

January 5, 1999

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22
	)	
(Private Fuel Storage Facility)	)	ASLBP No. 97-732-02-ISFSI

**APPLICANT'S REPLY TO STATE OF UTAH'S
RESPONSE TO NRC STAFF LEAD AGENCY FILING**

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby submits this reply to the "State of Utah's Response to NRC Staff's 'Lead Agency' Filing" of December 22, 1998 (hereinafter "State BLM Response") concerning the lead agency for the preparation of any environmental documents regarding the use of public lands administered by the Bureau of Land Management ("BLM") for the proposed Low Corridor rail spur. As set forth in the NRC Staff filing, NRC will serve as the lead agency and will supervise the preparation of an environmental impact statement ("EIS") for the PFS project with BLM participating as a cooperating agency in the preparation of that EIS.¹

The State in its response raises various issues, none of them relevant to the concern expressed by the Board at the December 11, 1998 hearing which led to the Board's

¹ Agreement Between U.S. Nuclear Regulatory Commission and Bureau of Land Management (October 6, 1998); Letter from Sherwin Turk, Counsel for NRC Staff, to Atomic Safety and Licensing Board (December 16, 1998).

request for information.² First, the State suggests that BLM, by being a cooperating agency, "may not" follow its own procedures in processing PFS's request for a right-of-way for the Low Corridor rail spur. State BLM Response at 3. Not only is this issue unrelated to the concern raised by the Board, but it is pure (and inappropriate) speculation on the part of the State. The only BLM procedures cited by the State are those providing for BLM's consultation with State and local officials with respect to right-of-way applications and the holding of a discretionary public meeting on such applications if sufficient public interest exists. Id. at 3 n.2. The State has pointed to no provision of the NRC-BLM cooperative agreement that would preclude BLM from following its procedures in evaluating and arriving at a decision on PFS's request for a right-of-way for the Low Corridor rail spur, and there is none.³ Thus, the State's avowed concern is not only irrelevant but also lacks any credible basis.

² The Board was concerned about whether it was within the NRC's NEPA jurisdiction to consider the environmental impacts of the Low Corridor rail spur, including any necessary assessments of alternatives, if BLM were to independently prepare an EIS with respect to PFS's request for a right-of-way for the spur. See Prehearing Conference Tr. at 1156-65. As PFS stated at the prehearing conference, the NRC is obligated under NEPA to consider the environmental impacts of the PFS project, including the associated rail spur, regardless of which agency actually prepares the EIS and regardless of whether BLM may independently consider the environmental impacts of the rail spur in conjunction with its decision making process. Id. at 1159. PFS's point regarding the jurisdictional limits of the NRC was that the NRC must respect the determination of BLM regarding whether a parcel of land is suitable for designation as wilderness (which PFS argued in its pleadings and orally before the Board underlies SUWA's intervention petition and contentions) in that the authority to make that determination has been statutorily delegated to the Interior Department (and by regulation to BLM).

³ The State also claims that "public participation procedures through NRC's NEPA process will not be equivalent to the established and required BLM procedures involving major federal action for the grant of a right-of-way across public lands." State BLM Response at 3-4. The sole basis for the State's claim is the NRC's response to a comment made in the NRC scoping process that separate scoping processes ought to be conducted for the BIA and BLM. Id. at 3 (citing NRC Scoping Report, Private Fuel Storage Facility (September 1998) at 14). The State's claim is utterly baseless. In its response, the NRC merely stated that such an issue is outside the scope of the EIS (see 10 C.F.R. § 51.71) and therefore would not be evaluated

Second, the State argues that, because of “procedural uncertainties as to what forums” may be available to the Southern Utah Wilderness Alliance (“SUWA”) “to raise and contest public land issues,” the second factor of the NRC’s test for the admission of late-filed petitions -- the ability of a petitioner to protect its interests through other means -- weighs in favor of admitting SUWA to this proceeding. Id. at 4. Specifically, the State claims that “BLM has yet to receive a complete right-of-way application from PFS” and, that therefore, it “may be premature to determine whether SUWA . . . will have a forum before the BLM to raise issues.” Id. The State’s argument appears to suggest that SUWA must be allowed to intervene in the NRC’s licensing proceeding because there is a chance that PFS or BLM will decide not to proceed with the right-of-way process for the Low Corridor rail spur, thereby depriving SUWA of a forum for public land issues. This argument is clearly illogical and incorrect in that SUWA’s petition is entirely premised upon the running of the rail spur through its proposed wilderness area, which could not occur unless BLM processed and approved a right-of-way application by PFS.

In any event, however, PFS has filed an application for such a right-of-way with BLM and is in the process of providing additional information necessary for BLM to pro-

in the EIS. See Exhibit 1, attached hereto (page 14 of NRC Scoping Report). The NRC said nothing about the nature or quality of NRC NEPA processes compared to BLM NEPA processes. Id. Nor did the NRC say anything about the merits of the comment. Indeed, the introductory paragraph of this section of the NRC Scoping Report notes that “[e]xclusion from the EIS . . . does not suggest that an issue or concern lacks value. Issues beyond the scope of an EIS may be appropriately discussed and decided in other venues.” Id.

cess and consider its application.⁴ BLM provides ample means for interested persons to participate in the process by which BLM grants right of ways. See generally 43 C.F.R. Subparts 2802 and 2804. Interested persons may contest or protest the issuance of a right-of-way, see 43 C.F.R. § 4.450-2, and may appeal BLM's grant of a right-of-way to the Interior Board of Land Appeals ("IBLA"), see 43 C.F.R. § 2804.1.⁵ Indeed, SUWA is aware of these procedures and has used them in the past. See, e.g., Southern Utah Wilderness Alliance, 127 IBLA 282 (1993) (SUWA appealing BLM grant of right-of-way for pipeline); Southern Utah Wilderness Alliance, 108 IBLA 318 (1989) (SUWA protesting and then appealing decision to conduct a lease sale for oil and gas).

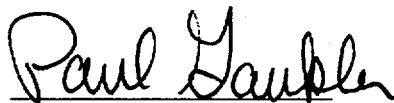
Therefore, contrary to the State's claim, SUWA has a forum other than the NRC licensing proceeding in which to raise public lands issues with respect to PFS's application for a right-of-way. Moreover, there is no reason to believe, as claimed by the State, that SUWA's rights before BLM will be infringed in any manner by BLM's participation as a cooperating agency. The State's argument that SUWA must be allowed to intervene if NRC procedures are substituted for BLM's "more extensive and open public participation procedures," see State BLM Response at 4, is completely lacking in merit. As previously discussed, nothing in the NRC-BLM cooperative agreement prevents BLM from

⁴ There was a slight hiatus in activity with respect to PFS's application for right-of-way until BLM decided on its costs for processing PFS's application and PFS deposited monies with BLM sufficient to cover these costs, both of which have now occurred.

⁵ See also 43 C.F.R. Part 4, Subparts B and E (Interior Department board and IBLA procedures). A party with standing may also challenge an IBLA or BLM right-of-way decision in Federal court. See 5 U.S.C. § 704 (right of judicial review of final agency action); e.g., Citizens for a Better Henderson v. Hodel, 768

following its own procedures regarding the granting of right of ways or its consideration of associated environmental impacts in its decision making process. BLM regulations provide for public participation in the right-of-way process and SUWA would be free to seek to participate in that process, if it chooses to do so, as it has done so in the past. Moreover, the State has provided absolutely no basis other than its bare assertion to show that BLM's procedures would provide for more extensive and open public participation, for example in commenting on a draft EIS, than would the NRC's procedures. In short, the State's claims regarding the availability and quality of BLM processes vis a vis NRC processes are groundless, based on pure speculation, and therefore provide no basis whatsoever for admitting SUWA to this NRC licensing proceeding.

Respectfully submitted,



Jay E. Silberg

Ernest L. Blake, Jr.

Paul A. Gaukler

SHAW, PITTMAN, POTTS & TROWBRIDGE

2300 N Street, N.W.

Washington, DC 20037

(202) 663-8000

Counsel for Private Fuel Storage L.L.C.

Dated: January 5, 1999

F.2d 1051 (9th Cir. 1985) (challenge to BLM right-of-way grant); Archer v. Babbitt, 1995 Westlaw 528000 (9th Cir. 1995) (challenge to IBLA affirmance of BLM grant of right-of-way).