

RAS 10460

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:

DOCKETED 09/15/05

SERVED 09/15/05

Michael C. Farrar, Chairman
Dr. Peter S. Lam
Dr. Paul B. Abramson

In the Matter of

PRIVATE FUEL STORAGE, LLC

(Independent Spent Fuel Storage Installation)

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

September 15, 2005

ORDER REGARDING REDACTION
OF FINAL PARTIAL INITIAL DECISION

On February 24 of this year, this Board issued its Final Partial Initial Decision in this proceeding, resolving the accidental aircraft crash “consequences” issue. Because our discussion therein involved Safeguards-protected matters, that decision was issued in two formats: one available to the public, and the other (the “official” one) available only to the litigating parties and to any reviewing tribunals. The publicly-available version differed from the non-public version in that the public Part II contains only a non-Safeguards summary or paraphrase of the Board majority’s reasoning on the crucial issues, rather than the full technical analysis detailed in the non-public version. All other Parts of the two versions are identical.

As indicated at that time (February 24 cover Memorandum, p. 2), the Board has always intended to explore the extent to which there are non-Safeguards portions in Part II of the non-public, official version that could be usefully made publicly available. If feasible, the Board will prepare and issue a redacted version that would be both published in the bound volumes of the periodic Nuclear Regulatory Commission Issuances and provided electronically in the agency’s ADAMS system for public viewing and reference.¹

1. To begin the determination of whether enough substance would remain in a redacted version of the opinion to make its publication worthwhile (in terms of making more information

¹ Our May 24 reconsideration decision was published (see LBP-05-12, 61 NRC 319), as will be the Commission’s September 9 decision denying review. CLI-05-19, 62 NRC ____ .

available to the public), we are adopting the following procedure. Because the interests being protected by non-disclosure involve matters that are the province of the NRC Staff in the first instance (unlike, for example, proprietary matters, which involve almost exclusively protection of an applicant's interests), that process will start with the NRC Staff.

Specifically, the Staff, working with its security experts, shall mark up a copy of the non-public Part II of our opinion (containing pages numbered B-1 to B-43), indicating -- in the manner specified below -- the portions it believes must be withheld from the public. That marked-up copy (and the later versions described below) shall be sent to the other parties, via overnight delivery, for first the State and then the Applicant to indicate, seriatim, their concurrence or disagreement with each portion marked by previous parties.

Upon its receipt of the final version containing all parties' markings, the Board will determine how best to obtain the supporting arguments of each party, as to the portions where there is not agreement, before ruling on any disputed areas and issuing a redacted opinion. Alternatively, after considering the arguments, we may determine that the required redactions are so significant and pervasive that nothing appreciable would be gained by issuing a redacted opinion.

2. The markup process shall be done as follows. Using a black felt-tipped pen, the Staff shall place brackets -- [.] -- at the beginning and end of every portion (paragraph, sentence, phrase or word) of the opinion it believes must be withheld from disclosure. (Each bracket set shall encompass no more than one paragraph.) Upon completion of that effort, the Staff shall send copies of its marked up version to the State, the Applicant and the Board.²

² For planning purposes, as each party begins the seriatim efforts described herein, it shall notify the other parties and the Board (via electronic mail) as to the time it expects to take to complete its work expeditiously, consistent with any other responsibilities it may have to undertake regarding other aspects of this overall matter. If any party anticipates it will require more than fourteen days from receipt to complete its work, it should request (via formal means) such additional time as it expects will be needed.

The State shall then indicate its agreement or disagreement with the Staff's view by drawing a line, again with a black felt-tipped pen, through (but not entirely covering) any Staff-bracketed material that the State agrees should be withheld from disclosure. Those portions bracketed but not lined out will thus represent the areas of disagreement.

Upon completion of that effort, the State shall send a copy of the dually marked document to the Applicant, the NRC Staff, and the Board. (In adopting this system, we are proceeding on the assumption that, given the relative general positions taken by the two parties thus far in the prehearing and hearing processes, there will be no areas that the Staff believes may be disclosed that the State believes should be withheld. If that assumption proves incorrect, the State should promptly advise the Board and the other parties and we will adopt such further measures as are appropriate.)

At that point, the Applicant shall indicate its agreement or disagreement as follows. For those portions that the Staff and State agree should be withheld (showing as bracketed and lined-out), and in which the Applicant concurs, it will make no entry. To the degree, if any, that it does not concur with the Staff's and State's judgment of non-disclosure, the Applicant should encircle, also with a black felt-tipped pen, the non-concur portions, i.e., any portions that the Staff and State agree should be withheld, but with which the Applicant believes should be disclosed.

For those portions that the Staff believes should be withheld but the State believes should be disclosed, the Applicant shall encircle any portions it believes should be disclosed, and make no entry as to those it believes should be withheld. For any (unmarked) portions which neither the Staff nor the State believes should be withheld, but which the Applicant believes must be withheld, the Applicant shall encircle those portions with a double-line.

Upon completion of its effort, the Applicant shall send a copy of the document, reflecting all parties' views on redaction, to the State, the Staff, and the Board. The Board will then

review the document and solicit the parties' oral or written supporting arguments as to the areas in controversy, in a manner to be determined at that time.

3. Given the experience of counsel for the State, the Applicant PFS, and the NRC Staff, and the prudence all have exhibited throughout this proceeding, the Board is confident that the parties will not over-reach in the course of taking their respective positions on disclosure/redaction. On the one hand, security interests will demand that certain material be protected, but excessive protection will deprive the citizens of Utah and the nation of the opportunity to understand more fully what underlies the agency's decision on this important issue. The parties should bear these dual responsibilities in mind as they indicate their positions on the document.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

By Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 15, 2005

Copies of this Order were sent this date by Internet e-mail transmission to counsel for Applicant PFS, Intervenor State of Utah, and the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER REGARDING REDACTION OF FINAL PARTIAL INITIAL DECISION 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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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of September 2005