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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

LBP-01-38

DOCKETED 12/19/01

SERVED 12/19/01

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

PRIVATE FUEL STORAGE, L.L.C.

(Independent Spent Fuel Storage Installation)

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

December 19, 2001

MEMORANDUM AND ORDER
(Denying Motion for Reconsideration
Regarding LBP-01-34)

Pending with the Licensing Board is the December 6, 2001 motion of applicant Private Fuel Storage, L.L.C., (PFS) seeking reconsideration of the Board's November 30, 2001 decision, LBP-01-34, 54 NRC __ (Nov. 30, 2001), denying a PFS request for summary disposition regarding contention SUWA B, Railroad Alignment Alternatives. In responses filed December 13, 2001, the NRC staff and intervenor Southern Utah Wilderness Alliance (SUWA) offer opposing views regarding the validity of the PFS request, the staff asserting the motion has merit and should be granted, while SUWA contends that the Board should deny reconsideration.

For the reasons set forth below, we deny the PFS reconsideration request.

I. BACKGROUND

In LBP-01-34, 54 NRC at __ (slip op. at 2-3), we set forth the background regarding our admission of contention SUWA B, in which intervenor SUWA challenges the adequacy of the

National Environmental Policy Act (NEPA) range of alternatives analysis afforded for the proposed Low Corridor rail spur on which spent nuclear fuel would be transported by train into the proposed PFS Skull Valley, Utah 10 C.F.R. Part 70 independent spent fuel storage installation (ISFSI). Further, in that issuance we held that, notwithstanding intervenor SUWA's failure to follow the dictates of 10 C.F.R. § 2.749(a) and provide a statement of material facts in dispute controverting the statement of material facts not at issue submitted by PFS in support of its dispositive motion, we were declining to grant summary disposition in favor of applicant PFS. As we explained in that opinion, we did so based on the staff's acknowledgment that it had not fully analyzed, and thus could not express an opinion on, the validity of the purported PFS undisputed material factual statements regarding an alternative rail corridor alignment. Although not addressed in the staff's June 2000 draft environmental impact statement (DEIS), this alignment nonetheless was one of four alternatives relied upon by PFS as supporting a summary merits determination in its favor. See id. at __ (slip. op. at 12-14) (citing 10 C.F.R. § 51.70(b) (staff must independently evaluate and be responsible for all information used in DEIS)).

In its December 6, 2001 motion seeking reconsideration of this ruling, PFS proffers several arguments it asserts compel a different result. First, PFS declares that in the face of the SUWA failure to contest any of its statement of material facts not in dispute, notwithstanding the staff's "no opinion" position regarding a number of the material facts purported to support one of the four alternatives, i.e., the so-called West Skull Valley Alternative, there clearly is no material factual dispute relative to the other three alternatives discussed in its dispositive motion and, as such, summary disposition should be granted as to those. See [PFS] Motion for Reconsideration of Ruling on the [PFS] Motion for Summary Disposition of [SUWA] Contention B (Dec. 6, 2001) at 2-5 [hereinafter PFS Reconsideration

Motion]. In this regard, PFS notes that in a previous summary disposition ruling regarding contention Utah K/Confederated Tribes B, the Board entered summary disposition in favor of PFS on certain matters despite the fact that the staff had not yet reached a conclusion regarding those items. See id. at 3 & n.3 (citing LBP-01-19, 53 NRC 416 (2001)). Additionally, PFS asserts that the staff's "no opinion" position relative to the PFS material facts regarding the fourth alternative was not a bar to the entry of summary disposition because the staff indicated it anticipated this alternative would result in impacts similar to or greater than those of the applicant's preferred Low Corridor rail spur proposal. See id. at 5-6. Finally, PFS asserts even though the staff may not have fully completed its analysis of one of the proffered PFS routes, the Board is authorized to evaluate the additional alternative proffered by PFS and, if it finds it adequate, amend the agency's environmental record of decision to incorporate its determination. See id. at 6-9.

The staff agrees with PFS in all material respects. Initially, the staff declares that the Board has misconstrued its statements regarding the status of its review of the PFS West Skull Valley Alternative. Acknowledging that it did not review this matter in its June 2000 DEIS and could not address the specifics of the PFS material facts relating to that alternative because it had not received the "specific design details or a detailed alignment for this alternative," the staff nonetheless asserts it did consider the alternative in responding to the PFS dispositive motion and was able to reach the ultimate judgment that the impacts involved were comparable to or greater than what would be involved in the Low Corridor alternative so as to support the PFS motion. NRC Staff's Response to [PFS] Motion for Reconsideration of Ruling on the [PFS] Motion for Summary Disposition of [SUWA] Contention B (Dec. 13, 2001) at 6-8 (quoting NRC Staff's Response to [PFS] Motion for Summary Disposition of Contention SUWA B -- Railroad Alignment Alternatives (July 19, 2001) unnumbered attach. at 5 (Affidavit of Gregory P.

Zimmerman Concerning Contention SUWA B)) [hereinafter State Response]. Further, while declaring it is within the Board's authority not to parse a contention on summary disposition, the staff maintains that doing so in this instance would reduce the multiplicity of factual issues for hearing, thereby expediting the proceeding. See id. at 8. Finally, the staff maintains that, regardless of what requirements may be imposed upon the staff relative to the independent analysis of alternatives in a DEIS, the Board is free to modify the environmental record of decision by way of a summary disposition ruling such as the one sought by PFS. See id. at 8-10.

Not unexpectedly, SUWA does not agree with the PFS and staff positions regarding reconsideration. SUWA declares that whatever problems are asserted to arise in connection with the SUWA dispositive motion response, the Board's ruling made clear that these were irrelevant to its ultimate ruling rejecting the PFS request based on a perceived deficiency in the agency's NEPA process. See [SUWA] Response (and Objection) to [PFS] Motion for Reconsideration of Ruling on SUWA's Contention B (Dec. 13, 2001) at 1-2. Further, SUWA asserts that contrary to the suggestions of PFS and the staff, the Board cannot grant summary disposition regarding the West Skull Valley Alternative because that would involve the type of factual determinations that the Board cannot make at this stage of the proceeding. See id. at 3-5.

II. ANALYSIS

As we have indicated earlier in this proceeding relative to reconsideration requests:

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, see *Louisiana Energy Services, L.P. (Claiborne Enrichment Center)*, CLI-97-2, 45 NRC 3, 4 & n.1 (1997) (citing cases); or (2) previously

presented arguments that have been rejected, see Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). 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. See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 140 (1994); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 687, rev'd and remanded on other grounds, ALAB-726, 17 NRC 755 (1983). Reconsideration also may be appropriately sought to have the presiding officer correct what appear to be inharmonious rulings in the same decision. See LBP-98-10, 47 NRC 288, 296 (1998).

LBP-98-17, 48 NRC 69, 73-74 (1998); see also LBP-00-31, 52 NRC 340, 342 (2000).

In this instance, at least as presented by PFS and the staff, the bases supporting the requested reconsideration arguably fall into the category of arguments relating to an unanticipated presiding officer ruling and misapprehended factual information.

Addressing then the parties' assertions regarding the Board's authority/ability to rule on the PFS request for summary disposition of contention SUWA B,¹ as we observed in LBP-01-34, 54 NRC at __ (slip op. at 12-13 & n.5), 10 C.F.R. § 51.70(b) specifically charges "the NRC staff" with the responsibility for evaluating all information used in a DEIS. We consider this regulatory directive a clear indication of the Commission's intent that the staff's assessment of relevant information is an important component in the appraisal of any NEPA issues prior to the issuance of a Final Environmental Impact Statement (FEIS). Accordingly, whatever may be the case relative to the staff's assessment of information concerning Atomic Energy Act-related public health/safety/common defense and security matters, see LBP-01-19,

¹ Of course, SUWA's failure to provide a statement of material facts at issue did not relieve the Board of the responsibility of reviewing the PFS showing regarding purported undisputed facts to ensure that summary disposition was appropriate. See LBP-01-30, 54 NRC 231, 235 n.5 (2001).

53 NRC at 456 (granting summary disposition regarding safety matter in the absence of staff position on PFS undisputed material facts), some form of staff evaluation of any information purportedly germane to reaching a Board merits disposition of pre-FEIS environmental matters is a prerequisite to such determination.² We thus reject this claim as a basis for revising LBP-01-34, albeit noting that whether (and to what degree) such information, once assessed by the staff, would support summary disposition is a separate matter.

We likewise reject the notion supported by PFS and the staff that we are not constrained by the staff's admitted inability to express an opinion about the validity of the specific PFS undisputed material factual statements regarding the Western Skull Valley Alternative because of the unavailability of design and alignment details. As this argument goes, the staff nonetheless afforded any requisite assessment of the new PFS information by reason of its stated agreement with the PFS conclusion that this alternative would have environmental impacts the same as or greater than those of the Low Corridor rail spur. This seems to suggest that, in this instance, a conclusion about the sum of the whole can be reached without an assessment of its individual parts. Yet, elsewhere in this proceeding, in the apparent exercise of its independent assessment role relative to NEPA, the staff has taken pains to identify any corrections it perceives are necessary to PFS undisputed material factual statements, thereby attempting to ensure the integrity of the NEPA decisional record. See NRC Staff's Response to [PFS] Motion for Summary Disposition of Utah Contention O -- Hydrology (July 19, 2001) unnumbered attach. at 2-5 (Affidavit of Richard H. Ketelle

² Although the applicant suggests that this determination does not square with the fact that the agency's rules of practice do not preclude the entry of summary disposition absent a staff response to such a motion, see PFS Reconsideration Motion at 9, we note that in the context of a pre-FEIS summary disposition motion by an applicant, confirmation of such a staff assessment could be provided by reference to any staff DEIS findings or, in instances in which information not assessed in the DEIS is relied upon to support a dispositive motion, a functional equivalent.

Concerning Utah Contention O -- Hydrology). In this instance, the same approach seems warranted before summary disposition would be appropriate.³

Finally, in response to the PFS request that we grant summary disposition relative to the other three rail line alternatives discussed, as the staff notes, the Board has considerable latitude in determining the extent to which it will grant what is essentially partial summary disposition. In this instance, based on the potential inter-relationship of the various alternatives in any overall analysis of NEPA compliance and our assessment of the limiting time likely to be required to hear the entire matter, we have declined to take that approach.

III. CONCLUSION

Although PFS has put forth appropriate grounds for requesting reexamination by the Licensing Board of its ruling in LBP-01-34 declining to enter summary disposition in its favor on

³ As the staff point out, the FEIS in this proceeding is scheduled to be issued sometime in the near future, an event it asserts could provide the basis for a new or renewed summary disposition motion regarding contention SUWA B. See Staff Response at 10 n.9; see also PFS Reconsideration Motion at 10 n.15. Putting aside the fact that the existing general schedule for this proceeding does not contemplate such a motion, with an evidentiary hearing regarding this and other outstanding contentions scheduled to begin in April 2002, such a filing is likely to engender dismissal in accordance with 10 C.F.R. § 2.749(a) or result in a deferred schedule for addressing this issue.

contention SUWA B, we are unable to agree with PFS (and the staff) that those grounds warrant revision of our ruling. We thus deny the PFS reconsideration motion.

For the foregoing reasons, it is this nineteenth day of December 2001, ORDERED, that the December 6, 2001 motion of applicant PFS for reconsideration of the Licensing Board's decision in LBP-01-34, 54 NRC __ (Nov. 30, 2001), is denied.

THE ATOMIC SAFETY
AND LICENSING BOARD⁴

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Jerry R. Kline
ADMINISTRATIVE JUDGE

/RA/

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

December 19, 2001

⁴ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant PFS; (2) intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, SUWA, and the State; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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PRIVATE FUEL STORAGE, L.L.C.)	Docket No. 72-22-ISFSI
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(Independent Spent Fuel Storage)	
Installation))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING MOTION FOR RECONSIDERATION REGARDING LBP-01-34) (LBP-01-38) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Docket No. 72-22-ISFSI
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MOTION FOR RECONSIDERATION REGARDING
LBP-01-34) (LBP-01-38)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 19th day of December 2001