

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE 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 APPLICANT'S
MOTION FOR RECONSIDERATION OF RULING ON
THE APPLICANT'S MOTION FOR SUMMARY DISPOSITION
OF SOUTHERN UTAH WILDERNESS ALLIANCE CONTENTION B

INTRODUCTION

Pursuant to 10 C.F.R. § 2.730 and the Atomic Safety and Licensing Board's December 7, 2001, "Order (Schedule for Motion for Reconsideration Responses)," the NRC Staff ("Staff") hereby responds to "Applicant's Motion for Reconsideration of Ruling on the Applicant's Motion For Summary Disposition of Southern Utah Wilderness Alliance Contention B" ("Reconsideration Motion"), filed on December 6, 2001, by Private Fuel Storage L.L.C. ("Applicant" or "PFS"). For the reasons set forth below, the Staff submits that the Applicant's Reconsideration Motion should be granted.

BACKGROUND

Southern Utah Wilderness Alliance ("SUWA") was admitted as a party to this proceeding in 1999. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-3, 49 NRC 40 (1999), *aff'd*, CLI-99-10, 49 NRC 318 (1999). In its decision, the Licensing Board found that one of SUWA's contentions, SUWA Contention B, was admissible. This contention states as follows:

The License Application Amendment fails to develop and analyze a meaningful range of alternatives to the Low Corridor Rail Spur and the associated fire buffer zone that will preserve the wilderness character and the potential wilderness designation of a tract of roadless Bureau of Land Management (BLM) land -- the North Cedar Mountains -- which it crosses.

PFS, LBP-99-3, 49 NRC at 53.

On June 29, 2001, the Applicant filed a motion for summary disposition of SUWA B.¹ Therein, the Applicant argued, among other things, that it considered the reasonable alternatives to the Low Rail line, and that the Low Corridor alignment is the preferable alternative. Summary Disposition Motion at 9-13. The Applicant further asserted that summary disposition was appropriate because no material facts were in dispute and it was entitled to a ruling in its favor as a matter of law. *Id.* at 6. The Applicant appended to its motion a "Statement of Material Facts on Which No Genuine Dispute Exists" ("Statement of Material Facts").

On July 19, 2001, the Staff filed its response to the Applicant's Summary Disposition Motion, asserting, among other things, that the Staff's discussion of alternatives to the Low Rail Corridor in its Draft Environmental Impact Statement ("DEIS")² eliminates any genuine dispute of material fact with respect to the assertions raised in SUWA Contention B.³ The Staff considered each of the Applicant's purported material facts and determined that they were correct, with the exception of a limited set of facts as to which the Staff expressed "no position." *Id.* at 8. This set of facts pertained to new information provided in PFS's Summary Disposition Motion concerning

¹ See "Applicant's Motion for Summary Disposition of Contention SUWA B - - Railroad Alignment Alternatives" ("Summary Disposition Motion"), dated June 29, 2001.

² See "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," NUREG-1714 (June 2000) ("DEIS").

³ See "NRC Staff's Response to Applicant's Motion For Summary Disposition of Contention SUWA B - - Railroad Alignment Alternatives," ("Staff's Response"), dated July 19, 2001, at 8-11.

an alternative rail route which PFS referred to as the “West Skull Valley Alternative,” Although the Staff expressed “no position” with respect to the West Skull Valley Alternative, the Staff stated that it was satisfied the West Skull Valley Alternative would result in similar or greater environmental impacts when compared to the proposed Low Corridor Rail Line, and the Staff therefore agreed with the Applicant’s conclusion that no genuine issue of material facts existed with respect to this matter. Staff’s Response at 8.⁴

On July 23, 2001, SUWA filed its response in opposition to the Applicant’s Summary Disposition Motion, arguing, among other things, that PFS and the Staff did not consider a range of reasonable alternatives to the Low Corridor Rail Spur, and that PFS’s statement of facts remained in dispute.⁵ Contrary to the requirements of 10 C.F.R. § 2.749(a), however, SUWA did not attach to its response a statement of material facts which it contends are in dispute.

On November 30, 2001, the Licensing Board denied PFS’s motion for summary disposition of SUWA Contention B. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-34, 54 NRC ____ (Nov. 30, 2001) (“Memorandum and Order (Denying Motion for Summary Disposition Regarding Contention SUWA B).” As the basis for this decision, the Licensing Board found that the Staff’s DEIS did not analyze the recently proposed West Skull Valley Alternative and, although the Staff’s affiant was satisfied with PFS’s evaluation of this alternative alignment, “he acknowledged that the staff has not fully evaluated this proposed western

⁴ This determination was supported by the affidavit of Gregory P. Zimmerman, who served as a team leader and participated in the Staff’s environmental evaluation of the Applicant’s proposed rail line and alternatives. Mr. Zimmerman stated that because of the close proximity of the proposed route to the West Skull Valley Alternative, the types of environmental impacts that would likely result from the construction of the West Skull Valley Alternative would “largely be indistinguishable” from the proposed route’s impacts (with the possible exception of the greater need for fill material that might be required for the construction of the West Skull Valley Alternative). Zimmerman Aff. at ¶ 18.

⁵ See “Southern Utah Wilderness Alliance’s (SUWA) Response (and Objection) to Applicant’s Motion for Summary Disposition of SUWA’s Contention B,” dated July 23, 2001 at 7-10.

alternative” and therefore could not take a position on the specific statements of fact proffered by PFS in support of this aspect of its Summary Disposition Motion (LBP-01-34, slip op. at 13-14). Accordingly, the Board concluded that “[t]here thus remains a deficiency relative to the agency’s NEPA process that precludes the Board from making a merits determination that all reasonable alternatives to the proposed Low Corridor alignment have been adequately developed and analyzed as is required by NEPA.” *Id.* at 14. The Licensing Board further stated that it could not supplement the agency’s environmental impact analysis in a ruling on summary disposition, because “that authority does not extend to the particular shortcoming associated with staff compliance with section 51.70(b) that is extant in this proceeding.” *Id.* at n.7.

On December 6, 2001, PFS filed the instant motion seeking reconsideration of the Board’s ruling in LBP-01-34. In its Motion, PFS (a) requested reconsideration of the Board’s denial of summary disposition with respect to the facts recited in its Statement of Material Facts, which it claims had not been challenged, Reconsideration Motion at 2-6; and (b) requested reconsideration of the Board’s ruling that it cannot modify the NRC’s environmental analysis *pro tanto* in consideration of the new information provided by PFS. *Id.* at 6-9. For the reasons set forth below, the Staff respectfully submits that the Applicant’s Reconsideration Motion should be granted.

DISCUSSION

A. Legal Standards Governing Motions for Reconsideration

The Licensing Board has previously set forth the standards for a properly supported motion for reconsideration:

A properly supported reconsideration motion is one that does not rely upon (1) entirely new theses or arguments, except to the extent it attempts to address a presiding officer’s ruling that could not reasonably have been anticipated, or (2) previously presented arguments that have been rejected. Instead, the movant must identify errors or deficiencies in the presiding officer’s determination indicating the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual information. Reconsideration also

may be appropriately sought to have the presiding officer correct what appear to be inharmonious rulings in the same decision.

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 73-74 (1998) (citations omitted). PFS's Reconsideration Motion satisfies this requirement, in that it asserts that the Licensing Board misapprehended a legal principle: *i.e.* the provisions contained in 10 C.F.R. §§ 2.749 and 51.70(b). The Staff shares the Applicant's view of this matter -- and further believes that the Board may have misapprehended the meaning of certain statements contained in the Staff's affidavit, wherein the Staff described its conclusions regarding the West Skull Valley Alternative.

B. The Effect of PFS's Statement of Material Facts
 and SUWA's Failure to Include a Statement of Material Facts

The Commission's regulations provide that the movant shall annex to its summary disposition motion "a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard." 10 C.F.R. § 2.749(a). Any party opposing the motion must annex to its answer "a separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard." *Id.* The Commission's regulations further state: "All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party." *Id.* When a motion for summary disposition is made and supported as required by regulation, a party opposing the motion may not rest upon "the mere allegations or denials of his answer;" rather, the answer "by affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact." 10 C.F.R. § 2.749(b). If no such answer is filed, the decision sought by the movant, "if appropriate," shall be rendered. *Id.*

However, this does not end the inquiry, in that a party seeking summary disposition has the burden of proving the absence of genuine issues of material fact. *See, e.g., Adickes v. S. H. Kress*

& Co., 398 U.S. 144, 157 (1970) (applying Rule 56 of the Federal Rules of Civil Procedure); *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977).⁶ In addition, the record is to be viewed in the light most favorable to the party opposing the motion. *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962); *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-944, 33 NRC 81, 144 (1991). Thus, it has been held that even if there is no opposition to a motion for summary disposition, the movant's filings must still establish the absence of a genuine issue of material fact. *Perry*, 6 NRC at 753-54; *Adickes v. Kress & Co.*, 398 U.S. at 157.

It is clear that SUWA failed to follow the Commission's regulations governing summary disposition, in that it failed to file a statement of material facts which it contends remain in dispute or to specifically controvert the facts recited by PFS in its Material Fact Statement -- as the Board found. See LBP-01-34, slip op. at 12. However, in declining to grant summary disposition of this contention, the Board essentially determined that a material fact was in dispute: i.e., whether the Staff's DEIS had considered the West Skull Valley Alternative. The Board noted that this alternative was not analyzed in the DEIS, and that the Staff's supporting witness indicated that the Staff "has not fully evaluated this proposed western alternative." LBP-01-34, slip op. at 13. As set forth below, however, the Board appears to have misconstrued the Staff's statements.

PFS first described the West Skull Valley Alternative in its Summary Disposition Motion -- fully one year after the DEIS had been published in July 2000. Although the Staff did not review

⁶ See also, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-32, 50 NRC 155, 158 (1999). Indeed, the Commission, when considering motions for summary disposition filed pursuant to 10 C.F.R. § 2.749, generally applies the same standards that the Federal courts use in determining motions for summary judgment under Rule 56 of the Federal Rules. See *Advanced Medical Systems*, 38 NRC at 102 (1993). Decisions arising under Rule 56 of the Federal Rules may thus serve as guidelines to the Commission's adjudicatory boards in applying 10 C.F.R. § 2.749. *Perry*, 6 NRC at 754.

the later-identified Western Skull Valley Alternative in the DEIS, the Staff did consider this alternative in responding to the Applicant's Summary Disposition Motion. Thus, the Staff stated that it had not received "the specific design details or a detailed alignment for this alternative [and] [h]ence the Staff has not fully evaluated this alternative," and therefore could not address the specific facts asserted in Material Facts Nos. 10-16. Zimmerman Aff., ¶ 19. Nonetheless, based on the information which it had received, the Staff stated that it was satisfied that this alternative "would result in similar or greater environmental impacts when compared to the Low Corridor Rail [Line]." *Id.*

Specifically, the Staff stated that because of the close proximity of the proposed route to the West Skull Valley Alternative, the types of environmental impacts that would likely result from the construction of the West Skull Valley Alternative would "largely be indistinguishable" from the proposed Low Corridor Rail Line's impacts, with the possible exception of a greater need for fill material that might be required for the construction of the West Skull Valley Alternative as asserted by PFS, and/or increased costs. Zimmerman Aff., ¶ 18. Thus, the Staff effectively concluded that the West Skull Valley Alternative would result in similar or greater environmental impacts when compared to the Applicant's preferred alternative (*i.e.*, the Low Corridor Rail Line) and does not warrant any change in the DEIS conclusions.

The Licensing Board observed that the Staff had declined "to express an opinion on the validity of the PFS material factual statements regarding this alternative alignment, and concluded that this showed the existence of "a deficiency relative to the agency's NEPA process that precludes the Board from making a merits determination that all reasonable alternatives to the proposed Low Corridor alignment have been adequately developed and analyzed as is required by NEPA." LBP-01-34, slip op. at 14. On this basis, the Board concluded that "summary disposition of contention SUWA B is inappropriate at this juncture." *Id.* In so ruling, however, the Board appears to have misconstrued the Staff's statements. Rather than signifying a belief that

open issues existed with respect to the Western Skull Valley Alternative, the Staff's affidavit indicated that notwithstanding its inability to address certain facts contained in the Applicant's Statement of Material Facts, the Staff considered that it had sufficient information to reach a conclusion on this issue -- which it described in stating that the Western Skull Valley Alternative "would result in similar or greater environmental impacts when compared to the Low Corridor Rail [Line]."⁷ On this basis, the Staff supported the Applicant's Summary Disposition Motion.

Finally, in its Reconsideration Motion, the Applicant indicates that the Licensing Board could have granted summary disposition with respect to the other alternatives that the Staff did evaluate in the DEIS. See Reconsideration Motion at 3. The Licensing Board's decision not to parse the contention on summary disposition is certainly within its authority. The Staff agrees with PFS, however, that to do so in this instance would reduce the multiplicity of factual issues to be heard and would serve to expedite the proceeding, just as the Board has done with respect to the numerous issues raised in Contention Utah K/Confederated Tribes B. Thus, the Staff believes that the Applicant's Reconsideration Motion should be granted in this regard, and that the Board should delineate the facts pertaining to SUWA Contention B which it considers to be resolved.

C. Reconsideration of the Ruling Regarding Modification, *Pro Tanto*, of the Staff's DEIS Environmental Analysis.

In its decision, the Licensing Board refrained from modifying the NRC's environmental analysis in its Draft EIS, *pro tanto*. LBP-01-34, slip op. at 14 n.7. In doing so, the Board relied on 10 C.F.R. § 51.70(b). That regulation provides, in pertinent part, as follows:

(b) The draft environmental impact statement will be concise, clear and analytic, . . . will state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of NEPA and of any other relevant and

⁷ On December 4, 2001, PFS formally submitted information to the Staff concerning the West Skull Valley Alternative. The Staff has completed its review of this information and expects to incorporate its evaluation of the West Skull Valley Alternative into the Final EIS to be issued later this month.

applicable environmental laws and policies, will identify any methodologies used and sources relied upon, and will be supported by evidence that the necessary environmental analyses have been made. . . . The NRC staff will independently evaluate and be responsible for the reliability of all information used in the draft environmental impact statement.

In its motion for reconsideration, the Applicant asserts that if the Licensing Board or Commission reaches a conclusion different from that set forth in an EIS, the statement is “simply deemed amended *pro tanto*.” Reconsideration Motion at 7-9, *citing Allied General Nuclear Services* (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 680 (1975); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 705-07 (1985), and *New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87, 93-94 (1st Cir. 1978). In presenting this analysis, the Applicant does not distinguish between a Draft or Final EIS, in effect arguing that a Board ruling on summary disposition which amends the DEIS, may be deemed to amend the FEIS as well. See *id.* at 7-8. The Staff agrees with the Applicant’s argument in this regard.

A Commission decision on any action for which a final environmental impact statement has been prepared is to be accompanied by or include a concise public record of decision. 10 C.F.R. § 51.102(a). The record of decision is required to, among other things, identify all alternatives considered by the Commission in reaching the decision, state that these alternatives were included in the range of alternatives discussed in the environmental impact statement, and specify the alternative or alternatives which were considered to be environmentally preferable. 10 C.F.R. § 51.103(a)(2). Further, the record of decision must discuss preferences among alternatives based on relevant factors which were balanced by the Commission in making the decision and state how these considerations entered into the decision. 10 C.F.R. § 51.103(a)(3).

When a hearing is held on the proposed action under 10 C.F.R. Part 2, Subpart G, the initial decision of the presiding officer or the final decision of the Commissioners acting as a collegial

body will constitute the record of decision. 10 C.F.R. § 51.102. Thus, it has been held that the final EIS is merged with any relevant licensing board decision to form the complete environmental record of decision. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 706 (1985) (“[n]othing in 51.102 precludes modification of an FES by licensing board decision”). Further, the ultimate resolution of the issues in controversy necessarily incorporates all previous rulings by the Licensing Board or Commission in the proceeding. Thus, a Licensing Board decision granting summary disposition of an environmental contention in favor of an applicant, prior to issuance of the Board’s Initial Decision, becomes part of the agency’s record of decision.⁸ Accordingly, if an FEIS is issued subsequent to the Board’s decision on summary disposition, the FEIS could be deemed to be modified thereby.⁹ The Staff, accordingly, agrees with the Applicant’s motion as it pertains to modification of the DEIS environmental analysis.

CONCLUSION

For the reasons set forth above, the Staff supports the Applicant’s Reconsideration Motion and submits that it should be granted.

Respectfully submitted,

/RA/

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Counsel for NRC Staff

Dated at Rockville, Maryland
this 13th day of December 2001

⁸ Moreover, such a summary disposition decision is the dispositive ruling on an issue and, as such, could modify an EIS with respect to that issue.

⁹ As noted above, the Staff intends to issue the FEIS later this month, in which it intends to incorporate its evaluation of the West Skull Valley Alternative. See n.7, *supra*. Accordingly, any question as to whether the FEIS should be deemed to be amended by the Board’s decision could well become moot, and the Applicant could seek leave to refile its Summary Disposition Motion at that time.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO APPLICANT'S MOTION FOR RECONSIDERATION OF RULING ON THE APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF SOUTHERN UTAH WILDERNESS ALLIANCE CONTENTION B," 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 13th day of December, 2001:

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