

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 RESPONSE TO APPLICANT'S MOTION IN LIMINE
TO PRECLUDE NEW STATE OF UTAH TESTIMONY REGARDING
JETTISONED ORDNANCE IMPACT PROBABILITY

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.730 and 2.743(c), and the Atomic Safety and Licensing Board's "Memorandum of Conference Call" dated June 2, 2004, the Staff herein responds to the "Applicant's Motion in Limine to Preclude New State of Utah Testimony Regarding Jettisoned Ordnance Impact Probability" ("Motion"), filed by Private Fuel Storage, L.L.C. ("Applicant" or "PFS") on June 9, 2004. The Staff has reviewed the Applicant's Motion as well as the record of this proceeding with respect to the issue of jettisoned ordnance. On the basis of its review, the Staff supports the Applicant's Motion, in that the introduction of new testimony as to the probability of ordnance impacts at the proposed Private Fuel Storage Facility ("PFSF") is barred as *res judicata*, in the absence of significant new information and a properly supported motion to reopen.

II. DISCUSSION

As summarized by PFS in its Motion (at 2-4 and 6-8), the probability of jettisoned ordnance impacting the proposed PFS Facility was previously litigated in this proceeding, and was resolved by the Licensing Board in its decision on aircraft crash probability. See *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-03-04, 57 NRC 69, 127-32, 225-30 (2003). In a report filed by State of Utah ("State") expert witness Michael Thorne in May 2004, the State

apparently seeks to reopen this issue, asserting that the Licensing Board's determination of the probability of jettisoned ordnance impacting the PFS Facility should be doubled to account for the possibility that two items of ordnance on a single F-16 aircraft might impact the Facility.¹ The probability of such ordnance impacting the PFS Facility, however, was previously raised before and considered by the Licensing Board. See LBP-03-04, 57 NRC at 227 (State asserted that an F-16 might carry up to six ordnance per flight, or two MK-84 2000-pound bombs per flight).² After considering all of the evidence, the Licensing Board calculated the probability of jettisoned ordnance impacting the PFS Facility to be 2.11×10^{-7} . *Id.* at 131. As such, the Board's final determination of the probability of ordnance impacting the Facility is not subject to challenge at this time, in the absence of a properly supported motion to reopen based upon significant new information that could not have been presented previously.³

¹ M.C. Thorne, "Ordnance Impacts and Aircraft Crashes at a Proposed Private Fuel Storage Facility for Spent Nuclear Fuel in Utah: Summary of Probability Estimates" (May 2004).

² See "State of Utah's Prefiled Testimony of Dr. Marvin Resnikoff Regarding Contention Utah K/Confederated Tribes B," Post Tr. 8698, at 19 (F-16s transiting Skull Valley carry between 0 and 6 ordnance per flight. Horstman Tstmy at A.72. Although ordnance may be jettisoned on racks, there is the potential that each individual ordnance jettisoned could strike the proposed PFS facility. If live or inert MK-84 bombs (2,000 lbs) are carried, two are carried per F-16 fighter. *Id.*") This asserted need to consider the probability of more than one jettisoned ordnance impacting the PFS Facility was rebutted in the testimony of PFS witnesses Jefferson and Fly. See Tr. 8866-68.

³ 10 C.F.R. § 2.734, which applies in this proceeding, was recently recodified in 10 C.F.R. § 2.326. That rule provides, in pertinent part, as follows:

2.734. Motions to reopen.

(a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

(1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.

(2) The motion must address a significant safety or environmental issue.

(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

(continued...)

Previously in this litigation, the Licensing Board addressed the issue of *res judicata* (claim preclusion) in NRC proceedings, in connection with its consideration of Utah Contention Security-J. There, the Licensing Board stated as follows:

In applying the doctrine of claim preclusion, modern courts look to three factors to determine whether or not a claim should be barred in connection with subsequent litigation: (1) whether there was a final judgement on the merits of the claim by a court of competent jurisdiction; (2) did the prior action involve the same parties or their privies; and (3) did the prior action involve the same claim.

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-20, 56 NRC 169, 181 (2002), *citing Moore's Federal Practice* § 131.01 at 131-2 (3d ed. 1999).

All parties had ample opportunity to litigate the issue of ordnance impact probability during the previous hearings on "Utah K/Confederated Tribes B." All of the criteria outlined above and previously adopted by the Board in this proceeding are answered in the affirmative in this instance. Further, as stated in the Applicant's Motion, no new information is contained in either the Thorne report or the report filed by State expert McDonald,⁴ that would support any re-litigation of the Board's previously calculated jettisoned ordnance impact probability of 2.11×10^{-7} . *Private Fuel Storage, L.L.C.*, LBP-03-04, 57 NRC at 131.⁵

³(...continued)

(b) The motion must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. . . .

⁴ Lt. Col. L.N. McDonald (USAF, Ret.), "Evaluation of Military Ordnance Impacts at the Proposed Private Fuel Storage Site in Skull Valley, Utah" (Sep. 2003).

⁵ To be sure, all parties (PFS, the State, and the Staff) have submitted probability analyses in this phase of the proceeding. However, each of those analyses accept the Board's findings as to the probability of impact into the PFS Facility -- except that the State now challenges the Board's determination of the probability of ordnance impact, by seeking to double the Board's determination of a probability of 2.11×10^{-7} for an impact by such jettisoned ordnance.

III. CONCLUSION

For the foregoing reasons, the Staff supports the Applicant's request that new evidence concerning the probability of jettisoned ordnance impacting the PFS Facility be excluded.

Respectfully submitted,

/RA/

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Counsel for NRC Staff

Dated at Rockville, Maryland
this 18th day of June, 2004

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO APPLICANT'S MOTION IN LIMINE TO PRECLUDE NEW STATE OF UTAH TESTIMONY REGARDING JETTISONED ORDNANCE IMPACT PROBABILITY" 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 18th day of June, 2004:

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