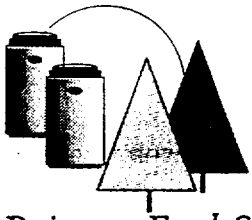
72-22



Private Fuel Storage, L.L.C.

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John L. Donnell, P.E., Project Director

U.S. Nuclear Regulatory Commission
ATTN: Document Control Desk
Washington, D.C. 20555-0001

June 28, 2001

REVIEW OF MEMORANDUM OF AGREEMENT
DOCKET NO. 72-22 / TAC NO. L22462
PRIVATE FUEL STORAGE FACILITY
PRIVATE FUEL STORAGE L.L.C.

Reference: U.S. NRC Letter, Delligatti to Parkyn, "Review of Memorandum of Agreement for the Proposed Private Fuel Storage Facility", dated June 19, 2001

In the referenced letter, the Nuclear Regulatory Commission (NRC) provided Private Fuel Storage, L.L.C. (PFS) with a draft Memorandum of Agreement (MOA) that outlines measures PFS will take to avoid, minimize, or mitigate the potential effects of the Private Fuel Storage Facility on properties that are deemed eligible for inclusion in the National Register of Historic Places. PFS has submitted comments on earlier iterations of the MOA and acknowledges that certain of its comments have been incorporated into the revised text. PFS has additional comments on the revised version of the MOA. Those comments are included in the attachment and are not an effort to resubmit comments already reviewed. However, PFS notes that there have been changes to the MOA that warrant consideration of the following three overarching issues.

First, the MOA now identifies BLM as the lead agency for purposes of its implementation. PFS requests that BLM identify the process whereby the MOA will be finalized and executed by all necessary parties in a timely fashion. Specifically, PFS would like to understand the time period for signatory parties to execute the MOA or in the alternative, the procedure for finalizing the MOA absent those signatures.

Second, the MOA retains language that does not reflect the ongoing efforts to comply with the cooperating federal agencies' requests. Specifically, Stipulation I. still requires that a Treatment Plan be developed. In fact, the Treatment Plan has already been drafted and was submitted to the cooperating federal agencies in March of 2001. Accordingly, references to Treatment Plan development and revisions are no longer appropriate. PFS has included revisions to Stipulation

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I. in the attachment that accurately reflect the current status of the Treatment Plan implementation.

Third, PFS notes that the role of the concurring parties in the MOA is, in some instances, inconsistent with the regulations implementing Section 106 of NHPA. Those regulations establish that only signatory parties can terminate, execute or amend an MOA. 36 C.F.R. § 800.6(c)(1). Accordingly, PFS maintains that the MOA ought to incorporate a consistent role for the concurring parties and has attached specific comments that include, among other things, references to the overbroad provisions in the MOA.

Thank you for the opportunity to comment on the development of the MOA. PFS would like to respond to questions or comments on the MOA and would welcome an opportunity to discuss the suggested changes and clarifications in a conference call.

If you have any questions regarding this matter, please contact me at 303-741-7009.

Sincerely,

John L. Donnell
Project Director
Private Fuel Storage L.L.C.

Attachment

Copy to (with enclosure):
Mark Delligatti
Scott Flanders
John Parkyn
Jay Silberg
Sherwin Turk
Greg Zimmerman
Scott Northard
Denise Chancellor
Richard E. Condit
John Paul Kennedy
Joro Walker

COMMENTS ON REVISED MEMORANDUM OF AGREEMENT FOR THE PROPOSED PRIVATE FUEL STORAGE FACILITY (June 19, 2001)

**WHEREAS Clause (Fourth) and Enclosure 1: "the cooperating Federal agencies have determined that the Project will have adverse effects on historic properties within the APE . . .a list of these properties and their eligibility and effect determinations are presented in Enclosure 1. . . ."

Enclosure 1 currently consists of the December 12, 2000 mitigation agreement letter and a list of sites. It does not identify the eligibility and effect determinations; as such, the enclosure ought to be substituted with the appropriate supporting documentation. Additionally, the revised enclosure and existing Enclosure 1 ought to be amended to specify that 42TO1187 is not eligible for inclusion on the National Register of Historic Places; that site has already been addressed and determined to be ineligible in detailed analysis prepared by P-III Associates, Inc., (dated January 24, 2001). Existing Enclosure 1 ought to also specify that 42TO709 is not eligible for inclusion on the National Register of Historic Places. That site is referenced as consisting of a rock cairn and alignment that require further evaluation. Presumably, 42TO709 ought to have really referenced 1187 and as noted above, that site is not eligible for listing.

**WHEREAS Clause (second to last) and Signatory/Concurring Party Page: "the cooperating Federal agencies have consulted with the Confederated Tribes of the Goshute Reservation . . . the Paiute Indian Tribe of Utah. . . ." (emphasis added).

The Paiute have been removed as a signatory or concurring party. Should the reference be stricken or the tribe added as a concurring party?

** Stipulation I. Revise to read as follows:

I. Implementation of Treatment Plan (for Historic Properties)

PFS shall implement a Treatment Plan for the treatment of the effects of the undertaking on the historic properties identified in Enclosure 1 of this Agreement to the BLM.

a. The Treatment Plan, entitled Treatment Plan for Mitigation Measures for Eight Historic Properties and a Discovery Plan for the Private Fuel Storage Project, Skull Valley, Utah, dated March, 2001, identifies (1) all *National Register* eligible properties in the APE, (2) the nature of the effects to which each property will be subjected, and (3) the mitigation measures to avoid, minimize, or mitigate the effects of the Project agreed to by the parties. The Treatment Plan is consistent with the Secretary of the Interior's "Standards and Guidelines for Archaeological Documentation" (42 Fed. Reg. 44734-37), and takes into account the Council's publication, "The Council's Recommended Approach for Consultation on Recovery of Significant Information from Archaeological Sites (*Federal Register* Vol. 64, No. 95, May 18, 1999)." The Treatment Plan incorporates the required mitigation measures from the letter dated December 12, 2000, from NRC to PFS (see Enclosure 1 of this Agreement).

b. Treatment Plan Report Preparation and Review

Within 180 calendar days of completion of field work pursuant to the Treatment Plan, PFS will submit a report to BLM incorporating all appropriate data analysis and interpretations. BLM will submit the report to signatory and concurring parties who will be provided 30 calendar days to review and comment on the report. Failure to comment 30 calendar days after receipt of the report will be presumed to represent concurrence with the report. Upon BLM concurrence that that the treatment has been satisfactory completed, BLM will notify PFS and the other cooperating Federal agencies. BLM will then allow construction to proceed in and around the resource area.

**Stipulations I.e. and II.b. Stipulations I.e. (in current draft) and II.b. both address the same issue. Stipulation II.b. is redundant. As drafted, Stipulation I.e. provides that PFS must submit a report to BLM after competing fieldwork and that BLM and other parties have 30 calendar days to comment on that report. Accordingly, Stipulation II.b. could be stricken. The reference to BLM approval of construction has been incorporated into the redline of Stipulation I.e. Alternatively, the agencies ought to incorporate the same time periods for BLM concurrence into Stipulation II.b. as are in Stipulation I.e. Specifically, Stipulation I.b. would state that *"within 30 calendar days after receipt of the Treatment Plan Report, BLM shall review the document. Failure to comment within the 30 calendar days will be presumed to represent concurrence with the report and authorization to proceed with construction in and around the resource area."*

**Stipulation III.a. Amend the first line as follows: A Discovery Plan for previously unencountered sites *has been incorporated into* the Treatment Plan. Additionally, all references to the cessation of construction should also specify that it only applies within 200 feet of the resource. "For example, if PFS identifies any previously unrecorded artifacts or other cultural resources during construction activities on land under the jurisdiction of BLM, . . PFS shall immediately cease construction *within 200 feet of the resource* . . . If PFS identifies any previously unrecorded or other cultural resources during construction activities on the Reservation . . . PFS shall immediately cease construction *within 200 feet of the resource*. . . .

**Stipulation III.b. Add to the sentence the following: *consistent with recovery procedures identified in the Discovery Plan.*

**Stipulation III.c. Add the following to the beginning of the sentence: *As established in the Discovery Plan,* PFS will provide. . . .

Stipulation VI.b. The Council comment period is not well defined. It would appear that the Council has 45 calendar days to comment (in accordance with 800.7). It is unclear why subsection 2 is required and it should be stricken. Subsection 1 could be amended to state: Provide BLM with a ***recommendation or comments in accordance with 36 CFR Part 800.7* (followed by the remainder of that subsection).

**Stipulation VI.c. Consistent with the remainder of the revised Agreement, it would appear that the final sentence ought to state: *BLM's* (not the cooperating Federal Agencies') decision will be final.

**Stipulation VI.e. For reasons outlined in the transmittal letter, this provision ought to be stricken. A concurring party does not have the same role and opportunity to dispute the implementation of the MOA as do the signatory parties. To provide such a role, undermines the purpose of distinguishing signatory parties who can amend an agreement from concurring parties who were afforded an opportunity to consult throughout the Section 106 process up to the development of the agreement. Alternatively, should the parties determine to include such a provision, BLM should be required to resolve the objection or make a determination regarding the objection within 15 calendar days.

**Stipulation VIII. The second line ought to specify that signatory parties will expeditiously consult to consider the proposed amendment since only signatory parties can amend the terms of the agreement.