

POLICY ISSUE NOTATION VOTE

February 1, 2006

SECY-06-0020

FOR: The Commissioners

FROM: Luis A. Reyes
Executive Director for Operations

Karen D. Cyr
General Counsel

SUBJECT: PRIVATE FUEL STORAGE, L.L.C. - THE ADVISORY COUNCIL ON
HISTORIC PRESERVATION'S COMMENT(S) ON TERMINATION OF
CONSULTATION PROCESS

PURPOSE:

To provide the staff's analysis of the Advisory Council on Historic Preservation's (ACHP's) comments provided in response to the staff's letter, dated November 22, 2005. In that letter, the U.S. Nuclear Regulatory Commission (NRC) terminated its participation in the consultation process under Section 106 of the National Historic Preservation Act (NHPA) regarding Private Fuel Storage, L.L.C. (PFS's) application to construct and operate an independent spent fuel storage installation (ISFSI). Also, to inform the Commission that the staff plans to issue a license authorizing PFS's proposed ISFSI in accordance with the Commission's Memorandum and Order, CLI-05-19, dated September 9, 2005, after the Commission has responded to the ACHP's letter, dated January 9, 2006 (Attachment 1).

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BACKGROUND:

The Commission, in CLI-05-19, authorized the 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. In SECY-05-0198, dated October 31, 2005, the staff identified the need to complete certain actions under the provisions of the NHPA and the ACHP's regulations, 36 C.F.R. Part 800, before a license could be issued. Specifically, the Bureau of Land Management (BLM), one of the four cooperating Federal agencies in the Final Environmental Impact Statement (FEIS),¹ as well as in the PFS NHPA consultation process,² declined to implement a Memorandum of Agreement (MOA), the final step of the consultation process, at this time. BLM's decision precluded the MOA from being finalized, thereby preventing the NRC (as well as the other three cooperating Federal agencies), from completing the actions necessary to meet its NHPA obligations.

In SECY-05-0198, the staff recommended that NRC proceed through literal compliance with the ACHP's regulations by terminating the consultation process in accordance with 36 C.F.R. § 800.7. In keeping with the Commission direction in a Staff Requirements Memorandum (SRM), dated November 15, 2005, the staff sent a letter to the ACHP on November 22, 2005. In its SRM, the Commission further directed the staff, upon receipt of the ACHP's comments, to prepare a notation paper relaying the staff's analysis of the comments as well as a recommendation for resolution of any outstanding issues, prior to proceeding with any additional action.

DISCUSSION:

The staff, in a letter from Jack Strosnider, Director of the Office of Nuclear Material Safety and Safeguards, to the ACHP, dated November 22, 2005, described the consultation process and steps which had been taken to comply with the NHPA, the NRC's proposed incorporation of the MOA's draft treatment and discovery plan requirements into an NRC license condition, and the refusal by the Utah State Historic Preservation Officer (SHPO) and BLM to execute the MOA at this time. Further, the staff's letter terminated NRC's participation in the NHPA consultation process and requested the ACHP to provide its comments on such termination in accordance with 36 C.F.R. § 800.7.

ACHP's Comments

The ACHP, in a letter from its Chairman, John L. Nau, III, to Chairman Diaz, dated January 9, 2006, provided the following comments:

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 The BLM, the Bureau of Indian Affairs, the Surface Transportation Board, and the 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.

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.³
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 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.

³ 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.

Staff Analysis of the ACHP's CommentsACHP Comment 1

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.”

The NRC staff has proposed inclusion of 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 (Attachment 2), 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 staff intends 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 of the approach taken by the staff 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 Final Environmental Impact Statement.” Accordingly, the Commission may properly conclude 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, and no further 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 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. Further, 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 action is required with respect to this comment prior to issuance of a license to PFS.

ACHP Comment 3

This comment indicates that the ACHP believes 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.⁴ This presents an entirely hypothetical case, and no further action is required with respect to this comment prior to issuance of a license to PFS (conditioned as described above).

Additional Observations

After providing its comments on the NRC's termination letter, the ACHP acknowledged "the

⁴ 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.

diligent and thorough manner in which your agency has addressed its responsibilities under the National Historic Preservation Act for this undertaking.” The ACHP then reminded the agency that the following procedures should be followed to conclude this matter:

As the head of NRC, you are required to take into account these comments in reaching a final decision on the undertaking. The regulations implementing Section 110(l) of the National Historic Preservation Act direct that the head of the agency document this decision by: (1) preparing a summary with rationale for the decision and evidence of consideration of the ACHP’s comments and providing it to the ACHP prior to approval of the undertaking; (2) providing a copy of the summary to all consulting parties; and (3) notifying the public and making the record available for public inspection.

As noted by the ACHP, these procedural requirements are applicable where a Federal agency terminates the NHPA consultation process under 36 C.F.R. § 800.7. In compliance with these requirements, the staff has prepared a letter to the ACHP which provides a summary of the rationale for a decision to issue a license to PFS, confirms that the NRC has considered the ACHP’s comments in reaching its decision, and reiterates that the NRC will condition the PFS license on compliance with the requirements stated in Section 9.4.2 of the FEIS. The draft letter to ACHP is provided as Attachment 3 for the Commission’s review and approval.

Conclusion

With NRC’s termination of the PFS NHPA consultation process in accordance with 36 C.F.R. § 800.7, and the ACHP’s determination that NRC has met its NHPA obligations, the staff concludes that there are no outstanding issues that preclude the NRC from issuing a license for construction and operation of the proposed PFS Facility, upon compliance with the final administrative tasks outlined by the ACHP in its letter of January 9, 2006.

RECOMMENDATIONS:

That the Commission:

1. Approve Attachment 3, a letter to John Nau, III, Chairman of the ACHP, for signature by the Chairman, summarizing the rationale for this licensing decision and documenting the NRC’s consideration of the ACHP’s comments. Upon transmittal, a copy of this letter will be sent to all consulting parties.
2. Note that upon issuance of Attachment 3, the staff plans to issue the license to PFS in accordance with the Commission’s Memorandum and Order, CLI-05-19.

3. Approve the attached *Federal Register* Notice (Attachment 4), informing the public that the Commission has approved the issuance of a license to PFS for construction and operation of the proposed PFS Facility and of the conclusion of the NHPA process in accordance with the ACHP's letter of January 9, 2006, and making the record available for public inspection in the NRC's ADAMS document collection.

/RA/

Luis A. Reyes
Executive Director
for Operations

/RA/

Karen D. Cyr
General Counsel

Attachments:

1. ACHP Letter dated January 9, 2006
2. PFS FEIS Sect. 9.4.2
3. Draft Letter to John Nau, III, ACHP Chairman
4. Draft Federal Register Notice

3. Approve the attached *Federal Register* Notice (Attachment 4), informing the public that the Commission has approved the issuance of a license to PFS for construction and operation of the proposed PFS Facility and of the conclusion of the NHPA process in accordance with the ACHP's letter of January 9, 2006, and making the record available for public inspection in the NRC's ADAMS document collection.

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C = Without attachment/enclosure E=With attachment/enclosure N=No copy OFFICIAL RECORD COPY