

January 4, 2005 (2:14pm)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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 17, 2004

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

The Board afforded to the State the opportunity to file a reply and specifically directed the State to respond to "the Applicant's documentary evidence that the proposed Yucca Mountain facility will accept spent fuel from the proposed PFS facility" and "Applicant's arguments that the existing Final Environmental Impact Statement is adequate." Order Regarding "Contention Utah UU" (Dec. 7, 2004) at 2 (*emphasis omitted*). In addition, the Order advised the Staff "to address whether any DOE documents were previously introduced into our proceeding, or otherwise available to the Applicant or the Staff, to indicate the PFS-stored fuel would or would not be acceptable at Yucca Mountain." *Id.* at n. 1. The State hereby replies to Applicant's response dated December 6, 2004 and Staff's response dated December 10, 2004 to Utah's Request for Admission of Late-Filed Contention Utah UU.

A. At Issue in Contention Utah UU is not DOE's Obligation to Accept Commercial Spent Nuclear Fuel

PFS responds to Utah UU that Yucca Mountain will be designed to accept canistered fuel and that DOE is obligated to accept all commercial spent nuclear fuel. PFS Response at III.A.1 and 2 (pp. 7-14). PFS has not been responsive to the issues raised in Utah UU. The question that Utah UU raises is the waste acceptance form of the fuel that DOE is obligated under the Standard Contract¹ to collect from utilities and whether DOE will pick up that fuel from the PFS site. Nielson Dec. ¶ 4. The State readily admits that pursuant to the Nuclear Waste Policy Act DOE has the responsibility to accept up to 63,000 MTU of commercial spent nuclear fuel for disposal at a permanent repository. 42 USC § 10134(b); Yucca Mountain FEIS² at 2-2 and 2-4. The Standard Contract – not the design of the proposed Yucca Mountain facility – addresses whether DOE has an obligation to accept canistered fuel. *See infra*.

PFS relies on various correspondence as support for its claim that DOE has acknowledged its obligation under the Standard Contract to accept all commercial spent nuclear fuel. *See* PFS Exhibits 3 through 8. PFS argues that this correspondence constitutes formal official statements that carry more probative weight than the evidence offered by the State. PFS Response at 12-13. On closer inspection, however, all the PFS-submitted

¹The Standard Contract is the contract DOE entered into with each utility pursuant to the Nuclear Waste Policy Act. The contract terms and conditions are codified at 10 CFR § 961.11.

²*Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-level Radioactive Waste at Yucca Mountain, Nye County, Nevada*, DOE/OCRWM, Feb. 2002.

correspondence shows is that DOE has been non-committal in responding to requests by utilities, the NRC, and congressional representatives that it will accept fuel in multiple purpose canisters (MPCs) under the Standard Contract.

In a letter from Ivan Itkin (DOE) to the Governor of Maine, dated May 3, 2000, the Department of Energy was unwilling to give "binding assurances . . . that the Department will accept spent fuel for transport and disposal that has been stored in accordance with NRC approved procedures." PFS Exh. 3. Instead, the letter deferred to the Standard Contract between DOE and Maine Yankee³ and it gave no interpretation whether, under the Standard Contract, DOE would accept fuel in welded multiple purpose canisters (MPCs).

The next letter PFS produces is from William Kane, Director, Office of Nuclear Materials Safety and Safeguards to attorneys for the State of Maine, dated November 9, 2000. PFS Exh. 4. That letter, in relevant part, merely quotes a portion of Dr. Itkin's letter, PFS Exh. 3. NRC's recitation of DOE's letter offers no independent evidence of DOE's intended actions. Furthermore, NRC's letter recognizes part of the State's concern: "the

³PFS's mistakenly claims the Commission expressly relied on DOE's letter to the State of Maine in adopting the rule for approval of the NAG-UMS dual purpose cask design. PFS Response at 12. In response to comments requesting NRC to acquire, as a prerequisite to approving NAG-UMS casks, "binding assurances from the DOE that the DOE will accept spent fuel for transport and disposal that has been stored in accordance with NRC-approved procedures," the Commission responded:

The NRC disagrees that 10 CFR 72.236 requires the NRC to obtain binding assurances from the DOE regarding the acceptance of spent fuel for disposal prior to approving a storage cask design.

65 Fed. Reg. 62,595-96 (2000). While the Commission refers to Dr. Itkin's letter, it relied on a promulgated regulation, rather than NRC's interpretation of a letter from DOE to the State of Maine, in certifying the NAG-UMS cask design.

canisters may have to be unsealed and inspected before any fuel can move.”⁴ PFS Exh. 4.

The next set of letters PFS relies upon are some dated correspondence from Lake H. Barrett (DOE) to Sacramento Municipal Utility District (SMUD), Rancho Seco Plant (September 2, 1993) (PFS Exh. 5) and to Representative Dicks (October 4, 1993) (PFS Exh. 6). Again, DOE is non-committal. It also defers initiating any action relating to the Standard Contract until NRC has approved SMUD’s transportation-storage system. The letter goes on to state: “it is premature . . . for the Department to commit to accept such canistered fuel, either as a matter of policy or under the terms of the Standard Contract.” PFS Exh. 5.⁵ Similar to the relationship between PFS Exhibits 2 and 3, DOE’s letter to Rep. Dicks (PFS Exh. 6) merely recites part of the language in the letter to SMUD, PFS Exh. 5. Neither letter from Lake H. Barrett provides probative evidence that DOE will accept fuel in welded canisters from utilities under the Standard Contract.

PFS Exhibit 7 is another dated piece of correspondence from Lake H. Barrett, DOE, to Yankee Atomic (August 20, 1996). The importance of this piece of correspondence is two pivotal statements: (1) the Standard Contract “signed by the Department and each utility is the key instrument guiding the specific terms and conditions for spent nuclear fuel

⁴The letter goes on to say and that “opening of the canister will be conducted in accordance with established procedures that reasonably assure the safety of all persons involved in the operation.” *Id.* Notably, however, no regulation or guidance document is cited for such “established procedures.”

⁵The Staff endorses PFS’s view that DOE must accept all spent nuclear fuel owned by domestic nuclear utilities. Staff Response at n. 26. Further, Staff Exhibit 2, letter from Lake H. Barrett, DOE, to E. William Brach, SFPO (April 9, 2001), refers back to the letter between DOE and SMUD, PFS Exhibit 5, and shows no commitment by DOE to its acceptance of canistered fuel.

acceptance,” and (2) at the time the Standard Contract was developed through rulemaking, “the issue of accepting large multiple spent fuel element containers was not contemplated by the Department or utilities.” PFS Exh. 7. These statements make it clear that multiple purpose canisters are not covered by the Standard Contract and the Standard Contract governs fuel acceptance. Neither PFS nor the Staff have offered any evidence to the contrary.

The final piece of correspondence PFS offers is an April 6, 2001 non-committal letter from David Zabransky (DOE) to SMUD. DOE states “we are unable at this time to complete final design and acceptance criteria for the disposability aspects of such a [multi-purpose storage/transport/disposal] system for commercial spent nuclear fuel.” PFS Exh.

8. Yet again, DOE defers taking any action under the Standard Contract.

B. The Standard Contract Does Not Cover MPCs, and if DOE Were to Accept Fuel Away from a Reactor Site, the Utility must First Obtain DOE’s Approval.

As PFS Exhibit 7 points out, the Standard Contract is the key document relating to waste acceptance and that document does not cover multiple purpose canisters. On November 12, 2002, DOE reiterated this position to Maine Yankee: “multi assembly canisters are not covered by the contract that Maine Yankee (MY) has with the Department,” and further noted that MPCs “are not considered an acceptable waste form, absent a modification to your contract.” See Exhibit 1 (attached).⁶

PFS’s recitation to various provisions in the Standard Contract is non-responsive to

⁶Letter from David Zabransky, Contracting Officer, Office of Civilian Radioactive Waste Management, DOE, to Thomas Williamson, Maine Yankee (Nov. 12, 2002).

the fact that the Standard Contract does not cover multiple purpose canisters, including the welded canisters that will be emplaced at the PFS site. PFS Response at 10-11. Accordingly, PFS's reference to non-standard fuel, as a potential designation for assemblies packaged in sealed MPCs, does not address how that fuel should be packaged for shipment. *Id.* at 11.

Furthermore, the financial costs of packaging the fuel assemblies under the Standard Contract is squarely the responsibility of the utilities. PFS refers to the first two "whereas" clauses relating to DOE's obligation under the Standard Contract but ignores the utilities' financial responsibility under the third whereas:

[A]ll costs associated with the preparation, transportation, and the disposal of spent nuclear fuel . . . from civilian nuclear power reactors shall be borne by the owners and generators of such fuel and waste

10 CFR § 961.11. Thus, the utilities, and not DOE, must bear the financial responsibility for fuel packaging under the Standard Contract.

Contrary to PFS's assertion, the utilities are not "free to designate facilities other than the reactor (such as the PFS facility) as the location from which DOE shall arrange transportation of their spent fuel." PFS Response at 11. Surely PFS is not suggesting that the utilities could designate any site in the 50 states as the collection point for transportation. Such action would be unreasonable and would not have been contemplated by the parties at the time they entered into the contract.⁷ The scope of the Standard

⁷*See* Restatement (Second) of Contracts § 203, Standards of Preference In Interpretation ("(1) an interpretation which give a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."); *id.* § 202(2) ("A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together."); and *id.* *Comment b* ("In interpreting the words and conduct of the parties to a contract, a court seeks to put itself in the position

Contract “applies to the delivery by Purchaser to DOE of SNF” Art. II. The definition of “delivery” is “the transfer of custody, f.o.b. carrier, of spent nuclear fuel . . . from Purchaser to DOE at Purchaser’s civilian nuclear power reactor or such other domestic site as may be designated by the Purchaser and approved by DOE.” Art. I (*emphasis added*). The reasonable interpretation, giving meaning to all terms in the contract, is that DOE must first approve any away-from-reactor site as a location from which it will collect fuel for shipment to a DOE facility for permanent disposal. *See* n. 7 *supra*.

C. To the State’s Knowledge, Neither the Staff Nor PFS Has Introduced into this Proceeding, or Otherwise Relied Upon, DOE Documents to Indicate Whether the PFS-Stored Fuel Would Be Acceptable at Yucca Mountain.

The Staff’s unsuccessful effort in locating specific DOE documents in response to the Board’s Order asking “whether any DOE documents were previously introduced into our proceeding, or otherwise available to the Applicant or the Staff, to indicate the PFS-stored fuel would or would not be acceptable at Yucca Mountain,”⁸ indicates that no such documents were relied upon. Staff Response at n. 27. The Yucca Mountain DEIS does not address waste packaging at reactor sites and reference thereto is to no avail in answering the Board’s question. *See id.* For the most part the FEIS for the PFS facility relies on PFS’s “expectation” that “its dual-purpose canister system would be compatible with DOE’s plans

they occupied at the time the contract was made.”). *See also* U.S. v. West, 2004 WL 2827967 at *9 (D.C. Cir.), ___ F.3d ___ (2004), and McConocha v. Blue Cross and Blue Shield Mutual of Ohio, 930 F.Supp. 1182, 1186 (N.D. Ohio 1996) (ambiguity in a contract “may be resolved through extrinsic evidence only if the extrinsic evidence relates to the formation of the contract.”).

⁸Order (Dec. 7, 2004) at n. 1

for placement in a permanent repository.” PFS FEIS at 2-26 (*emphasis added*); *see also* Staff Response at 3, n. 6,⁹ and 17-18.

While the Staff in its response cites to two DOE documents relating to Contention Utah D (*see nts. 29 and 30*), the Staff opposed Utah’s contention and makes no claim that it relied on either of those document in evaluating whether PFS-stored fuel would or would not be acceptable at Yucca Mountain. This situation is illustrative of the lack of coordination between the NRC and the DOE and indicative of the move towards creating a dysfunction national waste management system. Utah UU at 2.

D. Had Utah UU Been Considered, a Materially Different Result Would Be Likely Because NRC Substantive Requirements Have Not Been Met.

PFS and the Staff allege that Utah UU does not affect the FEIS, and the State’s NEPA challenge is merely quibbling over details. However, as the Commission stated, “the use of misleading economic assumptions in an EIS could thwart NEPA’s twin goals to inform the agency decisionmaker and the public-at-large.” CLI-04-22, slip op. at 23. As proponents of the facility, PFS and the Staff see the environmental impacts as slight. Residents of the State in which the facility will be located do not take this myopic view. There is a strong potential that welded canisters will have no utility-owned facility available to repack the fuel before transportation to the geologic repository. Without financial bonding, utility owners can give no more than a paper assurance that they will be capable in the next half century of paying for fuel removal and repackaging it.

⁹In n. 6, the Staff relies on either the Yucca Mountain DEIS or the PFS FEIS and does not cite to any other DOE documents.

In its licensee application, the up-front funding PFS has committed to is only \$17,000 per cask for cask decommissioning and, over time, up to \$1.6 million for site decommissioning. L.A. at 1-8 (Rev. 13). To any reasonable person, these paltry financial reserves, relative to PFS's overall operations, are inadequate to offer any assurance from this asset-starved limited liability company of its financial responsibility for cask removal. Notwithstanding PFS's arguments that the fuel owner will retain responsibility for cask removal and fuel repackaging, without any financial bonding there is no assurance to the public that 40 or 50 years hence the fuel owner will have the physical facilities or financial wherewithal to ship and repackage any fuel it stored at the PFS site:

It is obvious that the Staff in the EIS (either draft or final) did not seek out any information from DOE as to DOE's final waste acceptance package for fuel canisters. See Part C *supra*. As a consequence, the EIS did not address the potential that DOE will not collect fuel from the PFS site and that fuel stored at the PFS site in welded canisters will need to be shipped back and forth across the country for repackaging and final disposal. The Staff seeks refuge in PFS's statement that PFS expects that its cask system will be compatible with DOE's repository plans. Staff Response at 18. The Staff's attempt to split hairs by ascribing a distinction to the FEIS not "assuming" fuel would be shipped from the PFS site to the repository, and PFS's "expectation" that its canister-based system would be compatible with DOE's repository plans, is a distinction without a difference. *Id.* If the FEIS is going to rely on PFS's "expectation," then it follows that the assumption in the FEIS is that the PFS cask system is compatible with DOE's plans. The FEIS's reliance on PFS's expectation is relative to DOE's plans for fuel placement in a permanent repository.

FEIS at 2-26. The benefits from licensing the PFS facility, as contemplated by the Commission (and the FEIS), is that fuel will be “completely seal[ed] . . . inside a canister that is never opened from the time it leaves the power plant until it is deposited into a permanent repository.” CLI-00-22, slip op. at 6; *see also* FEIS at 5-55 (reduced radiation exposure from using the same canister for shipments to PFS and the repository). The financial, societal, and safety costs associated with fuel re-shipments and repackaging now significantly outweigh these benefits.

Neither PFS nor the Staff squarely addresses the fundamental premise of the cost-benefit analysis in FEIS Chapter 8 – that fuel will be shipped to the PFS site, then shipped by DOE for final disposal in a repository. PFS’s answer is that the environmental costs are slight and there is a wide array of economic and societal benefits.¹⁰ PFS Response at 15-16. However, this does not address the societal costs of creating a dysfunctional national waste system. *See* Utah UU at 4-7.

The goals of the Applicant, PFS, are not supreme in a NEPA analysis.¹¹ The

¹⁰PFS in n. 25 sets forth four overall benefits listed in the FEIS at 9-16. Those benefits are now called into question. First, the alternative to at-reactor storage is minimized if fuel is to be shipped back to the reactor for repackaging because of the added shipping costs and need to keep operational on-site fuel repackaging capabilities. Second, the radiological impacts and risks from SNF transportation are trebled by the need to ship fuel back and forth across the country for repackaging and final disposal. Third, to date, all Band members have not partaken in economic benefits from the Band’s association with PFS. *See* *eg.*, *U.S.A. v. Bear*, Docket No. 03-CR-999, U.S. District Court for the District of Utah. Fourth, the cooperating agencies, including BLM, did not participate in Chapter 8 of the FEIS, Benefits and Costs of the Proposed Action. FEIS at 8-1, n. 1.

¹¹The goals of an applicant are subservient to congressional intent and views as expressed by statute. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir.), *cert. denied* 502 U.S. 994 (1991).

congressional intent and expectation of an integrated national waste management system is paramount. Those goals are not addressed in the FEIS, thereby placing NRC's NEPA analysis on an unsound footing.

In sum, an objective review of the record could reasonably find that the substantive financial assurance and NEPA requirements have not been met and, thus, a materially different result would be likely from consideration of Contention Utah UU.

E. The State Meets the Contention and Reopening Standards

Unlike the Staff, PFS does not challenge the timeliness of the State's contention. PFS Response at n. 9. The footing for Staff claiming Utah is too late in filing its contention is that the Standard Contract was developed over 20 years ago and the State could have raised the issues in Utah UU long ago.¹² Staff Response at 14, 20. Moreover, continues the Staff, the State's reliance on Mr. Lanthrum's statements is insufficient to show a materially different result¹³ and, furthermore, the State raised a similar issue when it filed Contention Utah D. Staff Response at 9-11, 14-17. None of these claims defeats admission of Utah UU.

To argue that the State could have raised Utah UU earlier simply because the Standard Contract came into existence in 1983 is ludicrous. It was DOE's statements to the Governor of Utah and the Executive Director of the Department of Environmental Quality

¹²The Staff also implies that the State's contention is premature because DOE has not developed final waste acceptance plans. Staff Response at 11.

¹³See also PFS Response at 5-7. Section D *supra* addresses a "materially different result."

that alerted the State to DOE's position under the Standard Contract. As shown above, the Standard Contract is the key document guiding the specific terms and conditions for spent nuclear fuel acceptance, and at the time the contract was entered into, MPCs were not covered by the contract. Had the State attempted to raise the issues in Utah UU earlier, the Staff would have derided the State's effort as speculative. Furthermore, contrary to the Staff's assertion, the issues raised in Contention Utah D are distinctly different from those in Utah UU. Utah D, Facilitation of Decommissioning, makes no claim under financial assurance or NEPA as to the deficiency of PFS's application, as does Utah UU. Rather, the focus of Utah D was whether the fuel stored at the PFS site could be repackaged at the PFS site in order to comply with the decommissioning planning requirement in 10 CFR § 72.130 and Reg. Guide 3.48. Nowhere in Utah UU does Utah argue that PFS must have a hot cell, as it did in Utah D at 25. In fact, Utah acknowledges the Commission's statement that no hot cell is required at the PFS site. Utah UU at 3. In sum, Utah UU timely raises new issues not previously addressed in this proceeding.

One final point. The current litigious climate does not lend itself to any meaningful discussion between the utilities and DOE in resolving how fuel will be packaged for shipment. When asked whether discussions were taking place between DOE and the utilities, Mr. Lanthrum summed up the situation thus:

Unfortunately, they aren't, because of the lawsuits that are out there, we are constrained from talking directly to the utilities. The correspondence between the program and the utilities is very formal, and it goes from the program through the lawyers here, and [sic] DOE, to the lawyers at the utilities, to the technical people at the utilities, and then comes back through that same circuitous route.

See Exhibit 2 (attached), NWTRB Tr. at 72 (Oct. 13, 2004). Certainly, this climate offers no expectation that DOE will agree to amend the Standard Contract. However, that litigious climate should propel the NRC to act to ensure that the actions of at least one key agency do not adversely affect the national effort to permanently dispose of spent nuclear fuel.

DATED this 17th day of December, 2004.

Respectfully submitted,



Denise Chancellor, Assistant Attorney General
Fred G Nelson, 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, Utah 84114-0873
Telephone: (801) 366-0286, Fax: (801) 366-0292

CERTIFICATE OF SERVICE

I hereby certify that a copy 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 was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 17th day of December, 2004:

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)

Michael C. Farrar, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-Mail: mcf@nrc.gov

Dr. Paul B. Abramson
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: pba@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.
Laura Zaccari, 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: lcz@nrc.gov
E-Mail: pfscase@nrc.gov

Jay E. Silberg, Esq.
Paul A. Gaukler, Esq.
Shaw Pittman, LLP
2300 N Street, N. W.
Washington, DC 20037-8007
E-Mail: Jay_Silberg@shawpittman.com
E-Mail: paul_gaukler@shawpittman.com

John Paul Kennedy, Sr., Esq.
David W. Tufts
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, Utah 84111
E-Mail: dtufts@djplaw.com

Joro Walker, Esq.
Land and Water Fund of the Rockies
1473 South 1100 East, Suite F
Salt Lake City, Utah 84105
E-Mail: jwalker@westernresources.org
(electronic copy only)

Larry EchoHawk
Paul C. EchoHawk
Mark A. EchoHawk
EchoHawk Law Offices
151 North 4th Street, Suite A
P.O. Box 6119
Pocatello, Idaho 83205-6119
E-mail: paul@echohawk.com
(*electronic copy only*)

Tim Vollmann
3301-R Coors Road N.W. # 302
Albuquerque, NM 87120
E-mail: tvollmann@hotmail.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: 16C1
U. S. Nuclear Regulatory Commission
Washington, DC 20555



Denise Chancellor
Assistant Attorney General
State of Utah



Department of Energy

Washington, DC 20585

HQO.20030106.0014

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PERMANENT

QA:NA

Mr. Thomas L. Williamson, Director
Nuclear Safety and Regulatory Affairs
Maine Yankee
321 Old Ferry Road
Wiscasset, ME 04578-4922

Dear Mr. Williamson:

This letter is in response to your letter of May 20, 2002. At this time the Department will not observe any canister loading activity. I would also like to take this opportunity to reiterate the Department's position, that multi-assembly canisters are not covered by the contract that Maine Yankee (MY) has with the Department, and are not considered an acceptable waste form, absent a modification to your contract.

From your correspondence the Department understands that MY plans to load canisters and has no intent to re-open these canisters prior to the Department's acceptance of your spent nuclear fuel (SNF). Article VI.B.2 of the Standard Contract requires that verification be performed on all SNF and/or High-level Waste that the Department accepts under the contract. The Department stated its intent for verification in the *Spent Nuclear Fuel Verification Plan, Revision 0, March 1997*. This plan was transmitted to MY shortly after it was published.

If you have any questions, please feel free to contact me on (202) 586-9198.

Sincerely,

David Zabransky
Contracting Officer
Office of Civilian Radioactive
Waste Management



UNITED STATES

NUCLEAR WASTE TECHNICAL REVIEW BOARD

TRANSPORTATION PLANNING PANEL MEETING

October 13, 2004

Salt Lake City, Utah

1 So, it is their decision, not our decision, and that drives
2 one of the biggest uncertainties in the program.

3 LATANISION: Right. That will affect your management
4 of the fleet. It will affect a lot of the issues that are
5 obviously of great importance.

6 LANTHRUM: There is a caveat in that planning, though,
7 is that when they propose shipment, if it's something that
8 we're not capable of supporting, we're not capable. So,
9 what's your second choice? And, if we had the full funding
10 that we were pushing for, I would have been immune, I, the
11 Transportation part of the organization would have been
12 immune to any last minute decisions. If, in fact, we're
13 driven by funding constraints to limit the size of the
14 infrastructure that we develop, there will be things that we
15 have to say sorry, can't do it.

16 LATANISION: Are those kinds of conversations going on
17 now between DOE--

18 LANTHRUM: Unfortunately, they aren't, because of the
19 lawsuits that are out there, we are constrained from talking
20 directly to the utilities. The correspondence between the
21 program and the utilities is very formal, and it goes from
22 the program through the lawyers here, and DOE, to the
23 lawyers at the utilities, to the technical people at the
24 utilities, and then comes back through that same circuitous
25 route.