December 1, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE, LLC	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent Fuel Storage Installation)	)	

NRC STAFF'S RESPONSE TO SOUTHERN UTAH WILDERNESS ALLIANCE'S REQUEST FOR HEARING, PETITION TO INTERVENE, AND CONTENTIONS REGARDING PRIVATE FUEL STORAGE FACILITY LICENSE APPLICATION (THE LOW RAIL SPUR)

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's "Order (Granting Leave to File Reply and Setting Schedule for Intervention Petition Responses)," dated November 19, 1998 (Order), and 10 C.F.R. § 2.714(c), the staff of the Nuclear Regulatory Commission (Staff) hereby files its response to "Southern Utah Wilderness Alliance's Request for Hearing and Petition to Intervene" (SUWA Petition) and "Southern Utah Wilderness Alliance's Contentions Regarding Private Fuel Storage Facility License Application (The Low Rail Spur)" (SUWA Contentions), dated November 18, 1998. For the reasons set forth below, SUWA's petition for intervention should be denied.

BACKGROUND

On June 20, 1997, Private Fuel Storage L.L.C. (PFS or Applicant) applied for a license, pursuant to 10 C.F.R. Part 72, to receive, transfer and possess power reactor spent fuel and other radioactive material associated with spent fuel storage in an independent spent fuel storage

installation, to be constructed and operated on the Skull Valley Indian Reservation in Tooele County, Utah. The Commission published a notice and opportunity for hearing on PFS's license application in July 1997. The notice set September 15, 1997, as the deadline for filing petitions for intervention. *See* 62 Fed. Reg. 41,099 (1997). In April 1998, the Atomic Safety and Licensing Board (Board) admitted five intervenors as parties to the proceeding and approved an initial twenty-six contentions for litigation. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 206-211 (1998).

On August 28, 1998, the Applicant submitted a license application amendment to the NRC that, among other things, proposed a new rail spur corridor.[1] On November 18, 1998, SUWA filed the instant intervention petition and contentions. SUWA explained that it is a non-profit organization, interested in protecting roadless Bureau of Land Management (BLM) areas that possess wilderness character as defined in the Wilderness Act of 1964. SUWA Petition at 2. In its November 19, 1998, Order, the Board provided, among other things, that the parties shall have until December 1, 1998, to respond to SUWA's intervention petition and contentions. Order at 2.

DISCUSSION

A. Legal Standards for Late-Filed Petitions

The criteria to be considered when determining the admissibility of a late-filed petition are set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v). *Sacramento Municipal Utility Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 363 (1993). The five factors are:

(i) Good cause, if any, for failure to file on time.

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[1] Letter to Director, Office of Nuclear Material Safety and Safeguards, NRC from John D. Parkyn, Chairman, PFS, dated August 28, 1998.

> (ii) The availability of other means whereby the petitioner's interest will be protected.
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> (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
>
> (iv) The extent to which the petitioner's interest will be represented by existing parties.
>
> (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. § 2.714(a)(1). The burden of proof is on the petitioner, and the petitioner is obliged to affirmatively address the five lateness factors in its petition, and to demonstrate that a balancing of the five factors warrants overlooking the petition's lateness. *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 n.22 (1985). Further, the Commission can summarily reject a petition which fails to address the five factors or the standing requirements set forth in 10 C.F.R. § 2.714(d)(1). *Texas Utilities Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 and 2), CLI-93-11, 37 NRC 251, 255 (1993).

Although the regulations call for a balancing test, it has long been held that where a petitioner fails to show good cause for filing its contention late, the other four factors must weigh heavily in its favor in order for its petition to be granted. *See, e.g., State of New Jersey* (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 295 (1993). In evaluating the five lateness factors, two factors -- the availability of other means to protect the petitioner's interest and the ability of other parties to represent the petitioner's interest -- are less important than the other factors, and are therefore entitled to less weight. *Texas Utilities Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 74 (1992). With respect to the third factor (the potential contribution to the development of a sound record), the petitioner is obliged to

"set out with as much particularity as possible the precise issues it plans to cover, identify its potential witnesses, and summarize their proposed testimony." *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986), *quoting Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). In addition to showing that a balancing of the five factors favors intervention, a petitioner must also meet the requirements for setting forth a valid contention. 10 C.F.R. § 2.714(d)(2).

B. SUWA Has Not Met the Requirements For Late-Filed Consideration

The Staff believes that a balance of the five factors does not favor consideration of SUWA's late-filed intervention petition. Regarding good cause for filing its petition late, SUWA states the Applicant submitted its amended application on August 28, 1998, and that most of the parties to the proceeding did not receive notice of the submittal until early October, 1998. SUWA Petition at 10. SUWA, however, has not stated when it first received notice of the information contained in the amendment. *See* "Memorandum and Order (Ruling on Late-Filed Contentions Regarding August 1988 Low, Utah Rail Spur License Application Amendment)" (Low Rail Order), LBP-98-29 (slip op. at 9, Nov. 30, 1998) (where a new contention is based on a recently published document, an important consideration is the extent to which the new contention could have been put forward in advance of the document's release). SUWA has thus not demonstrated that it could not have filed its contentions earlier. In addition, SUWA claims that upon learning of the submittal, it acted as quickly as possible in submitting its petition. A period of six weeks, from the time of the Applicant's submittal to the time of SUWA's filing, although not entirely prompt, does not appear an altogether unreasonable amount of time in which to file its contentions. However, since SUWA has not stated when it

learned of the information contained in the Applicant's submittal, SUWA does not appear to have demonstrated good cause for the lateness of its petition.

Moreover, the other factors generally weigh against consideration of SUWA's late-filed petition. First, SUWA asserts that no other means exist by which it can protect its interest in the proceeding. SUWA Petition at 10. This factor, however, is not limited to this proceeding, but includes any means whereby the petitioner can protect its interest. 10 C.F.R. § 2.714(a)(1)(ii). The Staff notes that SUWA has supported legislation presently pending before the United States Senate and the United States House of Representatives, which would designate approximately six million acres in Utah, including portions of the Cedar Mountains area, as wilderness under the Wilderness Act of 1964. *See* S. 773, 105th Cong., 1st. Sess. (1997); H.R. 1500, 105th Cong., 1st Sess. (1997); SUWA Petition at 3. In fact, SUWA presented its views at a 1997 hearing on H.R. 1500 before a Congressional subcommittee.[2] SUWA subsequently sought to expand the area to 8.5 million acres, including the area subject to the Low Rail Spur. Inasmuch as SUWA may continue to seek legislative approval of its proposal, passage of this legislation would protect SUWA's interest. Accordingly, this factor appears to weigh against consideration of SUWA's Petition.

Regarding the next factor, the extent to which the petitioner's participation may lead to the development of a sound record, SUWA asserts that it is represented by experienced counsel and is assisted by experts who conducted a 1998 inventory of BLM land for the purpose of identifying land possessing wilderness character, as well as (unnamed) "other biological and legal experts." SUWA

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[2] *See Hearing on H.R. 1952 and H.R. 1500 to Designate Certain Federal Lands and Bureau of Land Management Lands, in the State of Utah as Wilderness, and For Other Purposes*, 105th Cong., 1st Sess. 44-56 (1997) (statement of Heidi J. McIntosh, Legal Director, Southern Utah Wilderness Alliance).

Petition at 10; *see also Id.* at 5-8 (describing the inventory process). Further, SUWA asserts that its knowledge of the Cedar Mountains and the criteria for wilderness designation enables it to provide information concerning the impacts of the Low Rail Spur on the area. *Id.* at 10. While SUWA has set out the issue it plans to address -- *i.e.*, the impact of the Low Rail Spur on the wilderness character of the North Cedar Mountain roadless area, with the exception of Dr. Catlin, SUWA has not identified any "biological" or other expert it intends to use as potential witnesses, and it has not summarized their proposed testimony.[3] *See Braidwood*, 16 NRC at 246; *PFS*, 47 NRC at 208. *See also* Low Rail Order at 13 (proffer of affidavit from a forestry ecosystem manager and assertion of other unnamed experts "falls considerably short" of specificity requirement). Further, SUWA's recitation of its attorneys' participation is not relevant to this inquiry. *See Braidwood* 16 NRC at 246-47. Therefore, this factor weighs against consideration of SUWA's petition.

Regarding the next factor, the extent to which the petitioner's interest will be represented by existing parties, the Staff agrees with SUWA that no other parties will represent SUWA's interest in the proceeding. To be sure, other parties in the proceeding have raised issues pertaining to protection of the environment surrounding the ISFSI and transportation corridor (*see, e.g.*, Castle Rock Contention 20, "Selection of Road or Rail Access to PFSF Site"), however, none of these parties have raised the particular concern that is at the heart of SUWA's interest: the preservation of the wilderness characteristics of the North Cedar Mountains roadless area until that area can be designated as

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[3] As part of its first contention, SUWA states that to establish its basis, it intends to rely on the expert opinion of two named individuals: Dr. Catlin, whose declaration was submitted with the instant request, and Dr. Leila M. Schultz of Harvard University. SUWA Contentions at 5. While Dr. Catlin's declaration could be considered to be a summary of his proposed testimony regarding Contention A, no mention is made as to what Dr. Schultz would testify to, or as to which experts would support Contention B.

protected wilderness under the Wilderness Act of 1964. *See* SUWA Petition at 2-3. Further, the other parties' Low Rail Contentions have been rejected. *See* Low Rail Order at 2. Therefore, this factor weighs in SUWA's favor.

Finally, with respect to the extent to which the petitioner's participation will broaden the issues or delay the proceeding, the introduction of a new intervenor and new contentions will undoubtedly delay the proceeding. To date, the admissibility of all of the parties' contentions has been ruled upon, and informal discovery is in progress with respect to the admitted contentions. Therefore, some delay could be expected in providing time for informal discovery concerning SUWA's contentions. In addition, the admission of SUWA's contentions as proposed would broaden the issues in the proceeding. As mentioned previously, no party to the proceeding has advanced SUWA's concerns with respect to the preservation of the wilderness character of the BLM land. SUWA's concerns will likely involve interpretation of the Wilderness Act of 1964 and accompanying case law. These issues involve discrete matters not previously raised that will broaden the issues in this proceeding. Therefore, this factor weighs against consideration of SUWA's Petition.

In conclusion, the Staff believes that the five factors weigh against consideration of SUWA's late-filed petition.

C. Legal Requirements for Intervention

It is fundamental that any person who requests a hearing or seeks to intervene in a Commission proceeding must demonstrate that it has standing to do so. Section 189a(1) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a) (AEA), provides:

> In any proceeding under this Act, for the granting . . . of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

The Commission's regulations in 10 C.F.R. § 2.714(a)(2) provide that a petition to intervene, *inter alia*, "shall set forth with particularity the interest of the petitioner in the proceeding, [and] how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors set forth in [§ 2.714(d)(1)]." Pursuant to 10 C.F.R. § 2.714(d)(1), in ruling on a petition for leave to intervene, the presiding officer or Licensing Board is to consider:

> (i) The nature of the petitioner's right under the Act to be made a party to the proceeding.
>
> (ii) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
>
> (iii) The possible effect of any order that may be entered in the proceeding on the petitioner's interest.

Finally, a petition for leave to intervene must set forth "the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene," 10 C.F.R. § 2.714(a)(2); and a petitioner must advance at least one admissible contention in order to be permitted to intervene in a proceeding. 10 C.F.R. § 2.714(b).

In determining whether a petitioner has established the requisite interest, the Commission has traditionally applied contemporaneous judicial concepts of standing. *See, e.g., Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation)), CLI-98-13, 48 NRC 26, 30 (1998). In order to establish standing, a petitioner must show that the proposed action will cause injury in fact to the petitioner's interest and that the injury is arguably within the zone of interests protected by the statutes governing the proceeding. *See, e.g., Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC ___ (slip op., Oct. 23, 1998). In Commission proceedings, the injury must fall within the zone of interests sought to be protected by the AEA or the National

Environmental Policy Act. *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 (1998).

To establish injury in fact and standing, the petitioner must establish (a) that it personally has suffered or will suffer a distinct and palpable harm that constitutes injury in fact; (b) that the injury can fairly be traced to the challenged action; and (c) that the injury is likely to be redressed by a favorable decision in the proceeding. *Bennett v. Spear*, 520 U.S. 154, 167 (1997); *Yankee Atomic*, CLI-98-21, *slip op.* at 3. The injury must be concrete and particularized, actual and imminent, as opposed to being conjectural or hypothetical. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992); *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 (1998). A determination that the injury is fairly traceable to the challenged action does not depend "on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible." *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994). It must be likely, rather than speculative, that a favorable decision will redress the injury. *Lujan*, 504 U.S. at 561; *Sequoyah Fuels,* 40 NRC at 71-72.

In order for an organization to establish standing, it must either demonstrate standing based on the interest of the petitioning organization itself, or it may derive standing based on the interest of one or more individual members who have authorized the organization to represent them. *Yankee Atomic*, CLI-98-21, *slip op.* at 3. An organization seeking to intervene in its own right must demonstrate palpable injury in fact to its organizational interests that is within the zone of interests protected by the AEA or the National Environmental Policy Act. *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-30 (1991). Where the organization relies upon the interests of its members, it must show that: (1) the members

possess standing in their own right; (2) the interest sought to be protected is germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of an individual member in the litigation. *PFS*, 48 NRC at 30-31. In addition, the organization must demonstrate that at least one member has authorized it to represent him or her in the proceeding. *Id.* at 31.

D. SUWA Has Not Demonstrated Standing to Intervene As of Right

In its petition, SUWA has failed to demonstrate that it has injury in fact sufficient to demonstrate standing in its own right or through the standing of its members. Regarding injury, SUWA asserts that it is dedicated to obtaining wilderness designation for BLM roadless areas and that it has determined that the North Cedar Mountain area qualifies as "wilderness" under the Wilderness Act of 1964. SUWA Petition at 13.[4] Further, SUWA claims that it is committed to protecting wild roadless areas until Congress "has the opportunity to designate them as wilderness"

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[4] Wilderness is defined under the Wilderness Act of 1964 as:

> an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean . . . an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

See Wilderness Act of 1964, 16 U.S.C. § 1131(c).

under the Wilderness Act. *Id.* SUWA asserts that the new rail spur poses a threat to the wilderness character of the North Cedar Mountains, and, if constructed and operated, will disqualify the area from being designated as a wilderness under the Wilderness Act. *See id.*

Significantly, SUWA has not demonstrated that it, as an entity, will suffer a distinct and palpable harm as a result of the Low Rail Spur proposal. Rather, SUWA's interest is akin to that of the Sierra Club in *Sierra Club v. Morton*, 405 U.S. 727 (1972), where the United States Supreme Court held that the Sierra Club did not have standing to challenge a commercial development proposal approved by the United States Forest Service. In that case, the Sierra Club, which favored preserving the area in its undeveloped condition, asserted injury by reason of changes in the uses of the area and attendant change in aesthetics and ecology. *Id.* at 734. The Sierra Club stated that one of its principal purposes is to "protect and conserve the national resources of the Sierra Nevada Mountains" and that its interests would be vitally affected and aggrieved by the proposal. *Id.* at 735 n.8. The Court, while agreeing that the Sierra Club had asserted injury to a cognizable interest -- aesthetic and environmental well-being -- found that the Sierra Club had failed to show that it was "among the injured." *Id.* at 734-35. According to the Court, a "mere interest in a problem" is insufficient, by itself, to establish standing. *Id.* at 739.

SUWA, like the Sierra Club, has demonstrated a genuine concern regarding the proposed change to the use of the land that it desires be maintained in an undisturbed state. Yet, like the Sierra Club, SUWA has not shown that it will be actually injured. SUWA has not demonstrated that its course of behavior or intended conduct will be harmed by the proposed action. *See Wilderness Society v. Griles*, 824 F.2d 4, 12 (D.C. Cir. 1987). Thus, SUWA has not demonstrated standing to intervene in its own right.

Further, SUWA has not shown that the injury it has advanced -- that the BLM land will lose its legal status as a "wilderness" under the Wilderness Act of 1964 -- is "concrete." Rather, SUWA's asserted injury relates to the legal status of the BLM land and not to a specific tangible environmental harm that could result from failure of the land to be protected under the Wilderness Act. Moreover, SUWA has not shown that the Cedar Mountain area is recognized to be a wilderness area -- at best, SUWA asserts that it believes the area qualifies as such and it hopes to persuade Congress to agree. At this time, however, it is wholly speculative whether anyone other than SUWA would define this area as wilderness.[5]

Finally, SUWA has failed to establish that it has representational standing through one or more of its members. SUWA attempts to show representational standing based on the declaration of Jim Catlin, a member of SUWA. In his declaration, Dr. Catlin sets forth many diverse activities that members of SUWA enjoy in and around the land which the Low Rail Spur will traverse. *See* Catlin Declaration at ¶ 18. In addition, Dr. Catlin describes SUWA's activities in citizen oversight, and as a commentor on government decision-making affecting BLM land. *Id.* at ¶ 19.[6] These portions of Dr. Catlin's declaration, however, are not sufficient to establish his standing because they

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[5] In addition, SUWA states that the North Cedar Mountains would be ineligible for wilderness designation as a result of the PFS Low Rail Line. *See* SUWA Petition at 2. SUWA, however, does not explain why construction and operation of the Low Rail Spur across a small strip of land -- three miles in length -- would render an entire area of several thousand acres ineligible for wilderness designation.

[6] In particular, Dr. Catlin declares that the potential failure of the government to disclose important impacts in its analysis and other documents may harm SUWA's ability "to fulfill their organizational mission to inform SUWA members and others about threats to the environment." Catlin Declaration at ¶ 19. The Commission, however, has long held that injury to a petitioner's informational and educational activities is not sufficient to show injury in fact for standing. *See, e.g., Sacramento Municipal Utility Dist.* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 57 (1992), and cases cited therein.

do not describe the personal interest of Dr. Catlin -- rather, they refer only to unnamed members and to the organization as an entity. *See Sierra Club,* 405 U.S. at 735 (party seeking review must himself be "among the injured").

Dr. Catlin describes his personal interest by stating, "I have used and enjoyed the public lands and natural resources on BLM lands . . . ," including the land depicted in the North Cedar Mountains roadless area. Catlin Declaration at ¶ 20; *see* Exhibit 2. Additionally, Dr. Catlin asserts, "[m]y health, recreational, scientific, spiritual, educational, aesthetic, informational, and other interests will be directly effected and irreparably harmed by a decision to allow construction and operation of the Low Rail Spur and by other agency actions which may impact the North Cedar Mountains or any other roadless BLM lands." Catlin Declaration at ¶ 20. Dr. Catlin, however, has not demonstrated that his injury is "concrete and particularized." Nowhere in his declaration does he demonstrate a likelihood of his own "ongoing connection and presence" with the proposed Low Rail location. *See PFS*, CLI-98-13, 48 NRC at 32. As the Commission stated in the *PFS* decision, "standing does not depend on the precise number of . . . visits. It is the visits' length . . . and nature" that establish a sufficient bond with the area to support standing. *Id.* Thus, by failing to show that Dr. Catlin's visits to the proposed Low Rail location are regular and ongoing, SUWA is unable to derive representational standing through Dr. Catlin. Finally, Dr. Catlin does not state in his declaration that he authorizes SUWA to represent him in the proceeding. The Board should not draw an inference that Dr. Catlin meant to authorize SUWA to represent him in the proceeding, particularly since such authorization is conspicuously absent from his full declaration.

Regarding the causation factor, the Staff believes that SUWA has demonstrated that its articulated injury is "fairly traceable" to the proposed action in that a chain of causation is

"plausible."[7] SUWA has stated that "if the Low Rail Spur and the fire buffer are constructed and the rail line operated, the North Cedar Mountains will no longer qualify for protection under the Wilderness Act." SUWA Petition at 13. This chain of causation breaks down into the following sequence: 1) if the PFS application is approved, PFS would construct and operate the Low Rail Spur across the BLM land at issue; 2) if the rail spur is built on this land, it is plausible that the land (or at least a small portion of it) will lose its "wilderness character," and, finally, 3) if the land no longer possesses "wilderness character," it is plausible that it would not be eligible for inclusion in the Wilderness Act as a protected wilderness. Thus, the chain of causation is complete.

Regarding the redressability factor, however, SUWA has not demonstrated that a favorable decision will "likely" redress its injury. SUWA asserts that "[i]f the rail spur is not built or its alignment significantly altered (sic) so that it does not jeopardize the North Cedar Mountain's wilderness character, SUWA will not be harmed." SUWA Petition at 14. Rejection of PFS's application, however, would not break the chain of causation leading to SUWA's injury. On the contrary, rejection of PFS's application would not preclude BLM from granting a separate proposal for use of the land. Neither BLM nor its future lessees are parties to this proceeding, so they would not be bound by a ruling favorable to SUWA. *See Lujan*, 504 U.S. at 568 (no redressability where agencies funding the projects were not parties to the case and could not be bound). Thus, there is no basis to conclude that BLM would, for an indefinite period of time, preclude entities from developing the land. Further, rejection of PFS's application would not cause Congress to enact protective

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[7] The Staff, as set forth above, does not believe that SUWA has demonstrated injury in fact. However, a finding that a petitioner has not satisfied the injury in fact standard does not preclude a finding that a petitioner has met the causation and redressability standards -- although all three are necessary for standing. *See Wilderness*, 824 F.2d at 17 (court finds causation but not injury in fact).

legislation. [8] *See Physicians' Education Network, Inc. v. Department of Health, Education and Welfare*, 653 F.2d 621, 623, 627 (D.C. Cir. 1981) (it was too speculative to find that rescission of a report submitted to Congress is "substantially likely to prevent enactment of legislation" or, once enacted, move the hand of Congress to repeal the legislation).[9]

In sum, SUWA has not demonstrated that it has standing to intervene in this proceeding. SUWA has not defined a concrete injury in fact and has not shown that it or its members will personally suffer from that injury. Further, while SUWA has demonstrated that its stated injury is fairly traceable to the proposed action, SUWA's injury will not be redressed by granting it the relief it seeks because independent third parties, who are not joined in this proceeding, would not be bound by the outcome of this proceeding.

E. Legal Standards Governing Discretionary Intervention

Where a petitioner has not demonstrated that it is entitled to intervene in a proceeding as a matter of right, it may, nevertheless, be admitted as a party to the proceeding at the discretion of the Licensing Board. The Commission has set forth the following factors for consideration of discretionary intervention:

(a) Weighing in favor of allowing intervention--

(1) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

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[8] Moreover, the proposed legislation pertaining to Utah BLM land, H.R. 1500, has been introduced every year since 1989 and was again introduced in 1997 along with the Senate counterpart, S. 773; however, this legislation has repeatedly failed to pass. *See State of Utah v. Babbitt*, 137 F.3d 1193, 1199 n.4 (10th Cir. 1998).

[9] A different result may obtain where the agency's action in dispute is its recommendation to Congress pertaining to the very matter that Congress will decide. *See Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1515 (9th Cir. 1992).

(2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.

(3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

(b) Weighing against allowing intervention--

(4) The availability of other means whereby petitioner's interest will be protected.

(5) The extent to which the petitioner's interest will be represented by existing parties.

(6) The extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

Portland Gen. Elec. Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 616 (1976); *Sacramento Municipal Utility Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 141 (1993). As stated by the Licensing Board, factors one, four, five, and six are basically the same as the last four factors of the late-filed petition standard, which are set forth above. *See PFS*, 48 NRC at 177; 10 C.F.R. § 2.714(a)(1). In the discretionary intervention analysis, however, the first factor, the ability to assist in developing a sound record, is accorded primary consideration. *Pebble Springs*, 4 NRC at 617. In this regard, a petitioner should show that it has specific knowledge of the matters in dispute. *PFS*, 48 NRC at 35. And, as stated previously, a petitioner should identify its proposed witnesses and summarize their testimony. *See Braidwood*, 16 NRC at 246.

F. SUWA Should Not Be Granted Discretionary Intervention

In its Petition, SUWA does little more than recite the standards for discretionary intervention and assert that the standards favor its participation in the proceeding. SUWA Petition at 14. SUWA,

however, has failed to establish that it should be granted discretionary intervention. First, as with the late-filed standard, SUWA has not demonstrated that its participation may reasonably be expected to assist in development of a sound record. Although SUWA claims to be assisted by a number of experts, SUWA has not identified any person, except for Dr. Catlin, as a witness and has not set forth any proposed testimony. Inasmuch as this factor is accorded the most weight, SUWA's failing in this regard is critical. As with the late-filed standard, other means exist whereby SUWA's interest will be protected; SUWA's interest will not be represented by existing parties; and SUWA's participation will likely broaden or delay the proceeding.

The remaining two criteria are suggestive of the factors set forth in 10 C.F.R. § 2.714(d), which govern intervention generally. *See Pebble Springs*, 4 NRC at 616. Regarding factor two, the nature and extent of the petitioner's property, financial, or other interest in the proceeding, SUWA has stated that its interest pertains to preserving the wilderness character of BLM land. As mentioned previously, SUWA has not demonstrated that this interest is sufficient, with respect to itself, to show standing. SUWA's interest does not pertain to property or financial interest, and does not relate to its intended behavior or planned conduct. *See Wilderness*, 824 F.2d at 12; *see also PFS*, 48 NRC at 176-177 (Board notes that interests that are academic or relate to dissemination of information are not sufficient to satisfy this discretionary intervention factor). Regarding the redressability factor, if an order is entered in the proceeding denying the application or conditioning its approval on the relocation of the proposed Low Rail Spur, SUWA's stated injury would not be averted.

On balance, these factors demonstrate that SUWA should not be granted discretionary intervention. Further, if the Licensing Board grants SUWA discretionary intervention, SUWA's participation should be limited to those issues SUWA has set forth for consideration. *See Pebble*

Springs, 4 NRC at 617 (to avoid the possibility of sporadic participation or delay, adjudicatory boards may limit discretionary intervenors to the issues they have identified as of particular concern to them).

G. Legal Standards Governing Contentions

It is well established that contentions may only be admitted in an NRC licensing proceeding if they fall within the scope of issues set forth in the *Federal Register* notice of hearing and comply with the requirements of 10 C.F.R. § 2.714(b) and applicable Commission case law. *See, e.g., Arizona Public Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155-56 (1991); *Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974). Pursuant to 10 C.F.R. § 2.714(b)(1), a petitioner for leave to intervene is required to file a list of the contentions it seeks to have litigated in the proceeding, at least one of which must satisfy the requirements of § 2.714(b)(2). Section 2.714(b)(2), as amended, requires that each contention "must consist of a specific statement of the issue of law or fact to be raised or controverted," and that the following information must be provided in support of the contention:

> (i) A brief explanation of the bases of the contention.
>
> (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.
>
> (iii) Sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National

> Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report.

Further, pursuant to 10 C.F.R. § 2.714(d)(2), a contention must be rejected if:

> (i) The contention and supporting material fail to satisfy the requirements of [§ 2.714(b)(2)]; or
>
> (ii) The contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.

The Commission has recently reemphasized that contentions must meet the requirements of 10 C.F.R. 2.714(b)(2), and that the burden of coming forward with a valid contention is on the proponent of the contention. *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998). Further, the Commission stated that the responsibility for formulating the contention and providing information sufficient to satisfy the basis requirement for the contention rests with the proponent of the contention and not with the Licensing Board. *Id.*

It is well established that the purpose for the basis requirements of 10 C.F.R. § 2.714(b)(2) is (1) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) to establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (3) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose. *Peach Bottom*, 8 AEC at 13, 20. Further, the *Peach Bottom* decision requires that a contention be rejected if:

> (1) it constitutes an attack on applicable statutory requirements;
>
> (2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;
>
> (3) it is nothing more than a generalization regarding the petitioner's view of what applicable policies ought to be;

(4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or

(5) it seeks to raise an issue which is not concrete or mitigable.

Peach Bottom, 8 AEC at 20-21.

H. SUWA's Contentions Are Inadmissible

The Staff submits that even if SUWA is found to have standing, it has failed to set forth an admissible contention. Accordingly, its petition to intervene should be denied.

SUWA Contention A
The License Application Amendment fails to consider adequately the impacts of the Low Corridor Rail Spur and the associated fire buffer zone on 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 has determined, after significant analysis, that the North Cedar Mountains qualifies for and should be designated as wilderness under the Wilderness Act of 1964 and therefore should be preserved in its current natural state until the United States Congress has an opportunity to evaluate the land for wilderness designation.

Staff Response:

SUWA's Contention should be dismissed because: 1) it does not set forth sufficient information to show that a material dispute exists with the Applicant by reference to key portions of the Application's Environmental Report (ER), and 2) it does not demonstrate that the Application is deficient, but only asserts what applicable policies ought to be. *See* 10 C.F.R. § 2.714(d)(2); *Peach Bottom*, 8 AEC at 20-21.

In its contention, SUWA describes: 1) the location of the Low Rail Spur; 2) SUWA's efforts in supporting passage of legislation that would designate the North Cedar Mountains, a portion of the land that the Low Rail Spur would cross, as "wilderness"; 3) the inventory process used to determine that the North Cedar Mountains would qualify under the proposed legislation as "wilderness;" 4) the

impact of the Low Rail Spur on the wilderness character of the land, as the term "wilderness" is defined in the Wilderness Act of 1964; and 5) the failure of the Applicant to address potential impacts on the area. SUWA Contentions at 2-5. In particular, SUWA asserts that the Application is deficient due to the failure of PFS to analyze the impact of construction and operation of the Low Rail Spur on the North Cedar Mountains and its current status as an area which "generally appears to have been affected primarily by the forces of nature, with the imprint of [human] work substantially unnoticeable." *See* SUWA Contentions at 4. SUWA also claims that the Applicant has not considered the impact of the Low Rail Spur on the "outstanding opportunities for solitude." *Id.* In addition, SUWA asserts that PFS does not adequately address the impact of construction and operation of the Low Rail Spur on the "wildlife, wildlife habitat, plant life, and other ecosystem values which are essential to the ecological health of the area and favor it for wilderness designation." *Id.* at 4-5.

In its application, PFS does recognize that the Low Rail Spur will add a "visual element to Skull Valley." *See* Environmental Report (ER) § 4.4.8, "Effects on Regional Historical, Cultural, Scenic, and Natural Features." PFS further states that "due to the variations in the rolling topography and the low profile of the rail spur (essentially at grade level), the rail line will not be obviously visible from most locations in the valley." *Id.* PFS also recognizes that the rail spur will be an "apparent change in the visual landscape" in developed areas near the interstate and from high elevations in the Cedar Mountains. *Id.* SUWA offers nothing to suggest that the Applicant's assessment is inaccurate. Therefore, SUWA has not shown that a material dispute exists with PFS.

Regarding consequences to the wildlife, plant life and ecological health, PFS has provided a discussion on the effects on ecological resources associated with the construction and operation of

the Low Rail Spur. *See* ER § 4.4.2, "Effects on Ecological Resources." Further, PFS has stated that construction of the 200 foot wide right-of-way for construction of the Low Corridor would "temporarily remove or disturb about 776 acres of greasewood and desert shrub salt/brush habitat." ER § 4.4. Further, as SUWA recognizes, PFS states that the forty foot wide corridor would be "cleared of vegetation" in order to create a fire buffer zone. ER § 4.4.8; *see* SUWA Contentions at 2-3. SUWA does not demonstrate by facts or expert opinion that PFS's discussion is inadequate.

In addition, the application states that BLM has established visual resource management (VRM) classes for lands under its management control. ER § 2.9.2, "Visual and Scenic Resources." Regarding the BLM classification along the Low Corridor, the Applicant states that this area falls within VRM Class IV, "which has a management objective that provides for activities that may result in *major modifications to the existing character* of the landscape." *Id.* (emphasis added). According to the Applicant, Class IV designation permits activities that may "dominate the view and be a major focal point for the viewer." *Id.* Class IV designation anticipates "high levels of change in the visual character of the landscape," while seeking to control the impact through various means. *Id.* PFS has stated that the rail spur will be consistent with BLM's Class IV designation for the Low Corridor. ER § 4.4.8. Thus, the Applicant has described impacts on the proposed area.

Regarding SUWA's claim that the Applicant has not described the impact of the loss of wilderness character on the ability of the land to be protected under the Wilderness Act, SUWA has not shown that such an impact is reasonably foreseeable. First, SUWA is silent with respect to the Applicant's discussion of its compliance with BLM Class IV status. SUWA does not point to any existing law or regulation that would currently preclude PFS from constructing and operating the Low Rail Spur in the approximately three-mile stretch of land near the North Cedar Mountains that

is at issue. SUWA desires to preserve the wilderness character of the land so that it may be included in the Wilderness Act as a protected wilderness; however, the Wilderness Act itself does not extend its protection to areas, such as this, that have not been listed. The Wilderness Act states that "no Federal lands shall be designated as 'wilderness areas' except as provided for in this chapter or by a subsequent Act." Wilderness Act of 1964, 16 U.S.C. § 1131(a). SUWA does not controvert the fact that the Wilderness Act does not mandate that the land at issue remain undeveloped.

While SUWA wishes to have included in the Application a discussion of the implications of development of the land on its future preservation under the Act, no such discussion is presently required. PFS is not required to address impacts that are not reasonably foreseeable. *See Scientists' Institute For Public Information v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973) (NEPA requirement that environmental effects of a proposed action be described is subject to a "rule of reason." Thus, "[a]n agency need not foresee the unforeseeable.") The impact on the future status of land subject to pending legislation is too speculative and remote for consideration in an environmental discussion of impacts of a proposed action. *See Arizona Public Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-45, 15 NRC 1527, 1528-30 (1982) (litigation pending in other forums which may some day have impact are not required to be considered under NEPA). In this situation, although SUWA may propose legislation to have this area included in the Wilderness Act of 1964, it is mere speculation that such legislation will pass this year or at any other time. As noted by the Tenth Circuit Court of Appeals in *State of Utah v. Babbitt*, 137 F.3d, 1193, 1199 n.4 (10th Cir. 1998), the proposed legislation pertaining to Utah BLM land, H.R. 1500, has been introduced every year since 1989, and was again introduced in 1997 along with the Senate counterpart, S. 773. None of the 1997 bills have passed. A review of the land in Utah that has been

granted protected wilderness status under the Wilderness Act of 1964 indicates that no land has been added to the list since 1984. *See* Wilderness Act of 1964, 16 U.S.C. § 1132. Accordingly, there is no reasonable basis to conclude that efforts to have this area designated as "wilderness" will succeed.

Further, the speculative nature of SUWA's argument is highlighted by the flurry of controversy surrounding the designation of land in the State of Utah as "wilderness." *See Babbitt*, 137 F.3d at 1199 (a "stalemate" on Utah wilderness issue was acknowledged by Bruce Babbitt, Secretary of the Interior); *see Hearing . . .*, 105th Cong., 1st Sess. 1 (1997) (statement of Hon. James V. Hansen, a Representative in Congress from the State of Utah) (acknowledging that Utah BLM wilderness concern has been a "hotly contested issue over the past 20 years in the State of Utah, and recently on a national scale"). *See also* Israelsen, *Wilderness Wish List: 8.5 Million Acres -- Advocates release Utah review, which off-road enthusiasts and others immediately challenge*, Salt Lake Tribune, July 9, 1998, attached to SUWA Petition as Exhibit 1.

The impact identified by SUWA -- that the proposed action will ruin the chances of having all or some of this tract of land declared off-limits to commercial development at some future date, if at all -- is remote. In sum, Contention A should be rejected because it fails to address pertinent aspects of PFS's application, constitutes a remote and speculative concern, and because it amounts to a generalization of SUWA's views of what applicable policies ought to be, rather than what it is required under NEPA and the Commission's regulations.

SUWA Contention B

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.

Staff Response:

The Staff objects to the admission of this contention because: 1) it does not set forth facts sufficient to show that a material dispute exists with the Applicant, and 2) it does not demonstrate that the Application is deficient, but only asserts what applicable policies ought to be. *See* 10 C.F.R. § 2.714(d)(2); *Peach Bottom*, 8 AEC at 20-21. SUWA has not set forth any alternative that is required to be considered as a part of the application. SUWA does not address the Applicant's discussion of facility siting alternatives, including the no action alternative. *See* ER at § 8.1. Further, as is shown in response to Contention A, SUWA has not set forth any environmental impacts required to be analyzed under NEPA to which a discussion of mitigative alternatives would pertain. For these reasons, Contention B should be rejected.

CONCLUSION

For the reasons set forth above, SUWA's petition for intervention should be denied.

Respectfully submitted,

Catherine Marco

Catherine Marco
Counsel for NRC Staff

Dated at Rockville, Maryland
this 1st day of December, 1998

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)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO SOUTHERN UTAH WILDERNESS ALLIANCE'S REQUEST FOR HEARING, PETITION TO INTERVENE, AND CONTENTIONS REGARDING PRIVATE FUEL STORAGE FACILITY LICENSE APPLICATION (THE LOW RAIL SPUR)" in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the United States mail, first class, as indicated by an asterisk, with copies by electronic mail as indicated, this 1st day of December, 1998.

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