

THIS CASE IS SET FOR ORAL ARGUMENT 16 JANUARY 2004

Case Nos. 03-1018 and 03-1022

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

MARGENE BULLCREEK, et al.,
Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, et al.,
Respondents,

and

PRIVATE FUEL STORAGE, L.L.C., et al.,
Intervenors.

STATE OF UTAH,
Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, et al.,
Respondents,

and

PRIVATE FUEL STORAGE, L.L.C., et al.,
Intervenors.

On Petitions for Review of
United States Nuclear Regulatory Commission Memorandum and Order,
56 NRC 390 (2002)

PETITIONERS' JOINT REPLY BRIEF

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TABLE OF CONTENTS

<i>TABLE OF CONTENTS</i>	i
<i>TABLE OF AUTHORITIES</i>	ii
SUMMARY OF THE ARGUMENT	1
ARGUMENT	1
I. ONLY UTAH’S READING OF THE STATUTE CAN BE RECONCILED WITH ITS PLAIN LANGUAGE.	2
A. NRC’s Construction Cannot Be Reconciled with the Statute’s Language	2
B. Intervenor’s Plain Language Arguments Support Utah’s Position	6
II. THERE IS NO BASIS FOR DEFERENCE TO THE NRC’S POSITION	9
A. The Court Should Not Accord <i>Chevron</i> Deference	9
B. The Court Should Not Accord Deference to the Refusal to Initiate Rulemaking	12
C. Subsection (h) is not an “Implied Repeal” of AEA Authority	13
III. NWPA’S STRUCTURE AND HISTORY SUPPORT UTAH’S POSITION	15
CONCLUSION	23
CERTIFICATE OF COMPLIANCE	23
AMENDED CERTIFICATE OF COMPLIANCE	24
CERTIFICATE OF SERVICE	25

TABLE OF AUTHORITIES

FEDERAL CASES

<i>American National Fire Insurance v. Rose Acre Farms, Inc.</i> , 107 F.3d 451 (7th Cir. 1997) . .	3-4
<i>BFP v. Resolution Trust Corp.</i> , 511 U.S. 531 (1994)	8
<i>Board of Trade v. SEC</i> , 187 F.3d 713 (7th Cir. 1999)	11
<i>California State Board of Optometry v. FTC</i> , 910 F.2d 976 (D.C. Cir. 1990)	8
<i>Chevron U.S.A. v. Natural Res. Def. Council</i> , 467 U.S. 837 (1984)	9-12
<i>FDA v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000)	14
<i>In re Espy</i> , 80 F.3d 501 (D.C. Cir. 1996)	4
<i>General Electric Uranium Mgmt. Corp. v. DOE</i> , 764 F.2d 896 (D.C. Cir. 1985)	10
<i>Illinois v. General Electric Co.</i> , 683 F.2d 206 (7th Cir. 1982)	14
<i>Indiana Michigan Power Co. v. DOE</i> , 88 F.3d 1272 (D.C. Cir. 1996)	10
<i>Kelley v. Selin</i> , 42 F.3d 1501 (6th Cir. 1995)	12
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974)	15
<i>NAACP v. FPC</i> , 520 F.2d 432 (D.C. Cir. 1975)	13
<i>National Public Radio, Inc. v. FCC</i> , 254 F.3d 226 (D.C. 2001)	5
<i>Pacific Gas and Electric Co. v. State Energy Resources Conserv. & Development Comm'n</i> , 461 U.S. 190 (1983)	8, 14
<i>Professional Pilots Federation v. FAA</i> , 18 F.3d 758 (D.C. Cir. 1997)	13
<i>Public Citizen v. NRC</i> , 901 F.2d 147 (D.C. Cir. 1990)	10
<i>Rapaport v. United States Department of Treasury</i> , 59 F.3d 212 (D.C. Cir. 1995)	9, 11

*Authorities upon which we chiefly rely are marked with asterisks.

<i>Russello v. U.S.</i> , 464 U.S. 16 (1983)	5
<i>Salleh v. Christopher</i> , 85 F.3d 689 (D.C. Cir. 1996)	9, 11
<i>Siegel v. Atomic Energy Commission</i> , 400 F.2d 778 (D.C. Cir. 1968)	12
<i>U.S. v. Estate of Romani</i> , 523 U.S. 517 (1998)	15
<i>U.S. v. Williams</i> , 216 F.3d 1099 (D.C. Cir. 2000)	15
<i>WWHT, Inc. v. FCC</i> , 656 F.2d 807 (D.C. Cir. 1981)	13
<i>Wachtel v. Office of Thrift Supervision</i> , 982 F.2d 581 (D.C. Cir. 1993)	11
<i>Whitman v. American Trucking Ass'ns</i> , 531 U.S. 457 (2001)	7
<i>Will v. Michigan Department of State Police</i> , 491 U.S. 58 (1989)	8

FEDERAL STATUTES

42 U.S.C. § 2014(e)	13
42 U.S.C. § 2014(z)	13
42 U.S.C. § 2014(aa)	13
42 U.S.C. § 2021a (West Valley Demonstration Project Act of 1982)	5, 14
42 U.S.C. §§ 2133, 2136, 5843	14
42 U.S.C. § 10154	18
42 U.S.C. § 10155(a)	20
42 U.S.C. § 10155(b)(1)	16
42 U.S.C. § 10155(b)(1)(A) & (B)	20
* 42 U.S.C. § 10155(h)	<i>passim</i>
42 U.S.C. § 10161(a)(2)	18
42 U.S.C. § 10161(b)(1) & (c)(2)	19

42 U.S.C. § 10162	19
42 U.S.C. § 10222(a)(5)(B)	10
42 U.S.C. § 10226	10
PL93-438 §§ 101, 202(3) (1974)	19

FEDERAL REGULATIONS

45 Fed. Reg. 74,693 (1980)	14
10 C.F.R. Part 72	15, 19, 22-23

LEGISLATIVE HISTORY

H.R. 3809, 97th Cong. § 133(d)	5
H.R. Rep. No. 97-491 (1982)	16, 21
H.R. Rep. No. 97-785 (1982)	16, 19, 21
S. Rep. No. 97-282 (1981)	19
97 Cong. Rec. 27777 (1982)	19
97 Cong. Rec. 32548 (1982)	16

MISCELLANEOUS

P. Rodney Huddleston, et al, <i>Coordination and Supplementation in <u>The Cambridge Grammar of the English Language</u></i> (Cambridge U. Press 2002)	3
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SUMMARY OF ARGUMENT

Section 10155(h) states that “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.” All parties agree that this provision disavows any intent to “encourage” or “require” the “private or federal use” of an AFR facility “not owned by the Federal Government on January 7, 1983,” and disclaims any intent to “authorize” the “federal use” of such a facility. The only disagreement is whether the statute also disavows any intent to “authorize” the “private ... use” of a private AFR facility.

The NRC Decision below construed subsection (h) to express “neutrality” regarding any intent to “authorize” such a facility. In its opening brief, Petitioners (collectively “Utah”) demonstrated the grammatical implausibility of this construction, noting that if “encourage” and “require” are words of active repudiation, “authorize” cannot be read as an expression of passive neutrality—particularly where it is acknowledged as an active disavowal of its application to “federal use.” In apparent recognition of the strength of Utah’s arguments, NRC’s appellate brief recasts its approach—apparently abandoning the “neutrality” construction at the core of the NRC Decision below. Acknowledging that the term “authorize” must be read as a disavowal of authority, NRC now proposes to limit its application to only one of the objects of the verbs in the statute—“federal use.”

This novel construction cannot stand. NRC’s creative reading of the statute is worse than awkward; it is grammatically impossible and contrary to any reasonable understanding of its plain language. An ordinary reader would extend each of the provision’s verbs to each of its

objects instead of arbitrarily mixing and matching them. NRC's contrary reading deserves no deference because it is plainly irreconcilable with the statute, and because the NWPA's prohibitions apply to multiple agencies, creating the risk of an inter-agency conflict. Finally, the structure and history of the statute confirm Utah's position, and certainly provide no basis for accepting NRC's counter-textual approach. None of the references in the legislative history indicate an intent to preserve authority for AFR facilities; they only confirm Utah's position.

ARGUMENT

I. ONLY UTAH'S READING OF THE STATUTE CAN BE RECONCILED WITH ITS PLAIN LANGUAGE.

Reduced to its essential terms, subsection (h) disclaims any Congressional intent "to encourage, authorize, or require the private or federal use" of a private AFR facility. 42 U.S.C. § 10155(h). NRC's construction does serious violence to the plain language and structure of the statute. To the extent Intervenor address the statutory language, their arguments only support Utah's position.

A. NRC's Construction Cannot Be Reconciled with the Statute's Language.

A common-sense reading would accord independent, consistent meaning to each of the verbs in the statute ("encourage, authorize, or require"), while applying them to *both* of the enumerated objects of those verbs ("private ... use" and "federal use"). Under NRC's reading, however, the verb "authorize" is arbitrarily assigned to only one object ("federal use"), despite the fact that there is no structural or linguistic basis for ignoring the other object ("private ... use"). This grossly distorts the meaning that an ordinary reader would ascribe to subsection (h)—extending each of the statute's verbs to each of its objects.

Although this principle is intuitive enough that it may be accepted without resort to further authority, it also finds support in rules of construction and grammar. The Seventh Circuit

applied a similar principle in interpreting the language of an insurance policy in *American National Fire Insurance v. Rose Acre Farms, Inc.*, 107 F.3d 451 (7th Cir. 1997). In that case, the court construed an insurance clause denying coverage to an “aircraft ... owned or hired without pilot or crew by ... the insured.” *Id.* In rejecting the argument that the adverbial phrase “without pilot or crew” should be read to extend only to the verb “hired” and not the verb “owned,” the court relied on a common-sense principle of grammar—that a “prepositional adverb phrase” (“without pilot or crew”) should be read to “modif[y] equally each verb” of a “compound predicate” (two verbs connected by ‘or’). *Id.* at 455-56. Under this rule, the court held that “the following qualifying phrase [without pilot or crew]” naturally would be understood to “modif[y] the clause which precedes the conjunction [hired] as well as the clause following the conjunction [owned].” *Id.* at 456.

Grammar texts identify a parallel principle. Subsection (h) uses a structural principle known as “coordination”—incorporating a series of interchangeable verbs (encourage, authorize, and require) and objects (private use and federal use). See P. Rodney Huddleston, John Payne & Peter Peterson, *Coordination and Supplementation*, in *The Cambridge Grammar of the English Language* 1273, 1275 & 1323 (Cambridge U. Press 2002). The coordinate verbs and objects are distinct clauses that can be read interchangeably—as in “encourage . . . private . . . use,” “encourage . . . federal use,” “authorize . . . private . . . use,” “authorize . . . federal use,” etc. Thus, to decline to extend any one verb to any particular object violates the common-sense principle of coordination.

In this case, NRC does just that by claiming that the coordinate verbs apply only to certain of the coordinate objects. Like the adverbial phrase in *American National Fire Insurance*, both private and federal use should naturally extend to all the verbs in the compound

predicate. NRC's interpretation is even more awkward than that rejected in *American National Fire Insurance*, since there the rejected argument would have assigned the adverbial phrase only to the immediately preceding verb, whereas here NRC arbitrarily assigns the middle verb ("authorize") only to the second object ("federal use").¹

If the verb "authorize" were limited to just one of the objects in the statute, it might just as well be confined to "private ... use," instead of "federal use." NRC undoubtedly would object to this construction—on the ground that it makes no sense grammatically to limit "authorize" to "private ... use." And it would have a point. But that same objection condemns NRC's own new theory of statutory construction, indicating that subsection (h) disavows authority for "private *or* federal use," not some arbitrary subset of the two.

For this reason, NRC's construction violates another canon—that the term "or" is disjunctive, meaning that it ascribes independent meaning to each of the words that it connects. *See In re Espy*, 80 F.3d 501, 505 (D.C. Cir. 1996). In the context of subsection (h), this canon means that each verb connected by the first "or" has independent significance, as does each object connected by the second "or." NRC's new reading of the statute violates this canon by applying the verb "authorize" only to the object "federal use," and by failing to extend it to the separate object "private use."

If Congress had intended to disavow authorization only for "federal use" of a private AFR, it could have done so straightforwardly, such as by disavowing any intent (a) "to

¹ NRC errs in insisting that "not every verb" in the statute "can reasonably be linked with each [object]." NRC33. Utah's construction does just that. It does not, as NRC implies, "pair 'encourage' and 'require' [only] with 'private use,'" NRC34, but instead extends these verbs (as well as the verb "authorize") to both "private use" and "federal use." Thus, NRC rightly objects to a construction based on "a select mixture of verb and [object]," NRC33, but this objection boomerangs against NRC's mix-and-match approach and leaves Utah's as the only grammatically plausible construction.

encourage or require the private or federal use” of a private AFR facility or (b) “to authorize the federal use” of such a facility. In fact, Congress rejected a predecessor to subsection (h) that would have done just that—expressly limiting its disclaimer of authority to the federal government. H.R. 3809, 97th Cong. § 133(d) (providing that “[DOE] may not purchase, lease, or otherwise acquire” a reprocessing facility); NRC48-49 (acknowledging that this predecessor “ma[de] clear that DOE had no authority to use private AFR facilities for purposes of the federal storage program”). Because Congress enacted a very different clause expressly disclaiming authority both for federal and private uses, the court should not lightly presume that Congress intended the approach expressly spelled out in the proposed provision. *See Russello v. U.S.*, 464 U.S. 16, 23-24 (1983); *National Public Radio, Inc. v. FCC*, 254 F.3d 226, 231 (D.C. Cir. 2001).

Moreover, NRC’s textual theory still fails to account for the “notwithstanding” clause, which confirms Congress’s intent that the disavowals in subsection (h) trump “any other provision of law.” NRC seeks to explain away this clause by noting that “other laws ... speak to AFR facilities,” such as the 1980 statute authorizing the West Valley AFR facility that pre-dated the NWSA, 42 U.S.C. § 2021a, and by asserting that the notwithstanding clause “make[s] clear that these other laws have no bearing on” the impact of subsection (h). NRC36. In NRC’s view, the notwithstanding clause “avoids any potential dispute” as to whether such other laws “can be construed ... to affect or influence the obligations of DOE and private generators.” *Id.* For example, NRC says that the notwithstanding clause clarifies that no other law can impose on a nuclear reactor the requirement to “exhaust” private AFR “options to gain eligibility for the DOE interim storage program” under the NWSA. *Id.* At 36-37

This argument, however, only confirms Utah’s understanding of the statute. It does not have the empty purpose of “acknowledging” other provisions of law, as the NRC decision below

assumed. That approach would leave open the inference (now disclaimed by NRC) that other provisions of law might trump the NWPA's disavowals—*e.g.*, of an intent to “require” AFR use, or even to “authorize” the “federal use” of AFRs. On both points, NRC understands that the NWPA's disavowals override any requirement or authority that might be inferred under the AEA, and that same meaning must be extended to the disavowal of intent to authorize the “private use” of AFRs.

B. Intervenor's Plain Language Arguments Support Utah's Position.

To the extent Intervenor's address the language of the statute, they unwittingly support Utah's construction, conceding that “Section 10155(h) states that ‘nothing in this chapter shall be construed’ to authorize private, AFR ISFSIs.” Interv18. Intervenor's attempt to distance themselves from Utah's construction by their insistence that subsection (h)'s disavowal of authority for private AFR facilities is limited to “this chapter,” meaning the NWPA. *Id.* According to Intervenor's, this indicates only that “the meaning of § 10155(h) is clear that the NWPA does not authorize private AFR ISFSIs.” *Id.* In their view, however, “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.” *Id.*

This construction of subsection (h) is merely a disguised restatement of NRC's abandoned “neutrality” position, and it is untenable. It acknowledges Congressional intent to disavow authority for private AFR facilities, yet it deprives that disavowal of authority of any practical impact by declining to extend it to the AEA or to any other statute that might otherwise authorize such facilities. Such a vacuous intent cannot be ascribed to Congress.

If Congress meant to disclaim any intent to “authorize” private AFR facilities, and to do so “[n]otwithstanding any other provision of law,” it cannot have meant to limit that disclaimer

to the NWPA, and to “say[] nothing about authority granted by other chapters of the U.S. Code, such as the AEA.” Interv18. The whole point of a disavowal of authority “notwithstanding any other provision of law” is to override “any other provision of law.” Otherwise, the disavowal is ineffectual.

Again, this approach would override Congress' admitted intent to disavow any authorization of new federal AFRs by freeing NRC to use its AEA authority to license newly established DOE AFRs. Yet there is no dispute that Congress clearly intended to foreclose any possibility of new DOE AFRs in enacting subsection (h)'s disavowal of authority for such a “federal use.” NRC32-33 (acknowledging that subsection (h) “underscores” Congress’s intent to disavow authority for “DOE to use, purchase, lease or acquire non-federal or private AFR storage facilities”). This disavowal of authority for “federal use” clearly overrides any AEA authority, and the same construction must extend to “private ... use.”

* * *

NRC and Intervenor miss the mark in their reliance on *Whitman v. American Trucking Ass’n*s, 531 U.S. 457 (2001). To be sure, we should not expect Congress to “alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions”—to “hide elephants in mouseholes.” *Id.* at 468. But there is nothing “vague,” much less “ancillary” about subsection (h). The statutory language is hardly “vague”; Utah’s construction gives a natural construction to the statute’s plain words. Nor is subsection (h) “ancillary.” All parties acknowledge that subsection (h)’s purpose is to disavow certain constructions of the NWPA (including authority for new federal AFR facilities and any requirement for their private use)—and to do so “notwithstanding any other provision of law.” So this provision is exactly where one would first think to look for a disclaimer of authority for private AFR facilities. If a

disclaimer of authority is an “elephant,” then subsection (h) is hardly a “mousehole”—it is the elephant’s natural habitat.

Finally, although the plain language of the statute is sufficiently clear to foreclose private AFR facilities under any standard, Utah’s approach is strengthened by the principle that Congress should not lightly be presumed to have impinged on important state prerogatives. In “traditionally sensitive areas,” such as “legislation affecting the federal balance” or impinging on “historic powers of the States,” the courts frequently have required that Congress make its intention “clear and manifest.” *Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1989); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (“Federal statutes impinging upon important state interests ‘cannot ... be construed without regard to the implications of our dual system of government,’ and any such ‘federal statutory purpose must be ‘clear and manifest’”); *California State Board of Optometry v. FTC*, 910 F.2d 976, 981 (D.C. Cir. 1990) (applying clear statement rule in considering whether Congress had given FTC authority to regulate states, and explaining that this “rule of statutory construction serves to ensure that the States’ sovereignty interests are adequately protected by the political process”). A requirement of a “clear and manifest” intention is appropriate here, where NRC’s position is that Congress implicitly removed the important prerogative of the states to participate in—even veto—the process for selection of a site for SNF storage within their sovereign boundaries. *Cf. Pacific Gas and Elec. v. State Energy Res. Conserv. & Dev. Comm’n*, 461 U.S. 190, 205-06 (1983) (recognizing that states have “retain[ed] their traditional responsibility” of “determining questions of need, reliability, cost and other related state concerns” affecting the decision whether to approve the construction of nuclear reactors, requiring a “clear and manifest” statement of purpose to override states’ prerogatives in those areas). Congress’s supposed intent

to foreclose such fundamental state prerogatives as to AFR/SNF facilities should be upheld only if it is clear and manifest—which it plainly is not.

II. THERE IS NO BASIS FOR DEFERENCE TO THE NRC'S POSITION.

NRC's conclusion that its purported authority over private AFR facilities is consistent with the NWPA should be reviewed *de novo*, and without any presumption against it as an "implied repeal."

A. The Court Should Not Accord *Chevron* Deference.

Although this Court repeatedly has indicated the impropriety of *Chevron* deference where multiple agencies administer the governing statute, *Salleh v. Christopher*, 85 F.3d 689, 611 (D.C. Cir. 1996); *Rapaport v. United States Department of Treasury*, 59 F.3d 212, 216 (D.C. Cir. 1995), NRC and Intervenor object to the application of this principle here on the grounds that (1) NRC's authority arises not under the NWPA but under the AEA, and NRC is entitled to deference on a question concerning its own jurisdiction under the AEA, NRC23-24; and (2) the multiple-agency rule applies only in cases of actual conflict between agencies, Interv22. Neither argument is persuasive.

1. The assertion that NRC has authority to license private AFR facilities under the AEA is an attempt to circumvent the central question of statutory interpretation presented on appeal—whether the NWPA disclaims any authority that otherwise might be inferred under that statute. Utah reads the NWPA to remove any authority that might otherwise have been inferred for a private AFR facility, and the NWPA prohibition has application not only to NRC but also to DOE and EPA, as Utah demonstrated in its opening brief. NRC obviously disagrees with that construction, but it cannot be permitted to assume away Utah's position on the merits to bootstrap its way into deference to its contrary view.

Intervenors' related assertion that NRC is entitled to *Chevron* deference on decisions regarding its own jurisdiction, Interv10, is similarly misguided. NRC's decision in this case was based on its interpretation of subsection (h), which deals not with any agency's jurisdiction, but with the pure mandates of the NWPA. Those mandates cut not to any particular agency's jurisdiction, but to whether any agency affected by the NWPA is properly implementing those mandates within its own sphere of authority. And again, there is no question that the NWPA's application extends across multiple agencies, beyond NRC and to DOE and EPA. *See* Opening Brief ("Utah")20-21. NRC, DOE, and EPA all have different spheres of authority over private AFR facilities (if they are authorized by the NWPA), and thus there is an unmistakable potential for a conflict in each agency's determination as to whether such facilities are in fact authorized. Significantly, neither NRC nor Intervenors challenge Utah's showing on this point. Accordingly, this case falls squarely under the multiple-agency rule applied in this Circuit's case law, which forecloses deference on the ground that NRC is one of three agencies that may potentially rule on the meaning of the statutory provision in question.

Section 10155 is easily distinguishable from the statutes at issue in the cases NRC cites as examples of *Chevron* deference to agency interpretation of the NWPA, where the statutory language at issue clearly authorized a single entity to administer that portion of the Act and there is no potential for inter-agency conflict. *Indiana Mich. Power Co. v. DOE*, 88 F.3d 1272, 1273 (D.C. Cir. 1996) (interpreting 42 U.S.C. § 10222(a)(5)(B) authorizing "the *Secretary of Energy* . . . to enter contracts with owners and generators of high- level radioactive waste and spent nuclear fuel"); *Public Citizen v. NRC*, 901 F.2d 147, 149 (D.C. Cir. 1990) (interpreting 42 U.S.C. § 10226 where "[t]he *Nuclear Regulatory Commission* is authorized and directed to promulgate regulations"); *General Elec. Uranium Mgmt. Corp. v. DOE*, 764 F.2d 896, 897

(D.C. Cir. 1985) (reviewing the *Secretary of Energy* in prescribing “fees for the disposal of spent nuclear fuel . . .” as specifically directed by statute). Because multiple agencies clearly operate under the mandates of § 10155(h), and each agency’s interpretative actions may conflict with other agency action, any interpretation of this subsection cannot be accorded *Chevron* deference under *Salleh* and *Rapaport*.

2. Second, Intervenor’s err in asserting that the multi-agency problem arises only in cases of actual disagreement between agencies. *See Interv22* (citing *Board of Trade v. SEC*, 187 F.3d 713, 719 (7th Cir. 1999)). The Seventh Circuit opinion relied on by Intervenor’s openly declines to follow this court’s holding in *Rapaport*, suggesting that “the court could accept the position of whichever agency’s order is under review.” *Board of Trade*, 187 F.3d at 719. *Rapaport*, however, could hardly be clearer in its refusal to accord *Chevron* deference on the basis of which agency order is being reviewed. *See Rapaport*, 59 F.3d at 216-17. Nor is there any doubt that D.C. Circuit precedent withholds *Chevron* deference not just in the face of actual agency conflict, but on the basis of a potential conflict. *Id.* at 36 (*Chevron* inapplicable either where “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,” and further explaining that deference is improper where “the agency *shares responsibility* for the administration of the statute with . . . other agencies”); *see also Wachtel v. Office of Thrift Supervision*, 982 F.2d 581, 585 (D.C. Cir. 1993).

This approach is also consistent with Judge Rogers’ concurrence in *Rapaport*. Judge Rogers’ point was that *Chevron* deference may be appropriate in a multi-agency scenario where the “agencies agree as to which of them has exclusive jurisdiction” over a particular matter. *Rapaport*, 59 F.3d at 221. But clearly that is not the case here. NRC, DOE, and EPA all share

jurisdiction over—or the potential to regulate—aspects of private AFR facilities if in fact they are authorized under § 10155(h) of the NWPA. The undoubted potential for a conflict as to whether such facilities are authorized under the NWPA precludes *Chevron* deference under this court’s cases.

The other case law cited by Intervenor is easily distinguishable. It may be that courts have previously “afford[ed] the NRC great deference,” Interv22, but not in cases where there is the potential for an inter-agency conflict as to the meaning of a statute. *See Kelley v. Selin*, 42 F.3d 1501, 1511 (6th Cir. 1995) (interpreting statutory language that refers specifically to decisions of the “Commission”); *Siegel v. Atomic Energy Commission*, 400 F.2d 778 (D.C. Cir. 1968) (reviewing AEC rules describing factors considered for licensing nuclear power plants under commission’s exclusive licensing authority).

Finally, even assuming the applicability of *Chevron* in this multi-agency setting, it bears repeating that NRC’s construction of the statute fails because it is not “based on a permissible construction of” the NWPA. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984). That conclusion has only been highlighted by the evolving, counter-textual theories advanced by NRC and Intervenor in this litigation.

B. The Court Should Not Accord Deference to the Refusal to Initiate Rulemaking.

Contrary to Intervenor’s argument, the NRC Decision deserves no special deference as a refusal to initiate rulemaking proceedings. Such deference is limited to circumstances where “the agency has clearly shown that ‘pragmatic considerations’ would render the usual and somewhat more searching inquiry problematic because ‘the agency has chosen not to regulate for reasons ill-suited to judicial resolution, *e.g.*, because of internal management considerations as to

budget and personnel or for reasons made after a weighing of competing policies.” *Professional Pilots Federation v. FAA*, 118 F.3d 758, 763-64 (D.C. Cir. 1997).

That is not the case here. NRC’s refusal to initiate rulemaking proceedings was based not on discretionary, pragmatic considerations outside the proper scope of judicial review, but on a fundamentally legal conclusion that the NWPA does not withdraw authority to license private AFR facilities. Such a decision is particularly “suited to judicial resolution,” and thus not subject to any standard of special deference. *See WWHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981) (no deference where “significant factual predicate” for agency’s refusal to initiate rulemaking “had been removed”); *NAACP v. FPC*, 520 F.2d 432 (D.C. Cir. 1975) (reversing refusal to initiate rulemaking on ground that Commission erred in concluding it lacked jurisdiction).

C. Subsection (h) is not an “Implied Repeal” of AEA Authority.

NRC and Intervenors also fail in their attempt to get around the statutory language under the rule that “implied repeals” are disfavored. First, any authority under the AEA over AFR/SNF is at best speculative and inferential. The AEA gives NRC authority over “source material,”² “byproduct material,”³ and “special nuclear material.”⁴ Significantly, neither NRC

² “Source material” means “uranium, thorium” or “ores containing one or more of the foregoing materials.” 42 U.S.C. § 2014(z).

³ “Byproduct material” means “(1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material and (2) the tailings or waste produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.” *Id.* § 2014 (e).

⁴ “Special nuclear material” means “plutonium or uranium enriched in the isotope 233 or in the isotope 235.” *Id.* § 2014 (aa).

nor the dicta in their cases⁵ suggest that SNF fits within the *express* definitions of any of these three materials. In fact, the principal case cited by NRC, *Illinois v. General Elec. Co.*, 683 F.2d 206, 214-15 (7th Cir. 1982), expressly acknowledges that the AEA “does *not* refer explicitly to spent nuclear fuel.” (emphasis added). Thus, there is no basis for the conclusion that the AEA expressly authorized NRC to license SNF storage at AFR sites, since SNF itself is nowhere expressly identified in the statute.⁶

This is not to say that prior to the NWPA NRC lacked authority to regulate SNF *on the site of a nuclear reactor*. But the structure of the AEA confirms that such authority inhered in NRC’s undoubted power to issue a facility license for a nuclear reactor, not from the SNF material itself. See 42 U.S.C §§ 2133, 2136, 5843. Under the AEA, NRC may issue either a “material” license (for the use of byproduct, source or special nuclear material) or a “facility” license. 45 Fed. Reg. 74,694 (1980). Thus, although NRC undoubtedly had power under the AEA to issue a “facility” license to a reactor that would cover any SNF produced incident to reactor operations, this is no indication that it also had power to issue an independent “material” license for material (SNF) not expressly identified in the AEA. At best, any authority under the AEA was inferential and dependent on an “unresolved” question of statutory interpretation, and thus the disavowals in the later-enacted, comprehensive NWPA cannot be dismissed as a

⁵ NRC and Intervenor suggest that case law sustains AEA authority over AFR/SNF storage, but no court has ever evaluated the impact of subsection (h) on that authority, and any case law treatment of this issue is rank dicta. *Pacific Gas*, for example, adverted broadly to AEA authority over “nuclear materials,” 461 U.S. at 207, but it had no occasion to address the specific issue presented here, and its discussion of this issue is pure dicta.

⁶ Intervenor’s reliance on the language of the West Valley Demonstration Project Act of 1980, 42 U.S.C. § 2021a(a) (Interv11), is unavailing. The quoted language merely requires notice to NRC of any proposed “storage ... facility.” *Id.* Such a procedural requirement of notice can hardly be read as any confirmation of authority for a private AFR facility, particularly where the provision says nothing to indicate that it contemplates a “facility” other than one at the site of a nuclear reactor.

disfavored implied repeal. See *FDA v. Brown & Williamson*, 529 U.S. 120, 143 (2000) (noting that implications to be drawn from statute may be altered by implications of later statute); *U.S. v. Estate of Romani*, 523 U.S. 517, 530 (1998) (implied repeal rule inapplicable because “basic question of interpretation” regarding earlier statute “remain[ed] unresolved”).

Finally, subsection (h)’s intent to override any implicit AEA authority is sufficiently clear even under the implied repeal cases, which recognize that any presumption against repeals is rebutted by an “affirmative showing” of Congress’s intent to repeal. *Morton v. Mancari*, 417 U.S. 535, 550 (1974); *U.S. v. Williams*, 216 F.3d 1099, 1102 (D.C. Cir. 2000). Even NRC now acknowledges that in subsection (h) Congress intended to override (or “repeal”) *some* inferences that might otherwise be taken from the AEA—such as authority for federal use of AFR facilities, or any requirement for AFR use. The question, then, is not whether subsection (h) overrides the AEA, but whether its trumping effect on the AEA extends naturally to “private ... use.” Because that is the only plausible way to construe Congress’s intent in subsection (h), even the implied repeal standard has been met.

III. NWPA’S STRUCTURE AND HISTORY SUPPORT UTAH’S POSITION.

Neither NRC nor Intervenor offer a persuasive rebuttal to Utah’s arguments about the structure and legislative history of the NWPA. Nor have they offered a sufficient basis in the statute’s structure or history to revive their grammatically impossible construction of it.

A. Utah’s principal structural argument—the anomaly in the view that the NWPA provides state site-selection, veto, and financial assistance rights everywhere except where they are needed most (private AFR facilities)—stands largely unrefuted. NRC asserts that the Part 72 regulations provide a comparable “regulatory scheme” that allows state participation. NRC38. But the fact that Utah can and did participate in the Part 72 proceedings is hardly a substitute for

the key state prerogatives recognized under the NWPA—state site-selection, veto, and financial assistance rights, which are not provided under Part 72. Those rights are fundamental, and their need is only heightened where the facility in question is owned not by the federal government but by a private LLC. Congress could not have intended to delegate to NRC the monumental decision whether to deprive states of these important rights.

B. Congress’s supposed intent to disavow authority only for “federal” AFR use cannot be sustained by the notion that the NWPA focuses on federal (not private) solutions for storage and disposal of SNF. NRC31-32; Interv12. In enacting the NWPA, Congress repeatedly expressed its understanding that it was enacting a “comprehensive” policy for the storage and disposal of SNF. Utah26n.17; H.R. REP. NO. 97-491, pt.1, at 38 (1982); 97 Cong. Rec. 32548 (1982) (statement of Sen. Glenn) (NWPA “calls for spent fuel to be retained and managed in a variety of settings: at reactor sites, at interim away-from-reactor storage facilities, and ... longer term [MRS] facilities”). This understanding of the comprehensiveness of the statute, moreover, was never limited to the government. Congress recognized the federal government’s role in “exacerbat[ing] or creat[ing] a spent fuel bottleneck,” H.R. REP. NO. 97-491, pt. 1, at 28, but it did not recommend that centralized storage capacity be developed by the federal government “[b]ecause of the technical advances in at-reactor storage technology, and because of the logistical advantage of holding spent fuel at reactor sites until there is need to move it for reprocessing or disposal.” *Id.* at 37; *see also* H.R. REP. NO. 97-785, at 33 (1982) (noting intent to “encourage the use of available spent nuclear fuel storage capacity at the site” and “to provide for a Federal, last resort interim storage program”).

In fact, the NWPA treats private SNF storage at some length—in Part B. Section 10155(b)(1) sets the preconditions to use of federal interim storage, one of which is that the

nuclear utility be “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.” (emphasis added). Notably, each and every instance of private SNF storage is expressly limited to storage “at the site” of a “civilian nuclear power reactor.” The language and structure of these provisions is conspicuously parallel to that of § 10155(h). Whereas subsection (b)(1) expressly contemplates a range of private storage facilities “at the site of a[] civilian nuclear power reactor,” subsection (h) disavows any encouragement of, authority for, or requirement of any “private or federal use” of “any storage facility located away from the site of any civilian power reactor and not owned by the Federal Government on January 7, 1983.” The conclusion is unmistakable that the NWPA does address private SNF storage, both in requiring exhaustion of certain private storage options as a precondition to use of interim storage under Part B, and in disavowing authority for private AFR facilities.

Intervenors’ argument that the NWPA addresses only federal storage is also wrong in another respect: Subsection (h) itself expressly disclaims any requirement or encouragement for nuclear utilities to make use of private AFR facilities as a precondition to the federal interim storage program under Part B, as NRC acknowledges. NRC18-19. Thus, even if there were some question about the focus and intent of the NWPA generally, there can be no question that

the specific statutory provision at issue here—subsection (h)—expressly deals not only with “federal” storage but also “private” storage. The question, then, is not whether subsection (h) deals with private storage facilities, but whether its acknowledged focus on such facilities is limited to the verbs “encourage” and “require,” as NRC indicates, or instead extends naturally to the verb “authorize” as well. Moreover, as explained above, the Congress that enacted the NWPA understood that NRC had regulatory authority to license onsite facilities as part of the license issued to a nuclear reactor. In fact, streamlining NRC licensing procedures for new or expanded at-reactor SNF storage was part of Congress’ comprehensive SNF strategy. 42 U.S.C. § 10154.

Thus, far from supporting NRC’s a-textual reading of subsection (h), the structure of the NWPA cuts against it. It demonstrates that (1) the NWPA deals expressly with each and every method of SNF storage or disposal described in the parties’ briefs—**except** the private AFR method at issue here; and (2) state and local governments have extensive participation and site-selection rights for each and every one of those methods. Again, it is more than a little anomalous to think that Congress would have meant to abrogate essential state prerogatives without some clear statement of its intention to authorize private AFR facilities in the absence of state participation—particularly where all other methods of SNF storage and disposal are expressly mentioned in the NWPA.

C. NRC also errs in asserting that Utah’s position that the NWPA forecloses new AFR construction is incompatible with NWPA Part C, which calls for federal “construction of one or more monitored retrievable storage facilities.” *Id.* §10161(a)(2). As enacted in 1982, NWPA Part C did not expressly authorize construction of MRS facilities; it merely empowered DOE to study MRS and to propose any construction to Congress, who would subsequently

determine whether to authorize such construction. *Id.* § 10161(b)(1)&(c)(2); 97 Cong. Rec. 27777, Nov. 29, 1982 (statement of Rep. Tauzin) (explaining that NWPA “does not authorize” an MRS facility until “this Congress approves one”). If and when Congress expressly authorized such a facility in subsequent legislation, as it did a few years later in enacting 42 U.S.C. § 10162, that specific authorization obviously would override the more general prohibition in subsection (h). But absent any subsequent, specific authorization from Congress, subsection (h)’s express disavowal of authority remains in place.

D. NRC also quotes a passage in the House Report acknowledging that, if necessary, SNF may be stored “off-site at another reactor’s storage pool or at some other location.” NRC44 (quoting H.R. REP. NO. 97-785, at 40). Contrary to NRC’s argument, this is hardly a recognition that private AFR facilities would still be an option after the NWPA. Federal interim storage is itself “some other location.” The House Report identifies AFR as a storage alternative; in context the reference is clearly to federal (not private) AFRs . H.R. REP. NO. 97-785 at 41 (referring to AFRs licensed by NRC under Section 202(3) of the Energy Reorganization Act, which addresses only federal facilities owned by the Energy Research and Development Administration (DOE’s predecessor), *see* PL93-438 §§ 101, 202(3) (1974)). Notably absent is any reference to the AEA or NRC’s Part 72 regulations.

The reference to “other location[s]” may also be understood to refer to existing private AFRs. See NRC14-15. All parties agree that subsection (h) is aimed prospectively at new construction, Utah40; NRC47 (indicating that “the terms ‘use, purchase, lease, or other acquisition’ as used in subsection (h) were intended to exclude ‘construction’”); § 10155(h) (limiting AFR authority to sites in existence at the time of the NWPA’s enactment—January 7, 1983), and thus cannot be read to outlaw these existing sites. Accordingly, the House Report can

easily be understood to have made reference to the three existing sites in contemplating storage “at some other location.”

E. NRC suggests that Utah’s construction renders “superfluous” the statute’s disavowal of an intent to “encourage” and “require” AFR use, NRC34-35, but this point is neither accurate nor supportive of the NRC’s position—if anything, it cuts the other way. First, disavowal of an intent to “encourage” or “require” use of AFR facilities not owned by the federal government on January 7, 1983, has independent meaning in its application to the three existing facilities identified above. Without the separate disavowal of intent to “encourage” or “require” the use of those facilities, it might be plausible to infer that Congress meant to encourage or require such use as a prerequisite to the use of the interim storage program under NWPA Part B.

Second, and in any event, the entire purpose of subsection (h) is to reiterate what is already implied by other provisions of the statute, even at expense of redundancy. Subsection (h) disclaims authority for a federal AFR facility, but the statute already so provides. Under 42 U.S.C. § 10155(a), federal interim storage “shall be provided” only “through one or more of” three specified “methods,” including “(A) use of available capacity at one or more facilities owned by the Federal Government on January 7, 1983”; “(B) acquisition of any modular or mobile spent nuclear fuel storage equipment ... 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”; and “(C) construction of storage capacity at the site of any civilian nuclear power reactor.” Similarly, subsection (h) disclaims a requirement for AFR use as a precondition to use of federal interim storage, but again the statute elsewhere suggests the same thing. *Id.* § 10155(b)(1)(A) & (B) (limiting prerequisites to interim storage to exhaustion of storage capacity at the site of the reactor or transshipment to another reactor).

The disclaimer of authority for private AFR facilities is parallel to these acknowledged purposes of subsection (h): it confirms (at the expense of redundancy) what is implicit in the structure of the statute—that storage facilities expressly authorized and regulated by the comprehensive terms of the NWPA are permitted, and any other new facilities are expressly foreclosed.

F. NRC and Intervenor also err in insisting that it is “unlikely that Congress would have responded [to the SNF storage problem] by establishing a severely limited government program while at the same time eliminating existing AEA authority for private AFR storage facilities.” NRC41-45; Interv13. Congress implemented the NWPA with the expectation that its provisions alone would solve the AFR storage problem. See H.R. REP. NO. 97-491, pt.1, at 38 (“The Committee anticipates that all utilities can provide increased storage capacity in a timely, safe, and economic manner over the next eight years. Although there may be near-term need for use of Federal capacity, the Committee has recommended programs under which it anticipates all utilities will be able to resolve their storage problems by the end of the decade.”) (emphasis added). NRC’s and Intervenor’s perceptions of the storage problem simply do not line up with Congress’s own understanding—or with the reality that on-site storage has been sufficient. In any event the federal interim storage program was never utilized. Interv16,n.3.

Moreover, NRC and Intervenor oversimplify the NWPA’s purpose as one of broadly increasing options for SNF storage. Among other things, Congress was concerned that too many options for short-term storage would take away the incentive for the creation of a permanent repository—a solution universally aspired to. H.R. Rep. No. 97-491, at 29 (recommending “that the focus of the Federal waste management program remain” on a permanent repository); *id.* at 96 (indicating concern that “[t]he creation of a federal interim storage facility relieves the

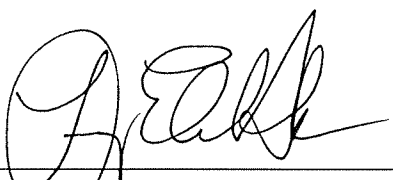
pressure to establish a permanent repository”). And, as noted above, nuclear fuel storage was and is an issue with broad political implications. The NWPA cannot accurately be characterized as a statute that had the single purpose of maximizing facilities for SNF storage; members of Congress were also greatly concerned about the political impacts on their districts of SNF storage facilities and the perceived catastrophic risks that they carried with them. Utah39-45.

G. Finally, there is no reason to infer any intent to preserve NRC authority over AFR facilities from the passing references to Part 72 in the legislative history. NRC42-44; Interv23-24. The testimony cited by NRC and Intervenors must be put in its proper temporal context. The references to Part 72 were raised in the context of a discussion of a scheme for SNF storage that would have required DOE construction and private exhaustion of AFR facilities—*i.e.*, well before that scheme was drastically altered in several respects by subsection (h). *See* NRC43,48 (noting that subsection (h) originated in H.R. 6598 as reported out of the Committee on Energy and Commerce in August 1982). Thus, there is no reason to conclude that the Congress that subsequently enacted subsection (h) had any intention to preserve Part 72 authority over AFR facilities, any more than it intended to preserve authority for federal AFRs or a requirement of private AFR use.

CONCLUSION

Petitioners respectfully request that the Court reverse the NRC Decision and direct that NRC amend its Part 72 regulations to reflect the NWPA's prohibition of private AFR/SNF facilities.

Respectfully submitted,



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DATED: October 30, 2003

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(5), (6), and (7)(B), Federal Rules of Appellate Procedure, and the corresponding Circuit Rule, I certify that this Petitioners' Reply Brief complies with the type-volume limitation of those Rules because this brief contains no more than 7000 words, excluding the parts of the brief exempted by those Rules; and that this Petitioners' Reply Brief complies with the typeface and type style requirements of those Rules because this brief has been prepared using WordPerfect in a proportionally spaced typeface (Times New Roman) in 12-point font for the text and 11-point font for the footnotes.




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DATED: October 30, 2003

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

Pursuant to Rule 32(a)(5), (6), and (7)(B), Federal Rules of Appellate Procedure, and the corresponding Circuit Rule, I certify that this Petitioners' Reply Brief complies with the type-volume limitation of those Rules because this brief contains 6992 words, excluding the parts of the brief exempted by those Rules; and that this Petitioners' Reply Brief complies with the typeface and type style requirements of those Rules because this brief has been prepared using Microsoft Word in a proportionally spaced typeface (Times New Roman) in 12-point font for both the text and the footnotes.


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24

CERTIFICATE OF SERVICE

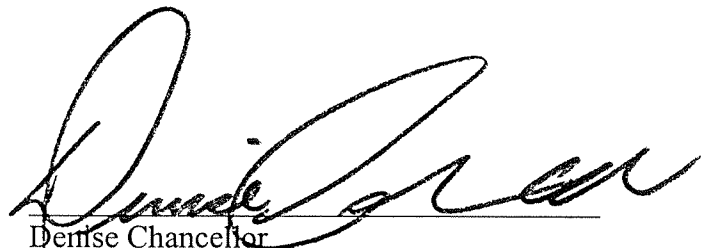
I hereby certify that on this 30th day of October, 2003, I served two true and correct copies of the foregoing **PETITIONERS' JOINT REPLY BRIEF** via United States first-class mail, postage prepaid, to the following:

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