

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel)	
Storage Installation))	December 22, 1998

STATE OF UTAH'S RESPONSE TO NRC STAFF'S
"LEAD AGENCY" FILING

In its December 14, 1998 Order (Schedule for NRC Staff "Lead Agency" Filing), the Board requested the NRC Staff to prepare a submission "concerning the 'lead agency' relative to any environmental documents regarding the use of public land administered by the Bureau of Land Management for the proposed Low Corridor rail spur." Order at 1. By Order dated December 17, 1998, the Board offered other parties the opportunity to comment on the Staff's letter relevant to Southern Utah Wilderness Alliance's (SUWA) pending hearing request and contentions. The State believes the NRC Staff's response does not answer the question whether SUWA, other members of the public, or State and local government agencies, will have a forum, other than through the NRC process, where SUWA or others may litigate and protect their interests relating to the environmental impacts from any proposed rail spur across public lands administered by BLM.

Responding to the Board's Order, Mr. Turk, Counsel for NRC Staff, in a letter dated December 16, 1998, advised the Board that NRC and BLM have entered into an Agreement whereby NRC will serve as lead agency and BLM as Cooperating Agency in the preparation of an EIS for the PFS facility. Furthermore, Mr. Turk, citing the NRC-BLM Agreement, stated that BLM will provide to NRC information on conditions, resources and uses of public lands; impacts on public lands; mitigation measures; and potential alternative routes across public lands. NRC will analyze BLM's recommended alternatives and describe BLM's mitigating measures in published documents. Mr. Turk added that the Agreement between BLM and NRC "contemplates that BLM will not prepare its own EIS...."

An agreement to create lead and cooperating agency arrangements under any NEPA review process is designed to promote efficiency in the preparation of the environmental documentation, pursuant to Council on Environmental Quality (CEQ) regulations.¹ However, each agency—lead and cooperating—retains all responsibility for decisions required of it by law, and for all processes related to that decision. A lead agency's processes under NEPA cannot substitute for those of a cooperating agency, if such procedures are not coextensive.

¹ See e.g. 40 CFR § 1501.1(b) (purpose of NEPA and Agency planning is to emphasize "cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.")

In this case, status as a cooperating agency neither relieves BLM of its legal responsibilities, nor confers them upon the NRC. Furthermore, NRC has no authority to subvert BLM's procedures which invite (and require) participation by the state, local governments, and the general public in a very broad, free-ranging discussion of the issues.² If NRC restricts the NEPA process, BLM may not be able to satisfy its established and codified procedures through its status as a cooperating agency with NRC. To the extent that Mr. Turk's December 16, 1998 letter on these points is unclear, or purports to "answer" the question of public participation in an NRC-driven process, it must be clarified and corrected.

Also, it should be noted that NRC considers extending "the scoping period in response to revised license-related submittals by the applicant and conducting separate scoping processes for BIA and BLM" to be issues outside the scope of NRC's EIS. NRC Scoping Report, Private Fuel Storage Facility (September 1998) at 14. Thus, it appears that public participation procedures through NRC's NEPA process will not be equivalent to the established and required BLM procedures involving major federal

² For example, BLM regulations, 43 CFR Part 2800 (Rights-of-way, Principles and Procedures) require BLM to coordinate and consult, to the fullest extent possible, with State and local governments on all actions taken pursuant to Part 2800 (Id. §§ 2800.0-2(d) and 2802.4(d)(3)); inform appropriate Federal, State and local government agencies that preapplication right-of-way discussions have begun (Id. § 2802.1 (e)); and if sufficient public interest exists, hold public meetings on an application for a right-of-way grant, giving notice of the meetings in the Federal Register, local newspaper, or both (Id. at § 2802.4(e)).

action for the grant of a right-of-way across public lands.

Finally, procedural uncertainties as to what forums may now be available to SUWA or others to raise and contest public lands issues weigh in favor of granting SUWA's petition in this case. It is the State's understanding that BLM has yet to receive a complete right-of-way application from PFS.³ Procedurally, it may be premature to determine whether SUWA or others will have a forum before the BLM to raise issues. As it currently stands, however, SUWA may be confined to the NRC NEPA process if it wishes to contest and preserve BLM-related issues that are encompassed within the scope of NRC's proposed EIS for the PFS facility. One of the factors the Board considers in determining whether to permit SUWA to intervene in this case is the availability of other means whereby SUWA's interests will be protected. 10 CFR § 2.714(a)(1)(ii). Given the procedural uncertainties described above, the Board should weigh this factor in favor of granting SUWA's petition for a hearing and admission of its contentions. Furthermore, if NRC procedures are to substitute for BLM's more extensive and open public participation procedures, the Board must allow SUWA to intervene, as well as State and local government agencies and other interested members of the public.

³ Personal communication, December 18, 1998, with Greg Thayn, Salt Lake BLM Office.

DATED this 22nd day of December, 1998.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Denise Chancellor", written over a horizontal line.

Denise Chancellor, Assistant Attorney General
Fred G Nelson, Assistant Attorney General
Diane Curran, Special Assistant Attorney General
Connie Nakahara, Special Assistant Attorney General
Attorneys for State of Utah
Utah Attorney General's Office
160 East 300 South, 5th Floor, P.O. Box 140873
Salt Lake City, UT 84114-0873
Telephone: (801) 366-0286, Fax: (801) 366-0292

CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S RESPONSE TO NRC STAFF'S "LEAD AGENCY" FILING was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 22nd day of December, 1998:

Rulemaking & Adjudication Staff
Secretary of the Commission
U. S. Nuclear Regulatory Commission
Washington D.C. 20555
E-mail: hearingdocket@nrc.gov
(original and two copies)

G. Paul Bollwerk, III, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: gpb@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: jrk2@nrc.gov

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: psl@nrc.gov

Sherwin E. Turk, Esq.
Catherine L. Marco, Esq.
Office of the General Counsel
Mail Stop - 0-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: set@nrc.gov
E-Mail: clm@nrc.gov
E-Mail: pfscase@nrc.gov

Jay E. Silberg, Esq.
Ernest L. Blake, Jr.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N. W.
Washington, DC 20037-8007
E-mail: Jay_Silberg@shawpittman.com
E-mail: ernest_blake@shawpittman.com
E-mail: paul_gaukler@shawpittman.com

Clayton J. Parr, Esq.
Parr, Waddoups, Brown, Gee & Loveless
185 South State Street, Suite 1300
P. O. Box 11019
Salt Lake City, Utah 84147-0019
E-Mail: karenj@pwlaw.com

John Paul Kennedy, Sr., Esq.

1385 Yale Avenue
Salt Lake City, Utah 84105
E-Mail: john@kennedys.org

Richard E. Condit, Esq.
Land and Water Fund of the Rockies
2260 Baseline Road, Suite 200
Boulder, Colorado 80302
E-Mail: rcondit@lawfund.org

Joro Walker, Esq.
Land and Water Fund of the Rockies
165 South Main, Suite 1
Salt Lake City, Utah 84111
E-Mail: joro61@inconnect.com

Danny Quintana, Esq.
Danny Quintana & Associates, P.C.
50 West Broadway, Fourth Floor
Salt Lake City, Utah 84101
E-Mail: quintana@xmission.com

James M. Cutchin
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-Mail: jmc3@nrc.gov
(*electronic copy only*)

Office of the Commission Appellate
Adjudication
Mail Stop: 16-G-15 OWFN
U. S. Nuclear Regulatory Commission
Washington, DC 20555
(*United States mail only*)



Denise Chancellor
Assistant Attorney General
State of Utah