

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 APPLICANT'S MOTION FOR SUMMARY
DISPOSITION OF UTAH CONTENTION 0 -- HYDROLOGY

INTRODUCTION

Pursuant to 10 C.F.R. § 2.749, the staff of the Nuclear Regulatory Commission ("Staff") hereby responds to the "Applicant's Motion For Summary Disposition of Utah Contention O -- Hydrology" ("Motion") filed by Private Fuel Storage, L.L.C. ("PFS" or "Applicant") on June 29, 2001. For the reasons set forth below and in the attached affidavit,¹ the Staff submits that the issues pertaining to Utah Contention O have been resolved and there does not exist a genuine dispute of material fact with respect to these matters. Accordingly, the Staff submits that the Applicant is entitled to a decision in its favor as a matter of law, and its Motion should be granted.

BACKGROUND

In June 1997, the Applicant filed a license application for its proposed independent spent fuel storage installation ("ISFSI"), to be located on the Reservation of the Skull Valley Band of Goshute Indians ("Skull Valley Band"). The application consisted of several documents including, as pertinent here, an Environmental Report ("ER"), which addressed the environmental impacts of the Applicant's proposed facility.

¹ See "Affidavit of Richard H. Ketelle Concerning Utah Contention O -- Hydrology" ("Staff Affidavit"), attached hereto.

In November 1997, the State of Utah (“State” or “Utah”) and three ranching, farming and land investment companies (collectively “Castle Rock”), among other petitioners, filed contentions opposing the PFS application. Included among these contentions was Contention Utah O, in which Utah challenged the adequacy of the Applicant’s assessment of “the health, safety and environmental effects from the construction, operation, and decommissioning of the ISFSI and the potential impacts of transportation of spent fuel on groundwater”;² and two Castle Rock contentions which asserted that the PFS facility would result in groundwater quality degradation (Castle Rock Contention 8), and overflow and groundwater contamination from the retention pond. (Castle Rock Contention 10).³

On April 22, 1998, the Atomic Safety and Licensing Board ruled on the State’s and Castle Rock’s standing to intervene and the admissibility of their contentions, in LBP-98-7. The Licensing Board admitted and consolidated Contention Utah O and Contentions Castle Rock 8 and 10, as “Contention Utah O -- Hydrology” in LBP-98-7.⁴ Contention Utah O, as subsequently revised,⁵ asserts as follows:

The Applicant has failed to adequately assess the health, safety and environmental effects from the construction, routine operation, and decommissioning of the ISFSI, as required by 10 C.F.R. §§ 72.24(d),

² See “State of Utah Contentions Regarding the Materials License Application of Private Fuel Storage In An Independent Spent Fuel Storage Installation,” dated November 23, 1997 (“Utah Contentions”), at 100-08.

³ See “Contentions of Petitioners Castle Rock Land & Livestock, L.C., Skull Valley Co., Ltd, and Ensign Ranches of Utah, L.C. on the License Application for the Private Fuel Storage Facility,” filed November 21, 1997 (“Castle Rock Contentions”), at 40-41 and 44-45.

⁴ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 192-93, 254 (1998).

⁵ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-6, 49 NRC 114, 121 (1999) (dismissing, *inter alia*, issues raised by Castle Rock Contentions 8 and 10); *Id.*, LBP-99-39, 50 NRC 232, 236 (1999) (dismissing issues related to the proposed Rowley Junction Intermodal Transfer Point (“ITP”)).

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 [Environmental Report] 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 down-gradient hydrological resources.

In June 2000, the Staff published its "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 ("DEIS"). Therein, the Staff, *inter alia*, addressed the impacts of the proposed PFS facility ("PFSF") on the hydrological resources in and around the proposed Skull Valley site. See DEIS §§ 3.2, 4.2, 5.2, 6.1.2, 6.3.2, and 6.4.2.

On June 29, 2001, PFS filed the instant Motion, on the grounds that there does not exist a genuine dispute of material fact with respect to the matters raised in Contention Utah O. PFS asserts that the State has provided only subjective belief and unsupported speculation to support its broad claims raised in Contention Utah O regarding the health and safety impacts of alleged

contamination to ground and surface waters resulting from the PFSF. See Applicant's Motion, at 5. PFS contends that such speculation is insufficient to establish the existence of a genuine issue of material fact and PFS is therefore entitled to summary disposition of Contention Utah O. *Id.* at 9-10.

As set forth below and in the attached Affidavit, the Staff has reviewed the Applicant's Motion and the Statement of Material Facts attached thereto, and is satisfied that the statements of fact contained therein are correct, subject to the modifications contained in the attached affidavit (none of which affects the Staff's determination that there does not exist any genuine dispute of material fact with respect to Contention Utah O). Accordingly, the Staff submits that summary disposition of Contention Utah O is appropriate at this time.

DISCUSSION

A. Legal Standards Governing Motions for Summary Disposition.

Pursuant to 10 C.F.R. § 2.749(a), "[a]ny party to a proceeding may move, with or without supporting affidavits, for a decision by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding. The moving party shall annex to the motion a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard." In accordance with 10 C.F.R. § 2.749(b), when a properly supported motion for summary disposition is made, "a party opposing the motion may not rest upon the mere allegations or denials of his answer; his answer by affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact." In addition, an opposing party must annex to its answer a short and concise statement of material facts as to which it contends there exists a genuine issue to be heard. 10 C.F.R. § 2.749(a). All material facts set forth in the moving party's statement will be deemed to be admitted unless controverted in the

opposing party's statement. *Id.*⁶ Pursuant to 10 C.F.R. § 2.749(d), "[t]he presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavit, 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."⁷

The Licensing Board has previously ruled upon various motions for summary disposition filed by PFS, in accordance with these principles. In doing so, the Board succinctly summarized the standards for granting summary disposition, as follows:

⁶ *Accord, Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 93 (1986). General denials and bare assertions are not sufficient to preclude summary disposition when the proponent of the motion has met its burden. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993) ("AMS"). Although the opposing party does not need to demonstrate that it will succeed on the issues, it must at least demonstrate that a genuine issue of fact exists to be tried. *Id.*; *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-92-8, 35 NRC 145, 154 (1992) (to avoid summary disposition, the opposing party had to present contrary evidence that was so significantly probative as to create a material issue of fact).

⁷ The Commission's summary disposition procedures have been analogized to Rule 56 of the Federal Rules of Civil Procedure. *See, e.g., Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation) LBP-99-32, 50 NRC 155, 158 (1999). Indeed, the Commission, when considering motions for summary disposition filed pursuant to 10 C.F.R. § 2.749, generally applies the same standards that the Federal courts use in determining motions for summary judgment under Rule 56 of the Federal Rules. *AMS*, CLI-93-22, 38 NRC at 102. Decisions arising under Rule 56 of the Federal Rules may thus serve as guidelines to the Commission's adjudicatory boards in applying 10 C.F.R. § 2.749. *Perry*, ALAB-443, 6 NRC at 754. Under Rule 56, the party seeking summary judgment has the burden of proving the absence of genuine issues of material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *AMS*, 38 NRC at 102. In addition, the record is viewed in the light most favorable to the party opposing the motion. *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962); *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-944, 33 NRC 81, 144 (1991). If the moving party makes a proper showing for summary disposition and the opposing party fails to show that there is a genuine issue of material fact, the court (or Licensing Board) may summarily dispose of all of the matters before it on the basis of the filings in the proceeding, the statements of the parties, and affidavits. *See* Rule 56(e), Fed. R. Civ. P.; 10 C.F.R. § 2.749(d); *AMS*, 38 NRC at 102.

Under 10 C.F.R. § 2.749(a), (d), summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting material, shows 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.” 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 not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its 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).

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-19, 53 NRC 416, 421-22 (May 31, 2001) (partial summary disposition of Contention Utah K), *citing PFS*, LBP-99-23, 49 NRC 485, 491 (1999) (Contention Utah C).⁸

The Commission has encouraged the use of summary disposition procedures “on issues where there is no genuine issue of material fact so that evidentiary hearing time is not unnecessarily devoted to such issues.” *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 457 (1981).⁹ Likewise, the Appeal Board has recognized that summary disposition provides “an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues.” *Wisconsin Electric Power Co.* (Point Beach

⁸ *Accord, Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation) LBP-99-31, 50 NRC 147, 152 (1999) (Security-A, B, and C); LBP-99-32, 50 NRC 155, 158 (1999) (Utah G); LBP-99-33, 50 NRC 161, 164-65 (1999) (Utah M); LBP-99-34, 50 NRC 168, 173-74 (1999) (Utah B); LBP-99-35, 50 NRC 180, 184 (1999) (Utah K); LBP-99-36, 50 NRC 202, 207 (1999) (Utah R); LBP-99-42, 50 NRC 295, 301 (1999) (Utah H); LBP-00-06, 51 NRC 101, 112 (2000) (Utah E).

⁹ The Commission recently endorsed this policy statement, but indicated that “Boards should forego the use of motions for summary disposition except upon a written finding that such a motion will likely substantially reduce the number of issues to be decided, or otherwise expedite the proceeding.” *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 20-21 (1998). The Staff submits that summary disposition of this contention will reduce the number of issues to be decided and will serve to expedite the proceeding.

Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982); *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550 (1980).¹⁰

Finally, if a contention challenges an applicant's environmental report, the contention may be viewed as a challenge to the Staff's EIS. *See, e.g., Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998). Accordingly, where a contention asserts that the ER failed to consider some matter or did not explain clearly how that matter was treated, those assertions may be deemed to apply to the Staff's EIS as well, and may be resolved by a showing that the EIS resolved the alleged deficiency.

As more fully set forth below, the Staff submits that summary disposition of Contention Utah O is appropriate in accordance with these established standards, in that a genuine dispute of material fact no longer exists with respect to any of the specific matters alleged in the contention.

B. No Genuine Issue of Material Fact Remains Concerning Contention Utah O.

The State has made broad allegations of potential and adverse impacts to hydrologic resources in Skull Valley resulting from the construction, operation, and decommissioning of the PFSF. As set forth in the Staff's Affidavit attached hereto, the Staff has reviewed the Applicant's Statement of Material Facts and has determined that it is correct, subject to certain minor modifications, none of which affects the Staff's determination that there does not exist any genuine dispute of material fact with respect to Contention Utah O. *See* Staff Affidavit, ¶¶ 5, 18, and 19. Further, as set forth in the Staff's DEIS, the Staff has evaluated the potential impacts due to construction, operation and decommissioning of the PFSF on hydrologic resources in Skull Valley, and has determined that any such impacts will be small. *See, e.g.,* DEIS §§ 4.2.1.1, 4.2.1.2, 4.2.1.3, 4.2.2.1., 4.2.2.3, and 4.2.2.4. Accordingly, the Staff submits that there does not exist any

¹⁰ It is well settled that an agency may ordinarily dispense with an evidentiary hearing where no genuine issue of material fact exists. *Veg-Mix, Inc. v. U.S. Dep't of Agriculture*, 832 F.2d 601, 607-08 (D.C. Cir. 1987).

genuine issue of material fact with respect to Contention Utah O, and the Applicant is entitled to a decision in its favor on this contention as a matter of law.

CONCLUSION

For the reasons set forth above, the Staff submits that the Applicant is entitled to summary disposition on Contention Utah O as a matter of law.

Respectfully submitted,

/RA/

Norman D. St. Amour
Sherwin E. Turk
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 19th day of July 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))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF UTAH CONTENTION 0 -- HYDROLOGY" 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 19th day of July, 2001:

G. Paul Bollwerk, III, Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to GPB@NRC.GOV)

Office of the Secretary*
ATTN: Rulemakings and Adjudications
Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copies to SECY@NRC.GOV
and HEARINGDOCKET@NRC.GOV)

Dr. Jerry R. Kline*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to JRK2@NRC.GOV)

Office of the Commission Appellate
Adjudication
Mail Stop: 16-C-1 OWFN
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Peter S. Lam*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to PSL@NRC.GOV)

James M. Cutchin, V*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail to JMC3@NRC.GOV)

Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Jay E. Silberg, Esq.**
Ernest Blake, Esq.
Paul A. Gaukler, Esq.
Sean Barnett, Esq.
Shaw Pittman
2300 N Street, N.W
Washington, DC 20037-8007
(E-mail copy to [jay_silberg,
paul_gaukler, sean_barnett, and
ernest_blake@shawpittman.com](mailto:jay_silberg,paul_gaukler,sean_barnett,ernest_blake@shawpittman.com))

Danny Quintana, Esq.**
Danny Quintana & Associates, P.C.
68 South Main Street, Suite 600
Salt Lake City, UT 84101
(E-mail copy to [quintana
@Xmission.com](mailto:quintana@Xmission.com))

Denise Chancellor, Esq.**
Fred G. Nelson, Esq.
Laura Lockhart, Esq.
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, UT 84114-0873
(E-mail copy to dchancel@State.UT.US)
and jbraxton@email.usertrust.com

Connie Nakahara, Esq.**
Utah Dep't of Environmental Quality
168 North 1950 West
P. O. Box 144810
Salt Lake City, UT 84114-4810
(E-mail copy to cnakahar@state.UT.US)

Diane Curran, Esq.**
Harmon, Curran, Spielberg & Eisenberg
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
(E-mail copy to
dcurran@harmoncurran.com)

John Paul Kennedy, Sr., Esq.**
1385 Yale Ave.
Salt Lake City, UT 84105
(E-mail copy to john@kennedys.org)

Joro Walker, Esq.**
Land and Water Fund of the Rockies
1473 South 1100 East, Suite F
Salt Lake City, UT 84105
(E-mail copy to lawfund@inconnect.com)

Land and Water Fund of the Rockies**
2260 Baseline Road, Suite 200
Boulder, CO 80302

Samuel E. Shepley, Esq.
Steadman & Shepley, LC
550 South 300 West
Payson, Utah 84651-2808
(E-mail copies to: slawfirm@hotmail.com,
Steadman&Shepley@usa.com, and
DuncanSteadman@mail.com

/RA/

Norman D. St. Amour
Counsel for NRC Staff