

December 13, 2001

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF THE SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Private Fuel Storage, a Limited Liability  
Company;

(Independent Spent Fuel Storage  
Installation).

Docket No. 72-22-ISFSI  
ASLBP No. 97-732-02-  
ISFSI

**SOUTHERN UTAH WILDERNESS ALLIANCE'S (SUWA)  
RESPONSE (AND OBJECTION) TO APPLICANT'S  
MOTION FOR RECONSIDERATION OF RULING ON SUWA'S CONTENTION B**

In Memorandum and Order LPB-01-34, dated November 30, 2001, the Atomic Safety and Licensing Board (the Board) denied a motion for summary disposition relative to SUWA Contention B (SUWA B) filed by the applicant Private Fuel Storage, L.L.C. (PFS). Subsequently, PFS filed a motion for reconsideration of this denial. Because the Board's ruling was proper and PFS's arguments otherwise fail, SUWA respectfully asks the Board to reconfirm that PFS's motion for summary disposition is denied.

**ARGUMENT**

To argue for reconsideration and reversal of the Board's decision, PFS makes two unavailing arguments. SUWA shows the failures of these arguments in sequence.

**A. SUWA's Purported Failure to Challenge PFS's Statement of Material Facts is Irrelevant to the Board's Ultimate Ruling.**

First, PFS contends that because SUWA failed to adequately challenge PFS's statement of undisputed material facts, PFS is entitled to summary disposition of SUWA B. PFS's Motion for Reconsideration of SUWA B at 2-6. However, what PFS forgets is that SUWA's failure is

irrelevant to the Board's ultimate ruling. As the Board already stated, the "SUWA pleading defect turns out not to be controlling . . . ." LBP-01-34 at 12. This is because, in rejecting PFS's motion for reconsideration, the Board relied on the statement by the Nuclear Regulatory Commission Staff (the Staff) that the Staff had "**not** fully evaluated" the proposed western alignment for the rail spur. LBP-01-34 at 13, *citing* Zimmerman Affidavit at 5, ¶ 19 ("the Staff has not been given the specific design details or a detailed alignment for this alternative . . . . Hence, the Staff has not fully evaluated this alternative . . . ."). Based on this admission, the Board properly concluded that the Staff, which, under the National Environmental Policy Act (NEPA) must "independently evaluate and be responsible" for all information relative to NEPA compliance, had not fulfilled its NEPA duties.

In other words, because the Staff admitted that it had not fully evaluated the proposed alternative, SUWA's contention remains valid – the Staff, which is responsible for meeting NEPA's requirements, had not **analyzed** a range of reasonable alternatives to the proposed rail spur. *See, Colorado Environmental Coalition v. Domback*, 185 F.3d 1162, 1174 (1999) (under NEPA's alternative analysis, the "heart" of the EIS, the agency must "rigorously explore all reasonable alternatives to [the proposed project] in comparative form, and give each alternative **substantial** treatment in the environmental impact statement") (emphasis added). Indeed, as the Board stated, the Staff's failure to evaluate the western alternative was such that the Staff could not even express "an opinion on the validity of the PFS material factual statements regarding this [western] alternative alignment." LBP-01-34 at 14.

Thus, PFS's argument regarding SUWA's failure to respond to the PFS statement of material facts is irrelevant to the Board's final ruling preserving SUWA B for further

consideration. As a result, PFS's contention that the Board should change its ruling on the basis of SUWA's non-response necessarily fails and the Board should reassert its conclusion.

**B. Because, the Board Cannot Engage in Fact Finding at the Summary Disposition Stage, the Board Cannot Now Amend the EIS *Pro Tonto*.**

Second, PFS suggests that even though the Board determined and the Staff did not analyze the western alternative, the Board should do so. On this basis, PFS argues, the Board should then grant the applicant its motion for summary disposition. PFS Motion for Reconsideration of SUWA B at 6-10. This argument is easily discredited.

As the Board has stated repeatedly, summary disposition is appropriate only where there are "no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." LBP-01-34 at 4-5, *quoting* LBP-99-23, 49 NRC 485, 491 (1999) (internal quotations and citations omitted). Initially, on the basis of the Staff's admission that it did not evaluate the western alternative, the Board cannot determine on the basis of the undisputed facts before it, that the Staff has fulfilled its NEPA duties. Indeed, the Board is compelled to determine the opposite – that the Staff has not analyzed a range of reasonable alternatives to the proposed rail spur.

In addition, in reviewing a motion for summary disposition, the Board will never weigh the evidence or find the facts. Instead, the Board's role is limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring further inquiry. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (motion for summary judgment). Thus, what PFS asks the Board to do in the context of its motion for summary disposition is impossible – to evaluate the western alternative. PFS Motion for Reconsideration at 8. This evaluation is necessarily a factual determination. While such an inquiry may be proper at hearing, it is not

proper for the Board to make this factual determination when considering a motion for summary disposition.

Moreover, to the extent that PFS also argues that the Board can “evaluate” the western alternative based on PFS’s statement of undisputed facts, the applicant’s argument also fails. Such an “evaluation” does not constitute analysis for the purposes of NEPA compliance. While the PFS statement of facts may be admitted for the purposes of a summary disposition, that does not mean that “acceptance” of these facts represent “**substantial** treatment” in an environmental impact statement. PFS’s suggestion to the contrary – that amendment of an EIS after a hearing is analogous to amendment after a motion for summary disposition – has no merit. This is because, as the case law establishes, the Board will not make factual determinations at the summary disposition stage, while it is well within its powers to do so after a hearing.

Finally, PFS’s argument regarding amendment of the EIS has no bearing on the Board’s other reasons for denying the applicant’s motion for summary disposition. For example, the Board stated plainly that

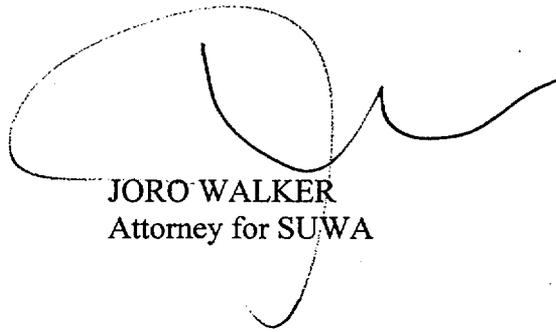
nothing in this ruling precludes further litigation regarding the expressed SUWA concern about the sufficiency of the environmental impact analysis of fire buffer zone alignment alternatives or the validity of the PFS premise that State lands are unavailable for rail spur use.

LBP-01-34 at 14, Fn. 8. Thus, even if the Board were to evaluate the western alternative and somehow find it adequate, SUWA B would remain unresolved. This is because the issues of the fire buffer and the availability of State lands, which are key to a determination of the adequacy of the Staff’s alternatives analysis, have not been decided in the context of the motion of summary disposition.

### III. CONCLUSION

For the above reasons, PFS's motion for summary disposition is without merit. The Board's reconsideration of this motion should lead to the same result. PFS's motion should be rejected.

Respectfully submitted December 13, 2001.



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UNITED STATES OF AMERICA  
BEFORE THE  
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**CERTIFICATE OF SERVICE**

I hereby certify that copies of **Southern Utah Wilderness Alliance's Response to Applicant's Motion for Reconsideration of Ruling on SUWA's Contention B** was served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 13th day of December 2001.

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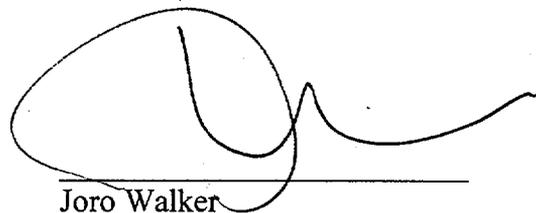
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