RAS 2991

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF UTAH CONTENTION AA – RANGE OF ALTERNATIVES

Applicant Private Fuel Storage, L.L.C. ("Applicant" or "PFS") files this motion for summary disposition of Utah Contention AA, "Range of Alternatives" ("Utah AA") pursuant to 10 C.F.R. § 2.749. Summary disposition is warranted on the grounds that there exists no genuine issue as to any material fact relevant to the contention and, under applicable Commission regulations, PFS is entitled to a decision as a matter of law. This motion is supported by a Statement of Material Facts as to which PFS asserts there is no genuine dispute.

I. STATEMENT OF THE ISSUES

On April 22, 1998, the Atomic Safety and Licensing Board ("Licensing Board" or "Board") admitted Utah AA. Private Fuel Storage, L.L.C. (Independent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 203 (1998). Utah AA, as admitted, asserts that:

> The Environmental Report fails to comply with the National Environmental Policy Act because it does not adequately evaluate the range of reasonable alternatives to the proposed action.

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Id. In admitting the contention, the Board stated that "the scope of the contention is limited to the issue of the adequacy of the PFS alternative site analysis." Id.

The State's entire basis for Utah AA relates solely to purported omissions of certain discussions from the PFS Environmental Report.[1] The State asserts that the ER discussion of siting alternatives is "woefully inadequate" because there is "no discussion" of site screening results, "no mention" of who received site selection questionnaires, and "absolutely no discussion" of questionnaire responses. Utah Contentions[2] at 172-3. As PFS shows below, each of these assertions is without legal basis or rendered moot by the NRC Staff's Draft Environmental Impact Statement.[3]

In its responses to PFS's discovery requests, the State "admits that the DEIS discusses the site selection process used by PFS (Request [for Admission] No. 1) and the site selection criteria used by PFS (Request [for Admission] No. 2)." Discovery Letter[4] at 1. However, the State now seeks to "set forth some of the problems with PFS's site selection criteria" and "process." State's Sixth Discovery Response[5] at 47-51; Discovery Letter at 1-2 (Interrogatories. Nos. 4, 5, and 9 "are intended to summarize all of the State's concerns" based on currently available information). This is a fundamental change from asserting that "there is no discussion," "no mention," and "absolutely no

[1] PFS, "Environmental Report for the Private Fuel Storage Facility" (1997) ("ER").

[2] State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage, L.L.C. for an Independent Spent Fuel Storage Facility (Nov. 23, 1997) ("Utah Contentions").

[3] NUREG-1714, "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 on Tooele County, Utah" (June 2000) ("DEIS").

[4] Letter D. Chancellor to P. Gaukler (Mar. 9, 2001) ("Discovery Letter") (attached as Exhibit 1).

[5] State of Utah's Objections and Response to Applicant's Sixth Set of Discovery Requests to Intervenor State of Utah (Feb. 28, 2001) ("State's Sixth Discovery Response").

discussion or tabulations" of certain information in the environmental analysis. Utah Contentions at 173. As with Contention Utah Z, the State is again struggling to compensate for its failure to revise its existing contention, or to submit an additional contention, based on the new analysis in the DEIS by divorcing the general statement of the contention from its bases and seeking an ever-increasing amount of information. See Applicant's Response to the State of Utah's Motion to Compel Applicant to Respond to the State's Tenth Set of Discovery Requests on Utah Contention Z (Mar. 26, 2001). The State cannot at this late date seek to amend Utah AA and is limited to the contention as admitted.

Further, the State neglects to recognize that an applicant's discussion of a site selection process serves only as an aid to the NRC Staff in preparation of the environmental analysis required by the National Environmental Policy Act ("NEPA") and that a "free-ranging," never-ending, inquiry of the applicant's process, which the State seeks, is not required. None of the State's objections raised in Utah AA or in its discovery responses suggests an alternate site that is "obviously superior" to Skull Valley. Rather, the DEIS as written fully satisfies NEPA as a matter of law.

PFS therefore moves for summary disposition of Utah AA on the grounds that there exists no genuine dispute concerning any facts material to the foregoing matters. The DEIS contains all of the discussions that the State asserted in its bases for Utah AA were missing from the ER. Further, the discussion of alternative sites in the DEIS, which is the current environmental analysis, fully satisfies NEPA as a matter of law. Therefore, the State's assertions were rendered moot by the DEIS or are incorrect as a matter of law. Based on a lack of genuine disputed facts, the Board should grant PFS summary disposition of Contention Utah AA.

II. LEGAL BASIS

A. Summary Disposition

The standards for motions for summary disposition are set forth in 10 C.F.R. § 2.749. A party is entitled to summary disposition of all or any part of a matter if "there is no genuine issue as to any material fact and . . . the . . . party is entitled to a decision as a matter of law." 10 C.F.R. §§ 2.749(a), (d). The legal standards relevant to summary disposition have been thoroughly discussed in previous pleadings and Board decisions in this matter, and will not be repeated here.[6] PFS demonstrates that it is entitled to summary disposition of Utah AA below.

B. National Environmental Policy Act

NEPA requires that an Environmental Impact Statement (EIS) describe the potential environmental impacts of a proposed federal action significantly affecting the quality of the human environment and discuss any reasonable alternatives. 42 U.S.C. § 4332; 40 C.F.R. § 1502.14. An EIS should provide "sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a 'hard look' at environmental factors and make a reasoned decision." Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 88 (1998) (citing Tongass Conservation Society v. Cheney, 924 F.2d 1137, 1140 (D.C. Cir. 1991)). As long "as the agency's decision is 'fully informed' and 'well-considered,' it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment." Transmission Access Policy Study Group v. Federal Energy Regulatory Comm'n, 225 F.3d 667, 736 (D.C. Cir.

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[6] See, e.g., Private Fuel Storage, L.L.C. (Independent Fuel Storage Installation), LBP-99-23, 49 NRC 485, 491 (1999); Applicant's Motion For Summary Disposition of Utah Contention C – Failure to Demonstrate Compliance With NRC Dose Limits (Apr. 21, 1999) at 4-16.

2000) (quoting NRDC v. Hodel, 865 F.2d 288, 294 (D.C. Cir. 1988)); see also All Indian Pueblo Council v. U.S., 975 F.2d 1437, 1445 (10th Cir. 1992); City of Carmel-by-the-Sea v DOT, 123 F.3d 1142, 1150 (9th Cir. 1997). The necessary level of detail required in an EIS is that which provides "information sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned." All Indian Pueblo Council, 975 F.2d at 1444 (quoting NRDC v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972)). The case law is clear that while an EIS must support a reasoned decision, exhaustive analyses of each potential environmental impact discussed therein are not required.

NEPA does not require the NRC, in licensing a facility, to determine the most environmentally preferable site or to conduct equally detailed investigations of alternative sites. The "licensing process is structured for rejection or acceptance of the proposed site rather than choice of sites." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 529 (1977). An "application should not be denied on the basis of a comparison between the applicant's proposed site and an alternative site unless the alternative site appears to be obviously superior to the proposed site." Id. at 514 (emphasis added); accord New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 95 (1st Cir. 1978) (finding no conflict between the "obviously superior" test and NEPA).

Further, it is fundamental that NEPA is "applicable only to an agency's environmental review, not a licensee's." Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 144 (1993). NEPA "is directed at an agency's preparation of environmental statements" and "does not require that an applicant submit an environmental report or that a report, if submitted, cover any specific areas." Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 2), ALAB-

137, 6 AEC 491, 494 (1973). The "purpose of an environmental report is to inform the Staff's preparation of an Environmental Assessment ('EA') and, where appropriate an [EIS]." In re Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 396 (1995) (citing 10 C.F.R. § 51.45(c) (the "environmental report should contain sufficient data to aid the Commission in its development of an independent analysis")).[7] It is "the Staff's obligation to perform the requisite NEPA analysis of alternative sites." Rochester Gas & Electric Corporation (Sterling Power Project, Nuclear Unit No. 1), CLI-80-23, 11 NRC 731, 736 (1980).

An applicant's site selection process and the NRC Staff's analysis of alternatives are also fundamentally different. The purpose of the applicant's site selection process is to identify a site to propose to the NRC as the location for the facility. The applicant's site selection process is described in an environmental report solely "to aid the Commission in complying with section 102(2) of NEPA." 10 C.F.R. § 51.14 (emphasis added).

In contrast, the purpose of the NRC Staff's EIS is to document the environmental analysis, including the range of alternatives considered by the agency, in a detailed written statement required by NEPA § 102(2). 10 C.F.R. § 51.14. As a result, it is "the alternate site analysis performed by the Staff that remains a proper subject of inquiry by the Licensing Board." Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2), LBP-77-60, 6 NRC 647, 659 (1977). Only the Staff's environmental analysis, therefore, and not the applicant's site selection process, must satisfy NEPA.

[7] Commission regulations contain preparation and content requirements for applicant's environmental reports. See, e.g., 10 C.F.R. §§ 51.41, 51.45, 51.61. Commission regulations also establish the requirements for NRC Staff implementation of NEPA. See, e.g., 10 C.F.R. §§ 51.14, 51.70(a).

C. Contention Scope

The Commission's "longstanding practice requires adjudicatory boards to adhere to the terms of admitted contentions." Claiborne, CLI-98-3, 47 NRC at 105. The "reach of a contention necessarily hinges upon its terms coupled with its stated basis." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988). The "scope of a contention is determined by the 'literal terms' of the contention, coupled with its stated bases." Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), LBP-88-25, 28 NRC 394, 396 (1988). A contention, therefore, is properly viewed as a general allegation focused by the specific assertions in the contention's basis, which provide the specificity necessary for the contention's admission. See Baltimore Gas & Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325 (1998) (vague and unparticularized contentions are inadmissible). These focused assertions, in turn, define the scope of an admitted contention.

A contention, in its basis, must "include references to the specific portions of the application [or environmental report] that the petitioner disputes and the supporting reasons for each dispute." 10 C.F.R. § 2.714 (b)(2)(iii). A party cannot choose to rely on the specificity in the basis for admissibility, see Calvert Cliffs, CLI-98-25, 48 NRC at 348-50, and then choose to ignore the same basis in determining scope. An "intervenor is not free to change the focus of its admitted contention, at will, as the litigation progresses." Seabrook, ALAB-899, 28 NRC at 97 n.11.

The proponent of an environmental contention is, however, provided an opportunity to revise a contention following publication of an agency's draft environmental impact statement.

> On issues arising under [NEPA], the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

10 C.F.R. § 2.714(b)(2)(iii) (emphasis added); see also Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983). Although a Licensing Board can appropriately consider environmental contentions made against an applicant's environmental report as challenges to an agency's environmental impact statement, see Claiborne, CLI-98-3, 47 NRC at 84, an intervenor cannot amend its contention "at will." Seabrook, ALAB-899, 28 NRC at 97 n.11.

III. PFS IS ENTITLED TO SUMMARY DISPOSITION OF UTAH AA

PFS is entitled to summary disposition of Utah AA because there remains no genuine issue as to any material fact relevant to the contention and PFS is entitled to a decision as a matter of law. The scope of Utah AA is limited by its bases to a claim of whether certain issues identified by the State regarding alternatives are or are not discussed in the ER. The State did not revise Utah AA or submit new contentions based on the DEIS concerning the alternate site analysis, despite a specific opportunity afforded by the regulations and the Licensing Board, and cannot now change the scope of the contention.[8] Although Utah AA was not revised, it is the present status of the environmental analysis (the DEIS) that is relevant in determining whether a material dispute exists and

[8] See 10 C.F.R. § 2.714(b)(2)(iii)). The Board provided that any contentions based on the DEIS "should be submitted no later than thirty days" after the DEIS was made available. Memorandum and Order (General Scheduling for Proceeding and Associated Guidance) slip op. at 5 (June 29, 1998).

the Board should now consider the State's assertions as challenges to the DEIS. Claiborne, CLI-98-3, 47 NRC at 84; Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-23, 49 NRC 485, 491-94 (1999).

In Utah AA, the State asserts broadly that the environmental analysis contains deficiencies implementing NEPA regarding the evaluation of reasonable alternatives to the proposed PFSF. When the language of the contention is properly "coupled" with its basis,[9] however, Utah AA alleges only that the environmental analysis violates NEPA by not adequately evaluating the PFS alternative site analysis because the document does not contain a discussion of certain specified issues (i.e., Utah AA only challenges the existence of specific information in the DEIS, not the adequacy of that information). Contrary to these assertions, the DEIS contains the discussion of the site selection process, including screening criteria, screening results, and questionnaire responses, that the State claims are missing. As with Contention Utah C, the State's asserted deficiencies concerning an analysis have been addressed by publication of a new analysis (here the DEIS). See LBP-99-23, 49 NRC at 491. Analogous to the Board's treatment of Utah C, whatever may have been the situation prior to the issuance of the DEIS, the State's assertions are rendered moot by the analysis therein.

Confronted with the limitations of its own contention, the State is now attempting to improperly broaden the scope of Utah AA to include substantive "problems" with the PFS site selection process discussion.[10] The State cannot amend its contention at this late

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[9] In this proceeding, the Board has made it clear that it only admitted the State's contentions "as supported by bases establishing a genuine material dispute adequate to warrant further inquiry." See, e.g., LBP-98-7, 47 NRC at 188-192, 194, 196-97, 198-200, 203 (emphasis added).

[10] See State's Sixth Discovery Response at 46-51 (describing "some of the problems with" PFS's discussion" of the site selection process and site selection criteria); Discovery Letter at 1-2 (clarifying that dis-

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date. These belated claims are beyond the scope of the contention (see supra § II.C), and must be rejected as such.

Moreover, the State fails to cite any NEPA text or case law that requires such detailed inquiry into an applicant's site selection process. This is not an oversight, for NEPA does not contain any such requirement and the Commission has rejected the State's position, as discussed below. In this respect, the DEIS as written fully satisfies NEPA as a matter of law. The State's assertions seek an analysis of candidate sites with a level of detail not required by NEPA and explicitly rejected by the courts and the Commission. The DEIS discussion of the PFS site selection process and the criteria used to identify the Skull Valley site are completely consistent with NEPA.

For the above reasons, as amplified below, the Board should dispose of Utah AA on the pleadings pursuant to 10 C.F.R. § 2.749.

A. The DEIS Addresses the State's Alleged Deficiencies in Utah AA

Contrary to the State's assertions, the scope of Utah AA does not raise substantive issues regarding the adequacy of the DEIS discussions. Thus, because the scope of Utah AA is limited to the question of whether the DEIS discusses the topics relating to the range of alternatives that the State claims were omitted, Utah AA challenges only the existence of material in the DEIS. PFS shows below that the DEIS contains each discussion that the State asserted was missing from the ER.

The State asserts in Utah AA that how the site selection process "jumped from 38 sites to two sites" is a "mystery" and that the "overarching criterion" used by PFS in se-

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covery responses "summarize all of the State's concerns based on the information currently available to it").

lecting the 38 candidate sites for evaluation, and the choosing of the Skull Valley reservation as the preferred site, "seems to [have been] a willing jurisdiction." Utah Contentions at 174. The State also asserts that "there is no discussion or tabulation of the results from phase two screening," "there is no mention of whether the Applicant sent the [site selection] questionnaire to all 38 site owners or just to the Skull Valley Band of Goshutes," "there is absolutely no discussion or tabulation of the response to the questionnaire," and the State "is absolutely baffled" as to what three sites remained in the last phase of the selection process.[11] To the contrary, the information sought by the State is set forth in the DEIS, which establishes that the State's assertions are plainly wrong, moot, or both.

Contrary to the State's assertion, the PFS site selection process is not a mystery. The PFS site selection process is described, and the corresponding site selection criteria are clearly identified, in DEIS § 7.1. PFS screened the 38 candidate sites, applying both regulatory and non-regulatory criteria, to arrive at four sites for in-depth review. The DEIS discussion of the site selection process includes descriptions of the objective, the screening criteria, the information provided to the PFS Board members performing the screening, and the identification of the sites selected to receive closer scrutiny. Id. at 7-4 to 7-5.

Contrary to the State's assertion that a willing host jurisdiction was the "overarching criterion," Utah Contentions at 174, the screening criteria were identified and included: public acceptance; favorable proximity to transportation access; jurisdictional re-

[11] The State also alleged that application of 10 C.F.R. Part 72, Subpart E, site evaluation factors, were "not discusse[d] at all" in the ER. Id. at 173-174 (emphasis added). This issue is discussed infra § III.D.

strictions; site availability; site development cost; flood plains; geology; seismology; demography; and environmental considerations, as well as a willing host jurisdiction. DEIS at 7-3.[12] PFS applied these criteria in an initial screening to identify those candidate sites that were burdened by obvious disqualifying factors, such as an unwilling host jurisdiction or insufficient physical area to build a facility of suitable size. DEIS Appendix F, "Site Selection/Evaluation Forms," "displays copies of the evaluation forms used by [PFS] in the process of identifying a site for the proposed spent nuclear fuel storage facility." Id., Append. F at F-1. A complete list of the 38 candidate sites considered, and the information forms for all 38 sites, are contained in DEIS Appendix F. The results of this initial process screened out 20 of these 38 sites. Id. at 7-3 – 7-4.

Contrary to the State's assertion that "there is no discussion" of the results of the phase two screening, Utah Contentions at 173, the DEIS describes how the PFS Board of Managers carefully considered the available information to further narrow the candidate sites, based on (1) an information sheet for all 38 sites that tabulated responses to a series of questions that were based on the screening criteria[13] and (2) written evaluations of the sites with the most detailed available information.[14] DEIS at 7-3 – 7-4. This consideration included "background information, as well as the various advantages and disadvantages of each site." Id. at 7-4. As described in the DEIS, this additional screening resulted in four sites being selected for further, more detailed, evaluation: (1) City of Ca-

[12] The individual criterion are described in more detail in the DEIS text.

[13] All 38 of these tabulations are included in DEIS Appendix F.

[14] PFS initially selected seven sites: (1) Santee Sioux; Knox County, Nebraska, (2) City of Caliente and Lincoln County, Nevada, (3) Goshute Tribe; Skull Valley, Utah, (4) Barnwell, South Carolina, (5) Hanford; Richland, Washington, (6) NEW Corporation; Fremont County, Wyoming, and (7) United Nuclear Corporation; New Mexico. At the request of one of the PFS members, the Pacific Atoll (Palmyra Island), U.S. protectorate site, was added to the initial list, for a total of eight sites. DEIS at 7-4.

liente and Lincoln County, Nevada, (2) Goshute Tribe; Skull Valley, Utah, and, (3) NEW Corporation; Fremont County, Wyoming, and (4) United Nuclear Corporation; New Mexico. Id.

Contrary to the State's assertion that the discussion left them "absolutely baffled" as to the identity of the last three remaining sites, Utah Contentions at 173, each of those sites is explicitly identified in the DEIS. As stated in the DEIS, PFS selected for further evaluation via the above screening processes the four sites identified above. DEIS at 7-4. Subsequently, however, the City of Caliente and Lincoln County, Nevada decided not to participate further in the process. The DEIS notes accordingly that "[s]ubsequent to the identification of these four sites, the host jurisdiction for the City of Caliente and Lincoln County, Nevada, decided not to participate in the additional studies." Id. Thus, only the other "three sites were left for further consideration." Id.

Contrary to the State's assertion that there is "no mention" of where the Site Selection Questionnaire was sent, Utah Contentions at 173, the DEIS states that the questionnaire was sent to the owners or promoters of each of the remaining three candidate sites. DEIS at 7-4. The responses to the Questionnaire are included in the DEIS. Id., App. F, Exhs. F.39 – F.41. The DEIS states that, in addition to the questionnaire, PFS engaged an engineering firm experienced in nuclear facility construction to conduct a field investigation of each of the three remaining candidate sites. PFS then sought to identify two candidate sites that "would likely meet NRC's licensing regulations" and "not be unreasonably expensive to develop." DEIS at 7-4.

Contrary to the State's assertions, Utah Contentions at 173, the responses to the questionnaire were tabulated in an evaluation matrix. Following completion of the field evaluations and receipt of responses from the three candidate sites, the PFS Board of

Managers directed the engineering firm to perform an independent evaluation of the strengths and weaknesses of each candidate site. DEIS at 7-4. An evaluation matrix was developed to aid in the decisionmaking. Id. Subsequently, based on PFS's evaluation matrix, it was "concluded that the United Nuclear Corporation, New Mexico, site did not appear to offer sufficient contiguous land areas suitable for siting an ISFSI of a size anticipated for this project" and this site was eliminated from further consideration. Id. "The two remaining sites were the Skull Valley site and the New Corporation site in Fremont County, Wyoming." Id.

Finally, the two remaining candidate sites were "subjected to field investigations to further [determine] their technical and licensing viability." Id. At this point, PFS applied three primary categories of criteria to differentiate between the two remaining candidate sites: 1) environmental, 2) technical, and 3) permitting. Id. Environmental criteria included: land use, demographics, cultural factors, ecological factors, hydrology, hazards, meteorological factors, visual impact, and auditory impact. Id. Technical criteria included geological factors, topography, drainage, siting, flexibility, cost, and accessibility. Id. The permitting criteria included requirements for wetlands, dredge/fill operations, Endangered Species Act compliance, and building. Id.

Both of the remaining candidate sites were found "suitable for development of a SNF storage facility," although, based upon the point evaluation system established by the engineering firm, the Wyoming site ranked slightly higher. Id. at 7-5. However, PFS ultimately chose Skull Valley as the proposed site for the PFSF based upon: a) a more favorable lease or purchase arrangement; b) greater distance to population centers; c) the promoter of the Wyoming site possessing only an option to purchase the site; d) uncertainties associated with required legislative approval for the Wyoming site; and e) a fa-

vorable vote by the Skull Valley Band's tribal council to proceed with the project. Id. In light of these very important practical considerations, PFS concluded that the Skull Valley site presented fewer uncertainties to successful project completion and was designated the preferred site.

PFS has shown that the DEIS contains a clear and concise discussion of the site selection process, criteria, and decisionmaking. The State's assertion otherwise is plainly wrong or rendered moot by the DEIS. PFS is, therefore, entitled to summary disposition of Utah AA as a matter of law.

B. The State's Attempt to Broaden Utah AA Must Be Rejected

The State has recently attempted to broadly recast Utah AA and assert substantive analysis requirements not found in NEPA or Commission regulations.[15] The Board, however, must "adhere to the terms" of Utah AA as admitted and not allow the State to amend its contentions "at will." See supra § II.C. The State did not avail itself of the opportunity to revise Utah AA or submit new contentions challenging the DEIS alternate site analysis, and the time to do so has long since passed. See supra note 9. Allowing the State to broaden Utah AA at this point would be contrary to the explicit prohibition against changing the focus of an admitted contention during litigation. Seabrook, ALAB-899, 28 NRC at 97 n.11. Utah AA, therefore, must stand as admitted.

[15] As described above, in its recent discovery response the State now seeks to "set forth some of the problems with PFS's site selection process" and "criteria." State's Sixth Discovery Response at 47-51; Discovery Letter at 1-2 (Interrogatories. Nos. 4, 5, and 9 "are intended to summarize all of the State's concerns" based on currently available information). These assertions represent a fundamental change in the scope of Utah AA.

C. The DEIS Discussion of Alternate Sites Fully Satisfies NEPA As a Matter of Law

Even assuming arguendo that the State could sua sponte change the scope of Utah AA to include issues of substantive adequacy, the State's new claim that NEPA requires a detailed site selection process discussion and evaluation in the ER (or the DEIS) simply misstates the law. Long-standing case law and Commission rulings make it clear that NEPA does not require more analysis or information than is already contained in the DEIS. The DEIS as written fully satisfies NEPA.

The "licensing process is structured for rejection or acceptance of the proposed site rather than choice of sites." Seabrook, CLI-77-8, 5 NRC at 529. The Commission implements the NEPA-required analyses of alternate sites pursuant to an "obviously superior" standard that "is designed to guarantee that a proposed site will not be rejected in favor of a substitute unless" the Commission is "confident that such action is called for." New England Coalition on Nuclear Pollution, 582 F.2d at 95 (aff'g Seabrook, CLI-77-8, 5 NRC 503). An "intervenor must offer tangible evidence that an alternative site might offer 'a substantial measure of superiority'" to challenge the proposed site. Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1047 (1st Cir. 1982); Claiborne, CLI-98-3, 47 NRC at 104.

The State has failed to come forward with any "tangible evidence" that any alternate site is "obviously superior" to Skull Valley. As the First Circuit observed in Roosevelt Campobello, "[n]o purpose would be served" by requiring an agency "to study exhaustively all environmental impacts at each alternative site considered once it has reasonably concluded that none of the alternatives will be substantially preferable to the proposed site." Id. at 1047. The DEIS identified the Skull Valley site as meeting the requirements for the PFSF. The State has not claimed in Utah AA or its recent discovery

responses that any other site could reasonably be found "obviously superior" to Skull Valley. As in Roosevelt Campobello, therefore, no additional analysis is required.

Further, the Commission has explicitly rejected the State's argument for additional site selection process analysis, finding that the

> [C]ontemplated free-ranging inquiry into the site selection process would go well beyond what . . . is required of an agency considering a license application. The site screening process is used by a license applicant to identify sites that may meet the stated goals of the proposed action. It is not uncommon for only one of many possible sites to be deemed reasonable. . . . For those alternatives that have been eliminated from detailed study, the EIS is required merely to briefly discuss why they were ruled out. Where (as here) a federal agency is not the sponsor of a project, the federal government's consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project.

Claiborne, CLI-98-3, 47 NRC at 103-04 (internal citations and quotations omitted). Thus, the Commission recognized the substantive difference between the requirement to "rigorously explore" reasonable alternatives and the requirement to "briefly discuss the reasons for" eliminating alternatives from detailed study. 40 C.F.R. § 1502.14(a).

The Commission's instruction in Claiborne is directly applicable here.[16] As in Claiborne, the applicant undertook a site selection process to identify a proposed site. PFS determined, and the Staff independently found, that the site proposed in the License Application (i.e., Skull Valley) "complies with the criteria of 10 CFR 72 Subpart E, as required by 10 CFR 72.40(a)(2)." Safety Evaluation Report Concerning the Private Fuel

[16] See LBP-98-7, 47 NRC at 203 (rejecting Contention Utah BB, a companion contention to Utah AA, because discrimination in the site selection process is not a cognizable licensing subject based on the Commission's decision in Claiborne).

Storage Facility ("SER") § 2.2 (2000). As in Claiborne, the applicant's site selection process successfully identified only a single site "suiting its stated goals." Claiborne, CLI-98-3, 47 NRC at 104. Finally, as in Claiborne, in "accordance with NEPA, the Staff discussed [in the DEIS] the process used by [PFS] to select a suitable site, and found it reasonable." Id. This is all NEPA requires regarding an applicant's site selection process. Id. The State's contention that NEPA demands more detailed analyses of an applicant's site selection process in the DEIS confuses regulatory and NEPA requirements and ignores Commission case law.[17]

In sum, the State's assertion that a more rigorous and detailed analysis and discussion of the site selection process is required in the DEIS, without providing any tangible evidence of the existence of an obviously superior site, is contrary to long-standing NEPA case law. The DEIS discussion and analysis of the reasons for eliminating potential sites is completely in accord with the Commission's direction to "briefly discuss why they were ruled out." See Id. at 103-04. The DEIS as written fully satisfies NEPA. Therefore, PFS is entitled to summary disposition of Utah AA as a matter of law for this reason as well.

D. Subpart E is Not Applicable to the Agency's Alternate Site Evaluation

Finally, the State also asserts that the application of the factors set forth in 10 C.F.R. Part 72, Subpart E, must be discussed in the environmental analysis for "candidate sites." Utah Contentions at 174. Contrary to the State's assertion, nowhere in Subpart E

[17] The State has also failed to "offer tangible evidence of an obviously superior site sufficient to call for [the] more thorough site-by-site NEPA review" it apparently seeks. Id. at 104 (internal quotations omitted).

does it state that the siting evaluation factors apply to "candidate sites."[18] Indeed, Subpart E siting evaluation factors only refer to the "proposed" site. See, e.g., 10 C.F.R. §§ 72.90(b), (c), 72.92(a), 72.100(a), 72.108. The State now agrees that "it may not be legally required that the DEIS explicitly consider the factors listed in 10 C.F.R. part 72, Subpart E" and that Subpart E is merely a "source of guidance" for the DEIS. State's Sixth Response at 50. The DEIS as written, therefore, fully satisfies NEPA and the Commission's regulations regarding Subpart E.

Further, the State's assertion that discussion of the Subpart E factors is required for each "candidate site" considered in the selection process, Utah Contentions at 174, is contrary to NEPA, as discussed above. The DEIS discussion and analysis of the reasons for ruling out potential sites is completely in accord with the Commission's direction to "briefly discuss why they were ruled out." See Claiborne, CLI-98-3, 47 NRC at 103-04. Requiring detailed analysis of all 38 candidate sites, therefore, would directly conflict with NEPA and Commission case law. As a result, the State's assertion regarding application of Subpart E to the DEIS discussion of alternatives is legally incorrect or moot and PFS is entitled to summary disposition of this issue as a matter of law.

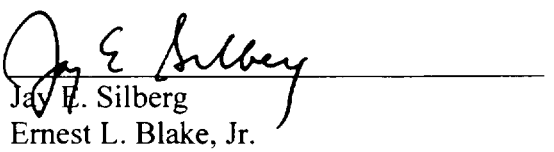
IV. CONCLUSION

PFS has demonstrated that the State's assertion that it cannot rely on the available environmental analysis because "it does not adequately evaluate the range of reasonable alternatives to the proposed action" has no legal or factual basis. The NRC Staff's DEIS, which contains the environmental analysis required by NEPA, discusses each issue as-

[18] By "candidate sites," it is not clear if the State means all 38 sites considered by in the PFS site selection process or the "alternate" sites considered in the environmental analysis. In any case, neither term appears in Subpart E.

serted by the State to be missing from the ER. Case law and the Commission has made explicit that NEPA does not enable, much less require, a "free-ranging inquiry" into the PFS site selection process. Finally, the State's assertions regarding application of 10 C.F.R. Part 72, Subpart E, are contrary to NEPA and the plain language of the Commission's regulations. In sum, the DEIS as written fully satisfies NEPA. There is, therefore, no genuine dispute of material fact and PFS is entitled to a decision as a matter of law.

Respectfully submitted,



Jay E. Silberg
Ernest L. Blake, Jr.
Paul A. Gaukler
D. Sean Barnett
SHAW PITTMAN
2300 N Street, N.W.
Washington, DC 20037
(202) 663-8000
Counsel for Private Fuel Storage, L.L.C.

Dated: April 18, 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

STATEMENT OF MATERIAL FACTS ON WHICH NO GENUINE DISPUTE EXISTS

Applicant submits, in support of its motion for summary disposition of Utah AA, this statement of material facts as to which the Applicant contends there is no genuine issue to be heard.

1. Private Fuel Storage, L.L.C. ("PFS") submitted an Environmental Report ("ER") and Safety Analysis Report ("SAR") with its initial License Application for the Private Fuel Storage Facility ("PFSF") dated June 20, 1997.

2. On November 23, 1997, the State of Utah filed as part of its contentions, Contention Utah AA, challenging the adequacy of the environmental analysis of alternatives to building the PFSF. Private Fuel Storage, L.L.C. (Independent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 203 (1998).

3. In its Memorandum and Order of April 22, 1998, the Board admitted contention Utah AA as follows: "The Environmental Report fails to comply with the National Environmental Policy Act because it does not adequately evaluate the range of reasonable alternatives to the proposed action." The Board also ruled that "the scope of the contention is limited to the issue of the adequacy of the PFS alternative site analysis." Private Fuel Storage, L.L.C. (Independent Fuel Storage Installation), LBP-98-10, 47 NRC 147, 203 (1998).

4. The State's basis for Utah AA is limited by its own language to challenging only whether particular issues were discussed in the environmental analysis and does not raise any substantive challenge to the merits of any analysis.

5. In June 2000, the NRC Staff issued NUREG-1714, "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 on Tooele County, Utah" ("DEIS").

6. The State has not identified any alternate site for the PFSF that is "obviously superior" to the Skull Valley site proposed by PFSF.

7. As a basis for Utah AA, the State asserts that how the site selection process "jumped from 38 sites to two sites" is a "mystery" and that the "overarching criterion" used by PFS in selecting the 38 candidate sites for evaluation, and the choosing of the Skull Valley reservation as the preferred site, "seems to [have been] a willing jurisdiction." Utah Contentions at 174.

8. The PFS site selection process is described, and the corresponding site selection criteria are clearly identified, in DEIS § 7.1.

9. As a basis for Utah AA, the State asserts that "there is no discussion" or tabulation of the results from phase two screening. Utah Contentions at 173.

10. The DEIS describes how in phase two of the site selection process the PFS Board of Managers carefully considered the available information to further narrow the candidate sites, based on (1) an information sheet for all 38 sites that tabulated responses to a series of questions that were based on the screening criteria and (2) written evaluations of the sites with the most detailed available information. DEIS at 7-3 – 7-4.

11. As a basis for Utah AA, the State asserts that the discussion left them "absolutely baffled" as to the identity of the last three remaining sites. Utah Contentions at 173.

12. As described in the DEIS, the site selection process resulted in four sites being selected for further, more detailed, evaluation: (1) City of Caliente and Lincoln County, Nevada, (2) Goshute Tribe; Skull Valley, Utah, and, (3) NEW Corporation; Fremont County, Wyoming, and (4) United Nuclear Corporation; New Mexico. DEIS at 7-4. Subsequently, however, the City of Caliente and Lincoln County, Nevada decided not to participate further in the process. Thus, only the other "three sites were left for further consideration." Id.

13. As a basis for Utah AA, the State asserts that there is "no mention" of where the site selection questionnaire was sent. Utah Contentions at 173.

14. The DEIS states that the site selection questionnaire was sent to the owners or promoters of each of the remaining three candidate sites. DEIS at 7-4. The responses to the Questionnaire are included in the DEIS. Id., App. F, Exhs. F.39 – F.41.

15. As a basis for Utah AA, the State asserts that the responses to the site selection questionnaire were not tabulated. Utah Contentions at 173.

16. The PFS Board of Managers directed the contracted engineering firm to perform an independent evaluation of the strengths and weaknesses of each of the three remaining candidate sites. DEIS at 7-4. The DEIS states that an evaluation matrix was developed to aid in the decisionmaking. Id.

17. As a basis for Utah AA, the State asserts that the application of 10 C.F.R. Part 72, Subpart E, Site Evaluation Factors, to "candidate sites" is not discussed at all in the environmental analysis. Utah Contentions at 174.

18. Nowhere in Subpart E does it state that the siting evaluation factors apply to "candidate sites." Indeed, Subpart E siting evaluation factors only refer to the "proposed" site. See, e.g., 10 C.F.R. §§ 72.90(b), (c), 72.92(a), 72.100(a), 72.108. The State agrees that "it may not be legally required that the DEIS explicitly consider the factors listed in 10 C.F.R. part 72, Subpart E" and that Subpart E is merely a "source of guidance" for the DEIS. State's Sixth Response at 50. Further, detailed evaluation of candidate sites ruled out during the site selection process is not required. See 10 C.F.R. § 51.61; Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 104 (1998).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of Applicant's Motion for Summary Disposition of Utah Contention AA – Range of Alternatives were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage pre-paid, this 18th day of April 2001.

G. Paul Bollwerk III, Esq., Chairman Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: GPB@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: JRK2@nrc.gov; kjerry@erols.com

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: PSL@nrc.gov

* Susan F. Shankman
Deputy Director, Licensing & Inspection
Directorate, Spent Fuel Project Office
Office of Nuclear Material Safety & Safeguards
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications Staff
e-mail: hearingdocket@nrc.gov
(Original and two copies)

* Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Catherine L. Marco, Esq.
Sherwin E. Turk, Esq.
Office of the General Counsel
Mail Stop O-15 B18
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: pfscase@nrc.gov

John Paul Kennedy, Sr., Esq.
Confederated Tribes of the Goshute
Reservation and David Pete
1385 Yale Avenue
Salt Lake City, Utah 84105
e-mail: john@kennedys.org

Diane Curran, Esq.
Harmon, Curran, Spielberg &
Eisenberg, L.L.P.
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
e-mail: dcurran@harmoncurran.com

*Richard E. Condit, Esq.
Land and Water Fund of the Rockies
2260 Baseline Road, Suite 200
Boulder, CO 80302

*Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Denise Chancellor, Esq.
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, Utah 84114-0873
e-mail: dchancel@state.UT.US

Joro Walker, Esq.
Land and Water Fund of the Rockies
1473 South 1100 East, Suite F
Salt Lake City, UT 84105
e-mail: joro61@inconnect.com

Danny Quintana, Esq.
Skull Valley Band of Goshute Indians
Danny Quintana & Associates, P.C.
68 South Main Street, Suite 600
Salt Lake City, Utah 84101
e-mail: quintana@xmission.com

Samuel E. Shepley, Esq.
Steadman & Shepley, LC
550 South 300 West
Payson, Utah 84651-2808
e-mail: Steadman&Shepley@usa.com

Jay E. Silberg

* By U.S. Mail only

EXHIBIT 1

STATE OF UTAH

OFFICE OF THE ATTORNEY GENERAL

MARK L. SHURTLEFF
ATTORNEY GENERAL

RAY HINTZE
Chief Deputy - Civil

RYAN MECHAM
Chief of Staff

KIRK TORGENSEN
Chief Deputy - Criminal

March 9, 2001

Paul Gaukler, Esq.
Shaw Pittman
2300 N Street, N.W.
Washington DC 20037-1128

Via E-mail and First Class Mail

re: Resolution of the State's Response to PFS's Sixth Set of Discovery Requests (Contentions Utah AA & DD)

Dear Paul:

In our telephone conversation on Monday, March 5, 2001, you suggested that PFS may file a Motion to Compel discovery responses with respect to Contentions Utah AA, Requests for Admissions Nos. 1-4, and Interrogatory Responses Nos. 4, 5, and 9; and Utah DD, Interrogatory Responses Nos. 7, 8, and 9.

The State believes that it has filed a complete response to PFS's Sixth Set of Discovery but in order to settle this dispute the State elaborates further on its discovery responses.

Contention Utah AA

You objected to Responses to Admission Requests Nos. 1-4, because the response stated that the DEIS document speaks for itself. In fact, only the State's answer to Admissions Nos. 1 through 3 gave such a response.

Requests for Admissions Nos. 1 and 2: The State admits that the DEIS discusses the site selection process used by PFS (Request No. 1) and the site selection criteria used by PFS (Request No. 2) but the State makes no admission as to the adequacy of those discussions.

Requests for Admissions No. 3: Denied. It is difficult to determine which candidates were screened after Phase 1 versus which candidates were simply not further considered in Phase 2.

Interrogatory Nos. 4, 5, and 9 In the following statement, PFS took issue with "some of the problems" that is repeated in responses to Interrogatories Nos. 4, 5, and 9:

160 East 300 South, 5th Floor, P.O. Box 140873, Salt Lake City, Utah 84114-0873
Telephone: (801) 366-0290 • Facsimile: (801) 366-0292

Having said this, and in light of the materials the State currently has, the following set forth some of the problems with PFS's site selection process:

The responses following this statement are intended to summarize all of the State's concerns based on the information currently available to it.

Contention Utah DD

You requested the State clarify whether the concluding paragraph in response to Interrogatory Nos. 7, 8, and 9, which cross references the State's previous answers to Interrogatory Nos. 1, 5 and 6, relates to the DEIS.

To clarify, the issues specified in our answers to Interrogatory Nos. 1, 5 and 6 also apply to the DEIS with the exceptions noted below:

Response to Interrogatory No. 1:

Paragraphs 2 and 3 ["First, the Applicant has not adequately addressed...." and "[a]dditionally, 260 passenger vehicle trips per day ...."]: We do not intend to dispute the DEIS's quantification of increases in traffic as a result of the project.

Response to Interrogatory No. 6:

Paragraphs 1 and 2 ["The Applicant's assessment...." and "The effects of the potential increase in background radiation...."]: We do not adopt these paragraphs with respect to the DEIS.

Paragraph 4 ["Third, there has been no mention of the potential for food chain alteration due to low level radiation..."]: We do not adopt the final phrase beginning with "and the ultimate effects of the exposure..." with respect to the DEIS.

I believe the above elaboration of the State's Response to PFS's 6th Set of Discovery should satisfy the concerns you raised with me on March 5.

Sincerely,

Denise Chancellor
Assistant Attorney General