agencies on a matter over which the Commission is totally devoid of any jurisdiction."). Thus, by considering a license application in which ISP would be violating the NWPA, the NRC would also violate the NWPA. That is certainly germane to this licensing proceeding.

~~Furthermore, Beyond Nuclear and Fasken Oil, et al. were required by the Commission to raise the issue of DOE taking title in this proceeding, rather than by a motion to dismiss. So the Commission itself has determined that the ownership of the waste is a proper issue for this proceeding and is within the scope of this proceeding.~~

Contention 1 also asserted that the NRC has no jurisdiction under the AEA to issue a license for a CIS facility. This contention is not an attack on Part 72 rules that allegedly allow for the licensing of a CIS facility. This contention is a challenge to the NRC's jurisdiction. In Private Fuel Storage LLC (Independent Spent Fuel Storage Installation), 55 NRC 260 (2002), the State of Utah raised a contention challenging the NRC's jurisdiction under the NWPA. This contention was initially considered an attack on NRC regulations. But the licensing board decided that the contention should be addressed because "the issue presented

respect to cost of cleanup and the likelihood of severe transportation accidents.

With respect to cleanup costs, NRC Guidance, Environmental Review Guidance for Licensing Actions Associated With NMSS Programs, NUREG-1748, 6.4.2, specifically lists transportation impacts as a required subject to be included in environmental reports. NUREG-1748, 6.7, further requires a discussion of those impacts to include a cost-benefit analysis. The cost of cleaning up the environmental damage from a transportation accident is certainly a cost that must be considered in a cost-benefit analysis.

As an example, the EIS for the PFS project in Utah, NUREG-1714, 5.7.2.5, states "Transportation accidents resulting in a release of radioactive material would have economic costs." The EIS then discusses the factors in determining the economic damages. So it is clear that the economic impacts from an accident during transportation of radioactive material to a CIS site are a relevant subject that must be included and accurately evaluated in the ER.

The ER, Chapter 6, discusses costs and benefits, but does not discuss the cost of remediating the environmental damage from a rail accident. Therefore, the NRC Staff's

~~argument is not supported by NRC policy, or at the most is a factual dispute which is not appropriate at this stage of the proceedings.~~

The ASLB should not address the merits of a contention when determining its admissibility. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), 28 NRC 440, 446 (1988); Sierra Club v. NRC, 862 F.2d 222, 228 (9th Cir. 1988). What is required is that the intervenor state the reasons for its concerns. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), 16 NRC 1649, 1654 (1982). The contention rules require only that contentions have "at least some minimal factual and legal foundation in support" and are not to be a "fortress to deny intervention." U.S. Dept. of Energy (High Level Waste Repository), LBP-09-06 (May 11, 2009).

The NRC Staff also appears to argue that transportation accidents need not be discussed in the ER because such accidents allegedly have a low probability of occurrence. In this context, as well, the Staff claims that Sierra Club is positing a worst case analysis. In this regard, the litigation surrounding the Private Fuel Storage (PFS) case in Utah is instructive. The EIS, 5.7.2, prepared by the NRC in the PFS case examined the economic impacts of a

that on-site storage is just as safe and secure as a CIS facility.

CONTENTION 9

The NRC Staff agrees that this contention is admissible to the extent that it challenges ISP's requested exemption from the application of 10 C.F.R. § 72.30. ISP, on the other hand, claims that Contention 9 does not make any showing that neither DOE nor private waste owners would provide decommissioning funds. In making that argument, ISP is improperly shifting the burden of proof. As explained in Sierra Club's Petition to Intervene, p. 13, the NRC and the courts have made clear that the burden of persuasion is on the licensee, not the petitioner. The petitioner only needs to "com[e] forward with factual issues, not merely conclusory statements and vague allegations." Northeast Nuclear Energy Company, 53 NRC 22, 27 (2001).

With that burden of proof in mind, ISP has not presented any evidence that private parties would want to retain title to the waste and fund decommissioning. ~~NRC guidance, Consolidated Decommissioning Guidance, v. 3, Rev. 1 (2012), NUREG-1757, states that applicants for a license to store large amounts of nuclear waste must "provide a certification of financial assurance" to cover the cost~~

estimate for decommissioning, and this certification must be provided at the time of license application. Although guidance cited above does not describe exactly what form the required certification must take, it does not appear that anything that could reasonably be described as a certification of financial assurance has been submitted. There should at least be some credible statement from nuclear plant owners that they are willing to retain title to the waste and fund decommissioning.

Nor is there any certification that DOE would be willing or legally able to take title to the waste and fund decommissioning. In fact, ISP asserts that it will request a waiver of the provisions of 10 C.F.R. § 72.30(e) in order to try to execute a contract with DOE to fund decommissioning. (Application, Rev. 2, App. D, p. 1-8).

There is certainly no assurance that the NRC would grant such a waiver or exemption. 10 C.F.R. § 72.7 states:

> The Commission may, upon application by any interested person or upon it own initiative, grant such exemptions from the requirements of the regulations in this part as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest.

In this case, for the reasons explained in Sierra Club Contention 1, granting such an exemption for DOE to provide

decommissioning funding would be a violation of the NWPA.

ISP has not made any showing that an exemption would not violate the NWPA. In its Answer, n. 325, ISP cites to a report of the Nuclear Waste Technical Review Board that ISP claims proves DOE can legally take title to waste at a waste facility. The Review Board report refers to four sites where DOE owns the waste: Hanford, Idaho National Laboratory, Savannah River, and Ft. St. Vrain. But these are all government owned and operated sites. They have no relevance to the issue of DOE ownership in this case.

~~So, in reviewing ISP's statements regarding financial assurance for decommissioning, we are treated to a host of possible funding mechanisms, but no certification of assurance.~~ ISP says maybe DOE will provide funding or maybe the nuclear plant owners will provide funding. Maybe the funding will be supplied by surety or insurance or guarantee or external sinking fund. Or maybe there will be no funding source at all. Based on ISP's decommissioning funding plan there is no way to know.

Finally, ISP and NRC Staff misapprehend Contention 9 with respect to ISP's decommissioning cost estimate. Both parties cite to page 60 of Sierra Club's Petition to Intervene. That reference in the Petition to the cost

to the purpose and need for the project. But the Staff does not cite to any legal or regulatory basis for that statement. There is nothing in the purpose and need statement, ER, 1.1, that refers to siting criteria, or to any aspect of actually siting the facility.

ISP is actually more correct that the siting criteria pertain more closely to the review of alternatives, in this instance alternative sites. ISP misses the point, however, in citing Fla. Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), 6 NRC 541 (1977), for the argument that "an applicant's selection of a site may be rejected on the ground that a preferable alternative exists only if the alternative is 'obviously superior.'" As the St. Lucie decision pointed out, an intervenor can challenge the procedures the applicant followed in conducting its alternative site review, without alleging that another site is "obviously superior." ISP is attempting to misdirect the focus of this contention.

It is obvious that Contention 11 challenges the procedure used in the site selection analysis.

~~NRC Guidance on environmental reports, NUREG-1748, 6.2.1, requires a detailed description of alternatives. The alternatives analysis is the "heart of the environmental~~

impact statement." 40 C.F.R. § 1502.14. NEPA requires that an environmental review "[r]igorously explore and objectively evaluate all reasonable alternatives" and "[d]evote substantial treatment to each alternative considered in detail . . . ." Id. The point of Contention 11 is that the ISP ER does not comply with these requirements.

Sierra Club's discussion of Contention 11, p. 71-75, sets forth in detail why the discussion of the environmental impacts of the alternative sites does not comply with the requirement for a rigorous and objective evaluation of alternatives. The arguments by ISP and NRC Staff in attempting to challenge Sierra Club's discussion is a dispute about the facts, which is inappropriate at the contention admissibility stage of the proceedings.

The ASLB should not address the merits of a contention when determining its admissibility. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), 28 NRC 440, 446 (1988); Sierra Club v. NRC, 862 F.2d 222, 228 (9th Cir. 1988). What is required is that the intervenor state the reasons for its concerns. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), 16 NRC 1649, 1654 (1982). The contention rules require only that contentions have "at least some minimal factual and legal foundation in

support" and are not to be a "fortress to deny intervention." U.S. Dept. of Energy (High Level Waste Repository), LBP-09-06 (May 11, 2009).

CONTENTION 12

Sierra Club has no additional response beyond what is stated in Contention 12.

CONTENTION 13

NRC Staff again has the burden of proof backwards. Staff states in its Answer that Sierra Club has the burden of presenting facts and expert opinion, but that the ER can make unsupported conclusory statements and allegedly satisfy the applicant's burden.

~~Section 4.5.10 of the ER simply says, "Additionally, the two identified species of concern in the general area, the Texas horned lizard and the sand dune lizard either do not occur on the CISF or are highly adaptable." The part of that statement alleging that the two species do not occur in the project area is in direct contradiction of the statement in the ER, 3.5.2. That section states, "Two species of concern, the Texas horned lizard (*Phyrnosoma cornutum*) and sand dune lizard (*Sceloporus arenicolus*), occur within the area."~~

The second part of the statement in Section 4.5.10, that the species are highly adaptable, is contradicted by the statement in Section 3.5.2 that the horned lizard is considered threatened because of over-collecting, incidental loss, and habitat disturbance. The sand dune lizard has a specialized habitat that occurs throughout much of the region of the proposed CISF. These descriptions of the precarious status of the species do not support the assertion that they are highly adaptable.

Most importantly, the statements in Sections 3.5.2 and 4.5.10 do not reference any authority or basis for those statements. They are simply unsupported conclusory statements.

NEPA regulations provide that "[a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b). NEPA regulations further require:

> Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement.

40 C.F.R. § 1502.24. The unsupported statements regarding the protected species do not satisfy these standards.

ISP also attempts a diversionary tactic in referring to a letter from the U.S. Fish and Wildlife Service, found in Attachment 3-3 of the ER. USFWS has jurisdiction only over federally protected species. ~~The horned lizard and the sand dune lizard are not federally protected, but the horned lizard is a state threatened species and the sand dune lizard is of special concern at the state level. In any event, the ER, 3.5.2, lists those two species as be of concern and the ER expressly attempts to deny any impact to those species from the CIS project.~~

Contention 13 also raised the point that the sources allegedly relied upon in the ER, 3.5.16, regarding the ecological resources, are not described well enough to allow members of the public to access the sources. As noted above, NEPA regulations require enough information as to the scientific methodology used and reference the sources to ensure the "public scrutiny . . . essential to implementing NEPA." If the sources of the scientific information are not available to the public, there can be no public scrutiny.

CONTENTION 14

The Continued Storage Rule does not make this contention inadmissible. As noted in the contention, the license period for the containers is 20 years, with ISP's

expectation of license renewal for an additional 40 years. ~~If the expected life of the facility, as stated by ISP, is 60-100 years, the containers will be in use beyond the period of institutional controls. One of the assumptions on which the Continued Storage Rule is based is that there will be institutional controls. So the Continued Storage Rule does not apply in this case.~~

Another assumption on which the Continued Storage Rule is based is that there will be a dry transfer system in place to transfer the waste to new containers by the time the waste has been stored for 100 years. ISP admits in its Answer, p. 118, that there will be no dry transfer system. So if no permanent repository is found in 100 years and the ISP facility is required to continue operation beyond that point and there is no dry transfer system, the Continued Storage Rule would not apply and the consequences of that occurrence must be considered in the ER.

It must also be emphasized that this contention is about the containers, not about the storage per se. The GEIS which forms the basis of the Continued Storage Rule makes no mention of the containers or any assumptions regarding the containers. Therefore, the impacts related to the specific container systems beyond their licensed period would be a