

Appeal No. 02-4149

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

THE SKULL VALLEY BAND OF GOSHUTE INDIANS, et al.
Plaintiffs-Appellees,

v.

MICHAEL O. LEAVITT, in his official capacity as
Governor of the State of Utah, et al.

Defendants-Appellants.

On Appeal from the United States District Court for the
District of Utah, No. 2:01 CV 00270CV
Honorable Tena Campbell

APPELLANTS' REPLY BRIEF

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We use in this Reply Brief the same abbreviations and short-hand phrases used in our Opening Brief. Thus, all appellants are “Utah”; appellee Private Fuel Storage LLC is “the Consortium”; appellee Skull Valley Band of Goshute Indians is “the Band”; the appellees collectively are “PFS”; etc.

SUPPLEMENTAL STATEMENT OF THE CASE

Since the filing of Utah’s Opening Brief on 18 October 2002, the following events material to this appeal have occurred:

1. On 18 December 2002, the NRC’s Commissioners entered an order resolving, in two different proceedings, challenges to the NRC’s authority to license a private, away-from-reactor, SNF storage facility. In resolving those challenges, the Commissioners addressed the underlying legal question: With enactment of the Nuclear Waste Policy Act of 1982 (“NWPA”), did Congress intend to exclude from the Nation’s nuclear waste management system the use of such a private facility? The Commissioners ruled in favor of PFS’s position, as and when Utah’s Opening Brief had predicted they would. Opening Brief, at 33 & n. 41.

Regarding the two proceedings, one is the Consortium’s licensing proceeding. In that proceeding, the Commissioners denied Utah’s “Suggestion of Lack of Jurisdiction,” which various members of the Band’s General Council had joined. (The Band’s General Council consists of all adult members of the Band.)

The other proceeding is separate from and outside the Consortium’s licensing proceeding; that other proceeding was initiated by Utah’s “Petition to Initiate Rulemaking,” which, again, various General Council members joined. Utah’s Petition requested that the NRC amend its Part 72, or ISFSI, regulation to reflect that Congress had excluded private, away-from-reactor, SNF storage facilities from the Nation’s nuclear

waste management system. The Commissioners' decision denying the Petition to Initiate Rulemaking constituted final agency action subject to an immediate appeal of right. 28 U.S.C. §§ 2342, 2344; 42 U.S.C. § 2239(a)(1)(A) and (b)(1); 5 U.S.C. §§ 703, 704.

For ease of reference, we attach the Commissioners' 18 December 2002 decision as Addendum 7 and hereafter refer to it as "the NRC Decision."

2. On 29 January 2003, nine of the Band's General Council – including two of the three signers of the 1996 lease between the Band and the Consortium – appealed the Commissioners' denial of the Petition to Initiate Rulemaking to the Court of Appeals for the District of Columbia. Addendum 8. Utah is still considering whether it will do the same.

3. On 23 December 2002, the United States Department of Justice asked this Court for an extension of time until 5 March 2003 in which to decide whether the United States would file an amicus brief in support of PFS. This Court granted the extension. If such a brief is filed, this Court has ordered that Utah will have ten days to file a supplemental Reply Brief.

4. On 23 January 2003, one of two Licensing Boards (the Farrar board) involved in the Consortium's NRC licensing proceeding announced that it hoped to file decisions by the end of February 2003 on the contentions still remaining before it: geotechnical, military aircraft crashes, and rail spur alignment. The other Licensing Board (the Bollwerk board) has informally advised that it will file its decisions on the contentions still remaining before it – financial assurance and decommissioning – at the time of the Farrar board's filings.

ARGUMENT IN REPLY TO PFS'S RESPONSE BRIEF

I. THIS CASE SHOULD BE DISMISSED ON STANDING OR RIPENESS GROUNDS

Utah's Opening Brief challenged the federal courts' jurisdiction to hear this case on standing and ripeness grounds. The linchpin of Utah's jurisdictional challenges is its position on the "lawfulness issue": that the private, off-site facility proposed by PFS is prohibited by federal law under the NWPA. From the premise that PFS's facility is already barred by federal statute, Utah demonstrated that PFS lacks standing because (1) the only "injury" to PFS from the Utah statutes at issue is an empty, procedural interest in pursuing "a license from the NRC free from alleged state interference," Order, App. V, 40, at 1566, an injury that is not legally cognizable under controlling precedent; and (2) any injuries incurred by PFS are "fairly traceable" to the NWPA, not to the Utah statutes.

PFS's Brief mostly sidesteps the substance of these arguments. It characterizes Utah's jurisdictional challenge as a "diversionary tactic[]," Response Brief at 22, and brushes aside Utah's "elaborate argument" on the lawfulness issue by insisting that "the Hobbs Act deprives this Court of jurisdiction to decide the ... issue," *id.* at 31. But of course federal jurisdiction is fundamental (not diversionary), and neither the Hobbs Act nor any other statute can excuse a federal court from its essential duty to determine whether it has the constitutional power to hear the case before it. Indeed, it is settled law that an Article III court always has the jurisdiction to determine its own subject-matter jurisdiction under Article III. *In re Department of Energy Stripper Well Exemption Litigation*, 945 F.2d 1575, 1579 (T.E.C.A. 1991) (noting that federal courts "always" have such jurisdiction); *Kuhali v. Reno*, 266 F.3d 93, 100 (2nd Cir. 2001) (explaining that such power "stems not from [Congressional action], but rather from the inherent

jurisdiction of Article III federal courts to determine their jurisdiction”); *State ex rel. Oklahoma Tax Com'n v. Graham*, 822 F.2d 951, 955 (10th Cir. 1987) (noting that “jurisdiction to determine jurisdiction” is “an essential power”), *vacated on other grounds*, 484 U.S. 973 (1987). If PFS’s standing turns on whether its proposed facility is already barred by the NWPA, the Court can hardly avoid the constitutional question of whether this case presents a “case or controversy” by pointing to the Hobbs Act. If the Hobbs Act were so construed, it would be unconstitutional under Article III.

The Court can and should avoid such an obvious problem of unconstitutionality by construing the Hobbs Act to permit the resolution of the lawfulness issue in circumstances like that presented here. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (courts read statutes to avoid constitutional doubts “so long as such a reading is not plainly contrary to the intent of Congress”). A decision on the issue of whether the NWPA prohibits private, offsite facilities resolves a pure legal question. It does not run afoul of the Hobbs Act, which provides that the NRC’s final orders must be reviewed on direct appeal, and not in a collateral proceeding. 28 U.S.C. § 2342.

PFS offers no basis for construing the Hobbs Act to deprive a federal court of the power to determine its own Article III jurisdiction. Although the Response Brief argues that the Hobbs Act precludes any resolution of the lawfulness issue “no matter how the collateral attack on the agency action is raised” – even “as part of a standing and ripeness argument” – Response Brief at 69, PFS cites no case applying the Hobbs Act to cut off a federal court’s power to determine its own Article III jurisdiction. We have been able to find no case so holding, nor have we been able to find any intimation in Congressional deliberations or in the scholarly literature that Congress intended the Hobbs Act to deprive the federal courts of the power to fully resolve justiciability issues. Thus, this

Court can and should construe the Hobbs Act so as to avoid the thorny constitutional problems PFS's position leads to.

Even if PFS's broad construction of the Hobbs Act were accepted, however, it would lead inevitably to the dismissal of this case as unripe. After all, the question of the lawfulness of PFS's proposed facility is integral not only to PFS's standing but also to the merits questions of whether the Utah statutes are preempted or are otherwise constitutional. Clearly, this Court cannot evaluate whether the challenged statutes are consistent with the federal statutory scheme without first determining the meaning and content of the federal scheme. Likewise, this Court cannot resolve a Commerce Clause attack on the Utah statutes without first determining whether Congress excluded the proposed PFS facility from interstate commerce. Nor can this Court resolve the Impairment-of-Contracts Clause attack without first determining whether the prohibited contracts indeed violate public policy – as set by Congress and then only thereafter confirmed by Utah's Legislature. And the list goes on. See sections III.A. and IV below.

PFS cannot have it both ways – asserting in one breath that the lawfulness issue must be deferred for decision in an appeal from the NRC's final order(s), while insisting in the next breath that this Court must go forward with a case that necessarily turns on that very issue. But that is exactly what PFS is proposing in this case. PFS seeks a breathtaking overhaul of the Utah Code that can only succeed if the Court *assumes* that PFS's offsite SNF facility is lawful under the NWPA.¹

¹PFS cannot avoid this dilemma by its misguided insistence that a federal court should accord standing on the basis of a conclusion that a plaintiff has at least “‘a colorable right’ to undertake the[] activity” in question. Response Brief at 30 (citing *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997); *Arjay Assocs., Inc. v. Bush*, 891 F.2d 894, 898 (Fed. Cir. 1989)). Neither *Claybrook* nor *Arjay Associates* purports to excuse the courts from resolving a legal question that is a prerequisite to a plaintiff's standing. Just the contrary: those cases establish that a federal court must decide such an

Indeed, the only distinction between Utah's counterclaim (the validity of which PFS insists on raising and countering in this appeal, despite the fact that Utah abandoned its original counterclaim even before the district court's ruling, App. IV, 27, at 21 n.9; V, 32 and 38) and the claims in PFS's Complaint is that the former asked the district court to decide that the NRC lacks the authority to license PFS's proposed facility, while the latter necessarily ask the Court to decide the lawfulness issue in a way that upholds NRC authority. But that is obviously a distinction without a difference. The Hobbs Act bars *any* collateral proceeding that would "determine the validity of" the NRC's licensing authority, 28 U.S.C. § 2342, and that jurisdictional limitation cannot possibly turn on whether the claimant in that collateral proceeding argues in favor of or against such validity.

Thus, the case must be dismissed on at least one of the jurisdictional grounds raised by Utah. If the Court decides that the NWPA bars the away-from-reactor facility proposed by PFS, the case falters on standing grounds. On the other hand, if the Court agrees that the lawfulness issue can be decided only in the appeal from either the denial of the Petition to Initiate Rulemaking or the appeal from the still-future NRC licensing decision, the case falters on ripeness grounds.

issue, no matter how difficult or "colorable" it may be. *See Claybrook*, 111 F.3d at 906, & n. 5 (resolving as the "primary issue in dispute" the question "whether [plaintiff] possesses a legally protected interest in enforcing" a particular federal statute governing advisory committees, and concluding on the basis of a negative answer to that question "that [plaintiff] has not identified a legally protected interest"); *Arjay*, 891 F.2d at 898 (resolving the legal question whether the Constitution imposes limits on Congress' power to regulate foreign commerce in the form of excluding a particular manufacturer's products from import in determining whether the plaintiffs had standing).

A. PFS Lacks Standing.

As the parties and the district court agree, PFS's standing requires both a showing of a legally cognizable injury and a showing that such injury is causally connected to the Utah statutes. PFS's standing fails on both elements.

1. PFS failed to present evidence of any cognizable injury.

The Response Brief only confirms the defects in PFS's showing of injury. It does so first by suggesting that PFS carried its burden merely by demonstrating (a) that the Utah statutory scheme "targeted" the proposed PFS facility, Response Brief, at 23, and (b) that PFS "is pursuing a license from the NRC" for the facility and has "executed contracts in furtherance of the project," *id.* Because these facts are "undisputed," PFS insists that "[p]laintiffs' injuries need no further evidentiary support," and that the district court's finding of standing was an "indisputable conclusion" and not a factual finding. *Id.* In other words, PFS's position on appeal is that its standing is based on "[a] straightforward reading of the Utah statutes" and does not require any affirmative evidentiary support. *Id.* at 24.

PFS wisely appears to have backed away from the argument it made below: that the allegations of the Complaint should be taken as true and thus that affirmative evidence of injury was unnecessary. App. IV, 23, at 1028 n.4. As the summary judgment movant and plaintiff, PFS obviously bore the burden of presenting affirmative evidence of its injury. *E.g., U.S. ex rel. Hafter D.O. v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999). But the argument presented here is equally unavailing. PFS

cannot avoid its burden of establishing injury by its characterization of standing as a legal question that flows from a simple exercise in statutory construction.²

It is equally clear that PFS has failed to carry that burden. PFS vaguely asserts that the Utah statutes (in particular, the “contracts prohibited” provision³ and the “enforcement” provisions⁴) have hindered its pre-construction preparations and its NRC licensing proceeding, but it has presented no affidavit or other evidence that remotely suggests that such “hindrance” has occurred. As to PFS’s contracts, neither Mr. Bear for the Band nor Mr. Parkyn for the Consortium intimated that the contracts they identified were not being fully performed. See App. III, 15, at 874, and 16, at 878. As to the enforcement provisions, PFS has presented no evidence that the mere existence of such provisions has in any way hindered PFS’s pre-construction activities – or even that any “enforcement” under those provisions has ever occurred.⁵

² This Court’s decision in *Sac & Fox Nation of Missouri v. Pierce*, 213 F.3d 566 (10th Cir. 2000), does not excuse PFS’s failure to offer affirmative evidence of injury, as PFS seems to suggest. Response Brief at 29. Although in that case the court found standing to challenge a state tax, it did not excuse the plaintiffs from offering affirmative proof of the economic impact of the tax on the tribes. Indeed, the court expressly noted that the tribes had submitted “uncontroverted affidavits” establishing the “particularized imminent economic injury” that would flow from the tax. 213 F.3d at 573.

³ U.C.A. § 19-3-301(9)(a)(ii) (“These contracts are declared to be void . . . as against public policy.”); U.C.A. § 17-34-1(3) (municipal contracts prohibited unless a court rules against Utah on the lawfulness issue).

⁴ U.C.A. § 19-3-312.

⁵ Moreover, as explained in detail section I.A.2. below, even if any of these injuries were assumed to exist, they would be causally connected to the NWPA (which flatly prohibits PFS’s proposed facility), not to the Utah statutes. If Utah’s position on the lawfulness issue is correct, the “contracts prohibited” provisions are clearly constitutional, since the federal constitution allows state abrogation of contracts contrary to public policy. See section IV.B. below. Thus, any “injury” to PFS’s contracts flows from

Even if the Response Brief could point (as it does not and cannot) to record support for the assertion of the requisite injury, PFS offers no persuasive response to Utah's argument that this injury is merely procedural and not legally cognizable under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 572 (1992), and *In re Integra Realty Resources, Inc. v. Fidelity Capital Appreciation Fund*, 262 F.3d 1089, 1103 (10th Cir. 2001). As the Supreme Court's decision in *Lujan* makes clear, PFS has no legally cognizable interest in pursuing its NRC application in the abstract. 504 U.S. at 572-73 (holding that there is no "abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law"). Thus, PFS has standing to challenge the conditions that Utah would impose on its application for a license from the NRC *only* if it can show that its challenge would "protect some threatened *concrete interest* ... that is the ultimate basis of [its] standing." *Id.* at 573 n.8 (emphasis added).

Because PFS's proposed facility is barred by federal statute, PFS's only interest in challenging the Utah statutes in question is an "abstract," "noninstrumental" right to assure that applicants for an NRC license are subjected to the proper procedures required by law. PFS has no underlying "concrete interest" in securing a license, in other words, because such a license is ultimately unlawful. This is the prototypical sort of procedural injury that falls flat under *Lujan*. It also fails under *Integra Realty*. At most, PFS has identified a "tactical disadvantage" that it has suffered in the pursuit of its NRC license,

federal law (the NWPA). Moreover, the "enforcement" provisions can cause "enforcement" of only the challenged Utah statutes presently in force, and until a court overturns Utah's statutory position on the lawfulness issue, the only provisions presently in force are the flat prohibition on a private, away-from-reactor, SNF storage facility and the "contracts prohibited" provisions. Thus, again, the cause-in-fact of any supposed injury to PFS is the existence of the NWPA.

but *Integra Realty* holds that such disadvantage does not amount to “legal prejudice” where there is no underlying legal interest to be vindicated. 262 F.3d at 1103.

PFS’s response to this argument is telling. It ignores the relevant question under *Lujan* – whether *the Utah statutes* affect an underlying, concrete interest in securing a license from the NRC. Instead, PFS changes the subject, offering in a footnote the irrelevant point that “*the outcome of the NRC licensing proceeding* will have a direct and concrete impact on Plaintiffs.” Response Brief at 28, n. 11 (emphasis added). This attempt to distinguish *Lujan* is tautological, irrelevant, and unavailing. It is true by definition that “the outcome of the NRC licensing proceeding” will have a concrete effect on PFS, but that is not the question under *Lujan*. Instead, the question of whether PFS has standing *to challenge the Utah statutes* must turn on whether *those statutes* will have a concrete impact on plaintiffs’ underlying right to a license. And if the NWPA precludes the notion of any “right” to such a license, the challenged Utah statutes certainly cannot be deemed to have a “concrete impact” on what federal law says does not exist.

The cases cited by PFS miss the mark. Response Brief at 25-26. The first two cases address ripeness, not standing, and do so in the context of a challenge to a local ordinance where the plaintiff has not yet sought required state permits. *Triple G Landfills, Inc. v. Board of Commissioners of Fountain County*, 977 F.2d 287, 288-91 (7th Cir. 1992); *Gary D. Peake Excavating, Inc. v. Town Bd. Of Hancock*, 93 F.3d 68, 72 (2d Cir. 1996). But these cases miss the whole point of the standing problem in this case; neither of these cases involves a situation where the governing law, as a matter of law, precluded the plaintiff from receiving the essential license that must ultimately be secured from the state. To the contrary, in the two cases the plaintiffs had no legal roadblock to receiving the essential state license, the state license most likely would be granted and

upheld in the courts, and only factual considerations supported the slim “chance that [the state] will turn down” the application. *Triple G Landfills*, 977 F.2d at 290; *see also Gary D. Peake Excavating*, 93 F.3d at 72.

The third case, *1995 Venture I, Inc. v. Orange County*, 947 F. Supp. 271, 276-77 (E.D. Tex. 1996), is also a ripeness, not a standing, case and is inapposite because there the plaintiff faced *no* requirement to secure a state or federal license but only the local permit required by the challenged local ordinance. Thus, no uncertainty regarding ultimate issuance of a required state or federal license existed so as to give rise to standing or ripeness problems. By contrast, here, besides numerous uncertainties as to whether PFS will receive necessary NRC and Interior approvals based on the merits of the proposed facility, governing federal law (the NWPA) precludes that facility as a matter of Congressional intent and hence as a matter of law.

The fourth and last case, *ANR Pipeline Co. v. Corp. Comm’n of Oklahoma*, 860 F.2d 1571, 1579 (10th Cir. 1998), is also inapposite because there the plaintiff pipeline company already had a license to operate a pipeline and was in fact fully engaged in that business. 860 F.2d at 1573. Under those circumstances, it was hardly surprising that the court found that the challenged state regulations caused plaintiff to suffer injuries in the form of “out-of-pocket costs” in the operation of its pipeline. *Id.* at 1579. By contrast, here governing federal law (the NWPA) will preclude PFS from ever incurring any out-of-pocket costs in the operation of the proposed nuclear waste dump – because the NWPA has precluded such a dump.

Thus, the cases cited by PFS do not and could not address the important question presented here of whether a party has standing to challenge state statutes that purportedly affect the regulatory procedures in a federal licensing proceeding the ultimate end of

which is foreclosed by federal statute. Under those circumstances, *Lujan* controls and holds that a purely procedural, noninstrumental interest in the licensing procedures is not legally cognizable where there is no concrete right to the underlying license.

2. PFS's injuries are traceable to the NWPA, not to the Utah statutes.

In any event, the supposed injuries identified by PFS fail to confer standing because they are not fairly traceable to the Utah statutes. As explained in more detail in Utah's Opening Brief, the causal connection between the Utah statutes and PFS's supposed injuries is broken by the broad, supervening prohibition of the NWPA. In other words, if the NWPA flatly bans the private, offsite facility proposed by PFS, the more narrow regulations imposed by the Utah statutory scheme can hardly be said to be the actual cause of any of the hardships identified by PFS.

This is true of the supposed interference with the NRC licensing proceeding, but it is also true of the theoretical interference with PFS's pre-construction activities.

Assuming for the moment that the Utah statutes may pose interim obstacles to PFS's preparations, nevertheless, the NWPA poses a flat prohibition, and that prohibition breaks the causal connection to Utah law under *Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590 (10th Cir. 1996), *Fuller v. Norton*, 86 F.3d 1016 (10th Cir. 1996), and *International Union v. Johnson*, 674 F.2d 1195, 1199 (7th Cir. 1982).

As Utah explained in its Opening Brief, these cases stand for the proposition that a plaintiff lacks standing to challenge one provision of a statutory scheme where the injuries suffered by the plaintiff inevitably would have been incurred under another, independent provision. In *Wilson*, the plaintiffs lacked standing to challenge the defendant's gender-discriminatory housing rules because they were, as non-students, independently ineligible for student housing. 98 F.3d at 594. Similarly, in *Fuller*, the

plaintiffs lacked standing to insist that they were entitled to an exemption from a Colorado regulation of a “multiple employer welfare arrangement” because they failed to satisfy an additional, independent condition for the exemption, a condition not at issue in the case. 86 F.3d at 1027. And finally, in *International Union*, the plaintiffs lacked standing to challenge pregnancy leave limitations on unemployment compensation because they were “independently ineligible for benefits because they were not actively seeking work during their pregnancy leave,” as required elsewhere under the statute. 674 F.2d at 1199. In each case (as here), the causal connection to the challenged statutory provision was broken because the plaintiffs would have been independently ineligible for the relief they sought in their complaint under an alternative provision of law.

PFS acknowledges the basic principle established by these cases but nevertheless seeks to distinguish them on the narrow, irrelevant ground that plaintiffs in those cases were seeking an “ultimate remedy,” whereas PFS is seeking only “access to the process” for acquiring such a remedy. Response Brief at 32. In other words, PFS points out that “Plaintiffs here are not seeking a license, but instead seek only relief from the state statutory scheme imposing uncertainty in seeking a license,” *Id.*

PFS makes no effort to explain the logic of this distinction, and there is none. The above-cited cases stand for a simple principle of causation that has nothing to do with the precise nature of the relief sought by the plaintiff. Under *Wilson*, *Fuller*, and *International Union*, a plaintiff’s injuries must be causally connected to the specific challenged statutory provision, and the causal chain is broken when those injuries would independently flow from some other provision of law. That is precisely the problem with PFS’s theory of standing – since all of PFS’s purported hardships are independently

traceable to the broad prohibition of the NWPA – and that problem in no way depends on the precise nature of the relief that PFS seeks.

* * * * *

For all these reasons, PFS’s standing necessarily fails if its proposed facility is barred by the NWPA (as Utah demonstrated in its Opening Brief). If the PFS waste facility is independently unlawful by federal statute, then PFS has no legally cognizable injury and certainly no injury that is fairly traceable to the Utah statutes. On the other hand, if this Court accepts PFS’s position that the Court may not resolve this issue, then the case is unripe, for reasons described below.

B. PFS’s Challenge to the Constitutionality of the Utah Statutes Is Unripe.

The principal ripeness concerns raised by PFS’s constitutional challenge are threefold: (1) PFS seeks a comprehensive constitutional overhaul of a complex statutory scheme of crucial importance to the State of Utah; (2) the comprehensive review sought by PFS will be unnecessary if the necessary NRC or the Department of the Interior approvals are denied or reversed on appeal; and (3) the constitutional challenges presented by PFS necessarily require resolution of the lawfulness issue – an issue not properly before this Court according to PFS’s own argument. For the reasons set forth below, this case is unfit for judicial resolution at this stage, and PFS’s supposed hardships are insufficient to justify a premature judicial interference in the Utah statutory scheme, particularly where any such hardships are attributable to the NWPA.

1. This case is premature and unfit for judicial resolution.

Although this case primarily presents issues of law, that alone does not make it fit for judicial resolution (as the district court seemed to think, App. V., 40, at 1558).

Indeed, the courts have long held that the fitness of a case for ripeness purposes depends

on whether the plaintiff's case (a) is premature in the sense that it depends on uncertain or contingent events that have yet to be resolved, *see New Mexicans for Bill Richardson v. Gonzalez*, 64 F.3d 1495, 1499 (10th Cir. 1995); or (b) requires further development of the meaning and implications of underlying questions of law, 13A Wright & Miller, *Federal Practice & Procedure* § 3532.3, at 149. PFS's case presents both problems.

a. PFS's constitutional challenge depends on uncertain, contingent events.

The uncertainties and contingencies inherent in PFS's case are manifest, despite PFS's puzzling assertion that "[t]here are no contingent future events here." Response Brief at 33. In fact, the contingencies that render unripe PFS's constitutional challenge are precisely those that led to this Court's dismissal of Utah's own action in *Utah v. United States Dept. of the Interior* ("*Utah II*"), 210 F.3d 1193 (10th Cir. 2000): that "[w]e cannot be certain ... whether the NRC will issue a license to PFS" or whether the Department of the Interior will "ultimately authorize[]" the facility, *id.* at 1198, much less whether either approval will withstand judicial review. Indeed, elsewhere in its brief, PFS wisely acknowledges the possibility "that this case could become moot" in light of these contingencies. Response Brief at 34. This conceded risk of "potential mootness" is alone enough to call into question the advisability of proceeding with PFS's comprehensive review of the Utah statutory scheme; after all, conceptually "potential mootness" is nothing more than "present lack of ripeness."

It is no answer to argue, as PFS does, that despite the risk of mootness, "[t]he impact of the Utah statutes is [currently] being felt in a concrete way." *Id.* The supposed current "impact" of the statutes goes to the hardship prong of the ripeness doctrine, not the fitness prong. As we show below in the next subsection, PFS's purported hardships are insufficient to justify the courts' premature intervention in the Utah statutory scheme,

but for now it is sufficient to note that Utah's showing of the contingent, uncertain posture of PFS's case stands effectively un rebutted.

PFS's attempt to distinguish the *Utah II* case fails for the same reason. PFS does not and cannot dispute that the uncertain contingencies noted in *Utah II* are also present here. Instead, PFS merely points out that here plaintiffs are challenging the Utah statutes, not "an agency decision," and insists that "[t]he statutes impact plaintiffs now."

Response Brief at 34. This misses the whole point of the fitness analysis in *Utah II*: that premature evaluation of constitutional issues may be unwise if such issues may be mooted by unknown contingencies. Those contingencies are simply undisputed, and they counsel strongly against PFS's broad overhaul of the Utah statutory scheme.

b. PFS's constitutional challenge depends on legal issues that, according to PFS, cannot be resolved on the current record.

Moreover, PFS's constitutional challenge to the Utah statutes is unfit for judicial review for a second reason that also stands un rebutted: PFS's claims depend on underlying legal issues that cannot be resolved on the current record and that require further development. As Utah explained in greater detail in its Opening Brief, many of PFS's claims require further factual and legal development. Opening Brief at 71-72. For example, the viability of the "municipal contract" provisions depends in part on the costs imposed on PFS by these provisions and on whether and to what extent such costs result in a "direct and substantial" effect on nuclear safety decisions. Opening Brief at 84-89. Also, the constitutionality of the "unfunded potential liability" and "equity holder liability" provisions depends in part on future determinations by the DEQ as to what "unfunded liability" may be or what "cash equivalents" might include, and on whether and to what extent PFS's activities fall outside the scope of the Price-Anderson Act. Opening Brief at 89-98.

PFS derisively seeks to brush these arguments aside as “wishful thinking.” Response Brief at 35. But it offers absolutely no substantive response to them, thus underscoring the inevitable conclusion that this case is premature.

Moreover, PFS’s Hobbs Act argument itself raises serious ripeness problems. The lawfulness issue must be resolved not only to resolve correctly PFS’s standing but also to resolve the merits of each (not just some) of PFS’s constitutional attacks on Utah’s challenged statutes. See sections III.B. and IV below. Thus, if Congress prohibited a PFS-type dump, a Utah statute doing the same cannot be deemed “preempted.” Likewise, Utah statutes prohibiting or hindering a PFS-type waste dump cannot be deemed to hinder interstate commerce – and thus be invalid under dormant Commerce Clause analysis – if Congress itself has already excluded just such a facility from interstate commerce. In the same vein, because Impairment-of-Contract Clause analysis clearly allows a state to invalidate contracts contrary to public policy, the question whether Congress prohibited PFS’s proposed facility must be answered to resolve PFS’s Impairment Clause challenge to the “contracts prohibited” and the “municipal contracts” provisions of Utah’s challenged statutes. And it is the same for each of PFS’s constitutional challenges; each depends on a resolution, one way or the other, of the lawfulness issue.

Assuming this Court decides (as the district court did) that it can somehow resolve PFS’s standing without resolving whether governing federal law prohibits PFS’s waste dump project, this Court then confronts an insoluble dilemma: PFS has asked the Court to resolve the merits of a constitutional challenge that cannot be decided without a decision on the lawfulness issue – an issue that PFS claims to be outside this Court’s jurisdiction under the Hobbs Act. If this Court accepts PFS’s Hobbs Act argument, the only sensible approach to that dilemma – of PFS’s own creation – is to dismiss PFS’s claims as unripe.

After all, the Court cannot *presume* that the proposed waste dump is lawful under federal law; the challenged Utah statutes come before this Court with a *presumption* of constitutionality⁶, meaning that, if it must presume, this Court should presume that the waste dump is unlawful. But in this context, this Court should not have to presume, and the ripeness doctrine precludes it from doing so. That is because a merits resolution based on a presumption (whether that presumption is for or against PFS's position on the lawfulness issue) that may later be upended is the very evil this Court and the Supreme Court have sought to avoid in their ripeness decisions. *E.g.*, *New Mexicans for Bill Richardson v. Gonzalez*, *supra*, 64 F.3d at 1499 (in determining fitness, central focus is whether case involves uncertain or contingent events); *Utah II*, *supra*, 210 F.3d at 1196 (same); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967) (same).

The Response Brief's silence on this issue is deafening. It offers no response whatsoever to the internal conflict in PFS's position. It offers no response because there is none. PFS cannot have it both ways, and this case must be dismissed because – if PFS's position is accepted – this Court lacks jurisdiction to decide the most fundamental legal question raised by PFS's case.

2. PFS's supposed hardships are insufficient.

PFS argues that despite the above-noted fitness problems with this case, this Court should still find that the case is ripe in light of the “dilemma” plaintiffs will face in the absence of a decision as to “whether the statutory scheme is constitutional and enforceable.” Response Brief at 35. Specifically, PFS assert that the Utah statutes

⁶ *Bush v. Vera*, 517 U.S. 952, 992 (1996) (“Statutes are presumed constitutional . . .”); *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 796 (1994) (noting the “presumption of constitutionality to which every state statute is entitled”).

“increase the cost of the proposed facility” and cause plaintiffs “uncertainty about predicting future costs.” *Id.* at 36.⁷

These “hardships” are insufficient to justify the premature constitutional review sought by PFS, particularly given the intractable fitness problems noted above. First, as we have demonstrated in the standing context, PFS failed to meet its burden to present evidence that it was actually suffering the claimed “hardships.” PFS so failed despite the fact that Utah always contested, as a matter of fact, the existence of such hardships; despite the settled rule that PFS, as the party with the burden of proof on standing and ripeness, was the party obligated to affirmatively prove the claimed hardships; and despite the fact that, if PFS were suffering actual “hardships,” its own officers would know that and thus could readily submit a declaration to that effect.

Second, PFS offers no substantive response to Utah’s showing that PFS’s hardships are attributable to the NWPA (which flatly prohibits PFS’s proposed facility) and not to the Utah statutes. As Utah demonstrated in its Opening Brief, the broader prohibition in the NWPA means that PFS’s “dilemma” will continue despite any resolution of PFS’s challenge to the Utah statutes. PFS may now claim that the uncertain viability of the Utah statutes stands in the way of its planning and development of a nuclear waste facility, but the more fundamental uncertainty is whether that facility is flatly unlawful under the NWPA. Thus, the case is profoundly unfit for resolution now for the reasons noted above, and dismissal is appropriate because there is no real countervailing benefit in resolving any uncertainty. *See Ernst & Young v. Depositors*

⁷ Not surprisingly, PFS seems not to pursue its argument that its hardship is in increasing the difficulty or cost of its licensing proceeding with the NRC. Such “hardship” would not be cognizable under *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 734-35 (1998), and in any event lacks any support in the record.

Economic Protection Corp., 45 F.3d 530, 540 (1st Cir. 1995) (explaining that the “usefulness that may satisfy the hardship prong” of the ripeness test “is not met by a party showing that it has the opportunity to move from a position of utter confusion to one of mere befuddlement”).⁸

Third, despite PFS’s best efforts to find analogous cases, none of the cited cases remotely suggests that PFS’s uncertainty alone is enough to justify an immediate constitutional review of the Utah statutes. The license cases cited by PFS (Response Brief at 36) are superficially similar, in that the plaintiff in each of those cases was a permit applicant who asserted constitutional claims against a local ordinance in order “to make an informed decision as to whether [to] cut his losses by halting his efforts to obtain a [] permit ... or continue with the [] permitting process,” *Gary D. Peake Excavating*, 93 F.3d at 72; *see also 1995 Venture I*, 947 F. Supp. at 277 (to the same effect). But none of these cases involved the salient characteristics of this one – a constitutional challenge to a comprehensive state statutory scheme where (1) the plaintiffs’ uncertainty arises not from a local permitting process but from future federal agency and judicial action that will turn on both factual and legal considerations; (2) the plaintiffs insist that the pre-eminent legal consideration in that future federal agency and judicial action cannot be resolved by either the district court or this Court; (3) the Court has no basis for predicting whether that future federal agency and judicial action will go one way or the other; and yet (4) the

⁸PFS makes a passing attempt at distinguishing *Ernst & Young*, but its purported distinction focuses on irrelevant facts of the case and completely ignores the salient language quoted above. The point of the above-quoted language is that any benefit associated with the early resolution of a plaintiff’s case must be discounted where much of the uncertainty that the plaintiff seeks to resolve will persist even after the judgment. That is true here, as it was in *Ernst & Young*, and it is simply irrelevant that here the “Plaintiffs are engaged in the activity that the statutes currently prohibit and regulate,” whereas in *Ernst & Young* “the party had not yet engaged in the process regulated by the challenged statute.” PFS Br. at 38.

Court in a related case (*Utah II*) has held that this very same future federal agency and judicial action is too contingent, too uncertain, to sustain a holding of ripeness. These fundamental problems with this case surely distinguish it from the garden-variety license cases cited by PFS.

PFS ignores these same crucial features in baldly asserting that “[t]here is no meaningful distinction between the ripeness issue in *Pacific Gas [& Elec. Co. v. State Energy Res. Conserv. & Dev. Comm’n*, 461 U.S. 190 (1983)] and in this case.” Response Brief at 37. In fact, the distinction is indicated on the face of the Supreme Court’s opinion in *Pacific Gas*. In upholding the ripeness of plaintiffs’ preemption challenge to California statutes regulating the construction of nuclear plants, the Court noted that “resolution of the preemption issue need not await [any further] development.” *Id.* at 201. That clearly cannot be said here for the reasons noted above. By the same token, even the “uncertainty” identified by PFS is different from that which sustained ripeness in *Pacific Gas*, as here PFS’s more fundamental uncertainty concerns the lawfulness of its proposed facility under the NWPA, and again that uncertainty will not be resolved by the judgment sought by PFS – if PFS has its way.

For the same reasons, PFS also fails in its attempt to sustain ripeness by its insistence that in declaratory relief cases “[o]ne does not have to await the consummation of threatened injury to obtain preventive relief.” Response Brief at 37 (quoting *Pacific Gas*, 461 U.S. at 201). This assertion simply misses Utah’s point. The ripeness problem with PFS’s case is not that its injury is unconsummated or only threatened but that its claims cannot properly be resolved on the current record and its injury of uncertainty will persist even after a declaratory judgment. Moreover, the courts consistently have held that the same principles of ripeness and standing apply with the same force to declaratory

judgment actions as to actions seeking any other kind of relief. *E.g., Navegar, Inc. v. United States*, 103 F.3d 994, 998 (D.C. Cir. 1997) (in a declaratory judgment action, held: “Under the ‘standing’ component of Article III justiciability doctrine, plaintiffs in a federal court **must** demonstrate that their claims spring from an ‘injury in fact’— an invasion of a legally protected interest” Emphasis added); *Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990) (on the basis of standard ripeness principles and analysis, holding declaratory judgment action not ripe).

II. WITH THE NWPA, CONGRESS EXCLUDED A PFS-TYPE FACILITY FROM THE NATION’S WASTE MANAGEMENT SYSTEM.

The Response Brief’s attention to the merits of the lawfulness issue, Response Brief at 70-77, appears to adopt by reference the NRC Decision, Addendum 7; in any event, it is certain that, of the two documents, the NRC Decision more comprehensively engages the statutory construction arguments we advanced in the Opening Brief. Accordingly, we reply directly to the NRC Decision.

A. The NWPA’s Language in Section 10155(h) Expresses Congress’s Intent to Preclude SNF Storage at Privately Owned, Away-From-Reactor Facilities.

Both sides agree that the language of the statute is the starting point in determining Congress’s intent, and that a statute should be construed to give meaning to all its words. Each side, however, suggests that the other’s subsection (h) interpretation violates the latter rule of construction. Thus, Utah points out that PFS and the NRC have failed to give any sensible meaning and purpose to “Notwithstanding any other provision of law” or to “private or.” *E.g.*, Opening Brief at 41-48. The NRC Decision at 8-9 suggests that Utah has failed with respect to “encourage” and “require.” For the reasons set forth below, Utah’s argument stands effectively unrefuted, while the NRC’s is insubstantial.

Neither PFS nor the NRC has come to grips with Congress's decision to make subsection (h) applicable not just to "Federal use" of an away-from-reactor, SNF storage facility but also to "private . . . use" of such a facility. Thus, the NRC Decision at 23-27 tries at length to argue (mingling plain meaning and legislative history analysis) that the Congressional purpose for subsection (h) was to prevent the federal government from "federalizing" one of the three existing (but not operating) SNF reprocessing facilities (GE Morris in Illinois, West Valley in New York, and Barnwell in South Carolina) for use in the temporary, or "emergency," SNF storage program. But subsection (h) itself defeats that attempt; that subsection speaks against the "use" not just of any newly created or acquired "federal" facility but of a "private" one as well. "Notwithstanding any other provision of law, nothing in this Act shall be construed to . . . authorize . . . the private or Federal use . . . of any storage facility located away from the site of any civilian nuclear power reactor" The NRC Decision offers no explanation of how one can square with its "no federalization" theory the Congressional decision to add the word "private." Indeed, what the NRC Decision at 10-11 calls (inaccurately) a "precursor" of subsection (h) is absolutely plain in prohibiting *only* federal acquisition of any of the existing reprocessing plants for "emergency" SNF storage (with *no* prohibition on the private use of any facility for any away-from-reactor SNF storage). Thus, Congress knew how to state the "no federalization" theory – if that were its purpose. But that was not its purpose; its purpose was to prevent private as well as federal use of any facility for any away-from-reactor SNF storage except as authorized by the NWPA. And that is what subsection (h) says.

PFS and the NRC have likewise failed to give sensible meaning and purpose to "Notwithstanding any other provision of law." The Opening Brief at 44-46 demonstrates

that this “language has no meaning unless it means that no other previously enacted provision of law can counter Congressional decision not to authorize a PFS-type facility” and further demonstrates that this language is fatal to the *no-decision* (what the NRC Decision calls “neutral”) interpretation of the statute. The NRC Decision at 12-13 fails to counter this demonstration. Although it notes that Congress was aware of the NRC’s Part 72 regulation and NRC’s interpretation of that regulation to encompass away-from-reactor facilities, Utah itself advanced that fact, Opening Brief at 47, and identified its sensible import: that when Congress said “any other provision of law” it meant “any,” including the AEA and Part 72. The NRC Decision’s approach, by contrast, amounts to treating “any” as tantamount to “some” because that approach refuses to place the AEA and Part 72 within “any.” Confronted with this problem, the Decision at 13 makes not a “language” argument but a “legislative history” argument, saying that Congress could not have intended to prohibit already existing SNF storage at GE Morris and West Valley. Because this is a legislative history argument, we refute it in section II.C. below.

The important point is that the NRC Decision fails to counter this argument: If Congress had simply wanted to make clear that it was not deciding the fate of away-from-reactor SNF facilities not expressly authorized by the NWPA, Congress would have had no reason to begin by using the “notwithstanding” clause. Certainly neither PFS nor the NRC Decision has provided a reason. Moreover, that clause obviously counters the essence of the *no-decision*, or *neutral*, theory exactly because that clause operates not to limit “the Act” itself but to limit every other preexisting law. The *neutral* theory cannot explain why an Act supposedly *not* affecting *any* other provision of law has language the only purpose of which is to affect *every* other provision of law. *See Andreiu v. Ashcroft*, 253 F.3d 477, 482 (9th Cir. 2001) (“the phrase [“notwithstanding any other provision of

law”] means that [the statute containing it] . . . trumps any contrary provision elsewhere in the law”) (emphasis added).⁹

Contrary to PFS’s argument, Utah’s construction does preserve meaning for the terms “encourage” and “require.” Those words can easily be understood to have been inserted to make clear that Congress was eliminating what, in the lengthy legislative process, had been a somewhat prominent concept: the requirement that, to qualify for federal “emergency” storage, a nuclear utility had to exhaust not just on-site and but also off-site options. What Utah strongly opposes, however, is the use of those words to render “authorize” meaningless, which is the use to which they are put by the NRC Decision. The subject of “authorize” is “this Act,” the NWPA. The NWPA was, and was understood by the Congress that enacted it to be, Congress’s first and comprehensive treatment of the management of high-level nuclear waste. Thus, Senator McClure (principal Senate sponsor): The NWPA “provides a firm national policy for spent-fuel storage.” 128 Cong. Rec. 32,556 (1982). Senator Simpson: The NWPA “establish[es] the framework for this Nation’s first comprehensive nuclear waste management and disposal program.” *Id.* at 32,560. Senator Moynihan: The NWPA constitutes “comprehensive Federal nuclear waste management legislation” and “is long overdue” because “we have no comprehensive nuclear waste management program in place.” *Id.* at 32,562-63.¹⁰ Given what the NWPA is – given what Congress intended it to be and made

⁹ The Response Brief’s assertion at 78 that “law” in the “notwithstanding” clause means only “this Act” is simply and obviously wrong.

¹⁰ Both the design and content of the NWPA and the quoted statements refute PFS’s and the NRC Decision’s repeated efforts to diminish the NWPA into an Act “comprehensive” only with respect to disposal, that is, the repository. Only one part of the Act, Subtitle A, deals with the repository while most of the other Subtitles address storage. As the Members recognized, the NWPA truly created the Nation’s “comprehensive nuclear waste management program.”

it to be – the source of the Nation’s comprehensive nuclear waste management program –, when the NWPA expressly refuses to “authorize” the private use of away-from-reactor, SNF storage facility except what the NWPA authorizes – “notwithstanding any other provision of law” – such non-NWPA facility is not authorized. Period.¹¹

Nothing about the AEA diminishes this conclusion. The content of the AEA itself, as originally enacted and as amended, is *not* an expression of Congressional policy on the management of high-level nuclear waste in this Nation. That expression is the NWPA, and Congress knew it – as evidenced by the Members’ statements quoted above.¹²

Finally, the NRC Decision’s argument, at 8, on the absence of the word “prohibit” from subsection (h)’s text must fail because it proceeds on the erroneous presumption that the words Congress did choose are not adequate to sustain Utah’s position and to refute the contrary position. All that we have said regarding the language of subsection (h) shows the error of that presumption. And it is a misguided approach to statutory construction to say that a meaning adequately expressed by the words chosen will be discarded if, after the fact, one can think of words supposedly better at expressing that same meaning.

¹¹ It makes no sense to sever the subject (“this Act,” the NWPA) from the verb (“authorize”) in interpreting subsection (h). The NWPA does not authorize a PFS-type facility to be a part of the Nation’s “comprehensive waste management program.”

¹² And as further evidenced by the fact that, when enacted in 1954, the AEA said nothing regarding nuclear waste management, and even now, nearly fifty years later, any references in the AEA to high-level nuclear waste storage or disposal are *de minimis* in number and substance. See Addendum 3 to the Opening Brief.

B. The Design, Object, and Policy of the NWPA Make Clear that Congress Intended to Preclude SNF Storage at Privately Owned, Away-From-Reactor Facilities.

The Opening Brief at 48-53 demonstrated that all three times Congress in the NWPA authorized an away-from-reactor SNF facility, Congress (1) mandated substantial protections for affected local governments and communities that included participation rights, extraordinary procedural rights, and rights to substantial financial assistance, (2) placed limits on the quantity allowed, and (3) insisted on a careful, statutorily guided site selection process. Against that picture of careful Congressional action, PFS and the NRC assert that Congress somehow intended to allow PFS's proposed facility, even though (1) the affected state and local communities have none of the participation, procedural, and financial rights, (2) PFS's proposed facility will take about twenty times more SNF than what Congress allowed for temporary storage and three to four times more SNF than what Congress allowed at an MRS, (3) PFS's proposed facility will retain SNF twenty to thirty years longer than what Congress allowed for temporary storage, and (4) Congress's careful site selection guidelines did not operate in the selection of the Skull Valley site.

This assertion creates the "big anomaly" in the PFS/NRC position: the notion that Congress intended that the federal government could proceed only upon compliance with a host of protective, limiting provisions but that a private entity could proceed to devise a "private" solution completely unfettered by Congress's protective judgments. Neither PFS nor the NRC has advanced a plausible explanation for Congress's supposed highly disparate treatment, relative to the handling of away-from-reactor SNF, between the federal government and a private entity.¹³

¹³ The PFS/NRC failure is particularly egregious in the face of the intuitive notion that, if Congress saw a need to limit anyone, it would be a private entity (such as a shell Delaware limited liability company) and not the federal government (with its vast

The NRC Decision's primary effort to provide an explanation – and thereby avoid the “big anomaly” inherent in its construction of the NWPA – does not wash. The NRC Decision at 17-18 argues that Congress imposed the limitations on the section 10155 federal “emergency” storage facilities because those facilities were “not otherwise subject to NRC licensing” and so Congress needed to impose limitations of the sort imposed on a private facility by an NRC license and oversight. But Congress imposed *the same limitations* the two other times the NWPA authorized away-from-reactor SNF – the permanent repository and the MRS facility – and both of those facilities *are* subject to NRC licensing. 42 U.S.C. §§ 10106(b)(3), 10141(b), 10161(d). So the NRC Decision's explanation stands refuted by the very design and content of the NWPA itself. Not surprisingly, in light of these realities regarding the NWPA, nothing in the legislative history supports the suggestion that even one Member of Congress ever thought of the “Congressional-limitations-as-substitute-for-NRC-regulation” theory.

The NRC Decision's further effort at 17 to provide a plausible explanation likewise founders: “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.”¹⁴ We note again that nothing in the legislative

resources and experience in things nuclear).

¹⁴ The last phrase is misleading: two of the three NWPA programs for away-from-reactor SNF are for the benefit not so much of “a private commercial enterprise” but of the federal government; a primary purpose of the repository and the MRS facility is to enable the federal government to fulfill its contractual obligations – which it has already breached – to the nuclear utilities to take possession of their SNF. Opening Brief at 13; *Indiana Michigan Power Co. v. Department of Energy*, 88 F.3d 1272, 1276 (D.C.Cir.1996); *Northern States Power Co. v. Department of Energy*, 128 F.3d 754, 759 (D.C.Cir.1997); *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336 (Fed.Cir.2000); *Northern States Power Co. v. United States*, 224 F.3d 1361 (Fed.Cir.2000).

history supports the notion that this quoted “reason” ever entered the head of even one Member of Congress involved with the enactment of the NWPA. More importantly, the NWPA’s strictures on away-from-reactor SNF are obviously designed **not** to protect the federal pocket book (those strictures are actually costly) but (1) to protect the interests and sensitivities of the communities affected by a federal nuclear waste facility and (2) to prevent interference with progress on the permanent repository.¹⁵ Thus, in **both** Subtitle B (emergency storage at existing federal facility) and Subtitle C (MRS facility), Congress imposed capacity, siting, and duration limitations (with direct ties to progress on the permanent repository) and mandated protections for local communities, including participation and financial rights and the disapproval power – a veto power subject to override only by action of both Houses of Congress. Congress imposed the same kinds of limitations and protections (except duration, of course) in Subtitle A (permanent repository). A private facility, such as PFS’s proposed facility, obviously impacts local community interests and sensitivities and stands to impact repository development every bit as much (if not more so) than a smaller federal facility. But we are left without explanation as to why Congress did not protect those same interests in the private context as it did in the federal context. Again, the design and content of the NWPA itself undermines a “reason” advanced to escape the “big anomaly.”

As the NRC Decision has now unintentionally proven, the only way to avoid the “big anomaly” is to read the NWPA as its plain language, design, and legislative history

¹⁵ The NRC Decision at 19 seriously misstates Utah’s position: “Therefore, Utah’s characterization of the NWPA’s limits as somehow safety-related is inaccurate.” Neither before the NRC nor here has Utah ever even intimated such a “characterization.” (Our filings here and there are essentially the same.) Utah’s position is as stated in the text above, that the limits are (1) to protect the interests and sensitivities of the communities affected by a federal nuclear waste facility and (2) to prevent interference with progress on the permanent repository.

all mandate: as leaving authorized away-from-reactor SNF storage and disposal facilities in the hands of only the federal government.

C. The NWPA's Legislative History Demonstrates Congress's Intent to Exclude a Private, Away-From-Reactor, SNF Storage Facility.

The Opening Brief at 55-56 set forth such clear and certain legislative history as this: From Rep Lujan, a floor manager of section 10155: "We have been very careful to specify [in section 10155] that [away-from-reactor storage] would be *only* at existing Federal sites, **so that any Member does not have to worry about whether or not a new interim storage facility is going to come into his district.**" 128 Cong. Rec. 28,034 (emphasis supplied). From Rep. Broyhill, another floor manager:

Mr. Chairman, I would point out to the Members that the last-resort interim storage program is limited to existing Federal facilities **And I would also say that we have special statutory language in [subsection (h)], 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 they have expressed as [to] the possible use of privately owned facilities in their particular districts.

Id. at 28,040 (emphasis supplied).

The NRC Decision does not grapple with this language; it ignores the Rep. Lujan language and, although quoting the Rep. Broyhill language, passes it by as if it does not say what it says. NRC Decision at 25-26. What both Reps. Lujan and Broyhill were saying to their colleagues is plain: we know that a new away-from-reactor, SNF storage facility in your district is one of your worst nightmares, and we have language in subsection (h) to prevent that nightmare from becoming a reality. (In light of the NRC Decision's failure to grapple with what the floor managers had to say, it is telling that that Decision at 18 relies in support of its interpretation heavily on the statements of one who strongly *opposed* enactment of that section, Rep. Lundine.)

The NRC Decision at 23-27 tries at length to argue that the Congressional purpose for subsection (h) was to prevent the federal government from “federalizing” one of the three existing (but not operating) waste processing facilities (GE Morris in Illinois, West Valley in New York, and Barnwell in South Carolina) for use in the temporary, or “emergency,” SNF storage program. We have already refuted that argument in section II.A. above.

The NRC Decision’s other extended effort in support of its reading of section 10155 focuses on two of the three inoperative reprocessing facilities, West Valley and GE Morris. The argument is that in 1982 these private facilities already had SNF present and that Congress could not have intended, with subsection (h), to prevent their on-going use after enactment of the NWRPA. NRC Decision at 11, 23-27. Here is the heart of that Decision’s argument, at 26:

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 NWRPA ordered those [two] private facilities to be shut down [meaning, presumably, to have the SNF removed]. Instead, the Act merely states that it does not “authorize” them [the two facilities] to be used, purchased, leased or acquired.

The NRC Decision’s argument in this context is based on unstated conclusions regarding the nature of both GE Morris and West Valley – and conclusions that are not at all free from doubt. Regarding GE Morris, the unstated conclusion is that it is a “facility located away from the site of any civilian nuclear power reactor.” The simple fact, it seems to us, is that GE Morris is not “located away from the site of any civilian nuclear power reactor.” Rather, GE Morris is immediately adjacent to the Dresden Nuclear Power Station.¹⁶ This is important because subsection (h) does not say “any storage

¹⁶ GE Morris’s 22 May 2000 Environmental Report to the NRC at 3 acknowledges what is commonly known: The GE Morris “site is bounded on the north by

facility not located on the site of any civilian nuclear power reactor”; rather, it says “any storage facility located away from the site of any civilian nuclear power reactor.” Our understanding of plain meaning and usage does not support the suggestion that “away from” includes “immediately adjacent to.”

A similarly troubling doubt arises with respect to West Valley, this time in connection with subsection (h)’s phrase “not owned by the Federal Government on January 7, 1983.” In this context, we think of the classic law school example of the bundle of sticks. From before enactment of the NWPA until the present, the federal government has held the lion’s share of the sticks in the West Valley bundle.¹⁷ Thus, it is not at all certain that, if the issue ever required resolution¹⁸, the conclusion would be that the site of the West Valley SNF should be deemed as “not owned by the Federal Government on January 7, 1983.”

These doubts at the intersection of subsection (h) language and the nature of GE Morris and West Valley seem to us to seriously undermine the NRC Decision’s argument. That argument’s concern (the “shut down” concern) is that, if Utah’s position on the

the Dresden Nuclear Power Station.” Applicant’s Environmental Report, GE Nuclear Energy, Morris Operation, Morris, Illinois. Prepared and Issued by Morris Operation of GE Nuclear Energy, May 2000, NEDO-32966.

¹⁷ To accomplish the mandates of the West Valley Demonstration Project Act of 1980, DOE obtained exclusive control of the West Valley Center on February 5, 1982. See *In the Matter of Nuclear Fuel Services Inc. and the New York State Energy Research and Development Authority* 16 NRC 121, 124 (1982). The Center in which DOE has exclusive control includes the Fuel Reprocessing Facility where the SNF fuel is stored in pools. See *In the Matter of Commonwealth Edison, Inc. et al*, 18 NRC 726, 729 (1983).

¹⁸ West Valley is or soon will be a moot point in this context; the federal government has in place a program to transfer that site’s SNF in transportation casks by rail to INEEL in Idaho. Although September 11 and agreements with Idaho delayed the implementation of that program, the program is still in place and will proceed. See DOE posting at <http://www.wv.doe.gov/LinkingPages/SpentFuelShipping.htm>.

lawfulness issue were sustained, then SNF storage at GE Morris and West Valley would be deemed unlawful and the SNF would have to be immediately removed. But given the nature of each facility, it seems to us far from certain that those facilities would be “shut down” – because of the plain language of subsection (h). In any event, the NRC Decision does nothing to resolve the doubts we have noted.¹⁹

D. The NWPA Alters the Implications that Can Plausibly Be Drawn from the AEA about Authorization for Private, Away-from-Reactor, SNF Storage Facilities; The NWPA Does Not “Repeal” Any Part of the AEA.

As the NRC Decision at 5-6 concedes, the AEA does not expressly authorize the NRC to license a private, away-from-reactor, SNF storage facility.²⁰ Rather, the NRC has drawn the implication from the AEA’s grant of licensing authority over “special nuclear material” that it has licensing authority over such a facility. *Id.*²¹ But with the later passage of the NWPA, that implication loses its viability. As the Opening Brief at 61 demonstrates, in such a case, the law’s disfavor of a “repeal by implication” simply does not apply: “This classic judicial task of reconciling many laws enacted over time, and getting them to ‘make sense’ in combination, necessarily assumes that the implications of

¹⁹ *Illinois v. General Electric Co.*, 683 F.2d 206, 208 (7th Cir. 1982), refers to GE Morris as an “away-from-site facility,” but that case was decided *before* the NWPA’s enactment and obviously was not construing the key language of subsection (h).

²⁰ Indeed, the original AEA did not even mention nuclear waste storage or disposal and even now, after fifty years of amendments, the AEA’s references to that subject are sporadic and of minimal substance. See the Opening Brief’s Addendum 3 for a listing of those AEA references.

²¹ The NRC Decision at 6-7 cites cases as supporting its implication. Yet none of those cases addressed the lawfulness issue; indeed, the case on which the NRC Decision most relies, *Illinois v. General Electric Co.*, 683 F.2d 206 (7th Cir. 1982), was decided *before* the NWPA’s enactment. We confidently believe that, until this action, the lawfulness issue has never been presented to a court. That is the case undoubtedly because, after the NWPA’s enactment, PFS was the first to promote a facility raising the issue.

a statute [such as the AEA] may be altered by the implications of a later statute [the NWPA].” *United States v. Fausto*, 484 U.S. 439, 453 (1988).²²

Thus, Utah has always made it clear that it is *not* arguing that the NWPA implicitly repeals either any express language of the AEA or the general licensing authority granted to the NRC by the AEA. See, e.g., Opening Brief at 62. To make that point irrefutable, Utah uses *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (“*FDA*”), to demonstrate how a later, specific statute (such as the NWPA) is properly used to limit the implications drawn from a general, earlier statute (such as the AEA). Opening Brief at 63-66 (the same argument went to the NRC).

Confronted with these realities, the NRC Decision at 13-22 asserts that Utah is arguing for a disfavored “repeal by implication” and argues against that non-existent argument. The NRC Decision does so without ever noting the far different argument that Utah in fact advances – that a later, specific statute may well alter the implications that properly may be drawn from an earlier, general one. But nowhere is the NRC Decision’s evasion of Utah’s real argument any more apparent than in this – the NRC Decision never once cites or even alludes to the *FDA* case, even though Utah demonstrates that the *FDA*

²² The NRC Decision at 21 misrepresents to what use Utah puts *Fausto* and then “distinguishes” *Fausto* in ways and on grounds that have nothing to do with the real reason we use the case. The real reason is just what we stated in the text above and at Opening Brief at 61.

case in on all fours with this one.²³ It seems to us that evasion amounts to a concession that the *FDA* case defeats that NRC Decision's analysis and conclusion.

E. The *Chevron* Doctrine Neither Sustains the NRC's Construction of the NWPA Nor Requires this Court to Defer to that Construction.

The Response Brief at 81-85 argues that the *Chevron* doctrine bolsters PFS's and NRC's reading of the NWPA. Because the *FDA* case is on all fours with this case, we quote its summary of the *Chevron* doctrine:

Because this case involves an administrative agency's construction of a statute that it administers, our analysis is governed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, a reviewing court must first ask "whether Congress has directly spoken to the precise question at issue." . . . If Congress has done so, the inquiry is at an end; the court "must give effect to the unambiguously expressed intent of Congress." . . . But if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible. . . . Such deference is justified because "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones," . . . and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated

529 U.S. at 132.

Because the *FDA* analysis applies to the key issue in this case (the impact of the NWPA on the implications to be drawn from the older AEA) at least as strongly as it

²³ The Response Brief at 84-85 attempts to distinguish *FDA* from this case on the grounds that in *FDA* the agency had previously concluded it did not have the authority to regulate tobacco and only changed its position later, whereas here the NRC has never denied its authority to regulate PFS-type facilities. The *FDA* opinion itself defeats this "distinction":

Although the dissent takes issue with our discussion of the FDA's change in position, . . . our conclusion does *not* rely on the fact that the FDA's assertion of jurisdiction represents a sharp break with its prior interpretation of the FDCA.

529 U.S. at 157.

applies to the key issue in that case (the impact of tobacco-specific statutes on the older FDCA), Opening Brief at 63-66, the same result obtains regarding the shared *Chevron* issue. That result is a rejection of the agency’s proffered interpretation of Congress’s intent. *See also Lamb v. Thompson*, 265 F.3d 1038 (10th Cir. 2001) (“Even if we were to assume the statute is ambiguous, we would conclude in the second step of *Chevron* that the [agency’s] interpretation . . . cannot stand because it renders words in the statute ‘mere surplusage.’ . . . ‘Although we afford deference to the [agency’s] interpretation of a statute under [its] purview, we cannot overlook an interpretation that flies in the face of the statutory language.’”) ²⁴

III.

THE CHALLENGED UTAH STATUTES ARE NOT PREEMPTED BY THE AEA.

Utah’s Opening Brief established the following fundamental points relevant to AEA preemption analysis: (1) that the Court cannot resolve the merits of PFS’s preemption attack on the challenged statutes without first resolving the lawfulness issue; (2) that Supreme Court precedents establish that federal statutes do not occupy a field of “all things nuclear,” but preserve substantial local authority; (3) that the Utah statutory provisions should be considered individually (not collectively) in light of the severability

²⁴ Although the NWPA limits the implications that can be drawn regarding the extreme scope of the AEA’s grant of licensing authority, and although the NWPA expressly calls for NRC licensing of two of the three away-from-reactor SNF facilities authorized by the NWPA (the repository and the MRS facilities, 42 U.S.C. §§ 10106(b)(3), 10141(b), 10161(d),) the DOE, not the NRC, is the agency primarily responsible for the administration of the NWPA. The DOE has not taken a position on the lawfulness issue, although Utah has urged it to do so.

We also note that the lawfulness issue is not a technical issue of the kind commanding deference for agency expertise. Nor is it even a policy issue. It is a pure question of law: What did Congress intend in enacting the NWPA regarding private, away-from-reactor, SNF storage facilities?

clause, and that each provision should be construed to avoid any potential constitutional deficiencies; and (4) that legislators' subjective intents or purposes are irrelevant in preemption analysis.

PFS's Response Brief makes no attempt to refute these important propositions, yet its arguments run afoul of all of them. PFS seeks to sidestep the lawfulness issue on the basis of its assumption that federal law preempts the broad field of "all things nuclear"; it construes the Utah statutes to facilitate, to the greatest extent possible, PFS's constitutional attacks on those statutes; it largely fail to address Utah's provision-by-provision preemption analysis, treating all the challenged statutes preempted if any one is; and it makes the supposed subjective intents of legislators the mainstay of its preemption argument. In addition, the Response Brief pervasively advances bald assertions of "fact" (regarding actual impact on safety decisions), ignoring the Opening Brief's demonstration that the record is devoid of any basis for those assertions and that it was PFS's burden to place the necessary evidence in the record as the movant for summary judgment.

A. This Court Cannot Resolve the Merits of PFS's AEA Preemption Attack on the Challenged Statutes Without First Resolving the Lawfulness Issue.

PFS's argument (which the district court accepted) is (1) that field preemption analysis invalidates any state regulation in the federally regulated field, even if the state regulation is in harmony with the federal regulation and (2) that no need exists therefore to resolve the lawfulness issue, even if Utah's position is the correct reading of Congressional intent in the NWPA, because the challenged statutes regulate in the "field" of "radiological safety" and must be preempted no matter how harmonious they are with the federal scheme.

In advancing this argument, the Response Brief passes over the Opening Brief's demonstration that a prerequisite to field preemption is a showing that "Congressional

intent to supersede state laws [is] ‘clear and manifest’” and that, consequently, if Congressional intent was to prohibit a PFS-type facility, that intent can provide no basis for subjecting the Utah statutes to field preemption analysis. Opening Brief at 79-80.

Equally telling is that the Response Brief ignores the Supreme Court holdings, set forth in the Opening Brief at 82-84, that field preemption analysis does not even apply in cases such as this. In the Supreme Court’s two most recent AEA preemption cases, *Silkwood* and *English*, the Court rejected a “broad preemption analysis,” further rejected the notion that field preemption analysis even applied, and held that the only proper preemption analysis was conflict analysis. *Id.* Given the *Silkwood* and *English* rejection of field analysis in cases such as this, the Response Brief’s reliance on field analysis simply will not sustain PFS’s purpose – dissuading this Court from resolving the lawfulness issue. (Of course, the lawfulness issue cannot be avoided under conflict analysis, and we do not understand PFS to be suggesting otherwise.)

B. The Law’s Mandate to Construe Statutes to Avoid Constitutional Difficulties Defeats the Response Brief’s “Construction” of the Challenged Utah Statutes.

It is well settled that the federal courts should construe statute to avoid constitutional problems “unless such construction is plainly contrary to the intent of” the legislature. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988); accord *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994). The Opening Brief at 19 demonstrated that only the Step One provisions are presently in force and effect. Those provisions are the prohibition, based on Utah’s view of Congressional intent to ban PFS-type facilities²⁵; the “contracts

²⁵ U.C.A. § 19-3-301(1).

prohibited” provisions, including some of the “municipal contract” provisions²⁶; and the “enforcement” provisions²⁷ to they extent they apply to the other Step One provisions.²⁸ The Opening Brief at 19-20 further demonstrated that the Step Two provisions are not presently in force and effect and will never be unless and until a judicial determination of the lawfulness issue adverse to Utah’s position – at which time the Step One provisions will no longer be in force and effect. (This demonstration, of course, highlighted the baselessness – both for justiciability and on the merits – of PFS’s present constitutional attack on the Step Two provisions.)

Utah’s construction of its own statutes provides both the most sensible coordination and integration of all the challenged statutes and avoids constitutional deficiencies. By contrast, PFS repeatedly insists on construing the challenged statutes to facilitate (rather than obviate) PFS’s constitutional challenges to them. Thus, the Response Brief at 10 asserts that the challenged statutes create “classic ‘Catch 22’s.’ For example, under section 19-3-306(8), the facility cannot be [state] licensed unless a third party has irrevocably agreed to accept the SNF following the temporary storage period at the facility, while section 19-3-301(9) voids any such agreement.” Yet, section 19-3-306(8) is a Step Two provision, and section 19-3-301(9) is a Step One provision; thus, when one is in effect, the other will not be, thereby eliminating PFS’s “Catch 22”

²⁶ U.C.A. § 19-3-301(9)(a)(ii) (“These contracts are declared to be void . . . as against public policy.”); U.C.A. § 17-34-1(3) (municipal contracts prohibited unless a court rules against Utah on the lawfulness issue).

²⁷ U.C.A. § 19-3-312.

²⁸ The Response Brief erroneously asserts at 61 that we treat the presently-in-effect “contracts prohibited” provisions, “municipal contract” provisions; and “enforcement” provisions as Step Two provisions. We never have. See Opening Brief at 19.

criticism. Further, at 11-12, the Response Brief criticizes the Step Two provisions collectively as if those provisions were currently in effect, ignoring the probability that they never will be. (The Response Brief never does explain on what basis – under notions governing either justiciability or the merits of PFS’s various constitutional attacks – it can pursue an action to strike down statutes not now and probably never in effect. See Opening Brief at 79-80.) As a further example, the Response Brief at 12 asserts that Utah has “mischaracterized” the Step One/Step Two nature of the statutory scheme with an “over-simplified description [that] completely ignores the many provisions that impact [PFS] immediately, without regard to whether the ‘Step 1’ explicit ban is effective.” But the Response Brief does not identify those “many provisions” and thus provides no basis for concluding that Utah’s construction of its own statutes is not fair and accurate.

C. Preemption Analysis Does Not Include a Search for the Legislators’ Subjective Intentions or Purposes.

Although PFS does not refute Utah’s showing that legislators’ subjective intentions are irrelevant to preemption analysis, the Response Brief makes just such supposed subjective intentions the mainstay of its AEA preemption argument. See Response Brief at 13-21, 44-49. The Response Brief begins its preemption argument at 44 by saying that “Part 3 – both in **purpose** and effect – goes to the very heart of the NRC’s jurisdiction to regulate nuclear radiological safety, and therefore falls within the preempted field.” (Emphasis added.) The following pages then focus almost exclusively on the various legislators’ subjective intentions or purposes while essentially ignoring what the record says (or more accurately, fails to say) about effect. Such an approach undermines PFS’s position because purpose is irrelevant under settled law, Opening Brief at 99-101, and the record is devoid of evidence from PFS or any other source of the requisite “effect” on “radiological safety decisions.” E.g., Opening Brief at 85-86, 93, 97-98.

D. The Challenged Statutes' Severability Provision Will Be Given Full Effect, and Thus Each Statutory Provision Will Stand or Fall on Its Own Merits.

The Response Brief ignores the severability provision²⁹ in the challenged statutes and the settled law governing the application of such a provision. Opening Brief at 106 n.80. The settled law is that a court will give full effect to a severability provision in a challenged statutory scheme so as to preserve each provision able to withstand constitutional challenge. *E.g., American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1250 (10th Cir. 2000) (“In Utah, the test is ‘whether the legislature would have passed the statute without the objectionable part.... Frequently the courts are aided in the determination of legislative intent by the inclusion ... of a “saving clause.””).

Despite this settled law, the Response Brief at 43 argues that the challenged statutes must be judged, and struck down, as a whole because those statutes “cannot be examined in some balkanized fashion but rather must be reviewed in totality.” The Response Brief then cites to and relies on cases applying the well-known rule of *statutory construction* that, in determining the meaning of one provision, the courts can and will look at that provision in the context of the entire act of which it is a part. *Id.* at 43-44. But, of course, that is the wrong rule for the issue before this Court. The issue is not what some particular provision means but whether, if one provision is struck down, what is to happen to the other provisions that can withstand constitutional attack. The right rule for the real issue is the rule of severability. And that rule, in the context of the challenged Utah statutes, is that each provision that can withstand constitutional attack remains in full force and effect.

²⁹ U.C.A. § 19-3-317.

E. Each Challenged Provision Defended by Utah in Its Opening Brief Withstands PFS's Preemption Attack.

Thus, careful preemption analysis is required of each challenged provision. Such careful analysis leads to the conclusion that the defended Utah statutes are not preempted.

1. The Step One provisions cannot be held preempted.

In section III.A. above, we addressed a fundamental flaw in PFS's AEA preemption challenge to the Step One provisions (that is, the "prohibition" provisions, together with the implementing "contracts prohibited" provisions, part of the "municipal contract" provisions, and, to an extent, the "enforcement" provisions). That flaw is that under *Silkwood* and *English*, the AEA does not preempt the broad field of "all things nuclear"; rather, AEA preemption applies only where "there is an irreconcilable conflict between the federal and state standards," *Silkwood, supra*, 464 U.S. at 256, or where state law has a "direct and substantial effect on the decisions made by those who build or nuclear facilities concerning radiological safety levels," *English, supra*, 496 U.S. at 85.

These preemption questions cannot be decided without a resolution of the lawfulness issue. If this Court resolves the lawfulness issue in Utah's favor, then the Step One provisions are in perfect harmony with federal law on the unlawfulness of a PFS-type facility. In the face of such harmony, there can be no "conflict" nor any effect on radiological safety levels. If, on the other hand, this Court resolves the lawfulness issue in PFS's favor, then, by the terms and scheme of the challenged Utah statutes, the Step One provisions are no longer in force or effect. To again state the obvious, state statutes not in force or effect cannot be preempted. Accordingly, PFS's AEA preemption challenge to the Step One provisions must fail.

2. The defended Step Two provisions are not preempted.

a. The AEA does not preempt the “municipal contract” provisions. The Response Brief refuses to engage the fundamental flaw in PFS’s position, as set forth in the Opening Brief at 85-86: The NRC allows PFS to provide the requisite municipal-type services, particularly security, through either a private entity or local government; PFS presented no evidence that one approach would be any more or less expensive than the other approach; PFS hence failed to demonstrate that Utah’s decision to preclude its law enforcement resources from being used at the PFS facility (absent compliance with state licensure) would have any financial impact on the PFS project; and, accordingly, PFS failed to demonstrate the significant impact on “safety decisions” required by *Silkwood* and *English* to sustain an AEA preemption challenge.

What the Response Brief at 57-58 does (as did the district court) is make an unsupported assertion of fact: “A prohibition on the provision of municipal services by Tooele County would dramatically increase PFS’ cost of operation because the SNF facility would have to provide its own emergency services.” The Response Brief, of course, provides no cite to the record in connection with that assertion. (The Opening Brief’s second argument was that, in the absence of evidence in the record, the courts in the summary judgment context will infer in favor of the non-moving party, meaning here an inference that private emergency services are less expensive than local government emergency services. The Response Brief does not speak to that argument.)

The Opening Brief’s third argument was that relevant precedents support a holding of no AEA preemption, citing *Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1)*, LPB-85-12, 21 NRC 644 (1985) and *Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk*, 604 F.Supp. 1084, 1093-96 (E.D.N.Y. 1985). Regarding

the former, the Response Brief falls into its oft repeated error of considering what preemption analysis makes irrelevant: subjective legislative intents. The Response Brief at 56-57 says that the local ordinance reviewed in *Shoreham* pre-dated the proposal for the nuclear facility and here the “municipal contract” provisions do not; this makes all the difference, according to PFS, because one can infer a legislative intent arising from radiological safety fears, which intent supposedly is fatal to the challenged provision. But settled preemption analysis makes that intent irrelevant. Section III.C. above. (Moreover, PFS ignores the fact that, relative to the “municipal contract” provisions, one could more readily infer a legislative intent to use scare law enforcement resources to protect property and projects more vital to the State’s well-being.)

Regarding the latter case (“the Judge Altimari decision”), the Response Brief counters with *Long Island Lighting Co. v. Suffolk County*, 628 F. Supp. 654, 659 (E.D.N.Y. 1986), saying that its case (“the Judge Wexler decision”) is more applicable than ours. Both cases involve the same nuclear facility on Long Island, New York, but different ordinances of Suffolk County. The Response Brief is simply wrong in its reliance on the Judge Wexler decision; that decision, unlike the Judge Altimari decision, does not square up at all with the facts of this case. The Judge Wexler decision’s own language so demonstrates:

In Resolution III-1983 [the ordinance addressed in the Judge Altimari decision], however, the County Legislature decided that no plan would protect the safety of Suffolk County's residents in the event of a radiological disaster and declined to approve the Planning Department's proposal. Accordingly, the County Legislature terminated any further emergency planning and resolved not to participate in the development, approval, or implementation of any RERP [emergency plan]. With construction of the Shoreham facility nearly complete, the County withdrew its support for LILCO's power plant. Subsequently, . . . the County Legislature went on record as both opposing the licensing or operation of the Shoreham facility and advocating its complete abandonment.

....

In another action, commenced shortly after the County's Resolution III-1983, [plaintiffs, including LILCO,] sought equitable relief that would have compelled Suffolk County and Peter Cohalan's participation in the development of RERP. After a thorough and detailed examination of the complex legislative history of the 1980 NRC Authorization Act, then District Court Judge Altimari held that Suffolk County's Resolution III-1983, by which the County withdrew from the emergency planning process and declared Shoreham unsafe, did not amount to a regulation of or interference with the federal government's exclusive power to regulate matters of nuclear power production or radiological safety. . . . Judge Altimari concluded that the eventuality of local non-participation had been considered by Congress and that Congress had restructured the law to enable the NRC to continue evaluating emergency plans and granting licenses even in the absence of local governmental input. . . . The Court noted that the result would be different if Suffolk County engaged in some affirmative action amounting to a regulation of nuclear power or a moratorium on plant operation.

628 F. Supp. 656-57.

LILCO then proceeded to develop an emergency plan without Suffolk County's involvement. *Id.* at 657-58. When the NRC required LILCO to test the plan, LILCO decided to use federal officials and private employees, some of whom would simulate the roles of various country officials. *Id.* With Local Law 2-86, Suffolk County then made it a Class A misdemeanor for those private employees to take such a role. *Id.* at 659. In the face of this development, Judge Wexler held Local Law 2-86 AEA preempted.

In so ruling, this Court is not acting inconsistently with the prior decision of this Court [by Judge Altimari] States and localities are not required to develop emergency evacuation plans and a refusal to do so can be based on any reason or no reason. It is quite another matter, however, for a local government affirmatively to obstruct the information gathering process of the NRC for a reason that lies within the NRC's congressionally-mandated sphere of authority.

Id. at 666.

The facts here fall within the rule of the Judge Altimari decision. Nothing in the "municipal contract" provisions prohibits or hinders PFS or anyone else from providing

private security and other services to the proposed facility. Moreover, NRC regulations expressly make private security services an adequate alternative to municipally provided services. On these facts, the Judge Wexler decision simply does not apply, and the Response Brief fails to demonstrate otherwise. (The Judge Wexler decision does apply to this case to this extent: That decision expressly holds that subjective legislative intents are irrelevant to AEA preemption analysis. “States and localities are not required to develop emergency evacuation plans and a refusal to do so can be based *on any reason or no reason.*” *Id.* at 666 (emphasis added)).

b. The AEA does not preempt the “unfunded potential liability” provisions. The Opening Brief at 89-95 demonstrated that these provisions are carefully crafted to provide a compensation fund only for damages resulting from a nuclear event that is not covered by the AEA’s Price-Anderson Act (“PAA”); that whether such damages could even arise from PFS’s proposed operations is uncertain; and that PFS made no showing in this record that these provisions even apply to its proposed activities and, if so, what the financial effects of these provisions on PFS’s proposed operations might be. Despite *Silkwood’s* and *English’s* rejection of broad field preemption analysis in cases such as this, section I.A. above, the Response Brief at 49 chants its usual “field preemption” mantra: “Field preemption analysis is not, however, one of harmony, but whether Congress intended to occupy the field.”

Tellingly, the Response Brief is silent regarding the record’s silence on the financial effects of the “unfunded potential liability” provisions on PFS’s proposed operations. Nor does the Response Brief provide light on the extent to which PFS’s proposed activities will fall (if any of them do) outside the scope of the PAA; it merely tries to distinguish on meaningless grounds this Court’s preeminent PAA decision, *Kerr-*

McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997). Response Brief at 50 n.20. The unrefuted fact remains that PFS has offered no evidence to show that the unfunded potential liability provisions will have any effect on decisions regarding radiological safety levels, much less the direct, substantial effect required under *Silkwood* and *English*.

c. **The AEA does not preempt U.C.A. § 19-3-318 (financial responsibility of equity interest holders).** The Opening Brief at 95-98 demonstrated that section 318 determines who, as between innocent bystanders and those who stand to profit from the proposed facility, should bear the risk of harm both not funded and capped by the PAA and not covered by the state fund created by the “unfunded potential liability” provisions; section 318’s answer is, those who stand to profit. The Response Brief at 51 asserts that “the State has estimated the ‘unfunded potential liability’ of PFS to be between \$14 and \$313 billion dollars [sic]”; therefore, the district court was correct in concluding that “there would be an additional, substantial cost of insurance . . . and a corresponding effect on the safety measures employed by the facility” (quoting 215 F. Supp. 2d at 1246-47). But the Response Brief grievously misstates what the State has estimated. Utah, just like PFS and the district court, has *never* yet determined the amount of potential liability to PFS, its officers, directors, and equity holders. What Utah has considered is that actual damages could range to over \$300 billion, Opening Brief at 96, while not yet determining what, if any, might be the potential liability of PFS and those connected to it. That amount of potential liability – the amount that matters for correct preemption analysis – might be zero; it will be zero if the PAA covers all PFS’s activities. Further, the equity holders as a practical and probably legal matter become personally liable only after the state fund is exhausted, an unlikely event given that the fund will hold 75% of the upper end of potential damages from activities not covered by the PAA. So the fact remains:

PFS did not provide and the district court did not have access to *any* figure or estimate of the actual financial impact of section 318 on PFS's operations. Yet on the pure speculation that the financial impact would be great, the district court at PFS's urging struck down section 318. This conclusion again is inconsistent with *Silkwood* and *English*, as the district court did not and could not find that the financial impact of section 318 was more direct or more substantial than the compensation schemes upheld in those cases.

d. The "roads" provisions are not preempted. The entirety of the Response Brief's discussion of the "roads" provisions is devoted to showing "bad legislative intents." Response Brief at 53-55. In doing so, the Response Brief ignores the settled law that such "intents" are irrelevant. Opening Brief at 99-101; section III.C. above. The Response Brief counters none of the Opening Brief's arguments sustaining the constitutionality of the "roads" provisions.

e. The "licensing" provisions are not preempted. The Opening Brief demonstrated that the "licensing" provisions were designed in light of the Supreme Court's decision in *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 593 (1987), and that under that decision PFS's present attack on the licensing provisions must fail. Specifically, *Granite Rock* held that, to defeat a broad, absolute, and facial preemption challenge (like PFS's here), the defendant state agency "needed merely to identify a possible set of permit conditions not in conflict with federal law," 480 U.S. at 593, and that Utah's DEQ and Department of Transportation do identify such "a possible set of permit conditions" in their administration of the "licensing" provisions. The Response Brief at 52 asserts that *Granite Rock* "is inapplicable," but the reason given for that assertion is without basis:

In *Granite Rock*, the Court held it could not engage in a field preemption analysis because it could not *objectively* discern the purpose of the challenged legislation given that plaintiffs initiated litigation before knowing what conditions would be imposed on the permit. Here, Defendants' purpose can be objectively determined from both the face of the statutes and the legislative history – it is to prohibit SNF storage and transportation in Utah. (Emphasis in original.)

First, as in *Silkwood* and *English*, the Supreme Court in *Granite Rock* rejected the argument that broad field preemption analysis was appropriate; the Court rejected the plaintiff's argument "that any possible state permit requirement would be pre-empted" if it applied to activities on unpatented mining claims in national forests. 480 U.S. at 581-82. In this context, the Court saw that some state permit requirements would operate in the "gaps," that is, in areas not covered by federal regulation. *Id.* at 582-83. Second, the Court rejected the plaintiff's effort (akin to PFS's here with its "radiological safety" mantra) to force field preemption analysis by stretching the "land use planning" rubric over all possible permit requirements. *Id.* at 584-86. Third, the Court rejected the plaintiff's argument "that the Coastal Commission's true purpose in enforcing a permit requirement is to prohibit Granite Rock's mining entirely." *Id.* at 588. The Court was not interested in "true purpose"; it was interested in the actual content and operation of the permit requirements so that it could conduct the appropriate analysis:

By choosing to seek injunctive and declaratory relief against the permit requirement before discovering what conditions the Coastal Commission would have placed on the permit, Granite Rock has lost the possibility of making this argument in this litigation. Granite Rock's case must stand or fall on the question whether any possible set of conditions attached to the Coastal Commission's permit requirement would be pre-empted.

Id. And as in *Granite Rock*, so here: the state agencies have identified permit requirements immune to preemption challenge. Opening Brief at 105.

**IV.
NONE OF THE RESPONSE BRIEF'S "ALTERNATIVE GROUNDS FOR
AFFIRMING THE DISTRICT COURT'S DECISION" SUSTAINS AN
AFFIRMANCE.**

The Response Brief presents six "alternative grounds" for sustaining the district court's judgment striking down the challenged Utah statutes – none of which the district court addressed. All of the "alternative grounds" implicate the lawfulness issue, and none will sustain a judgment striking down the challenged statutes.

A. The Challenged Statutes Do Not Violate the Dormant Commerce Clause.

PFS's Dormant Commerce Clause challenge fails for numerous reasons. The first level of analysis is straightforward: With the NWPA, Congress excluded from interstate commerce a PFS-type facility. The challenged Utah statutes cannot run afoul of the Commerce Clause because of their impact on something Congress, with its undoubted authority, has excluded from interstate commerce and hence from the protection of that Clause. "It is well established that Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid." *Maine v. Taylor*, 477 U.S. 131, 138 (1986). Accordingly, if the NWPA already prohibits the construction of the private, off-site waste dump proposed by PFS, then Utah's prohibition of the same facility can hardly be said to offend the Commerce Clause. Thus, the merits of the case again cannot be resolved without deciding the lawfulness issue.

Even if this Court resolves the lawfulness issue adverse to Utah's position, however, the challenged statutes survive dormant Commerce Clause analysis. PFS's dormant Commerce Clause argument relies on a series of cases striking down state protectionist measures that discriminate against nonhazardous waste originating out of state and in favor of local garbage. Response Brief at 86-90. The analogy to nonhazardous waste is inapt, however, in that SNF (1) originates only in a select number

of states (excluding Utah and about fifteen others) and (2) carries unique safety and environmental hazards in its transportation across state lines. These two distinctions make this a very easy case under the Commerce Clause. First, the Utah statutes survive Commerce Clause scrutiny because they treat all SNF identically, so they do not have the prohibited purpose or effect of “protectionism” or “discrimination” against interstate commerce. Second, the Utah statutes survive under a long line of cases (including those cited by PFS) that recognize the power of the states to ban the importation of articles originating out of state that are more dangerous than those found within the state. Finally, the Utah statutes survive under the “quarantine cases,” which are expressly preserved in the cases cited by PFS and which uphold the power of the states to prohibit the importation of “noxious” things whose transportation across state lines poses safety and environmental hazards.

1. The Utah statutes do not discriminate against interstate commerce.

Contrary to PFS’s argument, the courts have never held that all regulation of the interstate transportation of waste is subject to strict scrutiny under the Commerce Clause. Rather, as the Supreme Court’s precedents hold, strict scrutiny is triggered only by those state “regulatory measures designed to *benefit in-state economic interests* by burdening out-of-state competitors,” *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988) (emphasis added) – i.e., only by state laws that provide “differential treatment of in-state and out-of-state economic interests that *benefits the former* and burdens the latter.” *Oregon State Waste Systems, Inc. v. DEQ of Oregon*, 511 U.S. 93, 99 (1994) (emphasis added). Thus, PFS’s analysis skips “the first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause”: “whether it ‘regulates evenhandedly with

only “incidental” effects on interstate commerce, or discriminates against interstate commerce.” *Id.* (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).³⁰

Under this first step, the Utah statutes are easily distinguishable from the nonhazardous waste regulations identified by PFS. In each of the cases striking down such statutes, the state’s regulation of out-of-state waste discriminated in favor of in-state waste. In *Oregon Waste Systems*, for example, the statute at issue imposed a discriminatory surcharge on nonhazardous waste that was “three times greater” for waste generated outside of the State of Oregon than the surcharge applicable to in-state waste. *Id.* Similarly, in *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992), Alabama had imposed a higher fee on the disposal of out-of-state waste than it did on the disposal of identical in-state waste. *Id.* at 342. In both cases, the Court struck down the regulations under a strict scrutiny standard because they were facially discriminatory – because “[t]he statutory determinant for which fee applies to any particular shipment of solid waste ... is whether or not the waste was ‘generated out-of-state.’” *Oregon Waste Systems*, 511 U.S. at 99.

The ban on the importation of waste in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), was similarly discriminatory. In that case, the Court struck down a ban on the importation of out-of-state garbage on the ground that it violated the “principle of nondiscrimination”– “[b]oth on its face and in its plain effect.” 437 U.S. at 627. The discrimination in the New Jersey statute was evident, as nonhazardous waste originated

³⁰ “[N]ondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless ‘the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.’” *Oregon Waste Systems*, 511 U.S. at 99 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). For the reasons explained in subsection 2 below, the Utah regulations easily satisfy this standard. Indeed, the “local benefits” identified by Utah in support of its statutes have been expressly endorsed as constitutionally sufficient under a long line of precedents.

both within New Jersey and in other states, yet the New Jersey statute banned only garbage “coming from outside the State,” without any “reason, apart from [its] origin, to treat [it] differently.”³¹ *Id.*

The Utah statutes easily escape strict scrutiny under this standard. It is undisputed that there is no such thing as Utah-originated SNF, and thus the Utah statutes cannot be said to discriminate in favor of any local interest. Thus, the Utah statutes regulate (or “discriminate”) not on the basis of the *origin* of the nuclear waste at issue, but on the basis of its nature. All SNF is prohibited, based on the unremarkable legislative finding that the presence of SNF “within the state is an ultra-hazardous activity which carries with it the risk that any release of waste may result in enormous economic and human injury.” U.C.A. § 19-3-302(8).

Such regulation is clearly sustainable under the Commerce Clause, as the nonhazardous waste cases cited above themselves indicate. Utah has identified “some reason, apart from their origin” for treating spent nuclear fuel rods “differently” from other kinds of waste that is not regulated by the statute. *Philadelphia*, 437 U.S. at 627. Again, there is no such thing as in-state SNF, and thus there is no way to conclude that Utah has discriminated against interstate commerce by “benefitting” in-state economic interests while “burdening” the out-of-state interests.

Indeed, this conclusion was spelled out expressly in *Oregon Waste Systems*. There, the Court explained that Oregon clearly would have the power to subject out-of-

³¹PFS cites one nuclear waste case, *Illinois v. Gen. Elec. Co.*, 683 F.2d 206 (7th Cir. 1982), but that case is distinguishable on the same ground: Illinois had its own nuclear waste, and its regulations discriminated in favor of Illinois-based waste and against that coming from out of state. Indeed, the court in that case acknowledged that the Commerce Clause would not be offended by “undiscriminating hostility” to all nuclear waste, but noted that Illinois “is quite willing to allow the storage and even the shipment for storage of spent nuclear fuel in Illinois, provided only that its origin is intrastate.” *Id.* at 214.

state waste to a different regulatory standard if “the disposal of waste from other States impose[d] higher costs on Oregon and its political subdivisions than the disposal of in-state waste,” or if there were “any safety or health reason unique to nonhazardous waste from other States.” *Id.* at 101. That is precisely the situation here, and thus the nonhazardous waste cases cited by PFS contradict PFS’s position and sustain the constitutionality of the Utah statutes.

In apparent recognition of the lack of any discrimination on the face of the Utah statutes, PFS asserts that they have a discriminatory “purpose” or “effect” – of “preventing the movement of SNF to Utah.” Response Brief at 88-89. But the purpose and effect identified by PFS is legally irrelevant. As the above cases emphasize, Utah clearly has the power to regulate nuclear waste so long as it does so on an evenhanded basis, without regard to its state of origin. By the same token, there is nothing constitutionally suspect about Utah’s “intent” to do so, or on the permissible “effect” of the Utah statutes in this regard. *See Hunt v. Washington Apple Adv. Comm’n*, 432 U.S. 333, 350 (identifying as the relevant “intent” a “purpose to discriminate against interstate goods” and as the relevant “effect” that of “discriminating” against interstate commerce).

The cases cited by PFS are simply inapplicable, because they all involve a purpose or an effect of discriminating in favor of local economic interests. *See Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 340 (4th Cir. 2001) (concluding that the sponsors of Virginia legislation regulating nonhazardous waste intended to discriminate against waste originating outside the state, and not to regulate all similar waste “regardless of the source”); *SDDS, Inc. v. South Dakota*, 47 F.3d 263, 268 (8th Cir. 1995) (noting that the sponsors of South Dakota regulations were intended “not [to] apply to existing or foreseeable future landfills that dispose of South Dakota waste,” but only

“to defeat a specific ‘out-of-state’ dump”). None involved the salient feature of the Utah statutes: a regulation defined by health and safety considerations (not state of origin) associated with an article that simply does not otherwise exist in the state in which it is being regulated. *See SDDS*, 47 F.3d at 268, n. 8 (acknowledging that waste regulation is constitutional where “out-of-state articles are more dangerous than are in-state articles”). In these unique circumstances, there can be no discrimination on the prohibited basis of state of origin and thus no purpose or effect that has any relevance to the Commerce Clause.

2. The Utah statutes survive scrutiny.

Because the Utah statutes at most are “nondiscriminatory regulations that have only incidental effects on interstate commerce,” they are presumptively “valid unless ‘the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.’” *Oregon Waste Systems*, 511 U.S. at 99 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). The Utah statutes easily survive under this standard. In fact, they would withstand even strict scrutiny, as indicated by the Supreme Court’s decision in *Maine v. Taylor*, 477 U.S. 131 (1986).

In that case, Maine had imposed a ban on the importation of certain live baitfish, based on its concerns about “‘substantial uncertainties’ surround[ing] the effects that baitfish parasites would have on the State’s unique population of wild fish.” *Id.* at 142. Although the Court found that the Maine ban discriminated in favor of local baitfish and against those coming from out of state, it nevertheless upheld it under the two-pronged strict scrutiny test: that it (a) “serve[d] a legitimate local purpose” that (b) could not “be served as well by available nondiscriminatory means.” *Id.* at 140. As to Maine’s purpose, the Court acknowledged that there was “substantial scientific uncertainty

surround[ing] the effect that baitfish parasites and nonnative species could have on Maine's fisheries," but nevertheless held that "Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible." *Id.* at 148. Specifically, the Court concluded that "the constitutional principles underlying the commerce clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences." *Id.* Thus, although the record included some statements that seemed to suggest "signs of protectionist intent" on Maine's part, the Court held that the health and safety concerns were legitimate, and that there was no reason "to believe that [such justifications were] merely a sham or a *post hoc* rationalization." *Id.* at 149.

The Court also held that Maine could not accomplish its legitimate objectives through nondiscriminatory means. First, the Court recognized that there was an "abstract possibility" of developing testing procedures that would allow for the screening of out-of-state baitfish that might be contaminated with parasites. *Id.* at 147. But ultimately the Court concluded that Maine was required only to "make reasonable efforts to avoid restraining the free flow of commerce across its borders," and was "not required to develop new and unproven means of protection at an uncertain cost." *Id.*

If Maine's baitfish ban survives strict scrutiny, then Utah's ban on high-level nuclear waste clearly survives under that standard.³² Even if there is "scientific

³²In fact, PFS's own cases recognize as much. *See SDDS, Inc. v. State of South Dakota*, 47 F.3d 263, 268, n. 8 (8th Cir. 1995) (acknowledging that a ban on importation of waste "can withstand [strict] scrutiny ... if the state demonstrates that the out-of-state articles are more dangerous than are in-state articles").

uncertainty” about the extent of the risks associated with the transportation and storage of SNF, there can be no doubt that Utah has a “legitimate interest in guarding against imperfectly understood environmental risks,” and need not “sit idly by and wait until potentially irreversible environmental damage has occurred.” Indeed, the risks associated with baitfish parasites pale in comparison to the catastrophic health and safety risks inevitably associated with nuclear waste, and the legitimacy of Utah’s interest cannot seriously be doubted.

Moreover, Utah’s regulation of SNF is at least as narrowly tailored as the Maine baitfish ban. Again, the most that could be said is that there may be some “abstract possibility” of reducing the risks associated with the transportation and storage of nuclear waste without imposing an outright prohibition. But Utah is “not required to develop new and unproven means of protection at an uncertain cost.” *Id.* at 147. Surely Utah is entitled to make the judgment that the only effective means of protection against the catastrophic risks associated with nuclear waste is to ban it altogether, particularly where that ban is nondiscriminatory in nature (a factor that would uphold the Utah statutes under the much more deferential test articulated in *Pike*, 397 U.S. at 142 (holding that nondiscriminatory regulations are “valid unless ‘the burden imposed on such commerce is clearly excessive in relation to the putative local benefits’”)).³³

3. The Utah statutes survive under the quarantine cases.

This same conclusion follows from the “quarantine cases,” a long line of cases that has been expressly preserved by the Supreme Court – and expressly distinguished in the

³³In any event, even if there were any doubt about the legitimacy of Utah’s interest or whether that interest could be advanced without an outright ban, such concerns would hardly justify the entry of summary judgment against Utah. Instead, they would counsel in favor of dismissal on ripeness grounds, or at least reversal of summary judgment for further proceedings below.

nonhazardous waste cases cited by PFS. *See SDDS*, 47 F.3d at 269, n.9 (acknowledging that an “absolute ban” on importation of dangerous articles is “a permissible quarantine law” that furthers “a legitimate state interest in environmental protection”). The quarantine cases expressly uphold the right of the states to ban the importation of “out-of-state goods or services [that] are particularly likely for some reason to threaten the health and safety of a State’s citizens or the integrity of its natural resources.” *Taylor*, 477 U.S. at 149, n. 19.

Indeed, this line of cases was expressly preserved (and distinguished) in the principal case cited by PFS, *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Although the Court in that case struck down a New Jersey law that banned the importation of out-of-state garbage, the Court was careful to preserve the quarantine cases. Specifically, the Court reaffirmed its earlier decisions upholding the states’ right to “ban[] the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils.” *Id.* at 628-29. In so doing, the Court also explained the crucial distinction that condemns the New Jersey ban on out-of-state garbage while sustaining the quarantine laws (and the Utah statutes): the quarantine laws “did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin.” *Id.* at 629; *see also Robertson v. California*, 328 U.S. 440, 458 (1946) (noting that the Commerce Clause “is not a guaranty of the right to import into a state whatever one may please ... regardless of the effects of the importation upon the local community”).

This distinction rendered the New Jersey ban on importation of nonhazardous waste unconstitutional, but it easily sustains the Utah statutes. The New Jersey ban “is not ... a quarantine law” because there was “no claim ... that the very movement of waste

into or through New Jersey endangers health.” 437 U.S. at 629. Here, by contrast, the dangers of movement and transportation are at the core of the concerns surrounding the importation of SNF. E.g., U.C.A. § 19-3-302(8). If the states have the power to prohibit the transportation of “diseased livestock” in light of the risk of “contagion” they bring, surely Utah has the power to quarantine itself and its residents from the much more catastrophic risks associated with the transportation and placement of SNF.

B. The Challenged Statutes Do Not Violate the Impairment-of-Contracts Clause.

The Impairment-of-Contracts Clause provides that “no state shall . . . pass any . . . law impairing the obligation of contracts.” Yet the courts have consistently held that this language does not protect illegal or void contracts, including contracts contrary to public policy. E.g., *Zane v. Hamilton County*, 189 U.S. 370, 383 (1903); *People by Mosk v. Lynam*, 61 Cal. Rptr. 800, 806 (Cal. 1967) (“No contract contrary to public policy, however, is protected by that [the Contract] clause.”)

The PFS contracts allegedly “impaired” all have as their common denominator this: bringing to pass the creation and operation of the proposed Skull Valley nuclear waste dump. Yet if Congress has prohibited such a facility, contracts designed to create such a facility in violation of Congressional intent are contrary to public policy and can certainly be made unenforceable, void, or otherwise unlawful by the State Legislature.

In short, a holding that Congress prohibited a PFS-type facility destroys PFS’s Contracts Clause argument.³⁴ If, however, the Court holds against Utah on the lawfulness

³⁴ Analysis leads to the same conclusion when premised on *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400 (1983), with its allowance of state legislation impairing contractual obligations where the State’s legislation has an important protective function. First, the Court noted: “Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State ‘to safeguard the vital interests of its people.’” *Id.* at 410. Then the Court explained that a state regulation, although constituting a substantial impairment,

issue, then the “contracts prohibited” provisions, as Step One provisions, are no longer in force or effect and thus are not subject to any constitutional challenge.

C. The Challenged Statutes Do Not Violate Indian Rights.

The initial problem with the Response Brief at 95-97 is that it fails to identify which of the challenged statutes the Band is challenging; the only guidance is the statement that “the Band has contended below that the statutory scheme violates the Band’s property rights . . . and that these state laws are preempted by federal laws pertaining to the leasing, regulation, and governance of tribal lands.” *Id.* at 95. Accordingly, from the Response Brief, we are left guessing, but by reference to the Band’s and Utah’s filings below relative to the Band’s summary judgment motion, App. 3, 12; 5, 29; 5, 33, we conclude that the Band’s challenge here is to the Step One provisions “insofar as [they] purport[] to prohibit . . . the storage and transportation of spent nuclear fuel on the Skull Valley Reservation,” App. 5, 33, at 1418, and to the Step Two provisions “insofar as [they] purport[] to . . . regulate the storage and transportation of spent nuclear fuel on” the Reservation. *Id.*

Regarding the Step One provisions, we did not below understand the Band to be challenging the “contracts prohibited” provisions as somehow applying to the Band-Consortium lease; Utah has never been of the view that those provisions apply to the lease, which is subject to Department of the Interior approval and regulation, see U.C.A. § 19-3-302(5), and the Band’s arguments below seemed to proceed accordingly. If the

does not impair the Contract Clause where the State has “a significant and legitimate public purpose behind the regulation, . . . such as the remedying of a broad and general social or economic problem.” *Id.* at 411-12. A combination to bring into this State a nuclear waste dump prohibited by Congress constitutes, we submit, a broad and general social and economic problem.

Band's argument here is otherwise, our response is that the "contracts prohibited" provisions do not apply to the lease.

Utah does understand that the Band was and is challenging U.C.A. § 19-3-301(1)'s flat prohibition on a PFS-type facility "within the exterior boundaries of Utah." Accordingly, we argue here as we did in the district court: The federal prohibition on the proposed Skull Valley facility defeats the Band's Indian preemption claim. It is axiomatic that federal law, even that governing commerce in Indian country, does not preempt state law prohibiting that which federal law itself prohibits. And at least in the district court, if not here, the Band implicitly acknowledged this point when it stated that "Utah simply cannot justify its effort to defeat an enterprise on Skull Valley Reservation land which benefits the members of the Band, when such an enterprise is conducted *in accordance with federal law.*" App. 3, 12, at 623 (emphasis added). Utah's prohibition against PFS-type facilities "within the exterior boundaries" of the state is based on federal law and has effect only to the extent it is consistent with federal law. Thus, on a resolution of the lawfulness issue adverse to the Band, the Band's attack on the flat prohibition must be rejected.

Regarding the Band's Indian preemption challenge to the Step Two provisions, this challenge must be rejected because the balancing of interests required by the federal law governing commerce in Indian country tips decisively in Utah's favor. Under *New Mexico v. Mescalero Apache Tribe*, 426 U.S. 324 (1983), the task of determining preemption of state law impacting Indian reservations requires the courts to balance and weigh the affected interests (federal, tribal, and state), all with the "overriding goal of encouraging tribal self-sufficiency and economic development" firmly in mind. *Id.* at 334-35. At the same time, in that balancing test "[a] State's regulatory interest will be

particularly substantial if the State can point to off-reservation effects that necessitate State intervention.” *Id.* at 336.

In enacting the Step Two provisions, Utah’s Legislature was appropriately concerned about the potentially catastrophic off-reservation effects of PFS’s proposed Skull Valley facility. See U.C.A. § 19-3-302(3)-(6). We have already reviewed those effects and need not repeat them here. Those effects are of such a magnitude as to fully justify, under the Indian preemption balancing test, the regulations authorized by the defended Step Two provisions. This conclusion is supported by analysis of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which the Band accurately referred to below as “the most instructive Supreme Court decision” on application of the principles of Indian preemption. App. 3, 12, at 624. Although the balance in the end swung in favor of the tribal parties in *Cabazon*, under that case’s principles the balance here swings clearly in favor of Utah’s regulatory efforts. To put the matter plainly, this is the mother of all off-reservation effects cases. If state regulation is not justified here, then the Supreme Court’s test as enunciated in *Cabazon* is a dead letter and has no meaning.

D. The Hazardous Materials Transportation Act Does Not Preempt the Challenged Statutes.

The Utah statutes challenged by the HMTA preemption argument do not address the transportation of SNF generally. Thus, for example, under Utah’s view of them, the challenged transportation statutes do not apply to any transportation of SNF through to Yucca Mountain, Nevada. Utah reads its statutes as applying **only** to transportation of SNF to and from a privately owned, away-from-reactor, SNF storage facility inside

Utah.³⁵ If Congress has prohibited such a facility, the challenged transportation statutes have no application simply because there will be no such facility. Hence, the HMTA preemption argument, like the other arguments, is premised on the view that Congress authorized rather than prohibited the proposed Skull Valley facility.

In short, a holding that Congress prohibited a PFS-type facility eliminates all basis for the HMTA preemption argument.

E. The Challenged Statutes Do Not Implicate, Let Alone Violate, First, Sixth, and Fourteenth Amendment Rights, and The “Enforcement” Provisions Are Not Unconstitutionally Vague.

The Response Brief at 101 argues that the challenged statutory program “violates Plaintiffs’ First Amendment freedom of association by (1) prohibiting Plaintiffs from contracting with each other and with other persons necessary to plan for, build, and operate the Facility; (2) denying those in association with plaintiffs the normal protections and rights afforded to others doing business in the State of Utah; and (3) imposing civil and criminal penalties for violating or ‘facilitat[ing]’ the violation of any portion” of that statutory program. That argument, of course, is premised on the unstated assumption that Congress has not prohibited the proposed Skull Valley facility. Otherwise, we would have to conclude that the First Amendment renders unconstitutional the federal antitrust laws, such as the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*, with all their prohibitions on various kinds of contracts, combinations, and associations and with their onerous civil

³⁵ In its effort to facilitate its own constitutional attacks on the challenged transportation statutes – the opposite of construing the statutes if reasonably possible to avoid constitutional issues –, PFS argues, contrary to Utah’s reading, that those statutes should be read as prohibiting SNF transportation through Utah to Yucca Mountain. But that argument avails PFS nothing; if that argument is accepted, still PFS has no standing to challenge the statutes to the extent they do apply to SNF transportation through to Yucca Mountain; PFS’s business does not encompass such transportation. PFS’s business, and hence its standing, is limited to SNF transportation to and from the proposed Skull Valley facility.

and criminal penalties. Ditto the post-Civil War federal civil rights statutes, *see* 42 U.S.C. §§ 1981 *et seq.*, with all their prohibitions on various kinds of contracts, combinations, and associations and with their onerous civil and criminal penalties. Ditto the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, with all its prohibitions on various kinds of contracts, combinations, and associations and with its onerous civil and criminal penalties. In short, a holding that Congress prohibited a PFS-type facility destroys all basis for the First Amendment argument.

The argument also fails on other grounds. The challenged statutes expressly provide that the scope of the statutory scheme should not be construed to “prohibit or interfere with a person’s exercise of the rights under the First Amendment to the Constitution of the United States” U.C.A. § 19-3-301(12). PFS’s First Amendment argument depends on an unreasonable construction of the Utah statutes that disregards this important provision. The statutes can and should be construed to avoid the constitutional problems that PFS has imagined.

The Response Brief’s Sixth and Fourteenth Amendment argument, at 104, fares no better. That argument is that the challenged statutes operate to deprive PFS of its right to counsel (or, perhaps, to chill the exercise of that right). Every one of the tens of thousands of words written and spoken in this litigation by the lawyers from PFS’s four different law firms situated in three different jurisdictions (including Utah) stands as un rebutted evidence that those statutes do not so operate.³⁶

The Response Brief’s vagueness argument, at 105-06, is premised on the assertion that “the penalty provisions of Part 3 purport to criminalize and otherwise restrict the

³⁶ In their fee application to the district court, PFS’s counsel valued their legal services at over \$675,000. Utah thinks PFS was not chilled in the exercise of its Sixth Amendment rights to counsel.

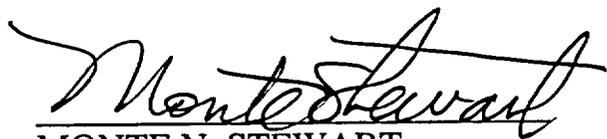
exercise of constitutional rights” and that consequently vagueness must be considered under a “stringently examined” standard. But, as already demonstrated, the challenged statutes do not “criminalize and otherwise restrict the exercise of constitutional rights,” leaving the vagueness argument without basis.

V.

CONCLUSION.

In light of the foregoing, Utah respectfully requests that this Court order this action dismissed for lack of standing and/or ripeness; failing that, that this Court hold that the defended Utah statutes are not unconstitutional.

Dated: 31 January 2003



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), Federal Rules of Appellate Procedure, I certify that, by unopposed Motion dated 30 January 2003 but not yet acted upon, Appellants sought leave to file a Reply Brief of 1,650 lines of text and that this Reply Brief consists of 1,650 lines of text.



MONTE N. STEWART
Counsel for Appellants

ADDENDUM

7

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 12/18/02

COMMISSIONERS

SERVED 12/18/02

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.

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.

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

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;

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,

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

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

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

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 facility, section 135(h) limited DOE’s powers under NWPA. Because DOE’s authority to take spent fuel for storage originated with section 135 of NWPA section 135(h) ensured that DOE would not take over a private facility to fulfil its section 135 obligation.²⁸ But because private generators’ authority to store spent fuel originated with the AEA, the NWPA’s failure to “authorize” them to take the fuel had 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

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:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Power).

⁶⁹ H.R. REP. NO. 97-785, pt. 1, 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

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

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.

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 Commission⁸⁰

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

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

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

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

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

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

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

8

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Attorneys for Petitioners

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 |) | PETITION FOR REVIEW |
| the Band's General Council, and OHNGO |) | |
| GAUDADEH DEVIA, an unincorporated |) | |
| association, |) | |
| |) | |
| Petitioners, |) | |
| 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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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of January, 2003, I served two true and correct copies of the foregoing **APPELLANTS' REPLY BRIEF** via United States first-class mail, postage prepaid, to each of the following:

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