

August 10, 2000

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-ISFSI
)	
(Independent Spent)	
Fuel Storage Installation))	

NRC STAFF'S RESPONSE TO
"STATE OF UTAH'S REQUEST FOR ADMISSION OF
LATE-FILED UTAH CONTENTION KK (POTENTIAL IMPACTS
TO MILITARY TRAINING AND TESTING AND STATE ECONOMY)"
TO MILITARY TRAINING AND TESTING AND STATE ECONOMY)"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.714(c), and the Atomic Safety and Licensing Board's "Order (Schedule for Responses to Request for Admission of Late-Filed Contention)," dated July 31, 2000, the NRC Staff ("Staff") hereby files its response to the "State of Utah's Request for Admission of Late-Filed Contention KK (Potential Impacts to Military Training and Testing and State Economy)," dated July 27, 2000. For the reasons set forth below, Late-Filed Utah Contention KK should be rejected.

BACKGROUND

On June 25, 1997, Private Fuel Storage, L.L.C. ("PFS" or "Applicant"), filed an application for a license to possess and store spent nuclear fuel in an Independent Spent Fuel Storage Installation ("ISFSI") to be constructed and operated on the Skull Valley Goshute Indian Reservation in Skull Valley, Utah. The application included five documents: a license application, safety analysis report, emergency plan, physical security plan -- and, as pertinent here, an Environmental Report ("ER").

On July 31, 1997, the Commission published in the Federal Register a Notice of Consideration and Notice of Opportunity for Hearing concerning the license application. See 62 Fed. Reg. 41,099 (1997). The Notice advised interested persons, *inter alia*, that petitions for leave to intervene may be filed by September 15, 1997, and that they must file a list of contentions they wish to litigate no later than 15 days before the first prehearing conference scheduled in the proceeding.

In accordance with the Licensing Board's Orders in this proceeding, on or before November 24, 1997, numerous contentions were timely filed by the various petitioners, including approximately 40 contentions filed by the State. Many of these contentions challenged the adequacy of PFS' application and Environmental Report under the National Environmental Policy Act of 1969 ("NEPA"). See, e.g., Utah Contentions T, U, V, W, X, Z, AA, BB, CC, and DD. In addition, as pertinent here, one contention (Utah K) challenged the adequacy of the Applicant's consideration of credible accidents that might result from offsite hazards, including nearby military installations and activities -- specifically including the site's location under the Sevier B restricted military airspace;¹ and one contention (Utah W, Basis 1) challenged the adequacy of the Applicant's evaluation of the "cumulative impacts" from the "hazardous and industrial activities" listed in Contention Utah K. Utah Contentions at 162.

On April 22, 1998, the Licensing Board issued its ruling on standing and the admissibility of the petitioners' contentions. In particular, the Board admitted Contention Utah K relating to the hazard posed by nearby military facilities and activities, but it rejected

¹ "State of Utah's Contentions on the Construction and Operating Licence Application by Private Fuel Storage, LLC, for an Independent Spent Fuel Storage Facility" ("Utah Contentions"), dated November 23, 1997, at 76.

the related assertion in Contention Utah W that PFS had failed to consider the “cumulative impacts” of these facilities and activities, on the grounds that this contention and its supporting basis “fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 202 (1998).²

On or about June 16, 2000, the NRC Staff and cooperating federal agencies (the U.S. Bureau of Indian Affairs, U.S. Bureau of Land Management, and U.S. Surface Transportation Board) issued their Draft Environmental Impact Statement concerning PFS’ application for an NRC license and its requests for related Federal agency actions, in accordance with their NEPA responsibilities.³ In the DEIS, the Staff and cooperating agencies evaluated the environmental effects of their proposed actions, including, *inter alia*, the environmental and economic costs and benefits resulting from the PFS proposal. See, e.g., DEIS, Executive Summary at xlii.

On July 27, 2000, following its receipt of the DEIS, the State filed the instant request for admission of late-filed Contention Utah KK (Potential Impacts to Military Training and Testing and State Economy). Therein, the State proposed a new issue for litigation,

² While the State asserted in Contention W that the Applicant had failed to evaluate the cumulative impacts of “hazardous and industrial activities located in the region of the ISFSI site and the Intermodal Transfer site,” the only support provided for this assertion was the State’s incorporation by reference of the basis for Contention Utah K. No facts or expert opinion were provided to show that these activities might have any “cumulative impacts” that required consideration in an environmental evaluation.

³ NUREG-1714, “Draft Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah” (June 2000) (“DEIS”). See 65 Fed. Reg. 39,206 (June 23, 2000).

challenging the “failure” of the Staff’s DEIS “to assess the impacts to military training and testing, overall military readiness and national security, and subsequent impacts to the economy in the State of Utah,” which the State asserts may result from licensing the PFS facility. Late-Filed Utah Contention KK, at 1. In support of this contention, the State asserts that the facility’s location in the Sevier B military operations area (“MOA”) airspace could cause the U.S. Air Force (“USAF”) to voluntarily restrict or eliminate military flights and training or weapons testing in the airspace over the proposed site, thereby causing a decrease in military readiness, a threat to national security, and a weakening of the Utah Test and Training Range (“UTTR”) -- which would allegedly “cripple the military value of Hill Air Force Base and subject it to possible closure.” *Id.* at 7. Reductions in operations related to the UTTR and Hill AFB, in turn, would allegedly result in a variety of negative socioeconomic impacts to Utah. *Id.* at 8.

For the reasons set forth below, the Staff respectfully submits that Late-Filed Utah Contention KK should be rejected, on the grounds that it (a) is impermissibly late, without a demonstration that good cause and other factors set forth in 10 C.F.R. § 2.714(a)(1) support its admission at this time, and (b) fails to set forth a reasonably foreseeable impact that may result from the licensing of the PFS facility, and therefore fails to show that a genuine dispute exists with the Applicant on a material issue of law or fact, and even if proven, would be of no consequence because it would not entitle the State to relief. See 10 C.F.R. §§ 2.714(b)(2)(iii).

DISCUSSION

A. Legal Standards for Late-Filed Contentions.

The criteria to be considered when determining the admissibility of a late-filed contention are set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v), as follows:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of ~~other~~ means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

It has long been held that the first factor, good cause for lateness, carries the most weight in the balancing test. See *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 295 (1993). Absent a showing of good cause, a petitioner must make a compelling showing that the remaining factors outweigh the lack of good cause for the untimely filing. See *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986).

In evaluating the five lateness factors, two factors -- the availability of other means to protect the petitioner's interest and the ability of other parties to represent the petitioner's interest -- are less important than the other factors, and are therefore entitled to less weight. *Texas Utilities Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 74 (1992). With respect to the third factor (the potential contribution to the development of a sound record), petitioners are to provide a "real clue about what they would say to support the contention beyond the minimal information they provide for admitting the contention." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation) LBP-98-7, 47 NRC 142, 208-09 (1998).

Finally, in addition to showing that a balancing of the five factors favors intervention, a petitioner must also meet the requirements for setting forth a valid contention, as stated in 10 C.F.R. § 2.714(d)(2).

B. The State Has Failed to Establish Good Cause For the Late Filing of Contention KK.

Late-Filed Utah Contention KK asserts as follows:

Contention KK. Military Training Impacts

The draft Environmental Impact Statement fails to comply with the National Environmental Policy Act and 10 CFR § 51.71(d) because it does not adequately assess the cumulative and socioeconomic impacts from loss of military operations area airspace use, including a reduction in military readiness and national security, and potential socioeconomic impacts to Utah communities that rely on employment and patrons of military agencies that use the Sevier B military operating area.

In support of this contention, the State provided substantial documentation which, together, postulate dire consequences to military training and testing, overall military readiness, national defense and security, and the economy of Utah, which the State contends may result if the PFS facility is licensed. Late-Filed Utah Contention KK, at 1.⁴

Specifically, the State asserts (1) that the DEIS fails to consider that the proposed PFS facility will be located under the Sevier B military operating area ("MOA") airspace, *Id.*

⁴ The State provided (1) the Declaration of USAF Maj. Gen. (Ret.) Michael D. Pavich, Executive Director of the Ogden Local Redevelopment Authority and President of Hill/DDO-'95 Inc., a non-profit organization established to maximize the economic potential of Hill AFB and Defense Depot Ogden for the State of Utah; (2) the Declaration of John A. Harja, Manager of Legal Analysis for the Governor's Office of Planning and Budget; (3) a written statement to the Board by Congressman James V. Hansen, Chairman of the House Subcommittee on National Parks and Public Lands, dated June 23, 2000; (4) a letter from USAF Col. Ronald G. Oholendt, Vice Commander of the 388th Fighter Wing at Hill AFB, to Utah Governor Michael O. Leavitt, dated May 3, 1999; (5) a September 1994 report by the Governor's Office of Planning and Budget, entitled "Hill Air Force Base and Utah's Defense Sector: An Economic Analysis of Two Realignment Scenarios"; and (6) a copy of Utah Code Ann. § 63-28a (Resource Development Coordinating Committee).

at 5; (2) that the use of this area by the military and by the PFS facility and proposed rail spur pose a "conflict" that must be addressed in a NEPA analysis of the PFS application, *Id.* at 6; (3) that various military training and testing activities are conducted in the Sevier B MOA, including low and medium altitude entry to the UTTR-Dugway Proving Ground ("DPG") land mass by fighter wings stationed at Hill AFB, *Id.* at 5-6; (4) that Hill AFB aircraft carrying live ammunition must use the Sevier B MOA in Skull Valley to make undetected approach to targets located in the UTTR-DPG, *Id.* at 6; (5) that "there is no other suitable nearby airspace" in which Hill AFB aircraft may perform certain combat exercises, *Id.* at 6-7; (6) that "even a five nautical mile overflight prohibition above the PFS ISFSI would basically eliminate the use of the Sevier B MOA," *Id.* at 7; (7) that "it is reasonably foreseeable that, in order to avoid potential liability, the military will be forced to voluntarily restrict or eliminate military training or weapons testing activities currently authorized over the area of the proposed PFS facility," *Id.* (emphasis added); (8) that such a voluntary restriction by the military "would result in a decrease in military readiness and threaten national security, *Id.*;" (9) that such voluntary restrictions in training or testing could weaken the UTTR and thereby "cripple the military value of Hill AFB and subject it to possible closure," *Id.*; and (10) that this would severely affect the economy of Utah, since Hill AFB is the largest "basic" employer in the State and is responsible for hundreds of millions of dollars in direct and indirect benefits. *Id.* at 8-9.

Notwithstanding the significance of the alleged potential adverse impacts presented by the PFS facility's location under a portion of the Sevier B MOA (discussed *infra* at 13-16), the State has failed to show why it could not have filed a contention raising this matter sooner. In this regard, it is beyond dispute that the State has been aware that the PFS site is located under a portion of the Sevier B MOA since the time it filed its original

contentions in November 1997, having specifically mentioned this fact in Utah Contention K (challenging the adequacy of the Applicant's analysis of credible accidents that might result from offsite hazards, including nearby military installations and activities). See discussion *supra* at 2. Although the State has long been aware of the site's location under the Sevier B MOA airspace, it failed to allege (either in Contention Utah K or in any other contention) that the site's location under the Sevier B MOA airspace could adversely affect Hill AFB, the UTTR, military operations and readiness, national defense and security, or the Utah economy.

Moreover, the State had specifically identified the concerns specified in Late-Filed Utah Contention KK over one year ago, in its comments submitted during the DEIS scoping process on May 27, 1999. See Late-Filed Utah Contention KK, at 3-4, 9; DEIS, Appendix A ("Supplemental Scoping Report," November 1999), at 8.⁵ Although the State filed those comments in the scoping process for the DEIS, it failed to raise these concerns in a contention for litigation in this proceeding, until now --14 months after submitting its DEIS scoping comments.

Similarly, since at least May 1999, the State has been aware of Col. Oholendt's views that overflight restrictions associated with the PFS facility "could have dire consequences for Air Force training and testing conducted in the UTTR." See Late-Filed Utah Contention KK, Oholendt Letter at 1. In addition, since at least September 1994, the State has been aware of Hill AFB's significant economic value to the Utah economy. Late-Filed Utah Contention KK, Governor's Economic Report, at 1-2. While the State has

⁵ The State's DEIS scoping comments concerning this matter are attached hereto as Attachment A ("Scoping Comments Submitted by the State of Utah, May 27, 1999)," at 22 § 16.

been in possession of these documents for quite some time, it failed to present any contention based on those documents until now.

In an attempt to justify its late filing of its contention, the State admits that it “became aware of the significance of the potential impacts to the military in May 1999,” but argues that it “reasonably believed the DEIS would address such cumulative and socioeconomic impacts. Thus, the State has not idly waited until the DEIS was published to make its concerns known to the Staff.” Late-Filed Utah Contention KK, at 9, 10.

These arguments fail to establish good cause for the State’s late filing of this contention. The Licensing Board has observed that an intervenor has an “ironclad obligation” to examine the application, and “other publicly available documents, with sufficient care to uncover any information that could serve as the foundation for a contention.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-43, 50 NRC 306, 313 (1999). As the Board further stated, intervenors “have been counseled to evaluate all available information at the earliest possible time to identify the potential basis for contentions and preserve their admissibility.” *Id.* Further, in assessing a contention’s timeliness, “the emphasis is on the substance and sufficiency of the information available to the contention’s sponsor.” *Id.* Where a new issue is asserted to be based upon information contained in a document that has recently been made available to the public, “an important consideration is the extent to which the new contention could have been put forward with any degree of specificity in advance of the document’s release.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 292 (1998).

Here, by the State’s own admission, it had the information it needed to formulate this contention at least since May 1999. Thus, the State’s filing of this contention more than

14 months after its receipt of this information is late in the extreme. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-3, 49 NRC 40, 47 (1999) (45-day period for intervention petition stretches the limits of "good cause"). Moreover, regardless of the "reasonableness" of State's belief that the DEIS would address (and presumably, resolve) its concerns, it was incumbent upon the State to timely file its contention at the time it obtained, or could have obtained, information regarding these matters without waiting for publication of the DEIS.

In this regard, 10 C.F.R. § 2.714(b)(2)(iii) provides:

On issues arising under the National Environmental policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement . . . that differ significantly from the data or conclusions in the applicant's document.

Accordingly, it has been held that "as a matter of law, an intervenor must file contentions on the basis of an applicant's ER, and does not have good cause for delaying its filing until issuance of a Staff document unless it establishes that new or different data or conclusions are contained in that Staff environmental document." *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 251 (1993).

Finally, in support of its assertion that "good cause" supports the admission of this late-filed contention, the State argues that good cause for its admission is supported by "the national significance of this issue." This argument is without merit. First, the State's contention shows that the State had a good understanding and awareness of this matter as early as May 1999. *See Late-Filed Utah Contention KK, Oholendt Letter at 1.* Therefore, particularly in light of the alleged "significance" of this issue, the State should have been diligent in raising this issue in a contention when it first received information

concerning this matter. Second, it has been held that the significance of the issue has no bearing on good cause for the late filing of a party's contention. *See South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 887 n.5 (1991) (good cause "depends wholly upon the substantiality of the reasons asserted for not having filed at an earlier date") (emphasis in original). Accordingly, the alleged significance of this issue does not support a finding of good cause for the State's lateness in filing this contention. In sum, the State has failed to demonstrate good cause for the lateness of its contention.

C. The Other Late-Filing Factors Do Not Favor the Admission of Contention KK.

With respect to the other factors specified in 10 C.F.R. § 2.714(a)(1), the State has not made a compelling showing that those factors support the admission of Late-Filed Contention KK. With respect to factor three, whether the State's participation may be expected to assist in developing a sound record, the State rests on its proposed offer of testimony by Maj. Gen. Pavich and John Harja. The State indicates that Maj. Gen. Pavich has expertise concerning Utah's economic dependence on military facilities in the State, and is knowledgeable concerning the military activities which occur in the UTTR-DPG airspace, including those that occur in the Sevier B MOA. Late-Filed Utah Contention KK, at 11. Similarly, the State indicates that Mr. Harja, an attorney who serves as Executive Director of the Utah Resource Development Coordinating Committee, is prepared to testify concerning the socioeconomic importance of Hill AFB to Utah and the impact that locating the PFS facility and rail spur may have on Hill AFB and Utah's economy. *Id.* However, the State's showing with respect to factor three falls short of a compelling showing that admission of this contention will assist in developing a sound record. The State does not provide a "real clue" as to what these individuals will say to support the contention. *See*

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation) LBP-99-43, 50 NRC 306, 315 (1999). No indication is provided, either in the contention or the attachments thereto, that either of these individuals knows whether the military will “voluntarily” decide to restrict its use of the Sevier B MOA; nor is any indication provided to show that these individuals know the nature or scope of such a voluntary restriction, or whether it would result in the dire, worst-case scenario postulated in the contention. Rather than assist in the development of a sound record, the State’s proffer of these individuals instead appears likely to result in confusion and uncertainty as to whether any of the impacts postulated by the State are, in fact, “reasonably foreseeable” consequences of licensing the PFS facility. Accordingly, this factor does not weigh in favor of the admission of this contention.

Regarding factors two and four, no other means appear clearly to be available to protect the State’s interest with respect to the issues raised in the Late-Filed Contention KK,⁶ and the State’s interest would not be represented by existing parties with respect to these issues. These factors, however, carry less weight than the three other factors specified in the regulation. *Private Fuel Storage*, LBP-98-7, 47 NRC at 208.

Finally, the fifth factor weighs against the admission of Late-Filed Contention KK, in that admission of the contention would broaden the issues and cause delay in the proceeding. The State asserts that this contention “may be accommodated in the existing schedule with other admitted NEPA contentions,” so that “the licensing proceeding will not

⁶ Nonetheless, the Staff notes that the State may have other means available to protect its interest, insofar as Utah Congressman Hansen has expressed his concern with respect to this issue, and has stated that he will “do all that is within [his] power” to oppose locating a spent fuel facility in Skull Valley, UT. Late-Filed Utah Contention KK, Congressman Hansen Letter, at 3.

be delayed.” Late-Filed Utah Contention KK at 13. The State’s assertion ignores the fact that discovery on Contention KK may well take substantial time, particularly in view of the likelihood that evidence would likely be required to be obtained from the U.S. military and other persons who are not parties in this proceeding. Therefore, consideration of this contention would likely cause some delay in the proceeding, and would broaden the issues beyond those that have been identified in other admitted contentions. Therefore, this factor does not weigh in favor of the admission of Late-Filed Utah Contention KK.

In sum, the State has not made a compelling showing that the remaining factors overcome the failure of the State to demonstrate good cause for filing this contention late. Accordingly, Late-Filed Utah Contention KK should be rejected.

D. The Admissibility of Late-Filed Contention KK

In the event that the Licensing Board determines that Contention KK should not be rejected on grounds of timeliness, the contention nonetheless should be rejected in that it (a) fails to provide sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact (with respect to the matters raised), and/or (b) even if proven, would be of no consequence because it would not entitle the State to relief. See 10 C.F.R. §§ 2.714(b)(2)(iii).

In this regard, it is important to observe that not all alleged environmental or economic impacts need to be considered in an Environmental Impact Statement under NEPA, regardless of their likelihood of occurrence. Rather, a “rule of reason” applies, pursuant to which an EIS is required to consider those environmental impacts which are “reasonably foreseeable” to result from the agency’s action; “remote and speculative” environmental impacts, in contrast, need not be considered. See, e.g., *Scientists’ Institute for Public Information, Inc. v. AEC*, 481 F.2d 1079, 1092 (D.C. Cir. 1973); *Public Service*

Electric and Gas Co. (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 38-39 (1979); *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 & 2), LBP-78-26, 8 NRC 102, 141 (1978); *see also, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978), *quoting NRDC v. Morton*, 458 F.2d 827, 837-38 (D.C. Cir. 1972) (consideration of alternatives).

Here, despite the State's assertion that "it is reasonably foreseeable that, in order to avoid potential liability, the military will be forced to voluntarily restrict or eliminate military training or weapons testing activities currently authorized over the area of the proposed PFS facility," *Late-Filed Utah Contention KK*, at 7, and that the Staff has failed to consider this issue in the DEIS,⁷ no information has been provided to indicate that such a voluntary restriction is, in fact, a reasonably foreseeable consequence of this licensing action; nor do

⁷ The ~~State~~ indicates that the DEIS failed to consider the State's scoping comments concerning this ~~matter~~ (despite the State's apparent assumption that it would), and that the Staff appears to have "brushed aside" this issue. *See Late-Filed Utah Contention KK*, at 4-5, and 10. In fact, the Staff consulted with officials of the Dugway Proving Ground, U.S. Air Force (Pentagon), and Hill AFB. *See, e.g.,* (1) letter from Charles J. Haughney (NRC) to Col. John A. Como (DPG), dated February 12, 1998 ("Attachment B" hereto); (2) memorandum from Mark S. Delligatti to Susan F. Shankman, dated November 9, 1999 ("Report on November 4, 1999, Trip to the Pentagon") ("Attachment C" hereto); and (3) memorandum from Mark S. Delligatti to Susan F. Shankman, dated November 23, 1999 ("Report on November 17, 1999, Trip to Hill Air Force Base") ("Attachment D" hereto). These agency consultations were inadvertently omitted from the list of "Agencies Consulted" in ~~Chapter~~ 10 of the DEIS, but will be inserted in Chapter 10 of the Final EIS.

As set forth in Attachments C and D hereto, in its discussions with USAF representatives, the Staff indicated that the NRC lacks authority to impose flight restrictions over the PFS facility, addressing a concern which had been expressed by USAF representatives. No information was received by the Staff which would indicate that a voluntary restriction of flights over the PFS facility or Sevier B MOA by the military is a reasonably foreseeable consequence of licensing the PFS facility; rather, USAF representatives indicated that they would not want to adopt flight restrictions. Moreover, no information was received which would indicate that the adoption of a voluntary flight restriction would have any impact on the usefulness of the UTTR-DPG, Hill AFB, military readiness, national defense and security, or the Utah economy. The Staff will consider including a discussion of this matter in the FEIS.

the State's proposed witnesses provide any reason to believe that any such restrictions will be adopted.⁸ Further, even if voluntary flight restrictions are adopted, no information has been presented by the State or its proposed witnesses to indicate that such restrictions would result in anything more than a relocation of military flight paths to other portions of Skull Valley, so as to avoid direct overflight of the PFS facility. Finally, even if a broader (but still unidentified) restriction were to be adopted by the military, the State has neither alleged, nor provided information to show, that a "reasonably foreseeable" consequence of such restrictions would be the loss of UTTR-DPG military usefulness, closure of Hill AFB, and/or severe damage to the Utah economy.⁹

Rather than show that any of its postulated consequences are reasonably foreseeable, the State has, in essence, provided only speculation that such results could occur. In the absence of any showing that these are "reasonably foreseeable" consequences, the contention fails to present an issue that should be admitted for litigation in this proceeding. In this regard, the State has failed to provide sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact concerning this matter, and the contention should therefore be rejected. See 10 C.F.R. §§ 2.714(b)(2)(iii). Even if the State is correct in asserting that the Staff failed to consider the impacts on the UTTR, Hill AFB, military readiness, national defense and security, and

⁸ Indeed, the State's witnesses fail to indicate why such restrictions would be required in lieu of any other available measures to reduce the potential for an accident, such as inserting a provision in the military flight operations procedures which alerts pilots to the existence and location of the PFS and the need for collision avoidance in the event of an aircraft mishap.

⁹ The only assertion made by the State that any of its postulated consequences is "reasonably foreseeable" is its assertion that "the military will be forced to voluntarily restrict or eliminate military training or weapons testing activities currently authorized over the area of the proposed PFS facility." Late-Filed Utah Contention KK, at 7. No assertion has been made that any of the other sequence of events postulated by the State is "reasonably foreseeable." See *Id.* at 3-9.

the Utah economy, this assertion is of no consequence since it would not entitle the State to relief absent information showing that such impacts are reasonably foreseeable.

CONCLUSION

For the reasons set forth above, the Staff submits that Late-Filed Utah Contention KK should be rejected.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sherwin E. Turk". The signature is fluid and cursive, with a long horizontal stroke at the end.

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 10th day of August 2000

U. S. NUCLEAR REGULATORY COMMISSION
DEPARTMENT OF THE INTERIOR
Bureau of Indian Affairs
Bureau of Land Management
DOCKET NO. 72-22
And
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
PONY EXPRESS RESOURCE MANAGEMENT PLAN

ENVIRONMENTAL IMPACT STATEMENT
SCOPING COMMENTS
And
BLM RESOURCE MANAGEMENT PLAN AMENDMENT
SCOPING COMMENTS

SUBMITTED BY THE STATE OF UTAH
MAY 27, 1999

The following comments are provided by the State of Utah (State) in response to the March 31, 1999 Notice of Intent to Prepare Environmental Impact Statement (EIS) and Notice of Public Scoping Meeting issued by the U. S. Nuclear Regulatory Commission (NRC) and by the U.S. Department of Interior for the Bureau of Indian Affairs (BIA) and the Bureau of Land Management (BLM). These comments are also being provided in response to the BLM's separate Notice of Intent to Prepare a Plan Amendment to the Pony Express Resource Management Plan (RMP).

Because there are two agencies involved in this environmental decisionmaking process that were not involved at the time of the NRC's 1998 scoping process, it is important that these comments address matters that have already been considered by the NRC. For that reason, the EIS Scoping Comments submitted by the State of Utah on June 19, 1998 are hereby incorporated by reference. A copy of the Comments (not including the incorporated attachments) is included as Attachment A to this document.

The State's Contentions Relating to the Low Rail Spur Transportation License Amendment dated Sept. 29, 1998, developed in PFS's licensing proceeding before the NRC (NRC Docket No. 72-22) is also incorporated by reference and included as Attachment B to this document.

Comments are organized under topic headings for ease of consideration. However, issues are interrelated and commonly impact or encompass other issues under other topic headings. Issues should not be narrowly construed or evaluated, based on topic headings. If additional information or clarification is needed, please contact:

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and Pony Express RMP
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A. THE PROPOSED ACTION

The NRC is considering Private Fuel Storage's (PFS's) license application for an Independent Spent Fuel Storage Installation (ISFSI) at the Skull Valley Reservation (NRC Docket No. 72-22). PFS is proposing to store up to 40,000 Metric Tons of Uranium at a storage facility on the Skull Valley Goshute Reservation. In addition, PFS has requested of BLM both a right-of-way to build a rail spur from the Union Pacific mainline paralleling I-80 south to the Reservation across BLM land and a right-of-way to use BLM land near Rowley Junction for an intermodal transfer station (ITS) to transfer the spent fuel to heavy haul trucks.

Thus, PFS is asking to transport potentially more than 80,000 Metric Tons of Uranium of high level nuclear waste on or across public lands, forty thousand metric tons to the storage area and, presumably, forty thousand metric tons from the storage area once a permanent repository is prepared. Forty thousand metric tons, the current total accumulation of the nation's commercial high-level nuclear waste, is an enormous amount. By comparison, Northern State's Power, one of the member utilities of PFS, only stores 7,000 metric tons in dry cask storage.

In addition, the proposed action includes the BIA's consideration of a proposed lease agreement between the Skull Valley Band of Goshute Indians and PFS. As a related but separate matter, the BLM is considering an amendment to its Resource Management Plan that would allow it to grant PFS's proposed right of way.

B. SCOPING IS PREMATURE

This issue is discussed in the State's June 19, 1998 Scoping Comments, included as Attachment A, at 1. Although additional information has been submitted since the time of those comments, there are still substantial gaps in the information available and necessary to complete an EIS. For example, PFS has still not provided any information about the frequency of truck or rail shipments through Skull Valley.

16. The effects of the proposal on the Utah Test and Training Range must be considered

The proposal to store high level nuclear waste in Skull Valley, and either method to get it there - rail/truck or rail spur - both constitute a threat to the vitality and mission of the Utah Test and Training Range, operated out of Hill Air Force Base. Hill Air Force Base is a major economic engine for the economy of the state of Utah. The Test Range is a key component of the vitality of the Base, and its ability to remain open in times of reductions in military force. The Test Range offers outstanding and unique opportunities for low level topographic flying, low-level helicopter training, and one of the only places where unmanned missiles can be flown. It is flown at all times of the year, in all types of weather, in order to train the pilots for all types of combat conditions. The need for this type of facility will only increase as the new generation of planes, missiles and helicopters is developed. Skull Valley is both within the restricted flight zone Military Operating Area, and an ingress route to the MOA. Ingress routes are limited both by nearby civilian commercial flight requirements, and the need for realistic tactical operational training of the military pilots.

The proposal threatens the operations of the Test Range in two ways. First, the threat of the accidental release of live ordnance or crash of aircraft with or without ordnance, the chance of which happening can never be realistically placed at zero. Secondly, the perception that the military may not be sensitive to this deadly material below their operations may cause restrictions on flight operations which reduce or eliminate the effectiveness of the training. These types of restrictions have happened at other flight ranges around the country for reasons related to recreational or other public uses. While the military may have accommodated those restrictions elsewhere, the reason for those restrictions was not concern about a material that has the potential to cause a catastrophic disaster in a large metropolitan area. The NRC and BLM cannot ignore or minimize the effects that movement and storage of high level, deadly, nuclear waste in the Skull Valley may have on the current and future uses of the Utah Test and Training Range and therefore on the viability of Hill Air Force Base.

G. ADDITIONAL COMMENTS ON BLM'S PROPOSAL TO AMEND THE RMP

In addition to the above comments on Docket No. 72-22 and the Pony Express RMP, when amending the Pony Express RMP, BLM is required to conform its planning process to the NEPA EIS planning process. 43 C.F.R. § 1610.2(a). For example, it is required to conform its planning process to the NEPA EIS planning process. 43 C.F.R. § 1610.2(a). For example, it is required to completely develop and consider all alternatives, including a no action alternative. In developing and considering such alternatives, consideration of each alternative's impact on local economies and uses of adjacent or nearby non-federal lands is required. Such consideration must include a

February 12, 1998

ATTACHMENT "B"

Colonel John A. Como, USA
Commander
Dugway Proving Ground
Dugway, Utah 84022

SUBJECT: RECENT VISIT BY STAFF OF THE SPENT FUEL PROJECT OFFICE
TO DUGWAY

Dear Colonel Como:

I want to thank you and your staff for the interesting briefing and tour you provided to me and my staff, along with all of the participants in the January 26, 1998, tour of sites and facilities in the general vicinity of the Reservation of the Skull Valley Band of Goshute Indians, organized by the Nuclear Regulatory Commission's Atomic Safety and Licensing Board. We particularly appreciated the amount of time that you made available to us. Your tour guides were also extremely knowledgeable and provided us with a good understanding of the kinds of activities taking place at Dugway.

I am enclosing for your information a copy of NUREG-1571, "Information Handbook on Independent Spent Fuel Storage Installations." I hope that you will find this guide useful in understanding the kind of facility that Private Fuel Storage L.L.C. (PFS) seeks to construct in Skull Valley. If you or your staff would like any further information on NRC's role in the licensing process for this proposed facility, please feel free to contact Mr. Mark Delligatti of my staff. Mr. Delligatti is the Senior Project Manager assigned to the PFS application. He can be reached at (301) 415-8518.

Sincerely,

[original signed by /s/]

Charles J. Haughney, Acting Director
Spent Fuel Project Office
Office of Nuclear Material Safety
and Safeguards

Docket 72-22

Enclosure: As stated

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November 9, 1999

MEMORANDUM TO: Susan F. Shankman, Deputy Director
Licensing and Inspection Directorate
Spent Fuel Project Office, NMSS

ATTACHMENT "C"

FROM: Mark S. Delligatti, Senior Project Manager /s/
Licensing Section
Spent Fuel Project Office, NMSS

SUBJECT: REPORT ON NOVEMBER 4, 1999, TRIP TO THE PENTAGON

On November 4, 1999, Marissa Bailey, Scott Flanders, Kaz Campe (Office of Nuclear Reactor Regulation) and I visited the Pentagon in Arlington, Virginia, to meet with representatives of the U.S. Air Force. An attendance list is attached. The Air Force had requested this meeting to discuss the staff's review of the application from Private Fuel Storage, L.L.C. (PFS), to operate an away-from-reactor independent spent fuel storage installation (ISFSI) on the reservation of the Skull Valley Band of Goshute Indians. The reservation is geographically located in Tooele County, Utah and is near to Hill Air Force Base and two flight ranges used by the personnel at Hill. This meeting precedes a November 17, 1999, meeting with representatives of Hill Air Force Base and Dugway Proving Grounds which will assist the staff in completing its safety evaluation of the PFS application.

The Nuclear Regulatory Commission (NRC) staff discussed the safety and environmental review processes underway for the PFS application. We also discussed, at a general level, cask certification, the Atomic Safety Licensing Board adjudicatory process, and accident analysis. We explained that NRC does not have the authority to restrict air space or to take any other action which would impact any existing flight operations in or near Skull Valley, Utah, or the reservation of the Skull Valley Band of Goshute Indians. This seemed to be of concern to the Air Force.

The Air Force representatives discussed, in a general way, the types of flight operations that take place closest to the proposed PFS ISFSI. They explained that the participants in the November 17, 1999, meeting would be prepared to discuss more specific details.

Attachment: Attendance List

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*EEaston *MBailey *EHeumann *EWBrach *SFlanders KCampe, NRR
FLyon, NRR NJensen, OGC STurk, OGC CMarco, OGC

OFC	SFPO	E	SFPO	HC	SFPO	N		
NAME	MDelligatti		VTtarpe		CRChappel			
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ATTENDANCE LIST
NOVEMBER 4, 1999, MEETING BETWEEN
THE NUCLEAR REGULATORY COMMISSION STAFF
AND THE U.S. AIR FORCE

NAME

ORGANIZATION

1.	Mark Delligatti	U.S. Nuclear Regulatory Commission
2.	Marissa Bailey	U.S. Nuclear Regulatory Commission
3.	Scott Flanders	U.S. Nuclear Regulatory Commission
4.	Kaz Campe	U.S. Nuclear Regulatory Commission
5.	Rick Lemaire	U.S. Air Force
6.	Col. Fred Pease	U.S. Air Force
7.	Col Charlie Hale	U.S. Air Force
8.	Maj. Alan Holck	U.S. Air Force
9.	Maj. Lucien Neimeyer	U.S. Air Force
10.	E. David Hoard	U.S. Air Force

72-22



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

Attachment 'D'

November 23, 1999

MEMORANDUM TO: Susan F. Shankman, Deputy Director
Licensing and Inspection Directorate
Spent Fuel Project Office
Office of Nuclear Material Safety
and Safeguards

FROM: Mark S. Delligatti, Senior Project Manager
Licensing Section
Spent Fuel Project Office, NMSS

SUBJECT: REPORT ON NOVEMBER 17, 1999, TRIP TO HILL
AIR FORCE BASE

On November 17, 1999, Scott Flanders, Kazimieras Campe (Office of Nuclear Reactor Regulation), Sherwin Turk (Office of the General Counsel) and I visited Hill Air Force Base in Ogden, Utah, to meet with representatives of the U.S. Air Force. Budhi Sagar and Amitava Ghosh from the Center for Nuclear Waste Regulatory Analyses accompanied us. An attendance list is attached. We requested this visit to get a more complete understanding of the extent and kinds of U.S. Military use of the air space over the proposed Private Fuel Storage Facility (PFSF) on the Reservation of the Skull Valley Band of Goshute Indians. The Reservation and the surrounding Skull Valley, Utah area, lie beneath air space currently used by the U.S. Military. The staff, in its safety evaluation of the application from Private Fuel Storage, Limited Liability Corporation, and in the associated adjudicatory proceedings before the Atomic Safety and Licensing Board will consider questions about the credibility of accidents involving military aircraft which could impact the PFSF.

The Nuclear Regulatory Commission (NRC) staff discussed the safety and environmental review processes for the PFS application. We explained that NRC does not have the authority to restrict air space or to take any other action which would impact any existing flight operations in or near Skull Valley, Utah, or the Reservation of the Skull Valley Band of Goshute Indians.

The Air Force representatives discussed the types of flight operations that take place closest to the proposed PFS ISFSI. They indicated to the NRC staff that their current flight operations are basically unrestricted over Skull Valley, with the exception of limitations on flights over the English Village, which is the on-base housing for U.S. Army personnel stationed at Dugway Proving Ground. English Village is located at the southern end of Skull Valley. No such restrictions currently exist over the Goshute village. Air Force, Air National Guard, and limited Army aircraft (helicopters) use this air space for various training exercises.

S. Shankman

2

The representatives of the Air Force indicated that additional data would be provided to PFS to clarify the previously provided information. Also, a document which may be helpful to the staff in its review was recommended. I have requested a copy of the document from Air Force Headquarters.

Attachment: Attendance List

Docket: 72-22

Distribution: Docket 72-22

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*EHeumann *EWBrach *SFlanders
CMarco, OGC

*PEng
KCampe, NRR

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ATTENDANCE LIST
NOVEMBER 17, 1999, MEETING BETWEEN
THE NUCLEAR REGULATORY COMMISSION STAFF
AND THE U.S. AIR FORCE

<u>NAME</u>	<u>ORGANIZATION</u>
1. Mark Delligatti	U.S. Nuclear Regulatory Commission
2. Scott Flanders	U.S. Nuclear Regulatory Commission
3. Kazimieras Campe	U.S. Nuclear Regulatory Commission
4. Sherwin Turk	U.S. Nuclear Regulatory Commission
5. Budhi Sagar	Center for Nuclear Waste Regulatory Analyses
6. Amitava Ghosh	Center for Nuclear Waste Regulatory Analyses
7. Boe Hadley	U.S. Air Force
8. Lt. Col. Paul Lis	U.S. Air Force
9. Lt. Col. Bob Vozzola	U.S. Air Force
10. Col. Craig Lightfoot	U.S. Air Force
11. Major Shelley Chandler	U.S. Air Force

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-ISFSI
)	
(Independent Spent)	
Fuel Storage Installation))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO 'STATE OF UTAH'S REQUEST FOR ADMISSION OF LATE-FILED UTAH CONTENTION KK (POTENTIAL IMPACTS TO MILITARY TRAINING AND TESTING AND STATE ECONOMY)'" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 10th day of August, 2000:

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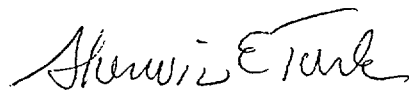
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Counsel for NRC Staff