

RAS 3411

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

LBP-01-26

DOCKETED 09/20/01
SERVED 09/20/01

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

September 20, 2001

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

Pending before the Licensing Board in this proceeding to construct and operate a 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI) on the Skull Valley, Utah reservation of intervenor Skull Valley Band of Goshute Indians (Skull Valley Band) is a motion by applicant Private Fuel Storage, L.L.C., (PFS) for summary disposition of intervenor State of Utah's (State) contention Utah AA, Range of Alternatives. As admitted, contention Utah AA challenges the PFS environmental report (ER) National Environmental Policy Act (NEPA) analysis of the range of reasonable siting alternatives for its proposed action. PFS asks that summary disposition be granted in its favor on contention Utah AA because that issue is now moot or incorrect as a matter of law, a request that is supported by the NRC staff and opposed by the State.

For the reasons set forth below, we grant the PFS dispositive motion on this issue.

I. BACKGROUND

In its April 1998 ruling on standing and litigable issues, the Licensing Board admitted contention Utah AA, concerning the sufficiency of the range of siting alternatives discussed in the ER that accompanied the PFS application for its proposed facility. See LBP-98-7, 47 NRC 142, aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998). As admitted by the Board, the contention reads:

The Environmental Report fails to comply with the National Environmental Policy Act because it does not adequately evaluate the range of reasonable alternatives to the proposed action.

Id. at 256. In admitting the contention, the Board limited the scope of the contention to the adequacy of the PFS alternative site analysis. See id. at 203. Additionally, the Board consolidated a similar portion of another contention, Castle Rock 13, Inadequate Consideration of Alternatives, with contention Utah AA. See id. at 219. Although the parties sponsoring that contention later withdrew as intervenors to this proceeding, the Board ruled their withdrawal did not affect the viability of contention Utah AA as admitted. See LBP-99-6, 49 NRC 114, 118 (1999).

As its basis for contention Utah AA, the State asserted that the ER discussion of siting alternatives was “woefully inadequate,” declaring more specifically that (1) for the second site screening phase, by which PFS reduced its consideration from thirty-eight to three sites, there was “no discussion or tabulation” of the screening results; (2) there was “no mention” of whether the site suitability questionnaire used for the third site screening phase went to all thirty-eight site owners or only to the Skull Valley Band; (3) there was “absolutely no discussion or tabulation” of the responses to the phase three questionnaire; (4) there was no identification of the three sites selected using the third screening phase; (5) there was no discussion of how

the two Skull Valley Band reservation sites were selected as a result of the final screening process; (6) whether a particular site was within a “willing jurisdiction” seemed to be an overarching selection criterion; (7) there was no discussion of the application of the 10 C.F.R. Part 72, Subpart E site evaluation factors; (8) there was a “failure to consider” transportation corridors and accident and risk analyses; (9) site selection criteria are unreliable because they were not applied at all screening levels; and (10) screening process information has not been described and tabulated. [State] Contentions on the Construction and Operating License Application by [PFS] for an Independent Spent Fuel Storage Facility (Nov. 23, 1997) at 172-74 [hereinafter State Contentions]. Further, in connection with contention Castle Rock 13, the relevant portion of the basis for the contention asserted that in connection with the Skull Valley Band site and a Wyoming site that were considered as the two final candidate sites, or for the Skull Valley Band site and any other location, there is “no discussion” in the ER on environmental effects and impacts, technical and other costs/benefits of alternatives. 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 [PFS] Facility (Nov. 21, 1997) at 50-51.

In June 2000, the staff issued a draft environmental impact statement (DEIS) for the PFS facility. See Draft Environmental Impact Statement for the Construction and Operation of an [ISFSI] on the Reservation of the [Skull Valley Band] and the Related Transportation Facility in Tooele County, Utah, NUREG-1714 (June 2000) [hereinafter DEIS]. In the DEIS, the staff discussed the PFS site selection process and criteria and performed an evaluation of various siting alternatives. See id. at 7-1 to -36.

On April 18, 2001, PFS filed the pending motion for summary disposition of contention Utah AA, along with a supporting statement of material facts not in dispute. See [PFS] Motion

for Summary Disposition of Utah Contention AA -- Range of Alternatives (Apr. 18, 2001) [hereinafter PFS Dispositive Motion]; see also id. Statement of Material Facts On Which No Genuine Dispute Exists [hereinafter PFS Undisputed Facts]. On May 15, 2001, the State filed a response to the PFS dispositive motion, including a statement of disputed and relevant material facts, in which it opposed the PFS motion. See [State] Response to [PFS] Motion for Summary Disposition of Contention Utah AA (May 15, 2001) [hereinafter State Response]; see also id. [State] Statement of Disputed and Relevant Material Facts. On that same date, the staff filed a response in support of the motion, including the supporting declaration of NRC staff contractor Gregory P. Zimmerman who serves as the Environmental Impact Analysis Program leader at the Oak Ridge National Laboratory Center for Energy and Environmental Analysis. See NRC Staff's Response to [PFS] Motion for Summary Disposition of Utah Contention AA -- Range of Alternatives (May 15, 2001) [hereinafter Staff Response]; see also id. Affidavit of Gregory P. Zimmerman at 18-20 (May 15, 2001) [hereinafter Zimmerman Declaration]. The staff's pleading engendered a May 25, 2001 State reply opposing the staff's support for the PFS contention Utah AA summary disposition request. See [State] Reply to Staff's Response to [PFS] Motion for Summary Disposition of Utah Contention AA -- Range of Alternatives (May 25, 2001) [hereinafter State Reply].

II. ANALYSIS

A. Summary Disposition Standards

We have articulated the standard governing consideration of a motion for summary disposition several times in this proceeding in ruling on previous PFS motions. We will rely on the same standard noted below in ruling on the pending PFS summary disposition motion:

“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).”

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

With these general principles as the backdrop, we now turn to the PFS summary disposition motion regarding contention Utah AA.

B. Application to Contention Utah AA

1. PFS Position

PFS provides eighteen assertedly undisputed material facts in support of its argument that the State’s concerns with respect to the ER analysis of the range of siting alternatives, as articulated in contention Utah AA and as admitted by the Board, have been rendered moot by the subsequent staff DEIS or, in the alternative, are incorrect as a matter of law. According to PFS, the State’s entire basis for contention Utah AA relates solely to purported omissions of certain discussions from the PFS ER. See PFS Dispositive Motion at 2. PFS suggests a literal reading of the State’s contention, pointing to language in the supporting basis statement that declares that the ER discussion of siting alternatives is “woefully inadequate” since there is “no discussion” of screening results, “no mention” of site selection questionnaire recipients, and “absolutely no discussion” of the recipient’s responses. Id. (quoting State Contentions at 172-73). PFS asserts that these supposed omissions, whether or not the cause for legitimate concern, have now been dealt with in the DEIS and so no longer provide the grounds

for a challenge to the PFS licensing request. Referencing DEIS section 7.1, relative to these State “no discussion” concerns, PFS declares that the site selection process and the corresponding site selection criteria were clearly identified, including a discussion of the PFS phase two site selection information gathering/tabulation/evaluation process that resulted in the identification of four and then, with one candidate jurisdiction’s withdrawal, three potential sites; an outline of the site selection questionnaire distribution process to the three site owners or promoters; and a discussion of the tabulation/evaluation process that was used for the phase three selection process. See PFS Dispositive Motion at 11-15; see also PFS Undisputed Facts at 2-3. Furthermore, PFS asserts that the DEIS discussion of alternative sites satisfies NEPA in that, contrary to the State’s claim, an applicant and the staff need not go into a detailed discussion and analysis of the site selection process, but rather need only provide a brief description of the process that outlines how alternate sites were identified/ruled out that is adequate to demonstrate no “obviously superior” site was overlooked. Given that the State has not identified such a site, PFS declares, the DEIS as written satisfies NEPA as a matter of law. Id. at 16-18. Finally, PFS declares that the asserted need for consideration of Subpart E site evaluation factors is legally incorrect because Subpart E, by its terms, applies only to a “proposed” site, i.e., the Skull Valley Band site actually put forth by PFS in its application. See PFS Dispositive Motion at 18-19; see also PFS Undisputed Facts at 3.

Although noting agency caselaw that contentions challenging an ER are considered as contesting a subsequently-prepared DEIS, see PFS Dispositive Motion at 8 (citing Louisiana Energy Services (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998)), PFS concludes that, to the extent the State’s concerns were legally cognizable, the DEIS siting alternatives discussion has addressed the omissions outlined in contention Utah AA so as to entitle PFS to summary disposition on that issue statement. Moreover, according to PFS, the

State is now foreclosed from raising the challenges to the substance of the DEIS discussion that it sets forth in its summary disposition response because the State failed to submit a timely revision of contention Utah AA following issuance of the DEIS. See id. at 8-10.

2. Staff Position

The staff agrees with PFS that there no longer exists any genuine dispute of material fact with respect to contention Utah AA. According to the staff, DEIS coverage of the siting alternatives to the proposed action nullifies the State challenges outlined in contention Utah AA. In this regard, the staff seeks to demonstrate in a point-by-point analysis that the DEIS covers each of the matters the State claims were allegedly neglected in the PFS ER. See Staff Response at 10-16; see also Zimmerman Declaration at 2-3. Like PFS, the staff argues that the scope of contention Utah AA (including the admitted portion of Castle Rock 13) is limited to the matters asserted not to have been addressed in the ER, which the staff maintains were addressed in its DEIS siting alternatives discussion. See Staff Response at 10, 16. Moreover, according to the staff, although the DEIS now provides a detailed discussion of the siting alternatives to the proposed action, the State took no steps to amend its contention or file a new contention to challenge the adequacy of the DEIS analysis. See id. at 9-10 & n.11. Under the circumstances, the staff concludes that PFS has met its burden of showing that there are no material facts in dispute regarding contention Utah AA and so should have summary disposition entered in its favor.

3. State Position

The State seeks to establish the existence of a material factual dispute with regard to PFS material facts four, eight, ten, and twelve, declaring that the State's challenge should not

be construed in the limited terms advocated by PFS.¹ Rather, the State asserts that its contention should be viewed as a broad challenge to the reasonableness of the PFS site selection process and its adequacy in meeting the requirements of NEPA. See State Disputed Facts at 2; State Reply at 5-7. Additionally, the State contends that the DEIS for the PFS facility erroneously relies upon the results of the site selection process in the ER and, therefore, does not contain a legally adequate analysis of alternatives. See State Response at 7-8; State Reply at 1-3. The State argues in this regard that PFS winnowed down its site list by applying objectives and criteria (such as selecting sites from a business rather than an environmental perspective) that are not acceptable for use by the staff relative to the elimination of alternative sites under NEPA. See State Response at 10-11. Further, the State contends that the staff's discussion of the PFS site selection process makes it clear that it did not understand fully the PFS process or did not have enough information to determine that only appropriate criteria were used, evidencing a staff failure to carry out its responsibility to make a knowledgeable, independent determination about which alternative sites are reasonable to analyze under NEPA. See id. at 12; State Reply at 4-5.

In advocating this position, the State asserts that its contention has not been mooted by issuance of the staff's DEIS. The State objects to what it believes is the PFS attempt to redefine the State's purpose "in an unreasonably narrow way" thereby "ignor[ing] the plain

¹ PFS material fact four asserts that contention Utah AA is limited by its own language to challenging only whether certain issues were discussed in the ER and does not function as a broad challenge to the merits of the analysis. See PFS Undisputed Facts at 1. Material fact eight states that the PFS site selection process is described and the selection criteria identified in DEIS section 7.1. Id. at 2. Material fact ten pertains to DEIS coverage of the basis upon which the PFS Board of Managers narrowed down the list of candidate sites in phase two of the site selection process. Id. Finally, material fact twelve states that the DEIS describes how the site selection process resulted in four sites being selected for further evaluation, a list that was later trimmed to three sites when one such site opted not to participate further in the process. Id.

language of the contention itself.” State Response at 14; State Reply at 5. Instead, the State asserts that contention AA is a broad challenge to the adequacy of site alternatives under NEPA, and not simply a challenge to the mere exclusion of relevant subject matter from the PFS ER. See State Response at 14. As a result, the State argues that it has established a material factual dispute relative to the adequacy of the DEIS site selection alternatives analysis such that summary disposition of contention Utah AA is not appropriate.

4. Board Ruling

As is apparent from the parties’ arguments relative to the PFS dispositive motion regarding contention Utah AA, the question of the scope of this contention once again is of critical concern. As we noted recently in addressing such a “scope” issue in the context of another summary disposition ruling in this proceeding:

[A]t the petitioner’s choosing, [contentions] 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”).

LBP-01-23, 54 NRC __, __ (slip op. at 9-10) (Aug. 1, 2001). As before, we consider the language in this one sentence contention, which declares that the PFS ER does not “adequately evaluate” the range of alternatives. Since on its face this language is sufficiently imprecise to encompass either a purported “analysis” or “omission” deficiency, further examination of the State’s basis statement is merited to discern the contention’s scope.

As the basis synopsis set forth above indicates, see supra pp. 2-3, the thrust of this contention is an “omission” challenge to the ER and, concomitantly, to the DEIS. Contention Utah AA basis items one through five, seven, eight, and ten and the basis for consolidated contention Castle Rock 13 make note of certain purported information deficiencies, including lack of discussion and/or tabulation of information and results, particularly for the second and third screening phases; lack of discussion of the distribution process used for the third screening phase questionnaire; failure to identify the three sites culled out by the third phase screening; failure to discuss how the two Skull Valley Band reservation sites were selected pursuant to the final screening process; and lack of consideration of transportation corridors and accident and risk analyses.² As is clear from the alternative site discussion in the DEIS, with one exception, those matters have now been addressed so as to render these State concerns moot and thus subject to summary disposition in favor of PFS.³ See PFS Motion at 10-15; Staff Response at 10-16. The only State-identified “omission” item that is not discussed in the DEIS -- item seven regarding the application of 10 C.F.R. Part 72, Subpart E --

² As to the other two basis matters, although they arguably do not fall strictly within the “omission” category, they nonetheless fail to embody a material factual dispute so as to merit further consideration in an evidentiary hearing. Relative to item six -- PFS over reliance on “willing jurisdiction” as a phase one selection criterion -- the State’s response, in which it indicates that utilizing such a factor was appropriate for PFS, see State Response at 10, essentially renders this matter moot as well. Moreover, relative to the item nine -- the purported failure to apply the same criteria during all screening phases -- as the staff points out without contradiction by the State, see Staff Response at 15; see State Reply at 1-7, this concern does not recognize the practical reality of the site selection process. It is not apparent how applying the same criteria at each level of the selection process will narrow the pool of candidate sites. Instead, different criteria are necessary as the pool of candidate sites becomes smaller in order to fine tune the site suitability process.

³ The ultimate issue of the validity or adequacy of the DEIS coverage of the range of alternatives to the proposed action is not now before us. We thus do not express a view on the “correctness” of the staff’s revised DEIS analysis. We also need not address PFS’s alternative argument relating to the level of detail needed in an inquiry into an applicant’s site selection process under NEPA. Instead, we consider the staff’s acknowledgment of the factors highlighted in contention Utah AA facially sufficient to support the PFS “mootness” argument.

likewise fails to provide the requisite material factual dispute because those provisions apply to a “proposed” site put forth by an applicant as the site for a licensed facility, not a site that is simply being evaluated to determine whether it should be chosen as the “proposed” site for an ISFSI facility.⁴

Given the curative treatment afforded by the DEIS regarding the information the State previously asserted was missing from the application, not unexpectedly the current focus of the State’s concern is the staff analysis provided in connection with this information now furnished in the DEIS. Nonetheless, with the issuance of the staff DEIS that includes the information previously alleged to have been lacking, we are presented with a substantial difference in the nature of the purported NEPA deficiency. While a contention initially framed as a challenge to the substance of an applicant’s ER analysis of particular matters would not necessarily require a late-filed revision or substitution to constitute a litigable issue statement relative to the substance of the staff’s DEIS (or final environmental impact statement) analysis of the same matter, a significant change in the nature of the purported NEPA imperfection, from one focused on a comprehensive information omission to one centered on a deficient analysis of subsequently supplied information, warrants such an issue modification. See 10 C.F.R. § 2.714(b)(2)(iii).

⁴ As the staff points out, see Staff Response at 14 n. 16, the only reference in Subpart E to alternative sites is 10 C.F.R. § 72.102(e), which states that “[i]n an evaluation of alternative sites, those which require a minimum of engineered provisions to correct site deficiencies are preferred. Sites with unstable geologic characteristics should be avoided.” In the context of Subpart E, however, this clearly is not an admonition intended to govern the scope of a NEPA environmental siting alternatives analysis, but rather is intended as a substantive site selection criterion applicable to an ISFSI site actually proposed in an application. See 45 Fed. Reg. 74,693, 74,697 (Nov. 12, 1980) (statement of considerations regarding initial adoption of 10 C.F.R. Part 72, Subpart E, including section 72.66(a)(5) that mirrors language of current section 72.102(e), notes that “[t]he principle of selecting sound sites has been retained in the final rule” in that, for example, “sites that lie within the range of strong nearfield ground motion from earthquakes on larger capable faults should be avoided”).

In this instance, relative to the matters about which the State previously expressed any particularized concern in formulating contention Utah AA, there has been a significant change by reason of the staff's DEIS such that the State should have channeled its concerns pertaining to the staff's discussion of siting alternatives into a new or amended contention to challenge the adequacy of the information and related analysis included in the DEIS. The State did not do so and the time for introducing such matters into this proceeding appears to have long since passed.⁵ These arguments, not having been presented in a timely fashion, cannot now provide the basis for a material factual dispute that supports a denial of summary disposition for contention Utah AA.

III. CONCLUSION

In connection with contention Utah AA, Range of Alternatives, in light of the discussion put forth by the staff in its June 2000 DEIS regarding the range of reasonable siting alternatives for the proposed PFS facility, we conclude that PFS has met its burden of establishing there are no material factual issues remaining in dispute regarding contention Utah AA so as to entitle it to a judgment in its favor in that, as a matter of law, contention Utah AA is now moot.

For the foregoing reasons, it is this twentieth day of September 2001, ORDERED, that the April 18, 2001 motion for summary disposition of PFS regarding contention Utah AA is

⁵ See Licensing Board Memorandum and Order (General Scheduling for Proceeding and Associated Guidance) (June 29, 1998) at 5 (contentions based on the PFS facility DEIS "should be submitted no later than thirty days" after the DEIS is made publically available) (unpublished).

granted and, for the reasons given in this memorandum and order, a decision regarding contention Utah AA is rendered in favor of PFS on the ground that the issue is now moot.

THE ATOMIC SAFETY
AND LICENSING BOARD⁶

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

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Jerry R. Kline
ADMINISTRATIVE JUDGE

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Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

September 20, 2001

⁶ 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 AA) (LBP-01-26) 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
LB ORDER (GRANTING SUMMARY
DISPOSITION MOTION REGARDING
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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of September 2001