UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 7312 **DOCKETED 02/05/04**
SERVED 02/05/04

COMMISSIONERS

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
(Independent Spent Fuel Storage Installation)	)	

CLI-04-04

MEMORANDUM AND ORDER

In response to the Commission's order of November 13, 2003,[1] Utah and Ohngo Gaudadeh Devia (OGD) filed their Petitions for Review presenting numerous issues for our consideration. We have considered each issue to determine whether it meets our standards for review under 10 C.F.R. §2.786. For the reasons we give below, we deny review for the most part, but grant review and request further briefs on two issues.

The Commission always has discretion whether to accept review of issues raised in our licensing proceedings. Our rules say that the Commission may grant review based on "any consideration" it "deems to be in the public interest."[2] Review is particularly appropriate where there is a possibility that the Board's ruling made a clear error as to a material fact, where a legal

[1]CLI-03-16, 58 NRC 360 (2003).

[2]*See* 10 C.F.R. § 2.786(b)(4).

conclusion therein is without precedent or conflicts with existing precedent, or where the ruling raises an important policy issue that the Commission should consider itself.[3]

With these standards in mind, below we consider the petitions for review filed by Utah and OGD.

II. UTAH'S POINTS OF ERROR

A. Security Related Contentions:

Utah initially challenged PFS's physical security plan with nine contentions, Utah Security A through Security I. Utah now asks review of portions of Utah Security A (inadequate staffing), Security G (inadequate protection against terrorism and sabotage), and Security J (no documented relationship with local law enforcement authority).

1. The Board Did Not Err In Applying Not-Yet-Effective Regulations

Utah's petition complains that the Board improperly applied regulations that were not yet effective. At the time the Board considered Utah's original security contentions, these regulations had been published in the Federal Register as final rules,[4] but would not take effect until five months after the Board's ruling. We see no real point to Utah's argument. The rules took effect in November, 1998, and will apply to the PFS facility, if licensed. It was sensible for the Board to evaluate Utah's contention under the rules that will cover the PFS facility.

2. Utah Security A (Security Implications of Lack of Nearby Housing)

Utah's Security A argued that the lack of housing near the PFS facility would make it impossible for PFS to call on off-duty security personnel in the case of an emergency. But as PFS's response pointed out, its security plan does not rely on off-duty security personnel to

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[3] *See id.*

[4] *See* Final Rule, Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste, 63 Fed. Reg. 26,955 (1998).

respond to an emergency or repel intruders. Our regulations provide that an ISFSI must have sufficient watchmen to detect intrusion and alert local law enforcement, but the regulations allow ISFSIs to rely on law enforcement (not the watchmen) to thwart an attack.[5] It appears that Utah's contention results from a misinterpretation of PFS's security plan. Utah's petition for review therefore fails to raise a significant issue of law, policy, or fact for the Commission to resolve.

3. Utah Security G (Failure to Describe Procedures for Protecting Fuel)

Utah's Security G contended that PFS "has failed to adequately assess and describe procedures that will protect spent fuel from unauthorized access or activities, such as terrorism and sabotage." The Board found this an impermissible attack on our regulations, specifically 10 C.F.R. 72.184(a), which states: "[p]rocedures do[] not have to be submitted for approval."[6] Utah's petition says only that the "security plan does not adequately protect fuel from unauthorized access or activities," but does not explain how the Board's ruling on Security-G constituted an error of fact or law. We see no basis for taking review of Security-G.

4. Utah Security J (Lack of Agreement with Local Law Enforcement)

In 2002, the Board admitted late-filed Utah Security J, which claimed that recently-enacted Utah legislation barring any local government from providing services (including law enforcement services) to a spent nuclear fuel storage facility rendered PFS unable to comply with various security regulations.[7] After the United States District Court for the District of Utah

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[5]10 C.F.R. §73.51. *See also* Statement of Considerations, 63 Fed. Reg. at 26,957.

[6]10 C.F.R. § 72.184(a). *See* 10 C.F.R. § 72.184(b) (safeguards contingency procedures must be developed and maintained).

[7]LBP-02-07, 55 NRC 167 (2002).

ruled the Utah statutes to be preempted by federal law,[8] the Board dismissed the contention.[9] Utah appealed the district court's ruling to the United States Court of Appeals for the Tenth Circuit, and a decision on that matter is pending.

Utah argues that the Board erred in dismissing its contention when the matter was still under appeal to a higher court. We see no error. The Board was bound to apply the law as it existed at the time of its ruling, which was as the district court ruled. In addition, the district court's legal conclusion that the Utah statutes were preempted by federal law seems reasonable. Congress, in enacting the Atomic Energy Act, clearly intended the federal government to occupy the field of regulating the safety of atomic energy.[10] Utah's laws seemingly amount to an attempt to make it impossible for any applicant to obtain an NRC ISFSI license, thereby effectively prohibiting this project. If, on appeal, the law on this point changes, we can consider requests to revive this contention.

5. Utah U, Basis 4 (EIS Should Describe Environmental Impact of Terrorism)

Utah U, Basis 4, argued that the EIS is deficient in not describing the environmental impacts of a saboteur successfully breaching one or more casks. Review of this matter is denied, as the Commission has already held in this proceeding that the environmental impacts of terrorism or sabotage are not subject to review under NEPA.[11]

B. Contentions Relating to the Intermodal Transfer Facility

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[8]*Skull Valley Band of Goshute Indians v. Leavitt*, 215 F.Supp.2d 1232 (D.Utah, 2002).

[9]LBP-02-20, 56 NRC 169 (2002).

[10]*English v. General Electric Co.*, 496 U.S. 72, 81; 11 S.Ct. 2270; 110 L. Ed. 2d 65 (1990).

[11]CLI-02-25, 56 NRC 340 (2002).

PFS envisions that spent fuel will be shipped to its facility on existing rail lines to an area north of the facility. At that point, PFS proposes to either build a new rail line to ship the casks the final 32 miles to the PFS facility, or to transfer the casks onto heavy-haul trucks at an Intermodal Transfer Facility (ITF). Utah claims that the volume of traffic at the proposed ITF would necessitate some temporary storage, thereby making the facility a storage facility that must be licensed under Part 72 and conform to all applicable regulations. Both PFS and the NRC staff believe that the ITF would not be an NRC-licensed facility at all. Rather, they argue, the spent fuel will still be in transit and would be covered by Department of Transportation ("DOT") regulations that will ensure public health and safety.

The Board initially found portions of the ITF related contentions admissible.[12] It later dismissed them as an attack on applicable NRC and Department of Transportation regulations, which hold spent fuel in transit to fall under DOT's jurisdiction.[13] The Board cited the Hazardous Materials Transportation Act,[14] which defines DOT's authority to regulate the "transportation" of nuclear materials, including "the movement of property and loading, unloading, or storage incidental to the movement" of materials.[15]

It appears to us that the Board reached the proper conclusion under the NRC-DOT regulatory regime. PFS-bound spent fuel will be in shipment, even during temporary holding at the transfer point, until it arrives at the PFS facility in Skull Valley. Thus it falls under DOT regulations. We see no basis for accepting review on the ITF contentions.

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[12]LBP-98-7, 47 NRC at 184-85.

[13]LBP-99-34, 50 NRC 168 (1999).

[14]49 U.S.C. §§ 5101-5127.

[15]*Id.* at § 5102(12). *See* LBP-99-34, 50 NRC at 177 n. 3.

C. Contentions Utah J and Utah U, Basis 2 (Inspection and Maintenance of Safety Components–Lack of a Hot Cell)

1. Utah J (Inspection and Maintenance of Safety Components, including Canisters and Cladding).

Utah J argues that the ISFSI's design is inadequate to protect public safety because there is no "hot cell" or other means through which a canister may be opened to inspect the condition of the fuel. Utah argues that this deficiency violates 10 C.F.R. § 72.122(f), which provides that components important to safety (that is, the fuel cladding) must be designed to permit inspection, and 10 C.F.R. § 72.128(a), which provides that spent fuel storage facilities "must be designed with ... [a] capability to test and monitor components important to safety."

The Board found this contention to be an attack on agency regulations and rulemaking-associated determinations and to be lacking in factual or expert support.[16]

Other than the general requirements that components important to safety must be capable of inspection, Utah cites no regulation requiring a hot cell at an ISFSI. The fuel cladding is not a "structure or system important to safety," as that term is defined in our regulations.[17] Those structures or systems are limited to parts of "the ISFSI,[18] MRS, or spent fuel *storage cask*" important to maintain the safe condition of the spent fuel. The regulation does not refer to the *contents* of the canister. NRC has made rulemaking-associated

[16]LBP-98-7, 47 NRC at 189-90.

[17]10 C.F.R. §73.3.

[18]That is, the "complex," or larger facility. *See id.*

determinations that the fuel cladding, once encased in a canister, is no longer important to safety.[19]

We therefore see no basis for questioning the Board's determination that this contention presented an impermissible challenge to our regulations, rulemaking-associated determinations, and lacked factual or expert opinion support.

2. *Utah U, Basis 2 (Impacts of Onsite Storage Not Considered)*

The Board rejected basis 2 of Utah U, which claimed the ER was defective in failing to "consider the safety risks and costs raised by PFS's failure to provide adequate means for inspecting and repairing the contents of spent fuel canisters or for detecting and removing contamination on the canisters." The Board found that this basis impermissibly attacked agency regulations or rulemaking-associated determinations. But whether or not NRC safety regulations impose certain requirements does not resolve the question whether there are potential environmental consequences that should be discussed under NEPA. Because we do not find the Board's rationale for rejecting Utah U, basis 2 entirely clear, the Commission grants review of whether that basis should have been admitted.

Various portions the FEIS discussed inspections and procedures to ensure that no contaminated canisters are stored at the PFS facility. Because Utah U, basis 2 was filed in response to the ER, it never addressed the FEIS. Among other issues the parties should address is whether the FEIS moots any of Utah's concerns. As the Commission recently held in *Catawba Nuclear Station,* complaints about the adequacy of an applicant's ER are superseded

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[19]*See, e.g.*, Proposed Rule Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High Level Radioactive Waste, 51 Fed. Reg. 19,106 (1986) "[F]or storage of spent fuel the cladding need not be maintained if additional confinement is provided ... the canister could act as a replacement for the cladding." *Id*. at 19,108.

when the issues involved are discussed in the FEIS.[20] Therefore, Utah's complaint may have been mooted by the FEIS.

D. NEPA/Economic Contentions

1. Contentions Utah X (Need for the Facility) and Utah Z (No Action)

In Contentions Utah X and Z, Utah claims that PFS's ER, and, subsequently, the Staff's EIS, overstate the need for the facility and the disadvantages of not building the facility. Utah claims that in looking at the "need" for the facility the EIS focuses on the advantages primarily to PFS and its potential customers, rather than including "an evenhanded discussion of the actual need for the proposed facility." In support of this, Utah claims that simply storing spent fuel at reactors until a permanent repository is ready is a safe and environmentally preferable option. In addition, in looking at the "no action" alternative, Utah claims that the Board erred in looking at only environmental effects. We are not persuaded that the EIS either overstates the need for the facility or fails to adequately discuss the advantages of not building the facility.

The heart of Utah's complaint is that the EIS fails to consider whether the country as a whole "needs" the facility or not. But that question borders on the political. We do not believe that NEPA charges the staff, in drafting the EIS, or the Board, in its hearing process, with answering that question. Rather, the EIS enumerated certain benefits of the project, which would accrue primarily to PFS and its customers. In addition, it listed benefits to certain communities–such as the benefit of allowing early decommissioning of shutdown reactors and the economic benefit to the Skull Valley Band of Goshutes, an impoverished Indian tribe. The

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[20] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 382-84 (2002).

EIS acknowledged that at-reactor storage was a viable option presenting no significant environmental impacts.[21]

On the other hand, the EIS examines in great detail various environmental effects of the project. Utah points to no significant environmental effect the staff failed to consider. Similarly, Utah does not specify any advantages of the "no action" alternative that it claims the EIS ignored. It is apparent that the disadvantages of allowing the project are the mirror image of the advantages of not allowing it (the "no action" alternative), and *vice versa*. As did the Board, we see no genuine dispute here.

We recently said that "NRC adjudicatory hearings are not EIS editing sessions."[22] Neither is the Commission appeals process. We find that Utah's complaint fails to raise any clear Board error of fact or law on the "need" and "no action" issues.

2. Contention Utah Y (Connected Actions)

The Board rejected Utah's proposed Contention Y at the outset of the adjudication.[23] Utah Y contended that the environmental analyses of the project should consider its impact on the Department of Energy's plans for a permanent waste repository at Yucca mountain. Utah argues that storing up to 40,000 metric tons of spent fuel would reduce the pressure on DOE to pursue a permanent waste repository. It also claims that "[o]ne implication of licensing the PFS facility is to practically foreclose DOE and congressional decisions on future [spent nuclear fuel] storage."

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[21]*See* Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, NUREG-1714, Vol. 1 at liii.

[22]*Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC __, __ (2003).

[23]LBP-98-7, 47 NRC at 202.

In a NEPA analysis it is proper for an agency to consider the overall effect of a government program involving smaller connected actions, rather than considering only the components, each of which may have only insignificant environmental effects.[24] But we do not agree that the logical result of approving the PFS facility is that it will affect, adversely, the development of a permanent repository. Utah believes that approval of the PFS facility will both delay the development of a permanent repository, and "commit the federal government to one of many courses of action."

We do not see why the availability of *private* offsite storage would affect *DOE's* duties under the Nuclear Waste Policy Act. The NWPA assigns DOE a duty to develop a permanent repository, which is not discretionary or dependent on DOE's deciding that there is a "need" for it. Further, the NWPA also requires DOE to fully investigate Yucca Mountain, and only Yucca Mountain, to determine whether it is suitable for long-term storage. The decision to go forward with the Yucca Mountain plan is to be based on scientific criteria only. Whether or not PFS is in place as an interim storage facility has no bearing at all on the Yucca Mountain decision.

Because Utah has not shown a connection between the PFS facility and the permanent repository to be developed by DOE, NEPA does not require the PFS EIS to consider impacts on the development of a permanent repository. We see no error in the Board's finding no genuine dispute here.

3. Contentions Utah CC (One-sided Cost-Benefit Analysis) and Utah SS (Final EIS Revised Cost-Benefit Analysis)

Utah argues that the cost-benefit analysis in the EIS is biased and inaccurate. Utah claims that the EIS improperly considers the benefit of a 40-year storage period, when it should

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[24]In *Thomas v. Peterson*, 753 F.3d 754 (9th Cir. 1985), cited by Utah, the court held that the environmental review of the effects of building a timber road through a National Forest must also consider the effects of the timber sales the road was designed to accommodate.

only consider the benefit of storing fuel at the site for 20 years, because PFS has applied for only a 20-year license. If one assumes that spent fuel will not be stored at the facility beyond 20 years of license issuance, the net benefit, in terms of costs avoided, would be reduced, Utah says. The Board dismissed Utah CC at the contention filing stage, finding no genuine dispute.[25]

After the FEIS was issued, Utah submitted contention SS, which again challenged the cost/benefit analysis as biased in favor of the project for failing to include a sufficient economic analysis. In a ruling from the bench, the Board found the contention timely, but rejected it for failing to state a claim for which relief could be granted. The Board held that NEPA did not require the staff to redo the analysis.[26] The Board noted that Utah had not alleged that there was "gross environmental harm," as in the cases requiring an economic analysis. Further, the Board found that the benefit put forward for the project was not economic, but "a sort of insurance policy" against late creation of a permanent repository for high level waste.

Utah points to our decision in *Claiborne Enrichment Center,* where we said that "[m]isleading information on the economic benefits of a project ... could skew an agency's overall assessment of a project's costs and benefits, and result in approval of a project that otherwise would not have been approved because of its adverse environmental impacts."[27]

Because NEPA cost/benefit questions have proved troublesome in the past, as for example in the *Claiborne* case,[28] because the record would benefit from a written decision on

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[25]LBP-98-7, 47 NRC at 204.

[26]*See* Oral decision at evidentiary hearing, Tr. 9213-14 (May 17, 2002).

[27]*Louisiana Energy Services* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998).

[28]*See* CLI-98-3, 47 NRC at 87-100. *See also, e.g.*, *Hydro Resources, Inc.,* CLI-01-4, 53 NRC 31, 48-51 (2001).

these issues, and because the context of the question here is unusual, the Commission believes that review of the admissibility of Utah CC and SS is appropriate.

4. Contention Utah HH and II (Low Rail Corridor Fire Hazards)

Utah contends that the Board improperly found its proposed contentions Utah HH and II to be impermissibly late. The issue for the Commission's review is whether the Board improperly found that Utah did not have good cause for filing these contentions late.

PFS originally proposed a rail spur to run alongside Skull Valley Road to bring the spent fuel from the existing rail line to the PFS facility. A year later, PFS amended its plan by moving the rail line to the west, through open rangeland along the edge of the Cedar Mountain range. Within 30 days of that license amendment, Utah sought to add Contention Utah HH, saying that this rail spur would cause fire hazards by providing a new ignition source and an obstacle to fire trucks attempting to cross the rail line, and Utah II, saying that the ER had failed to consider environmental impacts and costs of operating the rail line. The Board rejected this contention as impermissibly late, finding no reason that Utah could not have raised these issues with the original application.[29]

Utah now claims that the reason it did not file the contention at the time of the original application was that only the new alignment presented the fire hazards.

The Board noted that the differences in the new alignment and the old one might be a basis to find "good cause" for late filing, but found that Utah did not explain why the original alignment would not also provide a potential ignition source, impediment to firefighters, and so on.[30] Utah, however, did not present its argument with its contention to show good cause for late

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[29]LBP-98-29, 48 NRC 286 (1998).

[30]*See* LBP-98-29, 48 NRC at 292-93 n. 2 (1998).

filing, as it is required to do by our rules of practice.[31] Rather, the reason Utah gave for not filing its fire-related objections to the rail line at the outset was that the rail line was only one of many possibilities mentioned in PFS's initial application.[32]

In presenting a late contention, the proponent's first duty is to demonstrate good cause to the Board.[33] Even if a party on review provides a credible argument that there was good cause, if the intervenor did not present that argument to the Board along with the late contention, we have no basis for concluding that the Board erred.

Basis 1 of Utah II challenged the ER's failure to consider environmental impacts of fires caused by the rail spur. The Board found that basis untimely for the same reason it rejected HH, that is, that this issue could have been raised with respect to the original rail spur proposal.[34] Utah II also listed six additional bases, arguing that the ER failed to consider the rail line's effects on species, visual impacts, noise levels, historical resources, and the impact on grazing rights. The Board found these bases timely, but inadmissible on other grounds, such as lacking factual support and impermissibly challenging NRC regulations.[35]

Utah's petition does not discuss the Board's legal conclusions with respect to each of bases 2-7 of Utah II, making it difficult to ascertain any particular error. Rather, Utah makes a general allegation that the Commission has not complied with NEPA by evaluating the environmental impacts of the rail spur. But the FEIS does discuss the rail line's impacts on

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[31]10 C.F.R. § 2.714(a)(1)(i).

[32]LBP-98-29, 47 NRC at 292-93 (1998).

[33]*See* 10 C.F.R. §2.724(a)(1)(i).

[34]*Id.* at 295-96.

[35]*Id.* at 296.

vegetation and species,[36] livestock,[37] historic resources,[38] noise,[39] visual impacts,[40] recreation,[41] and wildfires.[42] Therefore, even if the Board erred (and we see no suggestion of error), Utah's contention II appears to be insubstantial, or even moot, given the FEIS's contents.

D. Utah KK (Interference with Use of UTTR and Resulting Economic Impacts)

In July, 2000, Utah filed Utah KK, which argued that the presence of the PFS facility would cause the military to restrict operations in the Utah Test and Training Range. This would both impair the nation's military readiness and possibly lead to closing Hill Air Force base, which in turn, Utah claims, would have adverse impacts on the local economy.

The Board rejected the contention as untimely as Utah showed no good cause for the late filing.[43] The issue before us is whether the Board properly rejected the contention on that basis.

Utah argues that it first raised this issue in comments on the scope of the EIS, and that the staff represented that the EIS would include all direct and indirect economic impacts. It argues that it relied on the staff's pronouncement that it would consider these impacts, but that the DEIS did not do so.

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[36]*See* FEIS § 5.4.

[37]*See* FEIS §§ 5.5.1.1, 5.5.2.1, 5.5.4.

[38]*See* FEIS § 5.6.1.1.

[39]*See* FEIS § 5.8.1.

[40]*See* FEIS § 5.8.2.

[41]*See* FEIS § 5.8.3.

[42]*See* FEIS § 5.8.4.

[43]LBP-00-27, 52 NRC 216 (2000).

The Board was correct in finding no good cause for Utah's late contention. Commenting on the scope of EIS does not substitute for raising a timely contention. It is essential to efficient case management that intervenors file contentions on the basis of the applicant's environmental report and not delay their contentions until after the staff issues its environmental analysis.[44] In the interest of expedition, our rules require the filing of contentions as early as possible. Utah did not do this and the Board rightly refused to allow Utah to bring up old grievances late in the hearing process.

Further, we reject the argument that the national significance of Utah's military concerns warrants overriding the usual requirement that intervenors show good cause for untimely filing. Utah has offered no factual support for its theory that the military will curtail training in Skull Valley if the PFS facility is built; in fact, there is evidence in the record to the contrary.[45] Thus, there appears to be little cause for concern either that the proposed facility could impact military preparedness or that it could cause the military to close Hill Air Force Base.

E. Transportation Contentions–Proposed Utah LL-OO

Utah contention V complained that PFS's ER failed to discuss environmental impacts of transportation. The Board admitted a single basis, whether PFS improperly relied on Summary Table S-4, Environmental Impact of Transportation of Fuel and Waste to and From one Light

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[44] *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 251 (1993), *petition for review and motion for directed certification denied*, CLI-94-2, 39 NRC 91 (1994).

[45] *See* FEIS §§ G.3.8.1.8, G.3.13.3.1. We also note that the parties are currently preparing for a hearing on the subject of the consequences of a military aircraft crashing into the PFS site. Last year, the Board found that, while such a crash is extremely unlikely, its probability is just within the range making it a "credible event" under the Commission's stringent safety standards. That ruling was premised on the military taking no steps to curtail flights over the site.

Water Cooled Nuclear Power Reactor,[46] because the shipping casks involved would be heavier than those assumed by Table S-4.

Instead of relying on table S-4, the DEIS calculated the transportation impacts using a PFS-specific computer analysis, called the RADTRAN 4 computer model. When Utah in turn challenged this model in Contentions Utah LL-OO, the Board found the new contentions impermissibly late.[47] The Board later dismissed Contention Utah V as moot.[48] The issue before us is whether the Board erred in finding the new transportation-related contentions impermissibly late.[49]

Recognizing that the DEIS could give rise to new contentions, the Board's procedural order governing the underlying proceeding required the staff to give all parties 15 days' notice before it planned to release the DEIS and make the DEIS available to the intervenors on an expedited basis.[50] The order explicitly provided that intervenors would have 30 days to file new contentions.

On June 12, 2000 the staff informed Utah that the DEIS had been completed and that a copy would be provided at the start of a June 19, 2000 evidentiary hearing. Utah filed its contentions on August 2, 2000. The Board found that, because staff had not given a full 15 day's notice before it gave Utah a copy of the DEIS, the due date for new contentions under its

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[46]10 C.F.R. §51.52.

[47]LBP-00-28, 52 NRC 226 (2000), *review denied*, CLI-01-01, 53 NRC 1 (2001).

[48]LBP-01-22, 54 NRC 155 (2001).

[49]Although Utah suggests that the dismissal of Utah V as moot denied it "due process," it does not explain how any aspect of that contention, as admitted, was still in issue after the staff's DEIS performed a PFS-specific analysis not relying on Table S-4.

[50]Licensing Board Memorandum and Order (General Schedule for Proceedings and Associated Guidance)(June 29, 1998), at 4-5 (unpublished).

order should be considered 45 days after that notice–or July 27, 2000. It ruled that Utah's amended contentions were therefore at least 5 days too late. It also found that portions of contentions Utah NN (economic effects of the maximum credible accident) and Utah OO (economic risks of a transportation accident) were nearly three years too late, because they could have been raised with respect to the PFS ER.[51]

Utah argues that, considering the timing of the DEIS's release at the start of a week-long hearing and narrow margin by which it missed the deadline, the Board's rejection of its contentions was a denial of due process. We can't agree. Although the size of the document and the timing of its release might well have justified an extension of the filing deadline, had Utah requested it, we cannot find that the Board's action amounted to a denial of due process when the schedule for late contentions was spelled out clearly in the Board's 1998 order.

In addition, we reject Utah's argument that the significance of the issues involved warrants overriding the Board's finding of no good cause for late filing. The Board noted that, had its inquiry reached the substantive stage, it would have admitted only a single subpart of one transportation contention, Utah MM (DEIS underestimates the severity of a category 6 accident by underestimating the release of Chalk River Unidentified Deposits (CRUD)).[52] We emphasize that our staff analyzes the safety of license applications in their entirety, whether or not particular questions are admitted for hearing. Thus rejecting contentions as too late is not the same as ignoring safety concerns.

IV. OHNGO GAUDADEH DEVIA'S PETITION FOR REVIEW

A. OGD Contention B (Emergency Plan and EPCRTKA)

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[51]LBP-00-28, 52 NRC at 235.

[52]*Id*. at 239, n. 3.

OGD's proposed Contention B contended that the emergency plan failed to address the safety of persons living outside the facility and failed to meet the requirements of the Emergency Planning and Community Right to Know Act of 1986 (EPCRTKA).[53] The Board found the contention inadmissible as a collateral attack on agency regulations, as lacking factual or expert support, and for failing to show any genuine dispute.[54]

As the Board recognized, NRC regulations distinguish between ISFSIs that will only store packaged waste and facilities that process or reprocess waste. NRC does not require a facility like the one PFS proposes to build, which will only store prepackaged waste, to have a formal offsite emergency plan because no onsite accident is expected to have significant offsite consequences.[55] Therefore, we see no suggestion that the Board may have made a mistake of law or fact in rejecting this portion of the contention.

In addition, the Board was correct in rejecting OGD's EPCRTKA claim as lacking a factual basis. EPCRTKA imposes reporting and emergency planning requirements on facilities possessing certain listed hazardous substances in excess of prescribed quantities established by the Environmental Protection Agency. PFS's Emergency Plan stated that it will not possess any listed substance in threshold quantities,[56] and OGD submitted no evidence to contradict that

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[53]Title III, Pub. L. 99-499.

[54]LBP-98-7, 47 NRC at 227.

[55]*See* 10 C.F.R. § 72.32(a). *See also* Emergency Planning Licensing Requirements for Independent Spent Fuel Storage Facilities (ISFSIs) and Monitored Retrievable Storage Facilities (MRS), 60 Fed. Reg. 32,430. The statement of considerations provided:

> NUREG-1140 concluded that the worst-case accident involving an ISFSI has insignificant consequences to the public health and safety. Therefore, the final requirements to be imposed on most ISFSI licensees reflect this fact, and do not mandate formal offsite components to their onsite emergency plans.

Id. at 32,431.

[56]PFS Emergency Plan at 2-6.

statement. Although the spent fuel itself is "hazardous," in that is requires safe handling under NRC regulations, it is not an "extremely hazardous substance" on the EPA's EPCRTKA list. The safe handling of spent nuclear fuel is NRC's bailiwick, and our own regulations describe all necessary emergency planning procedures. Because OGD did not show PFS would possess any EPCRTKA substances in reportable quantities, the Board properly rejected OGD's EPCRTKA complaint as lacking a factual basis.

B. OGD Contention E (Failure to Plan for Leaking or Contaminated Casks)

OGD's proposed Contention E argued that the license application failed to provide a plan for dealing with casks that may leak or become contaminated during the 20 to 40 year storage period. OGD claimed that the license application should have a plan for dealing with a leaking cask or canister, should have an alternative location to store a canister that becomes defective, and should address "uncertainties" about whether permanent storage will ever become available at Yucca Mountain. The Board rejected this contention as lacking a factual basis and constituting an attack on our regulations and rulemaking-associated determinations, and failing to show a genuine dispute.[57]

The problem with the contention is that NRC determined that even worst-case scenarios (such as drops) involving a cask would not breach it.[58] OGD's contention lacks a factual foundation because it does not present any plausible scenario requiring special planning for a breached cask. In addition, the applicant's response to this contention pointed out that its SAR did plan for either returning any defective cask to the shipper or enclosing it in a transportation cask at the ISFSI.[59] Other than the bald assertion that PFS does not adequately provide for

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[57]LBP-97-8, 47 NRC at 228-29.

[58]See 60 Fed. Reg. 32,430, 32,438 (1995).

[59]PFS Answer to Contentions, p. 524-25.

contingencies, OGD did not address PFS's proposals. Therefore, there is no error apparent in the Board's decision that this contention lacked factual support, failed to show a genuine dispute, and amounts to an attack on NRC regulations which rest on the premise that NRC-approved casks will survive accidents without contaminating the environment or causing safety concerns.

C. OGD Contention J (Licenses, Permits and Approvals)

OGD's proposed Contention J claimed that the license application failed to discuss the compliance with all applicable permits, licenses and approvals. It also alleged that the NRC, as a federal agency, owes a "trust responsibility" to Native Americans to ensure that their tribal lands are not contaminated.

The Board found this contention inadmissible for various reasons. We note that the FEIS discusses the permits, licenses and approvals PFS will need for its facility, mooting any deficiency in the ER.[60]

OGD's petition focuses not on any particular environmental permitting issue, but rather on the Board's conclusion that the NRC doesn't owe any heightened "trust responsibility" to Native Americans. OGD does not cite any legal basis for the proposition that the NRC owes a fiduciary duty to Native Americans to protect their land from contamination. Rather, the cases OGD cites deal with the government's fiduciary duties in handling funds owed or held in trust for Native Americans.

The NRC certainly has a statutory duty to protect all members of the public, including Indian tribes, from radiation hazards without regard to ethnic origin. The NRC is attempting to do so here both through the hearing process and through the NRC staff's safety and environmental review process. But we see no reason to foreclose Indian tribes from possible

[60]FEIS at 1.6.2.

economic opportunities (such as the PFS facility, if built) under the guise of protecting Indian tribes from environmental harm, no matter how slight.

OGD complains that the Board erred in placing the "burden of producing information" on OGD. But the party proffering a contention always has the burden to offer sufficient fact-based allegations showing that a genuine dispute exists.[61] That is the essence of our contention-pleading process.

D. OGD Contention O (Environmental Justice)

OGD initially offered six bases for its environmental justice claim. The Board accepted the contention as admissible insofar as it claimed that the facility would cause disparate environmental impacts to tribe members, who are both ethnic minorities and poor.[62] It later narrowed the issue to whether there was a subgroup within the tribe that was not receiving or would not receive any benefit from the project, thereby suffering a "disparate environmental harm" from the project.[63] The Commission reversed that ruling, finding that this agency's approach to environmental justice was to look at disparate environmental harms, not disparate economic benefits.[64]

OGD now argues that the Board improperly rejected bases that claimed the license application failed to discuss the "environmental, sociological, and psychological costs" to the Skull Valley Band. The Board rejected this claim both because the cost/benefit analysis was not

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[61]*See, e.g., Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002).

[62]LBP-98-7, 47 NRC at 233.

[63]LBP-02-08, 55 NRC 171 (2002).

[64]CLI-02-20, 56 NRC 147 (2002).

pertinent to the environmental justice inquiry and also because "psychological harm" resulting from fear or stigma associated with a facility is not cognizable under NEPA.[65]

OGD also says the Board should have admitted, under the environmental justice rubric, its argument that the ER should have weighed the costs and benefits of operating the ISFSI against the alternative of leaving the wastes where they are until a permanent facility is available. The Board rejected that claim because it found the cost/benefit analysis had nothing to do with an environmental justice claim. Here, however, the environmental justice concern is that society at large is reaping the economic benefits of a project while imposing its costs unfairly on an economically disadvantaged minority. The EIS did discuss various environmental impacts, including visual and cultural impacts.[66] The EIS concluded, however, that the particular benefits to the Skull Valley Band of Goshutes outweigh the particular environmental harms that will be suffered by the Band.[67] Therefore, it is not apparent how factoring in the costs to society at large of allowing the PFS facility (such as transportation costs and hazards), and the benefits to society at large of operating the PFS facility would give a more accurate picture of environmental justice considerations.

We therefore deny review of OGD's environmental justice issues.

V. CONCLUSION

For the foregoing reasons, Commission grants review in part and denies review in part. The parties are directed to file briefs, not to exceed 20 pages, on Utah U, basis 2, and on Utah CC and SS, as outlined above. Utah should file its opening brief within 21 days of this order; the

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[65]LBP-98-7, 47 NRC at 233. *See Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 772-79 (1983).

[66]*See* FEIS 4.5 (Socioeconomics and Community Resources); 4.6 (Cultural Resources); 4.8.2 (Scenic Qualities).

[67]*See* FEIS 6.2.1.2.

NRC staff and PFS should file their answering briefs within 21 days after receipt of Utah's brief. Utah may file a reply brief, not to exceed 5 pages, within 7 days after receipt of the staff and PFS briefs. All briefs should be served electronically. Any brief exceeding 10 pages shall contain a table of cases and authorities and a table of contents. Any interested *amici curiae* are authorized to file briefs as set out above, at the time of the party they support.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook,
Secretary of the Commission

Dated at Rockville, MD
This 5th day of February, 2004