

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

**DOCKETED
USNRC**

April 1, 2002

2002 APR 11 AM 11:15

OFFICE OF THE SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)	
)	
PRIVATE FUEL STORAGE, L.L.C.)	Docket No. 72-22-ISFSI
)	
(Private Fuel Storage Facility))	

**APPLICANT'S MOTION TO STRIKE PORTIONS OF
TESTIMONY OF DON A. OSTLER REGARDING CONTENTION UTAH O**

Pursuant to the Order (General Schedule Revisions) of the Atomic Safety and Licensing Board ("Board") dated September 20, 2001, Applicant Private Fuel Storage, L.L.C. ("Applicant" or "PFS") files this motion to strike part of Prefiled Testimony of Don A. Ostler, P.E., Regarding Contention Utah O ("Ostler Testimony"). The parts of Mr. Ostler's testimony subject to the motion concern radiological contamination of ground water and surface water, a subject which is now outside the scope of Utah Contention O ("Utah O") as a result of the Board's Memorandum and Order (Granting in Part and Denying in Part Summary Disposition Regarding Contention Utah O, Hydrology), LBP-01-40, 54 NRC 526 (December 28, 2001).

I. BACKGROUND

Utah O, admitted in April 1998, challenged the adequacy of PFS' consideration of the impacts of the Private Fuel Storage Facility ("PFSF") on surrounding hydrological resources. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation) LBP-98-7, 47 NRC 142, 192-93, 216, 217 (1998). Portions of the contention were subsequently dismissed upon the withdrawal of Castle Rock intervenors, see LBP-99-6, 49 NRC 114, 121 (1999) (dismissing portion relating to firefighting) and LBP-99-39, 50 NRC 232, 236, 240 (1999) (dismissing

portion of contention related to intermodal transfer point). As revised, the contention read as follows:

The Applicant has failed to adequately assess the health, safety, and environmental effects from the construction, operation, and decommissioning of the ISFSI as required by 10 C.F.R. §§ 72.24(d), 72.100(b), and 72.108, with respect to the following containment sources, pathways, and impacts:

1. Containment pathways from the [A]pplicant's sewer/wastewater system; routine facility operations; and construction activities.
2. Containment pathways from the [A]pplicant's retention pond in that:
 - a. The ER fails to discuss potential for overflow and therefore fails to comply with 10 C.F.R. Part 51.
 - b. ER is deficient because it contains no information concerning effluent characteristics and environmental impacts associated with seepage from the pond in violation of 10 C.F.R. § 51.45(b) and §72.126(c) & (d).
3. Potential for groundwater and surface water contamination.
4. The effects of [A]pplicant's water usage on other well users and on the aquifer.
5. Impact of potential groundwater contamination on downgradient hydrological resources.

LBP-01-40, 54 NRC at 528.

On June 29, 2001, PFS filed a motion for summary disposition on Utah O. Following responses by the NRC Staff and the State of Utah, the Board in LBP-01-40 granted summary disposition with respect to part 4 of the contention (impact of water usage on other well users and on the aquifer) and with respect to radiological contamination in parts one, two, three and five. LBP-01-40, 54 NRC at 538. It is therefore clear that the scope of the remaining portions of Utah O (parts one, two, three and five) is limited to nonradiological contaminants.

II. DISCUSSION

The Board should strike those parts of Mr. Ostler's testimony, as described below, which concern radiological contaminants, because those portions are outside the scope of amended Utah O.

A. Testimony Outside the Scope of a Contention Should Be Excluded

Under NRC regulations governing testimony at hearings, "[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an [otherwise] admissible document will be segregated and excluded so far as is practicable." 10 C.F.R. § 2.743(c). NRC case law is clear that "an intervenor is bound by the literal terms of its own contention," and "the reach of a contention necessarily hinges upon its terms coupled with its stated bases." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 & n.11 (1988). An intervenor is also bound by the literal terms of its contention as reworded or amended by a licensing board, if so reworded or amended. See Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 284 (1987). Particularly here, where the Board has explicitly narrowed the scope of the contention, testimony which is outside that scope has no place in the proceeding.

B. Portions of Mr. Ostler's Testimony Deal with Radiological Contamination and Should be Stricken

The Ostler testimony contains several passages which deal only with radiological contamination and are therefore outside the scope the Utah O.

1. In the first paragraph of his Answer 4 (page 4), Mr. Ostler's testimony states that "PFS resorts to a belief that its operation will 'start clean' and, during its 40 year life, it will 'stay

clean.’ Apparently, the NRC Staff has accepted this belief. FEIS at 2-28.” As is clear from the cited reference to the Final Environmental Impact Statement,¹ the “start clean/stay clean” philosophy applies only to radiological contamination. “Stormwater runoff is not expected to contain any radiological effluents since PFS intends to employ a ‘start clean/stay clean’ philosophy.” FEIS at 2-28 (emphasis added). Indeed, the Board’s ruling on Utah O summary disposition emphasized this fact. “With its Start Clean -- Stay Clean program, PFS commits to operating in a manner designed to eliminate any scenario whereby radiological contaminants might reach surface water and groundwater.” LBP-01-40, 54 NRC at 535 (original emphasis). This portion of the Ostler Testimony therefore relates to radiological contamination and should be stricken.

2. Mr. Ostler’s testimony (Answer 4, page 5) includes the statement, “The NRC is relying on 10 CFR Part 20, Standards for Protection Against Radiation, for cleanup standards. FEIS at 9-15.” By its own terms 10 CFR Part 20 relates to “Standards for Protection Against Radiation” and is thus irrelevant to nonradiological contamination.

3. In the first paragraph of Answer 14, (page 13), Mr. Ostler’s testimony states that “if radiological sampling is ignored or done improperly, contaminants will be released onsite” (emphasis added). The reference to radiological sampling is clearly outside the scope of a contention related solely to nonradiological contamination.

4. Footnote 4 to the Ostler Testimony (see para. 2 of Answer 14) deals solely with the alleged inadequacy of radiological monitoring.

¹ NUREG-1714, Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Goshute Indians (December 2001) (“FEIS”).

Even for radiologies [sic] that PFS proposes to monitor, neither the FEIS nor the ER contain sufficient information to determine whether background radiological levels in ground water below the site will be adequately established by PFS. To establish background levels of contamination, there must be an adequate number of appropriately located wells, monitored over at least 12 months. I am unaware of any plans such as the foregoing that PFS has to establish background levels in ground water below the site.

As such, this portion of the Ostler Testimony is beyond the scope of Utah O and should be stricken.

5. In the fourth paragraph of Answer 14 of the Ostler Testimony, the testimony refers to “radiologic contamination” and in the seventh paragraph to “radiologic [sic] pollutants”. Both of these references go beyond the admitted scope of Utah O and should be stricken.

III. CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the Board strike those parts of Mr. Ostler’s testimony on Utah O identified above regarding radiological contamination as outside the scope of Utah O.

Respectfully submitted,



Jay E. Silberg

Ernest L. Blake, Jr.

Paul A. Gaukler

SHAW PITTMAN

2300 N Street, N.W.

Washington, DC 20037

(202) 663-8000

Counsel for Private Fuel Storage, L.L.C.

April 1, 2002

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
)	
(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Motion to Strike Portions of Testimony of Don A. Ostler Regarding Contention Utah O" 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 1st day of April, 2002.

Michael C. Farrar, Esq. Chairman
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: MCF@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: JRK2@nrc.gov; kjerry@erols.com

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: PSL@nrc.gov

*Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications
Staff
e-mail: hearingdocket@nrc.gov
(Original and two copies)

Catherine L. Marco, Esq.
Sherwin E. Turk, Esq.
Office of the General Counsel
Mail Stop O-15 B18
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: pfscase@nrc.gov

John Paul Kennedy, Sr., Esq.
David W. Tufts, Esq.
Confederated Tribes of the Goshute
Reservation and David Pete
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, Utah 84105
e-mail: dtufts@djplaw.com

Diane Curran, Esq.
Harmon, Curran, Spielberg &
Eisenberg, L.L.P.
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
e-mail: dcurran@harmoncurran.com

Paul EchoHawk, Esq.
Larry EchoHawk, Esq.
Mark EchoHawk, Esq.
EchoHawk PLLC
P.O. Box 6119
Pocatello, ID 83205-6119
e-mail: paul@echohawk.com

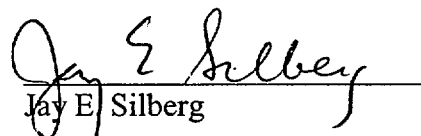
* Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Denise Chancellor, Esq.
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, Utah 84114-0873
e-mail: dchancel@att.state.UT.US

Joro Walker, Esq.
Land and Water Fund of the Rockies
1473 South 1100 East
Suite F
Salt Lake City, UT 84105
e-mail: lawfund@inconnect.com

Tim Vollmann, Esq.
Skull Valley Band of Goshute Indians
3301-R Coors Road, N.W.
Suite 302
Albuquerque, NM 87120
e-mail: tvollmann@hotmail.com

* By U.S. mail only


Jay E. Silberg