RAS 3101

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 25, 2001

STATE OF UTAH'S REPLY TO STAFF'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF UTAH CONTENTION AA - RANGE OF ALTERNATIVES

Pursuant to the Board's Order of April 23, 1999 and 10 CFR § 2.749, the State files this Rely to the Staff's Response to the Applicant's Motion for Summary Disposition of Utah Contention AA - Range of Alternatives (May 15, 2001) ("Staff's Response").

I. Staff Failed to Evaluate Whether PFS's Selection of Alternative Sites was Reasonable in Terms of the Project's Objectives

Staff believes that it may "accord substantial weight" to the siting preferences of the Applicant. Staff's Response at 7. The Staff is operating under a misunderstanding of the case law it has cited, however. Staff has cited part of one sentence of a Commission decision in support of its position, but it is instructive to review the entire paragraph:

> When reviewing a discrete license application filed by a private applicant, a federal agency may appropriately "accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project." [Citizens Against Burlington v. Busey, 938 F.2d 190, 197 (D.C. Cir. 1991).] The agency thus may take into account the "economic goals of the project's sponsor." City of Grapevine v. Dept. of Transportation, 17 F.3d 1502, 1506 (D.C. Cir.), cert. denied, 513 U.S. 1043 (1994); see also Citizens Against Burlington, 938 F.2d at 196 ("the agency should take into account the needs and goals of the parties involved in the application"). HRI proposes to mine on Section 8 of Church Rock because it owns land there in fee simple and that is where the ore body is located.

Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 55 (2001) .

It is clear then, that under Hydro the Staff may accord weight to an applicant's *goals or objectives* in making a proposal. Those goals or objectives in turn will influence a project's site selection, but neither Hydro, Burlington nor any of the other cases cited by Staff provide authority for an agency to give deference to an applicant's process for selecting alternatives, including alternative sites, except in the context of those goals and objectives. The distinction is an important one; it is the only reasonable way to reconcile the line of cases that indicate an agency may "accord weight" to an applicant's proposal, cited in Staff's Response at 7, with the line of cases that indicate that all reasonable alternatives must be evaluated in a DEIS, cited in State's Response to Applicant's Motion for Summary Disposition of Utah Contention AA ("State's Response") at 6-7.

The Burlington case, also cited by Staff, is similarly devoid of authority for deference to an applicant's delineation of acceptable alternatives, except in the context of deference to an applicant's goals and objectives. That court, in outlining the process for determining which alternatives are reasonable, stated that "the agency thus bears the responsibility for defining at the outset the objectives of an action." Burlington, 938 F.2d at 195-196. It later described the process for defining alternatives in the case before it:

> [T]he FAA defined the goal for its action as helping to launch a new cargo hub in Toledo and thereby helping to fuel the Toledo economy. The agency then eliminated from detailed discussion the alternatives that would not accomplish this goal.

Id., at 198.

In contrast, the Staff in this case gave deference to the *results* of PFS's site selection process, and accepted PFS's elimination of alternatives without reference to the project's overall goals and objectives. *See* DEIS at 7-5 (second paragraph). As the case law cited even by Staff makes clear, the reasonableness of the process can only be measured in terms of project objectives – and project objectives weren't even a consideration when Staff accepted PFS's process for eliminating alternatives.

Staff acknowledged that it was reasonable to begin its consideration of alternatives with the 38 alternative sites initially identified by PFS. DEIS at 7-5 (second paragraph, first sentence). Because some of these alternatives were eliminated, not for reasons of lack of fit with reasonable project objectives but for other reasons, the deference due to an applicant's objectives under Hydro and Burlington does not apply in this situation. The Staff must therefore make its own, independent determination of reasonableness. The Staff's analysis is not even sufficient to meet its obligations under a deferential standard, as further described below, and is therefore also insufficient to meet its obligations under a standard where no deference is granted.

Finally, it is important to note that not all circuits have accepted the D.C. Circuit's Burlington position that NEPA allows an agency to give deference to an applicant's goals and objectives. That position was explicitly recognized and rejected by the 7th Circuit in Simmons v. U.S. Army Corp of Engineers, et al., 120 F.3d 664 (7th Cir. 1997). That Court found that "[a]n agency cannot restrict its analysis to those 'alternative means by which a particular applicant can reach *his* goals.'" *Id.* at 669 (emphasis in original; citations omitted).

II. The Staff Has Failed to Conduct an Adequate Independent Evaluation of Potential Alternative Sites

"Deference does not mean dormancy...." Burlington, 938 F.2d at 196. Even if the deferential standard urged by Staff is accepted, the Staff retains an obligation to evaluate PFS's elimination of alternatives independently. CEQ regulations governing EIS preparation state:

> If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy.

40 CFR § 1506.5(a)(*emphasis added*). *See* also 10 CFR 51.73, which gives Staff the responsibility for preparing environmental impact statements, and for making a decision about which alternatives shall be recommended.

The discussion of the site selection process in the DEIS reveals that there has been no such independent evaluation by the Staff. Staff acknowledges it did not even understand the selection process PFS used:

> 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.

DEIS at 7-5. Staff did go on to say:

> 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.

Id. This is not a sufficient analysis of the site selection process. Staff's obligation to independently review the reasonableness of alternatives means that it must assure that the

decision was or at least could reasonably have been based on the information available.

Staff also apparently accepted, with no explicit discussion, PFS's elimination of eleven sites simply because PFS felt that it had enough sites under consideration to accomplish its goal of finding at least two sites. *See* State Response at 9-10. "Because we have other sites" may be reasonable from a business standpoint, but it is not a reason federal agencies can accept in light of regulatory language and case law that admonishes that all reasonable alternatives must be evaluated.[1] *See* State Response at 9-12 for a discussion of these and other inadequacies of the Staff's analysis.

III. The Scope of Utah Contention AA Addresses the Adequacy of the Site Selection Process

The Staff unreasonably believes that a discussion in the DEIS, regardless of its adequacy, should be sufficient to satisfy Utah Contention AA. The Staff's argument, and PFS's, ignores the plain language of the contention itself. Utah Contention AA, as admitted, 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."

State's Contentions on the Construction and Operating License Application by Private Fuel Storage, L.L.C. for an Independent Spent Fuel storage Facility (November 23, 1997) at 172-

[1] The State also acknowledges that NEPA does not require evaluation of an endless number of alternatives and that "because we have enough" may be sufficient in some cases for that reason. But this is hardly that case. Here, only two alternatives were finally selected for evaluation, alternatives that in important ways were very similar to one another and that therefore did not form the basis for a good comparison. *See* State Response at 7-8.

174 (*emphasis added*) ("State's Contentions"). Thus, the contention itself challenges the adequacy of the discussion. Any discussion, regardless of whether it is meritless or not does not satisfy Utah Contention AA and does not satisfy the requirements of the National Environmental Policy Act ("NEPA").

A contention may be clear enough to meet NRC pleading requirements even without reference to any underlying bases. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-15, 38 NRC 20, 22 n.2 (1993). Utah Contention AA is quite clear, certainly exceeding pleading requirements, particularly given that it was later limited by the Board to include only a challenge to the adequacy of PFS's alternative site analysis. *See* State Response at 2-3.[2]

The State's challenge is still supported by underlying basis of Utah Contention AA as well. The following excerpts from the basis of Utah Contention AA support the State's position:

> BASIS: NEPA requires consideration of all reasonable alternatives, 40 CFR § 1502.14, and it is well established that alternatives are at the heart of an EIS.....
>
> The discussion of siting alternatives in Chapter 8 of the Environmental Report is woefully inadequate....
>
> The second screening phase apparently involved regulatory criteria, however, there is no discussion or tabulation of the results from phase two screening....
>
> The Applicant's overarching criterion seems to be a willing jurisdiction. The Applicant's "screening" process jumped from 38 sites to two sites located almost next to each other on the Skull Valley reservation.

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[2] Neither of the cases cite by Staff, nor any other of which the State is aware, indicate that a contention may be dismissed, notwithstanding genuine issues of material fact that are clearly within that contention, because specific bases related to that contention are resolved.

> How the Applicant arrived at the two sites is a mystery.
>
> Furthermore, information used in the screening process has not been described and tabulated. Thus, the siting criteria in the Environmental Report is fatally flawed, and fails to demonstrate that the Applicant fully and objectively considered the range of alternative sites available to it.

Excerpts from State's Contentions at 172-74.

As described above, the Staff has acknowledged that PFS's process for selecting alternatives is something of a mystery. It has simply chosen to accept that mysterious process, a decision the State has the right to challenge under Utah Contention AA. Additionally, although PFS and the DEIS have subsequently better described what information was available to decisionmakers, neither has discussed how that information was used to make siting decisions, and to eliminate sites. Again, as described above, Staff has acknowledged that it does not know how the information was used.

Utah Contention AA and its basis, as a whole, clearly challenge the adequacy of the site selection process, not simply whether or not the issues raised in the basis for Utah Contention AA are mentioned in the DEIS.

CONCLUSION

NEPA requires consideration of all reasonable alternatives. Neither Staff not PFS has come close to demonstrating that has happened here. For the reasons stated above, PFS is not entitled to summary disposition and the matter should be set for hearing.

DATED this 25th day of May, 2001.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S REPLY TO STAFF'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF UTAH CONTENTION AA – RANGE OF ALTERNATIVES was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 25th day of May, 2001:

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