UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 03-1018 September Term, 2002

Margene Bullcreek, et al., Petitioners
v.
Nuclear Regulatory Commission, et al., Respondents

O R D E R

This case was filed and docketed on 1/31/03. The case was filed as a petition for review and was assigned the above number.

It is **ORDERED** that petitioner(s) shall submit the following document(s) (original and one copy required, unless otherwise noted) by the indicated date(s):

3/5/03 Docketing statement.
3/5/03 Statement of issues to be raised.
3/5/03 Certificate of Counsel (Cir. R. 28(a)(1)).
3/5/03 Statement as to whether or not a deferred appendix under F.R.A.P. 30(c) will be utilized. (A motion will not be necessary.)
3/5/03 Original and four copies of procedural motions which would affect the calendaring of this case.
3/20/03 Dispositive motions, if any. See Cir. R. 27(g). (Original and four copies.)

It is **FURTHER ORDERED** that respondent(s) shall submit the following document(s) (original and one copy required, unless otherwise noted) by the indicated date(s):

3/20/03 Entry of Appearance form.
3/20/03 Certified Index to Record.
3/5/03 Original and four copies of procedural motions which would affect the calendaring of this case.
3/20/03 Dispositive motions, if any. See Cir. R. 27(g). (Original and four copies.)

It is **FURTHER ORDERED** that briefing in this case is deferred pending further order of the Court.

The Clerk is directed to certify and transmit a copy of this order, along with the petition for review, to respondent(s).

FOR THE COURT:
Mark J. Langer, Clerk

BY: Lisa M. English
Lisa M. English, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED FEB - 3 2003
CLERK

Lisa M. English

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United States Court of Appeals

District of Columbia Circuit
Washington, D.C. 20001-2866

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ENTRY OF APPEARANCE

Case No. _____

CAPTION _____

v.

_____

PARTY

The Clerk will enter my appearance as counsel for:

☐ Appellant(s)
☐ Petitioner(s) _____
Name of Party

☐ Appellee(s)
☐ Respondent(s) _____
Name of Party

☐ Intervenor(s) _____
Name of Party

☐ Amicus Curiae _____
Name of Party

ATTORNEY

Name _____ Phone _____

Name _____ Phone _____

Name _____ Phone _____

Firm _____

Address _____

_____

NOTE: Must be submitted by a member of the Bar of the USCA for the D.C. Circuit.

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
JAN 3 1 2003
RECEIVED

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FOR DISTRICT OF COLUMBIA
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JAN 3 1 2003
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IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARGENE BULLCREEK, LISA BULLCREEK, REX ALLEN, MARY ALLEN, DANIEL MOON, DELFORD MOON, LENA KNIGHT, ABBY BULLCREEK, and LINDA WILLIAMS, individual members of the Skull Valley Band of Goshute Indians and members of the Band's General Council, and OHNGO GAUDADEH DEVIA, an unincorporated association,	PETITION FOR REVIEW
Petitioners,	03-1018
v.	
UNITED STATES NUCLEAR REGULATORY COMMISSION, and the UNITED STATES OF AMERICA	
Respondent.	

COME NOW, Margene Bullcreek, Lisa Bullcreek, Rex Allen, Mary Allen, Daniel Moon, Delford Moon, Lena Knight, Abby Bullcreek, and Linda Williams, individual members of the Skull Valley Band of Goshute Indians and members of the Band's General Council, and Ohngo Gaudadeh Devia ("OGD"), through their attorneys, EchoHawk Law Offices, and pursuant to 28 U.S.C. § 2342, 42 U.S.C. § 2239, 5 U.S.C.

§§ 703, 704, 706, and Fed. R. App. P. 15, hereby petition this Court for review of the Nuclear Regulatory Commission's ("NRC") Memorandum and Order, CLI-02-29, entered on December 18, 2002, to the extent the Memorandum and Order denied the Petition to Institute Rulemaking filed before the NRC on February 11, 2002.[1] Venue is proper in this Court pursuant to 28 U.S.C. § 2343.

The NRC's December 18, 2002 Memorandum and Order, CLI-02-29, denied a petition to institute rulemaking pursuant to 10 C.F.R. § 2.802(a) to amend regulations governing independent spent fuel storage installations ("ISFSIs"), 10 C.F.R. Part 72, to make clear that licensing is allowed only for federally owned and operated away-from-reactor spent nuclear fuel ("SNF") storage facilities and not for an away-from reactor storage facility that is privately owned. The requested amendment is necessary to bring Part 72 into conformity with the Nuclear Regulatory Policy Act of 1982, as amended, 42 U.S.C. §§ 10101 *et seq.*

DATED: January 30, 2003.

ECHOHAWK LAW OFFICES

By _____
Paul C. EchoHawk, of the firm
Attorneys for Petitioners

[1] The Petitioners do not petition for review of the Order to the extent it resolves Utah's Suggestion of Lack of Jurisdiction filed February 11, 2002 in the licensing proceeding known as In the Matter of Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), Docket No. 72-22-ISFSI, ASLBP No. 97-732-02-ISFSI.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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for ECHOHAWK LAW OFFICES

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 12/18/02

SERVED 12/18/02

COMMISSIONERS

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

In the Matter of	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
(Independent Spent Fuel Storage Installation)	)	

CLI-02-29

MEMORANDUM AND ORDER

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

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[1] CLI-02-11, 55 NRC 260 (2002).

[2] 42 U.S.C. § 2011 *et seq.*

[3] 42 U.S.C. § 10101 *et. seq.*

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

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

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

> Notwithstanding any other provision of law, nothing in this Act shall be construed to encourage, authorize, or require the private or Federal use, purchase, lease, or other acquisition of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government on the date of the enactment of this Act.[5]

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

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[4] *See* CLI-02-11, 55 NRC at 262-65.

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

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

In order to resolve the opposing claims, we start with a review of the NWPA's statutory framework. The NWPA's purpose was to establish the federal government's responsibilities for the permanent disposal and interim storage of spent nuclear fuel and high level waste, including a schedule for the development of permanent repositories.[6] Subtitle A of the Act establishes a plan for the federal government to build a permanent repository. Subtitle B deals with interim storage of spent nuclear fuel – that is, storage pending permanent disposal.[7] Other portions of the Act concerned investigating the feasibility of monitored retrievable storage,[8] financial arrangements for decommissioning low-level radioactive waste sites,[9] and a program for the DOE to conduct research and development on waste disposal technologies.[10]

Subtitle B contains the provisions of particular importance here. It seeks to help nuclear power reactor owners and operators manage spent fuel while waiting for a permanent disposal site. The Subtitle includes three "findings": that the owners and operators of reactors have the primary responsibility to provide interim storage by maximizing onsite storage; that the federal government has the responsibility to "encourage and expedite" the owners' use of onsite storage options; and that the federal government has the responsibility to provide a limited amount of

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[6] *See* NWPA § 111(b), 42 U.S.C. § 10131(b).

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

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

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

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

storage capacity.[11] Subtitle B established a federal program, now expired, to provide limited interim storage at existing federal facilities.[12] Subtitle B's section 135, which includes the provision upon which Utah relies, required the Department of Energy (DOE) to provide up to 1,900 metric tons of interim storage capacity if necessary to keep a reactor from having to shut down for lack of storage capacity. Other provisions of Subtitle B were designed to help the utilities meet their own storage needs by providing for expedited licensing procedures for onsite storage expansion, alternative storage technologies, and transshipments of spent fuel between facilities owned by the same utility.[13]

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

> (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;

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

[12] *See* NWPA, §§ 135-37, 42 U.S.C. §§ 10155-57. The Department of Energy was authorized to enter contracts for interim storage no later than January 1, 1990. NWPA § 136(a)(1), 42 U.S.C. § 10156(a)(1).

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

> (iii) acquisition of modular or mobile spent nuclear fuel storage equipment, including spent nuclear fuel storage casks, for use at the site of any civilian nuclear power reactor operated by such person; and
>
> (iv) transshipment to another civilian nuclear power reactor owned by such person.[14]

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

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

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

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

The AEA does not specifically direct the NRC to regulate spent fuel storage and disposal. Rather, it gives the Commission regulatory jurisdiction over the constituent materials of spent nuclear fuel. The AEA authorizes the Commission to license and regulate the possession, use,

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[14] NWPA § 135 (b)(1)(B), 42 U.S.C. §10155(b)(1)(B).

[15] NWPA § 136(a)(1), 42 U.S.C. § 10156(a)(1).

[16] *See* "Licensing Requirements for the Storage of Spent Fuel in an Independent Fuel Spent Storage Installation," 45 Fed. Reg. 74,693 (Nov. 12, 1980).

[17] *See id.* at 74,696.

and transfer of source, byproduct, and special nuclear materials regardless of their aggregate form.[18] It defines these materials to include uranium, thorium, plutonium, and "any radioactive material . . . yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material."[19] Source, byproduct, and special nuclear material are all found in spent nuclear fuel.[20]

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

> The Atomic Energy Act sets up a comprehensive scheme of federal regulation of atomic energy, administered by the Nuclear Regulatory Commission. The Act does not refer explicitly to spent nuclear fuel, but it does refer to the constituents

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[18] *See* AEA §§ 53, 62, 63, 81, 161(b), 42 U.S.C. §§ 2073, 2092, 2093, 2111, 2201(b).

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

[20] *See* 10 C.F.R. § 72.3.

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

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

> of that fuel, and the state does not, and could not, question the Commission's authority to regulate the storage of spent nuclear fuel.[23]

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

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

Nowhere does the NWPA purport to limit the Commission's general authority under the AEA to regulate spent fuel. Section 135(h), the provision on which Utah relies, states only that the NWPA itself does not authorize away-from-reactor ISFSIs:

> Notwithstanding any other provision of law, nothing in this Act shall be construed to encourage, authorize, or require the private or Federal use, purchase, lease, or other acquisition of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government on the date of the enactment of this Act.[25]

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

Contrary to Utah's claims, where an activity is already authorized by another provision of law, declining to "authorize" it anew – or encourage it or require it – is not the same as

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

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

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

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

prohibiting it. As noted above, when the NWPA was enacted, the AEA and the NRC's existing Part 72 regulations allowed private owners of spent fuel to use an offsite facility for storage and provided for NRC licensing of such facilities. By stating "nothing in *this Act* shall ... authorize" such storage, Congress limited the scope of section 135(h) to those programs created under the NWPA itself [Emphasis added.] The language of section 135(h) is facially neutral on the question of the NRC's general AEA authority to license away-from-reactor ISFSIs. Section 135(h) says what the then-new NWPA authorized, but it says nothing to override existing law.

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

Utah's reading of section 135(h) violates the principle of statutory construction that a statute should be interpreted, if possible, in a way that gives every word meaning.[27] It would make no sense to provide that a law does not "encourage" or "require" an activity if the law actually banned that activity altogether, as Utah maintains. Utah's interpretation would make the words "encourage" and "require" superfluous. The State offers no explanation why Congress

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

would see a need to add that it was not "encouraging" or "requiring" private, offsite storage if its decision not to authorize it in the NWPA were tantamount to an across-the-board prohibition.

But "encourage," "authorize" and "require" each has its own significance when read in context of the whole of Subtitle B, because this subtitle variously authorizes, encourages and requires different things. By saying the NWPA did not "authorize" the use of a private faility, section 135(h) limited DOE's powers under NWPA. Because DOE's authority to take spent fuel for storage originated with section 135 of NWPA section 135(h) ensured that DOE would not take over a private facility to fulfil its section 135 obligation.[28] But because private generators' authority to store spent fuel originated with the AEA, the NWPA's failure to "authorize" them to take the fuel had to effect on that pre-existing authority.

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

Subtitle B has several provisions that "encourage" generators to expand onsite storage. For example, section 132 requires DOE, NRC and "other authorized federal officials" to "take such actions as . . . necessary to encourage and expedite the effective use" of onsite storage.[29] Section 133 directs the Commission to devise procedures for licensing alternative onsite storage technologies, and section 134 provides for expedited hearings for the expansion of at-reactor

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

[29] NWPA § 132, 42 U.S.C. § 10152.

storage.[30] These provisions facilitating or encouraging expansion of onsite storage do not mention private offsite storage. Section 135(h) emphasized that they should not be construed as encouraging private storage located away from a reactor.

Context, and a little legislative background, also explain why Congress would specify that the NWPA did not "require" private offsite storage. NWPA section 135(b)(1)(B) "required" generators to maximize at-reactor storage as a prerequisite to DOE's taking possession for limited interim storage. For some time during the legislation's formative period, H.R. 3809 (the bill that was eventually enacted) and similar bills would have also required that generators exhaust private offsite storage options before they could ask DOE to take the fuel for interim storage.[31] Subsection 135(h) underscores that this requirement was eliminated in the final draft of the legislation: generators would not have to prove that they could not meet their own storage needs through storage at a private AFR facility.

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

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

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

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

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

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

Section 135(h), therefore, accomplished two things: it kept DOE from taking over a private AFR facility to fulfil its obligation under NWPA, while providing that Subtitle B's various provisions facilitating expanded onsite storage would not extend to private offsite storage. This reading comports with the rules of statutory construction because it gives each word Congress

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[32] *See* H.R. 3809, § 133(d) (as reported out of the House Committee on Interior and Insular Affairs on April 27, 1982). West Valley, the only facility that had ever reprocessed fuel, had a Part 50 license. The General Electric Company facility in Morris, Illinois initially accepted spent fuel for storage under a Part 70 license, and was granted a license renewal under Part 72 in May, 1982. *See* "Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste" 51 Fed. Reg. 19106, 19107 (May 27, 1982).

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

used a separate and distinct significance which is consistent with its ordinary meaning. This interpretation also explains why the NWPA's only reference to private, AFR storage is found in the middle of a complex statutory provision (section 135) describing a limited federal program to provide emergency storage at DOE sites. The reason is that Congress was concerned with how Subtitle B, generally, and the federal storage program, specifically, might be interpreted to affect private AFR facilities. The language of section 135(h) clarifies that there is to be no effect one way or the other.

In addition, we understand the phrase "[n]otwithstanding any other provision of law, nothing in *this Act* [shall authorize offsite storage]" to be an acknowledgment that other provisions of law might authorize private or federal use of nonfederal facilities for storage.[34] Members of Congress clearly were well aware that "other provisions of law" authorized private AFR storage facilities, as the existence, and fate, of such facilities was discussed in

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

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

Congressional committee debates.[35] Likewise, "other provisions of law" allowed DOE to use nonfederal storage facilities for purposes other than fulfilling its NWPA interim storage obligation. For example, Congress had only recently enacted the West Valley Demonstration Project Act, which directed DOE to take possession of, but not title to, a New York state-owned facility for a demonstration of high level waste solidification techniques.[36]

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

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

Because the NWPA does not expressly "prohibit" private away from reactor storage, but only declines to "authorize" it, Utah's argument depends upon a finding that the NWPA's waste storage provisions are exclusive. But Congress could not have created an exclusive means for dealing with waste without repealing the general authority over waste that the AEA already granted. As we have discussed, the NWPA does not explicitly repeal the NRC's AEA authority. If the NWPA took away the NRC's authority to license an AFR storage facility, then it must have

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

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

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

done so through an *implied* repeal of the general regulatory power under which the NRC promulgated Part 72. But there is no evidence of such an implied repeal.

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

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

The U.S. Court of Appeals for the District of Columbia Circuit once cautioned that, without the presumption against implied repeals, the difficulty in determining the effect of a bill on the body of preexisting law would turn the legislative process into "blind gamesmanship, in which Members of Congress vote for or against a particular measure according to their varying estimations of whether its implications will be held to suspend the effects of an earlier law that they favor or oppose."[42] Thus, in the current situation, only if there is no way to reconcile the AEA's general authority with the NWPA should we find that the latter overruled the former. For

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

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

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

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

[42] *Id.* at 944.

us to find an implied repeal, where the two laws can be reconciled, would give the NWPA a wider impact than Congress intended.

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

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

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

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

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

already existed at Morris, West Valley, and Barnwell, because their fate was specifically discussed.[46]

Utah claims that there would be a "big anomaly" between a system (the NWPA's) that would allow small federal AFR facilities only in limited circumstances, and a system (Part 72) that would allow private AFR facilities of unlimited size without the restrictions imposed on federal facilities.[47] But in face of the presumption against implied repeals, we would have to find an irreconcilable conflict between the NWPA's provisions and our AEA-authorized Part 72 regulations to find that the NWPA implicitly limited the NRC's general authority to license AFR storage. There is, however, no irreconcilable conflict between a law imposing one set of restrictions on federal facilities (the NWPA), and another law imposing a different set of restrictions on private facilities (Part 72).

To demonstrate an incompatibility between the AEA and the NWPA, Utah cites various differences between a NWPA-authorized federal AFR facility and a Part 72 private AFR facility. For example, the NWPA limited a DOE storage facility to 1,900 tons of material. In contrast, our Part 72 regulations do not limit the size of an ISFSI. Also, DOE was to take the fuel only where it was necessary to prevent reactor shutdown, whereas Part 72 has no parallel restriction. And DOE was only to provide storage at sites it already owned, while Part 72, of course, allows storage at privately owned sites. Other distinctions abound. Spent fuel was required to be removed from any subsection 135 facility within 3 years of the opening of a permanent repository or monitored retrievable storage facility; Part 72 allows for a 20-year, renewable

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

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

license that is not tied to the availability of a permanent disposal site. Section 135 also had provisions regarding state notification and participation, which included, in some cases, a right for the state to disapprove storage within its boundaries which could only be overridden by Congressional action.[48] By contrast, when an applicant seeks a license under Part 72, states may either intervene in NRC licensing hearings as an interested party, or participate as an interested state, but they do not have the veto power the NWPA granted over section 135 storage.[49]

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

Utah argues that it would make no sense to impose a "host of protective strictures" on DOE with its "vast experience with things nuclear" while "none" are imposed on private licensees.[50] But it is hardly true that existing law imposes no "protective strictures" on private NRC licensees. Part 72 establishes an elaborate regulatory scheme designed to protect public health and safety. Indeed, in the ongoing PFS adjudication at the NRC, Utah and other litigants have challenged the applicant's compliance with various aspects of Part 72. A DOE facility that is not otherwise subject to NRC licensing, however, would not become so when used to store

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

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

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

fuel under section 135,[51] so it was necessary for the NWPA itself to spell out any limits. To the extent that Utah suggests that limits spelled out in legislation are more "protective" than regulations promulgated by a regulatory agency, we simply note that an agency's properly promulgated, substantive regulations have the full force and effect of law.[52] We also note that while DOE may have had "vast experience with things nuclear" at the time when the NWPA was enacted,[53] private utilities – such as those making up the PFS consortium -- had been handling and storing nuclear materials for 25 years under NRC (or AEC) regulation, with a safety record that compared favorably to DOE's.

The NWPA's legislative history confirms that the limits imposed on the DOE's obligation to take spent fuel for interim storage stemmed, for the most part, not from opposition to a large, centralized facility, but from Congress's belief that interim storage was the generators' responsibility. Representative Stanley N. Lundine of New York, who sponsored an amendment that would have removed all of section 135 from the NWPA, summed up the principal arguments against federal interim storage. In debates before the full House in November, 1982, he argued that federal interim storage would detract from efforts to develop a permanent repository, would lead to increased transportation of fuel, and would lead to utilities' avoiding taking initiative to solve their own spent fuel storage problems.[54] He warned that the utilities would simply request

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

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

[53] Utah's Reply Brief, at 3.

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

the government to increase the amount of federal storage available.[55] Proponents of the federal program countered that the various limits that had been developed during the long process of crafting the legislation assured that federal interim storage would only be a "safety valve" if the generators' self-help efforts failed.[56]

Therefore, Utah's characterization of the NWPA's limits as somehow safety-related is inaccurate. The NWPA's statutory limits were clearly imposed not as safety limits, but to limit federal involvement in an area that was seen as private industry's responsibility. In particular, the 1,900-ton total storage limit was not a safety measure; legislative history shows that it represented a compromise reached between those who wanted more and those who wanted less.[57] Limiting section 135 storage to existing DOE sites was also not a safety measure. During the hearings, the Department of Energy identified 18 existing facilities, including Hanford Nuclear Reservation in Washington, that could accept spent reactor fuel with minimal modification.[58] The provision limiting federal storage to existing DOE sites meant that DOE would not have to acquire any new sites. Because existing facilities would only need some

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

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

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

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

modification to accept spent commercial fuel, this provision also ensured that the storage would be available quickly.

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

2. "Comprehensive" Legislation Did Not Ban Storage Alternatives

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

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

Another gap in the "comprehensiveness" of the NWPA is reflected in the fact that the federal interim storage program expired in 1990, at least five years before Congress anticipated

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

the opening of a permanent repository.[60] This gap suggests that Congress intended to force the utilities to solve their own interim storage solutions after the federal program had "bought them time" to do so. Again, this does not suggest an intent to restrain private-sector activities.

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

Fausto, in short, found that recognizing a cause of action not specifically recognized in the CSRA would undermine its whole purpose. To make a similar finding here, we would have to believe that Congress intended, with the NWPA, to replace all pre-existing authority under the

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

[61] *United States v. Fausto*, 484 U.S. 439 (1988).

[62] *Fausto,* 484 U.S. at 448-49.

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

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

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

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

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

history earlier in this opinion.[64] Here, we consider the history relating to the overall context for the legislation.

The 96th Congress considered almost 50 bills concerning radioactive waste management, but was not successful in enacting comprehensive legislation.[65] The 97th Congress also considered numerous bills. Portions of those bills addressing federally provided interim storage, which would eventually become NWPA section 135, went through numerous incarnations. A great deal of compromise was involved in getting the legislation passed.

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

There ensued a political struggle between those in Congress who supported federal interim storage as a way to help the nuclear power industry and those who believed that interim storage was not the federal government's responsibility and would only detract from the primary goal of permanent storage. The NWPA, as ultimately enacted, reflected a compromise: federal interim storage was to be allowed but would be subject to limitations.[68]

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

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

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

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

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

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

> The Committee bill does not require that storage capacity at a private AFR be exhausted or unavailable before a utility would be eligible for storage capacity provided by the Secretary.[70]

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

The record suggests that Congress removed the requirement to seek private offsite storage at the urging of the nuclear power industry. The industry had campaigned for federal government interim storage, claiming that the federal government had contributed to the storage problem by delaying a permanent solution and by changing its position on reprocessing.[71] Representatives from the industry proposed that the federal government should acquire the

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Power).

[69] H.R. REP. NO. 97-785, pt. I, at 24.

[70] *Id.* at 41.

[71] *See, e.g.*, *Radioactive Waste Legislation: Hearings before the Subcomm. on Energy and Env't of the House Comm. on Interior and Insular Affairs on H.R. 1993; H.R. 2800; H.R. 2840; H.R. 2881; H.R. 3809*, 97th Cong., 532, 549-551 (1981) [hereinafter *1981 Hearings on H.R. 1993*] (statement of Sherwood H. Smith, Jr., Chairman and Chief Executive Officer Carolina Power & Light Co. on behalf of the American Nuclear Energy Council, the Edison Electric Institute, and The Utility Nuclear Waste Management Group, July 9, 1981). *See also 1982 Hearings on H.R. 1993, supra* note 31, at 412, 434 (statement and testimony of Sherwood H. Smith, president, Carolina Power & Light Co.).

existing spent fuel pools attached to the out-of-service reprocessing facilities at Morris, Illinois; West Valley, New York; and Barnwell, South Carolina for this purpose.[72] According to one industry representative's testimony before Congress, utilities could not finance acquisition of these facilities, particularly because the current owners would be reluctant to sell the spent fuel pools alone.[73] Naturally, industry favored easing the conditions under which a utility could ask DOE's help. It was in the utilities' interest to remove from section 135 the requirement that they exhaust the opportunity for private offsite disposal before DOE could take their spent fuel.

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

> Mr. Chairman, I would point out to the Members that the last resort interim storage program is limited to existing Federal facilities, and those facilities which

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[72] *1981 Hearings on H.R. 1993*, *supra* note 71, at 530-532, 552, 566-67 (statement of Sherwood H. Smith); 578, 5584-85 (statement of Bertram Wolfe, Chairman of Atomic Industrial Forum's Comm. on Fuel Cycle Policy). *See also 1982 Hearings on H.R. 1993, supra* note 31, at 438 (statement of Seymour Raffety, representing Dairyland Power Cooperative and the National Rural Electric Cooperative Assn.); *Nuclear Waste Disposal: Joint Hearings before the Committee on Energy and Natural Resources and the Subcommittee on Nuclear Regulation of the Committee on Environment and Public Works, United States Senate, on S. 637 and S. 1662*, 97th Cong. at 329, 336, 352-57 (1981) [hereinafter *Senate Joint Hearings*] (testimony and prepared statement of Sherwood H. Smith, Jr. on behalf of American Nuclear Energy Council, The Edison Electric Institute, and The Utility Nuclear Waste Management Group).

[73] Statement of Sherwood Smith, *Senate Joint Hearings*, *supra* note 72, at 354-55.

[74] *See* 128 Cong. Rec. at 28,032.

> have undergone a public health and safety review by NRC. And I would also say that we have special statutory language in section 135, which [Rep. Lundine] now would have us strike, that would exclude the use of private away-from-reactor facilities for the storage of spent fuel. We specifically put this language in here to take care of the problem that he and others have talked about; that is, the concerns that they have expressed as [to] the possible use of privately owned facilities in their particular districts. And he now wants to strike the language that we put in the bill for the express purpose of saying that there will be no funds used for the private facilities.[75]

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

> Is it the intent of the managers of this legislation under section 135 to prohibit the Secretary from providing capacity for the storage of spent nuclear fuel from civilian nuclear power reactors at the following facilities:
> First. The interim spent fuel storage facility owned and operated by General Electric in Morris, Ill.;
> Second. The former nuclear fuel reprocessing center in West Valley, N.Y.; and
> Third. The Allied General Nuclear Services facility near Barnwell, S.C.?[77]

Senator Simpson replied that that was the managers' intent.

Although the prevention of the federal takeover of private storage facilities was of great concern to those members of Congress with existing facilities in their districts, nothing in the NWPA ordered those private facilities to be shut down. Instead, the Act merely states that it does not "authorize" them to be used, purchased, leased or acquired. Although the Congressional

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[75] *Id.* at 28,040.

[76] *See 1982 Hearings on H.R. 1993*, *supra* note 31, at 365-72 (testimony of Sen. Strom Thurmond).

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

deliberations leave the strong impression that members of Congress from districts with private storage facilities might have liked to see those facilities closed, it appears that those members of Congress settled for a provision that would in no way encourage their use.

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

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

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

IV. CONCLUSION

The Commission has the authority under the AEA to license privately owned, AFR spent fuel storage facilities. Nothing in the text or legislative history of the NWPA suggests that Congress intended to alter this authority when it enacted the NWPA, which is primarily concerned with the responsibilities and duties of federal agencies with respect to spent fuel storage and disposal.

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

IT IS SO ORDERED.

For the Commission[80]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

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

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

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent Fuel Storage Installation)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-02-29) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution with copies by electronic mail or facsimile as indicated.

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Docket No. 72-22-ISFSI
COMMISSION MEMORANDUM AND ORDER
(CLI-02-29)

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[Original signed by Evangeline S. Ngbea]

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