RAS 4585

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSIONERS

In the Matter of:	)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC (Independent Spent Fuel Storage Installation)	)	ASLBP No. 97-732-02-ISFSI
	)	17 June 2002

UTAH'S REPLY BRIEF REGARDING UTAH'S SUGGESTION OF LACK OF JURISDICTION

The central argument of applicant Private Fuel Storage, LLC ("PFS") and of the Staff (collectively "the Proponents") cannot withstand scrutiny. That central argument is that Congress intended privately owned, away-from-reactor, SNF storage facilities to serve a role in "the Nation's nuclear waste management system," 42 U.S.C. §§ 10163(a)(1)(B), a management system carefully crafted by Congress with the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10101, *et seq.* ("the NWPA"). Yet the NWPA's words, both on their face and in their context, and the NWPA's legislative history all defeat the notion that Congress intended a PFS-type facility to be a part of the Nation's nuclear waste management system.

The Proponents' treatment of the language of the NWPA, particularly subsection (h) of section 135, 42 U.S.C. § 10155(h), is a ruse apparently designed to obscure the fact that the Proponents present no "plain meaning" for subsection (h) other than one that eliminates from that provision its single most important word for purposes of the Commission's inquiry. That word is "private." Regarding subsection (h)'s context, the two determinative considerations are the comprehensive nature of the NWPA and the Big Anomaly. The Proponents utterly ignore the former, and their efforts to get around the latter cannot withstand scrutiny. Regarding the

Template = SECY-021

SECY-02

NWPA's legislative history, the Proponents rely on statements made before subsection (h) even made its appearance in the Congressional deliberations and, further, ignore the post-subsection (h) statements showing Congress's intent that PFS-type facilities not be a part of the Nation's nuclear waste management system.

We proceed as the courts direct, looking first at the statutory language, both on its face and in its context, and then if necessary at the legislative history. *E.g., Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.")

1. The Proponents' approach to the "plain meaning" of subsection (h) is neither plain nor meaningful but rather deletes the key word and ignores or misstates the context.

Here is the language of subsection (h) that matters for the Commission's decision:

> Notwithstanding any other provision of law, nothing in this chapter shall be construed to . . . authorize . . . the **private or** Federal use . . . of any storage facility located away from the site of any civilian nuclear power reactor . . . .

A key context for this language is the nature and purpose of the NWPA, specifically, whether Congress understood that it was merely supplementing an already existing federal system of nuclear waste management, or, rather, whether Congress understood that it was creating what had not existed before, a comprehensive national nuclear waste management system. The answer is the latter. The proof of that answer is found on pages 14-15 of Utah's Petition for Rulemaking, incorporated by reference into Utah's Suggestion of Lack of Jurisdiction. The Proponents have failed to refute – indeed, have ignored – that proof.

Thus, we have Congress understanding that, with the NWPA, it was creating something new, a comprehensive nuclear waste management program – for both storage and disposal. And we have Congress saying in light of that understanding that, "[n]otwithstanding any other

provision of law," the NWPA does not "authorize . . . the private . . . use . . . of any storage facility located away from the site of any civilian nuclear power reactor." Thus, the plain meaning emerges: Congress ruled out a PFS-type facility, refused to let such a facility be a part of "the Nation's nuclear waste management system."

The Proponents' "plain meaning" approach both deletes the single most important word (for present purposes) in subsection (h) and either ignores or misstates the context. The Proponents say that subsection (h)'s meaning is "to limit the federal government's acquisition of private property for spent fuel storage," PFS Brief at p. 3, and go on to explain that the private property Congress had in mind was the three idle reprocessing plants in New York, Illinois, and South Carolina. E.g., PFS Brief at 8-9. Yet Congress in subsection (h) expressly refused to authorize "**the private or** Federal use" of an away-from-reactor facility other than one at a site already owned by the federal government.[1] The Proponents' "plain meaning" is nonsensical without deletion of the words "the private or."[2]

Regarding context, we have already noted how the Proponents ignore one of the two key contextual settings of subsection (h), its position in an Act that Congress intended create the Nation's comprehensive nuclear waste management system. The other key context is that encompassed by our phrase "the Big Anomaly." The Proponents' reading of subsection (h) unavoidably gives rise to the Big Anomaly. The Big Anomaly is the radically disparate Congressional treatment of federal (as opposed to private) away-from-reactor storage facilities,

---

[1] Five years later, in 1987, Congress legislated another exception to its ban on away-from-reactor storage when it authorized construction (under strict limitations) of one monitored retrievable storage ("MRS") facility.

[2] The Proponents' argument makes sense only when applied to an antecedent of subsection (h) – and a far different and not-adopted provision, section 133(d)(1) of H.R. 3809 as it existed on 27 April 1982. See H.R. Rep. No. 97-491(I) (1982), at p. 20.

with Congress imposing a host of protective strictures on the entity with vast resources and vast experience with things nuclear (the federal government) and none on an entity (a shell Delaware limited liability company) with neither.

The Proponents fail to give any satisfactory explanation of the Big Anomaly, but not for lack of trying. We now explicate the Proponents's failures. First, the Proponents ignore the Big part of Big Anomaly; they proceed as if the disparate treatment between federal and private is relatively minor. E.g., PFS Brief, at p. 4. But whistling through the graveyard will not work; this is a genuinely Big Anomaly; the NWPA's host of strictures on federally owned away-from-reactor facilities is indeed a host, and those strictures, not just collectively but individually, are onerous. Please see Utah's Petition, at pp. 17-29 and Appendix 3.

Second, the "reasons" the Proponents advance to explain away the Big Anomaly cannot withstand scrutiny. Before scrutinizing each of those "reasons" in turn, however, this truth merits emphasis: **Not one shred of evidence exists (and the Proponents have advanced none) that any of their proffered "reasons" ever entered the head of even one Member of Congress involved with the enactment of the NWPA.** The Proponents' "reasons" are of the Proponents' own fabrication, with a "born on" date of 2002.[3] As we now show, the Proponents's fabricated "reasons" are of poor quality.

PFS says that Congress imposed the host of restrictions on the federal government because "federal projects consume federal resources and engender federal obligations." PFS Brief, at p. 4. Yet the NWPA's strictures are obviously designed **not** to protect the federal pocket book (those strictures are actually costly) but (i) to protect the interests and sensitivities

---

[3] The Members did articulate their real reasons for prohibiting a PFS-type facility. See Utah's Petition for Rulemaking, at pp. 10-13. Utah relies on those genuine reasons; the Proponents ignore them.

of the communities affected by a federal nuclear waste facility and (ii) to prevent interference with progress on the permanent repository. Thus, in **both** Subtitle B (emergency storage at existing federal facility) and Subtitle C (MRS facility), Congress imposed capacity, siting, and duration limitations (with direct ties to progress on the permanent repository) and mandated protections for local communities, including participation and financial rights and the disapproval power – a veto power subject to override only by action of both Houses of Congress. A private facility, such as PFS's proposed facility, obviously impacts local community interests and sensitivities and stands to impact repository development every bit as much (if not more so) than a smaller federal facility. Thus, disintegrates PFS's suggested "reason" for Congress's decision to limit the statutory strictures to federal facilities.

Staff says that Congress imposed the strictures only on federal facilities because any Subtitle B facility "is not subject to NRC licensing authority (unlike [a private facility]) . . . . Therefore, Congress needed to spell out special requirements for DOE facilities in the text of the NWPA itself." Staff Brief, at p. 11. This argument fails for three reasons. For one, although the NWPA exempted from NRC licensing a federal facility used for emergency storage, the NWPA still required that, before such a facility could be so used, the Commission must determine "that such use will adequately protect the public health and safety." 42 U.S.C. § 10155(a)(1)(A). For a second, a key House committee report gives the real – and different – reason for exemption from NRC licensing:

> The kind of documented quality assurance and construction specifications which would exist for a licensed facility, and necessary for licensing proceedings, do not exist for these [federal] facilities [previously exempted from NRC licensing but now made available for emergency storage of civilian waste]. It would not be feasible, therefore, to initiate licensing proceedings at these facilities.

H.R. Rep. No. 97-491(I), at p. 37 (1982).

Staff's argument also fails for this third reason: The Subtitle B strictures and the Subtitle C strictures are in very large measure **the same**, strongly evidencing that Congress's purpose with those strictures in both subtitles was **the same**. Yet a Subtitle C facility (a federal MRS) is subject to NRC licensing. Under the logic of Staff's argument, Congress would not have imposed the statutory strictures on a facility subject to NRC licensing, yet Congress obviously did just that.

So, when Staff says that "the 'Big Anomaly' is not really an anomaly at all," Staff Brief, at p. 11, in light of Staff's fabricated "reason" – now seen to be a mirage –, Staff is only underscoring the reality of the Big Anomaly.

For the Commission to accept the Proponents' position and therefore enshrine the Big Anomaly as federal law is tantamount to labeling Congress a creator of the absurd.[4] Utah's fair reading of the words of subsection (h) in their statutory context avoids the Big Anomaly altogether. Moreover, a fair reading of the legislative history, if resort to that is necessary, also fully supports Utah's position.

2. The Proponents' legislative history analysis is fatally defective because that analysis fails to distinguish the timing and consequences of subsection (h)'s appearance in the Congressional deliberations.

Absolutely essential to a correct understanding of the NWPA's relevant legislative history is a correct understanding of the timing and consequences of subsection (h)'s appearance in the Congressional deliberations. Here are the key facts:

The bills in front of the Senate before December 1982 **never** contained subsection (h) or an equivalent. Accordingly, during that time, Senate bills, as a pre-condition for utility access to federal emergency storage, required utility efforts not just with on-site storage but also with

---

[4] The Proponents have no hesitancy so labeling Congress. "[I]f there is any 'anomaly,' it is one the Congress ordained in the laws that it passed." PFS Brief at p. 5.

private off-site storage, and the Senators deliberated as if private off-site storage was an acceptable component of the national nuclear waste management system they were then laboring to fashion. Likewise, in the early going (before the end of July 1982), the House bills did not contain subsection (h) or an equivalent, with the same consequences seen in the Senate. Then, during the last week of July 1982, the House Energy and Commerce Committee created as an amendment and adopted by a 23-19 vote section 135 (what became 42 U.S.C. § 10155), including subsection (h) in essentially the form of its final passage. House Energy and Commerce Committee's Report on H.R. 6598, H.R. Rep. No. 97-785(I), at pp. 23-25, 50, 96 (1982). From the moment that happened, from the moment subsection (h) made its appearance, all deliberations in the House – with one ambiguous exception we address below – proceeded on the basis that private off-site storage was **not** an option in the Nation's nuclear waste management system. In like fashion, when the House bill – with subsection (h) – became the bill before the Senate for its Members' deliberations, all the discussion proceeded on that same basis of no private off-site storage.

Thus, on 30 November 1982, we have Rep. Broyhill saying:

> **And I would also say that we have special statutory language in [subsection (h)]**, which [Rep. Lundine] now would 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.

128 Cong. Rec. 28,040 (1982)(emphasis added).

The fatal flaw in the Proponents' legislative history analysis is that they base their position (with one exception) on statements made in the Senate or by Senate committees before December 1982 and on statements made in the House or by House committees before July

1982. Yet those pre-subsection (h) statements are worthless for purposes of determining Congress's intent with respect to subsection (h), for reasons that are now obvious.[5]

The one House statement after July 1982 cited by the Proponents is too ambiguous to be helpful to either side, or, stated another way, is just as helpful to Utah's position as to the Proponents'. That statement – consisting of three sentences – comes from the House Energy and Commerce Committee's Report on H.R. 6598, H.R. Rep. No. 97-785(I), dated 20 August 1982. At that time, what became subsection (h) said: "Notwithstanding any other provision of law, nothing in this Act shall be construed to . . . authorize . . . the private or Federal use . . . of any non-Federal storage facility located away from the site of any nuclear powerplant."[6] In discussing the entirety of section 135 (of which subsection (h) is a part), the House Report at page 41 said:

> 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.

This sentence does not specify whether the contemplated facility is federally owned,[7] privately owned, or either. But the very next sentence makes plain that the Report is referring to a federally owned facility, not a private one. That sentence reads:

---

[5] Utah readily acknowledges that before subsection (h) made its appearance in the Congressional deliberations, a number of Members shared the view that private off-site storage both could be and should be a component of the Nation's nuclear waste management system. But any fair observer will acknowledge just as readily that, after the appearance of subsection (h), such talk ceased and all talk on the matter was to the contrary.

[6] In final form, subsection (h) speaks of "the private or Federal use . . . of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal government on January 7, 1983."

[7] Such as an MRS facility slated for study under the bill's Subtitle C.

> Such facilities are required to be licensed by the NRC under Section 202(3) of the Energy Reorganization Act of 1974.

Section 202(3) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5842(3), unambiguously speaks of, and only of, NRC "licensing and related regulatory authority" over "the following facilities of the Administration: . . ." A subsection (3) Administration facility is one "used primarily for the receipt and storage of high-level radioactive wastes from activities licensed under" the Atomic Energy Act ("AEA"). The House Report's careful use of subsection (3) thus clarifies the federal ownership of the facility referenced in the previous sentence.

But in the next sentence, the Report's drafter inserted one word that the Proponents would urge resurrected the ambiguity of the first sentence. That word is "private."

> 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 sentence is factually accurate in explaining that, in the post-subsection (h) world, efforts to use private off-site storage is no longer a pre-condition for access to federal emergency storage. But the sentence's use of "private" will not sustain the claims made by the Proponents for that sentence. PFS Brief, at p. 6 ("This statement is virtually conclusive.") PFS's desperate use of the ambiguity only underscores this reality: No statement in post-subsection (h) Congressional deliberations supports a Congressional intent that PFS-type facilities would constitute an authorized component of the Nation's nuclear waste management system created by the NWPA, including that Act's express language in subsection (h).[8]

---

[8] Likewise improper is the PFS Brief's quote of Senator Mitchell's 20 December 1982 statement. 128 Cong. Record 32,571. Sen. Mitchell was explaining why he opposed the entirety of section 135, not what the meaning of subsection (h) was.

The Proponents' desperate ploy with the legislative history follows on their failure to explain away subsection (h) as written and in its context.[9] That subsection as written and in its context – amply supported by Congress's post-subsection (h) deliberations – reveals Congress's intent that no PFS-type facility be a part of the Nation's nuclear waste management system.

DATED this 17th day of June, 2002.

Respectfully submitted,

Monte N. Stewart /HF

Monte N. Stewart
Special Assistant Attorney General
Helen A. Frohlich
Assistant Attorney General
5110 State Office Building
Salt Lake City, Utah 84114
Tel. 801/538-3303

Attorneys for the State of Utah

[9] The Proponents' position also wrecks against the Supreme Court's decision in *Food and Drug Administration v Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). We need not belabor this point because the Proponents' Briefs failed to set forth any basis – meaningful or otherwise – for disregarding the dictates of the *FDA* case. We also need not belabor, for obvious reasons, Commission and court decisions that, although speaking of private AFRs being permitted under the NWPA, were made in proceedings where no one seriously considered, let alone asserted and proved, the contrary. Nor need we belabor, also for obvious reasons, statements in the 2000 legislative history made in support of a provision Congress refused to adopt.

CERTIFICATE OF SERVICE

I hereby certify that a copy of UTAH'S REPLY BRIEF REGARDING UTAH'S SUGGESTION OF LACK OF JURISDICTION was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 17th day of June, 2002:

Emile L. Julian, Assistant for
Rulemakings and Adjudications
Rulemaking & Adjudication Staff
Secretary of the Commission
U. S. Nuclear Regulatory Commission
Washington D.C. 20555
e-mail: hearingdocket@nrc.gov
(*original and two copies*)

Richard A. Meserve, Chairman
U.S. Nuclear Regulatory Commission
Mail Stop O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: chairman@nrc.gov

Edward McGaffigan, Jr., Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrmcgaffigan@nrc.gov

Greta J. Dicus, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrdicus@nrc.gov

Nils J. Diaz, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrdiaz@nrc.gov

Jeffrey S. Merrifield, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16 C1
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrmerrifield@nrc.gov

Michael C. Farrar, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-Mail: mcf@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: jrk2@nrc.gov
E-Mail: kjerry@erols.com

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: psl@nrc.gov

Sherwin E. Turk, Esq.
Catherine L. Marco, Esq.
Office of the General Counsel
Mail Stop - 0-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: set@nrc.gov
E-Mail: clm@nrc.gov
E-Mail: pfscase@nrc.gov

Jay E. Silberg, Esq.
Ernest L. Blake, Jr., Esq.
Paul A. Gaukler, Esq.
Shaw Pittman
2300 N Street, N. W.
Washington, DC 20037-8007
E-Mail: Jay_Silberg@shawpittman.com
E-Mail: ernest_blake@shawpittman.com
E-Mail: paul_gaukler@shawpittman.com

John Paul Kennedy, Sr., Esq.
David W. Tufts
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, Utah 84111
E-Mail: dtufts@djplaw.com

Joro Walker, Esq.
Land and Water Fund of the Rockies
1473 South 1100 East, Suite F
Salt Lake City, Utah 84105
E-Mail: utah@lawfund.org
(electronic copy only)

Larry EchoHawk
Paul C. EchoHawk
Mark A. EchoHawk
EchoHawk Law Offices
151 North 4th Avenue, Suite A
P.O. Box 6119
Pocatello, Idaho 83205-6119
E-mail: paul@echohawk.com

Tim Vollmann
3301-R Coors Road N.W. # 302
Albuquerque, NM 87120
E-mail: tvollmann@hotmail.com

James M. Cutchin
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-Mail: jmc3@nrc.gov
(electronic copy only)

Office of the Commission Appellate
Adjudication
Mail Stop: 16-G-15 OWFN
U. S. Nuclear Regulatory Commission
Washington, DC 20555
(United States mail only)

Helen Frohlich
Assistant Attorney General
State of Utah