

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

March 31, 2004 (11:11AM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

In the Matter of:

) Docket No. 72-22-ISFSI

)
) PRIVATE FUEL STORAGE, LLC
) (Independent Spent Fuel
) Storage Installation

) ASLBP No. 97-732-02-ISFSI

) March 25, 2004

STATE OF UTAH'S REPLY TO APPLICANT AND STAFF RESPONSE BRIEFS ON
THE COMMISSION'S REVIEW OF CONTENTIONS UTAH U BASIS 2, CC, & SS

Pursuant to CLI-04-04 (February 5, 2004), the State replies to the March 18, 2004 briefs filed by Applicant, PFS, and NRC Staff. In their briefs, PFS and the Staff unsuccessfully try to shore up the Board's rationale for not admitting contention Utah U, Basis 2. As to the 20-40 year cost-benefit analysis dichotomy in the Final Environmental Impact Statement ("FEIS") (Utah C and Utah SS), PFS and the Staff fail to overcome the unambiguous regulatory language that an FEIS for an ISFSI "will address environmental impacts of spent fuel storage only for the term of the license ... applied for." 10 C.F.R. § 51.97(a).

A. Contention Utah U, Basis 2

The Commission granted review of Utah U, Basis 2 because the Board's unclear rationale and reliance on NRC safety regulations in rejecting Basis 2 did not resolve the question of whether certain environmental consequences need to be addressed under NEPA. CLI-04-04, slip op. at 7. The NRC Staff attempts to ascribe a rationale to the Board that is non-existent in the Board's decision. In LBP-97-7, 47 NRC at 199, the Board ruled:

Inadmissible as to bases two, three, and four proffered in support of this contention, which fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including those involving canister inspection and repair and transportation sabotage; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application.

To support this ruling, the Staff posits that Utah U, Basis 2 requires PFS to discuss environmental impacts of hot cell operations but as no hot cell is required under NRC safety regulations the Board correctly ruled Utah's basis statement challenged NRC regulations or generic determinations. NRC Br. at 9 (as revised on March 23). There is no such rationale in the Board's ruling and the Staff-supplied reasons should be rejected. Furthermore, Basis 2, which incorporates Utah J, contends that without a hot cell there will be no means by which PFS can inspect and repair damaged or leaking canisters or detect and remove contamination from canisters, and as such the Applicant has failed to give adequate consideration to reasonably foreseeable potential adverse environmental impacts. This is not a challenge to NRC regulations. In fact, when making a finding of no significant impact (FONSI) for the Virgil C. Summer Nuclear Station, NRC relied on the cask park having "facilities to vacuum dry the cask, backfill it with helium, make leak checks, remachine the gasket surfaces if leaks persist, and assemble the cask on-site." 67 Fed. Reg. 55,436, 55,439 (2002). As described in Utah's brief at 6, PFS and the Staff have struggled with how this offsite ISFSI will deal with leaking or breached canisters. PFS's license application does not address the issue and as such, there is no basis for the State to controvert the application. PFS Br. at 7-8. Essentially, the NRC is now making a FONSI for the PFS facility absent any means by which PFS will have to inspect or repair canisters, or to detect and remove contamination on canisters.

Both the Staff and PFS complain that the State raises new issues on appeal. NRC Br. at 11; PFS Br. at 6. The State's brief, however, addresses why the FEIS does not "moot" the State's concerns, including those incorporated from Utah J.

B. Contentions Utah C and Utah SS - Cost Benefit Analysis

In granting review of Utah SS, the Commission stated: "the Board found the contention

timely, but rejected it for failing to state a claim for which relief could be granted.”¹ The Board’s reliance on economic impacts and finding the record adequate to explain the 20-40 year cost-benefit dichotomy do not sustain its decision not to admit Utah SS. The Board erroneously concluded that because the site is on an Indian reservation and there is no gross environmental damage, an economic analysis is probably unnecessary. Tr. at 9214.

NEPA requires consideration of the no-action alternative² as well as a broad balancing of the costs and benefits of the project. See e.g., CLI-04-09, slip op at 3. In FEIS Ch. 8, NRC has chosen to meet these NEPA requirements by balancing economic benefits of the project against the no action alternative. Neither NRC’s nor PFS’s briefs overcome the flawed FEIS which unreasonably relies on a 20 year period for fuel receipt and 40 years for fuel storage to find that the PFS project will produce net economic benefits and provides the decision-maker and the public with misleading economic assumptions when balancing the project’s economic benefits against its adverse environmental effects.³ Moreover, PFS resorts to economic benefits to shore up a claimed positive environmental cost-benefit balance. PFS Br. at 15 (economic storage option; economic benefits to the Band). Any positive cost-benefit balance, however, cannot be

¹CLI-04-04, slip op. at 11. Utah was the only party to petition for review; neither PFS nor the Staff appealed any issues in response to CLI-03-16, 58 NRC 360 (2003). In its bench ruling the Board summed up PFS opposition to Utah SS on two grounds, timeliness, and on the second ground that even if validly filed Utah was not entitled to relief and concluded: “We decide the issue against the State on the second ground only, not on the ground of untimeliness.” Tr. 9211. PFS and Staff claims of untimeliness are without merit. PFS Br. at 18-19; NRC Br. at n. 36.

²City of Tenakee Springs v. Clough, 915 F.2d 1308 (9th Cir. 1990); Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228 (9th Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989).

³Johnson v. Davis, 698 F.2d 1088, 1095 (10th Cir. 1983) (“EIS does not adequately explain and qualify the economic results rendered through the application of this unrealistically low discount rate, and thereby fails to provide the public and the decision-maker with an informed comparison of alternatives.”); Hughes River Watershed Conservancy v. Glickman, 81 F.3d. 437, 446 (4th Cir. 1996).

ascertained without a supplemental analysis to FEIS Ch. 8 using legally supportable and even-handed assumptions.⁴ Utah Br. at 14-17.

The obvious legal flaw in the FEIS is assessing storage benefits over a 40 year period. Both PFS and the Staff contort 10 C.F.R. §§ 51.23(b) and 51.97(a), forcing the regulations to read that the FEIS may address storage beyond the initial 20 year license term by attempting to distinguish “environmental impacts” as included in section 51.97(a) from “cost-benefit” assessments, which are not. NRC Br. at n. 33; PFS Br.16-17. This is a distinction without a difference. Utah’s challenge to the FEIS economic analysis is related to environmental impacts, as impacts and effects are defined in 40 C.F.R. § 1508.8 40, as incorporated into 10 C.F.R. § 51.14(b). Section 1508.8 treats effects as synonymous with impacts and whether direct, indirect, or cumulative, the definition includes ecological as well as economic and social impacts. Even if, on balance, the effects are beneficial, those effects that are both beneficial and detrimental are included in effects. *Id.* In sum, NEPA requires an EIS to include impacts and effects that are economic, and evaluate the effects that are detrimental and beneficial. Also, the Staff use the license renewal provision to insinuate that the extra 20 year storage period in the FEIS is reasonable. NRC Br. at n. 33. The regulatory language does not sustain this strained reading.

The term of an ISFSI license must not exceed 20 years⁵ and application for renewal must be submitted two years prior to license expiration.⁶ 10 C.F.R. § 72.42. The waste confidence rule

⁴Staff’s attempt to rescue its FEIS by finding safe harbor in Utah’s economic analysis in support of Utah SS is unavailing. NRC Br. at 19-20. Utah’s expert explicitly states there are insufficient data available in the FEIS to permit a numerical recalculation of the net benefits based on a genuine 20 year license period. Contention Utah SS, Sheehan Dec. ¶ 21.

⁵In his analysis, Utah’s expert recognizes and accounts for the Staff’s allowance of a 2 year decommissioning period beyond the initial license term. Contention Utah SS, Sheehan Dec. Attachment (Tables); FEIS, App. G-77.

⁶A license does not expire until final Commission action on the renewal application but it is unreasonable to assume this would take 22 years to achieve. *Sæ* NRC Br. at n. 33.

“does not alter any requirements to consider the environmental impacts of spent fuel storage during the term of . . . a license for an ISFSI in a licensing proceeding.” 10 C.F.R. § 51.23(c). Significantly, the directive in section 51.97(a) clearly states that the FEIS for an ISFSI “will address environmental impacts of spent fuel storage only for the term of the license... applied for” (*emphasis added*). Taken together, these regulations do not sustain the uneven treatment of fuel receipt (20 years) and fuel storage (40 years) that illegally biases the FEIS in favor of PFS.

Staff’s claim of “conservatism” in its analysis (Br. at n. 29) is belied by the fact that none of the scenarios⁷ in the FEIS is feasible when using a straight 20 year period. Staff also claim (*id.* at 18) that if Utah SS were admitted and is correct, it would not contribute meaningfully to the Commission’s decision. This assumes the Commission’s decision is preordained. The relief Utah requests is for NRC to comply with NEPA by rectifying the FEIS that evinces such a strong and unsupported bias towards the PFS ISFSI and to conduct a thorough, disciplined NEPA analysis based on supportable assumptions. Massachusetts v. Watt, 716 F.2d 946, 951 (1st Cir. 1983) (“in some instances, the statement may change a mind that previously thought itself unchangeable”).

DATED this 25th day of March, 2004.

Respectfully submitted,



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⁷Staff claims the small throughput in the FEIS is irrelevant because the financial assurance license condition “would preclude operation of the PFS [facility] with such a small throughput amount.” NRC Br. at n. 31. Staff’s statement is in conflict with CLI-04-10, slip op at 8-9 (proprietary) and further erodes its unsupported FEIS cost-benefit analysis.

CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S REPLY TO APPLICANT AND STAFF RESPONSE BRIEFS ON THE COMMISSION'S REVIEW OF CONTENTIONS UTAH U BASIS 2, CC, & SS was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 25th day of March, 2004:

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