

October 14, 1998

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

**APPLICANT'S ANSWER TO STATE OF UTAH'S CONTENTIONS RELATING  
TO THE LOW RAIL TRANSPORTATION LICENSE AMENDMENT**

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby submits its answers to the State of Utah's ("State") "Contentions Relating to the Low Rail Transportation License Amendment," filed September 29, 1998 ("Rail Cont. ").<sup>1</sup> For the reasons set forth below, PFS respectfully submits that Contentions HH and II should be denied in their entirety for failing to meet the requirements for late filed contentions and for pleading contentions set forth in 10 C.F.R. § 2.714. The revised bases for Utah Contention B submitted by the State must similarly be rejected.

**A. Utah Contention HH**

In Contention HH, the State alleges that the Environmental Report ("ER") "fails to give adequate consideration to the potential for fire hazards and the impediment to re-

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<sup>1</sup> On August 28, 1998, PFS filed an amendment to the license application which (1) changed the location of the rail spur from the Skull Valley road corridor to a corridor running from Low, Utah (on the main Union Pacific rail line near Interstate 80) running along the western side of Skull Valley to the Skull Valley Reservation (the "Low Corridor"), and (2) changed the location of the Intermodal Transfer Point ("ITP") to a location 1.8 miles west of its original location.

sponse to wild fires associated with constructing and operating the Applicant's proposed rail line in the Low corridor." Rail Cont. at 2-3. PFS proposes that Contention HH be restated (as set forth in Appendix A) to incorporate the specific allegations raised in its bases. We address the issues raised in the Contention HH below.

1. Failure to Meet Criteria for Late-Filed Contentions

Contention HH must be dismissed for failing to meet the five-part test for the admission of late-filed contentions. 10 C.F.R. § 2.714(a)(1)(i-v). This test must be satisfied even if the licensing-related document upon which the contention is predicated was not available before the deadline for filing timely contentions. Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983). The most important criterion of this five-part test is whether the petitioner had good cause for failing to file on time. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 208 (1998) (hereinafter "LBP-98-7, 47 NRC at \_\_\_"). If a late-filed contention is predicated upon the availability of a document, a petitioner will not have good cause for late filing unless the contention:

1. is wholly dependent upon the content of a particular document;
2. could not therefore be advanced with any degree of specificity (if at all) in advance of the public availability of that document; and
3. is tendered with the requisite degree of promptness once the document comes into existence and is accessible for public examination.

Catawba, CLI-83-19, 17 NRC at 1043-44.

The State lacks good cause for its late filing of Contention HH because it knew when the application was filed in June 1997 -- months before the November 23, 1997 deadline for filing contentions -- that PFS was considering building a rail line to transport

spent fuel casks to the ISFSI. See ER, Rev 0 at 4.4-1 to 6 (describing rail spur alternative for transporting casks to the ISFSI). It possessed the necessary information at that time to file a contention asserting that the rail spur alternative proposed by PFS had the potential to start or impede the fighting of wildfires. Yet the State raised no issue concerning the potential for the rail line to either cause or impede the fighting of wildfires.<sup>2</sup>

For example, the State asserts that (1) the “welding, grinding of rail and the presence of fuel for the operation of machinery” associated with rail construction, (2) the sparks from friction or train exhaust, or (3) the shearing off of a hot brake shoe during operation could potentially cause a fire. Rail Cont. at 4. Yet those phenomena would have been associated with the PFS rail line as initially proposed. The only difference concerning the rail line, between the application as docketed and the application as amended, is that the rail line is now 5-10 miles west of where it would have been if built as initially planned. See ER, Rev 1, Figure 2.1-1; ER, Rev 0 at 4.4-1. Similarly, the alleged impediments to fire fighting that the State claims are caused by the raised rail bed and the presence of trains carrying spent fuel casks, see Rail Cont. at 6-7, would have existed with the rail line as initially planned.<sup>3</sup>

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<sup>2</sup> See State of Utah’s Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility, dated November 23, 1997 (“State Cont.”). The State raised a contention concerning, in part, the effect of wildfires on the ISFSI, see id. at 121 (Contention R), as did Castle Rock and the Confederated Tribes, but that is a distinctly different factual issue in that it does not concern fires started by the Applicant’s rail line, the impediment to fighting fires that the rail line may or may not pose, or the effect of fires on the environment.

<sup>3</sup> Although the State emphasizes the susceptibility of the Low Corridor to wildfires, see Rail Cont. at 3-4, nowhere in Contention HH or the affidavit of David Schen does the State claim that the Low Corridor is more susceptible to wildfires than the Skull Valley Road corridor, which the Applicant had originally proposed for rail line to the ISFSI. Indeed, the map of wildfires in Skull Valley from the Utah Statewide Fire Assessment Fire History (1986-1996) attached to Castle Rock’s contentions indicates that the incidence of

Therefore, Contention HH is not dependent, much less wholly dependent, on the license application amendment as claimed by the State. The State could have filed this contention with specificity based on the original application filed in June 1997 in the same manner as it filed Contention B concerning the ITP. Contention HH is no more dependent on the precise location of the rail spur than Contention B is on the precise location of the ITP. Accordingly, the State lacks good cause for its lateness. Absent good cause, a petitioner must "make a compelling showing on the other four factors." LBP-98-7, 47 NRC at 208. The State makes no such showing here and accordingly Contention HH must be dismissed.<sup>4</sup>

2. Failure to Meet Commission Pleading Requirements

Each of the subparts of Contention HH must also be dismissed for failing to meet the Commission's pleading requirements for contentions.

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wildfires is lower in the Low Corridor than along Skull Valley Road. See Contentions of Petitioners Castle Rock Land & Livestock, L.C., Skull Valley Co., LTD, and Ensign Ranches of Utah, L.C. on the License Application for the Private Fuel Storage Facility, Exhibit A.

<sup>4</sup> With respect to factors two and four, regarding other means to protect and other parties to represent the State's interest, the State can make any information that it possesses concerning the potential for the rail spur to cause or to impede the fighting of wildfires available to the NRC Staff for the Staff to utilize in the EIS process. Further, factors two and four are accorded less weight than factors three and five. LBP-98-7, 47 NRC at 208. Factor three, sound record development, at most weakly favors admission here in that the State has not "identif[ied] its prospective witnesses and summarize[d] their proposed testimony" regarding the contention as required under this factor. See *id.* at 208-09. Factor five, delaying the proceeding or broadening issues, weighs against admission, in that contentions were admitted almost six months ago and the issue of wildfires potentially caused by the rail transportation of casks is, as noted in footnote 1, factually distinct from any other issue in the proceeding. See South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 891 (1981); compare LBP-98-7, 47 NRC at 209. Thus, its admission would broaden the issues to be litigated in this proceeding and potentially extend the proceeding. Moreover, the late admission of this contention could cause delay by requiring the parties, at this late date less than five months before the general cut-off of discovery, to locate experts and to conduct and complete discovery on its issues by March 1, 1999. But for the lateness of this contention, such could have been done in parallel with that being done for the issues originally admitted.

a. The Wildfire Hazard Posed by the Transportation of Casks via Rail

The State claims that the ER is deficient because it does not discuss the potential for construction or operation of the rail spur to cause wildfires or PFS's response if one is started. Rail Cont. at 4-5. Contrary to the State's claim, however, the ER does address the potential for range fires and identifies the fire prevention measures that PFS will employ. It clearly states that "the 40 ft wide rail spur corridor will be cleared of vegetation to provide a buffer zone in preventing fires" that may be caused by rail transport or construction. ER, Rev. 1 at 4.4-9.<sup>5</sup> The State's response is to merely to speculate that "there is no certainty that BLM will grant the Applicant the width it requests"<sup>6</sup> and that "a 40 foot wide corridor may not be sufficient to prevent sparks from being thrown beyond the cleared corridor." Rail Cont. at 5 (emphasis added). No citation to fact or expert opinion is provided by the State to support its speculation.<sup>7</sup> Accordingly, this subcontention must be dismissed for lack of basis and for failure to show a genuine dispute of material fact.

Moreover, the subcontention should be dismissed because the State has not shown that the risk of fires potentially started by the construction or operation of the rail line would be significant. In the ER, "[i]mpacts shall be discussed in proportion to their sig-

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<sup>5</sup> This buffer zone will be established prior to rail construction activities. See ER, Rev. 1 at 3.2-6.

<sup>6</sup> The fact that an applicant has not yet received a permit it seeks is not grounds for challenging an application. See Wisconsin Electric Power Company (Koshkonog Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928, 930 (1974); Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1509 (1982).

<sup>7</sup> While the State cites the Affidavit of David C. Schen for the proposition that the construction or operation of the rail line may cause fires, it conspicuously does not cite the affidavit when it asserts that the 40 foot wide cleared corridor "may not be sufficient to prevent sparks from being thrown" beyond it. See Rail Cont. at 4-5. Nor does any such assertion appear in Mr. Schen's affidavit. Therefore, the assertion is mere speculation, not supported by expert opinion, and may not serve as the basis for the subcontention.

nificance,” 10 C.F.R. § 51.45(b)(1); thus, “[t]here shall only be brief discussion of other than significant issues.” 49 Fed. Reg. 9,352, 9,363 (1984) (10 C.F.R. Part 51, Statement of Considerations). While the State has asserted mechanisms by which rail line activities could start fires, it has said nothing about the probability or likelihood that fires would be started, particularly with a 40 foot wide corridor cleared of vegetation. See Rail Cont. at 4-5. For example, the State has provided no statistics on the likelihood of fires being initiated by rail lines based on the many miles of rail lines currently operating in Utah. Nor has the State provided any information on the potential significance or consequences of fires initiated by rail related activities, particularly in view of what the State already acknowledges are frequent and recurring wildfires in the area. Thus, the subcontention must be dismissed for this reason as well.<sup>8</sup>

b. Wildfires Caused by Human Activity Near the Railroad

The State claims that the ER is inadequate in that it fails to “evaluate . . . the increased risk of wildfires caused by an increase of human activity near the railroad.” Rail Cont. at 5. The State claims that “the railroad will be accompanied by more developed access” and that “the improved access to the west side of Skull Valley may result in an increase in the occurrence of human caused fires.” Id. This subcontention must be dismissed because it is based on an inaccurate characterization of the application and thus lacks factual basis. Carolina Power & Light Company (Shearon Harris Nuclear Power

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<sup>8</sup> When a petitioner cites an accident scenario as the basis for a contention, it must set forth the “analyses and expert opinion showing why its bases support its contention.” Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305 (1995). The analyses must also be complete and “[a] Board may not make factual inferences on [a] petitioner’s behalf.” Id. Hence, the Board may not infer the likelihood or significance of potential fires on the State’s behalf.

Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2082 (1982). The State mistakenly asserts that the building of PFS's private rail line will lead to greater developed access to the west side of Skull Valley. Nowhere does the ER indicate that the Applicant will build roads into or allow the public greater access to the west side of Skull Valley that would potentially increase the occurrence of human caused fires. Nor again does the State provide any factual basis to claim that the impact of any such fires would be significant. Accordingly, this subcontention must be dismissed.

c. The Impediment to Fighting Wildfires

The State claims that the ER is inadequate in that it fails to address how the Applicant's proposed rail line may create an impediment to fighting wildfires. Rail Cont. at 5-6. The State claims that firefighting vehicles would be forced to detour to constructed rail crossings instead of following a fire cross-country, which would increase the risk that the fires would spread. Id. at 7. The State also asserts that firefighters would be at risk from potential collisions with trains because of the smoke associated with fires, that the spent fuel in the casks "may endanger responders," and that in any event firefighters would refrain from fighting fires in the vicinity of a spent fuel cask until it was ascertained that the spent fuel was contained and posed no threat to them. Id. at 6-7.

This subcontention must be dismissed for failure to show that a genuine dispute of a material issue of law or fact exists and for ignoring relevant material within the application. First, regarding the obstacle presented by the rails and roadbed, the ER expressly provides that "the elevation of the rail spur will be constructed close to grade to allow emergency fire vehicles access over the rail bed." ER, Rev. 1 at 4.4-9. Although the

State's affiant claims that emergency vehicles used to fight wildfires will still not be able to cross the rail bed, even if true the ER further provides that the Applicant will "provid[e] crossings where the rail spur intersects off-highway vehicle trails or dirt roads." Id. at 4.4-2. Thus, the rail line should not pose the severe obstacle supposed by the State. Second, regarding the significance of the impact that would be caused by the presence of the train or the spent fuel casks, the State has ignored the ER's statement that the rail spur would only be used "once or twice a week," id. at 4.4-8, and thus the likelihood of meeting a train while fire fighting would be minimal.

The ER need only discuss significant environmental impacts. See Subcontention a, supra. Here, the State has not asserted or established a factual basis to claim that the impediment to the fighting of wildfires posed by the rail line would be significant or that the ultimate impact of the rail line on any potential fires would be significant. See Rail Cont. at 6-7. Therefore, because the Board may not infer that an impact is significant, Georgia Tech, supra, LBP-95-6, 41 NRC at 305, the subcontention must be dismissed.<sup>9</sup>

## **B. Utah Contention II**

### **1. The Contention**

In Contention II the State asserts that "the Low Corridor License Amendment does not comply with 10 C.F.R. § 72.100(b) or NEPA, including 10 C.F.R. § 51.45(c),

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<sup>9</sup> Further, the State's assertion that firefighters will "back off . . . whether or not the spent nuclear fuel in the transportation cask will be at risk if it is engulfed in a wildfire," Rail Cont. at 7, is barred as a matter of law because of the NRC's generic determination that "in an actual emergency, state and local government officials will exercise their best efforts to protect the health and safety of the public." 10 C.F.R. § 50.47(c)(1)(iii); see Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-32, 28 NRC 667, 728-29, 749-50 (1988). Accordingly, this part of the contention should be barred as a matter of law.

and 40 C.F.R. § 1508.25 because it fails to evaluate, quantify, and analyze the costs and cumulative impacts associated with constructing and operating the rail line on the regional environment.” Rail Cont. at 7. No supporting affidavit accompanies the Contention. PFS proposes that Contention II be restated as set forth in Appendix A to incorporate the specific allegations raised in its bases, which are discussed in turn below.

2. Applicant’s Response to the Contention

Contention II must be dismissed in its entirety for failing to meet the pleading requirements of 10 C.F.R. § 2.714 and Subcontentions (a), (b), and (e), as set forth in Appendix A, must also be dismissed for being late-filed without good cause.

a. Costs and Impacts of Fires Started by Activities in Rail Corridor

The State claims that the ER is deficient in that it fails to quantify the costs and evaluate the cumulative impacts associated with fires potentially ignited as a result of activities occurring in the rail corridor. Rail Cont. at 9 (citing basis for Contention HH). At the outset, this subcontention must be dismissed because it is late-filed and the State has not shown good cause for its lateness. As discussed above, the State’s bases for Contention HH -- also cited as the bases for this subcontention -- are not dependent upon new information in the August 28 amendment but are new allegations concerning the application as docketed. Thus, this subcontention, like Contention HH, must be dismissed.

This subcontention must also be dismissed for lack of basis and because it “advocate[s] stricter requirements than those imposed by the regulations.” Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982). The State alleges that the ER must “quantify the costs associated

with fires.” Rail Cont. at 9 (emphasis added). NEPA, however, does not require the monetary quantification of impacts and benefits of the project.<sup>10</sup> Thus, NRC regulations require environmental analyses to quantify environmental effects only “to the fullest extent practicable;” “[t]o the extent that there are important qualitative considerations or factors that cannot be quantified, those considerations or factors shall be discussed in qualitative terms.” 10 C.F.R. § 51.45(c) (emphasis added). Indeed, the Board has already rejected Utah Contention CC which had alleged that the ER was inadequate for failure to quantify environmental effects. See LBP-98-7, 47 NRC at 204.

Here, as discussed, PFS will take steps to prevent wildfires for which the State has provided no basis to challenge. Nor has a basis been provided to claim that the potential impact from wildfires is either significant or amenable to reliable quantification. See Rail Cont. at 3-6, 9; Affidavit of David Schen, at 4 (asserting “potential” fire hazard without quantifying risk or asserting that it is likely). Thus, this subcontention must be dismissed.

b. Costs and Impacts of the Rail Line on Species

The State asserts that the ER is deficient because it does not quantify the costs or sufficiently analyze the cumulative impacts associated with the construction and operation of the rail line on “endangered, threatened, and candidate endangered species [that]

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<sup>10</sup> See, e.g., Britt v. Army Corps of Engineer, 769 F.2d 84, 91 (2d Cir. 1985) (EIS not deficient because it failed “to quantify the dollar value of the impact on traffic problems”); Izaak Walton League of America v. Marsh, 655 F.2d 346, 377 (D.C. Cir. 1981) (quantification of unlikely biological impact of locks and dam project not needed); Limerick Ecology Action, Inc. v. NRC, 869 F.2d, 719, 743 (3d Cir. 1989) (risks or effects need not be quantified where current assessment techniques do not provide a meaningful basis for quantification or when effects are too uncertain to be reliably quantified); Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974) (mathematical expression of benefit of environmental amenities not needed); 49 Fed. Reg. 9,352, 9,363 (1984) (10 C.F.R. Part 51 Statement of Considerations) (the merits and drawbacks of a proposal need not be displayed in a “monetary cost-benefit analysis”).

may be found in the Low Corridor.” Rail Cont. at 9. This subcontention must be also dismissed because it is late without good cause. The State cites no facts to indicate that the Low Corridor is any different from the rest of Skull Valley regarding the presence of such species. Indeed, ER, Rev. Table 2.3-2, cited in Rail Cont. at 9, pertains to Skull Valley as a whole, not just the Low Corridor.<sup>11</sup> Thus, this subcontention is not dependent on new information in the August 28 amendment and, like Contention HH and Subcontention a, must be dismissed for failing to meet the criteria for late filed contentions.

This subcontention must also be dismissed for lack of basis and failure to show a material dispute of fact. The State merely speculates -- with no citation of facts or expert opinion -- that “endangered, threatened, and candidate endangered species may be found in the Low Corridor.” Rail Cont. at 9 (emphasis added). The State also does not show that any effects that the rail line might have on any such species in the Low Corridor are reliably quantifiable, see Subcontention a supra, nor does it provide any factual basis to challenge PFS’s assessment that the impact of rail construction and operation on plant and animal species in the Low Corridor will be minimal.<sup>12</sup>

Finally, to gain admission of a contention on the grounds that the ER does not adequately address cumulative environmental impacts, a petitioner must also provide a factual basis for the existence of other impacts with which the incremental impact of the

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<sup>11</sup> Further, the State has already filed Contention DD concerning the impact of the Applicant’s proposal on species in Skull Valley, so its claim is not new and the Board should not permit it to be expanded.

<sup>12</sup> See ER, Rev. 1 at 4.4-1 to 4. Specifically, the ER notes that the permanent loss of vegetation will be approximately 155 acres which “is minor compared to the over 1 million acres” of similar habitat in Tooele County, that “there are . . . no unique vegetation habitat features in areas proposed for vegetation removal,” that the impact on animal species “is expected to be minimal,” and that “migratory peregrine falcons” and similar migratory species “should not be adversely affected.” Id. See also ER, Rev. 1 at § 2.3.3.

proposal would be cumulative.<sup>13</sup> Because the State has not asserted the presence of any impacts with which the impact of the rail line would be cumulative, see Rail Cont. at 9-10, this subcontention must be dismissed.

c. The Visual Impact of the Rail Line

The State claims that the ER is inadequate because “no account has been taken of the visual impact the railroad will have on the nearby BLM Cedar Mountains Wilderness Study Area (‘WSA’) or other locations in Skull Valley.” Rail Cont. at 10. This subcontention must be dismissed because it ignores relevant material in the Application. LBP-98-7, 47 NRC at 181. PFS assessed the visual impact of the rail line as follows:

The Low Corridor rail spur will be an apparent change in the visual landscape only in the developed areas near I-80 and from high elevations in the Cedar Mountains. Although the rail spur represents a change in the landscape, it will be consistent with the visual resource management classification (VRM Class IV) established by BLM for the Low Corridor and with other developments in the area, such as I-80, the mainline railroad along I-80, and the Skull Valley Road. Because of the low level of recreational use of the area and lack of nearby residences, the Low Corridor is not expected to be a significant impact to the scenic environment.

ER, Rev. 1 at 4.4-9 (emphasis added). Because the State completely ignores this assessment, this subcontention must be dismissed.

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<sup>13</sup> See Duquesne Light Company (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 425 (1984); Toledo Edison Company (Davis-Besse Nuclear Power Station, Unit 1), LBP-87-11, 25 NRC 287, 293 (1987)

d. The Noise Impact of the Rail Line

The State alleges that the ER is inadequate because it does not “quantif[y] the costs associated with noise levels from construction activities and operation of the railroad on wilderness and recreational areas.” Rail Cont. at 10-11. This contention must be dismissed because it lacks factual basis and ignores relevant material in the Application.

The State cites nothing to support its assertion that noise from the rail line will have an adverse impact on wilderness and recreational areas or that any such impact can be reliably quantified in monetary terms. Id.; see Subcontention a, supra. Moreover, the State ignores PFS’s quantification of the sound levels likely to be present at various distances from the rail line. The ER states that the “maximum” noise level (down wind) at a distance of five miles from the rail line would be “31 dBA . . . which may occasionally be just audible if the ambient sound level drops into the 20s dBA.” ER, Rev. 1 at 4.4-7. At closer locations, approximately 2 miles, “the [noise] levels may occasional[ly] reach 45 dBA and be audible.” Id. The State provides no factual basis to support any claim that this analysis is inadequate or that any resulting impacts would be significant, particularly given the fact that the rail spur would only be used “once or twice a week.” ER, Rev. 1 at 4.4-8. Hence, the subcontention must be dismissed for lack of basis.

e. Revegetation and Water Access

The State claims that the ER is inadequate because it fails to demonstrate how PFS plans to carry out the revegetation of the rail corridor in a “sensitive, slow growing, xeric environment” and fails to show “where and how the Applicant will obtain access to needed water.” Rail Cont. at 11. This subcontention must be dismissed because it lacks

good cause for late-filing and lacks factual basis. The State cites nothing to indicate that the revegetation of the rail line would be any different from the revegetation of the formerly planned rail corridor along Skull Valley Road. See Rail Cont. at 11. The State also cites no fact or expert opinion to support its assertion that “[t]he area of habitat destruction is located in a sensitive, slow growing, xeric environment.” See id. Thus, there is no basis for the assertion that it would be particularly difficult for the Applicant to restore the rail corridor. The State also provides no basis for its implied assertion that PFS will need water to revegetate the rail corridor or that it will be unable to obtain any water which it may need. See id. Therefore, this subcontention provides no basis to challenge the adequacy of the ER and must be dismissed.

This subcontention must also be dismissed for advocating stricter requirements than the law requires. Seabrook, LBP-82-106, 16 NRC at 1656. An EIS should discuss the means that will be employed to mitigate environmental harms -- as the ER does -- but it does not need to include “a detailed explanation of specific measures which will be employed to mitigate the adverse impacts of a proposed action.” Communities, Inc. v. Busey, 956 F.2d 619, 626 (6th Cir. 1992) (quoting Robertson v. Methow, 109 S.Ct. 1835, 1847 (1989)). Therefore, the State’s assertion that PFS must demonstrate how it plans to revegetate the rail corridor is more than what the law requires and it must be dismissed.

f. Impact on Historical Resources

The State asserts that the ER is inadequate because it does not “quantify or otherwise evaluate” the loss of historical resources that may occur where the rail line crosses the Hastings Trail and the Donner-Reed Trail. Rail Cont. at 11-12. The State cites the

ER for the fact that the rail line will cross the trails and then merely speculates -- with no supporting factual basis -- that “two significant historical resources may be lost where the rail line crosses” these trails, and claims that the ER is deficient because it does not “quantify or otherwise evaluate” this loss. Id. at 11 (emphasis added). The State also completely ignores PFS’s statement in the ER that the Low Corridor rail spur will be reviewed for consistency with the National Park Service’s Comprehensive Management Plan for Historic Trails to determine “how the rail spur would fit into the limits of acceptable change for the trails” and to “implement any mitigation measures as needed.” ER, Rev. 1 at 4.4-9. As stated in Florida Power and Light Company (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 N.R.C. 509, 521 n.12 (1990):

[F]ailure to demonstrate a genuine issue of fact [is the] failure to provide any factual evidence or supporting documents that produce some doubt about the adequacy of a specified portion of Applicant’s documents or that provides supporting reasons that tend to show that there is some specified omission from Applicant’s documents.

The State has provided no such factual basis or supporting reasons to show that the ER’s treatment of the historical trails is inadequate or that any genuine dispute of material fact exists. Thus, this subcontention must be dismissed.

Further, the State’s assertion that the loss of historical resources must be “quantified” conflicts with NEPA case law that holds that mathematical cost-benefit analyses are not required where subjectively valued resources, such as historical resources, are involved. See Trout Unlimited, supra, 509 F.2d at 1286 (“there is sufficient disagreement about how environmental amenities should be valued to permit any value so assigned to be challenged on the grounds of its subjectivity”). The only requirement where such re-

sources are involved is that the ER be “sufficiently detailed to aid the decision-makers in deciding whether to proceed or not and to provide the information the public needs to enable both those who would challenge, and those who would support, the project to respond effectively.” *Id.* As stated above, the State has provided no basis to challenge the adequacy of the ER’s evaluation here and hence this subcontention must be dismissed.

g. Costs and Impacts of Impeding Travel Across Skull Valley

The State claims that the ER is deficient because it fails to “quantify the costs or evaluate the cumulative impacts” associated with the rail line’s impeding recreational users’ and ranchers’ crossing of Skull Valley from east to west. Rail Cont. at 12. This subcontention must be dismissed for lack of factual basis and for seeking to impose stricter requirements than required by law.

First, the State’s assertion that PFS has not evaluated the cumulative impacts of the railroad on the ability of recreational users and ranchers to cross Skull Valley is unsupported by a factual basis. The ER states that “[r]ecreational use for the land on either side of the rail spur will be maintained by providing crossings where the rail spur intersects off-highway vehicle trails or dirt roads.” ER at 4.4-2 (emphasis added).<sup>14</sup> Further, the ER evaluates the impact of the rail spur on the use of these roads by ranchers, hunters and other recreational users and concludes that “it is unlikely that the rail spur will have any impact on traffic or vehicular safety.” *Id.* at 4.4-8. The State cites no facts or expert opinion to show that the rail line would have any adverse effects on travel or that the Ap-

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<sup>14</sup> The State claims that it is unclear whether “there will be constructed rail crossings for all roads, including dirt jeep trails.” Rail Cont. at 12. This assertion by the State ignores the above quoted portion of the ER.

plicant's evaluation of its effects is inadequate. See Rail Cont. at 12. Indeed, the only reference provided by the State is to the ER itself at 4.4-8, id., which it mistakenly cites for the proposition that the rail line will disrupt recreational and ranching activities, directly contrary to the actual conclusion reached in the ER. A contention cannot be based on an inaccurate reading of an application, Shearon Harris, supra, LBP-82-119A, 16 NRC at 2082, and lacking any other asserted basis, this subcontention must be dismissed.<sup>15</sup>

Second, the State's assertion that the Applicant must quantify the costs associated with the railroad must be rejected as in previous subcontentions. The State has not shown that the Applicant's qualitative impact assessment is inadequate or that the cost (if there will be any) associated with the rail line's impact on travel across Skull Valley can be reliably quantified. See Rail Cont. at 12; Subcontention a, supra. In fact, NEPA does not require the quantification, in dollar terms, of the impact of a project upon traffic problems. See Britt v. Army Corps of Engineer, supra note 10, 769 F.2d at 91. All it requires is "information as appears to be reasonably necessary under the circumstances for the evaluation of the project." Id. Again as stated above, the State has provided no basis to challenge the adequacy of the ER's evaluation here and this subcontention must be dismissed.

**C. Board Should Reject the State's New Bases for Utah Contention B**

The State also seeks to amend the bases of Utah Contention B as admitted by the Board. Rail Cont. at 2-3. The State's attempt should be rejected because the amended

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<sup>15</sup> The State's assertion of PFS's failure to evaluate the cumulative impacts of ranchers and recreational users to cross Skull Valley must also be dismissed because it cites nothing to show that there are any pre-

bases are largely a restatement of bases previously rejected by the Board and, as acknowledged by the State, the August 28 Amendment does not alter the proposed operation of the ITP. Thus, Contention B and its bases should remain as admitted by the Board except to indicate that the ITP is located 1.8 miles west of its original location.

The State's original Contention B included four bases of which the Board admitted bases 1 and 4 and rejected bases 2 and 3. LBP-98-7, 47 NRC at 184-85. Basis 2 asserted that because of the large volume and quantity of fuel shipments, the proposed ITP would be unlike previous intermodal operations. Basis 3 asserted that the large volume of fuel shipments and constraints on the number and design of the heavy-haul trucks would result in queuing of transportation casks and some temporary storage at the ITP. The Board rejected both of these bases because they "impermissibly challenge[d] the Commission's regulations or rulemaking-associated generic determinations, including the provisions of 10 C.F.R. Part 71 governing transportation of spent fuel from reactor sites to the PFS facility." LBP-98-7, 47 NRC at 184.

In its "new" amended bases, the State attempts to have these previously-rejected bases added back into Contention B, for the wording of its new bases are almost identical to the wording rejected by the Board. For one example, the State's new basis asserts that:

Given the operational constraints on the ITP associated with . . . heavy haul transport . . . to the proposed ISFSI [and] the anticipated number of shipments . . . , a queuing of casks at the intermodal transfer point awaiting heavy haul transport is apparent. [A]t least part of the time, a cask or casks will be present at Rowley Junction, thus making Rowley Junction a storage facility for nuclear materials.

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existing effects with which the effects of the railroad would be cumulative. See Subcontention (b), supra.

Rail Cont. at 16. The original basis 3 rejected by the Board similarly stated as follows:

[Given] [t]he operational constraints on the ITP associated with . . . heavy haul transport . . . to the proposed ISFSI [and] the anticipated volume of shipments . . . , a queuing of casks at the intermodal transfer point awaiting heavy haul transport is apparent. . . . [A]t least part of the time, a cask or casks will be present at Rowley Junction, thus, making Rowley Junction a storage facility for nuclear materials

State Cont. at 13. This wording of the rejected basis 3 is essentially identical to the “new” basis proposed by the State for Contention B.<sup>16</sup>

The State provides no reason why these bases, already rejected once by the Board, should be now added back into Contention B through a non-timely filing.<sup>17</sup> The State claims in its pleading that “[t]he ‘Basis’ is amended to account for proposed changes at the ITP as a result of the Applicant’s license amendment dated August 28, 1998.” Rail Cont. at 13 n.2. However, the only change to the ITP in the license amendment was to move its location 1.8 miles west of its original location; otherwise the ITP remains unchanged from the original license application. See, e.g., ER, Rev. 1 at 3.2-5.

Indeed, the State acknowledges this fact, stating in its filing that the only change to the ITP in the amendment is a “change in the location of the Rowley Junction ITP 1.8

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<sup>16</sup> As another example, the State’s “new” basis states that “[n]either the initial application nor the recent license amendment discusses the number of heavy haul trucks . . . , the mechanical reliability of these units, and their performance under all weather conditions. Rail Cont. at 15. This “new” basis is taken essentially verbatim from the original basis 3 for Utah B. See State Cont. at 13 (“heavy haul trucks . . . , the mechanical reliability of these units, and their performance under all weather conditions.”).

<sup>17</sup> Late-filed bases are subject to the five-factor test for non-timely filings set forth in 10 C.F.R. § 2.714(a)(1). Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 255 & n. 15 (1996).

miles west of the location described in the initial license application.” Rail Cont. at 2.

The State emphatically points out that:

The ITP would still be located next to the Union Pacific mainline and in close proximity to Interstate 80 and the industrial salt plant. ER Rev 1 at 4.7-5 & 6. The facilities at the ITP remain the same as in the initial license application.

Rail Cont. at 2. The State also acknowledges that “[f]or all intents and purposes, the factual and legal issues raised by the State and admitted by the Board in Contention B remain unchanged.” Rail Cont. at 13-14.

Thus, the only new ITP-related information (a change in location) provided by the August 28 amendment does not justify amending the bases for Contention B to reinstate those bases previously rejected by the Board. Accordingly, Contention B and its related bases should remain as originally admitted by the Board except to note that the ITP location is now 1.8 miles west of its original location. See ER Rev. 1, at 3.2-5.

Respectfully submitted,



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Dated: October 14, 1998

## **APPENDIX A: RESTATEMENT OF CONTENTIONS**

### **A. Contention HH**

The Applicant proposes that Contention HH be restated as follows to incorporate the specific allegations raised in its bases:

The Applicant's Environmental Report ("ER") fails to give adequate consideration to the potential for fire hazards and the impediment to response to wild fires associated with constructing and operating the Applicant's proposed rail line in the Low corridor, in that:

- a) The ER fails to recognize that the Applicant's proposed movement of casks by locomotive in the Low rail line corridor presents a new wildfire ignition source in an area prone to wildfires, specifically (i) the "welding, grinding of rail and the presence of fuel for the operation of machinery" associated with rail construction, (ii) sparks from friction or train exhaust, and (iii) the shearing off of a hot brake shoe during rail operation.
- b) The ER fails to evaluate the increased risk of wildfires caused by an increase of human activity near the railroad.
- c) The ER fails to address how the Applicant's proposed rail line and the spent fuel transported on it will create an impediment to fighting wildfires.

### **B. Contention II**

The Applicant proposes that Contention II be restated as follows to incorporate the specific allegations raised in its bases:

The Low Corridor License Amendment does not comply with 10 C.F.R. § 72.100(b) or NEPA, including 10 C.F.R. § 51.45(c), and 40 C.F.R. § 1508.25 because it fails to evaluate, quantify, and analyze the costs and cumulative impacts associated with constructing and operating the rail line on the regional environment, in that

- a) The ER fails to quantify the costs and evaluate the cumulative impacts associated with fires potentially ignited as a result of activities occurring in the rail corridor.

- b) The ER fails to quantify the costs and sufficiently analyze the impacts of the construction and operation of the rail line on species in the rail corridor.
- c) The ER fails to take account of the visual impact the railroad will have on the BLM Cedar Mountains Wilderness Study Area or other locations in Skull Valley.
- d) The ER fails to quantify the costs associated with noise levels from the construction and operation of the railroad on the surrounding wilderness and recreational areas.
- e) The ER fails to demonstrate how the Applicant plans to carry out the revegetation of the rail corridor and fails to show where and how the Applicant will obtain access to needed water.
- f) The ER does not quantify or otherwise evaluate the loss of historical resources that may occur where the rail line crosses the Hastings Trail and the Donner-Reed Trail.
- g) The ER fails to quantify the costs or evaluate the cumulative impacts associated with the rail line's impeding recreational users' and ranchers' crossing of Skull Valley from east to west.

**UNITED STATES OF AMERICA**  
**NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the "Applicant's Answer to State of Utah's Contentions Relating to the Low Rail Transportation License Amendment," dated October 14, 1998, were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 14th day of October 1998.

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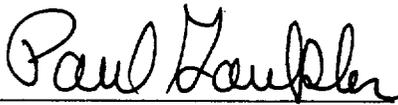
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