RAS 3734

December 6, 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
	)	
(Private Fuel Storage Facility)	)	ASLBP No. 97-732-02-ISFSI

APPLICANT'S MOTION FOR RECONSIDERATION OF RULING ON THE APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF SOUTHERN UTAH WILDERNESS ALLIANCE CONTENTION B

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby moves for reconsideration of the Atomic Safety and Licensing Board's ("Licensing Board" or "Board") Memorandum and Order (Denying Motion for Summary Disposition Regarding Contention SUWA B), LBP-01-34, 54 NRC __, slip op. (November 30, 2001). First, PFS requests reconsideration of the denial of summary disposition with respect to the material facts contained within the Statement of Material Facts on Which No Genuine Dispute Exists, filed by the Applicant with its motion,[1] which were unchallenged by intervenor Southern Utah Wilderness Alliance ("SUWA") and the NRC Staff. Second, PFS also requests that the Board reconsider its ruling that it is unable to modify the NRC's environmental analysis pro tanto in consideration of the information submitted with PFS's Motion.

[1] Applicant's Motion for Summary Disposition of Contention SUWA B–Railroad Alignment Alternatives (June 29, 2001) ("PFS Mot.").

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I. DISCUSSION

A. Standard for Reconsideration

In filing a motion for reconsideration, "the movant must identify errors or deficiencies in the presiding officer's determination indicating the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual information." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-31, 52 NRC 340, 342 (2000) (quoting Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 73-74 (1998)).[2] "Reconsideration also may be appropriately sought to have the presiding officer correct what appear to be inharmonious rulings in the same decision." Id. It is also appropriate to ask the deciding body to clarify its ruling on a matter. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 296-97 (1998).

B. Reconsideration of the Denial of Summary Disposition Concerning Unchallenged Material Facts

The Applicant requests the Board to reconsider its denial of summary disposition with respect to the material facts submitted by the Applicant in its Statement of Material Facts on Which No Genuine Dispute Exists and which were unchallenged by SUWA and the NRC Staff. See LBP-01-34, slip op. at 8, 12-13. As the Board stated here and as it has stated in resolving motions for summary disposition of other issues in this proceeding, "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." Id. at 4-5 (quoting LBP-99-23, 49 NRC 485, 491 (1999)). This admonition follows directly from the NRC rule on summary disposition. 10 C.F.R.

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[2] Central Electric Power Cooperative, Inc. (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-26, 14 NRC 787, 790 (1981) ("Motions to reconsider should be associated with requests for re-evaluation of an order in light of an elaboration upon, or refinement of, arguments previously advanced."). A party may not, however, base a motion for reconsideration on "entirely new theses or arguments." LBP-00-31, 52 NRC at 342.

§ 2.749(a). In ruling on previous motions for summary disposition, the Board has looked at each material fact submitted by the movant and the challenge thereto by the opponent and then has ruled whether there exists a genuine issue of material fact that warranted resolution by evidentiary hearing. See, e.g., LBP-01-19, 53 NRC 416 (2001). The Board has done this even in cases where it has not granted the motion in its entirety and thus has not dismissed the contention.

For example, in resolving PFS's motion for summary disposition regarding hazards to the Private Fuel Storage Facility ("PFSF") posed by cruise missile testing, weapons firing on Dugway Proving Ground, and aircraft crashes, the Board ruled that regarding some material facts submitted by PFS there were no genuine issues and hence the facts were deemed admitted. See id. at 424, 427-29, 451, 452 (cruise missiles, weapons testing, commercial and general aviation). Regarding other facts, it ruled that genuine issues remained and set them for resolution at the upcoming evidentiary hearing. E.g., id. at 440-41, 455. Thus, because some genuine issues of material fact remained, the Board did not dismiss the contention. Id. at 455-56. Nevertheless, it did rule that, for the purpose of ultimately resolving the contention, those facts on which it had found no genuine issues were resolved and hence would not be the subject of testimony at the upcoming hearing. Id. at 456.[3]

The Board's handling of the material facts concerning that and other contentions makes eminent sense, in that it preserves for submission of further testimony and evidentiary hearing only those facts on which genuine issues exist, while dispensing with other facts on which no issues exist and hence on which it would make no sense to receive further testimony at a hearing. Indeed, the Supreme Court has stated that the purpose of summary judgment is to determine "whether there is a need for a trial [on the issue at

[3] Regarding some of those facts (e.g., facts regarding cruise missile testing), the Board found that there were no genuine issues even though at the time the NRC Staff had not taken a position on them. See id. at 425, 428-29. While PFS's Motion for Summary Disposition here concerns an environmental rather than a safety contention, as we discuss below that fact does not change the result.

hand] – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact . . . ." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

Here, PFS set forth material facts on each of the four alternatives addressed in its Motion on which it claimed no genuine dispute existed, i.e., the Low Corridor Rail Line as proposed by PFS (Material Fact Nos. 6-9), the West Skull Valley Alternative (Material Fact Nos. 10-17), the Central Skull Valley Alternatives (Material Fact Nos. 18-21), and the East Skull Valley Alternatives (Material Fact Nos. 22-26). These material facts were supported by the declarations of John Donnell, Douglas Hayes, and Sue Davis. In response, SUWA not only failed to file a statement of material facts on which it asserted a genuine dispute existed, it did not file any affidavits or evidence whatsoever that could have been used to support such a statement.[4] Rather, SUWA's pleading consisted solely of counsel's argument, which is insufficient under the regulations to oppose a movant's statement of material facts that is supported by affidavits and other evidence. 10 C.F.R. §§ 2.749 (a) and (b) The NRC Staff, on the other hand, filed an affidavit in support of its response to PFS's motion, on the basis of which it supported PFS's claim that there was no genuine issue as to Material Fact Nos. 6-9 and 17-26. LBP-01-34, slip op. at 8. While the Staff took no position on Material Fact Nos. 10-16, it did not oppose PFS regarding those facts. Id.[5]

Thus, the material statement of facts with respect to three of the four alternatives addressed in PFS's Motion – the Low Corridor Rail Line (Material Fact Nos. 6-9), the Central Skull Valley Alternatives (Material Fact Nos. 18-21), and the East Skull Valley Alternatives (Material Fact Nos. 22-26) – were fully supported by the Staff's affiant with no counter-statement of material facts and supporting materials from by SUWA to dis-

[4] See Southern Utah Wilderness Alliance's (SUWA) Response (and Objection) to Applicant's Motion for Summary Disposition of SUWA's Contention B (July 23, 2001) ("SUWA Resp.").

[5] See also NRC Staff's Response to Applicant's Motion for Summary Disposition of Contention SUWA B – Railroad Alignment Alternatives (July 19, 2001) at 3 & n.3.

pute them. Only argument of counsel was provided by SUWA, clearly insufficient under the Commission's rules and regulations. Moreover, the Staff has independently evaluated these three alternatives[6] and therefore the Board's concern expressed with respect to the West Skull Valley Alternative is not present with respect them. Accordingly, there is no genuine issue of fact to litigate with respect to these three alternatives, and applying the same legal and policy underpinning the Board's earlier decisions, these material facts should be deemed to be admitted.

With respect to the material facts for the West Skull Valley Alternative (Material Fact Nos. 10-17), SUWA again only provided argument of counsel.[7] The Staff's affiant took no position on Material Fact Nos. 10-16, but fully supported Material Fact No. 17.[8] In this regard, he stated as follows:

> I agree with the Applicant's view that the construction of the West rail-alignment alternative would result in similar or greater environmental impacts when compared to the proposed Low Corridor Rail Spur (*see* Material Fact No. 17 in the Applicant's Statement of Material Facts).[9]

Further, in its brief, the Staff stated that it was "satisfied that the 'West Skull Valley Alternative' discussed by PFS in its Motion would result in similar or greater environmental impacts when compared to the proposed rail line discussed in the DEIS, and no genuine issue of material fact exists with respect to this matter." Staff Brief at 3 n.3 (emphasis added).

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[6] Affidavit of Gregory P. Zimmerman Concerning Contention SUWA B (July 19, 2001), ¶¶ 5-6, 8-17 ("Zimmerman Aff.").

[7] SUWA made a legal argument that PFS could have routed the West Skull Valley Alternative through State-owned land. SUWA Resp. at 8-10. PFS disagrees as set forth in its motion, but nevertheless, the State's argument is immaterial, in that as PFS pointed out (and SUWA did not contest), the route for the West Skull Valley Alternative is constrained by mudflats in Skull Valley independent of the location of State-owned land. PFS Mot. at 11; see Material Fact 11; Declaration of Susan Davis ¶¶ 6, 11; Declaration of Douglas Hayes, Exh. 4 (map).

[8] Material Fact No. 17 stated that aside from the impacts question of cut and fill requirements, both the West Skull Valley Alternative rail line alignment and PFS's preferred alignment "would have similar (small) environmental impacts."

[9] Zimmerman Aff. ¶ 19.

Thus, as with Material Facts No 6-9 and 18-26, no material issue of fact exists with respect to Material Fact No. 17, and it should be deemed admitted. Further, the Staff's affirmative support for Material Fact No. 17 shows that the Staff has sufficiently evaluated the West Skull Valley Alternative to conclude – independently of the Applicant – that this "alternative would result in similar or greater environmental impacts when compared" to the proposed Low Corridor Rail Line. Id. (emphasis added).[10] This fact combined with the other material facts with which the Staff concurred is sufficient to grant PFS's motion, in that they show that PFS's preferred alignment would have, at the least, no greater impact than any of the alternative alignments.[11]

Thus, PFS respectfully requests that the Board reconsider its decision and deem as admitted the material facts PFS submitted that were also supported by the NRC Staff (i.e., Material Fact Nos. 6-9 and 17-26).[12] Further, PFS submits that these material facts are sufficient to support summary disposition, and PFS respectfully requests the Board to reconsider its decision and to grant summary disposition with respect to SUWA B.

C. Reconsideration of the Ruling Regarding the Modification of the NRC's Environmental Analysis Pro Tanto

In ruling on PFS's motion, the Board also stated that "[t]o whatever degree the Licensing Board may be able to revise/supplement the agency's environmental impact analysis pro tanto in rendering a summary disposition ruling, that authority does not extend to the particular shortcoming associated with staff compliance with [10 C.F.R.] section 51.70(b) . . . ." LBP-01-34, slip op. at 14 n.7. That regulation provides in relevant

[10] The additional environmental impacts of the West Skull Valley Alternative set forth in PFS's Material Fact Nos 10-16 would only tilt the environmental balance further in favor of the Low Corridor Rail Line.

[11] See Headwaters, Inc. v. BLM, 914 F.2d 1174, 1181 (9th Cir. 1990), reh'g en banc denied, 940 F.2d 435 (1991) (NEPA only requires consideration of appropriate range of alternatives as opposed to all possible alternatives); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989) (NEPA is to ensure that important effects are not overlooked or underestimated).

[12] PFS submits that Material Fact Nos 10-16 should also be deemed admitted as a matter of law in that SUWA did not dispute them and the Staff took no position on them. See 10 C.F.R. § 2.749 (a). Whether such facts, once deemed admitted, would be sufficient to warrant judgment as a matter of law is a wholly separate issue under the Commission's regulations. See 10 C.F.R. §§ 2.749 (b) and (d).

part that "[t]he NRC Staff will independently evaluate and be responsible for all information used in the draft environmental impact statement."

PFS requests that the Board reconsider its ruling on the grounds that it is inconsistent with NRC case law and is premised on the incorrect regulation. The regulation that allows the Licensing Board to amend pro tanto the agency's environmental impact statement is 10 C.F.R. 51.102. That regulation provides that the record of decision on an action for which a final environmental impact statement is required and for which a hearing is held under 10 C.F.R. Part 2, Subpart G will consist of "the initial decision of the presiding officer." 10 C.F.R. § 51.102(c); see 10 C.F.R. § 51.104(a)(3) (presiding officer will decide NEPA matters in controversy among the parties). Initial decisions include all board findings, conclusions, and rulings, including any resolutions of contentions by summary disposition. 10 C.F.R. § 2.760(c); see, e.g., Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-85-5, 21 NRC 410, 412 (1985) (making prior summary disposition rulings on environmental contentions ripe for appellate review). Put another way, "[t]he record of decision may be integrated into any other record prepared by the Commission in connection with the action." 10 C.F.R. § 51.103(b). Accordingly, the record of decision may also include material contained in a final environmental impact statement. 10 C.F.R. § 51.103(c).

Therefore, in practice, in ruling on an environmental issue, if a licensing board (or the Commission on appeal) reaches a conclusion different from that set forth in the Environmental Impact Statement, the statement "is simply deemed amended pro tanto." Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 680 (1975).[13] Moreover, as noted by the Appeal Board in Barnwell, the board's conclusion can be – and "ordinarily" is – based on evidence pre-

[13] NRC regulations at the time of the Barnwell case described the record of decision in terms of the Final Environmental Impact Statement as amended by the presiding officer's conclusions (or by the Commission's conclusions on appeal). 10 C.F.R. § 51.52(b)(3) (1975).

sented by the parties to the case other than the Staff. Id. (emphasis added). As discussed in some detail in Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 705-07 (1985), these principles hold under current NRC environmental regulations as well and have been approved by the federal courts. See, e.g., New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 93-94 (1st Cir. 1978).

In Limerick the Appeal Board upheld a licensing board decision that concluded that evidence adduced at the hearing by the applicant and the staff along with the board's findings and conclusion properly amended the Final Environmental Impact Statement ("FEIS"). In New England Coalition, the court upheld the NRC's assessment of the environmental impacts of a new cooling water intake location for a power plant in an evidentiary hearing despite the fact that the Staff's FEIS did not analyze the new location. Id. at 93-94.[14] The analysis was performed for the agency by the licensing board in considering evidence and rendering its decision. Id.

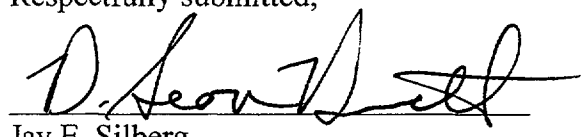
Thus, the Staff is not the sole NRC entity responsible for "evaluating" the environmental impacts of NRC agency decision-making. If it were, neither the Board nor the Commission could alter the conclusions of the EIS, as clearly they can under Commission regulation and NRC and judicial precedent. Nor would an applicant or intervenors be able to present evidence to a licensing board urging the board to reach a different conclusion than that set forth in the DEIS or FEIS prepared by the Staff. Here, fully in accordance with 10 C.F.R. § 51.70 (b), the NRC Staff did independently evaluate and was responsible for all information used in DEIS. But we are now in the adjudication of challenges to the Staff's EIS at which point in time, under 10 C.F.R. § 51.102, the Licensing Board and then the Commission conduct the further independent agency evaluation of the environmental impacts of proposed agency action under NEPA.

[14] The NRC had required the applicant to revise its environmental report to take into account the new location but did not redo its FEIS. Id.

Finally, receiving evidence through a motion for summary disposition and responses thereto and rendering a ruling is no different than rendering a ruling after a hearing. See 10 C.F.R. §§ 2.749 (a) and (d). The regulations do not prohibit the Board from ruling on summary disposition motions even if the Staff does not take a position. See 10 C.F.R. § 2.749(a) (answers to motions by other parties are not obligatory); Consolidated Edison Co. (Indian Point, Unit No. 1; Indian Point, Unit No. 2; Indian Point, Unit No. 3), ALAB-304, 3 NRC 1, 6 (1976) (Boards evaluate Staff evidence on same footing as evidence from other parties). Further, as noted above, a licensing board's initial decision, which under 10 C.F.R. § 51.102 pro tanto amends the EIS, includes resolution of issues by summary disposition.

Therefore, PFS requests that the Board reconsider its decision, amend the EIS pro tanto, and grant PFS's motion for summary disposition wholly apart from whether the Staff did or did not independently evaluate the West Skull Valley Alternative.[15]

Respectfully submitted,



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Dated: December 6, 2001

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[15] SUWA claims that the Licensing Board cannot grant summary disposition prior to the publication of the FEIS. SUWA Resp. at 4. However, the fact that the FEIS has not yet been published does not bar the Board from considering and ruling on a motion for summary disposition of an environmental contention. First, NEPA squarely does not require that an FEIS be prepared prior to receiving evidence on environmental issues. Aberdeen & Rockfish R.R. Co. v. SCRAP, 422 U.S. 289, 320 (1975). (In Aberdeen & Rockfish, the Interstate Commerce Commission had published a DEIS and received written comments on it and had held an oral hearing on environmental issues prior to issuing its findings on substantive issues and its FEIS. 422 U.S. at 297-99, 320.) For the NRC, the statement need only be prepared at the time of the licensing board's initial decision. New England Coalition, 582 F.2d at 94 & n.12 (noting that the FEIS is not adopted by the agency – as opposed to the Staff – until the time of the licensing board's initial decision). In any event, the FEIS is scheduled to be issued December 21, 2001, fifteen days from now. Memorandum and Order (Revised General Schedule) (Sept. 17, 2001) at 1.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Motion for Reconsideration of Ruling on the Applicant's Motion for Summary Disposition of Southern Utah Wilderness Alliance Contention B" were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this __ day of December, 2001.

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