UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

Private Fuel Storage, a Limited Liability Company; (Independent Spent Fuel Storage Installation).	Docket No. 72-22 February 25, 1999

SOUTHERN UTAH WILDERNESS ALLIANCE'S (SUWA)
BRIEF IN OPPOSITION TO APPLICANT'S APPEAL
OF THE ATOMIC SAFETY AND LICENSING BOARD'S
ORDER GRANTING SUWA'S INTERVENTION PETITION

I. Introduction

On August 28, 1998, Private Fuel Storage, L.L.C. ("the Applicant") submitted an amendment to its application to the Nuclear Regulatory Commission ("NRC") to store high level nuclear waste on the Reservation of the Skull Valley Band of the Goshutes. This amendment included a proposal to construct and operate a rail spur from the town of Low to the Reservation along the west side of Skull Valley for the transportation of nuclear waste. LBP –98-29, 48 NRC 286, 289 (1998).

Before submitting a plan for the Low rail spur alignment, the Applicant had never suggested that it planned to build a rail spur in the western portion of the valley. Instead, in its original June 1997 license application, the Applicant stated that it preferred to transport waste to the reservation by truck using the Skull Valley road. Alternatively, the Applicant stated it might construct a rail spur from Rowley Junction that would run near the Skull Valley Road to the reservation on the east side of the valley. As is evidenced by the transportation options studied in the original application, the Low rail project constituted a significant departure from the original transportation proposals. Id.

Despite this significant change to its license application, the Applicant did not notify the public in any way of its new plan. Indeed, most of the intervenors in this proceeding did not receive a copy of the amendment until early October.

On November 18, 1998, the Southern Utah Wilderness Alliance ("SUWA") filed with the Atomic Safety and Licensing Board ("the Board") a request for Hearing and Petition to Intervene in this proceeding and, in a separate document, its Contentions. SUWA established that it is entitled to intervene in this matter. SUWA further set forth specific issues which should be litigated in this proceeding because a genuine dispute exists on a material issue of law or fact and the application amendment does not contain important relevant information as required by law.

The State of Utah, the Applicant, and the NRC staff filed responses to SUWA's pleadings. On February 3, 1999 the Board granted SUWA's late-filed petition and admitted SUWA's Contention B for further litigation in this matter. LBP-99-3. The Applicant appealed the Board's order on February 16, 1999. This brief opposes that appeal pursuant to 10 C.F.R. § 2.714(a).

II. The Applicant's Arguments Fails to Establish that the Licensing Board's Decision Granting SUWA's Intervention Was Irrational.

To contend that SUWA is not entitled to intervention, the Applicant asserts that: 1) the term "frequently," used by Dr. Catlin to convey the repeated nature of his future visits to the North Cedar Mountains, is insufficient to establish his contact with that land for the purposes of standing; and 2) SUWA's Contention B is not admissible. In making these arguments, the Applicant ignores two crucial factors. First, the Applicant fails to acknowledge the extent to which the Commission gives deference to a Board's decision to grant intervention – the Commission will overturn such a decision only if it is irrational. As the Commission has ruled:

> In the absence of a clear misapplication of the facts or misunderstanding of law, the Licensing Board's judgment at the pleading stage that a party has crossed the standing threshold is entitled to substantial deference. "[W]e are not inclined to disturb a Licensing Board's conclusion that the requisite affected interest ... has been established unless it appears that that conclusion is irrational."

Gulf States Utilities Company, et al. (River Bend Station, Unit 1) 40 N.R.C. 43, 47-48 (1994) (*quoting* Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-273, 1 NRC 492, 494 (1975)).

Second, the Applicant improperly uses the appeal process to challenge a contention on the merits. At the contention filing stage, SUWA need not prove its case. Instead, "[w]hat is required is a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate." Gulf States, 40 N.R.C. at 51 (citations and internal quotations omitted). Thus, the Applicant's arguments to the merits of SUWA's contention are irrelevant to the current matter.

In light of these determinations, SUWA demonstrates that the Applicant's arguments fail to show that the Board acted irrationally when it granted the organization standing to intervene in this proceeding.

A. SUWA Has Demonstrated That it Has Sufficient Contact With the North Cedar Mountains to Establish Standing.

The Applicant unconvincingly attempts to argue that the Board was irrational when it granted SUWA's petition to intervene. The Applicant focuses on Dr. Catlin's statement that he had enjoyed and "will, in the future, with some frequency" enjoy hiking, camping and other activities in and around the North Cedar Mountains, "including the exact tract of land over which the proposed rail spur will traverse." Second Declaration of Dr. Catlin at ¶ 11. On the basis of this statement, the Board concluded, rightly, that Dr. Catlin's plans to return to the North Cedar

Mountains frequently in the future and demonstrates his bond with the area concretely enough to establish standing. Memo and Order at 19-20.

Relying on Lujan v. Defenders of Wildlife, the Applicant suggests that the Board irrationally concluded that Dr. Catlin's statement that he would "frequently" visit the North Cedar Mountains in the future did not constitute a concrete plan to return to the area. 504 U.S. 555 (1992). However, the Board's determination is consistent with Lujan. In Lujan, the Supreme Court determined that affiants' assertions that they had and would travel abroad **soon** to view endangered species, was not "imminent" enough to establish imminent injury. Id. at 564, fn. 2.

Plainly, "soon" is quite different from "frequently," and the latter is sufficient to establish imminence. Memo and Order at 19 (citing the definition of frequently as "habitual" or "persistent"). This is particularly true in light of the Supreme Court emphasis on the Lujan affiants' failures to assert concrete plans to go abroad in the future. Id. at 564 (affiant stating "I don't know" when I will return to Sri Lanka). This contrasts sharply with Dr. Catlin's clear statement that he **will** return to the North Cedar Mountains frequently in the future.[1]

Moreover, it is clear that the court in Lujan was concerned about the likelihood that the affiants there would actually travel aboard in the future to observe endangered species. In the case of Dr. Catlin, his home and work are relatively close to the proposed rail site an his intention to frequently visit the area is much more plausible than the circumstances the court faced in Lujan.

[1] The Board's finding of standing is particularly reasonable in light of the Supreme Court's statement that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." Lujan, 504 U.S. at 560 (citations and internal quotations omitted). Importantly, in Lujan, the Supreme Court distinguished the relaxed standard above applied at the pleading stage, with the situation before it – a motion for summary judgment – which must set forth specific facts. Id. Thus, in assessing SUWA's petition, which is at

Thus, contrary to the Applicant's assertions, Dr. Catlin demonstrated his contact with the North Cedar Mountains both spatially and temporally – he has frequently and plans to visit frequently the exact area over which the Low rail spur will traverse. Based on these assertions, the Board's finding of standing cannot be deemed irrational.

B. SUWA's Contention is Admissible

The Applicant improperly focuses on the merits, rather than the admissibility of SUWA's Contention B to argue that SUWA should not be permitted to intervene in this matter. Gulf States, 40 NRC 43. Contention B states that, in violation of the National Environmental Policy Act (NEPA), the "License Application Amendment fails to develop and analyze a meaningful range of alternatives to the Low Corridor Rail Spur . . . that will preserve the wilderness character " of the North Cedar Mountains.

In contesting Contention B, the Applicant first argues that the application amendment does analyze a reasonable range of alternatives to the proposed project. However, as the Applicant itself admits, "the Board admitted . . . [Contention B] to consider alignment alternatives to the Low Corridor Rail line, not transportation alternatives in general . . . ." PFS Appeal at 7, fn.10. In addition, as established below, none of the transportation alternatives under consideration is workable. Therefore, the agency has not formulated a reasonable range of alternatives to the proposed project and SUWA's contention that these alternatives must be developed is all the more valid.

Second, the Applicant argues that SUWA cannot contest the adequacy of the application's alternatives formulation, even at the contention pleading stage, unless SUWA

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the pleading stage, the Board is required to presume "specific facts" that support SUWA's claims – facts which the Supreme Court would not presume in Lujan. Id.

formulates a colorable alternative to the proposed project. However, the Applicant forgets that "the NRC . . . has the burden of complying with NEPA." In the Matter of Louisiana Energy Services, L.P. (Claiborne Enrichment Center), 44 N.R.C. 331 (1996) (*citing* Catawba, CLI-83-19, 17 NRC at 1049). Thus, it is up to the agency, with the applicant's assistance, to meet NEPA's requirement "that to the fullest extent possible," the NRC must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved concerning alternative uses of available resources." Id. at 340 -341 (*citing* 42 U.S.C. s 4332(2)(E)). Indeed, the agency's duty to formulate and study alternatives is its central obligation under NEPA. Id. ("the study and description of alternatives is the 'linchpin' of the environmental impact statement process").

In light of this clear statement of the agency's duty under NEPA, the Applicant's suggestion that unless SUWA formulates an unexamined alternative, it cannot object to the agency's NEPA's compliance, is unconvincing. The Applicant's scenario unfairly shifts the burden of formulating alternatives to intervenors. Indeed, under the Applicant's reasoning, the agency could completely fail its NEPA obligations by limiting its analysis to the proposed project and SUWA could not litigate this failure unless it set forth an alternative to the project. Because this result is not in keeping with an agency's central obligation under NEPA to formulate alternatives, the Applicant's argument must be rejected.

Further, the Applicant's citations do not support the colorable alternative requirement. For example, the Applicant states, citing Duke Power Company, that "a contention alleging that an applicant has not considered sufficient alternatives under NEPA fails to show a material dispute if it does not propose at least a `colorable alternative' to those put forward by the

applicant." Duke Power Company (Catawba Nuclear Station, Units 1 and 2), 4 NRC 397 (1976). What that decision actually says is that

> [w]e are particularly cognizant that, under NEPA, the Commission is charged with considering reasonable alternatives to each project and **that further examination may be called for where an intervenor suggests a 'colorable alternative' previously considered.**

Id. (citations omitted, emphasis added). Thus, Duke Power Company says merely that the Commission may be required to analyze a colorable alternative advanced by intervenors. The ruling **does not say** that intervenors may only make a NEPA alternatives argument if they have formulated such an alternative.

Further distinguishing the applicability of Duke Power Company is the fact that the decision concerns the resolution of an admitted contention rather than whether a contention should be admitted for the purposes of resolution. Rather than an "eleventh hour" formulation of an alternative, SUWA has stated, at the beginning of the NEPA process, that the License Application Amendment does not analyze a reasonable range of alternatives.[2]

Applicant's reliance on Vermont Yankee Nuclear Power Company v. NRDC, is also unavailing. 435 U.S. 519, 553 (1976). In that case, the Supreme Court dismissed NRDC's claims because the organization was too obscure in setting forth its criticisms of the agency's NEPA compliance. Thus, the Applicant's citations refer to the clarity of NRDC's participation in the process, not a requirement to formulate an alternative. Id. Thus, because the colorable alternative requirement is not supported by Commission decisions or case law, the Applicant's arguments otherwise should be rejected.

In addition, the Applicant ignores that SUWA did advance a colorable alternative to the proposed Low rail spur alignment. Second Declaration of Dr. Catlin at ¶ 9. Despite the

Applicant's arguments otherwise, this suggested alternative is not a new "basis" for Contention B, but merely a response to challenges to SUWA's petition to intervene.

The Applicant next argues that, in any case, SUWA's alternative should not be considered "colorable" because it is not workable. This is because SUWA's alternative would require the rail spur to traverse over state lands – something the Governor of Utah will not permit. This argument is ill conceived. Under the Applicant's reasoning, none of the transportation alternatives are workable. For example, the State of Utah has asserted control over the Skull Valley road and passed legislation prohibiting the transportation of nuclear waste on the road. Given the Applicant's reasoning, the truck transportation alternative unworkable. In addition, the construction of a rail line next to the Skull valley road is also unworkable because the Governor will not permit the Applicant to build within the State's right of way. Thus, adopting the Applicants logic, the Commission would have to determine that the agency has failed to analyze a reasonable range of alternatives, because it has not formulated **any** workable alternatives to the Low rail spur alignment.

Finally, as is evidenced by the Applicant's arguments and SUWA's demonstration that these arguments are mistaken, the focus of Applicant's appeal is the merit of SUWA's contention, not its admissibility. Because this focus is incorrect, all of the Applicant's arguments should be rejected and SUWA's Contention B should be admitted as worthy of an in depth inquiry.

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[2] This argument also applies to Vermont Yankee Nuclear Power Company v. NRDC, 435 U.S. 519 (1978), which also goes to the merits of a NEPA challenge.

III. Conclusion

For the reasons stated above, SUWA respectfully requests the Commission to dismiss the Applicant's appeal of the Boards decision to grant SUWA's petition to intervene in this matter and should allow SUWA to litigate Contention B as part of this proceeding.

Dated: February 25, 1999.

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CERTIFICATE OF SERVICE

I hereby certify that copies of SOUTHERN UTAH WILDERNESS ALLIANCE'S (SUWA) **BRIEF IN OPPOSITION TO APPLICANT'S APPEAL** OF THE ATOMIC SAFETY AND LICENSING BOARD'S ORDER GRANTING SUWA'S INTERVENTION PETITION dated February 25, 1999, 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 16th day of February 1999.

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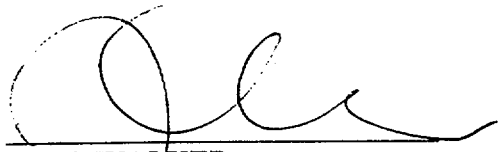

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