

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

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))	February 18, 1998

**STATE OF UTAH'S RESPONSE TO CASTLE ROCK LAND & LIVESTOCK,
L.C., ET AL'S NON-APPLICATION OR WAIVER OF COMMISSION
REGULATIONS, RULES AND GENERAL DETERMINATIONS**

Pursuant to the Board's Memorandum and Order of February 2, 1998, the State files this response in support of the Petition for Non-application or Waiver of Commission Regulations, Rules and General Determinations filed by Castle Rock Land & Livestock, L.C., et al ("Castle Rock") on January 21, 1998.

Discussion

Castle Rock filed its petition for waiver or exception pursuant to 10 CFR § 2.758(b), which in part provides:

The sole ground for petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation would not serve the purpose for which the rule was adopted.

If the presiding officer determines that the petitioner has made a prima facie showing based on the petition, affidavit and any response, that application of the rule or

regulation to a specific aspect of the proceedings would not serve the purpose for which the rule was adopted, the presiding officer shall directly certify the matter to the Commission. 10 CFR § 2.758(d). A determination is then made by the Commission whether to grant an exception to or waiver of the rule. Id.

Castle Rock's two part petition seeks first, a determination that the Commission does not have authority to grant a license to PFS under 10 CFR Part 72 thus making Part 72 inapplicable to this proceeding, and second, a waiver of, or exception permitting a challenge to, portions of 10 CFR § 51.23 and the Waste Confidence Rule, as each applies to this proceeding.

A. NRC's Authority to License the PFS ISFSI

Neither NRC's general statutory authority nor the Nuclear Waste Policy Act, 42 USC §§ 10,101 to 10,270 allow it to license a facility such as that being proposed by Private Fuel Storage, LLC ("PFS"). The State of Utah, on November 23, 1997, filed Contentions A through DD in this proceeding. Utah Contention A states: "Congress has not authorized NRC to issue a license to a private entity for a 4,000 cask, away-from-reactor, centralized, spent nuclear fuel storage facility." Utah Contentions A through DD at 3. The State's Contention A and its basis, at 3-9, are incorporated by reference into this Response and attached hereto as Exhibit 1. On January 16, 1998, the State filed a Reply to the NRC Staff's and Applicant's Responses to State of Utah's

Contentions A through DD ("Reply"). The State's Reply at 9-15 is incorporated by reference into this Response and attached hereto as Exhibit 2.

The Commission cannot rely on its general statutory authority to issue a license for the 40,000 MTU away-from-reactor national storage facility proposed by PFS. Part 72 regulations dealing with licensing Independent Spent Fuel Storage Installations ("ISFSIs") are an outgrowth of Part 70 regulations, Domestic Licensing of Special Nuclear Material. See Notice of Final Part 72 rule, 45 Fed. Reg. 74,693 (Nov. 12, 1980), Summary at *Id.* Chapter 6 of the Atomic Energy Act addresses Special Nuclear Material. Section 53(a) of the Atomic Energy Act, 42 USC § 2,073(a) authorized the Atomic Energy Commission (AEC) to license private persons to possess and use, but not own special nuclear materials. An amendment to § 53(a) in 1967 authorized the AEC to license private ownership, possession and use of special nuclear materials. See State's Reply, Exh. 2, at 10-13, which discusses the history of § 53. Thus, there is no clear statutory authority for NRC to license the centralized off-site storage of spent nuclear fuel. After passage of the Nuclear Waste Policy Act and the policy choices made therein by Congress, there can be no doubt that such general authority does not exist.

Utah Contention A and the Reply reiterate Castle Rock's premise that Congress, in the Nuclear Waste Policy Act ("NWPA"), has developed a comprehensive scheme to address interim storage of spent nuclear fuel. Nowhere in the NWPA does

Congress authorize NRC to license private away-from-reactor ISFSIs. To the contrary, in the NWPA Congress specifically addressed private storage of spent nuclear fuel at reactor sites. See e.g., 42 USC § 10,152 (use of on-site storage at civilian power reactors), § 10,153 (Commission authority license technology for use at the site of civilian power reactors) and § 10,155(b)(1)(B). Congress authorized interim storage of spent nuclear fuel away-from reactors only at federally owned facilities. 42 USC § 10,151(b)(2) ("establishment of a federally owned and operated system for the interim storage of spent nuclear fuel at one or more facilities owned by the Federal Government with not more than 1,900 metric tone of capacity...") See also Id. § 10,155(a) and (h).

Of particular concern to the State is its status as a litigant in this proceeding contrasted with the role Congress ascribed to States for siting, developing and licensing facilities authorized under the NWPA. 42 USC § 10,155(d). Utah Contention A at 6-8 contrasts the State's role under the NWPA, such as the information exchange and cooperative agreements between the federal and state governments, and the State's ability to voice its disapproval to Congress, with its diminished role in an adjudicatory proceeding such as this one. Also, Congress recognized that large, centralized storage facilities would carry with them social and economic costs and provided economic impact assistance to State and local governments for planning, public services and other costs. 42 USC § 10,156(e). See also Id. § 10,173. Furthermore, shipping fuel across the

country to Utah under the PFS proposal is in direct contradiction to the NWPA which directs that transportation of spent fuel be minimized. 42 USC § 10,155(a)(3).

The decision by a private limited liability company to site, construct and operate a national storage facility for spent nuclear fuel on an Indian reservation in Utah creates a special circumstance in defining the scope of Part 72. And the scope of Part 72 is bounded by the statutory authority granted to NRC to license such facilities. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.") Thus, the scope of Part 72 as it applies to NRC's statutory authority is a discrete question that has not been addressed before by the Commission.

The scope of ISFSI licenses issued by NRC to date, range from 2 casks to up to 247 casks at Fort St. Vrain, Colorado.¹ See Casks at Independent Spent Fuel Storage Installations, attached hereto as Exhibit 3. The PFS proposal is vastly different than any other facility licensed by the NRC. It creates a special circumstance in which the Commission should determine whether it has the statutory authority to proceed with the licensing of the proposed PFS facility.

For the reasons stated above, the State requests the Board to certify this matter to the Commission for its determination in accordance with 10 CFR § 2.758(d).

¹ Casks at Fort St. Vrain, which are smaller than those proposed to be used at PFS, will only be stored there until decommissioning is complete.

B. Waste Confidence Rule

The initial 1984 Waste Confidence Decision and 1990 revision thereto, codified at 10 CFR § 51.23, basically state that NRC has generically determined that spent fuel may be stored safely for at least 30 years beyond the term of a reactor's operating license at the reactor basin or either on-site or off-site at an ISFSI; that one permanent repository will be available within the first quarter of the 21st century; that sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor to dispose of spent fuel originating in reactors and generated up to that time; and that in issuing an initial ISFSI license or amendment no discussion of any environmental impact of spent fuel storage is required in any environmental report or environmental impact statement. In the 1990 Review and Final Revision of the Waste Confidence Decision, 55 Fed. Reg. 38,474, the Commission extended review of its Waste Confidence Decision from once every five years to once every ten years. Id. at 38,475. The Commission stated that this change "would not, however, disturb the Commission's original commitment to review its [Waste Confidence] Decision whenever significant and pertinent unexpected events occur." Id.

As Castle Rock has pointed out in its Petition at 18-24, "significant and pertinent unexpected events" have occurred since the 1990 decision. And one of those events is the application by PFS for a 4,000 cask, 40,000 MTU facility located on

Indian trust lands in Utah. The initial ISFSI license term would be for 20 years, plus one 20 year extension. The State pointed out in its Reply to Contention S at 70-71, that it is likely that spent fuel will be stored in Utah beyond the 40 year license and amendment term (i.e. beyond 2040). Assuming PFS is issued a license in 2000 and Yucca Mountain begins to accept fuel for entombment in 2020, by the year 2040 the prognosis for fuel receipt at Yucca Mountain would be about 38,000 MTU. See State's Reply to Contention S at 69-74, which is incorporated by reference into this Response and attached hereto as Exhibit 4. Furthermore, PFS would not be the only facility vying to send fuel to Yucca Mountain. First, 7,000 MTU storage capacity has been set aside at Yucca Mountain for the federal government. Second, interim storage of fuel at a federal facility must, by law, be removed within three years following the date on which a repository or MRS is available for disposal of such fuel. 42 USC § 10,155(e). There is no such linkage for removing spent fuel to Yucca Mountain for a private facility such as that proposed by PFS. Finally, there would be insufficient capacity at Yucca Mountain to timely accommodate all fuel stored at PFS by 2040. Even if Yucca Mountain were on track the premises of the Waste Confidence Rule do not hold up when applied to the huge centralized storage facility proposed by PFS. Therefore, the Waste Confidence Rule should be waived and an exception to NRC's generic determination granted to the extent that the Rule precludes analysis of the environmental impacts of storage of spent fuel; permits PFS to presume spent fuel will

be removed at the end of a 40 year license term; and allows PFS to address and fund decommissioning to the extent that spent fuel will not be stored at the facility beyond a 40 year license term.

A special circumstance, unique to this facility, is that the PFS facility will be located on the Skull Valley Reservation. PFS and the Skull Valley Band of Goshutes have entered into a 25 year lease with an option to extend for an additional 25 years. The lease must be approved in writing by the Bureau of Indian Affairs on behalf of the Secretary of the Interior. 25 USC § 162.5. On May 23, 1997, the BIA conditionally approved the lease between the Band and PFS. See Exh. 15 to State of Utah's Contentions. By statute, the maximum term of the lease shall not exceed 25 years with one additional term not to exceed 25 years. 25 USC § 162.8. Fuel stored on at the PFS ISFSI located on Indian trust lands probably will remain beyond the 50 year lease term and extension (i.e. by 2043). Regardless of NRC's Waste Confidence Rule, it would be illegal under 25 USC § 162.8 to store fuel on the Skull Valley Reservation after 2043. This is a critical issue to be resolved in the EIS for the PFS facility. Use of the Waste Confidence Rule to eliminate this issue from analysis would be a derogation of the federal government's fiduciary responsibility to Indian tribes as well as unsound from an environmental and safety perspective. This is yet another reason why the Waste Confidence Rule is inappropriate in this proceeding.

DATED this 18th day of February, 1998.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Denise Chancellor", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that copies of STATE OF UTAH'S RESPONSE TO CASTLE ROCK LAND & LIVESTOCK, L.C., ET AL'S NON-APPLICATION OR WAIVER OF COMMISSION REGULATIONS, RULES AND GENERAL DETERMINATIONS, were served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 18th day of February, 1998:

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