

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE THE COMMISSION

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 PETITION FOR REVIEW OF LBP-03-04INTRODUCTION

Pursuant to 10 C.F.R. § 2.786(b)(3), the staff of the Nuclear Regulatory Commission ("Staff") hereby files its response to the petition seeking Commission review of the Licensing Board's decision in LBP-03-04,¹ filed by Private Fuel Storage, L.L.C. ("PFS" or "Applicant").² For the reasons set forth herein and in the Staff's separate petition for Commission review of LBP-03-04,³ the Staff supports the Applicant's Petition and recommends that it be granted.

BACKGROUND

On March 10, 2003, the Licensing Board issued its Partial Initial Decision in LBP-03-04, in which it resolved the remaining portions of Utah Contention K/Confederated Tribes B ("Contention Utah K"). Therein, the Licensing Board found that the annual probability of an F-16 crash into the proposed PFS Facility is 4.29×10^{-6} , which it determined exceeds the Commission's threshold

¹ See *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-03-04, 57 NRC ____ (March 10, 2003) ("Partial Initial Decision Regarding 'Credible Accidents'").

² "Applicant's Petition for Review of LBP-03-04," dated March 31, 2003 ("Applicant's Petition" or "App. Pet.>").

³ "NRC Staff's Petition For Commission Review of the Licensing Board's Partial Initial Decision in LBP-03-04 Concerning Credible Accidents" ("Staff Petition"), dated March 31, 2003.

probability standard governing aircraft crash impacts at an ISFSI. See LBP-03-04, slip op. at 2. On March 31, 2003, the Applicant and the Staff filed separate petitions seeking Commission review of the Licensing Board's decision, setting forth the bases for their views that Commission review of the Board's decision is warranted under 10 C.F.R. § 2.786.

DISCUSSION

In the Staff's Petition, the Staff set forth its view that the Commission should undertake review of the Licensing Board's decision, in that the Board (a) misinterpreted the Commission's threshold probability standard contrary to established legal precedent and agency practice, by failing to recognize that a crash probability of "approximately," "about," or "on the order of" 1×10^{-6} is acceptable (which would allow acceptance of the Board's calculated probability value of 4.29×10^{-6}); and (b) erroneously disregarded the Applicant's "R" (risk reduction) factor, thereby ignoring the undisputed evidence that F-16 pilots facing an emergency situation in Skull Valley would be able to control their aircraft in 90% of the emergencies, and would more likely than not successfully take actions to avoid striking the Applicant's Facility. As set forth in its Petition, the Staff believes that the Board's decision warrants Commission review pursuant to 10 C.F.R. § 2.786(b)(4)(ii), (iii).

In its Petition, the Applicant raised the two principal issues cited by the Staff (App. Pet. at 4-6) -- and further asserted that the Board's decision warrants Commission review in certain other respects. In this regard, the Applicant asserts that the Licensing Board failed to properly account for and evaluate other critical evidence (App. Pet. at 6-9),⁴ and that the Board improperly

⁴ In making this argument, the Applicant highlights four areas in which it asserts the Licensing Board erred: (1) the Board required it to meet a higher burden of proof than the preponderance of evidence standard (App. Pet. at 6-7); (2) the Board failed to weigh the eight key material issues of fact critical to the Applicant's case regarding pilot avoidance (*Id.* at 7), and erred in flatly rejecting the Applicant's use of an "R" factor to account for pilot actions to avoid striking the Facility in the event of an emergency (*Id.* at 7); (3) the Board disregarded key factual evidence (*Id.* at 7-8) ; and (4) the Board relied upon "faulty logic and irrelevant evidence" by concluding that
(continued...)

excluded evidence concerning the consequences of an F-16 crash into a cask at its proposed Facility (*Id.* at 9-10).

Insofar as the Applicant raises the two concerns described in the Staff's Petition, the Staff shares the Applicant's view that Commission review is warranted under 10 C.F.R. § 2.786(b)(4), for the reasons set forth in the Staff's Petition. See Staff Petition at 4-8.⁵ Further, the Staff shares the Applicant's view that the Licensing Board failed to properly consider and evaluate critical evidence in the record (App. Pet. at 6-9).⁶ In particular, the Staff shares the Applicant's view that the Board erred in concluding that evidence of certain types of pilot error (e.g., attempting to restart the engine of an F-16 longer than the time specified in Air force instructions) supports the Board's conclusion that pilots would fail to avoid hitting a Facility in the event of a crash. See LBP-03-04, slip op. at 34-44.

Finally, the Staff does not support the Applicant's request for Commission review of the Licensing Board's exclusion of evidence that an F-16 crash at the site "would be unlikely to

⁴(...continued)

because pilots make human errors, they may not be expected to avoid striking the Facility in an emergency situation (*Id.* at 8-9). See LBP-03-04, slip op. at 35-36.

⁵ In its Petition, the Applicant argued, *inter alia*, that "a higher calculated probability for ISFSIs, presumably 10⁻⁵, would also be acceptable where conservatisms are shown to exist." (App. Pet. at 5). The Staff expects that it would address this assertion, as appropriate, in the event that the Commission undertakes review of the Licensing Board's decision.

⁶ For example, the Staff agrees with the Applicant that the Board erred in calculating the width of the airway ("w") (see App. Pet. at 8). The Board's finding that the airway width is six miles is based on State witness Lt. Col. Horstman's prefiled testimony that the flight path would generally be no closer than two miles west of the Stansbury Mountains or at least five miles from the eastern border of Sevier B MOA. See LBP-03-04, slip op. at 59-60, 195-99. However, the Board disregarded substantial contrary evidence, including evidence presented by the same witness, which suggested that a larger value should be assigned to the airway width. See Tr. 8572 (when flying through Skull Valley, he would avoid the boundaries - - east and west, by a mile or two); Tr. 8571 (a mile or two from the eastern edge of the MOA); Tr. 8593 (farther than two miles); Tr. 8593 (two miles from the mountains); Tr. 8594 (west "of the tops" of the Stansbury Mountains); Tr. 8594 ("down the mountains somewhat would be as far east as I would ever go").

penetrate a storage cask or cause a release of radioactive material” (App. Pet. at 9-10).⁷ Regardless of whether the Applicant is correct in asserting that Board improperly ruled on the admissibility of such evidence, the exclusion of such evidence is of no effect in light of the Licensing Board’s decision to allow further litigation of aircraft crash consequences and the Applicant’s stated determination to proceed with such litigation.⁸ Accordingly, even if the Board erred in excluding such evidence, any such error would constitute “harmless error” and would not support or warrant Commission review. See 10 C.F.R. § 2.786(b)(4)(iv).

CONCLUSION

For the reasons set forth above and in the Staff’s Petition of March 31, 2003, the Staff supports the Applicant’s Petition and recommends that it be granted.

Respectfully submitted,

/RA/

Sherwin E. Turk
Catherine L. Marco
Counsel for NRC Staff

Dated at Rockville, Maryland
this 10th day of April, 2003

⁷ The Staff notes had argued to the Board that such evidence was not within the scope of the contention as it had been filed and litigated. See LBP-03-04, slip op. at 82-83; “NRC Staff’s Motion in Limine to Exclude Portions of the State of Utah’s Prefiled Testimony and Exhibits Concerning Contention Utah K/Confederated Tribes B,” dated March 25, 2002, at 5; see *also* “Applicant’s Motion to Strike Portions of State of Utah’s Prefiled Testimony of Dr. Marvin Resnikoff Regarding Utah Contention K/Confederated Tribes Contention B,” dated March 25, 2002, at 5-6.

⁸ See LBP-03-04, slip op. at 88-89; “Joint Report on ‘Consequences’ Proceedings,” dated March 31, 2003, at 2.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO APPLICANT'S PETITION FOR REVIEW OF LBP-03-04," 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 April, 2003:

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