

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

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LBP-99-33  
'99 AUG 27 P2:18

Before Administrative Judges:

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

ADJ.

**SERVED AUG 27 1999**

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  
August 27, 1999

MEMORANDUM AND ORDER  
(Granting Motion for Summary Disposition  
Regarding Contention Utah M)

Applicant Private Fuel Storage, L.L.C., (PFS) has requested that summary disposition be entered in its favor regarding contention Utah M, Probable Maximum Flood, because that issue is now moot. As admitted, that contention details intervenor State of Utah's (State) assertion that, as required by 10 C.F.R. §§ 72.24(d)(2), 72.98, PFS failed to estimate accurately the probable maximum flood (PMF) in its application for a license to construct and operate an independent spent fuel storage installation (ISFSI) in Skull Valley, Utah. According to PFS, there is no genuine issue as to any material fact relevant to this contention so that, in accordance with 10 C.F.R. § 2.749, it is entitled to a determination in its favor on this contention as a matter of

law. The NRC staff supports this request, while the State, as the contention's sponsor, does not directly oppose the PFS request and declines to file a response to the motion for summary disposition.

For the reasons described below, we grant summary disposition in favor of PFS on this issue.

### I. BACKGROUND

As submitted in November 1997, contention Utah M challenged the accuracy of PFS's PMF calculation that, as an ISFSI applicant, PFS is required to perform in order to evaluate the ability of its proposed site to withstand possible flooding. Under 10 C.F.R. § 72.122(b)(2), ISFSI structures, systems, and components important to safety must be designed to withstand the effect of natural phenomena, such as floods.<sup>1</sup> Further, the standard review plan for licensing ISFSIs indicates that an applicant's site assessment process must include a calculation of the greatest probable flood or PMF of the region surrounding a

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<sup>1</sup> As it did in its response to the State's original contention, the staff suggests that in addition to (or in lieu of) section 72.98, the contention Utah M should reference 10 C.F.R. § 72.122(b) as it establishes design criteria for the protection of structures important to safety against environmental conditions and natural phenomena, including floods. See Staff Response at 3 n.3. The absence of any reference in contention Utah M to section 72.122(b) has no substantive impact on our ruling here, however.

proposed site. See Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, NUREG-1567, Standard Review Plan for Spent Fuel Dry Storage Facilities at 2-8 to -9 (draft Oct. 1996). The State claimed that the PFS PMF calculation underestimated the flood volume for the area and failed to satisfy the dictates of 10 C.F.R. § 72.24(d)(2), which requires that in its Safety Analysis Report (SAR) an ISFSI applicant must discuss the ability of facility structures to withstand accidents and natural disasters such as floods. The State asserted that the underestimations contained in its PMF calculations meant that PFS could not prove adequate facility design as required by section 72.24(d)(2). See [State] Contentions on the Construction and Operating Licence Application by [PFS] for an Independent Spent Fuel Storage Facility (Nov. 23, 1997) at 96-97.

In an April 22, 1998 decision, the Board admitted a number of the State's contentions regarding the sufficiency of the PFS ISFSI proposal, including contention Utah M. As admitted, contention Utah M reads:

Utah M -- Probable Maximum Flood

CONTENTION: The application fails to accurately estimate the Probable Maximum Flood (PMF) as required by 10 C.F.R. § 72.98, and subsequently, design structures important to safety are inadequate to address the PMF; thus, the application fails to satisfy 10 C.F.R. § 72.24(d)(2).

1. The Applicant's determination of the PMF drainage area to be 26 sq. miles is inadequate because the Applicant has failed to account for all drainage sources that may impact the ISFSI site during extraordinary storm events.
2. In addition to design structures important to safety being inadequate to address the PMF, the consequences of an inaccurate PMF drainage area may negate the Applicant's assertion that the facility is "flood dry."

LBP-98-7, 47 NRC 142, 253-54, aff'd on other grounds, reconsideration granted in part and denied in part on other grounds, LBP-98-10, 47 NRC 288 CLI-98-13, 48 NRC 26 (1998).

Relying on an eleven item statement of material facts not in dispute and the supporting affidavits of Stone & Webster Engineering Corporation (S&W) program manager Dr. George H.C. Liang and S&W project engineer Jerry Cooper, along with assorted discovery materials,<sup>2</sup> PFS now asserts that the bases for the contention have been eradicated by its revision of the PMF in accordance with the concerns of the State and the staff. PFS also claims that the revised PMF, which has been incorporated into section 2.4 of its SAR by a May 1999 license application amendment, satisfies

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<sup>2</sup> There are no objections by PFS, the staff, or the State to the qualifications or expertise of the various affiants whose statements are relied upon to provide support for other parties' assertions regarding the material factual matters at issue in connection with contention Utah M.

applicable NRC regulations. As a result of these revisions, PFS argues, there are no longer material facts in dispute and summary disposition in its favor is proper. See [PFS] Motion for Summary Disposition of Utah Contention M - Probable Maximum Flood (June 28, 1999) at 4-7 [hereinafter PFS Motion].

For its part, the staff champions the PFS dispositive motion, stating that all the material facts presented by PFS are correct. Supported by the affidavit of Colorado State University civil engineering professor Dr. Steven R. Abt, the staff maintains the PFS revisions, first submitted as part of its responses to a December 1998 staff requests for additional information (RAI), fully rectify the inaccuracies contained in the initial PMF that formed the basis for admission of contention Utah M. The staff asserts that the revised PMF provides an accurate basis for PFS's conclusion that the design structures for its Skull Valley ISFSI adequately satisfy the applicable regulatory requirements. See NRC Staff's Response to [PFS] Motion for Summary Disposition of Utah Contention M - Probable Maximum Flood (July 19, 1999) at 8-9 [hereinafter Staff Response]; see also NRC Staff's Statement of Its Position Concerning Group I Contentions (June 15, 1999) at 17-18. The State, on the other hand, has declined to file a response to the PFS motion or the staff's response. See [State] Response to

[PFS] Motion for Summary Disposition of Utah Contention M  
(July 27, 1999) at 1.

## II. ANALYSIS

A party to a NRC proceeding is entitled to summary disposition on any or all matters

if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.

10 C.F.R. § 2.749(d). As with the analogous Rule 56 of the Federal Rules of Civil Procedure, the movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts and any supporting materials that accompany the dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. See Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993). Ultimately, however, the burden remains with the movant to establish that no material facts are in dispute so that it is entitled to a dispositive ruling in its favor. See Cleveland Electric

Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 753-53 (1977) (if evidence before presiding officer does not establish absence of genuine issue of material fact, summary disposition motion must be denied even if unopposed).

PFS's summary disposition motion is based upon its claim that the revised PMF analysis included in its response to the staff's December 1998 RAI, as incorporated into section 2.4 of its SAR in May 1999, establishes that there are no longer material facts in dispute. In this instance, PFS has provided a statement of material facts, accompanied by the Liang and Cooper affidavits, excerpts from the deposition of State flood expert David B. Cole, and excerpts from the State's second amended discovery response. PFS asserts that these documents establish that the revised PMF corrects the underestimations that formed the basis of the concerns raised by the State in contention Utah M.

Initially, PFS declares that the current PMF accounts for all the drainage sources that may impact the ISFSI site during extraordinary weather. PFS has increased the area analyzed in the revised PMF from the twenty-six square miles in the original PMF to 270 square miles. This expansion addresses State concerns that the initial PMF was inaccurate because it failed adequately to explore all the possible drainage sources in the area. By expanding the PMF to 270

square miles, PFS asserts that its analysis both satisfies and exceeds the 240 square miles suggested by NRC staff and the State's demand for a more expansive exploration of possible flooding. Furthermore, referencing the State's second discovery responses, PFS claims the State has acknowledged this "is an appropriate drainage area for calculating the PMF." PFS Motion at 3 (footnote omitted).

PFS also maintains that it "has adopted ultra conservative assumptions for calculating the PMF [as] suggested by the NRC, which are collectively more conservative than the assumptions used by the State in its PMF calculations." Id. at 5. As a result, PFS's present design, based upon PFS's calculation of a flood infiltration flow rate of 85,000 cubic feet per second (cfs) rather than the State's calculation of 64,500 cfs, is thirty-one percent larger than the design estimate advocated by the State. See id.

Next, PFS asserts that through the revisions, the current PMF complies with the requirements of 10 C.F.R. § 72.24(d)(2) by providing sufficient information to analyze the effects of possible floods on facility structures. The revised PMF contains data adequate to support PFS's conclusion that there will be no adverse impact on health or safety at the maximum probable flood level. PFS asserts that under the revised PMF, the facility and all appropriate

structures, systems, and components (SSCs) important to safety will remain flood-dry because peak flood level will be at least five feet below the ISFSI site's lowest elevations. PFS also describes the ways in which the design of the facility access road ensures that flood waters will remain away from the facility. See PFS Motion at 6-7. According to PFS, these conclusions, based upon the revised, accurate PMF, fulfill the demands of section 72.24(d)(2). This view, which likewise is advanced by the staff, is not challenged by the State.

After reviewing the PFS and staff submissions, we have concluded that the revised PMF seemingly has remedied the inaccuracies and inadequacies that formed the basis of contention Utah M and now satisfies the applicable regulatory requirements. Given that the changes made to the PMF exceed those advocated as necessary by the State at the contention's admission, we conclude that summary disposition in favor of PFS is appropriate in that this contention is now moot.

### III. CONCLUSION

With regard to contention Utah M, Probable Maximum Flood, having revised its flood calculations in a manner that fully addresses the analytical deficiencies noted by the State relative to the admission of this contention, PFS

has established there is no genuine issue as to any material fact and it is entitled to a judgment in its favor as a matter of law.

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For the foregoing reasons, it is this twenty-seventh day of August 1999, ORDERED, that the June 28, 1999 PFS motion for summary disposition regarding contention Utah M is granted, and, for the reasons given in this memorandum

and order, a decision regarding this contention is rendered in favor of PFS.

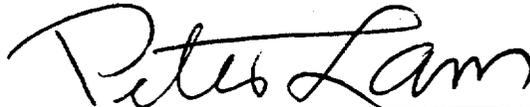
THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>3</sup>



G. Paul Bollwerk, III  
ADMINISTRATIVE JUDGE



Dr. Jerry R. Kline  
ADMINISTRATIVE JUDGE



Dr. Peter S. Lam  
ADMINISTRATIVE JUDGE

Rockville, Maryland

August 27, 1999

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<sup>3</sup> 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.

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-99-33) 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  
LB MEMO & ORDER (LBP-99-33)

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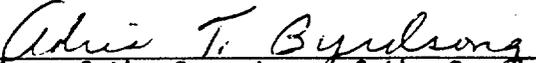
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Dated at Rockville, Md. this  
27 day of August 1999

  
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