

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION **DOCKETED 02/24/05**
LBP-05-05

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:

RAS 9417

SERVED 02/24/05

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

February 24, 2005

MEMORANDUM AND ORDER
(Ruling on State of Utah's Recently-Filed Contention UU)

Toward the end of last year, this proceeding -- concerning the license application of the Private Fuel Storage (PFS) consortium for its proposed temporary spent nuclear fuel storage facility in Skull Valley, Utah -- was seemingly headed to a long-awaited conclusion after a lengthy hearing on the last remaining issue in the case, namely, the degree of potential risk from accidental military jet crashes. On November 12, however, the State of Utah asked us to consider a new contention, designated Utah UU.

That contention was premised on an oral statement assertedly made, a month earlier, by a U.S. Department of Energy (DOE) official concerning the long-term fate of any spent fuel sealed at, and transported from, nuclear power plants around the country for temporary storage at the proposed PFS facility. As the State recounted and understood that statement, it was to the effect that such PFS-stored fuel would later be ineligible for disposal at the proposed Yucca Mountain permanent repository, unless it were first to be unsealed and repackaged elsewhere.

The asserted statement seemed on its face incongruent with a common understanding about the role of the proposed PFS facility held by, among others, the Commissioners who head this agency. Specifically, the **Commission recently spoke of what** has long been an

underlying assumption about the PFS project: that the Applicant “plans to completely seal spent fuel inside a canister that is never opened from the time it leaves the power plant until it is deposited into a permanent repository . . .” CLI-04-22, 60 NRC 125, 132 (2004) (emphasis added).

More than one of our decisions has reflected a similar understanding. For example, in our Partial Initial Decision on seismic issues, we had described the facility as “intended to serve as the spent fuel’s way station before the coming to fruition of the permanent underground repository long planned for Nevada’s Yucca Mountain.”¹

Both the Applicant and the NRC Staff have presented a variety of grounds opposing our admission of the new State contention at this stage of the proceeding. In simple terms, those grounds challenge Contention Utah UU as not material to the issues before us, for lacking a factual underpinning, and for not meeting various standards relating to the timing of its filing.²

We discuss all those grounds in the course of determining that we must reject the contention (and the motion to reopen the record) because its factual underpinning is inadequate. The underpinning provided is essentially the State’s interpretation of an “unofficial” oral opinion by a DOE Office Director who is not directly responsible for the subject about which he spoke. That opinion, when measured against key “official” DOE documents brought to our attention that portray the matter differently, is insufficient to launch a new adjudicatory inquiry at this juncture.

¹ LBP-03-08, 57 NRC 293, 296 (2003). See also LBP-01-40, 54 NRC 526, 531 (2001) (discussing PFS’s “Start Clean - Stay Clean” policy as including “seal-welded, never-to-be-opened spent nuclear fuel (SNF) canisters”). In this regard, the Applicant’s current advertising for the facility (brought to our attention by the State), while not pointing as we did to Yucca Mountain specifically, does indicate that those storing fuel at the PFS site would have “preparation for outbound shipment to DOE provided.” See State of Utah’s Request for Admission of Late-Filed Contention Utah UU (Ramifications of DOE’s Refusal to Accept Fuel in Welded Canisters from the PFS Site) Or In The Alternative Petition for Rulemaking, Exh. 8, PFS Advertisement (Nov. 12, 2004).

² Only the Staff, not the Applicant, claims the contention is untimely.

Accordingly, we need reach no firm conclusion on the other grounds advanced for rejecting the contention. But the analysis we do make of those grounds indicates that if the oral statement which launched the new contention were to have signified what the State thought it did upon hearing it, then the new contention might well have required further inquiry.

In Part I below, we discuss the factual and procedural background that led to the issue now before us. In Part II, we discuss the legal standards governing our decision. In Part III, we explain our ruling rejecting the admissibility of the new contention, and conclude by informally commending the matter to the Commission for such consideration as it deems appropriate.

I. THE FACTUAL AND PROCEDURAL BACKGROUND

In August and September of last year, we conducted what the parties expected to be the final phase of the evidentiary hearings in this proceeding, regarding the probability of a spent fuel cask/canister breach (and resulting radiation release) should an F-16 jet fighter plane accidentally crash into the proposed PFS facility. Upon coming to the end of the final day of that hearing on September 15, we closed **the taking of evidence**.³

Nearly two months later, we received the State's request to admit a new contention for consideration on its merits in this proceeding. The newly-filed contention, denominated "Utah

³ See Tr. at 19700 (where the Board Chairman noted "that concludes our record in the case"); compare 10 C.F.R. Part 2, App. A, § V(g)(5) ("The Chairman should formally close the hearing.").

UU – Ramifications of DOE’s Refusal to Accept Fuel in Welded Canisters from the PFS Site,” was framed by the State as follows:

PFS’s license application and NRC’s final environmental impact statement fail to describe or analyze the effect of DOE’s refusal to collect fuel in welded canisters from the PFS site and the concomitant potential to create a dysfunctional national waste management system, and added risks and costs from multiple and unnecessary fuel shipments back and forth across the country. In addition, absent a condition that fuel will only be accepted at PFS’s Skull Valley site if it can be shipped directly from PFS to a permanent repository, PFS must provide reasonable assurance that each and every fuel owner will accept the fuel back for repackaging, and PFS or the fuel owner will place, up-front in an escrow account, sufficient funds to cover the cost of fuel shipment back to the reactor or other facility for repackaging.

State of Utah’s Request for Admission of Late-Filed Contention Utah UU (Ramifications of DOE’s Refusal to Accept Fuel in Welded Canisters from the PFS Site) Or In The Alternative Petition for Rulemaking (Nov. 12, 2004) at 2 [hereinafter State Motion].

As discussed in further detail below, the former version of the NRC rules (under which this proceeding continues to be conducted) requires that a party provide, among other things, factual support for each contention it proffers. See 10 C.F.R. § 2.714(b)(2)(ii). In this vein, the State appended to its motion several exhibits, which it contends provided support for the assertion that DOE would not accept at Yucca Mountain any sealed spent fuel canisters or, for that matter, pick up any spent nuclear fuel from the PFS facility at all.

The principal foundation for the State’s new contention is an affidavit of Dianne R. Nielson, Executive Director of the Utah Department of Environmental Quality, elaborating on her recollection of an October 14 conversation she had with Gary Lanthrum, Director of DOE’s Office of National Transportation, at a meeting in Salt Lake City of the Nuclear Waste Technical Review Board.⁴ Specifically, as Dr. Nielson recalls, Mr. Lanthrum stated that DOE was required

⁴ This conversation, as well as similar statements allegedly made by Mr. Lanthrum to members of the local Utah press, provides the foundation upon which much of the State’s argument is based, and around which much of the controversy here arises. See, e.g., State Motion, Exh. 1, Declaration of Dianne Nielson (Nov. 12, 2004) ¶¶ 4-5; State Motion, Exh. 2, Patty Henetz, *Goshutes’ waste plan hits a snag; Yucca Mountain may reject spent nuclear fuel from proposed Skull Valley site; Skull Valley may be stuck with N-waste*, Salt Lake Trib., Oct. 15, 2004, at A1.

only to accept bare spent nuclear fuel from the nuclear utilities that generated it, would not accept spent fuel in pre-sealed welded canisters, and, further, was not obligated to pick up such fuel from the PFS facility. See State Motion, Exh. 1, Declaration of Dianne Nielson (Nov. 12, 2004), ¶ 4.

On November 16, 2004, upon request, we extended the time the Applicant and the Staff had to respond to the State's newly-filed contention. In doing so, and in the interest of efficiency, we directed the State first to supplement its motion by addressing: (1) the possible impact on its pending motion of the 10 C.F.R. § 2.734 criteria for re-opening an evidentiary record; and (2) whether, if we did grant its motion, the issues raised by Contention Utah UU should be addressed in the first instance by this Board, and in what manner, or in the alternative be addressed by the NRC Staff as a supplement to its National Environmental Policy Act (NEPA) review.⁵

The State filed the supplement to its motion on November 29, 2004,⁶ addressing the Section 2.734 re-opening factors. It declined the opportunity to address the second part of our order, however, regarding it as premature to consider how to resolve the merits of the proposed contention.⁷

In its December 6, 2004 response, the Applicant urged us to reject Contention Utah UU on essentially three grounds: (1) that the State met neither the Section 2.734 re-opening standard nor the requirements for filing a new contention based on recently-arising information;

⁵ See our unpublished November 16, 2004 "Order (Addressing Applicant's Request for Extension and Related Matters)" at 2-3.

⁶ The State's supplement was inadvertently dated November 16 on its cover page but, as reflected at its conclusion, was actually completed and served on November 29.

⁷ Perhaps there was a misunderstanding, for we were seeking only the State's opinion on how the proposed contention should be addressed at this juncture if it were to be admitted. In any event, our decision not to admit the contention moots the second, unanswered question.

(2) that there was no foundation for the asserted DOE informal statement, it being fully undercut by documents reflecting a different, official DOE viewpoint; and (3) that, even if true, the “no PFS fuel to Yucca Mountain” proposition could not lead to a different outcome in, and thus was immaterial to, this proceeding, in light of the consideration given to post-PFS transportation scenarios in the Final Environmental Impact Statement (FEIS) for the facility. With respect to the second ground, the Applicant supplied several supporting documents of its own, which it claimed removed all foundation from the State’s proposition that DOE was not obligated to, and indeed would not, accept spent fuel from the PFS facility.⁸

The following day, we decided not to move forward to set the oral argument we had earlier thought might be needed. Rather, in the interest of efficiency, we directed the State to respond by December 17, 2004, to: (1) the Applicant’s documentary evidence (by providing either other documents or other interpretations of the same documents); and (2) the Applicant’s arguments that the Staff’s FEIS was adequate in its current form.⁹

In its December 10, 2004 response to the State’s filings, the Staff asserted that: (1) Contention Utah UU was impermissibly late; (2) the State did not show that a materially different result would be reached if the contention were admitted, as required by Section 2.734;

⁸ See Applicant’s Response to State of Utah’s Request For Admission of Late-Filed Contention Utah UU (Dec. 6, 2004) [**hereinafter Applicant Response**].

⁹ See our unpublished December 7, 2004 “Order Regarding ‘Contention Utah UU’”. In the same order, we also directed the Staff to address in its pending response to the State’s motion whether any DOE documents had previously been introduced in the PFS proceeding, or were otherwise available to the Staff or PFS, to indicate whether spent fuel from PFS would be acceptable at Yucca Mountain. *Id.* at 1 n.1. To avoid any potential delays attributable to document unavailability, we also directed the Staff and the Applicant to supply complete copies of referenced documents to the State. *Id.* at 2. The next day the Applicant advised the State as to where the documents could be retrieved electronically. See Letter from Jay E. Silberg, Counsel for PFS, to Denise Chancellor, Utah Assistant Attorney General (Dec. 8, 2004), ADAMS Accession No. ML043510178.

and (3) even if Contention Utah UU were not impermissibly late, it lacked the substantial factual basis necessary for admissible contentions pursuant to NRC regulations.¹⁰

One week after we received the Staff's response, the State filed its December 17 reply, the final word to us on the subject. In that pleading, the State averred that the Applicant's papers were non-responsive to the issues posed by Contention Utah UU. Specifically, the State urged that the Applicant had improperly focused on the yet-to-be-designed Yucca Mountain facility and on DOE's obligation to accept all domestic commercial spent nuclear fuel under the Nuclear Waste Policy Act (NWPA), while ignoring the different issues raised by Contention Utah UU of whether the Standard Contract required DOE to accept waste in the form in which it would be stored at the PFS facility and whether DOE would collect the spent fuel from the PFS facility at all.¹¹ The State further responded to the Staff filing by asserting that a materially different result would indeed be likely should the Board admit Utah UU to this proceeding, for the FEIS cost-benefit analysis had not contemplated the possibility that DOE would not accept spent fuel from the PFS facility.

¹⁰ See NRC Staff's Response to "State of Utah's Request for Admission of Late-Filed Contention Utah UU (Ramifications of DOE's Refusal to Accept Fuel in Welded Canisters From The PFS Site) Or In the Alternative Petition For Rulemaking" (Dec. 10, 2004) at 1-2 [hereinafter Staff Response].

¹¹ See State of Utah's Reply to Responses Filed By the Applicant and the Staff to Utah's Request for Admission of Late-Filed Contention Utah UU (Dec. 17, 2004) at 1-2.

II. THE GOVERNING LEGAL STANDARDS

We have discussed contention admissibility standards on numerous occasions throughout the course of this proceeding,¹² and therefore will not provide an extensive discussion of those requirements here. In sum, 10 C.F.R. § 2.714(b)(2) requires that each contention include: (1) a brief explanation of the bases for the contention; (2) a concise statement of the alleged facts or expert opinion on which the petitioner relied to prove the contention, along with the source references relied upon to establish those facts or opinions; and (3) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact, including references to particular portions of the application and the reasons for the dispute, or the identification of a failure of the application to put forth information on a relevant matter required by law and reasons supporting the alleged omission.

Moreover, where the contention at issue is not filed during the period of time allotted by the agency's rules, the petitioner must also show that a balancing of five factors weighs in favor of admitting the contention. See 10 C.F.R. § 2.714(a)(1). Specifically, the petitioner must show: (1) good cause for failure to file on time; (2) the unavailability of other means of protecting petitioner's interest; (3) the extent to which petitioner's participation may reasonably be expected to assist in developing a sound record; (4) the extent to which petitioner's interest will be represented by existing parties; and (5) the extent to which petitioner's participation will broaden or delay the proceeding.

Of these, the most important factor is whether good cause exists to excuse the untimely filing. If the petitioner is unable to establish good cause, there must be a compelling showing on the remaining four factors sufficient to override the lack of good cause. Because we have elaborated on this balancing test on other occasions in this proceeding, we will not do so here.¹³

¹² See, e.g., LBP-98-07, 47 NRC 142, 178-82 (1998); LBP-01-39, 54 NRC 497, 505-06 (2001).

¹³ See, e.g., LBP-01-39, 54 NRC 497, 507 (elaborating on the balancing test required by the Section 2.714(a)(1) factors).

In addition, because the contention arrived at the tail end of this proceeding, with the record on the only remaining issue having previously been closed, we need be cognizant of 10 C.F.R. § 2.734, which sets standards regarding what is required for re-opening the record. Included among those standards, in subsections (a)(2)-(3), is that the “motion must address a significant safety or environmental issue” and that it “must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.”

In the main, that regulation addresses situations where a party moves to re-open an evidentiary record to present further evidence on a particular issue that was already the subject of the hearing. Subsection (d) goes on, however, to indicate that even where, as here, a party wishes to reopen the proceeding to address a new contention, the party must still fulfill the reopening criteria of subsections (a) through (c), in addition to the late-filing and general contention admissibility criteria found, respectively, in 10 C.F.R. § 2.714(a)(1) and (b)(2). It was based on this interpretation that we asked the parties to address whether the State’s filing met not only the criteria necessary for admission of a new contention, but also the standards required to reopen an evidentiary record.¹⁴

In this regard, the Applicant reminded us that the agency’s former Appeal Board had quite some time ago spoken to just the situation now presented, and had defined the procedure to be followed “when confronted with a motion to ‘reopen the record’ which . . . seeks a further evidentiary hearing on new issues not previously considered.” See Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523-24 (1973). Not being inclined to try to improve on the test laid down there for how to evaluate the

¹⁴ See our unpublished November 16, 2004 “Order (Addressing Applicant’s Request for Extension and Related Matters)” at 2-3.

admissibility of contentions on new subjects that arise after the evidentiary record has been closed, we simply repeat that test verbatim:

[T]o justify the granting of a motion to reopen the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition. Thus, . . . no reopening of the evidentiary hearing will be required if the [documents] submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact, i.e., if the undisputed facts establish that the apparently significant . . . issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the licensing proceeding.

* * * *

[W]hile it is useful from an analytical standpoint to keep separate the factors to be considered on a motion to reopen, it will not always be possible, in passing upon the motion, to give them separate consideration. The questions of whether the matter sought to be raised is significant and whether it presents a triable issue may often be intertwined, and can be so treated

Id. (emphasis added) (citations omitted).

In effect, then, the Vermont Yankee Appeal Board was indicating that, at this stage of a case, the standards governing contention admissibility and those governing summary disposition can, and should, be conflated. That advice seems to have withstood the test of time,¹⁵ and we therefore follow it here.

¹⁵ If anything, the agency's regulations governing the admission of contentions have been made more stringent in the half a lifetime since Vermont Yankee was decided. Accordingly, those rule changes would not be expected to have served to convert the Vermont Yankee test into one more favorable to the State at this juncture of a proceeding.

III. THE RESULTING RULING

For purposes of ruling on the pending request, we take the State's averments as true, and presume the accuracy of Dr. Nielson's rendition of what she heard the DOE official say. That leaves as the crucial matter the import of what he said.

Taking that approach, we have been presented with arguments against the contention's admission that challenge its materiality (in terms of leading to a different result), its underpinning (in terms of its factual support and basis), and its timeliness (in terms of the applicable regulatory criteria). We will discuss those arguments in that order.

But we begin by noting what emerges from the parties' filings, which in some respects pass by each other rather than meet head on. Quite simply, there are two different perspectives from which to view the statement of the DOE official.

On the one hand, the statement heard and recounted by the State could have been meant just to refer to a long-recognized situation, *i.e.*, that a key document, the Standard Contract between DOE and the nuclear utilities, does not cover PFS-stored fuel because at the time it was developed "the issue of accepting large multiple spent fuel element containers" had simply not been contemplated by [DOE] or utilities."¹⁶ In light of that situation, DOE had made it clear in the past that "consistent with the goals concerning minimizing spent nuclear fuel handlings," DOE would eventually "be willing to initiate the appropriate actions to include such a system as an acceptable waste form under the terms of the standard contract."¹⁷

It could well be, then, that the recent oral pronouncement that PFS-stored fuel is not covered by the Standard Contract may have been intended -- as the Applicant sees it -- as

¹⁶ See Applicant Response, Exh. 7, Letter from Lake Barrett, Deputy Director, DOE Office of Civilian Radioactive Waste Management, to R. M. Grube, Director, Fuel Management Department, Yankee Atomic Electric Company (Aug. 20, 1996) at 1 (emphasis added).

¹⁷ Ibid. (emphasis added).

nothing more than an innocuous repetition of what has long been a fact. Under that view, it would have no more import than to remind everyone that the amendment of the Standard Contract to incorporate the PFS-type eventuality -- not contemplated when the Standard Contract was drafted -- has yet to be done.

If this latter interpretation is all that was meant, the DOE statement would indeed add nothing material to the matters before us. It follows that the pending contention, which relies on the statement for its basis, would warrant no consideration by us, being barred both as an untimely rehash of old information and as contributing nothing that would raise any question about the common understanding (see pp. 1-2, above) about the PFS project's relationship to the longer-term issues concerning spent nuclear fuel. (The unfinished business to which it refers may, however, warrant attention elsewhere, as we explain at pages 23-25, below.)

The statement could, however, have been intended -- as the State's arguments seemed to be suggesting -- to have more dramatic import than simply reciting the existing, yet-to-be-amended, contractual state of affairs. Along those lines, it may have been put forward as a way of announcing a new DOE policy that PFS-stored fuel -- in its pre-sealed canisters -- was now viewed as indeed substantively unacceptable, ever, in that form at the now-contemplated Yucca **Mountain repository**. Under that view, being not now covered in the Standard Contract, the PFS-stored spent fuel was not only not now eligible for disposal at Yucca Mountain, but would remain so unless repackaged.

As indicated above, the Applicant would prevail, and the State's new contention would have to be rejected, if the Applicant's interpretation of the DOE statement were correct. If the State's interpretation of the DOE statement were correct, however, we might well reach the opposite result. We discuss all this below.

A. Materiality. In determining whether the State's new NEPA-driven contention could bring about a material change in the existing FEIS's NEPA-related approval of the project, we

start by pointing out that, broadly speaking, there are as a factual matter two distinct components to, and recipients of, the environmental impacts of this facility. One impact would be felt by the neighboring residents, stemming from the facility's construction and its operation (the latter derived largely from the presence of the spent fuel casks on site for whatever period they remain there).¹⁸ The other, entirely distinct, impact is that felt across the country by those (including residents of Utah) upon whom the transportation of the fuel -- to and/or from the facility -- may have a potential impact.¹⁹

In terms of legal principles, we look first to how the federal courts have interpreted NEPA. Again speaking broadly, NEPA requires, under the "cumulative impacts" rubric, the taking into account of future reasonably foreseeable results of current federal (licensing) actions, and imposes a rule against incrementalism, that is, against analyzing a succession of

¹⁸ We assume it was this factor the Applicant had in mind when, in opposing admission of the State's new contention, it pointed out that the Commission had previously expressed approval of our indication that the environmental impacts of the project were slight. See Applicant Response at 15 (citing CLI-04-22, 60 NRC 125, 145 (Aug. 17, 2004)). But we had expressed that view in the course of ruling on the State's Contention Utah SS, where what was at stake was the difference between a 20 and a 40 year license. It was in that context that we were speaking of the environmental impact at the facility itself, as envisioned in Skull Valley on private lands (i.e., on the Reservation of the Skull Valley Band of Goshute Indians, who had willingly leased their lands for that purpose). To say that the environmental impacts at that facility are small in the context of comparing a 20 year versus a 40 year operational period is not in any way to imply that rehandling, repackaging and reshipping the spent fuel to be stored there is a matter of little concern under NEPA in light of the common understanding and current advertising pointing otherwise. See pp. 18-19, below.

¹⁹ This makes the facility unlike a nuclear reactor, with respect to which the environmental risk of radiological effects associated with decades of operation dwarfs any similar risks associated with transportation. See 10 C.F.R. § 51.52(c) at n.4. The construction and operation of the PFS facility, on the one hand, and the transportation of spent fuel to and away from it, on the other, present an entirely different balance of relative environmental impacts than does the relationship of spent fuel transportation to reactor operation. The FEIS recognizes as much, in that the Staff determined that transportation impacts for the PFS facility required a more detailed analysis than that applied to reactors. See Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah (Dec. 31, 2001) at 5-40 [hereinafter PFS FEIS].

currently contemplated federal (licensing) actions in series, as though they were separate, unrelated activities.²⁰

For these purposes, then, the scope of the NEPA analysis requires that the project, including its definite follow-ons, be fairly defined. See 40 C.F.R. §§ 1501.7, 1508.25. Here, one could argue that, for NEPA purposes, the only subject of the pending license application is the PFS facility as proposed for Skull Valley. Under that view, where the fuel goes afterwards could be viewed as too speculative to consider at this juncture.²¹ In turn, that would mean that only transportation to and from the site need be considered (and, as we will see, that has indeed been done here).

We might readily agree with the legitimacy of this “PFS-only” definition of the project but for its being called into question by the Applicant’s indication in its own Environmental Report that “[t]he storage system technology is compatible with the long-term plans of the DOE interim storage facility and permanent repository”²² and by its current advertising for the project (see

²⁰ See the general NEPA regulations developed by the Council on Environmental Quality at 40 C.F.R. § 1508.7; 10 C.F.R. § 51.14(b) (NRC-specific NEPA regulation); Kleppe v. Sierra Club, 427 U.S. 390, 410 n.20 (1976) (less imminent contemplated actions need not be analyzed); see also Utahns For Better Transportation v. DOT, 305 F.3d 1152, 1173-74 (10th Cir. 2002) (future additional lanes in highway project need not be considered if only speculative); Airport Neighbors Alliance, Inc. v. United States, 90 F.3d 426 (10th Cir. 1996); Natural Res. Def. Council v. Callaway, 524 F.2d 79, 87-88 (2d Cir. 1975); Tex. Comm. on Natural Res. v. Van Winkle, 197 F. Supp. 2d 586 (N.D. Tex. 2002).

To be sure, many of these precedents involve matters where the court held that the future action which the plaintiffs wanted included in the NEPA analysis was in fact too speculative or uncertain to require its inclusion. But the limiting factual determinations those courts made about the scope of a particular project do not undercut the underlying principle that where a future action is found to follow ineluctably (rather than to be speculative or uncertain in nature), its inexorable impacts must be included in the current NEPA analysis of the government action.

²¹ There is, indeed, language in the FEIS which seems to embody a Staff view explicitly recognizing some degree of uncertainty about Yucca Mountain for this purpose. See PFS FEIS at 5-35, 5-46, 5-54; but see “waste confidence” rule, discussed at p. 15, below.

²² Private Fuel Storage Facility Environmental Report, Ch. 1, Rev. 11, at 1.2-7.

n.1, above), which similarly ties in to the common understanding about the fuel's eventual DOE destination. And, again, this view of the bigger picture of the project is apparently one shared by the Commission, as mentioned on page 2, above. Under this view of the project, a more integrated NEPA analysis might well be demanded if the State's assertion of a new DOE position against acceptance of PFS-stored fuel at Yucca Mountain carried the day.

Of course, it might eventually turn out that Yucca Mountain will simply not be built (notwithstanding that, for purposes of **this and previous NRC** licensing proceedings, the Commission's "waste confidence" rule has required that analysis be conducted on the assumption it would be).²³ The FEIS for this project notes precisely that possibility, but because of the NWPA presents an analysis of the consequences of shipment to a permanent repository at Yucca Mountain.²⁴

In any event, the Applicant has dealt with the "no Yucca Mountain" eventuality, in terms of its contractual insistence that the utilities generating the spent fuel both retain title to it, and take it back at the end of the PFS license if Yucca Mountain or another permanent repository is not in existence.²⁵ And on that score, the FEIS analyzes the transportation impacts in a manner that takes care of that eventuality.

That FEIS transportation analysis goes this way. The FEIS considers the environmental effects of transporting the fuel across the country from the originating utility to the PFS site.²⁶

²³ See 10 C.F.R. § 51.23.

²⁴ See FEIS p. 5-54; see also *id.* at 5-46.

²⁵ See, e.g., LBP-02-08, 55 NRC 171, 177 (2002)

²⁶ We note that in doing so the FEIS abandons any notion that the transportation effects are fully delineated by the elements of Table S-4 and are thus de minimis. As the Staff now appears to recognize in the PFS FEIS, considering transportation of spent fuel from a reactor to a storage or disposal site as de minimis in terms of the construction and operation, for several decades, of a nuclear power plant, does not establish that transportation of much of the Nation's spent fuel to a storage or disposal site is de minimis in terms of the comparatively minor construction and operation impact of a storage facility. See PFS FEIS at 5-40.

Then, in order to consider the environmental effects of transporting the fuel from PFS to a permanent repository, for convenience the FEIS reasons that those effects -- involving a “going out” transportation run with spent fuel whose radioactivity will then be approximately one-half of what it was when shipped to the PFS site,²⁷ and assuming the outgoing trip is of equal length to the incoming run (even though it may in fact be shorter)²⁸ -- will certainly not be more than the cross-country effects of getting it to the PFS site in the first place. In effect, then, the FEIS for the PFS project has already factored in the equivalent of two cross-country trips, in the course of evaluating one such trip to the PFS site and one trip, of indeterminate distance, away from it.

Viewed that way, the FEIS has already evaluated (1) the environmental impacts of transporting the spent fuel from the originating reactor to the proposed PFS site, and (2) upon the failure to build a permanent repository, the impacts of transporting it back. This argument has some merit, if all that is involved are the supposedly-minimal transportation impacts mentioned in the FEIS.

But the State’s challenge is not to the necessity for a second cross-country shipment if Yucca Mountain is not built. It is, rather, to the addition -- if Yucca Mountain is built but rejects the PFS-stored fuel as is -- of (1) not only an unnecessary second such shipment but a third one as well, and of (2) a major operational step, before that third shipment, of unsealing the welded canister to “re-package” the spent fuel.

It is, of course, possible that all these concerns are de minimis, and thus to agree with the Applicant that full consideration of the contention would not lead to any materially different environmental consequences, in that whatever happens to the fuel after its arrival at PFS is not material to the outcome here. In that connection, it could also be argued that concerns over the ultimate later fate of the fuel are not environmentally consequential but simply involve a

²⁷ See PFS FEIS at 5-55.

²⁸ See id. at 5-38.

business matter to be resolved between PFS and its customers, who are free to reject the opportunity the PFS facility would provide if the terms are not satisfactory to them.

As it turned out, no evidentiary record was ever developed, in an adversary context, to test the Applicant's and Staff's assumptions about the minimal impact of cross-country transportation. We would thus be at some disadvantage in any effort to evaluate the merits of these arguments.²⁹

But assuming that any transportation-related environmental impacts could be justified as part of a coherent scheme of waste fuel disposal -- from originating reactor, cross-country to temporary storage, then to nearby permanent repository, all in the same canister -- those impacts may make far less sense if they are known to be part of what the State calls a dysfunctional system -- from originating reactor, cross-country to temporary storage, back cross-country to reactor (or elsewhere) to be "recontainerized," and back again cross-country to permanent repository not far from the initial temporary storage site. If NEPA requires anything, it is that alternatives be evaluated, and that latter one would seem to have little to commend it.

This is the nature of the argument the State seeks to raise here. If its interpretation of the DOE statement embodied in its new contention is correct, that contention challenges the common (and Commission's) understanding about a role of the facility proposed to be licensed.

In that instance, more of an inquiry might well be in order, regardless of what has been said about transportation impacts and independent of the earlier dismissal, on procedural not substantive grounds, of the State's transportation-related contentions. Our thought process in this regard takes a cue from Judge Wisdom's insightful approach in McCain v. Davis, where he

²⁹ At an earlier stage, the State's attempts to raise a series of transportation-related contentions were rebuffed by our predecessor Board for having been filed a few days later than the thirty-day deadline the Board had established for new contentions arising from newly-available information. LBP-00-28, 52 NRC 226, 236 (2000). The Commission upheld that ruling. CLI-04-04, 59 NRC 31, 46 (2004)

famously remarked, in the context of racial discrimination, that "What all Louisianans know, this Court knows." 217 F. Supp. 661, 666 (E.D. La. 1963) (three-judge court).

Along that line, we hazard the observation that "What all those dealing with spent nuclear fuel know, this Board knows." That would include that the fewer the times spent fuel canisters are transferred from one cask to another, the better; and even more to the good are the fewer the times bare fuel bundles are switched from one canister to another, and the fewer the times canisters are shipped cross-country.³⁰ If this were not the case, then presumably DOE would not have spoken officially (see p. 11, above) of the need to act "consistent[ly] with the goals concerning minimizing spent nuclear fuel handlings."

Congress would certainly seem to have already taken a position in implicit agreement with the view that shipping spent-fuel-laden canisters fewer, rather than more, times across the country, would make sense (and thus would better comport with NEPA). For the NWPA directs that, before DOE begins shipping spent fuel from reactor sites to Yucca Mountain, that agency fund and train the "first responders" in local communities along the way, preparing them to deal with possible emergencies.³¹ In that fashion, Congress has seemingly recognized that the risk of those shipments is not zero; rather, that risk -- whatever its calculated or actual level -- must

³⁰ Our observation is consistent, not only with the DOE documents before us here, but with the reported statement, which we cite only because it is a truism, of two Nuclear Energy Institute officers to the effect that the industry believes "you don't handle spent fuel more often than you need to." See Christopher Smith, *Nuclear Industry Doesn't Back Temporary Utah Storage*, Salt Lake Trib., Dec. 9, 2004, at A15.

³¹ 42 U.S.C. § 10175(c). That law does not apply to the privately-arranged shipments that would go the PFS site. But we take judicial notice that the consortium's Chief Executive Officer informed the Nuclear Waste Technical Review Board that the Applicant anticipates providing its own training to first responders along the travel routes. See United States Nuclear Waste Technical Review Board, Transportation Planning Panel Meeting (Oct. 14, 2004), Tr. at 384-85. Presumably, then, the Applicant too shares the view that, in the real world, potential transportation impacts deserve real attention.

have been viewed as sufficient to justify the expenditure of considerable training time and financial resources to ameliorate it.³²

Thus, it is perfectly understandable that State of Utah officials would be alarmed, and would embody that alarm in a new contention, upon hearing from a DOE official a statement that they thought undercut the overall scheme which they understood to accompany the PFS facility -- i.e., the plan that, assuming that both it and the Yucca Mountain facility are built, the spent fuel temporarily stored at PFS would eventually move directly to the permanent repository. Not to do so would seem not to make sense, at least from a NEPA standpoint if not from others, particularly given the proximity of Yucca Mountain to Skull Valley.

In that regard, we are unaware that the Applicant ever suggested during this entire proceeding that, if Yucca Mountain were built, the spent fuel would not go there, but instead would go back to its point of origin to be removed, not just from the shipping cask, but from the multi-purpose canister, and readied for another cross-country shipment. Nor can we recall that it ever suggested that there might someday need to be added at Skull Valley a facility to extract spent fuel from canisters and repackage it for shipment to Yucca Mountain.

Our view, then, is that before we could credit the Applicant's and Staff's arguments that the State's new contention could be dismissed because no materially different environmental result could possibly obtain in this proceeding, we would need to invest, at the least, far more analytical effort than we are now prepared to give it. We would also have to reconcile the views of individual Board members, whose differing preliminary analyses might lead them in different directions.

³² The Congressional action serves a different purpose than did the Commission's determination that, for purposes of NEPA consideration of the construction and decades-long operation of a nuclear power plant, the environmental impacts of shipping spent fuel are comparatively small and can be summarized in the minimalist "Table S-4." As the Staff's FEIS recognizes, the impacts of those shipments are entirely different in the context of a facility whose central purpose is the temporary away-from-reactor storage of spent nuclear fuel. See PFS FEIS at 5-40.

As it turns out, we need not pass final judgment on the theory behind the immateriality argument, for the Applicant's next argument carries the day -- the facts as they appear at this juncture do not provide a basis to which that theory can be tied. But for purposes of the NEPA analysis of this project, the foregoing discussion can be considered to have amended the FEIS pro tanto.³³

B. Underpinning. In contrast to the foregoing, the Applicant's argument that the State's new contention lacks a sufficient underpinning is one that prevails. In light of the positions taken, and the countering documents submitted, by the Applicant, nothing in the State's newly-proffered contention survives that would support our requiring an inquiry into whether DOE now intends to force on the Nation either of the potential outcomes referred to in the third-from-last paragraph of Section A, above. It is on that understanding -- alone -- that we dismiss the State's contention without any further Licensing Board proceedings. If the facts change, it will then be for others to examine the legitimacy of any new approach to the project.

The reasoning behind the conclusion just indicated is as follows. Although the State did indeed appear to have new information that, standing alone, might well have justified admission of a new contention, the admission of Contention Utah UU to this proceeding came down to a simple question: whether or not that factual support for the proffered contention could, in the face of contradictory information, be relied upon for even that preliminary purpose.

As an initial matter, we note that a Licensing Board cannot admit to a proceeding a contention which is formulated as a bare assertion without factual underpinning.³⁴ A close

³³ See LBP-03-30, 58 NRC 454, 474 (2003) (citing Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 680 (1975); Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), LBP-82-100, 16 NRC 1550, 1571 n.20 (1982); 10 C.F.R. §§ 51.102(c), 51.104(a)(3)).

³⁴ See 10 C.F.R. § 2.714(b)(2)(ii) and, e.g., an earlier decision herein, LBP-98-07, 47 NRC 142, 178, 180-81 (1998).

examination of the documents submitted by the State, the Applicant, and the Staff with regard to Contention Utah UU, make clear that there is, at this time, inadequate factual support for the proposition that DOE will not accept spent nuclear fuel from PFS because the spent nuclear fuel is stored in pre-sealed containers. Although the State offered **the statement of a witness who heard a DOE official make a remark to that effect, that remark itself has** no factual underpinning except its reference to the current form of the Standard Contract being executed between originating nuclear utilities and DOE for acceptance of spent nuclear fuel by DOE at Yucca Mountain (a form contract that does not indicate what different contract would eventuate, if the PFS facility were to be built and to be utilized by nuclear utilities).

In response, the Applicant submitted documents embodying the affirmations, over time, of cognizant DOE officials to the effect that DOE will accept waste in a variety of packages, including dual purpose canisters such as that contemplated for PFS,³⁵ and that the existing Standard Contract will be adapted to accommodate that packaging.³⁶ Therefore, we find that the statement allegedly made by the DOE official, on which the State bases its new contention, cannot reliably be interpreted or viewed as reflecting new DOE policy.

Stated otherwise, the State has put forward an opinion about the Yucca Mountain framework advanced by a DOE Office Director.³⁷ But the Applicant has supplied what appear to be official DOE documents -- whose legitimacy the State has not challenged³⁸ -- that undercut the oral opinion that is the foundation for the State's new contention. These

³⁵ See Applicant Response at 13.

³⁶ See id.

³⁷ If this matter had made it to trial, the DOE official's in-person testimony, rather than its recounting by another, would have been needed. For purposes of today's ruling, we are assuming he made the statement precisely as attested to by Dr. Nielson. What is in issue is the shortcomings inherent in the statement as recounted.

³⁸ The State is challenging their interpretation and import.

countering documents take on added significance because the management authority of the DOE official upon whose statement the State would rely does not appear to be in the specific area of which he spoke.

Thus, we are not faced with the oral opinion of a program administrator about the nature of his program, and inconsistent documents from elsewhere in the agency, but the converse -- documents from the affected program that take clear precedence over the opinion of an official from elsewhere. Under the Vermont Yankee standard, then, this potential controversy can be resolved at this re-opening stage in favor of what the documents appear to establish.

C. Timeliness. In light of the conclusion just reached, we need devote little attention to the question of timeliness. We need only note that, if -- as is not the case -- there was a clear foundation for the State's contention as to the nature of the Yucca Mountain conditions on receipt of spent fuel, the contention might well have met the following conditions: (1) good cause for its so-called "late-filing," in that it was submitted within 30 days of the emergence of the new announcement on which it was premised;³⁹ and (2) potential for changing the outcome of the proceeding, justifying admission even though the record had been closed.⁴⁰ Because the contention is being rejected on another ground, we need not address these and other timeliness-related factors.

As indicated above, the materials submitted by the Applicant make it appear that no one in a position of authority in DOE is advocating the result that the State thinks would be so

³⁹ That was the time period established, and relied upon, by our predecessor Board, and it still governs this proceeding. See note 29, above.

⁴⁰ We do admit to some conceptual difficulty in applying the same outcome-changing test to, on the one hand, (1) new evidence sought to be admitted on an already-tried issue, for which the test is readily understandable and easily applied by the Board which has heard the earlier evidence; and on the other hand, to (2) a new contention, for almost by definition most admissible contentions can change the outcome (for if they cannot lead to any remedy, they are on that ground inadmissible). See 10 C.F.R. § 2.714(d)(2)(ii).

untoward. On the other hand, no one has yet taken the initiative to do what those official documents say should be done, i.e., the reshaping of the Standard Contract to accommodate the PFS-type eventuality.

Perhaps, as one of the documents indicated, that cannot be done until the Yucca Mountain plans are farther along.⁴¹ Perhaps, as the same DOE official told the Nuclear Waste Technical Review Board, the ongoing litigation between the nuclear utilities and DOE has precluded the conduct of the negotiations that would have to take place for the contract amendment to be accomplished.⁴²

It may not be of concern that this has not yet been accomplished. AEC/NRC doctrine, going back to earliest times, provides an analogy -- applicants do not have to have all their other permits in hand before they can obtain an agency license.⁴³ Applicants are, instead, allowed to pursue in parallel the many permits and licenses they will eventually need to move forward with their proposal. But given the understanding, created by the Applicant's filings with the agency and advertising to its customers (see note 1, above), about the movement of fuel seamlessly from storage in Skull Valley to ultimate repose, it would seem advisable at least to attempt, before any spent fuel were to move to the proposed PFS facility, to put into place an arrangement whereby DOE has agreed to take that fuel, as then packaged, to Yucca Mountain, if it is eventually approved and built.

Putting such an arrangement in place does not seem like a role for us. As we have held, the papers before us establish that no evidentiary hearing is needed, or would be useful,

⁴¹ See Applicant Response at 13-14.

⁴² See United States Nuclear Waste Technical Review Board, Transportation Planning Panel Meeting (Oct. 13, 2004), Tr. at 84-85.

⁴³ See, e.g., Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 58 (1974); Consumers Power Co. (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 124 (1979).

on this point. Rather, it seems to be a matter the Commission would want to address in some other manner.

This could take place in several fashions. Under the special regulation applicable to this facility, if the adjudicatory process ends in the Applicant's favor, the Staff is not empowered -- as it is in other instances -- to issue the requested license. Rather, the Commission has to consider whether to authorize the Staff to do so. 10 C.F.R. § 2.764(c).

That regulation is silent as to what the Commission is supposed to consider or weigh at that point. The matter embodied in the State's latest contention might be suitable for the Commission to consider if that juncture is reached, perhaps making the receipt of spent fuel dependent upon the utilities and DOE having negotiated the anticipated changes in the Standard Contract.

The Commission may have other avenues for accomplishing the same result -- e.g., a rulemaking proceeding⁴⁴ looking toward a directive to any nuclear utilities contemplating off-site temporary storage; or a management overture to DOE as part of the regular series of quarterly meetings referred to in the materials before us;⁴⁵ or some other approach. The point is this -- the State's latest contention is not suitable for resolution in the adjudicatory process, but it is too important to be ignored, unless the "creation of a dysfunctional spent fuel management system" is viewed as not of NRC concern but is something to be left entirely to (1) the discretion of DOE or (2) such arrangements as the consortium and its customers are able, and choose, to make.

Given the seemingly universal recognition that extra or unnecessary handling and shipping of spent fuel should be avoided if possible, we think NEPA requires more, and that our

⁴⁴ The State's moving papers sought rulemaking as an alternative (see p. 4, above).

⁴⁵ See Staff Response at 11 n.23.

role in NEPA's implementation requires us to say so. We rest with having called the matter to the Commission's attention.

Thus, we hold that Contention Utah UU is inadmissible in that it provides inadequate factual support, *at this juncture and in light of the opposing filings*, for the proposition that DOE will not accept sealed canisters of spent nuclear fuel from the proposed PFS facility. Accordingly, the State's request that Contention Utah UU be accepted for consideration in this proceeding is DENIED, and that Contention is DISMISSED. Our discussion herein of that Contention's NEPA aspects will be deemed to have AMENDED the PFS FEIS pro tanto.

Under the agency's Rules of Practice, this ruling is interlocutory and thus not appealable upon issuance. Any appeal is to be taken after we render our final ruling in the proceeding.⁴⁶

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael C. Farrar
ADMINISTRATIVE JUDGE

/RA/

Peter S. Lam
ADMINISTRATIVE JUDGE

/RA/

Rockville, Maryland
February 24, 2005

Paul B. Abramson
ADMINISTRATIVE JUDGE

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.

⁴⁶ In that regard, only one matter remains before us for determination: a decision on the merits on the accidental aircraft crash "consequences" matter, which was the subject of a 16-day evidentiary hearing and on which we received the final brief on December 22, 2004. Issuance of that decision is imminent.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
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 MEMORANDUM AND ORDER (RULING ON STATE OF UTAH'S RECENTLY-FILED CONTENTION UU) (LBP-05-05) 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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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 24th day of February 2005