

November 22, 2005

The Honorable Orrin G. Hatch  
United States Senate  
Washington, D.C. 20510

Dear Senator Hatch:

On behalf of the U.S. Nuclear Regulatory Commission (NRC), I am responding to your letter of November 1, 2005, regarding NRC's obligation under the National Historic Preservation Act (NHPA), as it relates to the proposed Private Fuel Storage license.

I specifically wish to advise you of the enclosed letter from the NRC to the Advisory Council on Historic Preservation (ACHP), dated November 22, 2005. As stated in the letter, the NRC is formally terminating its participation in the consultation process, and has requested that the ACHP transmit comments on such termination in accordance with ACHP regulations. The letter addresses this issue in considerable detail.

I understand that this matter is of considerable importance to the people of Utah, and assure you that the NRC continues to take every step necessary to comply with the NHPA, while meeting its regulatory obligations in accordance with the provisions of the Atomic Energy Act of 1954, as amended.

Sincerely,

*/RA/*

Nils J. Diaz

Enclosure: As stated

November 22, 2005

Mr. John Fowler  
Executive Director  
Advisory Council on Historic Preservation  
1100 Pennsylvania Avenue, NW, Suite 809  
Washington, DC 20004

SUBJECT: COMPLETION OF ACTIONS AND TERMINATION OF THE SECTION 106  
PROCESS FOR THE PROPOSED PRIVATE FUEL STORAGE PROJECT

Dear Mr. Fowler:

As you may be aware, the U. S. Nuclear Regulatory Commission (NRC) has been working in cooperation with several other Federal agencies in order to complete the required reviews of environmental matters, among them the requirements of Section 106 of the National Historic Preservation Act (NHPA) for the proposed Private Fuel Storage (PFS) Independent Spent Fuel Storage Installation (ISFSI), to be constructed and operated on the Reservation of the Skull Valley Band of Goshute Indians, geographically located in Tooele County, Utah. The lead agency for the Section 106 process, including its documentation through a Memorandum of Agreement (MOA), is the Bureau of Land Management (BLM). For purposes of the NRC's federal action—issuance of a license to PFS—that process is complete.

Specifically, the NRC and three cooperating Federal agencies (the Bureau of Indian Affairs (BIA), BLM, and Surface Transportation Board (STB)) worked together to satisfy their obligations under the National Environmental Policy Act of 1969 (NEPA), culminating in the December 2001 publication of a "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 (FEIS). In addition, the NRC and cooperating Federal agencies developed a proposed MOA, that sets forth the mitigation measures which PFS must undertake in order to protect historical sites identified during the Section 106 consultation process and to identify and protect any additional sites that may be discovered during construction activities.

With respect to requirements associated with the NHPA, as discussed in the FEIS, the NRC and cooperating Federal agencies have completed all of the substantive requirements of the Section 106 process, including the identification of historic properties; the identification and assessment of potential adverse effects of the proposed PFS ISFSI (and related transportation facilities) on such properties; and the creation of measures to mitigate, avoid, or minimize those adverse effects. This process included consultation with the Utah State Historic Preservation Officer (SHPO), the Skull Valley Band of Goshute Indians, the Advisory Council on Historic Preservation (ACHP or Advisory Council), other consulting organizations and members of the public. Letters concerning the initiation of the NHPA consultation process were attached to the Draft EIS, published in June 2000, and interested parties were given the opportunity to comment on the Draft EIS via the NEPA notice and comment process. All such comments were addressed in the response to comments published by the Federal agencies, in Appendix G of the FEIS.

This NHPA-related consultation and comment process culminated in publication of the FEIS and distribution of the MOA for execution by the signatories and concurring parties. The measures deemed necessary to mitigate any adverse impacts to historic properties were incorporated into draft Treatment and Discovery plans developed by PFS in consultation with the cooperating Federal agencies, and are appended to the MOA. The NRC's safety and environmental review process, as well as all NRC adjudicatory proceedings, have been completed, and the NRC has concluded that a license may now be issued to PFS to construct and operate the proposed facility. Any NRC license issued to PFS for construction and operation of the proposed facility will be expressly conditioned on PFS's compliance with the specified NHPA-related mitigation measures, as set forth in section 9.4.2 of the FEIS.

As you know, the Utah SHPO has declined to consult several times during the Section 106 process, as reflected in the NRC's letter to Ms. Natalie Gochnour, Utah State Planning Coordinator, dated December 5, 2000. Most recently, by letters dated May 26, 2005 and June 2, 2005, the NRC asked the SHPO to execute the MOA. The SHPO did not respond to these requests, but in a letter dated June 7, 2005, addressed not to the NRC but to BLM, stated his position that BLM should defer signing the MOA and that this matter should "proceed concurrently" with BLM's review of PFS's application for rights-of-way and the associated amendment of BLM's Pony Express Resource Management Plan. Until BLM takes those other actions, its execution of the MOA is, in the SHPO's view, premature.

In addition, the NRC staff was recently advised by BLM (an active participant in developing the FEIS and the MOA) that it, likewise, will not execute the draft MOA at this time. In correspondence to NRC dated August 4, 2005, BLM gave two reasons for this development. First, BLM stated that it is precluded from executing the MOA by Section 2815 of the National Defense Authorization Act of 2000. This provision prohibits any revision of the Pony Express Resource Management Plan – noted above – until the Secretary of Defense completes specific studies which, to our knowledge, have not been initiated. Second, BLM expressed concern that the Treatment Plan places a disproportionate burden on PFS (which has agreed to take such measures) for the mitigation of adverse impacts. Subsequent discussions with officials in BLM and the Department of the Interior have made it clear that BLM will not sign the MOA at this time.

The NRC staff has considered the views expressed by BLM, and has not identified any substantive objections by BLM to the MOA or the Treatment and Discovery plans attached thereto – which plans had been developed with BLM's active participation.

The NRC staff and cooperating Federal agencies have duly considered the identification and mitigation of adverse effects to historical properties, through a consultative process in which the ACHP has participated since December 2000. The NRC believes that the substantive objectives of the Section 106 process – to consider the effects of federal undertakings on historically sensitive sites and to provide a reasonable opportunity for the Advisory Council to comment on such undertakings – have been satisfied in full by all cooperating agencies, including BLM. In this regard, no sites eligible for inclusion on the National Register of Historic Places have been identified on the PFS site; rather, all identified sites are located in areas affected by PFS's proposed transportation facilities, which will require separate action by BLM. In addition, measures to address sites that might be revealed during construction, as well as

treatment measures for those sites already identified (albeit off-site), have been developed and agreed to by PFS and will be included as conditions in any license issued by the NRC.

All signatories to the MOA, other than BLM, the SHPO, and the ACHP, have executed the MOA. Further, while additional steps may be necessary for BLM to finalize its individual responsibilities under Section 106 to enable BLM to issue an amendment to the resource management plan allowing PFS to construct its proposed transportation facilities, those steps go beyond those which the NRC is obliged to complete in order to discharge its Section 106 responsibilities and issue a license to PFS for its proposed ISFSI. Therefore, despite the absence of a fully executed MOA, the NRC staff believes that adverse impacts to historical sites have been adequately resolved, that the SHPO and BLM have clearly indicated they will not execute the MOA at this or any time in the foreseeable future, and that in these circumstances, further consultation is unnecessary and will not be productive.

Accordingly, the NRC is hereby formally terminating its participation in the consultation process, and requests that the ACHP transmit comments on such termination within 45 days of receiving this request, in accordance with 36 C.F.R. § 800.7.

Copies of the supporting documentation, including the proposed MOA, the FEIS, which documents the Section 106 consultation process in Appendix B, and relevant subsequent correspondence are provided in Enclosure 1, in accordance with 36 C.F.R. § 800.11(g). In addition, we are forwarding a copy of this termination and request for comments to each of the consulting parties listed in Enclosure 2.

If you or your staff have any questions regarding this request, please contact Mr. Stewart Brown at (301) 415-8531. Thank you for your consideration.

Sincerely,

Jack R. Strosnider, Director  
Office of Nuclear Material Safety  
and Safeguards

Docket No. 72-22

Enclosures:

1. Copies of Documentation, MOA, & FEIS
2. List of MOA Signatories & Concurring Parties

cc: PFS Service Lists  
MOA Signatories & Concurring Parties

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 Office of Nuclear Material Safety  
 and Safeguards

Docket No. 72-22

Enclosures:

1. Copies of Documentation, MOA, & FEIS
2. List of MOA Signatories & Concurring Parties

cc: PFS Service Lists  
 MOA Signatories & Concurring Parties

DISTRIBUTION:

PUBLIC	SFPO r/f	NMSS r/f	DMcIntyre, OPA
CMarco, OGC MWaters <b>ML053210432</b>	TMadden, OCA AChowdhury, CNWRA	SDroggitis, OSP	RWeisman, OGC

OFC:	SFPO	E	SFPO	E	SFPO		SFPO		SFPO		OGC		NMSS	
NAME:	SBrown:dmd1	EZiegler		RNelson		WHRuland for RNelson		EWBrach		STurk		JRStrosnider		
DATE:	11/17/05	11/17/05		11/17/05		11/17/05		11/18/05		11/21/05		11/22/05		



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Enclosure 1

1. Memorandum of Agreement (without the draft treatment and discovery plans, which were previously transmitted to the ACHP by letter of May 26, 2005)
2. Letter to S. Brown (NRC) from G. Carpenter (BLM) dated August 4, 2005
3. Letter to G. Carpenter (BLM) from J. Harja (Utah) dated June 7, 2005
4. Letter to J. Harja (Utah) from S. Brown (NRC) dated June 2, 2005
5. Letter to G. Carpenter (BLM), and other addressees, from S. Brown (NRC) dated May 26, 2005
6. Letter to J. Parkyn (PFS) from M. Delligatti (NRC) dated January 24, 2003
7. Letter to L. Bear (Skull Valley Band of Goshute Indians) from F. Mainella (DOI) dated October 1, 2003
8. Final Environmental Impact Statement (NUREG-1714), dated December 2001 (CD version)

Enclosure 2

List of Consulting Parties