

June 6, 2001

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO "STATE OF UTAH'S REQUEST FOR  
CLARIFICATION OF THE EFFECT OF A RULING ON GROUND AND  
SURFACE WATER IN CONTENTION OGD-O ON CONTENTION UTAH O"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.730(c) and the Atomic Safety and Licensing Board's ("Licensing Board") "Order (Schedule for Responses to Request for Clarification)," dated June 1, 2001, the NRC Staff ("Staff") hereby responds to the "State of Utah's Request for Clarification of the Effect of a Ruling on Ground and Surface Water in Contention OGD-O on Contention Utah O," dated May 31, 2001 (Request"). For the reasons set forth below, the Staff submits that Contentions Utah O and OGD O raise issues that are distinct from each other, and that clarification of their scope is not required; nonetheless, the Staff does not oppose the State's Request.

BACKGROUND

This proceeding concerns the application filed by Private Fuel Storage, L.L.C. ("PFS" or "Applicant") for an NRC license to construct and operate an independent spent fuel storage installation ("ISFSI") on the Reservation of the Skull Valley Band of Goshute Indians. Various parties were admitted as Intervenors in the proceeding, including the State of Utah ("State") and Ohngo Gaudadeh Devia ("OGD"). See *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-7, 47 NRC 142, 169 (1998).

Numerous contentions were filed by the Intervenors, including the State and OGD.<sup>1</sup> Among the contentions admitted for litigation was Contention Utah O (“Hydrology”). As revised and admitted by the Board, and as later revised in LBP-99-6,<sup>2</sup> this contention asserts as follows:

**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 and the ITP, 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 systems; 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.

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<sup>1</sup> See “State of Utah’s Contentions on the Construction and Operating License Application By Private Fuel Storage, LLC For an Independent Spent Fuel Storage Facility,” dated November 23, 1997 (“Utah Contentions”); and “[OGD’s] Contentions Regarding the Materials License Application of [PFS] in an [ISFSI],” dated November 24, 1997 (“OGD Contentions”).

<sup>2</sup> This contention was originally consolidated with Contentions Castle Rock 8 and 10. Upon the withdrawal of the Castle Rock Intervenors, the Board limited Paragraph 1 to routine facility operations; deleted the firefighting issues which had once been part of Contention Castle Rock 8; and redesignated the contention as Contention Utah O. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-6, 49 NRC 114 (1999).

See LBP-98-7, 47 NRC at 192-93, 215-16, 216-17, 254; LBP-99-6, 49 NRC at 121. Contention Utah O thus raises issues related to both water contamination and water usage.

Contention OGD O (“Environmental Justice Issues Are Not Addressed”), as revised and admitted by the Board in LBP-98-7 and later revised in LBP-98-10,<sup>3</sup> asserts as follows:

**OGD O -- Environmental Justice Issues Are Not Addressed**

CONTENTION: The license application poses undue risk to public health and safety because it fails to address environmental justice issues. In Executive Order 12898, 3 C.F.R. 859 (1995) issued February 11, 1994, President Clinton directed that each Federal agency “shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations in the United States.” It is not just and fair that this community be made to suffer more environmental degradation at the hands of the NRC. Presently, the area is surrounded by a ring of environmentally harmful companies and facilities. Within a radius of thirty-five (35) miles the members of OGD and the Goshute reservation are inundated with hazardous waste from: Dugway Proving Ground, Deseret Chemical Depot, Tooele Army Depot, Envirocare Mixed Waste storage facility, APTUS Hazardous Waste Incinerator, and Grassy Mountain Hazardous Waste Landfill.<sup>4</sup>

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<sup>3</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288 (1998). With respect to Contention OGD O, the Licensing Board deleted reference to the Utah Test and Training Range (“UTTR”) South, UTTR North, and the Environmental Protection Agency sites identified on a map referenced in basis 5. *Id.* at 298-99, 301 (1998).

<sup>4</sup> OGD provided six basis statements in support of this contention, including (1) negative economic and sociological impacts on the Goshute Indian community caused by siting the proposed facility on the Goshute Reservation, (2) adverse environmental, sociological and psychological costs to members of the Skull Valley Band living nearby (including increased traffic, more people, and impacts on traditional lifestyles), (3) lack of a cost-benefit analysis that considers the alternative of leaving the spent fuel at reactor sites, (4) need for the facility, (5) cumulative impacts of this facility in combination with impacts from other specified nearby hazardous waste facilities, and (6) adverse impacts on property values around the proposed facility. See OGD Contentions at 27-36. In admitting the contention, the Licensing Board explicitly limited it to the “disparate impact matters outlined in bases one, five, and six,” and it limited basis six to “the effects of the PFS facility on property values in and around the Skull Valley Goshute community as a component in the ‘environmental justice’ assessment of any disparate impacts suffered by minority and low-income communities.” See LBP-98-7, 47 NRC at 233.

See LBP-98-10, 47 NRC at 301. This contention thus seeks to litigate the disparate impacts on minority and low income populations as compared to the overall population, with respect to the specific issues raised in Basis 1 (economic and sociological impacts on the Goshute Indian community), Basis 5 (cumulative impacts of the PFS facility in combination with the impacts from other specified facilities), and Basis 6 (adverse impacts on property values).

### DISCUSSION

In its Request, the State asserts that part of Contention Utah O “addresses potential impacts to groundwater and surface water quality at the proposed facility,” and that a portion of the “Applicant’s Motion For Summary Disposition of OGD Contention O - Environmental Justice,” filed on May 25, 2001 (“PFS’s Motion”), “has some issues in common with Utah O” (Request at 1). For example, the State points to an assertion in PFS’s Motion that “the PFSF will have no significant impacts on groundwater or surface water quality in the first place and hence will create no groundwater or surface water impacts cumulative with those of the enumerated facilities” (*Id.* at 1 n.1, citing PFS’s Motion at 14-15).<sup>5</sup>

The State further asserts in its Request that it is “concerned that any ruling on OGD O may have a res judicata or issue preclusion effect on Utah O,” and it therefore requests a ruling that it “will not be bound by any decision of the Board regarding matters in [PFS’s] Motion which overlap those raised and argued by the State in Utah O.” (*Id.* at 1). The State further suggests that hydrological issues be addressed in the litigation of Contention Utah O rather than OGD O “where the major focus of the OGD contention is not on hydrological issues,” and it requests that the Board “expressly state that its rulings regarding OGD Contention O will not in any way preclude the State

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<sup>5</sup> Significantly, the State does not assert that Contention OGD O, itself, raises water quality or water usage impacts, but only states that the Applicant’s motion for summary disposition of Contention OGD O mentions this issue. As set forth below, the Staff believes that Contention OGD O does not raise these issues. Accordingly, the Applicant’s reference to these matters in its motion for summary disposition does not establish a basis for litigating these issues as part of Contention OGD O.

from arguing the same or similar issues encompassed in Utah O” (*Id.* at 2). Finally, the State suggests that if the Board intends “its ruling on PFS’s Motion for Summary Disposition of OGD O to also bind the State on the same or similar issues raised as part of Utah O, the State is willing to brief those issues in a response to PFS’s Motion.” (*Id.*)

The Staff does not believe that clarification of these matters is required. Contention OGD O refers generally to “adverse human health or environmental effects” (OGD Contentions at 27); and its Basis 5 refers to “disproportionate adverse health or environmental effects,” other hazardous waste facilities in the area, chemical emissions from those facilities, and the cumulative impacts of those facilities in combination with the PFS facility. However, Contention OGD O nowhere mentions any groundwater or surface water impacts, nor does it refer to water usage. Further, while Basis 5 of Contention OGD O states that cumulative impacts may be caused in combination with other listed facilities,<sup>6</sup> OGD’s contention fails to specify any cumulative water impacts.<sup>7</sup>

Consistent with the Commission’s Rules of Practice, Contention OGD O may be interpreted to include only those impacts which are explicitly set forth in the contention and its supporting basis statements. See 10 C.F.R. § 2.714(b)(2) (requiring a specific statement of the issue of fact or law raised in the contention, a brief explanation of the bases of the contention, a concise statement of the alleged facts or expert opinion which support the contention and which the Intervenor intends to prove at hearing, and sufficient information to show that a genuine dispute of material fact

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<sup>6</sup> Basis 1 of Contention OGD O is expressly limited to “economic and sociological impacts,” while Basis 6 of the contention relates only to “property values.” Thus, only Basis 5 of the contention raises a human health issue -- in the context of “cumulative” impacts in conjunction with other facilities.

<sup>7</sup> Further, Contention OGD O does not mention any water pathway by which any alleged impacts may be experienced by minority or low income populations. The contention states only that OGD members and other inhabitants of the Reservation “may be breathing, eating and living with” the chemicals and nuclear materials emitted by other facilities (OGD Contentions, at 34). While this statement may refer to the inhalation and ground deposition (foodstuff) pathways, it does not refer to a drinking water pathway, nor does it refer to any water quality or water usage issues.

exists). In this regard, it is well established that the scope of a contention is limited to its terms coupled with its stated bases. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988). Further, an intervenor is “bound by the literal terms of its own contention.” *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 709 (1985), *aff’d in part*, CLI-86-5, 23 NRC 125 (1986). Thus, a contention which asserts that a particular impact may result from a licensing action may not be interpreted to raise some other issue that was not specified in the contention. Having failed to mention any concern relating to water quality or water usage, Contention OGD O may not now be “interpreted” to raise such a concern.

Indeed, to interpret Contention OGD O in any other manner would result in confusion as to what issues need to be addressed in litigation of the contention, and would have the unfortunate result of requiring the litigation of all other environmental issues and contentions as part of this contention.<sup>8</sup> Thus, if Contention OGD O is read broadly to include each and every potential adverse environmental impact, whether or not that impact was specified in the contention (including water contamination, water usage, and numerous other potential impacts such as aesthetic, air quality, noise, traffic, sociological, economic, cultural, radiological, human health, property values, ecological resources, cultural resources, etc.), other parties would be deprived of a fair opportunity to litigate the contention because they would not know what issues they need to address in order to resolve the contention. Further, the Licensing Board would be precluded from resolving other environmental contentions prior to resolving Contention OGD O, if this contention is interpreted to include all such issues regardless of whether they were explicitly raised in this contention. Such an outcome would result in unnecessary and wasteful duplication of effort, and would be inconsistent with the Commission’s pleading requirements applicable to contentions.

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<sup>8</sup> See, e.g., Contention Utah V (transportation radiological impacts), and Contention Utah DD (ecological impacts including domestic livestock and plants).

Finally, even if Contention OGD O is interpreted to raise a concern over cumulative water contamination impacts under Basis 5 of the contention, no such issue would survive for litigation unless those other, distant, facilities are shown to have some adverse water impact which would have a "cumulative" effect in combination with water impacts from the PFS facility. Accordingly, the Staff submits that Contention OGD O may be resolved without requiring consideration of the PFS facility's water impacts, in the absence of any showing that those distant facilities have any impacts which could be cumulative with impacts from the PFS facility.<sup>9</sup>

#### CONCLUSION

For the reasons set forth above, the Staff believes that clarification of these matters is not required. Nonetheless, the Staff does not oppose the State's request for clarification, if the Licensing Board determines that such clarification is appropriate.

Respectfully submitted,

**/RA/**

Sherwin E. Turk  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 6th day of June 2001

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<sup>9</sup> See, e.g., "Draft 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 (June 2000), § 6.3 ("Cumulative Impacts"), at 6-33 (finding little or no cumulative water resource impacts) and 6-38 (finding no disproportionate high and adverse impacts to low income and minority populations, and little or no cumulative impacts). See also, PFS's Motion, at 14 ("impacts on groundwater from the enumerated facilities, if any, would not be felt in the vicinity of the PFS site," because of the distance between the facilities listed in the contention and the PFS site").

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO STATE OF UTAH'S REQUEST FOR CLARIFICATION OF THE EFFECT OF A RULING ON GROUND AND SURFACE WATER IN CONTENTION OGD-O ON CONTENTION UTAH O'" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 6<sup>th</sup> day of June, 2001:

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