

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
PRIVATE FUEL STORAGE, L.L.C.)	Docket No. 72-22-ISFSI
)	
(Independent Spent)	
Fuel Storage Installation))	

NRC STAFF'S BRIEF
IN RESPONSE TO CLI-02-11

Jared K. Heck
Counsel for NRC Staff

May 15, 2002

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
BACKGROUND	1
ARGUMENT	3
A. The Commission Derives its Authority to License Independent Spent Fuel Storage Installations from the Atomic Energy Act.	3
B. The Nuclear Waste Policy Act Does Not Alter the Commission’s Licensing Authority Under the Atomic Energy Act.	6
1. The Nuclear Waste Policy Act Defines the Duties of the Federal Government, not Private Entities, Regarding Storage and Disposal of Spent Nuclear Fuel.	6
2. Nothing in the Text of the Nuclear Waste Policy Act Reveals an Intent to Prohibit Licensing of Privately Owned, Away-From-Reactor ISFSIs.	8
3. Nothing in the Legislative History of the Nuclear Waste Policy Act Reveals an Intent to Prohibit Licensing of Privately Owned, Away-From-Reactor ISFSIs.	11
C. Since the Enactment of the Nuclear Waste Policy Act, the Commission Has Consistently Interpreted its Authority Under the Atomic Energy Act to Include Licensing of Privately Owned, Away-From-Reactor ISFSIs.	16
CONCLUSION	19

TABLE OF AUTHORITIES

FEDERAL DECISIONS

U.S. Supreme Court

<i>Asgrow Seed Co. v. Winterboer</i> , 513 U.S. 179 (1995)	8 to 9
<i>Barnhart v. Sigmon Coal Co., Inc.</i> , 122 S.Ct. 941 (2002)	9, 11
<i>Bryan v. U.S.</i> , 524 U.S. 184 (1998)	13
<i>Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.</i> , 511 U.S. 164 (1994)	10
<i>Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission</i> , 461 U.S. 190 (1983)	4
<i>Salinas v. U.S.</i> , 552 U.S. 52 (1997)	9
<i>South Dakota v. Yankton Sioux Tribe</i> , 522 U.S. 329 (1998)	14
<i>United States v. Craft</i> , 122 S.Ct. 1414 (2002)	10
<i>Williams v. Taylor</i> , 529 U.S. 420 (2000)	8

U.S. Court of Appeals

<i>Jersey Central Power & Light Co. v. Lacey Township</i> , 772 F.2d 1103 (3d Cir. 1985)	4
<i>Illinois v. General Electric Co.</i> , 683 F.2d 206 (7 th Cir. 1982)	4

U.S. District Court

<i>Maine Yankee Atomic Power Co. v. Bosney</i> , 107 F.Supp.2d 47 (D. Maine 2000)	4
---	---

ADMINISTRATIVE DECISIONS

Commission

<i>Private Fuel Storage, L.L.C.</i> (Independent Spent Fuel Storage Installation), CLI-02-11, 55 NRC ___ (2002)	1, 2 to 3
--	-----------

Licensing Board

<i>Private Fuel Storage, L.L.C.</i> (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142 (1998).	1 to 2
--	--------

STATUTES

Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 <i>et seq.</i> (AEA)	2, 3 to 4
Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10101 <i>et seq.</i> (NWPA)	2, 6 to 10, 11, 17

LEGISLATIVE HISTORY

97 Cong. Rec. 28,033-28,041 (1982)	12 to 13
H.R. 3809, 97 th Cong. § 133(b)(2)(d) (1982)	14
H.R. Rep. No. 97-785 (Part I), 97 th Cong. 2d Sess. (1982)	15
Radioactive Waste Legislation: Hearing on H.R. 1993, H.R. 2800, H.R. 2840, H.R. 2881, and H.R. 3809 Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 97 th Cong. 326 (1981)	14
S. 1662, 97 th Cong. § 301 (1982)	15
S. Rep. No. 97-282, 97 th Cong. 1 st Sess. (1989)	13

REGULATIONS

10 C.F.R. § 72.3 (2002)	3, 5
10 C.F.R. § 72.6(c) (2002)	5
10 C.F.R. § 72.24(a) (2002)	5
10 C.F.R. § 72.32(a) (2002)	5
10 C.F.R. Part 72 Subpart E (2002)	18

FEDERAL REGISTER

Criteria and Procedures for Determining the Adequacy of Available Spent Nuclear Fuel Storage Capacity, 50 Fed. Reg. 5548 (1985)	16 to 17
Interim Storage for Greater than Class C Waste, 66 Fed. Reg. 51,823 (2001)	18 to 19
Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste, 45 Fed. Reg. 74,693 (1980)	5, 18
Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste, 51 Fed. Reg. 19,106 (1986)	17 to 18

Removal of 10 C.F.R. Part 53 -- Criteria and Procedures for Determining the Adequacy of Available Spent Nuclear Fuel Storage Capacity, 61 Fed. Reg. 35,935 (1996)	17
Review and Proposed Revision of Waste Confidence Decision, 54 Fed. Reg. 39,767 (1989)	18
Storage of Spent Fuel in an Independent Spent Fuel Storage Installation, 42 Fed. Reg. 46,309 (1978)	5 to 6
Waste Confidence Decision, 49 Fed. Reg. 34,658 (1984)	16
Waste Confidence Decision, 55 Fed. Reg. 38,474 (1990)	18

May 15, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
PRIVATE FUEL STORAGE, L.L.C.)	Docket No. 72-22-ISFSI
)	
(Independent Spent)	
Fuel Storage Installation))	

NRC STAFF'S BRIEF
IN RESPONSE TO CLI-02-11

INTRODUCTION

On April 3, 2002, the Commission issued a Memorandum and Order setting a schedule for the parties in this proceeding to submit briefs on the substantive issue of whether the NRC has authority under federal law to license a privately-owned, away-from-reactor spent fuel storage facility. *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-02-11, slip. op. at 1-2, 55 NRC __ (2002) (Memorandum and Order). The Commission's Memorandum and Order was in response to the State of Utah's Suggestion of Lack of Jurisdiction (Suggestion) and Petition to Institute Rulemaking and to Stay Licensing Proceeding (Rulemaking Petition), both filed on February 11, 2002. For the reasons set forth below, the Staff of the Nuclear Regulatory Commission (Staff) submits that the Commission has the authority under federal law to license privately owned, away-from-reactor spent fuel storage facilities.

BACKGROUND

On April 22, 1998, the Atomic Safety and Licensing Board (Board) designated to rule on contentions in this proceeding rejected as inadmissible Contention Utah A, in which the State of Utah asserted that the Commission lacked the authority "to issue a license to a private entity for a 4,000 cask, away-from-reactor, centralized, spent nuclear fuel storage facility." *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-7, 47 NRC 142, 183 (1998).

As grounds for denial of the contention, the Board held that the contention and its bases “impermissibly challenge the agency’s existing regulatory provisions or rulemaking-associated generic determinations.” *Id.* Utah did not seek interlocutory review of the Board’s ruling on the matter.

Since the Board’s initial ruling on Contention Utah A, the parties have engaged in extensive litigation before both the Board and the Commission. On February 11, 2002, nearly four and a half years after this proceeding began, Utah filed two documents which are related to the subjects addressed in this brief: (1) Utah’s Suggestion that the Commission lacks jurisdiction over the license application submitted by Private Fuel Storage, L.L.C. (PFS) and its request that the Commission dismiss the application, and (2) Utah’s Rulemaking Petition to amend 10 C.F.R. Part 72 to provide that the regulations therein do not allow licensing of privately owned, away-from-reactor spent fuel storage facilities.¹ Utah argues in both documents that the Nuclear Waste Policy Act of 1982, as amended, (NWPA) deprives the Commission of jurisdiction over the license application submitted by PFS to construct and operate an independent spent fuel storage installation (ISFSI) on the Reservation of the Skull Valley Band of Goshute Indians. Specifically, Utah argues that the NWPA establishes a comprehensive national policy regarding the storage and disposal of spent nuclear fuel that expressly prohibits the licensing or construction of privately owned, away-from-reactor spent fuel storage facilities, thereby altering the Commission’s pre-NWPA licensing authority under the Atomic Energy Act of 1954, as amended (AEA). The Staff filed its response to Utah’s Suggestion on February 26, 2002.

On April 3, 2002, the Commission denied Utah’s motion to stay the PFS licensing proceeding. Memorandum and Order at 1. The Commission set a schedule for the filing of the

¹Because the Suggestion incorporates by reference the arguments contained in the Rulemaking Petition and appends the Rulemaking Petition as an exhibit, this brief cites to the Rulemaking Petition directly where necessary.

instant brief and deferred its decision on Utah's Rulemaking Petition until the "threshold legal question" of the Commission's authority to license a privately owned, away-from-reactor ISFSI has been decided. *Id.* at 2, 6-7. In response to the Commission's April 3, 2002, Memorandum and Order, the Staff submits this brief.

ARGUMENT

A. The Commission Derives its Authority to License Independent Spent Fuel Storage Installations from the Atomic Energy Act

In its Rulemaking Petition, Utah implies that the AEA does not authorize the Commission to license and regulate the storage of spent nuclear fuel: "[T]he NRC premised its Part 72 regulations, including the Commission's licensing authority specified in those regulations, on the general grant of licensing authority over the use and possession of nuclear materials appearing in the venerable Atomic Energy Act of 1954, 42 U.S.C. 2011, *et seq.* ("the AEA") -- even though the AEA then made no reference to [spent nuclear fuel] storage." Rulemaking Petition at 3. This argument ignores the basic scheme and structure of nuclear materials licensing envisioned by the AEA, however. The lack of specific language in the AEA directing the Commission to license spent fuel storage facilities in no way limits the Commission's authority to do so, given that the AEA authorizes the Commission to regulate the constituent materials of spent nuclear fuel.

The AEA authorizes the Commission to license and regulate the possession, use, and transfer of source, byproduct, and special nuclear materials as constituent materials regardless of their aggregate form. See AEA §§ 53, 62, 63, 81, 161(b), 42 U.S.C. §§ 2073, 2092, 2093, 2111, 2201(b). The AEA defines these materials as including uranium, thorium, plutonium, and "any radioactive material. . . yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material." AEA § 11(e)(1), (z), (aa), 42 U.S.C. § 2014(e)(1), (z), (aa). Source, byproduct, and special nuclear material can all be found in spent nuclear fuel. 10 C.F.R. § 72.3. Because the constituents of spent nuclear fuel include source,

byproduct, and special nuclear materials, the Commission has the authority under the AEA to regulate their possession and use, including storage in an ISFSI. See AEA § 161(b), (i)(3), 42 U.S.C. § 2201(b), (i)(3).

Several courts have recognized the Commission's authority under the AEA to license and regulate the storage of spent nuclear fuel. The Supreme Court has held that the AEA gave the Commission "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials." *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 207 (1983). Citing *Pacific Gas & Electric*, the Third Circuit noted, "This jurisdiction includes, thus, the authority to regulate the shipment and storage of radioactive materials." *Jersey Central Power & Light Co. v. Lacey Township*, 772 F.2d 1103, 1111 (3d Cir. 1985). In a recent case involving a reactor licensee's challenge to a state siting permit requirement prior to construction of an ISFSI, the court noted that "the NRC unquestionably retains full regulatory authority over the radiological health and safety aspects of spent fuel storage," holding that the state permit requirement was preempted under the AEA. *Maine Yankee Atomic Power Co. v. Bosney*, 107 F.Supp.2d 47, 53 (D. Me. 2000). In *Illinois v. General Electric Co.*, 683 F.2d 206 (7th Cir. 1982), the Court of Appeals considered whether a state law prohibiting the storage and transportation of spent nuclear fuel to a privately owned, away-from-reactor ISFSI was preempted by the Atomic Energy Act. In holding that the state law was preempted, the Court stated:

The Atomic Energy Act sets up a comprehensive scheme of federal regulation of atomic energy, administered by the Nuclear Regulatory Commission. The Act does not refer explicitly to spent nuclear fuel, but it does refer to the constituents of that fuel, and the state does not, and could not, question the Commission's authority to regulate the storage of spent nuclear fuel.

Illinois v. General Electric Co., 683 F.2d at 214-15 (internal citations omitted).

The Commission implemented its AEA licensing authority regarding spent fuel storage by promulgating 10 C.F.R. Part 72 in 1980. Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste, 45 Fed. Reg. 74,693 (1980). These regulations have specific requirements for away-from-reactor ISFSIs, which may be owned and operated by private entities. See 10 C.F.R. §§ 72.3, 72.6(c). For example, 10 C.F.R. § 72.32(a) provides that each application for an ISFSI licensed under Part 72 which is “[n]ot located on the site of a nuclear power reactor” be accompanied by an emergency plan. In addition, 10 C.F.R. § 72.24(a), which sets forth the required contents of a Part 72 license application, provides:

If the proposed ISFSI or MRS [monitored retrievable storage facility] is to be located on the site of a nuclear power plant or other licensed facility, the potential interactions between the ISFSI or MRS and such other facility-- including shared common utilities and services -- must be evaluated.

This language necessarily implies that an ISFSI may be located away from a nuclear power plant or other licensed facility, in which case “the potential interactions between the ISFSI. . . and such other facility” need not be evaluated in the license application. 10 C.F.R. § 72.24(a).

Nothing in the text of Part 72 restricts a private license applicant from siting a proposed ISFSI at an away-from-reactor site. The Commission’s Statement of Considerations supporting the promulgation of 10 C.F.R. Part 72 makes clear that Part 72 licensing was intended to apply to both at-reactor and away-from-reactor ISFSIs:

The NRC is not aware of any compelling reasons generally favoring either at-reactor or away-from-reactor siting of an ISFSI. There are many factors to be considered in each situation and in the licensing actions involved; accordingly, the rule permits either.

. . .

An ISFSI may be a free-standing, away-from reactor, fully independent type of facility or it may be located on the site of an existing facility such as a nuclear power plant. . . . [T]he rule is applicable to either type of location. . . .

45 Fed. Reg. at 74,696, 74,698. The Commission made consistent statements in the proposed rule. See Storage of Spent Fuel in an Independent Spent Fuel Storage Installation, 42 Fed. Reg.

46,309, at 46,309, 46,310 (1978). In sum, the Commission has the authority under the AEA to license privately owned, away-from-reactor ISFSIs, and the text and Statement of Considerations of 10 C.F.R. Part 72 clearly contemplate such licensing.

B. The Nuclear Waste Policy Act Does Not Alter the Commission's Licensing Authority Under the Atomic Energy Act

1. The Nuclear Waste Policy Act Defines the Duties of the Federal Government, not Private Entities, Regarding Storage and Disposal of Spent Nuclear Fuel

The NWPA was enacted in response to a growing need on behalf of both industry and the public for spent fuel storage and disposal solutions. See NWPA § 111(a), 42 U.S.C. § 10131(a). Its overarching purpose is to define the responsibilities of the Federal Government with respect to the storage and disposal of spent nuclear fuel and high level waste.²

Subtitle B of the NWPA sets forth the federal government's responsibilities regarding the interim storage of spent nuclear fuel. See NWPA §§ 131-137, 42 U.S.C. §§ 10151-10157. Each section under Subtitle B is addressed to agencies of the federal government and directs those agencies to develop and implement a coherent federal policy with regard to interim spent fuel storage. *Id.* Section 132 directs the Department of Energy (DOE) and the NRC to take actions to expedite the effective use of existing and additional at-reactor storage. Section 133 directs NRC to establish, by rule, procedures for the licensing of storage technology to be used at existing reactor sites. Section 134 sets forth streamlined hearing procedures for NRC to follow in the licensing of expanded at-reactor storage capacity. Section 135 directs DOE to assist private entities in expanding at-reactor interim storage and authorizes DOE to provide limited interim spent fuel storage capacity to private entities under certain circumstances. Section 136 directs DOE to charge fees for federal interim storage that will be used to establish an Interim Storage Fund.

²Because Utah's Suggestion and Rulemaking Petition primarily address private, away-from-reactor storage of spent fuel and do not challenge the Commission's authority to license a monitored retrievable storage facility or permanent geologic repository for spent nuclear fuel, issues associated with such facilities under NWPA Subtitles A and C are not addressed in this brief.

Section 137 directs DOE to use private contractors for the transportation of spent nuclear fuel under the NWPA. Nothing in Subtitle B prohibits the Commission from licensing privately owned, away-from-reactor ISFSIs.

Similarly, nothing in Subtitle B of the NWPA imposes affirmative duties upon private owners of spent nuclear fuel that would suggest Congress intended to prohibit the licensing of privately owned, away-from-reactor spent fuel storage facilities. The only responsibility that private owners of spent nuclear fuel may have under the NWPA is to exhaust reasonable, practical, at-reactor storage options before seeking to enter into a contract with DOE for federal interim storage of spent nuclear fuel. These requirements are set forth in NWPA section 135(b), which provides that DOE may only enter into a contract to take title to any privately owned or generated spent nuclear fuel if the Commission first determines that:

(A) adequate storage capacity to ensure the continued orderly operation of the civilian nuclear power reactor at which such spent nuclear fuel is generated cannot reasonably be provided by the person owning and operating such reactor at such site, or at the site of any other civilian nuclear power reactor operated by such person, and such capacity cannot be made available in a timely manner through any method describe in subparagraph (B); and

(B) such person is diligently pursuing licensed alternatives to the use of Federal storage capacity for the storage of spent nuclear fuel expected to be generated by such person in the future, including--

(i) expansion of storage facilities at the site of any civilian nuclear power reactor operated by such person;

(ii) construction of new or additional storage facilities at the site of any civilian nuclear power reactor operated by such person;

(iii) acquisition of modular or mobile spent nuclear fuel storage equipment, including spent nuclear fuel storage casks, for use at the site of any civilian nuclear power reactor operated by such person; and

(iv) transshipment to another civilian nuclear power reactor owned by such person.

42 U.S.C. § 10155(b). Because section 135(b) is couched in terms of the Commission's duties, it is not clear that it imposes any affirmative duties upon private owners and generators of spent nuclear fuel regarding interim storage. At most, section 135(b) sets forth the criteria the Commission must consider prior to authorizing a private entity's entry into a contract with DOE for federal interim spent fuel storage. This reading of section 135(b) is consistent with the rest of the NWPAA, which is aimed at defining the federal government's duties regarding spent fuel storage and disposal.

2. Nothing in the Text of the Nuclear Waste Policy Act Reveals an Intent to Prohibit Licensing of Privately Owned, Away-From-Reactor ISFSIs

Although the NWPAA does express a general preference for federal support of at-reactor interim storage solutions for high-level radioactive waste and spent nuclear fuel, see NWPAA §§ 131(a)(1), 132, 133, 135, 42 U.S.C. §§ 10151(a)(1), 10152, 10153, 10155, nothing in Subtitle B expressly prohibits privately owned, away-from-reactor storage of spent nuclear fuel. Nevertheless, Utah argues in its Rulemaking Petition that the NWPAA "expressly prohibits away-from-reactor storage of [spent nuclear fuel] at privately owned and operated storage facilities." Rulemaking Petition at 5. In support of this argument, Utah relies primarily on NWPAA section 135(h), which provides:

Notwithstanding any other provision of law, nothing in this Act shall be construed to encourage, authorize, or require the private or Federal use, purchase, lease, or other acquisition of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government on the date of the enactment of this Act.

42 U.S.C. § 10155(h). According to Utah, "This language is an express disallowance of any away-from-reactor storage other than that provided for in the NWPAA." Rulemaking Petition at 10.

The terms contained in section 135(h) must be read using their ordinary, contemporary, common meaning, given that Congress has not specifically defined the terms or otherwise indicated that they are to bear special import. See *Williams v. Taylor*, 529 U.S. 420, 431 (2000);

Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995). If the language of section 135(h) is unambiguous and the statutory scheme is coherent and consistent, the inquiry into its meaning ceases. See *Barnhart v. Sigmon Coal Co., Inc.*, 122 S.Ct. 941, 950 (2002). A statute can be unambiguous without addressing every interpretive theory offered. See *Salinas v. U.S.*, 552 U.S. 52, 60 (1997). With these principles in mind, a plain reading of section 135(h) reveals the error of Utah's textual argument. First, section 135(h) is limited in its operation to "this Act," meaning that the NWPA does not limit the Commission's authority under other statutes (e.g., the AEA) to license privately owned, away-from-reactor spent fuel storage facilities. 42 U.S.C. § 10155(h). Secondly, the language of section 135(h) is neither prescriptive nor proscriptive, it is facially neutral. While the cited provision clearly does not "authorize" the private use, purchase, lease, or other acquisition of away-from-reactor spent fuel storage facilities, it does not expressly prohibit it; no words of prohibition are used at all in section 135(h). Finally, a plain reading of section 135(h) as neither allowing nor disallowing privately owned, away-from-reactor spent fuel storage fits coherently in the overall scheme of the NWPA, which is consistently aimed at defining the federal government's duties regarding spent fuel storage and disposal.

In an effort to bolster its textual argument, Utah strains the language of the NWPA to argue that its overall object and policy is to establish "a comprehensive, detailed, and national nuclear waste management system, intended to prohibit away-from-reactor storage of [spent nuclear fuel] other than as provided in the NWPA." Rulemaking Petition at 13. In essence, Utah argues that wherever Congress could have mentioned privately owned, away-from-reactor storage but did not, Congress intended to prohibit such storage. For example, Utah notes that NWPA section 133 directs NRC to establish procedures for the licensing of new technology "for use at the site of any civilian nuclear power reactor," without mentioning privately owned, away-from-reactor storage. 42 U.S.C. § 10153. Utah argues that the reason section 133 does not also direct NRC to establish

licensing procedures for private away-from-reactor licensing is because “such storage was not an option under the national waste management system created by the NWPA.” Rulemaking Petition at 18. Similar arguments are made regarding NWPA sections 132, 134, and 135. *Id.* at 18-20. Regarding the restrictions and limitations placed upon DOE’s ability to provide federal interim storage of spent nuclear fuel,³ Utah argues, “It strains credulity to suggest that the restrictions in Subtitle B only express national policy with respect to the provision of away-from-reactor storage at already established federal facilities and that Congress left reactor owners free to develop their own away-from-reactor storage facilities, at whatever sites they chose, with whatever storage capacities they wanted, with storage for however long private interests might dictate -- subject only to the regulations of the NRC.” *Id.* at 22.

In its struggle to flesh out this so-called “Big Anomaly,” see *id.*, Utah engages in substantial speculation to explain why Congress did not squarely address privately owned, away-from-reactor spent fuel storage in the NWPA. However, as the Supreme Court has noted, “congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction. . . .” *United States v. Craft*, 122 S.Ct. 1414, 1425 (2002); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). Congress may well have chosen not to impose requirements on privately owned, away-from-reactor spent fuel storage facilities because a licensing scheme for such facilities already existed under the AEA and 10 C.F.R. Part 72. An equally likely, and complimentary explanation for congressional silence in this regard is that the NWPA simply does not prescribe or proscribe any particular course of action

³ The following are some examples of restrictions and limitations placed on DOE under the NWPA: DOE may accept no more than 1,900 metric tons of spent nuclear fuel from civilian sources for federal interim storage; DOE must involve affected States and Indian Tribes in any decision to use an established federal facility for interim storage of spent nuclear fuel; DOE must pay impact assistance to appropriate State or local governments impacted by the use of federal facilities for interim storage. See NWPA §§ 135, 136(e), 42 U.S.C. §§ 10155, 10156(e).

for private entities seeking solutions to their waste storage problems.⁴ Regarding special limitations imposed on DOE's ability to provide away-from-reactor storage, the "Big Anomaly" is not really an anomaly at all-- NWPA section 135(a)(1)(A)(i) provides that away-from-reactor storage provided by DOE is not subject to NRC licensing authority (unlike privately owned, away-from-reactor ISFSIs). 42 U.S.C. § 10155(a)(1)(A)(i). Therefore, Congress needed to spell out special requirements for DOE facilities in the text of the NWPA itself.

In summary, while the NWPA expresses a preference for federal support of at-reactor storage of spent nuclear fuel during the time a permanent geologic repository is being developed, the text of the NWPA is clear in its meaning and application and does nothing to alter the Commission's pre-existing licensing authority under the AEA. The overall scheme of the NWPA is designed to impose duties and responsibilities regarding the storage and disposal of spent fuel on agencies of the federal government, not private entities. The ability of private entities to construct, or of the Commission to license, privately owned, away-from-reactor spent fuel storage facilities are simply not matters with which the NWPA is concerned. Utah may speculate endlessly as to why Congress chose not to address such matters in the NWPA, however, its arguments and conclusions are unpersuasive in the face of unambiguous statutory text.

3. Nothing in the Legislative History of the Nuclear Waste Policy Act Reveals an Intent to Prohibit Licensing of Privately Owned, Away-From-Reactor ISFSIs

Because the language of the NWPA has a plain and unambiguous meaning, resort to the legislative history to determine the intent of Congress is unnecessary. *See Barnhart*, 122 S.Ct. at 950. Nevertheless, recognizing the weakness of its textual argument, Utah mines the legislative history of section 135(h) in an attempt to show that Congress intended to prohibit privately owned, away-from-reactor ISFSIs. Rulemaking Petition at 10-15. Utah first refers to an amendment

⁴ Such a view is consistent with statements in the legislative history by those members of Congress concerned with the federal government bailing out the owners and generators of nuclear waste from their storage problems. These statements are further discussed below.

offered by Representative Lundine during the House debates on the NWPA that was designed to eliminate the Federal interim storage program under section 135. Rulemaking Petition at 10-11.

In Mr. Lundine's own words, his concerns with section 135 were threefold:

First, too great a Federal involvement in interim storage of utility spent fuel is likely to detract from efforts to development of a permanent repository program. Development of permanent repositories must be our foremost goal.

Second, reliance on centralized Federal storage of utility spent fuel will lead to increased transportation of radioactive materials over our highways.

Third, I believe if a direct Federal role in storage of utility spent fuel is begun under this bill, it will really represent just the nose of the camel under the tent. In future years, once the program is established, we will undoubtedly see requests to increase the metric ton allotment of Federal storage. Once this Federal program is begun the inclination on the part of the utilities will be to avoid taking initiative to solve their own problems because they will be able to count on the feds coming to their rescue.

97 Cong. Rec. 28,033 (1982). Mr. Lundine's opening remarks suggest that the federal government should not overlook its primary responsibility under the NWPA of developing permanent disposal options, and that it should not bail out the generators and owners of spent nuclear fuel from their waste storage problems. The concern that the federal government should not bail out the utilities is a pervasive theme among supporters of Mr. Lundine's amendment. Representative Weiss, a supporter of the amendment, stated, "The nuclear industry has been promoting a Federal [away-from-reactor] program so that they will be absolved of the responsibility of storing spent nuclear fuel. But it is their responsibility, not that of the taxpayers. . ." *Id.* at 28,034. Representative Markey, another supporter of the amendment, argued, "It is not the job of the Federal Government to bail out the private sector. It is not our job to put together a program that ought to be put together by the private sector or the self-help program for a problem which the utilities have created and for which they have the facilities and the capacity to deal with themselves." *Id.* at 28,037. While Mr. Markey, Mr. Weiss, and Mr. Lundine also voiced their concerns about the risks posed by transporting spent nuclear fuel to federal away-from-reactor storage facilities, the issue of

private away-from-reactor storage was not squarely addressed in the House debates. In any event, Mr. Lundine's amendment, which he said would eliminate "congressional intent to establish an [away-from-reactor] program at any site," failed by a vote of 308 to 84. *Id.* at 28041.

Recognizing that the statements of opponents to section 135 are not persuasive evidence of congressional intent, see *Bryan v. U.S.*, 524 U.S. 184, 196 (1998), Utah also relies upon comments of one of the NWPA's supporters, Representative Broyhill, to support its argument that NWPA section 135(h) was intended to prohibit privately owned, away-from-reactor spent fuel storage. Mr. Broyhill's remarks, which came at the conclusion of the debate, follow in their entirety:

Mr. Chairman, I would point out to the Members that the last-resort interim storage program is limited to existing Federal facilities, and those facilities which have undergone a public health and safety review by NRC. And I would also say that we have special statutory language in section 135, which [Rep. Lundine] would now have us strike, that would exclude the use of private away-from-reactor facilities for the storage of spent fuel. We specifically put this language in here to take care of the problem that he and others have talked about; that is, the concerns they have expressed as [to] the possible use of privately owned facilities in their particular districts. *And he now wants to strike the language that we put in the bill for the express purpose of saying that there will be no funds used for the private facilities.*

Id. at 28,040 (emphasis added). Utah omits the italicized language when citing Mr. Broyhill's remarks in its Rulemaking Petition at page 12, leaving the impression that section 135(h) was intended as a ban on privately owned away-from-reactor storage facilities. To the contrary, Mr. Broyhill's remarks reveal that section 135(h) was intended to prohibit the expenditure of federal funds in support of privately owned, away-from-reactor storage facilities.

Other portions of the legislative history reveal that Congress was fully aware of the Commission's regulations for the licensing of privately owned, away-from-reactor ISFSIs under 10 C.F.R. Part 72 when it enacted the NWPA. The Chairman of the NRC testified in hearings before the Senate regarding promulgation of Part 72, noting that the agency was "ready and able to take prompt action for any licensing actions relating to interim spent fuel storage." S. Rep. No. 97-282, 97th Cong. 1st Sess. at 44 (1989) (statement of Chairman Pallidino). Similarly, the

Executive Director for Operations, William J. Dircks, testified before the House regarding the scope of Part 72:

The Commission has stated with the issuance of its regulation, 10 C.F.R. Part 72, which provides the licensing criteria for independent spent fuel storage installations, that there are no compelling safety or environmental reasons generally favoring either reactor sites or away from reactor sites. Thus, Part 72 establishes the licensing framework for such storage either at reactor sites or away from reactors using either wet or dry storage technologies.

Radioactive Waste Legislation: Hearing on H.R. 1993, H.R. 2800, H.R. 2840, H.R. 2881, and H.R. 3809 Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 97th Cong. 326 (1981) (statement of William J. Dircks, Executive Director for Operations, U.S. Nuclear Regulatory Commission). Having actual knowledge that NRC had recently completed a rulemaking that specifically authorized and contemplated the licensing of privately owned, away-from-reactor spent fuel storage, Congress could have prohibited such licensing in express terms, were that its intent with the NWPA. Even if no direct evidence existed that members of Congress knew of the Commission's licensing authority under the AEA when enacting the NWPA, Congress is still presumed to have legislated with full knowledge of pre-existing federal law. See *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 350 (1998). As discussed above, no express prohibition on private, away-from-reactor storage facilities exists in the NWPA, suggesting Congress did not intend to alter the licensing scheme for such facilities established under the AEA and 10 C.F.R. Part 72.

Careful consideration of early versions of the NWPA in the House and the version of the NWPA that passed the Senate further suggest that Congress never intended to prohibit private, away-from-reactor storage. Early House versions of the bill included among the criteria for entry into contracts for federal interim storage a finding by the Commission that private, away-from-reactor storage capacity was unavailable. See H.R. 3809, 97th Cong. § 133(b)(2)(d) (1982).

Subsequent drafts deleted this showing from the criteria for such contracts, as explained in H.R. Rep. No. 97-785 (Part I), 97th Cong. 2d Sess. (1982):

Another alternative for additional storage capacity is the utilization of a large capacity centralized storage facility, sometimes referred to as an away-from-reactor (AFR) facility, because it would not be located at the site of any of the reactors using it. . . . The Committee bill does not require that storage capacity at a private AFR be exhausted or unavailable before a utility would be eligible for storage capacity provided by the Secretary.

This statement indicates that deletion of private, away-from-reactor storage from the list of eligibility criteria contained in NWPA section 135(b) was not intended as an implicit prohibition on such facilities, but rather as the removal of one obstacle faced by utilities seeking Federal interim storage. In addition, the Senate version of the NWPA, which passed on April 29, 1982, found that “the persons owning and operating nuclear powerplants have the primary responsibility for providing interim storage of spent fuel from such powerplants” by, among other methods, “the use of available privately owned and operated offsite storage facilities where practical.” S. 1662, 97th Cong. § 301 (1982). This language suggests that the Senate contemplated that private entities might pursue away-from-reactor storage options.⁵

In summary, given the unambiguous meaning and coherence of the statutory text, resort to the legislative history of the NWPA in this case is unnecessary. In any event, the legislative history indicates that Congress was aware of the option for private, away-from-reactor spent fuel storage under the AEA and did nothing to prohibit this storage option in the statutory text. Nothing in the legislative history suggests that Congress intended to alter the Commission’s pre-existing authority to license private, away-from-reactor spent fuel storage facilities under the AEA.

⁵ S. 1662 was never enacted into law; the Conference Committee ultimately considered H.R. 3809, which was eventually enacted as the NWPA.

C. Since the Enactment of the Nuclear Waste Policy Act, the Commission Has Consistently Interpreted its Authority Under the Atomic Energy Act to Include Licensing of Privately Owned, Away-From-Reactor ISFSIs

The Commission has on several occasions since the enactment of the NWPA in 1982 revisited the issue of spent fuel storage and disposal, and has consistently maintained that it possesses the authority under the AEA to license privately owned, away-from-reactor storage. In 1984, the Commission issued by final rule its Waste Confidence Decision, which included the following findings:

Finding 4: The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin, or at either onsite or offsite independent spent fuel storage installations.

Finding 5: The Commission finds reasonable assurance that safe independent onsite spent fuel storage or offsite spent fuel storage will be made available if such storage capacity is needed.

Waste Confidence Decision, 49 Fed. Reg. 34,658, at 34,680-81, 34,686 (1984). In explaining Finding 5, the Commission stated, “The technology for independent spent fuel storage installations as discussed under the fourth Commission finding is available and demonstrated. The regulations and licensing procedures are in place.” *Id.* at 34,686. The Commission also noted that “[a]n implied commitment by industry to implement [away-from-reactor] storage if necessary using one of the several feasible spent fuel storage alternatives is evident. . . . [B]ased upon the foregoing, the Commission has, then, reasonable assurance that safe independent onsite or offsite spent fuel storage will be available if needed.” *Id.* These statements by the Commission indicate its expectation that privately owned, away-from-reactor spent fuel storage remained a viable legal option under the AEA even after the enactment of the NWPA.

One year after issuing its Waste Confidence Decision, the Commission promulgated 10 C.F.R. Part 53, Criteria and Procedures for Determining the Adequacy of Available Spent

Nuclear Fuel Storage Capacity.⁶ See 50 Fed. Reg. 5548 (1985). Part 53 was designed to implement NWSA section 135(b) and (g), which set forth criteria the Commission must use to determine whether private entities qualify for entry into a federal contract for the interim storage of spent fuel. *Id.* at 5548; See 42 U.S.C. § 10155(b), (g). Responding to comments that the Commission should give preference to on-site storage alternatives in making its determination, the Commission stated:

The Commission does not have any authority under Subtitle B of the Nuclear Waste Policy Act to establish priorities for the pursuit of spent fuel storage alternatives in the context of a Part 53 determination, as recommended by the public interest group commenters. The authority provided by section 135(b) of the Act requires the Commission to determine the feasibility of a utility's implementing each of a broad range of alternatives. If the implementation of one or more alternatives is feasible, the utility is not eligible to participate in the Federal interim storage program. . . . Thus, any preference expressed in the Act for on-site storage does not apply in the context of a Part 53 determination.

Id. at 5557. This statement suggests that the Commission expected private entities to pursue all reasonably feasible spent fuel storage alternatives, including both at-reactor and away-from-reactor options, before seeking a federal contract for interim storage.

In 1986, the Commission proposed to amend 10 C.F.R Part 72 in order to implement Subtitle C of the NWSA, which requires that monitored retrievable storage facilities (MRS) for spent nuclear fuel be subject to licensing by the NRC. Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste, 51 Fed. Reg. 19,106 (1986). In the proposed rule, the Commission noted:

The NWSA sets forth specific siting limitations for a Federally owned ISFSI and MRS. Section 72.75 of the proposed rule accommodates these requirements. The limitations are derived from paragraphs 114(d), 135(a)(2), and 141(g) of the NWSA.

⁶ Part 53 was repealed in 1996 because the statutory timeframe for private entities to request entry into a federal contract for interim storage of spent nuclear fuel expired on January 1, 1990. Removal of 10 C.F.R. Part 53 -- Criteria and Procedures for Determining the Adequacy of Available Spent Nuclear Fuel Storage Capacity, 61 Fed. Reg. 35,935 (1996).

Id. at 19,108. Significantly, the Commission did not interpret the siting limitations imposed by the NWPA to preclude private, away-from-reactor storage of spent nuclear fuel. *Id.* Nor did the final rule add any siting limitations that would alter the Commission's previous position that "an ISFSI may be a free-standing, away-from reactor, fully independent type of facility or it may be located on the site of an existing facility such as a nuclear power plant. . ." 45 Fed. Reg. at 74,698; See 10 C.F.R. Part 72 Subpart E. Had the Commission interpreted the NWPA to preclude siting of a privately owned, away-from-reactor ISFSI, it would have said so when it amended Part 72 to include the siting limitations imposed on MRSs.

In 1989, the Commission again stated its "confidence in the safety of extended spent fuel storage, either at the reactor or at independent spent fuel storage installations." Review and Proposed Revision of Waste Confidence Decision, 54 Fed. Reg. 39,767 at 39,770 (1989). The Commission noted, "If any offsite storage capacity is required, utilities may make application for a license to store spent fuel at a new site," and "The industry has made a general commitment to provide storage capacity, which could include away-from-reactor (AFR) storage capacity." *Id.* at 39,796, 39,797. The Commission reiterated these findings in its Waste Confidence Decision in 1990. 55 Fed. Reg. 38,474 at 38,513-14 (1990).

The Commission's most recent statement regarding away-from-reactor ISFSIs came in response to a comment by the State of Utah regarding the Commission's proposed rule, Interim Storage for Greater than Class C (GTCC) Waste. Portions of Utah's comment follow:

The State of Utah is greatly concerned, and adamantly opposes, the storage of GTCC waste at away-from-reactor ISFSIs, including something such as the proposed Private Fuel Storage facility for spent fuel. The commenter believes that there is the potential that most of the nation's spent nuclear fuel and GTCC waste could be shipped to Utah and that , once there, it will never leave the State.

. . .

If the proposed Private Fuel Storage ISFSI on the Skull Valley Goshute Indian reservation in Utah becomes the prime location for GTCC waste storage, the proposed rule would permit the mass movement of GTCC waste across the country.

66 Fed. Reg. 51,823, at 51,834-35 (2001). In response, the Commission stated, "Issues associated with an away-from-reactor ISFSI can appropriately be addressed in a specific licensing action concerning such a facility," implicitly asserting its authority under the AEA to license away-from-reactor ISFSIs. *Id.* at 51,835.

CONCLUSION

The Commission has the authority under the AEA to license privately owned, away-from-reactor spent fuel storage facilities. Nothing in the text or legislative history of the NWPA suggests that Congress intended to alter this authority when it enacted the NWPA, which is primarily concerned with the responsibilities and duties of federal agencies with respect to spent fuel storage and disposal. Since the NWPA was enacted, the Commission has repeatedly and consistently maintained its authority to license privately owned, away-from-reactor ISFSIs. Therefore, the Commission should conclude it has the legal authority to license privately owned, away-from-reactor spent fuel storage facilities.

Respectfully Submitted,

/RA/

Jared K. Heck
Counsel for NRC Staff

Dated at Rockville, Maryland
this 15th day of May, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
PRIVATE FUEL STORAGE L.L.C.)	Docket No. 72-22-ISFSI
)	
(Independent Spent)	
Fuel Storage Installation))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN RESPONSE TO CLI-02-11" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 15TH day of May, 2002:

Michael C. Farrar, Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to MCF@NRC.GOV)

Office of the Secretary*
ATTN: Rulemakings and Adjudications
Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copies to SECY@NRC.GOV
and HEARINGDOCKET@NRC.GOV)

Dr. Jerry R. Kline*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to JRK2@NRC.GOV)

Office of the Commission Appellate
Adjudication
Mail Stop: 16-C-1 OWFN
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Peter S. Lam*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to PSL@NRC.GOV)

James M. Cutchin, V*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail to JMC3@NRC.GOV)

Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Jay E. Silberg, Esq.**
Ernest Blake, Esq.
Paul A. Gaukler, Esq.
Sean Barnett, Esq.
Shaw Pittman
2300 N Street, N.W.
Washington, DC 20037-8007
(E-mail copy to jay_silberg,
paul_gaukler, sean_barnett, and
ernest_blake@shawpittman.com)

Tim Vollmann, Esq.**
3301-R Coors Road, N.W.
Suite 302
Albuquerque, NM 87120
(E-mail copy to tvollmann@hotmail.com)

Denise Chancellor, Esq.**
Fred G. Nelson, Esq.
Laura Lockhart, Esq.
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, UT 84114-0873
(E-mail copy to dchancel, fnelson,
llockhar, and jbraxton@att.State.UT.US,
adminag@xmission.com)

Connie Nakahara, Esq.**
Utah Dep't of Environmental Quality
168 North 1950 West
P. O. Box 144810
Salt Lake City, UT 84114-4810
(E-mail copy to cnakahar@att.state.ut.us)

Diane Curran, Esq.**
Harmon, Curran, Spielberg & Eisenberg
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
(E-mail copy to
dcurran@harmoncurran.com)

John Paul Kennedy, Sr., Esq.**
David W. Tufts, Esq.
Durham, Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, UT 84105
(E-mail copy to dtufts @djplaw.com)

Joro Walker, Esq.
Director, Utah Office**
Land and Water Fund of the Rockies
1473 South 1100 East, Suite F
Salt Lake City, UT 84105
(E-mail copy to utah@lawfund.org)

Paul C. EchoHawk, Esq.
ECHOHAWK LAW OFFICES
151 North 4th Avenue, Suite A
P.O. Box 6119
Pocatello, Idaho 83205-6119
(E-mail copy to Larry@echohawk.com
Paul@echohawk.com
Mark@echohawk.com)

Leon Bear, Chairman
Skull Valley Band of Goshute Indians
3359 South Main
Box 808
Salt Lake City, Utah 84115

/RA/

Jared K. Heck
Counsel for NRC Staff