

June 27, 2003 (9:17AM)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

SERVED June 27, 2003

In the Matter of)
)
PRIVATE FUEL STORAGE, L.L.C.)
)
(Independent Spent)
Fuel Storage Installation))

Docket No. 72-22-ISFSI

June 26, 2003

MEMORANDUM AND ORDER

(Modified Protective Order for Security Plan Contentions
and Aircraft Crash Consequences Safeguards Protected Information)

The physical security plan that is part of the pending application of Private Fuel Storage, L.L.C. (Applicant), to construct and operate a 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI) in Skull Valley, Utah, contains "protected information" and thus is not subject to public disclosure under 10 C.F.R. Part 73.¹ By memorandum and order issued November 21, 1997, the Licensing Board granted the unopposed request of petitioner State of Utah (State) for an order that would permit it to have access to the security plan for the purpose of litigating the plan's adequacy in this proceeding. See Licensing Board Memorandum and Order (Ruling on State of Utah Motion for Protective Order) (Nov. 21, 1997) at 2 (unpublished). The Board also requested that the NRC staff take the lead in preparing a proposed protective order and circulating it for comment among the interested participants. The NRC staff did so, obtaining the consent of the State and the Applicant to a proposed memorandum and order that was provided to the Board

¹ Under 10 C.F.R. Part 73, information contained in a facility physical security plan is generally considered "safeguards information" that is protected from public disclosure. As is noted in the nondisclosure affidavit included as Attachment A to this memorandum and order, the "protected information" involved here is (1) any form of the security plan, including the safeguards contingency plan, and any amendments thereto or portions thereof, for the Applicant's proposed facility, or (2) any information obtained by virtue of these proceedings that is not otherwise a matter of public record and that deals with or describes details of the security plan.

on December 12, 1997. See Letter from Sherwin E. Turk, Counsel to the NRC Staff, to the Licensing Board (Dec. 12, 1997).

After reviewing the proposed order, we adopt its terms with modifications.² In addition, the Board provides a schedule for the filing of contentions regarding the facility physical security plan that designated counsel, experts, and staff for the State will have access to once they have executed the required nondisclosure affidavits, the form for which is included as Attachment A to this issuance.

In addition, in March 2003, the Applicant indicated that it wished to litigate the consequences of an aircraft crash into the PFS facility in response to our memorandum and order of March 10, 2003. We therefore are reissuing this order to reflect the need to protect any Safeguards Information which may be developed and transmitted in this regard. However, if at some later date the Staff determines that any or part of such information is not considered Safeguards Information, this Order shall no longer apply to such information once the Safeguards designation has been removed.

² If the Applicant, the State, or the NRC staff have any objections to the modifications adopted by the Board, they should advise us in a pleading filed within five days of the date of this memorandum and order.

I. DISCLOSURE AND USE OF PROTECTED INFORMATION

This portion of this memorandum and order governs the disclosure and use of 10 C.F.R. Part 73 "protected information" contained in or concerning the security plan for the Skull Valley ISFSI facility, including the safeguards contingency plan, and any amendments thereto. In addition, this portion of this memorandum and order governs the disclosure and use of 10 C.F.R. Part 73 "protected information" contained in or concerning the Applicant's aircraft crash consequences reports, expected to be filed on June 30, 2003.³ Counsel, experts, and staff for the State and the Applicant in this proceeding who have executed a nondisclosure affidavit, in the form attached to this memorandum and order, shall be permitted access to protected information under the following conditions:⁴

A. Only the security plan, or all or portions of the Applicant's aircraft crash consequences reports designated as containing safeguards information, or all or portions of other documents designated as containing safeguards information, that are both relevant to and necessary for the preparation or litigation of the State's contentions, shall be shown to counsel, experts, or staff for the Applicant or the State pursuant to this memorandum and order.

³ This memorandum and order does not limit access to protected information by persons authorized to receive such information pursuant to 10 C.F.R. § 73.21(c)(1)(i) and (iii).

⁴ In addition to the State, other persons or entities have petitioned for leave to intervene in this proceeding, including (1) the Confederated Tribes of the Goshute Reservation and David Pete (Confederated Tribes/Pete), (2) Ohngo Gaudadeh Devia (OGD), (3) the Skull Valley Band of Goshute Indians (Skull Valley Band), and (4) Castle Rock Land and Livestock, L.C., Skull Valley Company, LTD., and Ensign Ranches of Utah, L.C. (Castle Rock/Skull Valley/Ensign Ranches). Inasmuch as the other petitioners have not expressed an interest in obtaining access to the security plan see Licensing Board Memorandum and Order (Ruling on State of Utah Motion for Protective Order) (Nov. 21, 1997) at 2 (unpublished), this issuance is addressed only to the State's request for access to the protected safeguards information contained therein. The other organizations/groups and the individual that petitioned for leave to intervene are not being given access to protected information under the terms of this memorandum and order.

B. Notwithstanding any other provisions set forth herein, and without waiving any objections the parties may have to any proposed expert's qualifications to testify concerning matters in this proceeding, the following persons may be afforded access to protected information under this memorandum and order for the purpose of preparing and/or responding to contentions and further litigation in this proceeding:

1. State of Utah

Denise Chancellor, Esq.
Fred G Nelson., Esq.
Connie Nakahara, Esq.
James Soper, Esq
Dianne R. Nielson, Executive Director,
Utah Department of
Environmental Quality
Jean Braxton, paralegal
Karma Pathakis, secretary

2. Applicant

Jay E. Silberg, Esq.
Paul A. Gaukler, Esq.
D. Sean Barnett, Esq.
Matias Travieso-Diaz, Esq.
John Parkyn, Chairman of the Board of Private
Fuel Storage, L.L.C.
Max DeLong, Member of the Board of Private
Fuel Storage, L.L.C.
John Donnell, Project Director for
Private Fuel Storage, L.L.C.
Christina Francani, paralegal
Virginia Seymour, secretary
Peggy Thompson, secretary

Additions or substitutions to this list of individuals for whom access to protected information may be provided under this memorandum and order should be made in accordance with the provisions of paragraph I.C. below.⁵

⁵ In addition, we note that certain persons employed by or on behalf of the Applicant (including Jay E. Silberg, Esq.) or the State (including William J. Sinclair and Denise Chancellor, Esq.) are already authorized to have access to all or part of the protected

C. 1. Only counsel, experts, and staff for the Applicant or the State who have been qualified in accordance with the requirements of this memorandum and order may have access to protected information on a "need to know" basis pursuant to this memorandum and order. Upon execution of a nondisclosure affidavit in the form attached hereto, and transmission to the Board of the executed affidavit, such persons shall have access to protected information.

2. To be qualified for access to protected information, an expert must have a "need to know" those portions of the protected information that he or she may be shown. In this regard, "need to know" means a determination by counsel for PFS or the State who has responsibility for protecting the protected information that the proposed recipient's access to the protected information is necessary in the performance of official, contractual, or employment duties with respect to the litigation in this proceeding.

D. Counsel, experts, and staff who receive any protected information (including transcripts of in camera hearings, filed testimony or any other document that reveals protected information) shall maintain its confidentiality as required by 10 C.F.R. § 73.21 and the annexed nondisclosure affidavit, the terms of which are hereby incorporated in this memorandum and order.

E. Counsel, experts, and staff who receive any protected information shall use it solely for the purpose of participation in this proceeding before the Licensing Board in matters directly pertaining to the security plan or aircraft crash consequences issues and any further Commission or judicial appellate proceedings in this case directly involving security matters or aircraft crash

information that is subject to this memorandum and order. Further, the provisions of this memorandum and order do not apply to NRC employees, consultants, and contractors. They are subject to internal NRC requirements governing the treatment of protected information. See NRC Management Directive 12.6, "NRC Sensitive Unclassified Information Security Program." However, all persons who serve documents containing protected information on other persons authorized to receive such information in this proceeding shall act in accordance with the procedures for service of documents specified in this memorandum and order and the attached nondisclosure affidavit.

consequences issues, and for no other purpose.

F. Counsel, experts, and staff shall keep a record of all documents containing protected information in their possession and shall account for and deliver that information for disposal or safekeeping, as may be determined to be appropriate by the Licensing Board or the Commission, to the Licensing Board or the Commission (or to a Commission employee designated by the Board or the Commission), or to a person authorized to receive protected information on behalf of the Applicant, in accordance with the nondisclosure affidavit attached hereto.

G. In accordance with 10 C.F.R. § 73.21, protected information may be reproduced to the minimum extent necessary consistent with need.

H. In addition to the requirements specified in the nondisclosure affidavit appended to this memorandum and order, all pleadings and correspondence in this proceeding (including testimony) that contain any protected information shall:

1. be segregated and served only --
 - a. on lead counsel,⁶ the Assistant for Rulemakings and Adjudications in the Office of the Secretary,⁷ and the individual members of the Licensing Board;
 - b. by (i) United States first class, registered, express, or certified mail, (ii) internal NRC mail, (iii) messenger-courier or overnight delivery service (e.g., Federal Express), or (iv) personal delivery by an individual who otherwise is authorized access pursuant to 10 C.F.R. § 73.21(c) or an order issued by the Licensing Board or the Commission in this proceeding; and
 - c. in two sealed envelopes or wrappers, including (i) an outer mailing envelope, and (ii) a heavy, opaque inner envelope bearing the name and address of the addressee and the

⁶ The following attorneys shall be considered "lead counsel" for service purposes: Jay E. Silberg (Applicant), Denise Chancellor (State of Utah), and Sherwin E. Turk (NRC staff).

⁷ The original of the pleading or correspondence containing the protected information (without any additional copies) should be directed to Emile L. Julian, Assistant for Rulemakings and Adjudications, Rulemakings and Adjudications Staff, Office of the Secretary.

statement "PRIVATE. TO BE OPENED BY ADDRESSEE ONLY." Addressees shall take all necessary precautions to ensure that they alone will open envelopes so marked. The outer envelope or wrapper will contain the intended recipient's name and address, and will bear no marking or indication that the document within contains protected information.⁸

2. include an attached cover letter or memorandum, which shall be served on the other participants to the proceeding by United States Postal Service first-class mail, that briefly describes the contents of the pleading or correspondence without reference to any protected information such that the cover letter or memorandum can be placed in the public docket of the proceeding.

I. Counsel, experts, staff, or any other individual who has reason to suspect that documents containing protected information may have been lost or misplaced (for example, because an expected paper has not been received) or that protected information has otherwise become available to unauthorized persons shall notify the Board promptly of those suspicions and the reasons for them.

II. SECURITY PLAN CONTENTIONS FILING SCHEDULE

The State shall file any contentions regarding the Applicant's security plan on or before Monday, January 5, 1998. These contentions should be numbered separately from the contentions already filed by the State, each with the designation "Security-_" Applicant and NRC

⁸ Notwithstanding the procedure that has been established for the service of copies of documents in this proceeding, see Licensing Board Memorandum and Order (Initial Prehearing Order) (Sept. 23, 1997) at 5 (unpublished), because of the subject matter the parties shall not make any facsimile or e-mail transmission to the Licensing Board or other parties of any document that contains or discusses protected information. With this restriction in mind, and to facilitate the Licensing Board's preparation of an electronic hearing database, see id. at 7-8, the parties should submit to the Board copies of documents that contain or discuss protected information only on a 3.5 inch diskette or CD-ROM transmitted in accordance with the provisions of paragraph I.H.I, above and suitably marked in accordance with paragraph 5(g) of the appended nondisclosure affidavit.

staff responses to any State security plan contentions shall be filed on or before Tuesday, January 20, 1998. If the State's contentions and/or the Applicant and NRC staff responses include protected information, consistent with the requirements of paragraph I.H. above, the contentions and/or responses shall be served by United States Postal Service express mail or other approved means that will ensure receipt by the next business day. Otherwise, consistent with the Board's September 23, 1997 issuance, see supra note 8, the contentions and/or responses should be served by e-mail, facsimile transmission, or other means that will ensure receipt on the date of filing.

In the cover letter or memorandum that is to accompany those filings in accordance with paragraph I.H.2. above, or in the pleadings themselves if the filings do not include protected information, the participants should advise the Board whether they anticipate that any oral argument regarding the security plan contentions at the prehearing conference now scheduled for the week of January 26, 1998, would involve discussing protected information so as to require an in camera session. The Board will advise the participants prior to the prehearing conference whether it anticipates holding an in camera session to hear arguments on the admissibility of any of the State's security plan contentions.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD



Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 26, 2003

APPENDIX A

NONDISCLOSURE AFFIDAVIT

I, _____, being duly sworn, state:

1. As used in this nondisclosure affidavit,

(a) "Protected information" is (i) any form of the security plan, including the safeguards contingency plan, and any amendments thereto (Security Plan), or portions thereof, for the Private Fuel Storage Facility proposed by Private Fuel Storage L.L.C. (Applicant), or (ii) any information obtained by virtue of these proceedings which is not otherwise a matter of public record and which deals with or describes details of the Security Plan, or (iii) any portion of the Applicant's aircraft crash consequences reports, including information obtained by virtue of these proceedings which deals with or describes details of the Applicant's aircraft crash consequences reports, unless otherwise determined by the NRC not to contain Safeguards Information.

(b) An "authorized person" is (i) an employee, consultant or contractor of the U.S. Nuclear Regulatory Commission (NRC or Commission) entitled to access to protected information; (ii) a person who has executed a copy of this affidavit, which has been transmitted to the Atomic Safety and Licensing Board (Licensing Board) ; or (iii) a person employed by or on behalf of the Applicant and authorized by it in accordance with 10 C.F.R. § 73.21(c)(1) to have access to protected information.

(c) A "document" means any audio or video tape recording or written matter of any kind, whether produced, reproduced, or stored on paper, cards, tapes, ribbons, disks, belts, charts, film, computer files, computer disks or diskettes, computer storage devices or any other medium, and includes, without limitation, books, reports, studies, statements, speeches, notebooks, calendars, working papers, manuals, memoranda, notes, instructions, directions, records, correspondence, diaries, diagrams, drawings, lists, telephone logs, minutes, and photographs, and also includes, without limitation, originals, copies (with or

without notes or changes thereon), and drafts.

2. I have read the June 26, 2003 Licensing Board memorandum and order issued in this proceeding and will comply in all respects with its terms and conditions regarding the protected information produced in connection therewith. I will safeguard protected information in accordance with the terms of this affidavit.

3. I will not disclose protected information to anyone except an authorized person, unless that information has previously been disclosed in the public record of this proceeding. I will safeguard documents containing protected information in written or recorded form (including any portions of transcripts of in camera hearings, filed testimony or any other documents that contain such information), so that the protected information contained therein remains at all times under the control of an authorized person and is not disclosed to anyone else.

4. I will not reproduce or copy any protected information by any means except to the minimum extent necessary consistent with need in accordance with 10 C.F.R. § 73.21(f)(1). I will only destroy protected information by methods that assure complete destruction of the protected information in accordance with 10 C.F.R. § 73.21(f)(2). I understand that I may take notes concerning such protected information, subject, however, to the terms of this affidavit and the Licensing Board's June 26, 2003 memorandum and order. So long as I possess protected information, I will continue to take these precautions until further order of the Licensing Board or the Commission.

5. I will safeguard and hold in confidence any data, notes, or copies of protected information and all other papers that contain any protected information in accordance with 10 C.F.R. Part 73.

(a) When not under my direct control or the direct control of another individual authorized to have access thereto, I will keep and safeguard all documents containing

protected information (including, without limitation, any notes that I may take) in a security storage container as defined in 10 C.F.R. 73.2 in a controlled access building that is either attended around the clock or locked at night. Access to the security storage container will be positively controlled by use of keys or other comparable means. Keys and/or knowledge of lock combinations protecting safeguards information shall be limited to authorized persons.

(b) Any secretarial or administrative work performed at my request or under my supervision will be performed only by personnel who have executed a nondisclosure affidavit pursuant to the Licensing Board's June 26, 2003 memorandum and order.

(c) Protected information shall not be discussed by telephone or communicated by email or facsimile transmission unless the protected information is transmitted through the use of an encryption system that the National Institute of Standards and Technology has validated as conforming to Federal Information Processing Standard 140-1 and 140-2, or as otherwise acceptable to the NRC.

(d) If protected information is processed on or with automated data processing, computerized word processing equipment, or a personal or laptop computer, access to such equipment shall require the use of an entry code for access to stored protected information. If use of an entry code is not feasible, protected information may be processed on, but shall not be stored in, such equipment. Additionally, any such word processing equipment, data processing equipment, or computer that is used to process or store protected information shall be operated as stand-alone or free-standing equipment, not connected to any other such equipment by means of a Local Area Network (LAN) or Wide Area Network (WAN) or other data-sharing system in accordance with 10 C.F.R. § 73.21(h). Further, if any protected information is backed up or stored on a computer hard drive or

other device, that drive or device shall be capable of being removed and shall be stored in the security storage container referred to in paragraph 5(b) above, when not in use.

(e) All mailings by me or on my behalf involving protected information shall be made from a facility referred to in paragraph 5(a) above.

(f) Each document that has been determined by the NRC to contain Safeguards Information, as defined in 10 C.F.R. § 73.2, shall be marked "Safeguards Information" in a conspicuous manner to indicate the presence of protected information, as set forth in 10 C.F.R. § 73.21(e). Documents, or portions thereof, originally determined by NRC to contain Safeguards Information but later determined by the NRC not to contain Safeguards Information shall no longer be subject to the Licensing Board's June 26, 2003 memorandum and order or this non-disclosure affidavit.

6. If I prepare documents containing protected information to participate in further proceedings in this case, I will assure that any secretary or other individual who must receive protected information to help me prepare those documents has executed an affidavit like this one and has agreed to abide by its terms. Copies of any such affidavit will be filed with the Licensing Board promptly upon execution.

7. I shall use protected information only for the purpose of preparation for any proceedings in this case dealing with Security Plan issues or aircraft crash consequences, and for no other purpose.

8. I shall keep a record of all documents containing protected information in my possession, including any copies of those documents or portions thereof made by me or on my behalf. At the conclusion of this proceeding, I shall account to the Licensing Board or the Commission, or to a Commission employee designated by the Board or the Commission, for all the documents or other materials containing protected information in my possession and deliver

them as provided herein. When I have finished using the protected information they contain, but in no event later than the conclusion of this proceeding (including any related Commission or judicial appeals), I shall deliver those documents and materials for disposal or safekeeping, as may be determined to be appropriate by the Licensing Board or the Commission, to the Licensing Board or the Commission, to a Commission employee designated by the Board or the Commission, or to a person authorized to receive protected information on behalf of the Applicant.

9. I make this agreement with the following understandings:

(a) I do not waive any objections that any other person may have to executing an affidavit such as this one;

(b) I do not waive any objections that I may have or raise at a subsequent time in this proceeding, concerning an expert's qualifications to testify concerning Security Plan issues or aircraft crash consequences issues; and

(c) I will not publicly discuss or disclose any protected information that I receive by virtue of this proceeding, and will not corroborate the accuracy or inaccuracy of information obtained outside this proceeding by using protected information, or my knowledge thereof, gained through the hearing process.

10. I acknowledge that any violation of the terms of this affidavit or the Licensing Board's June 26, 2003 memorandum and order, which incorporates the terms of this affidavit, may result in the imposition of sanctions as the Licensing Board or the Commission may deem to be appropriate, including, but not limited to, referral of the violation to appropriate disciplinary authorities. I further acknowledge that any unauthorized disclosure of protected information or breach of the protective order issued in this proceeding may be grounds for the imposition of civil and/or criminal penalties, as set forth in 10 C.F.R. § 2.744(e) and sections 223 and 234 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2273, 2282.

WHEREFORE,

I do solemnly agree to safeguard such protected information as may be disclosed to me in this proceeding, in accordance with the terms of this affidavit.

(Name)

Subscribed to and sworn before me
this ___ day of _____, 2003

Notary Public
My commission expires: _____

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

In the Matter of)
)
PRIVATE FUEL STORAGE, L.L.C.)
)
(Independent Spent Fuel Storage)
Installation))

Docket No. 72-22-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (MODIFIED PROTECTIVE ORDER FOR SECURITY PLAN CONTENTIONS AND AIRCRAFT CRASH CONSEQUENCES SAFEGUARDS PROTECTED INFORMATION) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Michael C. Farrar, Chairman
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Jerry R. Kline
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Peter S. Lam
Atomic Safety and Licensing Board Panel
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Sherwin E. Turk, Esquire
Catherine L. Marco, Esquire
Office of the General Counsel
Mail Stop - 0-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Diane Curran, Esquire
Harmon, Curran, Spielberg
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Washington, DC 20036

Joro Walker, Esquire
Director, Utah Office
Land and Water Fund of the Rockies
1473 South 1100 East, Suite F
Salt Lake City, UT 84105

Martin S. Kaufman, Esquire
Atlantic Legal Foundation
205 E. 42nd St.
New York, NY 10017

**Docket No. 72-22-ISFSI
 LB MEMORANDUM AND ORDER
 (MODIFIED PROTECTIVE ORDER FOR
 SECURITY PLAN CONTENTIONS AND
 AIRCRAFT CRASH CONSEQUENCES
 SAFEGUARDS PROTECTED INFORMATION)**

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 Assistant Attorney General
 Utah Attorney General's Office
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 David W. Tufts, Esquire
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 Reservation and David Pete
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 Albuquerque, NM 87120**

**Marlinda Moon, Chairman
 Sammy Blackbear, Sr., Vice-Chairman
 Miranda Wash, Secretary
 Skull Valley Band of Goshute Indians
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 Washington, DC 20240**

Adria T. Byrdson
 Office of the Secretary of the Commission

**Dated at Rockville, Maryland,
 this 27th day of June 2003**