

RAS 3245

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S BRIEF IN RESPONSE TO "STATE OF UTAH'S BRIEF
ON THE QUESTION CERTIFIED IN LBP-01-19: THE REGULATORY
STANDARD FOR AIRCRAFT CRASH HAZARDS AT THE PFS SITE -
CONTENTION UTAH K (CREDIBLE ACCIDENTS)"

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July 23, 2001

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INTRODUCTION

In accordance with the Commission's Order in CLI-01-15,¹ the NRC Staff ("Staff") hereby files its Brief in response to the "State of Utah's Brief on the Question Certified in LBP-01-19: The Regulatory Standard for Aircraft Crash Hazards at the PFS Site - Contention Utah K (Credible Accidents)," filed on July 13, 2001 ("Utah Brief"). For the reasons set forth below, the Staff submits that the State of Utah ("State") is incorrect in asserting that the Licensing Board erred in LBP-01-19,² in its determination that a 10⁻⁶ standard for probability of occurrence should be used in evaluating aircraft crash hazards at an independent spent fuel storage installation ("ISFSI"), and that this issue was not ripe for resolution and/or required the prior resolution of disputed material facts. Accordingly, as set forth in the Staff's Brief of July 13, 2001,³ the Licensing Board's ruling

¹ *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-01-15, 53 NRC __ (June 27, 2001) (slip opinion).

² *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-01-19, 53 NRC 416, 429-32 (May 31, 2001).

³ "NRC Staff's Brief on the Appropriate Regulatory Standard to be Used in Evaluating Aircraft Crash Hazards at an Independent Spent Fuel Storage Installation Under 10 C.F.R. Part 72," filed July 13, 2001 ("Staff Brief").

in LBP-01-19 concerning the appropriate regulatory standard to be used in evaluating aircraft crash hazards at an ISFSI, should be affirmed.

BACKGROUND

On April 22, 1998, the Licensing Board admitted Contention Utah K/Confederated Tribes B (“Contention Utah K”) for litigation in this proceeding.⁴ On September 29, 2000, the Staff issued its “Safety Evaluation Report Concerning the Private Fuel Storage Facility” (“SER”), in which it, *inter alia*, determined that “the threshold probability of 1×10^{-6} crashes per year is an acceptable value for evaluating aircraft crash hazards at the PFS Facility” (SER at 15-77), and found reasonable assurance that civilian or military air crashes would not pose a hazard to the facility (*Id.* at 15-81).⁵

Following the issuance of the Staff’s SER, PFS submitted a motion for summary disposition of this contention -- in which it included new information concerning the number of F-16 aircraft transiting Skull Valley in Fiscal Years 1999 and 2000, cruise missiles, and the impact hazard posed

⁴ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 190-91, 234-35 (1998). As consolidated and admitted, Contention Utah K asserted:

The Applicant has inadequately considered credible accidents caused by external events and facilities affecting the ISFSI and the intermodal transfer site, including the cumulative effects of the nearby hazardous waste and military testing facilities in the vicinity and the effects on wildfires.

Id. at 253. See also, *Id.*, LBP-99-35, 50 NRC 180, 200-01 (1999) (granting in part, and denying in part, PFS’s first motion for partial summary disposition of this contention); *Id.*, LBP-99-39, 50 NRC 232 (1999) (dismissing the wildfire issue, and clarifying LBP-99-35).

⁵ In its Brief, the State asserts that PFS’s first motion for summary disposition “holds out the 10^{-7} standard of acceptable risk found in NUREG-0800 as the measure it must meet”; that PFS’s “most recent iteration of its Aircraft Crash Report” calculates a cumulative aircraft crash probability that exceeds 10^{-7} ; and that “as a consequence, in its Second Motion, PFS argued for a less protective aircraft crash standard than the 10^{-7} standard established in NUREG-0800” (Utah Brief at 6-7). The State implies that PFS adopted a 10^{-6} standard only when it determined that it could not meet the standard in NUREG-0800; however, the State fails to note that PFS had submitted its aircraft crash probability analysis to the Staff for review, and that the Staff’s SER, issued three months prior to PFS’s filing of its second motion for summary disposition, had agreed that a 10^{-6} probability standard is appropriate for the PFS Facility.

by general aviation aircraft.⁶ As a result of PFS's submittal of this new information, the Staff determined that it might need to revise its SER or issue an SER supplement following its review of the new information, and that it could not take a position on this issue in the proceeding until its review was complete⁷ -- notwithstanding its conclusion in the SER, based on information that it had received prior to December 2000, that aircraft crashes do not pose a credible hazard to the PFS facility.⁸ Accordingly, the Staff's response to PFS's motion for summary disposition stated a position only with respect to issues that were not affected by the new information submitted by PFS, and took no position on matters which remained under Staff review.⁹

On May 31, 2001, the Licensing Board issued its decision in LBP-01-19, in which it granted the Applicant's motion for summary disposition as to some of the issues raised in Contention Utah K, and denied the motion on other issues raised in the contention; in addition, the Board ruled that the threshold probability standard to be applied in determining whether aircraft crashes pose

⁶ See "Applicant's Motion for Summary Disposition of [Contention Utah K]," dated December 30, 2000 ("Motion"), at 13 and 21-22. PFS later submitted this new information to the NRC in formal amendments to its licensing documents. See letter from John L. Donnell (PFS) to Document Control Desk (NRC), dated January 19, 2001 (transmitting a revision of its "Aircraft Crash Impact Hazard Report"); and letter from John D. Parkyn (PFS) to Document Control Desk (NRC), dated January 19, 2001 (transmitting license application ("LA") Amendment No. 20).

⁷ See letter from E. William Brach (NRC) to John D. Parkyn (PFS), dated January 19, 2001, at 2; and letter from Sherwin E. Turk, Esq., to the Licensing Board, dated January 23, 2001, at 2.

⁸ PFS subsequently submitted additional information and analyses concerning this issue. See letters from John L. Donnell (PFS) to Document Control Desk (NRC), dated January 25, March 20, March 30, May 15, May 31, and July 20, 2001; and letter from John D. Parkyn to Document Control Desk (NRC), dated January 25, 2001 (transmitting LA Amendment No. 21).

⁹ See "NRC Staff's Response to Applicant's Motion for Summary Disposition of Utah Contention K and Confederated Tribes Contention B," dated January 30, 2001 ("Staff Response"), at 5-6, and 7-9. The State incorrectly asserts in its Brief that the Staff's Response "failed to specifically address [the] aircraft crash risk standard" (Utah Brief at 9 n.14). The Staff repeatedly stated its view that 10^{-6} was the appropriate "threshold criterion." See, e.g., Staff's Response at 7. Similarly, the State asserts that the Staff "failed to take a position on certain issues in its Response to the Applicant's motion for summary disposition (Utah Brief, at 9 n.14); in fact, the Staff clearly indicated that it was unable to address certain specified issues at that time, due to the Applicant's recent submission of new information concerning those matters. See Staff's Response at 5-6.

a credible hazard for an ISFSI is $1E-06$ (*i.e.*, 10^{-6}) per year, and referred this portion of its ruling to the Commission for review. LBP-01-19, 53 NRC at 431, 455-56. On June 27, 2001, the Commission issued its Order in CLI-01-15, directing the filing of briefs on the appropriate regulatory standard for determining whether aircraft crash hazards should be deemed to be a “credible accident” for an ISFSI. Briefs concerning this issue were then filed by PFS, the State and the Staff, on July 13, 2001.

ARGUMENT

I. The Licensing Board Correctly Found That NUREG-0800 Supports the Application of A 10^{-6} Regulatory Standard in Assessing The Probability of Aircraft Crash Hazards at an ISFSI.

In its Brief, the State argues that the Licensing Board erred in not applying a probability standard of 10^{-7} , in that (a) such a standard is established in § 3.5.1.6 of NUREG-0800, “Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants,” as “a conservative upper bound on aircraft impact probability” (Utah Brief at 6); (b) that the Licensing Board, Staff, and PFS incorrectly read § 3.5.1.6 in conjunction with NUREG-0800, § 2.2.3 (which provides that “the expected rate of occurrence of potential exposures in excess of the 10 CFR Part 100 guidelines of approximately 10^{-6} per year is acceptable if, when combined with reasonable qualitative arguments, the realistic probability can be shown to be lower”) (*Id.* at 8); and (c) that the nature and siting of the PFS facility require application of a 10^{-7} probability standard (*Id.* at 5, 8). These arguments are without merit.

First, the Licensing Board’s understanding and construction of NUREG-0800 is consistent with long-standing Staff practice and established Commission precedent which, although expressly relevant to nuclear power reactors, is also pertinent here (as discussed in the Staff’s Brief at 12). *See, e.g., Consumers Power Co.* (Big Rock Point Nuclear Power Plant), LBP-84-32, 20 NRC 601, 641 (1984), *aff’d*, ALAB-795, 21 NRC 1 (1985) (under NUREG-0800, § 2.2.3, “accidents, including those involving aircraft, may be neglected in reactor design if the expected rate of occurrence of

potential exposures in excess of 10 C.F.R. Part 100 guidelines” is below 10^{-6} per year, “if, when combined with reasonable qualitative arguments, the realistic probability of occurrence can be shown to be lower”); *cf. Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-603, 12 NRC 30, 45 (1980) (under the former Standard Review Plan (NUREG-75/087), events were to be included in the design basis for a reactor “where they have (1) a realistically calculated probability of occurrence of at least 10^{-7} per year or (2) a conservatively calculated probability of 10^{-6} per year”).¹⁰

Second, the State’s argument that a more restrictive standard should be applied to the PFS Facility, due to its large size (*i.e.*, its plan to store up to 4,000 spent fuel casks) and its siting “next to the largest military bombing and training range in the continental United States” (Utah Brief at 5), is without merit. Whatever standard is deemed to apply to an ISFSI, it should be applied generically to all ISFSIs licensed under 10 C.F.R. Part 72; whether or not a specific facility satisfies that standard is a matter that must be determined on a site-specific basis -- as will be determined in this proceeding, based on the parties’ evidentiary presentations. Moreover, the size and location of the PFS Facility are matters which are already explicitly factored into PFS’s aircraft crash analysis and in the Staff’s review thereof.¹¹ Thus, these factors do not affect the choice of an

¹⁰ The State claims that “NUREG-0800 establishes an acceptable aircraft crash probability as less than 10^{-7} per year. NUREG-0800 at 3.5.1.6-2. If the probability exceeds 10^{-7} , then the structures, systems, and components important to safety must be protected from the effects of missiles (*e.g.*, aircraft engines or ordnance).” (Utah Brief at 6 n.11). This is an incorrect restatement of NUREG-0800. As indicated in the text above, NUREG-0800 states that “accidents, including those involving aircraft, may be neglected in reactor design if the expected rate of occurrence of potential exposures in excess of 10 C.F.R. Part 100 guidelines” is below the pertinent threshold. NUREG-0800, § 2.2.3, at 2.2.3-2. *Id.*; emphasis added.

¹¹ Thus, the size of the facility is reflected in the size of the “footprint” of the facility, *i.e.*, the area available for impact by a crashing aircraft; and the site’s proximity to nearby civilian and military facilities and activities is reflected in the number and nature of aircraft flights and related activities considered in the analysis. *See, e.g.*, SER at 15-45, 15-50 to 15-51, 15-56, 15-61, and 15-72 (effective area of the facility); *Id.* at 15-46 to 15-80 (number of military flights and related activities near the PFS Facility).

appropriate regulatory standard, but rather, affect PFS's ability to satisfy that standard -- which is a matter that remains for litigation in this proceeding.

Finally, the Staff notes that the standard discussed in NUREG-0800 is directly applicable to nuclear reactors, which have a larger radiological source term and larger potential accident consequences than ISFSIs. For this reason, the Staff has indicated that the 10^{-7} "realistic analysis" standard discussed in NUREG-0800 is more conservative than necessary in considering the hazards at an ISFSI, and it is more appropriate to apply the 10^{-6} standard discussed in NUREG-0800, given the differences between an ISFSI and a nuclear reactor. See SER, at 15-77.¹² This determination is reinforced by the Commission's statements in rulemaking proceedings related to 10 C.F.R. Part 60, as discussed below.

II. The Licensing Board Correctly Derived Guidance For Its Ruling From The Commission's Statements in Rulemaking Proceedings Pertaining to Part 60 Facilities.

In its decision, the Licensing Board referred to the Commission's pronouncements, in a Statement of Consideration accompanying its 1996 Part 60 rulemaking proceeding, in support of its adoption of a 10^{-6} probability threshold for an ISFSI licensed under 10 C.F.R. Part 72. See LBP-01-19, 53 NRC at 429-31, *citing* Statement of Consideration, "Disposal of High-Level Radioactive Wastes in Geologic Repositories; Design Basis Events," 61 Fed. Reg. 64,257 (1996). The Licensing Board's reference to the Part 60 rulemaking proceeding was entirely appropriate, particularly in light of the Commission's statements that compare operations at a Part 60 geologic repository operations area ("GROA") with operations at a Part 72 Monitored Retrievable Storage

¹² The radiological source term is lower at an ISFSI than at a nuclear reactor, considering that the spent fuel has decayed over time prior to its receipt at the ISFSI; the cask has relatively low thermal energy as compared to a reactor; the number of fuel assemblies in an individual cask is less than the number of assemblies in a reactor; and spent fuel casks do not require active cooling systems and avoidance of a loss of coolant in order to avert criticality. See SER at 15-77. The reduced accident consequences of an ISFSI as compared to a nuclear reactor is reflected in the Commission's emergency planning regulations. Compare 10 C.F.R. § 72.32 and 10 C.F.R. § 50.47.

(“MRS”) facility, 61 Fed. Reg. at 64,262; the Commission’s conclusion that because those operations “are expected to be similar . . . , it is appropriate that their design bases be comparable,” *Id.*; and the Commission’s determination that “[w]ith regard to the scope of design basis events that should be considered . . . , events with probabilities of occurrence lower than 1×10^{-6} per year could be screened from further consideration due to their negligible contribution to individual risk.” *Id.* at 64,265. See Staff Brief, at 7-9.

Notwithstanding the Commission’s clear statements in its Part 60 rulemaking proceeding, and its reiteration of those views in a 1999 proposed Part 63 rulemaking proceeding,¹³ the State argues that the Commission’s adoption of a generic standard of 10^{-6} for a Part 60 facility “is not an appropriate standard for the PFS ISFSI site”; that the record “does not support the Board’s rationale that the newly promulgated generic Part 60 regulations . . . cover a Part 72 MRS – and by extension the PFS facility”; that a rule adopted under Part 60 “does not constitute a formal rule for a Part 72 facility”; and that the adoption of a rule for a Part 72 facility requires “advance notice and comment procedures” (Utah Brief at 13, 14). These arguments are misplaced.

The Licensing Board did not apply the Part 60 standard to an ISFSI based upon an erroneous belief that those rules apply to an ISFSI licensed under Part 72. Rather, the Licensing Board took notice of the Commission’s statements in the Part 60 rulemaking proceeding as guidance in interpreting the existing Part 72 requirements, based on the Commission’s indication that the Part 60 rules were intended to be consistent with its Part 72 requirements, and the Commission’s explanation of those generic requirements. Accordingly, the Licensing Board’s reference to the Commission’s statements in the Part 60 rulemaking proceeding did not constitute

¹³ Proposed Rule, “Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada,” 64 Fed. Reg. 8640, 8644, 8652 (Feb. 22, 1999). See Staff Brief, at 8-9.

either an improper application of Part 60 requirements to an ISFSI facility or an attempt to establish new regulatory requirements under Part 72.¹⁴

Finally, there is no merit in the State's assertion that a 10^{-7} probability standard should be applied, on the grounds that "a site-specific analysis of probability, consequences, and risk" for the PFS Facility "leads to a very different result than for the proposed Yucca Mountain facility," including doses and cancer risks that exceed those considered in the Part 60 rulemaking (Utah Brief, at 16). First, the Licensing Board did not base its decision on the relative risks posed by the PFS Facility as compared to any facilities discussed in the Part 60 rulemaking, and the Commission need not address this issue here.¹⁵ Second, altogether missing from the State's argument is any comparison of the risks from an ISFSI to the risks at a nuclear reactor, for which the Commission's Policy Statement on Safety Goals applies a 10^{-6} standard.¹⁶ Third, the State fails to allege that the

¹⁴ The State argues that when the Commission determined that only "accidents that will occur at a frequency of 10^{-6} or greater need be considered" in the design basis of a Part 60 facility, "[t]his was not a general pronouncement. It was a site-specific conclusion based on site-specific analyses of risk at the Yucca Mountain facility" (Utah Brief at 15). This is incorrect. The Commission's statement refers to a generic standard for the design basis of a Part 60 GROA and Part 72 facilities, due to similarities in their types of operations. See 61 Fed. Reg. at 64,261.

¹⁵ The Licensing Board noted that the Commission had made its remarks concerning "'surface facilities' at a Part 72 [MRS] installation that, unlike the proposed PFS interim storage facility, could include spent fuel handling and packaging operations," but found that:

[N]othing in that rulemaking discussion suggests that the central basis for the State's claimed $1E-07$ boundary figure -- the consequences of an aircraft crash into a storage cask -- was outside the scope of the matters considered by the Commission in reaching its bounding conclusion. Whatever may be the differences relative to fuel handling and packaging, as is the case with the PFS ISFSI facility, an MRS will utilize above-ground storage casks. Thus, in accordance with the Commission's guidance in the 1996 Part 60 rulemaking, we will apply the $1E-06$ standard outlined therein.

LBP-01-19, 53 NRC at 431.

¹⁶ See Policy Statement, "Safety Goals for the Operations of Nuclear Power Plants," 51 Fed. Reg. 30,028, 30,031 (1986).

risks at the PFS facility exceed the risks at an MRS or ISFSI of the type considered by the Commission in its generic statements in the Part 60 rulemaking proceeding; inasmuch as those statements concerned MRS and ISFSI facilities which handle, process and repackage spent fuel and thus present greater risk than the PFS Facility (which will not remove spent fuel from the canisters),¹⁷ the Commission's statements concerning the design basis of facilities licensed under 10 C.F.R. Part 72 may be deemed to apply with even greater force to the PFS Facility.¹⁸

III. The Licensing Board Correctly Determined That The Issue Of The Appropriate Regulatory Standard For Use in Assessing Aircraft Crash Hazards At An ISFSI Was Ripe For Resolution, And That Summary Disposition of This Issue Was Appropriate.

The State argues that relevant material facts remain in dispute, and that summary disposition was therefore inappropriate. In this regard, the State claims that disputed facts exist as to "whether PFS used meaningful and conservative data as required by NUREG-0800," or can show that the realistic probability is lower than 10^{-7} (Utah Brief at 9); and the magnitude of the hazard posed by "F-16s transiting Skull Valley, potential F-16 ordnance impacts, air-to-air combat training on the UTTR, aircraft flying the Moser Recovery Route, aircraft flying on IR-420, and the cumulative hazard" (*Id.*). These issues, however, were not disposed of by the Board's ruling in LBP-01-19; rather, these matters concern factual issues as to the adequacy and outcome of PFS's hazard analysis, and may be addressed later in the proceeding, in considering whether the aircraft

¹⁷ See *generally*, Statement of Consideration, "Emergency Planning Licensing Requirements for Independent Spent Fuel Storage Facilities (ISFSI) and Monitored Retrievable Storage Facilities (MRS)," 60 Fed. Reg. 32,430, 32,431 (1995) (establishing offsite emergency planning requirements under Part 72 only for those facilities that handle, process or repackage spent fuel). See 10 C.F.R. § 72.32(b).

¹⁸ The State urges the Commission to adopt a 10^{-7} standard, or to "remand the issue back to the Board for an evidentiary finding of whether the PFS facility is sufficiently similar to the Yucca Mountain waste storage and handling Part 60 facility that the same generic 10^{-6} standard should apply to both" (Utah Brief, at 17). No such remand is required, in that the standard to be used in establishing the design basis for an ISFSI under 10 C.F.R. Part 72 has already been addressed by the Commission on a generic basis. See 61 Fed. Reg. at 64,261.

crash hazards at the PFS Facility exceed the regulatory standard adopted in LBP-01-19.¹⁹ Accordingly, contrary to the State's assertion, there did not exist a genuine issue of material fact which should have precluded the Licensing Board from resolving this issue on summary disposition.

CONCLUSION

For the reasons set forth above, the Staff submits that the Licensing Board correctly determined that a threshold probability of (approximately) 10^{-6} per year establishes the appropriate regulatory standard for evaluating whether aircraft crashes pose a credible hazard for an ISFSI under 10 C.F.R. Part 72. The State has not demonstrated any legal or factual error in this determination, or any reason to believe that summary disposition of this issue was inappropriate. Accordingly, the Licensing Board's ruling on this issue in LBP-01-19 should be affirmed.

Respectfully submitted,

/RA/

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 23rd day of July 2001

¹⁹ The State also argues that the Licensing Board "inappropriately uses a Part 60 rulemaking proceeding to make a Part 72 summary disposition decision," and improperly imposes the burden of proof on summary disposition against the State (Utah Brief, at 14-15). This argument is without merit. The Board's ruling resolved a legal issue as to the appropriate regulatory standard to be applied; the Board did not impose the burden of proof upon the State, but merely weighed the parties' legal arguments, and found the Applicant's argument to be more persuasive and legally sound than that of the State. A resolution of legal issues is entirely proper upon summary disposition, in that no issues of material fact remain for resolution. *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-34, 50 NRC 168 (1999) (summary disposition of Contention Utah B, "License Needed for Intermodal Transfer Facility"); *General Public Utilities Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-97-1, 45 NRC 7, 12-13 (1997); *Id.*, LBP-96-23, 44 NRC 143, 166 (1997).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN RESPONSE TO "STATE OF UTAH'S BRIEF ON THE QUESTION CERTIFIED IN LBP-01-19: THE REGULATORY STANDARD FOR AIRCRAFT CRASH HAZARDS AT THE PFS SITE - CONTENTION UTAH K (CREDIBLE ACCIDENTS)" 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 23rd day of July, 2001:

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