

III Reply to Applicant's and Staff's Response to State's Contentions

REPLY: CONTENTION A

The Applicant asserts that the State in Contention A is impermissibly challenging a Commission rule. Applicant's Answer at 23. This is incorrect. The State in Contention A is challenging the statutory authority of the NRC to license a centralized 4,000 cask away-from-reactor ISFSI. The NRC Staff initially made the same assertion as the Applicant in its December 24, 1997 Response at 7, n. 11, and at 14, but on December 31, 1997 the Staff filed substitutes for pages 7 and 14,¹ deleting any reference to an impermissible challenge to the Commission's regulations. Thus, the Staff does not consider Contention A to be a challenge to the Commission's regulations.

The Applicant, citing Siegel v. AEC, 400 F.2d 778, 783 (D.C. Cir. 1968), argues that the regulatory scheme authorized by the Atomic Energy Act is "virtually unique in the degree to which broad responsibility is reposed in the administering agency" [then the Atomic Energy Commission] to decide how to achieve statutory objectives. Applicant's Answer at 23-24. The Applicant is apparently implying that the NRC now has broad discretion to license any spent fuel storage facility it deems appropriate. That view glosses over the critical distinction between the great deference courts give

¹ See Letter from NRC Staff attaching corrected pages 7 and 14 to its December 24, 1997 Response to Contentions . . . , filed December 31, 1997.

to NRC's "technical" decisions "at the frontiers of science" and "policy choice[s] made by Congress," such as those "embodied in the NWPA." Kelley v. Selin, 42 F.3d 1501, 1521 (6th Cir. 1995).

The language the Applicant cites from Siegel describes the authority of the Atomic Energy Commission (AEC), not that of the NRC. The Atomic Energy Commission had broader statutory authority than does the NRC. In the Energy Reorganization Act of 1974, Congress abolished the AEC, separated its functions, and transferred them to other agencies. 42 U.S.C. §§ 5801(c) and 5814(a)-(c). The AEC's functions were split between the newly created Energy Research & Development Administration (now the Department of Energy) and the newly created Nuclear Regulatory Commission. 42 U.S.C. §§ 5801(b), 5814(c) and 5841(f), respectively. The Applicant has used Siegel's description of AEC authority in 1968 to characterize NRC authority 30 years and major events later.

The "backdrop" for the unique degree of broad responsibility given to the Atomic Energy Commission, as described in Siegel, was that Congress allowed such flexibility under the Atomic Energy Act of 1954 in the hope of fostering the new civilian atomic energy industry. At that time, Congress agreed that "it would be unwise to try to anticipate by law all of the many problems that are certain to arise." Siegel, 400 F.2d at 783.

One unanticipated future problem involved the storage and disposal of spent

nuclear fuel, which was of minor, if any, concern to Congress in the 1960's. Pub. L. No. 97-425, Legislative History, Nuclear Waste Policy Act of 1982, House Report No. 97-491, 1982 U.S.C.C.A.N. (96 Stat. 2201) 3792. Back then, Congress recognized that it could not predict with certainty "the events of 1975 or 1980," and that "many unforeseeable developments may arise in this field [atomic energy] requiring changes in legislation from time to time." Pub. L. No. 88-489, Legislative History, Private Ownership of Special Nuclear Materials Act of 1964, Senate Report No. 1325, 1964 U.S.C.C.A.N. 3113, 3123 (emphasis added). For example, the general recognition that storage of spent nuclear fuel, prior to its ultimate disposal, would be a likely "additional new step in the nuclear fuel cycle" came about only after the deferral of reprocessing of spent fuel in 1977. 45 Fed. Reg. 74,693 (Comment No. 1) (1980). In other words, Congress was not concerned with interim storage of spent fuel when, in the 1950's and 1960's, it provided the Atomic Energy Commission with the broad general authority described in the Siegel case.

Siegel held that since the Atomic Energy Commission's expedited licensing of a nuclear reactor in the 1960's was not in conflict with the Congressional purposes underlying the [Atomic Energy] Act, it was within the AEC's broad authority to realize those purposes. Siegel, 400 F.2d at 783-784. Since then, Congress enacted the Nuclear Waste Policy Act of 1982, which declares the national policy regarding nuclear waste. The broad AEC authority to further the Congress' Atomic Energy Act (AEA)

objective of promoting the civilian commercial nuclear power industry in the 1960s, does not equate with NRC authority to thwart the current Congressional policy on interim storage of spent fuel as expressed in the NWPA, 42 U.S.C. §§ 10151-10157. Moreover, the NWPA does not delegate policy decisions to the NRC. Kelley v. Selin, 42 F.3d 1501, 1521 (6th Cir. 1995).

The Staff in its Response at 8-9, cites various sections of the AEA dealing with authority to license source and byproduct materials, in addition to special nuclear material, as support for authority to license spent fuel under Part 72. However, the NRC's notice of the final Part 72 rule, published at 45 Fed. Reg. 74,693 on Nov. 12, 1980, specifically states that Part 72 was developed to provide a more definitive regulation for spent fuel storage in lieu of the general regulation, Domestic Licensing of Special Nuclear Material, 10 CFR Part 70. The rationale for enacting Part 72 calls into question NRC's claim that its byproduct and source material authority also authorize it to license away-from-reactor ISFSIs. In addition, NRC's reliance on § 53(a) of the AEA, 42 U.S.C. § 2073(a),² for its authority to license private away-from-reactor ISFSIs does not comport with the legislative history of the enactment and amendment of § 53(a).

As enacted, § 53(a) of the AEA, 42 USC § 2073(a), authorized the AEC to license private persons to possess and use, but not own, special nuclear materials,

² The Staff (Response at 7-8) incorrectly cites 42 U.S.C. § 2071 instead of § 2073 for authority to license special nuclear material.

which were then in short supply. By 1964 special nuclear material was no longer scarce and Congress believed that private ownership legislation would enable utilities to negotiate long term supply contracts and encourage long term planning for the development of civilian, commercial nuclear power. Pub. L. No. 88-489, Legislative History, Private Ownership of Special Nuclear Materials Act of 1964, Senate Report No. 1325, 1964 U.S.C.C.A.N. 3,111-13. Thus, in 1967, Congress amended § 53(a) of the AEA, 42 USC § 2073(a), to clarify the AEC's authority to license private ownership, possession and use of special nuclear material. Id. ("Section by Section Analysis"), 1964 U.S.C.C.A.N. at 3125. The NRC is inappropriately trying to use § 53(a) of the AEA to overcome the interim storage policy choices made by Congress in the NWPA.

In disputing Utah's contentions that the NWPA rejects NRC authority to license a private away-from-reactor ISFSI, the Applicant (Answer at 24) confuses the scheme established for a federal MRS, 42 U.S.C. § 10161-10168, with the interim storage program under the NWPA, 42 U.S.C. § 10151-10157. It is the interim storage program, not the MRS program, that reflects Congressional intent on the issue of at-reactor versus away-from-reactor private storage of spent fuel. The MRS program does not address these private storage issues.

Both the Staff (Response at 7) and the Applicant (Answer at 24) argue that the NWPA did not repeal, impinge or limit the NRC's existing authority which they both

presumed has existed under the Atomic Energy Act to license interim storage of spent nuclear fuel at away-from-reactor sites. The Applicant cites Morton v. Mancuri, 417 U.S. 536 (1974) for the proposition that "repeal of statutes by implication are strongly disfavored as a matter of law." Applicant's Answer at 24-25. But by the same token, courts should not presume the existence of rulemaking power (such as for licensing of spent fuel storage in privately owned, away-from-reactor ISFSIs) based solely on the fact that Congress has not expressly withheld such power. American Petroleum Institute v. EPA, 52 F.2d 1113, 1120 (D.C. Cir. 1995); National Mining Association v. Department of Interior, 104 F.3d 691, 695 (D.C. Cir. 1997).

If the NRC already had general licensing authority under the Atomic Energy Act to approve spent fuel storage in private facilities either at or away-from-reactor sites (Staff's Response at 7), then why did Congress in the NWPA's interim storage program bother to specifically authorize private storage of spent nuclear fuel only at reactors (42 U.S.C. § 10155(h))? The more sensible explanation is that § 10155(h) simply expresses a Congressional policy choice to preclude private storage of spent fuel at away-from-reactor facility sites.

Even if the NRC did issue a license for an ISFSI to GE (Morris, Ill.) under Part 72 before the NWPA was enacted (Applicant's Answer at 4), that would not justify continuing to do so after the NWPA was enacted. 42 U.S.C. § 10155 (h). And now that Congress in amending the NWPA has rejected a proposal which would have

expressly authorized the NRC to license away-from-reactor ISFSIs, the NRC's position is even more suspect. See Sec. 207, Private Storage Facilities, of H.R. 1270, Nuclear Waste Policy Act of 1997.

Response to Applicant's Rephrasing of Contention A:

The State objects to the Applicant's rephrasing of Contention A.