

September 4, 2001 (10:09AM)

NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel)	
Storage Installation))	August 27, 2001

STATE OF UTAH'S REPLY TO NRC STAFF'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF UTAH CONTENTION W

The State files this Reply to the Staff's August 16, 2001 Response to the Applicant's July 27, 2001, Motion for Summary Disposition of Utah Contention W - NEPA Flooding at Rowley Junction. The Staff's Response is in harmony with PFS's Motion. The Staff raises no new or novel arguments in its Response and like PFS the Staff relies on undocumented elevations figures for the final grade elevation of the Intermodal Transfer Facility ("ITF") as well as an inapplicable draft State of Utah planning document. There still remain disputed questions of relevant material fact and, as a matter of law, PFS is not entitled to summary disposition of Contention Utah W.

ARGUMENT

I. The Staff's Minor Modifications to PFS's Material Facts Do Not Change the State's Statement of Disputed and Relevant Material Facts

The Staff has edited PFS's Material Facts even though the Staff considers that PFS's unedited Material Fact raise no genuine dispute of material fact. Staff Response at 4. A good portion of the Staff's "corrections" consists of adding "PFS states" to introduce the fact, adding "HI-STAR 100" before the words "shipping cask" and softening some of PFS's

absolute statements.¹ The Staff's minor editorial changes to PFS's Material Facts do not in any way change the State's Statement of Disputed and Relevant Material Facts. Moreover, the Staff's edited Material Facts offer no support for PFS's Motion for Summary Disposition.

II. The Issues Raised by the State in Contention Utah W Are Procedurally Valid.

The Staff bemoans that the State did not amend Contention Utah W when in its August 1998 license application amendment PFS "abandoned" its original site at Rowley Junction in favor of a site 1.8 miles west of Rowley Junction. Staff Response at 7.

The State had no reason to amend its contention. Notably, PFS did not accurately identify the new intermodal transfer facility site. See State of Utah's Response and Objections to Applicant's First Set of Formal Discovery Requests ("Utah's Response to First Set") dated April 14, 1999 wherein the State advised PFS that based on information PFS had submitted to the U.S. Bureau of Land Management in February 1999, the legal description of the ITF placed the site on the mudflats south of Interstate 80. Utah's Response to First Set at 53.² Until PFS accurately described the new location of the ITF, the State had no accurate means of comparing the elevations at the two sites. *Id.* at 53-54. In a supplement response to PFS's First Set of Discovery, the State again advised PFS that it could not make such comparisons "until the Applicant supplies the exact location and elevation for the new intermodal transfer facility..." State of Utah's Fourth Supplemental Response to First Set, dated May 21, 1999, at 2.

¹ See *eg.*, Staff edited Fact 33 deleting the word "always;" see *also* edited Fact 47.

² The discovery response was in relation to contention Utah N. Contention Utah W, however, incorporates Utah N by reference, thus the response is relevant to Utah W too.

Moreover, in September 1999 the Staff did not raise the issue of the State amending Contention Utah W when the Staff commented on the impact of the Board's ruling granting PFS summary disposition of Utah B. See NRC Staff's Position Regarding the Impact of LBP-00-34 on Other Contentions, dated September 7, 1999 at 8. Nor did the Board find it necessary for the State to amend Utah W when it chose not to dismiss Utah W as part of the Board's merits determination on Utah B. LBP 99-39, 50 NRC 232, 236 (1999).

PFS's April 14, 2000 revision to its Environmental Report and the Staff's Draft Environment Impact Statement, NUREG-1714 ("DEIS") referred to in the Staff's Response as other reasons requiring the State to amend its contention do not withstand scrutiny. Both documents do not have evidentiary support for the proposed final grade elevation of the ITF and both documents rely on a draft State of Utah planning document that is inappropriate for siting an ITF. See Utah's Response to Summary Disposition of Utah W at 6-7 and Utah's Statement of Disputed and Relevant Material Facts ("Utah Facts") at ¶¶ 1-5.

For the Board to accept the Staff's procedural argument, it would have to agree that the State should have amended Contention Utah W to contend that PFS says it has re-located the ITF site, although the State does not know the exact location of the new site.³ Under the Staff's rationale, the State would also be required to amend Utah W to avoid mootness even though the ER and DEIS were not bottomed on unsupportable evidence.⁴

³ Undoubtedly, the Staff would have opposed any proposal by the State's to amend Utah W as lacking support.

⁴ Here the State would have to contend that a State of Utah draft planning document is not applicable to either the new or the old ITF sites, and that PFS has not conducted a survey to determine the exact location or elevation of either site.

Under the Commission's strict contention rule, even without amendment, contention Utah W served the purpose of the rule: it put the parties on notice of the State's specific grievances and invoked the hearing process in a dispute susceptible of resolution through adjudication. See Duke Energy Co. (Oconee Nuclear Station, Units 1, 2 and 3), 49 NRC 328, 334 (1999). Such a hyper-technical reading of NRC's procedural rules is an anathema to procedural due process and should be not be countenanced by the Board.

III. The DEIS Does Not Evaluate the Environmental Impacts of Flooding at Rowley Junction.

The Staff's references to various sections of the DEIS offer no substantive support that the Staff has evaluated the environmental impacts of flooding at the ITF. See Staff Response at 3 and 8. The most relevant reference in the Staff's Response is to DEIS Section 5.2.1.2 where there is a paragraph about flooding at the ITF. DEIS at 5-7, lines 9-18. Also, Section 5.2.2.2 has a two line sentence that says potential flooding impacts from operation of the ITF would be "small" and then it cross references DEIS Section 5.2.1.2. In the DEIS discussion on page 5-7, the Staff has no support for the ITF site elevation levels referenced therein. The Staff relies on the unsupported elevation figures in the DEIS in combination with a draft planning document prepared by the State of Utah after the recent historic rise of the Great Salt Lake as its only substantive evaluation of potential environmental impacts from flooding at Rowley Junction. Accordingly, the DEIS does not meet NEPA's pronouncement for a "detailed statement by the responsible official on (i) the environmental impact of the proposed action, [and] (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented...." 42 U.S.C. § 4332(C).

As described in the State's Response to PFS's Motion, the Great Salt Lake Planning Project Draft Analysis of Proposed Management Alternatives is not applicable to siting high hazard industries. *Sæ* State Response to PFS's Motion 6-7 and Utah Facts at ¶¶ 1-5. The State has laws directly relating to siting an intermodal transfer facility that the Staff has completely ignored in the DEIS. *Id.* State laws and policies are not a smorgasbord where the federal government can pick and choose only tasty morsels that support its position. If the Staff intends to rely on State laws or policies in the DEIS, it should use State law in its entirety – or at least explain why only the issues supportive of the Staff's position warrant airing in the DEIS.

The other sections of the DEIS referenced by the Staff are only marginally relevant, if at all to the environmental impacts of flooding at Rowley Junction. Section 2.2.4.2, Local Transportation Options (in Skull Valley), describes the general lay-out of the site and the proposed operations that PFS intends to conduct at the site. Section 3.2.1.2, Flooding, is a subsection on Surface Water Hydrology and Quality, and the only discussion about the ITF is a reference to the historic high of the Great Salt Lake and another reference to the Utah Department of Natural Resources draft planning document. *Sæ* DEIS at 3-11, lines 27-31. DEIS Section 5.2.1.3 relates to water use during construction; it does not describe flooding. Contrary to the Staff's assertion, the foregoing sections of the DEIS do not evaluate the environmental impacts of flooding at the ITF.

Finally, the Staff makes the point that it did not rely on Table S-4 and "to the extent that transportation impacts are raised by Contention Utah W, the Staff relies upon the PFS-specific transportation analysis set forth in the DEIS." Staff Response at 8 and n. 11. The

Staff's transportation analysis, however, does not encompass the conditions at the ITF that may cause environmental impacts because of flooding. Therefore, the issues raised by Dr. Resnikoff in support of the State's Response to PFS's Motion are valid and have not been addressed in the DEIS.

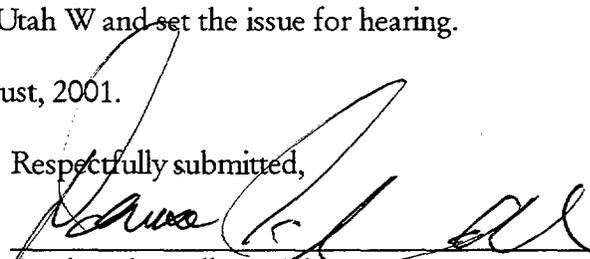
The DEIS focuses on the unsubstantiated elevation of the ITF and an inapplicable draft State of Utah planning document. There is no foundational support for the elevation figures in the DEIS or Staff's reliance on the draft planning document. Accordingly, the DEIS does not comply with NEPA and it does not support PFS's Motion for Summary Disposition of Utah W.

CONCLUSION

For the reasons stated above, the State request the Board to deny PFS's Motion for Summary Disposition of Contention Utah W and set the issue for hearing.

DATED this 27th day of August, 2001.

Respectfully submitted,



Denise Chancellor, Assistant Attorney General
Fred G Nelson, Assistant Attorney General
Connie Nakahara, Special Assistant Attorney General
Diane Curran, Special Assistant Attorney General
Laura Lockhart, Assistant Attorney General
Attorneys for State of Utah
Utah Attorney General's Office
160 East 300 South, 5th Floor, Box 140873
Salt Lake City, UT 84114-0873
Telephone: (801) 366-0286, Fax: (801) 366-0292

CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S REPLY TO NRC STAFF'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF UTAH CONTENTION W was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 27th day of August 2001:

Rulemaking & Adjudication Staff
Secretary of the Commission
U. S. Nuclear Regulatory Commission
Washington D.C. 20555
E-mail: hearingdocket@nrc.gov
(original and two copies)

G. Paul Bollwerk, III, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: gpb@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: jrk2@nrc.gov
E-Mail: kjerry@erols.com

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: psl@nrc.gov

Sherwin E. Turk, Esq.
Catherine L. Marco, Esq.
Office of the General Counsel
Mail Stop - 0-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: set@nrc.gov
E-Mail: clm@nrc.gov
E-Mail: pfscase@nrc.gov

Jay E. Silberg, Esq.
Ernest L. Blake, Jr., Esq.
Paul A. Gaukler, Esq.
Shaw Pittman, LLP
2300 N Street, N. W.
Washington, DC 20037-8007
E-Mail: Jay_Silberg@shawpittman.com
E-Mail: ernest_blake@shawpittman.com
E-Mail: paul_gaukler@shawpittman.com

John Paul Kennedy, Sr., Esq.
David W. Tufts
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, Utah 84111
E-Mail: dtufts@djplaw.com

Joro Walker, Esq.
Land and Water Fund of the Rockies
1473 South 1100 East, Suite F
Salt Lake City, Utah 84105

E-Mail: utah@lawfund.org

Larry EchoHawk
Paul C. EchoHawk
Mark A. EchoHawk
EchoHawk PLLC
P.O. Box 6119
Pocatello, Idaho 83205-6119
E-mail: pechohawk@hollandhart.com

Tim Vollmann
3301-R Coors Road N.W. # 302
Albuquerque, NM 87120
E-mail: tvollmann@hotmail.com

James M. Cutchin
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-Mail: jmc3@nrc.gov
(*electronic copy only*)

Office of the Commission Appellate
Adjudication
Mail Stop: O14-G-15
U. S. Nuclear Regulatory Commission
Washington, DC 20555



Denise Chancellor
Assistant Attorney General
State of Utah