UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

**RAS 11125**

**DOCKETED 01/31/06**

COMMISSIONERS

**SERVED 01/31/06**

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jackzo[1]
Peter B. Lyons

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

**CLI-06-03**

**MEMORANDUM AND ORDER**

In September, 2005, we issued what we anticipated to be the final adjudicatory decision in this protracted, 8-year proceeding.[2] Finding "reasonable assurance" that Private Fuel Storage, L.L.C.'s ("PFS") proposed spent fuel storage facility could be "constructed and operated safely," we authorized the NRC Staff to issue PFS a license to construct and operate its facility.[3] For reasons unrelated to the adjudication, the PFS license has not yet issued.

On November 3, 2005, the State of Utah ("Utah") filed a motion asking us to reopen the adjudicatory record to litigate its proposed Contention Utah UU (Ramifications of DOE's Refusal to Accept Fuel in Welded Canisters from the PFS Site). Utah also asked us to prohibit PFS from

[1] Because this decision necessarily discusses matters relating to the Yucca Mountain High Level Waste Repository, Commissioner Jaczko has recused himself from participation.

[2] CLI-05-19, 62 NRC 403 (2005).

[3] *Id.* at 424.

accepting spent fuel at its temporary storage site until it obtains the Department of Energy's ("DOE") agreement that the proposed permanent waste repository at Yucca Mountain will accept fuel stored in the canisters PFS plans to use. Because the new information Utah submits does not raise a significant environmental or safety issue, we deny the motion to reopen.

## I. BACKGROUND

Last year we upheld a Licensing Board decision refusing to reopen the record to litigate an earlier version of Contention Utah UU.[4] We agreed with the Board that Contention UU lacked adequate factual support. Utah's recent motion seeks to revive Contention UU and argues that "new information" supports its claim that DOE will not accept PFS fuel at the proposed Yucca Mountain repository. The new information is a DOE announcement that it is developing a proposal to use a standard, multi-purpose canister design. The multi-purpose canister would be loaded at reactor sites and used for transportation and eventual disposal. If ultimately pursued, the new plan would potentially reduce or eliminate the need for DOE to repackage spent fuel at Yucca Mountain, simplifying the process there (and, potentially, the Yucca Mountain licensing proceeding).[5] This potential alternative strategy could modify DOE's previous plan to accept high level waste in a variety of packages at the proposed Yucca Mountain facility, and to transfer the waste to a permanent disposal container at that site.[6]

Utah first raised its concern about storage package incompatibility in 1997, when it filed its original contentions.[7] Proposed Contention Utah D claimed that PFS's facility was not

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[4] CLI-05-12, 61 NRC 345 (2005).

[5] *See* DOE, "Yucca Mountain – Program Redirection Fact Sheet" (Oct. 25, 2005) (Attached as State of Utah's Motion to Reopen the Record and to Amend Utah Contention Utah UU (Nov. 3, 2005), Exh. 6).

[6] *See* CLI-05-12, 61 NRC at 352-53.

[7] *See* State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility, Nov.

"designed for decommissioning" because of the "potential incompatibility between the design of PFS storage canisters and the DOE's acceptance criteria for the packaging of spent fuel in a high level nuclear waste repository."[8] The Board rejected the proposed contention as an impermissible challenge to Commission regulations.[9]

In November of 2004, after the adjudicatory record had closed, Utah raised its concern again, this time in the form of a new (albeit late-filed) NEPA contention, proposed Contention Utah UU, concerning the effect that DOE's refusal to accept pre-packaged waste would have on the proposed PFS facility. The contention was based on informal remarks by a DOE official indicating that DOE was contemplating changing its design for the proposed Yucca Mountain facility.

The Board ruled that the evidence that DOE intended to change its previous plan was too thin to warrant reopening the record.[10] Pointing to longstanding NRC regulations and precedent establishing a high threshold for reopening a closed record, the Board held that Utah's new evidence was not so significant that it likely would change the outcome of the proceeding.[11] The Commission affirmed, agreeing with the Board that Utah had not met the agency's "strict" reopening burden because the evidence that DOE had changed its longstanding position that it would accept PFS-type stored fuel at Yucca Mountain was not "sufficient."[12]

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23, 1997, at 22-26.

[8] *Id.* at 23.

[9] LBP-98-7, 47 NRC 142, 186-87, *reconsideration granted in part and denied in part on other grounds*, LBP-98-10, 47 NRC 288, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998).

[10] LBP-05-5, 61 NRC 108, 111 (2005).

[11] *Id.* at 117-18, 124-25. *See also* 10 C.F.R. § 2.734(a)(2004) (now recodified, in substantially identical form, at 10 C.F.R. § 2.326(a)(2005)).

[12] CLI-05-12, 61 NRC at 353-55.

In its latest motion to reopen, Utah relies on what it believes is new and additional evidence that DOE is reconsidering its plan with respect to waste acceptance at Yucca Mountain. Utah points out that PFS's environmental report and the NRC Staff's subsequent environmental impact statement envisioned that fuel stored at PFS ultimately could be shipped directly to Yucca Mountain without further handling by the fuel's owners.[13] But, Utah argues, if DOE will not accept fuel in the canisters that PFS intends to use, then the fuel will have to be shipped back to the originating reactor or to another facility capable of transferring the fuel from one package to another.[14] Utah claims that the environmental impact statement therefore has become inaccurate because it does not take into account the environmental impact of shipping the fuel across the country an additional time. PFS and the NRC Staff oppose Utah's motion to reopen.

## II. DISCUSSION

We find that Utah's new information would not be likely to change the outcome of the proceeding or affect the licensing decision in a material way. Therefore, the record will remain closed. In addition, we decline to impose additional license conditions that may delay the PFS project unnecessarily and without significant benefit.

### A. The Commission Has Jurisdiction to Consider the Motion to Reopen

[13] *See, e.g.*, NUREG-1714, Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, (FEIS), at 5-35, 5-38, 5-55 to -56. PFS's customers, primarily the originating reactor owners, will retain ownership of the spent fuel stored at the PFS facility.

[14] PFS will have no facility capable of performing this operation, nor will its license allow this type of handling.

As an initial matter, we reject PFS's argument that the Commission lacks jurisdiction even to consider Utah's motion to reopen.[15] PFS argues that there is an important distinction between reopening the record in a case where the taking of evidence has concluded, but the Commission has not issued a final adjudicatory decision, and reopening the record where, as here, the Commission has already rendered its final adjudicatory decision. According to PFS, this case falls in the latter category because in CLI-05-19 – our decision on the last litigated contention in the case (concerning aircraft crash hazards) – we determined that the litigation had been resolved and we authorized the NRC Staff to issue PFS its license.[16] Utah itself seemingly considered CLI-05-19 "final" agency action, as just days after filing its motion to reopen with the Commission, Utah filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.[17] What all of this means, PFS claims, is that there is no longer any pending Commission adjudicatory proceeding to reopen. PFS argues that Utah's only remedy at this point is to petition the NRC to institute an enforcement proceeding under 10 C.F.R. § 2.206.[18]

The NRC Staff, while opposing Utah's motion on substantive grounds, does not agree with PFS that the Commission lacks jurisdiction to consider the motion. As the NRC Staff indicates,[19] none of our prior cases involved "the precise procedural posture" Utah's motion presents. But some years ago, in the *Comanche Peak* licensing adjudication, the Commission

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[15] *See* Applicant's Response to State of Utah's Motion to Reopen the Record and to Amend Utah Contention Utah UU, at 5-9.

[16] CLI-05-19, 62 NRC 403, 424 (2005).

[17] No. 05-1420 (D.C. Cir.). All parties joined in a motion with the court of appeals to hold Utah's petition for review, as well as a petition for review (No. 05-1419) filed by Ohngo Gaudadeh Devia, in abeyance to await our decision on Utah's motion to reopen.

[18] Because we find that we have jurisdiction over Utah's motion, we need not reach the issue of the appropriateness of a Section 2.206 petition as a remedy in this matter.

[19] *See* NRC Staff's Response to "State of Utah's Motion to Reopen the Record and to Amend Contention Utah UU," at 6-7 n.15.

rejected an argument similar to PFS's that the Commission lost jurisdiction to reopen the record after the litigation ended (through a settlement agreement) but before issuance of a license.[20] In *Comanche Peak*, the Commission held expressly that until a license actually is issued, "there remains in existence an operating license 'proceeding' that can be "reopened."[21]

*Comanche Peak* defeats PFS's jurisdictional argument. Here, as in *Comanche Peak*, no license has yet issued. License issuance is the crucial point marking the end of any possibility of reopening an adjudicatory record. Until then, the Commission still has authority to add conditions to a license or to supplement an environmental impact statement if intervenors (or the NRC Staff itself) uncover significant, previously-unconsidered, and newly-arising safety or environmental impacts. Here, Utah argues that new information about DOE's Yucca Mountain plans requires us to restart adjudicatory hearings on the adequacy of the EIS. We have authority to consider Utah's claim. For NEPA purposes, the "major federal action" triggering the EIS is issuing the license, not adjudicating the license. Until a license issues, we must entertain motions to reopen the adjudicatory record, albeit under the strict standards of our reopening regulations.[22] In short, we have jurisdiction to consider Utah's motion to reopen, and we now proceed to consider its substance.

**B. The New Evidence Would Make No Material Difference in the Result**

In such a case as this, with the record long closed, we do not lightly reopen our adjudicatory proceedings. Agencies need not reopen adjudicatory proceedings merely on a plea of new evidence:

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[20] *Texas Utilities Electric Company* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-1, 35 NRC 1, 6 n.5 (1992).

[21] *Id.*

[22] *See* 10 C.F.R. § 2.734 (2004) (now codified at 10 C.F.R. § 2.326 (2005)). *See also* CLI-05-12, 61 NRC at 350 & n.19.

> Administrative consideration of evidence ... always creates a gap between the time the record is closed and the time the administrative decision is promulgated ... If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.[23]

Hence, in NRC practice, parties seeking to reopen a closed record must meet a stiff test: (1) the new information must raise a "significant" environmental or safety issue; and (2) a materially different result must be "likely" as a result of the new evidence.[24] Both the NRC staff and PFS argue that Utah's motion to reopen fails this test. We agree.

***1. DOE's Announcement Does Not Unequivocally Exclude PFS-Stored Waste***

The NRC Staff and PFS argue that the evidence Utah submitted does not raise a material issue because DOE's Yucca Mountain plans still have not been finalized and DOE has not yet taken a firm stance on which fuel containers it will and will not accept. According to the information Utah provided, DOE "has instructed its managing contractor to devise a plan to operate the site as a primarily 'clean' or non-contaminated facility," meaning that "*most* spent nuclear fuel would be sent to Yucca Mountain in a standardized canister that would not require repetitive handling of bare fuel."[25] But even in exploring this new option, DOE asked its contractor to come up with a recommendation for handling spent fuel that is already being stored

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[23] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 554-555 (1978) (internal quotation omitted). *See also Northern Lines Merger Cases*, 396 U.S. 491, 521 (1970).

[24] *See* 10 C.F.R. § 2.734(a) (2004). The new information must also be submitted in a "timely" fashion (except in the instance of an "exceptionally grave issue"). We find Utah's motion to be timely.

[25] *See* "Yucca Mountain – Program Redirection Fact Sheet," *supra* n. 5 (emphasis added). DOE's announcement states that it envisions that spent fuel will be delivered to Yucca Mountain "primarily" in standard canisters. *See* DOE News, "New Yucca Mountain Repository Design to be Simpler, Safer and More Cost-Effective" (Utah Motion to Reopen, Exh. 2).

in welded canisters at reactor sites.[26] At this time would be premature to conclude that DOE will *not* accept waste in PFS's welded canisters.[27]

It should be noted that Utah recognizes that DOE has not expressly excluded acceptance of PFS-type prepackaged waste. Part of the relief Utah seeks is that the license be conditioned on:

> (1) a formal DOE pronouncement that the PFS canister (HI-STORM 100 Rev. 0) is the standardized canister selected by DOE to be accepted at the Yucca Mountain Repository, and
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> (2) confirmation that DOE is obligated to collect fuel from the PFS off-site ISFSI.[28]

Thus, Utah does not claim that the HI-STORM canister PFS plans to use is absolutely incompatible with plans for ultimate disposal at the proposed Yucca Mountain repository. Rather, Utah maintains that national waste policy would be better served, in terms of transportation and handling, if the containers PFS will use and those DOE will use are one and the same.

Therefore, argues Utah, the Commission should place the entire PFS project on hold until DOE can offer guarantees that it will take the spent fuel away from PFS directly to Yucca Mountain without further handling at PFS. Alternatively, Utah argues, the Commission should amend the final environmental impact statement (FEIS) to discuss the consequences of re-

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[26] *See* Letter from W. John Arthur, III (Deputy Director, DOE Office of Civilian Radioactive Waste Management) to Ted. C. Feigenbaum, (President and General Manager of Bechtel, SAIC, DOE's contractor) dated Oct. 25, 2005 (PFS Response, Attach. 2), directing Bechtel to design new canisters and "provide recommendations on optimum methods and timing of handling waste in existing non-disposable dual purpose canisters."

[27] Under Utah's interpretation of this far from conclusive DOE statement numerous decommissioned sites using NRC-certified dual purpose canisters for storage (*e.g.*, Trojan, Maine Yankee, Haddam Neck, Rancho Seco, and Big Rock Point), would face significant problems. We question whether DOE would intend to create such difficulties.

[28] *See* State of Utah's Motion to Reopen the Record and to Amend Contention Utah UU, at 7 (Nov. 3, 2005).

transporting PFS-stored spent fuel on the assumption that it will have to be shipped back to its place of origin and repackaged.[29] But DOE's latest statements continue to leave room for accepting PFS-stored fuel at the proposed Yucca Mountain repository.[30] Hence, as when we considered Utah's prior version of its Contention UU, we cannot say on the current record that a materially different result in our licensing proceeding is so "likely" that we must reopen the adjudicatory proceeding for additional hearings and findings.

Perhaps more significantly, as we explain below, even if we were to assume all factual uncertainties in Utah's favor – that is, if we were to assume much or all of the PFS-stored spent fuel ultimately will be shipped back to originating reactors -- the consequences are not so significant that NEPA would require reopening the record and amending the FEIS. We turn now to that point.

***2. DOE's Refusal to Pick Up Fuel Would Not Raise a Significant Environmental or Safety Issue***

If we were to assume for the sake of argument that DOE will not accept waste directly from the PFS site, then -- according to Utah -- NEPA would require an analysis of the impacts of the additional transportation of fuel back to a facility capable of repackaging the spent fuel.[31] We find that the additional transportation does not raise a serious environmental issue requiring a

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[29] Indeed, the FEIS already discusses the possibility that fuel would have to be shipped back to its place of origin instead of going on to Yucca Mountain. It states that the environmental impacts of shipping the fuel to Utah were expected to be small and the effects of shipping it back would be comparable to those of shipping it to the PFS facility in the first place. *See* FEIS at G-330.

[30] *See* nn. 25-27, *supra*, and accompanying text.

[31] Utah's contention focuses on the environmental effects of transportation, but not on the effects of repackaging. Its motion to reopen mentions "handling" in only cursory terms. At any rate, it is evident that at least a large percentage of the nation's spent fuel must be stored temporarily in dry storage casks while awaiting DOE action, regardless of whether the PFS facility is available. Thus, fuel would have to be repackaged if DOE determines the existing canisters are inadequate, whether stored at PFS or not. The repackaging, if it has any effect on the environment at all, could not fairly be attributed to PFS.

supplemental EIS, nor does it raise a "significant environmental or safety issue," necessary to reopen a closed record.

As amended, Utah's proposed contention states:

> PFS's license application and NRC's final environmental impact statement fail to describe or analyze the effect of DOE's refusal to collect fuel in welded or other non-standardized canisters from the PFS site and the concomitant potential to create a dysfunctional national waste management system, and added risks and costs from multiple and unnecessary fuel shipments back and forth across the country. In addition, absent a condition that fuel will only be accepted at PFS's Skull Valley site if it can be shipped directly from PFS to a permanent repository, PFS must provide reasonable assurance that each and every fuel owner will accept the fuel back for repackaging and PFS or the fuel owner will place, up-front, in an escrow account, sufficient funds to cover the cost of fuel shipment back to the reactor or other facility for repackaging.[32]

Earlier in this proceeding, in a lengthy ruling on financial assurance, the Licensing Board considered and rejected Utah's argument that PFS should place sufficient funds in escrow to pay for transporting spent fuel back to the originating reactors.[33] The Board found the model service agreement, which makes clear that the fuel owners have the responsibility to pay for offsite transportation, ensures that there will be funds to remove the fuel from the PFS site at the end of the license.[34] Nothing in the Board's ruling suggests that its finding of adequate financial assurance was predicated on the assumption that DOE would pick the fuel up from the PFS site.[35] Therefore, the new information that Utah characterizes as showing that DOE will not accept

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[32] *See* Motion to Reopen, at 7-8, Utah's Request for Admission of Late-Filed Contention Utah UU (Ramifications of DOE's Refusal to Accept Fuel in Welded Canisters from the PFS Site) or in the Alternative Petition for Rulemaking, at 2 (Nov. 12, 2004).

[33] LBP-05-20, 62 NRC 187, 236-37 (2003), *review denied,* CLI-04-10, 61 NRC 131 (2004).

[34] *See id.*

[35] *Id.*

prepackaged fuel at Yucca Mountain does not affect the previous adjudicatory ruling that PFS is not required to place funds in escrow for shipping the fuel back to its place of origin.

This leaves the question whether the potential additional transportation impacts require a supplemental EIS, and hence requires us to reopen the record.

***a. NEPA Standards for Supplementing an EIS***

A supplemental EIS is needed where new information "raises new concerns of sufficient gravity such that another, formal in-depth look at the environmental consequences of the proposed action is necessary."[36] The new information must paint a "*seriously* different picture of the environmental landscape."[37]

NEPA case law suggests that "new information" requires a supplemental EIS when it raises a previously unknown environmental concern, but not necessarily when it amounts to mere additional evidence supporting one side or the other of a disputed environmental effect. For example, the Fourth Circuit ruled that the Army Corps of Engineers would have to supplement its EIS after the Environmental Protection Agency informed the Corps that its proposed project would cause a "devastating" zebra mussel infestation to a wild river and wipe out populations of endangered native mussels.[38] On the other hand, in *Wisconsin v. Weinberger*, the Seventh Circuit approved the Navy's decision not to supplement its EIS with respect to the effects of electromagnetic radiation where additional studies done after its publication had inconsistent results and limited relevance to the Navy's proposed project.[39] The Seventh Circuit held that

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[36] *Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984). *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989).

[37] *National Comm. for the New River v. FERC,* 373 F.3d 1323, 1330 (D.C. Cir. 2004), *quoting City of Olmsted Falls v. FAA*, 292 F.3d 261, 274 (D.C. Cir. 2002)(emphasis in original).

[38] *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 444 (4th Cir. 1996).

[39] *Weinberger*, 745 F.2d at 422-23.

those studies that suggested electromagnetic radiation could be harmful at high doses did not "alter the view" of the likely environmental effect of the Navy's use of low doses of electromagnetic radiation.

Similarly, in *Marsh v. Oregon Natural Resources Council,*[40] the Supreme Court accepted the Army Corps of Engineers' reasoning for not supplementing the EIS for a proposed dam to consider a study and related memorandum claiming that the dam would raise water temperature and turbidity downstream -- effects which had already been studied. The Court deferred to the Corps' conclusion that "the new and accurate information contained in the documents was not significant and that the significant information was not new and accurate."[41]

We think that the effects of additional transportation – if such transportation in fact proves necessary – are not so significant or central to the FEIS's discussion of environmental impacts that an FEIS supplement (and the consequent reopening of our adjudicatory record) is reasonable or necessary. The FEIS analyzed the impacts of shipping waste from eastern reactors to the PFS facility, and (ultimately) on to the Utah-Nevada border.[42] The FEIS showed that transportation of the fuel to the PFS facility is not anticipated to have significant environmental impacts.[43] Specifically, it found that the non-radiological risks from transportation-related pollution were small,[44] risks from transportation accidents were "small,"[45] and radiological risks of transportation

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[40] 490 U.S. 360 (1989).

[41] *Id.* at 378.

[42] *See* NUREG-1714, Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, (FEIS), Section 5.7, "Human Health Impacts of SNF Transportation," 5-35 to -64.

[43] *Id.*

[44] *Id*. at 5-39.

[45] *Id*. at 5-38.

were also "small."[46] While loading the fuel back onto trucks or trains and shipping it back to originating reactors would no doubt be costly, the environmental effects would be of the type and severity (that is, "small") originally discussed in the FEIS. Indeed, the FEIS stated expressly that re-shipment, should it prove necessary, would have "small" impacts.[47]

***b. Cost-Benefit Analysis***

The potential economic impacts of additional transportation are more pronounced than the potential environmental impacts. The FEIS considered the most significant economic benefit of the project to be the storage costs the fuel owners would save.[48] The additional transportation of fuel back to the originating reactor no doubt would increase the customer's expenses, reducing the project's economic benefits to the customer, and altering balance of the costs to benefits as described in the FEIS. Because the difference in the analysis is primarily *financial*, however, we do not find that NEPA requires a re-analysis this late in the licensing proceeding.

We have previously rejected a challenge to the PFS FEIS that was based primarily on economics.[49] We recognize that NEPA requires a weighing of the environmental costs of a project against its benefits to society at large.[50] While economic benefits are properly considered in an EIS, NEPA does not transform the financial costs and benefits into environmental costs and benefits.

***c. Additional License Conditions Are Unnecessary.***

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[46] *Id*. at 5-39 to -41.

[47] *See* FEIS at G-330.

[48] FEIS at 8-4.

[49] *See* CLI-04-22, 60 NRC 125, 141-46 (2004).

[50] *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998).

Utah also asks that even if we do not reopen the adjudicatory record to allow litigation on the implications of DOE's recent announcement, we nevertheless should impose conditions on PFS's license as follows:

> (1) a formal DOE pronouncement that the PFS canister (HI-STORM 100, Rev. 0) is the standardized canister selected by DOE to be accepted at the Yucca Mountain Repository, and
>
> (2) confirmation that DOE is obligated to collect fuel from the PFS off-site ISFSI.[51]

Utah cites no provision in law requiring the condition it asks NRC to impose. Utah does point to a provision in the Nuclear Waste Policy Act (NWPA) authorizing the Commission to predicate a reactor license on the licensee's first entering a waste disposal contract with DOE,[52] and advocates that a similar requirement be imposed on PFS.

The NRC, of course, has general authority to impose reasonable restrictions on licenses to protect public health and safety and common defense and security.[53] But there are potential obstacles to requiring such a condition here. First of all, DOE has no statutory duty (or evident authority) to enter into a disposal contract with PFS directly (although it continues to have a statutory duty and contractual duty to the spent fuel owners ultimately to dispose of the spent fuel). Second, DOE would be understandably reluctant to enter into an agreement to accept a particular canister when it has just begun exploring the option of designing the facility to use a standard, DOE-provided canister. And, third, we see no health-and-safety basis for requiring an agreement with DOE in advance of licensing.

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[51] *See* State of Utah's Motion to Reopen the Record and to Amend Contention Utah UU, at 6 (Nov. 3, 2005).

[52] *See*, *e.g.,* Nuclear Waste Policy Act of 1982, § 302(b)(1)(B), 42 U.S.C. § 10222(b)(1)(B).

[53] *See* Atomic Energy Act § 161b, 42 U.S.C. § 2201b.

Including a "DOE agreement" condition in PFS's license effectively would place the approval of the PFS project in DOE's hands, and would put the project on hold until DOE finalizes its plans. We do not think that the NWPA was intended to have any such effect. To the contrary, that Act expressly encouraged the development of dry cask storage and temporary storage facilities.[54] Delaying a *temporary* storage facility until such time as DOE completes its design of a *permanent* facility would considerably diminish the temporary facility's usefulness. To force PFS to put its facility on hold until the plans for a permanent repository are finalized would violate the spirit, if not the letter, of the NWPA and would thwart the nation's statutory and regulatory scheme putting the NRC in charge of licensing commercial or private spent fuel storage facilities and making sure they are safely built and operated.

[54] *See, e.g.*, Nuclear Waste Policy Act, § 218 (Research and Development on Spent Nuclear Fuel), 42 U.S.C. § 10198.

We therefore decline to impose the license conditions Utah proposes.

## III. CONCLUSION

For the foregoing reasons, we deny Utah's motion in its entirety.[55]

IT IS SO ORDERED.

For the Commission

***/RA by Andrew L. Bates Acting For/***

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, MD
This 31st day of January, 2006

[55] Although we decide today that Utah's motion to reopen does not justify formally supplementing the FEIS, our memorandum and order becomes part of the agency's NEPA record of decision, as we have pointed out in other decisions in this docket. *See, e.g.,* CLI-02-25, 56 NRC 340, 356 n.66 (2002).