsored off-site or cooperative storage. This comprehensive solution to the nation's nuclear waste storage problem does not include private, off-site storage. Rather, as made clear by the only reference to facilities "located away from the site of any civilian nuclear power reactor and not owned by the Federal Government" is that "nothing in this chapter is shall be construed to . . . authorize" them<sup>7</sup>. See also 42 U.S.C. 10163(B)(2)(requiring the MRS Commission to compare the need

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<sup>6</sup> The use of the word "chapter" as opposed to "part" or "section", as used in other provision of the NWPA, makes it clear that the limitations of 42 U.S.C. § 10155(h) apply to the entire NWPA.

<sup>7</sup> PFS appears to argue that 42 U.S.C. § 10155(h) does not exist, presumably because NRC rescinded related regulations. PFS's fervent hoping to the contrary, an agency does not repeal statutory provisions restricting its authority by failing to comply with them and then rescinding

for an MRS to "the alternative of at-reactor storage of spent nuclear fuel prior to disposal of such fuel in a repository," but not mentioning away-from-reactor storage as an alternative).

An agency "cannot rely on its general authority . . . when a specific statutory directive defines the relevant function of [the agency] in a particular area." American Petroleum Institute v. EPA, 52 F.3d 691, 694 (D.C. Cir. 1997). Accordingly, NRC may not rely on the AEA to license an private, off-site ISFSI when the statute defining its function relative to storage of spent nuclear fuel—the NWPA—denies its such authority. See Western National Mutual Insurance Company v. Commissioner, 65 F.3d 90, 94 (8th Cir. 1995)(a regulation may not be sustained "when that regulation is fundamentally at odds with the manifest congressional design"); Webb v. Hodel, 878 F.2d 1252, 1255 (10th Cir. 1989) (regulations are "entitled to no deference if they are inconsistent with congressional intent" or "if there are compelling indications that the regulations are wrong").

Furthermore, the Staff and PFS completely ignore Congress's desire to ensure that a large capacity, centralized storage facility would be constructed only if strict safety, environmental and political prerequisites were satisfied. In the NWPA, Congress restricted DOE to providing "not more than 1,900 metric tons of capacity" through the various DOE-sponsored or cooperative methods outlined in 42 U.S.C. § 10155. The monitored retrievable storage facility authorized by Part C of the NWPA was to hold not more than 15,000 MTU of spent nuclear fuel, 42 U.S.C. § 10168(d)(4). Even with that comparatively small capacity, Congress made sure that such a facility could not be constructed absent, among other things (1) express

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related regulations. Congress has not passed any law repealing or superseding section 10155(h), so it remains the law.

Congressional approval; (42 U.S.C. § 10161(c)(2)), (2) mitigation payments to affected local government units; (42 U.S.C. §§ 10161(f)(2), 10167); (3) state and Indian tribe participation, including the right to disapprove, subject only to Congressional veto (42 U.S.C. §§ 10166(a), 10161(h)), and (4) appointment of a commission to evaluate the need for and effects of such a large centralized facility. (42 U.S.C. § 10163). Even the proposed permanent repository authorized in Part A -- the construction and licensing of which is subject to numerous approvals outlined in Castle Rock's Contention 1 -- may not exceed 70,000 MTU of capacity. (42 U.S.C. § 10134(d)). Thus, even if it could be argued that Congress did not bar private, off-site ISFSIs per se when it passed the NWPA, Congress certainly did not place the extensive political, safety, and environmental restrictions on the 15,000 MTU monitored retrievable storage facility and yet somehow give NRC permission to license a private 40,000 MTU facility--almost 3 times the size of the MRS--without any such restrictions or prerequisites.

The Staff's reliance on the Ninth Circuit Court of Appeal's decision in State of Idaho v. U.S. Dep't of Energy, 1991 U.S. App. LEXIS 29421 (December 13, 1991) is misplaced. In State of Idaho, DOE had entered into a contract in 1965, amended in 1989, under which a private entity agreed to construct an experimental nuclear plant. DOE, in turn, agreed to purchase spent nuclear fuel from the experimental plant upon its delivery to a storage facility located in Idaho. In 1989, the experimental plant closed down and, over the objections of the governor of Idaho, the DOE agreed to receive the spent fuel. The State of Idaho and intervening Indian tribes argued that the NWPA, especially its transportation requirements, prevented DOE from transporting such spent fuel to Idaho. Holding for DOE, the court determined that "[r]ead in light of the statute's historical context and the accompanying legislative history, . . . [the

NWPA] does not apply to storage agreements in existence before its enactment." Id. at \*9 (emphasis added). This was, in part, because the purchase and receipt of spent fuel by DOE from that specific experimental plant had been expressly authorized in Public Law 89-32, at p. 122 (June 2, 1965). Id. at \*12. Unlike State of Idaho, this case does not involve the question of whether the NWPA prohibits the federal government from fulfilling its obligations under a contract entered into 17 years before the enactment of the NWPA and entered into pursuant to Congress's express authorization. Moreover, the NWPA contemplates use of off-site storage facilities "owned by the Federal Government on January 3, 1983," like the facility in State of Idaho, 42 U.S.C. § 10155(h). The NWPA does not in any manner contemplate--and in fact provides that it "nothing . . . shall be construed to . . . authorize"--a private, off-site storage facility.

The Staff's discussion of the history and context of the NWPA is similarly unpersuasive. First, the Staff relies extensively on statement of NRC's own Director of Operations and a single representative. "The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." Chrysler corp. v. Brown, 441 U.S. 281, 311 (1979); see also Weinberger v. Rossi, 456 U.S. 25, 35 (1982)("One isolated remark by a single [congressman] . . . is insufficient to establish the kind of affirmative congressional expression necessary to evidence an intent . . ."). To the extent the remarks of legislators or witnesses at committee meetings are relevant, the remarks relevant to the bills leading up to the NWPA reveal only that the question private, off-site storage was hotly contested. See, e.g., Statement of U.S. Rep. Butler Derrick Before the Subcommittee on Energy and the Environment Committee on Interior and Insular Affairs, 97th Cong., 1st Sess., on H.R. 1993, H.R. 2800, H.R. 2840, H.R. 2888,

H.R. 3809 (1981) 315, 318 ("with regard to interim storage at spent nuclear fuel in away from reactor (AFR) storage pool, I remained opposed . . ."); Testimony of David Berrick, Environmental Policy Center, *id.*, 334, 337 (acknowledging a hot dispute about away from reactor storage).

Even were the Staff quoting from reports approved by a whole committee--rather than the comments of one legislator and NRC's own representative--such quotes would shed little light on Congressional intent. As explained by the Ninth Circuit Court of Appeals:

The legislative history suffers from the usual infirmity, that it was not passed by both houses of Congress and signed into law by the President. For that reason, it is not the law. The staff person who wrote the House committee's legislative history might have represented accurately what all the House committee members meant to say in the bill but did not . . . . Alternatively, the staff person might have been assigned to write what some committee members wanted in the bill but did not get, or to throw a bone to some pro-privacy lobbying whose preferred language was rejected by the House committee . . . . Legislative history need not be written with the same care, or scrutinized by those skeptical of the statute with the same care as statutory language. There is no way for a House or Senate member outside the relevant committee to vote against legislative history.

*Puerta v. United States*, 121 F.3d 1338, 1344 (9th Cir. 1997). In this case, the statute setting forth Congress's comprehensive, "definite federal policy" regarding storage of spent nuclear fuel expressly provides that "nothing in this chapter is shall be construed to . . . authorize" any but federally-sponsored or on-site storage of spent nuclear fuel; accordingly, a few isolated comments from advocates of the non-prevailing position can hardly be considered evidence of congressional intent.

Castle Rock's argument that Congress intended to withhold authority from NRC to authorize private, off-site storage in the NWPA is strengthened, not weakened, by the amendment history recited by the Staff. The Staff explains that :

Earlier versions of the bill had, in fact, required reactor operators and owners seeking to enter into storage contracts with DOE to first pursue options for non-federal storage away from the site of a nuclear reactor. . . . [cite] (utilities would be permitted to enter into contracts with DOE if they are pursuing license alternatives, including the "purchase, lease, or other acquisition of any non-Federal storage facility located away from the site of any nuclear power reactor."). The final bill however, did not contain such language.

Staff Response, at 12. As the Ninth Circuit's discussion in Puerta suggested was possible, the view represented by the Staff's legislative history is the viewpoint not enacted into law. Certain groups wanted the NWPA to authorize and require utilities to pursue private, off-site storage alternatives. As enacted into law by the entirety of Congress and the President, however, the NWPA contained the exact opposite language--i.e. "nothing in this chapter is shall be construed to . . . authorize" private, off-site storage. Consistent with such language, and the overall intent of the NWPA, NRC does not have authority to authorize a private, off-site 40,000 MTU storage facility.

B. **Contention 2: Non-Compliance with Regulations (Category - Safety, Environmental, Emergence Planning, Other)**. PFS's Application is defective because it seeks a license for an ISFSI pursuant to 10 C.F.R. Part 72. However, the proposed storage installation is not an ISFSI and is otherwise not licensable under 10 C.F.R. Part 72 because:

1. In order to harmonize NRC regulations with the NWPA and AEA, the regulation defining ISFSI must be interpreted to exclude the proposed PFSF;
2. NRC regulations must be construed to require PFS to demonstrate maximization of the use of existing storage capability at reactor sites;
3. NRC regulations must be construed to require PFS to demonstrate that DOE has exhausted all means for providing off-site storage capacity;
4. [Castle Rock withdraws its Fourth Basis for Contention 2].

**Reply.**

1. The First Basis is Not a Challenge to 10 C.F.R. Part 72: Contrary to the assumption of the Staff and PFS, Castle Rock is not attacking the regulations authorizing ISFSIs; rather, Castle Rock seeks a determination that the PFSF is not an ISFSI. ISFSI is defined to mean "a complex designed and constructed for the interim storage of spent nuclear fuel and other radioactive materials associated with spent fuel storage." 10 C.F.R. § 72.3. This definition neither specifically includes nor excludes private, off-site 40,000 MTU facilities. As discussed in Contention 1, however, NRC does not have the authority to license a private, off-site 40,000 MTU storage facility. A regulation may not be sustained "when that regulation is fundamentally at odds with the manifest congressional design." Western National Mutual Insurance Company v. Commissioner, 65 F.3d 90, 94 (8th Cir. 1995). Moreover, a "regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements." Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1414 (10th Cir. 1984)(citation omitted).<sup>8</sup> Because the definition of ISFSI provided in the regulation does not by its terms include or exclude a private, off-site 40,000 MTU facility, Castle Rock's request for a determination that the definition of ISFSI excludes the PFSF is not an attack on the

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<sup>8</sup> Both the Staff and PFS try to argue that Emery Mining does not apply because, they assert, 10 C.F.R. Part 72 implements the AEA, not the NWP. Their assertion--that NRC can interpret a regulation so as to clearly conflict with the NWP, as long as such interpretation is consistent with the statute the regulation purportedly implements--is preposterous. A regulation must be consistent with congressional intent, as expressed in all governing and relevant statutes. See Webb v. Hodel, 878 F.2d 1252, 1255 (10th Cir. 1989) (regulations are "entitled to no deference if they are inconsistent with congressional intent" or "if there are compelling indications that the regulations are wrong"). In Addition, it is worth noting that the "authority notes applicable to all of 10 C.F.R. Part 72." (i.e. including section 72.3) cites not only sections of the AEA, but also 42 U.S.C. §§ 10151, 10152, 10153, 10155, 10157, 10162, 10168, 10162(b), 10168(c), and 10154--all of which are sections are part of the NWP.

regulation; it is merely a request that, in selecting among alternative interpretations of ISFSI, the Licensing Board select the definition that is compatible with the NWPA.

2. The Second and Third Bases Are Not a Challenge to 10 C.F.R. Part 72:

Castle Rock does not attack 10 C.F.R. Part 72 in its second and third bases. Castle Rock merely argues that the Application is deficient because, in addition to the aspects in which it fails to comply with 10 C.F.R. Part 72, the Application does not comply with certain requirements of the NWPA--specifically that an applicant demonstrate exhaustion of storage capacity at each current on-site storage facility and exhaustion of DOE's obligations to provide 1,900 MTU of storage capacity for facilities lacking space. Because such Contentions merely seek to have the regulations construed to reflect statutory requirements, any arguments deeming them to be impermissible attacks on the regulations or structure of the proceedings are without merit.

3. Incorporation of Permissible Challenge Argument. To the extent any parts of Contention 2 are interpreted to be attacks on the regulations or structure of these proceedings, Castle Rock incorporates herein its Reply #2 to Contention 1, regarding the permissibility of a challenge to the regulations in this proceeding and the importance of the Licensing Board reviewing such challenges on the merits or certifying them to the Commission.

C. Contention 3: Conflict with DOE Duties and Prerogatives (Category - Safety, Environmental, Emergency Planning, Other). The Application must be denied because the proposed PFSF interferes with DOE duties and prerogatives under the NWPA:

1. to encourage and expedite the effective use of available storage, and additional storage, at the site of each civilian nuclear power reactor by, among other means, encouraging optimization of existing capacity, cooperating in the development of new technology, and ensuring that spent fuel is not removed from the site of power plants with adequate storage capacity;

2. to provide not more than 1,900 MTU of capacity for the storage of spent nuclear fuel if on-site storage space is inadequate;
3. to complete a detailed study of the need for and feasibility of, and submit to Congress a proposal for, the construction of one or more monitored retrievable storage facilities for high-level radioactive wastage and spent nuclear fuel; and
4. beginning not later than January 31, 1998, to dispose of the high-level radioactive waste or spent nuclear fuel subject to certain statutorily required contracts in a safe, permanent repository.

**Reply:**

As outlined in Castle Rock's reply to Contention 2, which legal arguments are incorporated herein by reference, Castle Rock does not attack 10 C.F.R. Part 72 or the licensing process. Castle Rock merely argues that the Application is deficient because, in addition to the aspects in which it fails to comply with 10 C.F.R. Part 72, it conflicts with enumerated statutory duties and prerogatives of DOE. Because Contention 3 merely seeks to have the regulations construed to reflect, or not conflict with, all statutory requirements, the Staff's and PFS's arguments that Contention 3 should be rejected as an attack on the regulations or structure of the proceedings are without merit.

To the extent any parts of Contention 3 are interpreted to be attacks on the regulations or structure of these proceedings, Castle Rock incorporates herein its Reply #2 to Contention 1, regarding the permissibility of a challenge to the regulations in this proceeding and the importance of the Licensing Board reviewing such challenges on the merits or certifying them to the Commission.

- D. **Contention 4: Attempts to Evade the Requirements of the NWPA (Category - Other)**. The status of the Application suggests that DOE has either tacitly or

directly agreed with PFS and its member utilities to allow the Application to proceed in an attempt to evade the statutory mandates of the NWPA.<sup>9</sup>

The Staff's and PFS's claim that Castle Rock has not submitted sufficient evidence in support of Contention 4 is without merit. Castle Rock described DOE's numerous responsibilities--including without limitation the provision of 1,900 MTU of additional storage capacity, the proposal of a 15,000 MTU monitored retrievable storage facility, the assumption of ownership of spent nuclear fuel subject to certain contracts, and the evaluation and construction of a permanent repository--each of which DOE has failed, or will fail, to timely execute. The proposed PFSF encroaches on the DOE's jurisdiction with respect to spent fuel subject to such obligations, yet DOE has not intervened in these licensing proceedings to prevent PFS from expropriating such responsibilities. The proposed PFSF could also divert attention from the negative impacts of DOE's failure to execute many of its duties under the NWPA. An improper agreement can be inferred from such circumstantial evidence. See United States v. Wood, 879 F.2d 927, 938 (D.C. Cir. 1989); United States v. Treadwell, 760 F.2d 327, 333 (D.C. Cir. 1985) (same).

PFS's alleged participation in the lawsuit against DOE only strengthens Castle Rock's evidence. PFS explains in its response that the absence of any improper agreement with the DOE can be inferred from the fact that "most of the utilities who have formed and owned PFS" have filed suit against DOE and are insistent that DOE enforce its obligations. (PFS Response, at 343). Of course, the Application contains no information about the identities of the members

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<sup>9</sup> This Contention is not appropriate for division into subcontentions because all arguments, facts, citations, descriptions, etc. evidence support the same basis--i.e. an apparent improper agreement between DOE and PFS.

of PFS, so Castle Rock is unable to verify their participation in the lawsuit. But, assuming the constituent entities of PFS are participants in the lawsuit against DOE, their status as plaintiffs demanding that DOE begin receiving waste as soon as possible creates incentive for DOE to support--despite its statutory obligations--any means of security space for the storage of spent nuclear fuel. Castle Rock has met its evidentiary burden and Contention 4 should be admitted.

To the extent any parts of Contention 4 are interpreted to be attacks on the regulations or structure of these proceedings, Castle Rock incorporates herein its Reply #2 to Contention 1, regarding the permissibility a challenge to the regulations in this proceedings, and the importance of the Licensing Board reviewing the challenge on the merits or certifying it to the Commission.

E. **Contention 5: Application For Permanent Repository (Category -- Safety, Environmental, Emergence Planning, Other)**. The proposed PFSF is properly characterized as a de facto permanent repository, and the Application fails to comply with the licensing requirements for a permanent repository in that:

1. no repository or other storage facilities capable of absorbing the 40,000 MTU of spent fuel to be stored at the PFSF exist, or likely will exist at the time PFS proposed to decommission the PFSF; the PFSF will function as a de facto permanent repository and must be licensed as such; the Application is defective because it does not meet the requirements of a permanent repository.
2. even if a permanent repository is operational at the time the PFSF is proposed to be decommissioned, such repository will not be able to absorb 40,000 MTU at once or at a rate that will permit decommissioning of the PFSF; the PFSF will function as a de facto permanent repository and must be licensed as such; the Application is defective because it does not meet the requirements of a permanent repository.

**Reply:**

1. **Contention 5 Does Not Challenge 10 C.F.R. Part 72.**

Contrary to the Staff's argument, Contention 5 does not challenge the NRC's right to license ISFSIs or the specific requirements of 10 C.F.R. Part 72. Rather, Contention 5 challenges the Application's assertion that the proposed PFSF is an ISFSI which can be licensed under 10 C.F.R. Part 72. Castle Rock describes facts in Contention 5 evidencing that, if constructed, the PFSF will store spent nuclear fuel indefinitely into the future. Because ISFSI is defined to mean a complex "for the interim storage of spent nuclear fuel," (10 C.F.R. § 72.3), the PFSF will not, as the Application asserts, be an "ISFSI." Rather, it will be a permanent storage facility, and as such, must meet the requirements for a permanent geological repository identified in Part A of the NWPA and in relevant regulations. The Application and PFSF do not meet the requirements for a permanent repository, and therefore, the Application must be rejected.

2. Contention 5 is Not an Impermissible Challenge to the Waste Confidence Decision.

Contrary to the Staff's and PFS's arguments, Contention 5 does not impermissibly challenge NRC's determinations in 10 C.F.R. § 51.23 or the so-called Waste Confidence decision<sup>10</sup> (collectively the "Waste Confidence Decision"). (See Review and Final Revision of

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<sup>10</sup> The substance of the Waste Confidence Decision has been incorporated into 10 C.F.R. § 51.23, which provides:

The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the license for operation . . . of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations. Further, the Commission believes there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor to dispose of the commercial high-level radioactive waste and spent fuel originating in reactors and generated up to that time.

Waste Confidence Decision, 55 Fed. Reg. 38,474 (September 18, 1990)(the "1990 Release)).

First, Contention 5 does not challenge the determination "that at least one mined geologic repository will be available within the first quarter of the twenty-first century." (the "Repository Determination") (See 10 C.F.R. § 51.23(a)). In Contention 5, Castle Rock points out that "even if a permanent repository were constructed . . . it may not be able to absorb the full 40,000 MTU proposed to be stored at the PFSF." Consistent with such determination, it is estimated that the proposed permanent repository will be operational in year 2015, or as late as 2023. GAO/T-RCED-93-58, Yucca Mountain Project Management and Funding Issues, statement of Jim Wells (1993). A queue has been established for the first ten years of repository operation, see DOE/RW-1457, Department of Energy Annual Capacity Report (OCRWM: March 1995), attached hereto as Exhibit 1. Once the repository is up and running, it is expected to receive additional spent fuel at the pace of only 900 MTU per year. Id. at 4. Thus, even assuming that the permanent repository were constructed in 2015 and received only fuel from the PFSF, it would be year 2059 (44 years at 900 MTU) before the repository could receive all of the fuel stored at the proposed PFSF. If we factor in the existence of a queue for the first ten years of operation and the likelihood that fuel from numerous sources will compete for the repository's limited to 70,000 MTU of capacity, it becomes clear that the proposed PFSF will of necessity

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Accordingly, . . . within the scope of the generic determination in paragraph (a) of this section no discussion of any environmental impact of spent fuel storage . . . in independent spent fuel storage installations (ISFSI) for the period following the term of the . . . initial ISFSI license or amendment for which application is made, is required in any environmental report, environmental impact statement, environmental assessment or other analysis prepared . . . in connection with the issuance of an initial license for storage of spent fuel at an ISFSI, or any amendment thereto.

10 C.F.R. §51.23

continue storing spent nuclear fuel well beyond a 20, or even a 40 year licensing term-- indefinitely into the future. Accordingly, even if the Depository Determination remains unchallenged, the PFSF will of necessity store spent nuclear fuel indefinitely into the future, and therefore, must be licensed under regulations and statutes governing permanent repositories.

3. The Depository Determination Must Be Questioned in this Proceeding.

The Depository Determination must, and may, be questioned as part of the licensing proceeding. The Commission has stated its intent to review the Waste Confidence Decision whenever significant or unexpected events occur. As explained in NRC's Review and Final Revision of Waste Confidence Decision, 55 Fed. Reg. 38474 (September 18, 1990):

This would not, however, disturb the Commission's original commitment to review its Decision whenever significant and pertinent unexpected events occur. The Commission anticipates that such events as a major shift in national policy, a major unexpected institutional development, and/or new technical information might cause the Commission to consider reevaluating its Waste Confidence Findings . . . .

Although 10 C.F.R. Section 2.758(a) generally bars contentions challenging NRC regulations or generic determinations as part of the licensing process, a combination of numerous events-- including NRC's issuance of the Notice, unexpected discoveries in site characterization activities at Yucca Mountain, and a shift in national policy--require consideration of the Depository Determination as part of this proceeding.

As discussed in Castle Rock's reply #2 with respect to Contention 1, which argument is incorporated herein by reference, "to the extent an agency's action 'necessarily raises' the question of whether an earlier action was lawful, review of the earlier action for lawfulness is not time-barred." Public Citizen v. Nuclear Regulatory Com'n, 901 F.2d 147, 152 (D.C. Cir. 1990)(quoting Environmental Defense Fund v. EPA, 852 F.2d 316, 1325 (D.C. Cir. 1988).

Moreover, when certain facts have rendered a generic determination subject to new challenge, forcing a petitioner to challenge the lawfulness of a rule through a separate proceeding--when an appropriate forum is at hand--" would be waste of everyone's time and resources." Public Citizens, 901 F.2d at 152-53 (D.C. Cir. 1990).

Numerous unexpected and significant events have happened since 1990 that merit re-review of the Depository Determination. At this time, the only site DOE can legally consider for a permanent repository is Yucca Mountain. See 42 U.S.C. § 10133. In 1992, a 5.6 magnitude earthquake 8 miles from Yucca Mountain site affected the site enough to cause \$1 million worth of damages at the DOE field office, raising serious questions about the geologic stability of the site. See Earl Lane, The Leftovers of a Nuclear Age, Newsday, August 4, 1997, at A07, a copy of which is attached hereto as Exhibit 2. In addition, recent discoveries of water inside Yucca Mountain contaminated from atomic testing demonstrate that water will penetrate into the repository much faster than expected. Earl Lane, The Leftovers of a Nuclear Age, Newsday, August 3, 1997, at A04, a copy of which is attached hereto as Exhibit 3; see also Keith Rogers, Plutonium Found In Water, Las Vegas Review-Journal, September 11, 1997, at 1A. In addition, the Nuclear Waste Policy Act of 1997 (the "1997 NWPA"), Senate Bill 107, which passed the Senate by a wide margin and is expected to do the same in the House, authorizes construction of a large, government sponsored, centralized storage facility by 2003. See 105th Cong., 1st Sess. S. Bill 104, Version 4, Section 205, excerpts of which are attached hereto as Exhibit 4; 1997 LEXIS, Bill Tracking S. 104, attached hereto as Exhibit 5; Earl Lane, The Leftovers of a Nuclear Age, Newsday, August 3, 1997, at A04. This facility will certainly displace the funding and perceived need for a permanent geological repository. In addition, the

governor of Nevada, who has a right to veto the proposed repository, has publicly announced his opposition to a permanent repository in the State of Nevada. See 42 U.S.C. 10135(c); Kenneth J. Garcia et al., Fighting for Lethal Leftovers, San Francisco Chronicle, April 13, 1995, at A1. Furthermore, DOE has repeatedly failed to meet mandatory deadlines with respect to the storage of spent nuclear fuel, and is about to fail to fulfill its statutory obligation to take possession of spent nuclear fuel subject to NWPAs-mandated contracts. See 42 U.S.C. § 10222(a)(5)(B); Northern States Power Co. v. Dep't of Energy, 1997 WL 705072 (D.C. Cir.) (November 14, 1997). In fact, in Northern States Power Co., DOE admitted that it was "uncertain" as to when it could begin spent fuel acceptance. Id. at \*3.

In light of the significant and unexpected events casting doubt on the Depository Determination since the affirmation of the Waste Confidence Decision in 1990, NRC must fulfill its commitment to reconsider the decision. The PFSF will be a de facto permanent repository and must be recognized and licensed as such. In order to avoid unnecessary parallel proceedings, the Licensing Board should re-consider the Depository Determination as part of this proceeding and, after determining that the PFSF is a de facto permanent repository, require that it comply with the relevant requirements. Alternatively, the Licensing Board should certify Contention 5 to the Commission pursuant to 10 C.F.R. § 2.718.

4. The Impact Analysis Limitations Must Also Be Reviewed in this Proceeding.

The limitations on impact analysis in 10 C.F.R. § 51.23(b) must be reviewed or waived for this proceeding. Section 51.23(b) provides, in relevant part:

Accordingly, . . . within the scope of the generic determination in paragraph (a) of this section no discussion of any environmental impact of spent fuel storage . . . in

independent spent fuel storage installations (ISFSI) for the period following the term of the . . . initial ISFSI license or amendment for which application is made, is required in any environmental report, environmental impact statement, environmental assessment or other analysis prepared . . . in connection with the issuance of an initial license for storage of spent fuel at an ISFSI, or any amendment thereto.

10 C.F.R. § 51.23(b) (the "Impact Analysis Restrictions").

As discussed above, it is estimated that the proposed permanent repository, if constructed, will be operational in year 2015, or as late as 2023. GAO/T-RCED-93-58, Yucca Mountain Project Management and Funding Issues, statement of Jim Wells (1993). A queue has been established for the first ten years of repository operation. See DOE/RW-1457, Department of Energy Annual Capacity Report (OCRWM: March 1995) ("Capacity Report"), attached hereto as Exhibit 1. Once the repository is operating, it is projected to receive no more than 900 MTU of spent nuclear fuel per year. Capacity Report, at 4. Thus, even assuming that the permanent repository were constructed in 2015 and received only fuel from the PFSF, it would be year 2059 (44 years at 900 MTU) before the repository could receive all of the fuel stored at the proposed PFSF. If one factors in the existence of a queue for the first ten years and the likelihood that fuel from numerous sources will compete for the repository's 70,000 MTU of capacity, it becomes clear that the repository will not be able to absorb all of the fuel stored at the proposed PFSF until at least the last quarter of the twenty-first century--if at all.

This inability of the repository to timely absorb all spent fuel at the PFS will, among other things, increase decommissioning costs and create an extended (and possibly heightened) impact on the environment. Moreover, continued operation of the PFSF well beyond the planned date of decommission will have significant safety ramifications. PFS's proposed budget, service contracts (to the extent discernible from PFS's brief summary), and decommissioning

plan do not provide funds for a super-extended operating or decommissioning period. A shortfall of funds could lead to shortcuts and related safety problems. (See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), 30 N.R.C. 121, 1989 NRC LEXIS 39 \*29-30 (1989) (acknowledging a nexus between financing shortages and safety problems). Also, the possibility of human error, cask degradation, and external events affecting the PFSF increase as decommissioning is delayed.

Facts demonstrating that the PFSF cannot dispose of the spent fuel it is storing and complete decommissioning until at least 2059, probably much later, require a review and waiver of the Impact Analysis Restrictions in this proceeding. Even if it is assumed that a permanent repository will be timely constructed, the above-described facts conclusively negate any generic assumption that PFS will be able to remove all fuel from the facility and decommission it at the end of an initial, or even a second, twenty year licensing period. The possibility of an application for a 40,000 MTU private storage facility was not considered by the Commission when it issued the Impact Analysis Restrictions and raises serious safety concerns. Accordingly, the Impact Analysis Restrictions should be reviewed or waived in this proceeding, to the extent either permits PFS to limit its environmental impact analysis to fewer than seventy-five years, permits PFS to assume that decommissioning will occur before year 2075, or permits PFS to assume that all fuel stored in the proposed PFSF will timely be received by a permanent repository.

- F. **Contention 6: Emergency Planning and Safety Analysis Deficiencies (Category - Emergency and Safety)**. The Application does not provide for reasonable assurance that the public health and safety will be adequately protected in the event of an emergency affecting the PFSF, in that:

1. the EP and SAR fail to consider the effect of fires or similar events in the Skull Valley that could force evacuation of the PFSF or cause degradation of fuel cladding, canisters, and storage cask concrete;
2. the EP and SAR fail to address the availability of water to defend the PFSF from such a fire, measures for ensuring groundwater is not contaminated by run-off, and the possible need to quarantine the PFSF;
3. the EP and SAR fail to consider the effects of an emergency at a nearby facility requiring extended evacuation of the PFSF, compromising the safety of PFSF personnel or compromising the PFSF's proposed security and emergency response measures; and
4. the EP and SAR fail to consider the effect of the 2002 Winter Olympic Games in Salt Lake City.

**Reply:**

1. Fires and Toxic Releases. The EP and SAR fail to consider the effect of a fire or series of fires in the Skull Valley requiring an extended evacuation of the PFSF. In Contention 6, Castle Rock submits evidence of a history of numerous fires in the area surrounding the proposed PFSF, including a fire of such duration that some residents on the Goshute Reservation and a nearby town had to be evacuated. See Photographic excerpt from the Utah Statewide Fire Assessment Fire History (1986-1996), attached to the Contentions as Exhibit A; ER Figure 2.2-2; Larry D. Hatfield, Wildfires Dances Across Sierra Lightning, San Francisco Examiner, July 9, 1996, at A2, a copy of which is attached hereto as Exhibit 6; Fires Gain Upper Hand on Lightning-Sparked Blazes in Utah, Las Vegas Review-Journal, July 11, 1996, at 5B, a copy of which is attached hereto as Exhibit 7. In addition, leaders of the Skull Valley Band of Goshute Indians have claimed that the 1968 release of nerve gas from the Tooele Army Depot that killed over 6,000 sheep (owned by Castle Rock's predecessors) also affected, and even killed, residents of the Goshute Reservation. See Jim Woolf, Nerve Agent Near Dead

Utah Sheep in '68, Salt Lake Tribune, January 1, 1998, at A1, a copy of which is attached hereto as Exhibit 8. Contrary to the implications of PFS's arguments, the regulations do not require analysis of potential emergency situations only if intervenors can prove that the identical events happened in the past---which ironically is the case here. Rather, the Application must examine activities that "might endanger the proposed ISFSI" or "could affect the safe operation of the ISFSI." See 10 CFR §§ 72.90 & 72.94. Castle Rock has introduced evidence that fires and a release of nerve gas have affected the region in which the proposed PFSF will be located and described the probable effects of such events--including the need for an evacuation, possible degradation as a result of smoke and heat, a shortage of water, or contamination as a result of fire fighting efforts.

Although the Application does address fires, it does not acknowledge the probability of an extended brush fire and unrealistically assumes that any fire would be extinguished in 15-30 minutes. See EP at 2-12 to 16; SAR § 8.2.5. Brush fires and releases of toxic agents are credible accident scenarios, and the Applications fails to adequately deal with the likely consequences of such events. See 54 Fed. Reg. 33,168, 33170 (1989) (where an applicant has filed incomplete documents or failed to supply necessary information, it "will be sufficient for the intervenor to explain why the application is deficient"). Accordingly, the Application is defective, and Contention 6 should be admitted.

2. An Emergency at a Nearby Facility. The EP and SAR fail to consider the effect of an emergency at a nearby facility requiring extended evacuation of the PFSF, compromising the safety of PFSF personnel, or compromising the PFSF's proposed security and emergency response measures. While the Application cursorily mentions land uses within a five

mile radius of the proposed ISFSI (ER § 2.2.2, SAR §§ 2.1.4 & 2.2), it fails to adequately address the requirements of NUREG-1567, which states:

The locations of nearby nuclear, industrial, transportation, and military installations should be indicated on a map which clearly shows their distance and relationship to the ISFSI. All facilities within an 8-km (5-mi) radius should be included, as well as facilities at greater distances, as appropriate to their significance. For each facility, a description of the products or materials produced, stored or transported should be provided, along with a discussion of potential hazards to the ISFSI from activities or materials at the facilities.

NUREG-1567, *Standard Review Plan for Spent Fuel Dry Storage Facilities (Draft)*, § 2.4.2, U.S. Nuclear Regulatory Commission, October 1966 (emphasis added).

The eight facilities described in Contention 6 clearly pose a danger to the PFSF, and all information required by NUREG-1567 should be provided with respect to each. PFS claims that there is no evidence the proposed PFSF could be affected or endangered by the eight enumerated facilities. In Contention 6, Castle Rock described several accidents that affected the Reservation or nearby lands, including a DOE experiment at Dugway Proving Grounds that spread nerve-gas over a portion of the Skull Valley and killed 6,400 sheep--and also apparently hastened the deaths of several people living on the Goshute Reservation. See Jim Woolf, Nerve Agent Near Dead Utah Sheep in '68, Salt Lake Tribune, January 1, 1998, at A1, a copy of which is attached hereto as Exhibit 8. In addition, just within the last few months the following relevant events have occurred: (1) a cruise missile at Dugway Proving Ground went astray and crashed into a trailer near the Goshute Reservation; see John Heilprin and Lee Siegel, Missile Take Wrong Turn at Dugway, Salt Lake Tribune, December 11, 1997, at A1, a copy of which is attached hereto as Exhibit 9; (2) there have been two separate crashes of F-16 fighter jets in the desert surrounding the Goshute Reservation; see John Heilprin and Greg Burton, Another F-16 Crashes

in West Desert, Salt Lake Tribune, January 9, 1998, at B-1, a copy of which is attached hereto as Exhibit 10, (3) the Envirocare Low-Level Waste Facility was cited for holding excess radioactive material; See Jim Woolf, Envirocare Fined for Excess Radiation, Salt Lake Tribune, December 11, 1997, a copy of which is attached hereto as Exhibit 11; and (4) the Tooele Army Depot Chemical Weapons Incinerator was issued 25 citations for violations of state hazardous waste rules. See Tooele Cited for HazWaste Violations, Greenwire, November 20, 1997, a copy of which is attached hereto as Exhibit 12. With such a range of serious accidents, explosion, and violations near the PFSF in a random few month period, PFS can not credibly claim that the eight enumerated facilities--individually and/or collectively--are not significant enough to require description under NUREG-1567. Abundant evidence indicates that the Goshute Reservation has been, and the safe operation of the PFSF may be, affected by any of the eight nearby facilities, and the Application fails to give any of the information required by NUREG-1567 or account for related accident scenarios. Accordingly, the Application is defective and Contention 6 should be admitted. See 54 Fed. Reg. 33,168, 33170 (1989) (where an applicant has filed incomplete documents or failed to supply necessary information, it "will be sufficient for the intervenor to explain why the application is deficient").

G. **Contention 7: Inadequate Financial Qualifications (Category - Other/Safety).**

The Application does not provide assurance that PFS will have the necessary funds to cover estimated construction costs, operating costs, and decommissioning costs, as required by 10 C.F.R. § 72.22(e) in that

1. PFS is a limited liability company with no known assets; because PFS is a limited liability company, absent express agreements to the contrary, PFS's members are not individually liable for the costs of the proposed PFSF, and PFS's members are not required to advance equity contributions. PFS has not produced any documents evidencing its members' obligations, and thus, has failed to show that it has a sufficient financial base to assume all obligations, known and unknown, incident to

ownership and operation of the PFSF; also, PFS may be subject to termination prior to expiration of the license; ✓

2. the Application does not adequately account for possible shortfalls in revenue if customers become insolvent, default on their obligations, or otherwise do not continue making payments to the proposed PFSF; ✓
3. the Application does not provide assurance that PFS will have sufficient resources to cover non-routine expenses, including without limitation the costs of a worst case accident in transportation, storage, or disposal of the spent fuel; ✓
4. the Application fails to provide enough detail concerning the limited liability company agreement between PFS's members, the Service Agreements to be entered with customers, the business plans of PFS, and the other documents relevant to assessing the financial strength of PFS; ✓
5. the Application fails to describe the legal obligations of the Skull Valley Band of Goshute Indians and provide assurance that third parties will have adequate legal remedies if injured as a result of the its acts or omissions; and ✗
6. the Application fails to itemize cost estimates and otherwise provide enough detail to permit evaluation of the tenability of such estimates. ✓

**Reply:**

1. PFS Impermissibly attempts to Shift the Burden of Proof.

In general, PFS has miserably failed to satisfy its obligation under 10 C.F.R. section 72.22(e) "to demonstrate to the Commission the financial qualifications of the applicant" to construct, operate, and decommission the PFSF, and PFS has impermissibly attempted to shift the burden of proof onto Castle Rock. Nothing could be more crucial to PFS's Application, or more in doubt, than PFS's financial capacity as a private entity to bear both the quantifiable and unforeseeable costs of the proposed PFSF. One seeking to perform an analysis of PFS's financial capacity would reasonably expect the Applicant to have provided a financial plan showing (i) an estimate of the costs of each phase of the project with detailed time line and cost

category breakdowns, (ii) a financial statement for the Applicant showing its current financial condition, (iii) pro forma financial statements projecting the financial condition of the Applicant through each of the phases of the project, (iv) identification of the specific sources of funds, (v) details of existing funding agreements, (v) commitments from sources of additional funds including commitments from lenders, equity contributions, and customers whose funds are being relied upon to fund the PFSF, (vi) details of prospective funding agreements, and (vii) details of contingency plans for obtaining additional funding for overruns or costs arising from unforeseen events such as systems failures, funding contract defaults, or accidents. PFS has failed to provide any of these documents.

Instead of providing adequate information, PFS has attempted to escape its burden of demonstrating its financial qualification by arguing that Castle Rock has failed to provide facts showing that PFS does not have the requisite financial capacity--suggesting that an astute applicant should provide as little detail as possible concerning its financial qualifications so that opponents cannot challenge them. As stated in detail in Section II supra, contrary to PFS's claims, 10 C.F.R. Section 2.714(b)(2) "does not shift the ultimate burden of proof from the applicant to the Petitioner." Yankee Atomic Electric Company (Yankee Nuclear Power Station, 43 N.R.C. 235, 1996 NRC LEXIS 32, \*28 (1996); see also Rules of Practice for Domestic Licensing Proceedings, 54 Fed. Reg. 33,168, 33171 (1989)("The revised rule does not shift the ultimate burden of persuasion on the question of whether the permit or license should be issued; it rest with the applicant."). Moreover, the intervenor's burden of alleging a factual basis for a contention is especially light in situations where the essential information--i.e. all information related to PFS's financial capacity and arrangement--is entirely in the hands of the applicant.

See York Committee for a Safe Environment v. N.R.C., 527 F.2d 812, 815-16 n.12 (D.C. Cir. 1975). Furthermore, where the applicant has filed incomplete documents or failed to supply necessary information, it "will be sufficient for the intervenor to explain why the application is deficient." 54 Fed. Reg. 33,168, 33170 (1989); 10 C.F.R. § 2.714(b)(2)(iii). PFS cannot dodge its obligation to provide sufficient information about its financial qualifications by revealing only sketchy generalizations and shifting the burden to its opponents to counter with detailed information that is available only to it.

2. First Basis: PFS's Status as an L.L.C. Makes Its Financial Strength Suspect. As explained in Contention 7, PFS has not shown that it has the necessary assets to construct, operate, and decommission the PFSF. Moreover, because PFS is a limited liability company, any evidence of the financial capacities of its members does not meet this burden, unless PFS also affirmatively demonstrates that its members will guarantee all obligations of PFSF, have the capacity to guarantee such obligations, and will otherwise provide equity to sustain the PFSF on an as needed basis. The Application contains no such information; nor does it provide information indicating that PFS will continue to exist into the future. Thus, NRC has no assurance that PFS will even exist in year 2002 when the PFSF is supposed to begin operating.

PFS's comparison of its status to that of Castle Rock strengthens Castle Rock's position. PFS suggests that its status as a limited liability company is irrelevant because the limited liability status of its members is akin to the limited liability of shareholders of a corporation. (PFS Response at 363). That is exactly the point of Castle Rock's contention. Just as the financial capacity of a corporation must stand alone without regard to the financial strength of

its shareholders, so too must the financial strength of the limited liability company like PFS be measured without regard to the financial capacity of its members. PFS's large public utility members have no more liability for funding the entity than they would if they were shareholders in a corporation. Because the Application does not presently provide anything but bald generalizations as to PFS's financial capacity, and conspicuously fails to details the relations of PFS's members to PFS, it is inadequate, and Contention 7 must be admitted.

3. Second Basis: PFS Must Demonstrate that the Service Contracts Can Sustain Its Operating and Decommissioning Costs. PFS plans to finance its ongoing operation "solely through annual payment by customers pursuant to the Service Agreement." (Application 1.6). Nevertheless, PFS's description of such proposed agreements is limited to a brief paragraph, which could be fairly summarized as "trust us." See (Application 1.6, 1.7). Moreover, PFS has supplied no surveys or commitments indicating that nuclear power plants would be willing to sign such agreements in the event the PFSF is constructed. (The existence of a domestic market for PFSF's storage services is questionable in light of pending government-sponsored storage sites). It is PFS's burden to demonstrate that it has the financial capacity to cover all estimated operating costs of the proposed PFSF. (10 C.F.R. § 72.22(e)). PFS's brief and unsupported assertions about the substance of hypothetical service agreements do not meet that burden. Accordingly, the Application is inadequate, and Contention 7 must be admitted.

4. Third Basis: PFS Must Provide a Financial Plan Detailing Its Means For Covering All Routine and Non-Routine Expenses. To be credible, a financial plan must provide for contingency expenses.

Once such a plan is presented, expertise can be brought to bear in examining the assumptions used to identify the contingencies and the adequacy of the funding sources to meet the attendant costs. PFS remains consistent in trying to dodge the Contention by saying that Castle Rock has the burden of providing the threshold data. Until PFS provides a detailed, credible financial plan, subject to testing and evaluation, Castle Rock will remain unable to provide expert opinion as to its weakness. PFS has not provided such a plan, and accordingly, Contention 7 must be admitted.

5. Fourth Basis: PFS must Provide all Key Agreements and Other Documents. The Application must include copies of any agreements related to debt or equity funding, PFS's business plan, a complete copy of its lease with the Tribe, all agreements and plans related to construction of a transportation corridor, and all agreements related to or governing the obligations of PFS's members. As PFS has done with regard to the whole of Contention 7, PFS seeks to shift place on Castle Rock the burden of providing a detailed criticism of relevant documents, when PFS has not yet provided information and documentation sufficient to support such analysis.

With respect to the specific financial information required by 10 C.F.R. Part 50, the Commission recognized that particular circumstances may warrant application of any or all of the criteria imposed by 10 C.F.R. Part 50 in a Part 72 application. Louisiana Energy Services, L.P. (Claibourne Enrichment Center), CLI-97-15, slip op., at 14 (December 18, 1997). Because PFS has no operating history and essentially no assets, application of the Part 50 requirements to PFS is appropriate.

6. Fifth Basis: PFS Must Show that the Tribe Will Accountable for its Actions. PFS has produced an excerpted copy of the Amended and Restated Business Lease dated May 20, 1997, between PFS and the Tribe (the "Lease"), a copy of which is attached hereto as Exhibit 13. As Lessor under the Lease, the Tribe may be in a position to evict PFS, impose substantial burdens on the PFSF, or otherwise interfere with safe operation of the PFSF. Although there are provisions in the Lease suggesting the Tribe's power to do so may be limited, PFS has characteristically omitted Section 4(C)(1) (related to termination of the Lease), parts of Section 27 (related to waiver of sovereign immunity), Section 35(A)(1)(related to the enforceability of the Lease against the Tribe), and other provisions limiting the Tribe's power or outlining its willingness to submit to United State or local courts. Having received only a partial copy of the Lease, no party can be sure whether PFS has left open the possibility that the Tribe evict PFS or otherwise interfere with safe operation of the PFSF or whether the Tribe will be subject to non-Tribal courts.

In addition, in view of the limited assets of PFS, the Tribe (as landlord) may be ultimately responsibility for damages cause by a unsafe, contaminating, abandoned and/or insolvent facility. Accordingly, it is essential that the Application include a description of the Tribe's obligation and financial ability to compensate third parties for accident or injuries arising in relationship to the PFSF. Until the Application demonstrates that the PFSF is free from interference from the Tribe, and that the Tribe is legally obligated and financially able to compensated third parties, the Application remains defective, and Contention 7 must be admitted.

7. Sixth Basis: PFS must Itemize its Cost Estimates. Once again, it seems obvious that the absence of details as to specific cost items in the Application is a per se failure to meet the financial qualification criteria imposed by 10 C.F.R. § 72.22(e). Neither Castle Rock, the Staff, other intervenors, nor the Licensing Board can even begin to evaluate PFS's ability to finance construction, operation, and decommissioning of the proposed PFSF until a clear breakdown of projected costs is presented.

The importance of a detailed decommission plan is heightened by the fact that not only logic, but also DOE projections, make it clear that it will take decades to decommission the PFSF. As explained above, if and when a permanent repository is up and running, it is expected to receive additional spent fuel at the pace of only 900 MTU per year. See DOE/RW-1457, Department of Energy Annual Capacity Report (OCRWM: March 1995), attached hereto as Exhibit 1. Thus, PFS will not be able to decommission at once, or even in a few years. At the rate of 900 MTU per year--and that assumes the repository receives spent fuel from no source other than the PFSF--it will take 44 years for the repository to absorb 40,000 MTU of spent nuclear fuel. Accordingly, the PFSF will have to continue to store at least some fuel more than four decades beyond its proposed or intended decommissioning date. To supply the assurance required by 10 C.F.R. section 72.22(e), the decommissioning plan must take into account, among other things, the more than 40 years it will take the proposed repository to absorb all of the spent nuclear fuel stored at the PFSF.

H. Contention 8: Groundwater Quality Degradation (Category--Environmental/Safety). The Application, including the ER, is defective and therefore raises the issue of risk to public health and safety because the proposed site of the PFSF will not, or cannot, be adequately protected against ground water contamination due to facility design, its location, contaminants it will generate, and the nature of the soils and bedrock of the area.

**Reply:**

The Application does not adequately address the credible problem of groundwater contamination. PFS does not dispute that contaminants in the ground water would flow northward and contaminate Castle Rock's wells. Moreover, PFS does not provide any explanation supporting its denial of the self evident fact that absent protective barriers, waste water generated at the PFSF will eventually seep into the groundwater. PFS's only argument is that there is no conceivable way water and contaminants will ever mix at the PFSF. This assumption is simply not credible. The Application contemplates decontamination of caskets at the PFSF, which will produce contaminated fabrics, rags, and other materials. (SAR 4.5). If any decontamination materials are misplaced, left out, or affected by floods or fire fighting efforts, mixture with water is possible. There are also possibilities that casks will be broken in the process of transportation or as a result of fire, explosions, earthquakes, or sabotage at the facility. If a fire occurred in conjunction with any decontamination activity, receipt of a broken cask, or on-site damage a cask, contaminated water would certainly escape. There is a credible possibility of groundwater contamination, and the Application fails to address it; accordingly, the Application is inadequate, and Contention 8 should be admitted.

**I. Contention 9: Regional and Cumulative Environmental Impacts (Category - Environmental, Safety).** The Application fails to adequately discuss the regional and cumulative environmental impacts of the proposed PFSF, as required by 10 C.F.R. §§ 72.98(b) & (c) and 72.100, and NEPA, in that:

1. the SAR and ER fail to address the cumulative regional health and safety impact of the ISFSI and other dangerous facilities in Tooele County, including without limitation issues regarding the cumulative impact to the regional environment and population;
2. the SAR and ER fail to address the cumulative quantitative risk to the public of numerous dangerous facilities in one area and the interrelated

transportation, sabotage, and accident risks arising from concentration of such facilities.

**Reply:**

The Application fails to adequately address the cumulative and quantitative regional health, safety and environmental impacts resulting from the concentration of dangerous facilities in Tooele County. Section 72.98(c) requires the Application to include an identification of the "potential regional impacts" of the project and an investigation of "present and future uses of the land". In addition, Section 72.100 of NEPA requires the Application to contain an evaluation of the effects on the "regional environment" and the "populations in the region". Section 122(e) requires analysis of the "cumulative effects" of the combined operation of other nuclear facilities "near" a proposed ISFSI. The approximately five mile radius used by PFS, and supported by the Staff, is too narrow. The regulations speak in terms of "regional impacts," "regional environment," and "near." As discussed in Castle Rock's reply regarding Contention 6, accidents, near-accidents, and violations are a frequent occurrence at the eleven enumerated dangerous facilities in Tooele County--many of which have, or certainly could, affect the area where the PFSF is proposed to be sited. The 6,800 sheep killed by a nerve gas release in 1968 were owned by Castle Rock's predecessors and located on the ranches abutting the Goshute Reservation. See Nerve Agent Near Dead Utah Sheep in '68, Salt Lake Tribune, January 1, 1998, at A1, a copy of which is attached hereto as Exhibit 8. The cruise missile that recently went awry at Dugway Proving Ground landed within 20 miles of the Goshute Reservation. See John Heilprin and Lee Siegel, Missile Take Wrong Turn at Dugway, Salt Lake Tribune, December 11, 1997, at A1, a copy of which is attached hereto as Exhibit 9. The numerous nuclear waste, nerve gas, weapons testing, weapons storage, hazardous waste incineration and

other facilities in Tooele County cannot remain unaffected by each other's accidents and the danger to the public and environment increases significantly as each new facility is added. Caselaw supports the proposition that an EIS is defective if it fails to analyze and address the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other action (See e.g., Fritiofson v. Alexander, 772 F.2d 1225 (5th Cir. 1985); Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985). See also 40 C.F.R. §§ 1508.7 & 1508.25). Certainly the facts of this case--with at least eleven facilities conducting dangerous activities within the same county--require more than a bare bones analysis or more than a cursory look at one or two such facilities. The Application fails to adequately address the cumulative effect on the population and environment of the numerous dangerous facilities concentrated in Tooele County. Accordingly, the Application is defective and Contention 9 should be admitted.

J. **Contention 10: Retention Pond (Category - Environmental)**. The Application, including the ER, is defective and therefore raises public health and safety risks because it does not adequately address the potential of overflow and groundwater contamination from the retention pond and the environmental hazards created by such overflow, in that:

1. the ER does not does not address the potential for overflow from the retention pond;
2. the ER does not address effluent characteristics and environmental impacts associated with seepage from the pond; and
3. the ER does not address the applicability of Utah Groundwater Protection Rules.

**Reply:**

As it did with respect to Contention 8, PFS unreasonably assumes the "the material stored (spent fuel rod assemblies) and the method of storage (dry casks) precludes the possibility that

water will become contaminated at the facility." Such an assumption does not account for the possibility of fire in conjunction with a contaminated or damaged cask, improper disposal of cleaning materials, sabotage, explosion, flood, or simple human error or inattention. There are numerous credible scenarios for the water in the retention pond to become contaminated--and either overflow or seep into the subsoils and groundwater. Because the Application does not address such credible scenarios, it is defective, and Contention 10 must be admitted.

- K. **Contention 11: Radiation and Environmental Monitoring (Category - Environmental, Safety, Other)**. The Application poses undue risk to the public health and safety and fails to comply with 10 C.F.R. § 72.22, § 72.24 and § 72.126 because it fails to provide for adequate radiation monitoring necessary to facilitate radiation detection, event classification, emergency planning, and notification, including systematic baseline measurements of soils, forage, and water either near the PFSF site, or at Petitioners' adjoining lands.

**Reply:** None.

- L. **Contention 12: Permits, Licenses and Approvals (Category - Environmental, Safety, Other)**. The Application violates NRC regulations and NEPA because the ER fails to address adequately the status of compliance with all Federal, State, regional and local permits, licenses and approvals required for the proposed PFSF facility, see, e.g., 10 C.F.R. §§ 51.45(d) and 51.71(d), in that:

1. the ER fails to contain the list all permits, licenses and approvals, or include a description of the status of compliance with applicable environmental quality standards and requirements;
2. the ER fails to definitely identify transportation corridors and to identify facts about affected streams and wetlands relevant to obtaining a so-called Dredge & Fill Permit;
3. the ER fails to discuss whether the Tribe has been, or on what basis it would be, granted CWA authority by the EPA;
4. the ER contains insufficient facts relevant to assessing the applicability of air quality permitting;
5. the ER does not contain facts essential to addressing State of Utah permitting requirements, or definitely list which requirements do apply;

6. the ER does not address the need for approvals from Castle Rock in order to widen the Skull Valley Road.

**Reply:** In its response, PFS argues that Castle Rock does not describe which permitting requirements the ER fails to address. Where the applicant has filed incomplete documents or failed to supply necessary information, it "will be sufficient for the intervenor to explain why the application is deficient." (54 Fed. Reg. 33,168, 33170 (1989); 10 C.F.R. § 2.714(b)(2)(iii)). PFS has not provided the facts and initial analysis essential for determination of the applicability of permitting, licensing, and approval requirements. For example, the ER provides that "several specific environmentally sensitive areas have been identified along the transportation corridor and may require special consideration during construction activities." (ER at 4.3-2, 2-3). PFS does not describe these areas, why they may require special consideration, or what special consideration may be required. Once PFS has come forth with a detailed discussion of facts relevant to permitting, licensing and approvals, Castle Rock will be in a position to offer affirmative information about which requirements do and do not apply.

**M. Contention 13: Inadequate Consideration of Alternatives (Category - Environmental, Safety, Other).** The Application violates NRC regulations and NEPA because the ER fails to give adequate consideration to alternatives, including alternative sites, alternative technologies, and the no-action alternative, see 10 C.F.R. § 51.45(c), in that:

1. the ER does not adequately discuss the environmental effects and impacts or the economic, technical and other costs or benefits associated with its selection of the Goshute Reservation over alternative sites;
2. the ER does not contain a balanced, detailed discussion of the no build alternative;
3. the analysis of alternatives ignores every potential negative factor, including:

- a. the environmental and safety benefits associated with maintaining a decentralized, on-site storage system;
  - b. the environmental and safety impacts and risks associated with the proposed privately operated centralized system;
  - c. the state-by-state, plant-by-plant facts which create the need for moving spent fuel to a centralized location;
  - d. the environmental impacts and safety hazards associated with moving so many casks from dispersed locations to a centralized location;
  - e. the environmental benefits of a combination of expanded onsite storage and regional ISFSIs; and
  - f. the heightened safety hazards associated with transportation of spent fuel during the 2002 Olympics Games;
4. the ER does not contain a discussion of the environmental advantages and disadvantages associated with the government-operated temporary facility proposed in the 1997 NWSA.

**Reply:** The ER must include an analysis of the effects of the ranch on neighboring landowners, including Castle Rock. Among other things, 10 C.F.R. § 51.45(c) requires the ER to "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." This subsection also requires the ER to "include consideration of the economic, technical, and other benefits and costs of the proposed action and of alternatives." One economic effect and cost of placing the PFSF on the Goshute Reservation is the effect of the facility on the value of Castle Rock's land and the usefulness of Castle Rock's land for agricultural and development purposes. (See *infra* Reply to Contention 17, incorporated herein by reference). In order to fulfill the requirement of considering "the economic . . . benefits and costs of the proposed action and of alternatives," the ER must consider the economic cost to Castle Rock of placing the facility on the Goshute Reservation, and the economic benefit to Castle Rock of not placing it there. The Application

fails to describe this economic effects of the PFSF on Castle Rock, and all other information described in Contention 13, and accordingly, Contention 13 should be admitted. a )

**Contention 14: Inadequate Consideration of Impacts (Category - Environmental).**

The Application violates NRC regulations and NEPA because the ER fails to give adequate consideration to the adverse impacts of the proposed PFSF, including the risk of transportation accidents, the risks of contamination of human and livestock food sources, the risks of contamination of water sources (including ground water contamination arising from leaching of contaminated soils), the risks of particulate emissions from construction and cement activities and similar risks. 10 C.F.R. § 72.100.

**Reply: None.**

N. **Contention 15: Cost-Benefit Analysis.** The Application violates NRC regulations and NEPA because the ER does not contain a reasonable and legitimate comparison of costs and benefits, 10 C.F.R. § 51.45(c), in that:

1. it is over simplistic and fails to account for the true environmental, safety, social and economic costs associated with the proposed PFSF;
2. it fails to consider the loss of property values, economic opportunities and other business and economic losses that will be imposed on Castle Rock by the mere existence of the PFSF;
3. it does not describe PFS's financial arrangement with the Tribe or attach related documents, which are essential the evaluation of the full cost of the facility.

**Reply: None.**

O. **Contention 16: Impacts on Flora, Fauna and Existing Land Uses (Category - Environmental).** The Application violates NRC regulations and NEPA because the ER does not adequately address the impact of the proposed PFSF upon the agriculture, recreation, wildlife, endangered or threatened species, and land quality of the area, see 10 C.F.R. § 72.100(b), in that:

1. the ER fails to evaluate both usual and unusual site characteristics throughout all of Northwestern Utah;
2. the ER fails to provide sufficient facts to enable one to understand the true impacts of the PFS on the environment, including without limitation information from a survey of endangered or threatened species in the area (including small spring parsley, Pohl's milvetch, peregrine falcon, and the Skull Valley Pocket gopher);

3. the precise transportation corridor has not been identified, and thus the Application does not contain specific information about affected species in the transportation corridor.

**Reply:** None.

P. **Contention 17: Inadequate Consideration of Land Impacts (Category - Environmental)**. The Application violates NRC regulations and NEPA because the ER does not adequately consider the impact of the facility upon such critical matters as future economic and residential development in the vicinity, potential differing land uses, property values, the tax base, and the loss of revenue and opportunity for agriculture, recreation, beef and dairy production, residential and commercial development, and investment opportunities, all of which have constituted the economic base and future use of Skull Valley and the economic interests of Petitioners, or how such impacts can and must be mitigated, see e.g., 10 C.F.R. §§ 72.90(e), 72.98(c)(2) and 72.100(b), in that:

1. the ER does not recognize the potential use of the areas surrounding the PFSF for residential or commercial development;
2. the ER paints a misleading picture of the area population by ignoring a majority of the Salt Lake Valley;
3. the ER fails to consider the effect of the PFSF on the present use of Castle Rock's lands for farming, ranch operations and residential purposes or the projected use of such lands for dairy operations, residential development, or commercial development;
4. the ER provides no, or inaccurate, information on the economic value of current agricultural/ranching operations conduct on Castle Rock's lands; and
5. the ER fails to discuss the impact of placing a spent fuel storage facility near a national wilderness area.

**Reply:**

The ER must consider the effect of the PFSF on the present and future projected uses of Castle Rock's land. Contrary to PFS's arguments, 10 C.F.R. Section 72.98 expressly requires an application to consider "present and projected future uses of land and water within the region." It is well established that NEPA protects economic interests which are connected

to the land. See Jersey Central Power and Light Co. (Forked River Nuclear Generating Station, Unit 1), ALAB-139, 6 AEC 535 (1973) (marina operators have standing under NEPA to complain of the introduction of shipworms in the vicinity of their business resulting from the operation of a nuclear power plant); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-223, 8 AEC 241 (1974) (commercial fisherman has standing under NEPA to complain of the discharge of cooling water which may affect his catch). As described in the letter of Gregg Simonds, attached hereto as Exhibit 14, Castle Rock owns 67,000 acres of next to the Goshute Reservation (the "Ranchland"). (Id.). The present uses of the Ranchland include grazing cattle, raising horses, farming, and residential uses. Because of public concerns about food safety, especially with respect to beef, the trend in the beef industry is toward forming alliances among feeders, producers, packers, and retailers that involve "source verification"--i.e. establishment of a mechanism for verify the participants in, and cleanliness of, the chain of production for beef. (Id.). Beef produced in an open, free ranging, wilderness-like environment is perceived to be cleaner, safer, and more valuable than beef produced elsewhere. (Id.). Construction and operation of the PFSF will inhibit, if not eliminate, Castle Rock's ability to market beef raised on the Ranchland as being "clean" range beef. This will keep Castle Rock from being a part of the developing alliances and from realizing the premiums that beef marketed through such alliances will command. (Id.). The ER must discuss the PFSF's effect making the Ranchland ineligible for certification as a clean, open range for raising cattle.

In addition, as discussed in Castle Rock's Reply regarding Contention 8, there is a credible possibility that contaminated water from the PFSF will enter the wells under, and used by, the Ranchland. Contamination of well water will make the Ranchland generally unsuitable

for raising cattle or horses or for farming--and at a minimum would decrease the usefulness of the Ranchland for such purposes. Id. Also, the dust, noise and an increased risk of accidents resulting from the increase in heavy-load traffic on the Skull Valley Road associated with the construction and operation of the PFSF will diminish the usefulness of the Ranchland for ranching or farming operation. (Id.). NEPA protects Castle Rock's economic interest in the Ranchland, and the ER must address the affects of the PFSF on the ranching and farming operations currently conducted thereon.

In addition, Castle Rocks projects that the future uses of the Ranchland include development for commercial or residential purposes or dairy operations. As discussed in the letter from Christopher E. Robinson, attached hereto as Exhibit 15, the value of the Ranchland for development purposes lies in it being in a remote, rather undisturbed, desert location. Id. Construction, dusty, increased traffic, public perception of danger, and actual danger of accidents related to the PFSF will substantially reduce, if not eliminate, the value of the Ranchland for commercial or residential development. (Id.). Although the ER mentions the existence of some ranching operations on the Ranchland in passing, the ER fails to fully consider these and other effects of the PFSF on the Ranchland's present and projected uses, as required by 10 C.F.R. § 72.98 and NEPA. Accordingly, the ER is inadequate and Contention 17 must be admitted.

- Q. **Contention 18: Impacts on Public Health (Category - Environmental)**. The Application violates NRC regulations and NEPA because the ER does not adequately consider the impact of the proposed PFSF upon the production of the agricultural products for human consumption by Petitioners, their tenants and others in the area. See 10 C.F.R. § 72.98(b).

**Reply:** Castle Rock incorporates by reference its Reply regarding Contention 17.

- R. **Contention 19: Septic Tank (Category - Environmental)**. The Application violates NRC regulations and NEPA because the ER does not adequately consider the impact of a septic tank system on the ground water and ecology of the area and the related potential of this system to injure Petitioners. See 10 C.F.R. §§ 72.98(b) and 72.100(b).

**Reply:** None.

- S. **Contention 20: Selection of Road or Rail Access to PFSF Site (Category - Environmental, Other)**. The Application violates NRC regulations and NEPA because it fails to describe the considerations governing selection of either the Skull Valley road or the rail spur access alternative over the other and the implications of such selection in light of such considerations, See 10 C.F.R. §§ 51.45(c) and 72.100(b), in that:

1. the ER fails to consider and balance the advantages and disadvantages of the two transportation alternatives, except in a cursory manner;
2. the ER concedes, and evidences, that certain investigations and studies related to the selection of a transportation corridor, including a Class II Cultural Resources Survey, have not been completed;
3. the ER does not discuss the third transportation corridor PFS is considering; and
4. the ER fails to mention some significant environmental effects associated with the two acknowledged transportation alternatives, including an increased traffic and noise levels.

**Reply:** None.

- T. **Contention 21: Exact Location of Rail Spur (Category - Environmental, Other)**: The Application violates NRC regulations and NEPA because it fails to describe in detail the route of the potential rail spur, property ownership along the

route, and property rights needed to construct and operate the rail spur, See 10 C.F.R. § 72.90(a), in that:

1. the ER fails to provide any detail concerning the precise location of the proposed rail spur and impacted on property rights along the route;
2. the ER is defective because it does not discuss the second rail spur being considered by PFS.

**Reply: None.**

- U. **Contention 22: Road Expansion Authorizations (Category - Environment, Other)**. The Application violates NRC regulations and NEPA because it fails to describe adequately the nature and ownership of right-of-way that would permit PFS's contemplated improvements of the Skull Valley Road and what permits and approval from, or agreements with, the owner or owners thereof are needed for such improvements. See 10 C.F.R. § 72.90(a).

**Reply: None.**

- V. **Contention 23: Existing Land Uses (Category - Environmental)**. The Application violates NRC regulations and NEPA because it fails to describe with particularity, using appropriate maps, land use patterns and ownership as to lands in the vicinity of the proposed PFSF and along the 24 mile access route, including without limitation, homes, outbuildings, corrals and fences, roads and trails, pastures, crop producing areas, water wells, tanks and troughs, ponds, ditches and canals, see 10 C.F.R. §§ 72.90(a) & (c), 72.98(b), in that:

1. the Application fails to discuss, in detail, the various impacted property rights and owners along the 24-mile transportation corridor;
2. the Application fails to discuss the legal basis for the right-of-way along the 24-mile transportation corridor;
3. the Application fails to identify existing structures that would be impacted by the various transportation corridors suggested by PFS;
4. the Application fails to discuss impacts to existing grazing patterns and rights that would be impacted by the various transportation corridors proposed by PFS;
5. the Application fails to discuss all impacts to those living near to the proposed transportation corridors; and

6. the Application fails to discuss other deficiencies.

**Reply:** None.

**W. Contention 24; Incorporation by Reference (Category - Other/All).** Petitioners Castle Rock and Skull Valley Co. by this reference adopt in its entirety each and every contention filed by the State of Utah and incorporate each herein by this reference.

**Reply:** See Section I(A) supra.

Dated this 16<sup>th</sup> day of January, 1998.

Respectfully submitted,

*Michael Later*

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Michael M. Later, USB #3728

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Certificate of Mailing

I hereby certify that I caused to be sent by E-Mail and U.S. Express Mail a copy of the foregoing REPLY OF PETITIONERS CASTLE ROCK LAND & LIVESTOCK, L.C. AND SKULL VALLEY CO., LTD, AND ENSIGN RANCHES OF UTAH, L.C. TO THE RESPONSES OF THE NRC STAFF AND THE APPLICANT to the following:

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and also certify that I caused to be sent by facsimile and Federal Express overnight courier service, a copy of the foregoing to the following:

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Dated this 16th day of January, 1998.



DeAnn Thompson