

December 30, 1997

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-ISFSI
	)	
(Independent Spent	)	
Fuel Storage Installation)	)	

NRC STAFF'S RESPONSE TO THE LICENSING BOARD'S  
QUESTION CONCERNING ITS AUTHORITY TO ISSUE  
A FINAL INITIAL DECISION PRIOR TO ISSUANCE OF  
NRC STAFF'S SAFETY AND ENVIRONMENTAL REPORTS

INTRODUCTION

On October 17, 1997, the Licensing Board issued a Memorandum and Order in which it, *inter alia*, requested the views of the NRC Staff ("Staff") and Private Fuel Storage L.L.C. ("PFS" or the "Applicant"), with responses to be filed by the petitioners for leave to intervene, as to whether the Board has the "authority to issue a final initial decision on any safety, environmental, or other issues that may be admitted" in the absence of the Staff's Safety Evaluation Report (SER) and Final Environmental Impact Statement (FEIS), "whether in draft or final form."<sup>1</sup> The Licensing Board noted that the Applicant's schedule contemplated that construction of the access road and facility would commence in January 2000, while the Staff expected to issue its draft and final safety evaluation report (SER) and its draft and final environmental impact statements (EIS) in two to three

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<sup>1</sup> "Memorandum and Order (Ruling on Motions to Suspend Proceeding and for Extension of Time to File Contentions)," dated October 17, 1997 ("Order"), at 10.

years<sup>2</sup> -- or "as much as a year beyond the licensee's anticipated starting date for facility construction." Accordingly, the Licensing Board requested the parties' views with respect to the Board's authority to issue a final decision in the absence of the SER and FEIS, including a discussion of "any potentially relevant regulatory provisions, such as 10 C.F.R. §§ 51.100-.104; *id.*, § 72.40(b), and any analogous case authority from reactor licensing or other proceedings that shed light on this matter." Order at 10. The Staff's views with respect to the Licensing Board's question are as follows.

### DISCUSSION

The Commission's regulations recognize the need for completion of the Staff's review of license applications, prior to issuance of an agency decision on the application. With respect to environmental statements, this is reflected in 10 C.F.R. Part 51. In proceedings on licensing actions for which an EIS is required, 10 C.F.R. § 51.101 prohibits the applicant from taking any action which would have adverse environmental impact or limit the choice of reasonable alternatives, prior to issuance of the record of decision. Further, pursuant to 10 C.F.R. § 51.100, a Commission decision on the proposed action may not be made, and a record of decision may not issue, until a specified number of days after the Environmental Protection Agency (EPA) has published a *Federal Register* notice that the draft or final EIS has been filed with EPA. The record of decision, in

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<sup>2</sup> See "NRC Staff's Status Report and Response to Requests for Hearing and Petitions to Intervene Filed by (1) the State of Utah, (2) Skull Valley Band of Goshute Indians, (3) Ohngo Gaudadeh Devia, and (4) Castle Rock Land and Livestock, L.C., et al.," dated October 1, 1997, at 5. The Staff indicated that it expects to complete a draft EIS within approximately two years, and to issue a Final EIS approximately six to twelve months later; and it expects to issue an SER in approximately two to three years. *Id.* The Staff noted that its review schedule depends upon the prior occurrence of certain other events, including completion of the certification process for the casks to be used by PFS, and the receipt of timely and complete responses from PFS to any requests for information which may be transmitted by the Staff during its review. *Id.*

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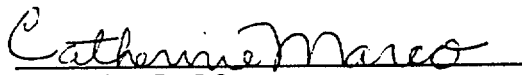
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proceedings in which a hearing is held, is to consist of the Licensing Board's initial decision or the Commission's final decision. 10 C.F.R. § 51.102(c). In such proceedings, the Staff "may not offer the final [EIS] in evidence or present the position of the NRC Staff on matters within the scope of NEPA and [10 C.F.R. Part 51] until the final [EIS] is filed with the [EPA], furnished to commenting agencies, and made available to the public." 10 C.F.R. § 51.104. Although the Licensing Board may direct other parties to present their witnesses and take positions in the hearing prior to issuance of the Final EIS and presentation of testimony by the Staff, it would be precluded from issuing a "final initial decision" until the Staff has issued the FEIS and offered it into evidence.<sup>3</sup>

It is also clear that the Staff is required to offer the its safety evaluation as well as the final EIS in evidence. Section 2.743(g) provides, in relevant part, as follows:

(g) *Proceedings involving applications.* In any proceeding involving an application, there shall be offered in evidence by the staff . . . any safety evaluation prepared by the staff and any environmental impact statement prepared by the . . . Director of Nuclear Material Safety and Safeguards . . . or his designee in the proceeding pursuant to subpart A of part 51 of this chapter.

*See generally, Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-883, 27 NRC 43, 52 n.28 (1988); *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 368 n.38 (1983); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-86-24, 24 NRC 132, 138-39 (1986). The Staff intends to document its review in a Safety Evaluation Report.

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<sup>3</sup> The Commission has recognized, in a reactor licensing case, that the EIS forms an "integral" and "vital part" of the agency's decisional record, "and the agency's decision would be fundamentally flawed without it." *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), CLI-80-31, 12 NRC 264, 275 (1980), citing *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

Accordingly, it is the Staff's view that the Licensing Board may not issue a final initial decision on any safety, environmental, or other issue that is admitted for litigation in this proceeding, if such issue is within the scope of the Staff's Safety Evaluation Report or Final Environmental Impact Statement, prior to the issuance of the SER or FEIS, as applicable.

Respectfully submitted,

*Catherine Marco for*

Sherwin E. Turk  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 30th day of December 1997

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO THE LICENSING BOARD'S QUESTION CONCERNING ITS AUTHORITY TO ISSUE A FINAL INITIAL DECISION PRIOR TO ISSUANCE OF NRC STAFF'S SAFETY AND ENVIRONMENTAL REPORTS" in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or, as indicated by an asterisk, by Email (with confirming copies by deposit in the Nuclear Regulatory Commission's internal mail system or by deposit in United States mail, first class) this 30th day of December, 1997:

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