

A. Statutory Authority

CONTENTION: Congress has not authorized NRC to issue a license to a private entity for a 4,000 cask, away-from reactor, centralized, spent nuclear fuel storage facility.

BASIS: The NRC may only license the storage of spent fuel at facilities which are authorized by statute. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). The Nuclear Waste Policy Act (NWPA), Part B, Interim Storage Program, 42 USC §§ 10151 - 10157, defines the scope of facilities authorized for interim storage of spent nuclear fuel. In light of the NWPA, NRC cannot rely on its general statutory authority or authority to license spent nuclear fuel as the source of its authority to license a centralized 4,000 cask away-from-reactor facility operated by a limited liability corporation. American Petroleum Institute v. EPA, 52 F.3d 1113, 1119 (D.C. Cir. 1995) ("EPA cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of EPA in a particular area."); Sierra Club v. EPA, 719 F.2d 436, 455 (D.C. Cir 1983), *cert. denied*, 468 U.S. 1204 (1984). NRC's general licensing authority does not give NRC carte blanche authority to make any rules it wishes regarding away-from-reactor storage of spent nuclear fuel.

Initially, NRC licensed ISFSIs under its general regulation for the Domestic Licensing of Special Nuclear Material, 10 CFR Part 70. See 45 Fed. Reg. 74,693 (Nov. 12, 1980). Chapter 6 of the Atomic Energy Act deals specifically with special nuclear material in terms of the acquisition and domestic and foreign distribution of special nuclear material. 42 USC §§ 2071, 2073 to 2077. Under the Atomic Energy Act congressional authorization extended to NRC's authority to license civilian ownership and possession of special nuclear material. 42 USC § 2073. However, it was not until the NWPA that Congress specifically addressed storage of spent nuclear fuel.

In the NWPA of 1982 Congress specifically authorized private storage of spent nuclear fuel at reactor sites. Congress authorized storage of spent nuclear fuel away from reactors only at federally owned facilities. 42 USC § 10,155(h). Neither the NWPA, nor the statutory basis in 1980 for NRC to promulgate Part 72, can be construed as authorizing NRC to issue a license for a 4,000 cask, centralized, privately owned, away-from-reactor, nuclear waste storage facility that is being sought by this Applicant.

The NWPA expresses Congress's purpose and intent in dealing with spent nuclear fuel storage.¹ 42 USC § 10,151. Congress directed the NRC and other

¹ As stated in the legislative history of the Nuclear Waste Policy Act of 1982, PL 97-425, House Report No. 97-491, Pt. 1, p.26 "Background," U.S. Code Cong. & Admin. News 1982, at 3,792: "The need for legislation to address problems besetting nuclear waste management, and Congressional efforts to address these problems, has increased and become urgent since the early 1970's. Prior to this time, the inventory of wastes from nuclear activities grew with little public notice and minor

authorized federal officials to encourage and expedite the storage of spent nuclear fuel at the site of each civilian nuclear power reactor. 42 USC §§10,151 and 10152.

Congress granted the NRC rulemaking authority for licensing technologies for the storage of civilian spent nuclear fuel at the site of any civilian nuclear power reactor.

Id. § 10,153. Finally, the NWPA authorized the "establishment of a federally owned and operated system for the interim storage of spent nuclear fuel at one or more facilities owned by the Federal Government with not more than 1,900 metric tons of capacity...." Id. § 10,151(b)(2).

Congress imposed limits on centralized storage of spent nuclear fuel. First, the facility is to be federally owned and operated. 42 USC § 10,155(a). Second, maximum storage capacity is no more than 1,900 metric tons. Id. Third, when providing storage capacity, Congress directed the Department of Energy (DOE) to seek to minimize the transportation of spent nuclear fuel. Id. at § 10155(a)(3). Fourth, storage of spent fuel must be removed from the site not later than 3 years following the date on which a repository or monitored retrievable storage (MRS) facility is available. Id. § 10,155(e). Finally, Congress imposed annual reporting requirements on DOE. Id. § 10155(f).

The stark contrast between what the Applicant is requesting NRC to authorize under Part 72 and the directives Congress imposed on the federal ownership and operation of centralized interim away-from-reactor storage under the NWPA bespeaks

Congressional concern: (*emphasis added*).

the lack of statutory authority for NRC to license the proposed PFS facility. First, the Applicant's facility would not have the backing of the federal government but would be owned and operated by a limited liability company with no independent assets. Second, instead of a maximum limit of 1,900 metric tons the Applicant requests a maximum limit of 40,000 metric tons. Third, spent nuclear fuel would be transported from all over the United States, primarily from the eastern states, thousands of miles to the Utah facility. Fourth, the Applicant's facility is de-linked from completion of Yucca Mountain or an MRS. There is no assurance that the stored fuel in Utah will ever be moved. Finally, as the licensing of an off-site ISFSI is totally an NRC regulatory creation, there are no Congressional reporting requirements.

Another glaring aberration between this Applicant's proposal under Part 72 and the centralized away-from-reactor storage under NWPA is to contrast the involvement of States. See 42 USC § 10,155(d). First, under NWPA, the Secretary of Energy must appraise the State Governor and its legislature of potentially acceptable interim storage sites and the Secretary's intention to investigate those sites. 42 USC § 10,155(d)(1). Second, the Secretary is required to give timely updates and results of investigations to the Governor and State legislator and enter into negotiations to establish a cooperative agreement between the Secretary and the State. Under such an agreement the State "shall have the right to participate in a process of consultation and cooperation ... in all stages of the planning, development, modification, expansion,

operation and closures of storage capacity at a site or facility within such State for the interim storage of spent fuel from civilian nuclear power reactors." Id. § 10,155(d)(2).

Third, the cooperative agreement must include sharing of all technical and licensing information; use of available expertise; joint project review, surveillance and monitoring arrangements; and schedule of milestones and decisions points and opportunities for State review and objection. Id. § 10,155(d)(3). Fourth, the Secretary must periodically report to Congress. Id. § 10,155(f). Finally, a State may voice its disapproval to Congress of a proposal to construct storage capacity of 300 metric ton or larger at any one site. Id. § 10,155(d)(6).

In contrast to a cooperative agreement and meaningful role ascribed to the State under the NWPA, Part 72 requires no cooperation or involvement with the State. What has occurred to date is indicative of the pitiful role assigned to the State under Part 72. First, the Applicant made no effort to apprise the State of its proposed facility. The State first learned about the facility through press releases and by sending State officials to Washington, D.C. to attend meetings between the Applicant and the NRC that were open to the public. Second, there has been no cooperation or consultation between the Applicant and the State. Failure to even allow the State to review and comment on the Emergency Plan, as required by 10 CFR § 72.32(a)(14), is just one conspicuous example of the Applicant's refusal to deal up-front with the State. Finally, there is no opportunity for State review or oversight of the project, except

through litigation. The State endeavored to place some its concerns before the NRC, prior to NRC's acceptance of the application, through 2.206 petitions but the NRC ignored those efforts. Instead, the State has to expend thousands of dollars to participate through intervention in the NRC formal license adjudication if it wants to have any voice in the siting and licensing of this facility. This is a far cry from the role Congress assigned to the State under § 10,155(d).

Another salient factor in the analysis of whether NRC has statutory authority to license the PFS facility is the way in which the Applicant will use public services without any compensation to government coffers. Congress recognized that there would be social and economic impacts associated with a large centralized storage facility. 42 USC § 10,156(e). Accordingly, Congress authorized payment of up to \$15 per kilogram of spent fuel or ten percent of costs associated with planning, public services and other social and economic impact costs. Part 72 imposes no requirements on the Applicant to give financial assistance to governmental entities. For example, if NRC licenses the PFS facility, annual shipments of up to 200 casks of nuclear waste may travel through the rail congested and populated Wasatch front area, including downtown Salt Lake City. The State at least receives training and financial assistance from the federal government for the military nuclear waste shipments (such as WIPP wastes) passing through the State as it would if this facility were authorized by the NWPA. But no such assistance will be forthcoming from this Applicant. In fact, the

State is unaware of what arrangements the Applicant intends to use to safeguard shipments and respond to emergencies en route, at Rowley Junction, or along Skull Valley Road. Rather than receiving financial assistance, the State of Utah will be forced to expend funds to ensure that its citizens will not be harmed.

After comparing what this Applicant is requesting and what Congress requires under the NWPA, it should be obvious that NRC by regulation is thwarting the national policy and directives Congress set in the NWPA. NRC is without statutory authority to license the proposed PFS facility.