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NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC (Independent Spent Fuel Storage Installation)	)	ASLBP No. 97-732-02-ISFSI
	)	May 15, 2001

STATE OF UTAH'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF CONTENTION UTAH AA

Pursuant to the Board's Order of April 20, 2001 and 10 CFR § 2.749(a), the State files this Response to the Applicant's April 18, 2001, Motion for Summary Disposition of Utah Contention AA – Range of Alternatives ("Applicant's Motion"). The State opposes the Applicant's Motion on the grounds that the Applicant has failed to demonstrate that it is entitled to summary disposition as a matter of law. 10 CFR § 2.749. The State's opposition is supported by a Statement of Disputed and Relevant Material Facts ("Utah Facts"), attached hereto.

FACTUAL BACKGROUND

PFS started its site selection process with a group of 38 sites, 26 of which had been under consideration by the federal Nuclear Waste Negotiator ("NWN") before the funding for that office ran out, and 12 of which had proponents who had expressed to PFS an interest in siting the facility. PFS then undertook a selection process, using a variety of decision criteria as further described below, to narrow those 38 sites down to at least two likely sites. See Environmental Report ("ER") at 8.1-1 through 8.1-9e. The site selection process PFS underwent was implicitly adopted by Staff in its Draft Environmental Impact

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Statement ("DEIS"). See DEIS at 7-1 through 7-5. After describing the site selection process, the DEIS concluded:

> The PFS site-selection process has structure and appears practicable. The approach of using the NWN sites, as well as others that expressed an interest in hosting the PFSF, as the set of sites considered appears to be a reasonable [*sic*]. Specific weighting and ranking factors were not developed by PFS Board of Managers, therefore, it is difficult to ascertain specifically how the PFS Board of Managers evaluated and selected the four candidate sites. However, based on the information provided on these four sites, the Board of Managers did have objective information that would allow them to make a reasoned decision among the alternative sites. Once the candidate sites were selected, PFS did perform site investigations and evaluated the sites using specific technical and environmental criteria. Weighting factors were used to rank the sites.

DEIS at 7-5.

PROCEDURAL BACKGROUND

At the time PFS filed its license application in 1997, the only environmental document supporting the PFS license application was the Applicant's Environmental Report. The State challenged the adequacy of the ER's discussion of the site selection alternative of the proposed ISFSI under the National Environmental Policy Act ("NEPA") in Contention Utah AA. As admitted by the Board, the contention states:

> 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.

LBP-98-7, 47 NRC 142, 203, 256, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998); *see also* State's Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility (November 23, 1997) at 172-174 ("Utah AA"). The Board specified that Utah AA was "limited to the issue of the

adequacy of the PFS alternative site analysis" and consolidated a similar portion of another party's contention, Castle Rock 13 - Inadequate Consideration of Alternatives, with Utah AA. *See* 47 NRC at 203, 218-219. When Castle Rock withdrew as an intervenor in this proceeding, the Board ruled that Castle Rock's withdrawal did not affect the viability of Utah AA, which remained intact. LBP-99-06, 49 NRC 114, 118 (1999).

PFS's ER, as last revised on April 14, 2000, now contains more information on the site selection process. However the State still considers the information and the process it describes to be legally insufficient to meet NEPA requirements. In June 2000, the NRC Staff issued the DEIS for the PFS facility. The description of the site selection process in that document essentially mirrored PFS's revised discussion in the ER.

STANDARD OF REVIEW AND APPLICABLE LAW

A. Summary Disposition

Pursuant to 10 CFR § 2.749(d), a party is entitled to summary disposition if "there is no genuine issue as to any material fact" and the party "is entitled to a decision as a matter of law." The burden of proving entitlement to summary disposition is on the movant.[1] Because the burden of proof is on the proponent, "the evidence submitted must be construed in favor of the party in opposition thereto, who receives the benefit of any

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[1] Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993). *See also* Cleveland Electric Illuminating Co (Perry Nuclear Power Plant, Units 1 and 2) ALAB-443, 6 NRC 741, 755 (1977): "[S]ummary disposition is a harsh remedy. It deprives the opposing litigant of the right to cross-examine the witness, which is perhaps at the very essence of an adjudicatory hearing. In such circumstances -- even in administrative proceedings where the rules of evidence may be relaxed -- it is important that a movant for summary disposition be required to hew strictly to the line set out by our Rules of Practice."

favorable inferences that can be drawn."[2] Furthermore, if there is any possibility that a litigable issue of fact exists or any doubt as to whether the parties should be permitted or required to proceed further, the motion must be denied.[3]

B. Standards Urged by Applicant Are Not Applicable

The deferential judicial standard of review urged by the Applicant[4] is not applicable at this stage of the proceeding. This is agency decisionmaking, not judicial review, and the Board at this time has the opportunity and obligation to assure that the environmental analysis contains all of the information a reasonable decisionmaker would want in order to take the "hard look" at environmental consequences that is required by the National Environmental Policy Act, as further described below. The job of collecting information and performing necessary analyses initially belongs to the Staff, but it is the Board's responsibility to assure that work has been done adequately. The Board must assure that it has, and the Commission will have, sufficient information to allow the Board and the Commission to meet their statutory obligations under NEPA to "consider whether reasonable alternatives less harmful to the environment exist before allowing a utility to proceed with construction." Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), ALAB-479, 7 NRC 774 (1978). The Board's role is further described in that case:

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[2] 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).

[3] General Electric Co. (GE Morris Operation Spent Fuel Storage Facility), LBP-82-14, 15 NRC 530, 532 (1982).

[4] Applicant's Motion at 4.

> [T]he Commission itself has made clear that in contested proceedings a board has not only the right to but 'is expected to' do more than simply resolve the litigants' contentions. In these cases a licensing board must take steps to assure itself that the regulatory staff's review has been adequate, and to inquire further into areas where it may perceive problems or find a need for elaboration. If it finds itself not satisfied with the adequacy or completeness of the staff review, or of the evidence presented in support of the license application, it may, for example, reject the application, or may require further development of the record to support such application.

Id. at 793 (citation omitted).

The standards governing selection of a site alternative to the one proposed by an applicant, outlined at Applicant's Motion at 5, are also irrelevant to this proceeding. The State of Utah is not claiming at this time that another site should be selected. As further described below, its claim is that alternatives that may have been reasonable were rejected by PFS, in a process that was adopted wholesale by the Staff, without legally adequate explanation. Until all reasonable alternatives are evaluated, it is impossible to know whether another alternative is "obviously superior."

ARGUMENT

A. The Heart of an Adequate Environmental Impact Statement Is its Analysis of Alternatives.

It is axiomatic that NEPA requires federal agencies to take a "hard look" at the environmental consequences of potential federal actions. New York v. Kleppe, 429 U.S. 1307, 1310-11 (1976), quoting Natural Resources Defense Council v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972). NEPA requires environmental impact statements to effect "a broad national commitment to protecting and promoting environmental quality." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348 (1989); *see also* Louisiana Energy Services,

L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87 (1998). NEPA does so by ensuring:

> That the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Robertson, 490 U.S. at 349.

The heart and purpose of that "hard look" is the evaluation of alternatives. 40 CFR § 1502.14. As one court has observed, NEPA requires a "'detailed' EIS 'to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project . . . which would alter the environmental impact and the cost-benefit balance." All Indian Pueblo Council v. United States, 975 F.2d 1437, 1444 (10th Cir. 1992), *quoting* Calvert Cliffs' Coordinating Comm. Inc. v. United States Atomic Energy Comm'n, 449 F.2nd 1109, 1114 (D.C. Cir. 1971). The discussion of alternatives has been described as the "linchpin" of the entire impact statement. Dubois v. U.S. Department of Agriculture, 102 F.3d 1273, 1286-7 (1st Cir. 1996), *cert denied*, 521 U.S. 1119 (1997), *quoting* Natural Resources Defense Council v. Callaway, 524 F. 2nd 79, 92 (2nd Cir. 1975).

All reasonable alternatives must be evaluated. Federal rules governing the NEPA process require an agency to "rigorously explore and objectively evaluate *all reasonable alternatives*, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 CFR § 1502.14(a) (*emphasis added*). As the 7th Circuit has stated:

> No decision is more important than delimiting what these "reasonable alternatives" are. That choice, and the ensuing analysis, forms 'the heart of the environmental impact statement.'

Simmons v. U.S. Army Corp of Engineers, 120 F.3d 664, 666 (7th Cir. 1997), *quoting* 40 CFR § 1504.14.[5] The existence of a viable but unexamined alternative renders an environmental impact statement inadequate. Idaho Conservation League v. Mumma, 956 F.2nd 1508, 1519 (9th Cir. 1992); *see also* Dubois v. Department of Agriculture, 102 F.3rd 1273 (1st Cir. 1996), Friends of Boundary Waters Wilderness v. Dombeck, 164 F.3d 1115, 1128 (8th Cir. 1999), and Committee to Preserve Boomer Lake Park v. Department of Transp., 4 F.3d 1543, 1551 (10th Cir. 1993). A thorough discussion of alternatives is "imperative." Dubois, 102 F.3d at 1287.

B. The DEIS for the PFS Facility Relies upon the Results of the Site Selection Process in the ER and Consequently Does Not Contain a Legally Adequate Analysis of Alternatives.

If the heart of an EIS is its comparison of alternatives, the heart of the DEIS for the proposed PFS facility, which addresses the transport and storage of nuclear waste that is stored nationwide, is a meager look at a site in Wyoming. This comparison is of very limited value because the Wyoming site has some of the same significant environmental disadvantages as the Utah site. Specifically, use of the Wyoming site, which is also located at

[5] The reasonable range of alternatives is defined by reference to the agency's purpose in proposing a project. Courts become concerned when an agency "contrive[s] a purpose so slender as to define competing 'reasonable alternatives' out of consideration..." Simmons, 120 F.3rd at 666. But that is not the issue before this Board because the Staff did not attempt to defend its failure to look at potential alternatives by citing to a narrow purpose; it did not discuss purpose at all in this context.

See also discussion in note 8, *infra*, regarding agency adoption of an applicant's purpose.

a great distance from the bulk of the stored high level nuclear waste in this county, would require transportation of large amounts of that waste on railways throughout the country.[6] The Wyoming site is also, like Utah, located in the more seismically active and complex intermountain west.[7]

If there were some reasonable agency objective that made these two sites the only appropriate places to store nuclear waste, the analysis in the DEIS might be sufficient. Plainly, though, there could be no such objective that would be reasonable, and neither PFS nor the Staff has indicated otherwise. The number of nuclear facilities throughout the nation, in states other than Utah, demonstrates that high level nuclear waste management is feasible at many locations.[8]

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[6] The DEIS noted that the overall radiological impact of transporting spent nuclear fuel ("SNF") to and away from the Wyoming repository would be similar to the impact of SNF transportation to and away from Skull Valley. DEIS at 7-20.

[7] The DEIS also contains a comparison with a second site in Skull Valley which is adjacent to the proposed site. This analysis of nearly identical sites obviously gives the agency little or no additional information for its "hard look" comparison of reasonable alternatives.

[8] The State is aware of case law suggesting that an applicant's needs and goals choice should be taken into account in formulating alternatives. Citizens Against Burlington v. Busey, 938 F.2d 190, 196 (10th Cir. 1991). Even if this case law is followed (and there is a split in the circuits that indicates it may not be; *see* Simmons, 120 F.3d at 669), it does not mean that the agency may simply accept an applicant's conclusions about which sites meet those needs and goals. The Nuclear Regulatory Commission has required careful scrutiny of the availability of alternative sites when an applicant has proposed a preferred site. Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), ALAB-479, 7 NRC 774 (1978).

1. PFS's Site Selection Process

It is against this backdrop that PFS's site selection process must be evaluated. PFS started with a list of 38 sites, sites that had been considered by the short-lived Office of the Nuclear Waste Negotiator, or had proponents who had expressed to PFS an interest in siting the facility. PFS had a business purpose as it worked through its initial list of 38 sites: find at least two sites – a primary site, and a secondary site that would be used in order to have an alternate choice should problems with the primary site develop further into the process. ER at 8.1-9a; DEIS at 7-4. In order to get to that goal, PFS had to evaluate and eliminate sites. It did so in a multi-step process based on a number of factors, including:

- Public acceptance and willing host jurisdiction. ER at 8.1-5; DEIS at 7-1 and 7-3.
- Whether a site could be developed at reasonable cost. ER at 8.1-5; DEIS at 7-3.
- Lack of success in reaching a lease agreement in the past (Mescalero tribe). ER at 8.1-8; DEIS at 7-3.
- Which sites were "furthest along in the evaluation process." ER at 8.1-9; *see also* DEIS at 7-4.
- Whether the owner or promoter had declined or did not actively pursue DOE MRS funding. ER at 8.1-7; DEIS at 7-3.

In winnowing down to two acceptable sites, PFS acknowledges that it did not eliminate all potential sites. There were eleven other potential areas it decided not to pursue, but those areas were generally not deemed by PFS to provide any greater potential of a satisfactory site than the seven initially discussed. ER at 8.1-9; DEIS at 7-4. The PFS Chairman recommended, however, that the remaining eleven sites that had not been

screened out be "held in reserve." ER at 8.1-9; not acknowledged in DEIS.

2. The Objectives and Criteria Used by PFS for its Site-Selection Process are not Acceptable Criteria for Staff to Use in Eliminating Alternatives Under NEPA.

PFS's purpose in winnowing sites was a reasonable business purpose: find sites that work. Its purpose was not to find all reasonable sites that could be used for a nuclear waste storage facility. In fact, once it had some sites on its list that appeared to be acceptable, PFS by its own admission quit looking for other alternatives.

PFS also used some criteria for eliminating sites that may have been reasonable from a business perspective: whether sufficient information had been developed about the site to allow its evaluation at the time decisions were being made, whether PFS had previously failed in its attempt to enter into a financial agreement with the site's owner, and whether public opinion and the host jurisdiction favored the project.

PFS's reasonable business purposes and criteria do not translate to criteria that may legally be used by the Staff to eliminate potential alternative sites under NEPA, however. Staff acknowledges that PFS has started with a list of 38 potentially reasonable sites.[9] It is therefore not appropriate for Staff to accept the elimination of any of those sites simply because PFS has found other acceptable sites, because insufficient information had been gathered about the sites at the time PFS was making its site selection, or because the cost of

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[9] "The approach of using the NWN sites, as well as others that expressed an interest in hosting the PFSF, as the set of sites considered appears to be a reasonable [*sic*]." DEIS at 7-5.

entering into a lease might be higher than PFS would freely accept.[10] Even the lack of a willing host or public acceptance should not be used to eliminate an otherwise reasonable alternative site given the large number of nuclear projects that have been sited in the United States with considerable public and governmental opposition.

As noted above, the Staff acknowledged that "[s]pecific weighting and ranking factors were not developed by PFS Board of Managers, therefore, it is difficult to ascertain specifically how the PFS Board of Managers evaluated and selected the four candidate sites." DEIS at 7-5. Staff did no additional, independent analysis of alternatives eliminated. Moreover, the Staff's DEIS did not even acknowledge, much less address, PFS's admission that there were eleven sites that had not been screened out, but that were not pursued simply because PFS felt the sites it had would be sufficient.

Staff admitted that it did not understand PFS's process, and yet it relied on that process in evaluating the existence of appropriate alternatives. It is clear, then, that Staff could not have performed a legally adequate analysis of the existence of alternatives under 40 CFR § 1502.14(a). The Commission has found that "an applicant's evidence 'cannot be taken as a substitute for the appraisal of the Staff.'" Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-14, 7 NRC 952, 967 (1978) (quotations omitted). An applicant's alternative site selection process, adopted without analysis or even understanding by the Staff, should be similarly rejected.

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[10] The State acknowledges that where there have been a large number of reasonable alternatives identified, NEPA probably does not require analysis of every one, but that is not the problem in the case before this Board.

3. Lacking Basic Information about the Site Selection Process, the Staff Also Lacks Sufficient Information to Rule Out PFS's Use of Objectives That Would Not Be Appropriate under NEPA.

PFS's description of its site selection process also does not include sufficient information to allow the agency to assure that only appropriate objectives have been used in determining which sites are reasonable to analyze. Specifically, it would not be appropriate to have as an objective that the site should be located where the facility can escape any state jurisdiction and application of any state environmental laws. Although PFS does not directly admit this is one of its objectives, it did consider the host's sovereign immunity as one of its evaluating criteria. ER, Table 8.1-1A. This may be an understandable business objective for PFS, but such an inappropriate objective must not be the basis of a federal agency's selection of reasonable alternatives to evaluate.

Nor would it be reasonable to limit the alternatives considered to sites near Yucca Mountain, a site identified as a potential permanent high level nuclear waste disposal facility, but about which no final decisions have been made.

Obviously, these are objectives that, together or separately, could easily explain the results of PFS's site selection process. It is important that the agency assure that these inappropriate objectives have not been used to eliminate reasonable alternative sites that should have been evaluated. In this case, the Staff has simply accepted PFS's analysis without understanding it. It obviously could not have assured that only appropriate criteria were used for eliminating alternative sites.[11]

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[11] Even if the Staff were to accept these inappropriate criteria, that acceptance should be tested through explicit recognition in the DEIS, and through public notice and

C. The State's Contention Has Not Been Mooted

The Board should reject PFS's complaint that the State's contention, as written, applies only to PFS's site selection process, and not to the site selection process undertaken by the Staff in the DEIS. This complaint ignores the close relationship between the two processes. As even a casual reading of the ER (ER at 8.1-1 through 8.1-9e) and DEIS (7-1 through 7-5 and Appendix F) reveal, the Staff adopted PFS's site selection process nearly wholesale.

The Commission has previously determined that a challenge to an applicant's ER may stand as a complaint against the Staff's EIS once the latter is completed. In Louisiana Energy Services (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998), the intervenor filed most of its environmental contentions on the basis of the applicant's ER. "But by the time the various NEPA issues came before the Board on the merits, the NRC Staff had issued its FEIS. In [two board decisions], therefore, the Board appropriately deemed all of CANT's environmental contentions to be challenges to the FEIS." Claiborne, 47 NRC at 84.

PFS's plea that the State should be held to its complaint that there was "no discussion" in the ER of the site selection process should also be rejected. PFS apparently believes that any added discussion, even if it is completely inadequate, should be sufficient to vitiate the State's contention. Although some of the State's language may have been framed in terms that were responsive to the ER as it existed at the time the contention was filed, an

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comment.

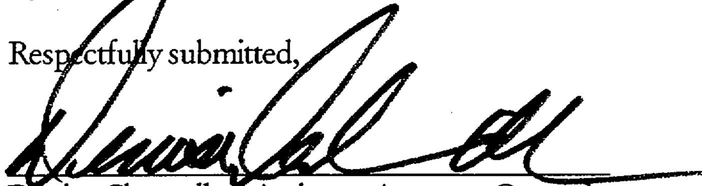
objective reading of the contention, as it was accepted by the Board, makes it clear that the State wanted to bring to the Board's and the Commission's attention the inadequacy under NEPA of PFS's (and now the Staff's) analysis of site alternatives. That purpose has not changed, and PFS should not be allowed to redefine the State's purpose in an unreasonably narrow way.

CONCLUSION

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

DATED this May 15, 2001.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF UTAH CONTENTION AA was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this May 15, 2001:

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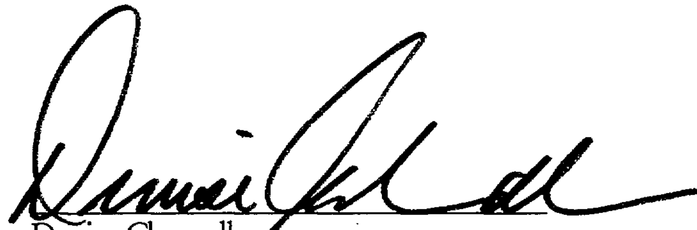

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC (Independent Spent Fuel Storage Installation)	)	ASLBP No. 97-732-02-ISFSI
	)	May 15, 2001

STATE OF UTAH'S STATEMENT OF DISPUTED AND RELEVANT MATERIAL FACTS

In support of its Response to PFS's Motion for Summary Disposition of Utah Contention AA, the State submits this Statement of Disputed and Relevant Material Facts.

1. When Contention AA was filed, it challenged that the Environmental Report ("ER") did not adequately consider alternatives,[1] but at this stage of the proceeding it is appropriate that Contention AA also challenge the Draft Environmental Impact Statement ("DEIS").

2. The site selection process PFS underwent was implicitly adopted by Staff in its DEIS. DEIS at 7-1 through 7-5.

3. The Staff found it to be reasonable for PFS to begin its search for alternative sites using the Nuclear Waste Negotiator sites, as well as others that expressed an interest in hosting the PFSF. DEIS at 7-5.

4. The Staff found that "it is difficult to ascertain specifically how the PFS Board of Managers evaluated and selected the four candidate sites." DEIS at 7-5.

5. The Staff did not analyze PFS's objectives in the context of determining whether sites PFS had declined to pursue might be reasonable alternatives that should be evaluated under NEPA.

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[1] State of Utah's Contentions on the Construction and Operating License Application by the Private Fuel Storage, L.L.C. for an Independent Spent Fuel Storage Facility, dated November 23, 1997 at 172 ("Utah AA").

6. PFS had a business purpose as it worked through its initial list of 38 sites: find at least two sites – a primary site, and a secondary site that would be used in order to have an alternate choice should problems with the primary site develop further into the process. ER at 8.1-9a; DEIS at 7-4.

7. In order to get to a final pair of sites, PFS had to evaluate and eliminate sites. It did so in a multi-step process based on a number of factors, including:
   - Public acceptance and willing host jurisdiction. ER at 8.1-5; DEIS at 7-1 and 7-2.
   - Whether a site could be developed at reasonable cost. DEIS at 7-3.
   - Lack of success in reaching a lease agreement in the past (Mescalero tribe). ER at 8.1-8; DEIS at 7-3.
   - Which sites were "furthest along in the evaluation process." ER at 8.1-9; DEIS at 7-4.
   - Whether the owner or promoter had declined or did not actively pursue DOE MRS funding. ER at 8.1-7; DEIS at 7-3.
   - Whether the host had sovereign immunity. ER, Table 8.1-1A.

8. PFS acknowledges that it did not eliminate all potential sites. There were eleven other potential areas they decided not to pursue, because those areas were generally not deemed by PFS to provide any greater potential of a satisfactory site than the seven initially discussed. ER at 8.1-9; DEIS at 7-4.

9. The Chairman of PFS recommended that the remaining eleven sites that had not been screened out be "held in reserve," indicating clearly that the sites did not have any disqualifying factors. ER at 8.1-9; not acknowledged in DEIS.

10. Staff did no additional, independent analysis of alternatives eliminated. DEIS at 7-1 through 7-5.

11. The State disputes PFS Material Facts 5, which indicates that the State's challenge is limited by its own language to challenging only whether particular issues were discussed in the environmental analysis not whether they were discussed adequately. The State's clear intent, of which PFS had sufficient notice, was to challenge the adequacy of PFS's site selection analysis. State's Response at 13.

12. The State disputes the descriptions of PFS's site selection process in PFS Material Facts 8, 10, and 12 insofar as they imply that the site selection process was reasonable and adequate to meet the requirements of NEPA. State's Response at 7-12.