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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

2002 APR 17 AM 8: 53

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD OFFICE OF THE SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

<p>In the Matter of</p> <p>Private Fuel Storage, L.L.C.</p> <p>(Independent Spent Fuel Storage Installation)</p>	<p>Docket No. 72-22-ISFSI</p> <p>ASLBP No. 97-732-02-ISFSI</p> <p>April 8, 2002</p>
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**SUWA's Response to Motion in Limine and Motion to Strike Filed by the NRC Staff and Applicant Concerning Contention SUWA B**

INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.730 and 2.743(c), and the Atomic Safety and Licensing Board's "Prehearing Memorandum: Summary and Order," dated March 22, 2002, the Southern Utah Wilderness Alliance (SUWA) hereby responds to the April 1, 2002 motion in limine filed by the Staff of the Nuclear Regulatory Commission (NRC Staff or the Staff) to exclude Exhibit SUWA 3 and portions of prefiled testimony of Dr. James C. Catlin, and to the April 1, 2002 Motion to Strike Portions of the Testimony of James C. Catlin filed by Private Fuel Storage, L.L.C. (PFS or the Applicant). SUWA opposes these motions.

DISCUSSION

A. Legal Standards

Admissibility of evidence in a Nuclear Regulatory Commission (NRC) adjudicatory proceeding is governed by rules set forth in 10 C.F.R. § 2.743(c), which

Template = SECY-041

SECY-02

states that “[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted.”

#### B. Congressional Consideration of Proposed Wilderness

Both NRC Staff and PFS move to strike or exclude portions of Dr. Catlin’s testimony that concern possible future designation of North Cedar Mountains area (NCMA) as Wilderness by the United States Congress. PFS alleges that future action by Congress with regard to the wilderness character of the NCMA is irrelevant. *See*, Applicant’s Motion to Strike Portions of Testimony of James C. Catlin Regarding Contention SUWA B and Exhibit SUWA 3 (Applicant’s Motion) at 5. Similarly, the NRC Staff submits that such testimony “should be stricken as irrelevant.” NRC Staff’s Motion in Limine to Exclude Exhibit SUWA 3 and Portions of Prefiled Testimony of Dr. James C. Catlin, (NRC Staff’s Motion) at 3. SUWA disagrees with both the NRC Staff and PFS regarding this issue, and offers the following discussion of the relevance of future actions of the United States Congress.

The NRC Staff argues that any discussion of possible future Congressional action regarding wilderness designation of the NCMA “has no relevance to any issue admitted in Contention SUWA B.”<sup>1</sup> NRC Staff’s Motion at 3. PFS argues that Dr. Catlin’s testimony has no bearing on NRC’s obligation to consider a full range of alternatives to the Low Corridor Rail Spur. *See*, Applicant’s Motion at 5. PFS further argues that SUWA’s own response to PFS’ Motion for Summary Disposition Regarding Contention

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<sup>1</sup> Contention SUWA B asserts that the License Amendment [and later FEIS] “fails to develop and analyze a meaningful range of alternatives to the Low Corridor rail spur and 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.”

SUWA B demonstrates that the opinions and potential future actions of Congress have no bearing on Contention SUWA B. *See*, Applicant's Motion at 5. *See also*, 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").

In response to the latter argument, PFS misconstrues SUWA's statement. SUWA's intent was to point out that Congressional or agency inaction is not a valid reason for the NRC Staff to end the inquiry as to what constitutes a valid formulation and analysis of a range of alternatives for National Environmental Policy Act (NEPA) purposes. SUWA did not intend to suggest—as PFS does—that Congress' or BLM's inaction with regard to wilderness in the NCMA is wholly irrelevant to the issue at hand. Moreover, the Board's ruling on this issue indicates that it endorses this same interpretation of the relevance of Congressional action relative to the NCMA. *See*, LBP-99-3, 49 NRC at 51, n. 6; LBP-01-34 (Memorandum and Order Denying Motion for summary Disposition Regarding Contention SUWA B) at 11 ("[e]ven 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"). Thus, the Board's ruling and SUWA's statements regarding that ruling do not suggest that Dr. Catlin's testimony is irrelevant to SUWA B – just that it is not dispositive of the issue of alternatives.

Dr. Catlin's testimony regarding significant Congressional support for the NCMA is relevant for other reasons as well. The NRC Staff analyzed four alternative local rail transportation options: the Low rail corridor, the west valley rail alternative, and two other options that "were eliminated from detailed evaluation in the FEIS." NRC Staff's Objections and Responses to Southern Utah Wilderness Alliance's (SUWA) First Set of Discovery Requests Directed to the NRC Staff at 8. This analysis represents the full extent of the staff's investigation into alternative rail routes. Id.

When examining the impacts to wilderness character from the Low rail corridor and the west valley alignment—the heart of the issue posed by Contention SUWA B—the FEIS states:

impacts to wilderness values from the proposed rail line [the Low rail corridor] would not significantly differ from impacts expected from the west valley alternative route, *because the North Cedar Mountains contain no wilderness or wilderness study designation and contain no wilderness values or characteristics.*

FEIS, 2.2.4.2 at 2-49 (emphasis added).

The Staff's perception that the NCMA "contain[s] no wilderness values or characteristics" is critical in this instance, because it informed the development of rail spur alternatives and prejudiced the Staff's analysis of the west valley alternative. Because, as the FEIS makes clear, the Staff removed the NCMA's wilderness values from the equation, the Staff felt no inclination to develop and analyze the west valley alternative fully. For the same reason, its balancing of the benefits and harms of the west valley alternative is necessarily ill-informed. Thus, the issue of Staff's evaluation of wilderness character in the NCMA is central to Contention SUWA B that the FEIS "fails to develop and analyze a meaningful range of alternatives to the Low Corridor rail spur and associated fire buffer zone that will preserve the wilderness character" of the NCMA.

In this context, the issue of pending legislation and potential future Congressional action is clearly relevant and significant. As of this writing, 159 members of the United States House of Representatives and 15 Senators have cosponsored legislation<sup>2</sup> that, if passed, would designate the NCMA, among other areas, as wilderness, pursuant to the 1964 Wilderness Act. Such support of wilderness designation for the NCMA reveals that these members of Congress have recognized and want to protect the NCMA's wilderness characteristics. That the NRC Staff ignored this Congressional finding and relied solely on a contested BLM inventory when determining the wilderness character of the NCMA makes Congress's endorsement of the NCMA for wilderness designation highly relevant.

Importantly, this Board has stated that the question of wilderness character is central to the issues regarding Contention SUWA B:

[g]iven that there has been no statutory wilderness designation regarding the NCMA, in any further litigation concerning this contention the question of the 'natural state' of the area at issue will be a matter for party presentations via direct and/or cross-examination testimony.

Memorandum and Order (Denying Motion for Summary Disposition Regarding Contention SUWA B) at 11, n.4. In addition, this same refusal to recognize wilderness values in the NCMA led the Staff to undertake a limited and incomplete analysis of local transportation alternatives, and thus led to a violation of NEPA, as alleged in Contention SUWA B. Dr. Catlin's testimony regarding Congressional support and potential future Congressional action is therefore relevant and material to the issues presented in Contention SUWA B, and should not be removed from the record.

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<sup>2</sup> "America's Redrock Wilderness Act," H.R. 1613, S. 786.

C. Exhibit SUWA 3

Both PFS and the NRC Staff move to strike Exhibit SUWA 3. PFS claims that Exhibit SUWA 3 is either redundant, has no evidentiary value, or is inappropriate. *See*, Applicant's Motion at 5-6. NRC Staff submits that Exhibit SUWA 3 lacks foundation and is inappropriate for inclusion in testimony. *See*, NRC Staff's Motion at 4-5. SUWA seeks to clarify the reason Exhibit SUWA 3 was included with Dr. Catlin's prefiled testimony.

SUWA included Exhibit SUWA 3 solely to respond to the Staff's reliance, in the FEIS, on the Bureau Land Management's (BLM) decision not to reinventory the NCMA for wilderness character. The Staff referenced the BLM determination denying SUWA's proposal under the Wilderness Inventory Handbook (BLM Manual H-6310-1) in the FEIS as evidence that the NCMA does not contain wilderness values. *See*, FEIS at 2.2.4.2, page 2-49.

In turn, SUWA 3 establishes that the BLM's refusal to reassess the NCMA is under appeal and should not be considered as a final decision. Exhibit SUWA 3 contains selected pages from a Notice of Appeal, Statement of Reasons, and Request for Stay Re: Utah State [BLM] Director Sally Wisely's Decision Partially Denying Southern Utah Wilderness Alliance's Protest of Inclusion of Certain Parcels in the May 22, 2001, Competitive Oil and Gas Lease Sale. As a component of this protest, SUWA asserts that the BLM failed to follow the 2001 Wilderness Inventory Handbook guidelines when it determined that SUWA's new and supplemental information regarding the wilderness character of the NCMA did not differ significantly from previous BLM inventories. As

a result of SUWA's appeal, this issue is still alive before the Office of Hearings and Appeals, Interior Board of Land Appeals (IBLA)—the adjudicatory branch of the BLM.

In sum, because the Staff first raised the issue, SUWA 3 is a directly relevant to the Staff's statement of facts in the FEIS and the "natural condition" of the NCMA. As such, SUWA 3 is properly before this Board.<sup>3</sup>

D. Impacts of the Proposed Low Corridor Rail Line

NRC Staff contends that two assertions made in Dr. Catlin's response to question 10 of prefiled testimony lack legal foundation. NRC Staff's Motion at 3. First, the NRC Staff alleges that Dr. Catlin's mention of the possibility of a road or access route accompanying the proposed rail line is inappropriate because Dr. Catlin does not provide any testimony that that there would, in fact, be a road or access route. NRC Staff's Motion at 3. Second, the NRC Staff suggests that Dr. Catlin lacks the proper qualifications to address the issue of wildfire propagation and wildfire propagation resulting from the proposed rail line. SUWA opposes, and offers the following discussion in support of Dr. Catlin's assertions.

In response to the NRC Staff's first issue, SUWA does not disagree that Dr. Catlin does not provide testimony that a road or access route will accompany the proposed rail lines. However, in the case of the proposed west valley alignment, the FEIS gives little information as to the details of the rail line. While the FEIS contains a specific diagram showing that the cross-section of the proposed Low corridor alignment

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<sup>3</sup> If it will not accept SUWA 3 as an exhibit, SUWA requests that the Board take judicial notice of the appeal referenced in SUWA 3.

includes no road or access route, the FEIS does not include such detail in its description of the west valley alignment. See, FEIS Figure 2.5 at 2-17. The FEIS does not include a cross section of the proposed west valley rail alignment, nor does it specify the method or methods by which the proposed west valley alignment would be maintained. Thus, it is not unreasonable to assume that an access road might be involved in the maintenance of the proposed route. Furthermore, Dr. Catlin does not positively assert that a road *will* be built. Instead, he simply suggests impacts that *would* occur *if* a road were to be a part of the proposed alignment. As noted above, the FEIS is vague concerning this aspect of the west valley alignment, and it is therefore not unreasonable for Dr. Catlin to discuss the possible impacts of any potential access routes built in relation to the proposed rail line.

The NRC Staff's second issue also involves an assertion made by Dr. Catlin in his reply to question 10 in SUWA's prefiled testimony. NRC Staff claims that Dr. Catlin is not "qualified as an expert to address the ignition and propagation of wildfires or to opine as to the likelihood that a rail line could lead to destructive fires." NRC Staff's Motion at 4. Again, SUWA disagrees. Dr. Catlin holds a Ph.D. from the University of California at Berkeley's Department of Science, Policy, and Management and studied the influence of the Geographic Information System (GIS) on natural resource management. Dr. Catlin also has served as the director of the Wild Utah Project since 1996, and as such has provided scientific analysis for a number of Utah environmental organizations. Dr. Catlin has extensive experience in dealing with wildfire issues through both his educational experience and his professional experience. As a result, Dr. Catlin is well qualified to discuss wildfire ignition and propagation, particularly in remote arid and semi-arid environments, as well as the potential impacts of the proposed rail line on



wildfires in the NCMA. Even if Dr. Catlin cannot speak to the increased likelihood of wildfire ignition due to the proposed rail line, he is well qualified, and the NRC Staff makes no argument otherwise, to testify to the impacts to wilderness of wildfires, if such fires occur.

#### E. Bureau of Land Management Inventory Errors

The NRC Staff moves to exclude portions of the testimony of Dr. Catlin relating to errors made by the BLM in its assessment of the wilderness character of public lands in areas other than the North Cedar Mountains Area (NCMA). Specifically, the NRC Staff suggests that Dr. Catlin should not refer to errors committed by the BLM outside the NCMA, as these have no relevance to Contention SUWA B. NRC Staff's Motion at 2. Again, SUWA opposes this motion to strike and offers the following discussion in support of Dr. Catlin's testimony.

The NRC Staff asserts that any errors made outside the NCMA in assessing the wilderness characteristics of public lands during its 1980 inventory process are not relevant to Contention SUWA B, but these claims lack merit. The BLM's errors during the 1980 inventory process demonstrate a consistent pattern in which the agency failed to recognize the wilderness values of public lands in Utah. The BLM as much as admitted this when it reinventoried certain lands in Utah (not including the NCMA) in the late 1990s and found that *lands it had previously dismissed as lacking wilderness character did, in fact, contain wilderness character pursuant to the 1964 Wilderness Act*. BLM 1999 Utah Wilderness Inventory Report. As Dr. Catlin states, the BLM did not reassess the NCMA as part of its 1999 reinventory because it specifically limited its review to

other public lands. At the same time, when SUWA asked the BLM to reassess the NCMA for wilderness character in 2001, the BLM refused to reevaluate the area and, in doing so, failed to comply with its own policies. Thus, in denying the wilderness character of the NCMA, the BLM is still relying on its 1980 inventory, an inventory, that when checked by the BLM, has consistently been found faulty by the agency itself. BLM 1999 Utah Wilderness Inventory Report (finding that approximately 2.6 million more acres of public lands qualified as wilderness over and above the total acreage BLM found to qualify in its 1980 inventory).

The BLM's 1980 determination that the NCMA lacked wilderness character must be put into this context before it can be accurately assessed, making Dr. Catlin's testimony regarding the failings of the 1980 inventory highly relevant. By relying exclusively on this 1980 inventory to determine the wilderness character of the NCMA, the Staff has placed this issue squarely before this Board. *See*, Memorandum and Order (Denying Motion for Summary Disposition Regarding Contention SUWA B) at 11, n. 4 (the "question of the 'natural state' of the area at issue will be a matter for party presentations via direct and/or cross-examination testimony").

Finally, as someone who has been intimately involved with the BLM's wilderness inventory process for years, Dr. Catlin knows the history of the BLM inventory process and noted the BLM's widespread errors during the 1980 inventory process in his testimony because they are vital to a proper understanding of the issue at hand in Contention SUWA B. Thus, Dr. Catlin is qualified to testify as to the failings of the

BLM 1980 wilderness inventory and the lessons of that inventory are germane to  
Contention SUWA B.

CONCLUSION

For the reasons set forth above, SUWA respectfully submits that the Motions of  
the NRC Staff and PFS should be denied.

Respectfully submitted, this 8<sup>th</sup> day of April, 2002

A handwritten signature in black ink, consisting of several loops and a long horizontal tail.

JORO WALKER  
Attorney for Southern Utah Wilderness  
Alliance

April 8, 2002

UNITED STATES OF AMERICA  
BEFORE THE  
NUCLEAR REGULATORY COMMISSION

Private Fuel Storage, a Limited Liability  
Company;

(Independent Spent Fuel Storage  
Installation).

Docket No. 72-22  
ASLBP No. 97-732-02-  
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**CERTIFICATE OF SERVICE**

I hereby certify that I emailed copies of "SUWA's Response to Motion in Limine and Motion to Strike Filed by the NRC Staff and Applicant Concerning Contention SUWA B" on the persons listed below (unless otherwise noted) on **April 8, 2002** and, where indicated, hand delivered the same document to various persons on **April 8, 2002** and, where indicated served conforming copies by U.S. mail, first class, postage prepaid, on **April 8, 2002**.

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