

There is no basis whatsoever for the preposterous assertion that PFS and DOE have entered into some express or tacit agreement to allow DOE to evade its statutory mandate, and Castle Rock offers no basis. Nor is such an allegation relevant to any issue before the Board. Rather, Castle Rock suggests that an inference of conspiracy can be drawn from DOE's failure to intervene in this proceeding. The suggestion is absurd. A clear, unequivocal contrary inference can be drawn from the actions brought against DOE by 37 electric utilities, including most of the utilities who have formed and own PFS, demanding that DOE meet its obligations under the NWPA.<sup>72</sup> The utilities which own PFS are insistent that DOE meet its statutory and contractual obligations to take title and possession of their spent nuclear fuel.

Castle Rock cannot cure its utter lack of basis or the irrelevancy of this contention by seeking discovery. As stated by the Commission in the 1989 statement of consideration to the amended rules:

[A] contention is not to be admitted where an intervenor has no facts to support its position and where the intervenor contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts.

54 Fed. Reg. 33,168, 33,171 (1989). Accord, Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983) (Rules of Practice do not permit "the filing of

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<sup>72</sup>Northern States Power, slip op. at 5-7..

a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff.”).

Castle Rock Contention 4 must be rejected as allegations against DOE for which this Licensing Board has no jurisdiction and as an allegation of a conspiracy between PFS and DOE without any basis.

**E. Castle Rock Contention 5: Application for Permanent Repository**

1. The Contention

The Castle Rock petitioners allege in Contention 5 that:

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.

See Castle Rock Petition at 22. The asserted bases for the contention are set forth in several pages of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations raised in its bases:

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:

- a) no permanent repository or other repository capable of receiving the fuel from the PFSF exists, or foreseeably will exist at the time PFS proposes to dismantle the PFSF;
- b) at the present time, there is no facility or group of facilities in existence that could absorb 40,000 MTU of spent nuclear fuel when the proposed PFSF is

scheduled to be decommissioned, and there are no definitive plans for such a facility; and

- c) a federally operated permanent repository is the only facility that could possibly absorb 40,000 MTU of spent nuclear fuel in forty years when PFS proposes to decommission the PFSF and the only federal repository site presently being considered is located near Yucca Mountain, Nevada for which construction cannot begin until (i) DOE completes site characterization and determines the site is suitable, (ii) the President submits a recommendation of the site to the Congress, (iii) the Governor of the State of Nevada does not submit a notice of disapproval, or if such notice is submitted, Congress passes a resolution approving the site within 90 days, and (iv) the NRC licenses the repository at the site.

## 2. Applicant's Response to the Contention

Castle Rock Contention 5, asserting that the PFSF will become a permanent repository, is a direct challenge to the NRC's Waste Confidence Decision as reflected in 10 C.F.R. § 51.23 and, as such, is barred as a matter of law from being litigated in this licensing proceeding. The regulation, 10 C.F.R. § 51.23, provides, in relevant part, as follows:

- a) 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 licensed life 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 waste and spent fuel originating in such reactor and generated up to that time.

- b) 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 (emphasis added).

This regulation is based directly on generic determinations made by the Commission in the Waste Confidence Decision (issued initially in 1984) as revised and reaffirmed by the Commission in September 1990. 55 Fed. Reg. 38,474 (1990) (“Review and Final Revision of Waste Confidence Decision”). In the 1990 revision, the Commission reaffirmed its first finding rendered initially in 1984, which declares as follows:

The Commission finds reasonable assurance that safe disposal of high-level radioactive waste and spent fuel in a mined geologic repository is technically feasible.

55 Fed. Reg. at 38,475. Further, the Commission revised its second finding to state in relevant part as follows:

The Commission finds reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century . . . .

55 Fed. Reg. at 38,474. This finding is expressly incorporated in the regulation 10 C.F.R. § 51.23(a) quoted above.<sup>73</sup>

Together, 10 C.F.R. § 51.23(a) and the Waste Confidence Decision lead to the inexorable conclusion that Castle Rock's Contention 5 that the PFSF might become a de facto permanent repository cannot be admitted in this licensing proceeding. Contrary to the Commission's generic determination of "reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century," Contention 5 would litigate whether such a repository would be available in about the year 2040 after the PFSF had operated for forty years (assuming its license were renewed). Both 10 C.F.R. § 2.758(a) and the case precedent discussed in Section II above bar litigation in this licensing proceeding of such a direct challenge to the generic determinations established by the Commission's Waste Confidence rulemaking. Other NRC decisions also unequivocally support this result. See, e.g., Pacific Gas and Electric Company, (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5,

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<sup>73</sup> The Commission has recently confirmed these generic determinations in issuing the final rule for "Environmental Review for Renewal of Nuclear Power Plant Operating Licenses." 61 Fed. Reg. 66,537 (Dec. 18, 1996). The Commission stated there as follows:

The Commission believes that conditioning individual license renewal decisions on resolution of radioactive waste disposal issues is not warranted because the Commission has already made a generic determination, codified in 10 CFR 51.23, that spent fuel generated at any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond a license renewal term and that there will be a repository available within the first quarter of the twenty-first century.

Id. at 66,538 (emphasis added).

29-30 (1993); Vermont Yankee Nuclear Power Corporation, (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 853-54. (1987).<sup>74</sup>

**F. Castle Rock Contention 6: Emergency Planning and Safety Analysis Deficiencies**

1. The Contention

Castle Rock alleges in Contention 6 that:

The Application does not provide the reasonable assurance that the public health and safety will be adequately protected in the event of an emergency affecting the PFSF.

Castle Rock Petition at 26. The asserted bases for the contention are set forth in five pages of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, Applicant proposes that the contention be restated as follows, incorporating the specific allegations in its bases:

The Application does not provide the reasonable assurance that the public health and safety will be adequately protected in the event of an emergency affecting the PFSF.

- a) The EP and SAR fail to consider the effect of fires in Skull Valley that could require extended evacuation of the PFSF.
- b) The smoke or heat associated with such a fire may interrupt normal cooling and air circulation of the casks.
- c) The EP and SAR fail to consider the effect of an emergency at a nearby facility requiring extended evacuation of PFSF and to discuss a response coordinated between the PFSF and said facility.

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<sup>74</sup> Affirmed in part and rev'd in part, ALAB-869, 26 NRC 13, reconsideration denied, ALAB-876, 26 NRC 277 (1987).

- d) The EP and SAR fail to consider potential terrorist attacks connected with the 2002 Winter Olympics in Salt Lake City

2. Applicant's Response to the Contention

Castle Rock raises a number of issues under Contention 6, which we address in turn below.

- a) Evacuation of the Proposed ISFSI Caused by Fires

Castle Rock asserts that the Emergency Plan and the SAR fail to consider the effect on the ISFSI of brushfires in the Skull Valley that could require an extended evacuation of the PFSF, which would be an emergency situation. Castle Rock Petition at 26 (citing EP §§ 2.4.1.7, 2.4.2.8). According to Castle Rock, neither the Emergency Plan nor the SAR contains a plan for mitigating such an event; for example, they do not address the availability of water to fight such a fire, measures for ensuring that groundwater is not contaminated by run-off from firefighting efforts, or the need to “quarantine” the ISFSI. *Id.* at 27.

This subcontention must be dismissed because it makes allegations without providing “concise statements of the alleged facts or expert opinion which supports” the allegations and it provides no “references to . . . specific sources and documents . . . on which the petitioner intends to rely to establish [said] facts or expert opinion.” 10 C.F.R. § 2.714(b)(2)(ii). See also Section II.C. *supra*.

Castle Rock alleges that a brushfire that would require evacuation of the ISFSI is “highly possible” during the lifetime of the facility and that evacuation followed by fire

damage to the spent fuel casks could cause degradation of the fuel cladding, canisters, and casks. Castle Rock Petition at 27. While Castle Rock provides a factual basis for the occurrence of fires in the Skull Valley, its only basis for its allegation that such fires might cause the evacuation of the ISFSI is that a recent fire 20 miles from the proposed site “forced the evacuation of residents.” *Id.* Castle Rock provides no facts or analysis to support its analogy between that fire and a hypothetical fire at the ISFSI. *Id.* 27-28. It provides no factual basis for its presumption that the duration of the brushfire immediately around the ISFSI or the peak temperatures resulting from it would pose a significant threat to either ISFSI personnel or the spent fuel casks. *Id.*; see EP at 2-15 to 16 (onsite fires below specified duration and temperature do not warrant classification as Alerts).<sup>75</sup> If a petitioner contends that a license application is inadequate on the basis of an analogy between the Applicant’s facility and a proposed benchmark, the petitioner must establish that the benchmark is valid to show that the analogy raises a disputed material issue of fact with the Applicant. Yankee Atomic Electric Company (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 32 (1996); Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 267 (1996) (petitioner must show “logical relationship” with alleged analogy). Castle Rock has not provided facts or analysis to establish a valid benchmark here.

Moreover, Castle Rock’s Exhibit 1 shows that although many brushfires have occurred in the general vicinity of the Skull Valley since 1986, none have occurred in the

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<sup>75</sup> The ISFSI is less susceptible to fire than an ordinary home because it contains few combustibles. See EP §§ 2.1,3.2.

immediate vicinity of the PFSF site. See Castle Rock Exhibit 1. This brings the subcontention into further question. Cf. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990) (contention lacks cognizable basis if cited document does not support the point for which it is urged). See also Section II.C.1 supra at 14. Therefore, because Castle Rock has not provided sufficient factual and analytical basis to support its allegation that a brushfire could cause the evacuation of the ISFSI or damage the spent fuel casks, this subcontention must be dismissed.

This subcontention must be also dismissed because it mistakenly claims that Applicant failed to address relevant issues in the application. See Section II.C.2, supra. Contrary to Castle Rock's assertion, the EP and the SAR do address brush fires and the means for mitigating their consequences. See EP at 2-12 to 16, 3-5; SAR § 8.2.5. The EP states that fires of specified severity may warrant the declaration of an alert at the site. EP at 2-12 to 16. The ISFSI will possess a fire truck, firefighting equipment and trained personnel assigned to the site fire brigade to mitigate the effects of fires. EP at 3-5. Furthermore, the Applicant's firefighting capability will be supplemented by offsite Tooele County capabilities. Id. Regarding water supply, the onsite water storage tanks will be sized to handle onsite firefighting and other PFS needs. SAR at 2.5-5, 4.3-4 to 5. Additional water, if needed, can be obtained from the Reservation's water supply. ER at 4.2-4.

Moreover, “regulation[s] do[] not require dedication of [planning] resources to handle every possible accident [scenario] that can be imagined. The concept of . . . regulation is that there should be core planning with sufficient planning flexibility to develop a reasonable *ad hoc* response to . . . very serious low probability accidents . . . .” Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-84-31, 20 NRC 446, 535 (1984) (quoting Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528, 533 (1983)); accord 60 Fed. Reg. 32,430, 32,435-46 (1995) (Emergency Planning Licensing Requirements for ISFSI and MRS, Final Rule) (“Emergency planning focuses on the detection of accidents and the mitigation of their consequences . . . not . . . on the initiating events.”). Therefore, the Applicant need not address any specific accident scenario in its EP so long as the EP provides for the capability to respond to such a scenario. Because Castle Rock has overlooked the response capability that the Applicant’s EP provides, this subcontention must be dismissed.

Finally, Castle Rock provides no facts, expert opinion, or analysis whatsoever to support its allegations that groundwater might be contaminated by run-off from firefighting efforts, or that there would ever be any need to quarantine the ISFSI. See Castle Rock Petition at 26-27. A bald or conclusory allegation of dispute is not sufficient to admit the contention; the petitioner must show that “facts are in dispute,” thereby demonstrating that an “inquiry in depth” is appropriate. See Section II.C.1 supra. Therefore, this subcontention must be dismissed.

b) The Effect of Fires on the Cooling of the Fuel Casks

Castle Rock alleges that the smoke and heat associated with a brushfire “may interrupt normal cooling and air circulation, causing degradation of fuel cladding, canisters, and storage cask concrete.” Castle Rock Petition at 27. The application is allegedly inadequate because the EP and the SAR fail to identify and assess such “credible” emergency or accident conditions and do not contain a plan for mitigating these conditions. Id. This subcontention must be dismissed because it makes allegations without providing supporting facts or expert opinion and it provides no references to specific sources or documents to establish such facts or opinion. Furthermore, it provides no technical basis in references or expert opinion to support its claim that its accident scenario will cause an accidental release of radioactive materials.

If such a hypothetical brushfire were to occur at the site, Castle Rock provides no support for its allegation that the effects of the fire on the air circulation around the casks (as opposed to direct thermal effects, which are addressed supra in Subcontention (a)) could somehow lead to the degradation of the fuel, the canisters, and the casks and thus cause a radioactive release. See Castle Rock Petition at 26-27. The EP states that only blockage of the storage cask air inlet or outlet ducts by “snow, ice, dirt, or debris” for 48 hours would cause the cask concrete to reach its maximum allowable temperature. EP at 2-11; see also SAR at 8.1-9 to 10, 8.2-44 to 45. Castle Rock present no basis to even suggest that the alteration of air flow from a fire could cause the same result.

Georgia Tech, LBP-95-6, 41 NRC at 306-07, involved a similarly remote and speculative accident scenario. Petitioners in that case raised the contention that in the

event of an accidental release from the nuclear reactor at issue, a nearby reservoir would be vulnerable to "extensive contamination." Id. The Board ruled that

This contention about an accidental release contaminating the . . . reservoir is merely an expression of [petitioner's] opinion. No basis is provided for any of these assertions. The Commission's regulations require, inter alia, that [petitioner] provide a concise statement of the alleged facts or expert opinion to support the contention, and sufficient information to show that a genuine dispute exists with the Applicant. 10 C.F.R. § 2.714(b)(ii) and (iii). [Petitioner] has not met these requirements.

Specifically, [petitioner] has not provided a concise statement of the alleged facts relating to how an accidental release would occur and how such a release would contaminate the reservoir, nor what expert opinion [petitioner] intends to rely upon to prove the contention. Neither does [petitioner] make any references to any specific sources or documents upon which it intends to rely to prove the contention. Without these showings [petitioner] has not provided sufficient information to demonstrate that a genuine dispute exists with the Applicant regarding the postulated accidental release from the reactor and any subsequent contamination of the reservoir.

Id. at 307. Based on these considerations, the Georgia Tech Board ruled the contention inadmissible. Similarly, Castle Rock does not support its allegation with any fact, expert opinion, or documentation and its subcontention must be dismissed.

This subcontention must be also dismissed because it mistakenly claims that the Applicant failed to address relevant issues in the application. See, Section II.C.2. supra. First, the EP does indeed address the possibility that fires will occur at the site and the EP provides for their mitigation. See, supra Subcontention (a). Second, the EP also

addresses the possibility that the air ducts of the spent fuel casks will become obstructed. EP at 2-11. Even complete blockage of the cask ducts for up to 12 hours would not warrant the declaration of an alert and the casks would not reach their maximum allowable temperature until the ducts were blocked for 48 hours straight. *Id.*<sup>76</sup> Moreover, the Applicant need not plan for every imaginable accident scenario so long as its EP provides for the capability to respond to such scenarios. *See supra* Subcontention (a). Therefore, because Castle Rock overlooks the Applicant's response capability, this subcontention must be dismissed.

c) Evacuation of the ISFSI Caused by Emergencies at Nearby Facilities

Castle Rock alleges that the EP and the SAR fail to consider the effect of potential emergencies at nearby facilities requiring "extended evacuation of the [ISFSI]," or compromising the safety of ISFSI personnel or the ISFSI's security and emergency response measures. Castle Rock Petition at 28. Castle Rock asserts that NUREG-1567, Standard Review Plan for Spent Fuel Dry Storage Facilities (Draft), § 2.4.2, (October 1996), requires the EP to include in its site area description "nuclear, industrial, transportation, and military installations" at distances greater than five miles from the site. *Id.* (quoting NUREG-1567 at 2-6). Moreover, the EP should describe the "products or materials produced, stored or transported" at such installations and discuss potential hazards to the ISFSI from the activities or the materials there. *Id.* (quoting NUREG-1567

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<sup>76</sup> The Emergency Plan discussion of blockage of the air ducts is based on extensive analysis of this issue in the SAR. SAR §§ 8.1.3, 8.2.8.

at 2-6). Castle Rock goes on to assert that the following facilities in Tooele County are “significant” in that they conduct “extremely dangerous and volatile activities that might create an emergency condition at the ISFSI:”

- a) Dugway Proving Grounds: Weapons testing and a landing field;
- b) Department of Defense Chemical Weapons Incinerator: Incineration of Chemical Weapons;
- c) Tooele Army Depot: Storage of Chemical Weapons;
- d) Wendover Air Force Bombing Range: Testing and practice of air-to-ground bombing;
- e) Hill Air Force Bombing Range: Testing and practice of air-to-ground bombing;
- f) Aptus Hazardous Waste Incinerator: Low-level hazardous waste incineration;
- g) Laidlaw Hazardous Waste Incinerator and Landfill: Low-level hazardous waste incineration;
- h) Envirocare of Utah Low-level Waste Disposal Facility: Low-level radioactive waste disposal.

Id. at 28-29. Castle Rock alleges that “with the exception of a cursory discussion,” the Applicant fails to describe the products or materials handled at the facilities and the potential hazards they pose to the ISFSI. Id. at 29. Moreover, the application is allegedly inadequate because it does not discuss a “program for a coordinated [emergency] response” between the ISFSI and the other facilities. Id. at 30.

This subcontention must also be rejected because it makes allegations without providing supporting facts or expert opinion and it provides no references to specific sources or documents to establish such facts or opinion. Furthermore, it provides no

“technical basis in references or expert opinion” to support its claim that its accident scenarios will cause an accidental release of radioactive materials. Castle Rock asserts that emergencies or accidents at the installations on its list could pose a threat to the ISFSI without providing any basis, beyond the most general nature of the activities there, for believing that they pose a genuine danger. See Castle Rock Petition at 28-29.<sup>77</sup> It states that activities at the installations are “extremely dangerous and volatile” without further description and without indicating any mechanism by which they could affect the ISFSI. See id. It provides no support whatsoever for its remarks about “radioactive, chemical or biological contaminants or explosives” being spread “throughout Tooele County.” Id. at 29. Moreover, all of the installations Castle Rock cites, other than Dugway Proving Ground and the Tooele Army Depot, are at least 18 miles from the ISFSI site. State of Utah’s Request for Hearing and Petition for Leave to Intervene at 4-5, and Exhibit 1, September 11, 1997. Castle Rock has provided no explanation as to how facilities that distance from the ISFSI could pose any danger at all to the ISFSI.

The Georgia Tech analysis is equally appropos here. Castle Rock has offered no factual basis as required to support its allegation but only bald, conclusory allegations. Such bald conclusory allegations of dispute are not sufficient to admit a contention. Because Castle Rock has provided no more than that, this subcontention must be dismissed.

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<sup>77</sup> Castle Rock provides some documentary support for the existence of potential threats at Dugway Proving Ground and Tooele Army Depot, see Castle Rock Petition at 29, but as described infra the Applicant has addressed those installations in detail in the SAR. See SAR at 2.2-1 to 4.

Moreover, this subcontention must be dismissed because it ignores relevant material submitted by the Applicant. The only installations for which Castle Rock provides any factual support for its allegations of danger to the ISFSI are Dugway Proving Ground and Tooele Army Depot, see Castle Rock Petition at 29, which the Applicant has analyzed in detail. See SAR at 2.2-1 to 4. The SAR has assessed the threat from weapons-related activities and the Army airfield at Dugway and has determined that because of the distance from the site and the intervening terrain that they do not endanger the ISFSI. Id. at 2.2-2 to 3. Likewise it has addressed the threat from the Tooele Army Depot chemical munitions storage and incineration activities and reached the same conclusion. Id. at 2.2-4. Castle Rocks ignores this analysis and fails to identify any respect in which it is inadequate and therefore its contention must be dismissed. See Section II.C.2. supra.

Finally, there is no requirement anywhere in Part 72, contrary to Castle Rock's bald assertion, that an ISFSI licensee participate with any organizations in planning for emergencies away from the ISFSI site. 10 C.F.R. § 72; see Castle Rock Petition at 30. An ISFSI that will not process and/or repackage spent fuel is not required to have an offsite component to its emergency plan. 60 Fed. Reg. 32,430, 32,435 (1995) (10 C.F.R. § 72.32, Statement of Considerations); Northern States Power Company (Independent Fuel Storage Installation) Director's Decision under 10 C.F.R. § 2.206 (DD-97-24), 62 Fed. Reg. 51916, 51,917 (1997). Therefore, there is no requirement that the Applicant coordinate with any offsite organizations regarding offsite emergencies and this

subcontention must be dismissed as an impermissible collateral attack on the NRC's rules. See Section II.B. supra.

d) Terrorist Attacks During the 2002 Olympics

Castle Rock claims that the Applicant has failed to address the potential threat posed to the ISFSI from possible terrorist attacks in conjunction with the 2002 Winter Olympics to be held in Salt Lake City. Castle Rock Petition at 30. Castle Rock asserts that the Applicant must analyze the potential for attacks, outline heightened security measures to be emplaced, and discuss plans for coordinating security measures with Olympic and Federal officials. Id.

This subcontention must be dismissed as an impermissible collateral attack on the NRC's regulations for advocating stricter requirements than they impose. See Section II.B. supra. The Applicant need not consider site-specific security threats to the ISFSI unless expressly required by the NRC. See 10 C.F.R. § 73.46(a). The design basis threat of radiological sabotage for a nuclear facility is defined in 10 C.F.R. § 73.1(a)(1). See Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, printed as an Attachment to CLI-82-19, 16 NRC 53, 59. The design basis threat for a nuclear facility is generic rather than site-specific. See Diablo Canyon, ALAB-653, 16 NRC at 74. There is no need for the Applicant or the NRC staff to perform site-specific analyses of potential threats that are specific to the Applicant's proposed facility. Id. Nor is it necessary for the Applicant or NRC staff to understand, characterize, and analyze the attributes of potential attackers in light of the site-specific

conditions at the proposed facility, because the characteristics and attributes of the generic design basis adversary are set forth in the regulations. Id. at 75.

Having the Olympic Games in the immediate proximity of a nuclear facility that normally has no armed guards or substantial barriers may present special circumstances for which enhanced security measures may be required by the Commission. Georgia Tech, LBP-95-6, 41 NRC at 281, 294-95 (research reactor within one mile of the Olympic Village for the 1996 Atlanta Olympics). Whether there is substantial threat to an NRC-licensed nuclear facility relative to the Olympic Games is an issue to be determined by the Federal Bureau of Investigation ("FBI") as the lead law enforcement agency in charge of the Olympics. See id. at 294. Neither the FBI, nor the Commission, has made a finding that the 2002 Winter Olympics in Salt Lake City poses a substantial threat to the PFSF that would require the imposition of special circumstances for the PFSF design basis threat for sabotage. It is also notable that the PFSF is located some 50 miles away from Salt Lake City, whereas the nuclear reactor in the Georgia Tech case was located less than one mile away from the Olympic Village (and even in that case there was no finding from the FBI that the Olympics posed a substantial threat to the facility that would change the design basis threat for sabotage). See id.

Therefore, because the Commission has not made a finding of special circumstances, there is no need for the Applicant or the NRC staff to perform site-specific analyses of potential threats that are specific to the Applicant's proposed facility, including any potential terrorist threat associated with the 2002 Winter Olympics. Diablo

Canyon, ALAB-653, 16 NRC at 74. Thus this subcontention must be dismissed as a collateral attack on the Commission's regulations.

**G. Castle Rock Contention 7: Inadequate Financial Qualifications**

1. The Contention

Castle Rock alleges in Contention 7 that:

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).

Castle Rock Petition at 30. The asserted bases for the contention are set forth in 11 pages of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

The 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

- a) PFS is a limited liability company organized and existing under the laws of Delaware. As such, its members are not individually liable for its debts, obligations and liabilities and are not obligated to advance additional monies beyond agreed upon contributions. Moreover, PFS is subject to termination in accordance with the terms of its agreement and Delaware law.
- b) PFS has failed to provide adequate financial assurance that revenues from customers pursuant to Service Agreements will provide sufficient funds to cover operating and decommissioning costs because (i) PFS has omitted meaningful detail from the Application

concerning the rights and obligations of parties under the Service Agreements and (ii) if operating costs exceed PFS's customers ability to pay, or if over the passage of time some customers suffer financial crises or go out of business, PFS will not have sufficient income to cover operating costs.

- c) PFS's proposed financing plan does not account for non-routine expenses of operation and decommissioning, such as an accident in transporting, storing, or disposing of spent fuel or other emergencies, fires, accidents, or injuries to neighbors.
- d) 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 financial obligations of PFS in order to evaluate and to establish PFS's financial qualification. In accordance with the decision in Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-96-25, 44 N.R.C. 331 (1996), 10 C.F.R. § 50.33(f) should be used as the framework for reviewing PFS's financial qualifications and PFS must provide the information required by 10 C.F.R. § 50.33(f) and 10 C.F.R. Part 50, App. C.II.
- e) The application fails to describe the legal obligations of the Skull Valley Band to compensate third parties for accidents or injuries arising from acts or omissions of the Band or, alternatively, fails to describe PFS's willingness to submit to the jurisdiction of the courts in lieu of the Band and to indemnify third parties for any injuries caused by acts or omissions of the Band.
- f) The Application fails to comply with 10 C.F.R. § 72.22(e) because it fails to itemize or justify PFS's estimates of the cost of constructing, operating, or decommissioning the PFSF.

2. Applicant's Response to the Contention

- a) Limited Liability Company

Castle Rock asserts that three financial concerns flow from PFS's organization as a limited liability company. These are (i) its members are not individually liable for its debts, obligations and liabilities; (ii) its members are not obligated to advance additional monies beyond agreed upon contributions; and (iii) PFS is subject to termination in accordance with the terms of its agreement and Delaware law. Based on these uncertainties Castle Rock contends that "the application fails to provide adequate assurance that PFS will continue to exist, let alone have sufficient funds for operation, over the potential duration of the PFSF." Castle Rock. Petition at 34.

This subcontention must be dismissed for a lack of basis. The Commission's amended pleading requirements "places an initial burden on Petitioners to come forward with reasonably precise claims rooted in fact, documents, or expert opinion in order to proceed past the initial stage and toward a hearing." Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 262 (1996). Castle Rock's claim is not "rooted in fact, documents, or expert opinion," but in speculation. It speculates that the attributes it cites of a limited liability company will make PFS financially unstable. Castle Rock Petition at 32. Castle Rock fails to note that the irony of this claim is that Castle Rock itself is a "limited liability company." Castle Rock Petition at 1. Moreover, the very attributes cited by Castle Rock are applicable to corporations as well.<sup>78</sup> They provide no bases on which to challenge whether the

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<sup>78</sup> In this regard (1) the shareholders of a corporation like the members of a limited liability company are not individually liable for the corporation's debt; (2) shareholders are not obligated to advance additional monies beyond their initial share investment; and (3) corporations are subject to termination in accordance with state law and company charters.

Applicants have put forth "a reasonable financing plan" for funding the project which is the issue for the Board to decide under applicable Commission precedent.<sup>79</sup>

Such speculation cannot be the basis for admitting a contention that an applicant lacks reasonable assurance of obtaining funding. As stated by the Commission in Vermont Yankee in holding that speculation of possible bankruptcy or default was insufficient to admit a contention:

Petitioners say that the Power Contracts are nonetheless insufficient to provide reasonable assurance of decommissioning funding, but Petitioners offer no contract language, case law, or expert opinion justifying their view. Instead, they merely argue, based primarily on the prior (and now resolved) bankruptcy of PSCNH, that YAEC plan may not be fully funded because of possible contract breaches. Petitioners . . . offer no supporting evidence for their conjecture . . . .

Yankee Atomic, CLI-96-7, 43 NRC at 262-63.

Similarly here, Castle Rock has provided no supporting evidence for its conjecture and its contention must be dismissed.

b) Sufficient Funds to Cover Operations and Decommissioning Costs

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<sup>79</sup> Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 18 (1978), *affirmed sub nom*, New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978). In that case the Commission spoke to what constitutes "reasonable assurance" in the context of financial qualifications, stating as follows:

"[R]easonable assurance" does not mean a demonstration of near certainty that an applicant will never be pressed for funds in the course of construction. It does mean that the applicant must have a reasonable financing plan in the light of relevant circumstances."

7 NRC at 18 (emphasis added). In a similar vein the Commission has recently recognized in the context of decommissioning that the reasonable assurance standard does not require "an absolute guarantee of such funds." Yankee Atomic, *supra.*, CLI-96-7, 43 N.R.C. at 262.

Castle Rock contends in this subcontention that PFS has failed to provide adequate financial assurance that revenues from customers pursuant to Service Agreements will provide sufficient funds to cover operating and decommissioning costs because (i) PFS has omitted meaningful detail from the Application concerning the rights and obligations of parties under the Service Agreements, and (ii) if operating costs exceed PFS's customers' ability to pay, or if during passage of time some customers suffer financial crises or go out of business, PFS will not have sufficient income to cover operating costs. Castle Rock Petition at 35.

The first part of this subcontention concerning the obligation of customers to make payments must be dismissed because it ignores relevant information in the License Application. The Application provides with respect to the obligations of customers as follows:

The Service Agreements will provide assurance for the continued payment of these costs by requiring the customers to provide annual financial information, meet creditworthiness requirements, and, if necessary, provide additional financial assurances (such as an advance payment, irrevocable letter of credit, third-party guarantee, or a payment and performance bond).

LA at 1-6, 1-7. Castle Rock provides no basis why these mechanisms set forth in the License Application are inadequate to provide reasonable assurance other than pure conjecture of the type rejected by the Commission in Yankee Atomic, CLI-96-7. It sets forth "no facts, documents, or expert opinion" to establish a basis on which to challenge

the adequacy of these mechanisms as required by the Commission's decision in Yankee Atomic.

The second part of this subcontention must also be rejected for lack of sufficient basis. There Castle Rock claims that if operating costs exceed PFS's customers' ability to pay, or if over the passage of time some customers suffer financial crises or go out of business, PFS will not have sufficient income to cover operating costs. Castle Rock. Petition at 35. However, this is pure speculation of the type rejected by the Commission in Yankee Atomic lacking supporting facts, documents or expert opinion. As stated by the Commission there, "[p]etitioners must submit more than this in order for a contention to be admitted for litigation." Yankee Atomic, CLI-96-7, 43 NRC at 261. Thus, this subcontention must be dismissed.

c) Non-Routine Expenses

Castle Rock contends in this subcontention that PFS's proposed financing plan for the PFSF does not account for non-routine expenses of operation and decommissioning, such as an accident in transporting, storing, or disposing of spent fuel or other emergencies, fires, accidents, or injuries to neighbors.

This subcontention must be dismissed for lack of basis. Castle Rock has provided absolutely no basis for its assertion that PFS -- with projected operating expenses of approximately \$1 billion over its expected lifetime<sup>80</sup> -- will not be able to pay for non-routine expenses. The only actual instance suggested by Castle Rock where PFS would

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<sup>80</sup> See EP § 7.3 and Table 7.3-1.

lack financial resources concerns radiological accidents for which Castle Rock claims that “expenses could be enormous.” Castle Rock Petition at 36. Castle Rock has, however, set forth no basis for a credible accident involving the storage of materials at the proposed ISFSI, or the spill and release of nuclear materials. Commission precedent is clear that “when [a] postulated accident scenario provides the premise for a contention, a causative mechanism for the accident must be described and some credible basis for it must be provided.” Vermont Yankee Nuclear Power Corporation. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 44 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990). Moreover, a petitioner must provide the technical analyses and expert opinion or other information showing why its asserted factual bases support its contention and a licensing Board may not make factual inferences on [the] petitioner’s behalf. See Section II.C.1. supra.

In short, Castle Rock has completely failed to provide such a basis for its subcontention and therefore it must be rejected.

d) Lack of Information

In this subcontention, Castle Rock contends that 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 financial obligations of PFS in order to evaluate and to establish PFS’s financial qualification. According to Castle Rock, the financial qualification provisions of 10 C.F.R. Part 50 should be used as the framework for establishing the information

required by PFS for review. It cites Louisiana Energy Services, L.P. (Claiborne Enrichment Center), 44 NRC 331 (1996) (“LES”) as authority for the application of 10 C.F.R. Part 50 financial qualification requirements to a 10 C.F.R. Part 70 license application.

The basis for this contention has disappeared with the Commission’s overturning of the licensing board’s LES decision, Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, slip op. (December 18, 1997), holding that 10 C.F.R. Part 50 financial requirements do not as a matter of law apply in the context of 10 C.F.R. Part 70. This subcontention “advocat[es] stricter requirements than those imposed by the regulations” and therefore must be rejected as “an impermissible collateral attack on Commission rules.” See Section II.B. *supra* at 6-7. Neither does the logic underlying the licensing board’s LES decision apply here. See Applicant’s Response to Utah Contention E, *supra*.

Thus, Castle Rock’s claim that PFS must submit more detailed information, whether in accordance with 10 C.F.R. Part 50 requirements or independently thereof, must be rejected as “advocating stricter requirements than those imposed by the regulations” and therefore “an impermissible collateral attack on Commission rules.” *Id.*

Moreover, this subcontention must be dismissed because it does not provide any basis to show that the alleged deficiency will result in a lack of reasonable assurance of PFS obtaining the funds necessary to cover the construction and operation of the PFSF. In the context of decommissioning, the Commission has held that a petitioner challenging

the adequacy of decommissioning funding or the decommissioning plan funding must do more than assert deficiencies in the plan or its estimates. Rather, the petitioner “must show some specific, tangible link between the alleged errors in the plan and the health and safety impacts they invoke.” Yankee Atomic, supra, CLI-96-7, 43 NRC at 258. Thus, for example, challenges to the reasonableness of an applicant’s decommissioning cost estimates are not admissible unless the petitioner shows that “there is no [ ] reasonable assurance that the amount will be paid.” Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 9 (1996). Without such a showing, the only relief available would be “the formalistic redraft of the plan with a new estimate.” Id.

The same rationale would apply equally to challenges to the reasonable assurance of obtaining funds for construction and operation. A petitioner must show that its contentions have some health and safety significance, or else the Commission would be engaged in merely requiring additional information or analysis of no health and safety significance. Yankee Atomic, CLI-96-2, 43 NRC at 75. See also Yankee Atomic, CLI-96-7. Here Castle Rock merely seeks additional information without establishing any basis for its significance and thus the contention must be rejected. Id.

e) Compensation of Third Parties for Skull Valley Band Liability

Castle Rock contends that the application fails to describe the legal obligations of the Skull Valley Band to compensate third parties for accidents or injuries arising from acts or omissions of the Band. Castle Rock contends that either the Band must agree to

provide such compensation or alternatively PFS must submit to the jurisdiction of the courts in lieu of the Band and to indemnify third parties for any injuries caused by acts or omissions of the Band.

At the outset this contention must be dismissed for vagueness and lack of specificity. It fails completely to identify what acts or omissions by the Tribe would give rise to third party liability and how those acts or omissions would relate in any manner to the Applicant or the PFSF. It fails to cite to a legal or regulatory basis that would require the Application to include a description of the Band's legal obligation to compensate third parties. Thus, this subcontention must be dismissed for not containing a specific statement of the issue of law or fact to be raised or controverted. Moreover, this contention is completely devoid of both legal and factual basis. Castle Rock has identified no legal or factual basis on which PFS would be liable to third parties for acts or omissions of the Band. Under the Commission's rules of pleading a basis of supporting facts, documents or expert opinion must be supplied. Castle Rock has failed to do so here. Accordingly, the subcontention must be dismissed. Finally, the contention must be dismissed for failure to provide any underlying legal basis for the proposed requirement that PFS submit to the jurisdiction of courts in lieu of the Band or to indemnify third parties for injuries caused by acts or omissions of the Band.

f) Inadequate Detail of Cost Estimates

In this subcontention, Castle Rock contends that the Application fails to comply with 10 C.F.R. § 72.22(e) because it fails to itemize or justify PFS's estimates of the cost

of constructing, operating, or decommissioning the PFSF. According to Castle Rock an applicant must itemize such costs in order to enable third party review.

This contention must be dismissed as an impermissible challenge to agency regulation and for lack of a sufficient factual basis. 10 C.F.R. § 72.22(e) does not require detailed cost estimates in order to comply with its provisions. Indeed, as discussed above and with regard to Utah Contention E, the Commission declined to apply the more detailed requirements of 10 C.F.R. Part 50 in the content of 10 C.F.R. Part 72 applications. Therefore, Castle Rock's contention must be rejected as advocating stricter requirements than those imposed as the regulations and therefore an impermissible collateral attack on commission rules.

Further, Castle Rock has provided no factual basis to show that the estimated costs are unreasonable. It has provided no facts, expert opinions or documents to support an allegation that Applicant's cost estimates are unreasonable as it is required to do under the Commission's amended rules of pleadings. Moreover, Castle Rock must provide some basis that the alleged inadequacies of the cost estimates will result in an actual shortfall of funds for the construction operation on decommissioning of the PFSF. See Yankee Atomic, supra, CLI-96-1, 43 NRC at 9. Castle Rock has failed on this account as well. Thus, this subcontention must be dismissed.

Finally, this subcontention must be dismissed as seeking discovery. Castle Rock claims that detailed itemization of the cost estimates must be provided to enable third party review. However, this is in effect a request for discovery to overcome a lack of

sufficient basis in the pleadings which is completely inappropriate in the contention phase. As stated by the Commission in the 1989 statement of consideration to the amended rules:

[A] contention is not to be admitted where an intervenor has no facts to support its position and where the intervenor contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts.

54 Fed. Reg. 33,168, 33,171 (1989). Accord, Catawba, ALAB-687, 16 NRC at 468.

(Rules of Practice do not permit “the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff.”). Thus, Castle Rock’s claimed need to review itemized cost information in order to come up with a basis for its contention must be rejected.

#### **H. Castle Rock Contention 8: Groundwater Quality Degradation.**

##### **1. The Contention**

Castle Rock alleges in Contention 8 that:

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.

Castle Rock Petition at 40. The asserted bases for the contention are set forth in one page of discussion following the contention. In order to focus the analysis on whether the

contention should be admitted, the Applicant proposes that the contention be restated incorporating as follows the specific allegations in its bases:

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, in that

- a) Firefighting activities will cause the release of contaminated water into the surrounding soil and groundwater.
- b) The ER is silent as to what technology, strategies and procedures will be used to prevent such groundwater contamination and on steps PFS plans to take to remedy any contamination problems.

2. Applicant's Response to the Contention

Castle Rock's Contention 8 is totally flawed under the Commission's Rules of Practice, as amended, and must be rejected. As discussed in more detail below, Castle Rock's contention at page 41 that fire fighting activities will release contaminated water to the surrounding soil and groundwater fails because it is an assertion without factual support. Also, Castle Rock's contention at page 41 that the Environmental Report is silent on technology, strategies and procedures used to prevent groundwater contamination and remedy any contamination problems fails because it is simply wrong.

a) Firefighting Activities

Castle Rock contends that firefighting will cause the release of contaminated water into the surrounding soil and groundwater based on its statements that (1) in

Section 3.4 of the Environmental Report, the Applicant acknowledges that low-level radioactive wastes will likely be generated at the PFSF site and temporarily stored on site, and (2) various solid wastes and potentially hazardous wastes will undoubtedly be generated at the site. This is not only a mischaracterization of the Applicant's statement that low level waste "may" be generated at the PFSF site, but also reflects Castle Rock's misunderstanding that the design of the PFSF is based on a "Start Clean/Stay Clean" philosophy to ensure that there will be negligible contamination within the facility and negligible radioactive waste generated. SAR Section 1.2. At the originating nuclear power plants, the shipping casks are surveyed and decontaminated as necessary so that contamination concentrations are below the DOT criteria (49 CFR § 173.443) (SAR Section 6.3). Upon receipt of shipping casks at the PFSF, the casks are again surveyed to ensure that radiation and contamination levels are still below regulatory requirements. Any contamination is removed using dry decon swipes that would be disposed of as solid activated waste, thus avoiding the generation of liquid wastes. This is in accordance with the PFS policy of precluding the generation of liquid radioactive waste. Considerable information discussing PFSF design features for contamination prevention and control as well as site generated waste confinement and management is presented throughout SAR chapters 3, 4, 5, 6 and 7.

The Environmental Report also states that radioactive liquid wastes are not generated at the PFSF. See e.g., ER Section 3.4. Small quantities of dry low level solid waste may be generated, consisting of smears, disposable clothing, tape, blotter paper, rags, and related health physics material. This material will be collected, identified,

packaged in suitable containers in accordance with 10 CFR Part 20 requirements and temporarily stored in a holding area while awaiting removal to a low level waste disposal facility, e.g., the Envirocare facility. *Id.* Additionally, the inside environment of the canister-based storage system is an inert gas (helium). There are no liquids on the inside of the canister and the canister is seal welded to preclude liquids from entering. SAR Section 6.3.

With this system, there is no credible scenario in which the firefighting water is contaminated as the contention suggests. There is no accident that would cause contaminated liquid to flow into the ground (SAR Section 6.3) much less the ground water, which is over 100 feet below the surface (SAR Section 2.5.2). Hence, Castle Rock's contention that firefighting will release contaminated water to the surrounding soil and groundwater fails because it does not controvert the facts and conclusion of the Applicant. As required under the NRC amended rules of practice, Castle Rock has not provided any factual support or expert opinion to provide a basis for this contention. Indeed, the contention must fail because no credible scenario has been presented which demonstrates that fire fighting activities will release contaminated water to the surrounding soil and groundwater.

b) Technology, Strategies and Procedures to Prevent Groundwater Contamination

Castle Rock's Contention 8 also fails because it is mistaken in its assertion that "[t]he ER is silent as to what technology, strategies and procedures will be used to prevent such groundwater contamination . . . ." Castle Rock Petition at 41. Section 2.5.5

of the Environmental Report states that operation of the PFSF will have no measurable offsite effects on existing groundwater quality or levels. Section 2.5.6 of the Environmental Report explains that the nature and form of the material stored (spent fuel rod assemblies) and the method of storage (dry casks) preclude the possibility of a liquid contaminant spill. Therefore, discussion of potential contamination of groundwater is not realistic. Section 4.5 of the Environmental Report also explains that operation of the site will have no effects on existing groundwater quality.

Castle Rock has not provided any factual basis or credible scenario to show that a genuine dispute exists with the Applicant on a material issue of fact, or law. Hence, Castle Rock's contention in this regard must be rejected.

**I. Castle Rock Contention 9: Regional and Cumulative Environmental Impacts**

1. The Contention

Castle Rock alleges in Contention 9 that:

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), 72.100, and NEPA.

Castle Rock Petition at 41. The asserted bases for the contention are set forth in three pages of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

The 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), 72.100, 72.122(e), and NEPA.

- a) The ER and SAR are defective because they fail to address the cumulative regional health and safety impacts of the ISFSI and other dangerous facilities in Tooele County.
- b) The ER and the SAR must address the cumulative quantitative risk to the public of so many dangerous facilities in one county

2. Applicant's Response to the Contention

Castle Rock raises a number of issues under Contention 9, which we address in turn below.

a) Cumulative Health and Safety Impacts in Tooele County

Castle Rock asserts that the application (the Environmental Report and the SAR) are deficient because they do not address the “regional and cumulative environmental impacts of the proposed PFSF.” Castle Rock Petition at 41. Castle Rock asserts that “Tooele County is already the location of an unusually large number of facilities and operations with serious environmental impacts.” *Id.* at 42 (listing 11 facilities in Tooele County). The “concentration of so many high impact facilities in such a relatively small area requires adequate environmental and safety analysis which is wholly lacking in the Application and ER.” *Id.* (citing 10 C.F.R. §§ 72.98(b) & (c), 72.100, and 72.122(e)).

This subcontention must be dismissed because it makes allegations without providing “concise statement[s] of the alleged facts or expert opinion which support” the allegations and it provides no “references to . . . specific sources and documents . . . on which the petitioner intends to rely to establish [said] facts or expert opinion.” 10 C.F.R.

§ 2.714(b)(2)(ii). As Applicant discussed above in its response to Contention K, for contentions that an application is deficient regarding its analysis of allegedly cumulative environmental effects, the petitioner must specify the effects and must come forward with specific facts and reasons to show that such effects will occur. In particular, it must come forward with specific information regarding the incremental effects of the proposed action and it must show why the applicant's analysis of the pre-existing effects with which the effects of the proposed action will supposedly be cumulative is wrong.

This subcontention must be dismissed because Castle Rock has come forward with no data whatsoever and has not provided reasons to show that cumulative environmental effects will occur. See Castle Rock Petition at 41-44. Castle Rock claims that the facilities it lists have "serious environmental impacts," but it does not describe any impacts. Id. at 42. It merely names the facilities and, for some of them, lists their alleged principal activity. Id. Castle Rock speculates about "possible interrelated risks" such as "burdens on transportation corridors of large quantities of hazardous and radioactive wastes, increased chance of terrorism and sabotage, increased chance of accidents involving multiple facilities." Id. at 43. But it provides no data concerning those risks and no reasons to show that those risks will result in environmental effects cumulative with those of the Applicant's ISFSI. Id. at 42-44. Moreover, it provides no data whatsoever regarding the ISFSI or its incremental environmental effects. Id. And beyond claiming (wrongly) that the Applicant has not addressed cumulative environmental impacts, Castle Rock does not provide any reasons to question the Applicant's assessment. Id. Therefore, because Castle Rock has not specified or come

forward with facts regarding the environmental effects with which the effects of the ISFSI would supposedly be cumulative, because it has not provided any data on the allegedly incremental effects of the ISFSI, and because it has not provided reasons why the effects would occur, or why the Applicant's assessment of cumulative impacts is wrong, this subcontention must be dismissed.

This subcontention must also be dismissed because it ignores relevant material submitted by the Applicant. The Environmental Report addresses the cumulative environmental impact of the ISFSI and other sources where they are relevant. See, e.g., ER §§ 4.1.7, 4.2.7. For example, the Environmental Report addresses the cumulative impact of truck and other vehicular traffic on Skull Valley road in terms of air pollution, impediments to traffic flow, and noise. Id. §§ 4.1.3, 4.1.7, 4.2.3, 4.2.7. It estimates the cumulative radiological and non-radiological impact on various offsite personnel of loading, sealing and transporting spent fuel canisters and casks. Id. § 4.7. Moreover, the Applicant has considered the potential impact of other facilities in Tooele County on the ISFSI and has found that it is unlikely that they would have any. See SAR § 2.2. For example, the Applicant has considered the effects of operations at the Tekoi Rocket Engine Test Facility, Dugway Proving Ground, and Tooele Army Depot, the industrial, transportation, or military facilities closest to the site, and has found that they would pose no threat to the ISFSI because of the distance to them and the presence of intervening terrain. SAR at 2.2-1 to 4. Besides its unsupported generic allegation, Castle Rock provides no information to the contrary. Therefore, because Castle Rock has ignored this material, this subcontention must be dismissed. See Section II.C.2. supra.

b) Cumulative Quantitative Risk

Castle Rock claims that “[a] number of cumulative/regional impact/effects issues must be addressed, including . . . the cumulative quantitative risk to the public of so many facilities in one county.” Castle Rock Petition at 43.

First, this subcontention must be dismissed because Castle Rock has not provided sufficient factual basis to support a contention regarding cumulative environmental impacts. See supra Subcontention (a).

Moreover, this subcontention must be dismissed as “an impermissible collateral attack on the Commission’s rules” for “advocat[ing] stricter requirements than those imposed by the regulations.” See Section II.B. supra at 57. NRC regulations do not require an applicant to assess cumulative quantitative environmental risk in its environmental analysis. First, 10 C.F.R. § 51.45 states that:

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

10 C.F.R. § 51.45(c) (emphasis added). Thus the NRC does not impose an absolute requirement that the Applicant even quantify all environmental impacts, let alone cumulative risk to the public.

Second, courts have held that not all environmental impacts or risks must be quantified. An environmental analysis must contain “sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a ‘hard look’ at the

environmental factors and to make a reasoned decision.” Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719, 737 (3d Cir. 1989); Town of Norfolk v. EPA, 761 F. Supp. 867, 873 (D. Mass. 1991), aff’d, 960 F.2d 143 (1st Cir. 1992). But such analysis must be guided by a “rule of reason[.]” Limerick Ecology Action, 869 F.2d at 745; Enos v. Marsh, 769 F.2d 1363, 1372 (9th Cir. 1985). Detailed analysis is only required where impacts are likely. Izaak Walton League of America v. Marsh, 655 F.2d 346, 377 (D.C. Cir. 1981). And, risks or effects need not be quantified where current assessment techniques do not provide a meaningful basis for quantification (Limerick Ecology Action, 869 F.2d at 743 (emphasis added)) or when the effects are too uncertain to be reliably quantified (Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974); see Town of Norfolk, 761 F. Supp. at 887-88). Therefore, there is no requirement under NRC regulations or NEPA that the Applicant determine the cumulative quantitative risk to the public from the ISFSI and other facilities in Tooele County and this subcontention must be dismissed.

**J. Castle Rock Contention 10: Retention Pond.**

1. The Contention

Castle Rock alleges in Contention 10 that:

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.

Castle Rock Petition at 44. The asserted bases for the contention are set forth in two pages of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated, as follows incorporating the specific allegations in its bases:

The 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

- a) The ER fails to discuss potential for overflow and therefore fails to comply with 10 C.F.R. Part 51.
- b) ER is deficient because it contains no information concerning effluent characteristics and environmental impacts associated with seepage from the pond in violation of 10 C.F.R. § 51.45(b) and § 72.126(c) & (d).
- c) The ER should address the applicability of the Utah Groundwater Protection Rules, which apply specifically to facilities such as the retention pond and generally require that such ponds be lined.

2. Applicant's Response to the Contention

As described below, Castle Rock's Contention 10 fails to comply with the amended Rules of Practice and must be rejected.

a) Potential for Overflow from the Pond

The retention pond is designed to collect runoff from the site for a 100 year-storm event. See ER Section 4.2.4. Storm water storage requirements are conservatively based on the 100-year, 24-hour rainfall as recommended in 40 C.F.R. Part 122, NPDES General Permit Requirements for Storm Water Discharges Associated with Industrial Activity.

Id. Under these design conditions, there will be no overflow of the retention pond. Since the design of the retention pond assures no overflow for the 100-year storm event, the overflow postulated by the contention is the kind of remote event that need not be considered under NEPA.

Surface hydrology of the site is described in SAR Section 2.4 and subsurface hydrology is described in SAR Section 2.5. The storm water collected in the retention basin will be surface runoff from the site and will not contain effluents. ER Section 2.5. ER Section 4.2.2 indicates that surface runoff is uncontaminated and will not adversely affect vegetation or wildlife. Also, as stated in SAR Section 2.5.3, potential contamination of groundwater is not applicable since the depth to groundwater at the site is substantially removed from any activity at the site finished grade. Castle Rock ignored these evaluations and provided no supported contrary view.

Castle Rock's Contention concerning potential for overflow from the pond must be rejected. The Applicant addressed this issue in detail in both the SAR and the Environmental Report. A contention cannot ignore it and still be acceptable. See Section II.C.2. supra.

b) Effluent Characteristics and Environmental Impacts Associated with Seepage

Castle Rock does not present any credible mechanism for the surface runoff to become radioactively contaminated. Hence, addressing environmental impacts associated with seepage from the pool is not appropriate and not required under the regulations. The facility is only required to provide effluent systems "as appropriate for the handling and

storage system.” 10 C.F.R. § 72.126(c). As described in detail in Applicant’s response to Castle Rock’s Contention 11, the PFSF handling and storage systems are designed to preclude surface water runoff at the PFSF from any radioactive effluents (SAR Sections 6.3, 6.4 and 6.5). Also, the Environmental Report states that the nature and form of the material stored (spent fuel rod assemblies) and the method of storage (dry casks) precludes the possibility of a liquid contaminate spill. ER Section 2.5.6. Hence, discussion of potential contamination of the groundwater and seepage from the pond is not applicable.

Castle Rock’s contention must be rejected both because it does not provide a credible mechanism that could cause contamination of the surface water runoff, and because it advocates stricter requirements than are imposed by the regulations. See Section II.B. supra.

c) Applicability of Utah Groundwater Protection Rules

Castle Rock’s contention that the Utah Groundwater Protection Rules should be discussed in the Environmental Report is incorrect. The storm water retention pond (which will be used solely for collecting storm runoff) is exempted from the State’s individual discharge permit requirement. See Applicant response to Contention T referencing Utah Administrative Code R317-6-6.2 (exempting detention basins, catch basins and other facilities used for collecting or conveying storm water).

Since the Utah Groundwater Protection Rules do not, as a matter of law, apply to the retention pond, there is no basis for a contention aimed at requiring a discussion of those rules in the Groundwater Report.

**K. Castle Rock Contention 11: Radiation and Environmental Monitoring**

1. The Contention

Castle Rock alleges in Contention 11 that:

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.

Castle Rock Petition at 45. The asserted bases for the contention are set forth in three pages of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

The 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 in that:

- a) PFS has taken no background radiological samples of nearby vegetation and groundwater.

- b) PFS has provided no radioactive effluent monitoring system to detect radioactive contamination in surface runoff water that collects in a retention pond on the PFSF site.

2. Applicant's Response to the Contention

Castle Rock raises two issues in Contention 11. The general assertion that radiation monitoring provided by the Application is inadequate to facilitate "radiation detection, event classification, emergency planning, and notification" is not explained, supported, or addressed in any way by the bases for the contention, and is therefore far too generalized and unsupported to establish a litigable contention in its general form. The role played by radiation monitoring with respect to radiation detection is discussed extensively at SAR 7.1-1 to 7.1-4; 7.3-16 to 7.3-17. Similarly, the role of radiation monitoring with respect to event classification is discussed at EP 2-7 to 2-16, emergency planning at EP and notification at EP 5-1 to 5-3. Castle Rock does not take issue with the radiation monitoring program described there except with respect to the two specific issues raised in the bases, background radiological samples and effluent monitoring of surface runoff collected in a retention pond, which are addressed below.

a) No Background Radiological Samples of Vegetation and Groundwater

As set forth above, Castle Rock contends that the License Application is deficient because PFS has taken no background radiological samples of nearby vegetation and groundwater. Castle Rock's assertion must be dismissed for failure to provide a sufficient basis to establish a litigable contention, as required by 10 C.F.R. § 2.714(b).

The only regulatory basis cited by Castle Rock in support of this subcontention is 10 C.F.R. § 72.126(c). Castle Rock Petition at 46-47. This provision is, however, inapplicable here. As discussed further in section b), *infra*, 10 C.F.R. § 72.126(c) requires systems for “effluent and direct radiation monitoring,” “[a]s appropriate,” during “normal operations and under accident conditions” at an operating ISFSI. 10 C.F.R. § 72.126(c) (emphasis in original). Thus, this regulation does not require taking background radiological samples prior to licensing of an ISFSI. Castle Rock provides no other regulatory basis for its contention.

The Applicant’s SAR has determined that the operation of the PFSF will have no effect on nearby vegetation or groundwater because there are no liquid or gaseous radioactive effluent releases from the PFSF. *See* SAR at 7.3-17, 7.6-2. Solid low level waste (“LLW”) generated at the PFSF is collected, packaged, and temporarily stored in a holding cell in the Canister Transfer Building for shipment to an offsite LLW disposal facility. *Id.* at 7.6-2. There are no credible scenarios in which radioactive effluents would be released from the PFSF. *See* ER at 6.2-1. Castle Rock’s contention does not challenge the validity of these determinations and certainly provides no basis for any challenge.

Because there are no radioactive effluents from the PFSF, there is no radiological effect on nearby vegetation and groundwater and therefore there is no reason to perform background radiological samples on nearby vegetation and groundwater. The Commission’s regulation on environmental reports for ISFSIs, 10 C.F.R. § 51.61, requires the report to include the information specified in 10 C.F.R. § 51.45 and

Subpart E of 10 C.F.R. Part 72. Nothing in Subpart E of 10 C.F.R. Part 72 requires background radiological samples of vegetation and groundwater near an ISFSI. 10 C.F.R. § 51.45 requires that the environmental report “considers and balances the environmental effects” of the ISFSI. See 10 C.F.R. § 51.45(c) (emphasis added). As discussed above, the PFSF design and operation is such that the PFSF will have no environmental effects on nearby vegetation or groundwater. Castle Rock’s contention neither contradicts nor challenges this determination. See generally, Castle Rock Petition at 45-47. Further, Castle Rock has not put forth any mechanism whatsoever that would show any environmental effects on nearby vegetation or groundwater. Rather, Castle Rock’s petition acknowledges that the PFSF is “expected to be very clean.” Id. at 47.

Castle Rock’s contention provides no basis for its assertion that the License Application is deficient because PFS has taken no background radiological samples of nearby vegetation and groundwater. Castle Rock’s contention does not provide any regulatory support for its assertion that PFS must take background radiological samples of nearby vegetation and groundwater. Nor does Castle Rock’s contention identify any credible mechanism by which the operation of the PFSF would have any environmental effects on nearby vegetation and groundwater. Castle Rock’s contention must therefore be rejected for failure to provide a sufficient basis to establish an litigable contention under the requirements in the Commission’s regulations. 10 C.F.R. § 2.714(b)(2).

- b) No Radioactive Effluent Monitoring System for Retention Pond

As set forth above, Castle Rock contends that the License Application is deficient because it provides no radioactive effluent monitoring system to detect radioactive contamination in surface runoff water that collects in the retention pond.<sup>81</sup> Castle Rock's assertion must be rejected as a contention that advocates stricter requirements than are imposed by the Commission's regulations, and is therefore an impermissible collateral attack on the Commission's regulations. 10 C.F.R. § 2.758. See also Section II.B. supra at 5-7.

The Contention is based on Castle Rock's incomplete reading of the Commission's regulations regarding effluent radiation monitoring systems. See 10 C.F.R. § 72.126(c). Castle Rock's contention asserts that PFSF is required to perform effluent monitoring for a surface runoff retention pond because "the language of § 72.126(c) . . . states that 'effluent [monitoring] systems must be provided.' (emphasis added)." See Castle Rock Petition at 46-47 (emphasis in original). Castle Rock's reading of the Commission's regulation is incorrect and must be rejected because it is both incomplete and taken out of context. The complete requirement reads as follows:

(c) Effluent and direct radiation monitoring. (1) As appropriate for the handling and storage system, effluent systems must be provided. Means for measuring the amount of radionuclides in effluents during normal operations and under accident conditions must be provided for these systems. A means of measuring the flow of the diluting medium, either air or water, must also be provided.

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<sup>81</sup> The retention pond collects and drains surface water runoff from the PFSF site. See ER at 4.2-4. The retention pond is designed to accommodate the surface water runoff from a 100-year storm event. Id. Water collected in the retention pond dissipates by evaporation and percolation into the subsoils. Id.

10 C.F.R. § 72.126(c) (emphasis in original). The text of the regulation makes clear on its face that effluent radiation monitoring systems need only be provided “as appropriate for the handling and storage system,” not absolutely in every case, as Castle Rock implies through its incomplete quotation from the regulations. Castle Rock has provided no basis for why such monitoring is appropriate in this case.

Because there is no credible mechanism for the surface runoff addressed in Castle Rock’s contention to become radioactively contaminated, an effluent monitoring system for the surface water retention pond is not “appropriate,” and not required under the Commission’s regulations. No radioactive liquid wastes are generated at the PFSF. See SAR at 7.6-3. The storage system designs for the PFSF use only seal welded metal canisters to preclude any radioactive effluents from the canister internals. See id. at 7.1-5, 7.5-4. The License Application states that

Under normal and off-normal conditions of transport, handling, storage, and removal offsite, the potential does not exist for breach of the canister and release of radioactive material associated with the spent fuel from inside the canister. . . . [t]here are no credible scenarios that release effluents.

ER at 6.2-1. The storage casks themselves are monitored for surface contamination in the Canister Transfer Building, and decontaminated in the unlikely event that they pick up any removable contamination in the event of an off-normal condition, such as a canister mishandling event. See SAR at 6.4-2. The storage casks are only moved outside of the Canister Transfer Building for storage after a contamination survey determines they are free of removable contamination. Id. Thus, “[d]uring spent fuel storage, no releases of

any type of radioactive material occur. Therefore, there are no radiological waste impacts from the storage of spent fuel.” *Id.* at 6.5-2. Because there are no releases of any type of radioactive material from spent fuel storage, surface water runoff from the PFSF storage area cannot contain any radioactive effluents. Castle Rock has provided no information that would support a contrary view.

As described in detail in the SAR, *see, e.g.* §§ 6.3, 6.4, 6.5, the PFSF handling and storage systems are therefore designed to preclude surface water runoff at the PFSF from containing any radioactive effluents. The facility is required to provide effluent monitoring systems only “as appropriate for the handling and storage system.” 10 C.F.R. § 72.126(c). Because of the handling and storage system design of the PFSF, such a system is not “appropriate “for the surface water retention pond on the PFSF site. Castle Rock’s contention neither addresses, nor challenges the validity of, the discussion of radioactive effluents from the PFSF in the License Application. Castle Rock’s contention puts forth no mechanism whatsoever through which the surface water runoff collecting in the retention pond could have radioactive contamination, nor any discussion of why an effluent monitoring system would be “appropriate” under such circumstances.

Castle Rock’s assertion that the regulations require “that ‘effluent [monitoring] systems must be provided’” in all cases, regardless of whether they are “appropriate” or not, goes beyond the scope of the Commission’s regulations. A contention which advocates stricter requirements than are imposed by the regulations is an impermissible collateral attack on the Commission’s rules and must be rejected. *See* Section II.B. *supra* at 5-7.

**L. Castle Rock Contention 12: Permits, Licenses and Approvals**

**1. The Contention**

Castle Rock alleges in Contention 12 that:

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).

Castle Rock Petition at 47. The asserted bases for the contention are set forth in 4 pages of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its basis:

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:

- a) The ER does not contain a list of all permits, etc. which must be obtained as required by 10 C.F.R. § 51.45(d).
- b) The ER fails to include a discussion of the status of compliance with applicable environmental quality standards and requirements as required by 10 C.F.R. § 51.45(d) in that the (i) discussion of the Army Corps of Engineers permitting requirements for construction along the new corridor is inadequate; (ii) the discussion of requirements at the Site is inadequate and (iii) the conclusory sentence that no air quality permitting requirements apply is inadequate.
- c) Section 9.2 of the ER discussing Utah permitting requirements is inadequate.

- d) Sections 4.1.3 and 4.2.3 of the ER concerning Utah air quality permits are inadequate.
- e) ER discussion of widening Skull Valley Road is inadequate.

2. Applicant's Response to the Contention

a) List of Permits

Castle Rock claims that the Environmental Report is inadequate in that it does not contain a "list" of all permits, licenses and approvals "which must be obtained" as required by 10 C.F.R. § 51.45(d). Castle Rock Petition at 47. This contention must be rejected for ignoring relevant information in the application and for lack of basis.

This subcontention appears to be based on a mistaken belief that this regulation requires a listing of required permits and approvals in tabular form, for Chapter 9 of the Environmental Report does set forth, agency by agency, the approvals that will be required to be obtained prior to construction or operation of the facility, along with the status of compliance with those approvals. Section 9.1 lists the NRC, Department of Interior (DOI), U.S. Fish and Wildlife Service (USFWS), Bureau of Land Management (BLM), Bureau of Indian Affairs (BIA), Environmental Protection Agency (EPA), U.S. Army Corps of Engineers (COE) and Department of Transportation (DOT), as federal agencies from which the Applicant must obtain various approvals. These approvals are clearly specified in Chapter 9 and include approval of the lease between the Applicant and the Skull Valley Band of Goshute Indians, approval of the Applicant's LA, ER and SAR by NRC and approval of a storage system under Part 72 and a transportation cask under Part 71, among others.

Thus, Chapter 9 of the Environmental Report provides a listing, along with a discussion within the list, of the required environmentally related permits, licenses and approvals that typically are required for a project of this magnitude and a status of whether the PFSF is required to obtain them. Many of the permits that could apply are not required because the project is located on an Indian reservation, which is not subject to state and local laws, or because the project does not require Clean Air Act and related permits for the reasons stated below. Although the list of required permits and approvals does not appear in tabular form, as Castle Rock appears to suggest it should, no such requirement is found in 10 C.F.R. § 51.45(d). Because Castle Rock mistakenly claims that the Applicant failed to address a relevant issue in its Environmental Report, its contention must be dismissed. See, e.g., Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993).

This contention must also be dismissed because it fails to set forth an adequate basis. Nowhere does Castle Rock allege that there are specific permit requirements that the Applicant's Environmental Report neglects to address; Castle Rock's challenge to the information contained in the Environmental Report goes to the format rather than the substance of that document. Having failed to come forward with any facts to support a challenge that the Applicant has failed to address specific permit requirements, this contention must be dismissed for lack of adequate basis.

b) Status of Compliance

Castle Rock also claims that the Environmental Report fails to include a discussion of the status of compliance with applicable environmental quality standards and requirements as required by 10 C.F.R. § 51.45(d). Castle Rock Petition at 47. Castle Rock claims that the Environmental Report “merely mentions a number of permitting requirements that might apply; the ER provides no critical facts necessary to determine whether such requirements do apply and, if so, what, if anything, is being done to comply with them, or whether the Application does comply with those requirements.” Castle Rock Petition at 47, 48. Castle Rock specifically contends that the discussion of required permits in the Environmental Report is inadequate in three respects. These are (i) the discussion concerning Dredge and Fill permits for new construction along the transportation corridor; (ii) the discussion of applicable Clean Water Act permits required for the proposed ISFSI facility; and (iii) the discussion of permitting requirements under the Clean Air Act. As discussed below, Castle Rock in each instance ignores relevant information in the Environmental Report and this contention must be dismissed.

First, Castle Rock claims that “Section 9.1.3 states that the U.S. Army Corps of Engineers must be requested to issue a so-called Dredge & Fill Permit under Section 404 of the Federal Clean Water Act (“CWA”) if new construction along the transportation corridor disturbs streams and wetlands.” Castle Rock Petition at 48. According to Castle Rock, this “does not comply with the Environmental Report and NEPA requirements” in that “[t]ransportation corridors must be identified and facts about streams and wetlands must be analyzed before the Environmental Report can satisfy NRC/NEPA

requirements.” This contention ignores relevant information in the Environmental Report and exceeds the regulatory requirements and must therefore be dismissed.

The environmental effects of site and transportation corridor construction and operation are discussed in Chapter 4 of the Environmental Report. Section 4.1.4 specifically discusses effects on hydrological resources. That section, ignored by Castle Rock, states that “[t]here are no perennial streams at or near the PFSF and its access road . . . . Therefore, there will be no impact on area hydrology due to construction of the facility and its access road.” ER at 4.1-10. Further, Section 4.3.2 of the Environmental Report expressly addresses environmental impact of the widening of the road as follows:

Road expansion will require the permanent alteration of approximately 29 acres to accommodate the new wider lanes and shoulders . . . . In general, the small amount of road-side vegetation lost will be a minor impact as much of this land is composed of common habitat types, such as desert shrub/saltbush . . . .

ER at 4.3-2. The section goes on to discuss “[s]everal specific environmentally sensitive areas [that] have been identified along the transportation corridor and [that] may require special consideration during construction activities.” ER at 4.3-2, 2-3. Thus, this contention must be dismissed for ignoring information in the Application and a concomitant lack of basis.

Second, Castle Rock suggests that the Environmental Report’s discussion of the permitting authority of the Skull Valley Band under the Clean Water Act is inadequate. According to Castle Rock “[i]f the tribe has not been granted CWA authority by the . . . U.S. Environmental Protection Agency . . . the ER must clearly state this fact and identify

what EPA and state permitting requirements apply and what, if anything, is being done by PFS to comply with them.” Castle Rock Petition at 48. Castle Rock ignores, however, that the Environmental Report does exactly that on the same page of the report. It states: “There are no stream or wetland impacts associated with the development of the facility site.” ER at 9.1-4. Castle Rock does not claim that this is an incorrect determination nor does it supply any facts or expert opinion or supporting documents that would support a challenge to this determination.

Third, Castle Rock claims that the “one-sentence, conclusory statement that no [air] permitting requirements apply . . . is woefully inadequate.” It claims that none of the analysis necessary to determine whether air permitting requirements apply is set forth and as a result Castle Rock “cannot assess the reasoning and data underlying PFS’s conclusions.” Castle Rock Petition at 48, 49.

Again Castle Rock ignores relevant information in the Environmental Report. The analysis of impact of the Facility and related construction is analyzed in other sections of the Environmental Report. Specifically, Section 4.1.3 of the Environmental Report analyzes the pollutant emissions from construction of the site and summarizes the results of that analysis in Tables 4.1-4, and 4.1-5. These tables, which provide emissions estimates, indicate that the point sources on the PFSF will emit significantly less than the 100 ton per year threshold for the Title V program. Thus, Castle Rock’s contention that the Applicant’s analysis is “woefully inadequate” of air permitting requirements is simply incorrect. Castle Rock has presented no facts or expert testimony to challenge the

information from these tables; Castle Rock's failure to provide a basis for its contention must result in the dismissal of this contention.

In sum, Castle Rock is required to do more than make bald, conclusory allegations concerning the adequacy of the Environmental Report. Castle Rock "must make a minimal showing that material facts are in dispute . . ." Connecticut Bankers Ass'n v. Board of Governors, 627 F.2d 245, 251 (D.C. Cir. 1980). Castle Rock has ignored the Applicant's facts and analysis in the Environmental Report and has presented no facts or expert testimony to contest them or to challenge those conclusions. Therefore, this subcontention must be dismissed for lack of an adequate basis.

c) Utah Permitting Requirements

Castle Rock claims that "Section 9.2 of the ER (addressing State of Utah permitting requirements) " is inadequate because it "uses the word 'may' in referring to which state permitting requirements are applicable to the PFSF project leaving 'up in the air' the question of what state permitting requirements actually apply." Castle Rock Petition at 49. According to Castle Rock, "there are very few solid facts allowing the reader to understand the permitting status of the Application. Thus, we cannot assess the reasoning and data underlying PFS's conclusions." Id.

This Contention must be dismissed for lack of a legal and factual basis. Castle Rock cites no legal authority in support of its contention that the Applicant's analysis of the state permitting requirements is inadequate. Castle Rock generically states that the Applicant has provided "very few solid facts" but fails to specify what additional facts are

required to be provided or why the facts provided are inadequate. Furthermore, Castle Rock does not challenge the statement in the ER that “[t]he permitting of the PFSF located on the Skull Valley Indian Reservation is governed by federal and tribal law. Applicable Utah laws only pertain to construction activities outside of the Reservation involving the transportation corridor.” ER at 9.2-1.

Further, because it is not yet clear which mode of transportation will be utilized, (*i.e.*, rail spur or heavy haul truck), it is premature to attempt to determine what permits will be required. There is no requirement that permits be obtained or precisely identified in scope and nature at the time of filling a license application with the NRC. NRC case law strongly supports the conclusion that the application for and procurement of permits and licenses may proceed simultaneously with the consideration of the proposal by the NRC. See, Applicant’s response to Utah Contention T and cases cited therein.

Thus, contrary to Castle Rock’s implicit underlying assumption, the Applicant is not required to have determined at this preliminary stage of the proceeding what permitting requirements will apply. It is sufficient to have considered, in the context of alternatives that are still being weighed, what permitting requirements may apply. Because it is not yet been decided which mode of transportation will be utilized, (*i.e.*, rail spur or heavy haul truck), it is premature to attempt to determine exactly what permits will be required.

d) Utah Air Quality Permits

Castle Rock claims that the discussion in Sections 4.1.3 and 4.2.3 of the Environmental Report concerning Utah air permitting requirements is inadequate. Castle Rock Petition at 48. According to Castle Rock, PFS “cites to a number of Utah Division of Air Quality (‘DAQ’) rules with the apparent assumption that they do apply to the construction of the PFSF. If DAQ rules apply . . . it is clear that prior to the commencement of construction a DAQ approval order must be obtained.” Castle Rock Petition at 49.

This contention must be dismissed for lack of an adequate basis because the State of Utah Division of Air Quality (DAQ) rules are not enforceable on the Skull Valley reservation. As set forth in the response to Utah Contention T, no state air quality order or approval is required here because the State has no jurisdiction or authority to require such an order for activities on the Skull Valley reservation, absent an express delegation from Congress, which has not been provided.

Further, as indicated in the Environmental Report, Castle Rock completely ignores the discussion in Sections 4.1.3 and 4.2.3 of the Environmental Report of air emissions produced by the PFSF during construction and operation of the facility. Also ignored are the data in Table 4.1-4 which lists the specific pollutants and their estimated emission rate in tons/month. Castle Rock does not challenge the Applicant’s assertion that “[t]he operation of the PFSF is not expected to have any measurable impact on the local meteorology or air quality.” ER at 4.2-3. Nor does Castle Rock challenge the analysis provided in § 4.1.3 that preliminary analysis of “[c]onstruction related pollutant emissions . . . indicate that the estimated pollutant concentrations at Skull Valley Road

and at the nearest residences are all below the ambient air quality standards.” ER at 4.1-9, 10.

Castle Rock has provided no facts or expert opinion to challenge these conclusions or to support its assertion that “it is clear” that a DAQ approval order would be required assuming State law were applicable. This failure to comply with the requirements of 10 C.F.R. § 2.714(b)(2)(ii) is also grounds for dismissal.

Thus, this contention must be dismissed for lack of basis and materiality. Even if proven, this contention “would not entitle [the] petitioner to relief,” 10 C.F.R. § 2.714(d)(2)(ii), since Applicant’s proposed activities fall outside the jurisdiction of the DAQ and therefore, DAQ permits are not applicable. See also Section II.B. supra.

e) Widening Skull Valley Road.

Castle Rock’s Petition states that the “Environmental Report mentions that the Skull Valley Road may need to be widened to accommodate the large trucks proposed for hauling the spent fuel to the PFSF site,” but fails to discuss that “two critical approvals are needed: Those of Castle Rock and Skull Valley Co.” who own the land on both sides of this highway. Castle Rock Petition at 49.

This contention must be dismissed for failure to provide an adequate factual basis. Castle Rock asserts that it owns land on both sides of the highway, and that the Applicant will be required to obtain approval from Castle Rock in order to widen the Skull Valley Road. But Castle Rock has failed to provide an adequate factual basis for its contention that expansion of the existing roadway would require additional land acquisition from

Castle Rock. Castle Rock's only assertion is that it owns much of the land on either side of the road. Id. Castle Rock provides no facts or expert opinion to suggest that additional right-of-way will be necessary to expand the roadway. In short, this subcontention amounts to nothing more than a mere expression of Castle Rock's opinion and is therefore inadmissible.

**M. Castle Rock Contention 13: Inadequate Consideration of Alternatives.**

1. The Contention

Castle Rock alleges in Contention 13 that:

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).

Castle Rock Petition at 50. The asserted bases for the contention are set forth on pages 50-52. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

The 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:

- a) There is no discussion in the ER on the required topics of environmental effects and impacts, economic, technical and other costs and benefits of the alternatives.

- b) The evaluation and comparison of the no build or no action alternative is inadequate.
- c) The analyses of alternatives ignores every potential negative factor with respect to the PFSF. Such an analysis must include
  - (i) the environmental and safety benefits associated with maintaining and expanding a decentralized, onsite storage system;
  - (ii) the environmental and safety impacts and risks associated with the proposed privately operated, centralized system,
  - (iii) the state-by-state, plant-by-plant facts which create the need PFS asserts is present for moving the spent fuel to another location;
  - (iv) the environmental impacts and safety hazards associated with moving so many casks from various locations across the country to a centralized location;
  - (v) the environmental benefits of a combination of expanded onsite storage and regional ISFSIs;
  - (vi) the heightened safety hazards associated with moving such a large quantity of spent fuel to Utah when the transportation corridors will be contested for the 2002 Olympic Games and subsequent activities.
- d) The ER fails to include an analysis of the prospect of a legislative solution.

2. Applicant's Response to the Contention

a) Inadequate Environmental Evaluation of Alternatives

Castle Rock alleges that the Applicant has violated NRC regulations, specifically 10 C.F.R. § 51.45(c), and NEPA because the Environmental Report fails to adequately consider the environmental effects of constructing the ISFSI, the environmental impacts

of alternatives to that action, and alternatives available for reducing or avoiding adverse environmental effects. In particular, Castle Rock asserts that the Environmental Report fails to discuss the relative “environmental effects and impacts, economic, technical and other costs and benefits” among the Skull Valley site, the NEW Corporation alternative site and any other potential sites. Castle Rock Petition at 50-51.

Subsection (c) of § 51.45 states that

The environmental report shall include an analysis that considers and balances the environmental effects of the proposed action, the environmental impacts of alternatives to the proposed action, and alternatives available for reducing or avoiding adverse environmental effects . . . . [T]he analysis in the environmental report should also include consideration of the economic, technical, and other benefits and costs of the proposed action and of alternatives. . . . The environmental report should contain sufficient data to aid the Commission in its development of an independent analysis. 10 C.F.R. § 51.45(c).

This contention must be dismissed for two reasons. First, Castle Rock mistakenly claims that Applicant’s ER fails to address the required topics of discussion mandated by the above regulation. Second, Castle Rock fails to provide any basis for its generalized allegation that the Applicant has not complied with the requirements of §51.45(c). Specifically, Castle Rock fails to explain in what respects the information contained in the application is insufficient to “aid the Commission in its development of an independent analysis.” §51.45(c).

The first ground for dismissal is that Castle Rock completely ignores the discussion and analysis in the Environmental Report that explains the process by which

the Applicant selected among 38 candidate sites (including the NEW Corporation site identified by Castle Rock) and narrowed that preliminary list of choices to the proposed primary and alternative sites. See §8.1.3 of the ER, "Siting Alternatives," Table 8.1-1, "Potential Host Sites," Table 8.1-2, "Site Selection Questionnaire," and Table 8.1-3, "Evaluation Criteria." The process included consideration of the relevant environmental effects, economic, technical, and other considerations, including political factors.

Similarly, Castle Rock ignores the discussion and analysis in the Environmental Report that explains the process by which the Applicant selected the multi-purpose canister technology for use at the PFSF. See ER §8.2, "Facility Design Alternatives," which describes the "five types of system technologies available or under development for the dry storage of spent nuclear fuel." *Id.* at 8.2-1. That section describes each alternative, its concomitant health, safety, environmental, and financial advantages and disadvantages, and the sequence of operations for each identified alternative system.

Thus, contrary to Castle Rock's assertion that the environmental, technical, economic and other factors identified in §51.45(c) were not considered in the Applicant's site selection, the Environmental Report shows that these factors were considered. See ER at 8.1-2. A contention such as this one, that mistakenly claims that the applicant failed to address a relevant issue in the application must be dismissed. See, e.g., Georgia Power Company (Vogle Electric Generating Plant, Units 1 and 2), LBP-91-21, 33 NRC 419, 424 (1991).

b) "No-Action" Alternative

Castle Rock claims that the discussion of the “no-action” alternative in the Environmental Report “focuses almost exclusively on the costs to be incurred by some power companies if . . . the centralized ISFSI is not built when and where [the Applicant] proposes.” Castle Rock Petition at 51. Once again, Castle Rock ignores relevant information in the Environmental Report, which considers the “no action” alternative and discusses the consequences that would result from a decision not to build the facility. Those consequences include the premature shutdown of currently operational commercial nuclear power plants and delayed decommissioning and increased maintenance expenses for permanently shutdown reactors. Additional adverse environmental consequences would likely result from the proliferation at plant sites of onsite ISFSIs that lack standardization and which would thereby increase the complexity and cost of preparing and shipping spent fuel to a permanent federal repository and which would increase the decommissioning burden for utilities. ER at 8.1-3.

The “no-action” alternative means that the project will not take place. See Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ’s National Env’tl. Policy Act Regulations, 46 Fed. Reg. 18,026, Q.3. (Mar. 23, 1981). In the context of a licensing decision, there are two alternatives: to grant the license or to deny the license. The costs and benefits of granting the license will be reversed if the license is denied. (See, e.g., South Louisiana Environmental Council, Inc. v. Sand, 629 F.2d 1005, 1017 (5th Cir. 1980), stating that “. . . obviously, the adverse environmental effects would not take place were the project to be stopped . . .”). Since the Applicant has comprehensively identified and evaluated the environmental impacts of proceeding with

the proposed action<sup>82</sup> it has *ipso facto* identified the benefits of not proceeding. Once again, Castle Rock has ignored relevant information in the Environmental Report and has merely advocated additional discussion of issues. Such a contention is not admissible and must be dismissed. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23 38 NRC 200, 246 (1993).

c) Ignoring Potential Negative Factors

Castle Rock also claims that the analysis in the Environmental Report is “utterly one sided and creates an obvious bias . . . in favor of the Skull Valley alternative by ignoring every potential negative factor.” The contention then lists the environmental impacts that it claims should have been considered, such as those associated with (i) “maintaining and expanding a decentralized, on-site storage system; (ii) the environmental and safety impacts and risks associated with the proposed privately operated, centralized system; (iii) the state-by-state, plant-by-plant facts which create the need [the Applicant] asserts is present for moving the spent fuel to another location . . . ; (iv) the environmental impacts and safety hazards associated with moving so many casks from various locations across the country to a centralized location . . . ; (v) the environmental benefits of a combination of expanded on-site storage and regional ISFSIs as opposed to the national, centralized approach to the environmental benefits of a government-sponsored monitored retrievable storage facility, . . . and (vi) the heightened

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<sup>82</sup> See Chapter 4 of the Environmental Report. Also, Chapter 5 of that report addresses the environmental effects of accidents and Chapter 7 discusses economic and social effects of installation, construction and operation.

safety hazards associated with moving such a large quantity of spent nuclear fuel to Utah when the transportation corridors will be congested for the 2002 Olympic Games and subsequent activities.” Castle Rock Petition at 51.

This part of the contention must also be rejected. Again, Castle Rock ignores information in the Environmental Report that directly addresses its claims.

(i) Decentralized, on-site Storage System

The contention’s first claim, that the Applicant should evaluate the alternative of maintaining and expanding a decentralized on-site storage system, is addressed at §1.2 of the Environmental Report, entitled, “Need for the Facility,” which discusses the economic and regulatory impediments to continued on-site storage, as well as the shortage of available capacity in on-site spent fuel pools--a shortage which is likely to impede the continuing operation of commercial nuclear power plants, hamper their future decommissioning, and significantly raise the costs of that process. Because this contention mistakenly claims that the Applicant failed to address a relevant issue in the application, it must be dismissed. See, e.g., Rancho Seco, at 247-48. Furthermore, the contention amounts to nothing more than an assertion that the Applicant should have considered the alternative of maintaining and expanding a decentralized on-site storage system. As such, it must be dismissed. The NRC Rules of Practice are clear that a statement “that simply alleges that some matter ought to be considered” does not provide a sufficient basis for an admissible contention. Id. at 246.

(ii) Privately Operated, Centralized System

Petitioner also demands that the alternatives discussion “objectively include the environmental and safety impacts and risks associated with the proposed privately operated, centralized system.” Castle Rock Petition at 51. Again, Petitioner completely ignores the discussion of those issues in Chapter 4 of the Applicant’s Environmental Report. That Chapter discusses the environmental effects of facility operation including effects on air quality, geography, land use and demography, ecological resources, hydrological resources, etc. ER §4.3. Because this subcontention mistakenly asserts that information required to be included in the LA or ER was not included, it must be dismissed. Rancho Seco at 247-48.

(iii) Nation-Wide Analysis of Need

Next, Castle Rock demands a summary of the “state-by-state, plant-by-plant facts which create the need [the Applicant] asserts is present for moving the spent fuel to another location.” Castle Rock Petition at 51. This challenge to the Applicant’s conclusion that there is a “need” for the facility must also be dismissed as “advocat[ing] stricter requirements than those imposed by the regulations, [and therefore amounting to] “an impermissible collateral attack on the Commission’s rules.” See Section II.B. supra.

Castle Rock asserts, without providing any supporting factual or legal basis, that the Applicant must provide in its statement of need for the facility, a detailed analysis for each reactor site. Castle Rock has provided absolutely no legal or factual basis to show that Applicant’s analysis of need is inadequate or that its proposed far-reaching analysis

of need must be undertaken under NEPA's rule of reason. For the reasons set forth in response to Utah Contention X, this subcontention should be excluded.

(iv) Moving the Casks Across Country

Here, Castle Rock asserts that "the alternatives discussion must objectively include . . . the environmental impacts and safety hazards associated with moving so many casks from various locations across the country to a centralized location . . ."

Castle Rock Petition at 51.

This subcontention must be dismissed as an impermissible collateral attack on the NRC's regulations for advocating stricter requirements than they impose. *Id.* The spent fuel is shipped in shipping casks which are required to comply with applicable DOT and NRC regulations. The shipping cask is a 10 C.F.R. Part 71 certified package that is required to be designed to ensure containment of any radioactive material, including any external surface contamination on a canister, and prevent release of the material to the environment. See 10 C.F.R. Part 71 Subpart E; see also SAR at 5.1-8. A challenge to the capability of a shipping cask to perform its designed and certified function is a challenge to NRC regulation.

Furthermore, Castle Rock's subcontention is also a direct challenge to the Commission's regulations in 10 C.F.R. Part 72 which expressly limit (as discussed in Applicant's Response to Utah Contention V) the evaluation of the environmental effects of transporting spent fuel to the region of the ISFSI. 10 C.F.R. §§ 72.34, 72.108.<sup>83</sup> The

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<sup>83</sup> Applicant incorporates its response to Utah Contention V, subpart a.

Commission has expressly considered in promulgating those regulations the extent to which the environmental impacts of transporting spent fuel to and from an ISFSI are to be considered, and it has determined that the transportation environmental impacts to be assessed are those "within the region" where the ISFSI will be located. Id. (emphasis added); see also, 45 Fed. Reg. 74,693, 74,695 (1980). As a result, Castle Rock's contention and its related bases, which argue that "the alternatives discussion must objectively include . . . the environmental impacts and safety hazards associated with moving so many casks from various locations across the country to a centralized location . . ." (Castle Rock Petition at 51), are barred as a matter of law from being litigated in this licensing proceeding. See Section II.B. supra.

Additionally, the environmental effects of such shipments have been evaluated using the NRC's generic determination of the environmental impact of shipping spent fuel and must similarly be rejected. See Table S-4 and the discussion of Radioactive Material Movement at § 4.7 of the Environmental Report as well as § 5.2 which discussed Transportation Accidents. Castle Rock provides no factual basis to support a challenge to the conclusion of Table S-4 that "although the environmental risk of radiological effects stemming from transportation accidents is currently incapable of being quantified, the risk remains small." Table S-4, fn. 4. Nor does Castle Rock challenge the conclusion of several other studies mentioned in section 5.2 of the Environmental Report, all of which concluded that the environmental impacts of

transportation of spent nuclear fuel are acceptable. ER at 5.2-2.<sup>84</sup> Castle Rock's failure to provide any basis of fact or expert testimony to challenge the Environmental Report's findings must result in a rejection of this subcontention for lack of adequate basis.

(v) Combination of Expanded on-site Storage and Regional ISFSIs

The next part of the contention asserts that Applicant must include in its "alternatives" discussion, "the environmental benefits of a combination of expanded on-site storage and regional ISFSIs as opposed to the national, centralized approach to the environmental benefits of a government-sponsored monitored retrievable storage facility, as prescribed by the NWPA." Castle Rock Petition at 51. Here, again, Petitioner ignores the entirety of that discussion in the Environmental Report. The MRS is discussed at 1.1-1 of the Environmental Report. That discussion explains that the siting and construction of the MRS, the construction of which is authorized by the NWPA, will not occur until "well beyond the 1998 deadline." *Id.* Therefore, a discussion of this alternative is inextricably linked to the Applicant's discussion of the need for the facility. To the extent that an MRS will not be available in the near future, the scarcity of on-site storage space makes consideration of the environmental benefits of this alternative a moot issue. The Applicant has also addressed the issue of the environmental benefits of a

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<sup>84</sup> For example, NUREG-0170 concluded that "[t]he radiological risk from accidents in transportation is small . . . ." Likewise, NUREG/CR-4829 concluded that "at least 99.4 percent of truck and train accidents involving a spent fuel shipment will result in negligible radiological hazards which are less than those implied by the current . . . regulations." Similarly, the Environmental Assessment for the Yucca Mountain Site, performed by DOE concluded that ". . . it is very unlikely that an accident resulting in a release of radioactive material would occur and . . . evidence suggests that the consequences would not be great should such an accident occur." ER at 5.2-2, 3.

combination of expanded on-site storage and regional ISFSIs. §8.1.3.1, "Selection of Candidate Sites," discusses the consequences of building ISFSIs at sites around the country, including increasing the number of sites, increasing the number of storage technologies used, greater environmental disturbance than a single site, increased decommissioning burden, and increased complexity and cost for ultimate spent fuel disposal. ER at 8.1-3. Castle Rock does not challenge the Applicant's assessment of this alternative. To the extent that Castle Rock's references to "regional ISFSIs" is intended to refer to away-from-reactor ISFSIs, it has provided no basis or support for the availability of other sites beyond those considered by Applicant. Finally, Castle Rock's statement that this matter should be considered in the Environmental Report does not provide a sufficient basis for an admissible contention.

(vi) Congested Transportation Corridors during 2002 Olympics

Castle Rock also claims that there will be "heightened safety hazards associated with moving such a large quantity of spent nuclear fuel to Utah when the transportation corridors will be congested for the 2002 Olympic Games and subsequent activities . . . ." Castle Rock Petition at 51. This subcontention must be dismissed as an impermissible challenge to NRC regulations for the same reasons as subcontention c(iv) above.

Furthermore, this subcontention must be dismissed for lack of an adequate factual basis. Castle Rock has provided no support for its unsupported, conclusory allegation that the transportation corridors that will be used to move the fuel will be congested for the Olympic Games. It certainly is not apparent why the Olympic Games would

substantially increase traffic on the main railway or Skull Valley Road. In any event, Castle Rock provides no facts in support of its claim that congested transportation corridors will present "heightened safety hazards"; nor does it specify what those hazards would be and how they would endanger the environment or the health and safety of the public. Finally, Castle Rock specifies no other "subsequent activities" that will cause congestion of the transportation corridors. In sum, this subcontention lacks any factual bases and must be dismissed.

(vii) Legislative Solution

Castle Rock claims that since legislation is currently "moving through Congress which would address the stated concerns of PFS . . . , NEPA requires that the ER include an analysis of the prospect for a legislative solution . . ." Castle Rock Petition at 52. This contention must be dismissed for lack of an adequate legal basis. Contrary to NRC regulations (see, e.g., 10 C.F.R. §2.714(b)(2)(i)), Castle Rock cites no legal authority for requiring the Applicant to consider pending legislation. Furthermore, Castle Rock's suggestion that the Applicant evaluate "the environmental advantages of a government operated temporary, high-level nuclear waste, spent fuel facility" (Castle Rock Petition at 52) is moot, since, as the Applicant discusses in §1.2 on "Need for the Facility," many utilities are facing a near term shortage of spent fuel storage capacity and any prospects for a "government operated temporary, high-level nuclear waste spent fuel facility" (id.) are years in the future.

**N. Castle Rock Contention 14: Inadequate Consideration of Impacts**

1. The Contention

Castle Rock alleges in Contention 14 that:

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.

Castle Rock Petition at 52. The asserted bases for the contention are set forth in two pages of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

The 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) in that

- a) Section 5.2 discussing transportation accidents contains no site specific information on the "effects on populations in the region" as required by the rule.
- b) Chapter 4 of the ER contains no meaningful evaluation of impact of unlined retention pond and other PFSF operations on surrounding subsoils and ground water.

- c) The ER fails to give adequate consideration to the adverse impacts of the PFSF, including the risks of contamination of human and livestock food sources.
- d) The ER fails to give adequate consideration to the adverse impacts of the PFSF, including the risks of particulate emissions from construction and cement activities.

2. Applicant's Response to the Contention

a) Effects of Transportation Accidents

Castle Rock's claims that section 5.2 of the Environmental Report contains no site specific information on the effects on population in the region as required by the rule. Castle Rock Petition at 52-53. This subcontention must be rejected for lack of bases and as an impermissible challenge to Commission regulations and generic determinations concerning the transportation of spent fuel for the reasons set forth in the Response to Castle Rock Contention 13, subpart c.(iv). The Applicant calculated the effects on population in the region in accordance with those rules and generic determinations. Contrary to the legal principles set forth in section II.B supra, Castle Rock seeks to litigate in this licensing proceeding the generic determination embedded in Table S-4. As set forth in the Response to Castle Rock Contention 13, subpart c.(iv), Castle Rock has provided no factual basis to challenge Table S-4 and this subcontention, like the previous, must likewise be rejected.

b) Effects of ISFSI Operations on Subsoil and Groundwater

Castle Rock alleges that the Environmental Report fails to give adequate consideration to "the risks of contamination of water sources (including ground water

contamination arising from leaching of contaminated soils).” Castle Rock Petition at 52. It states that the Environmental Report “contains no meaningful evaluation of the potential impact of the unlined retention pond and other PFSF operations on surrounding subsoils and ground water.” Castle Rock Petition at 53.

This subcontention must be dismissed because it provides neither a “concise statement of the alleged facts or expert opinion” in its support nor “references to those specific sources and documents . . . on which the petitioner intends to rely to establish [the] facts or expert opinion” on which it bases its contention. 10 C.F.R. § 2.714(b)(2)(ii). Castle Rock refers to no facts, expert opinion, or documents to support a claim that the ISFSI will have any impact on groundwater or will contaminate the soil in any way. See Castle Rock Petition at 52-53. Moreover, it provides no basis for its unsupported allegation that the Applicant’s treatment of groundwater or soil effects is inadequate. See id. The Castle Rock subcontention is utterly devoid of a factual basis, contrary to the requirements of 10 C.F.R. § 2.714(b)(2)(ii). Thus, this subcontention must be dismissed.

This subcontention must be also dismissed because it mistakenly claims that Applicant failed to address a relevant issue in the application. The Environmental Report addresses the effects of ISFSI operation on ground and surface water. See ER at 2.5-5 to 12, 4.1-10, 4.2-4 to 5, 4.3-6, 4.4-3 to 4, 4.5-1 to 2, concluding that “[o]peration of the PFSF will have no measurable offsite effects on existing groundwater quality or levels.” Id. at 2.5-12. Moreover, the Environmental Report specifically addresses the flow of

water into and the evaporation and seepage of water from the retention pond. See id. at 2.5-7, 4.2-2, 4.2-4 to 5.

Runoff from precipitation will be collected in the retention basin. Surface runoff is uncontaminated and will not adversely affect vegetation or wildlife. . . . In the immediate area of the retention basin . . . , the vegetative species composition could change to include species that occur in areas with greater root zone water availability. No adverse impacts to area vegetation would result from operation of the PFSF.

Id. at 4.2-2.

c) Risks of Contamination of Food Sources

Castle Rock alleges that the Environmental Report fails to give adequate consideration to “the risks of contamination of human and livestock food sources.”

Castle Rock Petition at 52.

This subcontention must be dismissed because it provides neither a concise statement of the alleged facts or expert opinion in its support nor references to specific sources and documents to establish the facts or expert opinion. Castle Rock refers to no facts, expert opinion, or documents to support a claim that ISFSI operation will contaminate human or livestock food sources in any way. See Castle Rock Petition at 52. Moreover, it provides no basis for its argument that Applicant’s consideration is inadequate. See id. This subcontention too is utterly devoid of a factual basis. See also Applicant’s Response to Castle Rock Contention 18.

d) Risks of Particulate Emissions from Construction Activities

Castle Rock alleges that the Environmental Report fails to give adequate consideration to “the risks of particulate emissions from construction and cement activities and similar risks.” Castle Rock Petition at 52.

This subcontention must be dismissed because it provides neither a concise statement of the alleged facts or expert opinion in its support nor references to specific sources and documents to establish the facts or expert opinion. 10 C.F.R. § 2.714(b)(2)(ii). Castle Rock refers to no facts, expert opinion, or documents to support a claim that ISFSI construction or operation will pose any risks due to particulate emissions from construction activities. See Castle Rock Petition at 52. Moreover, it provides no basis for its argument that the Applicant’s analysis is inadequate. See id. This subcontention as well is devoid of a factual basis and must be dismissed.

This subcontention must be also dismissed because it mistakenly claims that Applicant failed to address a relevant issue in the application. The Environmental Report addresses the impact of construction activities and particulate control:

Dust control techniques may include watering and/or chemical stabilization of potential dust sources. Other techniques that will be used to control fugitive dust emissions include covering materials being hauled from the site by truck and by employing routine washing of trucks. Dust emissions from anticipated concrete and asphalt batch plant operations will also be mitigated through the use of enclosures, hoods, shrouds, and water sprays.

ER at 4.1-8 to 9; see also id. at Table 4.1-5.

In fact, the Environmental Report quantifies the amount of particulate matter that construction activities are expected to produce and compares it to regulatory limits. Id. at

Tables 4.1-4 and 5. Therefore, because Castle Rock has ignored this material, this subcontention must be dismissed.

**O. Castle Rock Contention 15: Cost-Benefit Analysis**

1. The Contention

Castle Rock alleges in Contention 15 that:

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).

Castle Rock Petition at 53. The asserted bases for the contention are set forth in one page of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

The 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:

- a) ER Chapter 7 cost-benefit analysis is overly simplistic and fails to account for the true environmental, safety, social and economic costs associated with the proposed PFSF in Skull Valley.
- b) Cost-benefit analysis fails to account for the “loss of property values, economic opportunities and other business and economic losses” imposed by mere existence of PFSF.
- c) Chapter 7 of the ER fails to discuss applicant’s financial arrangements with the Skull Valley Band which is essential to the cost-benefit analysis.

d) The Castle Rock Petitioners intend to offer evidence on true costs of the proposed facility.

2. Applicant's Response to the Contention

Castle Rock raises a number of issues under Contention 17, which we address in turn below.

a) Simplicity of the Cost-Benefit Analysis

Castle Rock asserts that the cost-benefit analysis in Chapter 7 of the ER is "overly simplistic and fails to account for the true environmental, safety, social and economic costs associated with the proposed PFSF in Skull Valley." Castle Rock Petition at 53.

In this subcontention, Castle Rock does not specify either the environmental impacts that the Applicant has allegedly not addressed nor the parts of the application that are allegedly defective. See Castle Rock Petition at 53. Castle Rock only makes a broad, general allegation that the ER's cost-benefit analysis is "overly simplistic." Id. Thus, the subcontention is nonspecific and must be dismissed. The Applicant treats Castle Rock's other, more specific points, below.

Moreover, this subcontention must be dismissed because it does not include "sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact." 10 C.F.R. § 2.714(b)(2)(iii). It does not provide the "supporting reasons for the petitioner's belief" that the ER's cost-benefit analysis is overly simplistic. Id. In this subcontention, Castle Rock does not say why the analysis is overly simplistic. Castle Rock Petition at 53. If a petitioner believes that an application has omitted required material, it must "explain why the application is deficient." 54 Fed.

Reg. 33,168, 33,170 (1989) (10 C.F.R. § 2.714(b)(2), Statement of Considerations), cited with approval in Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 41 (1993). Castle Rock has the obligation to specify how the application is inadequate to demonstrate a litigable contention. It has not done so here, so this subcontention must be dismissed.

b) Property Values and Other Business and Economic Losses

Castle Rock asserts that the cost-benefit analysis in the ER is “overly simplistic” and fails to account for the true cost of the ISFSI in that it “totally fails to consider the loss of property values, economic opportunities and other business and economic losses that will be imposed on Petitioners by the mere existence of the PFSF.” Castle Rock Petition at 53.

This subcontention must be dismissed because Castle Rock has provided no facts or expert opinion, together with references to specific sources and documents to establish such facts or expert opinion, to support its contention. Castle Rock provides no facts, expert opinion, or documents whatsoever to support its claim that the Applicant’s ISFSI will harm property values, economic opportunities, or cause other business or economic losses. See Castle Rock Petition at 53.

c) PFS’s Financial Arrangements with the Goshutes

Castle Rock alleges that the ER’s cost-benefit analysis is inadequate because it “does not describe PFS’s financial arrangements with the Goshutes . . . which are essential to any cost-benefit analysis.” Castle Rock Petition at 53.

This subcontention must be dismissed because it overlooks relevant material submitted by the Applicant. The Environmental Report states that “[t]he direct costs of the PFSF include . . . annual costs associated with the Tribal lease.” ER at 7.3-1. The total life-cycle cost of the facility is given as \$1.536 billion. *Id.* Therefore, because this subcontention overlooks the fact that the cost of the Tribal lease has been incorporated into the total cost of the facility, the subcontention must be dismissed.

Moreover, this subcontention must be dismissed as “an impermissible collateral attack on the Commission’s rules” for “advocat[ing] stricter requirements than those imposed by the regulations.” None of the NRC’s environmental regulations require the Applicant to provide the details of the lease by which it will obtain use of the land for the facility. *See* 10 C.F.R. § 51.45. 10 C.F.R. § 51.45 requires the Applicant to include the economic costs of the proposed facility in its environmental analysis. 10 C.F.R. § 51.45(c). The Environmental Report has done this. 10 C.F.R. § 51.45 does not, however, require the Applicant to describe one component of these economic costs, the details of its lease arrangement with the Goshutes. *Id.* Therefore, because this subcontention advocates stricter requirements than those imposed by the regulations, it must be dismissed.

Since Castle Rock does not even allege that the cost estimate is inaccurate, let alone that any environmental impact would result from its inaccuracy (Castle Rock Petition at 53), the alleged injury falls outside the zone of interest of NEPA, and thus this subcontention must be dismissed.

d) Intent to Offer Evidence on True Costs

Castle Rock states that it “intend[s] to offer evidence with respect to the true costs of the proposed facility.” Castle Rock Petition at 53.

This subcontention must be dismissed because it is directly contrary to the 1989 amendments to the Commission’s Rules of Practice. When filing a contention, a petitioner must “show that a genuine dispute exists between the petitioner and the applicant on a material issue of law or fact.” 54 Fed. Reg. 33,168, 33,170. (1989) “[T]his will preclude a contention from being admitted where an intervenor has no facts to support its position and where the intervenor contemplates using discovery or cross-examination as a fishing expedition which might produce relevant facts.” *Id.* at 33,171. Thus, a petitioner cannot merely wait until the hearing to present the facts that ostensibly support its contention. It must come forward with them at the filing of its contention, or the contention will not be admitted. Castle Rock has not come forward here; so its subcontention must be dismissed.

Extraneous matters such as the preservation of rights (e.g., “[p]etitioners intend to offer evidence,” Castle Rock Petition at 53) will be disregarded as contrary to the Rules of Practice. Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 689-90 (1980). Therefore, this subcontention must be dismissed.

This subcontention must also be dismissed for containing neither a specific statement of the issue of law or fact to be raised nor references to the specific portions of the application that the petitioner disputes. 10 C.F.R. §§ 2.714(b)(2), (b)(2)(iii). In this

subcontention, Castle Rock does not specify any cost that the Applicant has wrongly omitted. See Castle Rock Petition at 53. Thus, the subcontention is nonspecific and must be dismissed.

**P. Castle Rock Contention 16: Impacts on Flora, Fauna and Existing Land Uses**

1. The Contention

Castle Rock alleges in Contention 16 that:

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, and endangered or threatened species, and land quality of the area. See 10 C.F.R. § 72.100(b).

Castle Rock Petition at 54. The asserted bases for the contention are set forth in two pages of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

The Application violates NRC regulations and NEPA because the ER does not adequately address the impact of the proposed PFSF upon the agriculture, recreation, wildlife, and endangered or threatened species, and land quality of the area, see 10 C.F.R. § 72.100(b), in that

- a) The required regional impact should include all of Northwestern Utah.
- b) The ER fails to provide sufficient facts to understand true impacts.
- c) PFS has not conducted surveys to ascertain the presence and, if present, the exact location of rare species.

- d) The ER impact evaluation is legally insufficient until such time as PFS identifies final location of transportation corridor.

2. Applicant's Response to the Contention

Castle Rock raises a number of issues under Contention 16, which we address in turn below.

a) Size of the Region Analyzed

Castle Rock claims that the Applicant's environmental impact analysis must be expanded to include all of northwestern Utah. Castle Rock Petition at 54, citing 10 C.F.R. § 72.100(b) which requires an evaluation of "regional and site characteristics."

According to Castle Rock, "[T]he word 'regional' [in § 72.100(b)] should be interpreted to refer to at least to all of northwestern Utah." Castle Rock Petition at 54.

Castle Rock provides no facts, expert opinion, or documents to support its assertion that the word "regional" must be defined to include all northwestern Utah. See Castle Rock Petition at 54. At the very least, Castle Rock would need to show that the facility would have impacts throughout "all of northwestern Utah." It has not done so. Absent such impacts, there would be no point in evaluating that geographic area. See 10 C.F.R. § 51.45(b)(1) ("Impacts shall be discussed in proportion to their significance").

Castle Rock provides no basis (nor does it even allege) that Applicant's facility will have any impacts on "all of northwestern Utah." See Castle Rock Petition at 54. An unsupported conclusory allegation of dispute is not sufficient to admit a contention. Here, Castle Rock has provided nothing more than that; so the subcontention must be dismissed.

This subcontention must also be dismissed because it does not include “sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact.” 10 C.F.R. § 2.714(b)(2)(iii). It does not provide the supporting reasons for the petitioner’s belief that the application is inadequate. Castle Rock never says why the word “regional” must be defined to include all of northwestern Utah. Castle Rock Petition at 54. Indeed, Castle Rock does not even define what is meant by “all of northwestern Utah.” Thus, this subcontention must be dismissed.

b) Sufficiency of Facts and Information

Castle Rock claims that the Environmental Report is inadequate “because it fails to provide sufficient facts and information to enable one to understand what the true impacts of the PFSF project will be on the regional environment.” Castle Rock Petition at 54.

This subcontention must be dismissed for lacking specificity. Castle Rock does not specify which facts or what information Applicant has allegedly not provided or which environmental impacts it is allegedly unable to understand because of the absence of such facts or information. See Castle Rock Petition at 54. Castle Rock makes no more than a broad, general allegation. Id. Thus, the subcontention is nonspecific and must be dismissed. The Applicant treats Castle Rock’s other, more specific, points below.

Moreover, this subcontention must be dismissed because it does not include sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact. 10 C.F.R. § 2.714(b)(2)(iii). It does not provide the

supporting reasons for Castle Rock's belief that Environmental Report lacks information or does not enable one to understand its environmental impacts. In this subcontention, Castle Rock does not say which facts Applicant must provide or how the facts allegedly omitted would enable one to understand the impact of the ISFSI on the environment. Castle Rock Petition at 54. This subcontention must be dismissed.

c) Survey of the Site for Plants and Animals

Castle Rock asserts that the Environmental Report is inadequate because it does not contain sufficient facts concerning endangered, threatened, or sensitive species that "have been identified by State and Federal officials as being potentially impacted in an adverse way by the PFSF project . . . to determine the extent or significance" of the impacts upon them. Castle Rock Petition at 54. Castle Rock claims that the Applicant's reliance on "previously written" documentary evidence of the presence or absence of species in the vicinity of the ISFSI is "inadequate." Id. Castle Rock claims that the Applicant must "conduct a survey" to determine whether the species in question occur in the area. Id. Furthermore, Castle Rock claims that Applicant must state the "exact location" of the species in relation to the ISFSI site and transportation corridor. Id. at 55.

This subcontention must be dismissed because it does not include sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact. See Section II.C.2. supra. It provides no supporting reasons for Castle Rock's belief that Environmental Report's characterization of the location of animal and plant species around the ISFSI site is "inadequate." Castle Rock Petition at 54. Castle

Rock does not say why the Applicant must conduct a survey of the site or why the Applicant cannot rely on documentary sources regarding the occurrence of species in the area. See Id. at 54-55. Castle Rock does not say why the Applicant must indicate the “exact location” of the species within the area. See id. at 55. Castle Rock has not stated how the Application is inadequate. Therefore, this subcontention must be dismissed.

Additionally, this subcontention must be dismissed as “an impermissible collateral attack on the Commission’s rules” for “advocat[ing] stricter requirements than those imposed by the regulations.” Seabrook, LBP-82-106, 16 NRC at 1656. Nothing in the NRC’s environmental regulations requires the Applicant to conduct its own survey of the site area for plant and animal species. See 10 C.F.R. §§ 51.45, 72.100(b). In fact, applicants, when preparing Environmental Reports, and the NRC Staff, when preparing Environmental Impact Statements, have frequently relied on data on area plant and animal species previously collected by other entities. See e.g., Duke Power Company (Perkins Nuclear Station, Units 1, 2, and 3), LBP-80-9, 11 NRC 310, 325 (1980) (environmental impact statements (“EIS”) for projects in the same or similar locations, government reports, other reports); Tennessee Valley Authority (Hartsville Nuclear Plants, Units 1A, 2A, 1B, and 2B), ALAB-467, 7 NRC 459, 462-63 (1978) (Army Corps of Engineers map); All Chemical Isotope Enrichment, Inc. (AlChemIE Facility-1 CPDF; Facility-2, Oliver Springs), LBP-89-5, 29 NRC 99, 116 (1989) (“numerous studies and assessments”). Courts have rejected the proposition that Federal agencies must perform all their own surveys. Inland Empire Pub. Lands Council v. United States Forest Serv., 88 F.3d 754, 762 (9th Cir. 1996) (“an analysis that uses all the scientific data currently

available is a sound one”). Furthermore, in the place of direct observation, Federal agencies may use reasonable assumptions in characterizing species and their habitats in environmental analyses. See id. at 761 (citing Sierra Club v. Marita, 845 F. Supp. 1317, 1331 (E.D. Wis. 1994), aff’d, 46 F.3d 606 (7th Cir. 1995); Greenpeace Action v. Franklin, 14 F.3d 1324, 1335-36 (9th Cir. 1992)). Therefore, Castle Rock’s contention, that Applicant cannot rely on documentary evidence of the location of plant and animal species near the ISFSI site and must perform its own survey, is clearly wrong and requires more than NRC regulations require. Accordingly, this subcontention must be dismissed.

Castle Rock also attacks the Commission’s regulations in that it asserts that Applicant must determine the “exact location” of all relevant plant and animal species in the vicinity of the ISFSI site. Castle Rock Petition at 55. The NRC’s environmental regulations require that Applicant analyze the “impacts” and “effects” of the proposed facility on the surrounding region. 10 C.F.R. §§ 51.45, 72.98, 72.100. The Applicant needs to determine the location of plant and animal species within the region only to the extent necessary to analyze the effects of the proposed ISFSI upon them; nothing requires the location to be exact. See e.g., AlChemIE Facility-1, LBP-89-5, 29 NRC at 116 (threatened plant within 3 km of facility, endangered mussel in neighboring river); Perkins, LBP-80-9, 11 NRC at 324, 326 (alternative sites characterized by number of endangered species in vicinity); Inland Empire, 88 F.3d at 761-62. Therefore, Castle Rock’s assertion that Applicant must determine the exact location of the plant and animal species within the region around the proposed ISFSI is a collateral attack on the NRC’s

regulations as it advocates stricter requirements than the regulations impose. Therefore, this subcontention must be dismissed.

d) Identification of the Final Location of the Transportation Corridor

Castle Rock states that the Applicant's environmental impact evaluation will continue to be inadequate and any attempt at NEPA compliance will be "fatally flawed" until the Applicant "identifies the final location of the transportation corridor to haul the spent fuel from I-80 south to the Goshute Reservation." Castle Rock Petition at 55. "Accordingly, Petitioners reserve the right to amend their Contentions . . . ." Id.

This subcontention must be dismissed because it does not include sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact. The Applicant has identified and analyzed for environmental impact two transportation corridor alternatives, one road and one rail. See ER §§ 4.3, 4.4. Castle Rock does not say why the Applicant must definitively choose one alternative over another at this stage of the process before its environmental impact evaluation will satisfy the NRC's requirements. See Castle Rock Petition at 55. Castle Rock should state how the application is inadequate to demonstrate a litigable contention. Shoreham, LBP-82-75, 16 NRC at 993. It must present a reasoned statement, supported by facts, expert opinion, or documents, of why the application is unacceptable. Castle Rock has not done so here; so this subcontention must be dismissed.

Castle Rock's preservation of rights should be disregarded as contrary to the Rules of Practice. Should there be additional subsequent information, NRC regulations

expressly provide a mechanism for raising late-filed contentions. 10 C.F.R.

§ 2.714(b)(2)(iii). No reservation of rights is necessary.

**Q. Castle Rock Contention 17: Inadequate Consideration of Land Impacts**

1. The Contention

Castle Rock alleges in Contention 17 that:

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 revenues 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.

Castle Rock Petition at 56. The asserted bases for the contention are set forth in three pages of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

The 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 revenues 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, in that:

- a) The ER fails to recognize the potential of the area for and address the impact of the PFSF on future real estate and other development.
- b) The ER fails to address the impact of the PFSF upon wilderness areas and nearby recreational land uses.
- c) The ER is inadequate because it ignores anything outside a 50-mile radius from the PFSF.
- d) The ER provides no information on the economic value of and inadequate information on the size of current agricultural/ranching operations in the area.
- e) The ER fails to consider the diminution of property values and harm to investments and future economic benefits caused by the danger or perceived danger from the PFSF.
- f) The ER fails to consider impact of placing PFSF next to dairy /beef operations.

2. Applicant's Response to the Contention

Castle Rock raises a number of issues under Contention 17, which we address in turn below.

a) Future Real Estate and Other Development

Castle Rock alleges that the ER does not adequately consider the impact of the proposed ISFSI on the future real estate and other development in the surrounding area. Castle Rock Petition at 56 (citing 10 C.F.R. § 72.98(c)(2)). According to Castle Rock, the land in the Skull Valley is attractive for potential development because of its proximity to Salt Lake City. *Id.* Castle Rock claims that the ISFSI would eliminate or sharply reduce the potential use of its lands and dangers and perceived dangers from the

ISFSI will drive away potential residential, commercial, and agricultural development. Id. at 56-57.

This subcontention must be dismissed because Castle Rock provides no facts, expert opinion, or documents to support its allegation that the area has significant development potential or that the Applicant's ISFSI will have any impact on future development in the area. See Castle Rock Petition at 56-57. Its allegation concerning prospective developers' fear of the ISFSI is wholly speculative. See id. at 57. Even where a petitioner postulates specific environmental effects of a proposed action (which Castle Rock has not done here), its contention will be deemed speculative and inadmissible without showing that such effects have ever occurred. Illinois Power Company (Clinton Power Station, Unit No. 1), LBP-82-103, 16 NRC 1603, 1613 (1982); Illinois Power Company (Clinton Power Station, Unit Nos. 1 and 2), ALAB-340, 4 NRC 27, 50-51 (1976). Because this subcontention contains no more than conclusory allegations, and does not show that the Applicant's ISFSI will have any impact on future development in the area, it must be dismissed.

Furthermore, this subcontention must be dismissed because it ignores relevant material submitted by the Applicant. The ER characterizes the ownership and current use of the land around the PFSF site. ER at 2.1-1 to 3, 2.2-2 to 4, Figure 2.2-1. Land uses within the Skull Valley Indian Reservation consist of residential uses (approximately 30 persons living on the Reservation) and the Tekoi Rocket Engine Test Facility. Id. at 2.1-3. The principal land use in the Skull Valley is rangeland for livestock grazing. Id. at 2.2-2. The land in the Skull Valley outside the Indian Reservation is regulated by Tooele

County Zoning and is currently zoned into Multiple Use Districts, consisting of open, undeveloped areas, with minimum lot sizes of 40 acres, and Agricultural Districts, consisting of areas used for farming, recreational, and residential purposes, with minimum lot sizes of 20 acres. Id. at 2.2-3 to 4. The ER also addresses projected population growth for the area around the site. Id. at 2.2-4 to 7. The ER also graphically projects population growth for the area within a 50-mile radius of the site between 1990 and 2020. Id. at Figures 2.2-2 and 3. The ER projects that the ISFSI will not preclude the future development of residential, commercial, or industrial facilities outside the Owner Controlled Area of the site. Id. at 4.1-2, 4.2-1. Because Castle Rock has ignored the Environmental Report's discussion of the issues which Castle Rock claims have not been addressed this subcontention must be dismissed.

b) Nearby Wilderness Areas and Recreational Land Uses

Castle Rock claims that the ER does not adequately consider the impact of the ISFSI on recreational land uses such as those in Deseret Peak National Wilderness Area. Castle Rock Petition at 56.

This subcontention must be dismissed because it fails to provide facts, expert opinion, or documents to support its allegation that the Applicant's ISFSI will have any impact on recreation at Deseret Peak or anywhere else. See Castle Rock Petition at 56-57. This is a bald and conclusory allegation of dispute in which Castle Rock does not even speculate as to the types of impacts that the that Applicant's ISFSI might have on local recreation; thus it must be dismissed.

Moreover, this subcontention must be dismissed because it ignores relevant material submitted by the Applicant. The ER addresses recreational activities around the area of the proposed ISFSI. See ER at 2.2-3. It recognizes off-highway vehicle use, dispersed camping, and hunting activities in the general area. Id. The EP recognizes Deseret Peak and the Deseret Peak Wilderness Area, which is located six miles east of the site, as regional scenic features. Id. at 2.9-4. It addresses the impact the ISFSI and construction traffic might have on views from the wilderness area across Skull Valley. Id. at 4.2-7. Because Castle Rock has ignored this material, the subcontention must be dismissed.

Finally, this subcontention must be dismissed because it does not include “sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact.” 10 C.F.R. § 21.714(b)(2)(iii). It does not provide the “supporting reasons for the petitioner’s belief” that the application is inadequate. Id. Although Castle Rock claims that the Environmental Report’s consideration of impacts on recreation is inadequate, it never says why. Castle Rock Petition at 56. Thus, this subcontention must be dismissed.

c) 50-Mile Radius

Castle Rock alleges that the ER “understates the size of the potentially impacted population” by limiting its consideration of impacts to those within a 50-mile radius of the proposed ISFSI. Castle Rock Petition at 57. Such limitation includes only part of the population of the Salt Lake Valley. Id.

This subcontention too must be dismissed because Castle Rock provides no facts, expert opinion, or documents whatsoever to support its implied claim that the Applicant's ISFSI will have any environmental impacts on populations more than 50 miles from the site. See Castle Rock Petition at 56-57. This is another unsupported allegation of dispute in which Castle Rock does not even speculate as to the types of impacts that the that Applicant's ISFSI might have; thus it must be dismissed.

Moreover, this subcontention must be dismissed as "an impermissible collateral attack on the Commission's rules" for "advocat[ing] 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). 10 C.F.R. § 51.61 requires an ISFSI license applicant to file an ER that includes the information required by 10 C.F.R. § 51.45 and addresses the siting factors contained in Part 72, Subpart E. 10 C.F.R. § 72.61. 10 C.F.R. § 51.45 requires that the ER contain "a description of the environment affected" and "the impact of the proposed action on the environment." 10 C.F.R. § 51.45 (emphasis added). The siting factors in Part 72, Subpart E require the ER to address "the potential regional impact due to the construction, operation, or decommissioning of the ISFSI . . . on the basis of potential measurable effects on the population or the environment from ISFSI . . . activities." 10 C.F.R. § 72.98(b) (emphasis added). Thus, there is no requirement to perform an assessment for the ER regarding populations that cannot be measurably affected by operations at the ISFSI. Castle Rock alleges that the ER should consider the "potentially impacted population" outside of a 50-mile radius from the site without providing any reason at all to believe

that that population would actually be affected by ISFSI operations. Castle Rock Petition at 57. Therefore, Castle Rock seeks to impose stricter requirements on the Applicant than the NRC's regulations do, and this subcontention must be dismissed.

Finally, to the extent that the transportation of spent fuel is a secondary effect of the ISFSI, the Applicant has addressed the environmental impacts of transportation throughout the region. See Applicant's Response to Castle Rock Contention 14. Hence, this subcontention must be dismissed because it ignores relevant material submitted by the Applicant. See e.g., Vogtle, LBP-91-21, 33 NRC at 424; Rancho Seco, LBP-93-23, 38 NRC at 247-48.

d) Size and Economic Value of Current Agricultural/Ranching Operations

Castle Rock asserts that the ER is inadequate because it provides no information on the economic value of the current agricultural/ranching operations in the area and provides only the most general information on the relative size of the operations. Castle Rock Petition at 57-58.

This subcontention must be dismissed for advocating stricter requirements than those imposed by NRC regulations. Seabrook, LBP-82-106, 16 NRC at 1656. The regulations require that the ER assess "the impact of the proposed action on the environment" (10 C.F.R. § 51.45), and address the potential regional impact from the ISFSI on the basis of potential measurable effects on the environment (10 C.F.R. § 72.98(b)). Within the region potentially affected, the ER must consider present and

future projected uses of land. 10 C.F.R. § 72.98(c)(2). Nothing requires that the Applicant determine the economic value of agricultural or ranching operations in the area.

Moreover, this subcontention must be dismissed because it does not include “sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact.” 10 C.F.R. § 2.714(b)(2)(iii). Castle Rock alleges that the ER should provide data on the economic value of local agricultural operations without providing any reason at all to believe that the operations would actually be affected by the ISFSI. Castle Rock Petition at 57. It alleges, without any basis whatsoever, that the impact of the ISFSI would be “devastating.” *Id.* at 58. Furthermore, it provides no reason to believe that the economic value of the agricultural or ranching operations are relevant at all to any environmental analysis. *Id.* at 57-58; see Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-260, 1 NRC 51, 54 (1975) (depth of analysis required by NEPA “rule of reason” depends on total land productivity affected; construction of nuclear power plant taking land of marginal utility completely out of service required little consideration); Clinton, ALAB-340, 4 NRC at 43 (rejecting use of monetary value of production as measure of impact of taking land out of service). Castle Rock provides no reason to believe that the operations in question would be affected by the ISFSI, which is not surprising given the proximity of agricultural operations to virtually all licensed nuclear facilities in the United States. See, e.g., Carolina Power & Light Company (Shearon Harris Nuclear Plant), LBP-86-11, 23 NRC 299, 393 (1986) (agricultural and recreational activities take place within reactor emergency planning zone. Therefore, this subcontention must be dismissed.

Finally, regarding the size of local agricultural and ranching operations, this subcontention must be dismissed because it ignores relevant material submitted by the Applicant. See e.g., Vogle, LBP-91-21, 33 NRC at 424; Rancho Seco, LBP-93-23, 38 NRC at 247-48. The Environmental Report discusses ranching and grazing operations in the vicinity of the Skull Valley Indian Reservation. ER at 2.2-2 to 4. It describes the number of cattle and sheep that are permitted to graze on BLM land in the area. Id. at 2.2-2. It describes the grazing cycles for cattle and sheep. Id. And, it describes the locations of the grazing pastures in relation to the ISFSI site. Id. Furthermore, it describes the pattern of zoning in Tooele County by which land is allocated to agricultural purpose. Id. at 2.2-3 to 4. Therefore, because Castle Rock overlooks relevant material submitted by the Applicant, its subcontention must be dismissed.

e) Diminution of Property Value and Harm to Investments and Future Economic Benefit

Castle Rock claims that the ER fails to consider the impact of the ISFSI on property values, investments and future economic benefits to be obtained from land use. Castle Rock Petition at 57. Castle Rock alleges that property values and investments will be harmed because of fears stemming from the danger and perceived danger from the ISFSI. Id. (citing City of Santa Fe v. Komis, 845 P.2d 753, 756 (N.M. 1992)). According to Castle Rock, businesses and developers will not want to locate in the vicinity of the site. Id. “Moreover, [Castle Rock] cannot fully assess such aspects because PFS has not given data on safety, transportation, environment, etc.” Id.

First, this subcontention must be dismissed because Castle Rock has provided no facts or expert opinion, together with references to specific sources and documents to establish such facts or expert opinion, to support its contention. 10 C.F.R. § 2.714(b)(2)(ii). Castle Rock provides no facts, expert opinion, or documents whatsoever to support its claim that the Applicant's ISFSI will harm property values, investments, or future economic benefits in the area. See Castle Rock Petition at 56-57. It states without support or citation that "[p]etitioners believe that the proposed PFSF would eliminate or sharply reduce their investment value and potential use of their lands." Id. at 57 (emphasis added). They provide no facts to warrant such a belief besides unsupported allegations that food production businesses will terminate negotiations with local land owners and that residential and commercial development adjacent to the PFSF "would no longer be desirable." Id. These are bald and conclusory allegations of dispute and thus this subcontention must be dismissed. Comanche Peak, LBP-92-37, 36 NRC at, 376; see Clinton, LBP-82-103, 16 NRC at 1613.

To the extent that one might infer factual support for Castle Rock's allegations from its citation of City of Santa Fe v. Komis, 845 P.2d 753, 756 (N.M. 1992), this subcontention should nonetheless be dismissed because Castle Rock provides nothing to support its analogy between this case and the facts of that case.<sup>85</sup> Castle Rock Petition at 57. If a petitioner contends that a license application is inadequate on the basis of an

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<sup>85</sup> City of Santa Fe v. Komis, 845 P.2d 753 (N.M. 1992), cited by Castle Rock to support its position, is inapposite to this hearing. That case involved a government taking of property and the issue of the amount to be paid to the landowners for their loss. Id. at 755. The court decided that public fear of the use to which the condemned land would be put and its impact on the value of the owners' remaining land was cognizable under New Mexico law. Id. at 755 & n.1 (interpreting NMSA 1978, Section 42-2-15(A)).

analogy between the Applicant's facility and a proposed benchmark, the petitioner must establish that the benchmark is valid to show that the analogy raises a disputed material issue of fact with the Applicant. Yankee Atomic Electric Company (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 32 (1996); Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 267 (1996) (petitioner must show "logical relationship" with alleged analogy); see also Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305 (1995) ("the Board may not make factual inferences on [a] petitioner's behalf"). Castle Rock does not even discuss the facts of City of Santa Fe; so, this subcontention must be dismissed.

Finally, this subcontention must be dismissed because psychological effects are outside the zone of interest protected by the Atomic Energy Act ("AEA") and NEPA, the statutes under which the NRC holds licensing hearings. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-82-6, 15 NRC 407, 408 (1982) (AEA); Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772 (1983) (NEPA). Purely economic effects are also outside the zones of interest of the AEA and NEPA and may not give rise to admissible contentions. See e.g., Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992). NEPA does not encompass adverse health effects resulting from the fear of the risk of an accident at a nuclear power plant. Metropolitan Edison, 460 U.S. at 775. And it does not encompass effects on property values arising solely out of the fear of the presence of a nuclear power plant, Houston Lighting and Power Company (Allens Creek

Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980), or the fear of radiological contamination potentially caused by a nuclear power plant, Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1448-49 (1982). To be cognizable under NEPA, there must be “a reasonably close causal relationship between a change in the physical environment and the effect at issue.” Metropolitan Edison, 460 U.S. at 774 (emphasis added). Whether the fear is unreasonable or reasonable, see Castle Rock Petition at 57, is irrelevant; fear and its effects on property values, investments, or business opportunities do not give rise to litigable contentions and thus this subcontention must be dismissed.

f) Impact on Dairy/Beef Operations

Castle Rock asserts that the ER fails to consider the “devastating impact” of placing the ISFSI next to a dairy/beef operation. Castle Rock Petition at 58.

The Applicant addresses this issue in its response to Castle Rock Contention 18.

**R. Castle Rock Contention 18: Impacts on Public Health**

1. The Contention

Castle Rock alleges in Contention 18 that:

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).

See Castle Rock Petition at 58. The bases for the contention is set forth on the same page of the petition. In order to focus the analysis on whether the contention should be

admitted, the Applicant proposes that the contention be restated incorporating as follows the specific allegations raised in its bases:

The Application violates NRC regulations and NEPA because the Environmental Report (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)) in that:

- a) The ER fails to analyze, evaluate, or consider the potential impacts on the regional population associated with potential contamination of plants or animals destined for human consumption.
- b) The ER provides no detailed description at all of the coordinated ranching, farming, and livestock production activities currently carried on by Petitioners.

2. Applicant's Response to the Contention

Castle Rock raises two issues under its Contention 18, each of which we address in turn below.

a) Failure to Analyze Impacts on Regional Population from Potential Contamination of Plants and Animals

As set forth above, Castle Rock alleges that the Environmental Report fails to “analyze, evaluate, or consider the potential impacts on the regional population associated with potential contamination of plants and animals destined for human consumption.” Castle Rock Supp. Petition at 58. Castle Rock’s contention asserts that “NEPA requires this specific evaluation to be included in the ER and forthcoming EIS.” Id.

The only basis cited by Castle Rock for this contention is 10 C.F.R. § 72.98(b), which states:

The potential regional impact due to the construction, operation or decommissioning of the ISFSI or MRS must be identified. The extent of regional impacts must be determined on the basis of potential measurable effects on the population or the environment from ISFSI or MRS operations.

(emphasis added). Castle Rock's contention fails to identify any basis in the License Application, or any other basis of any kind to support its assertion that the proposed facility will have any "measurable effect[]" whatsoever "upon the production of the agricultural products for human consumption." See generally, Castle Rock Supp. Petition at 58. Castle Rock's contention does not identify any mechanism, or provide any facts, references, or any other information to support its assertion. Castle Rock's contention must be rejected for failing to establish a basis for an admissible contention. See Section II.C., supra.

Moreover, Castle Rock has ignored relevant information in the License Application. PFS has performed a bounding calculation of offsite dose consequences in the License Application using the worst case assumptions for offsite dose, as recommended by the NRC. This worst-case offsite dose calculation envelopes any possible dose consequences from the "potential contamination of plants or animals destined for human consumption." The offsite dose calculations in the Applicant's License Application assumes a worst-case instantaneous release from both the off-normal contamination release and the hypothetical breach of a storage canister and evaluates the dose to a maximally exposed individual located at the nearest point on the site boundary who is assumed to be there for the duration of the release. See SAR § 8.2.7. This

analysis assumes a worst case instantaneous release (and instantaneous exposure),<sup>86</sup> as recommended by the NRC for a bounding offsite dose calculation.

This NRC-recommended worst-case bounding dose analysis assumes an instantaneous release (and instantaneous exposure), and does not include an analysis of dose from "potential contamination of plants or animals destined for human consumption." See NUREG-1536 at 7-5 to 7-7. Doses from the ingestion of contaminated plants and animals are enveloped by the worst case assumptions of "instantaneous release (and instantaneous exposure)" that are recommended by the NRC, even though they are not included in the analysis. They are not included because the exposure pathway of "potential contamination of plants or animals destined for human consumption" does not occur instantaneously, but takes days or weeks to develop and therefore their inclusion would result in exposures less than worst-case postulated design basis event, as defined by the NRC in NUREG-1536.<sup>87</sup>

The Applicant did a worst case analysis both off normal and postulated accident conditions. The off-normal contamination release analysis concludes that the effect on populations in the region from a "postulated release of surface contamination from the canister exterior" would be a maximum of  $4.4 \times 10^{-3}$  mrem committed effective dose

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<sup>86</sup> See Calculation Package Vol. II, Tab 17, "Accident N/Qs for the Private Fuel Storage Facility ("PFSF")," SWEC calc. No. 05996.01-UR-1 at 8; Calculation Package Vol. II, Tab 18, "Doses From Hypothetical Loss of Canister Confinement Accident," SWEC Calculation No. 05996.01-UR-2 at 7.

<sup>87</sup> The NRC Staff guidance in NUREG-1536 notes that for this dose analysis "the leak is assumed to be instantaneous" and then clearly states:

Note that for an instantaneous release (and instantaneous exposure), the time that an individual remains at the controlled area boundary is not a factor in the dose calculation.

equivalent ("CEDE"), and  $2.6 \times 10^{-2}$  mrem committed dose equivalent ("CDE"), to the lungs, the maximally exposed organ, to an individual assumed to be standing at the site boundary.<sup>88</sup> See ER at 5.1-1 to 6. The hypothetical loss of confinement barrier accident concluded that the effect on populations in the region from a "non-mechanistic breach of the canister confinement, hypothesized for purposes of assessing bounding doses at the site boundary" would be a maximum of 0.752 rem CEDE, and 3.48 rem CDE, to an individual assumed to be standing at the nearest point of the site boundary for the entire duration of the release. ER at 5.1-4.<sup>89</sup>

Both these worst case analyses bound the dose any real person could receive from such events and envelopes any dose a real person could receive from indirect secondary dose sources such as plant and animal consumption. Thus, this analysis does what Castle Rock claims the Applicant should do: It assesses and bounds the potential impacts on the regional population from releases of radioactive material, including that received from indirect secondary sources. Castle Rock's contention neither addresses nor challenges the validity of this conclusion. It neither identifies any alleged flaw in this computation, as required by 10 C.F.R. § 2.714(2)(b)(iii), or provides facts or expert opinion to contest the analyses or its results, as required by 10 C.F.R. § 2.714(b)(2)(ii). Accordingly, this contention must be rejected.

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<sup>88</sup> This is far less (less than 0.02 percent) than the 25 mrem whole body CEDE annual dose limit set by the Commission for normal and anticipated occurrences. See 10 C.F.R. § 72.104(a).

<sup>89</sup> This is far less than the 5 rem whole body CEDE dose limit set by the Commission for design basis accidents. See 10 C.F.R. § 72.106(b).

Further, the Commission's regulations do not require the License Application to evaluate an exposure pathway (e.g., contamination of plants or animals destined for human consumption) that does not occur as a result of the postulated design basis event that the Applicant is evaluating. See 10 C.F.R. § 72.24(m). The NRC Staff guidance for bounding offsite dose calculations supports this position. See NUREG-1536 at 7-7 ("time . . . is not a factor in the dose calculation . . . for an instantaneous release (and instantaneous exposure)"). The State's contention would require more. A contention which "advocate[s] stricter requirements than those imposed by the regulations" is "an impermissible collateral attack on the Commission's rules" and must be rejected. See Section II.B. supra.

b) No Detailed Description at All of The Petitioner's Ranching, Farming, and Livestock Production Activities

As set forth above, Castle Rock contends that the Environmental Report provides no detailed description at all of the coordinated ranching, farming, and livestock production activities currently carried on by the Petitioners. A contention that mistakenly claims that the Applicant did not address a relevant issue in the license application must be dismissed. In setting forth a contention pursuant to 10 C.F.R. § 2.714(b), a petitioner is required to "read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant's position and the petitioner's opposing view." See 54 Fed. Reg. at 33,170.

Contrary to Castle Rock's assertion, the Applicant's Environmental Report does address the use of the region around the PFSF as rangeland for livestock grazing. See ER

at 2.2-2. The analysis in the Environmental Report addresses the agricultural activities of all entities operating in the region of the PFSF, as the regulations require. See 10 C.F.R. § 72.98 (“the potential regional impact”) (emphasis added). The Environmental Report explicitly recognizes the number, type, and timetables of livestock grazed in the region of the PFSF by regional sheep and cattle ranchers. ER at 2.2-2. The Environmental Report describes in some detail the specific type of vegetation in the region of the PFSF that is used for grazing by ranchers, and the range forage condition of land around the PFSF. See id. at 2.3-2 to 4. The Environmental Report evaluates the effect of the PFSF on the use of livestock grazing lands in the region around the PFSF. The Environmental Report concludes that the PFSF

will remove 820 acres from potential use as livestock grazing lands. This reduction in area will not result in a significant loss of valuable grazing land. It represents less than 0.5 percent of the 271,000 acres of rangeland in Skull Valley, the majority of which is characterized as of fair to poor quality.

Id. at 4.2-1. Castle Rock’s contention neither addresses nor challenges the validity of these findings and conclusions in the Applicant’s Environmental Report.

To the extent that Castle Rock’s contention alleges that the Environmental Report “fails to contain information on a relevant matter as required by law,” Castle Rock must “explain why the application is deficient.” Id.; see 10 C.F.R. § 2.714(b)(2)(iii). A petitioner alleging that part of an application is “inadequate” has the obligation to specify how the application is inadequate in order to demonstrate a litigable contention. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-82-75, 16

NRC 986, 993 (1982). Castle Rock's contention does not "explain why the application is deficient" or "inadequate" in analyzing the impact of the PFSF on regional agricultural operations. Castle Rock's contention does not address or challenge the findings of this analysis in the Environmental Report. To the extent Castle Rock's contention alleges the Environmental Report is "deficient" or "inadequate," it must be rejected for failing to provide the specificity and basis required by the Commission's regulations for contentions.

**S. Castle Rock Contention 19: Septic Tank.**

1. The Contention

Castle Rock alleges in Contention 19 that:

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).

Castle Rock Petition at 58. The asserted bases for the contention are set forth in less than one page of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

The 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)), in that

- a) The ER contains very little information on how sewage wastes will be managed at the proposed facility during both the construction and operation facilities.
- b) The ER fails to discuss in detail how the septic system will be designed so as to eliminate the risk of contamination to groundwater and petitioner's property.

2. Applicant's Response to the Contention

As discussed below, Castle Rock's Contention 19 is totally flawed under the amended Rules of Practice and must be rejected.

a) Management of Sewage Wastes

Castle Rock does not provide any support to explain why additional information on how sewage wastes will be managed at the proposed facility is necessary at this stage. An underground septic system with two leach fields, designed to meet State requirements, will be used for normal facility services. ER, §§ 2.5.4, 3.3, 4.2.2. Castle Rock does not explain why additional information is needed or what that information might be.

b) Design of the Septic System

Castle Rock's contention that the Application and Environmental Report do not address in detail how the septic system will be designed so as to eliminate the risk of contamination to groundwater and Castle Rock's property is inaccurate. Specifically, the Application establishes that the design of the septic system is based on normal sanitary wastes for PFSF personnel. SAR Section 4.3.6. Also, the PFSF is designed to preclude radioactive material from entering the system, *i.e.*, no floor drains are located in the Canister Transfer Building which precludes the possibility of contamination entering the

septic system. SAR Section 4.7.1. The environmental impacts of system effluents, facility operation, and effects on ecological resources are also specifically addressed in SER sections 2.5.4, 3.3, and 4.2.2. The PFSF septic system will be designed to meet state requirements. As stated in the Environmental Report (Section 3.3), the site soils appear to be suitable for septic tank and leach field development. Hence, no impact to local resources will result from the effluents. Castle Rock provides no grounds for questioning the information presented.

**T. Castle Rock Contention 20: Selection of Road or Rail Access to PSFS Site**

1. The Contention

Castle Rock alleges in Contention 20 that:

The Application violates NRC regulations and NEPA because it fails to describe the considerations governing selection of either the Skull Valley [R]oad 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).

Castle Rock Petition at 59. The asserted bases for the contention are set forth in two pages of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

The 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

- a) The ER is deficient because it fails to properly analyze the transportation alternatives.
- b) The ER is incomplete because investigations and studies have not been performed which will have a direct bearing on the environmental effects of the alternative selected.
- c) The ER is defective because PFS is considering a third option not discussed in the ER.
- d) The ER fails to mention some significant environmental effects of the transportation alternatives such as increased traffic and noise.

2. Applicant's Response to the Contention

The Petitioner raises a number of related issues under Contention 20, which we will address below.

a) Environmental Report Fails to Analyze Transportation Alternatives.

This subcontention must be dismissed because it ignores relevant material submitted by the Applicant. See, Section II.C.2 supra. The Environmental Report not only provides similar discussions of the environmental effects for the road (ER Section 4.3) and rail (ER Section 4.4) alternatives but sets forth comparisons between them, as appropriate. For instance, Applicant indicates that the rail alternative will (1) result in the permanent alteration of approximately 52.5 acres more than the road expansion (ER Section 4.4.1); (2) have similar construction and operation and impacts as those described for heavy haul transport (ER Section 4.4.3); and (3) require a slightly wider right of way than the heavy haul road so the locations of the springs will need to be evaluated (ER Section 4.4.4). Other than erroneously stating that in the ER "there is little, if any,

analysis that ‘considers and balances’ the advantages and disadvantages” of the road and rail alternatives (Castle Rock Petition at 59) the subcontention contains neither specificity nor basis. Therefore, because Castle Rock has ignored the Environmental Report and has provided no basis for its allegations, this subcontention must be rejected.

b) The Environmental Report Is Incomplete Because Investigations and Studies Have Not Been Performed.

This subcontention alleges that the Environmental Report violates NEPA and NRC regulations because a “Class III Cultural Resources Survey” and other consultations and studies have not yet been performed. Castle Rock Petition at 59. The subcontention must be dismissed for advocating stricter requirements than those composed by the regulations and for lacking a basis. The Environmental Report clearly states that these surveys and studies will be performed. See, e.g., ER at 4.3-2, 4.3-9, 4.4-2, 4.4-5, 9.2-1. Castle Rock does not claim that the surveys and studies that will be performed are inadequate. Furthermore, there is no requirement in NEPA or NRC regulations that these studies and consultations should have already been performed at this stage. If the studies, when they are performed, result in new information, Castle Rock may seek to submit new or amended contentions at that time. See, 10 C.F.R. § 2.714(a)(3). Hence, the petitioners contention should be rejected.

c) PFS Is Considering A Third Transportation Alternative Not Mentioned

Castle Rock argues that the Environmental Report is defective because it does not mention a transportation alternative that Castle Rock understands that Applicant is

considering. Castle Rock Petition at 60. As with any other new information that may arise during the course of the proceeding, Castle Rock is entitled to demonstrate good cause for submitting a late-filed contention based upon that new information. See 10 C.F.R. 2.714(a)(3). The possibility that new information might arise is not, however, the basis for a contention.

d) The Environmental Report Fails to Mention Some Significant Environmental Effects of the Transportation Alternatives Such as Increased Traffic and Noise

This contention claims that the Environmental Report fails to mention some significant environmental effects of the transportation alternatives such as increased traffic and noise. Castle Rock Petition at 60. In fact, the Environmental Report does consider these effects. See ER sections 4.3.7 and 4.4.7. Section 4.3.7 of the Environmental Report specifically deals with the effects of widening the road on traffic and noise (e.g., “widening Skull Valley Road will result in some temporary disruption of traffic . . .”) and Section 4.4.7 addresses the effects of installing a new railroad spur (e.g., “. . . transport by rail could have adverse impacts on sensitive residential receptors. . .”). The contention must, therefore, be dismissed because it ignores relevant material submitted by Applicant.

**U. Castle Rock Contention 21: Exact Location of Rail Spur**

1. The Contention

Castle Rock alleges in Contention 21 that:

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).

Castle Rock Petition at 60. The asserted bases for the contention are set forth in less than one page of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

The 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

- a) The ER fails to provide any detail concerning location of the rail spur and impact on property rights along the route.
- b) Upon information and belief, ER is defective because PFS is considering two locations for the rail spur.

2. Applicant's Response to the Contention

The petitioner raises two issues under Contention 21.

a) Location of Rail Spur and Impact on Property Rights

This subcontention must be dismissed because it ignores relevant material submitted by the Applicant. Applicant specifically addresses the location and effects on property of a railroad spur alternative. In the railroad alternative discussion in the Environmental Report, the rail spur will be 24 miles long, beginning at the railroad mainline and continuing south to the PFSF site. ER Section 4.4. The railroad will consist of a single track installed parallel to the existing Skull Valley Road. Id.

Construction of the railroad will require the alteration of approximately 81.5 acres of land adjacent to the existing road. Id. at section 4.4.1. It is anticipated, however, that the railroad will require only minor realignment of range fencing, driveways and other roadside utilities that are all present with the road's existing right of way. Id. It is not expected to require relocation of any residential, commercial or industrial structures. Id. Also, the Applicant states that additional survey work will be done to ascertain the effect on two residences that will be closer to the rail spur than equipment under the road transportation alternative. Id. Castle Rock simply ignores this information, failing to point out why it may be in error. Since the Petitioner has ignored this relevant material, this subcontention must be rejected.

b) Two Possible Locations for Rail Spur

Castle Rock argues that the Environmental Report is defective because it does not discuss a transportation alternative that Castle Rock understands that the Applicant is considering. Castle Rock Petition at 61. As with any other new information that may arise during the course of the proceeding, Castle Rock is entitled to demonstrate good cause for submitting a late-filed contention based upon that new information. See, 10 C.F.R. § 2.714(a)(iii).

**V. Castle Rock Contention 22: Road Expansion Authorizations.**

1. The Contention

Castle Rock alleges in Contention 22 that:

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).

Castle Rock Petition at 61. The asserted bases for the contention are set forth in a page of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

The 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), in that the assertion in the ER that Skull Valley road expansion could occur within existing right-of-way and with no additional land acquisition is demonstrably incorrect.

2. Applicant's Response to the Contention

Castle Rock contends that the Environmental Report's statement (cited in the contention) that the Skull Valley road expansion could occur within the existing right-of-way and with no land acquisition from Castle Rock is "demonstrably incorrect." Castle Rock Petition at 62. Castle Rock, however, provides absolutely no factual basis, expert opinion or supporting documents to support its contention that the expansion could not occur with the existing right-of-way.

It requests instead to present evidence to this effect at the hearing. This is insufficient under the amended rules of practice. Castle Rock states that it "desires to

present evidence [in support of its contention] at a hearing.” Castle Rock Petition at 62. This statement is directly contrary to the intent of the 1989 amendments to the Commission’s Rules of Practice. When filing a contention, a petitioner must “show that a genuine dispute exists between the petitioner and the applicant on a material issue of law or fact.” 54 Fed. Reg. 33,168, 33,171 (1989) A proper request to intervene in a hearing “shall include a statement of the facts supporting each contention together with references to the sources and documents on which the intervenor relies to establish those facts.” *Id.* “[T]his will preclude a contention from being admitted where an intervenor has no facts to support its position and where the intervenor contemplates using discovery or cross-examination as a fishing expedition which might produce relevant facts.” *Id.*

Thus, a petitioner cannot merely wait until the hearing to present facts that ostensibly support its contention. It must come forward with facts at the filing of its contentions.

**W. Castle Rock Contention 23: Existing Land Uses**

1. The Contention

Castle Rock alleges in Contention 23 that:

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)

Castle Rock Petition at 62. The asserted bases for the contention are set forth in a page of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated incorporating the specific allegations in its bases as indicated below:

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:

- a) PFS fails to discuss in detail the various impacted property rights and owners around the site and along the 24-mile transportation corridor
- b) PFS fails to discuss the legal basis for the right of way along the 24-mile transportation corridor
- c) PFS fails to identify existing structures that would be impacted by the ISFSI and the various transportation corridors suggested by PFS
- d) PFS fails to discuss impacts to existing grazing patterns and rights that would be impacted by the ISFSI and the various transportation corridors proposed by PFS
- e) PFS fails to discuss all impacts to those living near to the ISFSI and the proposed transportation corridors
- f) The PFS application has "other deficiencies."

2. Applicant's Response to the Contention

In Contention 23, Castle Rock asserts that the application violates NEPA and NRC regulations in that it fails to describe with sufficient detail the land uses that will be

affected by the proposed ISFSI and the transportation corridors. Castle Rock Petition at 62 (citing 10 C.F.R. §§ 72.90(a) and (c), 72.98(b)). Castle Rock raises a number of issues, which we address in turn below.

a) Identification of Impacted Property Rights and Landowners

Castle Rock asserts that the application fails to discuss, in detail, “the various impacted property rights and owners” around the ISFSI and along the proposed transportation corridors. Castle Rock Petition at 62.

This subcontention must be dismissed because it does not include “sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact.” 10 C.F.R. § 2.714(b)(2)(iii). It does not provide the “supporting reasons for the petitioner’s belief” that the application is inadequate. *Id.* 10 C.F.R. § 72.98(b) requires the Applicant to identify “[t]he potential regional impact due to the construction, operation or decommissioning of the ISFSI.” 10 C.F.R. § 72.98(b). “The extent of regional impacts must be determined on the basis of potential measurable effects on the population or the environment from ISFSI . . . activities.” *Id.* (emphasis added). Castle Rock presents no facts, expert opinion, or documentation whatsoever to indicate that the Applicant has neglected any measurable effects of ISFSI construction or operations on regional landowners. Castle Rock Petition at 62-63.

Nor does Castle Rock demonstrate that NEPA or NRC regulations require the ER “to discuss, in detail the various impacted property rights and owners” (Castle Rock Petition at 62) beyond the description of impacts already set forth in the Environmental Report.

Because Castle Rock has failed to provide any factual evidence or supporting reasons that tend to cast doubt on a specified portion of the application, or show that there is some specified omission, this subcontention must be dismissed.

This subcontention must also be dismissed because it ignores relevant material submitted by the Applicant. First, the Environmental Report states that there are only about 36 residents within five miles of the proposed ISFSI site, but nevertheless it identifies a variety of effects that ISFSI construction and operation could potentially have on nearby landowners. See ER at 5.1-5; Chapter 4, §§ 4.1 to 4.1.8. Sections 4.1 to 4.1.8 discuss effects on: geography; land use; demography; ecological resources, such as local flora and fauna; air quality near the site and along the transportation corridors due to construction activities; the socioeconomics of Tooele County; regional historical, cultural, scenic and natural resources including the visual impact of the facility; and noise and traffic levels. Id. §§ 4.1 to 4.1.8. While there will be no radiological effluents from the ISFSI (ER at 6.2-1), Section 4.7 of the Environmental Report discusses the radiological effects of the transportation of spent nuclear fuel in the region stemming from occupational exposure and exposure of members of the public. Id. at 4.7-4 to 6.

Specifically regarding the transportation corridor, even if the Applicant pursues the rail option described in the application (and that option will require the permanent alteration of approximately 52.5 more acres of land than the road option (id. at 4.4-1)), “conventional construction practices will occur within the existing Skull Valley Road right-of-way and . . . no additional land acquisition will be required.” Id. at 4.4-1.

[Moreover,] only minor realignment of range fencing, driveways, and other roadside utilities that are present within the existing Skull Valley Road right-of-way will be required. No relocation of residential, commercial, or industrial structures is anticipated under this alternative.”

Id. at 4.4-1 to 2. Furthermore, the Environmental Report goes on to compare the environmental impacts from transporting fuel by rail to those from transporting it by road. Id. at 4.3-1 to 4.4.5. Because Castle Rock ignores all this material, this subcontention must be dismissed.

b) Legal Basis for Transportation Right of Way

Castle Rock asserts that the application fails to discuss, “the legal basis for the right-of-way along the 24-mile transportation corridor.” Castle Rock Petition at 63.

However, because there is no requirement that an applicant establish ownership or control with respect to property to be used for or related to the proposed facility. See Applicant’s Response to Utah Contention T, subpart a, incorporated here. Similarly, the application for and procurement of permits and other licenses may proceed simultaneously with the consideration of the license application by the NRC. See Applicant’s Response to Utah Contention T, subpart d.(i), incorporated here. Accordingly, this subcontention should be rejected.

c) Identification of Impacted Structures

Castle Rock asserts that the application fails to “identify existing structures that would be impacted by the various transportation corridors suggested by PFS.” Castle Rock Petition at 63.

Like Subcontention (a), this subcontention must be dismissed because it does not include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. It does not provide the supporting reasons for Castle Rock's belief that the application is inadequate. Castle Rock presents no facts, expert opinion, or documentation to indicate that the Applicant has neglected any measurable effects of the ISFSI on any structures. Castle Rock Petition at 62-63. Because Castle Rock has failed to provide any factual evidence or supporting documents that produce some doubt about the adequacy of the Applicant's assessment of environmental impacts on structures or that provides supporting reasons that tend to show that there is some specified omission from the application, it has failed to demonstrate a genuine dispute with the Applicant on a material issue of fact. Therefore, this subcontention must be dismissed.

This subcontention must also be dismissed because it overlooks relevant material submitted by the Applicant. See Section II.C.2 *supra*. Subcontention (a), the Environmental Report identifies a variety of environmental effects that ISFSI-related activities will have on the region. See ER §§ 4.1 to 4.1.4; supra Subcontention (a). Regarding specific structures, the Environmental Report describes, for example, noise impacts on two residences on Skull Valley Road. ER at 4.1-15. It also states that the nearest noise-sensitive residential receptor is two miles from the ISFSI site and will not be affected by construction activities. Id. at 4.1-17. It states that the Iosepa Cemetery, the only site eligible for or listed on the National Register of Historic Places, will be unaffected by ISFSI-related activities and that no impacts will occur on any other historic,

architectural, or cultural features in the region. Id. at 4.1-18. Because Castle Rock has ignored this information, this subcontention must be dismissed.

d) Impacts on Grazing Patterns and Rights

Castle Rock asserts that the application fails to discuss “impacts to existing grazing patterns and rights that would be impacted by the various transportation corridors proposed by PFS.” Castle Rock Petition at 63.

This subcontention must be dismissed because it provides neither a “concise statement of the alleged facts or expert opinion” in its support nor “references to . . . specific sources and documents . . . on which the petitioner intends to rely to establish [the] facts or expert opinion” on which it bases its contention. 10 C.F.R. § 2.714(b)(2)(ii). Castle Rock refers to no facts, expert opinion, or documents to support a claim that the ISFSI or the transportation corridor will have any impact on grazing patterns or rights. See Castle Rock Petition at 62-63. Moreover, it provides no basis for its unsupported allegation that the Applicant’s assessment of the effects of the project on grazing is inadequate. See id. The Castle Rock subcontention is devoid of a factual basis and thus it must be dismissed.

This subcontention must also be dismissed because it overlooks relevant material submitted by the Applicant. The Environmental Report characterizes the local pattern of land use for the grazing of cattle and sheep. ER at 2.2-2. It states that the only impact the ISFSI will have on grazing is the removal of 820 acres (the Owner Controlled Area (ER at 2.1-2)) of potential grazing land from use. ER at 4.2-1. This represents “less than 0.5

percent of the 271,000 acres of rangeland in Skull Valley, the majority of which is characterized as of fair to poor quality.” *Id.* The Environmental Report also states that the use of water at the site will have no impact on the few downgradient stock watering wells because of their distance from the site and the size of the aquifer. *Id.* at 4.2-4. Sections 7.3 and 7.6 of the SAR demonstrate that offsite radiation doses to individuals (and animals) at the site boundary will be insignificant. SAR §§ 7.3, 7.6. “[I]t is generally agreed that the [radiation exposure] limits established for humans are also conservative for other species.” Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-77-52, 6 NRC 294, 305 (1977); The Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 2 and 3), LBP-75-75, 2 NRC 993, 1006 (1975). The Environmental Report shows that even the worst-case, non-credible accident at the ISFSI would cause a member of the public offsite to receive a maximum radiation dose of less than 200 mrem. ER at 5.1-5 to 6. Thus, radiation effects on animals would also be negligible. Because Castle Rock ignores all this information, this subcontention must be dismissed.

e) Impacts on Residents

Castle Rock asserts that the application fails to discuss “all impacts to those living near to the proposed transportation corridors.” Castle Rock Petition at 63.

Like Subcontentions (a) and (c), this subcontention must be dismissed because it does not include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. 10 C.F.R. § 2.714(b)(2)(iii). It does not

provide the supporting reasons for Castle Rock's belief that the application is inadequate. Id. The Applicant must identify the potential regional impact of the ISFSI on the basis of potential measurable effects. 10 C.F.R. § 72.98(b). Castle Rock presents no facts, expert opinion, or documentation to indicate that the Applicant has omitted any measurable effects on any individuals. Castle Rock Petition at 62-63. Because Castle Rock has failed to provide any factual evidence or supporting documents that produce some doubt about the assessment of effects on individuals or that provides supporting reasons that tend to show that there is some specified omission from the application, it has failed to demonstrate a genuine dispute with the Applicant on a material issue of fact. Turkey Point, LBP-90-16, 31 NRC at 521 n.12. Therefore, this subcontention must be dismissed.

Moreover, this subcontention must be dismissed because it overlooks relevant material submitted by the Applicant. See, e.g., Vogtle, LBP-91-21, 33 NRC at 424; Rancho Seco, LBP-93-23, 38 NRC at 247-48. The same way the Environmental Report discusses the potential environmental impacts on local landowners, it discusses potential impacts on local residents. See, supra, Subcontention (a). Because Castle Rock has ignored all this material, this subcontention must be dismissed.

f) Other Deficiencies

Castle Rock asserts that the application has "other deficiencies" in that it "suffers generally from an overall defect of failing to comply with [10 C.F.R. § 72.98(b)] and similar NRC/NEPA requirements by a simple lack of detail with respect to existing land

uses that will be impacted by both the PFSF itself and the proposed 24-mile transportation corridor.” Castle Rock Petition at 62-63.

This subcontention must be dismissed for not containing “a specific statement of the issue of law or fact to be raised or controverted” (10 C.F.R. § 2.714(b)(2)) and “references to the specific portions of the application . . . that the petitioner disputes” (10 C.F.R. § 2.714(b)(2)(iii)). A Board may not admit, for any reason, a contention that fails to meet the specificity requirements of 10 C.F.R. § 2.714(b)(2). Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983). In this subcontention Castle Rock does not identify the “other deficiencies” in the Governmental Report nor the parts of the application that are allegedly defective. See Castle Rock Petition at 63. Thus the subcontention is nonspecific and must be dismissed.

This subcontention must also be dismissed because it provides neither a concise statement of the alleged facts or expert opinion in its support nor references to specific sources and documents to establish the facts or expert opinion. 10 C.F.R. § 2.714(b)(2)(ii). Castle Rock refers to no facts, expert opinion, or documents to support a claim that the Applicant has wrongly omitted any details from the Environmental Report or has overlooked any environmental effects. See Castle Rock Petition at 62-63. Thus this subcontention is devoid of factual basis and must be dismissed.

**X. Castle Rock Contention 24: Incorporation by Reference**

Castle Rock Contention 24 states in its entirety that:

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.

For the reasons set forth in section II.E supra, the Board should reject this contention.

## VI. OGD CONTENTIONS

### A. OGD Contention A: Lack of Sufficient Provisions for Prevention of and Recovery from Accidents.

OGD has filed 16 contentions<sup>90</sup> to which the Applicant responds as set forth below.

#### 1. The Contention

OGD alleges in Contention A that:

The license application poses undue risk to public health and safety because it lacks sufficient provisions for prevention of and recovery from accidents during storage resulting from such causes as sabotage, fire, cask drop and bend, lid drop damage and/or improper welds.

OGD Petition at 1-2. The asserted bases for the contention are set forth in four pages of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases below:

The license application poses undue risk to public health and safety because it lacks sufficient provisions for

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<sup>90</sup> See Ohngo Gaudadeh Devia's Contentions Regarding the Materials License Application of Private Fuel Storage in an Independent Spent Fuel Storage Installation (hereinafter "OGD Petition") dated November 24, 1997.

prevention of and recovery from accidents during storage resulting from such causes as sabotage, fire, cask drop and bend, lid drop damage and/or improper welds in that:

- a) License application is deficient because it does not include a comprehensive risk assessment to identify the full range of accidents which could occur at the PFSF. A comprehensive risk assessment must also be performed for the Intermodal Transfer Facility.
- b) License application is deficient because it does not address the impact of human error or insider sabotage as a cause of or contribution to accidents. The license application is also deficient because it does not consider human errors in the planning of the facility in evaluating accident risks.
- c) License application is deficient because the PFSF does not include a hot cell to unload, replace, and reload a damaged fuel canister. It is unreasonable to presume that facility could operate for 20 or more years and handle 40,000 MTU without the need for a hot cell.
- d) Even if no accidents occur, the risk of accidents will adversely affect members of OGD.

In addition to the contention, OGD also petitions the Commission to require PFS to implement a series of seven measures "to minimize accident risks, and to mitigate the impacts of any accidents and incidents" in the event the Commission grants a license to PFS. OGD Petition at 5. OGD's petition must be dismissed as a premature request for the Commission to impose license conditions. It is based on the presumption that it will prevail on its contention which, assuming the contention were admitted, would only be determined after hearing. OGD does not represent that the seven measures are to be considered as a contention for litigation in this proceeding. Nor could it, since it plainly

does not meet the pleading requirements of 10 C.F.R. § 2.714(b) in that, among other failings, it is totally devoid of any supporting basis.

2. Applicant's Response to the Contention

OGD raises several issues under its Contention A. We address in turn below each of the specific allegations raised by OGD in Contention A as set forth above. The generalized assertion in the Contention regarding the specific events of "fire, cask drop and bend, lid drop damage and/or improper welds" (*id.* at 1-2 (emphasis added)), is not explained, supported, or discussed any further by the bases for the contention. The simple mention of these events is far too generalized and unsupported to establish a litigable contention under the Commission's regulations. The specific issues that are addressed in the bases, including risk assessment, human error, insider sabotage, and need for a hot cell, are addressed herein. We address in turn below each of the specific allegations raised by OGD in Contention A as set forth above.

a) The Application Fails to Include a "Comprehensive Risk Assessment" of the PFSF and the Intermodal Transfer Facility

As set forth above, OGD alleges that the license application is deficient because it does not include a "comprehensive risk assessment" to identify the "full range of accidents" which could occur at the PFSF. *See* OGD Petition at 2. OGD further asserts that such an assessment must also be performed for the Intermodal Transfer Point. *See id.*

OGD's assertion that the license application is deficient because it does not include a "comprehensive risk assessment" for the PFSF must be rejected both for failure

to provide a sufficient basis for a litigable contention, pursuant to 10 C.F.R. § 2.714(b), and as an impermissible collateral challenge to the Commission's regulations, pursuant to 10 C.F.R. § 2.758. OGD's contention implies that a "comprehensive risk assessment" is required as part of an ISFSI license application under 10 C.F.R. Part 72, and therefore the Applicant's License Application is deficient because it does not include such an assessment. "Comprehensive risk assessment" (CRA), invented by the author of the report relied upon by OGD, is a proposed type of risk analysis that appears to be above and beyond the scope of a "probabilistic risk assessment." See Golding & White, Guidelines on the Scope, Content, and Use of Comprehensive Risk Assessment in the Management of High-Level Nuclear Waste Transportation 1,1 (1990) (Exhibit 1 of OGD's Petition, cited in OGD Petition at 2). There is no NRC regulatory basis for a "comprehensive risk assessment." There is no requirement in the Commission's regulations for an ISFSI license applicant to include a "comprehensive risk assessment" as part of the part 72 license application. See generally 10 C.F.R. Part 72. OGD's contention does not even allege that such a regulation exists. The question for the Licensing Board is whether there is any basis for requiring a "comprehensive risk assessment" under the Commission's regulations. Applicant's view is that there is none.

The documents cited by OGD in their contention (and included as Exhibits 1 and 2 to OGD's Petition) do not lend any support to OGD's assertion that a "comprehensive risk assessment" is a Commission requirement. First, Exhibit 1 to OGD's Petition specifically addresses the use of a "comprehensive risk assessment" for high-level

nuclear waste transportation, and does not address spent fuel storage. See, e.g., Exhibit 1 to OGD's Petition at 1, 37.

OGD's Exhibit 1 identifies no Commission regulations whatsoever that would require such an assessment. Exhibit 1 concludes that "[a] CRA should be used as a risk management tool," "should be developed prior to construction of the HLNW transportation system," and "should be used interactively throughout the operational phase of the system," and not that a "comprehensive risk assessment" is required even in the transportation arena. Id. at 38 (emphasis added). It is not clear from OGD's contention that a "comprehensive risk assessment" even exists. OGD does not indicate that a "comprehensive risk assessment" has ever been used anywhere, nor does OGD's reference document, Exhibit 1.

The second document referenced by OGD in support of this Contention is also specifically addressed to transportation, and not storage. See e.g., Freudenburg, Organizational Management of Long-Term Risks: Implications for Risk and Safety In the Transportation of Nuclear Wastes 1, 38 (1991) (Exhibit 2 of OGD's Petition, cited in OGD Petition at 3). This report also fails to identify any Commission regulations that would require a risk assessment like a "comprehensive risk assessment" for an ISFSI license application. See generally, id. The stated purpose of this second report,

to examine whether or not it would be prudent for the citizens and the state of Nevada simply to assume that even "official" DOE risk assessments, such as the transportation risk assessment in the 1986 Yucca Mountain Environmental Assessment, or future estimates of the risks of nuclear waste transportation, can safely be assumed to be reasonable approximations of the "real" risks[.]

(id. at 40), is not even relevant to this proceeding, because it sheds no light on the Commission's requirements for ISFSI licensing under 10 C.F.R. Part 72.

OGD's assertion that the Applicant's License Application must include a "comprehensive risk assessment" is not grounded in, or supported by, any Commission regulation. This contention must therefore be rejected as advocating stricter requirements than imposed by the regulations and therefore an impermissible attack on the Commission's regulations. See Section II.B supra at 5-7. Further, this contention must be rejected for failure to meet the basis and specificity requirements for a litigable contention.

OGD also alleges that the License Application must include a "comprehensive risk assessment" for the Intermodal Transfer Point. See OGD Petition at 2. As for the PFSF as discussed above, no Commission regulation requires an ISFSI license application to include a "comprehensive risk assessment." Nor does OGD's contention identify or allege the existence of any such regulation. Furthermore, as discussed at length in the Applicant's response to Utah Contention B, no specific license is required for the intermodal transfer operation. The intermodal transfer operation is within the scope of the general license under 10 C.F.R. § 71.12. See id. OGD's contention that the license application must include a "comprehensive risk assessment" for the intermodal transfer operation "advocate[s] stricter requirements than are imposed by the regulations" and must be rejected as an impermissible collateral attack on the Commission's regulations. Moreover, it must be rejected as being beyond the scope of this proceeding, which concerns PFS's "application . . . for a materials license, under the provisions of 10

C.F.R. Part 72,” to store spent nuclear fuel “in an . . . (ISFSI) located on the Skull Valley Goshute Indian Reservation.” See Section II.B supra at 8.

b) License Application Fails to Address Human Error or Insider Sabotage as A Cause of Accidents

As set forth above, OGD alleges that the license application is deficient because it does not address the impact of human error or insider sabotage as a cause of or contribution to accidents. See OGD Petition at 2. OGD also asserts that the license application is deficient because it does not consider human errors in the planning of the facility in evaluating accident risks. See id. at 3.

A contention that mistakenly claims that the applicant did not address a relevant issue in the license application must be dismissed. See Section II.C.2 supra. In setting forth a contention pursuant to 10 C.F.R. § 2.714(b), a petitioner is required to “read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant’s position and the petitioner’s opposing view.” 54 Fed. Reg. 33,168, 33,170 (1989) (Commission discussing its revised, higher threshold for admissibility of contentions).

OGD’s assertion that the license application does not address the impact of human error as a cause of or contribution to accidents ignores relevant portions of the license application, and is mistaken. See OGD Supp. Petition at 2. Contrary to OGD’s assertion, the License Application does address the impact of human error as a cause or contribution to accident events. As set forth below, human error is considered in the off-normal and accident scenarios in the license application. Off-normal and accident events considered

in the PFSF license application are defined and evaluated in Chapter 8, “Accident Analysis,” of the Safety Analysis Report. See SAR at 8.1-1.

For example, Section 8.1.3 of the Safety Analysis Report assumes and analyzes the consequences of human error causing the failure to identify and remove blockage of half of the storage cask inlet air ducts and the storage cask is presumed to reach a maximum steady-state temperature assuming the blockage is never removed. Id. at 8.1-10.

Section 8.1.4 of the Safety Analysis Report evaluates the off normal condition of “Operator Error.” Id. at 8.1-11. This analysis explicitly addresses human error in load handling at the PFSF as the off-normal condition. See id. In this analysis, “[s]everal postulated events involving off-normal handling have been considered, all caused by personnel error.” Id. (emphasis added).

Section 8.1.5 of the Safety Analysis Report evaluates the off normal condition of “Off-Normal Contamination Release” from the surface of a sealed canister. SAR at 8.1-16. While contamination of the canister surface is not expected to occur, this analysis assumes human error results in all of these precautionary measures being overlooked or erroneously performed by the operators at the originating power plant, such that the surface of the canister is contaminated when it arrives at the PFSF. See id. The analysis further assumes that human error results in operators at the PFSF overlooking the contamination and then handling the canister rather than immediately returning it to the originating power plant for decontamination. See id. at 8.1-16 to 17.

The accident conditions analyzed in Section 8.2 of the Safety Analysis Report include the evaluation of “[h]ypothetical accidents” that are not considered credible at the PFSF. See id. at 8.2-1. Section 8.2.8 of the Safety Analysis Report evaluates the hypothetical accident condition of “100% Blockage of Air Inlet Ducts.” Id. at 8.2-44. While this event has no credible causes at the PFSF, the analysis nevertheless assumes that because of human error the complete blockage of cask air inlet ducts and resulting increase in cask temperatures is not detected, identified, or removed for almost four days, regardless of the continuous temperature monitoring, alarms, and periodic inspections. See id. at 8.2-44 to 46.

OGD’s contention neither addresses, nor challenges the validity of, any of these scenarios and their analyses. OGD’s contention fails to identify any scenario caused by human error that is not taken into account in the license application. OGD’s contention cites no regulatory basis or support to show that the Applicant has not adequately considered human error as a causative factor in the scenarios the Applicant has evaluated in the Safety Analysis Report.

Finally, regarding human error at ISFSIs, the Commission observed the following in the Waste Confidence rulemaking:

Unlike the accident at the Three Mile Island reactor, human error at a spent fuel storage installation does not have the capability to create a major radiological hazard to the public. The absence of high temperature and pressure conditions that would provide a driving force essentially eliminates the likelihood that an operator error would lead to a major release of radioactivity . . . .In addition, features incorporated in storage facilities are designed to mitigate

the consequences of accidents caused by human error or otherwise.

Rulemaking on the Storage and Disposal of Nuclear Waste (Waste Confidence Rulemaking), CLI-84-15, 20 NRC 288, 365 (1984). OGD's contention does not address or challenge this finding by the Commission.

OGD's contention that the Applicant's License Application does not take into account human error as a cause of, or contribution to, accidents must be rejected for mistakenly claiming that the Applicant did not address a relevant issue in the License Application, and for failure to provide a sufficient regulatory or factual basis to support its assertion and establish an admissible contention.

OGD's contention also mistakenly claims the license application does not address insider sabotage as a cause of or contribution to accidents. See OGD Petition at 2. Insider sabotage is an integral part of the Commission's design basis threat for radiological sabotage for an ISFSI. See 10 C.F.R. § 73.1(a)(1). Specifically, the design basis threat includes:

inside assistance which may include a knowledgeable individual who attempts to participate in a passive role (e.g., provide information), an active role (e.g., facilitate entrance and exit, disable alarms and communications, participate in violent attack), or both.

Id. (emphasis added). This design basis threat, including the threat from "insider sabotage" is explicitly required to be included in the ISFSI physical security plan, which is required to "demonstrate how the applicant plans to comply with the applicable requirements of Part 73," including the design basis threat for radiological sabotage in 10

C.F.R. § 73.1. 10 C.F.R. § 72.180 (“Physical security plan”). Insider sabotage is addressed as part of the design basis threat for radiological sabotage in the Applicant’s security plan. OGD’s assertion that the license application does not address insider sabotage must be rejected for mistakenly claiming that the Applicant did not address a relevant issue.

OGD’s contention that the License Application must consider human errors in the planning of the facility when evaluating accident risks must be rejected as a collateral attack on the Commission’s regulations and regulatory framework. See 10 C.F.R. § 2.758. OGD’s contention asserts that license application must evaluate the effect of human errors (including intentional human actions such as insider sabotage) during the planning of the facility, for example in “facility and equipment design” and “preparation of the facility license application.” See OGD Petition at 3. OGD’s contention cites no Commission regulation in support of this proposition.

The Applicant has established and implemented a quality assurance program to ensure the quality of the design and construction and the operation of the Facility. See LA at 6-1; SAR at 11.1-1. The quality assurance program specifically guards against human error in, *inter alia*, design; document preparation and control; control of materials, equipment, and services; and inspecting and testing equipment and systems. See id. The quality assurance program therefore covers all of the areas addressed in OGD’s contention. See OGD Petition at 3. OGD’s contention does not address or challenge the adequacy of PFS’s quality assurance program. OGD’s contention does not allege that PFS has not properly implemented its quality assurance program in the design

and preparation of the License Application for the PFSF. OGD may not assert that PFSF will not implement its quality assurance program because a petitioner may not assert that an NRC licensee will violate NRC regulations without “some particularized demonstration that there is a reasonable basis to believe that [the licensee] would act contrary to their explicit terms.” General Public Utilities Nuclear Corporation (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 164 (1996). OGD makes no such demonstration here. Therefore, OGD’s contention must be dismissed for failure to establish a sufficient basis for a litigable contention as required by 10 C.F.R. § 2.714(b).

c) License Application is Deficient because the PFSF Does Not Include a Hot Cell

As set forth above, OGD alleges that the license application is deficient because the PFSF does not include a hot cell to unload, replace, and reload a damaged fuel canister. See OGD Petition at 4. OGD further asserts that it is unreasonable to presume that facility could operate for 20 or more years and handle 40,000 MTU without the need for a hot cell. See id. As set forth in Applicant’s response to Utah Contention J, a hot cell is not required under NRC regulations for an ISFSI such as the PFSF and this contention must be dismissed as seeking to litigate a generic determination established by Commission rulemaking among other grounds.<sup>91</sup>

d) Even if no Accidents Occur, the Risk of Accidents Will Adversely Affect Members of OGD

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Applicant incorporates its response to Utah Contention J.

As set forth above, OGD contends that even if no accidents occur, the risk of accidents alone will adversely affect members of OGD. See OGD Petition at 4. OGD alleges that the “physical presence of the facility” will constantly “remind OGD members of these risks.” Id. OGD provides no background, discussion, expert opinion, reference documentation, or any basis of any sort for its assertion of psychological harm from the mere presence of the Applicant’s facility. This contention must be dismissed for failure to provide a sufficient basis for an admissible contention. See 10 C.F.R. § 2.714(b). Furthermore, the Commission and the United States Supreme Court have explicitly recognized that psychological harm from the mere presence of a nuclear facility is outside of the zone of interest protected by the Atomic Energy Act (“AEA”) and the National Environmental Policy Act (“NEPA”), the statutes under which the NRC holds licensing hearings. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-82-6, 15 NRC 407, 408 (1982) (AEA); Metropolitan Edison Company v. People Against Nuclear Energy, 460 U.S. 766, 772 (1983) (NEPA). OGD’s contention alleging psychological harms from the presence of the PFSF must be rejected because it is not a cognizable basis for an admissible contention in a Commission licensing proceeding.

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**B. OGD Contention B: Emergency Plan Fails to Address the Safety of Those Living Outside of the Facility**

1. The Contention

OGD alleges in Contention B that:

The license application, specifically the emergency plan submitted with the license application fails to address the

safety provisions made for those individuals living outside of the facility within a five mile radius of the facility. The emergency plan addresses only those measures that pertain to employees and have not addressed the provisions that would apply to those people living around the facility. The emergency plan does not address a warning system such as would be implemented to put the resident on notice of an accident.

OGD Petition at 6. The asserted bases for the contention are set forth in two pages of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, Applicant proposes that the contention be restated as follows, incorporating the specific allegations in its bases:

The license application, specifically the emergency plan submitted with the license application fails to address the safety provisions made for those individuals living outside of the facility within a five mile radius of the facility in that (a) the emergency plan addresses only those measures that pertain to employees and have not addressed the provisions that would apply to those people living around the facility and does not address a warning system such as would be implemented to put the residents on notice of an accident. Further:

- a) PFS has not indicated how it will comply with Emergency Planning and Community Right to Know Act as required by 10 C.F.R. § 73.32.
- b) PFS has failed to show commitment and means to promptly notify offsite response organizations and request assistance.
- c) The license application fails to deal with unavailability of personnel, parts of facility and some equipment should an accident occur, as required by 10 C.F.R. § 72.32(8).

2. Applicant's Response to the Contention

OGD raises a number of issues under Contention B which we address in turn below.

a) EP Provisions for People Living Off the ISFSI Site

OGD asserts that "the license application . . . fails to address the safety provisions made for those individuals living . . . within a five mile radius of the facility" and fails to provide for an offsite "warning system . . . to put the residents on notice of an accident." OGD Petition at 6.

This subcontention must be dismissed as "an impermissible collateral attack on the Commission's rules" for "advocat[ing] stricter requirements than those imposed by the regulations." A licensee of an ISFSI that will not "process and/or repackage spent fuel," -- such as Applicant's proposed ISFSI<sup>92</sup> -- is not required to have an offsite component to its emergency plan. 60 Fed. Reg. 32,430, 32,442 (1995) (10 C.F.R. § 72.32, Statement of Considerations); Northern States Power Company (Independent Fuel Storage Installation) Director's Decision under 10 C.F.R. § 2.206 (DD-97-24), 62 Fed. Reg. 51,916, 51,917 (1997). This is because the NRC has found that "the postulated worst-case accident involving an ISFSI has insignificant consequences to the public health and safety." 60 Fed. Reg. at 32,431, 32,436. Under 10 C.F.R. § 72.32(b), the emergency plan for an ISFSI that does not "process and or repackage spent fuel" need only have a system for classifying accidents as "alerts." 10 C.F.R. § 72.32(b). An

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<sup>92</sup> The Applicant will neither process nor repackage spent fuel at the ISFSI. LA at 1-1; compare 10 C.F.R. § 72.32(a) with 10 C.F.R. § 72.32(b).

“Alert” is the proper classification for events “not likely to spawn radiation consequences outside the site boundary.” Curators of the University of Missouri (Trump-S Project), CLI-95-11, 42 NRC 47, 48 (1995) (citing 10 C.F.R. §§ 40.4, 70.4) (emphasis added).

In short, under the applicable regulations, based on the Commission’s generic determination that postulated worst case accidents for ISFSIs that do not process or package spent fuel have “insignificant consequences to the public health and safety,” Applicant’s emergency plan does not need to contain provisions for addressing potential harm to individuals living offsite but within five miles of the facility. Nor, therefore, does it need to address the provision of an offsite warning system. Thus, these general contentions must be dismissed.

b) Compliance with EPCRTKA

OGD alleges that the Emergency Plan has not indicated how the Applicant plans to comply with Emergency Planning and Community Right to Know Act of 1986 (“EPCRTKA”) with respect to hazardous materials at the ISFSI. OGD Petition at 6 (citing 10 C.F.R. § 72.32).

This subcontention must be dismissed because it mistakenly claims that the Applicant failed to address a relevant issue in the application. EPCRTKA applies only to facilities possessing “extremely hazardous substances” in amounts above specified regulatory thresholds. It does not require an Applicant to do anything regarding “hazardous materials” that might be present at the ISFSI. 40 C.F.R. § 355.30(a); Title II, Pub. L. No. 99-499, § 302, 100 Stat. 1613, 1730 (1986). The Emergency Plan states that

“[t]he PFSF will not have extremely hazardous substances present in an amount equal to or greater than the threshold planning quantities of 40 C.F.R. § 355. EP at 2-6. The threshold planning quantities for each extremely hazardous substance designated under EPCRTKA are given in 40 C.F.R. § 355, Appendices A and B. 40 C.F.R. § 355, App. A & B. The quantities range from 1 to 10,000 pounds. Id. The lesser of the two quantities given for each substance applies only if the substance is powdered, in solution, molten, or meets National Fire Protection Association ratings of 2, 3, or 4 for reactivity. 40 C.F.R. § 355.30(e)(2)(i).

Moreover, OGD provides no factual basis for its allegation that the ISFSI will possess regulated substances of any kind. OGD Petition at 6. It has supplied no factual basis of facts or expert opinion with supporting references. Therefore, the Emergency Plan does address EPCRTKA; that Act does not apply, and this subcontention must be dismissed.

c) Notification of Offsite Response Organizations

OGD alleges that Applicant has failed to show a commitment, and a means, to promptly notify and request assistance from offsite emergency response organizations. OGD Petition at 6. OGD also alleges that Applicant has not provided backup for the communication means necessary to notify and request assistance from offsite response organizations. Id. (citing 10 C.F.R. § 72.32).

This subcontention must be dismissed because it too mistakenly claims that the Applicant failed to address a relevant issue in the application. The Environmental Plan

states that “[w]hen an Alert is declared or terminated, the [ISFSI] Emergency Response Leader shall designate an Emergency Communicator and ensure that notifications are promptly made to: [1]) Tooele County . . . , [2]) the NRC Operations Center . . . , and 3) [other] [o]ffsite response organizations, as appropriate.” ER at 5-2. In the event of an emergency, assistance from offsite emergency response organizations will be requested “at the discretion of the [ISFSI] Emergency Response Leader.” Id.; see Northern States Power, DD-97-24, 62 Fed. Reg. at 51,917 (relevant offsite response organizations are those from which the Applicant expects to request assistance). Thus, the Emergency Plan does include a commitment to promptly notify appropriate offsite emergency response organizations.

Further, the Emergency Plan provides the means for such notification, with both primary and backup communications systems. It states that the Emergency Communicator shall ensure that notification in an alert will be provided to: “Tooele County, by commercial telephone lines or backup radio communication as soon as possible.” EP at 5-2. The Emergency Plan also states that “[b]ackup communications equipment include facility radios and cellular telephones.” Id. OGD simply ignores the information in the Application. Therefore, this subcontention must be dismissed.

d) Unavailability During an Accident of Personnel and Equipment

OGD claims that the Application fails to deal with the unavailability of personnel, parts of the facility, and some equipment in the event of an accident. OGD Petition at 6 (citing 10 C.F.R. § 72.32(a)(8)).

This subcontention must also be dismissed for not containing a specific statement of the issue of law or fact to be raised or controverted. OGD does not indicate at all which personnel, parts of the facility, or pieces of equipment might be unavailable or which of them are not addressed by the Emergency Plan. OGD Petition at 6. Thus, the subcontention is nonspecific and must be dismissed.

This subcontention must also be dismissed because it ignores that the Applicant addressed a relevant issue in the application. The Emergency Plan provides for emergency notification in the event of the unavailability of some personnel in that it specifically addresses emergency notification during off-shift hours. EP at 5-1. It also addresses the notification of ISFSI emergency response personnel who are otherwise offsite. Id. Furthermore, it provides for requesting assistance from offsite emergency response organizations to supplement the ISFSI staff if necessary. Id. at 5-2. The Emergency Plan provides for the unavailability of part of the facility and some equipment as the emergency response Control Point has a primary location in the Security and Health Physics Building and a secondary location in the Operations and Maintenance Building. Id. at 5-9. The primary assembly area for personnel evacuated from the restricted area is the Administration Building, while the secondary area is in the Operations and Maintenance Building. Id. at 5-6. Radiation monitoring equipment is located in both the Security and Health Physics Building and the Administration Building. Id. at 5-4. The Emergency Plan provides for backup communications systems. Id. at 5-9; see also Subcontention (c), supra. It provides for backup power for the onsite intercom. EP at 5-1. Thus, Applicant has clearly provided for the unavailability of

personnel, different areas within the facility, and facility equipment. OGD again ignores this information and provides no basis for challenging it. Therefore, this subcontention must be dismissed.

**C. OGD Contention C: License Application Lacks Sufficient Provisions for Protection Against Transportation Accidents.**

1. The Contention

The OGD petitioner alleges in Contention C that:

The license application poses undue risk to public health and safety because it lacks sufficient provisions for protection against transportation accidents, including a criticality accident.

See OGD Petition at 6-7. The asserted bases for the contention are set forth in several pages of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, Applicant proposes that the contention be restated incorporating the specific allegations raised in its bases as follows:

The license application poses undue risk to public health and safety because it lacks sufficient provisions for protection against transportation accidents, including a criticality accident in that:

- a) the license application lacks sufficient provisions for protection against transportation accidents.
- b) the design of the shipping casks do not provide sufficient protection against a criticality accident during transportation.
- c) the license application does not provide sufficient measures for protection of shipping casks during the harsh summer temperatures and sub-zero winter temperatures.

- d) the license application fails to provide sufficient information to fully evaluate the impacts and risks of spent nuclear fuel transportation to PFS. The absent information is the detailed inventory of specific radionuclides expected to be present in the typical fuel assembly received at PFS and the anticipated shipment characteristics necessary for evaluation of transportation impacts and risks.
- e) the license application fails to adequately analyze routine transportation conditions in that the license application fails to consider the radiological risks of routine transportation by rail and heavy-haul truck and ignores the potentially significant radiation exposures which members of OGD and other residents of Skull Valley may receive as a result of gridlock traffic incidents involving heavy-haul truck shipments from the intermodal transfer point to the canister transfer building.
- f) the license application fails to adequately analyze transportation accident conditions in that:
  - (i) the license application fails to consider the historical records of spent nuclear fuel transportation accidents and incidents.
  - (ii) the license application fails to consider the risks of severe accidents and terrorist attacks which could result in significant radiological releases. The license application ignores the potentially severe consequence of a successful terrorist attack against a spent fuel shipping cask using a high energy explosive device or an anti-tank weapon. Radioactive contamination from a terrorist incident could spread beyond the site of the attack.
  - (iii) the license application fails to consider the ways in which human errors or insider sabotage could cause or exacerbate transportation accidents.
  - (iv) the license application ignores the accident rate analysis prepared by DOE and the accident consequence analyses prepared by DOE and by the State of Nevada for use in assessing the impacts of spent nuclear fuel shipments to the proposed Yucca Mountain repository.

(v) the license application is silent regarding the number of accidents that would be expected to occur during shipments to PFS if those shipments are made as safely as past shipments by general freight service and by dedicated train service.

g) the license application fails to consider the traumatic collective impact of transportation risks on members of OGD who seek to preserve their traditional life style.

In addition to the contention, OGD also petitions the Commission to require PFS to implement a series of nine measures regarding transportation of spent fuel to the PFSF in the event the Commission grants a license to PFS. OGD Petition at 15-16. OGD's petition must be dismissed as a premature request for the Commission to impose license conditions. It is based on the presumption that it will prevail on its contention which, assuming the contention were admitted, would only be determined after a hearing. OGD does not represent the measures of its petition to be considered as a contention for litigation in this proceeding. Nor could it. It plainly does not meet the pleading requirements of 10 C.F.R. § 2.714(b) in that, among failing to meet other requirements, it is totally devoid of any supporting basis.

2. Applicant's Response to the Contention

OGD raises a number of issues under Contention C, which Applicant addresses in turn below:

a) Lacks provisions for protection against transportation accidents

OGD asserts that Applicant's License Application "poses undue risk to public health and safety because it lacks sufficient provisions for protection against transportation accidents." OGD Petition at 6-7. Applicant identifies applicable accidents

in the Emergency Plan Chapter 2. The requirements for emergency plans for ISFSIs are for on-site emergencies only. See Northern States Power Co. (Independent Fuel Storage Installation) Director's Decision under 10 C.F.R. § 2.206 (DD-97-24), 62 Fed. Reg. 51,916, 51,917 (1997). An on-site emergency does not include a spent fuel transportation accident that occurs off-site, to the extent that it has no effect on the site.<sup>93</sup> The safety aspects of off-site transportation of spent fuel, including measures to address spent fuel transportation accidents, are controlled by 10 C.F.R. Parts 71 and 73, and by DOT regulations, not by 10 C.F.R. Part 72. See, e.g., 10 C.F.R. §§ 71.5, 73.37. A 10 C.F.R. Part 72 materials licensing proceeding is not the proper forum to address off-site transportation spent fuel accidents. Hence, this contention must be dismissed as being beyond the scope of this proceeding. See also Applicant's Response to OGD Contention M.

b) Design of shipping casks not sufficient to protect against criticality accident

OGD asserts that Applicant's License Application "poses undue risk to public health and safety because it lacks sufficient provisions for protection against transportation accidents, including a criticality accident" in that "[t]he design of the shipping casks do not provide sufficient protection against a criticality accident during transportation." OGD Petition at 6-7. A contention that challenges the capability of a

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<sup>93</sup> Applicant provides further response to its evaluation of the impact of off-site accidents or incidents that effect the site at its response to OGD Contention M. See Applicant's Response to OGD Contention M.

shipping cask to perform its designed and certified function, is a challenge to NRC regulations governing the licensing of such a cask, 10 C.F.R. Part 71. The NRC in promulgating the design and certification requirements for shipping casks has made the generic determination that such casks, including the provisions to protect against accidental criticality at 10 C.F.R. § 71.55 and 10 C.F.R. § 71.59, adequately protect public health and safety of spent fuel while in transit. See 31 Fed. Reg. 9941, 9942 (“Packaging of Radioactive Material For Transport” - Final Rule) (July 22, 1966); 30 Fed. Reg. 15,750 (“Transport of Licensed Material, Notice of Proposed Rulemaking”) (December 21, 1965).<sup>94</sup> Therefore, a contention against transporting spent fuel in NRC-approved shipping casks in compliance with applicable regulatory requirements, is a direct challenge to the regulations and the NRC’s generic determination made as part of the rulemaking. To be admitted, a contention may not attack a Commission rule or regulation, 10 C.F.R. § 2.758, and therefore such a contention must be dismissed. Furthermore, this proceeding is a 10 C.F.R. Part 72 licensing proceeding. A challenge to a 10 C.F.R. Part 71 license is outside the scope of this case. See Section II.B supra.

Additionally, this contention does not provide any facts or technical analyses to support this claim. Thus this contention must be dismissed.

- c) Inadequate protection of shipping casks during the harsh summer temperatures and sub-zero winter temperatures.

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<sup>94</sup> 10 C.F.R. Part 71, “Regulations to Protect Against Accidental Conditions of Criticality in the Shipment of Special Nuclear Material,” was originally promulgated in 1958 “to establish appropriate precautions in connection with the transportation of special nuclear material to prevent accidental conditions of criticality.” 23 Fed. Reg. 7666 (“Part 71 - Regulations to Protect Against Accidental Conditions of Criticality in the Shipment of Special Nuclear Material” - Final Rule) (October 3, 1958).

OGD asserts that Applicant's License Application "poses undue risk to public health and safety because it lacks sufficient provisions for protection against transportation accidents" in that "the license application [does not] provide sufficient measures for protection of shipping casks during the harsh summers and sub-zero temperatures of winter." OGD Petition at 6-7. As stated above, a contention that challenges the capability of a shipping cask to perform its designed and certified function, is a challenge to NRC regulations governing the licensing of such a cask, 10 C.F.R. Part 71. The NRC in promulgating the design and certification requirements for shipping casks has made the generic determination that such casks, including provisions for thermal extremes at 10 C.F.R. § 71.71 and 10 C.F.R. § 71.73, adequately protect public health and safety of spent fuel while in transit. See 48 Fed. Reg. 36,600, 35,606 ("Rules to Achieve Compatibility with the Transport Regulations of the International Atomic Energy Agency (IAEA)" - Final Rule) (August 5, 1983). Applicant's SAR in Section 3.2.6, "Thermal Loads," and in Table 3.6-1, "Summary of PFS Design Criteria," describes the design ambient conditions for the PFS site at any one time; the thermal conditions range from a minimum of -35°F to a maximum of 110°F at any one time during a day. See SAR at 3.2-5 and Sheet 2 of Table 3.6-1. The NRC design and testing thermal conditions over extended periods of time range from -40°F to 1475°F to cover normal and hypothetical accident conditions. See 10 C.F.R. § 71.71(c) and 10 C.F.R. § 71.73(c). The NRC also states in the statement of considerations that:

... Type B packages do not respond quickly to temperature changes, so a long-term average temperature test is more appropriate than a test which includes temperature extremes.

48 Fed. Reg. at 35,606. See also State of Wisconsin , DPRM-86-5, 24 NRC 647, 652 (1986). Hence, Applicant's thermal design conditions are well within the bounds of the NRC-specified thermal conditions, and here OGD has not challenged Applicant's specified thermal design conditions. Therefore, a contention against transporting spent fuel in NRC-approved shipping casks in compliance with applicable regulatory requirements, is a direct challenge to the regulations and the NRC's generic determination made as part of the rulemaking. To be admitted, a contention may not attack a Commission rule or regulation, 10 C.F.R. § 2.758, and therefore such a contention must be dismissed. In addition, as with the prior contention, this 10 C.F.R. Part 71 issue is outside the scope of this 10 C.F.R. Part 72 licensing proceeding. Finally, OGD has failed to provide any facts, technical analyses or expert opinion to support this claim in its contention. For all these reasons, this contention must be dismissed.

d) Insufficient information to fully evaluate the impacts and risks of spent nuclear fuel transportation.

OGD alleges that Applicant's License Application is deficient because it "fails to provide sufficient information to fully evaluate the impacts and risks of spent nuclear fuel transportation to PFS." OGD Petition at 7. Specifically, OGD contends that (1) "the license application does not provide detailed information about the radiological characteristics of the spent fuel which will be shipped to Skull Valley," *id.*, and (2) "the license application also fails to provide sufficient details about the anticipated shipment characteristics necessary for evaluation of the transportation impacts and risks," *id.* at 8.

(i) Detailed radiological characteristics of spent fuel.

OGD asserts that “the license application fails to provide the detailed inventory of specific radionuclides expected to be present in the typical fuel assembly received at PFS.

Id. The only specific radionuclides addressed in OGD’s contention are “the major radionuclides of concern in a transportation accident . . . strontium-90 and cesium-137.”

Id. OGD provides no regulatory basis whatsoever that such detailed information is required in the License Application. OGD provides no support whatsoever for its assertion.

Nonetheless, Applicant’s License Application does provide detailed information about the spent fuel which may be shipped to the PFSF. See, e.g., SAR at 3.1-2 (“Materials to be Stored”), Table 3.1-1 (“Types of PWR Fuel that can be Stored at the PFSF”), Table 3.1-2 (“Types of BWR Fuel that can be Stored at the PFSF”), and Table 3.1-3 (“PFSF Bounding Design Fuel Characteristics”). The spent fuel characteristics provided in the License Application are consistent with the NRC’s recommendations for such information in an ISFSI SAR. NRC’s guidance is that:

A detailed description of the physical, thermal, and radiological characteristics of the spent fuel... to be stored should be provided. Include spent fuel characteristics such as specific power, burnup, decay time, and heat generation rates ...

Regulatory Guide 3.48 at 3-1 (emphasis added); see also NUREG-1567 at 3-5 to 3-6.

This information is provided in Applicant’s License Application. OGD’s contention does not address, nor challenge the validity of, the information in the License Application or the NRC’s guidance that the SAR include those spent fuel characteristics.

Furthermore, from this data, the specific inventory of each radionuclide can be calculated using the standard ORIGEN-S code that is referenced, and used, in the License Application. See SAR at 8.2-38 (“radionuclide inventories were derived from ORIGEN-S calculations”); see also Calculation Package Vol. II, Tab 18, “Dose From Hypothetical Loss of Canister Confinement Accident,” SWEC 05996.01-UR-2, at 6 (1997). In fact, the specific inventories of the only two radionuclides cited in OGD’s contention, “strontium-90 and cesium-137,” are explicitly calculated and included in the License Application. *Id.* (Calc. Pack. Tab 18 “Table 2- Radionuclide Inventories in Spent Fuel in Canisters”). OGD neither addresses, nor challenges the validity of, the calculation of the specific inventory of strontium-90 and cesium-137 in the spent fuel at the PFS.

OGD also fails to identify any specific analyses it is unable to do with the spent fuel characteristics included in the License Application. OGD’s contention also fails to identify any deficiency in the design or operation of the PFSF in the License Application as a result of the asserted lack of detailed radionuclide inventory information. OGD’s contention must be rejected for two reasons. First, OGD’s contention ignores the relevant information on spent fuel characteristics and radionuclide inventories (e.g., for strontium-90 and cesium-137) that is included in the License Application. A contention that mistakenly claims that an applicant fails to address a relevant issue in the application must be dismissed. Second, OGD’s contention does not provide a sufficient basis for an admissible contention, as required by the Commission’s regulation. 10 C.F.R. § 2.714(b). In addition to not addressing the “pertinent portions of the license application,”

OGD has not identified any regulatory basis for its contention, has not identified any problem in the design or operation of the proposed facility related to the alleged lack of data, and has not addressed why the spent fuel data and description of the radionuclide inventory model that are in the License Application are inadequate and cannot be used to generate any needed information on spent fuel characteristics and radionuclide characteristics. OGD's unsupported contention must be dismissed.

(ii) Detailed characteristics of anticipated shipments

OGD asserts that "[t]he License Application also fails to provide sufficient details about the anticipated shipment characteristics necessary for evaluation of transportation impacts and risks." OGD Petition at 8. OGD's contention provides no regulatory basis, or any other basis whatsoever, for this assertion. OGD's contention is accompanied by only a generalized discussion of the potential number of shipments to the PFSF and OGD's "assum[ption] that the average rail shipment distance to Skull Valley will be between 1,500 and 2,000 miles," statement that "[t]he average [heavy-haul truck] loaded shipment distance would be about 25 miles," and statement that "the proposed shipments to Skull Valley would represent an unprecedented increase in the amount of spent fuel shipped ...." OGD Petition at 9. None of these generalized statements establishes a genuine dispute with Applicant. Furthermore, each of these issues (shipments, rail shipment distance, and heavy-haul truck shipment distance) is specifically addressed in Applicant's License Application. See ER at 4.7-5 ("PFSF is expected to receive 100 to 200 fuel shipments ... per year"), 4.7-7 ("Shipping distances by rail to the PFSF will be approximately 2,600 miles from reactors in east coast and

southern states, approximately 1,600 miles from reactors in the central states, and approximately 1,000 miles from reactors in western states”). OGD’s contention neither addresses, nor challenges the validity of any of this information in the License Application. OGD’s contention must be rejected for failing to provide a sufficient basis for an admissible contention, as required by the Commission’s regulations.

e) Failure to consider the radiological risks of routine transportation.

OGD asserts that the License Application “fails to consider . . . the radiological risks of routine transportation,” including gridlock traffic incidents and routine rail or highway transportation activities. OGD Petition at 7, 14-15.

Contrary to the State’s assertion, since Applicant utilizes Table S-4 to calculate the environmental impacts of spent fuel transportation, Applicant does consider the environmental impacts of routine transportation and postulated transportation accidents. See ER at 4.7-1 through 4.7-9 (incident-free transportation); ER at 5.2-1 through 5.2-3 (postulated transportation accidents); see also Calculation Package Vol. II, Tab 21, “PFSF Transportation Impacts,” SWEC Calc. No. 05996.01-P-001 at 4. WASH-1238 considers activities normally incident to transportation is evaluating the environmental impacts of transportation. See WASH-1238 at 5, 110 (discussing vehicle speed as 200 miles/day - - “Based on a uniform distance traveled each day and uniform distribution of persons along the route, the cumulative radiation dose to the population is the same whether the vehicle is moving all of the time at a constant rate of speed or standing still part of the day.”). The environmental impacts assessed by Applicant (both routine and accident conditions) are performed in a similar manner as that performed by NRC in

promulgating 10 C.F.R. Part 72. The "Generic Environmental Impact Statement on Handling and Storage of Spent Light Water Reactor Fuel," NUREG-0575, utilizes the information and data in WASH-1238, "Environmental Survey of Transportation of Radioactive Materials To and From Nuclear Power Plants," (and hence Table S-4 from 10 C.F.R. Part 51) in assessing the environmental impacts of spent fuel transportation for an away-from-reactor ISFSI. See NUREG-0575 at 3-21, 4-22; see also, 45 Fed. Reg. at 74,698 (1980). Applicant is relying on Table S-4 in 10 C.F.R. Part 51, which is based on WASH-1238, supplemented with information from NUREG-1437 and NUREG-0170, as the best available data and information to assess environmental impacts of spent fuel transportation that is approved by the Commission for use in a licensing proceeding. OGD does not challenge the methodology implemented by Applicant. Hence, this contention must be dismissed because it does not allege that the application is deficient.

WASH-1238, and hence Table S-4, considers that routine transportation instances including that by intermodal transfer, and hence rail-to-heavy haul truck shipments, may be necessary for radioactive material shipments and addresses the environmental impacts of that transfer. See WASH-1238 at 38, 41 (discussing the option of "intermediate trucking by special equipment to the nearest railhead" and discussing the exposure to carrier personnel or the general public, specifically mentioning "transshipment, e.g., when the cask is transported by truck from the reactor to a nearby railhead and transferred from the truck to a railroad car."). A contention that mistakenly claims that an applicant fails to address a relevant issue in the application must be dismissed. Thus, this contention must be dismissed.

- f) Failure to adequately analyze transportation accident conditions in that the license application:
- (i) Fails to consider the historical records of spent nuclear fuel transportation accidents and incidents.

OGD alleges that the License Application fails to adequately analyze transportation accident conditions<sup>95</sup> in that it “fails to consider the historical records of spent nuclear fuel transportation accidents and incidents.” OGD Petition at 7, 9. The regulation requiring Applicant to evaluate spent fuel transportation does not require Applicant “to consider the historical records of spent nuclear fuel transportation accidents and incidents.” *Id.* The regulation states that:

The proposed ISFSI or MRS must be evaluated with respect to the potential impact on the environment of the transportation of spent fuel or high-level radioactive waste within the region.

10 C.F.R. § 72.108. OGD’s contention is invalid in that OGD inappropriately “advocates stricter requirements than those imposed by the regulations.”

As stated above in Applicant’s Response to OGD C subsection (e), since Applicant utilizes Table S-4 to calculate the environmental impacts of spent fuel transportation, the License Application does consider the environmental impacts of routine and accident transportation associated with shipping spent fuel to and from the PFS. *See* Applicant’s Response to OGD Contention C Subpart (e). This is another instance of a contention that mistakenly claims that Applicant failed to address a relevant issue in the application -- and was wrong. Thus, this contention must be dismissed.

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<sup>95</sup> Applicant provides further response to its evaluation of the impact of transportation accidents at its response to OGD Contention M. *See* Applicant’s Response to OGD Contention M

(ii) Fails to consider the risks of severe accidents and terrorist attacks.

OGD asserts that Applicant's License Application fails to adequately analyze transportation accident conditions in that "it fails to consider the risks of severe accidents and terrorist attacks which could result in significant radiological releases." OGD Petition at 7, 12. The safety aspects of off-site transportation of spent fuel, including measures to address spent fuel transportation accidents including sabotage, are controlled by 10 C.F.R. Parts 71 and 73, and by DOT regulations, not by 10 C.F.R. Part 72. See, e.g., 10 C.F.R. §§ 71.5, 73.37. So to the extent that OGD seeks to include off-site spent fuel transportation accidents in Applicant's ISFSI Emergency Plan, this contention must be dismissed as being beyond the scope of this proceeding. See Section II.B supra at 8.

Environmental impact statements need not discuss, moreover, the environmental effects of alternatives which are "deemed only remote and speculative possibilities." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551 (1978); Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 696-97, n.12, 700 (1985). Additionally, the environmental report for a facility need not include the environmental effects from the risk of sabotage. Limerick, ALAB-819, 22 NRC at 701. The risk of sabotage is not yet amenable to the degree of quantification that could be meaningfully used in the environmental impact decisionmaking process. Id. So to the extent that OGD seeks to include off-site spent fuel transportation accidents, including sabotage, beyond what is accounted for in Table S-4, this contention must be dismissed as being beyond the scope of this proceeding.

The design basis threat of radiological sabotage for a nuclear facility and for materials in transit is defined in 10 C.F.R. § 73.1(a)(1). See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, printed as an Attachment to CLI-82-19, 16 NRC 53, 59 (1981). The specific provisions of the design basis in 10 C.F.R. § 73.1(a)(1) are applicable to a particular type of nuclear facility (an ISFSI, for example) only to the extent that they are referenced in sections of 10 C.F.R. 73 that are applicable to that particular type of nuclear facility or to materials in transit. See Georgia Tech, LBP-95-6, 41 NRC at 292. The design basis threat for a nuclear facility is generic rather than site-specific. See Diablo Canyon, ALAB-653, 16 NRC at 74. There is no need for Applicant or the NRC staff to perform site-specific analyses of potential threats that are specific to Applicant's proposed facility. Id. Nor is it necessary for Applicant or NRC staff to understand, characterize, and analyze the attributes of the attackers in light of the site-specific conditions at the proposed facility, because the characteristics and attributes of the generic design basis adversary are set forth in the regulations. Id. at 75. The types of weapons used by the design basis attackers are also established in the regulations. Id. OGD asserts that Applicant should consider terrorist attack "using a high energy explosive device or an anti-tank weapon." OGD Petition at 12. Contrary to OGD's assertion, a petitioner can not require the proposed facility to take into account various weapons that are not included in the regulations, such as "fixed-wing aircraft, helicopters, mortars, rocket launchers, grenade launchers, and anti-tank weapons." See Diablo Canyon, ALAB-653, 16 NRC at 75. OGD's contention is invalid in that OGD inappropriately "advocates stricter requirements than those imposed by the

regulations,” and moreover, this contention is a direct challenge to NRC regulation in its definition of design basis threats in 10 C.F.R. § 73.1(a) (see 10 C.F.R. § 2.758(a)).

Hence, this contention must be dismissed.

(iii) Fails to consider human errors or insider sabotage.

OGD asserts that Applicant’s License Application fails to adequately analyze transportation accident conditions in that it “fails to consider . . . the ways in which human errors . . . could cause or exacerbate transportation accidents.” OGD Petition at 7.<sup>96</sup>

Contrary to OGD’s assertion, Applicant does address human error in evaluating the environmental impacts of transporting spent fuel to the PFS, in utilizing Table S-4 in 10 C.F.R. § 51.52 and WASH-1238. See ER at 4.7-1 through 4.7-9 (incident-free transportation); ER at 5.2-1 through 5.2-3 (postulated transportation accidents); see also Calculation Package Vol. II, Tab 21, “PFSF Transportation Impacts,” SWEC Calc. No. 05996.01-P-001 at 4. WASH-1238 and Table S-4 adequately evaluate the probability and consequences of a shipping accident, including those that might be caused by error in preparing a cask for shipment. Virginia Electric and Power Co., (North Anna Power Station, Units 1 & 20, LBP-85-34, 22 NRC 481, 488 (1986). WASH-1238, which is the basis for Table S-4, states that:

[i]t is possible that a package will be constructed or used in a manner not in accordance with the design; however, the

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<sup>96</sup> Applicant provides further response to its evaluation of the impact of human error as a cause or contribution to accident events at the PFS site at its response to OGD Contention A. See Applicant’s Response to OGD Contention A.

likelihood of such error is considered small in view of the regulatory requirements for quality assurance and for various observations and tests before each shipment.

WASH-1238 at 16, 72. Yet again, OGD asserts a contention that mistakenly claims that Applicant failed to address a relevant issue in the application. Therefore, this contention must be dismissed.

OGD asserts that Applicant's License Application fails to adequately analyze transportation accident conditions in that it "fails to consider . . . the ways in which . . . insider sabotage could cause or exacerbate transportation accidents." OGD Petition at 7.<sup>97</sup> The design basis threat of radiological sabotage for a nuclear facility and to materials in transit is defined in 10 C.F.R. § 73.1(a)(1). See Diablo Canyon, ALAB-653, 16 NRC at 59. Insider sabotage is an integral part of the Commission's design basis threat for radiological sabotage. See 10 C.F.R. § 73.1(a)(1). Specifically, the design basis threat includes:

inside assistance which may include a knowledgeable individual who attempts to participate in a passive role (e.g., provide information), an active role (e.g., facilitate entrance and exit, disable alarms and communications, participate in violent attack), or both.

...

[a]n internal threat of an insider, including an employee (in any position) ...

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<sup>97</sup> Applicant provides further response to its addressing insider sabotage as a cause of or contribution to accident events at the PFS site at its response to OGD Contention A. See Applicant's Response to OGD Contention A.

Id. (emphasis added). The physical security measures required for a fixed facility under 10 C.F.R. Part 73 do not extend beyond the facility's boundaries. See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-27, 22 NRC 126, 138 (1985). The Commission regulates off-site transportation of spent fuel under 10 C.F.R. Part 71, not 10 C.F.R. Part 72. 10 C.F.R. Part 71, in turn, requires spent fuel transportation to be done in compliance with the transportation safeguards requirements in 10 C.F.R. Part 73. See 10 C.F.R. § 71.0(b). Part 73 explicitly includes other measures in transportation-specific regulations to protect off-site shipments of spent fuel to or from a fixed facility. Id.; see, e.g., 10 C.F.R. §§ 73.25, 73.26, 73.27, and 73.37. So to the extent that OGD seeks to include transportation safeguards measures in a 10 C.F.R. Part 72 materials licensing proceeding, this contention must be dismissed as being beyond the scope of this proceeding.

Additionally, this contention does not provide any facts or technical analyses to support this claim. A contention that simply alleges that some matter ought to be considered" does not provide a sufficient basis for an admissible contention. See Section II.C.1 supra at 13. A petitioner is obligated "to provide the [technical] analyses and expert opinion" or other information "showing why its bases support its contention." OGD here has failed to do so and thus this contention must be dismissed.

- (iv) Ignores DOE accident rate analysis and DOE and Nevada accident consequence analyses.

OGD asserts that Applicant's License Application fails to adequately analyze transportation accident conditions in that it "ignores the accident rate analysis prepared by

DOE” and “the accident consequence analyses prepared by DOE and by the State of Nevada for use in assessing the impacts of spent nuclear fuel shipments to the proposed Yucca Mountain repository.” See OGD Petition at 10, 11. However, even if the DOE accident rate and accident consequence analysis cited by OGD are accepted, they have no bearing on the information included in Applicant’s Environmental Report. The accident rate cited by OGD is irrelevant, as explicitly stated in OGD’s Exhibit 6, on which it relies for this contention (OGD Petition at 10-11):

in no case has there been injury, death, or environmental damages as a result of the radioactive nature of the cargo.

...

[d]uring the domestic history of SNF [spent nuclear fuel] transportation, there have been no accidents or incidents where damages to the vehicle or cask resulted in the release of radioactive materials or injury to the public.

OGD Petition Ex. 6 at 1, 8. Therefore, since the accidents have had no radiological consequences, the accuracy of OGD’s numbers is of no concern. In any case, OGD has not alleged, let alone shown any basis, that the transportation impacts described in the Environmental Report are inconsistent with DOE’s accident numbers.

OGD itself states that:

the probability of an accident severe enough to cause even a small risk of radioactivity is extremely low (the previously cited study [at OGD Petition Ex. 7 at 3-2] estimated the probability of the very severe rail accident at no more than two accidents per million shipments) ....

OGD Petition at 11. Such low probability events are the types of remote and speculative impacts that NEPA does not require to be considered. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1300 (D.C. Cir. 1984), rehearing en banc granted on other grounds, 760 F.2d 1320 (D.C. Cir. 1985), aff'd on hearing en banc, 789 F.2d 26 (D.C. Cir.), cert. denied, 479 U.S. 923 (1986). This contention must be dismissed as beyond the reach of NEPA.

(v) Is silent regarding number of accidents expected to occur during shipments to PFS

OGD alleges that the License Application “is silent regarding the number of accidents that would be expected to occur during shipments to PFS.” OGD Petition at 10. OGD further provides a calculation of the expected number of accidents utilizing data from a DOE report. Id.

The regulation requiring Applicant to evaluate spent fuel transportation does not require Applicant to specify “the number of accidents that would be expected to occur during shipments to PFS.” Id. The regulation states that:

The proposed ISFSI or MRS must be evaluated with respect to the potential impact on the environment of the transportation of spent fuel or high-level radioactive waste within the region.

10 C.F.R. § 72.108. OGD’s contention is invalid in that OGD inappropriately “advocates stricter requirements than those imposed by the regulations.” Seabrook, LBP-82-106, 15.

Hence, this contention must be dismissed.

The contention should also be rejected in that it seeks to raise an issue (i.e., the number of accidents) that is outside the scope of NEPA. The number of accidents is

irrelevant if those accidents cause no environmental impact. As noted above, OGD's own exhibit relied upon as the basis for this contention (see OGD Petition at 10) states that none of the accidents caused any environmental damages of a radiological nature. OGD Petition Ex. 3 at 2. Hence, this contention must be dismissed because it does not allege that the application is deficient.

g) Failure to consider the traumatic collective impact of transportation risks.

OGD alleges that the License Application "fails to consider . . . the traumatic collective impact of transportation risks on members of OGD who seek to preserve their traditional life style." OGD Petition at 7. OGD claims that "[e]ven if the contamination resulting from a very severe transportation accident could be completely cleaned up, the cleanup process itself would have severe impacts on the OGD community and traditional life style, and their attitudes toward their traditional homeland could be permanently altered, tinged forever by uncertainty about the events they had already experienced and burdened by additional fears of future radioactive releases." Id. at 12.

However, as discussed further in response to OGD Contention P, subpart c, psychological effects are outside the zone of interest protected by NEPA and the Atomic Energy Act. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-82-6, 15 NRC 407, 408 (1982) (AEA); Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772 (1983) (NEPA). To be cognizable under NEPA, there must be "a reasonably close causal relationship between a change in the physical environment and the effect at issue." Metropolitan Edison, 460 U.S. at 774 (emphasis

added). Fear and its effects on the mental or physical well-being of individuals do not give rise to litigable contentions and thus this contention must be dismissed.

**D. OGD Contention D: License Application Lacks Procedures for Returning Damaged Casks to the Generating Reactor.**

1. The Contention

OGD alleges in Contention D that:

The license application poses undue risk to public health and safety because it has not provided procedures for returning casks to the generating reactor. The SAR indicates that the casks will be inspected for damage prior to “accepting” the cask and before it enters the Restricted Area. SAR p. 5.1-4. If the casks are damaged or do not meet the criteria specified in LA AP. A, p. TS-19 there is no provision for housing the casks prior to shipping the cask back to the generating reactor.

OGD Petition at 16. The asserted basis for the contention simply states, without further explanation or support, that the “license application does not provide for procedures for returning casks to the generating reactor should there be a[n] accident as provided for in 10 C.F.R. § 72.32 which requires a description of the means of restoring the facility to a safe condition after an accident.” *Id.*<sup>98</sup> In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations made in its basis:

The license application, which indicates that the casks will be inspected for damage prior to “accepting” the cask and

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<sup>98</sup> The basis also states that the OGD incorporates the discussions regarding “possible accidents and the mitigation measures” in its contentions A and C. *Id.* The Applicant’s responses to the “possible accidents and the mitigation measures” discussed in OGD’s contentions A and C are fully addressed in its responses to those contentions.

before it enters the Restricted Area (SAR p. 5.1-4}, poses undue risk to public health and safety in that

- a) The license application does not provide for procedures for returning casks to the generating reactor should there be an accident as provided for in 10 C.F.R. § 72.32 which requires a description of the means of restoring the facility to a safe condition after an accident.
- b) If the casks are damaged or do not meet the criteria specified in LA AP. A, p. TS-19, there is no provision for housing the casks prior to shipping the casks back to the generating reactor.

2. Applicant's Response to the Contention

a) Procedures for Returning Damaged Casks

OGD claims that the License Application is deficient because it does not provide procedures for returning damaged shipping casks to the generating reactor.<sup>99</sup>

This subcontention must be dismissed on various grounds. First, the Applicant's Emergency Plan is not required to include implementing procedures: "the Commission never intended the implementing procedures to be required for the 'reasonable assurance' finding and thus to be prepared and subject to scrutiny during the hearing. . . . [T]he Commission did not want licensing hearings to become bogged down with such details." Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1107 (1983); Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 398 (1995). As stated by the licensing board in Carolina Power & Light

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<sup>99</sup> The contention's focus on shipping casks is clear from its reference to SAR p. 5.1-4, which addresses receipt and inspection of incoming shipping casks and spent fuel canisters.

Company (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-84-29B, 20 NRC

389, 408 (1984):

Implementability is the characteristic of good *plans* . . . .  
Thus it is to the adequacy of planning that all the  
Commission's planning standards and evaluation criteria  
are directed . . . . The mechanical details implementing  
procedures largely consist of are almost never suitable for  
litigation.

Thus, assuming arguendo that shipping casks will become damaged and that a licensee application for an ISFSI must address their return to reactor sites under the requirement that the emergency plan include a description of the means to mitigate the consequences of accidents and restore the facility after an accident, the Applicant need not include procedures for returning damaged shipping casks to reactor sites. Therefore this subcontention must be dismissed as "an impermissible collateral attack on the Commission's rules" for "advocat[ing] stricter requirements than those imposed by the regulations." See Section II.B supra.

Second, this subcontention must be dismissed because the issue it raises is outside the scope of this hearing. See supra Section II. The Applicant's Emergency Plan is required to address accidents at the ISFSI, not offsite transportation accidents that might damage a spent fuel cask. Because of the low risk posed to the public by ISFSI's, such as the Applicant's, that do not repackage or handle spent fuel, their emergency plans are required to address onsite emergencies only. See Northern States Power Company (Independent Fuel Storage Installation) Director's Decision under 10 C.F.R. § 2.206 (DD-97-24), 62 Fed. Reg. 51,916, 51,917 (1997); see also supra Applicant's response to

OGD Contention B. The safety aspects of offsite transportation of spent fuel, including measures to address spent fuel transportation accidents, are controlled by 10 C.F.R. Parts 71 and 73, and by DOT regulations, not by 10 C.F.R. Part 72. See, e.g., 10 C.F.R. §§ 71.5, 73.37. So to the extent that OGD seeks to include offsite transportation accidents in the Applicant's ISFSI Emergency Plan, this contention must be dismissed as being beyond the scope of this proceeding.

Third, this subcontention must be dismissed because it ignores relevant material submitted by the Applicant. Contrary to OGD's assertion (OGD Petition at 16), the Applicant's SAR makes no mention of returning degraded or contaminated shipping casks to the reactors from which the ISFSI will receive spent fuel. The SAR specifically provides that:

If shipping cask repair or maintenance activities are necessary, they will be conducted at the Operation and Maintenance Building or at a vendor designated location.

SAR at 4.5-3. Moreover, the casks are designed to withstand being dropped, so it is unlikely that they would suffer significant damage due to mishandling at the ISFSI. Id. Furthermore, the Applicant provides a means for removing surface contamination from a shipping cask even though the contamination of a cask is not a likely event. Under off-normal conditions in which contamination of equipment or structures is encountered, contamination would be removed by use of dry decontamination methods (e.g., paper wipes or rags). SAR at 4.4-1. There is no need for more extensive decontamination measures because the spent fuel inside the casks is sealed within welded canisters. Id. at

4.5-3. Here, OGD has ignored the provisions in the Applicant's SAR that provide for repair of a damaged or degraded shipping cask and provide a means for removing surface contamination from a shipping cask. See OGD Petition at 15-16. Thus this subcontention must be dismissed.

Finally, this subcontention must be dismissed for failing to show that a genuine dispute exists regarding a material issue of law or fact. See Section II.C.2 supra. OGD identifies no facts, expert opinion, analyses or documents to support its implied allegation that a shipping cask could become damaged or contaminated such that the measures for repair and decontamination provided for in the application would be insufficient. See OGD Petition at 16. Furthermore, the Applicant's handling of transportation of casks to be repaired or maintained offsite would be governed by the provisions of 10 C.F.R. Part 71, Subpart G. See 10 C.F.R. §§ 71.81-71.100. Finally, to gain the admission of a contention founded on the premise that the Applicant will not follow regulatory requirements, petitioner must make some particularized demonstration that there is a reasonable basis to believe the Applicant would act contrary to their explicit terms.

General Public Utilities Nuclear Corporation (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 164 (1996). OGD makes no such showing. See OGD Petition at 15-16. Therefore, OGD has not shown that a material dispute exists with the Applicant and thus this subcontention must be dismissed.

b) Housing of Damaged or Contaminated Casks

In this subcontention, OGD claims that “there is no provision for housing the casks prior to shipping the cask back to the generating reactor” if the “casks are damaged or do not meet the criteria specified in LA AP. A, p. TS-19.” OGD Petition at 16. This subcontention must be dismissed for various reasons, including the fact that it is based on a misinterpretation of the cited License Application provision.

First, like Subcontention (a), this subcontention must be dismissed because the Applicant is not required to include implementing procedures with its application. See supra Subcontention (a).

Second, this subcontention ignores relevant material submitted by the Applicant. The particular License Application provision cited by OGD is addressing a canister - - not a shipping cask - - that exceeds the specification limits for external surface contamination. The License Application provision cited by OGD contains the following:

3/4.1 Canister External Surface Contamination

The removable surface contamination on the outer surface of the canister shall be less than 22,000 dpm/100 sq cm from beta and gamma and less than 2,200 dpm/100 sq cm from alpha emitting sources.

....

If the above specified limits are exceeded, return the canister and shipping cask to the originating nuclear power plant for decontamination.

LA App. A at TS-19, cited in OGD Petition at 16 (emphasis added). The SAR similarly provides for the return of the canister in such circumstances:

[o]nce the shipping cask arrives at the PFSF and its closure is removed, a smear survey of accessible portions of the canister is again performed.<sup>[100]</sup> If removable surface contamination levels on the top of the canister exceed the limits specified in Section 10.2.2.1 (22,000 dpm/100 cm<sup>2</sup> beta/gamma and 2,200 dpm/100 cm<sup>2</sup> alpha), the canister is returned to the originating nuclear power plant for decontamination.

SAR at 7.2-11 (emphasis added). If a canister exceeds the limits in the specification, then the canister will be returned in its shipping cask to the originating nuclear power plant for decontamination; the canister will not be decontaminated at the PFSF. See SAR at 6.4-1. Thus, the provision cited concerns canister contamination and not the shipping cask and the subcontention must be dismissed “because [it does] not accurately address the Applicant[‘s] proposal.” Carolina Power & Light Company (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2082 (1982).

Moreover, the SAR does expressly provide one measure for housing a shipping cask while it is being repaired or maintained (see supra Subcontention (a)): “[i]f shipping cask repair or maintenance activities are necessary, they will be conducted at the Operation and Maintenance Building.” SAR at 4.5-3. OGD has ignored this point. See OGD Petition at 15-16. In addition, OGD has provided absolutely no basis in fact, expert opinion, or documentation, to support its challenge of the adequacy of the Applicant’s repair, maintenance or temporary housing measures. See id. For failing to provide a specific factual basis that shows that a specific part of the application is in error or that

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<sup>100</sup> Health physics smear surveys are performed at the originating nuclear power plant on the accessible surfaces of the canister and the interior of the transfer cask to assess removable contamination levels prior to release of the shipment. See SAR at 6.1-1.

the Applicant has omitted some specific relevant piece of information, OGD has failed to show that a genuine dispute exists with the Applicant on a material issue of fact or law and thus this subcontention must be dismissed.

**E. OGD Contention E: License Application Fails to Provide Information and a Plan to Deal with Casks that May Leak or Become Contaminated During the 20 to 40 year storage period.**

1. The Contention:

OGD alleges in Contention E that:

The License Application poses undue risk to the public health and safety because it fails to provide information and a plan to deal with casks that may leak or become contaminated during the 20 to 40 year storage period. Sending such casks back to the generating reactor may not be an option for several reasons, such as: PFS does not have the facilities to repackage contaminated canisters, the casks may be too contaminated to transport, or the nuclear power plant from which the fuel originated may have been decommissioned, and there are no assurances that the storage will be only "interim."

OGD Petition at 17. The asserted bases for the contention are set forth in two pages of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows, incorporating the specific allegations in its bases:

The License Application poses undue risk to the public health and safety because it fails to provide information and a plan to deal with casks that may leak or become contaminated during the 20 to 40 year storage period. Sending such casks back to the generating reactor may not be an option for several reasons, such as: PFS does not have the facilities to repackage contaminated canisters, the casks may be too contaminated to transport, or the nuclear power plant from which the fuel originated may have been

decommissioned, and there are no assurances that the storage will be only "interim." Specifically:

- a) The Application does not provide for procedures for returning defective casks as required by 10 C.F.R. § 72.32.
- b) The Application provides no assurance of the existence of alternative sites if casks become defective while in storage at PFS.
  - Some of the participating plants may be decommissioned rapidly and be unavailable for the return of their spent fuel if the canisters and/or casks become defective while in storage at PFSF.
  - Application does not address uncertainties about availability of Yucca Mountain. Moreover, earliest availability would be 2010.

2. Applicant's Response to the Contention

OGD raises a number of issues under Contention E, which we address in turn below.

a) Procedures for Returning Defective Casks

OGD asserts that the proposed ISFSI poses an undue threat to the public health and safety in that the Applicant fails to provide information regarding and a plan to deal with casks that may leak or become contaminated during the lifetime of the facility. OGD Petition at 17. Specifically, OGD claims that the Applicant fails to provide procedures for returning the casks to the generating reactor or dealing with the casks in the event of an accident at the proposed ISFSI or a contaminated canister should the generating reactor have been decommissioned as provided for in 10 C.F.R. § 72.32,

which requires a description of the means of restoring the facility to a safe condition after an accident. Id.

First, this subcontention must be dismissed because it provides no underlying factual basis for the contention. OGD simply alleges that accidents will cause casks to become defective or contaminated, and thus necessary to remove from the ISFSI, without providing any “alleged facts or expert opinion, [nor related references,] which support” its allegation as required by 10 C.F.R. § 2.714(b)(2)(ii). Similarly, OGD asserts that casks “may leak or become contaminated” during the license term of the ISFSI without providing any factual basis, expert opinion, or supporting sources for this assertion. See OGD Petition at 17-18. Moreover, OGD provides no basis for the assertion (assuming *arguendo* that casks did become damaged or contaminated) that those casks would have to be removed from the ISFSI prior to the availability of a disposal site. See id. It merely states, without support, that “PFS does not have the facilities to repackage contaminated canisters,” and that “the casks may be too contaminated to transport.” Id. at 17. In addition, this subcontention should be dismissed because OGD is required to set forth a technical basis in references or expert opinion in order to support a claim that an accident scenario will cause an accidental release of radioactive materials. OGD did not do so. See OGD Petition at 17-18. Thus the subcontention must be dismissed.

Second, this subcontention must be dismissed because it seeks to litigate a generic determination made by the NRC. See Section II.B supra. OGD asserts that casks “may leak or become contaminated” through an accident at the ISFSI. OGD Petition at 17. The NRC, however, has generically determined that such an accident scenario is not

credible. See 60 Fed. Reg. 32,430, 32,438 (1995) (Part 72, Statements of Consideration). In the context of promulgating emergency planning rules for ISFSIs, the NRC stated that it “was not able to identify any design basis accident that would result in the failure of a confinement boundary.” *Id.* It addressed a hypothetical loss of confinement boundary (i.e. breach of both the canister and the cask) accident only “to provide a conservative bounding analysis of the threat to public health and safety.” *Id.* Therefore, because it is premised on a scenario that the NRC has generically determined to be non-credible, this subcontention must be dismissed.

Third, this subcontention must be dismissed because it is another case where OGD mistakenly claims that the applicant failed to address a relevant issue in the application. Contrary to OGD’s assertion that the Applicant “fails to provide information and a plan to deal with casks that may leak or become contaminated” (OGD Petition at 17), the Applicant has established a three-tiered method for accident recovery and retrieval capability (i.e., to deal with the casks and canisters) following a hypothetical (but non-credible) loss of confinement barrier accident. The primary method for recovery would be to return the breached canister to the spent fuel pool where it was originally loaded. See SAR at 8.2-40 to 41.<sup>101</sup> This approach was cited with approval in Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), DD-96-21, 44 NRC 297, 309 (1996), which rejected a 2.206 Petition which claimed that plans for unloading spent fuel from storage casks in emergency conditions did not satisfy NRC

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<sup>101</sup> The canister would be loaded into a shipping cask which would provide the confinement boundary during transportation back to the reactor. SAR at 8.2-40.

requirements. The second method would be to enclose the breached canister inside another canister or a certified transportation cask at the ISFSI site. See SAR at 8.2-41 to 42. This is fully consistent with a second approach, temporary storage in another storage cask or a certified transportation cask, also cited in Prairie Island, DD-96-21, 44 NRC at 309. The third method would be to utilize a portable dry transfer system at the ISFSI to transfer spent fuel from a breached canister into a new canister or a transportation cask. See SAR at 8.2-42 to 43. This is analogous to that proposed for the Yankee Rowe nuclear power plant and discussed in Yankee Atomic Electric Company (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 79-80. Therefore, contrary to OGD's assertion (OGD Petition at 16), the Applicant has provided information regarding and a plan to deal with casks that may leak or become contaminated; thus, this subcontention must be dismissed.

Finally, this subcontention must be dismissed as "an impermissible collateral attack on the Commission's rules" for "advocat[ing] stricter requirements than those imposed by the regulations." OGD alleges that the Applicant must provide procedures for returning the casks to the generating reactor or dealing with the casks should the generating reactor have been decommissioned. OGD Petition at 17 (citing 10 C.F.R. § 72.32). 10 C.F.R. § 72.32 does not require that the Applicant submit accident recovery procedures but only that the Applicant provide "[a] brief description of the means of restoring the facility to a safe condition after an accident." 10 C.F.R. § 72.32(a)(11).

Further, Commission precedent establishes that the means of accident recovery need not be finalized as part of the emergency plan, as long as it is sufficiently developed

to support the necessary finding of “reasonable assurance” that the means could be implemented. See Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 710 (1985), citing Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103-04 (1984). Because it must anticipate unintended “off-normal” and “accident” events, the Commission relies on predictive findings of adequacy in the emergency planning area more so than in other areas of facility licensing. Limerick, ALAB-819, 22 NRC at 710. Therefore, the Applicant need not include accident recovery procedures in its license application and this subcontention must be dismissed as an impermissible collateral attack on NRC regulations.

b) Alternative Sites for the Return of Defective Casks

OGD asserts that the application provides no assurance that there will be an alternative site to which canisters and/or casks can be shipped if they become defective while in storage at the ISFSI. OGD Petition at 17.

At the outset, like Subcontention (a), supra, this subcontention must be dismissed because it is premised on the assumption that accidents will cause casks to become defective or contaminated, and thus necessary to remove from the ISFSI, without providing any “alleged facts or expert opinion which support” its assumption and without providing “references to . . . specific sources and documents . . . on which the petitioner intends to rely to establish [said] facts or expert opinion.” 10 C.F.R. § 2.714(b)(2)(ii); see OGD Petition at 17-18.

Moreover, also like Subcontention (a), this subcontention must be dismissed because it seeks to litigate a generic determination made by the NRC. See Section II. B. OGD asserts that casks “may leak or become contaminated” through an accident at the ISFSI, OGD Petition at 17, yet the NRC has generically determined that such an accident scenario is not credible. See 60 Fed. Reg. at 32,438; see supra Subcontention (a). Therefore, this subcontention must be dismissed.

(i) Potential Decommissioning of Reactors

OGD claims that there may be no alternative sites for shipping contaminated canisters or casks because some of the reactors that may ship fuel to the ISFSI will be decommissioned shortly after their fuel is gone. OGD Petition at 17 (quoting ER at 8.1-3).

This subcontention must be dismissed because OGD has not provided “[s]ufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact.” 10 C.F.R. § 2.714(b)(2)(iii). OGD claims that the fact that some of the reactors that ship fuel to the ISFSI may be decommissioned shortly thereafter is relevant because the Applicant may have to ship canisters and/or casks that become contaminated back to the reactor sites from which they came. OGD Petition at 17. On the contrary, however, the application shows that while the Applicant may return canisters it discovers to be contaminated immediately upon their arrival at the ISFSI, SAR at 7.2-11, the Applicant has other means, as discussed in subpart (a) above, of dealing with casks or canisters that become damaged or contaminated while in storage

and thus it need not return them. SAR at 8.2-40 to 43. Therefore, the fact that reactors may be decommissioned shortly after shipping their fuel to the ISFSI is not a material issue. A contention must be dismissed where the “contention, if proven, would be of no consequence . . . because it would not entitle the petitioner to relief.” See Section II.A. supra. Because this contention would be of no consequence if proven, it must be dismissed.

(ii) Potential Unavailability of DOE Repository

OGD asserts that the Applicant does not adequately address the uncertainties regarding the availability of the Yucca Mountain site as a DOE repository for spent fuel and that in any event the repository would not be available until 2010. OGD Petition at 18.

Like Subcontention (b)(1), this subcontention must be dismissed because OGD has not provided “[s]ufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact.” 10 C.F.R. § 2.714(b)(2)(iii). The availability of a Federal repository for spent fuel is not relevant to accident recovery and therefore this is not a material issue of law or fact. See id. Because the Applicant has other means of dealing with damaged or contaminated casks or canisters, it need not move them offsite at all until the ISFSI is decommissioned. SAR at 8.2-40 to 43. Therefore, the fact that a Federal repository might not be available during some portion of the ISFSI’s lifetime is not a material issue. A contention must be dismissed where the “contention, if proven, would be of no consequence . . . because it would not entitle the

petitioner to relief.” 10 C.F.R. § 2.714(d)(2)(ii). Because this contention would be of no consequence if proven, it must be dismissed.

Moreover, this subcontention must be dismissed because it seeks to litigate a generic determination made by the NRC. See Section II.B. supra. The NRC has determined that

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 . . . spent fuel originating in such reactor and generated up to that time.

10 C.F.R. § 51.23(a) (emphasis added). Therefore, the Applicant may indeed rely on the availability of a Federal spent fuel repository as a site to which damaged canisters could ultimately be shipped. Because it attacks the NRC’s generic determination, this subcontention is “barred as a matter of law.”

**F. OGD Contention F: The License Application Fails to Make Clear Provisions for Funding of Estimated Construction Costs, Operating Costs, and Decommissioning Costs**

1. The Contention

OGD alleges in Contention F that:

The license application fails to make clear provisions for funding of estimated construction costs, operating costs, and decommissioning costs. It also fails to make clear as part of the construction who the contractors will be.

OGD Petition at 18. The basis for the contention provides in its entirety that:

The license application poses undue risk to public health and safety because it fails to make clear provisions for funding of estimated construction costs, operating costs, and decommissioning costs. 10 C.F.R. §§ 72.22(e). The application does not demonstrate that PFS “either possesses the necessary funds, or . . . has reasonable assurance of obtaining the necessary funds” as required by 10 C.F.R. § 72.22(e).

Id. at 18-19. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

The license application poses undue risk to public health and safety in that the license application fails to

- a) make clear provisions for the funding of estimated construction costs, operating costs, and decommissioning costs.
- b) make clear as part of the construction who the contractors will be; and
- c) does not demonstrate that PFS either possesses the necessary funds or has reasonable assurance of obtaining the necessary funds as required by 10 C.F.R. § 72.22(e).

2. Applicant’s Response to the Contention

The contention and bases quoted above are the sum total of OGD’s filing with respect to its Contention F. As such, the contention is fatally flawed and must be rejected for failing to meet the rudimentary pleading requirements set forth in 10 C.F.R.

§ 2.714(b). OGD has failed to supply a “concise statement of the alleged facts or expert opinion” supporting the contention together with references to “specific sources and documents . . . on which [it] intends to rely to establish those facts or expert opinion,” as

required by 10 C.F.R. § 2.714(b)(2)(ii). Nor has OGD set forth “the specific portions of the application . . . that [OGD] disputes and the supporting reasons for each dispute” as required by 10 C.F.R. § 2.714(b)(2)(iii).

In short, OGD has not met its initial burden to come forward with reasonably precise claims rooted in fact, documents or expert opinion in order to proceed past the initial stage and toward a hearing. Therefore, as discussed further below, OGD Contention F must be dismissed.

a) Funding Provisions

OGD contends that the License Application “fails to make clear provisions for funding of estimated construction costs, operating costs and decommissioning costs.” OGD Petition at 18. This subcontention must be dismissed for lack of specificity and basis. OGD fails to specify the type of “clear provisions” that it contends are required for funding estimated construction costs, operating costs and decommission costs. The License Application sets forth the funding mechanism to be used for construction, operations and decommissioning. See LA at 1-4 to 1-8. OGD sets forth not a single specific objection to the mechanisms, or indeed even a recognition that they have been specified in the License Application. Thus, this subcontention must be dismissed for not containing “a specific statement of the issue of law or fact to be raised or controverted.” 10 C.F.R. § 2.714(b)(2).

Additionally, this subcontention is completely devoid of any basis as generally discussed above and must be rejected for that reason as well. Moreover, it must be

dismissed because it does not provide any basis to show that the alleged lack of clear funding provisions will result in a lack of reasonable assurance of PFS obtaining the necessary funds to cover the construction and operation of the PFSF. In the context of decommissioning, the Commission has held that a petitioner challenging the adequacy of decommissioning funding or the decommissioning plan must do more than assert deficiencies in the plan or its estimates. Rather, “some specific, tangible link between the alleged errors in the plan and the health and safety impacts they invoke must be shown.” Yankee Atomic, supra, CLI-96-7, 43 NRC at 258. Accord Yankee Atomic Electric Company, (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 9 (1996) (a petitioner “will need to show not only that the estimate is in error but that there is not reasonable assurance that the amount will be paid.”). The same rationale would apply equally to challenges to the reasonable assurance of obtaining funds for construction and operation. A petitioner must show that its contentions have some health and safety significance, which OGD has not done here. The subcontention must therefore be rejected.

b) Failure to Identify Contractors

In this subcontention OGD alleges that the Application fails to make clear who the construction contractors will be. By doing so it “advocate[s] stricter requirements than imposed by the regulations” and therefore is “an impermissible collateral attack on the Commission’s rules” which must be rejected. Nowhere do the financial qualification regulations, or any other applicable regulations, expressly or implicitly require an applicant to identify the names of the contractors that will be constructing a facility. Additionally, this subcontention is completely devoid of any basis as discussed generally

above. Moreover, as in subpart a), this subcontention provides no basis whatsoever to show that the alleged lack of identification of contractors will result in a lack of reasonable assurances of PFS obtaining the necessary funds for the construction, operation and decommissioning of the PFSF as required by the two Commission decisions in Yankee Atomic, supra.

Thus, this subcontention must be dismissed.

c) Lack of Reasonable Assurance

OGD contends that Applicant does not demonstrate that PFS has reasonable assurance of obtaining the necessary funds as required by 10 C.F.R. § 72.22(e). This contention must be dismissed for lack of basis. As set forth at the outset of this response, this contention is totally devoid of any supporting facts, expert opinion or documents as required by the Commission Rules of Practice. Such unsupported allegations are insufficient to admit a contention for litigation. Therefore this subcontention, and the contention in its entirety, must be dismissed.

**G. OGD Contention G: The License Application Fails to Provide for Adequate Radiation Monitoring**

1. The Contention

OGD alleges in Contention G that:

The license application poses undue risk to public health and safety because it fails to provide for adequate radiation monitoring to protect the health of the public and workers. It also fails to provide for adequate radiation monitoring necessary to facilitate radiation detection, event classification, emergency planning and notification.

OGD Petition at 19. The asserted basis for the contention is set forth in a two-sentence paragraph, on the same page as a petition from OGD. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated incorporating the specific allegations in its bases as indicated below:

The license application poses undue risk to public health and safety because it fails to provide for adequate radiation monitoring to protect the health of the public and workers in that it

- a) fails to provide for adequate radiation monitoring necessary to facilitate radiation detection, event classification, emergency planning and notification, and
- b) fails to meet requirements of 10 C.F.R. § 72.32(a)(6) because it does not describe the methods and equipment to assess releases of radioactive material outside of the ISFSI site.

In addition to the contention, OGD also petitions the Commission to require PFS to implement a series of eight measures to monitor radiation exposure from PFSF activities in the event the Commission grants a license to PFS. OGD Petition at 19-20. OGD's petition must be dismissed as a premature request for the Commission to impose license conditions. It is based on the presumption that it will prevail on its contention which, assuming the contention were admitted, would only be determined after hearing. OGD does not represent the measures of its petition to be considered as a contention for litigation in this proceeding. Nor could it, since it plainly does not meet the pleading requirements of 10 C.F.R. § 2.714(b) in that, among failing to meet other requirements, it is totally devoid of any supporting basis.

2. Applicant's Response to the Contention

OGD raises two issues under its Contention G. First, it asserts that the License Application fails generally to provide for adequate radiation monitoring. Second, it asserts that the License Application fails to meet requirements of 10 C.F.R. § 72.32(a)(6) because it does not describe the methods and equipment to assess releases of radioactive material outside of the ISFSI site. We address each in turn below.

a) License Application Fails to Provide Adequate Radiation Monitoring.

OGD contends that the Applicant's license application is deficient because it fails to provide adequate radiation monitoring necessary to facilitate radiation detection, event classification, emergency planning, and notification. See OGD Petition at 19. OGD's assertion that the license application is deficient because it fails to provide adequate radiation monitoring must be rejected for failure to meet the Commission's regulations on basis and specificity for contentions. See 10 C.F.R. § 2.714(b). OGD alleges that the license application fails to facilitate "radiation detection, event classification, emergency planning and notification." OGD Petition at 19. But, contrary to the Commission's regulations, OGD's contention is neither supported by any specific "bases," "alleged facts," or "expert opinions," nor is it supported by a "showing [of] references to the specific portions of the application . . . that the petitioner disputes," both required for an admissible contention. See 10 C.F.R. § 2.714(b). In fact, the bases for the entire contention is only two sentences which comprise the subcontention discussed under subpart (b) infra. Such unsubstantiated claims must fall in the face of the Commission's

amended pleading requirements. OGD's Contention G fails on all accounts and must be dismissed.

Furthermore, OGD's Contention G must be dismissed because it ignores the fact that the License Application does discuss the "radiation monitoring necessary to facilitate radiation detection, event classification, emergency planning and notification." See OGD Petition at 19. A contention that mistakenly claims that the applicant did not address a relevant issue in the license application must be dismissed. In setting forth a contention pursuant to 10 C.F.R. § 2.714(b), a petitioner is required to "read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant's position and the petitioner's opposing view." See 54 Fed. Reg. 33,168, 33,170 (1989). [discussing revised, higher threshold for admissibility of contentions]. OGD has failed to do so here.

Radiation monitoring for "radiation detection, event classification, emergency planning, and notification" is addressed in numerous locations throughout the Applicant's license application. Radiation monitoring for "radiation detection" is explicitly addressed in Section 3.1, "Accident Detection" in the Emergency Plan ("EP"), which states

Radiation Protection personnel monitor canister transfer operations and would identify significant levels of contamination that could result from off-normal operations. In the event of a dropped or mishandled canister, Radiation Protection personnel would perform surveys of the area, including radiation, airborne, and surface contamination surveys, which would detect the radiological effects of a breached canister.

Fixed radiation monitors with audible alarms in the Canister Transfer Building will provide warning to

personnel involved in canister transfer operations if abnormal radiation levels occur during transfer operations.

EP at 3-1 to 3-2. Radiation monitoring for event classification and notification is also addressed in the Emergency Plan, where it states that in the event that there are elevated radiation or airborne contamination levels in the Canister Transfer Building, the

Elevated radiation levels would activate area radiation monitor alarms, warning site personnel to evacuate the area. Elevated contamination levels would be announced to the site personnel in the area by the radiation protection technician measuring the sample, evacuating personnel from the area as appropriate. Incidents of elevated radiation or contamination levels will be announced over the site intercom system.

EP at 3-6 to 3-7.

Radiation monitoring is also addressed in the Applicant's Environmental Report ("ER"). For example, Section 6.2, "Proposed Operational Monitoring Programs," specifically addresses the methods and equipment for radiation monitoring at the PFSF:

Airborne monitoring will be performed in the Canister Transfer Building during canister handling operations if a radiological survey identifies contamination on the canister, or if contamination is found in the shipping cask of the canister being handles. The monitoring will be done using portable monitors. The Canister Transfer Building will also use area radiation monitors for monitoring the general building dose rate from casks and canisters during canister transfer operations.

TLD's [Thermoluminescent Dosimeters] will be used along the boundaries of the Restricted Area and Owner Controlled Area to record radiation dose data.

ER at 6.2-1.

Radiation monitoring is also discussed in the Applicant's Safety Analysis Report ("SAR"). For example, Section 6.2, "Operational Considerations," states that radiation monitoring for the PFSF is provided by

the use of area radiation monitors in the Canister Transfer Building and TLDs around the RA and OCA boundaries. In addition, radiation protection personnel will use portable monitors during shipping cask receipt, inspection, and canister transfer operations, and the operating staff will have personal dosimetry (Section 7.5.2). . . . Airborne monitoring will be performed using portable monitors as needed. A low-radiation background counting room is included in the Security and Health Physics Building.

SAR at 7.1-11.

The Safety Analysis Report also identifies the PFSF personnel responsible for performing radiation monitoring:

Responsibilities of radiation protection technicians include the following:

- Conduct radiation, contamination, and airborne surveys and prepare complete and accurate records . . .
- Identify and post radiation, contamination, hot article, airborne and radioactive material areas in accordance with 10 CFR 20 requirements
- Monitor PFSF operations to assure good radiological work practices . . .
- Maintain and calibrate portable monitoring instruments. . .
- Participate in the event of an emergency, as required.

Id. at 7.5-2.

The Safety Analysis Report also describes radiation monitoring equipment available at the PFSF. It includes “[a] sufficient inventory and variety of operable and calibrated portable and fixed radiological instrumentation . . . to allow for effective measurement and control of radiation exposure and radioactive material.” Id. The radiation monitoring equipment at the PFSF “will be appropriate to enable the assessment of sources of gamma, neutron, beta, and alpha radiation, including the capability to measure the range of dose rates and radioactivity concentrations expected.” Id. at 7.5-2 to 7.5-3. The “[p]ortable survey and personnel monitoring instrumentation” available at the PFSF will include, but not be limited to, “[l]ow-level contamination meters,” “[b]eta/gamma portable survey meters,” “[a]larming beta/gamma personnel friskers,” and “[p]ortable air samplers.” Id. at 7.5-3.

OGD’s contention neither acknowledges, addresses, nor challenges the validity of, any of the many descriptions of radiation monitoring methods and equipment in the Applicant’s Emergency Plan, Environmental Report, and Safety Analysis Report. See generally, OGD Petition at 19. OGD’s unsupported assertion that the license application fails to provide adequate radiation monitoring to facilitate radiation detection, event classification, emergency planning, and notification (See OGD Petition at 19) must be rejected both for failing to provide any basis and specificity, and for mistakenly alleging that the Applicant did not address a relevant issue. To establish a basis for litigation, a contention must either allege with particularity that an applicant is not complying with a specified regulation, or allege with particularity the existence of a detail of a substantial safety issue on which the regulations are silent. A statement that simply alleges that

some matter ought to be considered does not provide a sufficient basis for an admissible contention under the Commission's regulations. OGD's contention that the license application fails to provide adequate radiation monitoring is "fatally flawed" and must be dismissed. See Section II.C.1, supra at 13.

- b) The License Application fails to describe methods and equipment needed to assess releases outside of PFSF site.

In the second part of this contention, OGD asserts that the license application fails to meet requirements of 10 C.F.R. § 72.32(a)(6) because it does not describe the methods and equipment to assess releases of radioactive material outside of the PFSF site. This contention must also be rejected because it fails to meet the Commission's regulations for admissible contentions. 10 C.F.R. § 2.714(b). As with subpart (a) the contention is totally devoid of any supporting bases. Furthermore, it again ignores, and fails to dispute relevant information in the License Application.

10 C.F.R. § 72.32(a)(6), on "Assessment of releases," which OGD claims the Applicant fails to satisfy, requires the license application to provide:

A brief description of the methods and equipment to assess releases of radioactive materials.

10 C.F.R. § 72.32(a)(6) (emphasis added). OGD's contention claims -- mistakenly -- that the Applicant's license application has no "description of the methods and equipment to assess releases of radioactive material" and provides "nothing that addresses releases outside the ISFSI site." OGD Petition at 19 (emphasis added). Aside from citing the

regulation, 10 C.F.R. § 72.32(a)(6), OGD provides no basis or support of any kind for this contention.

Contrary to OGD's assertion, the license application does address the "methods and equipment to assess releases of radioactive materials," as required by 10 C.F.R. § 72.32(a)(6), and does address "releases outside the ISFSI site." The discussion of the license application in the response to this contention, supra, demonstrated many examples in the Applicant's Emergency Plan, Environmental Report, and Safety Analysis Report that address the "methods and equipment to assess releases of radioactive materials."

Also directly contrary to OGD's baseless contention, the license application explicitly addresses the assessment of "releases outside the ISFSI site." OGD Petition at 19. The Safety Analysis Report and the Environmental Report explicitly evaluate the maximum bounding dose to persons "outside the ISFSI site" from postulated events that lead to releases of radioactive material from the PFSF. See SAR, Sections 8.1.5 and 8.2.7; see ER, Section 5.1.<sup>102</sup> The analysis for the "postulated release of surface contamination from the canister exterior" concluded that the maximum offsite dose would be  $4.4 \times 10^{-3}$  mrem committed effective dose equivalent (CEDE), and  $2.6 \times 10^{-2}$  mrem committed dose equivalent to the lungs, to an individual assumed to be standing at the site boundary. See ER at 5.1-2. This is well within the Commission's annual regulatory limit of 25 mrem. See 10 C.F.R. § 72.104(a). This analysis assumes a worst

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<sup>102</sup> These bounding calculations and their results are discussed in more detail in "Applicant's Response to Castle Rock Contention 18."

case scenario for the person's location and for atmospheric dispersion characteristics to ensure the analysis is bounding. See id.

The analysis of a "hypothetical breach of the canister" concluded that the maximum offsite dose would be 0.752 rem committed effective dose equivalent (CEDE), and 3.48 rem committed dose equivalent to the lungs, to an individual assumed to be standing at the site boundary. See ER at 5.1-4 to 5.1-5. This is within the Commission's regulatory limit of 5 rem. See 10 C.F.R. § 72.106(b). This analysis assumes a worst case scenario for the person's location and for atmospheric dispersion characteristics to ensure the analysis is bounding. See ER at 5.1-4 to 5.1-5.

These worst-case bounding doses are used in the Applicant's accident assessment and notification plan. In the event of a postulated canister breach accident with the potential for offsite releases of radioactivity, the initial assessment of offsite dose rates will be based upon the worst-case bounding dose analysis. This is discussed in Section 3.3, "Accident Assessment," of the Emergency Plan:

In the event of a loss of canister confinement accident, which has the potential for the release of fission products from the canister, the emergency response system will be activated and dose rates will initially be assigned based upon the worst-case doses calculated in the PFSF SAR accident analysis. This analysis assumed canister breach in addition to failure of fuel rod cladding of all the fuel rods stored in a canister. A conservative fraction of the fission products and activation products contained in the spent fuel were postulated to be released to atmosphere under worst case meteorological conditions. As a result of conservatism in the analysis, assigned dose rates will be greater than actual dose rates.

EP at 3-7 to 3-8 (emphasis added). The PFSF will revise the worst-case bounding offsite dose assessment to reflect actual dose rate projections as data becomes available from emergency response survey teams. See EP 3-2, 3-8, 3-9, 4-2, 5-5, 6.2:

Actual dose rates will be projected as data from the emergency response radiological survey team(s) become available. When the emergency response organization is staffed, the radiological monitoring team will be dispatched to perform surveys and assess the extent of contamination from the release. Surveys typically include measurements of radiation levels, surface contamination levels, airborne activity and soil contamination, as applicable.

Id. at 3-8; 5-5.

For the off-normal, postulated release of removable contamination from the external surface of a canister, the initial offsite dose assessment again assumes the worst-case bounding dose, which for this event is less than 1 mrem. See id. at 3-9. Radiation monitoring is again used to provide actual data to use for revised dose assessments:

Assessment of radiological conditions following release of radioactivity from the outside surfaces of a canister will be performed by Radiation Protection personnel assigned to monitor canister transfer operations. An off-normal canister handling event will be detected by operators involved in the transfer operation, and Radiation Protection personnel would then conduct radiation and contamination surveys to assess the extent of contamination. . . . [T]he spread of contamination outside of the Canister Transfer Building is not anticipated. However, in the unlikely event significant levels of contamination are discovered inside the Canister Transfer Building, Radiation Protection personnel will assess the need to perform surveys outside the building to determine whether any contamination has spread to outside areas.

Id. at 3-9.

OGD's contention does not acknowledge, address, or challenge the validity of, any of the descriptions in the License Application addressing the methods and equipment to assess releases of radioactive materials, including offsite releases, from the PFSF. See OGD Petition at 19. OGD's contention that the Applicant's License Application fails to meet requirements of 10 C.F.R. § 72.32(a)(6) because it does not describe the methods and equipment to assess releases of radioactive material outside of the ISFSI site must be rejected as a contention that mistakenly claims that the applicant did not address a relevant issue in the license application.

**H. OGD Contention H: The License Application Poses Undue Risk to Public Health and Safety Because It Fails to Provide Adequate Protection of the Site Against Intruders**

1. The Contention

OGD alleges in Contention H that:

The license application poses undue risk to public health and safety because it fails to provide adequate protection of the ISFSI against intruders. The site is in such a remote area that it would take at least two (2) hours for access to the sight [sic] to be made by emergency personnel.

See OGD Petition at 20. The specific bases for the OGD contention are set forth at pages 20 to 22 of OGD's Petition. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated incorporating the specific allegations raised in its bases as follows:

The license application poses undue risk to public health and safety because it fails to provide adequate protection of the ISFSI against intruders in that:

- a) The only protection provided for the facility is a fenced perimeter, one layer of which will be a typical range fence.
- b) The facility will have an intrusion detection system but one can only speculate about whether the facility's security system will be manned full time or by how many individuals because the security plan is not public information.
- c) The Applicant has failed to address the ability of the storage casks to withstand a terrorist attack intended to breach the storage cask using high energy explosives. The Applicant is required to address at least two modes of attack:
  - (i) An attack in which explosives are applied directly against the storage cask, similar to attacks on shipping casks using weapons analyzed in Exhibits 3, 10, and 11. The design basis for this analysis must assume knowledgeable, heavily-armed intruders who are assumed to (i) approach the site undetected; (ii) disable the intrusion detection system; (iii) disarm any fixed anti-personnel weapons; (iv) penetrate the security fences; (v) gain unimpeded access to the storage casks for a period of at least 15 minutes during which a variety of explosive devices would be applied to various parts of the casks, such as military demolition charges, linear cutting charges, and multiple commercial shaped charges.
  - (ii) An attack in which adversaries use missiles or rocket-propelled explosives to project warheads against the storage casks from a distance. The design basis must include a variety of military weapons similar to those identified as threats to metal shipping casks in Exhibits 3 and 12. Among the missiles that should be considered are missiles specifically designed for attacking bunkers and field fortifications, such as (i) the U.S. Army's AT-8 Bunker Buster and (ii) the U.S. Army's SMAW (Shoulder-launched Multi-purpose Assault Weapon) armed with an HE Dual Purpose Warhead.

- d) The ISFSI is in such a remote area that it would take at least two (2) hours for emergency personnel to make access to the site.

2. Applicant's Response to the Contention

OGD raises several issues under its Contention H. We address in turn below each of the specific allegations raised by OGD in Contention H as set forth above.

a) The Only Protection Provided is a Fenced Perimeter

As set forth above, OGD contends that a fenced perimeter is the only protection provided by the Applicant against intruders. This contention is, however, demonstrably incorrect, as shown by the License Application. A contention that mistakenly claims that the Applicant did not address a relevant issue in the license application must be dismissed. In setting forth a contention pursuant to 10 C.F.R. § 2.714(b), a petitioner is required to "read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the Applicant's position and the petitioner's opposing view." See 54 Fed. Reg. 33,168, 33,170 (1989) (Commission discussing its revised, higher threshold for admissibility of contentions).

The Applicant's license application, however, clearly shows that a fenced perimeter is not the only protection provided against intruders. Section 1.4, "Description of the PFSF" in the PFSF Emergency Plan states that the PFSF is protected by:

- an 8 foot high chain link security fence surrounding the Restricted Area
- light poles surrounding the Restricted Area inside the security fence
- an isolation zone beyond the first security fence

- an 8 foot high outer chain link nuisance fence at the outside of the isolation zone beyond the security fence
- an intrusion detection system between the two fences, and
- a barbed wire range fence at the boundary of the Owner Controlled Area.

See PFSF Emergency Plan at 1-5. Furthermore, the nearest location where spent fuel canisters are stored or handled within the isolated restricted area is more than 500 meters from the boundary of the site Owner Controlled Area and the barbed wire range fence, well beyond the 100 meter isolation distance required by the Commission's regulations. See PFSF Emergency Plan at 1-5, 1-6; 10 C.F.R. § 72.106(b) (100 meter requirement).

In addition to these extensive protection measures, the spent fuel stored at the PFSF will be enclosed in "massive concrete and steel structures" with walls "approximately 2 1/2 feet thick." See PFSF Emergency Plan at 2-2. The Commission has explicitly recognized that an approved storage cask is a physical protection "barrier offering substantial penetration resistance." See 60 Fed. Reg. 42,079, 42,084 (1995) (proposing 10 C.F.R. § 73.51 to "codify existing practice for the safeguarding of stored spent nuclear fuel," Id. at 42,079.). In the Commission's 1984 Waste Confidence Rulemaking, the Commission concluded that "the weight and size of the sealed, protective enclosures which may include 100-ton steel casks . . . and surface concrete silos" make "dry spent fuel storage . . . relatively invulnerable to sabotage." Rulemaking on the Storage and Disposal of Nuclear Waste (Waste Confidence Rulemaking), CLI-84-15, 20 NRC 288, 365 (1984) (published in 49 Fed. Reg. 34,658 (1984)). The

Commission reviewed these conclusions five years later in the Waste Confidence Decision Review and concluded that

no considerations have arisen to affect the Commission's confidence since 1984 that the possibility of a major accident or sabotage with offsite radiological impacts at a spent-fuel storage facility is extremely remote.

55 Fed. Reg. 38,474, 38,512 (1990). OGD's failure to accord recognition to the Commission's conclusion that an approved storage cask is a substantial barrier for physical protection is a contention that seeks to litigate a generic determination established by Commission rulemaking. Such a contention is "barred as a matter of law." Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plan, Units 1 and 2), LBP-93-1, 37 NRC 5, 30 (1993).

In sum, OGD's contention claiming that a fenced perimeter is the only protection provided by the Applicant must be dismissed. OGD ignores both Applicant's "fences," and ignores entirely the barrier provided by the cask. Moreover, OGD has not shown any reason why a fenced perimeter, and the rest of the Applicant's physical protection system, is inadequate under the Commission's regulations on physical protection for ISFSIs. To establish a basis for litigation, a contention "must either allege with particularity that an Applicant is not complying with a specified regulation, or allege with particularity the existence and detail of a substantial safety issue on which the regulations are silent." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982). A statement "that simply alleges that some matter ought to be considered" does not provide a sufficient basis for an admissible contention

under the Commission's regulations. OGD's contention does not provide a sufficient basis for an admissible contention under 10 C.F.R. § 2.714(b). See Section II.C.1, supra.

b) Manning of Security System

As set forth above, OGD contends that one can only speculate about whether the facility's security system will be manned full-time or by how many individuals because the PFS security plan is not public information. As discussed under section a, supra, a petitioner is required to "read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report," 54 Fed. Reg. at 33,170, and any contention that mistakenly claims that the Applicant did not address a relevant issue must be dismissed. OGD overlooks many locations in Applicant's license application stating that the facility will have "security coverage 24 hours a day, 7 days a week." PFSF Emergency Plan at 4-1. See also id. at 3-2 ("Security and Health Physics Building is manned 24 hours a day"); id. at 3-6 (same).

OGD also contends that it does not know how many individuals are on the facility's security force. The number of security guards available to respond to events at the facility is protected information that is contained only in the Applicant's security plan, and not in other, publicly-available parts of the license application, pursuant to 10 C.F.R. § 73.21. See Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, printed as an attachment to CLI-82-19, 16 NRC 53, 104 (1982). A contention challenging the contents of an Applicant's security plan must be dismissed absent identification by the petitioner of a qualified security plan expert

capable of reviewing the plan under a protective order. Duke Power Company (Catawba Nuclear Station, Units 1 and 2), LBP-82-51, 16 NRC 167, 176-77 (1982). Absent satisfaction of this condition, the contention must be dismissed as “impermissibly vague” (id. at 177) because a petitioner cannot meet its burden to “show that a genuine dispute exists with the Applicant on a material issue of law or fact.” 10 C.F.R. § 2.714(b)(2)(iii). OGD has not satisfied this condition and therefore this contention should be dismissed because it fails to provide a sufficient basis as required by the Commission’s regulations.

- c) Design Basis Threat of Use of Explosives for Security Plan
  - (i) Scenario and Explosive Devices for Application of Explosive Directly Against the Storage Cask

As set forth above, OGD contends that the design basis threat for sabotage at the PFSF must include a specific scenario in which “explosives [are applied] directly against the storage cask” by “knowledgeable, heavily-armed intruders” who are assumed to:

- approach the site undetected,
- disable the intrusion detection system
- disarm any fixed anti-personnel weapons
- penetrate the security fences, and
- gain unimpeded access to the storage casks for a period of at least 15 minutes.

See OGD Petition at 21. OGD further claims that the design basis threat must assume that a variety of explosive devices would be variously applied to the target, including “military demolition charges such as the M3A1 used in the Sandia full-scale truck cask test . . . applied to the cask lid,” “a large quantity of linear cutting charge . . . applied around the middle of the cask exterior,” and “multiple commercial shaped charges . . . applied to various parts of the cask lid and exterior and detonated simultaneously.” Id.

This contention must be dismissed for two reasons. First, there is no basis cited by the OGD for their highly imaginative scenario. One cannot simply assume all the security fails and intruders succeed. Second, it is an impermissible attack on the Commission's regulations pursuant to 10 C.F.R. § 2.758.

It is well established that "a licensing proceeding . . . is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission's regulatory process." See Section II.B., supra. Thus a contention which collaterally attacks a Commission rule or regulation is not appropriate for litigation and must be rejected. Id.

The Commission's regulations define the design basis threat for which a licensee is to design safeguards systems to protect against acts of radiological sabotage at a nuclear facility. See 10 C.F.R. § 73.1(a)(1). See Diablo Canyon, ALAB-653, 16 NRC at 58-59. A particular type of nuclear facility (an ISFSI, for example) must be protected against the design basis radiological sabotage threats set forth 10 C.F.R. § 73.1(a)(1) only to the extent that they are referenced in sections of 10 C.F.R. 73 which are applicable to that particular type of nuclear facility. See Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 292 (1995). Thus, under the Commission's regulations, the design basis threat for radiological sabotage at a nuclear facility for which a licensee is to design safeguards systems "is . . . generic rather than site-specific." See Diablo Canyon, ALAB-653, 16 NRC at 74. Accordingly, there is "no requirement that the Applicant or [the NRC] staff perform 'site-specific analyses or

assessments of potential threats” that are specific to the Applicant’s proposed facility.

Id. at 74.

The design basis threat for radiological sabotage for an ISFSI is clearly defined by the Commission’s regulations. 10 C.F.R. 73.1(a)(1). The Commission-directed design basis threat for ISFSIs is:

(i) A determined violent external assault, attack by stealth, or deceptive actions, of several persons with the following attributes, assistance and equipment: (A) Well-trained (including military training and skills) and dedicated individuals, (B) inside assistance which may include a knowledgeable individual who attempts to participate in a passive role (e.g., provide information), an active role (e.g., facilitate entrance and exit, disable alarms and communications, participate in violent attack), or both, (C) suitable weapons, up to and including hand-held automatic weapons, equipped with silencers and having effective long range accuracy, (D) hand-carried equipment, including incapacitating agendas and explosives for use as tools of entry or for otherwise destroying reactor, facility, transporter, or container integrity or features of the safeguards system and . . . .

(ii) An internal threat of an insider, including an employee (in any position) . . . .

10 C.F.R. 73.1(a). The specific details further defining this design basis threat (for example, further definition of “hand-held automatic weapons”) are classified and protected from public disclosure as safeguards information. See 10 C.F.R. 73.21. A contention which goes beyond the scope of the Commission-established design basis threat for ISFSI is a per se challenge to the Commissioner’s regulations. Such a contention must be rejected as an impermissible collateral attack on the Commission’s regulations pursuant to 10 C.F.R. 2.758. For example, the types of “weapons used by the

design basis attackers are established in the regulations.” Diablo Canyon, ALAB-653, 16 NRC at 75. A petitioner can not require the proposed facility to take into account of various weapons that are not included in the regulations, such as “fixed-wing aircraft, helicopters, mortars, rocket launchers, grenade launchers, and anti-tank weapons.” Id. (emphasis added).

Contrary to the clear Commission regulations and precedent set forth above, OGD contends that the design basis threat for the sabotage at the PFSF must include a specific scenario of intruders who “approach[] the site undetected, disabl[e] the intrusion detection system, disarm[] any fixed anti-personnel weapons, penetrat[e] the security fences, and gain[] unimpeded access to the storage casks for a period of at least 15 minutes” during which time they apply “a variety of explosive devices” to the spent fuel storage casks, including “military demolition charges such as the M3A1 used in the Sandia full-scale truck cask test . . . applied to the cask lid,” “a large quantity of linear cutting charge . . . applied around the middle of the cask exterior,” and “multiple commercial shaped charges . . . applied to various parts of the cask lid and exterior and detonated simultaneously.” OGD Petition at 21. In essence, OGD attempts to establish a new, site-specific design basis threat for sabotage at the PFSF through its contention.

Commission regulations and precedent do not, however, allow a petitioner to concoct a new, site-specific design basis threat for radiological sabotage at a nuclear facility. Commission precedent clearly establishes that a petitioner can not require a proposed facility to perform site-specific analyses of potential threats developed by the petitioner. Diablo Canyon, ALAB-653, 16 NRC at 74. In a similar vein, it is well

established that a contention which “advocate[s] stricter requirements than those imposed by the regulations” is “an impermissible collateral attack on the Commission’s rules” and must be rejected. See Section II.B. supra at 6. OGD’s contention attempting to establish a new, site-specific design basis threat for sabotage at the PFSF must therefore be dismissed as an impermissible collateral attack on the Commission’s regulations.

(ii) Use of Missiles or Rocket-Propelled Explosives to Project Warheads Against the Storage Casks from a Distance

As set forth above, OGD also contends that the design basis threat for sabotage at the PFSF must include “an attack in which adversaries use missiles or rockets to project warheads against the storage casks from a distance.” OGD Petition at 21. Specifically, OGD contends that the design basis threat for the PFSF should include “missiles specifically designed for attacking bunkers and field fortifications, such as the U.S. Army’s AT-8 Bunker Buster or the U.S. Army’s SMAW (Shoulder-launched Multi-purpose Assault Weapon) armed with an HE Dual Purpose Warhead.” OGD Petition at 22.

This contention must also be dismissed for the same two reasons. No basis is cited for this remarkable scenario, for example, that the weapons are that readily available and transportable. Further, this too is an impermissible attack on the Commission’s regulations pursuant to 10 C.F.R. § 2.758. The Commission has defined the design basis threat of radiological sabotage for a nuclear facility in 10 C.F.R. § 73.1(a)(1). See Diablo Canyon, ALAB-653, 16 NRC at 59. As discussed in part (1) above, the design basis threat for a nuclear facility is generic rather than site-specific. See id. at 74. The design

basis threat defined by the Commission in 10 C.F.R. § 73.1(a)(1) does not include “missiles or rocket[-propelled explosives] to project warheads . . . from a distance.” Furthermore, Commission case law has also established that the petitioner can not require the proposed facility to take into account various weapons that are not included in the regulations, including “mortars, rocket launchers, grenade launchers, and anti-tank weapons.” Diablo Canyon, ALAB-653, 16 NRC at 75 (emphasis added).

Accordingly, OGD’s contention that the design basis threat for the PFSF must consider “missiles or rocket-propelled explosives” is without an adequate basis and is a collateral attack on a Commission regulation that is not appropriate for litigation and must be rejected.

d) The ISFSI is in a Remote Area That Would Take at Least Two (2) Hours for Emergency Personnel to Access

As set forth above, OGD asserts that “[t]he site is in such a remote area that it would take at least two (2) hours for access to the sight [sic] to be made by emergency personnel.” OGD Petition at 20. This one sentence is the total extent of OGD’s contention on this issue. OGD provides no additional explanation or discussion of this issue. There is no requirement in the Commission’s regulations that offsite response capability should be less than two hours away, or any other fixed time. OGD provides no regulatory basis, additional facts, or references whatsoever to support its assertion that two hours is inadequate for access to an ISFSI by offsite emergency responders. This contention must be rejected for failing to provide a sufficient basis for an admissible contention, as required by the Commission’s regulations. 10 C.F.R. 2.718(b).

Furthermore, there is no Commission regulation that bars an ISFSI from being located in a "remote area." See generally 10 C.F.R. Part 72. To the extent that OGD is claiming there is, or should be, such a requirement, OGD's alleged contention must be dismissed as an impermissible attack on the Commission's regulations. 10 C.F.R. § 2.758. It is well established that a contention which "advocate[s] stricter requirements than those imposed by the regulations" is "an impermissible collateral attack on the Commission's rules" and must be rejected.

**I. OGD Contention I: The Cask Design is Unsafe and Untested for Long Periods of Time**

1. The Contention

The OGD petitioner alleges in Contention I that:

The license application poses undue risk to public health and safety because it calls for use of a cask whose design is unsafe and untested for long periods of time and which has not been certified for either transportation or long term storage.

See OGD Petition at 22. The asserted bases for the contention are set forth following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated incorporating as follows the specific allegations raised in its bases:

The License Application poses undue risk to public health and safety in that:

- a) The License Application calls for use of a cask whose design is unsafe and untested for long periods of time.

- b) The License Application calls for use of a cask that has not been certified for either transportation or long term storage.
- c) Until the cask design is certified, there is no way the PFS can make the necessary description of their ability to operate the facility as planned, as required by 10 C.F.R. §72.22(e).
- d) There is no way that a meaningful Environmental Impact Statement under the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., can be completed until the cask design is certified.

2. Applicant's Response to the Contention

OGD raises a number of issues under Contention I, which the Applicant addresses in turn below.

a) Use of a Cask Whose Design Is Unsafe and Untested

OGD asserts that the Applicant's License Application "poses undue risk to public health and safety because it calls for use of a cask whose design is unsafe and untested for long periods of time." See OGD Petition at 22. A contention that challenges the capability of a shipping cask or a storage cask to perform its designed and certified function, is a challenge to NRC regulations governing the licensing of such a cask, 10 C.F.R. part 71 and 10 C.F.R. part 72, respectively. OGD asserts that the "License Application poses undue risk to public health and safety because it calls for use of a cask whose design is unsafe and untested for long periods of time . . ." OGD Petition at 22 (emphasis added). The NRC in promulgating the design and certification requirements for shipping and storage casks has made the generic determination that such casks, including any specified testing measures, adequately protect public health and safety of

spent fuel while in transit or in storage. Part 71: 60 Fed. Reg. 50,248 (“10 CFR Part 71 Compatibility with International Atomic Energy Agency (IAEA)” Final Rule) (September 28, 1995); Part 72: 55 Fed. Reg. 29,181, 29,183 (“Storage of Spent Fuel in NRC-Approved Casks at Power Reactor Sites”) (July 18, 1990). Full-scale testing is not required prior to certification of a spent fuel shipping cask or a spent fuel storage cask. Part 71: 10 C.F.R. § 71.41(a), State of Wisconsin, DPRM-86-5, 24 NRC 647, 652 (1986); Part 72: 55 Fed. Reg. at 29,185. Therefore, a contention against transporting spent fuel in NRC-approved shipping casks or storing spent fuel in NRC-approved storage casks, both in compliance with applicable regulatory requirements, is a direct challenge to the regulations and the NRC’s generic determination made as part of both rulemakings. To be admitted, a contention may not attack a Commission rule or regulation, 10 C.F.R. § 2.758, and therefore such a contention must be dismissed.

Additionally, this contention does not provide any facts or technical analyses to support this claim. A petitioner is obligated “to provide the [technical] analyses and expert opinion” or other information “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). OGD here has failed to do so and thus this contention must be dismissed.

b) Use of a Cask that has not been Certified for either Transportation or Storage

OGD asserts that the Applicant’s License Application “poses undue risk to public health and safety because it calls for use of a cask . . . which has not been certified for

either transportation or long term storage.” See OGD Petition at 22. A contention that challenges a cask under review in another proceeding must be rejected as an impermissible allegation about the NRC staff’s review, rather than a contention about the adequacy of the information in the License Application. Safety Analysis Reports for both of the cask systems utilized by the PFSF, the HI-STORM and the TranStor, have been submitted to the NRC and are actively undergoing Staff review in parallel with this proceeding. See SAR at 4.1-1. OGD contends that the “use of a cask whose design . . . has not been certified for either transportation or long term storage” is per se deficient because the Staff’s review of the cask Safety Analysis Reports is not complete. See OGD Petition at 22.

The Commission has rejected the admissibility of this type of contention. The Commission addressed this issue in its 1989 rulemaking amending its Rules of Practice to “raise the threshold for the admission of contentions.” See 54 Fed. Reg. at 33,168 (1989). In the Statement of Consideration for the final rulemaking, the Commission stated:

The Commission also disagrees with the comments that § 2.714(b)(2)(iii) should permit the petitioner to show that it has a dispute with the Commission staff or that petitioners not be required to set forth facts in support of contentions until the petitioner has access to NRC reports and documents. Apart from NEPA issues, which are specifically dealt with in the rule, a contention will not be admitted if the allegation is that the NRC staff has not performed an adequate analysis. With the exception of NEPA issues, the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than the adequacy of the NRC staff performance. See, e.g., *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, ALAB-728, 17 NRC

777, 807, review declined, CLI-83-32, 18 NRC 1309 (1983). For this reason, and because the license application should include sufficient information to form a basis for contentions, we reject commenters' suggestions that intervenors not be required to set forth pertinent facts until the staff has published its FES and SER.

54 Fed. Reg. at 33,171 (emphasis added). Without additional facts, which OGD does not provide to support this contention, OGD's contention that the License Application is deficient because it uses information or data from the HI-STORM and TranStor cask systems Safety Analysis Reports that for "a cask whose design . . . has not been certified" (OGD Petition at 22), must be rejected for failure to provide a sufficient basis for an admissible contention under clearly-established Commission's regulations and as an impermissible challenge to Commission regulations. See 10 C.F.R. §§ 2.714(b), 2.758.

Additionally, this contention does not provide any facts or technical analyses to support this claim. A petitioner is obligated to provide the technical analyses and expert opinion or other information showing why its bases support its contention. OGD here has failed to do so and thus this contention must be dismissed.

c) Inability to fully Describe Ability to Operate Facility until the Cask Design is Certified

OGD asserts that the Applicant's License Application "poses undue risk to public health and safety because . . . [u]ntil the [c]ask design is certified there is no way that PFS can make the necessary description of their ability to operated [sic] the facility as planned." OGD Petition at 22. According to OGD, the "general plan for carrying out the [licensing] activity" required by 10 C.F.R. §72.22(e) cannot be developed without a certified cask design. See OGD Petition at 22.

10 C.F.R. § 72.22(e) requires each applicant to submit, with the License Application,

information sufficient to demonstrate to the Commission the financial qualifications of the applicant to carry out in accordance with the regulations in this Chapter, the activities for which the licensee is sought. The information must state . . . the general plan for carrying out the activity .

...

10 C.F.R. § 72.22(e).

Contrary to OGD's contention, nothing in 10 C.F.R. § 72.22(e) requires an applicant to have an already approved certified cask in order to provide the information on "the general plan for carrying out the activity" called for by 10 C.F.R. § 72.22(e). Indeed, such a reading would produce a nonsensical result. OGD's interpretation would mean that the Commission acted illegally in licensing the three site specific ISFSIs approved after promulgation of the cask certification rates. See NUREG-1350, vol. 9, NRC Information Digest, App. H; 55 Fed. Reg. 29191 (1990) (promulgating Part 72, Subparts K and L). The contention is wholly inconsistent with NRC regulations and must be rejected. Further, OGD has provided no basis to support this subcontention and it must be dismissed for lack of basis as well.

d) Inability to Complete Environmental Impact Statement Until the Cask Design Is Certified

OGD asserts that the Applicant's License Application "poses undue risk to public health and safety because . . . there is no way that a meaningful Environmental Impact Statement under the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., can be

completed until the cask design is certified.” See OGD Petition at 22. A contention must be based on environmental issues raised by the applicant’s Environmental Report, not awaiting the Staff’s environmental review. 10 C.F.R. § 2.714(b)(2)(iii), 54 Fed. Reg. 33,168, 33,171 (1989), as corrected, 54 Fed. Reg. 39,728 (1989). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 154 (1993). OGD has failed to do so, and thus this contention must be dismissed.

Additionally, this contention does not provide any facts or technical analyses to support this claim. A petitioner is obligated “to provide the [technical] analyses and expert opinion” or other information “showing why its bases support its contention.” Georgia Institute, LBP-95-6, 41 NRC at 305. There is simply no logical connection between a certified cash design and the information required to perform the required NEPA review. If, for example, Applicant had referenced a cask design which was not in the process of certification but rather was to be the subject of a site specific review, OGD’s logic would mean that the License Application could never be reviewed, since the cask design would not be approved before the licensing process was completed. OGD has failed to do so, and thus this contention must be dismissed.

**J. OGD Contention J: The License Application Fails to Address the Status of Compliance with all Permits, Licenses and Approvals Required for the Facility**

1. The Contention

OGD alleges in Contention J that:

The license application violates NRC regulations because the ER fails to address the status of compliance with all permits, licenses and approvals required for the facility.

OGD Petition at 23. The asserted bases for the contention are set forth in pages 22-23 of discussion following the contention.<sup>103</sup> In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

The license application violates NRC regulations because the ER fails to address the status of compliance with all permits, licenses and approvals required for the facility in that

- a) The Environmental Report fails to address federal certifications and permits as required by 10 C.F.R. §§ 51.71(c) and (d).
- b) PFS's activities and accident recovery may contaminate the area water supply.
- c) NRC has a special obligation to the members of OGD by virtue of the federal trust responsibility for Indian lands.

2. Applicant's Response to the Contention

a) Failure to Address Federal Certifications and Permits

As the basis for its contention, the OGD asserts that, contrary to the requirements of 10 C.F.R. §§ 51.71(c) and (d), "the ER fails to address federal water discharge requirements and the certifications and permits required for water and storm discharges, erosion and sediment control for prevention of pollution of water; air quality requirements and the construction [sic] of a stationary source permit." OGD Petition at

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<sup>103</sup> As part of its basis OGD incorporates "Contention A and the accident discussion found in this document." OGD Petition at 24. Applicant's response to the accident discussion in Contention A is fully addressed in its response to that contention.

23. This contention must be dismissed because OGD has completely ignored relevant material in the Environmental Report.

The regulations cited by OGD require inclusion in the Draft Environmental Impact Statement ("DEIS") of a description of "all Federal permits, licenses, approvals, and other entitlements which must be obtained in implementing the proposed action and . . . the status of compliance with those requirements." 10 C.F.R. § 51.71(c). This regulation, of course, poses no obligation on Applicant or its Environmental Report. (OGD fails to note that 10 C.F.R. § 51.45(d) imposes similar obligations on applicants.) Similarly, 10 C.F.R. § 51.71(d) directs the NRC staff to give due consideration to "compliance with environmental quality standards and requirements that have been imposed by Federal, State, regional, and local agencies having responsibility for environmental protection, including applicable . . . water pollution limitations or requirements promulgated or imposed pursuant to the Federal Water Pollution Control Act." Unlike 10 C.F.R. §§ 51.45(d) and 51.71(c). There is no parallel provision which imposes the obligations of § 51.71(d) on applicants.

Not only does OGD cite as a basis for its position a regulation which has no application, it ignores the fact that these requirements are in fact discussed in Chapter 9 of the Environmental Report. That chapter discusses the various federal and state permits that must be obtained before the ISFSI may become operational. Included in that discussion are permits and licenses that must be obtained from the NRC (ER § 9.1.1), Department of Transportation ("DOT") (ER § 9.1.4), Environmental Protection Agency

("EPA") and the Corps. of Engineer ("COE") (ER § 9.1.3) and Utah Department of Environmental Quality ("UDEQ") (ER § 9.2.1)

OGD does not address this information in the Environmental Report concerning required permits. A contention that mistakenly claims that the applicant failed to address a relevant issue in the application -- such as OGD Contention J -- must be rejected. See, Section II.B.3, pp. 15-16, supra.

b) Contamination of Area Water Supply

OGD argues that, despite the precautions to be taken, accidents may occur and there is the possibility that the accident would be cleaned up using existing water which would then become contaminated. OGD Petition at 24. In addition, OGD claims that "other activities" will require the use of water to clean contaminated parts and that unspecified provisions need to be made so that this water may not contaminate the "already sparse water" supply and have an adverse effect on the members of OGD. OGD Petition at 24.

This contention must be dismissed for ignoring information in the License Application and for failing to provide a factual basis. OGD ignores relevant information submitted in both the SAR and the environmental report which evaluates and concludes that no contamination of the ground water will occur. The storage system designs for the PFSF specifically use only seal welded metal canisters to preclude any radioactive effluents from the canister internals. See SAR at 7.1-5, 7.5-4. Based on the use of such canisters, the Environmental Report states:

Under normal and off-normal conditions of transport, handling, storage, and removal offsite, the potential does not exist for breach of the canister and release of radioactive material associated with the spent fuel from inside the canister. . . . there are no credible scenarios that release effluents.

ER at 6.2-1. Further, the storage casks themselves are monitored for surface contamination in the Canister Transfer Building, and decontaminated in the unlikely event that they pick up any removable contamination in the event of an off-normal condition, such as a canister mishandling event. See SAR at 6.4-2. The storage casks are only moved outside of the Canister Transfer Building for storage after a contamination survey determines they are free of removable contamination. Id. Thus, “[d]uring spent fuel storage, no releases of any type of radioactive material occur. Therefore, there are no radiological waste impacts from the storage of spent fuel.” Id. at 6.5-2. Because there are no releases of any type of radioactive material from spent fuel storage, surface water runoff from the PFSF storage area cannot contain any radioactive effluents. OGD has ignored this relevant information and therefore this subcontention must be dismissed.

Further, OGD fails to state what type of accident it has in mind or what type of clean up scenario would result in contaminated water. Nor does OGD explain how such water, if in fact it was used to clean contaminated equipment, would contaminate the water supply used by OGD’s members. Nor does it specify what “other activities” will require the use of water. Furthermore, OGD fails to state what “parts” may become contaminated and fails to provide a mechanism by which the contaminated water used to

clean up an accident would then contaminate the water supply. Finally, OGD fails to explain or describe the "adverse" effects likely to be felt by members of OGD.

Thus, this subcontention is also totally devoid of any factual basis and amounts to mere speculation by OGD. An unsubstantiated allegation as the OGD has set forth here is not to be admitted.

Nowhere in its bases does OGD supply facts or expert opinion to support its contention. Its purported bases are mere speculation, expressions of the OGD's opinion without affidavit support, and thereby fall far short of the requirements for admissibility of a contention.

c) Federal Trust Obligation to Protect Indian Tribes

OGD also asserts that the NRC, as an agency of the United States, has a "special obligation" to protect the members of OGD from the harm of contaminated water because of the federal government's trust responsibility over Indian lands. The federal trust doctrine has no application here, however. OGD misunderstands both the general obligation of the NRC to protect the general public health and safety under the Atomic Energy Act and the basic purpose and scope of the federal trust responsibility.

First, OGD's argument lacks merit in the context of a federal regulatory agency, such as the NRC, which regulates for the public health and safety. Under the Atomic Energy Act, the Commission is charged to protect the health and safety of all the public, not selected classes as urged by OGD. Nothing in that Act requires -- or allows -- the NRC to apply a different set of standards to the members of OGD, or any other special

group. Such preferred treatment would be contrary to its basic mandate under the Act. Nor does OGD cite, as it cannot, any treaty, statute or other agreement which creates any "special obligation" on the part of the federal government toward its members regarding matters arising under the Atomic Energy Act.

Second, OGD misunderstands the basic purpose and scope of the federal trust responsibility. The Supreme Court has long "recognized the distinctive obligation of trust incumbent upon the Government in its dealings with [Indian tribes]." See, e.g., Seminole Nation v. United States, 316 U.S. 286, 296 (1942); Nevada v. United States, 463 U.S. 110, 127 (1983). However, in this instance, the proper party entitled to assert the benefit of a trust responsibility is the federally recognized Skull Valley Band of Goshute Indians, not a group of individuals, some of whom are not even members of the Skull Valley Band. The Interior Board of Indian Appeals has rejected on many occasions attempts of individual tribal members to assert the federal trust responsibility in situations in which an Indian tribe is the landowner. See e.g., Robert and Khrista Johnson v. Acting Phoenix Area Director, 25 IBIS 18.<sup>104</sup> Here the Skull Valley Band, not OGD or its

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<sup>104</sup> As stated by the Interior Board of Indian Appeals in that case:

BIA's trust duty is dependent upon the existence of a trust res. Here, the trust res is the real property which is held in trust for the Tribe. The Board has recently reiterated that, in situations involving trust real property, BIA's trust duty is to the Indian landowner. See Welmas v. Sacramento Area Director, 24 IBIA, 264, 272 (1993); Gullickson v. Aberdeen Area Director, 24 IBIA 247, 248 (1993). The landowner here is the Tribe, and BIA's trust duty is to the Tribe.

Any assumption that BIA also owes Krista [the individual Indian who was lessee of the Tribe] a trust duty must be based on the fact that she is Indian and a tribal member. The Board has considered numerous situations in which Indian individuals or tribes, each claiming to be the beneficiary of a trust duty, were involved on opposite sides in a dispute concerning trust real property. See, e.g.,

members, is the beneficial owner of the Skull Valley reservation lands over which it exercises jurisdiction. In fact, the members of OGD have asserted no claim of ownership to the lands in question.

Thus, to the extent any party is entitled to assert the benefit of the federal trust responsibility over Indian lands, it is the Skull Valley Band and not OGD or its members. Individual members of an Indian tribe may not invoke the federal trust responsibility to set aside a duly considered decision by the tribal government, even in a situation where individual property rights are alleged, which is not the case here. The federal courts have rejected, for example, suits brought by individual tribal members charging the Secretary of the Interior with having breached the federal trust responsibility for approving leases between Indian tribes and outside entities. See e.g., Tewa Tesuque v. Morton, 498 F.2d 240, 243 (10th Cir. 1974), cert. denied 420 U.S. 962 (1975); Yazzie v. Morton, 59 F.R.D. 377 (D. Ariz. 1973). In rejecting such a challenge on grounds that individual tribal members had no standing to challenge a breach of the federal trust responsibility, the court in Yazzie v. Morton clearly set forth the relationship between an Indian tribe and its individual members as follows:

Finally, the Tribe is an indispensable party [to the lawsuit] because the land in question is part of the Tribe's Reservation, any decision reached concerning the land directly affects the Tribe. Plaintiffs [individual tribal

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Welmas; Gullickson; Smith v. Acting Billings Area Director, 18 IBIA 36 (1989). In those cases, the Board held that BIA's trust duty was still to the landowner, and no trust duty was owed to other persons involved in the matter, even though those persons might be Indian. The same is true here. In the context of this case, BIA owes no trust duty to Krista, who is merely a person doing business with an Indian tribe.

members] have no vested interest in any of the land involved, they are only permittees of the Tribe; their permits expire after a given period of time and at death. The Tribe has the superior and paramount interest in the land.

The Tribe, in leasing the necessary lands to the intervenors [non-Indian companies] for the construction and operation of the power plant does so only as a Tribe consisting of all its members. Title 25, Section 415, U.S.C.A. Therefore, the Navajo Tribe in leasing the subject lands is acting in a communal capacity as a Tribe; in order for the plaintiffs [tribal members] to have any standing to bring suit, the Navajo Tribe is indispensable, since they only have an interest in the subject matter of this suit as members of the Tribe.

Id. at 383. None of the cases cited by OGD (Nevada v. United States, 463 U.S. 110 (1983); Morton v. Ruiz, 415 U.S. 199 (1973); or Seminole Nation v. U.S., *supra*) support OGD's claim that its members may invoke the Trust doctrine.

Thus, OGD and its individual tribal members cannot rely on the trust doctrine to overturn the decisions made by the Skull Valley Band as a whole. Therefore, OGD's contention is unsupported as a matter of law and should be rejected.

K. OGD Contention K: There are no provisions for paying for casks that may need to be returned to the generating facility

1. The Contention

OGD alleges in Contention K that:

The license application poses undue risk to public health and safety because it does not address how the facility will deal with paying for or returning casks that may prove unsafe should the generating reactor have been decommissioned.

OGD Petition at 24. The asserted bases for the contention are set forth in a half page of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated incorporating the specific allegations in its bases as indicated below:

The license application poses undue risk to public health and safety because it does not address how the facility will deal with paying for or returning casks that may prove unsafe should the generating reactor have been decommissioned, in that:

- a) There is not enough information in the License Application for an informed determination to be made about the financial capability of PFS to assure that the decommissioning of the ISFSI will be carried out after the spent fuel has been removed (citing 10 C.F.R. 72.22[(e)](3)).
- b) There are no assurances that other generating facilities will be allowed to use the ISFSI and there is no assurance that their financial capabilities will be sufficient to provide adequate mitigation should there be problems in the future.

2. The Applicant's Response to the Contention

OGD asserts in its contention that "[t]he license application poses undue risk to public health and safety because it does not address how the facility will deal with paying for or returning casks that may prove unsafe should the generating reactor have been decommissioned." OGD Petition at 24. The basis for the contention, however, discusses wholly unrelated topics -- the need for the Applicant to provide assurance that it will have the capability to pay the costs of decommissioning the ISFSI after the spent fuel is removed and whether reactor licensees other than the current members of PFS, if they

use the PFS ISFSI, will provide assurance of their financial capabilities with respect to decommissioning the ISFSI. Id. The basis provides no factual support for a contention concerning allegedly unsafe spent fuel transportation casks. See id. Indeed, it does not even mention spent fuel casks, how the spent fuel casks might become unsafe, or why they might need to be returned to a reactor site. See id. Therefore, this contention must be dismissed because OGD has failed to provide “[a] concise statement of the alleged facts or expert opinion which support the contention . . . , together with references to those specific sources and documents . . . on which [OGD] intends to rely to establish those facts or expert opinion.” 10 C.F.R. § 2.714(b)(2)(ii).

Moreover, clear regulatory constraints preclude a licensee from releasing for shipment a defective shipping cask or one with contaminated external surfaces above certain limits. See 49 C.F.R. § 173.443 and 10 C.F.R. § 71.87(I); see also Applicant’s response to OGD Contention D (addressing the Applicant’s measures to deal with potentially damaged or contaminated casks). A contention premised on the proposition that a licensee will violate regulatory requirements must be rejected. “[T]o gain the admission of a contention founded on the premise that [the Applicant] will not follow these requirements, the [petitioner] must make some particularized demonstration that there is a reasonable basis to believe [the Applicant] would act contrary to their explicit terms.” General Public Utilities Nuclear Corporation (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 164 (1996). OGD has not attempted to make any such showing here, so the contention must be dismissed.

Furthermore, the contention lacks the required specificity. The Contention does not specify why the cask might become unsafe. See OGD Petition at 24. Further, it does not identify how the shipping casks -- which are designed and certified to meet the rigorous requirements of 10 C.F.R. Part 71 in order to confine radioactivity during transit -- become unsafe. See id. Thus, this aspect of the contention must be dismissed for not containing “a specific statement of the issue of law or fact to be raised or controverted.” 10 C.F.R. § 2.714(b)(2); Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983) (“a Board may not admit for any reason, a contention that falls short of meeting the specificity requirements of 10 §2.714(b)(2)”) (emphasis in original).

a) Information Regarding the Financial Capability of PFS to Assure Funds for Decommissioning

Next the Applicant responds to the basis for OGD’s contention, treating it as two subcontentions. In the first subcontention, OGD alleges that “[t]here is not enough information contained in the Licensing Application for an informed determination to be made about the financial capability of the existing generating facilities who are now a part of PFS and the financial arrangements made with those facilities, and their financial capability to assure that after decommissioning there will be funds to carry out necessary mitigation should a problem arise.” OGD Petition at 25.

First this subcontention must be dismissed because it is non-specific. See supra. OGD does not specify what information the Applicant has omitted regarding its financial capability or decommissioning funding plan or why that information is necessary to make

the application adequate. Thus, OGD has failed to provide “a specific statement of the issue of law or fact to be raised or controverted.” 10 C.F.R. § 2.714(b)(2); Catawba, ALAB-687, 16 NRC at 467. Second, the failure to provide any factual evidence or supporting documents that produce some doubt about the adequacy of a specified portion of the application or that provides supporting reasons that tend to show that there is some specified omission from the application is a failure to demonstrate a genuine issue of fact. Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 521 n.12 (1990) (citing 10 C.F.R. § 2.714(b)(2)(ii) and (iii)). Because OGD has provided no factual evidence or documents to support its claim or reasons to show that there is a specific omission from the application, it has failed to show a genuine dispute on a material issue of fact and this subcontention must be dismissed.

This subcontention must also be dismissed because contentions regarding the accuracy or completeness of a decommissioning plan (or decommissioning funding plan) are admissible only if the contention also shows that the alleged deficiency in the plan “has some independent health and safety significance.” Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 256 (1996).<sup>105</sup> OGD claims no health or safety significance for the allegedly omitted information. See OGD Petition at 24. Petitioners must show “some specific tangible link between the alleged errors in the [decommissioning] plan and the health and safety impacts they invoke.”

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<sup>105</sup> See also Applicant’s response to State Contention S, in which the Applicant discusses the Commission’s standards for admitting decommissioning contentions in more detail.

Yankee Nuclear, *supra* at 258. Here, OGD invoked no health or safety significance, so the subcontention must be dismissed. Nor may the Board infer such a significance from the petitioners' language. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 304 (1995). A petitioner is obligated "to provide the [technical] analyses and expert opinion" or other information "showing why its bases support its contention." Georgia Tech, LBP-95-6, 41 NRC at 304. Where a petitioner has failed to do so, "the Board may not make factual inferences on [the] petitioner's behalf." *Id.* Therefore, the Board must rely on what the petitioners actually say in their contention and must not infer omitted support or meaning from its language or its tone.

Furthermore, this subcontention must be dismissed because challenges to the reasonableness of an applicant's decommissioning funding plan are not admissible unless the petitioners show that "there is no reasonable assurance that the amount will be paid." Yankee Nuclear, CLI-96-1, 43 NRC at 9 (1996). Without such a showing the only relief available would be "the formalistic redraft of the plan with a new estimate." *Id.* Such relief is not sufficient to warrant consideration of a contention because petitioners' are not entitled to it. Petitioners are only entitled to relief from the injury they rely upon to afford them standing in a hearing (*id.* at 6) and because a mere redrafting of a financial plan would have no effect on the physical events taking place at a facility (i.e., the potential health and safety threats that provide petitioners with standings), petitioners are not entitled to such relief. *See id.* at 6, 9. OGD makes no assertions that the Applicant will be unable to pay its decommissioning costs; it merely alleges that it is unable to

make an informed determination about the financial capabilities of the members of PFS. OGD Petition at 24. Therefore, OGD is not entitled to the relief it seeks and the subcontention must be dismissed.

Furthermore, without some indication that an alleged flaw in a funding plan will result in an actual shortfall of funds needed for decommissioning, this subcontention does not satisfy the materiality requirement of 10 C.F.R. § 2.714. Yankee Nuclear, CLI-96-7, 43 NRC at 259. The legal standard is reasonable assurance of funds, not “ironclad” assurance. Id. at 260. Short of an allegation of a “gross discrepancy” in the decommissioning cost estimate, supported by the necessary factual basis, a charge alleging the inadequacy of the estimate or the funding plan will not be admitted. Id. OGD does not claim that the allegedly omitted information will show an actual shortfall of funds or a “gross discrepancy” in the Applicant’s decommissioning cost estimate. See OGD Petition at 24. Therefore, this subcontention is also not material and must be dismissed.

b) Other Potential Users of the PFS ISFSI

OGD asserts that the License Application is inadequate because there are “no assurances that other generating facilities will be allowed to use the [ISFSI]” and there is no assurance that their financial capabilities “will be sufficient to provide adequate mitigation should there be problems in the future.” OGD Petition at 25.

First, this subcontention must be dismissed because it is non-specific. OGD does not say who the other users of the ISFSI might be, why their financial capabilities might

be insufficient, and what problems in the future might require mitigation. OGD Petition at 24; 10 C.F.R. § 2.714(b)(2); Catawba, ALAB-687, 16 NRC at 467. Second, OGD has not shown that a genuine dispute with the Applicant exists regarding a material issue of law or fact. See Turkey Point, LBP-90-16, 31 NRC at 521 n.12; 10 C.F.R. § 2.714(b)(2)(iii). OGD has not provided any factual evidence or supporting documents that produce some doubt about the adequacy of the financial capabilities of other potential users of the ISFSI or that provides supporting reasons that tend to show that the Applicant has omitted from the application some specific material regarding the financial capabilities of other potential users. See OGD Petition at 25.

Moreover, this subcontention must also be dismissed because it is an ostensible challenge to the adequacy of the Applicant's decommissioning funding plan, yet it does not claim that the alleged inadequacy has any independent health or safety significance and it does not show that there is no reasonable assurance that the decommissioning costs will be paid. See supra Subcontention (a).

Finally, this subcontention must be dismissed because it ignores relevant material submitted by the Applicant. See Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-21, 33 NRC 419, 424 (1991); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993). The License Application states that PFS will enter into Service Agreements with customers through which the customers will commit to store their spent fuel at the ISFSI and PFS will commit to providing the customers with storage services. LA at 1-4. Pursuant to such Service Agreements, the customers will make pre-shipment

payments and annual storage fee payments. Id. Portions of the customer payments will be go into an externalized escrow account to fund storage cask decommissioning “prior to the receipt of each spent fuel canister at the PESE.” LA at 1-7 (emphasis added). The average cost of decommissioning each canister is estimated to be \$17,000. Id. OGD neither alleges nor provides any basis for claiming that this amount is inadequate. OGD Petition at 24. “This method of funding provides prepayment of the storage cask decommissioning costs prior to any exposure of the storage cask to radiation or radioactive material, and therefore prior to the need for decommissioning.” LA at 1-7. Thus the financial capabilities of the customers of PFS are irrelevant to decommissioning of the storage casks. If customers cannot prepay this amount, their spent fuel will not be stored at the ISFSI and the customers’ financial qualifications are irrelevant. See Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, slip op. at 23 (December 18, 1997) (if facility cannot attract investors or customers, it cannot begin construction or operation; if facility “never begins operation, there is no risk whatever to public health and safety.”) Because OGD has ignored this material, this subcontention must be dismissed.

**L. OGD Contention L: Operators will not be trained for the specific job when hired and operators will undergo on-the-job training**

1. The Contention

OGD alleges in Contention L that:

The license application poses undue risk to public health and safety because it provides that operators will not be trained for the specific job when hired and that operators will undergo on-the-job training, and classroom training

leading to certification. The license application states that “of necessity, the first individuals certified may have to improvise in certain situations to complete the practical factors.” See, License Application, LA Chapter 7 p. 7.1. This doesn’t protect public health and safety in any manner.

OGD Petition at 25. In the discussion of the basis following this contention, OGD asserts that such persons being trained on the job “when they take over the critical job of handling nuclear fuel” will not be able to carry out their responsibilities under 10 C.F.R. § 72.32(7). Id at 26. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

The license application poses undue risk to public health and safety because it provides that operators will not be trained for the specific job when hired and that operators will undergo on-the-job training and classroom training leading to certification. The license application states that “of necessity, the first individuals certified may have to improvise in certain situations to complete the practical factors.” See, License Application, LA Chapter 7 p. 7.1. This doesn’t protect public health and safety in any manner in that personnel being trained on the job when they take over the critical job of handling nuclear fuel will not be able to carry out their responsibilities required by 10 C.F.R. § 72.32(7).

2. Applicant’s Response to the Contention

OGD mistakenly concludes that the License Application provides that operators will not be trained for the specific job when hired. In support of this assertion, the Petitioner relies upon the statement in the License Application that “[o]f necessity, the first individuals certified may have to improvise in certain situations to complete the

practical factors.” LA at 7-1. OGD cites 10 C.F.R. § 72.32(7) in support of its conclusory allegation that “[w]ith personnel being hired that are trained on-the-job, it seems very plausible that personnel will not be able to carry out the responsibilities required under this section” and expresses deep concern for its members, “when personnel are not even trained when they take over the critical job of handling nuclear fuel.” OGD Petition at 26.

This contention completely misreads and ignores relevant information in the License Application and SAR and therefore, must be dismissed. Contrary to OGD’s contention, Chapter 7 of the License Application does not provide that operators will be “untrained for the job” when “they take over the critical job of handling nuclear fuel” at the Facility. What Chapter 7 actually says is that

[t]he Operator Training Program will consist of a combination of on-the-job training (OJT) and classroom training leading to Certification. The OJT requirements will be documented in a set of Qualification Cards containing the Job Performance Measures of practical factors that are required to be performed by the Operator. Each person to become Certified must have these Qualification Cards completed prior to being allowed to independently perform the applicable tasks. Of necessity, the first individuals certified may have to improvise in certain situations to complete the practical factors . . . .

LA at 7-1 (emphasis added).

Thus, it is clear that the operators will receive their classroom training and on-the-job training prior to certification and prior to handling nuclear fuel at the PFSF. Before performing these or any other duties, operators will be trained and certified. As

specifically stated in the License Application, “prior to being allowed to independently perform the applicable tasks” the operator must have “Qualification Cards” completed and these cards are based on completion of on-the-job training. OGD has therefore misread the Application by alleging that operators will handle nuclear fuel before their training has been completed. The phrase latched on to by OGD, that “of necessity the first individuals certified may have to improvise in certain situations to complete the practical factors,” thus refers to the fact that the initial operators will receive their on-the-job training prior to their certification and prior to their handling nuclear fuel, and that therefore completion of some training will be accomplished under simulated conditions. Simulation of actual operating conditions is a well established and recognized training technique in the nuclear industry, such as, for example, in the training and certification of nuclear plant operators. Regulatory Guide 1.8 (Qualification and Training of Personnel for Nuclear Power Plants).

Accordingly, no adverse impact on safety can be attributed simply to the fact that the first operators certified will have been trained in part under simulated conditions. OGD provides no factual basis -- only hyperbole -- to support its contention that the public health and safety is jeopardized by the fact that the first individuals certified may have to complete their training on the practical factors under simulated conditions. OGD has provided no facts, expert opinion or analysis to support its proposition that personnel trained under simulated practical conditions will jeopardize the public health and safety and fail to carry out their responsibilities during an emergency. In short, this contention

is nothing but “an expression of the [OGD’s] opinion” and is therefore inadmissible.

Georgia Tech, supra, LBP-95-6, 41 NRC at 306-7.

Further, OGD completely ignores provisions of the SAR which show that operators “take over the critical job of handling nuclear fuel” after they are properly trained and certified. SAR Chapter 9, which the OGD totally ignores, specifically states at § 9.3.1 that

[i]t is the intent to hire individuals with the training, education and experience which enable them to perform the assigned tasks, and to provide additional training, as appropriate. There will be an adequate complement of trained and certified personnel prior to the receipt of spent fuel for storage, and throughout the period of the NRC operating license.

SAR at 9.3-1 (emphasis added). Further, SAR § 9.3.2.2 provides that “[i]ndividuals who operate equipment and controls that have been identified as ‘important to safety’ . . . must be trained and certified.” SAR at 9.3-3. A contention which ignores relevant information submitted by the Applicant must be dismissed. See Section II.C.2 supra.

Finally, although OGD cites to 10 C.F.R. § 72.32(7), OGD has identified no absolute basis to support a contention that this regulation has been violated.

10 CFR § 72.32(7) provides that

Each application for an ISFSI that is licensed under this part . . . must be accompanied by an Emergency Plan that includes the following information:

...

*Responsibilities.* A brief description of the responsibilities of licensee personnel should an accident occur, including

identification of personnel responsible for promptly notifying offsite response organizations and the NRC; also responsibilities for developing, maintaining, and updating the plan.

10 CFR § 72.32(7) (emphasis in original). OGD fails to identify any respect in which the Applicant's Emergency Plan is deficient and in which it falls short of the regulatory requirements. Moreover, OGD fails to specify what practical factors, if performed under simulated rather than actual operating conditions, would result in the operators being unable to perform their assigned duties. Nor does OGD describe what emergencies might arise and what particular duties the personnel will be unable to carry out as a result of such training. OGD's failure to provide a factual basis for its contention that Applicant has violated 10 C.F.R. § 72.32(7) must result in the rejection of this contention.

**M. OGD Contention M: No Provisions for Transportation Accidents are Made**

1. The Contention

The OGD petitioner alleges in Contention M that:

The license application poses undue risk to public health and safety because it makes no provisions for transportation accidents that might occur.

See OGD Petition at 26. The asserted bases for the contention are set forth following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows, incorporating the specific allegations raised in its bases:

The License Application poses undue risk to public health and safety because it makes no provisions for transportation accidents that might occur in that

- a) The Emergency Plan does not identify each type of radioactive material accident that may occur, which is required by 10 C.F.R. § 72.32(a)(2), particularly that involving a collision between a spent fuel heavy haul shipment and/or a collision between a truckload of military explosives to or from the Dugway Proving Ground on Skull Valley Road in a grade crossing accident, which could result in an explosion;
- b) Even though the “potential for an explosion” near the site is recognized in the License Application, the Emergency Plan fails to provide provisions to deal with the collision between a spent fuel heavy haul shipment and/or a collision between a truckload of military explosives to or from the Dugway Proving Ground on Skull Valley Road in a grade crossing accident and the potentially resulting explosion from such an event, which could result in impact forces in excess of those specified in NRC transportation cask performance standards.

2. Applicant’s Response to the Contention

OGD asserts in Contention M that the Applicant’s License Application “poses undue risk to public health and safety because it makes no provisions for transportation accidents that might occur.” OGD Supp. Petition at 26. OGD’s concerns raised under Contention M are addressed in turn below.

a) Identification of Type of Radioactive Material Accident

OGD asserts that the Applicant’s Emergency Plan does not identify each type of radioactive material accident that may occur, which is required by 10 C.F.R. § 72.32(a)(2). See OGD Petition at 26. OGD is particularly concerned with an accident involving a collision between a spent fuel heavy haul shipment and/or a collision between

a truckload of military explosives to or from the Dugway Proving Ground on Skull Valley Road in a grade crossing accident, which could result in an explosion. Id.

Contrary to OGD's assertion, the Applicant's Emergency Plan does evaluate "an accident associated with the transportation of explosives along the Skull Valley Road" and its effects on the site. Emergency Plan at 2-6. The analysis results show that "[t]he HI-STORM and TranStor storage casks protect the canisters from the effects of explosions" and "[t]he effects of credible explosions occurring on the Skull Valley Road, with resultant overpressures less than 1 psi at the PFSF, would not challenge the Canister Transfer Building's structural integrity." Id.; SAR at 8.2-21 to 8.2-23. A petitioner must set forth a "technical basis in references or expert opinion" in order to support a claim based on an accident scenario. OGD here has failed to do so and thus this contention must be dismissed.

Further, 10 C.F.R. § 72.32(a)(2) requires an ISFSI Emergency Plan to include, in part, "[a]n identification of each type of radioactive materials accident." 10 C.F.R. § 72.32(a)(2). The Applicant identifies applicable accidents in the Emergency Plan Chapter 2. The requirements for emergency plans for ISFSIs are for on-site emergencies only. See Northern States Power Company (Independent Fuel Storage Installation) Director's Decision under 10 C.F.R. § 2.206 (DD-97-24), 62 Fed. Reg. 51,916, 51,917 (1997). An on-site emergency does not include a spent fuel transportation accident that occurs off-site, even with a resulting explosion - - to the extent that the resulting explosion does not effect the site (as discussed above). The safety aspects of off-site transportation of spent fuel, including measures to address spent fuel transportation

accidents, are controlled by 10 C.F.R. Parts 71 and 73, and by DOT regulations, not by 10 C.F.R. Part 72. So to the extent that OGD seeks to include off-site spent fuel transportation accidents in the Applicant's ISFSI Emergency Plan, this contention must be dismissed as being beyond the scope of this proceeding. See Section II.B. supra.

b) Evaluation of Explosion Involving Off-Site Spent Fuel

OGD asserts that even though the 'potential for an explosion' near the site is recognized in the License Application, the Applicant's Emergency Plan fails to provide provisions to deal with a collision between a spent fuel heavy haul shipment and/or a collision between a truckload of military explosives to or from the Dugway Proving Ground on Skull Valley Road in a grade crossing accident and the potentially resulting explosion from such an event, which could result in impact forces in excess of those specified in NRC transportation cask performance standards. See OGD Petition at 26-27. As discussed in Applicant's response to subcontention (a) above, this contention lacks technical basis and is beyond the scope of this licensing proceeding, which is "for a materials license, under the provisions of 10 C.F.R. Part 72." See 62 Fed. Reg. 41,099 ("Private Fuel Storage, Limited Liability Company, Notice of Consideration of Issuance of a Materials License for the Storage of Spent Fuel and Notice of Opportunity for a Hearing") (July 31, 1997). A 10 C.F.R. Part 72 materials licensing proceeding is not the proper forum to address emergency measures for off-site transportation spent fuel accidents, and contrary to OGD's assertion, the Applicant does evaluate potential off-site explosions and their effect on the site. See Applicant's Response to OGD Contention (Subcontention (a)).

Additionally, a challenge to the capability of a shipping cask to perform its designed and certified function is a challenge to NRC regulations governing the licensing of such casks, 10 C.F.R. Part 71. OGD asserts that the potentially resulting explosion from “a collision between a cask on a heavy haul trailer and/or a collision between a truckload of military explosives in a grade crossing accident which may result from unique local conditions . . . could result in impact forces in excess of those specified in NRC [transportation] [c]ask performance standards.” OGD Petition at 26. The NRC in promulgating the design and certification requirements for shipping casks has made the generic determination that such casks adequately protect public health and safety of spent fuel while in transit. 60 Fed. Reg. 50,248 (“10 CFR Part 71 Compatibility with International Atomic Energy Agency (IAEA)” Final Rule) (September 28, 1995). Therefore, a contention challenging the transportation of spent fuel in NRC-approved shipping casks in compliance with applicable regulatory requirements is a direct challenge to the regulations and the NRC’s generic determination made as part of the rulemaking. To be admitted, a contention may not attack a Commission rule or regulation, 10 C.F.R. § 2.758, and therefore such a contention must be dismissed.

**N. OGD Contention N: There May Be a Leak that Contaminates the Present Water System**

1. The Contention

OGD alleges in Contention N that:

The license application poses undue risk to public health and safety because it fails to address the possibility of a leak occurring that might contaminate the present water system that members of the community rely on. The

application admits that several wells are going to have to be built to meet the demand that will be presented by the facility. Neither contingencies to deal with contamination nor lowering of the present water table are discussed.

OGD Petition at 27. OGD's basis for the contention, stated on the same page of its Petition, provides in its entirety as follows:

OGD hereby incorporates the discussion on the NRC's trust responsibility to protect the natural resources of the Tribe and individual Tribal members as found in Contention J found within this document. These issues need to be addressed in the License Application.

In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows:

The license application poses undue risk to public health and safety, in that

- a) It ignores NRC's trust responsibility to protect natural resources of Tribe and individual Tribal members.
- b) It fails to address the possibility of a leak occurring that might contaminate the present water system that members of the community rely on.
- c) The application admits that several wells are going to have go be built to meet the demand that will be presented by the facility but it fails to discuss the contingencies to deal with contamination or lowering of the present water table.

2. Applicant's Response to the Contention

Putting aside OGD's ill-founded trust argument, the sole basis provided for this contention is its statement that "[t]hese issues need to be addressed in the License Application." *Id.* (emphasis omitted). This is a totally inadequate statement of basis to

support the admission of a contention. As stated by the licensing board in Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC. 200, 246 (1993), a statement “that simply alleges that some matter ought to be considered” does not provide a sufficient basis for an admissible contention. The Commission’s Rules of Practice specifically provide that if “the petitioner believes that the application fails to contain information on a relevant matter as required by law,” the petitioner must identify “each failure and the supporting reasons for the petitioner’s belief . . . .” 10 C.F.R. § 2.714(b)(2)(iii). As further stated in the Statement of Considerations for the 1989 amended rules, if the Petitioner believes that the License Application, including the Safety Analysis Report and the Environmental Report, fails to address a relevant issue, the petitioner is “to explain why the application is deficient.” 54 Fed. Reg. 33,168, 33,170 (1989). OGD has failed to do so with respect to Contention N, and therefore that contention must be dismissed. See Section II.C.2 supra.

a) NRC’s trust responsibility

OGD’s discussion of the NRC’s trust responsibility to protect the natural resources of the Tribe and the alleged trust responsibility toward individual Tribal members (who have no beneficial interest in reservation lands) misconstrues the trust responsibility doctrine to argue that the NRC has a special obligation to protect the OGD members from harm over and above its public health and safety obligations under the Atomic Energy Act. As discussed in Applicant’s response to OGD Contention J, OGD’s trust argument simply lacks any merit in the context of a federal regulatory agency, such as the NRC, which regulates private activity to protect the public health and safety of all

members of the public, not selected groups as urged by OGD. Accordingly, in NRC proceedings, members of Indian tribes must satisfy the same pleading requirements as other members of the public in order to intervene and raise issues for litigation in NRC proceedings. See, e.g., Sequoyah Fuels Corporation (Gore, Oklahoma Site), LBP-94-19, 40 NRC 9 (1994).

b) Possibility of Leak Which Might Contaminate Present Water System

Besides not providing support for its assertion, OGD is simply mistaken in its claim that the “license application . . . fails to address the possibility of a leak occurring that might contaminate the present water system that members of the community rely on.” OGD Petition at 27. See SAR, Section 6.3. Moreover, the Petitioner’s suggestion that a leak could contaminate ground water sources is incorrect. After the canisters are loaded, they are vacuum cleaned, backfilled with helium and welded closed. Hence, the inside environment of the canisters is a gas (helium), there are no liquids on the inside and the canisters are all seal welded to preclude liquids from entering them. Id. Consequently, there is no leak accident that would cause contaminate material to flow into the ground much less the ground water, which is over 100 feet below the surface. SAR, Section 2.5. OGD has failed to specifically identify the means by which a leak could occur that would affect the groundwater.

Thus, OGD’s contention must also be rejected because its claim that the Applicant failed to address the possibility of a leak occurring which could possibly contaminate the

present water system is mistaken, as Applicant has addressed this issue. See Section II.C, pp. 15-16, supra.

c) Contamination or Lowering of Present Water Table

OGD's contention that Applicant did not discuss contingencies to deal with groundwater contamination or lowering of the present water table is mistaken and must be rejected. As described in detail in response to Castle Rock Contention 8, radioactive wastes are not generated at the site so groundwater contaminants are not considerations. SAR Section 6.3; ER Section 3.4. Lowering the present groundwater table is discussed in detail by Applicant; See SAR sections 2.5.3 and 2.6.1.9. Applicant also provides discussion on groundwater usage, describing how water storage tanks will be required to supply enough water (on-demand) for potable water, emergency fire water, and for the concrete batch plant. Applicant states that the Skull Valley aquifer will probably experience localized drawdown, but it will not extend beyond the PFSF site area. Applicant also states that additional testing and analysis will be performed to determine the number and depth of wells to be provided so that the drawdown will have no effect on adjacent existing wells. SAR Section 2.5.3. Therefore, OGD's contention must be rejected.

O. OGD Contention O: Environmental Justice Issues Are Not Addressed.

1. The Contention

OGD alleges in Contention O that:

The license application poses undue risk to public health and safety because it fails to address environmental justice issues. In Executive Order 12898, 3 C.F.R. 859 (1959)

issued February 11, 1994, President Clinton directed that each Federal agency "shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations in the United States." It is not just and fair that this community be made to suffer more environmental degradation at the hands of the NRC. Presently, the area is surrounded by a ring of environmentally harmful companies and facilities. Within a radius of thirty-five (35) miles the members of OGD and the Goshute reservation are inundated with hazardous waste from: Dugway Proving Ground, Utah Test and Training Range South, Deseret Chemical Depot, Tooele Army Depot, Envirocare Mixed Waste storage facility, Aptus Hazardous Waste Incinerator, Grassy Mountain Hazardous Waste Landfill and Utah Test and Training Range North.

OGD Petition at 27-28. The asserted bases for the contention are set forth in seven pages of discussion following the contention in which OGD claims that the NEPA cost benefit analysis in the Environmental Report is inadequate in six respects. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

The license application poses undue risk to public health and safety because it fails to address environmental justice issues. In Executive Order 12898, 3 C.F.R. 859 (1959) issued February 11, 1994, President Clinton directed that each Federal agency "shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations in the United States." It is not just and fair that this community be made to suffer more environmental degradation at the hands of the NRC. Presently, the area is surrounded by a ring of environmentally harmful companies and facilities. Within a radius of thirty-five (35) miles the members of OGD and the Goshute reservation are

inundated with hazardous waste water: Dugway Proving Ground, Utah Test and Training Range South, Deseret Chemical Depot, Tooele Army Depot, Envirocare Mixed Waste storage facility, Aptus Hazardous Waste Incinerator, Grassy Mountain Hazardous Waste Landfill and Utah Test and Training Range North. The benefit-cost analysis in the ER is inadequate in that:

- a) The proposed plant will have negative economic and sociological impacts on the native community of Goshute Indians who live near the site. The application demonstrates no attempts to avoid or mitigate the disparate impact of the proposed plant on this minority community.
- b) The ER only discusses benefits to Skull Valley Band and fails to discuss the environmental, sociological and psychological costs of living within a few miles of the facility.
- c) The ER does no benefit cost analysis of leaving waste on-site at reactors.
- d) The ER discusses need for ISFSI to provide sufficient spent fuel capacity to avoid shutdown. This is questionable however. PFS should be required to evaluate existing and projected storage capacity both in the U.S. and abroad in order to evaluate existing and projected need.
- e) Any environmental assessment must look at all hazardous facilities in the area as part of the cumulative and disproportionate impacts that OGD has been made to suffer. The ER fails to consider such disproportionate impacts that may be suffered by members of the Skull Valley Goshutes.
- f) The ER fails to address the effect that the facility will have on property owned by members of OGD or others living in surrounding area.

2. Applicant's Response to Reliance on Executive Order 12898

OGD seeks in this contention to rely upon Executive Order 12898. That reliance is, however, misplaced for the express terms of the Order provide that it does not create new law and that it is solely intended for the internal management of executive branch agencies. Section 1-101 directs agencies to integrate environmental justice concerns into their programs to the extent "permitted by law." (Emphasis added). The President's Memorandum accompanying the Order reflects the same intent "to underscore . . . provisions of existing law that can help ensure that all communities and persons . . . live in a safe and healthful environment." (Emphasis added.) Further, Section 6-609 of the Order states:

This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.

Executive Order No. 12898, 3 C.F.R. 859, 863 (1994).

The courts have found executive orders containing language virtually identical to that contained in section 6-609 to reflect "clear and unequivocal intent" that the executive order is intended merely to "improve the internal management of the Federal government" and does not create substantive rights "subject to judicial review." See, e.g., Michigan v. Thomas, 805 F.2d 176, 187 (6th Cir. 1986). As stated by the court in Meyer v. Bush, 981 F.2d 1288, 1297 (D.C. Cir. 1993), "it is doubtful" whether such executive

orders "[have] any legal significance." Indeed, the only court to consider the legal significance of Executive Order 12898 found that section 6-609 expressly denies any private right of action and therefore the Order does not create any enforceable rights or obligations. See New River Valley Greens v. DOT., Civ. A. 95-1203-R, 1996 U.S. Dist. LEXIS 16547 at \*16-17 (W.D. Va. Oct. 1, 1996), aff'd., 1997 U.S. App. LEXIS 32166 (4th Cir. 1997).

Because Executive Order 12898 creates no new enforceable rights or obligations, the provisions of the Order are not applicable in the context of licensing facilities and activities under the Atomic Energy Act. To apply the Executive Order in licensing proceedings, such as the present, would create an irreconcilable conflict with the Executive Order because such proceedings are subject to judicial review. 42 U.S.C. § 2239. Well-established principles of judicial review both authorize and require a court to review the basis of an agency's decision. See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 48-49 (1983); New England Coalition on Nuclear Pollution v. NRC, 727 F.2d 1127, 1131 (D.C. Cir. 1984) (courts "must affirm [agency] action on the basis of the reasons assigned or not at all"). Therefore, the Executive Order can not be applied to NRC licensing proceedings, for if so applied, it would become subject to judicial review, contrary to the express provision of section 6-609 of the Order.

Thus, the provisions of the Executive Order can neither enlarge nor otherwise alter requirements of NEPA. The scope and bounds of NEPA are explicated by the statute and applicable regulations and judicial precedent interpreting its requirements, and not the terms and provisions of Executive Order 12898. Accordingly, the adequacy of the

Environmental Report and any subsequent Environmental Impact Statement must be judged against the legal standards applicable under NEPA, and not the Executive Order, or OGD's construct of the Executive Order. Therefore, the contention should be rejected.

3. Applicant's Response to OGD's Specific Contentions

OGD raises various issues in Contention O which we discuss in turn below.

a) Negative Economic and Sociological Impacts on Native Community of Goshute Indians

OGD claims that the Environmental Report "does not reflect consideration of the fact that the plant is to be placed in the dead center of an Indian Reservation" and that the "Application does not demonstrate any attempts to avoid or mitigate the disparate impact of the proposed plant on this minority community." OGD Petition at 28-29. This contention must be dismissed for the lack of both a legal and a factual basis.

First, NEPA provides no legal basis for OGD to request mitigation of "disparate impacts." Under section 102(2)(C) of NEPA, agencies are required to analyze significant, adverse impacts on the physical environment resulting from major federal actions as well as proximately related secondary, socio-economic impacts. Nothing in NEPA suggests that either the significance of such impacts or the level of their mitigation are to be judged based on the race or economic status of those affected. NEPA has been in existence for more than 25 years and it has never been interpreted to require analysis of whether a particular major federal action will have a disproportionate impact on selected populations of differing race or economic class. As observed by the U.S. District Court in New River Valley Greens v. DOT, *supra*, LEXIS 16547, \* 18 an agency "could not be

held to have violated NEPA for failing to consider disproportionate impacts on minorities and low-income populations" prior to the Executive Order because no such mandate exists under NEPA.

Therefore, the issue under NEPA is not whether a particular major federal action, such as licensing the PFSF, has a disproportionate impact on minority or low income populations, but whether there are significant, adverse impacts regardless of the population affected. Executive Order 12898 does not impose any different approach for NEPA evaluations. The provisions of section 1-101 are expressly limited "[t]o the greatest extent practicable and permitted by law." (Emphasis added.) Further, the Executive Order itself does not call on agencies to address merely disparate impacts. Rather, the Executive Order instructs Federal agencies to achieve environmental justice as part of their missions "by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects." Executive Order No.12898, 3 C.F.R. 859 (1994) (emphasis added).

Second, this subcontention must also be dismissed for lack of basis. Contrary to the amended rules of practice, OGD does not "reference the specific portions" of the Application that the OGD disputes and the "supporting reasons for [the] dispute." 10 C.F.R. § 2.714(b)(2)(iii). Also the only facts or documents or other support provided for this subcontention are a 1987 study, a 1993 letter, and a 1996 article completely unrelated to, and supplying no factual basis for, its assertions that the Environmental Report in this specific licensing proceeding is deficient.

Further, the License Application expressly addresses the very topics that OGD claims it fails to consider. The very first page of the License Application reflects that the proposed ISFSI would be “located on the Skull Valley Indian Reservation.” LA at 1-1. Further, the Environmental Report expressly analyzes the persons living “within 5 miles of the PFSF” and sets forth that, included in the 36 persons within this area, are the “approximately 30 members of the Skull Valley Band of Goshute Indians living on the Reservation.” ER at 2.7-9.

Further the Environmental Report notes that although “[t]here are no significant impacts associated with the project requiring mitigative measures,” “[t]he design of the facility already provides mitigative measures to reduce potential impacts.” ER at 2.7-10.

Specifically:

The facility will be located away from residences to prevent disruption to existing land uses and minimize the visual impact on the regional surroundings. Dust pollution will be minimized by dust control techniques. The facility is designed to use very little water and to provide radiation shielding to lower doses to residences greatly below the regulation limits.

Id.

Having failed even to reference the License Application, OGD sets forth no facts or basis to challenge the analysis and evaluation in the License Application and the subcontention must be dismissed for lack of basis and failure to show a genuine dispute of a material issue of fact or law as well as a lack of any legal basis to request mitigation of disparate impacts. See Section II.C, supra.

b) Failure to Address Environmental, Sociological and Psychological Costs

OGD claims that the Environmental Report only addresses the benefits to the Skull Valley Band and fails to discuss the environmental, sociological and psychological costs of those living close to the facility of added traffic, more people, cultural impacts on traditional life styles, stigmatization resulting from adverse impacts (real or perceived) of the storage facility, changes in traffic patterns and pervasive fear of living in close proximity to the biggest nuclear storage facility in the United States. This contention must be dismissed because (i) certain of the alleged costs are outside the zone of interest of the Atomic Energy Act and NEPA and (ii) other costs are addressed in the Environmental Report, which OGD ignores.

(i) Pervasive Fear and Stigmatization

OGD claims that the Environmental Report fails to address “the pervasive fear of living in close proximity to the biggest nuclear storage facility in the United States” and stigmatization resulting from adverse impacts (real or perceived) of the storage facility.” However, as discussed further in Applicant’s Response to OGD Contention P, subpart c, it is established in NRC proceedings that psychological effects are outside the zone of interest protected by NEPA and the Atomic Energy Act. Therefore, pervasive fear and stigmatization (real or perceived) do not fall within the grounds of NEPA and the Applicant made no error in failing to address such psychological costs in the Environmental Report.

(ii) Other Alleged Costs

OGD's claims with respect to the other costs allegedly not addressed in the Environmental Report must be dismissed for ignoring relevant information in the Report and for lack of basis. The Environmental Report does address the costs of added traffic, more people and changes in traffic patterns. As discussed in Applicant's Response to OGD P, subpart b, the Environmental Report addresses the added traffic and influx of workers. See ER §§ 2.8, 4.16, 4.1.7, 4.2.6 and 4.2.7. Further the Environmental Report also addresses whether the PFSF would have any adverse impact on cultural resources of the Skull Valley Band, and, based upon responses from the Band, and concluded that there were none. ER §§ 2.9.1, 4.1.8.1, 4.2.8.1. Finally, as part of the environmental justice evaluation, the Environmental Report summarizes in tabular form the potential adverse "human to health" and "environmental effect" on "the minority or low-income population surrounding the site." ER at 2.7-9 and Table 2.7.3.

In short, the Environmental Report has evaluated the potential sociological, adverse sociological and environmental impacts on the "minority or low-income population" surrounding the site and has concluded that none of the impacts "are significant, unacceptable or above regulatory limits." ER at 2.7-10. While OGD may desire a different result to this evaluation, NEPA "does not mandate particular results." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). Rather under NEPA, the Applicant must describe the environmental impacts of the proposed ISFSI, which Applicant has done. OGD has ignored this evaluation and as a result has failed to provide a basis and show a genuine dispute of a material issue of law or fact as required by the 10 C.F.R. § 2.714(b).

c) Cost-Benefit Analysis for Leaving Fuel at Reactors

OGD implies that the Applicant's Environmental Report is inadequate because it contains "no benefit-cost analysis . . . that looks at the alternative of leaving waste on-site at reactors until a safe solution is developed." OGD Petition at 30-31. "The rush to move dangerous nuclear waste across America by road and rail is more dangerous and expensive than keeping the waste on-site at nuclear power plants. Undue haste and nuclear waste are a bad combination." *Id.* (quoting Public Citizen News Release, Oct. 6, 1997, statement by Auke Piersma).

This subcontention must be dismissed because it mistakenly claims that the applicant failed to address a relevant issue in the application. See Section II.C, pp. 15-16, supra. The Environmental Report specifically discusses the "No-Build Alternative" to the ISFSI in Chapter 8. ER at 8.1-2 to 4. The Applicant discusses the impacts of not building the ISFSI, including, for example, a need to shut down reactors earlier than planned or forego license renewal, causing utilities to buy replacement power or replacement generating capacity, which would in turn increase air pollution as more fossil fuels were burned. *Id.* at 8.1-2 to 3. If the PFS ISFSI were not built, reactor licensees might build more onsite ISFSIs and incur more environmental impacts at their sites. *Id.* at 8.1-3. Moreover, the resulting diversification of technology and decentralization of storage locations would increase the cost of interim fuel storage. *Id.* Not building the PFS ISFSI would also delay the decommissioning of some reactor sites that await the removal of the spent fuel stored there. *Id.* Such delay would increase costs further, including the cost of low-level waste disposal. *Id.* Thus the Applicant's analysis

concluded that not building the PFS ISFSI was an unattractive option. Id. at 8.1-4.

Because OGD ignores this analysis, this subcontention must be dismissed.

This subcontention must also be dismissed because it fails to show that a genuine dispute exists with the Applicant on a material issue of law or fact. 10 C.F.R. § 2.714(b)(2)(iii). OGD fails to provide any credible “factual evidence or supporting documents that produce some doubt about the adequacy of a specified portion of the Applicant’s documents or that provides supporting reasons that tend to show that there is some specified omission from the Applicant’s documents.” Florida Power and Light Company (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 521 n.12 (1990). Furthermore, if a petitioner believes that an application does not address a relevant matter, it must explain why the application is deficient. 54 Fed. Reg. 33,168, 33,170 (1989) (10 C.F.R. § 2.714, Statement of Considerations). Here, OGD provides no basis besides a conclusory allegation in a document of unknown credibility that the no-build alternative is preferable to any offsite ISFSI option. See OGD Petition at 30. Such an allegation does not speak to the Applicant’s analysis at all and it does not provide any reasons why any specific part of the application is wrong or any specific material should have been included; a petitioner must present a “reasoned statement” of why the application is unacceptable to have a contention admitted. See Turkey Point, LBP-90-16, 31 NRC at 521 & n.12. Here, OGD has not provided such a statement; thus this subcontention must be dismissed.

Finally, this subcontention must be dismissed for having insufficient factual basis. 10 C.F.R. § 2.714(b)(2)(ii). The only item OGD cites to support its contention is a short,

conclusory allegation that storing spent fuel at reactor sites is safer than storing it offsite. OGD Petition at 30. The document provides no reasons to support its conclusion and the expertise of the author of the statement is completely unknown. See id. Furthermore, and significantly here, under NEPA as interpreted by the Commission, applicants need not perform a cost-benefit analysis at all if they can identify no environmentally superior alternatives to their proposal. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 162-63 (1978). OGD presents no arguments that the no-build alternative is environmentally superior to the Applicant's ISFSI proposal. See OGD Petition at 30. Thus OGD provides insufficient factual basis to support its contention that the Applicant's analysis is incorrect and this subcontention must be dismissed.

d) Analysis of Alternative Fuel Storage Locations in the U.S. and Abroad

OGD asserts that the Applicant has not shown the need for additional spent fuel storage capacity in the United States and that therefore the Applicant "should be required to evaluate existing and projected storage capacity both in the U.S. and abroad, and to evaluate existing and projected storage need." OGD Petition at 30-31.

OGD asserts, without providing any supporting factual or legal basis (see 10 C.F.R § 2.714(b)(2)(ii)), that the Applicant must provide in its statement of need for the facility, an analysis for each reactor site "in the U.S. and abroad." OGD Petition at 31. As discussed in Applicant's Response to Utah Contention X, supra, NEPA employs a rule of reason and both the NRC and CEQ regulations only call for an applicant to "briefly"

specify the underlying purpose and need for the proposed action. 10 C.F.R. Part 51, App. A § 4; 40 C.F.R. § 1502.13.

Like the State, OGD has come forward with no facts to suggest under NEPA's rule of reason that this brief description of need envisioned by the applicable regulatory authorities must be expanded into its proposed worldwide reactor analysis. Absent some supporting basis -- which is absent from OGD's contention -- one can only conclude that OGD, like the State, seeks to stymie this project by never-ending analysis. Therefore, this subcontention must be dismissed for lack of basis. 10 C.F.R. § 2.714(b)(2)(ii). Further, it should be dismissed for advocating stricter requirements than those imposed by the regulations, and therefore amounting to an impermissible collateral attack on the Commission's rules. See Section II.B supra.

This subcontention must be dismissed as well for failing to show that a genuine dispute exists with the applicant on a material issue of law or fact. 10 C.F.R. § 2.714(b)(2)(iii). OGD asserts that the need for the Applicant's ISFSI is not as urgent as the Applicant describes it to be because the need is allegedly driven by electric utilities desire to maintain the ability to transfer all the fuel in their reactors into their spent fuel pools in order to reduce refueling outage time and thus save money. OGD Petition at 30 (quoting Auke Piersma, The Real Costs of On-Site Storage of Highly Irradiated Nuclear Fuel). But the very study cited by OGD, and even the portion quoted by OGD, shows that there is no basis to OGD's contention. OGD cites the Piersma document for the proposition that "only 9 reactors will require irradiated nuclear pool expansion or dry cask storage before 2000." In other words, Piersma and OGD concede that nine reactors

will run out of spent fuel storage by 2000. Piersma and OGD also are silent on the situation after 2000, ignoring the fact that Applicant's proposed ISFSI is not scheduled to begin operation until 2002. LA, at 1-8. See also ER at 1.3-2.

Finally, this subcontention must be dismissed because OGD bases its criticism of the Applicant's need assessment on the premise that reducing refueling outage time and thus saving money does not constitute "need."

e) Disproportionate Impacts

OGD claims that there are a host of hazardous facilities within a 35-mile radius of the Skull Valley reservation and that the Environmental Report fails to evaluate "disproportionate impacts that may be suffered by the members of the Goshute Tribe who live in the area or OGD members" who may be affected by the proposed ISFSI. OGD Petition at 34. This subcontention must be dismissed for a lack of legal basis for consideration of solely "disparate or disproportionate" impacts under NEPA, for the reasons set forth in subpart a above.

Further, the contention must be dismissed for a lack of factual basis as required by 10 C.F.R. § 2.714(b). OGD has referred to and incorporated various documents concerning various hazardous facilities located within its self-proclaimed 35-mile radius. However, the mere citation of an alleged factual basis for a contention is not sufficient by itself. Rather, a petitioner is obligated to provide the technical analyses and expert opinion or other information showing why its bases support its contention. See Section

II.C supra. Where a petitioner has failed to do so, “the Board may not make factual inferences on [the] petitioner’s behalf.” Id.

OGD has failed to provide “analyses and expert opinion showing why its [asserted] factual bases” support its contention. It has merely provided a list of permits and related documents from various hazardous facilities from within its self-proscribed 35-mile limit with no analysis that would support a contention that the cumulative presence of the ISFSI together with these other facilities presents a disproportionately high and adverse impact on the health or environment of persons living on or close to the Skull Valley reservation.

Specifically, OGD fails to provide credible scenarios in Contention O -- or any of its other contentions -- for an accident whereby the proposed ISFSI would have an adverse impact on the surrounding population. Nor by the same token has OGD provided any factual basis for a scenario that would result in the release of hazardous materials from one of these other facilities. Nor has OGD explained how a release of hazardous materials from one of these other facilities would travel to the Skull Valley Reservation, or provided any basis to conclude that any materials that may reach the reservation area would have a significant adverse consequence.

Indeed, OGD’s own Exhibit 21 reflects that the Clive Incineration Facility (to which OGD refers in its Petition as emitting numerous hazardous emissions into the surrounding area) has as a practical matter no impact whatsoever on the Reservation. The incinerator is located approximately 37 miles northwest of Grantsville in Tooele County,

which would place it about 40 miles north northwest from the Skull Valley Reservation. See OGD Exhibit 21 at 8; LA at Figure 1-1. Using “conservative, worst-case exposure from stack emissions,” the risk assessment which OGD cites concluded that the “excess life time cancer risk associated with exposure to emissions” from the incineration for individuals living ten miles from the incinerator are “de minimus.” OGD Exhibit 21 at 2-3 (emphasis added).

Further, OGD ignores the evaluation of potential cumulative impacts in the Environmental Report and the SAR. The Environmental Report addresses the cumulative environmental impact of the ISFSI and other sources where they are relevant. See, e.g., ER §§ 4.1.3, 4.2.3, 4.1.7, 4.2.7. Moreover, the Applicant has considered the potential impact of other facilities in Tooele County on the ISFSI and has found that it is unlikely that they would have any. See SAR § 2.2. For example, the Applicant has considered the effects of operations at the Tekoi Rocket Engine Test Facility, Dugway Proving Ground, and Tooele Army Depot, the industrial, transportation, or military facilities closest to the site, and has found that they would pose no threat to the ISFSI because of the distance to them and the presence of intervening terrain. See SAR at 2.2-1 to 4. OGD provides absolutely no factual basis to support a challenge to these determinations made in the SAR.

OGD has not met the standards set by NRC precedent on the admissibility of contentions alleging cumulative environmental effects. The petitioner must specify the effects and must come forward with specific facts and reasons to show that such effects will occur. See Duquesne Light Company (Beaver Valley Power Station, Unit 2), LBP-

84-6, 19 NRC 393, 425 (1984). In particular, it must come forward with specific information regarding the incremental effects of the proposed action and it must show why the applicant's analysis of the pre-existing effects with which the effects of the proposed action will supposedly be cumulative is wrong. Georgia Power Company (Vogtle Nuclear Plant, Units 1 and 2), LBP-84-35, 20 NRC 887, 914 (1984); Toledo Edison Company (Davis-Besse Nuclear Power Station, Unit 1), LBP-87-11, 25 NRC 287, 293 (1987); Rancho Seco, supra 38 NRC at 247 (petitioners must also come forward with data regarding pre-existing effects). OGD has not met this burden.

In short, OGD has supplied neither a legal or factual basis for its claims of disproportionate impact, and this subcontention must be dismissed.

f) The Impact of the ISFSI on Local Property Values

OGD claims that

[t]he ER fails to address the effect that the facility will have on property that is owned by members of OGD or by people living in and around the area of the proposed ISFSI site. The property values of the surrounding lands will be diminished by the ISFSI site itself, the dangers of nuclear waste transport, and the fear that these activities engender in the public.

OGD Petition at 34-35.

This subcontention must be dismissed because it lacks sufficient factual basis. 10 C.F.R. § 2.714(b)(2)(ii). OGD provides insufficient bases in the form of alleged facts, expert opinion, or documents to support its allegation that the Applicant's proposed ISFSI will have any impact on its members' property values. See OGD Petition at 34.

OGD cites Kelley v. Selin, 42 F.3d 1501, 1509 (6th Cir. 1995), and City of Santa Fe v. Komis, 845 P.2d 753 (N.M. 1992), to support its claim that the siting of the Applicant's ISFSI will harm OGD members' property values. OGD Supp. Petition at 34. These cases, however, do not support the point for which they are urged and thus this subcontention must be dismissed. Vermont Yankee Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990).

The court in Kelley did not hold that the storage of spent fuel at an ISFSI at the nearby Palisades nuclear reactor would have any impact on the petitioners' nearby property values. See Kelley, 42 F.3d at 1509-10. The court merely acknowledged that the petitioners had "alleged sufficient injury to establish standing," where the injuries alleged included "harm to [the petitioners'] aesthetic interests and their physical health" as well as "that the value of his or her property will be diminished." Id. at 1509. That holding is irrelevant here. First, a petitioner's burden of coming forward with factual bases to support a contention in an NRC licensing hearing is significantly higher than the "notice pleading" standard a party must meet to gain admission into Federal court. Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 & n.7 (1996). While the petitioners' assertions of harm to their property values in Kelley may have been sufficient to satisfy the "threatened injury" test necessary (along with the "zone of interest" test) to provide them with standing (see Kelley, 42 F.3d at 1508), their assertions, without more, do not rise to the factual standard required to warrant admission of a contention in an NRC licensing hearing. Yankee Atomic, CLI-

96-7, 43 NRC at 248 n.7. Second, in addition to asserting that the storage of the spent fuel would harm their property values, the petitioners in Kelley also alleged that it would harm their “aesthetic interests and their physical health” and both of those alleged injuries, independently, would be sufficient to satisfy the “threatened injury” test. See Kelley, 42 F.3d at 1509-10. Thus Kelley does not provide OGD with a factual basis to warrant the admission of this subcontention and it must be dismissed.

Similarly, while the court in Komis did find that the future transportation of nuclear waste would have an impact on the respondents’ property value, that finding was based on the public’s (i.e., potential buyers’) fear of waste. See Komis, 845 P.2d at 755-56. As the Applicant demonstrates below, fear and its effects are not cognizable under the Atomic Energy Act (“AEA”) or NEPA, the statutes under which the NRC holds licensing hearings. See infra. The court’s holding in Komis was based on its interpretation of a New Mexico statute (845 P.2d at 755 n.1), so it is not relevant to this hearing and does not provide a basis for OGD’s assertion. Thus this subcontention must be dismissed.

As mentioned above, this subcontention must also be dismissed because psychological effects are outside the zones of interest protected by the AEA and NEPA, the statutes under which the NRC holds licensing hearings. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-82-6, 15 NRC 407, 408 (1982) (AEA); Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772 (1983) (NEPA). Purely economic effects are also outside the zones of interest of the AEA and NEPA and may not give rise to admissible contentions. See e.g., Sacramento

Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992). NEPA does not encompass adverse health effects resulting from the fear of the risk of an accident at a nuclear power plant. Metropolitan Edison, 460 U.S. at 775. And it does not encompass effects on property values arising solely out of the fear of the presence of a nuclear power plant, Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980), or the fear of radiological contamination potentially caused by a nuclear power plant, Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1448-49 (1982). To be cognizable under NEPA, there must be "a reasonably close causal relationship between a change in the physical environment and the effect at issue." Metropolitan Edison, 460 U.S. at 774 (emphasis added).

While OGD presents affidavits to support its claim that its members fear the siting of the ISFSI and the transportation of spent fuel (see OGD Exhibits 16-19), it supplies no factual basis whatsoever to show that the ISFSI or the transportation of spent fuel will harm the physical environment. See *id.*; OGD Petition at 34. Therefore, OGD shows no injury to its members' property values that is cognizable under either NEPA or the AEA. Moreover, whether the OGD members' fear is unreasonable or reasonable (see OGD Petition at 34) is irrelevant; fear and its effects on property values do not give rise to litigable contentions. Therefore, because the only source of injury for which OGD provides a factual basis is not cognizable under either the AEA or NEPA, this subcontention must be dismissed.

P. OGD Contention P: Members of OGD Will Be Adversely Impacted by Routine Operations of the Proposed Storage Facility and Its Associated Transportation Activities.

1. The Contention:

OGD alleges in Contention P that:

The ability of OGD members to pursue the traditional Goshute life style will be adversely impacted by the routine operations at the storage facility. Obvious impacts resulting from the physical presence of the facility are; visual intrusion, noise, worker and visitor traffic to and from the storage site, and presence of strangers in the community. Those impacts that are not as obvious but nonetheless serious are; individual and collective social psychological, and cultural impacts such as a sense of loss of well-being because of the dangerous wastes that are being stored near their homes, in their community, and on their ancestral lands.

The ability of OGD members to pursue a traditional Goshute life style will be adversely affected by routine transportation operations of spent nuclear fuel and/or the presence of trucks, especially very large heavy haul trucks. The other obvious and other effects include the same kind of effects that are listed above, including fear that a transportation accident might happen, fear of acts of terrorism or sabotage which could expose members of OGD and their families, their homes, the community and their ancestral land.

OGD Petition at 36. The asserted basis for the contention states that 10 C.F.R. § 72.32(a)(5) requires that the Application contain a brief description of the means of mitigating the consequences of each type of accident, and that the Application fails to address the concerns that OGD members have about the “obvious impacts resulting from living in fear that an accident will happen which could expose members and their families, their homes, their community and their ancestral land” and make “their ancestral

homelands unlivable.” OGD Petition at 35-36.<sup>106</sup> In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated incorporating the specific allegations in its bases as indicated below:

The ability of OGD members to pursue the traditional Goshute life style will be adversely impacted by the routine operations at the storage facility, specifically:

- a) The storage facility will have a visual impact.
- b) The facility will have other impacts, including noise, the intrusion of vehicular and personnel traffic into the site area, and the presence of strangers.
- c) The License Application has not addressed the concerns of OGD members regarding the impact of living in fear of the wastes stored at the ISFSI and in fear of an accident at the site that could expose the members and their families.

2. Applicant’s Response to the Contention

OGD raises a number of issues under Contention P, which we address in turn below.

a) Visual Impact

OGD claims that “[t]he ability of OGD members to pursue the traditional Goshute life style will be adversely impacted by the routine operations at the storage facility.”

OGD Petition at 36. “Obvious impacts resulting from the physical presence of the facility [include:] visual intrusion.” Id.

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<sup>106</sup> The basis also states that OGD incorporates by reference the discussions of “accidents and the mitigation of those accidents” found in its Contentions A and C. OGD Petition at 37. The Applicant’s responses to the “accidents and the mitigation of those accidents” discussed in OGD’s Contentions A and C are fully addressed in its responses to those contentions.

This subcontention must also be dismissed because it ignores relevant material submitted by the Applicant. See, Section II.C.2, pp. 15-16, supra. The Environmental Report addresses the visual impact of the ISFSI, including its impact on the use and enjoyment of the surrounding area, regional parks, and wilderness areas. ER at 2.7-10, 2.9-3 to 2.9-4, 4.1-19, 4.2-7 to 4.2-9. The ISFSI was specifically designed to minimize its visual impact (its features are typical of other human settlements in Skull Valley); it is also remote (e.g., most OGD members live more than two miles from the site, OGD Exhibits 16, 17, 18, and 19) and partly obscured from view by the surrounding terrain (e.g., Hickman Knolls screens the site from view from the south). Id. at 4.2-7 to 4.2-8. Because OGD has ignored this material, this subcontention must be dismissed.

Moreover, this subcontention must be dismissed because it does not include “sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact.” 10 C.F.R. § 2.714(b)(2)(iii). It does not provide the “supporting reasons for the petitioner’s belief” that the application is inadequate. Id. While the fact that the ISFSI will be visible is obvious, OGD presents no facts, expert opinion, or documentation to indicate the relative visual impact of the facility, the nature of the impact, or the facility’s impact in relation to its surroundings. OGD Petition at 35-36. Even the affidavits OGD cites in support of other subcontentions do not provide a basis for OGD’s allegation. See OGD Exhibits 16, 17, 18, and 19.

Our memorandum defines the failure to demonstrate a genuine issue of fact as a failure to provide any factual evidence or supporting documents that produce some doubt about the adequacy of a specified portion of [the] Applicant’s documents or that provides supporting reasons

that tend to show that there is some specified omission from [the] Applicant's documents.

Florida Power and Light Company (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 521 n.12 (1990). Because OGD has failed to provide any factual evidence or supporting reasons that tend to cast doubt on a specified portion of the application, this subcontention must be dismissed.

b) Noise and Intrusion of Vehicular and Personnel Traffic

OGD also claims that the ability of OGD members to pursue the traditional Goshute lifestyle will be adversely impacted by "noise, worker and visitor traffic to and from the storage site, and presence of strangers in the community" and the routine transportation operations of spent nuclear fuel, including the presence of heavy haul fuel transportation trucks. OGD Petition at 36.

This subcontention like (a) must be dismissed because it ignores relevant material submitted by the Applicant. The Environmental Report addresses the impact of the construction and the operation of the ISFSI with respect to personnel traffic, vehicular traffic, and noise. See ER §§ 4.1.6, 4.1.7, 4.2.6, 4.2.7. The Environmental Report states that during the initial construction phase, 130 workers will be required on site, during later phases 43 workers will be required, and during operation, 42 staff members will be present. Id. at 4.1-11, 4.2-5. The construction work force and operating staff are expected to be drawn from the Tooele County and Salt Lake City areas, so personnel will commute to the site and there will be no influx of families with school-age children and

no impact on housing, schools, or the availability of other government services. Id. at 4.1-11, 4.2-5 to 6.

Regarding vehicular traffic and noise, the Environmental Report analyzes the number of truck trips per day that will be taken to and from the ISFSI, including trips taken by heavy haul trucks transporting spent fuel casks. Id. at 4.1-13 to 14, 4.1-16 to 17, 4.2.6, 4.7-7.<sup>107</sup> It also projects the number of personal vehicle trips that the construction workers and staff will make to the site. Id. at 4.1-14, 4.1-16 to 17, 4.2-6. The Environmental Report then analyzes the vehicular traffic and projects the congestive effect on local roads. Id. at 4.1-14 to 17, 4.2-6. It analyzes the noise impact of the traffic in terms of decibels and compares it to Federal Highway Administration and EPA standards. Id. at 4.1-15 to 18, 4.2-6. Because OGD has ignored this material, this subcontention must be dismissed.

This subcontention must also be dismissed because it does not include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. 10 C.F.R. § 2.714(b)(2)(iii). It does not provide supporting reasons for OGD's belief that the application is inadequate. Id. OGD presents no facts, expert opinion, or documentation regarding the intrusion of personnel into the ISFSI site area, vehicular traffic, or noise, or the Applicant's analysis thereof. OGD Petition at 35-36. Because OGD has failed to provide any factual evidence or supporting documents that

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<sup>107</sup> The number of heavy haul fuel transportation truck trips to and from the ISFSI (fewer than one per day, on average) will be quite small compared to the number of ordinary construction-related truck trips (a minimum of 20 per day, on average, over the first 10 years of operation of the facility). Compare ER at 4.1-17 with ER at 4.7-7.

produce some doubt about the adequacy of a specified portion of the application or that provide supporting reasons that tend to show that there is some specified omission from the application, OGD has failed to show that a material dispute exists with the Applicant and this subcontention must be dismissed. Turkey Point, LBP-90-16, 31 NRC at 521 n.12.

c) Fear of Waste and Accidents

OGD alleges that the License Application has not addressed the concerns of OGD members regarding the impact of living in fear of the wastes stored at the ISFSI and fear of an accident at the site (or acts of sabotage or terrorism) that could expose the members and their families. OGD Petition at 36. According to OGD, the Applicant has not addressed the “social, psychological, and cultural impacts such as a sense of loss of well-being because of the dangerous wastes that are being stored near their homes, in their community, and on their ancestral lands.” Id. The Applicant has also allegedly “failed to address the concerns that OGD members have about the obvious impacts resulting from living in fear that an accident will happen which could expose members and their families.” Id. OGD asserts that 10 C.F.R. § 72.32(a)(5) requires the application to include a brief description of the means of mitigating the consequences of each type of accident. Id. (citing 10 C.F.R. § 72.32(a)(5)).

This subcontention must be dismissed because psychological effects are outside the zone of interest protected by the Atomic Energy Act (AEA) and NEPA, the statutes under which the NRC holds licensing hearings. See Response to OGD Contention O,

subpart (f). Fear and its effects on the mental or physical well-being of individuals (see OGD Petition at 36-37) do not give rise to litigable contentions and thus this subcontention must be dismissed.

Furthermore, this subcontention must be dismissed as an impermissible collateral attack on the Commission's regulations for advocating stricter requirements than they impose. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982). 10 C.F.R. § 72.32(a)(5) does not require the Applicant to mitigate the effects of the fear of accidents. 10 C.F.R. § 72.32(a) states that an applicant's Emergency Plan must include the following information:

(5) *Mitigation of Consequences*. A brief description of the means of mitigating the consequences of each type of accident, including those provided to protect workers onsite, and a description of the program for maintaining the equipment.

10 C.F.R. § 72.32(a)(5). Thus the regulation speaks to the mitigation of the consequences of accidents, not the fear or apprehension thereof. Moreover, because of the low risk posed to the public, emergency plans for ISFSI's that do not handle or repackage spent fuel are not required to have offsite components. 60 Fed. Reg. 32,430, 32,436, 32,442 (1995) (10 C.F.R. § 72.32, Statement of Considerations); Northern States Power Company (Independent Fuel Storage Installation) Director's Decision under 10 C.F.R. § 2.206 (DD-97-24), 62 Fed. Reg. 51,916, 51,917 (1997); see supra Applicant's Response to OGD Contention B. Therefore, such emergency plans need not address even postulated physical accident consequences to people offsite, let alone the psychological

effects on them stemming from their fear of accidents. Thus, for advocating stricter requirements than the NRC's regulations impose, this subcontention must be dismissed.

## VII. CONFEDERATED TRIBES CONTENTIONS

### A. Confederated Tribes Contention A: Decommissioning Plan Deficiencies

Confederated Tribes has filed 8 contentions<sup>108</sup> to which the Applicant responds as set forth below.

#### 1. The Contention

The Confederated Tribes allege in Contention A that:

- PFS has not provided reasonable assurance that the ISFSI can be cleaned up and adequately restored upon cessation of operations.

Confederated Tribes Petition at 2. The asserted bases for the contention are set forth in two pages of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows, incorporating the specific allegations in its bases as indicated below.

PFS has not provided reasonable assurance that the ISFSI can be cleaned up and adequately restored upon cessation of operations in that:

- a) The Applicant's cost analysis is inadequate in that it does not take into account: i) the lack of available sites for disposing of mixed wastes, ii) the consideration offered to the Skull Valley Band for permission to locate the ISFSI on their Reservation, and iii) the cost

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See Statement of Contentions on Behalf of the Confederated Tribes of the Goshute Reservation and David Pete (hereinafter "Confederated Tribes Petition") dated November 23, 1997.

of the disposal of radioactive materials upon decommissioning.

- b) The license application should be rejected because it does not provide a reasonable assurance that PFS knows how the stored radioactive materials will ultimately be disposed of or how much such disposal will cost.
- c) No specific information has been provided to define the amount of funds required to be allocated to insure the adequate and timely handling of the eventual decommissioning of the ISFSI. See 10 C.F.R. §§ 72.25, 72.30(a), (b).
- d) PFS's description of the decommissioning process is not adequate in that it does not provide full details of the decommissioning and dismantlement of the ISFSI, including whether buildings that may have been radioactively contaminated will be left standing.

## 2. Applicant's Response to the Contention

The Confederated Tribes raise a number of issues under Contention A, which we address in turn below. At the outset, we draw the Board's attention to the pleading requirements for contentions concerning decommissioning and decommissioning funding that have been laid down in NRC case law. See, e.g., Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1 (1996) [hereinafter Yankee Atomic I]; Yankee Atomic Electric Company (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61 (1996) [hereinafter Yankee Atomic II]; Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235 (1996) [hereinafter Yankee Atomic III]. These standards, which have been set out in full detail in Applicant's Response to Utah Contention S, apply to all of the Confederated Tribes' decommissioning subcontentions.

a) Cost Analysis Factors

The Confederated Tribes allege that the Applicant has failed to consider a number of factors relevant to the cost of decommissioning of the ISFSI. Confederated Tribes Petition at 2. The factors are: i) the lack of available sites for disposing of mixed wastes, ii) the consideration offered to the Skull Valley Band for permission to locate the ISFSI on their Reservation, and iii) the cost of the disposal of radioactive materials upon decommissioning. Id.

At the outset, this subcontention must be dismissed because it fails to provide “references to those specific sources and documents . . . on which the petitioner intends to rely to establish [the] facts or expert opinion” on which it bases its contention. 10 C.F.R. § 2.714(b)(2)(ii). The Confederated Tribes refer to no sources or documents to support their claim that the allegedly omitted cost factors are relevant or significant to the ultimate cost of the decommissioning of the Applicant’s ISFSI. Confederated Tribes Petition at 2. While the Confederated Tribes cite a Defense Department document alleging that there are no sites available for the disposal of mixed wastes, they provide no basis for concluding that decommissioning of the proposed ISFSI would involve mixed wastes, nor do they indicate at all how unavailability of mixed waste sites would be relevant or even significant to the cost of decommissioning the ISFSI. Id. In fact, the Decommissioning Plan states that the Applicant only anticipates the generation of low-level costs at decommissioning from the cleanup of small amounts of residual contamination and the potential dispersal of contaminated storage casks. LA App. B at 2-3 to 4. Similarly, Confederated Tribes have set forth no basis why the consideration

offered to the Skull Valley Band for locating the ISFSI on their reservation is relevant to the decommissioning of the site. The Confederated Tribes have completely failed to set forth a factual basis for this subcontention as required by C.F.R. § 2.714(b)(2)(ii).

Therefore, this subcontention must be dismissed.

Next, this subcontention must be dismissed because contentions regarding the accuracy or completeness of a decommissioning plan (or decommissioning funding plan) are admissible only if the contention also shows that the alleged deficiency in the plan “has some independent health and safety significance.” Yankee Atomic III, CLI-96-7, 43 NRC at 256. The Confederated Tribes claim no health or safety significance for the alleged omission of the cost factors or the Applicant’s total cost estimate. See Confederated Tribes Petition at 2. Petitioners must show “some specific tangible link between the alleged errors in the [decommissioning] plan and the health and safety impacts they invoke.” Yankee Atomic III, CLI-96-7, 43 NRC at 258. Here, the Confederated Tribes invoked no health or safety impacts at all, so the subcontention must be dismissed. Nor may the Board infer such a significance from the petitioners’ language. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 304 (1995). A petitioner is obligated “to provide the [technical] analyses and expert opinion” or other information “showing why its bases support its contention.” Georgia Tech, LBP-95-6, 41 NRC at 304. Where a petitioner has failed to do so, “the Board may not make factual inferences on [the] petitioner’s behalf.” Id. Therefore, the Board must rely on what the petitioners actually say in their

contention and must not infer omitted support or meaning from its language or its tone.

See Section II.C supra.

Furthermore, this subcontention must be dismissed because challenges to the reasonableness of an applicant's decommissioning cost estimates are not admissible unless the petitioners show that "there is no reasonable assurance that the amount will be paid." Yankee Atomic I, CLI-96-1, 43 NRC at 9. Without such a showing the only relief available would be "the formalistic redraft of the plan with a new estimate." Yankee Atomic I, CLI-96-1, 43 NRC at 9. Such relief is not sufficient to warrant consideration of a contention because petitioners' are not entitled to it. Petitioners are only entitled to relief from the injury they rely upon to afford them standing in a hearing, id. at 6, and because a mere redrafting of a financial plan would have no effect on the physical events taking place at a facility (i.e., the potential health and safety threats that provide petitioners with standings), petitioners are not entitled to such relief. See id. at 6, 9. The Confederated Tribes make no assertions that the Applicant will be unable to pay its decommissioning costs; they merely allege that the cost estimates should be "more realistic." Confederated Tribes Petition at 2. Therefore, they are not entitled to the relief they seek and the subcontention must be dismissed.

Furthermore, without some indication that an alleged flaw in a funding plan will result in an actual shortfall of funds needed for decommissioning, this contention does not satisfy the materiality requirement of 10 C.F.R. § 2.714. Yankee Atomic III, CLI-96-7, 43 NRC at 259. The legal standard is reasonable assurance of funds, not "ironclad" assurance. Id. at 260. Short of an allegation of a "gross discrepancy" in the

decommissioning cost estimate, supported by the necessary factual basis, a charge alleging the inadequacy of the estimate or the funding plan will not be admitted. Id. The Confederated Tribes do not indicate that the alleged omission of decommissioning cost factors will result an actual shortfall of funds or a “gross discrepancy” in the Applicant’s cost estimate. See Confederated Tribes Petition at 2. Therefore, this subcontention is also not material and must be dismissed.

b) Disposal of Radioactive Materials

The Confederated Tribes allege that the application should be rejected because the Applicant does not provide reasonable assurance (in the form of a specific plan) that it knows how the stored radioactive materials will be disposed of or how much such disposal will cost. Confederated Tribes Petition at 2-3.

The part of this subcontention that claims a lack of reasonable assurance that the wastes can be disposed of must be dismissed because it seeks to litigate a generic determination made by the NRC. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 30 (1993). The NRC has determined that

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 . . . spent fuel originating in such reactor and generated up to that time.

10 C.F.R. § 51.23(a) (emphasis added). Therefore, the Applicant may indeed rely on the availability of a Federal fuel spent repository at the end of the license term of the ISFSI as a place to dispose of its spent fuel and need not provide other assurance that such a site will exist. As an attack on the NRC's determination, this subcontention is "barred as a matter of law." Diablo Canyon, LBP-93-1, 37 NRC at 30.

Moreover, this part of the subcontention should also be dismissed because it does not show that the alleged deficiency in the Applicant's decommissioning plan "has some independent health and safety significance." Yankee Atomic III, CLI-96-7, 43 NRC at 256. In Yankee Atomic II, the Board specifically determined that uncertainty regarding DOE's establishment of a mined geologic repository for spent fuel does not have the independent health and safety significance required to support a decommissioning contention. Yankee Atomic II, LBP-96-2, 43 NRC at 77 n.12, 78. (citing 10 C.F.R. § 51.23(a)). Therefore, this subcontention also must be dismissed.

Finally, the part of the subcontention that asserts that the Applicant must provide a cost estimate for the ultimate disposal of the spent fuel at the ISFSI must be dismissed as being beyond the scope of this proceeding. See supra Section III. Congress has provided a statutory means by which nuclear utilities will pay for DOE's ultimate disposal of the spent nuclear fuel generated at nuclear power plants. Indiana Michigan Power Company v. DOE, 88 F.3d 1272, 1273 (D.C. Cir. 1996). Under the Nuclear Waste Policy Act of 1982, utilities pay the Secretary of Energy statutorily imposed fees, in return for which DOE will construct a repository for the fuel. Id. (citing 42 U.S.C. §§ 10222(a)(5)(B), 10131(a)(5) (1994)). The statute requires utilities to enter into standard

contracts with DOE under which, in return for the fees, DOE will dispose of the fuel. Id.; see 10 C.F.R. § 961.11 (DOE standard contract). Therefore, because the issue of the cost of the ultimate disposal of spent fuel has been addressed statutorily, the issue is outside the scope of this hearing. See, e.g., Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 2 and 3, ALAB 216, 8 A.E.C. 13, 20 (1974)(it is well established that “a licensing proceeding . . . is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission’s regulatory process”). See also Section II.B. supra.

c) Decommissioning Cost Estimate

The Confederated Tribes claim that the Applicant “should be required to more adequately explain the derivation of its anticipated [decommissioning] costs to demonstrate that its estimates are rational and accurate.” Confederated Tribes Petition at 3.

First, this subcontention should be dismissed because it lacks sufficient factual basis. 10 C.F.R. § 2.714(b)(2)(ii). While the Confederated Tribes assert that the Applicant has left out “specific information . . . to define the amount of funds required” for decommissioning, it does not specify any details or information that the Applicant has omitted. Confederated Tribes Petition at 3. Thus the subcontention lacks facts or expert opinion to support it and lacks references to specific sources and documents to establish said facts or opinion. 10 C.F.R. § 2.714(b)(2)(ii). Therefore it must be dismissed.

Second, this subcontention must be dismissed because it challenges the reasonableness of the Applicant's decommissioning cost estimates without showing that "there is no reasonable assurance that the amount will be paid." Yankee Atomic I, CLI-96-1, 43 NRC at 9. Without such a showing the only relief available to the Confederated Tribes would be "the formalistic redraft of the plan with a new estimate," and the Confederated Tribes are not entitled to such relief. Id. at 6, 9. The Confederated Tribes make no argument at all that the Applicant will be unable to pay its decommissioning costs. See Confederated Tribes Petition at 3. Thus this contention must be dismissed.

Furthermore, without any indication that the alleged flaws in the Applicant's funding plan will result in an actual shortfall of funds needed for decommissioning, this subcontention does not satisfy the materiality requirement of 2.714. Yankee Atomic III, CLI-96-7, 43 NRC at 259. The Confederated Tribes' assertions that the Applicant's information is inadequate say nothing about a funding shortfall. See Confederated Tribes Petition at 3. Thus this subcontention must be dismissed.

Finally, this subcontention must be dismissed as lacking "sufficient information . . . to show that a genuine dispute exists with the [A]pplicant on a material issue of law or fact." 10 C.F.R. § 2.714(b)(2)(iii). The Confederated Tribes claim that the Applicant "should be required to more adequately explain the derivation of its anticipated costs," yet they provide no information or point of law whatsoever to support their assertion that the Applicant's explanation or derivation of its anticipated costs are inadequate and thus no showing that a genuine dispute exists on a material issue. See Confederated Tribes Petition at 3. Thus this subcontention must be dismissed.

d) Decommissioning Process

The Confederated Tribes claim that the Applicant's description of the decommissioning process is inadequate and that the application should be amended "to include full details of decommissioning and dismantlement of the ISFSI." Confederated Tribes Petition at 3. The application should also indicate "whether PFS intends to leave buildings standing that may have been radioactively contaminated." Id.

First, this subcontention must be dismissed as an impermissible attack on the Commission's regulations. There is no requirement that the "full details of decommissioning and dismantlement of the ISFSI" be included in the preliminary decommissioning plan under 10 C.F.R. § 72.30(a). Such detail is not required until filing of the final decommissioning plan under 10 C.F.R. § 72.54(g). Thus the contention "advocates stricter requirements than those imposed by regulation" and must be rejected.

Moreover, this subcontention must be dismissed because even contentions regarding the accuracy or completeness of a decommissioning plan that do have health and safety significance must allege more than mere uncertainty. Yankee Atomic I, CLI-96-1, 43 NRC at 8. It is unreasonable to require as much precision of an applicant's proposed decommissioning procedures at the time of licensing as will be required of its final procedures at the time of decommissioning. Id.; see 10 C.F.R. § 72.54(g) (requirements for *final* decommissioning plan). Significant uncertainties today regarding the decommissioning of a facility 30 or more years into the future are inevitable. Yankee Atomic I, CLI-96-1, 43 NRC at 8. Therefore, because the Confederated Tribes merely allege that the application is inadequate because of uncertainties regarding the exact

procedures the Applicant will use to decommission the facility, see Confederated Tribes Petition at 3, this subcontention must be dismissed.

Finally, this subcontention must be dismissed because it ignores relevant material submitted by the Applicant. See Section II, C, pp. 15-16, supra. In contending that the application should be amended to include “whether PFS intends to leave buildings standing that may have been radioactively contaminated,” Confederated Tribes Petition at 3, the Confederated Tribes ignore directly relevant material in the License Application. See LA Appendix B at 1-1, 2-1, 2-4. The Decommissioning Plan states that: “The objective of decommissioning activities for the PFSF is to remove all radioactive materials having activities above the applicable NRC release limits in order that the site may be released for *unrestricted use*.” Id. at 2-1. “A final radiation survey will be conducted to assure that all radioactive materials have been removed from the site.” Id. at 2-4. 10 C.F.R. Part 20, Subpart D spells out the maximum allowable radiation dose rate limits for members of the public from licensee operations and thereby controls the maximum residual contamination allowable at the ISFSI site. 10 C.F.R. §§ 20.1301-1302. Therefore, because this subcontention ignores relevant material in the License Application, it must be dismissed. Moreover, to the extent the Confederated Tribes seeks to impose stricter standards than that required by 10 C.F.R. Part 20, Subpart D, the contention must also be dismissed as an impermissible challenge to agency regulations.

**B. Confederated Tribes Contention B: Lack of protection against worst case accidents**

1. The Contention

Confederated Tribes allege in Contention B that:

PFS has violated both NRC regulations and NEPA requirements by not adequately dealing with certain reasonably foreseeable accidents and failing to fully evaluate their potential impacts on health and the environment, to protect against them in an adequate manner, or to provide adequate emergency response measures.

Confederated Tribes Petition at 3. The asserted bases for the contention are set forth on pages 3 and 4 of the Petition. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention, incorporating the asserted 10 C.F.R. § 72.32 regulation, be restated as follows:

PFS has violated both NRC regulations and NEPA requirements by not adequately dealing with certain reasonably foreseeable accidents and failing to fully evaluate their potential impacts on health and the environment, to protect against them in an adequate manner, or to provide adequate emergency response measures in that:

- a) No adequate plan for protection against accidental mishandling of storage containers has been provided.
- b) No adequate plan for protection against terrorist attack (by ground or air) which could result in the rupture of the storage containers has been provided.
- c) No adequate plan for protection against mishaps or terrorism during transportation of radioactive material to the facility has been provided.

- d) No adequate plan for emergencies has been provided in that PFS has not secured commitments from local emergency responders.
- e) No adequate plan for handling the impacts stemming from natural disasters such as wildfires has been provided.

2. Applicant's Response to the Contention

The Confederated Tribes raise various issues in Contention B, which the Applicant addresses below.

a) Mishandling of Storage Containers

The Confederated Tribes make the unsupported claim that “[n]o adequate plan for protection against accidental mishandling of storage containers has been provided.”<sup>109</sup>

Petition at 4. They provide no other information or support for this contention.

The Applicant has extensively addressed the consequences of a potential cask mishandling, and has concluded that the result of even a severe cask mishandling would be inconsequential. See SAR (“SAR”), § 8.2.6, “Hypothetical Storage Cask Drop/TipOver.” The limiting height for a cask drop event is ten inches because the cask transporter is designed to mechanically prevent a storage cask lift of more than 10 inches above the ground. The Safety Analysis Report has analyzed a cask drop from this

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<sup>109</sup> Confederated Tribes assert that NRC emergency planning regulations at 10 C.F.R. § 70.22 require license applicants to describe each type of radioactive materials accident for which protective action may be needed. But the Applicant's license application was submitted pursuant to Part 72 and, therefore, § 70.22 (which concerns information required in materials licenses applications under 10 C.F.R. Part 70) is inapplicable. Presumably, Petitioners were referring to § 72.32(a) which requires each application for an ISFSI to include an Emergency Plan that identifies each type of radioactive materials accident, among other requirements.

maximum height. As analyzed in the Safety Analysis Report, “storage cask end drops of up to 10 inches would not result in canister breach, and the storage cask would retain its structural integrity and continue to provide shielding and natural convection cooling for the canister.” SAR at § 8.2.6.1.

Even though they are “hypothetical events [with] no credible causes,” the Safety Analysis Report also analyzes “storage cask tipover accidents, and storage cask vertical end drop accidents from heights greater than 10 inches.” SAR at 8.2-30. Further, despite the improbability of such an event, the Safety Analysis Report provides a plan to contend with a storage cask tipover/drop accident. See SAR at 8.2-35, 36.

Although the Safety Analysis Report discusses cask handling accidents and a plan for coping with them, the Confederated Tribes neither refer to the Application nor provide any reasons to support their contention as required by 10 C.F.R. § 2.714(b)(2)(iii). Nor do they provide a “concise statement of the alleged facts or expert opinion” supporting the contention together with references to “specific sources and documents . . . on which the petitioner intends to rely to establish those facts or expert opinion” required by 10 C.F.R. § 2.714(b)(2)(ii). In Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993) (“Rancho Seco”), the petitioner similarly made no showing that the findings contained in the applicant’s Environmental Assessment were erroneous; “identifie[d] no specific additional information that . . . should have been included and might [have] affect[ed] any conclusions in the EA . . . [and] identif[ied] no facts or expert opinion, and

reference[d] no documents or other sources establishing the existence of a genuine dispute on a material issue of law or fact.” The Board therefore found the contention to be “fatally flawed” and rejected it. Rancho Seco, LBP-93-23, 38 NRC at 247-48. The Board should similarly reject Confederated Tribes’ contention.

Confederated Tribes state as a general matter that, “under NEPA, PFS must assess the consequences of reasonably foreseeable low probability worst case accidents.” Contention B at 3 (emphasis added). But their reference to NEPA in its contention does not in any way lessen the pleading requirements of § 2.714. NEPA does not require assessment of consequences of unforeseeable, remote and speculative accident scenarios; such scenarios need not even be considered. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277 (1987) (“NEPA does not require NRC consideration of severe, beyond design-basis accidents because they are, by definition, highly improbable--i.e., remote and speculative events.”).

For example, the Appeal Board in Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-877, 26 NRC 287 (1987) rejected a contention alleging the possibility of a zircalloy cladding fire due to loss of water from the spent fuel pool. The Board stated:

[N]either the contention nor the basis assigned for it contains an adequate explanation respecting why there is a reasonable possibility that the spent fuel pools would lose sufficient water to give rise to the chance of a fuel cladding fire and resultant radiation release.

Id. at 292. The Board then laid out possible scenarios that could lead to a significant loss of pool water but concluded that “the likelihood of such an untoward occurrence having that result is remote.” Id. at 293. The Board then emphasized that “NEPA does not require NRC consideration . . . of highly improbable--i.e., remote and speculative--events.” Id. Rather, the Board placed the burden on the intervenor to establish the likelihood of such an event. It said, “. . . it was incumbent upon the intervenor to provide at least some reason to think that . . . the possibility of an event causing a major loss of spent fuel pool water was sufficiently great to remove the hypothesized fuel cladding fire from the realm of the remote and speculative.” Id.

Confederated Tribes have failed to do so here. They have provided no technical analyses, expert opinion, or other information in support of their contention that the Applicant’s plan for protection against accidental mishandling of storage containers is inadequate as required by the Commission’s amended rule of procedures. See Section II. C. *supra*. Their contention is a bald conclusory assertion, totally devoid of supporting bases and as such the contention must be rejected as “fatally flawed.” Rancho Seco, LBP-93-23, 38 NRC at 248.

b) No Adequate Plan for Protection Against Terrorist Attack

Subpart (b) of the contention alleges that “[n]o adequate plan for protection against terrorist attack (by ground or air) which could result in the rupture of the storage containers has been provided.” Confederated Tribes Petition at 3. Again, Confederated Tribes have utterly failed to comply with the requirements of § 2.714(b)(2). They have

neither identified a credible terrorist attack scenario nor set forth any factual bases to support a terrorist attack scenario that could result in breach of a canister. Nor have they identified any way in which the security of the facility is inadequate. This subpart is fatally flawed in the same way as subpart a and, for the same reasons stated in part a above, this part of the contention must also be dismissed.

Furthermore, in similar contexts, licensing boards have rejected out-of-hand contentions that allege vulnerability to an air attack. In Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069 (1982), the Board rejected the petitioner's contention that the Applicant's safety analysis was deficient in that it failed to consider the "consequences of terrorists commandeering a very large airplane . . . and diving it into the containment." Id. at Eddleman Contention 52 at 2098. The grounds for rejection were that in accordance with 10 C.F.R. § 50.13, read in pari materia with Section 73.1:

Military style attacks with heavier weapons are not a part of the design basis threat for commercial reactors. Reactors could not be effectively protected against such attacks without turning them into virtually impregnable fortresses at much higher cost. Thus, [a]pplicants are not required to design against such things as . . . kamikaze dives by large airplanes, despite the fact that such attacks would damage and may well destroy a commercial reactor.

Carolina Power and Light Company, LBP-92-119A, 16 NRC at Eddleman Contention 52 at 2098. Applying the same logic here, Applicant should not be required to design the PFSF as an impenetrable fortress, impervious to any attack, no matter how incredible the postulated scenario.

c) Mishaps or Terrorism During Transportation of Canisters to the PFSF

Confederated Tribes allege in this subcontention that “[n]o adequate plan for protection against mishaps or terrorism during transportation of radioactive material to the facility has been provided.” Petition at 3. As with subparts a and b, the Confederated Tribes have failed to set forth any bases to support this contention. In addition, this subpart of the contention must be dismissed because the transportation of spent fuel is outside the scope of this hearing.

As discussed in Section III.B above, contentions are not cognizable unless they are material to a matter that falls within the scope of the proceeding for which the licensing board has been delegated jurisdiction as set forth in the Commission’s Notice of Opportunity for Hearing. The Notice of Opportunity for Hearing in this case delineates the scope of the present licensing proceeding to include only the consideration of “an application . . . for a materials license, under the provisions of 10 C.F.R. [P]art 72, . . . to possess spent fuel and other radioactive materials associated with spent fuel storage in an [ISFSI] located on the Skull Valley Goshute Indian Reservation . . . .” 62 Fed. Reg. 41,099 (1997) (Notice of Opportunity for Hearing). While ISFSIs are licensed under Part 72, the transportation of spent fuel is governed by Part 71 and other provisions, but not Part 72. 10 C.F.R. § 71.0. Thus, this subpart of the contention must be rejected as beyond the scope of the hearing.

d) No Adequate Plan for Emergencies

The Confederated Tribes allege that the Applicant has not provided for adequate emergency response in that it "has not secured commitments from local emergency responders." Confederated Tribes Petition at 4. The Confederated Tribes incorporate by reference, Exhibits 2(1) and 2(2) from the State of Utah's Motion to Suspend Licensing Proceedings, October 1, 1997, without indicating their relevance to the contention. See Confederated Tribes Petition at 4.

This subcontention must be dismissed as an as an impermissible attack on the NRC's regulations for advocating stricter standards than they impose. See Section II.B supra at 6. Contrary to the Confederated Tribes' claim, nothing in 10 C.F.R. § 72.32(a) requires the Applicant to "secure commitments" from offsite response organizations. Confederated Tribes Petition at 4; see 10 C.F.R. § 72.32(a). In fact, the NRC expressly rejected a suggestion that the regulations should "include the requirement that arrangements should be made (such as letters of agreement) with [offsite emergency response] organization[s]." 60 Fed. Reg. 32430 (1995) (Statements of Consideration, response to public comments on proposed 10 C.F.R. § 72.32). The NRC's rationale was that such arrangements or agreements were unnecessary: "offsite response organizations will respond in the event of an actual emergency in order to protect the health and safety of the public." Id. Therefore, there is no requirement that the Applicant secure commitments or agreements from any offsite response organization and hence, this subcontention must be dismissed as an impermissible collateral attack on the NRC's rules.

Next, regarding the Confederated Tribes' incorporation by reference of unspecified material from the State of Utah's Motion to Suspend Licensing Proceedings, Confederated Tribes Petition at 4, this subcontention must be dismissed for being vague and nonspecific. "[N]either Section 189a of the [Atomic Energy] Act nor Section 2.714 of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the [A]pplicant . . . ." Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983). "The Commission expects parties to bear their burden and to clearly identify matters on which they intend to rely with reference to a specific point." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241 (1989). The Confederated Tribes do not indicate in any way which material within the incorporated documents is pertinent to this subcontention. See Confederated Tribes Petition at 3. Therefore, this subcontention must be dismissed.

The documents cited by the Confederated Tribes are questionnaires from the State to the Tooele Valley Hospital and Tooele Police Chief on which each indicated that they had not been contacted by PFS. See State of Utah's Motion to Suspend Licensing Proceedings, dated October 1, 1997, Exhibit 2(1) and 2(2). To the extent Confederated Tribes seek to claim by reference to these letters that Applicant failed to notify and "allow the offsite response organizations expected to respond in case of an accident 60 days to comment on the . . . [Applicant's] emergency plan before submitting it to the NRC," as required by 10 C.F.R. § 72.32(a)(14), the Applicant's Claim must be rejected,

because it ignores relevant material submitted by the Applicant. See Section II.C, pp. 15-16, supra. As required by 10 C.F.R. § 72.32(a)(14), the Applicant provided the Emergency Plan to the Tooele County Department of Emergency Management—the offsite response organization it expected to respond (and coordinate responses) to an onsite emergency at its proposed ISFSI—at least 60 days before submitting its application to the NRC. Letter from Kari Sagers, Director, Tooele County Department of Emergency Management, to John D. Parkyn, Chairman of the Board, PFSLLC (June 3, 1997), included in Emergency Plan; see Northern States Power, DD-97-24, 62 Fed. Reg. at 51,917. Therefore the Applicant has complied with the applicable regulatory requirements and this subcontention must be dismissed.

e) Natural Disasters--Wildfires

The Confederated Tribes allege that the Applicant has not provided an adequate plan for “handling the impacts stemming from natural disasters such as wildfires” (Subcontention e, supra). Confederated Tribes Petition at 4. Referring to Exhibit 2(5) attached to the State of Utah’s motion to suspend licensing proceedings, the Confederated Tribes claim that “in the short span of only ten years there have been 48 wildfires at Skull Valley” half of which were started by lightening. Id.

This subcontention must be dismissed because it makes allegations without providing “concise statements of the alleged facts or expert opinion which supports” the allegations and it provides no “references to . . . specific sources and documents . . . on which the petitioner intends to rely to establish [said] facts or expert opinion.” 10 C.F.R.

§ 2.714(b)(2)(ii). While the Confederated Tribes provide a factual basis for the occurrence of fires in the Skull Valley generally, they provides no factual or expert opinion basis for believing that such fires would threaten the integrity of the spent fuel storage casks. See Confederated Tribes Petition at 4; compare EP at 2-15 to 16 (onsite fires below specified duration and temperature do not warrant classification as Alerts). For such a contention to be admitted, a petitioner must set forth a “technical basis in references or expert opinion” in order to support a claim that an accident scenario will cause an accidental release of radioactive materials. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 302 (1995). Confederated Tribes have not done so here.

Moreover, if a petitioner contends that a license application is inadequate on the basis of an analogy between the applicant’s facility and a proposed benchmark (i.e., the previous fires in the Skull Valley), the petitioner must establish that the benchmark is valid to show that the analogy raises a disputed material issue of fact with the applicant. Yankee Atomic Electric Company (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 32 (1996); Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 267 (1996) (petitioner must show “logical relationship” with alleged analogy). Again, Confederated Tribes have failed to do so, and therefore this contention must be rejected.

Further, the document that Confederated Tribes cite as a factual basis for their subcontention does not support their contention in that it suggests that wildfires would not threaten the integrity of the fuel storage casks. “Given the proposed method of

storage and fuel types . . . [t]he fuel rods should not be combustible given they will be sealed in steel and concrete." Memorandum from Dave Schen, Utah Department of Natural Resources, Division of Forestry, Fire and State Lands, to Jamie Dalton, Energy & Resource Planning (May 27, 1997), in Exhibit 2(5) to State of Utah's Motion to Suspend Licensing Proceedings, cited in Confederated Tribes Petition at 4 (emphasis added). A contention lacks a cognizable basis and must be dismissed if the document cited as its basis does not support the point for which it is urged. Vermont Yankee Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990) Thus, not only have the Confederated Tribes failed to provided facts or analysis to establish a credible accident scenario here, the document they cite as the factual basis for their subcontention suggests the opposite of what they assert. Therefore, this subcontention must be dismissed.

Moreover the contention overall is vague and unspecific and must be rejected as such. It claims that no adequate plan for handling impacts stemming from natural disasters such as wildfires has been provided. It fails to identify what the impacts are that have not been handled, fails to identify (other than wildfires) those natural disasters for which it claims the Plan is adequate and with respect to wildfires it has not identified the respects in which it claims the Plan is inadequate. In fact, the Emergency Plan and the Safety Analysis Report do address many potential emergency conditions, including natural disasters and fires, and means for mitigating their consequences. See EP Chapters

2 and 3 (addressing lightning, earthquakes, tornadoes, floods, and extreme temperatures); SAR Chapter 8.

Specifically regarding fires, the Emergency Plan states that fires of specified severity may warrant the declaration of an alert at the site. EP at 2-12 to 16. The ISFSI will possess a fire truck, firefighting equipment and trained personnel assigned to the site fire brigade to mitigate the effects of fires. EP at 3-5. Furthermore, the Applicant's firefighting capability will be supplemented by offsite Bureau of Land Management and Tooele County capabilities. EP at 3-5; SAR at xx. Regarding water supply, the onsite water storage tanks will be sized to handle onsite firefighting and other PFS needs. SAR at 2.5-5, 4.3-4 to 5. Additional water, if needed, can be obtained from the Reservation's water supply. ER at 4.2-4.

Although claiming that the Plan is inadequate, Confederated Tribes, similar to Rancho Seco, have identified no respect in which they contend the Plan is inadequate and have provided no facts or expert opinion to establish a genuine dispute on a material issue of law or fact with respect to the adequacy of the Plan. Therefore as in the Rancho Seco case, this contention must be dismissed as "fatally flawed." See Rancho Seco at 247-248.

Finally, "regulations do not require dedication of [planning] resources to handle every possible accident scenario that can be imagined. The concept of . . . regulation is that there should be core planning with sufficient planning flexibility to develop a reasonable ad hoc response to . . . very serious low probability accidents . . ."

Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-84-31,

20 NRC 446, 535 (1984) (quoting Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528, 533 (1983)); accord 60 Fed. Reg. 32,430, 32,435 (1995) (Statement of Considerations, 10 C.F.R. § 72.32) (“Emergency planning focuses on the detection of accidents and the mitigation of their consequences . . . not [ ] on the initiating events.”). Therefore, the Applicant need not address any specific accident scenario in its Emergency Plan so long as it provides for the capability to respond to such a scenario. Because the Confederated Tribes have overlooked the response capability that the Applicant’s Emergency Plan provides, this subcontention must be dismissed.

**C. Confederated Tribes Contention C: Inadequate Assessment of Costs Under NEPA**

1. The Contention

The Confederated Tribes allege in Contention C that:

PFS has not adequately described or weighed the environmental, social, and economic impacts and costs of operating the ISFSI. Indeed, there is no adequate benefit-cost analysis which even demonstrates a need for the ISFSI. On the whole, Petitioners contend that the costs of the project far outweigh the benefits of the proposed action. See, e.g., Public Service Co. of New Hampshire, 6 NRC 33, 90 (1977).

Confederated Tribes Petition at 5. The asserted bases for the contention are set forth in two pages of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated incorporating the specific allegations in its bases as indicated below:

PFS has not adequately described or weighed the environmental, social, and economic impacts and costs of operating the ISFSI, has not performed an adequate benefit-cost analysis which even demonstrates a need for the ISFSI, and has not recognized that the costs of the project far outweigh the benefits of the proposed action, (see, e.g., Public Service Company of New Hampshire, 6 NRC 33, 90 (1977)), in that PFS has:

- a) Failed to discuss the environmental impacts caused by the storage of a large amount of radioactive waste, for which no realistic disposal options currently exist.
- b) Failed to discuss the environmental impacts caused by creating an ISFSI without an adequate decommissioning plan for the facility.
- c) Failed to discuss the environmental impacts resulting from severe low probability accidents which may cause the release of discharges which exceed legal limits.
- d) Failed to adequately assess the environmental impacts stemming from underestimating the costs associated with decommissioning the project.
- e) Failed to present a complete or adequate assessment of the potential environmental impacts of the ISFSI on ground and surface water.
- f) Failed to recognize that the ISFSI will also have a dramatic economic and sociological impact on the minority community residing on the Skull Valley Reservation.

2. Applicant's Response to the Contention

The Confederated Tribes raise a number of issues under Contention C, which we address in turn below.

- a) Storage of Waste with No Realistic Disposal Options

The Confederated Tribes assert that the Applicant has “[f]ail[ed] to discuss the environmental impacts caused by the storage of a large amount of radioactive waste, for which no realistic disposal options currently exist.” Confederated Tribes Petition at 5. The Applicant will address the issue of the environmental impact of waste storage first and then the issue of whether a realistic disposal option exists.

(i) The Environmental Impact of Waste Storage

This subcontention must be dismissed because it provides neither a “concise statement of the alleged facts or expert opinion” in its support nor “references to specific sources and documents . . . on which the petitioner intends to rely to establish [the] facts or expert opinion” on which it bases its contention. 10 C.F.R. § 2.714(b)(2)(ii). The Confederated Tribes refer to no facts, expert opinion, or documents to support a claim regarding any ostensible environmental impacts of the ISFSI. See Confederated Tribes Petition at 5. The Confederated Tribes’ subcontention is utterly devoid of a factual basis, contrary to the requirements of 10 C.F.R. § 2.714(b)(2)(ii). Thus, this subcontention must be dismissed.

This subcontention must also be dismissed for not containing “a specific statement of the issue of law or fact to be raised or controverted,” 10 C.F.R. § 2.714(b)(2) (emphasis added), and “references to the specific portions of the application . . . that the petitioner disputes,” 10 C.F.R. § 2.714(b)(2)(iii) (emphasis added). A Board may not admit, for any reason, a contention that fails to meet the specificity requirements of 10 C.F.R. § 2.714(b)(2). Duke Power Company (Catawba Nuclear Station, Units 1 and 2),

ALAB-687, 16 NRC 460, 467 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983) (emphasis in original). The Confederated Tribes specify neither the environmental impacts that the Applicant has allegedly not addressed nor the parts of the application that are allegedly defective. See Confederated Tribes Petition at 5. Thus, the subcontention is nonspecific and must be dismissed.

This subcontention must be also dismissed because it mistakenly claims that the applicant failed to address a relevant issue in the application. See Section II.C, pp. 15-16, supra. The Environmental Report addresses the environmental effects of ISFSI operations in great detail. See ER chapters 4, 5, and 7. Confederated Tribes have set forth nothing to create a litigable issue with respect to any of this information.

(ii) Realistic Disposal Options

The Confederated Tribes allege that “no realistic disposal options currently exist” for spent nuclear fuel. Confederated Tribes Petition at 5. This part of the subcontention is “barred as a matter of law” because it attacks a generic determination of the NRC. See, Section II.B supra. The NRC has determined, as a matter of law, that indeed, a realistic disposal option for spent nuclear fuel does exist:

[T]here 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 . . . spent fuel originating in such reactor and generated up to that time.

10 C.F.R. § 51.23(a) (emphasis added). Therefore, this subcontention must be dismissed.

b) Inadequate Decommissioning Plan

The Confederated Tribes assert that the Applicant has “[f]ail[ed] to discuss the environmental impacts caused by creating an ISFSI without an adequate decommissioning plan for the facility.” Confederated Tribes Petition at 4.

This subcontention must be dismissed because it provides neither a concise statement of the alleged facts or expert opinion in its support nor references to specific sources and documents to establish the facts or expert opinion. 10 C.F.R. § 2.714(b)(2)(ii). The Confederated Tribes refer to no facts, expert opinion, or documents to support a claim that the Applicant’s decommissioning plan is inadequate or that any environmental effects would result from its flaws. See Confederated Tribes Petition at 5. This subcontention is also devoid of a factual basis and must be dismissed.

This subcontention must also be dismissed for containing neither a specific statement of the issue of law or fact to be raised nor references to the specific portions of the application that the petitioner disputes. 10 C.F.R. §§ 2.714(b)(2), (b)(2)(iii). A Board may not admit a contention that fails to meet the specificity requirements of 10 C.F.R. § 2.714(b)(2). Catawba, ALAB-687, 16 NRC at 467. The Confederated Tribes specify neither the environmental impacts of decommissioning that the Applicant has allegedly failed to address nor the parts of the decommissioning plan that are allegedly defective. See Confederated Tribes Petition at 5. Thus, the subcontention is nonspecific and must be dismissed.

This subcontention must be also dismissed because it mistakenly claims that the applicant failed to address a relevant issue in the application. See Section II.C.2 supra. The Application contains a decommissioning plan and addresses the environmental impacts of decommissioning. See LA App. B; ER at 4.6-1 to 3. The Confederated Tribes have provided no basis for challenging any of this information.

c) Severe Low Probability Accidents

The Confederated Tribes allege that the Applicant has failed to assess the impacts of the proposed licensing action and to weigh its costs and benefits in that it fails to discuss the impacts resulting from “severe low probability accidents which may cause the release of discharges which exceed legal limits.” Confederated Tribes Petition at 5.

This subcontention must be dismissed because it provides neither a concise statement of the alleged facts or expert opinion in its support nor references to specific sources and documents to establish the facts or expert opinion. 10 C.F.R. § 2.714(b)(2)(ii). The Confederated Tribes refer to no facts, expert opinion, or documents to support their claim that there exists any “severe low probability accidents” which have not been analyzed by Applicant or that such an accident could “cause the release of discharges that exceed legal limits.” See Confederated Tribes Petition at 5. The Confederated Tribes have not even defined the type of accident it postulates, and have set forth no factual basis at all to suggest such an accident or release is possible or how it might occur. Therefore, this subcontention must be dismissed.

Furthermore, the Confederated Tribes' subcontention does not meet NRC standards for the admission of contentions premised on accidents:

[W]hen a postulated accident scenario provides the premise for a contention, a causative mechanism for the accident must be described and some credible basis for it must be provided. If a contention claims that an EIS is necessary or inadequate in some respect, the "rule of reason" by which NEPA is to be interpreted provides that agencies need not consider "remote and speculative" risks or "events whose probabilities they believe to be inconsequentially small." In addition, the Supreme Court has . . . held that . . . NEPA [does not] require a "worst case analysis."

Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 44 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990) (citing, e.g., Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719, 739 (3d Cir. 1989); see also Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 354-56 (1989)). Without a "causative accident scenario" and a "credible basis," a postulated accident is "a matter of conjecture, beyond the rule of reason," and thus cannot be considered to be "reasonably foreseeable." Vermont Yankee, ALAB-919, 30 NRC at 51 n.30. Hence, such an accident is not cognizable under NEPA. The Confederated Tribes provide neither causative mechanism nor credible basis for any accident scenario. See Confederated Tribes Petition at 5. Therefore, this subcontention must be dismissed.

d) Underestimate of Decommissioning Costs

The Confederated Tribes assert that the Applicant has "[f]ail[ed] to adequately assess the environmental impacts stemming from underestimating the costs associated with decommissioning the project." Confederated Tribes Petition at 5.

Like Subcontention (b), this subcontention must be dismissed because 1) it has no factual basis regarding environmental impacts whatsoever, 2) it is nonspecific, and 3) it ignores relevant material submitted by the applicant, see LA Appendix B. See supra Subcontention (b).

Moreover, this subcontention must be dismissed because challenges to the reasonableness of an applicant's decommissioning cost estimates are not admissible unless the petitioners show that "there is no reasonable assurance that the amount will be paid." Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 9 (1996). Without such a showing the only relief available would be "the formalistic redraft of the plan with a new estimate." Id. Such relief is not sufficient to warrant consideration of a contention. See supra Confederated Tribes Contention A.

e) Impact on Ground and Surface Water

The Confederated Tribes claim that the Applicant has "[f]ail[ed] to present a complete or adequate assessment of the potential environmental impacts of the ISFSI on ground and surface water." Confederated Tribes Petition at 5. "The environmental report should fully evaluate the potential impacts of the proposed project on the ground and surface water in the area, and discuss in detail the manner in which such waters will be kept free from contamination." Id. at 6.

This subcontention must be dismissed because it provides neither a concise statement of the alleged facts or expert opinion in its support nor references to specific sources and documents to establish the facts or expert opinion. 10 C.F.R. §

2.714(b)(2)(ii). The Confederated Tribes refer to no facts, expert opinion, or documents to support a claim that the ISFSI will have any detrimental effects on ground or surface water. See Confederated Tribes Petition at 5-6. This subcontention is utterly devoid of a factual bases and must be dismissed.

This subcontention must also be dismissed for containing neither a specific statement of the issue of law or fact to be raised nor references to the specific portions of the application that the petitioner disputes. 10 C.F.R. §§ 2.714(b)(2), (b)(2)(iii). A board may not admit a contention that fails to meet the specificity requirements of 10 C.F.R. § 2.714(b)(2). Catawba, ALAB-687, 16 NRC at 467. The Confederated Tribes do not specify any effects that the ISFSI allegedly has on ground or surface water. See Confederated Tribes Petition at 5. Thus, the subcontention is nonspecific and must be dismissed.

This subcontention must be also dismissed because it mistakenly claims that the applicant failed to address a relevant issue in the application. The Environmental Report addresses the effects of ISFSI operation on ground and surface water. See ER at 2.5-5 to 12, 4.1-10, 4.2-4 to 5, 4.3-6, 4.4-3 to 4, 4.5-1 to 2.

f) Economic and Sociological Impacts on a Minority Community

The Confederated Tribes assert that the ISFSI will also have “a dramatic economic and sociological impact on the minority community residing on the Skull Valley Reservation.” Confederated Tribes Petition at 6. They allege that the proposed siting of the ISFSI in a minority community follows an ostensible national pattern of

siting hazardous waste facilities (citing The United Church of Christ, Toxic Wastes and Race in the United States (1987)) and that race was “the most significant among variables tested” in association with the location of waste facilities. Confederated Tribes Petition at 6. The Confederated Tribes assert that “no attempt has been made . . . to avoid or mitigate the disparate impact of the proposed facility on this minority community.” Id. The Confederated Tribes also claim that “no assessment of the impacts upon Indian religious ceremonies or visits by Indians to the Skull Valley burial ground has been made.” Id. Finally, the Confederated Tribes claim that there is no mention of the amount of the benefit the community will derive from the project; specifically the amount payable to the Skull Valley Band has not been disclosed, so it is “impossible to do a benefit-cost comparison.”

This subcontention must be dismissed for a number of reasons. First, this subcontention must be dismissed because the Confederated Tribes provide absolutely no factual basis to support their claims regarding any impact of the ISFSI on the environment. See Confederated Tribes Petition at 6-7. The report they cite regarding the locating of hazardous waste facilities on the basis of race is not germane to the issues in this hearing. The report says nothing about the ISFSI or any impact it might have on the surrounding environment. The Confederated Tribes allege that the application contains no assessment of the impacts of the ISFSI on Indian religious ceremonies or visits to Indian burial grounds, but they do not even allege that it will have any impacts in the first place, let alone support such an allegation with any facts. See Confederated Tribes Petition at 6. On the other hand, the application states that “[c]onsultation with the Utah

State Historic Preservation Officer . . . and the Skull Valley Band of Goshute Indians indicates that the areas within Skull Valley Reservation affected by project construction and operation contain no cultural or historic resources or areas of religious significance to the Skull Valley Band.” ER at 4.1-18. In short, this subcontention is baseless and must be dismissed.

Second, regarding the Confederated Tribes allegation that the Applicant’s NEPA cost-benefit analysis is inadequate because the Applicant does not disclose the terms of its lease with the Skull Valley Band,<sup>110</sup> this subcontention must be dismissed because it overlooks relevant material submitted by the Applicant. See, Section II.C, pp. 15-16, supra. The Environmental Report states that “[t]he direct costs of the PFSF include . . . annual costs associated with the Tribal lease.” ER at 7.3-1. The total life-cycle cost of the facility is given as \$1.536 billion. Id. Therefore, because this subcontention overlooks the fact that the cost of the Tribal lease has been incorporated into the total cost of the facility, the subcontention must be dismissed.

Moreover, this subcontention regarding the details of the lease must also be dismissed because none of the NRC’s environmental regulations require the Applicant to provide the details of the lease by which it will obtain use of the land for the facility. See 10 C.F.R. § 51.45. 10 C.F.R. § 51.45 requires the Applicant to include the economic costs of the proposed facility in its environmental analysis. 10 C.F.R. § 51.45(c). 10

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<sup>110</sup> The Applicant addresses the fact that the details of the Applicant’s lease with the Skull Valley Band are not required to be provided under the Commission’s regulations or under NEPA in greater detail in its response to Castle Rock Contention 15.

C.F.R. § 51.45 does not, however, require the Applicant to describe one component of these economic costs, the details of its lease arrangement with the Skull Valley Band. See also Idaho Conservation League v. Mumma, 956 F.2d 1508, 1522-23 (9th Cir. 1992) (“NEPA does not require a particularized assessment of non-environmental impact”).

**D. Confederated Tribes Contention D: Inadequate Discussion of No-Action Alternative.**

1. The Contention

Confederated Tribes allege in Contention D that:

PFS has failed to satisfy the requirements of NEPA because it does not adequately discuss the alternatives to the proposed action.

Confederated Tribes Petition at 5. The asserted bases for the contention are set forth within three sentences on the same page in which Confederated Tribes claim that PFS “has failed to discuss the no-action alternative.” Confederated Tribes Petition at 5-6. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

PFS has failed to satisfy the requirements of NEPA in that:

- (a) Applicant does not adequately discuss alternatives to the proposed action that are available for reducing or avoiding adverse environmental effects
- (b) Applicant has failed to discuss the no-action alternative.

2. Applicant's Response to the Contention

a) Failure to Discuss Alternatives Available for Reducing or Avoiding Adverse Environmental Effects

Confederated Tribes alleges that Applicant has violated NEPA in that it has failed to discuss alternatives available for reducing or avoiding adverse environmental effects. This contention must be dismissed for lack of basis and specificity. Confederated Tribes have provided no facts or expert opinion on which to support its contention, in violation of § 2.714(b)(2)(ii). That regulation requires that a petitioner provide:

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. 10 C.F.R. § 2.714(b)(2)(ii).

The Rules of Practice require that a petitioner include facts in support of its position in order to demonstrate that a genuine dispute as to a material issue of law or fact exists. 54 Fed. Reg. at 33,170. Such a requirement is consistent with judicial decisions, such as Connecticut Bankers Ass'n v. Board of Governors, 627 F.2d 245, 251 (D.C. Cir. 1980) which held that

[A] protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that . . . a dispute exists. The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an "inquiry in depth" is appropriate.

Id. Thus, Confederated Tribes' statement which "simply alleges that some matter ought to be considered" does not provide a sufficient basis for an admissible contention. See Section II.C.1 supra at 13.

b) Failure to Discuss the No-action Alternative

Confederated Tribes assert that Applicant has failed to adequately discuss alternatives to the proposed action in that it has failed to discuss the no action alternative. According to Confederated Tribes, "[i]n view of the significant environmental costs of this project and the fact that PFS has not demonstrated a need for the facility, this alternative should have been given substantially more attention." Confederated Tribes Petition at 6.

This contention mistakenly ignore relevant information in the Environmental Report and must be dismissed. Confederated Tribes completely ignore that the Applicant has discussed the no-action alternative in the Environmental Report at section 8.1.2. That discussion considers the deleterious consequences that would result from a decision not to build the facility. Included among those consequences are the premature shutdown of currently operational nuclear power plants and delayed decommissioning and increased maintenance expenses for permanently shutdown reactors. Additional adverse environmental consequences would likely result from the proliferation at plant sites of onsite ISFSIs, which would thereby increase the complexity and cost of preparing and shipping spent fuel to a permanent federal repository and increase the decommissioning

burden for utilities. ER at 8.1-3. A contention which mistakenly claims that the Applicant failed to address a relevant issue in the application must be dismissed.

Further, CEQ guidelines issued to assist federal agencies in complying with the National Environmental Policy Act have noted that “no-action” means that the project will not take place.<sup>111</sup> In the context of a licensing decision, there are two alternatives: to grant the license or to deny the license. The costs and benefits of granting the license will be reversed if the license is denied. (See, e.g., South Louisiana Environmental Council, Inc. v. Sand, 629 F.2d 1005, 1017 (5th Cir. 1980), stating that “. . . obviously, the adverse environmental effects would not take place were the project to be stopped . . .”). Since the Applicant has identified and evaluated the environmental impacts of proceeding with the proposed action,<sup>112</sup> it has ipso facto identified the benefits of not proceeding. Petitioner again has ignored this relevant information in the Environmental Report and has merely advocated additional discussion of issues. Such a contention is not admissible and must be rejected. Under the NRC’s amended Rules of Practice, a contention “that simply alleges that some matter ought to be considered,” as Petitioners have alleged here is not an admissible contention.

As part of its asserted basis for this contention, Confederated Tribes allege that the Applicant has failed to demonstrate a “need” for the facility. Confederated Tribes Petition at 6. Here again, Confederated Tribes completely ignores pertinent information

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<sup>111</sup> Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations (Q.3), 46 Fed. Reg. 18,026. (Mar. 23, 1981).

<sup>112</sup> These impacts are addressed in Chapters 4, 5 and 7 of the Environmental Report.

contained in the Environmental Report. Need for the facility is addressed in the Environmental Report at section 1.2. That section, entitled, "Need for the Facility," discusses the economic and regulatory impediments to continued on-site storage, as well as the alarming shortage of available capacity in on-site spent fuel pools--a shortage which is likely to impede the continuing operation of commercial nuclear power plants, hamper their future decommissioning, and significantly raise the costs of that process. Because this contention mistakenly claims that the Applicant failed to address a relevant issue in the Application, it must be dismissed.

**E. Confederated Tribes Contention E: Failure to Give Adequate Consideration to Adverse Impacts on the Historic District**

1. The Contention

Confederated Tribes allege in Contention E that:

PFS has failed to comply with NEPA in that it has not adequately discussed the impacts upon the historic district and the archeological heritage of the area.

Confederated Tribes Petition at 7. The asserted bases for the contention are set forth within four sentences on pages 7-8. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

Contrary to the requirements of NEPA, PFS has failed to adequately discuss the impacts upon the historic district and the archeological heritage of the area in that it has not evaluated the impact of the facility on the Pony Express Trail which passes ten miles south of the Skull Valley Reservation area.

2. Applicant's Response to the Contention

In this contention, Confederated Tribes allege that PFS has not adequately evaluated the impact of the facility on the archaeological heritage or historic character of the area, in particular the historic Pony Express Trail passes about ten miles south of the Skull Valley Reservation area. Confederated Tribes Petition at 6. This contention must be dismissed for lack of an adequate basis, and because the Confederated Tribes ignore relevant information in the Environmental Report.

The impact of the facility on the historic character of the area has been assessed in four separate contexts: site preparation and facility construction, facility operation, construction and operation of the Skull Valley Road transport alternative, and construction and operation of the railroad spur alternative.

First, Section 4.1.8 of the Environmental Report evaluates the effects of the construction phase of the project on regional historical, cultural, scenic, and natural resources. That discussion concludes that “[n]o impacts on known historic, architectural, or cultural features will occur as a result of facility construction.” ER at 4.1-18.

The Iosepa Cemetery is the only known site listed, or eligible for listing, on the National Register of Historic Places, located in the Skull Valley project area. This historic period site is located approximately 9 miles from the proposed PFSF site, and therefore will not be affected by construction or operation of the proposed facility.

Consultation with Utah State Historic Preservation Officer (SHPO) and the Skull Valley Band of Goshute Indians indicates that the areas within the Skull Valley Reservation affected by project construction and operation contain no cultural or historic resources or areas of religious significance to the Skull Valley Band.”

Id.

Section 4.2.8 of the Environmental Report evaluates the effects of the Facility's operation on regional historic, cultural, scenic and natural features. That section concludes that "[n]o regional historic, archaeological, architectural, or cultural resources were identified in areas utilized for project operation. Therefore, no impacts on these resources will result from operation of the proposed facility." ER at 4.2-7.

The effects of construction and operation of the Skull Valley Road transport alternative were evaluated in Environmental Report Section 4.3.8. That section concludes that "only one historic property, the Iosepa cemetery located approximately one-half mile from the Skull Valley Road, has been identified in the project's area of potential effect." ER at 4.3-8. "A Class III cultural resource survey in the area of potential effect will be performed . . . . The survey will be conducted by an archaeological firm holding an active joint permit issued by [Bureau of Land Management and Utah State Historic Preservation Office]." Id. at 4.3-9.

Finally, ER section 4.4.8 discusses effects of construction and operation of the railroad spur alternative on regional, historical, cultural, scenic, and natural features. The discussion in that section notes that there are "nine canyons, knolls, or places that have high potential for the location of other historic properties . . . . These places are located from 500 ft to several miles from the PFSF site and transportation corridor. The rail spur construction area is situated at a considerable distance from the areas with high potential for containing archaeological sites." ER at 4.4-5.

These four sections of the Environmental Report conclude that there will be no significant impact on the historic district and the archaeological heritage of the area. Confederated Tribes do not contest that finding and provide no basis for their allegation that the Applicant has not adequately evaluated the impact of the facility on the historic character of the area. Furthermore, the contention's assertion that "the historic Pony Express Trail passes only about ten miles south of the Skull Valley Reservation area" (Confederated Tribes Petition at 6), is not sufficient to support its claim that Applicant has not adequately considered historic district impacts. Confederated Tribes allege no impacts to the Pony Express Trail from either the facility or the transportation corridor, nor do they explain how the Trail, situated "only about ten miles south of the Skull Valley Reservation Area" (Confederated Tribes Petition at 6) will, or could, be impacted by the facility. Since the Trail is 10 miles south of the Reservation, it is also at least 10 miles away from the closest possible approach to either the transportation corridor or the ISFSI site.

Because Confederated Tribes have provided no facts or other basis to support its contention that there may be adverse impacts on the Pony Express Trail or any other historic district or archaeological heritage of the area, the contention must be dismissed. Under the amended Rules of Practice, a petitioner must set forth "[a] brief explanation of the bases of the contention." 10 C.F.R. § 2.714(b)(2)(i). Further, a petitioner must provide:

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.

10 C.F.R. § 2.714(b)(2)(ii). Confederated Tribes have failed to do so here and therefore, the contention must be dismissed.

Furthermore, the Confederated Tribes' claim that Applicant's discussion of the impacts on the historic district was inadequate fails to consider the sections of the Environmental Report discussed *supra*. Confederated Tribes Contention E ignores relevant information in the Application; it must therefore be rejected. Similarly, here, Confederated Tribes ignore the fact that the Environmental Report discusses the impacts on the historic district and makes no showing that any of these matters are misstated. On these grounds, Confederated Tribes Contention E must be rejected.

**F. Confederated Tribes Contention F: Failure to Adequately Establish Financial Qualifications**

1. The Contention

Confederated Tribes allege in Contention F that:

PFS has failed to demonstrate that it is financially qualified to build and operate the ISIS.

Confederated Tribes Petition at 8. The asserted bases for the contention are set forth in one and a half pages of discussion following the contention. In order to focus the analysis on whether the contention should be admitted, the Applicant proposes that the contention be restated as follows incorporating the specific allegations in its bases:

PFS has failed to demonstrate that it is financially qualified to build and operate the ISFSI in that

- a) The Application states that PFS is a limited liability company owned by eight U.S. utilities but the utilities are unnamed and individuals from only seven utilities are listed as directors. Also, there is no description of the assets of the limited liability company nor is there any mention or copy of any limited liability company agreement.
- b) The Application provides no detail with respect to the basis for the estimated construction costs of \$100 million and no effort has been made to show that the component costs have been legally pinned down with binding agreements.
- c) While PFS indicates that it intends to obtain an additional \$6 million from each of its participating companies, it has failed to provide any subscription agreements or other legally binding commitments which give any assurance of obtaining the necessary funding. PFS has failed also to show that the participating companies have any long term commitment to remain with the project to provide needed financial stability in the future.
- d) PFS has failed to provide any documentary evidence that shows it will be able to raise the additional \$52 million of additional capital through "service agreements" with customers nor have the terms of such agreements been provided.
- e) PFS has not provided any information which would show the amount to be paid to the Skull Valley Band for rental of its lands and therefore it is unknown whether PFS has the financial capacity to meet this fundamental cost of the project.

2. Applicant's Response to the Contention

a) Limited Liability Company

In this subcontention, Confederated Tribes complain that there is insufficient information concerning PFS in that the participating utility members of PFS are

unnamed, there is no description of the assets of PFS, nor is there any mention or copy of any limited liability company agreement.

This contention must be rejected for a lack of basis. The contention claims that the License Application is deficient for an alleged lack of information concerning PFS. However, Confederated Tribes have failed to provide any supporting reasons for the asserted need of this information as required by 10 C.F.R. § 2.714(b)(2)(iii). That provision expressly provides that if a “petitioner believes that the application fails to contain information on a relevant matter as required by law,” the petitioner must identify “each failure and the supporting reasons for the petitioner’s belief . . . .” *Id.* Confederated Tribes set forth no legal requirement why the information that it has identified in this subcontention would be required contrary to 10 C.F.R. § 2.714(b)(2)(iii).

Further, the Confederated Tribes do not provide any basis to show that the alleged deficiency -- *i.e.* the asserted lack of information on the utilities owning the LLC-- will result in a lack of reasonable assurance of the Applicant obtaining the funds necessary to cover the construction and operation of the PFSF as required by the Commission’s decisions in Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 9 (1996) (Yankee Atomic I) and Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 258 (1996) (Yankee Atomic II). In those cases, the Commission held that a petitioner challenging the adequacy of decommissioning funding or the decommissioning plan funding must do more than assert deficiencies in the plan or its estimates. Rather, petitioners must show “some specific, tangible link between the alleged errors in the plan and the health and safety impacts they

invoke.” Yankee Atomic II, CLI-96-7, 43 NRC at 258. Thus, for example, challenges to the reasonableness of an applicant’s decommissioning cost estimates are not admissible unless the petitioner shows that “there is not reasonable assurance that the amount will be paid.” Yankee Atomic I, CLI-96-1, 43 NRC at 9. Without such a showing, the only relief available would be “the formalistic redraft of the plan with a new estimate.” Id.

The same rationale would apply equally to challenges to the reasonable assurance of obtaining funds for construction and operation. A petitioner must show that its contentions have some health and safety significance, or else the Commission would be engaged in merely requiring additional information or analysis of no health and safety significance. See Id. Here, the Confederated Tribes merely seek additional information without establishing any basis for its significance, and thus the contention must be rejected. Id.

b) Lack of Detail and Binding Agreements

In this subcontention, Confederated Tribes assert that the Application provides no detail with respect to the basis for the estimated construction costs of \$100 million and no effort has been made to show that the component costs have been legally pinned down with binding agreements. Neither point of this subcontention is admissible.

(i) Lack of Detail

The Confederated Tribes contention that the construction cost estimates lack sufficient detail must be dismissed as an impermissible challenge to agency regulation and for lack of a sufficient factual basis. 10 C.F.R. § 72.22(e) does not require detailed cost estimates in order to comply with its provisions. Indeed, as set forth in the response

to Utah Contention E, the Commission declined to apply the more detailed requirements of 10 C.F.R. Part 50 to ISFSI applicants under 10 C.F.R. Part 72. Therefore, Confederated Tribes' contention must be rejected as "advocat[ing] stricter requirements than those imposed by the regulations" and therefore an impermissible collateral attack on commission rules."

Further, Confederated Tribes have provided no factual basis to show that the estimated costs set forth in the Application are unreasonable. As stated by the Commission in Yankee Atomic II, the amended pleading requirements "places an initial burden on Petitioners to come forward with reasonably precise claims rooted in fact, documents, or expert opinion in order to proceed past the initial stage and toward a hearing." Yankee Atomic II, CLI-96-7, 43 NRC at 262. Here Confederated Tribes have failed to provide "alleged facts or expert opinion" with references to "specific sources and documents" as required under 10 C.F.R. § 2.714(b)(2)(ii) to support an allegation that Applicant's cost estimates are unreasonable. 10 C.F.R. § 2.714(b)(2)(ii). In fact it does not claim that the cost estimates are unreasonable, but only lack detail. This is no claim at all, but in effect a request for discovery hoping to identify a basis for a claim in the additional information supplied. The Commission has made clear, however, that a contention is not to be admitted "where an intervenor has no facts to support its position and where the intervenor contemplates using discovery or cross-examination as a fishing

expedition which might produce relevant supporting facts.” 54 Fed. Reg. 33,168, 33,171 (1989) (Statement of Considerations for 1989 Amended Rules of Practice).<sup>113</sup>

Moreover, Confederated Tribes must provide some basis that the alleged inadequacies of the cost estimates will result in an actual shortfall of funds for the construction operation on decommissioning of the PFSF. See Yankee Atomic I, CLI-96-9, 43 NRC at 9. Because it makes no claim that the cost estimate is unreasonable, the Confederated Tribes contention fails on this account as well. Thus, this part of the subcontention must be dismissed.

(ii) Lack of Binding Agreements

Confederated Tribes also assert that “no effort has been made to show that component costs have been legally pinned down with binding agreements.” Confederated Tribes Petition at 9.

This part of the subcontention must be dismissed as an impermissible challenge to agency regulation and lack of basis. The Commission’s LES decision rejects this very argument. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15 (“LES”), slip op. (December 18, 1997) at 18-21. The applicable regulation requires only that an applicant show that it “has reasonable assurance of obtaining the necessary . . . funds “ to cover its construction costs. 10 C.F.R. § 72.22(e) (emphasis added). The

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<sup>113</sup> Accord Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983). The Rules of Practice do not permit “the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff.”)

Commission in Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 19 (1978), affirmed sub nom, New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978), has discussed what constitutes “reasonable assurance” in the context of financial qualifications. The Commission stated there as follows:

"[R]easonable assurance" does not mean a demonstration of near certainty that an applicant will never be pressed for funds in the course of construction. It does mean that the applicant must have a reasonable financing plan in the light of relevant circumstances.

Seabrook, CLI-78-1, 7 NRC at 18 (emphasis added). In a similar vein the Commission has recently recognized in the context of decommissioning that the reasonable assurance standard does not require an “ironclad guarantee” or “an absolute guarantee of such funds.” Yankee Atomic II, CLI-96-7, 43 NRC at 262.

Thus, contrary to Confederated Tribes’ thesis, estimated costs do not need to be “legally pinned down with binding agreements” and this part of its contention must be dismissed as an impermissible challenge to a Commission rule. It must also be dismissed because, as with the part (a) of this subcontention, Confederated Tribes have provided no basis to show that the current lack of binding agreements will result in an actual shortfall of funds for the construction of the proposed ISFSI.

c) Lack of Binding Subscription Agreements

In this part of its subcontention, Confederated Tribes contend that PFS has failed to provide any subscription agreements or other legally binding commitments which give

any assurance of obtaining the necessary funding, or failed to show that the participating companies have any long term commitment to remain with the project in order to provide needed financial stability in the future.

The first part of this subcontention -- the need for legally binding subscription commitments -- must be dismissed on the same grounds as those discussed above. The contention that PFS must have "legally binding commitments" in place is an impermissible challenge to an agency regulation for the reasons previously set forth. See LES, supra. Moreover, Confederated Tribes have provided absolutely no basis to show that the current lack of binding agreements will result in an actual shortfall of funds for the construction of the proposed ISFSI.

Confederated Tribes have likewise provided absolutely no basis to support the second point of this subcontention: the claimed potential lack of financial stability in the future. Confederated Tribes have provided no "alleged facts or expert opinion" with references to "specific sources and documents" as required under 10 C.F.R. § 2.714(b)(2)(ii). Rather, their claim is based solely on pure speculation such as that found inadequate by the Commission in Yankee Atomic II, CLI-96-7, 43 NRC at 261-263. In that case, petitioners contended that decommissioning was not assured because of potential default or bankruptcy of the utility participants in the Yankee Nuclear Power Station. In rejecting this potential as a basis for admissibility of a contention, the Commission stated as follows:

[T]he argument is based on pure speculation; Petitioners offer no evidence whatever suggesting that a Purchaser/Co-owner will either default on its obligations under the

Purchase Contract or go bankrupt. Petitioners must submit more than this in order for a contention to be admitted for litigation.

Yankee Atomic II, CLI-96-7, 43 NRC at 261.

Thus, this subcontention must be dismissed.

d) The Service Agreements

In this subcontention Confederated Tribes contend that PFS has failed to provide any documentary evidence to show that it will be able to raise the additional \$52 million of additional capital through "service agreements" with customers and that the terms of these agreements have not been provided. This subcontention must be rejected for the reasons set forth in LES, supra. This subcontention must also be rejected for both lack of specificity and lack of basis. The contention must be rejected for vagueness and lack of specificity because it fails to specify what documentary evidence PFS failed to present. Is it agreements evidencing binding agreements as alleged in subparts b and c above or some other type of documentary evidence? Thus, this subcontention must be dismissed for not containing "a specific statement of the issue of law or fact to be raised or controverted."

This subcontention must also be dismissed for lack of basis because the Confederated Tribes have provided absolutely no "alleged facts or expert opinion" with references to "specific sources and documents" as required under 10 C.F.R. § 2.714(b)(2)(ii) to challenge the adequacy of PFS's financing plans for obtaining the necessary funds to cover the estimated construction costs. As set forth by the

Commission in Yankee Atomic II, CLI-96-7, 43 NRC at 262, the legal standard for determining whether reasonable assurance has been demonstrated is whether the applicant has presented “a reasonable financing plan” for obtaining the necessary funds. Confederated Tribes have set forth no facts, expert opinion or documents on which to base a challenge to the reasonableness of PFS proposed financing plan.

In short, the Confederated Tribes have not met their “initial burden . . . to come forward with reasonably precise claims rooted in fact, documents or expert opinion in order to proceed . . . toward a hearing.” Id. Therefore, this subcontention must be dismissed.

e) Cost of Lease

In this subcontention, Confederated Tribes contend that PFS has not provided any information which would show the amount to be paid to the Skull Valley Band for lease of its lands, and therefore it is unknown whether PFS has the financial capacity to meet this fundamental cost of the project. This subcontention must be dismissed because it overlooks relevant material submitted by the Applicant. The Environmental Report states that “[t]he direct costs of the PFSF include . . . annual costs associated with the Tribal lease.” ER at 7.3-1. The total life-cycle cost of the facility is given as \$1.536 billion. Id. Therefore, because this subcontention overlooks the fact that the cost of the lease with the Skull Valley Band has been incorporated into the total cost of the facility, it must be dismissed.

**G. Incorporation by Reference of Castle Rock Contentions**

In this contention Confederated Tribes seek to “adopt and incorporate by reference” five contentions of the Castle Rock petitioners for the reasons set forth in Section II.E supra, the Board should reject this contention.

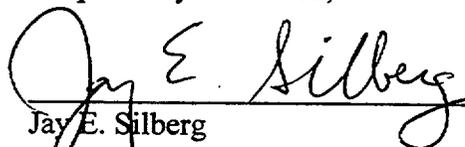
**H. Incorporation by Reference of State of Utah Contentions**

In this contention, Confederated Tribes seek to “adopt[ ] and incorporate[ ] by reference” the contentions and bases of the State of Utah. For the reasons set forth in Section II.E supra, the Board should reject this contention.

**VIII. CONCLUSION**

For the reasons set above with respect to each of the contentions, the Applicant respectfully submits that the contentions be admitted, admitted in part, or denied as appropriate.

Respectfully submitted,



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Dated: December 24, 1997

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December 24, 1997

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Answer to Petitioners' Contentions dated December 24, 1997 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 24<sup>th</sup> day of December 1997.

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