

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

) Docket No. 72-22-ISFSI

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)
PRIVATE FUEL STORAGE, LLC)
(Independent Spent Fuel)
Storage Installation))

) ASLBP No. 97-732-02-ISFSI

) September 7, 1999

**STATE OF UTAH'S 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**

On August 30, 1999, the Board granted summary disposition to the Applicant on Utah Contention B, License Needed for Intermodal Transfer Facility. See LBP-99-34. In ruling on Contention B, the Board suggested that its decision may potentially be dispositive of portions of other admitted contentions that relate to the Intermodal Transfer Facility.¹ It should be noted, however, that the Applicant has not filed for summary disposition on the portions of the contentions that may be affected by the Board's ruling on Contention B. The State submits that the NEPA-related contentions (*i.e.*, part of Contentions T and all of Contention W) survive the ruling on Contention B, as do Contentions R and S.

The Board ruled that all activities at the Intermodal Transfer Facility are somehow

¹ The contentions potentially affected are portions of Utah K (Inadequate Consideration of Credible Accidents), Utah O (Hydrology), Utah R (Emergency Plan), Utah S (Decommissioning), Utah T (Inadequate Assessment of Required Permits and Other Entitlements), and Utah U (Impacts of Onsite Storage Not Considered); and all of Utah N (Flooding at Rowley Junction) and Utah W (Other Impacts Not Considered). See LBP-99-34 at 19.

covered by either NRC Part 71 regulations or U.S. Department of Transportation regulations. Part 72, however, requires that "the proposed ISFSI ... must be evaluated with respect to the potential impact on the environment of the transportation of spent fuel or high level radioactive waste within the region." 10 CFR § 72.108 (*emphasis added*). Certainly, the Intermodal Transfer Facility, located 25 miles north of the proposed ISFSI, is "within the region." Moreover, the activities at the Intermodal Transfer Facility are inextricably linked to the operation of the ISFSI. For example, the Applicant will own the equipment and facilities at Rowley Junction, may act as a carrier of the spent fuel and may provide other services, such as security. See LBP 99-34 at 2. In addition, the rate at which the casks will be removed from the Intermodal Transfer Facility to the proposed ISFSI will, in part, be a function of the ISFSI's ability to handle receipt of casks by heavy haul truck and release the truck for a return trip back to the Intermodal Transfer Facility.

NEPA is not relegated to merely addressing the proposed facility site; nor can it be segmented by balkanizing the proposed action. NEPA requires an analysis of all adverse environmental effects from the proposed action. 10 CFR § 51.45. Accordingly, the Applicant's Environmental Report must describe and analyze any environmental impacts that may occur as a result of the Applicant's proposal. *Id.* Thus, the following NEPA-related contentions should not be dismissed:

Contention T. Contention T was admitted as to paragraphs 2 through 8. In the Matter of Private Fuel Storage, LBP 98-7, 47 NRC 147, 198 (1998) (hereafter "PFS"). Only

²The relevant portion of Contention T is:

In derogation of 10 CFR § 51.45(d), the Environmental Report does not list all Federal permits, licenses, approvals and other entitlements which must be obtained in connection with the PFS ISFSI License Application, nor does the Environmental Report describe the status of compliance with these requirements in that:

....

paragraphs 2 and 3 relate to Rowley Junction.² The Board, however, limited approvals and entitlement "to those involving appropriate governmental (as opposed to nongovernmental/private) entities." Id. 47 NRC at 198. The Applicant has chosen to locate the Intermodal Transfer Facility and the Low rail corridor on public land owned and controlled by the BLM. Accordingly, the Applicant must obtain approval from an agency of the federal government to use and conduct operations on those two sites. The Environmental Report must list all such Federal approvals and other entitlements and describe the status of compliance with those requirements. Thus, until PFS has obtained rights-of-way to use federal land, its status of compliance cannot be ascertained. To date, BLM has issued no such rights-of-way. Contention U. There appears to be nothing in Contention U, as admitted, that involves Rowley Junction, notwithstanding the Board's footnote to the contrary it is ruling on the admissibility of Contention U. PFS, 47 NRC 142, 199 at n. 22. Contention U was admitted as to basis one which deals with the ISFSI's inadequate thermal design. *See* State's Contentions dated November 23, 1997 at 142. Therefore, the Board's ruling on Contention B has no effect on Contention U.

Contention W. As admitted, Contention W states:

The Environmental Report does not adequately consider the adverse impacts of the proposed ISFSI and thus does not comply with NEPA or 10 CFR § 51.45(b) in that ... [t]he Applicant has not considered the impact of flooding on the ...

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2. The Applicant has shown no proof of entitlement to build a transfer facility at Rowley Junction or right to use the terminal there; nor has it identified the number of casks expected on each shipment, or explained the effects of rail congestion of whether Rowley Junction has the capacity of handling the expected number of casks; no has it shown that Union Pacific is willing and capable to handle shipments to Rowley Junction.
 3. The Applicant has shown no ability or authority to build a rail spur from the rail head at Rowley Junction to the proposed ISFSI site.

intermodal transfer point.

47 NRC at 201-02. Contention W is basically the NEPA component of Contention N (Flooding at Rowley Junction). While Contention N relates the requirements under 10 CFR § 72.92 (design basis external natural events), Contention W suffers no impediment because of the Board's ruling that the Intermodal Transfer Facility is regulated by transportation regulations. See 10 CFR § 72.108. Moreover, the environmental effects of flooding at Rowley Junction are not remote and speculative. Cf. Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1) ALAB-650, 14 NRC 43, 62 at n. 29 (1981) (citing Natural Resources Defense Council, Inv. v. Morton, 458 F.2d 837, 838 (D.C. Cir. 1972) ("NEPA, however does not require consideration of circumstances that are 'only remote and speculative possibilities.'"). In its discovery responses the State has produced documents and presented evidence to demonstrate the potential for flooding at Rowley Junction.³ The State alleges that its discovery responses with respect to Contentions N and W provide a sufficient basis to show that the State has met its burden of going forward with Contention W. Accordingly, Contention W should not be dismissed.

As to the other contentions, the State submits that the affected portions of Contentions R (Emergency Planning) and S (Decommissioning) survive the Board's ruling. The Board cites "timely and efficient conduct of this proceeding" as one reason for granting summary disposition. LBP 99-34 at n. 3. Yet, the Board has before it "the unique nature of the activities and environment around Rowley Junction - e.g., nearby bombing ranges, rocket engine transportation on the adjacent interstate highway, and the Great Salt Lake." LBP 99-34 at 9. Furthermore, workers at the Intermodal Transfer Facility will not be afforded adequate safety protection. Id. at 16. The State maintains that the Board has placed efficiency over public safety. There is nothing in the record to show that the public will be adequately protected from the Applicant's activities that occur at the Intermodal Transfer Facility.

³For example, in the State's May 21, 1999, Fourth Supplemental Response to the Applicant's First Set of Formal Discovery Request, the State elaborated on State-conducted studies of the feasibility of diking and other mitigation measures to address severe flooding of the Great Salt Lake in the 1980s. The State discussed wind tides, or seiche, associated with a high lake level and also the effects of earthquake-induced flooding.

Moreover, as a limited liability company with no independent assets, there is no assurance under the Board's current scheme that decommissioning of the Intermodal Transfer Facility will occur. Accordingly, the State maintains that the relevant portions of Contentions R and S should not be dismissed.

DATED this 7th day of September, 1999.

Respectfully submitted,

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