

DOCKETED
USNRC
April 1, 2002
2002 APR 11 AM 11:14
OFFICE OF THE SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board

In the Matter of)
)
PRIVATE FUEL STORAGE, L.L.C.) Docket No. 72-22-ISFSI
)
(Private Fuel Storage Facility))

APPLICANT'S MOTION TO STRIKE PORTIONS OF
TESTIMONY OF JAMES C. CATLIN REGARDING CONTENTION SUWA B AND
EXHIBIT SUWA 3

Pursuant to the Order (General Schedule Revisions) of the Atomic Safety and Licensing Board ("Board") dated September 20, 2001, Applicant Private Fuel Storage, L.L.C. ("Applicant" or "PFS") files this motion to strike part of "Testimony of James C. Catlin on the Wilderness Character of the North Cedar Mountains Contention SUWA B", dated March 18, 2002 ("Catlin Testimony") submitted by intervenor Southern Utah Wilderness Alliance ("SUWA") as well as Exhibit SUWA 3. The parts of Dr. Catlin's testimony subject to the motion concern Congressional action (or inaction) to designate the North Cedar Mountains area as a wilderness area, a subject which is outside the scope of SUWA Contention B ("SUWA B") as a result of the Board's Memorandum and Order (Granting Late-filed Intervention Petition), LBP-99-03, 49 NRC 40, 51 n. 6, aff'd, CLI-99-10, 49 NRC 318 (1999), and (Memorandum and Order (Denying Motion for Summary Disposition Regarding Contention SUWA B), LBP-01-34, 54 NRC 293 (2001).

I. BACKGROUND

SUWA B, admitted in February 1999, challenged the adequacy of PFS' consideration of "alternatives to the Low Corridor Rail Spur and the associated fire buffer zone that will preserve

the wilderness character and the potential wilderness designation of a tract of roadless Bureau of Land Management (BLM) land – the North Cedar Mountains – which it crosses.” LBP-99-3, 49 NRC at 53. In determining that SUWA had standing to raise this issue, the Board rejected the argument put forward by Applicant and the NRC Staff that the decision by the BLM to classify the North Cedar Mountains area as “wilderness” rendered any injury by SUWA as speculative, thus deprived SUWA of standing. The Board stated:

Both PFS and the Staff maintain that the fact BLM previously declined to designate the area in question as potential ‘wilderness’ area for further consideration by Congress renders speculative any SUWA injury in losing the opportunity to have the land designated for protection.... As we have noted, however, in the context of NEPA, even absent the FLPMA statutory scheme, there would be a need to consider the natural state of the land and alternatives, if any, that would be available to preserve that status.

Id. at 51 n. 6 (citation omitted).

On June 29, 2001, PFS filed a Motion for Summary Disposition on SUWA B. One of the arguments relied upon by Applicant in support of its motion was that the BLM had considered and rejected the North Cedar Mountains area for designation as wilderness and that bills to designate as wilderness certain lands in Utah (not including the North Cedar Mountains area) had been introduced in Congress but never passed. Applicant’s Motion for Summary Disposition of Contention SUWA B – Railroad Alignment Alternatives, June 29, 2001, at 6-9. The NRC Staff response to the PFS motion similarly relied upon BLM’s actions and Congress’ inaction. NRC Staff’s Response to Applicant’s Motion for Summary Disposition of Contention SUWA B – Railroad Alignment Alternatives, July 19, 2001, at 11-14.

The Board denied Applicant’s motion, explicitly considering and rejecting PFS’ and the NRC Staff’s arguments as to the relevance of BLM’s and Congress’ actions.

Addressing first the PFS and the Staff claims that in previous evaluations the BLM and the Congress have failed to acknowledge

NCMA as a wilderness area, thereby rendering contention SUWA B moot, we note that, as SUWA indicates, this issue previously was raised by both PFS and the Staff and addressed by the Board in admitting contention SUWA B. As we stated in LBP-99-3, 49 NRC at 51 n.6 (citation omitted):

Both PFS and the Staff maintain that the fact BLM previously declined to designate the area in question as potential 'wilderness' area for further consideration by Congress renders speculative any SUWA injury in losing the opportunity to have the land designated for protection.... As we have noted, however, in the context of NEPA, even absent the FLPMA statutory scheme, there would be a need to consider the natural state of the land and alternatives, if any, that would be available to preserve that status.

Having already ruled on this issue, the Board sees no reason to reconsider its determination at this time.

Memorandum and Order (Denying Motion for Summary Disposition Regarding Contention SUWA B), LBP-01-43, 54 NRC at 301-02 (footnote omitted).

II. DISCUSSION

A. Testimony on Future Congressional Action

The Board should strike those parts of Dr. Catlin's testimony described below that speculate as to possible future Congressional action designating the North Cedar Mountains area as wilderness, because those portions are outside the scope of SUWA B.

1. Testimony Outside the Scope of a Contention Should Be Excluded

Under NRC regulations governing testimony at hearings, "[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an [otherwise] admissible document will be segregated and excluded so far as is practicable." 10 C.F.R. § 2.743(c). NRC case law is clear that "an intervenor is bound by the literal terms of its own contention," and "the reach of a contention necessarily hinges upon its terms coupled with its stated bases." Public Service Company of New Hampshire (Seabrook Station, Units 1

and 2), ALAB-899, 28 NRC 93, 97 & n.11 (1988). An intervenor is also bound by the literal terms of its contention as described by a licensing board. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 284 (1987). Particularly here, where the Board has explicitly described the scope of the contention as excluding specific arguments, testimony which addresses the excluded argument has no place in the proceeding.

2. Portions of Dr. Catlin's Testimony Deal with Congressional Consideration of Purported Wilderness Areas and Should be Stricken

Dr. Catlin's testimony contains a lengthy answer which deals with possible future consideration by Congress of the North Cedar Mountains area and are therefore outside the scope of the SUWA B. Question 9 in Dr. Catlin's Testimony states:

Q9. The BLM decides whether or not an area is designated a Wilderness Study Area (WSA), and the agency has decided against this area. Does the agency have the final word in the matter?

His answer argues that Congress could decide to designate an area as wilderness regardless of what BLM recommends and that a bill has been introduced which designates certain Utah lands as wilderness.

A9. Actually, the agency does not have the final word in the wilderness debate. Congress has been given the authority to actually designate wilderness, so Congress has the final word. It is true that the BLM gets to decide what is a WSA and what is not, but Congress is by no means bound to restrict itself only to those areas that the BLM has named as WSAs when it designates wilderness. In fact, there is currently a statewide wilderness bill for Utah before Congress called America's Redrock Wilderness Act. It contains lands in Utah that the BLM recognizes as having wilderness character as well as lands—like the North Cedar Mountains—that the BLM has not yet recognized as having wilderness character. The bill has substantial support in Congress. At last check, it had 159 cosponsors in the House and 15 in the Senate. If this bill passes and becomes law, it will designate as wilderness lands that the BLM has chosen to ignore with regard to wilderness. Similarly, there have been bills proposed in Congress in the recent past that would have designated wilderness lands in only specific portions of the state of Utah, such as the west desert region, or, even smaller, the Pilot Range. It

is entirely possible that the North Cedar Mountains area could be included in one of these less comprehensive bills before Congress, and that it could gain wilderness designation that way. So, just because the BLM has not yet recognized the wilderness character of lands it manages does not mean that those lands are not being considered by Congress for wilderness designation.

Catlin Testimony at 6.

Indeed, SUWA made exactly that argument in responding to PFS' motion. See Southern Utah Wilderness Alliance's (SUWA) Response (and Objection) to Applicant's Motion for Summary Disposition of SUWA's Contention B, dated July 23, 2001, at 10 ("Already, this Board determined that unwillingness of BLM or Congress to extend wilderness protection to the area had no relevance to SUWA's contention that the NRC must formulate and consider a range of reasonable alternatives to the Low Corridor Rail Spur.") If BLM's and Congress' failure to designate the North Cedar Mountains area as wilderness was irrelevant with respect to PFS' Motion for Summary Disposition of SUWA B, testimony on possible future action by Congress to designate the area as wilderness must likewise be irrelevant. If BLM's and Congress' actual unwillingness to afford wilderness protection to the area cannot support summary disposition, then certainly possible speculative, future action by Congress to take such action is clearly irrelevant.

B. Exhibit SUWA 3

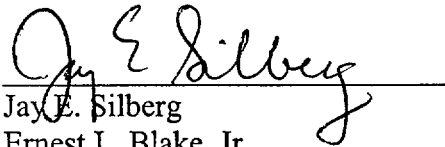
Applicant also moves to strike Exhibit SUWA 3, a portion of a pleading apparently filed in June 2001 on behalf of SUWA before the U.S. Department of the Interior, Office of Hearings and Appeals, Interior Board of Land Appeals. The Exhibit is nowhere referenced in Dr. Catlin's Testimony and therefore it is impossible to determine the purpose for which the Exhibit is sought to be introduced. To the extent that SUWA seeks to introduce it in support of Dr. Catlin's Testimony it is redundant and repetitive. To the extent that SUWA seeks to introduce it in order to put into the record factual information beyond that contained in Dr. Catlin's Testimony, the

document has no evidentiary value as a legal pleading. To the extent that SUWA intends to use the Exhibit to put into evidence materials that are referenced in the Exhibit, such incorporation by reference is inappropriate since SUWA has neither identified the referenced information, nor provided copies of such information to the Board and the parties. Nor is it clear that such referenced information was provided to PFS during the discovery process. Any one of these reasons warrants the exclusion of Exhibit SUWA 3. The combination of these deficiencies mandates its exclusion.

III. CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the Board strike those parts of Dr. Catlin's testimony on SUWA B identified above regarding Congressional action/inaction on wilderness area designations as well as Exhibit SUWA 3.

Respectfully submitted,



Jay E. Silberg
Ernest L. Blake, Jr.
Paul A. Gaukler
SHAW PITTMAN
2300 N Street, N.W.
Washington, DC 20037
(202) 663-8000
Counsel for Private Fuel Storage, L.L.C.

April 1, 2002

1226821v1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
PRIVATE FUEL STORAGE L.L.C.)	Docket No. 72-22
)	
(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the “Applicant’s Motion to Strike Portions of Testimony of James C. Catlin Regarding Contention SUWA B and Exhibit SUWA 3” were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 1st day of April, 2002.

Michael C. Farrar, Esq. Chairman
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: MCF@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: JRK2@nrc.gov; kjerry@erols.com

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: PSL@nrc.gov

*Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications
Staff
e-mail: hearingdocket@nrc.gov
(Original and two copies)

Catherine L. Marco, Esq.
Sherwin E. Turk, Esq.
Office of the General Counsel
Mail Stop O-15 B18
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: pfscase@nrc.gov

John Paul Kennedy, Sr., Esq.
David W. Tufts, Esq.
Confederated Tribes of the Goshute
Reservation and David Pete
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, Utah 84105
e-mail: dtufts@diplaw.com

Diane Curran, Esq.
Harmon, Curran, Spielberg &
Eisenberg, L.L.P.
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
e-mail: dcurran@harmoncurran.com

Paul EchoHawk, Esq.
Larry EchoHawk, Esq.
Mark EchoHawk, Esq.
EchoHawk PLLC
P.O. Box 6119
Pocatello, ID 83205-6119
e-mail: paul@echohawk.com

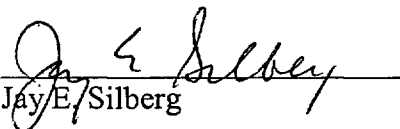
* Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Denise Chancellor, Esq.
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, Utah 84114-0873
e-mail: dchancel@att.state.UT.US

Joro Walker, Esq.
Land and Water Fund of the Rockies
1473 South 1100 East
Suite F
Salt Lake City, UT 84105
e-mail: lawfund@inconnect.com

Tim Vollmann, Esq.
Skull Valley Band of Goshute Indians
3301-R Coors Road, N.W.
Suite 302
Albuquerque, NM 87120
e-mail: tvollmann@hotmail.com

* By U.S. mail only


Jay E. Silberg