

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S MOTION IN LIMINE TO EXCLUDE EXHIBIT SUWA 3
AND PORTIONS OF PREFILED TESTIMONY OF DR. JAMES C. CATLININTRODUCTION

Pursuant to 10 C.F.R. §§ 2.730 and 2.743(c), and the Atomic Safety and Licensing Board's "Memorandum and Order (Revised General Schedule)," dated September 17, 2001, Attachment A, the staff of the Nuclear Regulatory Commission ("Staff") hereby requests that the Licensing Board issue an Order excluding portions of the prefiled testimony of James C. Catlin submitted on behalf of the Southern Utah Wilderness Alliance ("SUWA") and Exhibit SUWA 3 from the record of this proceeding. For the reasons set forth below, the Staff submits that several issues SUWA seeks to raise in the Catlin testimony are irrelevant to Contention SUWA B and lack a proper legal foundation. Further, the Staff submits that Exhibit SUWA 3 also lacks a proper legal foundation. Accordingly, Exhibit SUWA 3 and portions of Dr. Catlin's testimony, as more specifically identified below, should be stricken.

BACKGROUND

SUWA's Contention B, ("Rail Line Alignment Alternatives"), as admitted by the Licensing Board, raised an issue pertaining to consideration of rail line alternatives to PFS's proposed Low Corridor rail line, particularly with respect to the wilderness characteristics and potential wilderness designation of an area defined by SUWA as the "North Cedar Mountains Area" ("NCMA"). See

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-3, 49 NRC 40, at 51, 53, *aff'd*, CLI-99-10, 49 NRC 318, 327 (1999). The contention states 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.

The Licensing Board admitted this contention insofar as “it seeks to explore the question of alignment alternatives to the proposed placement of the Applicant’s proposed Low rail spur,” and whether consideration should be given by PFS and the Staff to “alternative rail routes that might prove more environmentally benign than PFS’s chosen route.” *See id.*, at 53.

On March 18, 2002, SUWA filed the “Testimony of James C. Catlin on the Wilderness Character of the North Cedar Mountains Contention SUWA B” (“Catlin Testimony”), together with three exhibits.

DISCUSSION

A. Legal Standards

The rules governing the admissibility of evidence in an NRC adjudicatory proceeding are set forth in 10 C.F.R. § 2.743(c), which specifies that “[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted.”

B. BLM Inventory Errors

In the pre-filed testimony of James C. Catlin, SUWA asserts that BLM made errors in inventories of various geographical areas. Dr. Catlin asserts that BLM made errors with respect to the 1980 intensive inventory of the North Cedar Mountains, and that BLM made errors in other inventories. Catlin Testimony, Answer 8, at 5 (¶ 2). Whether the BLM made an error in an inventory in some area other than the NCMA has no relevance to Contention SUWA B. Such claims have no relevance to the issue of whether an alternative rail alignment would preserve the

asserted wilderness character of the NCMA or the potential wilderness designation of the NCMA. Therefore, the second paragraph of Answer 8 in Dr. Catlin's testimony should be stricken.

C. Bills Introduced Before Congress

In the pre-filed testimony of James C. Catlin, SUWA asserts that bills pending before Congress would, if enacted, designate certain lands, including the NCMA, as wilderness. See Catlin Testimony, Answer 9, at 6. Whether any such bill is pending before Congress, however, has no relevance to any issue admitted in Contention SUWA B.

Answer 9 does not assert any fact tending to make it more probable or less probable that an alternative rail alignment would preserve the asserted "wilderness character" of the NCMA or the "potential wilderness designation" of the NCMA, as alleged in Contention SUWA B. In addition, it does not address the "natural state" of the area, as permitted by the Licensing Board (see LBP-01-34, 54 NRC 302 n4); nor does it address whether the FEIS considered "alternative rail routes that might prove more environmentally benign" than the Low Corridor rail line, the question the Commission specified as being in issue in this contention (see CLI-99-10, 49 NRC at 327). Accordingly, this testimony should be stricken as irrelevant.

D. Impacts of the Proposed Low Corridor Rail Line

In the pre-filed testimony of James C. Catlin, SUWA asserts that the Low Corridor rail line could have several adverse environmental impacts. Question 10 asks, "What impacts to the wilderness character of the North Cedar Mountains area could the proposed Low Corridor Rail Spur cause?" Catlin Testimony at 6. Two assertions in Dr. Catlin's response to this question lack a proper legal foundation:

First, the response addresses impacts that may result "[i]f a road or other access route accompanies the rail line." See *id.*, Answer 10, at 6-7. Dr. Catlin, however, has not provided any testimony whatsoever that there would in fact be such a road or access route. Thus, there is no foundation for the testimony asserting these impacts, and it should be stricken.

Second, the response asserts that the Low Corridor's rail line would add to the fire hazard in the area. *Id.* at 7. Dr. Catlin, however does not appear to be qualified as an expert to address the ignition and propagation of wild fires or opine as to the likelihood that a rail line could lead to destructive fires. A witness is qualified as an expert by knowledge, skill, experience, training or education. *Philadelphia Elec. Co. (Limerick Generating Station, Units 1 and 2)*, ALAB-819, 22 NRC 681, 732 n.67 (1985). A review of Dr. Catlin's qualifications suggests that he is not qualified to address wildfire matters.¹ See Exhibit SUWA 1. Accordingly, there is no foundation for this aspect of his testimony.

E. Exhibit SUWA 3 and the Factual Assertions in it Lack Foundation

Exhibit SUWA 3 is apparently a legal pleading SUWA filed before an administrative board of the BLM. Exhibit SUWA 3 is replete with references to a record compiled before the BLM, and makes many factual assertions based upon these references. The facts asserted in the record before the BLM, however, have not been sponsored by a witness in this proceeding, and lack reliability.

If SUWA sought to prove the statements asserted in Exhibit SUWA 3, it should have offered a witness to testify as to their truth. Indeed, SUWA's sole proffered witness, James C. Catlin, has provided testimony making assertions similar to, but different from, some claims in Exhibit SUWA 3. *Compare* Exhibit SUWA 3 at 32 (asserting a difference between one boundary of a "North Cedar Mountains unit" and the area BLM inventoried in 1980) with Catlin Testimony, A8., first paragraph (asserting new boundaries for the "NCMA" compared to the area BLM inventoried in 1980). SUWA, however, did not proffer testimony with respect to the majority of the assertions

¹ Dr. Catlin's qualifications in this regard do not appear as strong as that of the State of Utah's witness, David C. Schen, a forestry ecosystem manager experienced in fire management, who submitted an affidavit in support of the State's late filed Contention HH, "The Low Rail Corridor and Fire Hazards." See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 294 (1998). The Board found that the State's proffer fell short of the requisite showing to demonstrate assistance in the development of a sound record. *Id.*

in Exhibit SUWA 3. The Board has previously stated that exhibits should be sponsored by a witness, someone who can answer questions about them. Tr. 881.

Exhibit SUWA 3 also sets forth several legal arguments, some of which are not relevant to this proceeding, and all of which, in any event, are not appropriate for inclusion in testimony. Inasmuch as Exhibit SUWA 3 is a portion of an appeal filed in a BLM proceeding, it recites BLM decisions that are not only not controlling here, but are wholly irrelevant to the Licensing Board's decision. In addition, SUWA will have an opportunity to state its legal arguments when it files its proposed findings of fact and conclusions of law in this proceeding. Accordingly, it is not appropriate to admit into evidence SUWA's legal arguments in Exhibit SUWA 3. In view of the foregoing, Exhibit SUWA 3 should be stricken in its entirety.

CONCLUSION

For the reasons set forth above, the Staff submits that the Staff's Motion *in Limine* should be granted.

Respectfully submitted,

/RA/

Robert M. Weisman
Counsel for NRC Staff

Dated at Rockville, Maryland
this 1st day of April 2002

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION IN LIMINE TO EXCLUDE EXHIBIT SUWA 3 AND PORTIONS OF PREFILED TESTIMONY OF DR. JAMES C. CATLIN" 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 1st day of April, 2002:

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