

February 10, 2006

Honorable John L. Nau, III
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Dear Chairman Nau:

On behalf of the U. S. Nuclear Regulatory Commission (NRC), I am responding to your letter dated January 9, 2006, concerning the letter from Jack R. Strosnider, NRC, to John Fowler, Advisory Council on Historic Preservation (ACHP), dated November 22, 2005. In the NRC's letter of November 22, 2005, Mr. Strosnider informed the ACHP that, for reasons stated therein, and in accordance with the provisions of 36 C.F.R. § 800.7, the NRC had decided to terminate its participation in the consultation process established under Section 106 of the National Historic Preservation Act (NHPA), regarding the application of Private Fuel Storage, L.L.C. (PFS) for a license to construct and operate an Independent Spent Fuel Storage Installation (ISFSI) on the Reservation of the Skull Valley Band of Goshute Indians, located in Tooele County, Utah.

In your letter of January 9, 2006, you provided the ACHP's comments on the NRC's termination of the NHPA consultation process, which the NRC is required to consider in reaching a final decision on the PFS license application. The NRC has considered the ACHP's comments and has reached a final decision in this matter. Consistent with our obligations under the Atomic Energy Act of 1954, as amended, and in accordance with our regulations in 10 C.F.R. Part 72, the NRC has determined to grant the PFS license application and to issue a Materials License to PFS for its proposed ISFSI.

As required in 36 C.F.R. § 800.7(c)(4)(i), a summary of the NRC's decision, together with supporting rationale and evidence of our consideration of the ACHP comments, is provided below. In accordance with § 800.7(c)(4)(ii)-(iii), a copy of this summary is being provided to all consulting parties, and notice of the NRC's determination will be published in the *Federal Register*.

Background

On June 20, 1997, PFS submitted an application to the NRC for a license to construct and operate its proposed ISFSI. The NRC published a "Notice of Docketing, Notice of Proposed Action, and Notice of Opportunity for a Hearing for a Materials License for the PFSF in the Federal Register on July 31, 1997 (62 FR 41099). The NRC then commenced its review of the safety and environmental effects of the proposed PFS Facility (PFSF).

In connection with the NRC's review of the PFS license application, the NRC, in coordination with three cooperating Federal agencies (Bureau of Land Management (BLM), Bureau of Indian Affairs (BIA), and Surface Transportation Board (STB)), developed a Final Environmental Impact Statement (FEIS), pursuant to the National Environmental Policy Act of 1969 (NEPA).¹ The FEIS considered the impacts of the construction, operation, and decommissioning of the proposed ISFSI at the Skull Valley site as well as the impacts on certain transportation facilities that had been proposed by PFS. The FEIS indicated that the NRC staff and the three Cooperating Agencies had concluded, in part, that the overall benefits of the proposed PFSF outweigh the disadvantages and cost, and that the measures required by other permitting authorities and the mitigation measures proposed in the FEIS would eliminate or ameliorate any potential adverse environmental impacts associated with the PFS license application.

The safety and security of the proposed PFSF was addressed in a Safety Evaluation Report (SER) issued in December 2000 and two amendments thereto, as reissued in a consolidated SER in March 2002.² Evidentiary hearings on the proposed license application were held before an NRC Atomic Safety and Licensing Board in 2000, 2002 and 2004. All contested issues in the proceeding have now been resolved. Most recently, on September 9, 2005, the Nuclear Regulatory Commission, acting in its adjudicatory capacity, issued its final decision in the proceeding, in which it authorized the NRC staff to issue a license to PFS to construct and operate its proposed ISFSI once the staff has made the requisite findings pursuant to 10 C.F.R. § 72.40.³

In the course of its review of the PFS license application, the NRC participated in consultations with the three Cooperating Agencies and other parties concerning the protection of historic and cultural properties that may be impacted by the agencies' proposed actions in accordance with the NHPA and regulations promulgated by the ACHP.⁴ Pursuant to those consultations, the parties prepared a Memorandum of Agreement (MOA) and draft treatment and discovery plans. The MOA was subsequently executed by BIA, STB, the Skull Valley Band, and NRC, but was not executed by BLM, the Utah State Historic Preservation Officer (SHPO), or ACHP. In particular, both BLM and the Utah SHPO declined to execute the MOA at this time. This matter is more fully described in the NRC's letter of November 22, 2005, in which the NRC notified the ACHP that it was terminating the NHPA consultation process in accordance with 36 C.F.R. § 800.7(a). Copies of that letter were provided to all parties involved in the consultation process.

¹ "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," NUREG-1714 (December 2001).

² "Consolidated Safety Evaluation Report Concerning the Private Fuel Storage Facility" (March 2002).

³ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403 (2005).

⁴ The four Cooperating Agencies (BLM, BIA, STB and NRC) agreed to work in partnership as cooperating Federal agencies to complete the actions required by the NHPA and 36 C.F.R. Part 800.

By letter dated January 9, 2006, the ACHP provided its comments in response to the NRC's letter of November 22, 2005. In accordance with 36 C.F.R. § 800.7(c)(4), the NRC has considered the ACHP's comments and has determined that final action on the PFS license application is now appropriate. The following provides a summary of the ACHP's comments and the NRC's consideration thereof.

ACHP's Comments

1. The signatures that have been obtained on the MOA demonstrate support for the mitigation measures by key agencies, organizations that advocate for historic trails in Utah, and the Indian tribe on whose lands the project will be constructed, if approved. The ACHP has no objection to the substantive provisions of the MOA or to the treatment proposed for the historic properties

It is the ACHP's view that the draft treatment plan will be effective in minimizing and mitigating adverse effects to the eight historic properties if the project is approved. Because NRC has terminated consultation based on problems that do not reflect a disagreement among the consulting parties over the treatment of effects to historic properties, a commitment by NRC to condition the license on implementation of the terms of the MOA is a reasonable and appropriate means of concluding its responsibilities under Section 106 of the NHPA. The ACHP agrees with NRC's commitment to condition the license, if one is issued for this undertaking, on PFS carrying out the conditions for cultural resources in the Final Environmental Impact Statement (pp. 9-14 to 9-15) dated December 2001.

2. Section 383 of the recently enacted National Defense Authorization Act designates the Cedar Mountain Wilderness Area in the area of the proposed rail spur. NRC's Condition 3.A addresses the possibility that the rail line may not be approved by requiring the MOA and treatment plan to be implemented only if the rail line is approved for construction.⁵
3. None of the other cooperating Federal agencies has informed the ACHP of a desire to terminate consultation for this undertaking. It is our understanding that BLM, the lead federal agency for Section 106 review, intends to continue consultation with STB, BIA, SHPO, and the other consulting parties pursuant to 36 CFR 800.6, and hopes to finalize and execute the MOA when a moratorium on land use planning is lifted. Should BLM approve an alternative means to transport spent fuel to the PFS site, it will

⁵ The ACHP's citation of "NRC's Condition 3.A" refers to item A in Environmental Condition 3 provided in Section 9.4.2 of the FEIS.

need to consider the effects of that alternative on historic properties. The ACHP will support them in this effort, and will continue to participate in consultation as BLM, STB, and BIA conclude their responsibilities through execution of an MOA prior to issuing any required approvals for the project.

NRC Consideration of the ACHP's Comments

ACHP Comment 1

The ACHP recommends that the NRC condition the PFS license, should it be issued, to require PFS to comply with the requirements specified in Environmental Condition 3, Cultural Resources, provided in Section 9.4.2, Mitigation Measures, of the FEIS. The ACHP correctly recognized that "key" agencies and organizations whose interests are most directly affected by the MOA -- including historic trail organizations and the Skull Valley Band of Goshute Indians -- have executed the MOA, thus demonstrating their support for the mitigation measures proposed in the MOA and its draft treatment and discovery plans. The ACHP concluded that it "has no objection to the substantive provisions of the MOA or to the treatment proposed for the historic properties."

Consistent with recommendations contained in the FEIS, the NRC will include a condition in the PFS license requiring implementation of certain procedures for the protection of historic and cultural resources. In Section 9.4.2, "Mitigation Measures," of the FEIS, the staff from each of the four cooperating Federal agencies proposed that the eight Environmental Conditions listed in that section be included, as appropriate, as part of each agency's record of decision. See FEIS at 9-12. One of those conditions, Environmental Condition 3, identifies seven specific requirements for the protection of cultural resources, based on the MOA and its draft treatment and discovery plans. These proposed requirements are also attached to the ACHP's letter of January 9, 2006. In accordance with Section 9.4.2 of the FEIS, and consistent with the ACHP's letter, the NRC plans to include the following condition in the PFS license:

The licensee shall comply with the "Environmental Conditions" specified in Section 9.4.2, Mitigation Measures, of the 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.

This proposed license condition includes Environmental Condition 3, "Cultural Resources." This condition requires PFS to implement all the mitigation measures identified in the MOA before beginning construction of the rail line and to take certain specified actions with regard to any unrecorded artifacts or cultural resources identified during the construction process.

The ACHP's comment indicates that the ACHP approves the approach taken in the FEIS, which documents "a commitment by NRC to condition the license on implementation of the terms of the MOA." The ACHP further states its view that this approach provides "a reasonable and appropriate means of concluding its [the NRC's] responsibilities under Section 106 of the NHPA." Further, the ACHP states that it "agrees with NRC's commitment to

condition the license, if one is issued for this undertaking, on PFS carrying out the conditions for cultural resources in the [FEIS].” Accordingly, the Commission concludes that the conditions described in the FEIS provide reasonable assurance that historic and cultural properties will not be adversely affected by issuance of a license for the proposed PFS Facility. No other NRC action is required with respect to this comment prior to issuance of a license to PFS.

ACHP Comment 2

In this comment, the ACHP observed that the recently enacted Defense Authorization Act of 2006 designates a Cedar Mountain Wilderness Area in the area of PFS’s proposed rail line, which could impede PFS’s ability to construct and operate its proposed rail line in that area. The ACHP also observed that paragraph A of proposed environmental license condition 3 has the effect of “requiring the MOA and treatment plan to be implemented only if the rail line is approved for construction.” Thus, if the rail line is not constructed in that area as proposed, any historic and cultural resources identified in that area would not be impacted, and the MOA’s provisions to protect those resources will not be needed. It should be noted that the proposed license condition imposes certain requirements that pertain to the PFS site or any lands under BLM’s jurisdiction (Environmental Conditions 3.B - 3.G), and thus provides assurance that any historic and cultural resources in those areas will not be adversely affected by construction and operation of the PFS Facility, even if the proposed rail line is not constructed. No further NRC action is required with respect to this comment prior to issuance of a license to PFS (conditioned as described above).

ACHP Comment 3

In this comment, the ACHP expresses its belief that BLM “intends to continue consultation with STB, BIA, SHPO, and the other consulting parties pursuant to 36 CFR 800.6, and hopes to finalize and execute the MOA when a moratorium on land use planning is lifted.” The ACHP further indicates that “if BLM approves an alternative means to transport spent fuel to the PFS site, it will need to consider the effects of that alternative on historic properties.” In that event, the ACHP indicates that it would support any further efforts to obtain an executed MOA “prior to issuing any required approvals for the project.” This comment reflects the ACHP’s intention to continue to render assistance to other Federal agencies in obtaining final executed agreements that may be pertinent to separate actions pending before those agencies if the current “moratorium on land use planning is lifted” or if BLM approves an alternative plan for the transportation of spent fuel to the PFS site.⁶ This presents a hypothetical case, and no further NRC action is required with respect to this comment prior to issuance of a license to PFS (conditioned as described above).

⁶ This comment appears to address comments submitted to the ACHP by John Harja, the Utah SHPO, in a letter dated December 23, 2005. In his letter, Mr. Harja opined that the NRC’s termination letter attempted to terminate the consultation process for all parties and to find that the NHPA consultation process was satisfied for all parties; that the NRC cannot regulate PFS’s proposed off-site activities; and that the State and BLM have not terminated their participation in the consultation process. The ACHP’s letter of January 9 implicitly addresses these concerns, recognizing that other parties may continue the NHPA consultation process with respect to their proposed actions, notwithstanding the NRC’s termination of the consultation process with respect to the NRC’s proposed licensing action.

Additional ACHP Observations

After providing comments on the NRC's termination letter, the ACHP acknowledged "the diligent and thorough manner in which your agency [NRC] has addressed its responsibilities under the National Historic Preservation Act for this undertaking." The NRC appreciates your remarks and looks forward to further cooperation with the ACHP with respect to future NRC licensing actions.

With respect to the NHPA Section 110 obligations noted in your letter, a copy of this letter is being provided to all consulting parties and other members of the public that have an interest in the PFS licensing action. In addition, consistent with NRC's practice of publishing a "Notice of Issuance" in the *Federal Register* when a materials license is issued for an ISFSI, the NRC will provide notice to the public when the PFS license is issued. Documents upon which the NRC based its decision to license the PFS Facility, including the Safety Evaluation Report and FEIS, are available electronically from NRC's Electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this site, the public can access NRC's Agencywide Documents Access and Management System (ADAMS) which provides text and image files of NRC's public documents. Information concerning document availability will be included in our "Notice of Issuance" for the PFS Facility license.

Finally, I sincerely want to thank you and your staff at the Advisory Council on Historic Preservation for your timely consideration of this matter, for the highly professional assistance rendered by your staff in our licensing process, and for your thoughtful comments in response to NRC's letter of November 22, 2005.

Should you or any members of your staff have any questions related to this matter please do not hesitate to contact me or Mr. Jack R. Strosnider, Director, Office of Nuclear Material Safety and Safeguards. Mr. Strosnider can be reached by telephone at (301) 415-7800 or by E-mail at jrs2@nrc.gov.

Sincerely,

/RA/

Nils J. Diaz

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