

RAS 3267

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

LBP-01-23

DOCKETED 08/01/01

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Before Administrative Judges:

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

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 1, 2001

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

Pending before the Licensing Board in this 10 C.F.R. Part 72 proceeding concerning the application of Private Fuel Storage, L.L.C., (PFS) for authorization to construct and operate an independent spent fuel storage installation (ISFSI) in Skull Valley, Utah, is a motion for summary disposition filed by PFS regarding contention Utah Z, No Action Alternative. With contention Utah Z, intervenor State of Utah (State) challenges the adequacy of the "no-action" alternative discussion in the environmental report (ER) that accompanied the PFS ISFSI application. The NRC staff supports the PFS summary disposition request, while the State opposes this motion.

Pursuant to 10 C.F.R. § 2.749, for the reasons set forth below we grant the PFS dispositive motion.

I. BACKGROUND

In June 1997, as part of its license application for its proposed ISFSI, PFS submitted an ER addressing various issues pertaining to the National Environmental Policy Act of 1969 (NEPA). See 10 C.F.R. §§ 51.45, 51.60(b)(iii). On November 23, 1997, the State filed its safety and environmental contentions relating to the PFS application, including a challenge to the adequacy of the ER's discussion of the no-action alternative under NEPA. See [State] Contentions on the Construction and Operating License Application By [PFS] for an Independent Spent Fuel Storage Facility (Nov. 23, 1997) [hereinafter Utah Contentions]. The contention now at issue -- contention Utah Z -- was admitted in its entirety by the Licensing Board in its April 1998 ruling on standing and contentions. See LBP-98-7, 47 NRC 142, 203, aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998).

As admitted, that contention reads:

The Environmental Report does not comply with NEPA because it does not adequately discuss the "no action" alternative.

Id. at 256. In describing the basis for the admitted portions of this contention, the State declared that PFS's ER focused "solely on the perceived disadvantages of the no build alternative" and therefore "fail[ed] to provide [a] balanced comparison of environmental consequences among alternatives." See Utah Contentions at 169. To illustrate this failure, the State listed several advantages of the no-action alternative that PFS allegedly ignored in its ER: (1) the benefits of foregoing shipment of 4,000 casks of spent fuel rods thousands of miles across the country; (2) the diminished potential for sabotage at a centralized storage facility; (3) the decreased risk of accidents from additional cask handling; and (4) the safety gains in storing spent fuel at the reactor sites, whose spent fuel pools will be accessible for transfers or inspections. See id. at 169-70.

Thereafter, in a May 18, 1998 ruling on reconsideration motions relating to its April 1998 decision, the Board clarified the scope of the admitted contention by excluding consideration of the aforementioned sabotage aspects of contention Utah Z. See LBP-98-10, 47 NRC 288, 296 (1998). Additionally, in a November 9, 2000 memorandum and order, the Board further clarified the scope of Utah Z by limiting it to environmental impacts and excluding economic impacts. See Licensing Board Memorandum and Order (Ruling on Contention Utah Z Discovery Production Requests) (Nov. 9, 2000) at 4 (unpublished).

In June 2000, the staff issued its draft environmental impact statement (DEIS) regarding the PFS facility. See 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, NUREG-1714 (June 2000) [hereinafter DEIS]. Among other things, the DEIS provided a “no-action alternative” discussion containing an expanded analysis of the environmental impacts that might stem from the PFS proposal. Compare ER at 8.1-2 to -4 with DEIS at 6-43 to -47, 9-8 to -9 & Table 9.1 (summary and comparison of potential environmental impacts).

On February 14, 2001, PFS filed a motion for summary disposition of contention Utah Z, which is presently before us for resolution, supported by a statement of material facts not in dispute. The premise of this motion is that there is no genuine dispute of material fact with respect to the State’s no-action alternative contention Utah Z challenging the ER in that the State’s contention was rendered moot by the staff’s subsequent coverage of the no-action alternative in the DEIS. See [PFS] Motion for Summary Disposition of Utah Contention Z - No Action Alternative (Feb. 14, 2001) at 6-18 [hereinafter PFS Dispositive Motion]; see also id. Statement of Material Facts on Which No Genuine Dispute Exists [hereinafter PFS Undisputed Facts].

In its March 6, 2001 response to the PFS summary disposition motion, the staff declared its support for this PFS request. In its response, which is supported by the affidavit of Scott C. Flanders, a Senior Project Manager in the Spent Fuel Project Office of the Office of Nuclear Material Safety and Safeguards, the staff agrees with PFS that the DEIS renders contention Utah Z moot. See NRC Staff's Response to [PFS] Motion for Summary Disposition of Utah Contention Z - No Action Alternative (March 6, 2001) at 5-7 [hereinafter Staff Response]; see also id. attach. A (Affidavit of Scott C. Flanders Concerning Utah Contention Z) [hereinafter Flanders Affidavit]. The State, on the other hand, opposes the PFS motion in all respects, supported by a statement of disputed and relevant and material facts and the affidavit of Dr. Marvin Resnikoff, a senior associate with the private consulting firm Radioactive Waste Management Associates. See [State] Response to [PFS] Motion for Summary Disposition on Utah Contention Z (Mar. 13, 2001) at 4-18 [hereinafter State Response]; see also id. [State] Statement of Disputed and Relevant Material Facts; id. attach. A (Declaration of Dr. Marvin Resnikoff Regarding Material Facts in Dispute with Respect to Contention Utah Z). Thereafter, pursuant to 10 C.F.R. § 2.749 and in accordance with a Board scheduling order, see Licensing Board Order (General Response Schedules) (Apr. 23, 1999) (unpublished), the State expressed its disagreement with the staff response as well. See [State] Reply to Staff's Response to [PFS] Motion for Summary Disposition on Utah Contention Z (March 22, 2001) [hereinafter State Reply].

II. DISCUSSION

A. Summary Disposition Standards

We have articulated the standard governing the consideration of a motion for summary disposition several times in this proceeding in ruling on previous PFS dispositive motions and rely on that same standard here:

Under 10 C.F.R. § 2.749(a), (d) summary disposition may be entered with respect to any matter (or all 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).

LBP-01-19, 53 NRC 416, 421-22 (2001) (quoting cited cases from this proceeding).

With these general principles in mind, we turn to the PFS summary disposition motion regarding contention Utah Z.

B. Contention Utah Z

1. PFS Position

In this instance, PFS has provided a statement of purportedly undisputed material facts indicating that the State-alleged deficiencies regarding the no-action alternative discussion in the ER (i.e., the supposed PFS discussion only of the disadvantages of the no-action alternative) are, in fact, addressed in the staff-issued DEIS. Initially, PFS notes that the DEIS specifically acknowledges in chapter six:

“Under the no-action alternative, no PFS [facility] and no transportation facilities would be constructed in Skull Valley. The impacts described in Chapters 4 and 5 of the DEIS would not occur, and Skull Valley would remain as it is today (see Chapter 3).”

PFS Dispositive Motion at 9 (quoting DEIS at 6-43). According to PFS, DEIS chapters four and five are, respectively, sixty-five page discussions of PFS facility construction and operation impacts and transportation impacts. Also relevant to the State’s concerns, PFS declares, is the portion of DEIS chapter six that assesses the impact of the no-action alternative for future at-reactor ISFSIs relative to geology/minerals/soils, water resources, air quality, ecological/ socioeconomic/community/cultural resources, and human health. See id. at 9-10; see also DEIS at 6-45 to -47. And as further evidence that the State’s contention Utah Z concern regarding the no-action alternative analysis has now been addressed, PFS maintains that DEIS chapter 9 contains a comparative table summary of the impacts of alternative actions considered in the DEIS, including the no-action alternative. See PFS Dispositive Motion at 10.

Moreover, according to PFS, several sections of the DEIS address the particular assertions that form the basis of the State’s contention Utah Z challenge to the PFS ER relative to its discussion of the environmental advantages and disadvantages of the no-action alternative.¹ In connection with the State’s contention Utah Z concern about the transportation effect advantages of the no-action alternative, PFS highlights the DEIS chapter five discussion of the effects of transporting 4,000 casks of spent fuel across the country, the statement in DEIS chapter six indicating that the impacts described in chapters four and five would not occur if the proposed ISFSI were not built, and the chapter 9 table comparison of transportation impacts, including the no-action alternative. See PFS Dispositive Motion at 11-13; see also

¹ PFS notes that the other specific basis for the State’s no-action alternative contention -- sabotage avoidance -- was dismissed by the Board. See PFS Dispositive Motion at 2 (citing LBP-98-10, 47 NRC 288, 296 (1998)).

DEIS at 5-35, 6-43, 9-34 to -35 (Table 9.1). Relative to the State's contention Utah Z challenge to the lack of ER discussion about the accident risk increase associated with cask handling, PFS points out there is a measurement in DEIS chapter 4 of the impact of cask handling accidents as well as a conclusion that the effects of such an accident would be insignificant. See PFS Dispositive Motion at 13-15; see also DEIS at 4-48. Finally, with respect to the State's contention Utah Z challenge regarding the failure to outline the safety advantages of onsite waste storage at existing reactors, PFS declares that the DEIS recognizes another advantage of the no-action alternative, specifically that at-reactor storage is safe and will not have any significant incremental environmental impact. See PFS Dispositive Motion at 15-17; see also DEIS at 6-44.

Based on this DEIS consideration of the no-action alternative, PFS thus asserts that the concerns raised by contention Utah Z regarding the inadequate PFS ER discussion of the advantages of the no-action alternative have been satisfied. According to PFS, this renders moot any State assertion that a balanced discussion of the no-action alternative was lacking, thus entitling it to summary disposition in its favor on contention Utah Z. See PFS Dispositive Motion at 18.

2. Staff Position

For its part, the staff agrees with PFS, declaring that the DEIS sufficiently covers both the advantages and disadvantages of the no-action alternative so as to satisfy NEPA's requirements as well as the points highlighted by the State as the basis for contention Utah Z. See Staff Response at 8-13; see also Flanders Affidavit at 2-3. Thus, the staff concludes that by virtue of the DEIS, there no longer is any genuine issue of material fact relative to contention Utah Z so that summary disposition in favor of PFS is appropriate.

3. State Position

In opposing the PFS dispositive motion, the State rejects the PFS assertion that contention Utah Z is merely a challenge to the failure of the ER to address the advantages of the no-action alternative. The State asserts that this interpretation is contrary to the plain language of contention Utah Z in that the contention does not state that the ER is devoid of all discussion of the no-action alternative. Instead, the State maintains that the ER did not properly consider the no-action alternative and failed to provide a balanced comparison between the advantages and disadvantages of the option. According to the State, the contention was intended as a challenge to the adequacy of the qualitative discussion of the no-action alternative in the ER. See State Response at 5; see also State Reply 2-3.

Based on this interpretation of the scope of contention Utah Z, the State insists that PFS has failed to meet its burden relative to its summary disposition request. According to the State, as was the case with the ER, the DEIS presents the no-action alternative in a conclusory, biased manner by claiming and emphasizing the disadvantages of that alternative without justifying them. See State Response at 5-7; see also State Reply at 4-8, 9-10. The State asserts that this is apparent from the DEIS discussion of the three disadvantages that also were identified in the ER -- spent fuel storage space loss leading to power generation loss; delays in reactor decommissioning activities and associated expenses incurred for continued at-reactor spent fuel storage; and the need to construct additional reactor storage sites -- each of which are inadequately supported and analyzed. See State Response at 7-14; see also State Reply at 8. Further, the State declares, as was the case with the ER, the DEIS still fails to discuss adequately each of the three specific "advantage" items referenced in the basis statement to contention Utah Z. According to the State, relative to the question of transportation impacts, the DEIS fails to recognize that postponing spent fuel shipments until a final repository is

constructed will result in reduced radioactivity levels, and so reduced occupational and public doses, relative to the transported fuel. So too, the State asserts the DEIS fails to analyze adequately the no-action impacts of reduced exposures and other environmental benefits that would result from (1) fewer fuel handling operations; (2) fewer managerial actions and human errors that could result in transportation accidents or en route delays; and (3) the likelihood that existing reactor facilities will continue to store fuel onsite, regardless of whether an offsite facility like the PFS proposal is constructed. Finally, the State declares that the DEIS no-action alternative analysis is deficient because it does not recognize the benefits of on-site storage at existing reactor facilities vis-a-vis the possibility of military aircraft crash-related radiological releases, which the State asserts are a concern only with regard to the PFS facility. See State Response at 14-18; see also State Reply at 9.

4. Board Ruling

From this discussion, it is apparent that the parties' submissions relative to the PFS dispositive motion highlight the initial, and potentially determinative, question that must be answered relative to contention Utah Z, i.e., what is the scope of this State issue statement? In this regard, the Commission has made it clear that in drafting contentions regarding a challenged licensing action, the application (including an accompanying Safety Analysis Report and ER) is to be the initial focus of any issue statements and their supporting bases. As the Commission also has made clear, at the petitioner's choosing, such statements can take three forms: a challenge to the application's adequacy based on the validity of the information that is in the application; a challenge to the application's adequacy based on its alleged omission of relevant information; or some combination of these two challenges. See 10 C.F.R. § 2.714(b)(2)(iii). Further, it is apparent that in determining which of these three forms is involved in any contention, we look first to the language of the contention. Yet, if that proves

unavailing, the language of the bases provided to support the contention may be examined to discern the sponsor's intent relative to the contention's scope and meaning. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988) (explaining that when "the issue is the scope of a contention, there is no good reason not to construe the contention and its bases together in order to get a sense of what precise issue the party seeks to raise").

In this instance, the contention in question is relatively succinct, declaring simply that the PFS ER did not "adequately discuss" the no-action alternative. On its face, it is unclear which of the three forms of application challenges outlined above this issue statement is intended to encompass. To ascertain the scope of this contention, therefore, we must examine the two-page basis statement provided by the State. As was noted above, see supra p. 2, the basis for contention Utah Z declares, the ER "[cannot] be used to meaningfully discuss the no build alternative, because the Applicant focuses solely on the perceived disadvantages of the no build alternative." It then provides three examples of this purported deficiency -- transportation, spent fuel handling, and existing onsite storage expansion -- that the State asserts are not considered at all so as to render the PFS discussion "one-sided." Moreover, in seeking to support this challenge to the "adequacy" of the ER, the State also relied on four judicial decisions, all of which are described as supporting the proposition that an agency failure to discuss the no-build alternative is improper.²

Under the circumstances, it is apparent that contention Utah Z, as framed by the State, was an "omission" challenge to the no-action alternative aspect of the ER that was based on

² As PFS points out, only three of these cases actually involve a failure to discuss the no-build alternative. See PFS Dispositive Motion at 11. The fourth, Van Abbema v. Fornell, 807 F.2d 633, 640-43 (7th Cir. 1986), is based on an agency's reliance on a record containing known factual inconsistencies and ambiguities that the agency made no attempt to resolve, a situation unlike that before the Board.

the alleged PFS failure to include a discussion of certain information, specifically the disadvantages of the no-action alternative. Putting aside the question of whether or not an ER (or DEIS/EIS) lacking such a discussion would be adequate, the superseding DEIS includes a no-action alternative analysis that discusses both the advantages and disadvantages of the proposed course of action, including the three matters specifically identified by the State. What also is apparent is that the State now questions the adequacy of that analysis in the DEIS. This is certainly something the State can do, so long as it does so in the context of a timely, properly framed contention. As proffered and admitted, however, contention Utah Z does not provide the vehicle to pursue such a challenge. Rather, what is needed is a new or amended contention outlining the State's concerns about the DEIS discussion of the no-action alternative.³ At this point, more than a year after the DEIS was issued, whether the State could gain the admission of such an issue seems problematic. In any event, because the State has made no such request, that is not a matter we need resolve at this juncture.

Instead, relative to the matter before us, for the reasons set forth above, we find that PFS has met its burden of showing there are not material facts at issue so as to be entitled to summary disposition regarding contention Utah Z, as admitted, in that the State concern framed by that issue statement is now moot.⁴

³ As the parties noted, the Commission has recognized that a contention contesting an applicant's ER may be viewed as a challenge to the staff's subsequently-issued DEIS/EIS. See, e.g., Staff Response at 9-10 (citing Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998)). This "migration" tenet does not, however, change the basic form of the contention, i.e., whether it challenges the soundness of the information the contention contains or claims that the issue statement omits necessary information (or some combination of the two).

⁴ Although the issue of the qualitative validity of the DEIS no-action analysis is not now before us, the staff's DEIS analysis nonetheless is facially sufficient to support the PFS argument regarding the mootness of contention Utah Z in connection with the asserted failure to discuss the disadvantages of the no-action alternative.

III. Conclusion

With regard to contention Utah Z, No Action Alternative, based on the inclusion of a discussion in the DEIS that analyzes both the advantages and disadvantages of the no-action alternative, PFS has established that there are no genuine issues as to any material fact and that it is entitled to judgment in its favor as a matter of law regarding that State issue statement, which is now moot.

For the foregoing reasons, it is this first day of August 2001, ORDERED, that the February 14, 2001 PFS motion for summary disposition of contention Utah Z is granted and, for

the reasons set forth in section II.B.4 of this memorandum and order, a decision regarding contention Utah Z is rendered in favor of PFS on the ground that issue is now moot.

THE ATOMIC SAFETY
AND LICENSING BOARD⁵

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

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Dr. Peter S. Lam
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Rockville, Maryland

August 1, 2001

⁵ 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 L.L.C.) Docket No. 72-22-ISFSI
)
(Independent Spent Fuel Storage)
Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (GRANTING SUMMARY DISPOSITION MOTION REGARDING CONTENTION UTAH Z) (LBP-01-23) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Docket No. 72-22-ISFSI
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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 1st day of August 2001