

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-99-34 SERVED
USNRC

ATOMIC SAFETY AND LICENSING BOARD

'99 SEP 20 A10:05

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

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In the Matter of
PRIVATE FUEL STORAGE, L.L.C.

(Independent Spent Fuel
Storage Installation)

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

September 20, 1999

MEMORANDUM AND ORDER

(Summary Disposition-Related Rulings)

In late August 1999 rulings, LBP-99-34, 50 NRC ____ (Aug. 30, 1999), and LBP-99-35, 50 NRC ____ (Aug. 30, 1999), the Licensing Board addressed two motions filed by applicant Private Fuel Storage, L.L.C., (PFS) seeking summary disposition of contentions Utah B, License Needed for Intermodal Transfer Facility, and Utah K/Confederated Tribes B, Inadequate Consideration of Credible Accidents. Now pending with the Board are party pleadings relating to these determinations. Relative to contention Utah B, at the Board's request the parties have submitted their views on the impact on other pending contentions of the Board's ruling that the specific licensing provisions of 10 C.F.R. Part 72 do not apply to the planned Rowley Junction, Utah rail to heavy-haul truck intermodal transfer point (ITP).

Also, the Board's determination on contention Utah K/Confederated Tribes B regarding the use of ground-launched ordnance during military training exercises at Dugway Proving Ground (DPG) and military aircraft overflights relating to the use of the Utah Test and Training Range (UTTR) is the subject of a PFS reconsideration/clarification motion.

For the reasons set forth below, we dismiss all or part of contentions Utah K/Confederated Tribes B, Utah N, Utah O, Utah R, Utah S, as they relate to the Rowley Junction ITP and deny the PFS request for reconsideration of our ruling regarding training exercise ordnance at DPG. Further, we provide additional information regarding our ruling on UTTR-related overflights.

I. BACKGROUND

A. Impact of Ruling on Contention Utah B

In our LBP-99-34 ruling concerning contention Utah B, the Board found that the ITP that PFS has proposed may be constructed and operated at Rowley Junction, Utah, to move spent fuel shipments from the rail mainline some twenty-five miles north of its planned Skull Valley, Utah 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI) is "governed by the general licensing provisions of 10 C.F.R. Part 71 and the related [United States Department

of Transportation (DOT)] regulations for transporting spent nuclear fuel so as not to require specific licensing under 10 C.F.R. Part 72." 50 NRC at ____ (slip op. at 16). In addition, citing its early contentions-admission decision in LBP-98-7, 47 NRC 142, reconsideration granted in part and denied in part on other grounds, LBP-98-10, 47 NRC 288, aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998), the Board indicated that this determination could be dispositive of the ITP-related portions of eight other delineated State contentions. See LBP-99-34, 50 NRC at ____ (slip op. at 19-20). As a consequence, the Board requested that the parties address the question "whether, in light of this ruling on contention Utah B, the [referenced] contentions should be dismissed as they relate to the ITP." Id. at ____ (slip op. at 20).

In filings dated September 7, 1999, PFS, intervenor State of Utah (State), and the NRC staff discuss the impact of the Board's August 30, 1999 contention Utah B ruling on contentions Utah K/Confederated Tribes B; Utah N, Flooding; Utah O, Hydrology; Utah R, Emergency Plan; Utah S, Decommissioning; Utah T, Inadequate Assessment of Required Permits and Other Entitlements; Utah U, Impacts of Onsite Storage Not Considered; and Utah W, Other Impacts Not Considered. PFS and the staff declare that, with the exception of contention Utah U, the Board's ruling on Utah B

renders all or portions of these other contentions subject to dismissal as they relate to the Rowley Junction ITP. See [PFS] Position on Dismissal of ITP-Related Contentions (Sept. 7, 1999) at 3-10; NRC Staff's Position Regarding the Impact of LBP-99-34 on Other Contentions (Sept. 7, 1999) at 2-8. Relative to contention Utah U, both PFS and the staff assert that, notwithstanding the Board's identification of this contention as having an ITP connection, as admitted this issue has no ITP-related aspects and so is not to be subject to dismissal based on the Board's contention Utah B ruling.

The State takes a somewhat different stance. Although agreeing with PFS and the staff that contention Utah U has no ITP-related features, the State disagrees that the Board's ruling in LBP-99-34 is dispositive of several of the other contentions. See [State] Response to the Impact of the Board's Ruling in LBP-99-34 (Utah Contention B) as the Ruling May Relate to Other Admitted Contentions (Sept. 7, 1999) at 3-6. Specifically, the State declares that the ITP-related portions of emergency plan and decommissioning contentions Utah R and Utah S should be retained because there is nothing in the record to show that the public will be adequately protected from PFS activities at the ITP or that PFS has adequate assets to decommission the ITP. Additionally, the State asserts that because contentions

Utah T and Utah W involve issues that arise under the National Environmental Policy Act of 1969 (NEPA), their ITP-related aspects are not subject to dismissal as a consequence of LBP-99-34.

B. Reconsideration/Clarification of Ruling on Contention Utah K/Confederated Tribes B

The other summary disposition-related matter concerns a September 3, 1999 PFS filing seeking reconsideration and/or clarification of two aspects of the Board's LBP-99-35 ruling on summary disposition for contention Utah K/Confederated Tribes B. In this submission, PFS asks that the Board reconsider its determination denying summary disposition in PFS's favor regarding the firing of military ordnance during training exercises on DPG. See [PFS] Motion for Reconsideration and Clarification of Ruling on [PFS] Motion for Summary Disposition of Contention Utah K/Confederated Tribes B (Sept. 3, 1999) at 2-4. In addition, PFS suggests that the Board should clarify its ruling concerning the UTTR to address specifically the question of the hazard posed by aircraft using air-delivered ordnance other than cruise missiles on targets located within the United States Department of Defense (DOD) land boundaries of the UTTR. See id. at 4-6.

In its September 9, 1999 response to the PFS reconsideration/clarification motion, the staff indicates its support for the relief requested in the PFS motion based

on its position, as expressed in the staff's response to the PFS dispositive motion regarding this contention, that PFS was entitled to summary disposition on these aspects of contention Utah K/Confederated Tribes B. See NRC Staff's Response to "[PFS] Motion for Reconsideration and Clarification of Ruling on the [PFS] Motion for Summary Disposition of Contention Utah K/Confederated Tribes B" (Sept. 9, 1999) at 2. The State, on the other hand, asserts that the PFS reconsideration/clarification request should be denied. Regarding the matter of training exercise ordnance at DPG, the State maintains that its showing there were ground-based weapons used at DPG that exceeded the ranges described by PFS was sufficient to establish a material factual dispute because it showed PFS had not accounted for all training munitions used. See [State] Response to [PFS] Motion for Reconsideration and Clarification of Ruling on the [PFS] Motion for Summary Disposition of Contention Utah K/Confederated Tribes B (Sept. 13, 1999) at 3-6. Further, regarding the PFS request for clarification of the issue of UTTR air-delivered ordnance other than cruise missiles, the State declares that PFS is now trying to rewrite its motion to draw a distinction between air munitions fired over DOD property and air munitions fired over non-DOD land, including the Skull Valley site of the PFS ISFSI. The State declares this is inappropriate and, in

any event, does not exempt these concerns from consideration as part of the cumulative aircraft hazards analysis that is still outstanding. See id. at 6-8.

II. ANALYSIS

A. Impact of Ruling on Contention Utah B

Of the eight contentions identified by the Board in LBP-99-34 as potentially impacted by that ruling, there apparently is no dispute among PFS, the State, and the staff that our determination there is dispositive of all or part of three contentions -- Utah K/Confederated Tribes B, Utah N, and Utah O as they relate to the ITP. As a consequence, we dismiss the admitted portion of contention Utah K/Confederated Tribes B regarding the alleged impact on the Rowley Junction ITP of accidents involving (1) materials or activities at or emanating from (a) the Tekoi Rocket Engine Test facility (Tekoi), (b) Salt Lake City International Airport (SLCIA), (c) DPG, including Michael Army Airfield (MAAF), (e) Hill Air Force Base (HAFB), and (f) the UTTR; or (2) hazardous materials that pass through Rowley Junction from the Laidlaw APTUS hazardous waste incinerator, the Envirocare low-level radioactive and mixed waste landfill, or Laidlaw's Clive Hazardous Waste Facility and Grassy Mountain hazardous waste landfill. In addition, we dismiss the admitted portion of contention Utah O

regarding groundwater impacts relative to the Rowley Junction ITP as well as contention Utah N, which raised only an ITP-related concern, in its entirety.

Relative to the four contentions that the State asserts are not subject to dismissal, the State's argument regarding contentions Utah R and Utah S is simply a variation on its already rejected assertion that the existing program for regulating spent fuel transportation under 10 C.F.R. Part 71 and the complementary DOT regime is inadequate. See LBP-99-34, 50 NRC at ___ (slip op. at 16-18). Accordingly, based on our ruling regarding contention Utah B, we dismiss the aspects of these contentions that relate to the ITP.

Relative to contentions Utah T and Utah W, however, as the State points out, these raise issues that go to the NEPA responsibilities that are part of the agency licensing process relative to the PFS ISFSI. Although, as we pointed out in ruling on contention Utah B, the ITP is not subject to the Part 72 licensing process, like the more recently proposed Low Junction rail spur, it is proposed to be constructed as part of the PFS application for that license and, as such, is subject to consideration under NEPA. See LBP-99-3, 49 NRC 40, 53 (1999). Accordingly, we take no action regarding these two contentions as they relate to the ITP.

Finally, with respect to contention Utah U, we agree with the parties that this issue was mislabeled as including ITP-related concerns. Accordingly, our ruling in LBP-99-34 had no impact on the substance of contention Utah U as it was admitted by the Board.

We include as appendix A to this decision a revised version of contentions Utah K/Confederated Tribes B, Utah O, and Utah R that reflect our ruling here and, in the case of Utah K/Confederated Tribes B, our ruling in LBP-99-35 as well.

B. Reconsideration/Clarification of Ruling on Contention Utah K/Confederated Tribes B

1. Reconsideration Standard

Although a party may not base a reconsideration motion on new information or a new thesis, see LBP-98-10, 47 NRC at 292 (citing Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997)), a request to reexamine existing record material that may have been misunderstood or overlooked, or to clarify a matter that the party believes is unclear, is appropriate, see id. at 296-97 (citing Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 687 (1983)).

2. DPG Training Exercise Ordinance

In August 30 ruling on the PFS motion relative to the issue of DPG training exercise ordinance, the Board noted that "[t]he State's sworn assertions regarding the current

training use of a missile at the Wig Mountain site that can reach the PFS facility establishes a litigable material factual dispute." LBP-99-35, 50 NRC at ___ (slip op. at 28). Nonetheless, according to PFS, the State's showing that DPG-fired ordnance is capable of reaching the PFS facility is not sufficient given the PFS assertion that "most" of the training weapons do not have the range to reach the PFS facility and its showing that training weapons are fired away from the facility and only under stringent safety precautions. What this PFS claim fails fully to account for, however, is the nature of the ordnance involved. As is apparent from other portions of this contention, it has not been established that missiles necessarily travel in the direction they are fired. Accordingly, given the uncontroverted showings about the range of missiles utilized in training exercises and the distance between their firing area and the location of the PFS facility, we reaffirm our ruling regarding this portion of the contention and deny the PFS motion for reconsideration.¹

¹ Under the circumstances, we are unwilling to parse this portion of the contention based on the type of ordnance used, but would note that ordnance that is not capable of reaching the PFS facility from DPG training exercise areas, either because of its range or the manner in which it is delivered, seemingly provides little or no substantive support for the State's claims.

3. UTTR-Related Non-Cruise Missile Overflights

In ruling on the matter of UTTR-related overflights not involving cruise missiles, the Board indicated that "[r]elative to the issue of noncrash consequences of overflights, it is apparent this question hinges on whether UTTR aircraft will transit Skull Valley, a factual matter that the staff has asked be deferred as part of its military aircraft crash analysis." LBP-99-35, 50 NRC at ____ (slip op. at 37) (citation omitted). By way of further explanation, we note that this Board ruling was an acknowledgment of the staff's "no position" determination regarding the various PFS undisputed material factual statements that described the parameters of UTTR-related overflights in Skull Valley and the State's assertion that military aircraft "overflying" Skull Valley present a significant risk to the PFS facility as contrasted with the PFS asserted undisputed material factual statement that military aircraft on UTTR "run-ins for weapon delivery do not cross Skull Valley." Compare NRC Staff's Response to [PFS] Motion for Partial Summary Disposition of Utah Contention K and Confederated Tribes Contention B (July 22, 1999) at 4 n.3 and [State] Opposition to [PFS] Motion for Partial Summary Disposition of Utah Contention K and Confederated Tribes Contention B (July 22, 1999) at 8-9 with [PFS] Motion for Partial Summary Disposition of Utah

Contention K and Confederated Tribes Contention B (June 7, 1999), Statement of Material Facts at 8. By the Board's reckoning, these assertions by the parties leave open the possibility that there will be UTTR-related military overflights that, by reason of their proximity to the PFS facility, can have some direct impact on the PFS facility.

Of course, as the Board noted, PFS will be permitted to supplement its summary disposition motion as it concerns Skull Valley overflights once the staff has taken its position on such flights. See LBP-99-35, 50 NRC at ___ (slip op. at 37).

III. CONCLUSION

The Board's prior ruling in LBP-99-34 granting summary disposition in favor of PFS on contention Utah B concerning the proposed Rowley Junction ITP mandates the dismissal of contention Utah N and the ITP-related portions of contentions Utah K/Confederated Tribes B, Utah O, Utah R, and Utah S. Further, the Board denies the PFS request for reconsideration of its LBP-99-35 ruling denying summary disposition for contention Utah K/Confederated Tribes B on the matter of DPG training exercise ordnance and clarifies

its ruling regarding UTTR-related non-cruise missile overflights as set forth above.

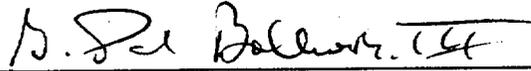
For the foregoing reasons, it is this twentieth day of September 1999, ORDERED, that:

1. Contention Utah N and the ITP-related portions of contentions Utah K/Confederated Tribes B, Utah O, Utah R, and Utah S are dismissed.

2. The PFS September 3, 1999 motion for reconsideration and/or clarification of LBP-99-35 is denied as to the portion of contention Utah K/Confederated Tribe B regarding DPG training exercise ordnance and is clarified on

the matter of UTTR air-delivered ordnance as is discussed in section II.B.3 above.

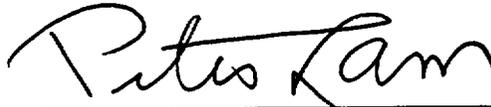
THE ATOMIC SAFETY
AND LICENSING BOARD²



G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE



Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE



Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

September 20, 1999

² Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant PFS; (2) intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the staff.

APPENDIX A

REVISED CONTENTIONS

1. Utah K/Confederated Tribes B -- Inadequate Consideration of Credible Accidents

CONTENTION: The Applicant has inadequately considered credible accidents caused by external events and facilities affecting the ISFSI, including the cumulative effects of military testing facilities in the vicinity.

2. Utah O -- Hydrology

CONTENTION: The Applicant has failed to adequately assess the health, safety and environmental effects from the construction, operation, and decommissioning of the ISFSI, as required by 10 C.F.R. §§ 72.24(d), 72.100(b) and 72.108, with respect to the following contaminant sources, pathways, and impacts:

1. Contaminant pathways from the applicant's sewer/wastewater system; routine facility operations; and construction activities.
2. Contaminant pathways from the applicant's retention pond in that:
 - a. The ER fails to discuss potential for overflow and therefore fails to comply with 10 C.F.R. Part 51.
 - b. ER is deficient because it contains no information concerning effluent characteristics and environmental impacts associated with seepage from the pond in violation of 10 C.F.R. § 51.45(b) and § 72.126(c) & (d).
3. Potential for groundwater and surface water contamination.
4. The effects of applicant's water usage on other well users and on the aquifer.
5. Impact of potential groundwater contamination on downgradient hydrological resources.

3. Utah R -- Emergency Plan

CONTENTION: The Applicant has not provided reasonable assurance that the public health and safety will be

adequately protected in the event of an emergency at the storage site in that PFS has not adequately described the means and equipment for mitigation of accidents because it does not have adequate support capability to fight fires onsite.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

PRIVATE FUEL STORAGE, LLC

(Independent Spent Fuel Storage
Installation)

Docket No.(s) 72-22-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMO & ORDER (LBP-99-39) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Docket No.(s)72-22-ISFSI
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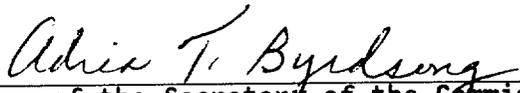
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Dated at Rockville, Md. this
20 day of September 1999


Office of the Secretary of the Commission