

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of)

PRIVATE FUEL STORAGE, L.L.C.)

(Independent Spent Fuel Storage
Installation))

Docket No. 72-22-ISFSI

CLI-99-10

MEMORANDUM AND ORDER

I. Introduction

This proceeding arises from the application of Private Fuel Storage, L.L.C. ("applicant" or "PFS") for a license to store spent nuclear fuel at an Independent Spent Fuel Storage Installation (ISFSI) on the Skull Valley Goshute Indian Reservation in Skull Valley, Utah. In this decision, we review an Atomic Safety and Licensing Board Memorandum and Order, LBP-99-3, 49 NRC ____ (Feb. 3, 1999), that granted the late-filed intervention petition of the Southern Utah Wilderness Alliance (SUWA). The Board found that (1) a balancing of the late-filing criteria in 10 C.F.R. § 2.714(a)(1) supports entertaining the petition and the accompanying contentions; (2) SUWA has established its representational standing to intervene; and (3) SUWA has proffered one litigable contention. Pursuant to section 2.714a, the applicant, PFS, has appealed the Board's ruling on the grounds that SUWA has neither submitted an admissible

contention nor established standing to intervene in this proceeding. We affirm the Board's decision.

II. Background

On July 31, 1997, the agency published in the Federal Register a notice of opportunity for hearing on PFS's license application. See 62 Fed. Reg. 41,099. On April 22, 1998, the Board resolved several petitions for intervention stemming from this notice and set the case for hearing. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142 (1998). We considered appellate challenges to some aspects of the Board's rulings on standing to intervene, but we ultimately approved the Board's rulings. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26 (1998).

On August 28, 1998, PFS submitted a license amendment application making several changes in the transportation scheme set out in the original license application. In particular, the license amendment application outlines a revised proposal to construct a rail spur (i.e., the "Low Junction" rail spur) off the existing Union Pacific rail mainline that would be used to transport flatbed rail cars holding spent fuel shipping casks to the PFS facility approximately 30 miles to the south. The Board denied late-filed contentions related to this license amendment submitted by Intervenor State of Utah, the Confederate Tribes of the Goshute Reservation, and Ohngo Gaudadeh Devia. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-29, 47 NRC 286 (1998).

In a November 18, 1998 hearing request, SUWA sought to intervene in the proceeding, either as of right or as a discretionary intervenor, to challenge the August license amendment. In its petition, SUWA describes itself as a non-profit organization dedicated to identifying and protecting the "wilderness character" of roadless areas under the jurisdiction of the United

States Department of the Interior's Bureau of Land Management (BLM) until such time as Congress has an opportunity to designate those areas as wilderness under the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136, and the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1784. In separate replies, Applicant PFS and the NRC Staff asserted that the SUWA petition should be denied. They argued that (1) the SUWA hearing request did not merit admission under the section 2.714(a)(1) late-filing standards; (2) SUWA had failed to establish its standing as of right; (3) SUWA had not made a case for permitting discretionary intervention; and (4) SUWA had failed to provide an admissible contention. On December 8, 1999, SUWA filed a reply to the PFS and staff response. On December 11, 1998, the Board convened a video-conference to hear arguments from SUWA, the State, PFS, the Skull Valley Band, and the staff concerning the SUWA petition and its contentions. See Private Fuel Storage, L.L.C. Prehearing Conference, (hereinafter "Prehearing Conference Tr.") (Dec. 11, 1998).

In its February 3, 1999 Memorandum and Order, the Board concluded that SUWA had met the five criteria of 10 C.F.R. § 2.714(a)(1) for admitting of late-filed intervention petitions and contentions. LBP-99-3, 49 NRC at ___, slip op. at 6-13. In addition, the Board found that SUWA had successfully established its standing to intervene. Of the various hurdles that must be met for an organization to establish standing,¹ the only issue before the Board was whether one or more of SUWA's members would otherwise have standing to sue in his or her own right. With regard to the standing of the individual SUWA member in question (Dr. Jim Catlin), only the issues of injury in fact and redressability were in dispute. Id. at ___, slip op.14.

The Board found that the injury claimed by Dr. Catlin "...would constitute a sufficiently direct and concrete injury to an intervenor's legitimate interests under NEPA to provide standing

¹ See CLI-98-13, 48 NRC 26, 30-31 (1998).

to contest that action." Id. at ___, slip op. at 17. The staff and PFS emphasized that Dr. Catlin had not specified the number of times he had visited the area in the past and the number of times he planned to visit in the future but merely indicated that he had visited "frequently" in the past and planned to do so frequently in the future. According to PFS and the NRC staff, Dr. Caitlin's contacts with the land proposed for the rail spur were insufficiently particularized and, as such, fail to establish personal injury. See Prehearing Conference Tr. at 1066-67, 1078-79. In ruling against PFS and the staff on this issue, the Board concluded that Dr. Catlin's "...adoption of the term 'frequently' in this context demonstrates that his bond with the area is sufficiently concrete to establish his standing and, consequently, that of his representative SUWA." LBP-99-3, 49 NRC ___, slip op. at 20. The Board also found that SUWA had met the redressability requirement, concluding that if, as a result of NEPA consideration urged by SUWA, the "... PFS proposal is implemented in a way that is not inconsistent with SUWA's asserted interest in the land, then SUWA has won all it can expect from this proceeding and its potential injury has been redressed." Id. at ___, slip op. at 19.

The Board also reviewed the two contentions that SUWA had raised in its November 18, 1998 petition. First, SUWA claimed that the license application amendment failed to adequately consider the impacts of the rail spur on the wilderness character of the area in question. Secondly, SUWA asserted that the amendment failed to develop and analyze a meaningful range of alternatives to the rail spur. The Board rejected the first contention. However, the Board found the second contention and its supporting basis "...sufficient to establish a genuine dispute adequate to warrant further inquiry." Id. at ___, slip op. at 21.

On February 16, 1999, PFS appealed the Board's decision and urged the Commission to reverse the Board's Order and deny SUWA's petition to intervene in its entirety for failure to

proffer an admissible contention and for lack of standing. SUWA has filed a brief opposing PFS's appeal and the NRC staff has filed a brief supporting it.

III. Analysis

On appeal, PFS first urges the Commission to find that SUWA has no standing in this proceeding because its member, Dr. Catlin, failed to demonstrate sufficient past and future contacts with the area in question. See Applicant's Appeal Brief at 12-15 (Feb. 16, 1999). PFS also argues that SUWA's contention on alternatives to the proposed rail spur is inadmissible because the contention did not, as initially filed, suggest an alternative of its own and because the alternatives raised by SUWA in a reply before the Board came too late to meet the five part test for late-filed contentions. Id. at 5-10.

A. Standing

Under section 189a of the Atomic Energy Act, the Commission must grant a hearing upon the request of any person "whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a). Accordingly, NRC regulations require a petition for intervention to "set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, ... and the specific aspect or aspects of the subject matter of the proceeding as to which [the] petitioner wishes to intervene." 10 C.F.R. § 2.714(a)(2). In evaluating whether a petitioner's asserted interest provides an appropriate basis for intervention, the Commission has long looked for guidance to judicial concepts of standing. Portland Gen. Elec. Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976). Accord Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-

21, 48 NRC 185, 195 (1998); Georgia Inst. of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995).

Where an organization asserts a right to represent the interests of its members "judicial concepts of standing" require a showing that: (1) its members would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires an individual member to participate in the organization's lawsuit. See Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). Longstanding NRC practice also requires an organization to demonstrate that at least one of its members has authorized it to represent the member's interests. See Georgia Tech Research Reactor, 42 NRC at 115. Of the four requirements that an organization must meet to establish standing, the only one at issue here is whether any of SUWA's members would otherwise have standing to sue in their own right, an issue similar to the tribal standing question we addressed earlier in this proceeding. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 30-31 (1998).

To determine whether an organization's individual members have standing, a petitioner must allege (1) a particularized injury, (2) that is fairly traceable to the challenged action and (3) is likely to be redressed by a favorable decision. Quivira Mining Co. (Ambrosia Lake Facility), CLI-98-11, 48 NRC 1, 5-6 (1998); See also Steel Co. v. Citizens for a Better Environment, 118 S. Ct. 1003, 1016-17 (1998). On appeal, the only issue before the Commission is whether Dr. Catlin has demonstrated a particularized injury here.

As discussed above, SUWA relied on the declarations of Dr. Catlin, to support the organization's argument for standing. In his second declaration filed before the Board, Dr. Catlin specifically indicates that:

I have visited these areas, including the exact tract of land within the North Cedar Mountains area that will be traversed by the proposed rail spur, and have developed an ongoing and deep bond with the land and its wilderness character which I will continue to cultivate in the future. I frequently enjoyed and will, in the future with some frequency, enjoy hiking, camping, birdwatching, study, contemplation, solitude, photography, and other activities in and around the North Cedar Mountains roadless area, including the exact tract of land -- the bench of the North Cedar Mountains -- over which the proposed rail spur will traverse.

SUWA Reply, Second Declaration of Jim Catlin for Petitioner [SUWA] at 4-5 (Dec. 8, 1998) at 4-5. In its appeal brief, the Applicant argues that SUWA lacks standing because Dr. Catlin has failed to demonstrate, as a matter of law, sufficient contact with the area that would be affected by the PFS proposal. Specifically, the Applicant believes that Dr. Catlin's use of the word "frequently" does not provide specific information regarding "the time or duration of his contact with this area." Applicant's Appeal Brief at 12. In its decision, the Board indicated that Dr. Catlin's imprecision in describing the number of contacts was not a substantial concern because of his "actual physical contact" with the area in question. LBP-99-3, slip op. at 20, n.7.

We historically have accorded "substantial deference" to Board determinations for or against standing, except where the Board has clearly misapplied the facts or law. See International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 118 (1998); Yankee Atomic Elec. Co. (Yankee Nuclear Power Station) CLI-96-7, 43 NRC 235, 248 (1996); Georgia Tech Research Reactor, 42 NRC at 116; Gulf States Util. Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47-48 (1994). PFS's arguments do not persuade us that we need to override the Board's judgments on SUWA's standing. We agree with the Board that, in this case, Dr. Catlin has demonstrated that he maintains contacts with the site that are sufficient to establish standing. While mere interest in an area alone does not establish

standing for an individual,² we note that Dr. Catlin is no casual bystander or generalist interested in environmental issues. He appears to have a significant and genuine personal attachment to the affected area, as demonstrated by his work in developing a reinventory of BLM lands in the area for the Utah Wilderness Coalition. SUWA Petition to Intervene, Declaration of Jim Catlin for Petitioner [SUWA] at 1-4 (Nov. 18, 1998).³

Most importantly, however, he has demonstrated actual contact with the area based on his "frequent" physical presence on the very parcel of land that would be altered by the proposed action. While his declaration does not specify the exact number of times he has visited in the past or plans to visit in the future, it was reasonable for the Board to conclude that his visits to the site are numerous enough to demonstrate that his "...bond with the area is sufficiently concrete to establish his standing." LBP-99-3 slip op. at 20. As we held in our prior standing decision in this proceeding (CLI-98-13), "standing does not depend on the precise number of ... visits," but turns on "the likelihood of an ongoing connection and presence." 47 NRC at 32. Dr. Catlin appears to meet this test.

We hasten to add, however, that a speculative contact will not pass muster. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 563-64 (1992). In particular, as the Supreme Court indicated in Lujan, mere intentions to visit "some day" are not sufficient to establish standing. Id. at 564. However, in this case, Dr. Catlin's declaration taken as a whole demonstrates that he has more than just "some day" intentions to visit the area that would be

²See, e.g., Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 95 n.10 (1993).

³We are not swayed by the decision cited by the applicant. See Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 456-57 (1979). While the facts in that case may hold some passing similarities to the controversy at hand, it provides little in the way of useful guidance for this case. In that case, the contacts in question involved fishing activities "about once a month within 40 or 50 miles of the plant." Id. at 457. In the case at hand, Dr. Catlin's visits involve use of the very site where the rail line would be constructed.

affected by the rail spur. He lives in the State of Utah, is director of the Wild Utah Project, and works with the Utah Wilderness Coalition putting to use his expertise in geographical information systems (GIS) to conduct land studies of the North Cedar Mountain area. See Dr. Catlin's Declaration, supra, at 1-5. Given Dr. Catlin's overall involvement with issues related to the area and given his sworn declaration indicating he has used the site in the past and will do so in the future, we see no reason to doubt his intent to revisit this area and, as such, see no need to look behind the meaning of the word "frequently" as used in his declaration.⁴

This is not to say, as the NRC staff suggests, that future intervenors will be able to use the word "frequently" as a talisman to ward off all challenges to their claims of standing. To the contrary, as this very case demonstrates, intervenors who fail to provide specific information regarding either the geographic proximity or timing of their visits will only complicate matters for themselves. In many instances, a lack of specificity will be sufficient to reject claims of standing. However, given the facts in this particular case, we cannot say that the Board erred in finding that Dr. Catlin had offered enough specific information to demonstrate the necessary injury in fact.

B. Admissibility of SUWA Contention B (Alternatives)

NRC regulations require that an admissible contention consist of: (1) a specific statement of the issue to be raised or controverted; (2) a brief explanation of the bases for the contention; (3) a concise statement of the alleged facts or expert opinion supporting the contention on which the petitioner intends to rely in proving the contention at any hearing; and

⁴See, e.g., Sierra Club v. Simkins Indus. Inc., 847 F.2d 1109, 1112 n.3 (4th Cir. 1988) (an affidavit from the member of the Sierra Club which indicated that the member "regularly" hiked along the river was sufficiently specific to confer standing), cert. denied, 491 U.S. 904 (1989).

(4) sufficient information to show that a genuine dispute exists on a material issue of law or fact. See 10 C.F.R. § 2.714(b)(2). Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248-49 (1996); Georgia Tech Research Reactor, 42 NRC at 117-18. A failure to comply with any of these requirements is grounds for dismissing the contention. Arizona Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-156 (1991).

The contention in question involves the range of alternatives to the Low Corridor rail spur and reads as follows:

The License Application Amendment fails to develop and analyze a meaningful range 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.

SUWA Contentions at 5 (Nov. 18, 1998). PFS believes that this contention is inadmissible because (1) it does not show a material dispute in that it ignores material submitted in the application, and (2) it fails to propose at least a "colorable alternative" to those put forth by the applicant. See Applicant's Appeal Brief at 6.

PFS is correct in pointing out that the application did consider a range of alternatives. Id. at 10 n.15. However, those alternatives addressed only general transportation options (e.g., trucking vs. railroad) and did not reflect consideration of alternative configurations to the proposed Low Corridor rail spur alignment. In the light of the fact that the rail spur has now become PFS's preferred option, we agree with the Board that a failure to consider alternative configurations to the specific alignment in question is at least worthy of further consideration on the merits.

In opposing the contention, PFS suggests that an intervenor must offer alternatives of its own in order to raise an admissible contention related to the adequacy of an applicant's

alternatives. See Id. at 7, citing Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 412 (1976). We frankly are puzzled by PFS's heavy reliance on the Catawba decision. Catawba merely states that "further examination may be called for when an intervenor suggests a 'colorable alternative.'" Catawba, 4 NRC at 412. The case established no rigid rule requiring intervenors to propose their own alternatives as a prerequisite to a NEPA claim resting on a failure to consider alternatives. The facts in Catawba were starkly different from ours. There, the Appeal Board considered, and understandably rejected, an "eleventh hour suggestion," advanced during the "last week of a reopened hearing," that the NRC had failed to consider the possibility of power purchases as an alternative to building the Catawba nuclear power plant. Here, by contrast, SUWA offers its "alternatives" contention prior to a hearing and at its earliest opportunity.

We recognize that in NEPA cases where no additional conceivable alternatives are apparent, the Commission sensibly could insist that a prospective intervenor offer its own alternatives in order to show that a genuine dispute over alternatives exists. But as a general matter NEPA places responsibility to consider alternatives on the applicant and ultimately on the NRC itself. SUWA's grievance here is not that PFS's environmental analysis fails to examine general transportation alternatives (e.g., trucks rather than railroads), but that it leaves unaddressed ready alternatives to the actual proposal at hand, the construction of a rail spur over a specific tract of land. We agree with the Board that SUWA can litigate the question whether, in the circumstances of this case, NEPA requires PFS and the NRC to consider alternate rail routes that might prove more environmentally benign than PFS's chosen route.

SUWA's reply before the Board did propose a specific alternative alignment for the Low Junction rail line. See SUWA Reply Brief at 15 (Dec. 8, 1998); Second Declaration of Jim Catlin at 3 (Dec. 8, 1998)(attached to SUWA Reply Brief). While PFS labels this additional

information as "a late-filed supplement without justification" (Applicant's Appeal Brief at 8), we view it as an elaboration of an already-admissible contention. The reply's suggested alternative simply reinforced SUWA's basic thesis that PFS had not considered alignments for the spur other than the one proposed in PFS's license amendment. PFS and the NRC staff view SUWA's proposed rail route as unworkable because it would traverse land owned by Utah, and Utah strongly opposes the PFS project. See Staff's Appeal Brief, at 19-21; Applicant's Appeal Brief, at 9-10. But that argument merely raises questions about the practical feasibility of the SUWA proposal.⁵ It does not abrogate the applicant's, and the NRC's, NEPA obligation to perform an analysis of alternatives. We see no basis for second-guessing the Board's decision to permit further consideration of SUWA's "alternatives" contention.

III. Conclusion and Order

For the reasons stated in this decision, the Commission hereby affirms LBP-99-3.

⁵Our decision to allow further examination of this issue is reinforced by a March 19, 1999, letter to the Office of the Secretary from PFS's counsel which indicates that a corridor of approximately 500 feet may exist between the State owned land and SUWA's proposed wilderness area. We commend PFS's counsel for bringing this matter to the Commission's attention as it identifies an additional possibility that may warrant consideration by the parties and the Board.

It is so ORDERED.



For the Commission

A handwritten signature in cursive script, reading "Annette L. Vietti-Cook".

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of April, 1999.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)

PRIVATE FUEL STORAGE L.L.C.)

(Independent Spent Fuel Storage
Installation))

Docket No. 72-22-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-99-10) have been served upon the following persons by deposit in the U.S. mail, first class, as indicated by an asterisk (*) or through deposit in the Nuclear Regulatory Commission's internal mail system as indicated by double asterisks (**), with copies by electronic mail as indicated.

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Docket No. 72-22-ISFSI
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(CLI-99-10)

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Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 15th day of April 1999