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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
BOARD MEETINGS AND
ADJUDICATIONS STAFF

In the Matter of:)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel)	
Storage Installation))	March 16, 2001

STATE OF UTAH'S REPLY TO STAFF'S RESPONSE TO
APPLICANT'S MOTION FOR SUMMARY DISPOSITION
ON UTAH CONTENTION Z

Pursuant to the Board's Order of April 23, 1999 and 10 CFR § 2.749, the State files this Reply to the Staff's Response to the Applicant's Motion for Summary Disposition of Utah Contention Z (March 6, 2001) ("Staff's Response").

In its response, the Staff admits that Utah Z may also be considered a challenge to the Staff's environmental analysis and the environmental impact statement ("EIS"). Staff Response at 6-7 (*citing Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-03, 47 NRC 77, 84 (1998)). However, the Staff maintains that the Draft Environmental Impact Statement for the Construction and Operation of an Independent Spent fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, NUREG-1714, June 2000 ("DEIS") addressed the "general deficiency" raised in Utah Z and there is no genuine dispute of material fact. Staff Response at 7. The Staff is in error.

I. The Scope of Utah Z Addresses the Substantive Adequacy of the No Action Alternative Discussion and Is Not Limited to Mere References to Advantages of No Action.

The Staff embraces PFS's assertions as to the limits of Utah Z¹ and unconditionally supports PFS's motion for summary disposition. Staff Response at 1, 3. The Staff accedes to PFS's myopic portrayal of the scope of Utah Z as being limited to the single phrase: "the Applicant focuses 'solely on the perceived disadvantages of the no build alternative.'" Staff Response at 7 (*emphasis in original*). The Staff unreasonably believes that a discussion in the DEIS, regardless of its adequacy, should suffice to satisfy Utah Z. *Id.* at 8 and n. 3. There is no merit to the Staff's position because Utah Z relates to the substantive adequacy of the no action alternative.

The Staff and PFS ignore the plain language of the contention itself. Utah Z, as admitted, states: "The Environmental Report does not comply with NEPA because it does not adequately discuss the no action alternative." State's Contentions on the Construction and Operating License Application by Private Fuel Storage, L.L.C. for an Independent Spent Fuel storage Facility (November 23, 1997) at 169 (*emphasis added*) ("State's Contentions"). Thus, the contention itself challenges the adequacy of the discussion. Any discussion, regardless of whether it is meritless or not, as the Staff proposes, does not satisfy Utah Z. Nor does it satisfy the National Environmental Policy Act ("NEPA").

¹ In its Response the Staff frames the Applicant's Motion thus: "the Applicant asserts that the State's contention is limited to the issue of whether particular matters were addressed at all in the Applicant's environmental analysis and that the contention is rendered moot by the Staff's consideration of those matters in the DEIS." Staff Response at 3 (*emphasis added*).

While a contention is framed by its basis, the basis must be evaluated as a whole and not parsed to one lone sentence as the Staff and PFS propose. The following excerpts from the basis of Utah Z demonstrate that the contention is not confined to the one narrow issue enumerated by the Staff and PFS:

NEPA requires that the no action alternative be included in the analysis to serve as a baseline and basis of comparison with the proposed action and other alternatives. By not properly considering the no build alternative, the Applicant fails to provide the balanced comparison of environmental consequences among alternatives. For example, the application does not consider the advantages of not transporting 4,000 casks of spent fuel rods . . ., not increasing the risk of accidents from additional cask handling, etc.

...

NRC cannot rely on the Applicant's inadequate and one-sided discussion of the no build alternative. Thus, NRC will not satisfy NEPA if it does not adequately address all sides of the no action alternative.

State's Contentions at 169-70 (*emphasis added*). Utah Z's basis as a whole challenges the adequacy of the no action discussion: it challenges whether the no action alternative has been properly considered; whether there has been a balanced comparison of environmental consequences among alternatives; whether the discussion of the no build alternative has been one-sided; and whether all sides of the no action alternative have been adequately addressed. *Id.* Clearly, Utah Z challenges the adequacy of the no action alternative discussion; the contention and its bases are not limited merely to whether or not the issues raised in Utah Z are mentioned in the DEIS. *See* State Response at 4-5.

II. The Substantive Merits of the No Action Alternative Discussion in the DEIS Are Within the Scope of Utah Z.

The Staff incorrectly argues that in order for the State to challenge the "substantive

merits” of the DEIS, it must amend its contention or file a new one. Staff Response at 8, n.3. As discussed previously, the plain language of Utah Z, as admitted, challenges the adequacy of the no action alternative discussion. Accordingly, a challenge to the adequacy of the no action alternative is commensurate with a challenge to the substantive merits of the no action discussion in the DEIS. Significantly, the Staff admits that the scope of Utah Z in challenging the ER also presents a challenge to the DEIS. *See supra* at 1. Therefore, the scope of Utah Z already encompasses a challenge to the “substantive merits” of the no action discussion in the DEIS.

In sum, the DEIS contains a perfunctory discussion of the no action alternative and a new or amended contention is not required.

III. NEPA Requires a Substantive, Balanced and Rational Discussion of the No Action Alternative.

The Staff in its response cites to the DEIS to support its claims that the no action alternative impacts are described. *See, e.g.*, Staff Response at 8-13. The DEIS merely superficially addresses some alleged impacts.² There is no rational basis for the Staff’s discussion in the DEIS of the no action alternative. The DEIS makes little or no attempt to analyze the extent of the no action alternative advantages or disadvantages, to quantify those impacts, to support the actual probability of alleged impacts, or to compare the impacts. *See Resnikoff Dec.* at ¶¶ 7-33 (March 6, 2001) in support of State’s March 6, 2001 Response to

² In Claiborne the Commission found that the no action discussion was inadequate because “[b]y merely reciting all of the benefits expected from the [proposed action], the ‘no-action’ section does not indicate how the agency evaluated the relative significance of these individually cited benefits.” 47 NRC at 98.

Applicant's Motion for Summary Disposition on Utah Contention Z. The Staff's approach to satisfying the requirements of the NEPA by merely mentioning unsupported and unquantified impacts completely frustrates the purpose of NEPA. NEPA mandates more.

As the Staff concedes, its primary duty is to take a "hard look" at environmental impacts. Staff Response at 4 (*citing Claiborne*, 47 NRC at 88). Further, argues the Staff, accessing the adequacy of an EIS invokes a rule of reason that requires a "reasonably thorough discussion of the significant aspects of probable environmental consequences." Staff Response at 4 (*citing Hells Canyon Alliance v. U.S. Forest Service*, 227 F.3d 1170, 1177 (9th Cir. 2000)). The State agrees. Nevertheless, the State asserts the Staff has failed in its duty to take a hard look because the no action alternative discussion in the DEIS and the ER is not "reasonably thorough" and it fails to meet the intent of NEPA.

In taking a "hard look" at environmental impacts, "the EIS should provide [a] 'sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker . . . to make a reasoned decision.'" (*Claiborne* at 88 (*quoting Tongass Conservation Society v. Cheney*, 924 F.2d 1137, 1140 (D.C. Cir, 1991) (*citations omitted*)) and to ensure NRC does not act upon "incomplete information" (*Claiborne* at 88 (*citing Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989))).

The level of detail necessary in the EIS must show that NRC has "in good faith objectivity . . . taken a sufficient look at the environmental consequences of a proposed action and at alternatives. . ." Final Rule, Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, 49 Fed. Reg. 9352, 9355 (1984). Moreover, "NRC regulations direct the Staff

to consider and weigh the environmental, technical, and other costs and benefits of a proposed action and alternatives, and ‘to the fullest extent practicable, quantify the various factors considered.’” Claiborne at 88 (*citing* 10 CFR § 51.71(d)) (*emphasis added*). NEPA requires the Staff to insure “‘scientific integrity[] of the discussions and analyses’ in EISs, identifying any methodologies used and sources relied on.” Hells Canyon, 227 F.3d at 1176 (*citing* 40 CFR § 1502.24). Furthermore, “[a]gencies must ‘rigorously explore and objectively evaluate all reasonable alternatives.’” Id. (*citing* 40 CFR § 1502.14). In addition to assisting decisionmakers, the DEIS must provide sufficient “detail to enable those who did not have a part in compiling the information to understand and consider meaningfully the pertinent environmental influences involved.” 49 Fed. Reg. at 9355.

The no action alternative discussion in the DEIS and the ER is merely a paper exercise that is incomplete, biased, and relatively unsupported. *See* Resnikoff Dec. at ¶¶ 7-33 (March 6, 2001). A significant number of environmental impacts have not been quantified. Typically, the methodologies used in the Staff’s analyses or sources the Staff relied upon have not been identified beyond a citation to the ER or generic NRC documents. Furthermore, there is no discussion or documentation of the actual probability of the consequences claimed in the DEIS. Id. at ¶¶ 16, 17, 20, 21. The DEIS discussion has not enabled the State, who did not participate in compiling the information, to meaningfully understand the scope and degree of environmental impacts of the no action alternative and the basis for the Staff’s decision to ignore numerous advantages of the no action alternative. The DEIS does not take the “rigorous” or “hard look” at environmental impacts that NEPA requires. In addition, the DEIS does not contain an objective, “reasonably thorough”

discussion of probable environmental consequences to allow an informed decision to be made.

DEISs are guided by the rule of reason. For the rule of reason to prevail, there must be a more substantive and supportable discussion of the no action alternative in the DEIS. As stated in Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir.), *cert. denied*, 502 US 994 (1991), “the rule of reason does not give agencies license to fulfill their own prophecies, whatever the parochial impulses that drive them.” Id. at 196. Moreover, “an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action, and the EIS would become a foreordained formality.” Id. (*citing City of New York v. Department of Transportation*, 715 F.2d 732, 743 (2d Cir. 1983)). “NEPA was not intended merely to give the appearance of weighing alternatives that were in fact foreclosed.” Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-14, 7 NRC 952, 959 (1978) (concerning a meaningful alternative analysis). To agree that both advantages and disadvantages of the no action alternative are currently discussed in the DEIS would reduce the requirements of NEPA to a charade and one of little or no value to decisionmakers or the public.

The Staff has failed to follow the rule of reason in addressing the no action alternative. Moreover, there is little or no rational basis for the limited discussion in the DEIS of the no action alternative. The DEIS does not satisfy NEPA nor does it render the issues in Utah Z moot. Most significantly, material facts remain in dispute as the State demonstrated in its Response. See State’s Response to Summary Disposition of Utah Z

(March 6, 2001) in its entirety.

IV. The No Action Alternative Discussion in the DEIS Is so Heavily Biased towards the Disadvantages of the No Action Alternative that it Effectively Disregards the Advantages of No Action.

The DEIS, like the ER, exhibits serious inadequacies in describing and supporting both the advantages and disadvantages of the no action alternative. For example, in describing the no action alternative disadvantages, the DEIS merely recites from the ER the purported no action alternative consequences that 1) there would be an increased probability of shutdown of operating reactors and loss of electrical power generation³, 2) there would be delays in decommissioning activities, and 3) there would be a need to construct additional at-reactor ISFSIs. DEIS at 6-43. There is no attempt by the Staff to analyze or quantify the disadvantages cited in the ER. *See* Resnikoff Dec. at ¶¶ 16, 17, 20, 21. This inadequate analysis is precisely the concern raised in Utah Z. With respect to the advantages of the no action alternative, the DEIS merely states “the impacts described in Chapters 4 and 5 of the DEIS would not occur.” DEIS at 6-43. That is the end of the discussion. The State recognizes there is a need to reduce or eliminate redundancy in the DEIS but the impacts of “[t]he ‘no-action’ discussion should contain a comparative analysis, a ‘concise, descriptive summary’ comparing the advantages and disadvantages of the no-action alternative to the

³ The State questions the actual reality and scope of the purported no action disadvantage of loss of electrical power. *See* Resnikoff Dec. at ¶ 17. Regardless of a potential energy crisis, NEPA still mandates a “case-by-case examination and balancing of discrete factors.” Calvert Cliffs’ Coordinating Committee, Inc. v. U.S. Atomic Energy Commission, 449 F.2d 1109, 1122 (D.C. Cir. 1971) (cautioning that the Commission’s belief of an pressing national energy crisis does not allow a “blackout” of environmental considerations).

proposed action.” Claiborne at 98 (*citing* CEQ Memorandum to Agencies: Answers to 40 Most Asked Questions on NEPA Regulations, 46 Fed. Reg. 18,026, 40 CFR § 1502.14). Moreover, the DEIS fails to clearly identify or neglects altogether the benefits of the no action alternative, such as reduced risks and impacts to the environment by allowing the spent fuel to further decay onsite until final transport to a permanent repository⁴; a reduction in management and transportation occurrences; etc. *See* Resnikoff Dec. at ¶¶ 8-15. Additionally, those no action alternative benefits (*eg*, transportation risks) to which the DEIS makes some minimal reference are grossly underestimated.

The DEIS lacks objectivity. It is so heavily biased towards the disadvantages of the no action alternative that it minimizes or ignores the substantial benefits of the no action alternative. As such, it prevents a meaningful comparison among alternatives. There has been no good faith effort by NRC to objectively evaluate alternatives. Instead, the DEIS appears to be foreordained in foreclosing the no action alternative because of its unreasonably narrow view of that alternative.

The DEIS and ER do not uphold dismissal of even the narrow issue that the Staff and PFS claims to be the entirety of Utah Z: whether the ER and the DEIS focus solely on the perceived disadvantages of the no build alternative. There is no comparative analysis or concise descriptive summary comparing the advantages and disadvantages of the no action

⁴ The Staff assumes, incorrectly, that the State has abandoned the basis of Utah Z with respect to the “safety advantages of storing spent fuel near the reactor.” Staff Response at 12, n. 7. On the contrary, the State has continued to address the substantial advantages of at-reactor storage. *See e.g.* State’s Response to Applicant’s Motion for Summary Disposition on Utah Contention Z (March 6, 2001) at 7-18 and notes 6-9; State’s Disputed and Relevant Material Facts (Utah Z) ¶¶ 22, 27, 34, 37; and Resnikoff Dec. ¶¶ 10-15, 18-26, 28, 30-32.

alternative to the proposed action. The discussion in ER and DEIS emphasizes the unsupported negative consequences of retaining the status quo and minimizes or omits any descriptive summary of the advantages of the no action alternative.

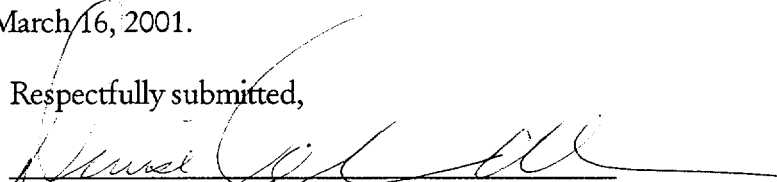
It is evident that there are substantive disputes of relevant material fact, and in this summary disposition proceeding the proponents of the motion have not proven they are entitled to a decision as a matter of law. The benefit of all favorable inferences that can be drawn from the evidence must be construed in favor of the State.⁵ The evidence here is that the DEIS and the ER cannot be construed to provide a fair and balanced description of all sides of the no action alternative. The State requests the Board to deny the motion and set this matter for hearing.

CONCLUSION

For the reasons stated above, PFS is not entitled to summary disposition and the matter should be set for hearing.

DATED this March 16, 2001.

Respectfully submitted,


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⁵ Sequoyah Fuels Corp. and General Atomics Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361, *aff'd* CLI-94-11, 40 NRC 55 (1994).

CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S REPLY TO STAFF'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION ON UTAH CONTENTION Z was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this March 16, 2001:

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