UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

October, 1 , 2003

Mark J. Langer, Clerk
U. S. Court of Appeals
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave., N.W.
Washington, D.C. 20001

RE: Margene Bullcreek, et al. v. Nuclear Regulatory Commission, No. 03-1018

Dear Mr. Langer:

Enclosed you will find an original and 14 copies of the Brief for Respondent, U.S. Nuclear Regulatory Commission, dated October 1, 2003, in the above-referenced case. Please date stamp the enclosed copy of this letter to indicate date of receipt, and return the copy to me in the enclosed envelope, postage pre-paid, at your convenience.

Respectfully submitted,

Grace H. Kim
Senior Attorney
Office of the General Counsel

Enclosures: As stated

cc: Service list.

ORAL ARGUMENT SCHEDULED FOR JANUARY 16, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 03 -1018
03 -1022

MARGENE BULLCREEK, et al.,

Petitioners,

v.

U.S. NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,

Respondent.

ON PETITION TO REVIEW AN ORDER OF THE
U.S. NUCLEAR REGULATORY COMMISSION

BRIEF FOR RESPONDENT
U.S. NUCLEAR REGULATORY COMMISSION

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October 1, 2003

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GLOSSARY

AFR	away-from-reactor
Atomic Energy Act	AEA
Department of Energy	DOE
Independent Spent Fuel Storage Installation	ISFSI
Nuclear Waste Policy Act of 1982	NWPA
Nuclear Regulatory Commission	NRC or Commission
Ohngo Gaudadeh Devia	OGD
Private Fuel Storage, LLC	PFS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Margene Bullcreek, *et al.*,	)	
	)	
Petitioners,	)	
	)	
v.	)	
	)	Nos. 03-1018
U.S. NUCLEAR REGULATORY COMMISSION	)	03-1022
and the UNITED STATES OF AMERICA,	)	(Consolidated)
	)	
Respondents,	)	
	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES.

Counsel for the United States Nuclear Regulatory Commission ("NRC") certifies the following with respect to the parties, rulings, and related cases.

A. Parties

Except for the Respondent NRC, all parties, intervenors, and amici appearing before the NRC below and in this Court are listed in the Petitioners' Joint Opening Brief.

B. Rulings Under Review

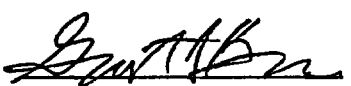
In Case Nos. 03-1018 and 03-1022, the State of Utah, Ohngo Gaudadeh Devia, and individual petitioners (Ms. Bullcreek, et al.) seek review of an NRC decision denying the State of Utah's rulemaking petition: Private Fuel Storage, CLI-02-29, 56 NRC 390 (2002) (App. 356).

C. Related Cases

In an unrelated case in federal district court, Utah raised the same legal issue as to the NRC's authority that it raises here. The United States, on behalf of the NRC, filed an amicus curiae brief arguing that the district court lacked jurisdiction to resolve the NRC authority issue. The district court agreed with the United States. The Skull Valley Band of Goshute Indians and

Private Fuel Storage, L.L.C. v. Leavitt, 215 F. Supp.2d 1232, 1252 (D. Utah 2002). Utah appealed the district court's judgment on the NRC authority issue and other matters to the Tenth Circuit in Case No. 02-4149. The United States filed an amicus curiae brief in that case on behalf of the NRC seeking affirmation of the district court's finding that it lacked authority to resolve the NRC authority issue. Briefing and oral argument have been completed.

Respectfully submitted,



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October 1, 2003

JURISDICTIONAL STATEMENT

These consolidated petitions for review challenge a final NRC decision denying the State of Utah's rulemaking petition. See Private Fuel Storage, CLI-02-29, 56 NRC 390 (2002) (App. 356). Under established doctrine, jurisdiction in rulemaking-denial cases lies directly in this Court under the Hobbs Act (28 U.S.C. § 2341-53 (2003)). See Pub. Citizen v. NRC, 901 F.2d 147, 151-53 (D.C. Cir. 1990); see also Nat'l Mining Ass'n v. Dept. of Interior, 70 F.3d 1345, 1350-51 (D.C. Cir. 1995) (collecting cases). Petitioners filed their suits within the Hobbs Act's 60-day limit. See 28 U.S.C. § 2344. Hence we do not contest this Court's subject matter jurisdiction to review the NRC's denial of Utah's rulemaking petition. But lurking in this case are related questions that warrant brief discussion.

1. The Hobbs Act allows only "parties" to the underlying agency proceeding to seek judicial review. See 28 U.S.C. § 2344; S. Pac. Transp. Co. v. ICC, 69 F.3d 583, 587 (D.C. Cir. 1995). Here, the individual petitioners (Ms. Bullcreek, et al.) in one of the consolidated lawsuits, No. 03-1018, filed nothing at all with the NRC in connection with Utah's rulemaking petition. And the only other petitioner in that lawsuit, Ohngo Gaudedeh Devia (OGD), filed only a short, and out of time, endorsement of Utah's rulemaking petition. Compare App. 241 (Commission scheduling order) with App. 273 (OGD filing).

It is not easy to see how petitioners with little or no involvement in the underlying agency proceeding can be considered "parties" to that proceeding

and thus eligible to sue. On this basis, a respondent-intervenor in this Court, the Skull Valley Band of Goshute Indians, sought threshold dismissal of No. 03-1018. A motions panel referred the matter to the merits panel. We agree with the Skull Valley Band on the "party" question. But the petitioner in the other consolidated case (No. 03-1058) -- Utah -- plainly did participate as a party before the NRC (Utah was the rulemaking petitioner). This makes the status of Utah's co-petitioners something of an academic point. See Envtl. Action v. FERC, 996 F.2d 401, 406 (D.C. Cir. 1993).

2. Utah's rulemaking petition rested on the premise that the NRC lacks statutory authority to license an away-from-reactor spent fuel storage facility (App. 87). When Utah filed its rulemaking petition it simultaneously filed a "suggestion" that the Commission terminate a pending proceeding to license a spent fuel storage facility on Indian land in Utah (App. 7). The NRC licensing hearing, in which Utah is an active litigant, remains ongoing.

Ordinarily, of course, a party to an agency hearing may not seek judicial relief prior to completion of the hearing. See Massachusetts v. NRC, 924 F.2d 311, 322 (D.C. Cir. 1991). But agency hearings are not the proper forum for rule challenges. See Tribune Co. v. FCC, 133 F.3d 61, 68 (D.C. Cir. 1998). To challenge an agency rule a party should first file a petition for rulemaking, and if dissatisfied by the result, seek judicial review from the rulemaking denial. See id.; see also Pub. Citizen v. NRC, 901 F.2d at 152. That is the procedure

that Utah followed here (its petition for review specifies that it challenges the NRC's rulemaking denial only).

QUESTION PRESENTED

Whether the Nuclear Waste Policy Act of 1982 repealed the NRC's pre-existing authority under the AEA to license the storage of commercial spent nuclear fuel away from a nuclear reactor site.

STATEMENT OF THE CASE

A. Nature of the Case

In 1997, Private Fuel Storage, L.L.C. ("PFS"), a consortium of private utilities that own and operate commercial nuclear reactors, submitted to the NRC a license application to construct and operate a facility for the interim storage of commercial spent nuclear fuel pending the availability of a permanent disposal site. The proposed PFS facility would store spent fuel in dry casks at a site located on the reservation of the Skull Valley Band of Goshute Indians ("Band") in the State of Utah, away from the site of any operating nuclear reactor. PFS sought an NRC license under 10 C.F.R. Part 72, an NRC rule that sets out standards for approving "Independent Spent Fuel Storage Installations," also known as "ISFSIs."

The NRC initiated an adjudicatory hearing on PFS's license application in 1997. The State of Utah has actively participated in the adjudicatory proceeding since that time, vigorously opposing issuance of the license on

various grounds. In February 2002, Utah filed with the NRC a "Petition to Institute Rulemaking and to Stay Licensing Proceeding." (App. 87).[1] Utah argued that the Nuclear Waste Policy Act of 1980 ("NWPA"), 42 U.S.C. §§ 10101-10270, deprived the NRC of any authority it may previously have had under the Atomic Energy Act of 1954 ("AEA") to license the construction and operation of a private away-from-reactor ("AFR") spent fuel storage facility such as the one proposed by PFS. Based on this theory, Utah requested that the NRC institute a proceeding to amend its regulations under 10 C.F.R. Part 72.[2] The Commission agreed to consider the statutory issue on the merits (App. 241).[3]

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[1]Utah also filed a companion "Suggestion of Lack of Jurisdiction" in the adjudicatory proceeding. App. 7.

[2]OGD, an unincorporated association made up of both members and non-members of the Band and also an active opponent of PFS's license in the NRC adjudicatory proceeding, expressed its support for and "joinder" of Utah's position in a two-page filing made with the NRC approximately six months after Utah's filings. App. 353.

[3]Petitioners' Appendix does not reproduce in full the Commission order agreeing to decide the statutory authority issue. The full order is published as CLI-02-11, 55 NRC 260 (2002). For convenience, our brief attaches as an addendum the official published version of CLI-02-11. (Petitioners' Appendix uses the typescript version.) Our brief also attaches as an addendum the official published version of CLI-02-29, 56 NRC 390 (2002), the Commission's merits order, the typescript version of which is included in Petitioner's appendix, although not at page 356, as its Table of Contents says, but at page 382. Our brief uses the proper Appendix ("App.") pages.

After reviewing lengthy legal arguments (App. 248-345), the Commission issued an opinion concluding "that Congress, in enacting the [AEA], gave the NRC authority to license privately owned, away-from-reactor (AFR) Facilities and did not repeal that authority when it later enacted the Nuclear Waste Policy Act of 1982." (App. 382). Thus, the Commission rejected Utah's "Petition to Institute Rulemaking" and "Suggestion of Lack of Jurisdiction." (App. 409). In these consolidated lawsuits, Utah, OGD, and individual Band members challenge the NRC's decision denying Utah's rulemaking petition.

B. Statutory Framework

1. NRC Authority under the AEA

The NRC has regulated spent nuclear fuel from the agency's inception. Spent nuclear fuel contains "special nuclear material," "source material," and "byproduct material." See 10 C.F.R. § 72.3 (2003) (definition of "Spent Nuclear Fuel"). The AEA grants the NRC authority to regulate the possession, use, and transfer of all of these constituent materials -- special nuclear material, source material, and byproduct material -- regardless of their aggregate form. See AEA, §§ 53, 62, 63, 81, 161(b), 42 U.S.C. §§ 2073, 2092, 2093, 2111, 2201(b). These materials are defined to include uranium (both natural and enriched), 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).

In 1980, two years before Congress enacted the NWPA, the NRC formally promulgated regulations, codified in 10 C.F.R. Part 72, governing the licensing of spent fuel storage facilities. The NRC invoked its AEA authority to regulate the possession, use, and transfer of special nuclear, source, and byproduct materials. See 10 C.F.R. Part 72 ("Authority"). The Part 72 regulations expressly permit NRC licensing of away-from-reactor as well as onsite spent fuel storage facilities. See Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation, 45 Fed. Reg. 74,693, 74,696 (Nov. 12, 1980).

2. The NWPA

(a) Historical Background

The following discussion comes from a Ninth Circuit decision, Idaho v. DOE, 945 F.2d 295, 298-99 (9th Cir. 1991). It reviews and sums up the situation that the NWPA (enacted in 1982) addressed.

"Prior to the late 1970's private utilities operating nuclear reactors were largely unconcerned with the storage of spent nuclear fuel because it was accepted that spent fuel would be reprocessed. Utilities entered contractual agreements for their spent fuel with private reprocessors. In the mid-70's, however, the private reprocessing industry collapsed for both economic and

regulatory reasons.[ ] As a consequence, the nuclear industry was confronted with an unanticipated accumulation of spent nuclear fuel, inadequate private facilities for the storage of the spent fuel, and no long term plans for managing the nuclear waste.

Because of the dangers of this unanticipated nuclear waste accumulation, Congress enacted the [NWPA]. The Act was directed toward both the immediate and long-term problems associated with storage [and disposal] of nuclear waste. Congress settled on a long-term policy of permanent [disposal in Subtitle A[4]]. Because the construction of permanent nuclear waste repositories would take years and the nuclear waste bottleneck caused by the collapse of the reprocessing industry threatened the continued operation of many reactors, Congress authorized the Department of Energy ("DOE") to contract with private utilities for interim storage at existing federal facilities.

Understood in terms of its history, the interim storage provisions of the [NWPA] are not comprehensive regulations governing all federal storage of nuclear waste, but remedial legislation addressed to a specific problem. Congress recognized that federal facilities could provide interim storage for a

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[4]See NWPA § 111(b), 42 U.S.C. § 10131(b), which establishes a plan and schedule for the federal government to build a permanent spent fuel and high level waste repository.

limited quantity of the spent fuel left unaccounted for by the collapse of the reprocessing industry."

(b) NWPA Provisions Pertaining to Spent Fuel Storage

Congress enacted the NWPA in 1982. Subtitle A, which provided for the permanent federal repository, expresses Congressional policy that "the generators and owners of...spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of ...spent fuel until such...spent fuel is accepted by [DOE for permanent disposal]." NWPA, § 111(a)(5), 42 U.S.C. §10131(a)(5). Subtitle B of the NWPA established a limited federal program for interim spent fuel storage for utilities showing they were in need. NWPA §§ 135-37, 42 U.S.C. §§ 10155-57. Subtitle C initiated the study and development of another federal program for interim storage which was intended to be available if the permanent federal repository was not available by the deadline specified in the Act. NWPA, § 141, 42 U.S.C. § 10161.

Subtitle B rests on three threshold findings: (1) the persons owning and operating civilian nuclear power reactors "have the primary responsibility for providing interim storage of spent nuclear fuel" by maximizing onsite storage "to the extent practical"; (2) the federal government has the responsibility to "encourage and expedite" the effective use of onsite storage options; and (3) the federal government has the responsibility to provide a limited amount of

interim storage capacity "for civilian nuclear power reactors that cannot reasonably provide adequate storage capacity at the sites of such reactors when needed to assure the continued, orderly operation of such reactors." NWPA, § 131(a), 42 U.S.C. § 10151(a).

Although establishing a federal program, the NWPA severely restricted the federal obligation to assist nuclear plant owners with spent fuel storage. For example, DOE was authorized to provide no more than 1900 metric tons of capacity for the interim storage of spent fuel from a civilian nuclear power reactors. NWPA, § 135(a)(1), 42 U.S.C. § 10155(a)(1). Section 135(a)(1) authorized DOE to provide this 1900 metric tons of capacity though various onsite storage methods,[5] or by use of available storage capacity at existing facilities "owned by the Federal Government on the date of enactment of [the NWPA]." 42 U.S.C. § 10155(a)(1)(A).

In addition, as a precondition to the use of federal interim storage, reactor owners were required to exhaust reasonable and practical storage options. Under Section 135(b), 42 U.S.C. § 10155(b), DOE was authorized to enter into a contract for interim storage with a reactor owner only if the NRC first determined that the reactor was on the verge of having to shut down for lack of storage capacity, and that the owner was "diligently pursuing licensed alternatives to the use of Federal storage capacity for the storage of spent

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[5]NWPA § 135(a)(1)(B) and (C), 42 U.S.C. § 10155(a)(1)(B) and (C).

nuclear fuel expected to be generated by such person in the future, including [various identified onsite storage options]." [6]

Moreover, Congress provided a limited window of opportunity -- until January 1, 1990 -- for reactor owners to enter into contracts for federal interim storage. NWPA, § 136(a)(1), 42 U.S.C. § 10156(a)(1). The federal interim storage option ultimately expired with no generators having taken advantage of the program.

Subtitle B also contains provisions designed to encourage private reactor owners to explore new at-reactor storage options. Section 132 explicitly directs the NRC and DOE to take actions to "encourage and expedite the effective use" of existing and additional at-reactor storage. 42 U.S.C. § 10152. Section 133 directs the NRC to establish procedures for licensing dry storage technologies developed through a DOE research program established under Section 218(a), 42 U.S.C. § 10198. 42 U.S.C. § 10153. And Section 134 establishes an expedited hearing process for NRC licensing of expansions of onsite storage capacity. 42 U.S.C. § 10154. Finally, in a provision that has gained prominence in this litigation, Subtitle B provides that "notwithstanding" any other law, "nothing in [the NWPA] shall be construed to encourage, authorize,

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[6]The identified onsite storage options included: expansion of on-site storage; construction of new or additional on-site storage facilities; acquisition, for on-site use, of modular or mobile storage equipment such as spent nuclear fuel dry storage casks; and transshipment to another civilian nuclear reactor owned by the same person. Id.

or require" private or federal use of an AFR storage facility at a site not already owned by the government. NWPA, § 135(h), 42 U.S.C. § 10155(h).

Congress also addressed the pressing need for interim spent fuel storage capacity in Subtitle C. In that subtitle, Congress found, inter alia, that long-term storage of spent fuel and high level waste in federally-constructed "monitored retrievable storage facilities" -- i.e., monitored AFR storage facilities from which waste can readily be retrieved for disposal or further processing (see Section 141(b)(1), 42 U.S.C. § 10161(b)(1)) -- is "an option for providing safe and reliable management of such waste" and that "the executive branch and Congress should proceed as expeditiously as possible to consider fully a proposal for construction of one or more monitored retrievable storage facilities to provide...long-term storage[.]" NWPA, § 141(a), 42 U.S.C. § 10161(a). Congress required DOE to complete a detailed study of the need for and feasibility of "the construction of one or more monitored retrievable storage facilities for high-level radioactive waste and spent nuclear fuel." NWPA, § 141(b), 42 U.S.C. § 10161(b).

3. The NRC's Decision

In its rulemaking petition (App. 87-125), Utah argued that the NWPA now constitutes the only possible source for NRC regulatory jurisdiction over private AFR storage of spent fuel, because Congress in that Act purportedly established a comprehensive and exclusive solution to the problem of storage of

spent nuclear fuel generated by commercial reactors. According to Utah, Congress's solution was to ban altogether the construction and operation of private AFR storage facilities (such as PFS's proposed facility) and to allow AFR storage of privately generated spent fuel only in federally owned facilities. (App. 87).

Utah argued that the NWPA "altered" any pre-existing "implication" that the AEA granted the NRC regulatory jurisdiction over AFR spent fuel storage facilities. (App. 118). In support of its position, Utah relied chiefly upon the following provision in section 135(h) of the NWPA, 42 U.S.C. § 10155(h):

> 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.

Utah claimed that this provision constitutes "an express disallowance of any away-from-reactor storage other than that provided for in the NWPA." (App. 96).

The Commission disagreed, and explained its position in detail. (App. 382-409). The Commission found nothing in the NWPA limiting or amending the NRC's pre-existing authority under the AEA to regulate spent fuel. (App. 388). The Commission pointed out that section 135(h), the chief provision relied on by Utah, "contains no language of prohibition." (App. 388). Rather, the Commission explained, the language "nothing in this Act shall ... authorize"

states only that the NWPA itself does not authorize (or "encourage" or "require") private AFR storage, "but it says nothing to override existing law." (App. 389). The Commission stressed that, under Utah's interpretation, the terms "encourage" and "require" would be rendered superfluous -- i.e., if Congress intended to prohibit private, offsite storage by "not authorizing" it, as Utah maintained, there would have been no need to add at the same time language declining to "encourage" or "require" it. (App. 389).

Construing section 135(h) in context with the rest of Subtitle B, the Commission's decision reconciled the use of the term "authorize" in conjunction with "encourage" and "require." (App. 390-93). The Commission noted that DOE had been authorized in Section 135(a)(1)(A), 42 U.S.C. § 10155(a)(1)(A), to provide storage capacity for commercially-generated spent fuel at existing federal facilities. (App.390). The Commission believed that the "nothing in this Act shall be construed to...authorize" language made the most sense when read simply as confirming limitations on DOE's newly-granted authority -- i.e., that nothing in the NWPA authorized DOE to "use, purchase, lease, or [acquire]" any existing privately-owned storage facilities for the limited federal storage program. (App. 390).

Explaining that it would have been unnecessary for Congress to add that DOE was also not "encouraged" or "required" to take over any existing private facility, the Commission concluded that the words should be understood in the

context of private generator obligations with respect to the newly-created federal interim storage program. (App. 390). The Commission pointed out that the NWPA expressed a policy in favor of private solutions to the problem of spent fuel storage. (App. 390-91). Section 135(h)'s "encourage" or "require" language, concluded the Commission, makes clear that the NWPA's preference for private solutions not be construed as "encouraging" or "requiring" private storage away from the reactor. (App. 391). The Commission viewed section 135(h)'s "[n]otwithstanding any other provision of law" clause -- a clause belatedly embraced before the Commission by Utah (App. 393) -- as an acknowledgment by Congress that other laws may encourage, authorize, or require private AFR storage or other solutions that the NWPA does not. (App. 393-94). The Commission rejected Utah's argument that the "notwithstanding" clause ousted the NRC's pre-existing AEA authority over private AFR storage. (App. 393-94).

The Commission found that the legislative history supported its construction of the statute in all respects. (App. 403-08). Regarding the words "encourage" and "require" in section 135(h), the Commission found that they underscored the removal from early waste bills of a requirement for generators to exhaust private offsite storage options before seeking federal storage capacity. (App. 391, 405-06). The Commission found evidence that section 135(h)'s "does not authorize" language was designed to prevent DOE from

taking over existing AFR spent fuel pools located at defunct non-federal reprocessing facilities -- in Morris, Illinois, West Valley, New York, and Barnwell, South Carolina -- for purposes of federal interim storage. (App. 391-92, 406).

The Commission found no support in the legislative history for Utah's view that section 135(h)'s "notwithstanding" clause overrides the NRC's AEA authority to license AFR storage at non-federal facilities. The Commission noted that had this been the intention, Congress would have provided in some manner for purportedly non-compliant facilities that had been authorized under "other provisions of law" including the state owned West Valley, New York facility, which DOE had been using for a spent fuel demonstration project and associated storage of commercial spent fuel,[7] and the privately owned Morris facility, which had been storing commercial spent fuel pursuant to an NRC license. (App. 393-94).

The Commission also rejected Utah's position that there existed a basic incompatibility -- a so-called "big anomaly" -- between the NWPA and the NRC's

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[7]As the Commission explained (App. 394), the West Valley Demonstration Project Act of 1980, 42 U.S.C § 2021a note, directed DOE to take possession of, but not title to, the New York state-owned facility in West Valley for a demonstration of high level waste solidification techniques. The West Valley facility, originally licensed by the NRC for spent fuel reprocessing, had been storing spent commercial fuel under NRC license since its operators ceased reprocessing. Id.

AEA-authorized Part 72 regulations in the fact that Congress had imposed various restrictions on federal AFR storage but had not imposed identical restrictions on private AFR storage. (App. 397-401). Part 72, the Commission noted, "establishes an elaborate regulatory scheme designed to protect public health and safety." (App. 398). The Commission explained, inter alia, that the imposition of restrictions on DOE's obligation to take spent fuel for interim storage was understandable in light of Congressional policy favoring private solutions to the interim storage problem and discouraging reliance on the federal storage program. (App. 399).

Finally, the Commission found no merit in Utah's suggestion that the NWPA reflected a comprehensive, across-the-board approach to spent fuel, implicitly repealing the NRC's prior statutory (AEA) authority. (App. 394-403). The Commission stressed that "implied repeals" are disfavored and that no implied repeal can be found here because the NRC's AEA licensing authority and the NWPA's limited interim storage program are "capable of co-existence." (App. 354-96). The Commission noted that Congress was "well aware" of the NRC's AFR licensing authority, and existing NRC-licensed AFR facilities, but did nothing in the NWPA to undo that authority or provide for these facilities. (App. 395-96). This obvious "gap" in the NWPA's supposed comprehensiveness, the Commission said, shows that "Congress intended to supplement, rather than replace, existing law." (App. 401).

SUMMARY OF ARGUMENT

Relying chiefly on section 135(h) of the NWPA, Utah and its co-petitioners (collectively referred to hereafter as "Utah") maintain that the NWPA unambiguously "disallows" or prohibits privately owned, AFR spent nuclear fuel storage facilities. Since the NRC unquestionably possessed AEA licensing authority over AFR spent fuel storage prior to the NWPA's enactment, Utah's fundamental assertion is that Congress, in enacting the NWPA, repealed that pre-existing AEA authority. But subsection (h) is devoid of any language whatsoever of prohibition, disavowal, disallowance or exclusion of privately owned AFR spent fuel facilities. The lack of such language is persuasive evidence that Congress had no intention to prohibit the construction and operation of private AFR spent fuel facilities and repeal the NRC's AEA authority to license such facilities.

Utah's disavowal theory is based on a reading of subsection (h) that would excise the words we have placed in brackets -- "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 enactmelnt of this Act." However, Utah's interpretation does not make sense when subsection (h) is construed in its entirety.

Utah does not successfully explain how the phrase "nothing in this Act shall be construed to authorize" equates to an across-the-board prohibition against private AFR storage authorized by any other Act. Nor does Utah say why a statute that (allegedly) prohibits private AFR storage also does not "encourage" or "require" such storage. Utah acknowledges that the statutory terms "encourage" and "require" concern private obligations ("private use..."). Utah's interpretation therefore renders the terms "encourage" and "require" superfluous - - i.e., Congress would hardly be expected in the same statutory provision both to prohibit an act and not "encourage" or "require" it.

Construed in context with the overall statutory scheme, subsection (h) is best read to harmonize the use of the terms "encourage," "authorize," and "require" within the same clause. As we see subsection (h), Congress's intention was to link "authorize" to "Federal use, purchase..."; and "encourage" and "require" to "private use, purchase...." The reference to "Federal use" is to an earlier subsection (§ 135(a)(1)(A)) establishing DOE's authority to use existing federal facilities for the newly established federal interim storage program. Understood this way, subsection (h) simply underscores that nothing in the Act "authorizes" DOE to use, purchase, lease, or acquire private or non-federal away-from-reactor facilities. Likewise, section 135(h) makes clear that an earlier subsection (§ 135(b)(1)(B)) holding private reactor owners responsible for "diligently pursuing licensed [offsite] alternatives to the use of Federal

storage capacity" does not "encourage" or "require" private generators to pursue the use, purchase, lease, or other acquisition of private offsite storage facilities as a pre-condition to utilizing federal interim storage.

Utah places great stress on section 135(h)'s introductory clause -- "[n]otwithstanding any other provision of law." Utah views this clause as negating any other laws authorizing private AFR storage facilities. The crucial flaw in this argument is that subsection (h) cannot reasonably be understood to negate or repeal pre-existing authority for private AFR storage facilities. It contains no words of prohibition. There are in fact other laws outside the NWPA that bear on private and non-federal AFR spent fuel storage. The "notwithstanding" clause, therefore, avoids any potential dispute as to whether these other laws can be construed to operate in tandem with the NWPA so as to affect or influence the obligations of DOE and private generators.

Utah argues that it would have been anomalous for Congress to have placed significant restrictions on access to federal interim storage capacity under the NWPA but allowed private AFR storage facilities to continue "unfettered" without these same restrictions. But private AFR facilities can only be authorized pursuant to the NRC's Part 72 regulations, which establish an elaborate regulatory scheme designed to protect public health and safety. Moreover, Congressional capacity, location, and other restrictions on the federal AFR interim storage are entirely consistent with the express

Congressional policy favoring private solutions to the spent fuel storage problem. Imposing restrictions on a federal storage program does not remotely evidence an intent to make that program the exclusive solution to spent fuel storage. In light of the pressing need perceived by Congress to expand, rather than contract, storage options, it is most unlikely that Congress would have drafted the NWPA as a vehicle to limit offsite spent fuel storage options to a small and restrictive federal storage program replete with hurdles for participation.

The NWPA's legislative history, too, is devoid of any suggestion of a Congressional intent to revoke the NRC's pre-existing authority under the AEA to license private AFR spent fuel facilities. In fact, the legislative history supports the NRC's affirmative interpretation of section 135(h)'s "encourage, authorize, or require" phrase and of the reasons underlying Congressional restrictions on the federal interim storage program. The legislative record is replete with indications that Congress was aware of the NRC's authority to license private AFR storage facilities and of the existence of such facilities (e.g., at Morris, Illinois, and West Valley, New York). Yet there is no indication of a Congressional intent to repeal then current law.

Utah claims that it reads the NWPA merely to have "altered the implications" of the AEA's general grant of authority to the NRC over nuclear materials. But the NRC's pre-existing authority under the AEA to license the

possession, use, and transfer of the radiological constituents of spent fuel, regardless of where the spent fuel might be stored, was broad, exclusive, and clear, not a mere "implication." It cannot be lightly assumed that Congress, indirectly and through implication, intended the NWPA to repeal the NRC's existing AEA authority.

At the very least, our reading of the AEA and the NWPA is a "permissible" one, giving a sensible meaning to the two statutes, and also accomplishing Congress's policy goals. For example, Congress could not reasonably have presumed that onsite storage capacity – which was already filling up at the time the NWPA was enacted – would be sufficient to take care of all of the utilities' spent fuel storage needs during the five-year gap of time between the expiration of the federal interim storage program (1990) and the earliest expected date for the opening of a permanent repository (1995). Moreover, Congress made no special accommodation for the existing state and privately owned AFR spent fuel storage facilities. Given the political significance and the magnitude of the waste storage problem at the time the NWPA was enacted, it does not make sense to believe that Congress would have foreclosed a viable option for spent fuel storage and repealed the NRC's pre-existing authority without expressly saying so.

ARGUMENT

Standard of Review

1. This case calls for review of the NRC's interpretation of its authority to exercise jurisdiction over private away-from-reactor spent fuel facilities under the AEA, a "statute which it administers," subsequent to the enactment of the NWPA. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984). Judicial review in such cases involves a now-familiar two-part inquiry. Id. at 842-43. See also Am. Pub. Power Ass'n v. NRC, 990 F.2d 1309, 1312-13 (D.C. Cir. 1993). Accord Am. Chemistry Council v. EPA, 337 F.3d 1060, 1063 (D.C. Cir. 2003).

"First, always, is the question whether Congress has directly spoken to the precise question at issue." Chevron, 467 U.S. at 842. If a court, "employing traditional tools to statutory construction, ascertains that Congress had an intention on the precise question in issue," id. at 843 n. 9, the inquiry is at an end since courts and agencies alike "must give effect to the unambiguously expressed intent of Congress." Id. at 843. If, however, Congress has not "directly addressed the precise question at issue" so that the statute is "ambiguous with respect to the specific issue," the "question for the court is whether the agency's answer is based on a permissible construction of the statute." Id.

To sustain an agency's statutory interpretation under the second step of the Chevron analysis, a reviewing court "'need not find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding...is a sufficiently rational one to preclude a court from substituting its judgment for that of [the agency].'" Young v. Cmty. Nutrition Inst., 476 U.S. 974, 981 (1986) (citations omitted).

2. Utah maintains that "Chevron deference is inappropriate because multiple agencies administer the NWPA." (Pet. Br. 19). As support, Utah cites Salleh v. Christopher, 85 F.2d 689 (D.C. Cir. 1996), and Rapaport v. United States Dept. of Treasury, 59 F.3d 212 (D.C. Cir. 1995). These cases are inapposite. This is not a case like Salleh, where two entities "claim[ed] conflicting administrative authority" under a statute both were entrusted to administer, id. at 691, or Rapaport, 59 F.3d at 216-17, where Chevron deference "would lay the groundwork for a regulatory regime in which either the same statute is interpreted differently by the several agencies or the one agency that happens to reach the courthouse first is allowed to fix the meaning of the text for all." Rather, in this case, Utah has put at issue a question of statutory interpretation as to the NRC's own jurisdiction under the statute it administers, the AEA -- i.e., whether subsequent to the NWPA's enactment the NRC retained its authority under the AEA to license private AFR spent fuel facilities. See Vill. of Bergen v. FERC, 33 F.2d 1385, 1388 (D.C. Cir. 1994)

("agency's determination of its own jurisdiction...fall[s] under the Chevron umbrella"); Okla. Natural Gas Co. v. FERC, 28 F.2d 1281, 1283-84 (D.C. Cir. 1994) (same).

Notably, this Court has followed the Chevron deference doctrine in numerous prior NWPA cases. See, e.g., Ind. Mich. Power Co. v. DOE, 88 F.3d 1272, 1274 (D.C. Cir. 1996); Public Citizen v. NRC, 901 F.2d 147, 153-54 (D.C. Cir. 1990); Gen. Elec. Uranium Mgmt. Corp. v. DOE, 764 F.2d 896, 898, 907 (D.C. Cir. 1985). There is no reason not to do so here.

THE NUCLEAR WASTE POLICY ACT OF 1982 DID NOT REVOKE THE NRC'S PRE-EXISTING AUTHORITY UNDER THE ATOMIC ENERGY ACT OF 1954, AS AMENDED, TO REGULATE PRIVATE AWAY-FROM-REACTOR SPENT FUEL STORAGE FACILITIES

A. Nothing In The Language Of The NWPA Reflects Congress's Intent To Revoke The NRC's Pre-existing Authority Under The AEA To License Private AFR Spent Fuel Storage Facilities

1. Utah offers a convoluted reading of the NWPA in an effort to transform it into a prohibition against private AFR storage facilities licensed by the NRC. Utah's effort is unsuccessful on many levels. It runs into obstacles at every turn.

Utah's interpretation of the NWPA is that Congress in that Act "disallowed" or "disavowed" a privately-owned, AFR spent nuclear fuel storage facility. (Pet. Br. 22). Utah's fundamental assertion in this case, therefore, is that Congress, in enacting the NWPA, revoked or repealed the NRC's pre-

existing licensing authority under the AEA to authorize spent fuel storage when such fuel happens to be located away from a reactor site.

Utah protests the characterization of its reading as advocating a revocation of the NRC's AEA regulatory authority over spent fuel (Pet. Br. at 42); it claims to be interpreting the NWPA "merely [to have] alter[ed] the implications that can properly be drawn from the AEA's general grant of authority." (Pet. Br. 42). But the NRC's pre-NWPA authority to regulate spent fuel under the AEA is not a mere "implication." It has long been established that the NRC's authority under the AEA to regulate the civilian possession, use, and transfer of all of the constituents of spent nuclear fuel-- i.e., special, source, and byproduct materials --is comprehensive and exclusive. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 207 (1983) (the AEA gives NRC "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials.").

It would be "illogical in the extreme" to believe that in enacting the AEA Congress left a gap in the NRC's otherwise exclusive authority by excluding spent fuel or excluding it when it is stored away from reactors. See NLRB v. United Food & Commercial Workers Union, 484 U.S. 112, 131 (1987). Not surprisingly, therefore, every court to address the question has found that the NRC's exclusive jurisdiction over source, byproduct, and special nuclear materials extends to the regulation of these materials in the aggregate -- i.e.,

spent nuclear fuel -- with no caveat as to the physical location of the spent fuel in relationship to the generating nuclear reactor.

For example, in Pac. Gas & Elec. Co., 461 U.S. at 217, a post-NWPA decision, the Supreme Court acknowledged the NRC's authority under the AEA to "promulgate[] detailed regulations governing storage and disposal away from the reactor. 10 C.F.R. Part 72." See also Illinois v. Gen. Elec. Co., 683 F.2d 206, 214-15 (7th Cir. 1982) (the AEA "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 [NRC's] authority to regulate the storage of spent nuclear fuel[;] [p]ursuant to that authority the [NRC] recently issued detailed regulations for the licensing of storage facilities - both at the reactor site and, as in the case of the Morris facility, away from the reactor site - for spent nuclear fuel") (internal citations omitted). And in Jersey Central Power & Light Co. v. Township of Lacey, 772 F.2d 1103, 1112 (3rd Cir. 1985), the court of appeals said that "Congress has specifically established [a] pervasive scheme of federal regulation established by the AEA and NRC regulations,...including the storage and shipment of spent fuel." See also Maine Yankee Atomic Power Co. v. Bonsey, 107 F. Supp. 2d 47, 53 (D. Me. 2000) ("the NRC unquestionably retains full regulatory authority over the radiological health and safety aspects of spent fuel storage"); Fla. Power and Light Co. v. Westinghouse Elec. Corp., 597 F. Supp. 1456, 1463 (E.D. Va. 1984) ("the NWPA expresses a government

policy of encouraging new on-site storage, rather than private AFR's [but] [t]he government policy does not mean that an AFR would automatically be unlicensable").

There can be, in short, no real doubt that the NRC possessed AEA licensing authority over spent fuel located away from a reactor site prior to the enactment of the NWPA. Thus, Utah's statutory construction that the NWPA "disallowed" private AFR spent fuel storage facilities can only be understood as saying that the NWPA repealed the NRC's prior authority. This, then, is the "precise question at issue" (Chevron, 467 U.S. at 842) over which the NRC and Utah disagree in this case -- i.e., whether in enacting the NWPA in 1982 Congress intended to revoke the NRC's pre-existing authority under the AEA to license the storage of spent fuel located away from a nuclear reactor site.

2. To determine if Congress has "directly addressed the precise question at issue" (id.), the "starting point...is the language of the statute itself." Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); accord Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002). Absent a "clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Prod. Safety Comm'n, 447 U.S. at 108. Utah chiefly relies on Section 135(h) of the NWPA as the "operative language" in support of its construction that Congress intended to

disallow privately owned AFR spent fuel storage facilities in enacting the NWPA. (Pet. Br. 23).

We turn now to that provision. It says:

> 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). Utah linguistically strings together several parts of subsection (h) to create and isolate the following sentence - - "[n]otwithstanding any other provision of law, nothing in this Act 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 and not owned by the Federal Government on the date of the enactment of this Act." Utah purports to find in this isolated sentence an express statement of Congressional intent "to exclude a privately owned, AFR/SNF storage facility from the Nation's nuclear waste management program." (Pet. Br. 22). The problem with Utah's reading, as the Commission said (App. 388), is that subsection (h) contains "no language of prohibition" -- it uses no words whatsoever of disavowal, disallowance, exclusion, or prohibition of privately owned AFR spent fuel facilities.

Congress knows how to "unambiguously express[] its intent through its choice of statutory language." Young, 476 U.S. at 980. If Congress had

intended to accomplish an absolute bar against private offsite storage, "it could easily have done so explicitly" (Consumer Prod. Safety Comm'n, 447 U.S. at 109) with concrete and specific language. As the Commission pointed out (App. 389), to enact a statutory bar, Congress would have been expected to say something like "notwithstanding any other provision of law, this Act prohibits the private or Federal use..." or "there shall be no private or Federal storage of spent nuclear fuel on any site...." But subsection (h) is utterly devoid of such language. This suggests powerfully that Congress had no intention to prohibit the construction and operation of private AFR spent fuel facilities and repeal the NRC's AEA authority to license such facilities. "Not authorizing" simply does not equate to a prohibition, particularly where another act, the AEA, has already done the authorizing.

3. When subsection (h) is construed in its entirety, without simply isolating choice language to linguistically force a particular meaning, as Utah has attempted to do, it becomes clear that whatever the phrase "nothing in this Act shall be construed to...authorize" may mean, it cannot sensibly be interpreted to prohibit private AFR spent fuel facilities by "not authorizing" them. As the Commission stressed (App. 389-90), if Congress had intended "nothing in this Act shall...authorize" to be an absolute ban on private AFR spent fuel facilities, it would have had no reason to state in the very same clause that nothing in the Act shall "encourage...or require" such facilities. In

the ordinary meaning of the words used,[8] "not requiring" or "not encouraging" an act is to permit it rather than to prohibit it.

Congress would hardly be expected in the same statutory provision both to prohibit an act and not "encourage" or "require" it. Thus, if Utah were correct that Congress intended a prohibition of private AFR storage, the terms "encourage" and "require" would be superfluous. This, of course, is contrary to established rules of statutory construction. See, e.g., Freytag v. C.I.R., 501 U.S. 868, 877 (1991) ("[o]ur cases consistently have expressed 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment'") (citation omitted). Accordingly, subsection (h) must be susceptible to another reading that would harmonize the use of the terms "encourage," "authorize," and "require" within the same clause.

4. As a case given great prominence in Utah's brief says, it is a "'fundamental canon of statutory construction that the words of a statute must be read in context and with a view to their place in the overall statutory scheme.'" FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (citation omitted). Whatever ambiguities may be raised by the simultaneous use of the terms "encourage," "authorize," and "require" within the same clause of subsection (h) are in fact "easily resolved" when these terms are read in context

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[8]See, e.g., Dae Corp. v. Engeleiter, 958 F.2d 436, 439 (D.C. Cir. 1992) ("'the legislative purpose is expressed by the ordinary meaning of the words used'") (citation omitted).

with subsection (h) as a whole and with other provisions of the NWPA. See Tataranowicz v. Sullivan, 959 F.2d 268, 276 (D.C. Cir. 1992). See also King v. St. Vincent's Hospital, 502 U.S. 215, 221 (1991) ("the meaning of statutory language, plain or not, depends on context").

As indicated above, "encourage, authorize, or require" could not all be applied to the same subject matter without rendering "encourage" and "require" superfluous. The most logical inference, then, is that the words "encourage" and "require" apply to a different subject matter than the word "authorize." Subsection (h) contains two possible subjects to which these words could apply -- i.e., the "private...use, purchase, lease, or other acquisition of any [non-federal AFR] storage facility" (emphasis added); or the "Federal use, purchase, lease, or other acquisition of any [non-federal AFR] storage facility" (emphasis added). When these words are construed within "their place in the overall statutory scheme," Brown & Williamson, 529 U.S. at 133, it becomes evident that Congress's intention was to link "authorize" to "Federal use, purchase..." and "encourage" and "require" to "private use, purchase...."

As noted, DOE was authorized to provide "available capacity at one or more facilities owned by the Federal Government on the date of the enactment of this Act" for purposes of the federal interim spent fuel storage program. NWPA, § 135(a)(1)(A), 42 U.S.C. § 10155(a)(1)(A). Subsection (h) tracks this limitation on DOE's authority to use existing capacity -- i.e., federal ownership

on the date of enactment. Thus, subsection (h), understood in reference to the earlier provision establishing DOE's authority to provide federal interim storage capacity, clarifies and underscores that nothing in the Act "authorizes" DOE to use, purchase, lease, or acquire non-federal or private AFR storage facilities.

The NWPA announces a clear congressional policy to place "primary responsibility" for storage for spent nuclear fuel on private reactor owners. In light of this policy, Congress severely restricted the ability of private reactor owners to utilize federal (DOE) interim storage capacity. One significant prerequisite to the use of federal interim storage capacity was that a private reactor owner must first be found by the NRC to be "diligently pursuing licensed alternatives to the use of Federal storage capacity for the storage of spent nuclear fuel"-- "including" several onsite alternatives. NWPA, § 135(b)(1)(B), 42 U.S.C. § 10155(b)(1)(B). This language does not on its own make onsite alternatives exclusive or expressly excuse reactor owners from having to pursue potentially available offsite alternatives. But subsection (h) does. It can readily be understood as making clear that nothing in the Act "encourages" or "requires" private generators to pursue the use, purchase, lease, or other acquisition of a private AFR storage facility as a prerequisite to taking part in the newly established federal storage program.

Utah faults the NRC for "preserv[ing] no meaning for the term 'private use'" when paired with the term "authorize." (Pet. Br. at 31). But when

subsection (h) is construed in its entirety and in context, it becomes apparent that the "authorize" language applies most reasonably to federal (DOE) obligations under the NWPA. The fact that not every verb ("encourage," "authorize," and "require") can reasonably be linked with each subject ("private use" and "federal use") indicates only that in the drafting process Congress tried to squeeze more than one thought into a single clause. But this is hardly surprising given the nature of the Congressional process. The agency's affirmative interpretation accepts that, in light of the "whole context" of the statutory provision, the term "authorize," on the one hand, and the terms "encourage" and "require," on the other, were intended to be paired with different subjects within the same clause. See Norfolk and W. Ry. Co. v. American Train Dispatchers' Ass'n, 499 U.S. 117, 129 (1991). Utah, in contrast, has isolated a select mixture of verb and subject and strains linguistically to reach the end result that it desires. Despite Utah's quibbles with the agency's affirmative interpretation, the crucial point is that the NWPA contains no "plain language" support for Utah's interpretation that Congress intended to revoke the NRC's pre-existing authority and disallow private AFR facilities.

5. As noted, Utah's construction links the phrase "nothing in this Act shall be construed to authorize" to the terms "private use" to arrive at what it calls an "active disavowal of authority" for private AFR spent fuel storage

facilities. Utah engages in various linguistic and grammatical exercises in an effort to demonstrate how its interpretation, and not the NRC's, gives "consistent meaning to the term 'authorize' and to the other verbs in subsection (h)." (Br. at 24). Utah claims that, by not reading the term "authorize" as an affirmative "disavowal of authority" for private AFR spent fuel facilities but at the same time reading the terms "encourage" and "require" as an affirmative "disavowal of intent" to encourage and require such facilities prior to utilizing the federal storage program, the NRC does "gruesome violence" to the canon of construction that parallel words in a list "must be given the same operative effect." (Pet. Br. 25). However, as discussed above, we do construe the term "authorize" as an "affirmative disclaimer of authority" (to use Utah's words) – but of DOE's authority rather than the NRC's. And our construction treats each of the "verbs" – "encourage," "authorize," and "require" – consistently in limiting the "disclaimer" to the confines of "this Act."

Utah admits that it makes sense to pair "encourage" and "require" with "private use" as a "disclaim[er] [of] any intent by Congress to encourage or require [generators to pursue private AFR storage] as a precondition to federal 'emergency' storage." (Pet. Br. 25). But Utah's position – i.e., that Congress did not "encourage" or "require" the pursuit of private AFR storage facilities by private generators -- implicitly acknowledges that such facilities remain authorized. An absolute prohibition of private AFR facilities would necessarily

override any implicit authority for them and thus render "encourage" and "require" meaningless and superfluous, a problem which Utah has failed to address.

6. Utah places great reliance on section 135(h)'s introductory clause -- "[n]otwithstanding any other provision of law" -- to support its position that the NWPA's storage provisions were intended to be comprehensive, leaving no room for spent fuel storage options that the Act itself does not expressly authorize. Specifically, Utah reads the "notwithstanding" clause to "mean[ ] that no other previously enacted provision of law can counter the Congressional disavowal of any intent to authorize a private, AFR/SNF storage facility." (Pet. Br 28).

Of course, the crucial flaw in this argument, as we have seen, is that subsection (h) cannot reasonably be understood to negate private AFR storage facilities. That aside, the "notwithstanding" clause as used in subsection (h) -- i.e., together with the language "nothing in this Act shall..."-- cannot be construed in context as repealing the NRC's AEA authority to license private AFR facilities.[9]

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[9]A statutory "notwithstanding clause" does not, as Utah implies (Pet. Br. at 28-29), invariably "trump" all other related laws and render them without force. As with other statutory provisions, the key to construing a "notwithstanding clause" is legislative intent. See, e.g., Mahadeo v. Reno, 226 F.3d 3, 11 (1st Cir. 2000); Northwest Forest Res. Council v. Pilchuck Audubon Soc'y, 97 F.3d 1161, 1166-67 (9th Cir. 1996); Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co., 68 F.3d 1016, 1019 (7th Cir. 1995); Carter v. Panama Canal Co., 463 F.2d 1289, 1299 n. 25 (D.C. Cir. 1972).

Utah maintains that the "notwithstanding" clause has "no purpose" if construed, as the Commission did in its opinion below (App. 393-94), as only an "acknowledg[ment] of what is already established in some 'other provision of law.'" (Pet. Br. at 30). But Congress's acknowledgment of the existence of other provisions of law is quite useful to make clear that these other laws have no bearing on, and operate independently from, the storage program established in the NWPA. On this view, the "notwithstanding" clause avoids any unintended overlap between other laws and the NWPA.

There are other laws that speak to AFR facilities. For example, the West Valley Demonstration Project Act of 1980, 42 U.S.C. § 2021a note, can readily be understood to "authorize" the federal use of a non-federally owned AFR spent fuel storage facility. And the AEA, which promotes the commercial use of nuclear power by providing for "a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the...health and safety of the public," AEA, § 3d., 42 U.S.C. § 2013(d), can arguably be viewed as "encouraging" private generators to develop whatever waste storage facilities are necessary to continue the commercial operation of nuclear power reactors. The "notwithstanding" clause avoids any potential dispute as to whether these or other laws can be construed to operate in tandem with the NWPA so as to affect or influence the obligations of DOE and private generators (e.g., their obligation

to exhaust available options to gain eligibility for the DOE interim storage program) under that Act.

7. Utah claims that the "design, object, and policy of the NWPA make clear that Congress intended to preclude SNF storage at privately owned, AFR facilities." (Pet. Br. at 31). To support this assertion, Utah points to various restrictions placed on the federal interim storage program established in Subtitle B and on the "monitored retrievable storage" ("MRS") program established in Subtitle C,[10] including: local community and governmental participation, procedural, and financial rights; limitations on the quantity of spent fuel permitted to be stored in federal facilities; and the "strict time limit" for participation in the federal interim storage program. (Pet. Br. at 33). Utah claims that it is "absurd," "anomalous," and "inconceivable" that Congress could have intended that "the federal government...proceed only upon compliance with a host of protective, limiting provisions, but that a private entity could proceed to devise a 'private' solution completely unfettered by Congress's protective judgments." (Pet. Br. at 34).

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[10]Utah also points out similar restrictions pertaining to the federal program for a permanent repository established in Subtitle A. See 42 U.S.C. §§ 10135-10138. We fail to see how restrictions on permanent disposal are relevant to the issue of authority for AFR interim storage. Obviously, permanent disposal raises unique legal and political ramifications and cannot be compared to interim storage, the subject matter of this lawsuit. For these reasons, we see no reason to address or justify in this brief the restrictions pertaining to a permanent federal repository.

Utah is seriously mistaken in its premise that AEA-authorized private AFR spent fuel storage facilities are "completely unfettered by Congress's protective judgments." Part 72 of the NRC's regulations, 10 C.F.R. Part 72, which were promulgated pursuant to the AEA, establishes an elaborate regulatory scheme designed to protect public heath and safety. (See App. 398). As the AEA requires,[11] the NRC's Part 72 licensing scheme allows participation by state and local governments and affected members of the public. Indeed, the petitioners in this lawsuit have vigorously contested the proposed PFS license adjudication before the NRC.

Each of the special conditions applicable to private generator participation in the NWPA-created federal interim storage program constitutes some form of limitation, whether substantive or procedural, on the availability of federal interim storage capacity. These restrictions, both individually and as a whole, plainly were designed to limit access by private generators to federal spent fuel storage capacity. But they say nothing about private AFR facilities. Rather, Congress's imposition of restrictions on the availability of federal interim storage is entirely consistent with the express policy underlying the NWPA that "the generators and owners of...spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the

[11]See AEA, § 189, 42 U.S.C. § 2239.

interim storage of...spent fuel until such...spent fuel is accepted by [DOE for permanent disposal]." NWPA, § 111(a)(5), 42 U.S.C. §10131.

In light of this policy, it is hardly surprising that Congress would have established various substantive and procedural restrictions to discourage private generators from relying on federal capacity to solve their storage needs. Viewed in context with this express Congressional policy, therefore, the restrictions imposed by Congress on the federal AFR interim storage do not remotely evidence an intent to make federal storage the exclusive solution to spent fuel storage or to prohibit existing or new private AFR facilities.

Indeed, Congress's provision for a federal interim storage program, if anything, cuts the other way. The very enactment of Subtitles B and C reflects Congress's growing concern over the nation's critically low storage capacity for spent nuclear fuel. Congress worried that needed power reactors might shut down for lack of storage room. It defies "common sense" to believe that Congress in this setting would have used the NWPA as a vehicle to cut back on storage options and restricted storage to onsite options and to a severely limited federal storage program replete with hurdles for participation. Cf. Brown & Williamson, 529 U.S. at 130-31.

8. The language of subsection (h) itself suggests another problem with Utah's interpretation. Section 135(h) of Subtitle B applies to "private or Federal use, purchase, lease, or other acquisition" of away-from-reactor facilities, other

than those "owned by the Federal government" on the date of enactment. To make its case against the PFS facility, Utah reads this language as a prohibition on private construction of a new AFR facility. But section 135(h) applies to "private or Federal use, purchase...." (emphasis added), so if Utah's reading were correct it must follow that section 135(h) also prohibits federal construction of any new AFR facilities. But Subtitle C of the NWPA, "Monitored Retrievable Storage," requires "the executive branch and Congress [to] proceed as expeditiously as possible to consider fully a proposal for construction of one or more monitored retrievable storage facilities." NWPA, § 141(a)(2), 42 U.S.C. § 10161(a)(2). In short, under Utah's interpretation, Subtitle B prohibits what Subtitle C encourages.

B. The Legislative History Reveals That Congress, in Enacting The NWPA, Had No Intent To Revoke The NRC's Authority Under The AEA To License Private Away-From-Reactor Spent Fuel Facilities

As shown above, the statutory language of the NWPA contains no expression of Congressional intent to revoke the NRC's pre-existing authority under the AEA to license private AFR spent fuel facilities. Thus, it is necessary to examine the legislative history "to determine only whether there is 'clearly expressed legislative intention' contrary to that language," which would draw into "question the strong presumption that Congress expresses its intent though the language it chooses." INS v. Cardoza Fonseca, 480 U.S. 421, 432, n. 12 (1987) (citation omitted). See also Barnhart v. Sigmon Coal Co., 534 U.S. 438,

450 (2002) ("The inquiry ceases 'if the statutory language is unambiguous and the statutory scheme is coherent and consistent.'") (citation and internal quotation marks omitted). Far from "draw[ing] into question" the NRC's view of the NWPA -- that Congress had no intention to revoke the NRC's AEA authority to license private AFR spent fuel facilities -- the legislative history confirms that conclusion.

1. The legislative history, fairly read, is devoid of any suggestion that Congress had an intention to revoke the NRC's licensing authority and restrict nuclear industry storage options. In fact, as the Commission noted (App. 405), it was the industry itself that had campaigned for federal government interim storage in an effort to expand storage alternatives.[12] It is most unlikely that Congress would have responded by establishing a severely limited government program while at the same time eliminating existing AEA authority for private AFR storage facilities. Indeed, as discussed infra, Congress was fully aware of the private AFR option during its NWPA deliberations.

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[12]See, e.g., Radioactive Waste Legislation:Hearings Before the Subcomm. on Energy and Env't of the House Comm. on Interior and Insular Affairs on H.R. 1993, H.R. 2800, H.R. 2840, H.R 2881, and H.R. 3809, 97th Cong., at 532, 549-551 (1981) (statement of Sherwood H. Smith, Jr., Chairman and Chief Executive Officer, Carolina Power & Light Co., on behalf of the American Nuclear Energy Council, the Edison Electric Institute, and The Utility Nuclear Waste Management Group, July 9, 1981). See also Nuclear Waste Disposal Policy Hearings on H.R. 1993, H.R. 2881, H.R. 3809, and H.R. 5016 Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce, 97th Cong., at 416, 434 (1982) ("1982 House Hearings") (testimony of Sherwood H. Smith).

The "official Senate and House Reports"[13] on bills leading to the enactment of the NWPA strongly suggest that Congress would in fact have welcomed private initiatives to solve the spent fuel storage problem but that utilities were reluctant "to provide additional storage capacities up to a life-time...of discharges" for various reasons, including the "threat of additional regulations, the indefinite deferral of reprocessing, the nonavailability of a repository, and increasing intervenor actions against any efforts to provide additional storage capacity...." S. Rep. No. 97-282, at 5 (1981) ("Joint Senate Report"). See also H.R.Rep. No. 97-491, Pt. I, at 28 (1982) (noting the "tendency on the part of utilities to hold the Federal government responsible for the lack of storage space for spent fuel" and that "private efforts which had been underway to provide interim storage capacity were abandoned" due to the promise of the Carter administration to provide federal interim storage).

In hearings, too, members of the 97th Congress received testimony based on the assumption that private AFR spent fuel facilities would remain a lawful (though perhaps difficult) option. For example, in a hearing on several of the proposed bills before the Subcommittee on Energy Conservation and Power, Rep. Ottinger asked an industry representative why utilities could not just "pool their resources" and construct their own AFR spent fuel storage facilities. See 1982

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[13]See Kelly v. Robinson, 479 U.S. 36, 51, n.13 (1986) (in hierarchy of legislative history "official Senate and House Reports" accorded significance); accord Gersman v. Group Health Ass'n, 975 F.2d 886, 891 (D.C. Cir. 1992).

House Hearings, at 415 (testimony of Sherwood Smith). The industry representative responded that because of the adversarial NRC licensing process, industry would be unable to construct new AFR facilities within the time frame to meet their needs. See 1982 House Hearings, at 415-16. And in hearing testimony from the then NRC Chairman (which was included in the Joint Senate Report), members of Congress were expressly informed that the NRC's Part 72 regulations were promulgated "in anticipation of requests to license away-from-reactor facilities...for the storage of spent fuel in an independent spent fuel storage installation" and that the NRC would be "ready and able to take prompt action for any licensing actions relating to interim spent fuel storage." Joint Senate Report, at 44.

The Report of the Committee on Energy and Commerce on H.R. 6598,[14] which originated subsection (h) in essentially its final form, also contains telling evidence that Congress had no intention to take away the option of private AFR spent fuel storage. As the Commission decision explained (App. 391, 405), earlier bills had expressly required generators to show that they had exhausted private offsite storage as an option before seeking federal storage, and H.R. 6598, 97th Cong. § (b)(2) (1982), as reported by the Committee on Energy and Commerce, was apparently the first bill to eliminate that requirement. (App. 24). Utah sees great significance in the elimination of the requirement to exhaust

[14]H.R.Rep. No. 97-785, pt. I (1982) ("House Committee Report").

private AFR options and the simultaneous appearance of subsection (h). Utah maintains that "[f]rom the moment that subsection (h) made its appearance, all deliberations in the House...proceeded on the basis that private off-site storage was not an option in the Nation's nuclear waste management system." See Pet. Br. at 39, n. 30 (emphasis in original).

But contrary to Utah's claim, the new bill, H.R. 6598, continued to assume the existence of private AFR storage facilities as a lawful option. As the House Committee Report explains (at 83), the version of the bill then before the Committee had retained a provision specifying that, "in any proceeding on an application for a license or for an amendment to an existing license to expand storage capacity...the [NRC] shall not consider any issue related to the availability or desirability of any alternative away-from-reactor storage sites...." The House committee would have had no need to direct the NRC not to "consider" the availability of private AFR storage facilities if the new law would have rendered such facilities illegal.

The House Committee Report also explains:

> The bill explicitly establishes a strong preference for storage of spent fuel at existing reactor sites. A major reason for this is a serious public concern about the safety of transporting nuclear materials. The storage capacity problem increases the incidence of transportation since, if additional storage capacity is not available at the site, it must be provided off-site at another reactor's storage pool or at some other location.

House Committee Report at 40 (emphasis added). Thus, the House committee that originated subsection (h) in essentially its final form explicitly recognized that offsite storage would continue to be a lawful option, because at-reactor storage might not be available. The House committee's expression of a "preference" for private onsite storage also provides explicit acknowledgment that private offsite facilities would continue to be authorized. If the House committee had it in mind to ban private offsite facilities altogether, it certainly would not have referred to onsite storage as only a "preference."

Finally, the House Committee Report (at 41) points out that the "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 [DOE]." This comment plainly reflects that private AFR storage was viewed as a continuing viable option even after the "appearance"[15] of subsection (h). Had the House committee intended to ban private AFR storage, there would have been no reason for the committee to "not require" that such capacity be exhausted or unavailable for federal storage eligibility -- there would have been no such capacity to exhaust.

2. The legislative history, moreover, supports the NRC's affirmative interpretation of section 135(h)'s "encourage, authorize, or require" phrase, and the reasons for Congressional restrictions on the interim federal storage

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[15]Pet. Br. 39, n. 30.

program. The Commission's detailed discussion of and numerous references to the legislative history provide overwhelming support for the NRC's interpretation in all of these respects. See App. 390-91, 393-94, 396-97, 399-400, 402, 403-04. Additional legislative history, including floor statements during the full House and Senate floor debates preceding the final votes on the bill ultimately enacted (H.R. 3809), provides further support for the NRC's interpretation. Because the final bill before both the House and the Senate represented a compromise worked out by the leaders of both Houses,[16] these remarks are particularly significant as expressions of Congressional intent underlying subsection (h).

(a) "Authorize". The legislative history supports our construction of the term "authorize" in subsection (h) -- i.e., as limiting DOE's new interim storage program to existing federal facilities. As the Commission's decision noted (App. 406), "members of Congress from...districts containing existing storage facilities [at Morris, Illinois; West Valley, New York; and Barnwell, South Carolina] were concerned that DOE would use those facilities to satisfy its obligation under section 135." See, e.g., Remark of Sen. Thurmond, 128 Cong. Rec. S15658; Remark of Rep. Corcoran, 128 Cong. Rec. H10518; H10522. The House and

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[16]See Remark of Rep. Moakley, 128 Cong. Rec. H10517 (daily ed. Dec. 20, 1982) ("[i]n virtually every important respect, the process by which the matter is placed before the House today represents the full equivalent of a conference report"); Remark of Sen. McClure), id. at S15654 (version of bill being voted on was a "consensus piece of legislation...represent[ing] the collective judgment of all the cosponsors representing themselves and their respective committees").

Senate floor debates on the compromise bill reflect that the intent underlying the final legislation was to "preclude Federal acquisition or use of private facilities in Morris, Barnwell, and West Valley for the limited away-from-reactor storage program authorized by the bill." Remark of Rep. Udall, 128 Cong. Rec. at H10522.[17] In addition, floor remarks on the joint compromise bill indicate that the terms "use, purchase, lease, or other acquisition" as used in subsection (h) were intended to exclude "construction." Remark of Senator Thurmond, id. at S15657 (noting that DOE would be prohibited from pursuing new construction of AFR facilities in order to satisfy its obligations under the federal interim storage program). There is no hint in the history that the "does not authorize" phrase in actuality -- as Utah maintains -- prohibits private AFR storage facilities.

(b) "Encourage" and "Require". The legislative history supports our construction of the terms "encourage" and "require" in subsection (h) -- i.e., as

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[17]See also, e.g., Remark of Rep. Corcoran, id. (legislation prohibits DOE from "purchas[ing], acquir[ing], or leas[ing] an interim privately owned away-from reactor storage program"); Remark of Rep. Broyhill, id. (proposed legislation "does not contain any authorization for the use of private storage facilities, such as Morris, Barnwell, or West Valley"); Remark of Rep. Madigan, id. (confirming that compromise legislation "precludes Federal use or acquisition of any of the three privately owned facilities that are capable of storing high level spent nuclear fuel...located in [Morris, Barnwell, and West Valley]"); Remark of Senator Simpson, id. at S15659 (confirming Senator Percy's understanding that intent of the managers was to "prohibit [DOE] from providing capacity for the storage of spent nuclear fuel from civilian nuclear power reactors at...[Morris, West Valley, and Barnwell]").

making clear that nothing in the Act "encourages" or "requires" private generators to pursue the use, purchase, lease, or other acquisition of a private AFR storage facility as a prerequisite to taking part in the newly established federal storage program. As noted, early bills had required generators to demonstrate that they had exhausted private offsite storage as an option as a prerequisite to eligibility for federal storage.[18] The Committee on Energy and Commerce, in reporting H.R. 6598, later eliminated that requirement, apparently at the urging of the nuclear industry in light of the difficulties it perceived in either acquiring existing private AFR facilities or constructing new AFR facilities.[19] (App. 405). Even before the elimination of the requirement to exhaust private AFR storage options, a similar House bill had included a "limitation" provision that spoke only to DOE's authority, making clear that DOE had no

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[18]See, e.g., H.R.Rep. No. 97-491, at 20 (H.R. 3809, 97th Cong. § 133(b)(1)(D), as reported out of the House Comm. on Interior and Insular Affairs, April 27, 1982); S. 1662, 97th Cong. § 301(a) (1982) (as reported out of the Comm. on Env't and Pub. Works, March 8, 1982); H.R. 6598, 97th Cong. § 135(b)(2)(B) (1982) (as reported out of the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce, July 8, 1982).

[19]Nuclear Waste Disposal: Joint Hearings before the Committee on Energy and Natural Resources and the Subcommittee on Nuclear Regulation of the Committee on Environment and Public Works, United States Senate, on S. 637 and S. 1662, 97th Cong., at 329, 336, 352-57 (testimony and prepared statement of industry representative that utilities could not finance acquisition of existing AFR facilities at Morris, West Valley, or Barnwell); 1982 House Hearings, at 415-16 (industry representative testimony explaining why utilities could not build AFR storage facility on timely basis).

authority to use private AFR facilities for purposes of the federal storage program:

> For the purposes of providing storage capacity under subsection (a), [DOE] may not purchase, lease, or otherwise acquire any commercial facility designed or intended to be used for the reprocessing of spent nuclear fuel for extraction of uranium or plutonium.

See H.R. 3809, 97th Cong. § 133(d) (as reported out of the House committee on Interior and Insular Affairs, April 27, 1982).

The version of H.R. 6598 that removed the requirement that private AFR storage be exhausted as a prerequisite to access to federal interim storage capacity contained a provision in essentially the same form as the current subsection (h). That provision picked up the limitation on DOE's authority to acquire private AFR facilities reflected in the earlier House bill, and included, in addition, the "encourage" and "require" language and the reference to "private use, purchase...." The fact that the "encourage," "require," and "private use" language was inserted against the backdrop of the elimination of the private AFR storage exhaustion requirement simply "underscores," as the Commission said (App. 391), that "generators would not have to prove that they could not meet their own storage needs through storage at a private AFR facility." Nothing suggests a Congressional intent to render private AFR storage unlawful.[20]

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[20]Utah argues that it is improper to reference legislative proposals that preceded the "appearance" of subsection (h). (Pet. Br. at 38, n. 30). Suffice it to (continued...)

(c) Limitations on the Federal Interim Storage Program

As the Commission indicated (App. 399-400), the legislative history undeniably supports the conclusion drawn from the statutory language that the severe restrictions placed on the availability of federal interim storage capacity were to discourage reliance on federal capacity and to encourage private solutions in light of Congress's conclusion that interim storage should primarily be the private industry's responsibility. Indeed, the Senate floor debate on the compromise bill is replete with suggestions to that effect. See, e.g., Remark of Sen. Thurmond, 128 Cong. Rec. at S15658; Remark of Sen. Percy, id. at S15659; Remark of Sen. Mitchell, id. at S15670. See also Remark of Rep. Lundine, 128 Con. Rec. 28,032-33. Again, nothing in the legislative history suggests that in limiting the new federal storage program Congress also meant to prohibit private AFR storage initiatives.

3. Finally, in its effort to find an elusive prohibiting intent, Utah selectively quotes from the House and Senate floor debates. Utah focuses on statements made by Representatives Lundine, Corcoran, Lujan, and Broyhill. (Pet. Br. at 36-38). But the statements Utah quotes, to the general effect that the NWPA would not result in private AFR facilities, "were obviously not made

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[20](...continued)
say, the Supreme Court itself relies upon the consideration and rejection of legislative proposals as a relevant aspect of the legislative history. See, e.g., Brown & Williamson, 529 U.S. at 144; Russello v. United States, 464 U.S. 16, 23-24 (1983).

with th[e] narrow issue in mind,'" Chevron, 467 U.S. at 862 (citation omitted), whether to exclude private AFR spent fuel facilities altogether as unlawful. Therefore, these statements "'cannot be said to demonstrate a Congressional desire....'" Id.

In fact, the quoted floor statements, expressed amidst a debate over Rep. Lundine's proposal to delete the federal interim storage program, were directed to and inspired by concerns expressed by Rep. Corcoran and others over a federal takeover of existing private AFR facilities. This is evident in the two quoted remarks Utah relies upon most heavily -- those by Reps. Lujan and Broyhill. (Pet. Br. at 37). In any event, given the stark absence anywhere in the statutory language or legislative history as a whole of any intention to revoke the NRC's authority and preclude private AFR spent fuel facilities, isolated statements of legislators do not demonstrate congressional intent. Barnhart, 534 U.S. at 457; see also Gersman, 975 F.2d at 891 ("meaning of the statute" not revealed in floor "rhetoric" of legislators "speaking for various constituencies"); Chem. Mfrs. Ass'n v. EPA, 673 F.2d 507, 512 n. 25 (D.C. Cir. 1982) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.'") (citation omitted).

C. In Enacting the NWPA, Congress Did Not Repeal The NRC's Authority To License Private Away-From-Reactor Spent Fuel Storage Facilities By Implication

It is a "cardinal rule" that "repeals by implication are not favored." FAIC Sec., Inc. v. United States, 768 F.2d 352, 362 (D.C. Cir. 1985) (citing Morton v. Mancari, 417 U.S. 535, 549-50 (1974)) (internal quotations omitted). In "the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." Morton, 417 U.S. at 550 (citation omitted). As discussed above, nothing in the language or the legislative history of the NWPA "demonstrates (or even hints at) a congressional intent" to repeal the NRC's authority to license the construction and operation of private AFR spent fuel facilities. See FTC v. Ken Roberts Co., 276 F.3d 583, 593 (D.C. Cir. 2001). Thus, if Congress intended to repeal the NRC's authority it must have done so by implication.

As the Commission said below (App. 398), however, there is "no particular incongruity, let alone absolute incompatibility" between the NWPA spent fuel storage provisions and the AEA provisions authorizing the NRC to license private AFR spent fuel facilities. Indeed, preserving the option pursuant to the AEA for storage of spent fuel in private AFR facilities is entirely consistent with and even furthers congressional goals underlying the NWPA's storage provisions – to

expand spent fuel storage options in light of the urgent need for spent fuel storage capacity.

Utah objects to the Commission's characterization of its reading of the NWPA as an implied repeal, which it acknowledges is "disfavored." (Pet. Br. at 42). It attempts to fit its construction into the category of cases in which courts have found a later specific statute to have "alter[ed] the implications" of an earlier general statute. But as discussed above in Part A.1., the NRC's pre-existing authority under the AEA to license the possession, use, and transfer of the radiological constituents of commercial spent fuel, regardless of the happenstance of the location of the spent fuel, was broad, exclusive, and clear, not a mere "implication." Therefore, this is not a case like United States v. Estate of Romani, 523 U.S. 517, 530 (1998), where the Supreme Court found it inappropriate to view the issue in the context of implied repeals because a "basic question of interpretation" regarding the earlier statute "remain[ed] unresolved." The interpretive canon disfavoring implied repeals applies even where, as arguably the case here, the earlier legislation is general and the new legislation more specific. See, e.g., J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 134 (2001) (applying canon to find no implied repeal of earlier general statute by later specific one where earlier statute did not expressly cover the disputed subject matter but had the "potential" to cover it before enactment of later specific statute); Chem. Mfrs. Ass'n, 673 F.2d at 512 (applying canon to

find no implied repeal of earlier general statute by later specific one and rejecting characterization of litigant's position as not advocating an implied repeal).

In support of its claim that its construction of the NWPA merely alters the "implications" of an earlier general statute -- i.e., the AEA -- and cannot be viewed as an implied repeal, Utah relies on United States v. Fausto, 484 U.S. 439 (1988), and FDA v. Brown & Williamson, supra.. But neither case is helpful to Utah's position.

In Fausto, the Supreme Court found an implied "'repeal'" of an earlier statute (as construed in the courts) where it found two schemes to be incompatible. 484 U.S. at 453. As noted above, preserving private AFR storage as an option under the AEA is not remotely incompatible with the storage scheme established in the NWPA. And in Brown & Williamson, the Supreme Court reconciled an apparent conflict between two laws by giving effect to the FDA's longstanding and consistent disavowal of jurisdiction over tobacco products under the earlier statute. 529 U.S. at 146. That case actually supports rather than defeats the NRC's position because the NRC, unlike the FDA in Brown & Williamson, has always claimed the authority now supposedly repealed. There has never been a time when the NRC disclaimed authority to license private AFR storage facilities.

D. The NRC's Interpretation That Congress Did Not Intend To Revoke Its Authority Under The AEA To License Private AFR Spent Fuel Storage Facilities Is Reasonable And Consistent With Congressional Objectives

The statutory language and legislative history of the NWPA reveal no Congressional intention, either affirmative or implied, to revoke the NRC's authority under the AEA to license private AFR spent fuel storage facilities. Thus, the NRC should prevail under the first step of the Chevron analysis. However, "insofar as there is [any] ambiguity," the agency should "certainly prevail at step two." See Public Citizen, Inc. v. FAA, 988 F.2d 186, 195 (D.C. Cir. 1993). At the very least, our reading of the AEA and the NWPA is a "permissible" one, giving a sensible meaning to the two statutes. See Chevron, 467 U.S. at 843. Our reading also accomplishes Congress's policy goals.

As the Commission noted (App. 402), the federal interim storage program expired in 1990, at least five years before Congress anticipated the opening of a permanent spent fuel repository.[21] Congress could not reasonably have presumed that onsite storage capacity – which was already filling up at the time the NWPA was enacted – would be sufficient to take care of all of the utilities' spent fuel storage needs during that gap of time. It is far more reasonable to conclude, as the Commission did (App. 402), that the "gap suggests that

[21]See H.Rep. No. 97-491, at 31 (Chronology of the NWPA's deadlines anticipating that operations at a permanent repository could begin "around 1995").

Congress intended to force the utilities to solve their own interim storage solutions after the federal program had 'bought them time' to do so."

Moreover, Congress made no special accommodation for the existing state and privately owned AFR spent fuel storage facilities in West Valley, N.Y. and Morris, Illinois, respectively, both of which were storing spent fuel under an NRC license at the time of the NWPA's passage. Neither of these facilities would legally have been allowed to continue if subsection (h) had constricted interim storage options to onsite storage and the limited federal storage program.[22]

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[22]Not surprisingly, Utah now attempts to square its theory of "disavowal" with congressional silence about the fate of these facilities in enacting the NWPA. Again engaging in a strained linguistic analysis, Utah concludes that "both the legislative history and the plain language of the statute may be read to suggest that Congress intended a prospective intent to withhold authorization for any new private AFR facilities, but not to pull the plug on existing ones." See Pet. Br. at 40 (emphasis in original). This "prospective intent" construction cannot be gleaned anywhere from the NWPA's statutory language or legislative history. Moreover, the construction does not square with Utah's own reading of the "notwithstanding" clause in subsection (h) (see Pet. Br. at 25). Had Congress intended a "prospective" only effect in disavowing the NRC's authority, as Utah now maintains, the "notwithstanding" clause would be rendered superfluous since statutes are generally presumed to operate prospectively. See, e.g., Gersman, 975 F.3d at 895. Utah also questions whether the Morris and West Valley facilities are away-from-reactor facilities. (Pet. Br. 40-41). But what matters for the purposes of statutory analysis is not what Utah believes but how these facilities were viewed by Congress. The legislative history is clear that Congress viewed both of these facilities as AFR facilities. See, e.g., Remarks of Rep. Udall, 128 Con. Rec. at H10522. Utah also suggests that the West Valley facility may not be a facility "not owned by the Federal government" within the meaning of subsection (h). (Pet. Br. 41-42). It is a matter of public record that the State of New York took over ownership of the facility from a private company before the NWPA's enactment.

The severely limited DOE interim storage program, its early expiration date, the existing West Valley and Morris facilities, the ongoing shortage in spent fuel storage capacity, and numerous other factors belie Utah's notion that in the NWPA Congress acted "comprehensively" (Pet. Br. 45), ousting prior NRC authority and alternate storage options. "The interim storage provisions of the [NWPA] are not comprehensive regulations. . .but remedial legislation addressed to a specific problem." Idaho v. DOE, 945 F.2d at 299.

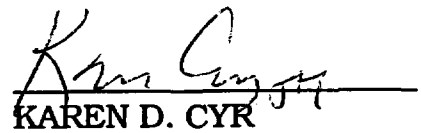
Finally, as the Commission indicated (App. 396), members of the Congress that enacted the NWPA well knew that the NRC's regulations under 10 C.F.R. Part 72 authorized private AFR spent fuel storage facilities. Given the political significance and the magnitude of the waste storage problem at the time the NWPA was enacted, it defies "common sense" to believe that Congress would have foreclosed a viable option for spent fuel storage, particularly "in so cryptic a fashion" as Utah imagines. Cf. Brown & Williamson, 529 U.S. at 133, 160.

Utah may believe that Congress stripped the NRC of AFR licensing authority through elliptical phrases in section 135(h). But this is most unlikely. As the Supreme Court noted in Whitman v. American Trucking Ass'ns, 531 U.S. 457, 468 (2001), "Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes."

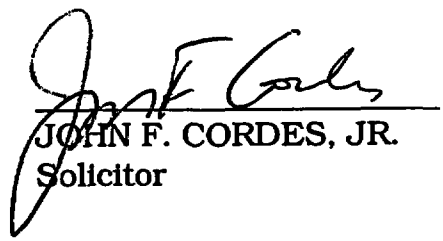
CONCLUSION

For the foregoing reasons, this Court should deny the petitions for review.

Respectfully submitted,



KAREN D. CYR
General Counsel



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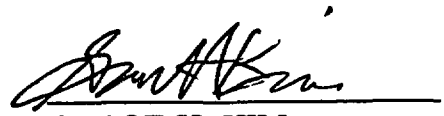

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October 1, 2003

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Margene Bullcreek, *et al.*,	)	
	)	
Petitioners,	)	
	)	
v.	)	
	)	Nos. 03-1018
U.S. NUCLEAR REGULATORY COMMISSION	)	03-1022
and the UNITED STATES OF AMERICA,	)	(Consolidated)
	)	
Respondents,	)	
	)	

CERTIFICATE OF LENGTH OF BRIEF

I hereby certify that the foregoing final "Brief for Respondent U.S. Nuclear Regulatory Commission" contains 13,938 words, excluding the Table of Contents, Table of Authorities, Glossary, Addendum, and Certificates of Counsel, as counted by the Corel WORDPERFECT 8 program.

Respectfully submitted,

Grace H. Kim
Senior Attorney

October 1, 2003

STATUTORY ADDENDUM

NUCLEAR WASTE POLICY ACT OF 1982
SUBTITLE A-REPOSITORIES FOR DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTE AND SPENT NUCLEAR FUEL

§ 10131. Findings and purposes

(a) The Congress finds that--

(1) radioactive waste creates potential risks and requires safe and environmentally acceptable methods of disposal;

(2) a national problem has been created by the accumulation of (A) spent nuclear fuel from nuclear reactors; and (B) radioactive waste from (i) reprocessing of spent nuclear fuel; (ii) activities related to medical research, diagnosis, and treatment; and (iii) other sources;

(3) Federal efforts during the past 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal have not been adequate;

(4) while the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel as may be disposed of in order to protect the public health and safety and the environment, the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel;

(5) the generators and owners of high-level radioactive waste and spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of such waste and spent fuel until such waste and spent fuel is accepted by the Secretary of Energy in accordance with the provisions of this chapter;

(6) State and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel; and

(7) high-level radioactive waste and spent nuclear fuel have become major subjects of public concern, and appropriate precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety and the environment for this or future generations.

NUCLEAR WASTE POLICY ACT OF 1982
SUBTITLE B-INTERIM STORAGE PROGRAM

§ 10151. Findings and purposes

(a) The Congress finds that--

(1) the persons owning and operating civilian nuclear power reactors have the primary responsibility for providing interim storage of spent nuclear fuel from such reactors, by maximizing, to the extent practical, the effective use of existing storage facilities at the site of each civilian nuclear power reactor, and by adding new onsite storage capacity in a timely manner where practical;
(2) the Federal Government has the responsibility to encourage and expedite the effective use of existing storage facilities and the addition of needed new storage capacity at the site of each civilian nuclear power reactor; and
(3) the Federal Government has the responsibility to provide, in accordance with the provisions of this part, not more than 1,900 metric tons of capacity for interim storage of spent nuclear fuel for civilian nuclear power reactors that cannot reasonably provide adequate storage capacity at the sites of such reactors when needed to assure the continued, orderly operation of such reactors.

(b) The purposes of this part are--

(1) to provide for the utilization of available spent nuclear fuel pools at the site of each civilian nuclear power reactor to the extent practical and the addition of new spent nuclear fuel storage capacity where practical at the site of such reactor; and
(2) to provide, in accordance with the provisions of this part, for the establishment of a federally owned and operated system for the interim storage of spent nuclear fuel at one or more facilities owned by the Federal Government with not more than 1,900 metric tons of capacity to prevent disruptions in the orderly operation of any civilian nuclear power reactor that cannot reasonably provide adequate spent nuclear fuel storage capacity at the site of such reactor when needed.

NUCLEAR WASTE POLICY ACT OF 1982
SUBTITLE B–INTERIM STORAGE PROGRAM

§ 10155. Storage of spent nuclear fuel

(a) Storage capacity

(1) Subject to section 10107 of this title, the Secretary shall provide, in accordance with paragraph (5), not more than 1,900 metric tons of capacity for the storage of spent nuclear fuel from civilian nuclear power reactors. Such storage capacity shall be provided through any one or more of the following methods, used in any combination determined by the Secretary to be appropriate:

(A) use of available capacity at one or more facilities owned by the Federal Government on January 7, 1983, including the modification and expansion of any such facilities, if the Commission determines that such use will adequately protect the public health and safety, except that such use shall not--

(i) render such facilities subject to licensing under the Atomic Energy under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.) or the Energy Reorganization Act of 1974 (42 U.S.C. 5801 et seq.); or

(ii) except as provided in subsection (c) of this section require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), such facility is already being used, or has previously been used, for such storage or for any similar purpose.

(B) acquisition of any modular or mobile spent nuclear fuel storage equipment, including spent nuclear fuel storage casks, and provision of such equipment, to any person generating or holding title to spent nuclear fuel, at the site of any civilian nuclear power reactor operated by such person or at any site owned by the Federal Government on January 7, 1983;

(C) construction of storage capacity at any site of a civilian nuclear power reactor.

(2) Storage capacity authorized by paragraph (1) shall not be provided at any Federal or non-Federal site within which there is a candidate site for a repository. The restriction in the preceding sentence shall only apply until such time as the Secretary decides that such candidate site is no longer a candidate site under consideration for development as a repository.

(3) In selecting methods of providing storage capacity under paragraph (1), the Secretary shall consider the timeliness of the availability of each such method and shall seek to minimize the transportation of spent nuclear fuel, the public health and safety impacts, and the costs of providing such storage capacity.

(4) In providing storage capacity through any method described in paragraph (1), the Secretary shall comply with any applicable requirements for licensing or authorization of such method, except as provided in paragraph (1)(A)(i).

(5) The Secretary shall ensure that storage capacity is made available under paragraph (1) when needed, as determined on the basis of the storage needs specified in contracts entered into under section 10156(a) of this title, and shall accept upon request any spent nuclear fuel as covered under such contracts.

(6) For purposes of paragraph (1)(A), the term "facility" means any building or structure.

NUCLEAR WASTE POLICY ACT OF 1982
SUBTITLE B–INTERIM STORAGE PROGRAM

§ 10155. Storage of spent nuclear fuel

(b) Contracts

(1) Subject to the capacity limitation established in subsections (a)(1) and (d) of this section, the Secretary shall offer to enter into, and may enter into, contracts under section 10156(a) of this title with any person generating or owning spent nuclear fuel for purposes of providing storage capacity for such spent fuel under this section only if the Commission 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 described 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.

NUCLEAR WASTE POLICY ACT OF 1982
SUBTITLE B-INTERIM STORAGE PROGRAM

§ 10155. Storage of spent nuclear fuel

(h) Application

Notwithstanding any other provision of law, nothing in this chapter 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 January 7, 1983.

NUCLEAR WASTE POLICY ACT OF 1982
SUBTITLE C-MONITORED RETRIEVABLE STORAGE PROGRAM

§ 10161. Monitored retrievable storage

(a) Findings

The Congress finds that--

(1) long-term storage of high-level radioactive waste or spent nuclear fuel in monitored retrievable storage facilities is an option for providing safe and reliable management of such waste or spent fuel;

(2) the executive branch and the Congress should proceed as expeditiously as possible to consider fully a proposal for construction of one or more monitored retrievable storage facilities to provide such long-term storage;

(3) the Federal Government has the responsibility to ensure that site-specific designs for such facilities are available as provided in this section;

(4) the generators and owners of the high-level radioactive waste and spent nuclear fuel to be stored in such facilities have the responsibility to pay the costs of the long-term storage of such waste and spent fuel; and

(5) disposal of high-level radioactive waste and spent nuclear fuel in a repository developed under this chapter should proceed regardless of any construction of a monitored retrievable storage facility pursuant to this section.

CLI-02-29
56 NRC 390 (2002)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of **Docket No. 72-22-ISFSI**

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage Installation)

December 18, 2002

NUCLEAR WASTE POLICY ACT: REGULATION OF SPENT NUCLEAR FUEL

The NWPA does not expressly repeal NRC's Atomic Energy Act–derived authority over spent fuel storage. NWPA section 135(h) provides that the NWPA itself does not authorize away-from-reactor ISFSIs.

NUCLEAR WASTE POLICY ACT: REGULATION OF SPENT NUCLEAR FUEL

Where an activity is already authorized by another provision of law, declining to "authorize" it anew is not the same as prohibiting it.

ATOMIC ENERGY ACT: REGULATION OF SPENT NUCLEAR FUEL

The NRC derives its authority to regulate spent nuclear fuel from the Atomic Energy Act. The AEA gives the Commission regulatory jurisdiction over the constituent materials of spent nuclear fuel. It authorizes the Commission to

license and regulate the possession, use, and transfer of source, byproduct, and special nuclear materials regardless of their aggregate form. *See* AEA §§ 53, 62, 63, 81, 161(b), 42 U.S.C. §§ 2073, 2092, 2093, 2111, 2201(b). These materials include 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." *See* AEA §§ 11e(1), z, aa, 42 U.S.C. §§ 2014(e)(1), (z), (aa). Source, byproduct, and special nuclear material are all found in spent nuclear fuel. *See* 10 C.F.R. § 72.3.

NUCLEAR WASTE POLICY ACT: REGULATION OF SPENT NUCLEAR FUEL

STATUTORY INTERPRETATION: GENERAL RULES

Congress knows how to draft legislation that clearly states its intent. If Congress intended the NWPA to absolutely prohibit private offsite storage, it would have accomplished that with concrete and specific language.

STATUTORY INTERPRETATION: IMPLIED REPEAL OF PRIOR LAW

One of the strongest maxims of statutory interpretation is that the law disfavors implied repeals. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 549-50 (1974). *Accord, J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 122 S. Ct. 593, 604-05 (2001); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 592-93 (D.C. Cir. 2001); *Elephant Butte Irrigation District v. U.S. Department of the Interior*, 269 F.3d 1158, 1164 (10th Cir. 2001). Where two statutes are "capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. at 551.

NRC: RULEMAKING AUTHORITY

REGULATIONS: VALIDITY

NRC's properly promulgated, substantive regulations have the full force and effect of law. *See, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979).

NUCLEAR WASTE POLICY ACT: REGULATION OF SPENT NUCLEAR FUEL

STATUTORY INTERPRETATION: IMPLIED REPEAL OF PRIOR LAW

It is not surprising that the law creates significant differences between a DOE facility storing commercial spent fuel under NWPA section 135 and a private interim storage facility. The Commission finds no real incompatibility in these laws, let alone the kind of "positive repugnancy" that it would need to see to find that the NWPA implicitly repealed its general regulatory authority over spent fuel. *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 122 S. Ct. at 605, *quoting Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976).

NUCLEAR WASTE POLICY ACT

STATUTORY INTERPRETATION: CONGRESSIONAL INTENT

There is no indication that Congress intended NWPA to effect a sweeping reform of all then-existing regulations relating to nuclear waste. In the NWPA, Congress intended not to reduce spent fuel storage options, but rather to expand them.

MEMORANDUM AND ORDER

By order dated April 3, 2002, the Commission granted review of the State of Utah's claim that this agency has no authority to issue the license sought by Private Fuel Storage, L.L.C. (PFS), in this proceeding.[1] We conclude that Congress, in enacting the Atomic Energy Act (AEA),[2] gave the NRC authority to license privately owned, away-from-reactor (AFR) facilities and did not repeal that authority when it later enacted the Nuclear Waste Policy Act of 1982, as amended (NWPA).[3] Accordingly, we reject Utah's claim that we lack authority to license the proposed PFS facility.

[1] CLI-02-11, 55 NRC 260 (2002).
[2] 42 U.S.C. § 2011 *et seq.*
[3] 42 U.S.C. § 10101 *et seq.*

I. THE NWPA'S STATUTORY FRAMEWORK AND UTAH'S JURISDICTIONAL THEORY

Utah's "Suggestion of Lack of Jurisdiction" argued that NWPA deprives the Commission of "jurisdiction" over PFS's application for a license to construct and operate an independent spent fuel storage installation (ISFSI) on the reservation of the Skull Valley Band of Goshute Indians. In a companion "Petition To Institute Rulemaking and To Stay Licensing Proceeding," Utah asked the Commission to amend its regulations in accordance with this theory, and to suspend related proceedings while the rulemaking is pending. We declined to suspend proceedings while we considered the merits of Utah's theory.[4]

Utah argues that the NWPA contemplates a comprehensive and exclusive solution to the problem of spent nuclear fuel and does not authorize private, AFR storage facilities such as the proposed PFS facility. Utah rests its argument on the following provision, found in subsection 135(h) of the Act:

> 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.[5]

Therefore, says Utah, the NWPA does not allow any AFR storage facility not located on federally owned land. Utah claims that the NWPA is the only possible source for NRC's jurisdiction over spent fuel storage and overrides the Commission's general authority under the AEA to regulate the handling of spent fuel because it established a comprehensive system for dealing with spent nuclear fuel.

PFS and the NRC Staff oppose Utah's position. They argue that nothing in the NWPA expressly repeals the NRC's general, AEA-based licensing authority over spent fuel. They emphasize that the provision on which Utah relies (subsection 135(h)) does not explicitly prohibit a private, AFR facility; it only fails to "authorize" such a facility.

In order to resolve the opposing claims, we start with a review of the NWPA's statutory framework. The NWPA's purpose was to establish the federal government's responsibilities for the permanent disposal and interim storage of spent nuclear fuel and high-level waste, including a schedule for the development of permanent repositories.[6] Subtitle A of the Act establishes a plan for the federal government to build a permanent repository. Subtitle B deals with interim

[4] *See* CLI-02-11, 55 NRC at 262-65.
[5] NWPA § 135(h), 42 U.S.C. § 10155(h).
[6] *See* NWPA § 111(b), 42 U.S.C. § 10131(b).

storage of spent nuclear fuel — that is, storage pending permanent disposal.[7] Other portions of the Act concerned investigating the feasibility of monitored retrievable storage,[8] financial arrangements for decommissioning low-level radioactive waste sites,[9] and a program for the DOE to conduct research and development on waste disposal technologies.[10]

Subtitle B contains the provisions of particular importance here. It seeks to help nuclear power reactor owners and operators manage spent fuel while waiting for a permanent disposal site. The Subtitle includes three "findings": that the owners and operators of reactors have the primary responsibility to provide interim storage by maximizing onsite storage; that the federal government has the responsibility to "encourage and expedite" the owners' use of onsite storage options; and that the federal government has the responsibility to provide a limited amount of storage capacity.[11] Subtitle B established a federal program, now expired, to provide limited interim storage at existing federal facilities.[12] Subtitle B's section 135, which includes the provision upon which Utah relies, required the Department of Energy (DOE) to provide up to 1900 metric tons of interim storage capacity if necessary to keep a reactor from having to shut down for lack of storage capacity. Other provisions of Subtitle B were designed to help the utilities meet their own storage needs by providing for expedited licensing procedures for onsite storage expansion, alternative storage technologies, and transshipments of spent fuel between facilities owned by the same utility.[13]

To trigger DOE's duty to take spent fuel for interim storage, Subtitle B required reactor owners to exhaust reasonable, practical, at-reactor storage options. NWPA subsection 135(b) required that, prior to DOE's entry into contracts for interim storage, the Commission must first determine that the reactor is in danger of having to shut down for lack of storage capacity, and that the owner was "diligently pursuing licensed alternatives to the use of Federal storage capacity," including various onsite storage options:

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[7] *See* NWPA §§ 131-137, 42 U.S.C. §§ 10151-10157.

[8] NWPA, Subtitle C, 42 U.S.C. §§ 10161-10169.

[9] NWPA, Subtitle D, 42 U.S.C. § 10171.

[10] NWPA, Title II, 42 U.S.C. §§ 10191-10204.

[11] NWPA § 131(a), 42 U.S.C. § 10151(a).

[12] *See* NWPA, §§ 135-137, 42 U.S.C. §§ 10155-10157. The Department of Energy was authorized to enter contracts for interim storage no later than January 1, 1990. NWPA § 136(a)(1), 42 U.S.C. § 10156(a)(1).

[13] Section 132 directs the DOE and the NRC to take actions to "encourage and expedite the effective use" of existing and additional at-reactor storage. 42 U.S.C. § 10152. Section 133 directs the NRC to establish procedures for licensing spent fuel storage technologies. 42 U.S.C. § 10153. Section 134 provides an expedited process for NRC licensing of alternative at-reactor storage technology, expanded at-reactor storage capacity, and transshipments of spent nuclear fuel between reactors within the same utility system. 42 U.S.C. § 10154.

(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.[14]

Utah contends that the NWPA contemplates that owners will use these options, and no others, to meet their spent fuel storage needs until such time as the federal government takes the material off their hands. The option to use federal interim storage expired in 1990,[15] with no generators having ever taken advantage of the program.

II. THE COMMISSION DERIVES ITS AUTHORITY TO LICENSE INDEPENDENT SPENT FUEL STORAGE INSTALLATIONS FROM THE ATOMIC ENERGY ACT

The NRC and its predecessor, the Atomic Energy Commission, have always regulated the storage of spent fuel from commercial reactors pursuant to their general authority under the AEA. In 1980, the NRC formally promulgated regulations governing the licensing of ISFSIs, 10 C.F.R. Part 72, under its AEA authority to regulate the use and possession of special nuclear material.[16] The regulations applied to both at-reactor and away-from-reactor ISFSIs.[17] This was 2 years before Congress enacted the NWPA.

A. The AEA Gives NRC the Power To Regulate Constituent Materials

The AEA does not specifically direct the NRC to regulate spent fuel storage and disposal. Rather, it gives the Commission regulatory jurisdiction over 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 regardless of their aggregate form.[18] It defines these

[14] NWPA § 135(b)(1)(B), 42 U.S.C. § 10155(b)(1)(B).
[15] NWPA § 136(a)(1), 42 U.S.C. § 10156(a)(1).
[16] *See* Licensing Requirements for the Storage of Spent Fuel in an Independent Fuel Spent Storage Installation, 45 Fed. Reg. 74,693 (Nov. 12, 1980).
[17] *See id.* at 74,696.
[18] *See* AEA §§ 53, 62, 63, 81, 161(b), 42 U.S.C. §§ 2073, 2092, 2093, 2111, 2201(b).

materials to include 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."[19] Source, byproduct, and special nuclear material are all found in spent nuclear fuel.[20]

Various courts have recognized the Commission's authority under the AEA to license and regulate the storage of spent nuclear fuel. The U.S. Supreme Court noted in *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission* that the AEA gave the Commission "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials."[21] The courts of appeals have followed the Supreme Court's lead. Relying on *Pacific Gas and Electric,* the Third Circuit held that the Commission's "exclusive" jurisdiction includes authority to regulate the shipment and storage of radioactive materials.[22] The Seventh Circuit, too, has expressly held that the AEA gives the Commission jurisdiction to regulate spent fuel storage. In holding that the AEA preempted an Illinois law prohibiting the storage and transportation of spent nuclear fuel to a privately owned, AFR facility, 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.[23]

In a more recent case challenging a state law that required a siting permit prior to construction of an ISFSI, a federal district court in Maine noted that "the NRC unquestionably retains full regulatory authority over the radiological health and safety aspects of spent fuel storage."[24]

B. The NWPA Does Not Expressly Repeal NRC's Authority over Spent Fuel Storage

Nowhere does the NWPA purport to limit the Commission's general authority under the AEA to regulate spent fuel. Section 135(h), the provision on which Utah

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[19] AEA §§ 11e(1), z, aa, 42 U.S.C. §§ 2014(e)(1), (z), (aa).

[20] *See* 10 C.F.R. § 72.3.

[21] 461 U.S. 190, 207 (1983).

[22] *Jersey Central Power & Light Co. v. Lacey Township,* 772 F.2d 1103, 1111 (3d Cir. 1985). *See also Kelley v. Selin,* 42 F.3d 1501 (6th Cir. 1995), *cert. denied,* 515 U.S. 1159 (1995).

[23] *Illinois v. General Electric Co.,* 683 F.2d 206, 214-15 (7th Cir. 1982) [internal citations omitted], *cert. denied,* 461 U.S. 913 (1983).

[24] *Maine Yankee Atomic Power Co. v. Bonsey,* 107 F. Supp. 2d 47, 53 (D. Me. 2000) (holding that the state permit requirement was preempted under the AEA).

relies, states only that the NWPA itself does not authorize away-from-reactor ISFSIs:

> 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.[25]

Notably, this provision contains no language of prohibition; it says simply that the NWPA does not "*authorize* . . . the private . . . use, purchase, lease or other acquisition" of any storage facility that is not at the site of a civilian nuclear power reactor or at a federally owned facility. According to Utah, though, "[t]his language is an express disallowance of any away-from-reactor storage other than that provided for in the NWPA."[26]

Contrary to Utah's claims, where an activity is already authorized by another provision of law, declining to "authorize" it anew — or encourage it or require it — is not the same as prohibiting it. As noted above, when the NWPA was enacted, the AEA and the NRC's existing Part 72 regulations allowed private owners of spent fuel to use an offsite facility for storage and provided for NRC licensing of such facilities. By stating "nothing in *this Act* shall . . . authorize" such storage, Congress limited the scope of section 135(h) to those programs created under the NWPA itself (emphasis added). The language of section 135(h) is facially neutral on the question of the NRC's general AEA authority to license away-from-reactor ISFSIs. Section 135(h) says what the then-new NWPA authorized, but it says nothing to override existing law.

Congress knows how to draft legislation that clearly states its intent. If Congress intended an absolute prohibition against private offsite storage, it could have accomplished that with concrete and specific language, such as: "Notwithstanding any other provision of law, this Act *prohibits* the private or Federal use . . . ," or "there shall be no private or Federal storage of spent nuclear fuel on any site . . . ." Arguably, had Congress stated in the NWPA that private AFR storage "is not authorized," without limiting that statement to the effect of "this Act," it might have suggested an intent to revoke the Commission's AEA authority to allow such storage. But Congress did not use such absolute language, and we believe that its choice of words was deliberate.

Utah's reading of section 135(h) violates the principle of statutory construction that a statute should be interpreted, if possible, in a way that gives every word meaning.[27] It would make no sense to provide that a law does not "encourage"

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[25] NWPA § 135(h), 42 U.S.C. § 10155(h).

[26] Utah's Petition To Institute Rulemaking and To Stay Licensing Proceeding (Feb. 11, 2002), at 10.

[27] *See United States v. Alaska*, 521 U.S. 1, 59 (1997); *see also Rosenberg v. XM Ventures*, 274 F.3d 137, 141 (3d Cir. 2001) ("[W]hen interpreting a statute, courts should endeavor to give meaning to every word that Congress used and therefore should avoid an interpretation which renders an element of the language superfluous").

or "require" an activity if the law actually banned that activity altogether, as Utah maintains. Utah's interpretation would make the words "encourage" and "require" superfluous. The State offers no explanation why Congress would see a need to add that it was not "encouraging" or "requiring" private, offsite storage if its decision not to authorize it in the NWPA were tantamount to an across-the-board prohibition.

But "encourage," "authorize," and "require" each has its own significance when read in context of the whole of Subtitle B, because this subtitle variously authorizes, encourages, and requires different things. By saying the NWPA did not "authorize" the use of a private facility, section 135(h) limited DOE's powers under NWPA. Because DOE's authority to take spent fuel for storage originated with section 135 of NWPA, section 135(h) ensured that DOE would not take over a private facility to fulfil its section 135 obligation.[28] But because private generators' authority to store spent fuel originated with the AEA, the NWPA's failure to "authorize" them to take the fuel had no effect on that preexisting authority.

With respect to DOE's role, it was not necessary to add that the NWPA doesn't "encourage" or "require" DOE to acquire or use private facilities. But Congress had a reason to add that the NWPA did not "encourage" and "require" storage at a private, AFR facility. These two terms relate to Subtitle B's provisions affecting private parties who own or generate spent fuel.

Subtitle B has several provisions that "encourage" generators to expand onsite storage. For example, section 132 requires DOE, NRC, and "other authorized federal officials" to "take such actions as . . . necessary to encourage and expedite the effective use" of onsite storage.[29] Section 133 directs the Commission to devise procedures for licensing alternative onsite storage technologies, and section 134 provides for expedited hearings for the expansion of at-reactor storage.[30] These provisions facilitating or encouraging expansion of onsite storage do not mention private offsite storage. Section 135(h) emphasized that they should not be construed as encouraging private storage located away from a reactor.

Context, and a little legislative background, also explains why Congress would specify that the NWPA did not "require" private offsite storage. NWPA section 135(b)(1)(B) "required" generators to maximize at-reactor storage as a prerequisite to DOE's taking possession for limited interim storage. For some time during the legislation's formative period, H.R. 3809 (the bill that was eventually enacted) and similar bills would have also required that generators exhaust private offsite storage options before they could ask DOE to take the fuel for interim

[28] Preventing DOE from taking over existing private or nonfederal spent fuel storage facilities was a specific concern of some members of Congress, as shown in both the debates (*see infra* notes 74-77 and accompanying text), and in previous versions of the bill (*see infra* note 31 and accompanying text).

[29] NWPA § 132, 42 U.S.C. § 10152.

[30] *See* 10 C.F.R. §§ 2.1101-1117 (implementing § 134).

storage.[31] Subsection 135(h) underscores that this requirement was eliminated in the final draft of the legislation: generators would not have to prove that they could not meet their own storage needs through storage at a private AFR facility.

The revisions made to section 135(h) as the legislation evolved affirm this interpretation. We can see, in an early version of H.R. 3809, the precursor of the provision that would become subsection 135(h). This was a site limitation provision prohibiting DOE from taking over commercial reprocessing facilities, which had onsite storage pools, to provide interim storage:

> For purposes of providing storage capacity under subsection (a), the Secretary may not purchase, lease, or otherwise acquire any commercial facility designed or intended to be used for the reprocessing of spent nuclear fuel for extraction of uranium or plutonium.[32]

There were, at the time, three facilities that had been built for commercial reprocessing — in Morris, Illinois; West Valley, New York; and Barnwell, South Carolina — none of which was operating. Morris and West Valley were both being used to store spent fuel, and there had been discussions of using all three for federal interim storage. If the legislation as enacted had kept the requirement that the owners of spent fuel had to show they could not meet their storage through private, offsite storage, these were the facilities to which the generators likely would have turned.[33]

Around the time the requirement that spent fuel owners exhaust private storage was removed, the site limitation provision was put into its current form, providing that private offsite storage was not "require[d]." The simple language of prohibition used in the earlier draft — "the Secretary may not" — was changed to the broader yet vaguer statement that the Act did not "authorize, encourage or require" either private or federal entities to use offsite AFR facilities.

Section 135(h), therefore, accomplished two things: it kept DOE from taking over a private AFR facility to fulfil its obligation under NWPA, while providing

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[31] *See* H.R. Rep. No. 97-491, at 20 (1982), *reprinted in part in* 1982 U.S.C.C.A.N. 3792 (H.R. 3809, § 133(b)(1)(D), reported out of the House Comm. on Interior and Insular Affairs on April 27, 1982). *See also Nuclear Waste Disposal Policy: Hearings Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce on H.R. 1993, H.R. 2881, H.R. 3809, and H.R. 5016*, 97th Cong. 2-3 (1982) [hereinafter *1982 Hearings on H.R. 1993*] (statement of Chairman Richard L. Ottinger (NY), before June 8, 1982 hearings that parties had reached "tentative agreement" calling for limited federal storage after generator had exhausted onsite storage, transshipment, or private offsite storage as options). *See also* S. 1662, 97th Cong. § 302(a) (1982) (as reported out of the Comm. on Env't and Pub. Works March 8, 1982); H.R. 6598, 97th Cong. § 135(b)(2)(B) (1982) (as reported from the Subcomm. on Energy Conservation and Power of the House Comm. on Energyand Commerce, July 8, 1982).

[32] *See* H.R. 3809, § 133(d) (as reported out of the House Committee on Interior and Insular Affairs on April 27, 1982). West Valley, the only facility that had ever reprocessed fuel, had a Part 50 license. The General Electric Company facility in Morris, Illinois, initially accepted spent fuel for storage under a Part 70 license, and was granted a license renewal under Part 72 in May 1982. *See* Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste, 51 Fed. Reg. 19,106, 19,107 (May 27, 1982).

[33] Possibly, under the original legislative approach, the owners of spent fuel would have had to show that they could not build their own offsite storage facility in time to avoid shutdown. But because the licensing process is lengthy, the owners likely may have been able to show that this was not feasible.

that Subtitle B's various provisions facilitating expanded onsite storage would not extend to private offsite storage. This reading comports with the rules of statutory construction because it gives each word Congress used a separate and distinct significance which is consistent with its ordinary meaning. This interpretation also explains why the NWPA's only reference to private, AFR storage is found in the middle of a complex statutory provision (section 135) describing a limited federal program to provide emergency storage at DOE sites. The reason is that Congress was concerned with how Subtitle B, generally, and the federal storage program, specifically, might be interpreted to affect private AFR facilities. The language of section 135(h) clarifies that there is to be no effect one way or the other.

In addition, we understand the phrase "[n]otwithstanding any other provision of law, nothing in *this Act* [shall authorize offsite storage]" to be an acknowledgment that other provisions of law might authorize private or federal use of nonfederal facilities for storage.[34] Members of Congress clearly were well aware that "other provisions of law" authorized private AFR storage facilities, as the existence, and fate, of such facilities was discussed in congressional committee debates.[35] Likewise, "other provisions of law" allowed DOE to use nonfederal storage facilities for purposes other than fulfilling its NWPA interim storage obligation. For example, Congress had only recently enacted the West Valley Demonstration Project Act, which directed DOE to take possession of, but not title to, a New York state-owned facility for a demonstration of high-level waste solidification techniques.[36]

If section 135(h) meant what Utah claims it does — namely, that prior laws granting authority to use nonfederal storage facilities were repealed —

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[34] On October 2, 2002, approximately 3½ months after the close of briefing on this matter, Utah moved to supplement its brief with an argument concerning the meaning of the phrase "[n]otwithstanding any other provision of law." Utah's Motion To Allow Three-Page Supplement on the Meaning of 42 U.S.C. 10155(h). Utah argues that the motion was timely because it was filed within 5 days of its lawyers' "flash" of insight into the meaning of the very provision of law upon which its whole argument turns. *See id.* This does not make its supplemental brief timely. We cannot accept the late brief, for to do otherwise would make briefing schedules meaningless and efficient case management impossible.

The Commission has been extremely indulgent with Utah in allowing it to explore and develop its arguments on the jurisdictional claim, which were first raised in 1997 with Utah's initial contentions before the Board. The Board rejected the argument in 1998. *See Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation) LBP-98-7, 47 NRC 142, 183-84 (1998). Although NRC Staff and the Applicant objected that Utah's effort to bring its jurisdictional claim before the Commission in 2002 amounted to an untimely appeal of the 1998 Board ruling, we accepted review in April 2002, allowing 6 weeks for briefing. *See* CLI-02-11, 55 NRC 260. Then, at Utah's request and again over the Applicant's and NRC Staff's objections, we allowed reply briefs. We also note that Utah has raised the same arguments in separate litigation in federal district court, where it might have come up with its latest "insight" a long time ago. *See Skull Valley Band of Goshute Indians v. Leavitt*, 215 F. Supp. 2d 1232 (D. Utah 2002) (appeal pending).

[35] *See, e.g.*, 128 Cong. Rec. 28,033-34 (1982) (Nov. 30, 1982); 128 Cong. Rec. H10522 (daily ed. Dec. 20, 1982); 128 Cong. Rec. S15,659 (daily ed. Dec. 20, 1982).

[36] West Valley Demonstration Project Act of 1980, 42 U.S.C. § 2021a. The West Valley facility, originally designed and licensed for spent fuel reprocessing, had been storing spent commercial fuel since its operators abandoned reprocessing in 1975.

then the West Valley Project would have been scuttled. Section 135(h) did not, in fact, affect that project, which is ongoing.[37] Similarly, under Utah's interpretation, existing storage facilities like that in Morris, Illinois, would have been rendered unlawful. There is no evidence that Congress intended that result. We conclude that Congress intended the "notwithstanding" clause in section 135(h) to recognize and distinguish, not abrogate, existing provisions of law authorizing AFR spent fuel storage.

C. The NWPA Does Not Implicitly Repeal NRC's General Authority

Because the NWPA does not expressly "prohibit" private away-from-reactor storage, but only declines to "authorize" it, Utah's argument depends upon a finding that the NWPA's waste storage provisions are exclusive. But Congress could not have created an exclusive means for dealing with waste without repealing the general authority over waste that the AEA already granted. As we have discussed, the NWPA does not explicitly repeal the NRC's AEA authority. If the NWPA took away the NRC's authority to license an AFR storage facility, then it must have done so through an *implied* repeal of the general regulatory power under which the NRC promulgated Part 72. But there is no evidence of such an implied repeal.

1. The NWPA- and AEA-Authorized Private Facility Are "Capable of Coexistence"

One of the strongest maxims of statutory interpretation is that the law disfavors implied repeals.[38] Where two statutes are "capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[39] This is because Congress is presumed to know the state of the law when it enacts legislation.[40] Therefore, courts can normally assume that Congress will specify any provisions of law that are to be superseded by new legislation.[41]

The U.S. Court of Appeals for the District of Columbia Circuit once cautioned that, without the presumption against implied repeals, the difficulty in determining the effect of a bill on the body of preexisting law would turn the legislative

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[37] *See http://www.wv.doe.gov/.*

[38] *See, e.g., Morton v. Mancari*, 417 U.S. 535, 549-50 (1974). *Accord, J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 122 S. Ct. 593, 604-05 (2001); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 592-93 (D.C. Cir. 2001); *Elephant Butte Irrigation District v. U.S. Department of the Interior*, 269 F.3d 1158, 1164 (10th Cir. 2001).

[39] *Morton v. Mancari*, 417 U.S. at 551.

[40] *See, e.g., Edelman v. Lynchburg College*, 122 S. Ct. 1145, 1151-52 (2002); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998); *White v. Mercury Marine, Division of Brunswick, Inc.*, 129 F.3d 1428, 1434 (11th Cir. 1997).

[41] *United States v. Hansen*, 772 F.2d 940, 944-45 (D.C. Cir. 1985).

process into "blind gamesmanship, in which Members of Congress vote for or against a particular measure according to their varying estimations of whether its implications will be held to suspend the effects of an earlier law that they favor or oppose."[42] Thus, in the current situation, only if there is no way to reconcile the AEA's general authority with the NWPA should we find that the latter overruled the former. For us to find an implied repeal, where the two laws can be reconciled, would give the NWPA a wider impact than Congress intended.

We should emphasize that Congress was well aware that private offsite storage was lawful when it enacted the NWPA. We could simply presume Congress knew that the AEA granted NRC the general power to regulate spent fuel storage and stop there. Or we could impute to Congress knowledge that the Commission had issued regulations allowing offsite storage, as this was announced in the *Federal Register*.[43] But we do not have to rely on any presumption that Congress was aware of existing law, for the legislative record shows that existing law on offsite storage was brought to Congress's attention. During Congress's consideration of the NWPA, NRC representatives testified before both the House and Senate concerning interim storage and the NRC's Part 72 regulations.[44] In addition, the hearings show that at least some members fully understood that NRC regulations allowed private, offsite storage. For example, in a 1981 hearing, Rep. Richard L. Ottinger asked an industry representative why the federal government should provide offsite storage when the law allowed the utilities to build their own facilities.[45] Finally, Congress knew that AFR storage facilities already existed at Morris, West Valley, and Barnwell, because their fate was specifically discussed.[46]

Utah claims that there would be a "big anomaly" between a system (the NWPA's) that would allow small federal AFR facilities only in limited circumstances, and a system (Part 72) that would allow private AFR facilities of unlimited size without the restrictions imposed on federal facilities.[47] But in face of the presumption against implied repeals, we would have to find an

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[42] *Id.* at 944.

[43] *See* 45 Fed. Reg. at 74,696; 74,698. The Commission's Statement of Considerations supporting the promulgation of 10 C.F.R. Part 72 makes clear that Part 72 applied to both at-reactor and away-from-reactor ISFSIs.

[44] *See* S. Rep. No. 97-282, at 44 (1981) (statement of Chairman Pallidino); *1982 Hearings on H.R. 1993, supra* note 31, at 326 (statement of William J. Dircks, Executive Director for Operations, U.S. Nuclear Regulatory Commission).

[45] *1982 Hearings on H.R. 1993, supra* note 31, at 411-12. In testimony before the House Energy and Commerce Committee, Subcommittee on Energy Conservation and Power, Chairman Richard L. Ottinger asked Sherwood H. Smith, president, Carolina Power & Light Co.:

> [A]s I understand it, you have the power now to expand away from reactor storage, to join together various utilities in establishing common sites away from reactor storage, and yet the utilities appear deliberately not to have done that, to have waited for the Federal Government to come in and dissolve their problem with some kind of federally provided reactor storage. Why should we save you from your own neglect?

[46] *See, e.g.*, 128 Cong. Rec. 28,033-34 (Nov. 30, 1982); 128 Cong. Rec. H10522 (daily ed. Dec. 20, 1982); 128 Cong. Rec. S15,659 (daily ed. Dec. 20, 1982).

[47] Utah's Petition To Institute Rulemaking at 22-28; Utah's Reply Brief Regarding Utah's Suggestion of Lack of Jurisdiction (June 17, 2002), at 1-6.

irreconcilable conflict between the NWPA's provisions and our AEA-authorized Part 72 regulations to find that the NWPA implicitly limited the NRC's general authority to license AFR storage. There is, however, no irreconcilable conflict between a law imposing one set of restrictions on federal facilities (the NWPA), and another law imposing a different set of restrictions on private facilities (Part 72).

To demonstrate an incompatibility between the AEA and the NWPA, Utah cites various differences between a NWPA-authorized federal AFR facility and a Part 72 private AFR facility. For example, the NWPA limited a DOE storage facility to 1900 tons of material. In contrast, our Part 72 regulations do not limit the size of an ISFSI. Also, DOE was to take the fuel only where it was necessary to prevent reactor shutdown, whereas Part 72 has no parallel restriction. And DOE was only to provide storage at sites it already owned, while Part 72, of course, allows storage at privately owned sites. Other distinctions abound. Spent fuel was required to be removed from any subsection 135 facility within 3 years of the opening of a permanent repository or monitored retrievable storage facility; Part 72 allows for a 20-year, renewable license that is not tied to the availability of a permanent disposal site. Section 135 also had provisions regarding state notification and participation, which included, in some cases, a right for the state to disapprove storage within its boundaries which could only be overridden by congressional action.[48] By contrast, when an applicant seeks a license under Part 72, states may either intervene in NRC licensing hearings as an interested party, or participate as an interested state, but they do not have the veto power the NWPA granted over section 135 storage.[49]

We see no particular incongruity, let alone absolute incompatibility, between the NWPA and our Part 72 regulations, as the differences between the law governing two types of facilities is accounted for by the fact that one facility is run by the DOE and the other privately. Federal programs use federal financial resources, and Congress would naturally set limits on the extent to which federal money and facilities are used to benefit a private commercial enterprise.

Utah argues that it would make no sense to impose a "host of protective strictures" on DOE with its "vast experience with things nuclear" while "none" are imposed on private licensees.[50] But it is hardly true that existing law imposes no "protective strictures" on private NRC licensees. Part 72 establishes an elaborate regulatory scheme designed to protect public health and safety. Indeed, in the ongoing PFS adjudication at the NRC, Utah and other litigants have challenged the Applicant's compliance with various aspects of Part 72. A DOE

[48] The state could disapprove provision of 300 or more tons of storage at any one site. *See* NWPA § 135(d)(6)(A), (D), 42 U.S.C. § 10155(d)(6)(A). The state had no right to disapprove a site on an Indian reservation, NWPA § 135(d)(6)(C), 42 U.S.C. § 10155(d)(6)(C).

[49] *See* 10 C.F.R. §§ 2.714, 2.715(c).

[50] *See* Utah's Reply Brief at 3-4.

facility that is not otherwise subject to NRC licensing, however, would not become so when used to store fuel under section 135,[51] so it was necessary for the NWPA itself to spell out any limits. To the extent that Utah suggests that limits spelled out in legislation are more "protective" than regulations promulgated by a regulatory agency, we simply note that an agency's properly promulgated, substantive regulations have the full force and effect of law.[52] We also note that while DOE may have had "vast experience with things nuclear" at the time when the NWPA was enacted,[53] private utilities — such as those making up the PFS consortium — had been handling and storing nuclear materials for 25 years under NRC (or AEC) regulation, with a safety record that compared favorably to DOE's.

The NWPA's legislative history confirms that the limits imposed on the DOE's obligation to take spent fuel for interim storage stemmed, for the most part, not from opposition to a large, centralized facility, but from Congress's belief that interim storage was the generators' responsibility. Representative Stanley N. Lundine of New York, who sponsored an amendment that would have removed all of section 135 from the NWPA, summed up the principal arguments against federal interim storage. In debates before the full House in November 1982, he argued that federal interim storage would detract from efforts to develop a permanent repository, would lead to increased transportation of fuel, and would lead to utilities' avoiding taking initiative to solve their own spent fuel storage problems.[54] He warned that the utilities would simply request the government to increase the amount of federal storage available.[55] Proponents of the federal program countered that the various limits that had been developed during the long process of crafting the legislation assured that federal interim storage would only be a "safety valve" if the generators' self-help efforts failed.[56]

Therefore, Utah's characterization of the NWPA's limits as somehow safety-related is inaccurate. The NWPA's statutory limits were clearly imposed not as safety limits, but to limit federal involvement in an area that was seen as private industry's responsibility. In particular, the 1900-ton total storage limit was not

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[51] *See* NWPA § 135(a)(1)(A)(i), 42 U.S.C. § 10155(a)(1)(A)(i). This provision exempts from NRC licensing DOE's use of federal government facilities for interim storage under section 135. The NWPA, however, did give a nonlicensing health-and-safety role to the Commission. *See* NWPA § 135(a)(1)(A), 42 U.S.C. § 10155(a)(1)(A).

[52] *See, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979).

[53] Utah's Reply Brief at 3.

[54] 128 Cong. Rec. 28,032-33 (1982).

[55] *Id.* at 28,033.

[56] *See, e.g.*, Comments of Mr. Lujan, 128 Cong. Rec. at 28,034 (1982) ("I think the thing we need to remember that we are providing for in the legislation is a last resort interim storage facility"); comments of Mr. Broyhill, *id.* at 28,035-36 ("this storage capacity cannot be used unless there are certain findings that are made by the NRC.... If they show to the satisfaction of the NRC that they have been diligently pursuing licensing alternatives and they show they cannot reasonably provide that storage capacity,... then they would have access to these Federal facilities... it is only a safety valve"); comments of Mr. Marriot, *id.* at 28,038 ("Does not the present bill require the utilities to try to expand onsite storage before they apply for AFR's?... I do not understand what the problem is.... We have then only to go to AFR's if in fact it was necessary and the reactors could make that point.").

a safety measure; legislative history shows that it represented a compromise reached between those who wanted more and those who wanted less.[57] Limiting section 135 storage to existing DOE sites was also not a safety measure. During the hearings, the Department of Energy identified eighteen existing facilities, including Hanford Nuclear Reservation in Washington, that could accept spent reactor fuel with minimal modification.[58] The provision limiting federal storage to existing DOE sites meant that DOE would not have to acquire any new sites. Because existing facilities would only need some modification to accept spent commercial fuel, this provision also ensured that the storage would be available quickly.

In sum, it is not surprising that there are significant differences between a DOE facility storing commercial spent fuel under section 135 and a private interim storage facility. We do not find any real incompatibility in these laws, let alone the kind of "positive repugnancy" that we would need to see to find that the NWPA implicitly repealed our general regulatory authority over spent fuel.[59]

2. *"Comprehensive" Legislation Did Not Ban Storage Alternatives*

Utah argues that because the NWPA was intended to be a "comprehensive" legislative solution for dealing with radioactive waste, any other provision of law concerning radioactive waste must necessarily be excluded. But, as we read the NWPA and its history, Congress intended to supplement, rather than replace, existing law.

Had Congress truly intended to revoke preexisting NRC licensing authority, as Utah believes, it forgot to provide for regulating those facilities that already existed. At the time of the NWPA's enactment, spent fuel was already being stored away from the reactor sites at two NRC-licensed facilities (Morris and West Valley). If section 135(h) banned such facilities, then Congress must be seen to have required these facilities to be shut down and the spent fuel sent elsewhere. But, if so, it is exceedingly odd that Congress did not explain how existing facilities should come into compliance. This is a gap in Utah's "comprehensiveness" position that the State has not addressed.

Another gap in the "comprehensiveness" of the NWPA is reflected in the fact that the federal interim storage program expired in 1990, at least 5 years before Congress anticipated the opening of a permanent repository.[60] This gap suggests that Congress intended to force the utilities to solve their own interim storage

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[57] *See* Comments of Mr. Lujan, 128 Cong. Rec. at 28,035 (1982).

[58] *See* H. Rep. No. 97-491, at 37-38, 1982 U.S.C.C.A.N. at 3803-04.

[59] *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 122 S. Ct. at 605, *quoting Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976).

[60] *See* H. Rep. No. 97-491, at 31, *reprinted in* 1982 U.S.C.C.A.N. at 3797 (Chronology of the NWPA's deadlines anticipating that operations at a permanent repository could begin "around 1995").

solutions after the federal program had "bought them time" to do so. Again, this does not suggest an intent to restrain private-sector activities.

Utah cites the U.S. Supreme Court's ruling in *United States v. Fausto* to support its argument that where legislation is intended to be "comprehensive," it can be presumed that anything left out was thereby prohibited.[61] *Fausto* involved an interpretation of the Civil Service Reform Act (CSRA). The Supreme Court considered the CSRA's failure to include a cause of action, previously recognized at common law, for a certain class of civil servants who claimed to have been wrongfully terminated. The Court said that the "structure of the statutory scheme" indicated that the omission was a purposeful denial of review to plaintiff, because the whole purpose of the CSRA was to achieve uniformity and predictability in civil servants' employment rights. The Court found that Congress would not have intentionally left open a common-law avenue of redress for employees like Fausto under the very system that it was trying to reform. As a result, the Court concluded that "the absence of provision for these employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory entitlement to review."[62]

Fausto, in short, found that recognizing a cause of action not specifically recognized in the CSRA would undermine its whole purpose. To make a similar finding here, we would have to believe that Congress intended, with the NWPA, to replace all preexisting authority under the AEA, and all NRC's regulations promulgated thereto, with respect to spent fuel and nuclear waste. But Utah has not pointed out, and we do not see, any indication that Congress intended a sweeping reform of all then-existing regulations relating to nuclear waste. Indeed, Utah has not shown that Congress found that the availability of private offsite storage was a problem that needed redress. Rather, the lack of a permanent solution, and the possible imminent reactor shutdowns for lack of onsite storage, were the problems Congress sought to resolve with the NWPA. As we see the NWPA, Congress showed an intent not to reduce spent fuel storage options, but rather to expand them. Because of this, we do not believe that allowing a privately run, AFR storage facility undermines the NWPA in the way that Fausto's complaint undermined the CSRA.

[61] *United States v. Fausto*, 484 U.S. 439 (1988).
[62] *Fausto*, 484 U.S. at 448-49.

III. THE NWPA'S LEGISLATIVE HISTORY SUPPORTS A NEUTRAL INTERPRETATION OF SECTION 135(h)

Our reading of section 135(h) is that it is facially neutral: neither prohibiting nor promoting the use of private AFR storage facilities. There is a middle ground between requiring a thing and proscribing it; Congress appears to have agreed to settle on this middle ground with respect to private offsite storage.

As explained above, a straightforward reading of section 135(h) shows that it does not bar private AFR storage. Where a statute is unambiguous, there is no need to look at legislative history to interpret its meaning.[63] But, if we review the NWPA's legislative history, we find it does not support Utah's case. The history leads us to conclude that the language of section 135(h) was carefully and deliberately chosen to reflect a political compromise between the various factions interested in this legislation. We already have discussed some pertinent legislative history earlier in this opinion.[64] Here, we consider the history relating to the overall context for the legislation.

The 96th Congress considered almost fifty bills concerning radioactive waste management, but was not successful in enacting comprehensive legislation.[65] The 97th Congress also considered numerous bills. Portions of those bills addressing federally provided interim storage, which would eventually become NWPA section 135, went through numerous incarnations. A great deal of compromise was involved in getting the legislation passed.

The Carter Administration first proposed that the federal government take spent fuel for interim storage, but at the time there was no legal authority for DOE to do so.[66] The initial versions of bills that included federal interim storage envisioned that the government would simply take the fuel off the generators' hands; there were no requirements that industry exhaust other storage options, or other limitations on the site and size of a federal storage facility.[67]

There ensued a political struggle between those in Congress who supported federal interim storage as a way to help the nuclear power industry and those who believed that interim storage was not the federal government's responsibility and would only detract from the primary goal of permanent storage. The NWPA,

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[63] *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002).

[64] *See, supra*, text accompanying notes 31-33, 35, 44-46, and 54-58.

[65] U.S. Congress, Office of Technology Assessment, Managing the Nation's Commercial High-Level Radioactive Waste, OTA-O-171 (March 1985).

[66] *See* H. Rep. No. 97-491, at 37, *reprinted in* 1982 U.S.C.C.A.N. at 3803.

[67] *See, e.g.*, S. 637, 97th Cong. (1981) (introduced by Senator J. Bennett Johnston in March 1981); H.R. 2840, 97th Cong. (1981) (introduced by Rep. Jerry Huckaby in March 1981).

as ultimately enacted, reflected a compromise: federal interim storage was to be allowed but would be subject to limitations.[68]

As noted above, at one point in the history of the evolving legislation, these limitations included a requirement that industry show it had exhausted private offsite storage as an option before seeking federal storage. The House Energy and Commerce Committee removed that requirement from the bill it was considering, H.R. 6598, when it reported the bill in August 1982.[69] We have not found any reference to who instigated the removal of this requirement or what reason they gave. The Committee report says simply:

> 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.[70]

This statement suggests that deletion of private, AFR storage from the list of eligibility criteria contained in NWPA subsection 135(b) was intended only to remove one obstacle faced by utilities seeking federal interim storage, not as an implicit prohibition on such facilities.

The record suggests that Congress removed the requirement to seek private offsite storage at the urging of the nuclear power industry. The industry had campaigned for federal government interim storage, claiming that the federal government had contributed to the storage problem by delaying a permanent solution and by changing its position on reprocessing.[71] Representatives from the industry proposed that the federal government should acquire the existing spent fuel pools attached to the out-of-service reprocessing facilities at Morris, Illinois, West Valley, New York, and Barnwell, South Carolina, for this purpose.[72] According to one industry representative's testimony before Congress, utilities could not finance acquisition of these facilities, particularly because the current

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[68] *See, generally, 1982 Hearings on H.R. 1993, supra* note 31, at 1-4 (overview of statute by Rep. Richard L. Ottinger, Chairman of Subcommittee on Energy Conservation and Power).

[69] H.R. Rep. No. 97-785, pt. I, at 24.

[70] *Id.* at 41.

[71] *See, e.g., Radioactive Waste Legislation: Hearings Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs on H.R. 1993, H.R. 2800, H.R. 2840, H.R. 2881, H.R. 3809,* 97th Cong. 532, 549-51 (1981) [hereinafter *1981 Hearings on H.R. 1993*] (statement of Sherwood H. Smith, Jr., Chairman and Chief Executive Officer Carolina Power & Light Co. on behalf of the American Nuclear Energy Council, the Edison Electric Institute, and the Utility Nuclear Waste Management Group, July 9, 1981). *See also 1982 Hearings on H.R. 1993, supra* note 31, at 412, 434 (statement and testimony of Sherwood H. Smith, president, Carolina Power & Light Co.).

[72] *1981 Hearings on H.R. 1993, supra* note 71, at 530-32, 552, 566-67 (statement of Sherwood H. Smith); 578, 584-85 (statement of Bertram Wolfe, Chairman of Atomic Industrial Forum's Comm. on Fuel Cycle Policy). *See also 1982 Hearings on H.R. 1993, supra* note 31, at 438 (statement of Seymour Raffety, representing Dairyland Power Cooperative and the National Rural Electric Cooperative Assn.); *Nuclear Waste Disposal: Joint Hearings Before the Comm. on Energy and Natural Resources and the Subcomm. on Nuclear Regulation of the Committee on Environment and Public Works, United States Senate, on S. 637 and S. 1662,* 97th Cong. at 329, 336, 352-57 (1981) [hereinafter *Senate Joint Hearings*] (testimony and prepared statement of Sherwood H. Smith, Jr. on behalf of American Nuclear Energy Council, the Edison Electric Institute, and the Utility Nuclear Waste Management Group).

owners would be reluctant to sell the spent fuel pools alone.[73] Naturally, industry favored easing the conditions under which a utility could ask DOE's help. It was in the utilities' interest to remove from section 135 the requirement that they exhaust the opportunity for private offsite disposal before DOE could take their spent fuel.

Faced with the nuclear industry's advocacy of a federal solution to the waste issue, members of Congress from those districts containing existing storage facilities were concerned that DOE would use those facilities to satisfy its obligation under section 135. The opposition of those members is seen in the debates. After Congress put section 135(h) into its final form, some members continued to express concern. On November 30, 1982, the full House considered Representative Lundine's amendment that would strike the federal interim storage program completely.[74] Representative Broyhill, who favored limited federal interim storage, argued that section 135(h) would ensure that DOE would not take over existing private facilities:

> 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] 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 that 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.[75]

The same concerns were seen on the Senate side. Senator Strom Thurmond of South Carolina was a vocal opponent of federal interim storage, as DOE had raised the possibility of using the Barnwell reprocessing facility for that purpose.[76] As the Senate was nearing its final vote, Senator Charles Percy of Illinois asked specifically:

> Is it the intent of the managers of this legislation under section 135 to prohibit the Secretary from providing capacity for the storage of spent nuclear fuel from civilian nuclear power reactors at the following facilities:
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> > First. The interim spent fuel storage facility owned and operated by General Electric in Morris, Ill.;

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[73] Statement of Sherwood Smith, *Senate Joint Hearings*, *supra* note 72, at 354-55.
[74] *See* 128 Cong. Rec. at 28,032.
[75] *Id.* at 28,040.
[76] *See 1982 Hearings on H.R. 1993*, *supra* note 31, at 365-72 (testimony of Sen. Strom Thurmond).

Second. The former nuclear fuel reprocessing center in West Valley, N.Y.; and

Third. The Allied General Nuclear Services facility near Barnwell, S.C.?[77]

Senator Simpson replied that that was the managers' intent.

Although the prevention of the federal takeover of private storage facilities was of great concern to those members of Congress with existing facilities in their districts, nothing in the NWPA ordered those private facilities to be shut down. Instead, the Act merely states that it does not "authorize" them to be used, purchased, leased, or acquired. Although the congressional deliberations leave the strong impression that members of Congress from districts with private storage facilities might have liked to see those facilities closed, it appears that those members of Congress settled for a provision that would in no way encourage their use.

We conclude that Congress was fully aware that existing law allowed for private parties to store spent nuclear fuel at an AFR facility and made a conscious decision not to prevent that storage. Congress intended section 135(h) to have no greater effect than what the provision clearly said: it was a limit on programs established under the NWPA and the NWPA alone. It did not affect preexisting regulatory authority under the AEA.

Finally, we reject as irrelevant Utah's arguments concerning the Nuclear Waste Policy Act Amendments of 2000, which was vetoed by President Clinton. The bill would have authorized DOE to take spent fuel immediately, and store it at the proposed permanent repository site as soon as NRC approves such site. Utah sees in this legislation confirmation that private interim offsite storage was not an option, because Congress thought federal storage was necessary. But this logic is unpersuasive: as Utah acknowledges, Congress was responding to the nuclear utilities' lawsuits over DOE's breach of its contracts to take the fuel off their hands by 1998. The existence of private storage would not relieve DOE of its contractual obligation. In addition, as the Supreme Court has noted, the "views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."[78] And, of course, vetoed legislation does not help us determine what the law is.

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[77] 128 Cong. Rec. S15659 (daily ed. Dec. 20, 1982). Senator Percy also commented: "I am [] pleased that the compromise bill prohibits the Federal Government from taking over the interim spent fuel storage facility in Morris, Ill. . . . I am sure that people in the Morris community will be relieved to know that they will no longer face the possibility of a federal takeover of the nuclear waste storage facility in Morris." *Id.*

[78] *See Waterman S.S. Corp. v. United States*, 381 U.S. 252, 268-69 (1965), *quoting United States v. Price*, 361 U.S. 304, 313 (1960). *Accord, Jones v. United States*, 526 U.S. 227, 238 (1999); *United States v. SCS Business & Technical Institute, Inc.*, 173 F.3d 870, 878 (D.C. Cir. 1999); *Arco Oil & Gas Co. v. EPA*, 14 F.3d 1431, 1435 n.4 (10th Cir. 1993).

IV. CONCLUSION

The Commission has the authority under the AEA to license privately owned, AFR 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.

Accordingly, we reject Utah's "Suggestion of Lack of Jurisdiction," and deny its "Petition to Institute Rulemaking."[79]

IT IS SO ORDERED.

For the Commission[80]

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 18th day of December 2002.

[79] The Commission is aware that the Board's final decision is expected soon. In light of the complex issues that have arisen in this adjudication, the Commission intends that the Office of the Secretary will, soon after the Board's decision, issue a scheduling order setting time and page limits governing further motions and appeals before the Commission.

[80] Commissioner Dicus was not present for the affirmation of this Order. If she had been present, she would have approved it.

CLI-02-11
55 NRC 260 (2002)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of **Docket No. 72-22-ISFSI**

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage Installation)

April 3, 2002

STAY OF PROCEEDINGS

In determining whether to grant a stay of a licensing proceeding, the Commission looks at four factors: (1) whether the petitioner has made a strong showing that it is likely to prevail upon the merits; (2) whether the petitioner faces irreparable injury if a stay is not granted; (3) whether the issuance of a stay would harm other interested parties; and (4) where the public interest lies. *See Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994); *Allied-General Nuclear Services* (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 677-78 (1975).

STAY OF PROCEEDINGS

The proponent of the stay has the burden of demonstrating that the four factors are met. *See Hydro Resources Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 323 (1998); *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

STAY OF PROCEEDINGS: IRREPARABLE INJURY

It is well established in Commission case law that the incurrence of litigation expenses does not constitute irreparable injury for the purposes of a stay decision. *See Sequoyah Fuels Corp. and General Atomics*, CLI-94-9, 40 NRC at 6. *See also Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984).

STAY OF PROCEEDINGS: HARM TO OPPOSING PARTIES

The inconvenience of being forced to reschedule attorney and expert time when a scheduled hearing is imminent constitutes harm to opposing parties militating against granting a stay of proceedings. (The argument that opposing party will actually benefit by saving litigation costs if the Commission stays proceedings that will ultimately prove futile once we determine that we have no authority to issue this license. Although this reasoning is imaginative, PFS does not agree and opposes the stay. The proceedings, which have gone on for over 4 years, are at last nearing completion and further hearings are imminent. If the other parties are forced to reschedule expert and attorney time for some future date, it will cause them great inconvenience.

The imminence of the hearings is also a factor in our determination that the public interest will be served if the parties are allowed to wrap up the matters they have been litigating for so long.

MEMORANDUM AND ORDER

This Order concerns two documents filed by the State of Utah on February 11, 2002, relating to the pending license application submitted by Private Fuel Storage, L.L.C. (PFS). Utah's "Suggestion of Lack of Jurisdiction" argues that the Nuclear Waste Policy Act of 1982, as amended (NWPA),[1] deprives the Commission of "jurisdiction" over PFS's application for a license to construct and operate an independent spent fuel storage installation (ISFSI) on the reservation of the Skull Valley Band of Goshute Indians. In its "Petition to Institute Rulemaking and to Stay Licensing Proceeding," Utah asks the Commission to amend its regulations in accordance with this theory, and to suspend related proceedings while the rulemaking is pending.

For the reasons set forth below, we deny the request for stay, set a schedule for interested parties to submit briefs on the substantive issue whether the NRC

[1] 42 U.S.C. § 10101 *et seq.*

has authority under federal law to issue a license for the proposed privately owned, away-from-reactor spent fuel storage facility, and defer a decision on the rulemaking petition until we have had the opportunity to decide this threshold legal question.

I. BACKGROUND

In 1980, the NRC promulgated its regulations allowing for licensing of ISFSIs, 10 C.F.R. Part 72, under its general authority under the Atomic Energy Act (AEA) to regulate the use and possession of special nuclear material.[2] This was 2 years before Congress enacted the NWPA.

In both its Petition for Rulemaking and "Suggestion of Lack of Jurisdiction," Utah argues that the NWPA contemplates a comprehensive and exclusive solution to the problem of spent nuclear fuel and does not authorize private, away-from-reactor storage facilities such as the proposed PFS facility. Utah rests its argument on the following provision:

> 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.[3]

Thus, says Utah, the NWPA cannot be said to "authorize" a private, away-from-reactor ISFSI like the proposed PFS facility. Utah claims that because the NWPA established a comprehensive system for dealing with spent nuclear fuel, it is the only possible source for NRC's jurisdiction over spent fuel storage and overrides the Commission's general authority under the AEA to regulate the handling of spent fuel.

PFS opposes Utah's petitions, and argues that nothing in the NWPA expressly repeals the NRC's general, AEA-based licensing authority over spent fuel. PFS emphasizes that the NWPA provision on which Utah relies does not explicitly prohibit a private, away-from-reactor facility. The NRC Staff opposes Utah's petitions on procedural grounds.

II. DISCUSSION

A. Request for Stay of Proceedings Pending Review

We find that Utah's request does not meet the four-part test for a stay of Board proceedings. In determining whether to grant a stay of a licensing proceeding, the

[2] *See* 45 Fed. Reg. 74,693 (Nov. 12, 1980).
[3] NWPA § 135(h).

Commission looks at four factors: (1) whether the petitioner has made a strong showing that it is likely to prevail upon the merits; (2) whether the petitioner faces irreparable injury if a stay is not granted; (3) whether the issuance of a stay would harm other interested parties; and (4) where the public interest lies.[4] The proponent of the stay has the burden of demonstrating that these factors are met.[5]

First, Utah does not make a strong showing of probable success on the merits. The NWPA on its face does not prohibit private, away-from-reactor spent fuel storage. The NWPA section on which Utah relies, if intended to prohibit such storage, certainly does not do so directly. It says only that "*nothing in this act* . . . encourage[s], authorize[s], or require[s]" the use of such facilities. It does not, in terms, prohibit storage of spent nuclear fuel at any privately owned, away-from-reactor facility — which is Utah's position. We are willing to consider Utah's complex legislative history and statutory structure arguments, but we are not prepared to say that Utah's arguments are likely to prevail.

Second, we find no evidence that Utah faces "irreparable injury" if an immediate stay is not granted. Utah claims that it will suffer a loss of "costs, expenses, and attorneys' fees" resulting from its participation in the PFS licensing proceeding.[6] It is well established in Commission case law, however, that we do not consider the incurrence of litigation expenses to constitute irreparable injury in the context of a stay decision.[7] Therefore, the State has failed to demonstrate that it would be irreparably harmed if a stay is not granted.

We also find that the third and fourth factors of the stay test are not met. Utah argues that PFS is not harmed, and will in fact benefit by saving litigation costs, if the Commission stays proceedings that will ultimately prove futile once we determine that we have no authority to issue this license. Although this reasoning is imaginative, PFS does not agree and opposes the stay. The proceedings, which have gone on for over 4 years, are at last nearing completion and further hearings are imminent. If the other parties are forced to reschedule expert and attorney time for some future date, it will cause them great inconvenience. The imminence of the hearings is also a factor in our determination that the public interest will be served if the parties are allowed to wrap up the matters they have been litigating for so long.

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[4] *See Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994); *Allied-General Nuclear Services* (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 677-78 (1975); *cf. Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222, 225 n.7 (2002). This is the same test set forth in our regulations for determining whether to grant a stay of the effectiveness of a presiding officer's decision. 10 C.F.R. § 2.788(e).

[5] *See Hydro Resources Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 323 (1998); *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

[6] Rulemaking Petition at 37-38.

[7] *See Sequoyah Fuels Corp. and General Atomics*, CLI-94-9, 40 NRC at 6. *See also Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984).

For the foregoing reasons, we deny Utah's request for a stay of these proceedings.

B. Commission Consideration of NWPA Issue on the Merits

Both the NRC Staff and PFS argue that the Commission should not consider the NWPA issue at this time because the Suggestion of Lack of Jurisdiction is untimely. They maintain that the "suggestion" constitutes an untimely interlocutory appeal of a 1998 Atomic Safety and Licensing Board decision ruling on Contention Utah A.[8]

Utah first made its NWPA argument in 1997 in its Contention Utah A in the proceedings before the Licensing Board.[9] On April 22, 1998, the Board rejected the contention as an impermissible challenge to the Commission's regulations.[10] Utah's newly filed "suggestion" could be viewed as merely a misnamed interlocutory appeal of the 1998 Board ruling, particularly because NRC's rules of practice have no provision for a pleading or motion called a "Suggestion of Lack of Jurisdiction." A petition for interlocutory Commission review, if desired, should have come 15 days after the Board entered the ruling.[11] Otherwise, interlocutory rulings must wait for resolution until a final decision is entered.

Despite the reasonableness of the Staff's and Applicant's timeliness argument, we find countervailing concerns that make immediate merits consideration appropriate. The issue presented here raises a fundamental issue going to the very heart of this proceeding. If in fact NRC has no authority to issue PFS a license, completion of the licensing process would be a waste of resources for all parties as well as the Commission. In addition, Utah has filed a petition for rulemaking, arguing that NRC's regulations must be amended in accordance with the state's legal theory. The underlying legal question, whether the law requires a rule change, must be resolved before NRC can accept or deny that petition.

We have decided that the legal issue is better resolved in an adjudicatory format — i.e., through legal briefs — than in a rulemaking format. We therefore take

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[8] *See* "NRC Staff's Response to the State of Utah's (1) Request to Stay Proceeding, and (2) Suggestion of Lack of Jurisdiction" (Feb. 26, 2002), at 7-8; "Applicant's Response to Utah's Suggestion of Lack of Jurisdiction" (Feb. 21, 2002), at 4-7.

[9] *See* "State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage L.L.C. for an Independent Spent Fuel Storage Facility" (Nov. 23, 1997). ("Congress has not authorized the NRC to issue a license to a private entity for a 4000 cask, away-from-reactor, centralized, spent nuclear fuel storage facility.")

[10] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 183 (1998).

[11] *See* 10 C.F.R. § 2.786(b).

review in the exercise of our inherent supervisory authority over adjudications and rulemakings.[12]

The parties to this adjudication are intimately concerned and eminently well informed about the legal question raised in Utah's petition. These litigation parties, as opposed to the general public, are likely to be the source of the most pertinent arguments and information. Public comment is likely to be less useful here, in a situation calling for pure legal analysis, than in the usual situation where the rulemaking proceeding raises scientific, policy, or safety issues. We do consider, however, that persons outside this litigation should have an opportunity to weigh in on the NWPA issue and therefore invite any interested persons to submit *amicus curiae* briefs.

We conclude that the rulemaking process should be put on hold until the Commission rules on the threshold issue of whether the NWPA deprives it of authority to license a private, away-from-reactor spent fuel storage facility. If the legal issue is ultimately resolved in Utah's favor, then a formal revision clarifying Part 72 could be issued at that time.

III. BRIEFS

We already have before us extensive arguments by Utah (in its Suggestion and Rulemaking Petition) and PFS (in its Response to Utah's Suggestion of Lack of Jurisdiction and attachments). We will consider the legal arguments set forth in those documents.

If these parties wish to supplement the arguments made therein, they may submit further briefs to the Commission by May 15. In addition, interested persons are invited to submit *amicus curiae* briefs by May 15. Briefs should be no longer than thirty pages and should be submitted electronically (or by other means to ensure that receipt by the Secretary of the Commission by the due date), with paper copies to follow. Briefs in excess of ten pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited. Page limitations are exclusive of pages containing a table of contents, table of cases, and any addendum containing statutes, rules, regulations, and like material.

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[12] *See, e.g., North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-98-18, 48 NRC 129 (1998); *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, 52-53 (1998); *cf. Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-5, 49 NRC 199 (1999).

IV. CONCLUSION

For the foregoing reasons, the request for a stay of proceedings is denied, the petition for rulemaking is deferred, Commission review of the NWPA issue is granted, and the adjudicatory parties and any interested *amicus curiae* are authorized to file briefs as set out above.

IT IS SO ORDERED.

For the Commission[13]

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 3d day of April 2002.

[13] Commissioner Diaz was not present for the affirmation of this Order. If he had been present, he would have approved it.

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2003, copies of the foregoing Brief for Respondent U.S. Nuclear Regulatory Commission, were served by mail, postage prepaid, upon the following counsel:

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