

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
)
(Independent Spent)
Fuel Storage Installation))

NRC STAFF'S REPLY FINDINGS OF FACT
AND CONCLUSIONS OF LAW CONCERNING
CONTENTION SUWA B (RAIL LINE ALIGNMENT ALTERNATIVES)

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July 8, 2002

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I. INTRODUCTION

In accordance with the Atomic Safety and Licensing Board’s “Memorandum and Order (General Schedule Revisions)” dated September 17, 2001, the Southern Utah Wilderness Alliance (“SUWA”), Private Fuel Storage, L.L.C. (“PFS” or “Applicant”), and the NRC staff (“Staff”) filed proposed findings of fact and conclusions of law concerning Contention SUWA B (Railroad Alignment Alternatives).¹ Pursuant to the Board’s Order, the Staff herewith files its reply to the proposed findings of fact and conclusions of law that were filed by PFS and SUWA concerning Contention SUWA B.

II. FINDINGS OF FACT²

2.7.1. SUWA urges us to treat “roadlessness” as a wilderness characteristic in addition to those defined in 16 U.S.C. § 1131(c). SUWA’s Proposed Findings at 7-8. The

¹ See (1) “[SUWA’s] Proposed Findings of Fact and Conclusions of Law Relative to Contention SUWA B” (“SUWA’s Proposed Findings”), dated June 7, 2002; (2) “Applicant’s Proposed Findings of Fact and Conclusions of Law on Contention SUWA B” (“Applicant’s Proposed Findings”), dated June 7, 2002; and (3) “NRC Staff’s Findings of Fact and Conclusions of Law Concerning Contention SUWA B (Rail Line Alignment Alternatives)” (“Staff’s Proposed Findings”), dated June 7, 2002.

² The paragraph numbering used in these reply findings of fact and conclusions of law generally follows the numbering used in the Staff’s Proposed Findings (e.g., Staff Reply Finding 2.7.1 should be read following the Staff’s initial Proposed Finding 2.7).

FLPMA directs the Secretary of the Interior to review “those roadless areas of five thousand acres or more . . . identified . . . as having wilderness characteristics described in the Wilderness Act[.]” 43 U.S.C. § 1782(a). In order for an area to qualify for designation as a wilderness study area (“WSA”) or as wilderness, the FLPMA requires the area to satisfy criteria for (1) size (contains at least 5,000 acres), (2) naturalness (affected primarily by the forces of nature, with the imprint of man’s work substantially unnoticeable), and (3) outstanding opportunities for solitude or a primitive and unconfined type of recreation. See 16 U.S.C. § 1131(c); see generally *Utah v. Babbitt*, 137 F.3d 1193, 1198 n.1 (10th Cir. 1998) (quoting the definition). Failure to satisfy any one of these criteria will disqualify an area from being designated as a WSA or as wilderness.³ See 16 U.S.C. § 1131(c). While a roadless area may be considered for designation as a WSA or as wilderness, we need not determine whether “roadlessness” is a “wilderness characteristic” under the FLPMA since, as discussed below, the NCMA does not meet some of the mandatory wilderness criteria set forth in 16 U.S.C. § 1131(c).

* * * * *

2.52.1. SUWA states that “roadlessness” is a wilderness characteristic, and cites a declaration of Dr. Catlin submitted earlier in this proceeding. See SUWA Proposed Findings at 7-9. While we did not admit Dr. Catlin’s earlier declaration into evidence, he stated in his testimony that the NCMA is roadless. See Catlin, Post Tr. 4795 at 3-4.

* * * * *

³ The Wilderness Act, while prohibiting roads in wilderness areas in general, does allow roads (and road construction) in wilderness areas under certain circumstances. See 16 U.S.C. §§ 1133(c) and (d). In particular, section 1133(d)(4) empowers the President to authorize road construction associated with certain water and power projects and other facilities needed in the public interest in national forests.

2.58.1. With respect to roadlessness, SUWA witness Catlin, in his testimony, did not identify roadlessness as a wilderness characteristic. Although Dr. Catlin testified that the NCMA is roadless, in discussing whether it possessed wilderness characteristics, Dr. Catlin mentioned roadlessness only in the context of the supplemental values that might be found in the NCMA.⁴ Neither the Applicant's witnesses nor the Staff's witnesses discussed "roadlessness" as a wilderness characteristic.

2.58.2. The Licensing Board finds that there is no dispute that the NCMA, as drawn by SUWA, is roadless. Nonetheless, neither the NCMA nor the 800 acre parcel that would be affected by the proposed rail line meet the wilderness criteria, since both lack the mandatory characteristics of "naturalness" and "outstanding opportunities for solitude or a primitive and unconfined type of recreation." See Staff Proposed Findings, ¶¶ 2.33, 2.37-2.38, 2.42-2.59, at 21-31. Accordingly, whether the NCMA is roadless or not does not affect our determination. Moreover, as set forth below, the land through which the proposed Low Corridor rail line would pass can be said to be roadless only with reference to the FLPMA.

2.58.3. We have previously suggested that the natural state of the land near the proposed Low Corridor rail line be considered without regard to the FLPMA. See *PFS*, LBP-01-34, 54 NRC at 302. Upon doing so, we conclude that the area is not roadless. This finding is based on the undisputed evidence that the proposed rail line would run parallel to a road that would form the eastern boundary of the NCMA, which is about one-half mile to the east (Hayes, Post Tr. 4564 at 6; see Staff Proposed Findings, ¶ 2.34), and

⁴ SUWA refers to matters observed by the Board and various parties during a site visit held on April 22, 2002. SUWA Proposed Findings at 9 n.7. The Board, however, did not compile any portion of the record in this proceeding during the site visit; rather, any observations made during the site visit have been admitted into evidence only to the extent that they have been described on the record during the hearing held on April 23-24, 2002.

would cross a road (a “jeep trail”) that goes to private land in the North Cedar Mountains (Tr. 4879; PFS Exhibit II). It is only with reference to the FLPMA, under which SUWA proposes its NCMA, that these roads can be excluded from consideration. (The NMCA’s boundary road is not considered as being in it (Tr. 4929-31, 4936), and the road crossing the proposed rail line would be “cherry stemmed” out of the NCMA (Tr. 4879, 4694-95).)

2.58.4. SUWA relies on the BLM initial inventory as showing that the NCMA meets the wilderness criteria specified in the Wilderness Act. SUWA Proposed Findings at 9-11 (citing “Unit No. UT-020-087,” signed May 30, 1979 (SUWA Exhibit 5) and “Intensive Wilderness Inventory Decision” signed in February 1979 (SUWA Exhibit 7)). SUWA quotes SUWA Exhibit 7 as stating that “[a]greement was clear and obvious: primarily the interior of the unit is unintruded; man’s imprints are not visible.” SUWA Exh. 7 at unnumbered 3. SUWA, however, omits much of the paragraph containing this quotation, including the following:

In contrast, the peripheral road is well maintained and gives rise to numerous “ways”. Mining along the unit border is active in the southern portion of the unit; old buildings remain as a reminder that the unit was even more actively mined in years past. In summary, the fact that 2c criteria do dominate the unit’s core should suggest that naturalness and solitude, though of somewhat questionable magnitude, be given further wilderness consideration.

Id. The portion of the paragraph that SUWA omits indicates that BLM had not made a final determination as to the area’s “naturalness,” but believed only that further consideration of the area was warranted. SUWA’s other quotations from SUWA Exhibit 7 are no more persuasive. Accordingly, we find that SUWA Exhibit 7 does not show that the NCMA possesses wilderness characteristics.

2.58.5. SUWA similarly states conclusions in SUWA Exhibit 5. SUWA Proposed Findings at 10. As with SUWA Exhibit 7, SUWA omits portions of SUWA Exhibit 5 that

state, for example, that opportunities for solitude are not outstanding. SUWA Exh. 5 at 5. The Board concludes that SUWA's characterization of SUWA Exhibit 5 is not persuasive.

2.58.6. SUWA, in its proposed findings, argues that, based on SUWA Exhibit 4, the BLM has designated the area through which the proposed Low Corridor rail line would run as a "limited use area" for off-road vehicles. SUWA Proposed Findings at 11. SUWA concludes that "ways" created in this area were illegally established. *Id.* at 12. SUWA, however, does not explain how the BLM's designation of an area as a "limited use area" has any bearing on whether the area possesses wilderness characteristics, nor do we find any such explanation in the record. Accordingly, the limited use area designation is no reason to find that the 800 acre parcel of the NCMA that would be affected by the proposed rail line possesses wilderness characteristics.

2.58.7. SUWA states that BLM's "Wilderness Inventory and Study Procedures" (SUWA Exhibit 6), indicates that an area should be considered further for designation "when it is reasonable to expect that human imprints will return or can be returned to a substantially unnoticeable level either by natural processes or by hand labor." *Id.* at 13. SUWA refers only to excerpts from BLM's initial inventory of the NCMA (SUWA Exhibit 5) as showing that "the BLM specifically determined that the North Cedar Mountain roadless area could be restored to 'a natural state, free from man's imprint[.]'" *Id.*

2.58.8. Whether such restoration is "reasonable to expect," as specified in BLM guidance (SUWA Exh. 6 at 17), is not addressed. Indeed, SUWA Exhibit 5 seems to imply that restoration is not reasonable to expect, stating that "[a]n attempt to restore the unit to a natural state, free from man's imprint, would require a lengthy cycle characterized by hand labor, reseeding and protective restriction of the unit." SUWA Exh. 5 at 8 (emphasis added). Further, the possibility of restoration is irrelevant to the current conditions in the area near the proposed Low Corridor rail line. Accordingly, the existence of this provision

in SUWA Exhibit 6 is no reason to find that the 800 acre parcel of the NCMA that would be affected by the proposed rail line possesses wilderness characteristics.

2.58.9. SUWA also argues that the portion of the NCMA that would be crossed by the proposed Low Corridor rail line has wilderness values beyond roadlessness. SUWA Proposed Findings at 14. SUWA, however, cites declarations that the Board has not admitted into evidence in this proceeding. *Id.* SUWA's assertions do not warrant any change in our conclusions. See Staff Proposed Findings, ¶¶ 2.52-2.58.

2.58.10. SUWA argues that allowing the proposed rail line to cross the NCMA will adversely impact the wilderness characteristics of the area. SUWA Proposed Findings at 14. SUWA believes that building the Low Corridor rail line would allow "encroachment" into the roadless area, which would mean that "future impacts would in effect be able to encroach on [the NCMA] creating a new 'zone of influence.'" *Id.*, citing SUWA Exh. 6 at 16. The BLM guidance, however, merely directs that an adjusted boundary must not be drawn on a "zone of influence." *Id.* No party has suggested that the boundary of the NCMA be drawn on a "zone of influence." Therefore, this provision is irrelevant to our inquiry.⁵

* * * * *

2.71.1. As set forth above, SUWA argues that "roadlessness" is a wilderness characteristic, and that the NCMA is roadless and has wilderness character. SUWA Proposed Findings at 12. SUWA argues further, therefore, that the Staff's conclusion that the west valley alternative and the proposed rail line would have essentially the same impacts on wilderness values cannot be defended. *Id.*

* * * * *

⁵ To the extent SUWA is suggesting that the location of the boundary of the NCMA controls whether the area contains wilderness characteristics, that suggestion is mistaken. Rather, whether the area possesses wilderness characteristics and the location of human impacts determine where the boundary (if any) should be drawn. See SUWA Exh. 6 at 16.

2.72.1. Before discussing Dr. Catlin’s testimony, we address SUWA’s argument regarding roadlessness. As stated above, the testimony in this proceeding does not address roadlessness as a wilderness characteristic (see ¶ 2.58.1, *supra*), and, without reference to the FLPMA, the area near the proposed rail line is not roadless (see ¶ 2.58.3, *supra*). Notwithstanding our determinations in this regard, we find that even if the area near the proposed Low Corridor rail line is roadless, that area lacks naturalness and outstanding opportunities for solitude or an unconfined and primitive type of recreation, both of which are required wilderness characteristics. Therefore, the west valley alternative would have no effect on preserving Congress’s ability to designate as wilderness the area through which the proposed rail line would pass.

* * * * *

2.75.1. SUWA argues that the decisionmaker must ultimately weigh the pros and cons, including the potential environmental impacts of the various alternatives. SUWA Proposed Findings at 15. SUWA argues further that the NRC staff, in concluding in the FEIS that the west valley alternative would result in greater environmental impacts than the proposed Low Corridor rail line, “took this decision from the hands of the decisionmaker.” *Id.* Upon examining the FEIS, however, we believe the Staff and the Cooperating Agencies have simply presented the results of their analysis. See Staff Exh. E, § 2.2.4.2. Because SUWA has submitted evidence in this proceeding to support its disagreement with the Staff’s analysis, that information is in the record and is available for review by the ultimate decision maker. SUWA’s argument in this regard is not persuasive.

2.75.2. SUWA also suggests that the west valley rail alternative is not a “real” alternative, and that the Applicant should have designed it “from scratch” (rather than as a detour from the proposed rail line) to minimize environmental impacts. SUWA Proposed Findings at 16. SUWA that argues such an alternative “may have been less objectionable

to Staff,” and “could well have presented a more appealing alternative to the Low corridor.” *Id.* at 17. SUWA, however, did not offer any evidence in this proceeding to support these assertions. Indeed, it appears that the Staff did seek to minimize the cut and fill associated with the west valley rail alternative. See Laub, *et al.*, Post Tr. 4653 at 29-30. We conclude that SUWA’s assertions are unfounded.

2.75.3. SUWA identifies what it believes are flaws in the Applicant’s exhibits, and indicates that the two alternatives (*i.e.*, the west valley alternative and the proposed rail line) received unequal treatment. SUWA Proposed Findings at 17-18. SUWA argues that the proposed rail line contains many of the same elements that the Staff used to disqualify the west valley route from detailed consideration, and that the two alternatives are more alike in terms of cut and fill than indicated by the Staff in the FEIS. *Id.* at 18. Specifically, SUWA cites to the FEIS for the proposition that “the Low rail corridor involves massive cuts at the siding” (*id.*, citing Staff Exh. E at 2-15), and believes that the proposed rail line would require “at least one fill 20 feet high” (*id.*).

2.75.4. As for the cuts at the Low siding, the two alignments are identical at that location. See Laub, *et al.*, Post Tr. 4653 at 27. It is thus not surprising that both alignments involve large amounts of cut material. Moreover, Staff witness McFarland explained under cross-examination that this cut would be used to balance the fill needed for the west valley alternative. Tr. 4670-71. He explained further that the amount of fill needed for the west valley alternative, as set forth in the FEIS, is the net amount of additional fill, compared to that needed for the proposed rail line. *Id.* SUWA did not submit any evidence to the contrary.

2.75.5. With respect to embankment height, SUWA points to a location south of the point at which the west valley alternative rejoins the proposed Low Corridor rail line and where there is a fill 20 feet high. Tr. 4596-97, 4634-35. Where the west valley alternative

diverges from the proposed rail line, however, the west valley alternative would require embankments (“fill”) in excess of 20 feet in three locations totaling about 5500 feet in length. Laub, *et al.*, Post Tr. 4653 at 30. By comparison, the embankments for the Low Corridor rail line have a maximum height of about 10 to 12 feet. *Id.* These facts are not in dispute. Accordingly, the Licensing Board concludes that the west valley alternative has significantly greater fill impacts than the proposed Low Corridor rail line.⁶

2.75.6. SUWA argues that the “unequal” treatment of the west valley alternative and the proposed rail line suggests that the Staff was more interested in pointing out the faults of the west valley alternative and rejecting it than in accurately comparing the pros and cons of the two routes. SUWA Proposed Findings at 18. SUWA asserts that this approach runs afoul of NEPA’s requirement that “environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.” *Id.*, quoting 40 C.F.R. § 1502.2(g).

2.75.7. SUWA did not present any evidence to suggest that the Staff attempted to justify, in the FEIS, a decision already made. Rather, the evidence admitted in this proceeding, as summarized above, demonstrates that the Staff reasonably identified one environmental impact of the west valley rail alternative—relating to the amount of fill material that would need to be imported to construct that alignment—that would significantly exceed the impact of the proposed Low Corridor rail line. The Staff has described the impacts of the proposed rail line as small except for five impacts (namely, water resources, air quality, socioeconomics, cultural resources and scenic qualities), which range from small to moderate. Laub, *et al.*, Post Tr. 4653 at 13. The Staff also described the impacts resulting

⁶ SUWA states that some PFS exhibits are distorted or unreadable, and that the PFS exhibits do not depict both the west valley alternative and the proposed rail line. SUWA Proposed Findings at 17-18. The asserted flaws in the PFS exhibits are immaterial to our decision.

from the west valley alternative as being greater than those of the proposed rail line in the areas of visual impacts, access to existing roads and grazing allotments, the movement of wildlife, and the fighting of wildfires. *Id.* at 28. Accordingly, we find that the Staff reasonably eliminated the west valley rail alternative from detailed consideration based on the significant fill impacts associated with it, as compared to the proposed Low Corridor rail line, and considered the other impacts associated with each of those alternatives. In view of the above, we also conclude that the Staff assessed the environmental impacts of the proposed action in its analysis, and did not merely justify a decision already made.

Respectfully submitted,

/RA/
Robert M. Weisman
Counsel for NRC Staff

Dated at Rockville, Maryland
this 8th day of July, 2002

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW CONCERNING CONTENTION SUWA B (RAIL LINE ALIGNMENT ALTERNATIVES)" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 8th day of July, 2002:

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