RAS 3251

July 23, 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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 REPLY TO THE STATE OF UTAH'S BRIEF ON THE REGULATORY STANDARD FOR AIRCRAFT CRASH HAZARDS AT THE PRIVATE FUEL STORAGE FACILITY

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Table of Contents

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The Commission's Order, CLI-01-15, 53 NRC __ (June 27, 2001), invited the parties to file reply briefs by July 23, 2001 on the appropriate regulatory standard for aircraft crash hazards at the Private Fuel Storage Facility ("PFSF"). Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby files this reply to the State of Utah's ("State" or "Utah") brief.[1] As set forth below, the State fails to show that the Atomic Safety and Licensing Board ("Licensing Board" or "Board") erred in holding that any accident at an independent spent fuel storage facility ("ISFSI") with a probability of occurrence of less than one in a million (10^{-6} or 1 E-6) per year is not a credible accident and an ISFSI need not be designed to withstand its effects. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), LBP-01-19, 53 NRC __, slip op. at 18-21 (May 31, 2001). The Board's ruling should be affirmed.

[1] State of Utah's Brief on the Certified Question in LBP-01-19: The Regulatory Standard for Aircraft Crash Hazards at the PFS Site – Contention Utah K (Credible Accidents) (July 13, 2001) ("State Br.").

I. ISSUE

The issue before the Commission is "where to set the regulatory standard for aircraft crash hazards at applicant Private Fuel Storage, L.L.C.'s proposed independent spent fuel storage installation (ISFSI) site." CLI-01-15, slip op. at 1.

> In its Aircraft Crash Impact Hazard Report (Rev. 4) (Aug. 11, 2000), Private Fuel Storage argued that any accident with a less than one in a million (10^{-6}) per year probability of occurring—"benchmark probability"—was not a credible accident. In its September 29, 2000, final Safety Evaluation Report, the NRC staff, accepting PFS's reasoning, agreed that the appropriate benchmark probability was one in a million per year. *See* SER at 15-77. The State of Utah contends, however, that the benchmark probability for air crash hazards should be one in ten million (10^{-7}), a higher standard. The Board found that the benchmark probability should be set at 10^{-6}, but referred the standard for the Commission's review

Id. at 2 (citing LBP-01-19, slip op. at 19-20).[2] Specifically, the Board interpreted the term "design basis accident," in 10 C.F.R. Part 72 to mean an accident with a probability of at least 1 E-6 per year. LBP-01-19, slip op. at 18, 20. It did so based on and "in accordance with the Commission's guidance in the 1996 Part 60 rulemaking" where the Commission stated that Part 60 and Part 72 design basis events were similar. Id. at 20-21 (emphasis added).

The State confuses this issue—the legal question of the standard to apply for determining whether the PFSF must be designed to withstand the effects of an aircraft crash—with the factual question of the probability that an aircraft crash would occur at the PFSF (i.e., whether PFS meets the standard). See State Br. at 11-15, 17 (challenging PFS's probability assessment methodology and data). Nevertheless, the only issue that the Licensing Board certified and the only issue that the Commission accepted for review was the legal standard, not the factual question of whether PFS actually meets the stan-

[2] PFS discussed the events leading up to the Board's certification of this question to the Commission in its brief. Applicant's Brief on the Regulatory Standard for Aircraft Crash Hazards at the Private Fuel Storage Facility (July 13, 2001) at 1-4 ("PFS Br.").

dard. See also LBP-01-19, slip op. at 18-21, 51-52 (granting PFS's motion with respect to the regulatory standard but denying it with respect to the cumulative aircraft crash probability at the PFSF).

II. DISCUSSION

A. Standard of Review

The State acknowledges that the appropriate standard of review of board decisions on legal questions and policy matters is de novo. State Br. at 4 (citing Sequoyah Fuels Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI-97-13, 46 NRC 195, 206 (1997)). It then erroneously claims, however, that the Commission must consider "the heavy burden borne by the movant" for summary disposition and the rule that "the Board must view the record in the light most favorable to the party opposing such a motion" in deciding whether the Board here correctly decided a legal question in favor of PFS. Id. The State's argument is misplaced, in that the burden borne by a movant for summary disposition and the rule that a board must view the record in a light favorable to the motion's opponent, pertain to the question of whether there exists "a genuine issue as to any material fact." Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993) (emphasis added).[3] The issue in ruling on summary judgment is "whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can only be resolved by a finder of fact . . . ." Anderson, supra note 3, 477 U.S. at 250 (emphasis

[3] To the extent that courts look at the record in the light most favorable to the opponent of a motion, they do so where issues like motive and intent are relevant and it may be important for witnesses to be present and subject to cross-examination so that their credibility and the weight to be given to their testimony can be appraised. See Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962), cited in Advanced Medical Systems, CLI-93-22, 38 NRC at 102 n.8; see also, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Such considerations clearly do not arise in resolving pure questions of law like the one before the Commission here.

added). Thus, questions of law are decided by boards (or courts) without the movant bearing a heavier burden than any other party.[4]

"[I]nterpretation of a statue or regulation is a question of law . . . ." Jensen v. Brown, 19 F.3d 1413, 1415 (Fed. Cir. 1994). The State's argument that the interpretation of the Part 72 term "design basis accident" to mean accidents with a probability of at least 1 E-6 per year depended on PFS's factual assessment of the probability that an aircraft crash would occur at the PFSF is erroneous. As stated above, the Board interpreted the regulation on the basis of its consideration of the Commission's discussion in the statements of consideration for the Part 60 rulemaking. LBP-01-19, slip op. at 20.

As explained further below, the State's argument is premised wholly on NUREG-0800 guidance, i.e., the State claims that the resolution of factual issues is required to apply the NUREG-0800 probability standard.[5] The State ignores, however, that the Board based its ruling on the applicability of the 1 E-6 standard for the PFSF on its evaluation of the Part 60 rulemaking, not NUREG-0800. Thus, any factual assessments required to apply NUREG-0800 are irrelevant to determining the correctness of the Board's ruling.

B. The NUREG-0800 1 E-7 Risk Standard for Nuclear Power Plants Does Not Apply to ISFSIs

The State argues that the 1 E-7 probability standard for defining credible accidents from NUREG-0800, the Standard Review Plan for nuclear power plants, should apply to the PFSF. State Br. at 5-9. Obviously, the PFSF is not a nuclear power plant. The State claims that NUREG-0800's methodology "provides a 'conservative upper bound on aircraft impact probability.'" Id. at 6. The methodology, however, concerns

[4] See, e.g., Pentel v. Mendota Heights, 13 F.3d 1261, 1263 (8th Cir. 1994) (summary judgment appropriate where court must make purely legal determination); Smith v Califano, 597 F.2d 152, 155 n.4 (9th Cir.), cert. denied, 444 U.S. 980 (1979) (same).

[5] Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants, NUREG-0800 (June 1987).

how one calculates the probability of an accident, not the standard for determining whether an accident of a given probability is credible or within the facility design basis. One can use the NUREG-0800 methodology without adopting its probability standard. Moreover, from an overall risk (i.e., probability x consequences) perspective, the Commission has clearly stated that the 1 E-6 standard "is expected to provide conservative estimates of risk" for Part 60 and Part 72 facilities. Disposal of High-Level Radioactive Wastes in Geologic Repositories, Design Basis Events, Final Rule, 61 Fed. Reg. 64,257, 64,265 (1996) (emphasis added).

The State asserts that as a guidance document, NUREG-0800 "should be accorded 'special weight.'" State Br. at 7. Yet it admits that NUREGs "are not legally binding regulations." Id. (emphasis added). Also, NUREG-0800 applies to power plants but not ISFSIs. Contrary to the State's urging, the Commission has rejected a nuclear power plant risk standard for Part 72 facilities in favor of the 1 E-6 standard set forth in the Statement of Considerations of Part 60, on the grounds that the risks associated with an ISFSI are significantly lower than the risks associated with an operating nuclear reactor. See 61 Fed. Reg. at 64,266.

The State's other arguments are largely irrelevant to the question of the proper legal standard to apply to the PFSF. For example, the State argues that the fact that the PFSF is located "next to the largest military bombing and training range in the continental United States . . . is critical in ascertaining the siting evaluation factors specific to the PFS . . . site," State Br. at 5; see also id. at 11; it complains that PFS's analysis is not conservative, id. at 8 & n.12; and it asserts that "material factual disputes clearly remain," id. at 9. Those complaints may go to the actual probability of an accident at the PFSF but they do not go to the applicable legal standard.[6] The State complains about prior risk

[6] PFS also notes that despite the State's claims about the location of the PFSF and the activity in its vicinity, State Br. at 5, the Board granted PFS's motion for summary disposition regarding the use of weapons

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analyses PFS has performed, id. at 6-7,[7] but does not show how they affect the Commission's statement that the 1 E-6 risk standard applies to Part 72 facilities. The State claims that the 1 E-7 standard should apply to ISFSIs because most of them are located near nuclear power plants and the 1 E-7 standard was used in evaluating the risk to the power plants from aircraft crashes. Id. at 7. That, however, is coincidental and says nothing about the standard that is necessary for the protection of public health and safety. On the contrary, the Commission has determined that the 1 E-6 standard provides adequate protection and "[a] higher screening criterion could probably be justified given the magnitude of the consequences and risks from this facility." 61 Fed. Reg. at 64,265 (emphasis added). In sum, the State's claims are unpersuasive and the Board's ruling should be affirmed.

C. The Issue Was Sufficiently Ripe and Disputed Material Facts Do Not Affect the Applicable Legal Standard

The State claims that the Board's ruling was unripe because "material factual disputes clearly remain," State Br. at 9, and those facts in dispute are "directly relevant" to whether 1) PFS used "meaningful and conservative data," 2) PFS calculated "a conservative upper bound," and 3) "the realistic probability is, in fact, lower than 10^{-7} . . . ," id.

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on Dugway Proving Ground, cruise missile testing, military air-to-ground and air-refueling training on the Utah Test and Training Range, and commercial and general aviation. LBP-01-19, slip op. at 53-54.

[7] The State asserts that PFS's first motion for summary disposition (Applicant's Motion for Partial Summary Disposition of Utah Contention K and Confederated Tribes Contention B (June 7, 1999) ("PFS 1st Motion")) held out the NUREG-0800 1 E-7 standard as "the measure it must meet." State Br. at 6. Indeed, PFS did not cite to NUREG-0800 in its motion. PFS used the NUREG-0800 methodology to calculate the hazard posed by aircraft flying over the PFSF site to and from Michael Army Airfield on Dugway Proving Ground. PFS 1st Motion, Cole Dec., Exh. 2 at 18-19. PFS compared the calculated hazard (2.23 E-9/year) with the NUREG-0800 standard only to show that the hazard was "extremely low." Id. To address other aviation hazards, PFS showed that aircraft did not fly directly over the site. PFS 1st Motion at 7-8, 11, 14-18. Indeed, PFS's current analytical assumption that F-16 flights are evenly distributed across Skull Valley, and thus some aircraft will fly over the site, is conservative in light of their tendency to fly down the east side of Skull Valley. See Applicant's Motion for Summary Disposition of Utah Contention K and Confederated Tribes Contention B (Dec. 30, 2000) at 13-14 ("PFS Motion").

See also id. at 11. The State then lists its sundry challenges to PFS's assessment of the probability that an aircraft crash will occur at the PFSF. See id. at 9.

The State's arguments are, however, based on the asserted applicability of the NUREG-0800 standard to the PFSF and the erroneous premise that the Board made a related finding as to the actual probability of an accident at the facility. As stated above, the Board based its interpretation of the Part 72 regulation on the Commission's discussion of the 1 E-6 standard in the Part 60 statement of considerations, not NUREG-0800.

Further, the State's arguments are simply irrelevant to the standard that defines a credible accident at an ISFSI. The disputes the State cites go to the actual probability that an accident will occur, i.e., whether PFS can meet the standard. The Board will decide that in due course, but that issue is not before the Commission. The State's charge that "even though [the Board] posited that a litigable issue may remain, it nonetheless granted summary disposition to the movant," id. at 10-11, is simply wrong. The Board ruled that disputes remain regarding factual questions concerning the probability that certain accidents would occur. See, e.g., LBP-01-19, slip op. at 34, 37, 41-42. It granted PFS's motion for summary disposition as to the legal standard for determining whether such an accident is a credible event which the PFSF must be designed to withstand. Id. at 20-21. The State's claim that a site-specific analysis is needed to determine the risk standard applicable to the PFSF, see State Br. at 10-11, was part of the State's legal argument, which the Board rejected. See LBP-01-19, slip op. at 19-20; see also PFS Br. at 9-11. It is not a factual dispute left to be litigated. The existence of factual disputes over the probability that an accident would occur—a different question—does not render the Board's decision of this legal question unripe where, as here, the Board decided the question and certified it to the Commission for the purpose of conserving judicial resources.[8]

[8] See Calpetco 1981 v. Marshall Exploration, Inc., 989 F.2d 1408, 1415 (5th Cir. 1993) (summary disposition serves to "root out, narrow, and focus the issues" and to lessen the length and complexity of trial on

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D. Alleged Lack of Conservatism Does Not Affect the Probability Standard Applicable to ISFSIs

The State argues next that PFS's position is that the applicable standard is the NUREG-0800 guidance that a probability limit of 10^{-6} is acceptable if "when combined with reasonable qualitative arguments, the realistic probability can be shown to be lower." State Br. at 12. It then claims that PFS fails to meet that standard because its data and methodology are not sufficiently conservative. See State Br. at 12-13. First, the issue here is the Board's ruling, not PFS's position. Second, the Board's ruling and PFS's position are that the 1 E-6 standard the Commission discussed in amending Part 60 applies to the PFSF.[9] Third, as discussed above, the alleged lack of conservatism in PFS's analysis goes to the actual probability of an accident, not to the standard that defines whether an accident is credible.

The State then goes on to challenge NUREG-0800 itself by asserting without basis that if NUREG-0800 establishes a 1 E-7 standard, then "the Commission intended applicants to demonstrate more than the mere use of 'meaningful and conservative data' to generate a 'conservative upper bound' to allow the use of the less protective 10^{-6} standard." State Br. at 17. Contrary to the State's claim, NUREG-0800 says what it says.[10] Nevertheless, the 1 E-6 standard and not the NUREG-0800 1 E-7 standard applies here.

E. The Generic 1 E-6 Standard is Appropriate for the PFSF

The State claims that the Part 60 1 E-6 probability screening standard does not apply to the PFSF, first, because it was not promulgated for 10 C.F.R. Part 72 via notice and comment rulemaking. State Br. at 18-19. Yet the State recognizes that the Commis-

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remaining issues, to the advantage of the litigants and the court). Here, the Board noted that certifying the issue of the applicable probability standard at this point would enable a more efficient use of resources if the Commission determined that a site-specific analysis were required. LBP-01-19, slip op. at 21 n.5.

[9] LBP-01-19, slip op. at 20-21; PFS Motion at 9-10. PFS believes that its probability assessment is conservative such that it could meet the NUREG-0800 guidance, see id. at 10 n.17, 28-29, but the 1 E-6 standard is the appropriate criterion.

[10] See NUREG-0800 at 2.2.3-2, 3.5.1.6-2.

sion may decide issues via adjudication. Id. at 19. More importantly, in applying the 1 E-6 standard, the Licensing Board was interpreting the meaning of the Part 72 term "design basis accident." LBP-01-19, slip op. at 18; see 10 C.F.R. §§ 72.90 (c) and (d), 72.94. For such interpretation, notice and comment was not required. Association of American Railroads v. DOT, 198 F.3d 944, 947 (D.C. Cir. 1999).[11] The State's claim that the Board's ruling "completely turned the burden of proof . . . against the State," State Br. at 19, is, as discussed above, meritless. See Section II.A, supra.

Second, the State claims that the Part 60 rule was promulgated for the Yucca Mountain repository and that differences between the PFSF and Yucca Mountain bar the application of the 1 E-6 standard to the PFSF. State Br. at 18-21. The State made the same argument below and PFS refuted the argument in its brief. PFS Br. at 9-11. The 1 E-6 standard is generically applicable to surface facilities at geologic repositories and ISFSIs, independent of the designs of the facilities or the characteristics of their sites.[12] Moreover, Yucca Mountain, like the PFSF, is located near an Air Force range and the Commission considered potential aircraft crashes in establishing the generic standard. PFS Br. at 9-11.[13]

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[11] See also Shell Offshore v. Babbitt, 238 F.3d 622, 629 n.6 (5th Cir. 2001); St. Francis Health Care Centre v. Shalala, 205 F.3d 937, 947 & n.11 (6th Cir. 2000).

[12] The State's claim that Part 60 was "harmonized" with Part 72 only to the extent of applicable accident radiation dose limits, State Br. at 22 n. 21 (citing 60 Fed. Reg. 15,180 (1995)), is wrong. The Commission explains clearly that from a risk perspective, dose limits must be tied to the probability that such doses will occur in the first place. See 60 Fed. Reg. at 15,186-87; 61 Fed. Reg. at 64,265. Furthermore, the Commission has stated explicitly that "Part 72 applies to those facilities (MRS installations) most similar to the surface facilities of a repository and for which the kinds of design basis events are also expected to be similar." Id. at 64,264 (emphasis added).

[13] Although irrelevant to the legal issue before the Commission, the State submits allegations by its witness Dr. Marvin Resnikoff that an "aircraft or related" accident at the PFSF could result in doses to individuals of "70 to over 10,000 rem." State Br. at 21 (citing State of Utah's Response to Applicant's Motion for Summary Disposition on Utah Contention K/Confederated Tribes Contention B (Jan. 30, 2001), Declaration of Dr. Marvin Resnikoff Regarding Material Facts in Dispute with Respect to Contention K (Jan. 30, 2001). ¶ 16). PFS notes only that NRC-sponsored research concerning spent fuel handling and spent fuel storage cask accidents indicates that Dr. Resknikoff's assessment is grossly in error. See 61 Fed. Reg. at 64,265-66 (bounding geologic repository surface facility event consequences of roughly 20 rem); R.J. Travis et al., A Safety and Regulatory Assessment of Generic BWR and PWR Permanently Shutdown Nu-

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The State proposes that the Commission remand the issue back to the Board for a determination as to whether the PFSF is sufficiently similar to Yucca Mountain that the 1 E-6 standard should apply to both. State Br. at 22. Remand would be inappropriate. The Commission stated that it considered the Yucca Mountain facility only to provide perspective on the risks associated with repository facilities generally; a comparison with Yucca Mountain (or any other facility) is not necessary to apply the 1 E-6 standard:

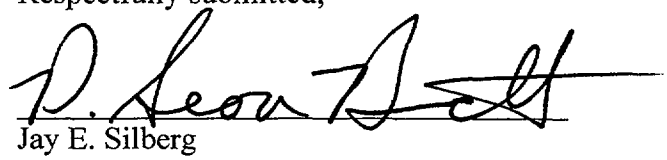
> The dose estimates of the DOE risk assessment are only reflective of a conceptual design for a repository at Yucca Mountain, Nevada. Nonetheless, the Commission believes that they provide perspective on the magnitude of the estimated consequences to members of the public from postulated Category 2 design basis events, and that variations in repository design or site selection would not likely vary these estimates by more than an order of magnitude.

61 Fed. Reg. at 64,266 (emphasis added). Therefore, the State's arguments fall short and the Licensing Board's decision should be affirmed.

III. CONCLUSION

For the foregoing reasons, the Licensing Board's ruling should be affirmed.

Respectfully submitted,



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clear Power Plants, NUREG/CR-6451, Brookhaven National Laboratory (Aug. 1997) at 3-10 to –12, 4-8 to –9 (maximum offsite individual dose of 472 mrem from penetration of ISFSI cask by high speed (567 mph) tornado-driven missile).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Reply to the State of Utah's Brief on the Regulatory Standard for Aircraft Crash Hazards at the Private Fuel Storage Facility" 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 23rd day of July 2001.

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