

PFS is fundamentally inconsistent with the comprehensive and exclusive program for the storage of spent nuclear fuel set out in the Nuclear Waste Policy Act of 1982, as amended (the "NWPA"). Even if existing law permitted NRC to license the proposed facility, PFS has failed to demonstrate its commitment and financial capacity to be responsible for all potential costs of the PFSF during its anticipated or possible life span. Furthermore, PFS has failed to demonstrate that the PFSF would provide adequate protection to the environment and groundwater and that the PFSF could be operated without substantial risk of accidents, terrorist intrusions, and other substantial safety hazards. Finally, PFS has ignored totally the severe economic impacts it will impose on the neighbors of the proposed facility, these Petitioners, and has ignored the substantial devaluation of the Petitioners' property and ability to use their property that would result from construction of the PFSF. The contentions submitted below, Petitioners submit, demonstrate that PFS's application for the License (the "Application") must be denied.

CONTENTIONS

1. **Absence of NRC Authority.** The Application is defective because NRC does not have authority to license a large-scale, off-site facility for the long-term storage of spent nuclear fuel such as the proposed PFSF.

Basis: The NWPA creates a comprehensive program for the interim storage and permanent disposal of spent nuclear fuel. The comprehensive program outlined in the NWPA, calls for spent nuclear fuel to be stored on the site of existing nuclear power plants and, to a limited extent, in DOE-initiated off-site storage facilities until such fuel is placed in a

government sponsored permanent repository. Consistent with this scheme, the NWPA expressly provides that it does not authorize the licensing of interim storage of spent nuclear fuel in private, off-site facilities. Contrary to the provisions of the NWPA, the Application seeks a license for an off-site, private facility to store up to 40,000 metric tons of uranium ("MTU") for an extended, possibly permanent, period. Licensing PFS to operate such a facility is outside the licensing authority granted NRC under the NWPA and related statutes; moreover, it is fundamentally at odds with the comprehensive program outlined by Congress in the NWPA. Accordingly, any regulation that is interpreted to countenance the Application, and all actions by NRC purporting to grant the Application, are invalid.

NRC's authority to license interim nuclear waste storage facilities is limited to the authority delegated to it by Congress, and NRC may not use its discretionary power to act contrary to the manifest will of Congress. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." Davis County Solid Waste Management v. Environmental Protection Agency, 101 F.3d 1395, 1410 (D.C. Cir. 1996). Although an administrative agency has some discretionary authority to interpret statutes or promulgate regulations to carry out its statutorily mandated functions, an agency "cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant function of [the agency] in a particular area. American Petroleum Institute v. Environmental Protection Agency, 52 F.3d 1113, 1119 (D.C. Cir. 1995); National Mining Ass'n v. Dep't of Interior, 105 F.3d 691, 694 (D.C. Cir. 1997). Moreover, a regulation may not be sustained "when that regulation is fundamentally at odds with the manifest congressional design." Western National Mutual Insurance Company v.

Commissioner, 65 F.3d 90, 94 (8th Cir. 1995); Webb v. Hodel, 878 F.2d 1252, 1255 (10th Cir. 1989) (regulations are "entitled to no deference if they are inconsistent with congressional intent" or "if there are compelling indications that the regulations are wrong").

In determining whether an agency has exceeded its authority in interpreting a statute or promulgating regulations, a two step process is employed:

First, we ask whether Congress has spoken unambiguously to the question at hand. If it has, then our duty is clear: We must follow that language and give it effect. If not, we consider the agency's action under the second step of Chevron, deferring to the agency's interpretation if it is reasonable and consistent with the statute's purpose.

Indiana Michigan Power Co. v. Dep't of Energy, 88 F.3d 1272, 1274 (D.C. Cir. 1996) (internal quotations and citations omitted). Amalgamated Transit Union, AFL-CIO v. Brock, 809 P.2d 909, 915 (D.C. Cir. 1987).

If interpreted to countenance the Application, the regulations in 10 C.F.R. Part 72 exceed the authority delegated to NRC by Congress. By means of the Atomic Energy Act of 1954, as amended (the "AEA"), Congress authorized the predecessor of NRC, the Atomic Energy Commission, to license the private use of special nuclear material. See Section 53(a) of the Atomic Energy Act of 1954, codified as 42 U.S.C. § 2073. Congress did not include any provisions in the AEA expressly authorizing the Atomic Energy Commission or its successors to store, or license the storage of, spent nuclear fuel. Lacking express authority, NRC appears to have relied upon Section 53(a) of the AEA in promulgating parts of 10 C.F.R. Part 72 dealing with storage of spent nuclear in off-site Independent Spent Fuel Storage Installations ("ISFSI"). As amended, section 53(a) gives NRC general authority to issue licenses for the transfer, acquisition, and possession of "special nuclear material," primarily for use in the development of civilian, commercial nuclear power. Id; see also Senate Report No 1325 (1964), reprinted in

1964 U.S.C.C.A.N. 3111-3113. When Section 53(a) was passed in the 1950s, and then amended in the 1960s, Congress and the nuclear energy industry anticipated that spent nuclear fuel would be reprocessed. See House Report No. 97-491 (1982), reprinted in 1982 U.S.C.C.A.N 3792, 3793-94. Consistent with this expectation, Congress omitted from the AEA any language authorizing NRC (or its predecessor agency) to license the interim or permanent storage of nuclear fuel.

Subsequent to the enactment of the AEA and the promulgation by NRC of regulations purporting to authorize storage of spent nuclear fuel in an off-site ISFSI, Congress definitively expressed its will with regard to storage of spent nuclear fuel in the NWPA. As stated by the District of Columbia Court of Appeals and the Department of Energy ("DOE"), "[i]n the NWPA, Congress created a comprehensive scheme for the interim storage and permanent disposal of high-level radioactive waste generated by civilian nuclear power plants." Indiana Michigan Power Co. v. Dep't of Energy, 88 F.3d 1272, 1273 (D.C. Cir. 1996); DOE Final Interpretation of Nuclear Waste Acceptance Issues, 60 Fed. Reg. 21793 (1995) (describing the NWPA as a "comprehensive framework for disposing of high level radioactive waste and spent nuclear fuel"). The NWPA expressly provides that its purposes are:

- (1) to establish a schedule for the siting, construction, and operation of repositories . . . [for the disposal of radioactive waste and spent nuclear fuel];
- (2) to establish the Federal responsibility, and a definite Federal policy, for the disposal of such waste and spent fuel

42 U.S.C. §10131(b)(emphasis added). To implement this policy, the NWPA instructs, in relevant part, DOE to propose, obtain a license for, and construct a large scale permanent repository capable of permanently storing the nation's spent nuclear fuel. 42 U.S.C. 10131 et

seq. To deal with spent nuclear fuel prior to the completion of the repository, the NWPA provides for interim storage of such spent fuel on-site at nuclear power reactors, through a sponsored storage program, and in a DOE-operated monitored retrievable storage facility. 42 U.S.C. 10151 et seq.; 42 U.S.C. 10161 et seq. To ensure that use of these interim methods does not continue indefinitely, the NWPA provides that: " (1) following the commencement of operation of a repository, the Secretary [of DOE] shall take title to the high-level radioactive waste or spent nuclear fuel as expeditiously as practical" and that "in return for the payment of fees . . . the Secretary [of DOE], beginning not later than January 31, 1998, will dispose of" the spent nuclear fuel. 42 U.S.C. § 10131(a)(5); see also 42 U.S.C. § 10155(e)(requiring any fuel stored under DOE-operated interim storage program to be removed within three years of the date a repository or monitored retrievable storage facility is available).

Within this larger statutory scheme, Congress explains that the purpose of the part of the NWPA addressing interim storage of spent nuclear fuel (§§10151-10157) is:

(1) to provide for the utilization of available spent nuclear fuel pools at the site of each civilian nuclear power reactor to the extent practical and the addition of new spent nuclear fuel storage capacity where practical at the site of such reactor, and

(2) to provide, in accordance with the provision of this part, for the establishment of a federally owned and operated system for the interim storage of spent nuclear fuel at one or more facilities owned by the Federal Government with not more than 1,900 metric tons of capacity to prevent disruption in the orderly operation of any civilian nuclear power reactor that cannot reasonably provide adequate spent nuclear fuel storage capacity at the site of such reactor when needed.

42 U.S.C. § 10151(b)(emphasis added). Consistent with these purposes, Congress authorizes NRC and DOE to take such action as necessary to "encourage and expedite the effective use of available storage, and necessary additional storage, at the site of each civilian nuclear power reactor." 42 U.S.C. § 10152 (emphasis added). Moreover, in order to expedite interim on-site

storage, the interim storage part of NWPA authorizes NRC to establish procedures for licensing any technology approved by NRC "for use at the site of any civilian nuclear power reactor." 42 U.S.C. § 10153; see also 42 U.S.C. § 10198 (directing DOE to enter into research partnerships to develop more efficient on-site storage technology).

With regard to the interim storage part's second purpose of providing for a DOE-operated interim storage facility, the NWPA states that "the Secretary shall provide . . . not more than 1,900 metric tons of capacity for the storage of spent nuclear fuel from civilian nuclear power reactors" through one or more of four enumerated methods (none of which involve off-site, private storage). 42 U.S.C. § 10155(a)(1). Because some of the enumerated methods could involve DOE-sponsored off-site storage, the NWPA mandates that, in selecting among the methods, DOE "shall seek to minimize the transportation of spent nuclear fuel." 42 U.S.C. § 10155(a)(3). Consistent with the NWPA's overall scheme of temporarily storing spent fuel on-site or at government-sponsored facilities until the establishment of a permanent repository, the NWPA provides that fuel stored by DOE under this Section 10155(a)(1) must be removed within three years of the date a repository or monitored retrievable storage facility¹ is available. Furthermore, to clarify the federal policy of using only on-site and federally owned facilities until a permanent repository is available, the statute unequivocally explains:

Notwithstanding any other provision of law, nothing in this chapter shall be construed to encourage, authorize or require the private or Federal use, purchase, lease or other

¹ In addition, anticipating a possible need for more than 1,900 metric tons of off-site storage, Congress provides in Sections 10161 et seq. for DOE to study, propose, and (if approved) construct a monitored retrievable storage facility for storage of up to 15,000 metric tons of spent fuel. Consistent with the program outlined above, this facility is to be owned and operated by the federal government, limited to 15,000 metric tons of capacity, and coordinated within the proposed permanent repository. See 42 U.S.C. 10168(d).

acquisition of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government on January 3, 1983.

42 U.S.C. § 10155(h)(emphasis added).

Given this statutory framework, to the extent 10 C.F.R Part 72 is interpreted to authorize a large scale, private, off-site ISFSI such as the proposed PFSF, such regulations are clearly beyond the authority of NRC and manifestly inconsistent with the purpose of the NWPA. As stated above, in reviewing the validity of an agency's construction of a statute or promulgation of regulations, one first asks whether Congress "has spoken unambiguously to the question at hand." Indiana Michigan Power, 88 F.3d at 1274. In this case, neither the AEA nor the NWPA expressly authorize NRC to license private, off-site interim storage of spent nuclear fuel. Although NRC's general licensing authority contained in 42 U.S.C. § 2073 conceivably could have been construed to implicitly authorize NRC to license storage of spent nuclear fuel prior to the passage of the NWPA, the NWPA has since indisputably preempted such an interpretation. In the NWPA, Congress expressly speaks to the issue of interim storage of spent nuclear fuel. The NWPA directs NRC and DOE to "encourage and expedite" the effective use of on-site storage 42 U.S.C. § 1015. It authorizes DOE to enter into research partnerships to develop more effective on-site storage and directs NRC to license such on-site storage technology. 42 U.S.C. §§ 10153, 10198. Furthermore, anticipating the possibility that on-site storage may be inadequate, the NWPA directs the DOE to provide 1,900 MTU of storage capacity and propose a DOE-operated facility for an additional 15,000 MTU of spent nuclear fuel. 42 U.S.C. §§ 10155(a)(1), 101 et seq. Finally, to make Congressional intent clear, the interim storage part of the NWPA expressly provides that it shall not "be construed to encourage, authorize, or require . . . any storage facility located away from the site of any

civilian nuclear power reactor and not owned by the Federal Government." 42 U.S.C. § 10155(h).

To the extent the NWPA is not interpreted to unambiguously and expressly prohibit private, off-site storage, the second step of the inquiry asks whether NRC's licensing of an off-site ISFSI under 10 C.F.R Part 72 would be "reasonable and consistent with the statute's purpose." Indiana Michigan Power, 88 F.3d at 1274. PFS is applying to NRC for a license to operate an off-site, private facility storing up to 40,000 MTU of spent nuclear fuel; (Emergency Plan ("EP") 1.1), moreover, PFS anticipates continually storing fuel at the PFSF even after a permanent repository is completed. Licensing such a facility is clearly inconsistent with both the language and purpose of the NWPA.

As detailed above, the NWPA, particularly the interim storage part (§§10151-10157), establishes a comprehensive and exclusive program for the storage of spent nuclear fuel, which scheme speaks exclusively in terms of private on-site storage and DOE-initiated off-site storage; in direct conflict with this scheme, the proposed PFSF would be a private, off-site facility. To the extent off-site storage is permitted by the NWPA, it must be sponsored by DOE and must be designed to minimize transportation of spent nuclear fuel; in contrast, the Application proposes to ship thousands of tons of spent nuclear fuel thousands of miles across the country to a private facility in a State that does not even contain a nuclear power facility. The scheme outlined in the NWPA clearly contemplates elimination of most off-site storage within a few years of the completion of a permanent repository; in contrast, the Application seeks a twenty year initial permit and contemplates a twenty year renewal--even if a permanent repository is available, as planned, less than a decade after the opening of the PFSF. Finally, the NWPA

expressly provides that it shall not be construed to authorize any storage facility except a facility located on the site of a nuclear reactor or on a site owned by the federal government; in direct conflict with this provision, PFS seeks a license for a facility that is neither located on the site of a nuclear reactor nor owned by the federal government. The proposed PFSF is "fundamentally at odds with the manifest congressional design," Western National, 65 F.3d at 94, and thoroughly "inconsistent with congressional intent" Webb, 878 F.2d at 1255, as set forth in the NWPA. Accordingly, the Application must be rejected as outside the scope of 10 C.F.R. Part 72, or if the regulations are interpreted to countenance PFS's Application, 10 C.F.R. Part 72 must be deemed invalid.

2. **Non-Compliance with Regulations.** PFS's Application is defective because it seeks a license for an ISFSI pursuant to 10 C.F.R. Part 72. However, the proposed storage installation is not an ISFSI and is otherwise not licensable under 10 C.F.R. Part 72.

First Basis: The regulations authorizing ISFSIs must be construed so as to harmonize and further the NWPA and AEA. As described in the preceding contention, storage of spent nuclear fuel in off-site, large-scale, private facilities is neither authorized by nor compatible with the comprehensive scheme for the storage of spent nuclear fuel set forth in the NWPA. Because the NWPA does not permit NRC to license a facility such as the PFSF, if the regulations in 10 C.F.R. Part 72 are valid in any respect, they remain valid only to the extent the definition of "ISFSI" is construed to exclude the proposed PFSF.

In 10 C.F.R. Part 72, NRC establishes the requirements, procedures, and criteria for the issuance of licenses to store spent nuclear fuel in, among other things, an ISFSI. 10 C.F.R. 72.1. An ISFSI is defined as follows:

ISFSI means a complex designed and constructed for the interim storage of spent nuclear fuel and other radioactive materials associated with spent fuel storage. An ISFSI which is located on the site of another facility may share common utilities and services with such a facility and be physically connected with such other facility and still be considered independent.

10 C.F.R. 72.3. PFS has submitted an Application to have the proposed PFSF licensed as an ISFSI. (Application 1.1).

Because licensing a facility such as the proposed PFSF is beyond the authority of NRC, the definition of "ISFSI" cannot be interpreted to encompass the proposed PFSF. It is a well excepted canon of interpretation that a "regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements." Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1414 (10th Cir. 1984)(citation omitted). Moreover, "where there is an interpretation of an ambiguous regulation which is reasonable and consistent with the statute, that interpretation is to be preferred." Id. The definition of ISFSI is unrestrictive and to a large extent ambiguous. PFS has applied pursuant to 10 C.F.R. Part 72 for the License to store spent nuclear fuel and associated radioactive material at an ISFSI to be constructed and operated on the Goshute Reservation in Tooele County, Utah. See Application Cover Letter dated June 20, 1997 from John D. Parkyn to NRC. The proposed ISFSI will not be owned by a government agency, will be located hundreds of miles from the nearest nuclear power plant, will store up to 40,000 MTU of spent fuel and will continue to store spent fuel even after a permanent repository is established. (EP 1.1). As explained in Contention 1, which is incorporated herein by this reference, the AEA contains no language authorizing NRC to license a facility such as the proposed PFSF; and the licensing of a privately-owned, off-site, 40,000 metric ton, long-term facility is "fundamentally at odds with

the manifest congressional design" outlined in the NWPA. Western National, 65 F.3d at 94. The definition of ISFSI in 10 C.F.R. Part 72 must be interpreted so as to harmonize with governing statutes, and the comprehensive storage program outlined in the NWPA precludes NRC from licensing a private, off-site, long-term, and large scale storage facility such as the PFSF. Accordingly, in order to harmonize with the NWPA and AEA, the regulation defining ISFSI must be interpreted so as to exclude the proposed PFSF, and the license application must be denied.

Second Basis: The regulations purportedly authorizing NRC to license the PFSF must be construed to require PFS to demonstrate maximization of the use of existing storage capacity at the site of civilian nuclear power reactors. In the NWPA, Congress explains as follows:

persons owning and operating civilian nuclear power reactors have the primary responsibility for providing interim storage of spent nuclear fuel from such reactors, by maximizing, to the extent practical, the effective use of existing storage facilities at the site of each civilian nuclear power reactor, and by adding new onsite storage capacity in a timely manner where practical.

42 U.S.C. 10151(a) (emphasis added). The NWPA further provides that NRC, DOE, and other agencies shall seek to "expedite the effective use of available storage and necessary additional storage, at the site of each civilian nuclear power reactor." 42 U.S.C. § 10152 (emphasis added); see also 42 U.S.C. 10151(a)(2)("the Federal Government has the responsibility to encourage and expedite the effective use of existing storage facilities and the addition of needed new storage capacity at the site of each civilian nuclear power reactor."). Through the NWPA, Congress has clearly stated that utilities operating civilian nuclear power reactors bear the "primary responsibility" for storage of spent nuclear fuel and that they must fulfill their obligation by maximizing the use of existing on-site storage facilities, and adding new on-site

capacity. Moreover, Congress has directed NRC and DOE to encourage maximum utilization and expansion of on-site storage facilities. In order for 10 C.F.R. Part 72 to be consistent with this statutory scheme, it must be construed to require an off-site ISFSI applicant to demonstrate exhaustion of each current on-site storage facility and all possibilities of expansion of on-site storage capacity at each nuclear power reactor. The Application does not demonstrate that PFS, its constituent facilities, or other nuclear power utilities have exhausted on-site capacity at each nuclear power plant and, accordingly, must be denied.

Third Basis: The regulations purportedly authorizing NRC to license the PFSF must be construed to require an applicant to demonstrate that DOE has exhausted all means for providing off-site storage capacity before any private, off-site facility can be licensed. The NWPA explains that "the Federal Government has the responsibility to provide, in accordance with the provisions of this part, not more than 1,900 MTU of capacity of interim storage of spent nuclear fuel for civilian nuclear power reactors that cannot reasonably provide adequate storage capacity at the sites of such reactors." 42 U.S.C. §10151(a)(3). Consistent with this express assumption of responsibility, the NWPA directs that DOE "shall provide, in accordance with paragraph (5), not more than 1,900 metric tons of capacity for the storage of spent nuclear fuel." 42 U.S.C. § 10155(a)(1); see also 42 U.S.C. § 10155(a)(5)("The Secretary shall ensure that storage capacity is made available under paragraph (1) when needed . . ."). If the NWPA could reasonably be construed to permit private, off-site storage of spent nuclear fuel at all, it cannot be construed to permit such private, off-site storage until DOE has fulfilled its statutory and contractual obligation to provide 1,900 MTU of storage capacity for utilities unable to storage spent nuclear fuel on site. In order for the parts of 10 C.F.R. Part 72 purportedly authorizing

off-site ISFSIs to be consistent with this statutory scheme, such regulations must be interpreted to require prior demonstration that DOE has fulfilled its statutory obligation to provide 1,900 MTU of storage capacity for utilities lacking on-site storage space. The Application does not demonstrate that DOE has fulfilled its contractual and statutory obligations to provide 1,900 MTU of storage capacity--or that PFS has called on DOE to do so; accordingly, the Application must be denied.

Fourth Basis: The regulations purportedly authorizing NRC to license the PFSF must be construed to require a showing that DOE has attempted to establish a cooperative demonstration program for the on-site dry storage of spent nuclear fuel before any private, off-site facility can be licensed. The NWPA provides:

The Secretary [of DOE] shall establish a demonstration program, in cooperation with the private sector, for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the object of establishing one or more technologies that the Commission may, by rule, provide for use at the site of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission.

42 U.S.C. § 10198. If the NWPA could reasonably be construed to permit private, off-site storage of spent nuclear fuel, it cannot be construed to permit such private off-site storage until DOE has established, or reasonably attempted to establish, a cooperative research program designed to develop and approve technology for on-site storage not requiring site-specific approval by NRC. In order for parts of 10 C.F.R. Part 72 purportedly authorizing off-site ISFSIs to be consistent with this statutory scheme, such regulations must be interpreted to require a showing that DOE has established, or attempted to establish, such a cooperative program or taken steps to develop storage technology not requiring site specific approval. The

Application does not demonstrate DOE has attempted to establish the requisite program--or that PFS has called on DOE to do so; accordingly, the Application must be denied.

3. **Conflict with DOE Duties and Prerogatives.** The Application must be denied because the proposed PFSF interferes with DOE duties and prerogatives under the NWPA.

Basis: The NWPA assigns certain duties and prerogatives to DOE, including establishment of a permanent repository for spent nuclear fuel, establishment of an interim storage program using new technologies to expand on-site storage capacity, taking title to certain spent nuclear fuel on January 31, 1998, and establishment of a Monitored Retrievable Storage facility ("MRS"). As proposed, the PFSF interferes with and undermines the duties and prerogatives of DOE as outlined in the NWPA.

The NWPA imposes certain responsibilities and grants certain rights related to spent nuclear fuel exclusively to DOE. With regard to interim storage, the NWPA provides that DOE, NRC, and other federal officials "shall take such actions as such official considers necessary to encourage and expedite the effective use of available storage, and necessary addition storage, at the site of each civilian nuclear power reactor." 42 U.S.C. § 10152 (emphasis added). It further provides that DOE "shall establish a demonstration program, in cooperation with the private sector, for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the [NRC] may, by rule approve;" 42 U.S.C. § 10198 (emphasis added). To the extent on-site storage space is inadequate, the NWPA directs that the "Secretary [of DOE] shall provide, in accordance with paragraph (5), not more than 1,900 MTU of capacity for the storage of spent nuclear fuel." 42 U.S.C. § 10155 (emphasis added) In addition, the NWPA directs that the "Secretary [of DOE]

shall complete a detailed study of the need for and feasibility of, and shall submit to Congress a proposal for, the construction of one or more monitored retrievable storage facilities for high-level radioactive wastage and spent nuclear fuel." 42 U.S.C. § 10161(b)(1) (emphasis added). Finally, the NWPA authorizes DOE to enter into contracts with persons producing nuclear waste and provides that such contracts "shall provide" that "in return for the payment of fees by this section, the Secretary [of DOE], beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided by this subchapter." 42 U.S.C. § 10222(a)(5)(B); see Indiana Michigan Power Co., 88 F.3d at 1277 (holding that § 10222(a)(5)(B) creates a mandatory obligation for DOE to take possession of nuclear waste subject to such contracts). This duty to take possession of spent nuclear fuel is in contemplation of a permanent repository to be established and operated by DOE. 42 U.S.C. § 10131 et seq.

As proposed, the PFSF violates the NWPA because it obstructs or usurps the mandatory duties and prerogatives of DOE. As explained in the Application, the intent of PFS in constructing the PFSF is to take nuclear fuel currently stored on the site of civilian nuclear power reactors, transport such fuel in storage containers across the country by rail, and store the containers for at least forty years in a facility containing up to 40,000 MTU of spent nuclear fuel. (EP 1.1). The Application does not make any showing that existing or possible on-site storage capacity has been optimized; moreover, it fails to describe attempts by PFS members to cooperate with DOE in developing more efficient on-site storage. In addition, PFS plans to accept spent fuel from some sites where there is no capacity problem--just a desire to reduce the costs of decommissioning. (Environmental Report ("ER") 1.2). Absent a showing of on-site optimization, cooperation with DOE, or the need to move spent fuel off-site, such a proposal

undermines DOE's statutorily mandated duty to "expedite the effective use of available storage . . . at the site of each civilian nuclear power reactor" and to establish demonstration programs designed to produce new technologies for safe on-site storage. See 42 U.S.C. §§ 10152, 10198.

PFS also contemplates taking fuel for which it alleges there is no capacity in on-site storage facilities and placing such fuel in its privately operated, off-site facility. This interferes with DOE's statutory mandate to accommodate excess spent nuclear fuel by providing 1,900 MTU of capacity through one of several numerated methods and, if this 1,900 MTU of capacity is inadequate, to submit to Congress a proposal for a larger scale facility that will handle up to 15,000 MTU of spent nuclear fuel. See 42 U.S.C. §§ 10155, 10161 et seq.

Finally, some or all of the spent fuel proposed to be stored the PFSF is presumably subject to contracts with DOE under which DOE is obligated to dispose of such spent fuel beginning not later than January 31, 1998. See 42 U.S.C. § 10222(a)(5)(B); see also Northern States Power Company v. Dep't of Energy, 1997 WL 705072 (D.C. Cir.) (November 14, 1997) (affirming the court's prior holding that DOE has an unavoidable duty to assume possession of spent nuclear fuel subject to certain contracts and ordering DOE to take no contrary position in negotiation with utilities). PFS is seeking to license the proposed PFSF for an initial term of twenty years and intends to seek an additional twenty year extension. (EP 1.1). The Application discloses no intent on the part of PFS to transfer the spent nuclear fuel subject to the contracts to DOE when DOE is prepared to take possession, as required by the NWPA, and fails to describe a program for removing such spent nuclear fuel from the PFSF for transfer to DOE. This failure to provide for transfer of the spent nuclear fuel to DOE will obstruct DOE in carrying out its statutorily and contractually mandated duty to assume responsibility for such

fuel beginning January 31, 1998 and, as soon as possible, place such fuel in a safe, permanent repository. The proposed PFSF is an attempt by PFS to undermine and interfere with the accomplishment of certain statutorily mandated duties by DOE and NRC; accordingly, the Application must be denied. At a minimum, the Application should be required to contain a showing that the PFSF is consistent with DOE's execution of its duties under the NWPA and the above-described contracts with utilities.

4. **Attempts to Evade the Requirements of the NWPA.** The status of the Application suggests that DOE has either tacitly or directly agreed with PFS and its member utilities to allow the Application to proceed in an attempt to evade the statutory mandates of the NWPA.

Basis: The NWPA expressly requires DOE to take certain steps to facilitate the interim and permanent storage of spent nuclear fuel. This statutory mandate grants DOE exclusive jurisdiction over and a responsibility toward some or all of the spent nuclear fuel to be stored at PFSF, which responsibilities DOE has failed to execute. If approved, the PFSF would encroach on DOE's jurisdiction and make timely accomplishment of many such statutorily mandated duties unnecessary; nevertheless, DOE has failed to intervene to prevent PFS from usurping DOE's responsibilities. These facts suggest tacit or express agreement by DOE not to oppose the Application and to permit construction of the proper PFSF so that DOE will be able to evade statutory mandate.

The NWPA requires DOE to take certain steps to facilitate safe interim and permanent storage of spent nuclear fuel. The NWPA directs that DOE "shall take such actions as such official considers necessary to encourage and expedite the effective use of available storage, and necessary addition storage, at the site of each civilian nuclear power reactor." 42 U.S.C. §

10152 (emphasis added). It provides that DOE "shall establish a demonstration program, in cooperation with the private sector, for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the [NRC] may, by rule approve;" 42 U.S.C. § 10198 (emphasis added). To the extent on-site storage space is inadequate, the NWPA directs that the "Secretary [of DOE] shall provide, in accordance with paragraph (5), not more than 1,900 MTU of capacity for the storage of spent nuclear fuel." 42 U.S.C. § 10155 (emphasis added) In addition, the NWPA directs that the "Secretary [of DOE] shall complete a detailed study of the need for and feasibility of, and shall submit to Congress a proposal for, the construction of one or more monitored retrievable storage facilities for high-level radioactive waste and spent nuclear fuel." 42 U.S.C. § 10161(b)(1) (emphasis added). The NWPA authorizes DOE to enter into contracts with persons producing nuclear waste and provides that such contracts "shall provide" that "in return for the payment of fees by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided by this subchapter." 42 U.S.C. § 10222(a)(5)(B). Although DOE has tried to avoid its obligation to take possession of such spent nuclear fuel on the ground that a repository has not been constituted, all appellate courts have unequivocally affirmed DOE's duty to begin assuming responsibility for fuel subject to its contracts on January 31, 1998. Indiana Michigan Power Co., 88 F.3d at 1277 (holding that § 10222(a)(5)(B) creates a mandatory obligation in DOE to take possession of nuclear waste subject to such contracts whether or not a repository is constructed); Northern States Power Company v. Dep't of Energy, 1997 WL 705072 (D.C. Cir.) (November 14, 1997) (affirming its prior decision, ordering the DOE to take no contrary position and ordering DOE to pay

damages if it cannot assume possession of fuel as required by contract). In addition, the NWPA directs DOE to issue guidelines, nominate sites, evaluate sites, and otherwise facilitate, construct, and operate a permanent repository for spent nuclear fuel. 42 U.S.C. § 10132; see generally 42 U.S.C. 10131 et seq.

These statutory mandates grant DOE exclusive jurisdiction over, and responsibility with regard to, some or all of the spent nuclear fuel to be stored at the PFSF. In addition to giving DOE a concurrent duty with the NRC to encourage and facilitate effective on-site storage of spent nuclear fuel, the above-described statutes direct DOE, and DOE alone: (1) to provide 1,900 MTU of additional storage capacity if on-site storage provides inadequate; (2) study and propose a monitored retrievable storage facility if the 1,900 MTU of additional capacity proves inadequate; (3) assume ownership of, and dispose, spent nuclear fuel subject to certain contracts; and (4) evaluate, obtain a license for, and construct a permanent repository for spent nuclear fuel. DOE has exclusive responsibility and jurisdiction with regard to each of these tasks, each of which it has failed, or is expected to fail, to timely complete. See, e.g., Northern States Power Company v. Dep't of Energy, 1997 WL 705072 (D.C. Cir.) (November 14, 1997) (describing DOE's concession that it will not be able to assume ownership of certain spent nuclear fuel on January 31, 1998, as required by statute and certain contracts, and will not have a repository constructed until 2010 at the earliest).

The proposed PFSF will encroach on DOE's jurisdiction with regard to spent nuclear fuel and will alleviate many of the consequences of DOE's failure to execute its above-described responsibilities. If the PFSF is constructed, fuel currently stored on the site of civilian nuclear power reactors will be removed from the reactor site, transported across the United States, and

stored for an indefinite period in a private, off-site facility designed to accommodate up to 40,000 MTU of spent nuclear fuel. (EP 1.1). The construction of the proposed PFSF would alleviate some of the adverse consequences of DOE's failure to take actions necessary to expedite use of available on-site storage capacity and to establish a demonstration program to develop technology to increase the efficiency and ease of on-site storage, as required by 42 U.S.C. §§ 10152, 10198. The proposed PFSF would expropriate DOE's responsibility to provide 1,900 MTU of interim storage capacity, as required by 42 U.S.C. § 10155, or to study and propose a 15,000 metric ton MRS, as required by 42 U.S.C. § 10161 et seq. Construction of the PFSF would interfere with DOE's ability to execute its statutory and contractual duty to take possession and dispose of large quantities of spent nuclear fuel, as required by 42 U.S.C. § 10222(a)(5)(B) and related contracts, and it would mitigate monetary damages DOE must pay because of its failure to fulfill such responsibility. Finally, the proposal by a private entity to construct an off-site facility designed to store 40,000 tons of spent nuclear fuel for at least forty years--but possibly indefinitely--would alleviate much of the fallout from DOE's failure to take the steps necessary to timely open the permanent repository contemplated and mandated by 42 U.S.C. § 10131 et seq.

In sum, the DOE has numerous responsibilities with respect to the interim and permanent storage of spent nuclear fuel under the NWPA, each of which it has failed, or will fail, to timely execute. The proposed PFSF encroaches on the DOE's jurisdiction with respect to such spent nuclear fuel; nevertheless, DOE has not intervened in these licensing proceedings to prevent PFS from expropriating such responsibilities. In addition, the proposed PFSF alleviates many of the negative impacts of the DOE's failure to execute many of its duties under the NWPA. From

these circumstances, the licensing board can assume that an improper agreement exists between PFS and DOE. See United States v. Wood, 879 F.2d 927, 938 (D.C. Cir. 1989) (holding that circumstantial evidence, including inferences from a development and collocation of circumstances, are sufficient to show a conspiracy); United States v. Treadwell, 760 F.2d 327, 333 (D.C. Cir. 1985) (same). Accordingly, the Application should be denied, or, at a minimum, Petitioners should be able to conduct discovery regarding the existence of any such improper agreement between PFS and DOE.

5. **Application For Permanent Repository**. 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.

Basis: Although the Application describes the proposed PFSF as a facility for the interim storage of spent nuclear fuel, that description is utterly disingenuous. 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. If the PFSF is constructed, it will continue to store spent fuel indefinitely into the future. Thus, the PFSF is a de facto permanent storage facility, and the Application must be evaluated and assessed as an application for a permanent repository. However, the Application does not meet the requirements for a permanent repository.

The proposed PFSF is a de facto permanent repository for the storage of spent nuclear fuel. The Application explains that:

The PFSF is designed to store spent fuel from commercial nuclear reactors in sealed metal canisters containing up to 40,000 Metric Tons of Uranium (MTU), which will require approximately 4,000 storage casks. . . . The PFSF is designed to store spent fuel for up to 40 years, at which time all spent fuel will have been transferred off-site and the facility will be ready for decommissioning. The initial request for a license is for a term

of 20 years. Prior to the end of the initial license term, an application for license renewal will be submitted for an additional 20 year term, if necessary.

(EP 1). The PFSF is designed to store up 40,000 MTU spent nuclear fuel. 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. The NWPA establishes a schedule and framework for the siting, licensing, and construction of a permanent repository capable of absorbing 70,000 MTU of spent nuclear fuel, 42 U.S.C. § 10131 et seq. Pursuant to congressional mandate, however, the only repository site presently being considered is that located near Yucca Mountain, Nevada. (42 U.S.C. 10133 (requiring DOE to conduct site characterization activities at the Yucca Mountain site); General Guidelines for the Recommendation of Site, 61 Fed. Reg. 66159 (1996)). Construction of a permanent repository at the Yucca Mountain site has not begun and cannot begin until and unless, among other things, all of the following occur: (1) DOE completes site characterizations for the Yucca Mountain site, determines that the site is suitable for development as a repository, and recommends it to the President of the United States²; (42 U.S.C. § 10133; (2) the President submits a recommendation of such site to Congress; 42 U.S.C. § 10134(a)(2)(A); and (3) the Governor of the State of Nevada does not submit a notice of disapproval of the repository site designation or, if the Governor does submit a notice of disapproval, Congress passes a resolution of repository siting approval within ninety days. 42

² There is presently no alternative to the Yucca Mountain site under consideration. If the DOE determines that the Yucca Mountain Site is unsuitable, the decades-long process of reviewing and selecting candidate sites will have to begin again, or the repository program will simply collapse.

U.S.C. § 10135(c). In addition, the repository must be licensed by NRC under applicable guidelines. 42 U.S.C. § 10134(d).

The Governor of Nevada has publicly announced his opposition to, and the State of Nevada has consistently opposed, the siting of a permanent repository in the State of Nevada. See Kenneth J. Garcia et al., Fighting for Lethal Leftovers, San Francisco Chronicle, April 13, 1995, at A1. DOE has repeatedly failed to meet mandatory deadlines with respect to the provision of interim and permanent storage facilities. In fact, already years behind in its site characterization activities for a permanent repository at Yucca Mountain, DOE recently discovered evidence of water seepage in its experimental tunnel--suggesting the site may not be suitable for permanent storage of spent nuclear fuel. See Transcript @ 97082007-j04; Nevada Hazardous Waste Site Still Not Proven Safe, World News Tonight with Peter Jennings, August 20, 1997. Furthermore, even if such a permanent repository were to be constructed, federal law limits its capacity to 70,000 MTU, (42 U.S.C. § 10134(d)); thus, it may not be able to absorb the full 40,000 MTU proposed to be stored at the PFSF on the date the PFSF is supposed to be decommissioned.

In sum, 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. No such repository exists, and the only such repository being seriously considered by DOE has not been deemed suitable as a repository or licensed by NRC, and still faces considerable political obstacles before construction can commence. Even if constructed, such a facility may not have the space for 40,000 MTU of spent fuel. Accordingly, regardless of what PFS proposes, the PFSF will in all likelihood continue to store spent nuclear fuel indefinitely

into the future and, therefore, is a de facto permanent repository. Any assertion or assumption to the contrary is speculative and should not be accepted by NRC absent substantial supporting evidence.

In all aspects of the licensing process, NRC is obligated to honestly and realistically analyze all political, economic, environmental and other factors which will impact a proposed nuclear storage facility. In this case, NRC must ask whether the proposed PFS will realistically store spent nuclear fuel for only twenty or forty years, as proposed in the Application. If NRC determines, as it must, that there is no realistic prospect that a permanent repository capable of absorbing 40,000 additional MTU of spent nuclear fuel will exist on the proposed date of decommissioning, NRC cannot treat, assess, and license the proposed PFSF as an interim storage facility pursuant to 10 C.F.R. Part 72. See 10 C.F.R. § 72.1 (defining "ISFSI" to mean "a complex designed and constructed for the interim storage of spent nuclear fuel") (emphasis added). Rather, NRC must evaluate and assess the Application as an application for a permanent repository. The requirements and prerequisites for licensing a permanent repository are numerous and complex but include without limitation: (1) compliance with general guidelines for the recommendation of sites for permanent repositories; 42 U.S.C. § 10132; 10 C.F.R. Part 60, (2) consultation with and establishment of a cooperative agreement with the State of Utah; 42 U.S.C. § 10155(d) (3) nomination of the site for such a repository by DOE and the President of the United States prior to site characterization; 42 U.S.C. § 10132(b)(c), and (4) and successful completion of the same site characterization activities and political approvals to which the proposed Yucca Mountain site is subject. See 42 U.S.C. § 10133, 10134(a)(2)(A) & 10135(c). There is no indication in the Application or in the record that these events, and other

pre-requisites to review of a permanent repository license by NRC, have occurred. Accordingly, the Application is defective and must be denied.

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

The EP and Safety Analysis Report ("SAR") fail to consider numerous potential emergency conditions and to describe means for mitigating the consequences of such conditions. NRC regulations require an applicant to identify emergency or accident conditions and describe the means of mitigating the consequences of any such accidents or conditions. See, e.g., 10 C.F.R. § 72.32(a). In addition, PSF is required to identify, examine, and evaluate the frequency and severity of external natural and man-induced events that could affect the safe operation of the proposed facility design, as well as the past and present man-made facilities and activities that may endanger the proposed facility. See 10 CFR §§ 72.90 & 72.94; see also, §§ 72.98, 72.100, 72.108, and 72.122.

The EP and SAR fail to consider the effect of a fire or series of fires in the Skull Valley requiring an extended evacuation of the PFSF. Section 2.4.1.7 and Section 2.4.2.8 of the EP acknowledge that if personnel were unable to retain physical control of the PFSF, an emergency condition would exist. Furthermore, Section 2.4.2.7 of the EP explains that degradation of fuel cladding, canisters, and storage cask concrete is possible if cooling cannot be maintained because of improper air circulation for a several day period. (See also SAR 8.2.8.2 (explaining that cladding occurs at a temperature 300 degrees)).

As indicated by the attached photographic excerpt from the Utah Statewide Fire Assessment Fire History (1986-1996), attached hereto as Exhibit A, there have been numerous 1000+ acre fires in the area immediately surrounding the Goshute Reservation over the last fifteen years. In fact, in 1996, concurrent fires on the Goshute Reservation and near the town of Terra, located fewer than twenty miles from the site, burned 36,000 acres and forced the evacuation of residents. See ER Figure 2.2-2; Larry D. Hatfield, Wildfires Dances Across Sierra Lightning, San Francisco Examiner, July 9, 1996, at A2; Fires Gain Upper Hand on Lightning-Sparked Blazes in Utah, Las Vegas Review-Journal, July 11, 1996, at 5B. The vegetation surrounding the proposed PFSF consists primarily of dry grasses and flammable bushes such as sagebrush, fourwing saltbush, and tumbleweed. (ER § 2.3.1.1).

Given the history of large fires in the region, including a recent fire covering over 36,000 acres and requiring evacuation of local residents, a fire that directly threatens or, because of smoke and heat, requires evacuation of the PFSF is highly possible during the proposed forty-year life of the PFSF. Moreover, the smoke and heat associated with such a fire, or series of fires, may interrupt normal cooling and air circulation, causing degradation of fuel cladding, canisters, and storage cask concrete. The Application is inadequate because the EP and SAR fail to identify and assess these credible emergency or accident conditions. In addition, neither the EP nor the SAR contain a plan for mitigating these conditions or related problems, such as the availability of water to defend the PFSF from such a fire, measures for ensuring groundwater is not contaminated by run-off from the efforts to fight any fire in or around the facility, or the possible need to quarantine the PFSF.

In addition, the EP and SAR fail to consider the effect of an emergency at a nearby facility requiring extended evacuation of the PFSF, compromising the safety of PFSF personnel, or compromising the PFSF's proposed security and emergency response measures. While the Application cursorily mentions land uses within a five mile radius of the proposed ISFSI (ER § 2.2.2, SAR §§ 2.1.4 & 2.2), it fails to adequately address the requirements of NUREG-1567, which states:

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

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

The PFSF will be located within the boundaries of Tooele County. Within Tooele County, the following significant facilities conduct extremely dangerous and volatile activities that might create an emergency condition at the PFSF:

- ✓(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 Airforce 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.

With the exception of a cursory discussion of Dugway Proving Grounds and the Tooele Army Depot in the SAR, the SAR and EP fail to describe the products or materials handled at these facilities, along with the potential hazards to the PFSF arising from their activities. Several of these facilities have a past history of accidents or contamination of the area. For example, in 1968, a DOE experiment at Dugway Proving Grounds spread nerve-gas over a portion of the Skull Valley, killing 6,400 sheep. See Norm Brewer and John Hanchette, [Dugway Accident May Explain Gulf Ills; Dead Sheep May Shed Light on Gulf War Ills](#), Salt Lake Tribune, April 3, 1997, at A1. In 1957 and 1958, scientists at Dugway Proving Grounds spread potentially toxic levels of zinc and cadmium sulfide over the surrounding areas. Secret Army Test Get Clean Bill of Health, Deseret News, May 17, 1997. As recently as May, 1997, citizens were accidentally exposed to traces of nerve gas at the Tooele Army Depot. Jim Woolf, Group Exposed to Chemical at Tooele Burn Plant, Salt Lake Tribune, June 18, 1997.

A serious accident at any of the above-described facilities could release radioactive, chemical or biological contaminants or explosives into the air throughout Tooele County, forcing an excavation of the PFSF and numerous other facilities. Such a release could also cause abnormal heat or fire conditions, compromising the cooling system, canisters, or casks. In any case, such an accident will require a coordinated safety response among numerous facilities

dealing with ultrahazardous or explosive materials. The Application is inadequate because the EP and SAR do not discuss the effect of an accident at any of these neighboring facilities and a program for a coordinated response to such an event.

In addition, the EP and SAR fail to consider the effect of the 2002 Winter Olympics Games in Salt Lake City. As illustrated by the well-known terrorist attack on Israeli athletes during the 1968 Summer Olympics in Munich, Germany and the bombing at Centennial Park during the 1996 Summer Olympics in Atlanta, Georgia, terrorists attacks are a significant possibility anywhere in or near the host city of the Olympic Games. Salt Lake City is going to be the host city for the Winter Olympic Games in 2002. According to the Application, construction of the PFSF will be completed by December 31, 2001 and operation will commence in early 2002. (Application 1.8). A lightly staffed, recently completed and controversial nuclear waste storage facility is an obvious target for a terrorist attack during a widely-broadcast event such as the Olympic Games--particularly a storage facility located near a chemical weapons or explosive storage and testing facilities. The EP and SAR fail to analyze the potential for terrorist attacks during the 2002 Winter Olympic Games, to outline the necessary heightened security measures, and to discuss PFS's plan for coordinating security measures with Olympic and federal officials. Accordingly, the Application is defective and should be denied.

7. **Inadequate Financial Qualifications.** 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).

Summary of Six Bases: Section 72.22(e) requires that an applicant seeking a license to operate an ISFSI show that it:

will have the necessary funds available to cover the following:

- (1) Estimated construction costs;
- (2) Estimated operating costs over the planned life of the ISFSI; and
- (3) Estimated decommissioning costs, and the necessary financial arrangements to provide reasonable assurance prior to licensing that decommissioning will be carried out after the removal of spent fuel and/or high-level radioactive waste from storage.

The portions of PFS's financing plan purporting to comply with the financial assurance requirements of 10 C.F.R. § 72.22 are contained on pages 1.4 through 1.8 of PFS's License Application. The Application sets forth seven steps of the PFSF (six of these steps are specifically enumerated, while the seventh, decommissioning, is treated separately). (Application 1.4, 1.8) The steps most relevant to the financial assurance requirements of 10 C.F.R. § 72.22 are Step V (construction of the PFSF), Step VI (operational phase of the PFSF), and Step VII (decommissioning of the PFSF). The Application states, without providing any supporting documentation of detail, that PFS estimates construction of the PFSF will cost \$100 million. PFS members plan to cover only \$48 million of this \$100 million estimate with additional equity contributions. (Application 1.6) The bulk of the construction costs are to be funded through Service Agreements with customers.

PFS plans to fund all of the operational costs of the PFSF through the Service Agreements with customers. (Id.) "The on-going operations and maintenance cost for spent fuel in storage at the PFSF will be paid by the customer on an annual basis as required by the Service Agreements." Id. The Application provides no details of the Service Agreements other than the statement, "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)." Id. at 1.6 to 1.7.

PFS has divided the funding of the decommissioning phase into two components. The first component is storage cask decommissioning, which PFS plans to fund with advance payments by customers of \$17,000 per storage cask into an escrow account. Id. at 1.7. The second component is the decommissioning of the remainder of the facility, which PFS plans to fund through a "letter of credit coupled with an external sinking fund." Id. at 1.8.

PFS's financing plan fails to satisfy 10 C.F.R. § 72.22(e) for six related reasons. First, being a limited liability company with no assets other than the PFSF, PFS's members are not individually liable for the costs of the proposed PFSF. Also, PFS's members are not required to advance equity contributions in addition to those agreed upon in the limited liability company agreement; thus PFS does not have a sufficient financial base to assume all obligations, known and unknown, incident to ownership and operation of the PFSF. Second, the Application does not adequately account for possible shortfalls in revenue if customers become insolvent, default on their obligations, or otherwise do not continue making payments to the proposed PFSF. Third, the Application does not provide assurance that PFS will have sufficient resources to cover non-routine expenses, such as the costs of a worst case accident in transportation, storage, or disposal of the spent fuel. Fourth, 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 to evaluate the financial assurance requirement. Fifth, the Application fails to describe the legal obligations of the Skull Valley Band of Goshute Indians (the "Tribe") and provide assurance that

third parties will have adequate legal remedies if injured as a result of the Tribe's acts or omissions. Finally, the Application fails to itemize cost estimates and otherwise provide enough detail to permit evaluation of the tenability of such estimates.

First Basis: PFS is a limited liability company, organized and existing under the laws of the State of Delaware. (Application 1.3) Three significant financial concerns flow from PFS's organization as a limited liability company. First, although the members of PFS are utilities with significant resources, members are not individually liable for "the debts, obligations and liabilities" of PFS. Del. Code Ann. tit. 6, § 18-303(a). Therefore, it is irrelevant that the members of PFS are large utilities with significant assets. Because the members are not individually liable for the debts, obligations, and liabilities of PFS, contractual obligees of PFS, third parties injured by the activities of PFS, or any entity seeking financial relief or assistance from PFS, including the United States government, can look only to the assets of PFS for recovery. It is for such protection from creditors that a limited liability company is attractive to PFS members.

Second, members are not required to advance equity contributions in excess of what the members previously agreed to in the limited liability company agreement, see Del. Code Ann. tit. 6, § 18-502, and the agreed upon amount of contributions by PFS members is not adequate to provide reasonable assurance that PFS will have sufficient funds for operating costs. The Application makes specific reference to equity contributions by members only through Step V, the construction of the PFSF. (Application 1.5 to 1.8) Thereafter, the Application provides that PFS will rely exclusively upon annual customer payments pursuant to the Service Agreements to pay for "on-going operations and maintenance cost for spent fuel in storage at the PFSF."

Id. at 1.6. There is no requirement under Delaware law that the members of PFS must agree to additional equity contributions should the assets of PFS prove to be insufficient to cover costs or liabilities. The members of PFS, who are large utilities with significant financial resources, can simply escape financial responsibility for the PFSF should it fail as a business venture, whether because of shortfalls in anticipated revenues, contractual liabilities, cost overruns, or a significant and costly accident involving the spent fuel.

Finally, the continuity of a limited liability company such as PFS is suspect. Under the laws of the state of Delaware, a limited liability company is dissolved upon the first to occur of the following: (i) the time specified in the limited liability company agreement, (ii) the occurrence of an event specified in the agreement, (iii) written consent of all the members, unless the agreement provides otherwise, (iv) any event that terminates the membership of a member unless all of the remaining members consent to continuing the business or the agreement provides that the limited liability company shall continue, or (v) judicial dissolution. Del. Code Ann. tit. 6, § 18-801. Membership in a limited liability company may be terminated at any time or on the occurrence of any event specified in the limited liability company agreement or, if the agreement does not contain a provision on termination, upon six months notice of termination. Id. § 18-603.

PFS did not include its limited liability company agreement with the Application. Given the lack of certainty of PFS's continued existence and the mutability of PFS's membership, coupled with the indefinite, if not permanent, time period for the proposed PFSF, 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.

Second Basis: PFS has failed to provide adequate assurance that it will have funds to cover operating and decommissioning costs if its revenue stream falls short of expectations. According to the Application, PFS plans to finance "on-going operations and maintenance costs for spent fuel in storage at the PFSF" solely through annual payments by customers pursuant to the Service Agreements. (Application 1.6) The annual payment means of financing on-going operating and maintenance costs is inherently risky, particularly since the proposed PFSF may de facto become a permanent repository. Yet, PFS is relying upon its customer's ability to make annual payments to cover its financial responsibility for the PFSF. This reliance fails to provide adequate financial assurance for two reasons. First, PFS omitted all meaningful detail concerning the Service Agreements from the Application. (See id. at 1.6 to 1.7). As a result, it is not known who the customers will be and under what circumstances the customers may avoid their obligation to make annual payments. The Service Agreements will no doubt contain conditions precedent to customer's obligation to pay, which conditions may not be satisfied; moreover, customers may be able to avoid payment altogether if PFS is in breach or, for example, if PFS's license is suspended or terminated.

Second, 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. Yet, as discussed above, members of PFS are not obligated to pay additional equity contributions to cover the shortfall. Thus, there is no assurance that PFS will have sufficient funds.

Third Basis: PFS's proposed financing in the Application does not account for non-routine expenses of operation and decommissioning, such as an accident in transporting, storing,

or disposing of the spent fuel or other emergencies, fires, accidents, or injuries to neighbors. The Application fails to provide any information concerning PFS's financing plan to cover expenses of an accident, which expenses could be enormous. This absence of information raises the question of the ability of a limited liability company like PFS to pay for such expenses.

As discussed above, PFS's only asset is the PFSF, and PFS's members are not required to advance additional equity contributions. Thus, unlike an MRS, which would be operated by the DOE with the financial backing of the United States government, see 42 U.S.C. §§ 10161-10169, 10 C.F.R. § 72.3, there is no assurance that PFS will have sufficient resources to cover accident costs or other unforeseen costs arising from operating or decommissioning the PFSF. As noted, the PFSF will be operated by PFS with the limited financial support of its customers under Service Agreements (the details of which are unknown) and without any guarantee that PFS members will advance additional equity contributions. This fact is particularly troubling given the unprecedented scale of the PFSF and its indefinite lifespan (in contrast to the limited or regulated lifespan of an MRS, see 42 U.S.C. § 10168(d), or an interim storage facility, see id. § 10155).

Fourth Basis: As discussed above, PFS will be a thinly capitalized company whose members have limited financial obligations for costs related to the PFSF. The financial strength of PFS will rest upon, and only upon, the value of the PFSF and the Services Agreements with utility customers. Although the Application suggests that PFS has the option to finance construction costs through debt financing (Application 1.6), neither the PFSF itself nor the Services Agreements with utility customers are likely to be available as security for borrowed funds because of tenuous market value and nontransferability of these assets independently of

the license. Therefore, any borrowed funds would have to be based upon direct obligations of either the members of PFS or of the utility customers. If plans or agreements regarding any such financing exist, a description and all relevant documents needs to be provided as part of the Application. Since no such commitments are described in the Application, it appears that the equity funding obligations of the members of PFS and the obligations of its customers under the Service Agreements will be the sole source of funding for the PFSF. Therefore, the agreements between the members with respect to funding and the Service Agreements are critical to the evaluation of PFS's ability to satisfy the financial assurance requirement of 10 C.F.R. § 72.22(e) and must be made available to all parties to this proceeding for scrutiny. In addition, on information and belief, PSF have developed a business plan, which would presumably describe in detail all estimated costs, revenues, and funding sources. Provision of a copy of any such business plan is essential to evaluation of PSF's ability to satisfy the financial assurance requirements of 10 C.F.R. § 72.22(e). If any of the above-described documents do not exist, or are not available, their absence is sufficient in itself to demonstrate noncompliance with the financial assurance requirement.

In addition, complete knowledge of the financial obligations of PFS is necessary to evaluate the degree of commitment for which financial assurance must be demonstrated. In this regard, any leasehold or other agreement with the Tribe and any other long-range financial commitments must be made available to all parties for scrutiny. Any contingency expenditures, such as costs for acquiring rights of way, securing rail transportation, obtaining permits, and construction must be provided in connection with the alternative railroad access route described

by PFS in the Application. Only with such a complete understanding of the financial affairs of this private applicant can an evaluation of financial capacity of PFS be adequately performed.

Although logic alone compels production of this additional financial information concerning PFS, the appropriateness of doing so is also supported by NRC's regulations. In Louisiana Energy Services, L.P., (Claiborne Enrichment Center), 44 NRC 333 (1996) (referred to as "Claiborne"), the Licensing Board looked to applicable provisions of Part 50 of 10 CFR for guidance as to the level of financial qualifications detail an applicant for a facility governed by Part 70 must provide. For the same reasons, § 50.33(f) should be used as a framework for reviewing PFS's financial qualifications. As to newly-formed entities such as PFS, the applications must include information showing:

- (i) The legal and financial relationships it has or proposes to have with its stockholders or owners;
- (ii) Its financial ability to meet any contractual obligation to the entity which they have incurred or proposed to incur; and
- (iii) Any other information considered necessary by the Commission to enable it to determine the applicant's financial qualifications.

In addition, an applicant which is a newly-formed entity must provide specific information concerning the sources of construction funds and "describe in detail the applicant's legal and financial relationships with its stockholders, corporate affiliates, or other (such as financial institutions) upon which the applicant is relying for financial assistance." 10 CFR Part 50, Appendix C.II.

Rather than provide any of the necessary details in the Application, PFS has elected to reveal only generalities. The limited liability company members of PFS are not even identified. No detail is provided about the supposed utility customers who are expected to enter into the services agreements that are planned to be the source of most of the funds needed to construct,

operate, and decommission the PFSF. The needed funds are described only in gross, apparently as preliminary estimates, rather than in itemized detail. No detail is provided concerning any of the contracts that PFS has, such as its agreement with the Tribe or contribution agreements among its members, or that it expects to have (such as the services agreements). Such scanty information fails to reach any meaningful threshold for evaluating the financial requirements of the proposed PFSF, let alone PFS's ability to satisfy them. PFS has failed dismally in meeting the requirements imposed by 72 CFR § 72.22(e) that it demonstrate what the costs for the PFSF will be and that it will have the necessary funds to cover them.

Fifth Basis: In addition, under 10 C.F.R. § 72.22(e), PFS's showing that necessary funds will be available to cover construction, operating, and decommission costs must include a description of the Tribe's obligations to compensate third parties for accident or injuries arising from acts or omissions of the Tribe. If the Tribe purportedly has no liability to third parties for injuries caused by its negligent or willful acts or omissions, or does not have the financial resources to cover such liabilities, or has not expressly consented to submit to the jurisdiction of U. S. and Utah State courts, the Application must describe PFS's willingness to submit to the jurisdiction of the courts in lieu of the Tribe and indemnify third parties for any injuries caused by acts or omissions of the Tribe. If the Tribe concedes liability, has expressly agreed to submit to United States and Utah State courts, and is capable of meeting any liabilities, the Application needs to describe, and provide evidence of, such facts. Absent assurance of the Tribe's duty, willingness, and ability to compensate third parties for injuries caused by its acts of omissions, the Application is defective, and the License must be denied.

Sixth Basis: 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. In the Application, PFS provides general estimates for the total costs of each step in the construction and operation process of the proposed PFSF. See, e.g., (Application 1.6) (estimating construction at \$100 million, estimating the costs of canisters at \$432 million and casks at \$134 million). However, it does not itemize costs or provide the other information necessary to enable a third party to evaluate its estimates. Section 72.22(e) requires that PFS show that it "will have the necessary funds available to cover" estimated construction costs, estimated operating costs, and estimated decommissioning costs. A precondition to demonstrating adequate funding to cover such costs is providing cost estimates that are itemized, detailed, and realistic enough to permit third party evaluation. The Application fails to provide adequate estimates of construction, operations, and decommissioning costs, as necessary to meet the financial assurance requirements of 10 C.F.R. § 72.22(e); accordingly, the License must be denied.

8. Groundwater Quality Degradation. 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.

Basis: Section 2.5.5 of the Environmental Report acknowledges that:

"Domestic water wells are developed...in the unconsolidated alluvial fan deposits along the east side of Skull Valley. ...Water quality is also the highest in this area. Discrete sand and gravel lenses are sufficiently interconnected so that water moves from bed to bed as a single hydrologic unit" (emphasis added).

The proposed PFSF is located "upstream" hydro-geologically from numerous wells used by Petitioners north of the PFSF site for human consumption, farm irrigation, and watering of livestock. The Environmental Report confirms that, "[g]roundwater flow is generally northward...." [i.e. from the proposed PFSF site toward the Petitioner's property] (ER 2.5-10). The aquifer from which the wells draw water encompasses both the Petitioner's property and the proposed PFSF site.

In Section 3.4 of the ER, entitled "Waste Confinement and Effluent Control", the applicant acknowledges that low-level radioactive wastes will likely be generated at the PFSF site and temporarily stored on-site. Spent nuclear fuel rods, of course, will be stored on-site (Id.). Various solid wastes, and potentially hazardous wastes, will undoubtedly be generated at the site based on the simple fact that people and equipment will be present and operating at the PFSF site. In addition, fire fighting activities will cause the release of contaminated water into the surrounding soil and groundwater. Thus, there is a very real potential for the PFSF site to contaminate the groundwater critical to Petitioner's continued economic well being. 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. This silence violates the requirements of 10 C.F.R. Parts 51, 72 and NEPA.

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

Basis: Among other things, 10 C.F.C. § 72.98(c) requires the PFSF Application to include an identification of the "potential regional impacts" of the project and an investigation

of "present and future uses of the land". In addition, Section 72.100 of NEPA requires the Application to contain an evaluation of the effects on the "regional environment" and the "populations in the region". Similarly, courts have ruled that an EIS is defective if it fails to analyze and address the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other action (See e.g., Fritiofson v. Alexander, 772 F.2d 1225 (5th Cir. 1985); Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985). See also 40 C.F.R. §§ 1508.7 & 1508.25).

In this situation, PFS is applying for a license to store, for an indefinite period of time, spent nuclear fuel rods in Skull Valley, Utah--about 40 miles west of the Salt Lake Valley (i.e. where Salt Lake City is located). Skull Valley is part of Tooele County, Utah. Tooele County is already the location of an unusually large number of facilities and operations with serious environmental impacts, including, but not limited to: (1) Department of Defense Chemical Weapons Incinerator; (2) Tooele Army Depot (Two locations--chemical weapons storage); (3) Dugway Proving Ground (Weapons and Landing Field); (4) Wendover Air Force Bombing Range; (5) Hill Air Force Bombing Range; (6) Magnesium Corporation of America Magnesium Plant (largest source of chlorine gas emissions in the United States); (7) Aptus Hazardous Waste Incinerator; (8) Laidlaw Hazardous Waste Incinerator; (9) Laidlaw Hazardous Waste Landfill; (10) Kennecott Copper Smelter (near Salt Lake County/Tooele County line); (11) Envirocare of Utah Low-level Radioactive Waste Disposal Facility; and (12) Other high impact private and public facilities. 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. A number of cumulative/regional impact/effects issues must be addressed,

including, but not limited to questions regarding: the cumulative quantitative risk to the public of so many facilities in one county; the cumulative impact to the regional environment and population; possible interrelated risks that may be created by concentration of these facilities in one county (i.e. 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, etc.). The Application is defective and will continue to be so unless and until these critical regional and cumulative effects are properly addressed.

In particular, NRC regulations require cumulative effects analysis. See 10 C.F.R. § 72.122. The regulations require an ISFSI to be designed and operated to "ensure that the cumulative effects" of "combined operations" of "other nuclear facilities" which are "near" the ISFSI do not create an unreasonable risk to the public health and safety (Id. at § 72.122(e)) (emphasis added). PFS has taken the position, however, that this regulation "is not applicable to the PFSF since there are no other nuclear facilities located within a 5-mile radius" of the proposed PFSF site (SAR at p. 7.6-2). Thus, PFS is assuming that the term "near" should be interpreted to mean five miles away. This interpretation is convenient for PFS, of course, because none of the above-described facilities (including the EnviroCare radioactive waste disposal facility) are located within five miles of the proposed PFSF, although all are within Tooele County. This interpretation is inconsistent with the spirit, if not the letter, of Section 72.122(e). The term "near" is not defined in the regulations. See 10 C.F.R. § 72.3. Inasmuch as the PFSF would be the largest ISFSI in the country, the term "near", in this case, must be interpreted (in the interest of protecting public health, safety and the environment) to include, at a minimum, all of Tooele County.

In addition, although the letter of Section 72.122 is concerned with "nuclear" facilities, this is presumably because the regulation contemplated on-site storage, not an off-site ISFSI surrounded by numerous chemical weapons, hazardous waste storage, bombing, and incinerator facilities. Accordingly, the ER and Safety Analysis Report ("SAR") are, and will continue to be, defective and deficient until such time as they include both an environmental and safety analysis of the cumulative/regional effects and impacts of all nuclear hazardous waste, testing, and other highly dangerous facilities in the greater Tooele County area--whether public or private.

10. **Retention Pond**. 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.

Basis: The retention pond is briefly discussed in Section 4.2.4 of the ER. In addition, general drawings of the PFSF site, including the retention pond, are found at Figures 2.1-2 and 2.6-2. The Figures show that the retention pond will be the northernmost "outcropping" of the PFSF site--closest to the northern boundary of the Goshute Reservation, and therefore closest to the private lands and grazing allotments of Petitioners. The ER states that the purpose of the retention pond will be to collect storm-water from the PFSF facility. Apparently, PFS has no plans to line this retention pond so that the anticipated surface runoff will "dissipate by evaporation and percolation in to the subsoils" (ER, § 4.2.4, p. 4.2-4). The ER fails to discuss the potential for overflow from the retention pond, and therefore, it fails to comply with 10 C.F.R. Part 51.

Similarly, the ER is flawed because it contains no information concerning effluent characteristics and environmental impacts associated with seepage from the pond. This violates both 10 C.F.R. § 51.45(b) and § 72.126(c) & (d). The ER states that the movement of the effluent from the pond into the subsoils will, in part, be "transpired by vegetation" north of the retention pond. (Id. at 4.2.4) The ER should identify the dimensions of the plume created by this underground discharge of effluent because of its close proximity to grazing cattle on the nearby grazing allotments. Moreover, given that the retention pond will admittedly discharge effluent to subsoils, and given the existence of a large aquifer under the retention pond on both the Goshute Reservation and Federal/private lands, the ER should address the applicability of the Utah Groundwater Protection Rules, which rules apply specifically to facilities such as the retention pond and generally require that such ponds be lined. On July 8, 1997, the Executive Secretary of the Utah Water Quality Board sent a notice to John D. Parkyn, Chairman of the Board, of PFS, advising PFS of their legal obligation to comply with the Utah Groundwater Protection Rules and permitting requirements.

11. **Radiation and Environmental Monitoring**. 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.

Basis: No assurance is provided in the Application for radiation monitoring adequate to protect the health of the public and workers in nearby areas. The activities of Petitioners, their

workers, and their tenants, including but not limited to, livestock grazing, farming and residential and commercial development are simply not addressed in the Application. For example, Section 2.10 of the ER deals with the subject of "Background Radiological Characteristics." It states that PFS has taken "no radiological samples of the vegetation." (ER 2.10-2). It also indicates that no background samples of groundwater were obtained. (See id.). Similarly, Chapter 6 of the ER dealing with "Effluent and Environmental Measurements and Monitoring Programs," it states that PFS plans to install "no site effluent monitoring system" because there are "no credible" scenarios that radioactive contaminated effluents will be released. (ER 6.2-1). PFS makes this claim, without supporting analysis despite the fact that the ER admits that the retention pond will capture surface runoff from the PFSF site and allow these effluents to percolate into the surrounding subsoils (ER 4.2-4). As noted above, PFS's dismissal ignores fire, disaster, and accident scenarios. In addition, the ER concedes that a low-level radioactive waste storage facility will be constructed at the PFSF because it is anticipated that radioactive wastes will be generated at the PFSF (ER § 3.4).

In brief, PFS proposes to construct the largest ISFSI facility ever constructed without knowing what the background radiological concentrations are in the nearby vegetation and groundwater and without any plans to install a system that will detect any offsite discharge of either radioactive or environmental contamination from a retention pond designed to leak into the subsoils.

In the SAR, PFS flatly takes the position that the provisions of 10 C.F.R. § 72.126(c), requiring effluent monitoring systems and effluent control designs, are "not applicable" (SAR, p. 7.6-2). PFS ignores the language of § 72.126(c), which states that "effluent [monitoring]

systems must be provided." (emphasis added). Moreover, PFS's "no monitoring--no data" position appears to adopt an "ignorance is bliss" philosophy rather than accept the rational view that monitoring air and water effluents (even if the PFSF is expected to be very clean) is the only way to document the performance of PFSF in preserving the public health, safety and environment in the Skull Valley area. For these reasons, Petitioners believe that PFS's position, and the Application, clearly violate 10 C.F.R. Parts 51 and 72, NEPA and DOE/NRC's legal obligations to protect public health and the environment.

12. **Permits, Licenses and Approvals.** 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).

Basis: Section 51.45(d) of 10 C.F.R. requires that the ER contain a "list" of all permits, licenses and approvals "which must be obtained". The Application simply ignores this requirement and nowhere sets forth the required list. Chapter 9 of the ER is entitled, "Environmental Approvals and Consultation" and would be the logical place for such a list, but the list is simply not there. Thus, the Application is incomplete and defective.

In addition, the ER fails to comply with the requirements of NEPA and NRC's regulations to "include a discussion of the status of compliance with applicable environmental quality standards and requirements..." 10 C.F.R. § 51.45(d) (emphasis added). The ER contains no such discussion. Rather, it 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. For example, 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". This is interesting information, but does not comply with the ER and NEPA requirements. Transportation corridors must be identified and facts about streams and wetlands must be analyzed before the ER can satisfy NRC/NEPA requirements. The Application answers none of these questions.

Similarly, the same section of the ER states that, under Section 518 of the CWA, the Goshute Tribe can be treated as a state for certain permitting purposes. Again, this is interesting information, but does nothing to comply with NRC/NEPA requirements. The critical discussion required here relates to the facts about the current permitting authority of the tribe under the CWA (if any) and what PFS is doing to comply with CWA requirements either with the tribe or with EPA. If the tribe has not been granted CWA authority by the U.S. Environmental Protection Agency ("EPA") (which is the Petitioners' understanding), 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.

As for air quality permitting, Section 9.1.3 contains a one-sentence, conclusory statement that no permitting requirements apply. This "analysis" is woefully inadequate, in part, because there are no facts and no discussion--just conclusions. Under Title V of the Federal Clean Air Act ("CAA") (42 U.S.C. §§ 7661 to 7661f), air emission sources at a single location can be classified in a number of ways (i.e. radionuclide sources, hazardous air pollutant sources, certain fugitive dust sources, stack sources, NSPS sources, and NESHAPS sources) to determine

whether permitting requirements apply. Of course, none of these facts, and the required discussion, are contained in the ER. Thus, we cannot assess the reasoning and data underlying PFS's conclusions.

Section 9.2 of the ER (addressing State of Utah permitting requirements) suffers from the same problems. PFS characterizes this section of the ER as a "summary" of state permitting requirements and 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. Again, 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.

In Sections 4.1.3 and 4.2.3 of the ER, by contrast, 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 the DAQ rules apply, as PFS assumes, it is clear that prior to the commencement of construction a DAQ approval order must be obtained. Neither this requirement, any steps to secure a permit, nor whether a permit can be secured are mentioned in the ER.

Again, this section of the ER 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. Since Castle Rock and Skull Valley Co. own the land on both sides of this highway, two critical "approvals" are needed: Those of Castle Rock and Skull Valley Co. The ER, however, does not discuss the need for such approvals or what PFS has or will do to attempt to secure those approvals -- or even more critically what PFS will do if it fails to secure such approvals.

Among other requirements, 10 C.F.R. Section 51.45 requires a discussion, within Chapter 9 of the ER, of the road widening issue and the governmental and private authorizations that will need to be obtained before the road can be widened.

13. **Inadequate Consideration of Alternatives.** 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).

Basis: Among other things, 1- C.F.R. § 51.45(c) requires the ER to "include an analysis that considers and balances the environmental effects of the proposed action, the environmental impacts of alternatives to the proposed action, and alternatives available for reducing or avoiding adverse environmental effects." This subsection also requires the ER to "include consideration of the economic, technical, and other benefits and costs of the proposed action and of alternatives." The ER falls far short of this requirement.

Chapter 8 of the ER is entitled, "Installation Siting and Design Alternatives". In general, the brief, six-page discussion of siting alternatives mentions that PFS performed some siting analysis and identified the Goshute Reservation in Utah and the NEW Corporation in Fremont County, Wyoming as its "primary" and "secondary" host sites (ER 8.1-2). These two sites were selected, according to the ER, because of "the failure of the federal government to make substantive progress on a centralized facility to store spent fuel assemblies from commercial reactors" and because PFS "and the Mescalero Apache Tribe were unable to reach an agreement." (ER 8.1-1 & 2). As between the Skull Valley and NEW Corporation alternative sites, however, 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. For that matter, there is no such required analysis with regard to the Skull Valley site and any other location whatsoever. Moreover, the two-page "No Build Alternative" discussion focuses almost exclusively on the costs to be incurred by some power companies if, as they assert, the centralized ISFSI is not built when and where they propose.

PFS's analysis creates an obvious bias in the document in favor of the Skull Valley alternative by ignoring every potential negative factor. This utterly one-sided "analysis" simply fails to comply with NRC/NEPA requirements. For example, the alternatives discussion must objectively include the environmental and safety benefits associated with maintaining and expanding a decentralized, on-site storage system; the environmental and safety impacts and risks associated with the proposed privately operated, centralized system; the state-by-state, plant-by-plant facts which create the need PFS asserts is present for moving the spent fuel to another location (in the face of Congress's mandate to the contrary); the environmental impacts and safety hazards associated with moving so many casks from various locations across the country to a centralized location (in the face of Congress's mandate to the contrary); 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; the 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; and so on.

Moreover, inasmuch as there is legislation moving through Congress at the present time which would address the stated concerns of PFS, e.g., H.R. 1270, Nuclear Waste Policy Act of 1997 and S. 104, Nuclear Waste Policy Act of 1997, NEPA requires that the ER include an analysis of the prospect for a legislative solution, PFS's efforts to achieve such a solution and the environmental advantages of a government operated temporary, high-level nuclear waste, spent fuel facility over the private facility proposed by PFS.

14. **Inadequate Consideration of Impacts.** 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.

Basis: Among other things, 10 C.F.R. § 72.100(b) requires an evaluation of the effects on the "regional environment resulting from construction, operation and decommissioning" of the facility in question. Chapter 4 of the ER is entitled, "Environmental Effects of Site and Transportation Corridor Construction and Operation" and is PFS'S attempt to comply with these regulatory requirements. Similarly, Chapter 5 of the ER is entitled, "Environmental Effects of Accidents" and is PFS's attempt to comply with the requirement in Section 72.100(a) that the Application must contain an evaluation of "effects on populations in the region resulting from the release of radioactive material under normal and accident conditions".

The ER clearly fails, however, to comply with these requirements in a number of significant respects. For example, Section 5.2 entitled, "Transportation Accidents" discusses the

risks of transportation accidents in a very general and abstract sense, but contains absolutely no site specific information on the "effects on populations in the region" as the rule specifically requires. Similarly, Chapter 4 contains no meaningful evaluation of the potential impact of the unlined retention pond and other PFSF operations on surrounding subsoils and ground water. In general, Chapters 4 and 5 suffer from a lack of application of the relevant facts to the requirement for meaningful environmental and safety evaluations.

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

Basis: 10 C.F.R. § 51.45(c) requires, among other things, consideration in the ER of the "economic, technical, and other benefits and costs of the proposed action and alternatives". Chapter 7 of the ER entitled, "Economic and Social Effects of Facility Construction and Operation" appears to be PFS's attempt to comply with this requirement. According to Section 7.1 of the ER, this chapter contains a "cost-benefit analysis" of the "aggregate benefits" and "aggregate costs" of the PFSF. Petitioners contend that the cost-benefit analysis contained in Chapter 7 is overly simplistic and fails to account for the true environmental, safety, social and economic costs associated with the proposed PFSF in Skull Valley. For example, the cost-benefit analysis 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. Moreover, Chapter 7 does not describe PFS's financial arrangements with the Goshutes or attach related documents, which are essential to any cost-benefit analysis. Petitioners intend to offer evidence with respect to the true costs of the proposed facility.

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

Basis: Among other things, the regulations require an evaluation of "both usual and unusual regional and site characteristics." 10 C.F.R. § 72.100(b). In this case, the word "regional" should be interpreted to refer at least to all of northwestern Utah. For this reason, the impacts analysis is, legally speaking, too narrow.

In addition, the ER 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. For example, the ER (Table 2.3-2) lists approximately 26 different species which are endangered, threatened or sensitive and have been identified by State and Federal officials as being potentially impacted in an adverse way by the PFSF project. The ER does not provide sufficient facts concerning these species for one to determine the extent or significance of those impacts, however. For example, the ER mentions "small spring parsley" (*Cymopterus acaulis* var. *parvus*) as occurring in the area and being "vulnerable to extinction" (ER, p. 2.3-11). However, the only detail provided in the ER on impacts is that the species "has not been documented" to occur within a "5-mile radius" around the PFSF site. This is inadequate. Given that the facility will be sited in an area that is admittedly within the habitat of this species, PFS must conduct a survey to determine if, in fact, it occurs in the area. In this case, relying on previously written, general literature searches is inadequate.

The same is true of the Pohl's milkvetch, peregrine falcon, and Skull Valley pocket gopher. For example, the ER states that the Skull Valley pocket gopher has been identified by the State of Utah as a "high interest" species. (ER 2.3-12). The ER further provides that this gopher "has been documented in Township 5 South, Range 8 West" (*Id.* (emphasis added)). These coordinates include the exact location of the proposed PFSF. Yet the ER goes on to say, in somewhat contradictory fashion, that the gopher "could occur within the project's 5-mile radius." (ER 2.3-13 (emphasis added)). This is clearly insufficient. PFS must determine, and the ER must clearly state if, in fact, the Skull Valley pocket gopher lives in the proposed PFSF site. Similarly, the ER places the admittedly "rare" Pohl's milkvetch in Township 4 South, Range 8 West, Section 6." (ER 2.3-10). The ER goes on to state that this location is "approximately 6 miles away from the PFSF." (*Id.*) What the ER does not say, however, is that this location is within two miles of the existing Skull Valley road--the road PFS will either enlarge or enhance with a nearby railroad spur. The Application is defective, therefore, because it does not contain critical facts about the exact location of this rare species in relation to the proposed transportation corridor for the PFSF project.

In addition, the impacts evaluation will continue to be legally insufficient until such time as PFS identifies the final location of the transportation corridor to haul the spent fuel from I-80 south to the Goshute Reservation. Until this corridor is identified, the ER, and any attempt at NEPA compliance will continue to be fatally flawed. Accordingly, Petitioners reserve the right to amend their Contentions as critical new facts come to light on the location and regional environmental impacts of the finally designated transportation corridors.

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

Basis: Among other things, 10 C.F.R. § 72.98(c)(2) requires the Application to include a consideration of the "present and future uses of land and water within the region". The present use of the private and Federal lands surrounding the proposed PFSF site are devoted heavily to agricultural and recreational uses. The future use of the lands, approximately 50 miles from the Salt Lake Valley (now containing a population of approximately one million people), and only 15 miles from the rapidly growing Tooele Valley area, would, without the PFSF, be a valuable area for residential land development for those commuting into the greater Salt Lake City area. The attraction of this area for future development arises, in part, from the fact that the Goshute Reservation and the Petitioner's properties abut the Deseret Peak National Wilderness Area which is a well known recreational and scenic resource.

Section 2.2.2 of the ER, entitled, "Land Use" totally fails to recognize or mention the potential of the area for future real estate development and fails to recognize or mention the proximity to, and impacts upon, recreational uses in the nearby Deseret Peak National Wilderness Area. Moreover, the ER paints a misleading picture of the population in the area

by drawing a 50-mile radius around the proposed PFSF site and ignoring anything outside that radius thereby understating the size of the potentially impacted population by including only part of the population of the Salt Lake Valley. (ER 2.2-4 & 5).

Petitioners believe that the proposed PFSF would eliminate or sharply reduce the investment value and potential use of their lands. The ability to locate future homes and businesses in Skull Valley will be directly related to the PFSF, the dangers associated with such a facility, and the public perception of the dangers associated with such a facility. Due to the nature of the PFSF, the food production businesses currently negotiating relocation of dairies, feed lots, and businesses to Skull Valley with Petitioners will terminate such discussions and have no interest in Skull Valley. Producing beef and dairy products next to or in proximity to the PFSF is not an acceptable risk for such enterprises.

Likewise, residential and commercial development adjacent to the PFSF would no longer be desirable or economically feasible. These reactions by potential users would cause an immediate reduction in the value of Petitioners' lands as well as loss of future economic benefit. Diminution of property values due to public perception, even when it may be unreasonable, is judicially recognized as a damage and injury-in-fact. See City of Santa Fe vs. Komis, 845 P.2d 753, 756 (N.M. 1992). Such impacts on property values and future land uses are not considered in the Application, and any potential negative impacts of future land use are simply denied. (ER 4.2.1). Moreover, Petitioners cannot fully assess such aspects because PFS has not given data on safety, transportation, environment, etc.

As for present land uses, the ER provides absolutely no information on the economic value of the current agricultural/ranching operations, and provides only the most general infor-

mation on relative size of those land uses. (See ER 2.2-2). Most important, the ER fails to consider the devastating impact (and logic) of placing a high-level radioactive waste/spent fuel facility "next door" to a dairy/beef operation and national wilderness area.

18. **Impacts on Public Health.** 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).

Basis: The ER must evaluate the regional impacts on the population and environment. Chapters 2 and 4 of the ER mention the agricultural operations in the area, but fail to analyze, evaluate, or consider the potential impacts on the regional population associated with potential contamination of plants or animals destined for human consumption. No detailed description of the coordinated ranching, farming, and livestock production activities currently carried on by Petitioners is provided at all. The Application is glaring in its cavalier disregard of these vital elements in the impact analyses. NEPA requires this specific evaluation to be included in the ER and forthcoming EIS.

19. **Septic Tank.** 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).

Basis: The ER contains very little information on how sewage wastes will be managed at the proposed facility during both the construction and operation phases. Moreover, the ER fails to discuss in detail how the septic system will be designed so as to eliminate the risk of

contamination to ground water and Petitioner's property. This omission violates the requirements of 10 C.F.R. §§ 72.98(b) and 72.100(b).

20. Selection of Road or Rail Access to PFSF Site. 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).

Basis: Among other things, 10 C.F.R. Section 51.45(c) specifically requires the ER to contain 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". See also 10 C.F.R. 72.100(b). The ER completely fails to comply with this important requirement. It is essential that the ER, and any subsequent EIS, contain sufficient facts and analysis of this issue because it is clear that some of the most significant environmental effects associated with the proposed PFSF project will occur as a result of the decision of how and where to transport the waste casks the distance of 24 miles from the I-80/railroad corridor south to the Goshute Reservation.

The failure of the ER to properly analyze these transportation alternatives manifests itself in a number of ways in the ER, including, but not limited to the following: First, although the ER describes the basic facts associated with the Skull Valley road and rail options, there is little, if any, analysis that "considers and balances" the advantages and disadvantages of one alternative versus the other (See ER, §§ 4.3 & 4.4); Second, the ER is incomplete because it concedes that there are necessary investigations and studies not yet performed that will have a direct bearing on the environmental effects of the option finally selected. For example, the road option would

result in disturbance of 29 acres of land and widening of the existing road and shoulders by a total of 10 feet. By contrast the rail option would result in disturbance of 81.5 acres of land and creation of a new rail right-of-way at least 28 feet wide. (ER 4.3-1 & 4.4-1). These land disturbances may not be undertaken without first performing a Class III Cultural Resources Survey, which may identify cultural resources that would make one of the options illegal or unacceptable. (See ER 4.3-8 & 4.4-5). Similarly, other studies must be performed and consultations take place with regard to proposed disturbance to the Horseshoe Springs Wildlife Management Area and the Timpie Springs Waterfowl Management Area and corollary effects upon protected and sensitive species living therein; Third, based upon information and belief, Petitioners understand that PFS is considering a third option, not even mentioned in the ER, that would attempt to avoid the numerous cultural, environmental and wildlife effects associated with the existing Skull Valley Road corridor. Accordingly, the ER is defective because it fails even to mention a transportation alternative that PFS may ultimately seek authorization to utilize; and Fourth, the ER, as drafted, fails to mention some of the more significant environmental effects associated with the two transportation alternatives discussed in Chapter 4 of the ER like, for example, the increase of traffic on the Skull Valley Road and the increase in noise levels at nearby residences associated with the constant use of a new railroad spur.

21. **Exact Location of Rail Spur.** 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).

Basis: Among other things, 10 C.F.R. § 72.90(a) requires that the Application contain investigations and assessments of environmental and safety impacts. The ER contains a discussion of a possible rail spur to transport the waste casks 24 miles south of the I-80/railroad corridor to the Goshute Reservation (ER 4.4). However, the ER fails to provide any detail concerning the location of this rail spur. Upon information and belief, Petitioners understand that PFS is actually considering two locations for this rail spur. The ER, Application, and any subsequent EIS will be legally defective so long as there is no detailed information on the location of the rail spur and an assessment of the impacts on property owners and their property rights.

22. **Road Expansion Authorizations.** 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).

Basis: Among other things, 10 C.F.R. § 72.90(a) requires that the Application contain investigations and assessments of environmental and safety impacts. The ER contains a discussion of a possible expansion and modification of the existing Skull Valley Road to allow for transportation of the waste casks by tractor-trailer for a distance of 24 miles south of the I-80/railroad corridor to the Goshute Reservation. This expansion would increase the size of the existing road and shoulder by 10 feet. (ER 4.3-1). The ER asserts that this road expansion

could occur "within the existing right-of-way" and with "no additional land acquisition" (Id.). Petitioners believe that this statement is demonstrably incorrect and desire the opportunity to present evidence to this effect at a hearing. Petitioners own much of the land on either side of the road and have not been approached by PFS about a right of way. Given PFS's carelèss and disingenuous attitude toward Petitioners, and the impact the proposed PFSF will have on Petitioners' land and business, Petitioners are unlikely to grant any need rights of way. Moreover, we believe that this identifies a significant deficiency in the ER, namely a failure to properly consider and investigate all of the necessary authorizations required to carry out the proposed PFSF project.

23. **Existing Land Uses.** 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).

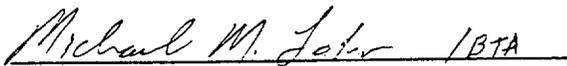
Basis: Among other things, 10 C.F.R. Section 72.98(b) requires the Application to identify potential regional impacts and to determine potential effects on the population or environment. The ER suffers generally from an overall defect of failing to comply with this and similar NRC/NEPA requirements by a simple lack of detail with regard to existing land uses that will be impacted by both the PFSF itself and the proposed 24-mile transportation corridor (i.e. road or rail). Numerous examples of this deficiency can be cited from the ER, including, but not limited to: (1) failure to discuss, in detail, the various impacted property rights and owners

along the 24-mile transportation corridor; (2) failure to discuss the legal basis for the right-of-way along the 24-mile transportation corridor; (3) failure to identify existing structures that would be impacted by the various transportation corridors suggested by PFS; (4) failure to discuss impacts to existing grazing patterns and rights that would be impacted by the various transportation corridors proposed by PFS; (5) failure to discuss all impacts to those living near to the proposed transportation corridors; and (6) other deficiencies. The ER, Application and any subsequent EIS is legally flawed until these details are identified and the attendant impacts determined as NRC regulations and NEPA require.

24. 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.

Dated this _____ day of November, 1997.

Respectfully submitted,


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I hereby certify that I caused to be sent by E-Mail and U.S. Express Mail a copy of the foregoing CONTENTIONS OF PETITIONERS CASTLE ROCK LAND & LIVESTOCK, L.C., SKULL VALLEY CO., LTD, AND ENSIGN RANCHES OF UTAH, L.C. ON THE LICENSE APPLICATION FOR THE PRIVATE FUEL STORAGE FACILITY the following:

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Dated this 21st day of November, 1997.



DeAnn Thompson

- Fires 0 - 100 Acres
- Fires 101 - 300 Acres
- Fires 301 - 1000 Acres
- Fires 1000+ Acres



County Boundary

Public Lands (BLM)

National Forest

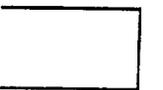
National Park/Recreation Area



National Wildlife Refuge

Military Reservation

State Land



Private Land

Indian Land



Contours, Interval 500 Feet