CASE SCHEDULED FOR ORAL ARGUMENT JANUARY 16, 2004

In The

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 03-1018 and 03-1022 (Consolidated)

Margene BULLCREEK, et al.,
Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA
Respondents, and

PRIVATE FUEL STORAGE, L.L.C. and
SKULL VALLEY BAND OF GOSHUTE INDIANS
Intervenors-Respondents.
On
Petition to Review a Final Decision of the
United States Nuclear Regulatory Commission

JOINT BRIEF OF INTERVENORS-RESPONDENTS PRIVATE FUEL STORAGE, L.L.C. AND SKULL VALLEY BAND OF GOSHUTE INDIANS

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Dated: October 16, 2003

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARGENE BULLCREEK, et al., Petitioners, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents.	No. 03-1018
STATE OF UTAH, Petitioner, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents, PRIVATE FUEL STORAGE, L.L.C. and SKULL VALLEY BAND OF GOSHUTE INDIANS, Intervenors-Respondents.	No. 03-1022

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. Parties and Amici

All parties, intervenors, and *amici* appearing in this court are listed in the Brief for the Respondents.

II. Rulings Under Review

References to the rulings at issue appear in the Brief for the Respondents.

III. Related Cases

The key issue in this matter was raised by officials of Petitioner State of Utah as a counterclaim in *The Skull Valley Band of Goshute Indians v. Michael O. Leavitt*, 215 F. Supp. 2d 1232 (D. Utah 2002), which was appealed to the United States Court of Appeals for the Tenth Circuit, Case No. 02-4149. That appeal is pending.

Respectfully submitted,

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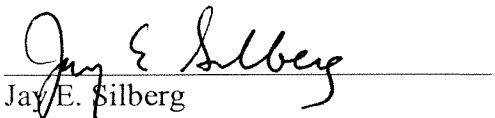
PRIVATE FUEL STORAGE, L.L.C.'s
CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rules 15(c)(6) and 26.1, Private Fuel Storage, L.L.C. ("PFS") submits this Corporate Disclosure Statement. PFS is a Delaware limited liability company. The PFS members with 10% or more ownership interest are Genoa Fueltech, Inc.; Northern States Power Company doing business as

Xcel Energy; Indiana Michigan Power Company, Inc.; Entergy Nuclear Indian Point 2, L.L.C.; Southern Company; and Florida Power and Light Company.

Respectfully submitted,



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BRIEF OF INTERVENORS-RESPONDENTS PRIVATE FUEL STORAGE, L.L.C. AND SKULL VALLEY BAND OF GOSHUTE INDIANS

Private Fuel Storage, L.L.C. ("PFS") and the Skull Valley Band of Goshute Indians (the "Band") submit this brief in support of the Nuclear Regulatory Commission ("Commission" or "NRC") in the above-captioned matters.

JURISDICTIONAL STATEMENT

PFS and the Band agree with the Jurisdictional Statement in the Brief for Respondents ("NRC Brief").

ISSUES PRESENTED FOR REVIEW

PFS and the Band agree with the question presented in the NRC Brief and raise the additional issue:

Whether OGD or the individual Petitioners in No. 03-1018 have standing pursuant to the Hobbs Act to seek review of the NRC decision denying the State's rulemaking petition.

STATEMENT OF THE CASE

On June 20, 1997, PFS submitted a license application to the NRC to construct and operate an Independent Spent Fuel Storage Installation ("ISFSI") on the Band's reservation. *See In the Matter of Private Fuel Storage, L.L.C.*, NRC Docket No. 72-22-ISFSI. PFS seeks a license to receive, transfer and possess spent nuclear fuel ("SNF") for interim storage in accordance with the requirements of the NRC regulations in 10 C.F.R. Part 72 ("Part 72"). The licensing decision remains pending.

The NRC licensing process for an ISFSI includes both a thorough-going technical review by the NRC Staff as well as an opportunity for a formal adjudicatory hearing before an independent Atomic Safety and Licensing Board ("ASLB"). The NRC Staff technical review covers both safety issues as required by the Atomic Energy Act, as amended, 42 U.S.C. §§ 2011-2297 ("AEA"), and defined in Part 72, and environmental issues as required by the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, ("NEPA") and defined in Part 51 of the NRC's regulations, 10 C.F.R. Part 51.

In parallel with the NRC Staff technical review, the AEA and NRC regulations provide the opportunity for adjudicatory proceedings. 42 U.S.C. §§ 2231, 2239; 10 C.F.R. § 72.46. The State of Utah ("State") sought and was granted a hearing on the PFS license application. The ASLB also admitted the Band and Ohngo Gaudadeh Devia ("OGD"), a group opposed to the PFS facility, as parties to the licensing proceeding. None of the individual Petitioners sought admission as parties to the PFS licensing hearing.

The State raised the same issue with the ASLB that Petitioners now urge on this Court: that the Nuclear Waste Policy Act of 1982, as amended ("NWPA"), revoked NRC's authority to license the proposed PFS storage facility. *See Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation) ("*PFS*"), LBP-98-7, 47 NRC 142, 183-84 (1998). The ASLB rejected the State's contention, ruling, *inter alia*, that the issue was inadmissible because the NRC had already "clearly [] established the scope" of its authority, which includes the authority to license an ISFSI such as the proposed facility. *Id.* at 184.

On April 19, 2001, the Band and PFS filed an action in the United States District Court for the District of Utah seeking to strike down as unconstitutional legislation enacted by the State to block construction and operation of the proposed PFS facility. The defendants in that suit, including Utah Governor Michael Leavitt and State Attorney General Mark Shurtleff in their official capacities, filed a Counterclaim on July 17, 2001, asking the Court to prohibit PFS' SNF storage project on the same basis that the State petitioned this Court – that the NRC lacks authority to license such a facility. On August 14, 2002, the District Court ruled that the State's statutes unconstitutionally interfered with PFS' attempt to obtain an NRC license and further ruled that the issue of whether the NWPA prohibited the PFS facility was properly "resolved by the NRC" and not a federal district court. *Skull Valley Band of Goshute Indians v. Leavitt*, 215 F.Supp. 1232, 1240 (D. Utah 2002). The defendants appealed that decision to the Court of Appeals for the Tenth Circuit (Case No. 02-4149), raising the same jurisdictional argument. The Tenth Circuit heard oral argument on August 26, 2003.

The State again raised essentially the same jurisdictional issue in two February 11, 2002, filings with the Commission. "Utah's Suggestion of Lack of Jurisdiction" (Feb. 11, 2002) ("Suggestion") and "Petition to Institute Rulemaking and to Stay Licensing Proceeding" (Feb. 11, 2002) ("Rulemaking Petition"). In these filings (as in its contention to the ASLB and its Counterclaim before the District Court), the State asserted that the NWPA prohibited the NRC

from licensing an away-from-reactor ("AFR") private spent fuel storage facility, like the facility proposed by PFS, and asked the Commission "to amend its regulations in accordance with [the State's] theory, and to suspend related proceedings while the rulemaking is pending." *PFS,* CLI-02-11, 55 NRC 260, 261 (2002). The Commission denied the State's request for a stay of proceedings, but invited "interested persons" to submit further briefs or comments by May 15, 2002. *Id.* at 265-66; *see also* 67 Fed. Reg. 18,253 (2002) (publishing decision in its entirety). The State, PFS, the Band, and the NRC Staff submitted timely briefs. App. at 0296, 0276, 0306, 0248. OGD submitted a timely two-page submittal in "support" of the Suggestion, a grossly out-of-time two-page "joinder" of the Rulemaking Petition dated October 18, 2002, App. at 0353, and an even more untimely two-page "Clarification" of its "joinder" filing on November 20, 2002. App. at 0355. The individual Petitioners here made no filing of any sort.

On December 18, 2002, the Commission rejected the State's claim that the NRC "lack[ed] authority to license the proposed PFS facility." *PFS*, CLI-02-29, 56 NRC 390, 392 (2002). In a detailed 20-page decision, the Commission found that: (1) the AEA, rather than the NWPA, provides the NRC with authority to license private AFR ISFSIs, *id.* at 395-96; (2) the NWPA neither expressly nor implicitly repealed that AEA authority, *id.* at 396-401; (3) the two acts were "capable of coexistence" and were not incompatible, *id.* at 401-06; and (4) the NWPA's legislative history supported the NRC's "neutral" interpretation. *Id.* at 407-10. Based on its careful review, the Commission concluded

> that Congress, in enacting the [AEA], gave the NRC authority to license privately owned, [AFR] facilities and did not repeal the authority when it later enacted the [NWPA]. Accordingly we reject Utah's claim that we lack authority to license the proposed PFS facility.

Id. (footnotes omitted) at 392. Accordingly, the Commission rejected Petitioner's Suggestion and denied the Rulemaking Petition. *Id.* at 411.

Petitioners' Brief includes numerous statements and characterizations unsupported by the record which Band and PFS dispute. Petitioners also offer "facts . . . which go to the standing of the Goshute petitioners . . .," Petitioners' Joint Opening Brief ("Pet'rs Br.") at 9, including an Affidavit of individual Petitioner Margene Bullcreek. This affidavit disputes the legitimacy of the leadership of the Band. In rebuttal of these self-serving assertions, the Band offers the Declaration of Lori B. Skiby, Vice-Chair of the Band, attached here as Addendum 1, and a May 24, 2002, letter from Neal A. McCaleb, Assistant Secretary of the Interior for Indian Affairs, to Chairman Leon D. Bear of the Skull Valley Band, reconfirming the agency's continued recognition of the current leadership of the Band, attached as Addendum 2.

On the merits, Petitioners offer nothing new here and the Court should uphold the Commission's decision not to undertake an unnecessary rulemaking.

SUMMARY OF THE ARGUMENT

OGD and the individual Petitioners failed to demonstrate their standing before the Court, treating this fundamental legal tenet as merely a bothersome technicality. They did not substantially participate in, or add any substance to, the proceedings below. Notwithstanding the State's uncontested standing, the Court should not allow its jurisdiction to be misused by those who lack standing.

On the merits, PFS and the Band support the legal analysis set forth in the NRC's Brief.[1] Petitioners failed to carry their heavy burden to establish that the NRC acted in an arbitrary and capricious manner in declining to adopt a radical revision to a longstanding agency rule. In apparent recognition of the weakness of their arguments, Petitioners attempt to argue that this

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[1] In a Statement of Position filed October 3, 2003, the Department of Justice, on behalf of Respondent United States of America stated that it "takes no position on the issues presented by" this case. *See* "Hatch and Bennett Compromise on Yucca N-Site – Sparing Utah," Deseret News (Jul. 14, 2002).

Court should abandon controlling precedent and strip the Commission's longstanding statutory interpretations of the unique degree of deference afforded the NRC's determinations. Petitioners' attempt to displace the Commission's carefully considered decision is unpersuasive and based on strained readings of the statutes, legislative history, and judicial decisions.

ARGUMENT

I. OGD AND THE INDIVIDUAL PETITIONERS FAILED TO ESTABLISH STANDING

As an initial matter, neither the individual Petitioners or OGD has demonstrated even a rudimentary legal basis for participating in this case. Only a "party aggrieved" by a final order of the NRC, including a denial of a rulemaking petition, may file a petition to review the final order. 28 U.S.C. § 2344; *NRDC v. NRC*, 666 F.2d 595, 601 n.42 (D.C. Cir. 1981). This Court has long held that to be a "party aggrieved" as contemplated by Congress, the petitioner must have participated in the agency proceedings below. *See, e.g.*, *Reytblatt v. NRC*, 105 F.3d 715, 720 (D.C. Cir. 1997); *Prof'l Reactor Operator Soc'y v. NRC*, 939 F.2d 1047, 1049 n.1 (D.C. Cir. 1991). Participation in the appropriate and available administrative procedure "is the statutorily prescribed prerequisite for this court's jurisdiction to entertain" a petition for review of an NRC order. *Gage v. AEC*, 479 F.2d 1214, 1217 (D.C. Cir. 1973).

Moreover, a party that fails to act in an agency proceeding is not "entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated." *Easton Utils. Comm'n v. AEC*, 424 F.2d 847, 851 (D.C. Cir. 1970). "In *Gage* and *Easton*, we refused to recognize as 'parties' those who had the opportunity to participate in the underlying Commission proceedings but who had failed to take advantage of it." *NRDC*, 666 F.2d at 602. OGD and the individual Petitioners had a full opportunity to participate in the rulemaking proceeding before the Commission, but did not do so. This Court should not now allow them to belatedly emerge from the sidelines.

The individual Petitioners' argument for standing is legally baseless, if not frivolous. After invoking the jurisdiction of the Court, the parties now demur from any supporting legal argument. *See* Pet'rs Br. § I.C. (entitled "This Court Need Not Address the Standing of the Individual Goshute Petitioners"). The named individuals were not parties below and, to the extent that they rely on OGD's representational standing here, cited no legal basis for such reliance. Using a petition to the Court of Appeals "as a witness of their personal and individual convictions," Pet'rs Br. at 12, clearly flouts the Court's rules, and should not be tolerated.

Neither has OGD demonstrated standing. While Petitioners concede that it is their burden to demonstrate each component of their standing before this Court, Pet'rs Br. at 15, OGD failed to do so. OGD confuses standing in the licensing proceeding with standing before this Court. *Id.* at 11. The proceeding underlying the matter before this Court, however, is not the licensing proceeding before the ASLB, but the Rulemaking Petition rejected by the Commission. *See* Petition for Review (Jan. 30, 2003) at 2 (seeking review of the Commission's December 18, 2002, decision "to the extent the Memorandum and Order denied the [Rulemaking Petition]"). App. at 0381. OGD's standing in the licensing hearing establishes no OGD relationship to, much less participation in, the proceeding under review here.

OGD also erroneously claims that it "fully satisfied" jurisdictional requirements with its May 15, 2002, "brief" to the NRC in support of the State's Suggestion. Pet'rs Br. at 15. To the contrary, OGD's less than two page submittal merely states that "OGD supports the suggestion that the Commission lacks authority to license PFS' proposed away from reactor spent fuel storage facility," "Ohngo Gaudadeh Devia ("OGD")'s Brief In Support of Utah's Suggestion of Lack of Jurisdiction" (May 15, 2002) at 1; App. at 0273. The sole "argument" was a total of three sentences that suggested that the Commission should "reflect" and "contemplate" on the intent of Congress and that "fundamental notions of democracy" supported OGD's position. *Id.* at

1-2. The Court should not accept such clichés as establishing standing to challenge the resulting agency decision.

Moreover, OGD's untimely attempts to later "join" the Rulemaking Petition demonstrates that OGD's May 15, 2002, filing lacked the requisite legal substance. OGD filed documents on October 18, 2002, and again on November 20, 2002, purporting to establish OGD's "joinder" of the State's Rulemaking Petition. *See* App. at 0353, 0355. The single substantive sentence in each of these two-page filings stated that only now "[h]aving reviewed the State of Utah's petition to institute rulemaking, OGD hereby joins, adopts, and incorporates" the Rulemaking Petition. App. at 0354, 0356. OGD provided no other argument, discussion or legal basis for its action or position, procedural or substantive, in either filing. *See* Pet'rs Br. at 16. Further, even if these filings contained any relevant argument, they were inexcusably late without leave of the Commission. OGD has simply not carried its burden to establish a factual or legal basis for standing here.

Thus, neither the individual Petitioners, nor OGD, have standing before this Court.

II. THE ATOMIC ENERGY ACT PROVIDES THE COMMISSION WITH AUTHORITY TO LICENSE THE PFS FACILITY, AUTHORITY WHICH THE NWPA DID NOT REVOKE

Petitioners, as the parties challenging the rejection of the Rulemaking Petition, have the considerable burden to demonstrate the need for this Court to overturn the NRC's decision. In order to avoid the scrutiny normally attendant to such a challenge, Petitioners ask this Court to ignore the high, if not unique, level of deference unwaveringly afforded to the NRC by federal courts, as well as the NRC's long-standing and judicially-affirmed interpretation of its organic act. There is simply no basis to reverse the Commission's decision.

A. Petitioners Failed To Satisfy The Strict Standard of Review

A Court should only overturn an agency's denial of a rulemaking petition when the decision has no reasonable basis. The NRC's construction of the AEA and the NWPA upon which it

rejects the Rulemaking Petition is properly subject to the analysis set forth in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). *See also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("Because this case involves an administrative agency's construction of a statute that it administers, our analysis is governed by *Chevron*."). Under *Chevron*, this Court must first determine "whether Congress has directly spoken to the precise question at issue." If Congress has not spoken directly on the precise issue, the Court must defer to the agency's interpretation so long as it is "permissible." *Chevron*, 467 U.S. at 842. The scope of the Court's review "of an agency denial of a petition for rulemaking is quite limited." *National Mining Ass'n v. Dep't of the Interior*, 70 F.3d 1345, 1352 (D.C. Cir. 1995). It is "in the rarest and most compelling of circumstances that this court has acted to overturn an agency judgment not to institute rulemaking." *ITT World Communications v. FCC*, 699 F.2d 1219, 1245-46 (D.C. Cir. 1983) (quoting *WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981)).

Furthermore, an agency's refusal to initiate a rulemaking is evaluated with "deference as to make the process akin to non-reviewability." *Cellnet Communication, Inc. v. FCC*, 965 F.2d 1106, 1111 (D.C. Cir. 1992) (citations omitted). The refusal to institute a rulemaking proceeding is reviewed by a Court with "extremely limited, highly deferential scope." *National Customs Brokers & Forwarders v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989). "We will overturn an agency's decision not to initiate a rulemaking only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency." *Id.* at 96-97 (emphasis added). Petitioners' arguments fall far short of the showing required for a court to overturn the Commission's carefully considered decision.

This Court made clear long ago that the "mere filing of a petition does not require an agency to grant it, or to hold a hearing, or engage in any other public rule making proceedings." *WWHT*, 656 F.2d at 813.

> Congress did not intend to compel an agency to undertake rule-making merely because a petition has been filed. When petitions

> for rulemaking are filed, [the APA] requires the agency to fully and promptly consider them, take such action as may be required, and . . . notify the petitioner in case the request is denied. The agency may either grant the petition, undertake public rule making proceedings or . . . deny the petition.

Id. Petitioners provided no basis to compel the Commission to undertake rulemaking here.

Moreover, and notwithstanding Petitioners' facile argument to the contrary, this result is completely unremarkable. In *Okla. Natural Gas Co. v. FERC*, 28 F.3d 1281 (D.C. Cir. 1994), the Court noted that "the Supreme Court has in practice deferred even on jurisdictional issues" where agencies determined their own statutory jurisdiction, succinctly holding, "So have we." *Id.* at 1283-84. *Oklahoma Natural Gas* firmly and unequivocally established that full *Chevron* deference applies in agency jurisdictional interpretations. Petitioners completely ignore this settled law.

B. Petitioners Focus on the Wrong Statute

Petitioners' arguments on the merits are based on analysis of the wrong statute. The Commission properly determined that its jurisdiction to license ISFSIs arises not from the NWPA, but from the AEA. *See PFS*, CLI-02-29, 56 NRC at 395 ("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"). NRC authority to regulate ISFSIs arises through the AEA grant of authority over the constituents of spent nuclear fuel, *i.e.*, special nuclear material, source material, and byproduct material. *See* 42 U.S.C. § 2201(b) (granting authority to issue rules, regulations and orders governing the use of special nuclear material, source material, and byproduct material); *see also* 42 U.S.C. § 2014(e), (z) and (aa); 10 C.F.R. § 72.3. The NRC has relied upon this statutory authority at least as far back as 1978 as the basis for regulating both at-reactor and AFR ISFSIs. *See* 10 C.F.R. Part 72 (Statement of

Authority); 43 Fed. Reg. 46,309, 46,311 (1978) (proposed Part 72).[2] In addition, Congress has specifically recognized the NRC licensing of spent fuel storage facilities. *See* 42 U.S.C. § 2021a(a) ("[a]ny person, agency, or other entity proposing to develop a storage . . . facility . . . for . . . irradiated nuclear reactor fuel . . . shall notify the Commission as early as possible . . .") (emphasis added).

The Supreme Court has long recognized that the AEA grants the NRC "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials." *Pac. Gas & Elec. v. Energy Res. Comm'n*, 461 U.S. 190, 207 (1983) (citation omitted). The Court also recognized that "the NRC has promulgated detailed regulations governing [SNF] storage and disposal away from the reactor." *Id.* at 217 (citing Part 72). The Seventh Circuit concluded that:

> The [AEA] 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, see 42 U.S.C. §§ 2014(e) [byproduct material], (z) [source material] (aa) [special nuclear material]; 10 C.F.R. § 72.3(v); and the state does not, and could not, see 42 U.S.C. §§ 2073, 2111, question the Commission's authority to regulate the storage of spent nuclear fuel.

Illinois v. Gen. Elec. Co., 683 F.2d 206, 214-15 (7th Cir. 1982) (emphasis added); *see also, e.g., Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1112 (3rd Cir. 1985) ("pervasive scheme of federal regulation established by the AEA . . . includ[es] the storage and shipment of spent fuel"). The Sixth Circuit has recognized that "[t]he AEA grants DOE and the [NRC] exclusive responsibility for regulating source, special nuclear, and byproduct material."

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[2] While Petitioners claim that Part 72 as adopted in 1980 did not expressly authorize AFR facilities, Pet'rs Br. at 7, they are incorrect. *See, e.g.*, 45 Fed. Reg. 74,701 (1980); 10 C.F.R. § 72.15(a)(1) ("If the proposed ISFSI is to be located on the site of a nuclear power plant or other licensed facility . . . " (emphasis added)).

United States v. Kentucky, 252 F.3d 816, 821 (6th Cir. 2001); *see also Kelley v. Selin*, 42 F.3d 1501, 1510-12 (6th Cir. 1995) (describing AEA authority for NRC licensing of spent fuel storage).

Thus, the Court properly should defer to the NRC's longstanding and judicially approved interpretation of the AEA as authority for regulating ISFSIs.

C. The Primary Purpose of the NWPA was to Establish the Federal Government's Role in Nuclear Waste Management, Not to Bar Private Efforts.

Petitioners badly misread Congress' purpose in enacting the NWPA. Congress' primary goal was to establish a Federal program for spent nuclear fuel and high level radioactive waste, not to limit private spent fuel storage options. The Federal program had three main components: a Federal permanent repository for nuclear waste, *see* 42 U.S.C. § 10131; Federal Monitored Retrievable Storage ("MRS") facilities, 42 U.S.C. §§ 10161-69; and Federal Interim Storage for a limited quantity of spent fuel. *See* 42 U.S.C. § 10151(b).

Petitioners take one subsection (42 U.S.C. § 10155(h)) from the provisions establishing the requirements for Federal Interim Storage and turn it into a prohibition against purely private spent fuel storage. The NWPA sets forth eligibility conditions for reactor operators to store SNF in a Federal Interim Storage facility. 42 U.S.C. § 10155. Petitioners mischaracterize these conditions as being the one and only way reactor owners and operators can qualify for interim storage. Pet'rs Br. § II.B.C.2. However, the NWPA does not use exclusive language, rather it requires that reactor operators pursue alternatives to federal storage "including" on-site storage. 42 U.S.C. § 10155(b)(1)(B). The eligibility requirements set forth in the NWPA's Federal Interim Storage provisions apply only to contracting for Federal Interim Storage and say nothing about the NRC's authority to license the private storage facility proposed by PFS in this case.

Congress intended that utilities, as much as possible, provide their own interim storage facilities. Congress also recognized, given the lengthy regulatory process and other difficulties in obtaining a license for private storage of spent nuclear fuel, that the federal government might

need to provide a limited amount of interim storage. *See* H.R. Rep. No. 97-491, pt. 1, at 37 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3792, 3803 (". . . some need for interim storage capacity may exist which utilities cannot meet in a timely manner"). Congress wanted to ensure that reactors would not be forced to shut down while waiting for the federal government to complete a permanent disposal site. On the other hand, some members of Congress felt that the private sector should provide its own storage. As Rep. Markey commented:

> We are talking about the Federal Government injecting itself into an area of the private sector that it has no business being in until there is a permanent repository which is a legitimate Federal responsibility. There is no role for the Federal Government in bailing out the utilities for the short term.

97 Cong. Rec. 28,033, 28,037. As a result of concerns that providing federal interim storage of spent nuclear fuel would "represent just the nose of the camel under the tent" and would result in the utilities not "taking initiative to solve their own problems because they will be able to count on the feds coming to their rescue," 97 Cong. Rec. at 28033 (statements of Rep. Lundine) (emphasis added), Congress strictly limited the amounts of spent fuel that could be held at a Federal Interim Storage facility, 42 U.S.C. § 10155(a)(1), and the period of time during which utilities could enter into contracts for such storage. *Id.* § 10156(a).

Petitioners' position that Congress intended to prohibit private AFR facilities clearly flies in the face of the express limitations on Federal Interim Storage. It is not reasonable for Congress to "comprehensively" solve a SNF storage problem by banning private interim storage while simulataneously severely limiting Federal Interim Storage.

D. The NWPA Did Not Revoke the Commission's AEA Authority Over Private Storage and Disposal of Nuclear Waste

Petitioners' facile arguments provide no basis for this Court to reverse the Commission's denial of the Rulemaking Petition. The Commission carefully considered Petitioners' interpretation of 42 U.S.C. § 10155(h) and rejected it. Petitioners' argument rests on an erroneous perception of a Congressional "intent to exclude from the Nation's nuclear waste management program

a privately owned AFR/SNF storage facility." Pet'rs Br. at 22. The provision in question provides:

> 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.

42 U.S.C. § 10155(h). Contrary to Petitioners' assertions, there is nothing in the language of § 10155(h) which repeals any portion of the AEA, or prohibits the licensing of any private AFR ISFSIs under the NRC's AEA authority. First, there is no express (or implied) prohibitory language, and second, on its face the purported restriction is limited to the authority conferred by the NWPA itself.

1. The NWPA does not address whether the AEA authorizes NRC licensing of a private away-from-reactor ISFSI.

Congress did not address the licensing of private AFR ISFSIs in the NWPA and, therefore, *Chevron* requires additional analysis. The Court must first ascertain whether "Congress had an intention on the precise question at issue," *Chevron*, 467 U.S. at 843, and if not, the Court must determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* (footnote omitted). "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Brown & Williamson*, 529 U.S. at 132 (citations omitted); *see also Kulmer v. Surface Transp. Bd.*, 236 F.3d 1255, 1257 (10th Cir. 2001) ("a court must read the relevant provisions in context and, insofar as possible, 'interpret the statute as a symmetrical and coherent regulatory scheme'"). Petitioners erroneously confined their analysis to a strained construction of the NWPA rather than place that act within the context of Congress' overall framework for regulating the nuclear industry. Thus, Petitioners' analysis – wholly apart

from its lack of persuasiveness – fails to consider Congress' broader policy concerns in enacting the NWPA.

One searches Petitioners' Brief – and the NWPA – in vain for any text directly contradicting the Commission's straightforward application of its AEA authority, which the courts have consistently described as "free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968). Petitioners unsuccessfully attempt to jump from asserting that the "language and structure" of § 10115(h) "indicate an intent to disavow certain otherwise possible contours" of the SNF program, Pet'rs Br. at 23 (emphasis added), to the unsupported conclusion that the "NWPA's exclusion of a privately owned, AFR/SNF storage facility is clear." Pet'rs Br. at 31 (emphasis added). Petitioners, however, fail to provide any reasoned analysis within the proper statutory context.

Courts have consistently interpreted the scope of the NWPA much more narrowly than Petitioners. The Supreme Court referred to the NWPA as "a new piece . . . to the regulatory puzzle." *Pacific Gas & Elec.*, 461 U.S. at 219. This is directly contrary to Petitioners' claim that the NWPA "comprehensively addresses the issue of nuclear waste storage." Pet'rs Br. at 43. The Court understood, as did Congress, that the NWPA was not intended to replace the AEA, but rather to address the problem of a permanent disposal site and what role, if any, the federal government would play in the temporary storage of nuclear waste.

Similarily, in *Idaho v. DOE*, 945 F.2d 295 (9th Cir. 1991), the Ninth Circuit determined that an agreement for spent fuel storage between the DOE and a private utility prior to the enactment of the NWPA was not governed by the statute. *Id.* at 298-99. The *Idaho* Court stated, "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." *Id.* (emphasis added). Thus, even as to interim storage provided to utilities by the federal government, the NWPA is not the exclusive basis of licensing authority.

2. The NWPA does not expressly repeal the NRC's AEA authority to license an independent AFR spent fuel storage installation.

The NWPA contains not a single word repealing the authority granted to the NRC by the AEA. Despite this glaring omission, Petitioners insist that the interim storage provision of the NWPA "comprehensively addresses the issue" of private, AFR storage facilities. Pet'rs Br. at 43. To the extent the NWPA scheme is "comprehensive," it is only so as to the role that the federal government was to play in providing nuclear waste facilities *(e.g.*, by providing a permanent disposal repository, and a maximum of 1900 tons of Federal Interim Storage at federal AFR facilities or on-site storage in DOE-owned casks, as well as by studying Monitored Retrievable Storage facilities).

Petitioners seriously overreach in arguing that other storage facilities are expressly "disavowed." Although the NWPA requires reactor owners to be primarily responsible for storing their own spent fuel, the obligation to maximize their onsite capacity is only a condition to utilizing Federal Interim Storage. 42 U.S.C. § 10155(b)(1)(B). No conditions or restrictions are placed on implementing non-federal (*i.e.*, private) interim solutions. Federal Interim Storage was, at most, a very limited interim storage solution for a limited amount of SNF for a limited period of time applicable only to utilities who could meet the Act's restrictive qualifications.[3] Thus, the NWPA is far from a "comprehensive" solution to interim storage problems.

In implementing the NWPA, the NRC consistently interpreted the Act as not limiting or affecting its authority under the AEA to license private AFR ISFSIs. It is a well-established rule of statutory interpretation that the contemporaneous interpretation of a statute by those charged with its implementation is entitled to great weight. *See, e.g., Watt v. Alaska*, 451 U.S. 259, 272-73 (1981) ("[t]he Department's contemporaneous construction carries persuasive weight"); *ac-*

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[3] Indeed, not a single plant operator sought to avail itself of the NWPA interim storage program, which expired – unused – on January 1, 1990. *See* 42 U.S.C. § 10156(a)(1).

cord Udall v. Tallman, 380 U.S. 1, 16 (1965). NRC's post-NWPA rulemakings continued to provide for the licensing of private AFR ISFSIs. Both the proposed rule (May 1986) and final rule (August 1988) to incorporate in Part 72 the Federal Monitored Retrievable Storage facility authorized by the NWPA state that the intent of the rulemaking is "to add language to its regulations in [Part 72] to provide for licensing the storage of spent nuclear fuel and HLW in an MRS." *See* 51 Fed. Reg. 19,106 (1986) (emphasis added) (Proposed Rule); *see also* 53 Fed. Reg. 31,651 (1988) (Final Rule). The Proposed Rule, the Final Rule, and the accompanying Statements of Considerations, all interpret the NWPA as leaving unaffected the NRC's regulations and authority to license private AFR ISFSIs. *See generally*, 51 Fed. Reg. at 19,106; 53 Fed. Reg. at 31,651.

The NRC did not rewrite Part 72 as Petitioners now demand because the NWPA simply does not require it. The proposed rulemaking to amend Part 72 after passage of the NWPA explicitly considered the effect of the revisions on an existing private, AFR ISFSI, the G.E.-Morris facility. The NRC noted that

> [t]here is now one facility which has been licensed as an ISFSI under the existing Part 72. This is the General Electric Company Morris Operations at Morris, Ill. . . . Under the proposed rule, the Morris facility would still be considered an ISFSI and no changes or additional reviews of its license would be required at this time.

51 Fed. Reg. at 19,107 (emphasis added).[4] It is clear that the NRC reached its conclusion many years before its decision on the Rulemaking Petition. Thus, the Commission's interpretation of

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[4] Amendments 2 through 9 to the GE-Morris license were issued after the passage of the NWPA. *See, e.g.*, Amendment No. 9 to License SNM-2500, dated June 16, 1995 (Docket No. 72-1). Although Petitioners argue that GE-Morris is not an AFR, they acknowledge that the Seventh Circuit described the site as an AFR facility several months before NWPA enactment. *See* Pet'rs. Br. at 41 n.33. Contrary to Petitioners' suggestion, *id.*, passage of the Act did not change the facility's physical location. The West Valley facility was never federally owned. *See* West Valley Demonstration Project Act, Pub. L. 96-368 (94 Stat. 1347) § 2(b)(4)(A).

the NWPA and AEA is not only permissible, but also consistent with the longstanding agency position regarding its jurisdiction.

Yet, Petitioners assert that § 10155(h) "is clear" in prohibiting the NRC from licensing an AFR ISFSI, Pet'rs Br. at 31, despite the lack of any express prohibition. Certainly, if Congress intended to ban all private AFR ISFSIs, it could have included express language in the NWPA that all such facilities were prohibited. "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." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 467-68 (2001). Instead, Congress used facially neutral language and expressly limited the application of § 10155(h) to the NWPA.

Section 10155(h) states that "nothing in this chapter shall be construed" to authorize private, AFR ISFSIs. The word "chapter" refers to the NWPA, not the AEA. The "chapter" in which 42 U.S.C. § 10155(h) appears is chapter 108 of title 42 of the U.S. Code. The AEA, on the other hand, is chapter 23 of title 42. Therefore, the meaning of § 10155(h) is clear that the NWPA does not authorize private AFR ISFSIs. Section 10155(h) says nothing about authority granted by other chapters of the U.S. Code, such as the AEA: it simply does not address the AEA or any other existing statutory authority. The NRC's authority conferred by the AEA thus remains unaffected. *See General Elec. Co.*, 683 F.2d at 215 (phrase "nothing in this Act" as used in the Clean Air Act does not limit any AEA powers, as the reference to "this Act" can apply only to the act in which it is contained).

It is a well-established rule of statutory interpretation that a tribunal is "to give effect, if possible, to every clause and word of a statute." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986). It would, therefore, be inappropriate to treat statutory terms as surplusage or words of no consequence. *See e.g., Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994); *Indiana Michigan Power Co. v. Department of Energy*, 88 F.3d 1272, 1275-76 (D.C. Cir.

1996). Here, Congress chose the words "this Chapter" instead of language that could have reached beyond the NWPA (*e.g.*, "this and other chapters," or "this title," or simply omitting any limitation). The statute's choice of words must be given effect and the effect of § 10155(h) must, therefore, be limited to the NWPA. To adopt any other result would do "gruesome violence to this canon of construction and to common-sense usage of the English language." Pet'rs Br. at 25.

Petitioners next turn unsuccessfully to selected legislative history in an attempt to muster support for their argument. To the extent that the legislative history provides insight into the meaning of § 10155(h), it indicates Congress' intent that the federal government not take over existing private facilities. Petitioners fail to recognize, *inter alia*, that at the time the NWPA was being considered, three private AFR ISFSIs were already in existence and federal officials were investigating ways to avoid a shutdown of commercial nuclear generating stations because of the federal government's failure to remove accumulating SNF as promised.

This fear of a federal takeover of the existing ISFSIs is evidenced by Rep. Corcoran's remarks that § 10155(h) addressed "the heart of the problem that many of us have, that is, the concern about whether or not private AFR storage facilities would be vulnerable to a federal takeover under [the NWPA]." 97 Cong. Rec. 28,033 (1982).[5] Rep. Corcoran and others were concerned that, if they did not provide some federal storage, already existing private storage facilities would be more vulnerable to a federal takeover. *Id.*[6] A review of the legislative history

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[5] Congressman Corcoran represented the congressional district in which the G.E.-Morris facility is located. The fear of the federal "foot in the door" is also recognized in the report relied on by Petitioners, Pet'rs Br., Addendum 3, at 94, and is the explanation for Petitioners' "Big Anomaly" allegations on the differences between requirements for federal and private facilities.

[6] As evidenced by this legislative history, Petitioners are simply wrong in saying that "all talk on the matter" of private AFR ISFSIs ceased after § 10155(h) appeared. Pet'rs Br. at 39.

simply does not establish any intent to prohibit NRC licensing of private AFR ISFSIs, but rather, only a concern over a potential federal takeover of those facilities.

3. The NWPA does not repeal the NRC's AEA authority by implication.

Petitioners argue that "implications" must be drawn from the NWPA that repeal the authority granted under the AEA. Pet'rs Br. at 43.

In advancing this argument, however, Petitioners ignore the "cardinal rule . . . that repeals by implication are not favored" and that "[i]n 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 v. Mancari*, 417 U.S. 535, 549-550 (1974) (citations omitted); *see also United States v. Williams*, 216 F.3d 1099, 1102 (D.C. Cir. 2000). The Supreme Court elaborated:

> The courts are not at liberty to pick and choose among congressional enactments, and when 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. When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal must be clear and manifest.

Morton, 417 U.S. at 551 (internal quotations and citations omitted); *accord Traynor v. Turnage*, 485 U.S. 535, 548 (1988). "Only a clear repugnancy" between the statutes could "justify a finding that repeal has occurred." *Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981). There is nothing repugnant about the integrated statutory scheme implemented by the Commission's interpretations of the AEA and NWPA.

An "implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch v. Smith*, 123 S.Ct. 1429, 1441 (2003). Not only are appeals by implication "not favored," such constructions "are never admitted where the former can stand with the new act." *Kappus v. Comm'r of Internal Revenue*, 337 F.3d 1053, 1058 (D.C. Cir.

2003) (emphasis added). Thus, Petitioners must demonstrate "not merely that the [NWPA], properly construed, deprives the [NRC] of jurisdiction, but that it does so patently." *FTC v. Ken Roberts Co.*, 276 F.3d 583, 592 (D.C. Cir. 2001). Petitioners' attempt to repeal the AEA through implication, therefore, must fail. It is not enough that Petitioners' can conjure up some NWPA interpretation that conflicts with the AEA, they must convince this Court that it is the only interpretation supported by the statutes' language. This Petitioners have not done and cannot do.

The AEA and the NWPA are capable of co-existence and both can be given effect. Putting aside Petitioners' tortured construction, the acts are harmonious and consistent with Congress' intent that reactor owners provide for their own SNF storage with only a limited federal role in providing interim storage. Reactor owners can seek licensing for at-reactor or away-from-reactor storage under the AEA; licensing of such storage facilities is perfectly consistent with the NWPA authorizing federally-provided "emergency storage" conditioned upon the reactor owner's meeting restrictive eligibility requirements (*e.g.*, diligent pursuit of "licensed alternatives to the use of Federal storage capacity" including various at-reactor storage options). 42 U.S.C. § 10155(b)(1)(B).

With respect to the incompatibility of the acts, Petitioners merely argue that storing a maximum of 40,000 metric tons of spent fuel at a private, AFR ISFSI is incompatible with quantity limitations placed by the NWPA on DOE's storage of spent fuel, *i.e.*, 1,900 metric tons for Federal Interim Storage pursuant to 42 U.S.C. § 10155(a)(1) and 10,000 or 15,000 metric tons for MRS pursuant to 42 U.S.C. §§ 10168(d)(3)-(4). Pet'rs Br. at 32-33.[7] Contrary to Petitioners' assertions, these limitations explicitly apply only to DOE storage and not to private storage. Pe-

[7] Petitioners wrongly state that "every time Congress authorized AFR/SNF, Congress placed limits on the quantity allowed." Pet'rs Br. at 32. The NWPA as initially enacted placed no quantity limits on the MRS.

titioners' attempt to conflate DOE facilities with private ones illustrates the lack of substance of their argument, rather than the existence of an irreconcilable conflict

Petitioners' assertion of "the unworkability of the *Chevron* framework" in this straightforward case is baseless. The evil that this Court has consistently sought to avoid in statutory interpretation cases is "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." *Rapaport v. OTS*, 59 F.3d 212, 216-17 (D.C. Cir. 1995). Only where there is an actual "disagreement between agencies," not the mere assignment of authority to multiple agencies, is the Court entitled to "cancel[] all deference" and "make an independent decision."[8] *Board of Trade v. SEC*, 187 F.3d 713, 719 (7th Cir. 1999) (citing *Rapaport,* 59 F.3d at 216-17) (emphasis added). If Petitioners were correct, NRC interpretations of the AEA would never receive judicial deference since DOE also has responsibilities under the statute. This is clearly not the case since courts routinely afford the NRC great deference. *See, e.g.*, *Selin*, 42 F.3d at 1511; *see also Siegel*, 400 F.2d at 783 (the AEA establishes "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed" in the Commission). It is precisely such a ridiculous result that *Rapaport* sought to avoid when observing that it is "too facile to conclude that deference is inappropriate simply because more than one agency is involved in administering a statute." *Rapaport*, 59 F.3d at 221. Petitioners' concerns regarding "a multiple agency scenario" and "peculiar corollaries" – even if valid in the NWPA context – clearly do not apply to the NRC's jurisdiction under the AEA.[9]

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[8] Petitioners reliance on *Salleh v. Christopher*, 85 F.3d 689 (D.C. Cir. 1996) is also misplaced because, "unlike in *Salleh*, there is no inter-agency conflict here." *Individual Reference Servs. Group, Inc. v. FTC*, 145 F. Supp. 2d 6, 24 n.12 (D.D.C. 2001).

[9] This Court has also found a *Chevron* inquiry appropriate where the "overall statutory scheme involves a statute over which" the agency did not have exclusive "administrative authority" but the agency's actions "derive principally from its interpretation" of a statute that it did ad-

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To be sure, DOE and the Environmental Protection Agency have specific roles in implementing the NWPA. *See* Pet'rs Br. at 20-21. So too does the NRC. Petitioners, however, failed to identify any conflict between these roles or areas of primary jurisdiction under the NWPA or the AEA. Petitioners' fundamental premise that "all three agencies [NRC, DOE and EPA] share jurisdiction and jointly regulate the matter in question," *id.* at 21-22, is plainly wrong. The Court should provide the Commission with full *Chevron* deference.

Further, the compatibility of the acts is supported by the NWPA's legislative history, which shows that Congress was well aware of (1) the NRC's pre-existing authority under the AEA, and (2) its use of that authority to license private AFR ISFSIs. During Congress' deliberations on the NWPA, the Chairman of the NRC specifically advised Congress that the Commission had just promulgated Part 72, which provided for the licensing of either at-reactor or AFR spent fuel storage. S. Rep. No. 97-282, 97th Cong. 1st Sess. at 44 (1981) ("S. Rep. 97-282") (Statement of Chairman Pallidino recognizing that "in anticipation of requests to license away from reactor facilities, the NRC last fall promulgated 10 C.F.R. Part 72 ... [and] is ready and able to take prompt action for any licensing actions relating to interim spent fuel storage"). The NRC Executive Director for Operations testified in greater detail:

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

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minister. *America's Cmty Bankers v. FDIC*, 200 F.3d 822, 833 (D.C. Cir. 2000) (citation omitted). NRC derives its authority to act here from the AEA, which it clearly administers.

Radioactive Waste Legislation: Hearings on H.R. 1993, H.R. 2800, H.R. 2840, H.R. 2881, and H.R. 3809 Before the Subcomm. On Energy and the Environment of the House Comm. On Interior and Insular Affairs, 97th Cong. 326 (1981) (emphasis added).

Significantly, Congress was also aware that the NRC had already licensed three AFR facilities at "Morris, Illinois..., Barnwell, South Carolina..., and West Valley, New York...." S. Rep. No. 97-282 at 65 (supplemental views of Senator Tsongas arguing that because there are private AFR ISFSIs "[t]here is no need for a Federal role"). Faced with testimony that the NRC stood ready and willing to license private, AFR storage facilities under its Part 72 regulations, and that such facilities were already operational, if Congress had intended to prohibit the use of private, away-from-reactor ISFSIs or to revoke the NRC's pre-existing authority to license such facilities, it would have said so in express terms in the NWPA.[10] In those instances where Congress intended the NWPA to modify NRC's pre-existing licensing authority, Congress did not hesitate to state those modifications in express terms. *See, e.g.*, 42 U.S.C. § 10141 (NRC required to promulgate technical requirements under its pre-existing authority for applications to construct, operate, close, and decommission permanent repositories); 42 U.S.C. § 10153 (NRC required to establish procedures for the licensing of dry storage technologies at reactor sites). In short, in enacting the NWPA, Congress neither repealed, nor intended to repeal, the NRC's authority for the licensing of off-site ISFSIs under the AEA. That authority remains wholly intact.[11]

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[10] Indeed, initial drafts of the NWPA required as one of the criteria for access to Federal Interim Storage the unavailability of private off-site storage facility capacity. *See* S. Rep. 97-282 at 19 (Report listing, among other criteria governing access to federal interim storage, the "use of private off-site storage facilities"). Thus, the language in § 10155(h) relied upon by Petitioners did not preclude the use of private, AFR storage facilities, but simply did not "require" their use as a condition for access to Federal Interim Storage under NWPA Subtitle B.

[11] Petitioners erroneously rely on *Brown & Williamson* to argue that the NWPA precludes the NRC from licensing private AFR ISFSIs. Pet'rs Br. at 44-45. *Brown & Williamson* is not only factually inapposite to this case but in fact weighs against Petitioners' interpretation of

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E. The Commission's Decision Should be Upheld Even if *Chevron* Does Not Apply

The Commission's interpretation of the NWPA and AEA satisfy the second *Chevron* prong because they are not only "based on a permissible construction of the statute," *Chevron*, 467 U.S. at 843 (footnote omitted), but as described above, are also consistent with the intent of Congress. Even if *Chevron* deference was found inapplicable here, an agency's statutory interpretation remains "eligible to claim respect according to its persuasiveness." *Public Citizen, Inc. v. HHS*, 332 F.3d 654, 662 (D.C. Cir. 2003). Further, where *Chevron*-style deference is not appropriate, an agency's interpretation is entitled to respect "to the extent that those interpretations have the 'power to persuade.'" *Skidmore v. Swift &Co.*, 323 U.S. 134, 140 (1994).

The Commission's decision is due great respect. The Rulemaking Petition received an extensive amount of NRC attention, culminating in a formal, 20-page decision by the Commission. *See generally PFS*, CLI-02-29, 56 NRC 390. Each substantive issue raised by Petitioners was addressed and extensive legal and policy bases were provided. The Commission's detailed legal analysis far exceeded the requirement for merely "an explanation of its decision" to reject a petition for rulemaking.

The Commission's effort in crafting its decision, in turn, provides the foundation for its "power to persuade." Unlike Petitioners, the Commission analyzed not only the NWPA, but the AEA, and found the statutes "capable of co-existence." *PFS*, CLI-02-29, 56 NRC at 401. At best, Petitioners analyzed the NWPA in a vacuum. Pet'rs Br. at 26. Thus, Petitioners' arguments supporting their reading of critical terms such as "Act" and "law" – if not fundamentally flawed – certainly have less "power to persuade," if only because Petitioners failed to test their

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the NWPA and AEA. Both the AEA and the NWPA designate the NRC as the administrative agency to regulate in the field of nuclear materials, including SNF, satisfying the *Brown & Williamson* analysis. *See, e.g.*, AEA § 161; NWPA § 114(d).

interpretations within the broader statutory context. The Court, therefore, need not parse subtle shades of deference here because the Commission's decision deserves great deference under any standards.

Even should the Court conduct that a *de novo* review, Petitioners' merits still fails. A *de novo* review means only that a "court's inquiry is not limited to or constricted by the administrative record, nor is any deference due the agency's conclusion." *Strang v. United States Arms Control & Disarmament Agency*, 864 F.2d 859, 866 (D.C. Cir. 1989). In other words, a court conducts "a fresh, independent determination." *Id.* A *de novo* review does not, as Petitioners' appear to believe, undermine the Commission's decision or place any heightened burden on the agency. For the same reasons discussed above, the Commission's carefully considered legal analysis can easily withstand the Court's independent scrutiny.[12] Petitioners' cramped analysis cannot.

Thus, the Court should uphold the Commission's decision to reject the Rulemaking Petition regardless of the level of deference applied in the Court's analysis.

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[12] An additional statutory construction, which the Commission did not need to reach, was that the NWPA – as a statute passed for the benefit of Indian Tribes, *see e.g.*, 42 U.S.C. §§ 10137-38 – should be construed liberally in the Band's favor. *See* App. at 0306.

CONCLUSION

For all the above reasons, and those presented in the NRC Brief, the Court should deny the Petitions for Review.

Respectfully submitted,

Tim Vollmann
Attorney for Skull Valley Band of
Goshute Indians

Jay E. Silberg
Douglas J. Rosinski
Shaw Pittman LLP
Attorney for Private Fuel
Storage, L.L.C.

Dated: October 16, 2003

Addendum

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARGENE BULLCREEK, *et al.*, Petitioners, v. UNITED STATES NUCLEAR REGULATORY COMMISSION, and the UNITED STATES OF AMERICA, Respondents, SKULL VALLEY BAND OF GOSHUTE INDIANS, and PRIVATE FUEL STORAGE, L.L.C., Intervenor-Respondents.	Nos. 03-1018, 1022 (consolidated)

DECLARATION OF LORI B. SKIBY

Lori B. Skiby, being duly sworn, states as follows under penalty of perjury:

1. I have served as Vice-Chair of the Executive Committee of the Skull Valley Band of Goshute Indians (the Band) since November 2000. At a duly called meeting of the General Council of the Skull Valley Band on November 25, 2000, I was elected to a four-year term as Chairman, defeating the incumbent Vice-Chair, Mary Allen.

2. As a member of the General Council of the Skull Valley Band, I have been witness to, and an active participant in, the affairs of the Band for many years, including the period of 1994 through 1997, when the Band was considering the possibility of entering into a business lease of Skull Valley Reservation land for the temporary storage of spent nuclear fuel rods. Between October 1997 and November 2000 I served as the

Band's Indian Child Welfare Act Coordinator. I also served from November 1998 to November 2000 as the Band's Diabetes Coordinator, administering the Band's federal grants for both programs.

3. My father was the Chairman of the Skull Valley Band on February 19, 1994, when the Band's General Council passed Resolution 94-02, authorizing the Band's Executive Committee to enter into formal negotiations with utility companies for the building of an interim storage facility for spent nuclear fuel on the Skull Valley Reservation.

4. The Executive Committee of the Skull Valley Band negotiated a lease with Private Fuel Storage, L.L.C., during 1996. On December 7, 1996, at a duly called meeting of the General Council of the Skull Valley Band, a vote was taken whether to authorize the Executive Committee to execute the lease. The overwhelming majority of the General Council voted in favor of Resolution No. 97-12A, confirming the Terms and Conditions of a draft Business Lease with Private Fuel Storage, L.L.C. (PFS).

5. The PFS Lease was executed on December 27, 1996, and presented to the Bureau of Indian Affairs (BIA) for its review and approval. Over the next several months, BIA officials made comments on the Lease, and suggested a number of amendments to the Lease. Amendments were made to the lease, and an Amended Lease was executed on May 20, 1997. The BIA Superintendent approved the Amended Lease on May 23, 1997. The Amended Lease recites conditions for its full implementation; one such condition is the issuance of a license by the Nuclear Regulatory Commission (NRC), permitting the storage of spent nuclear fuel on the Skull Valley Reservation.

6. From the time that the General Council authorized the execution of the PFS Lease there has been a minority of the Skull Valley Band who have been opposed to the storage of spent nuclear fuel on the Reservation. Some of those members, along with non-members of the Band, and with the financial assistance of the State of Utah, created Ohngo Gaudadeh Devia (OGD) to oppose the PFS Project.

7. Mary Allen and Rex Allen, sister and brother, executed both the original Lease and the Amended Lease on behalf of the Skull Valley Band as Vice-Chair and Secretary of the Band's Executive Committee. Prior to the November 2000 election, I had a telephone conversation with Mary Allen. She was angry that I was "taking her job." She told me that she would join forces with Margene Bullcreek and help her to oppose the PFS Lease in any way she could.

8. In August 2001 Mary and Rex Allen led an unsuccessful effort to recall Chairman Bear and myself from tribal office. Since October 2001 Rex Allen has not been recognized as the Secretary of the Band's Executive Committee. Shareen Wash served as Secretary until she died on August 1, 2003.

9. To my knowledge, neither Mary Allen nor Rex Allen spoke out publicly against the PFS Lease until the year 2002. Their statements opposing the Lease indicate that they are driven by their political opposition to Leon Bear and myself, and their desire to serve again on the Executive Committee.

10. Based on documents obtained from the State of Utah pursuant to the Band's request for public records, I am aware that attorneys for OGD, Margene

Bullcreek, and Rex and Mary Allen are being reimbursed by the State of Utah for their opposition to the Skull Valley Band's leadership.

I declare under penalties of perjury that the foregoing is true and correct, and is based on my personal knowledge.

Executed on October 14, 2003:

Lori B. Skiby

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

MAY 24 2002

Honorable Leon D. Bear
Chairman, Executive Committee
Skull Valley Band of Goshute Indians, #808
3359 South Main Street
Salt Lake City, Utah 84115

Dear Chairman Bear:

Thank you for your letter of April 25, 2002, informing us of the alleged theft of tribal funds and providing us with information regarding the position of banks holding other funds of the Skull Valley Band of Goshute Indians (Band).

Generally, we rely upon the Bureau of Indian Affairs (BIA) Regional Directors to carry out the government-to-government relations with the federally recognized Indian tribes, which includes the Band. However, in response to the dubious "court order (issued by an entity, that we are not familiar with, namely the "First Federal District Court, Western Region"), we contacted the Agency Superintendent, Uintah & Ouray Agency, Ft. Duchesne, Utah, in late September 2001 to obtain his perspective as the BIA line official closest to the Band.

We were advised then, and have been advised consistently since that time, that the BIA Agency office at Fort Duchesne recognizes you, Leon D. Bear, as the Chairman and Ms. Lori Skiby as the Vice-chairman of the Executive Committee for the Band. In January 2002, in response to a general request to update our tribal leaders directory, the BIA Western Region office in Phoenix, Arizona, again identified you, Leon D. Bear, as the recognized chairman of the Band. We have not been informed of any change in leadership and continue to recognize Leon D. Bear, as the Chairman and Ms. Lori Skiby as the Vice-chairman. We are aware that a March 25, 2002, letter from acting Agency Superintendent Allen J. Anspach reconfirms your status and that of Ms. Skiby as the recognized Band leadership.

We agree that it is important that congressionally appropriated Federal funds transferred to the Band for purposes of implementing Indian Self Determination contracts under provision of the 1975 Indian Self Determination and Education Assistance Act, Pub. L. 93-638,25 U.S.C. 450 et seq.,as amended, be released to the Band in order for the tribe to perform the agreed upon scope of work and carry out the purposes for which Congress appropriated the funds. We also agree that the banks holding tribal funds are

obliged to perform in accordance with the Depositor's Agreement and applicable provisions of the Uniform Commercial Code as codified in the laws of the state, and are dismayed to learn of the wrongful disbursement of tribal funds to unauthorized individuals in reliance upon a fictitious and possibly fabricated "court order."

We agree that it is proper for you, as the recognized Chairman of the Band to demand the release of the Band's funds from the banks for the purposes of tribal administration and for the administration of BIA education and community services programs contracted under Pub. L. 93-638 to provide assistance to members of the Band and other eligible Indians. We feel that it is improper for the subject banks to continue to withhold funds from the recognized, elected leadership of the Band. Unless the banks reach an accommodation forthwith with the Band, we intend to support the Band's Motion for Summary Judgment in *Skull Valley Band of Goshute Indians v. Zions Bank, et al.*, No. 2:01-CV-813 S. U.S. District Court, District of Utah, if such a motion is filed.

Sincerely,

Assistant Secretary - Indian Affairs

cc: Regional Director, Western Region

Zions Bank c/o Robert Goodman
10 East Temple, 5th Floor
Salt Lake City, Utah 84111

Brighton Bank c/o David E. Worthen
7101 Highland Drive
Salt Lake City, Utah 84121

Bank One c/o Brad Baldwin
50 West Broadway, Suite 300
Salt Lake City, Utah 84101

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARGENE BULLCREEK, et al., Petitioners, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents.	No. 03-1018
STATE OF UTAH, Petitioner, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents, PRIVATE FUEL STORAGE, L.L.C. and SKULL VALLEY BAND OF GOSHUTE INDIANS, Intervenors-Respondents.	No. 03-1022

Pursuant to Rule 32(a)7(B) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(3)(B), undersigned counsel for Intervenor Private Fuel Storage, L.L.C. certifies that the number of words in the Joint Brief of Intervenors-Respondents Private Fuel Storage, L.L.C. and Skull Valley Band of Goshute Indians, is 8,627 as counted by Microsoft Word.

Respectfully submitted,

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Counsel For Private Fuel Storage, L.L.C.

Dated: October 16, 2003

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARGENE BULLCREEK, et al., Petitioners,	)	
v.	)	No. 03-1018
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents.	)	
STATE OF UTAH, Petitioner,	)	
v.	)	No. 03-1022
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents,	)	
PRIVATE FUEL STORAGE, L.L.C. and SKULL VALLEY BAND OF GOSHUTE INDIANS, Intervenors-Respondents.	)	

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing Joint Brief of Intervenors-Respondents Private Fuel Storage, L.L.C. and Skull Valley Band of Goshute Indians were served upon the following by United States mail, first class, postage prepaid, on this 16th day of October, 2003:

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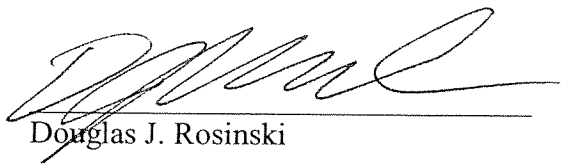

Douglas J. Rosinski