

December 1, 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
)	
(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

**APPLICANT'S ANSWER TO PETITION TO INTERVENE AND
CONTENTIONS OF SOUTHERN UTAH WILDERNESS ALLIANCE**

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby submits its answers to the Southern Utah Wilderness Alliance's ("SUWA") "Request for Hearing and Petition to Intervene" ("SUWA Pet."), and "Contentions Regarding Private Fuel Storage Facility License Application (The Low Rail Spur)" ("SUWA Cont."), both dated November 18, 1998.¹ PFS submits that SUWA's petition to intervene should be denied, in that (1) SUWA lacks standing, (2) SUWA has not justified its late intervention, and (3) SUWA has not advanced a single litigable contention.

I. FACTUAL AND LEGAL BACKGROUND

SUWA claims that it is "dedicated to obtaining wilderness designation for qualifying BLM [Bureau of Land Management] roadless areas" and that the construction of the Low rail spur would "disqualify the [North Cedar Mountains] [roadless] area for wilder-

¹ On August 28, 1998, PFS filed an amendment to the license application which (1) moved the rail spur from the Skull Valley road corridor to a corridor running from Low, Utah along the western side of Skull Valley to the Skull Valley Reservation (the "Low Corridor"), and (2) moved the Intermodal Transfer Point ("ITP") 1.8 miles west of its original location.

ness designation.” SUWA Pet. at 14. As can be seen from the map at Exhibit 2 to its petition, SUWA’s self described “North Cedar Mountains roadless area” -- located just one to three miles south of Interstate 80 and the main Union Pacific rail line -- is approximately five miles wide (east to west) and seven miles long (north to south). PFS’s rail spur affects only a thin sliver of that area. The rail spur passes through the area only one half to three quarters of a mile from its easternmost edge, for a distance of less than three miles of the 32 mile rail route.² Moreover, as seen from the profile maps in the Environmental Report (“ER”), the rail spur never actually enters the North Cedar Mountains, but lies entirely within the Skull Valley below. See ER Figs. 2.1-1 and 3.2-2 (Sheet 2).

Under the Federal Land Policy and Management Act of 1976 (“FLPMA”), the Secretary of the Interior is the federal official responsible for reviewing BLM land for potential designation as wilderness. The Secretary is to review “those roadless areas of five thousand acres or more . . . of the public lands, identified . . . as having wilderness characteristics described in the Wilderness Act” and report to the President on “the suitability or nonsuitability of each such area . . . for preservation as wilderness.” 43 U.S.C. §

1782(a). The President must then advise Congress of those areas he recommends be des-

² See id.; see also ER Fig. 3.2-2 (Sheet 2). The roads and other information in this figure are drawn from United States Geological Survey Maps, Delle, Utah, N4045-W11245/7.5 and Hastings Pass NE, Utah, N4037.5-W11245/7.5, attached as Exhibit 1 (the rail spur is depicted by a dark line on the USGS maps). By comparing ER Figure 3.2-2 and the USGS maps with SUWA’s Exhibit 2, it appears that the small parcel of land of SUWA’s “North Cedar Mountains roadless area” through which the proposed rail spur would pass is bounded on three sides by existing roads. The entire easternmost boundary (one half to three quarters mile from the rail line) appears to be a road which runs parallel to the proposed rail line and both the north and south boundaries appear to be roads which cross the path of the proposed rail spur. Thus, roads clearly exist in the close vicinity of where the proposed rail spur would pass through this small parcel and appear to cross the spur at the north and south boundaries of the parcel.

ignated as wilderness, but Congress must make the final designation by passing a statute.

43 U.S.C. § 1782(b).³

In 1979-80, BLM reviewed and conducted an "intensive inventory" of the North Cedar Mountains pursuant to FLPMA and "dropped [them] from further consideration as wilderness because of lack of wilderness characteristics. . . ." 45 Fed. Reg. 75,602, 75,603-04 (1980). In doing so, BLM reasoned and concluded as follows:

The lack of "outstanding" potential, or opportunity for solitude and/or primitive and unconfined recreational experience should drop [the North Cedar Mountains area] from further wilderness inventory consideration. Man's imprints are substantially noticeable within the unit. Natural screening contributes little to hide or enclose man and his contrasting influences. Recreation opportunities exist but all are encumbered by man's developments.⁴

Further, in 1990, BLM also declined to recommend for designation as wilderness the adjacent Cedar Mountains Wilderness Study Area (WSA) to the south, which it had identified (in 1980) for further consideration.⁵ BLM concluded: "The area is natural but the opportunity for primitive and unconfined recreation is not outstanding. Water is lacking,

³ The Wilderness Act of Sept. 3, 1964, imposes similar requirements and processes for areas within national forests, national parks, national wildlife refuges, and national game ranges. 16 U.S.C. §§ 1131 *et seq.* Further, the Wilderness Act characterizes a wilderness as an area "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) . . . and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value." 16 U.S.C. § 1311(c). The third criterion is whether the area includes at least 5,000 acres of land. 16 U.S.C. § 1311(c)(3).

⁴ BLM Intensive Wilderness Inventory, Final Decision on Wilderness Study Areas, Utah (November 1980), relevant excerpts attached as Exhibit 2. BLM's decision on the North Cedar Mountains was not protested after it was issued. 45 Fed. Reg. 86,558 (1980).

⁵ 2 Utah BLM Statewide Wilderness Final Environmental Impact Statement at Cedar Mountains WSA 1, 17 (1990) (hereinafter "Utah Wilderness FEIS"), relevant excerpts attached as Exhibit 3. The Cedar Mountains WSA generally corresponds to the Central Cedar Mountain area identified on SUWA's map at Exhibit 2 to its petition.

vegetation lacks variety, and scenic values are common. Supplemental values are lacking in most of the area.” 1 Utah Wilderness FEIS at 340 (Table 11.2).

SUWA claims that it has been trying to have the adjacent Cedar Mountains WSA to the south (and other areas in Utah covering some 5.7 million acres) designated as wilderness through House bill H.R. 1500.⁶ That bill, however, has been introduced every year since 1989 and has still not passed. Utah v. Babbitt, 137 F.3d 1193, 1199 n. 4 (10th Cir. 1998). Indeed, it has never been reported out of committee.⁷ Moreover, H.R. 1500 does not include the North Cedar Mountains. H.R. 1500 § 101; see SUWA Pet. at 5. SUWA’s new proposal, based on its “reinventory” of BLM lands, to designate 8.5 million acres of Utah as wilderness, including the North Cedar Mountains, has not even been introduced in Congress. SUWA Petition at 4-5.⁸ Indeed, SUWA’s own exhibit labels the proposal as a “wish list” and further notes that the Director of SUWA himself has said that “the new 8.5-million-acre figure is a starting point” for negotiations “with politicians to determine which of these areas should be included in a new wilderness bill.”⁹

⁶ SUWA Petition at 3-4; H.R. 1500, 105th Cong., 1st Sess. (1997), 105 Bill Tracking H.R. 1500, (LEXIS, Legis Library, BLTRCK File).

⁷ Library of Congress On-Line Legislative Information Service, <http://thomas.loc.gov/home/thomas2.html>; see also LEXIS Bill Tracking Report, H.R. 1500, supra note 6.

⁸ Although SUWA refers to a reinventory being done by BLM (SUWA Pet. at 4-5), that reinventory covers only the lands cited in H.R. 1500 and, hence, not the North Cedar Mountains. Babbitt, 137 F.3d at 1199.

⁹ Brent Israelsen, “Wilderness Wish List: 8.5 Million Acres,” The Salt Lake Tribune, July 9, 1998, SUWA Pet., Exh. 1.

II. SUWA LACKS STANDING TO INTERVENE

A party wishing to intervene in an adjudicatory proceeding concerning a proposed licensing action must establish that it

- (1) has filed a timely intervention petition or meets the standards that permit consideration of an untimely petition;
- (2) has standing to intervene; and
- (3) has proffered one or more contentions that are litigable in the proceeding.

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47

NRC 142, 167 (1998) (hereinafter "LBP-98-7, 47 NRC at __").

To determine whether a party has standing, the agency has applied "contemporaneous judicial standing concepts" that require the party to establish:

- (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statute (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA);
- (2) the injury is fairly traceable to the challenged action; and
- (3) the injury is likely to be redressed by a favorable decision.

Id. at 167-68.

SUWA lacks standing to intervene because it has not shown that it has suffered or will suffer injury-in-fact from the licensing of the Applicant's ISFSI. In order to establish standing, as an organization, SUWA must show that the action in question has caused or will cause harm to its organizational interests or the interests of at least one of its members. Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 n.10 (1994). It has done neither. Further, while a presiding officer may allow a petitioner to intervene as matter of discretion upon the consideration of six pertinent

factors, see LBP-98-7, 47 NRC at 168 (quoting Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 616 (1976)), SUWA's intervention here is not warranted under that test either.

A. SUWA Will Not Suffer Harm as an Organization

SUWA lacks standing in its own right because the proposed action will not harm SUWA as an organization. SUWA fails to show that the construction of the PFS's Low rail spur will harm SUWA as an organization as opposed to its generalized interest in the designation of land as wilderness. Further, even assuming that SUWA's generalized interest in the designation of land as wilderness could provide it with organizational standing, that interest -- as asserted with respect to the land to be traversed by the PFS's rail spur -- is nonexistent or too conjectural to provide SUWA with standing here.

1. SUWA's Interest in Wilderness Preservation Does not Provide Standing

SUWA states that it is "dedicated to identifying and protecting BLM roadless areas which possess wilderness character" and that it "seeks to protect those lands in their present condition until Congress has the opportunity to designate them as wilderness. . . ." SUWA Pet. at 2-3. SUWA claims that "[a]s a result of this organizational mandate, [it] has a profound interest in insuring that the Low Rail Spur does not adversely impact the North Cedar Mountain roadless area and therefore does not impair the wilderness character of the area." Id. at 3. It also claims involvement in "citizen oversight, review, and comment upon government decisionmaking affecting BLM lands" and to have a mission "to inform SUWA members and others about threats to the environment." Catlin Dec. ¶¶ 18-19.

These interests, however profound they may appear to be, are not sufficient to provide an organization with standing in its own right to intervene in a licensing proceeding. If they were, a petitioner like SUWA would have standing anywhere in Utah or indeed anywhere in the United States. As stated by the Appeal Board in Florida Power & Light Company (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 529 (1991):

[W]hen an environmental organization seeks to intervene in its own right, independent of its status as a representative of one or more of its members, . . . it must demonstrate an injury in fact to the organization within the zone of interests of [the AEA or NEPA].

(Emphasis added.) The standard required for an organization to show injury-in-fact is the same as that for an individual: the organization must show "a real or threatened harm, not merely an academic interest in a matter." Id. As stated by the Appeal Board:

An organization's asserted purposes and interests, whether national or local in scope, do not, without more, establish independent organizational standing. As the Supreme Court stated in Sierra Club v. Morton, "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient to render the organization 'adversely affected' or 'aggrieved . . .'"

Id. at 530 (quoting Sierra Club v. Morton, 405 U.S. 727, 739 (1972)) (emphasis added).

In Turkey Point, the Appeal Board affirmed the denial of standing to a local organization seeking to challenge a plant's license amendment, where the organization's "primary purpose [was] focused on providing for public safety and for the protection of the environment as a whole regarding Nuclear Power Generation" and where a further mission of the organization was to educate the local public about the plant by distributing

information and conducting seminars. ALAB-952, 33 NRC at 529-30 (footnote omitted).

The Appeal Board held that asserted harm to such organizational interests did not "demonstrate an injury in fact to an organizational interest . . . that is within the zone of interests of the applicable statutes." *Id.* Here, SUWA's purpose of preserving lands so they can be designated as wilderness and its mission to inform others of threats to the environment are no different from the Turkey Point petitioner's purpose of protecting the local public and the environment and its mission to provide education. Therefore, like the petitioner in Turkey Point, SUWA's possesses no standing in its own right.¹⁰

2. SUWA's Asserted Interest Is Not Legally Sufficient to Establish Standing

Even if SUWA's interest in the designation of land as wilderness were an interest of the type that could provide an organization with standing -- which it is not -- that interest, as asserted with respect to the land to be traversed by PFS's proposed rail spur, is either legally non-existent or, alternatively, too conjectural to provide SUWA with standing.

When a petitioner claims standing through injury to an asserted interest or right, it must show that the interest or right exists in the first place. *See Babbitt*, 137 F.3d at 1207 (quoting Claybrook v. Slater, 111 F.3d 904, 907 (D.C. Cir. 1997) ("If the plaintiff's claim has no foundation in law, he has no legally protected interest and thus no standing to sue."); Arjay Assocs., Inc. v. Bush, 891 F.2d 894, 898 (Fed. Cir. 1989) ("[a]ppellants lack standing because the injury they assert is to a nonexistent right"). Moreover, the potential

¹⁰ An organization can have standing in its own right by, for example, owning property that could potentially be harmed in the event of a release of radioactive material from a nearby nuclear facility. *See, e.g., Sequoyah Fuels Corporation* (Gore, Oklahoma Site), LBP-94-19, 40 NRC 9, 14-15 (1994). Such is clearly not the case here.

future existence of the interest, alone, is insufficient; the interest must be more than "conjectural" or a "mere possibility." See Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980); cf. International Uranium (USA) Corporation (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 (1998) (asserted future injury to interest must be "particular and concrete, as opposed to being conjectural or hypothetical").

Here, as discussed in Section I above, the federal agency responsible for making wilderness designation recommendations, BLM, has specifically considered recommending the North Cedar Mountains as a wilderness area and expressly found that it does not qualify for such designation. No challenge was made to this finding. BLM also considered and rejected, after further study, potential wilderness designation for the adjacent Cedar Mountains area to the south -- further removed from imprints of civilization such as Interstate 80 and the main Union Pacific rail line. Thus, the responsible federal agency has determined that the interest sought to be protected by SUWA in this licensing proceeding -- the designation of the North Cedar Mountains area as wilderness under the FLPMA and the Wilderness Act -- does not exist and hence cannot provide SUWA with standing. The Board must respect this determination made by the responsible federal agency. See Hydro Resources, Inc. (2929 Coors Road Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC ___, slip op. at 2 (Sept. 15, 1998) (the NRC should not resolve questions left to other regulatory bodies).

Further, apart from claiming that the North Cedar Mountains generally should be designated as wilderness, SUWA says nothing about the specific parcel of land through

which PFS's rail spur would pass. As discussed above, this parcel is but a small slice of the easternmost edge of the area -- approximately two square miles -- bounded on three sides by existing roads (as shown on USGS maps). SUWA (and its affiant, Mr. Catlin) frequently discuss the North Cedar Mountains but provide no facts concerning the wilderness characteristics or roadlessness of the parcel of land to be crossed by the spur.¹¹ Thus, even if SUWA has some cognizable interest in the Cedar Mountains generally, it has demonstrated no such interest in the particular tract of land to be traversed by the rail spur. The Board should not accept SUWA's broad, conclusory assertion regarding the nature of this land as a basis for standing where it is rebutted by the uncontroverted administrative determination by the governmental agency explicitly charged to make those determinations. See Yankee Atomic, CLI-94-3, 39 NRC at 102 n.10 (petitioner denied standing where it claimed that its members lived "close" to radioactive waste shipment routes without identifying the routes or explaining how close to the routes its members lived).

Moreover, even assuming that SUWA has an existing interest in having the land through which PFS's rail line will pass designated as wilderness, that interest is at best conjectural. Absent direct recourse to Congress, for the land to be designated as wilderness, BLM would have to reverse its prior determination and designate it as a wilderness study area; the Secretary of the Interior would then have to recommend to the President that the land be designated as wilderness; the President would have to make a similar recommendation to Congress; and Congress would have to pass a statute to make the final

¹¹ See SUWA Pet. at 2, 3, 5, 8-9, 11, 13, 14, 16; SUWA Cont. at 2-5; Catlin Dec. at ¶¶ 15-17.

designation. See Section I, supra. This is a long, arduous, uncertain process in which not even the first step has yet been taken. Indeed, the Tenth Circuit has found that a claim of impending injury from Congress' potential designation of BLM land in Utah as wilderness following such a process to be "conjecture based upon speculation that is bottomed on surmise." Babbitt, 137 F.3d at 1210 n.25.

Assumed vindication of SUWA's interest by direct recourse to Congress would be similar "conjecture based upon speculation that is bottomed on surmise." As discussed above, SUWA has been trying to get the adjacent Cedar Mountains area to the south (and other areas in Utah) designated as wilderness by Congress for the last ten years, but has failed, and SUWA's own director has indicated that its latest proposal of 8.5 million acres, which includes the North Cedar Mountains, is merely the "starting point" for negotiations with lawmakers. Further, the Commission itself has held that environmental impact statements need not consider alternatives that require "significant changes in governmental policy or legislation," because they are too speculative. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 145 (1993).

Therefore, any assumed interest based on BLM's reversal of its prior determination and/or Congress' potential wilderness designation of the land which the Low rail spur will traverse is too conjectural to provide SUWA with standing to intervene here.

B. Mr. Catlin Will Not Suffer Harm as an Individual

SUWA's attempt to invoke standing based upon one of its members, Mr. Catlin, must similarly be rejected because (1) Mr. Catlin fails to allege any particularized or immi-

nent injury and (2) the interest to which Mr. Catlin claims injury is, like SUWA's above, non-existent or too conjectural to provide a basis for standing.

1. Failure to Allege Particularized or Imminent Injury

To establish standing, a petitioner's injury must be particularized and concrete, *i.e.*, it must affect him "in a personal and individual way." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 n.1 (1992). Specifically, a petitioner claiming injury from environmental damage "must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it." *Id.* at 565-66 (quoting Lujan v. National Wildlife Fed'n, 497 U.S. 871, 887-89 (1990)); *see also* LBP-98-7, 47 NRC at 171. Further, an asserted future injury must be "imminent," *i.e.*, the petitioner must have current contact or show that it will have imminent future contact with the area where the harm will occur. *See* Defenders of Wildlife, 505 U.S. at 564; *see also* Houston Lighting and Power Company (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 456-57 (1979) (merely "occasional trips" to a location near a plant are insufficient to establish standing).¹²

Here, Mr. Catlin's claimed injury is neither particularized nor imminent. He states, "I have used . . . the public lands and natural resources on BLM lands . . . and have used . . . the exact tract of lands contained in the North Cedar Mountains roadless area as depicted in Exhibit 2." Catlin Dec. ¶ 20 (emphasis added). Even according to SUWA, however, PFS's rail spur involves only a thin sliver of that area, on its easternmost edge. *See*

¹² *Accord* Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1448 (1982); Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 338 (1979).

SUWA Pet., Exh. 2; see also Section I, supra. Mr. Catlin does not assert that he has had any contact with that small parcel of land, only that he has used the North Cedar Mountains area generally. Catlin Dec. ¶ 20. Such use of an area only vaguely "in the vicinity" of the challenged action does not establish standing. Lujan, 504 U.S. at 561 n. 1, supra.

Further, Mr. Catlin asserts only vague, generalized use of the area in the past. He does not assert how frequent or regular his use has been; nor does he express any intent to use the area in the future. Accordingly, any harm that Mr. Catlin's asserted interest might suffer from the challenged action is not imminent. See Lujan and other cases cited above. Hence, Mr. Catlin lacks standing for this reason as well. Because Mr. Catlin lacks standing, SUWA cannot derive its standing from him.¹³

2. Mr. Catlin's Asserted Interest Is Insufficient to Establish Standing

Mr. Catlin possesses no legally valid interest in potentially having the land that PFS's rail spur will traverse designated as wilderness where BLM has already determined that the land is ineligible for designation as a wilderness area. See Section II.A.2, supra. At best, the prospect of changing the land's status is so remote as to render Mr. Catlin's asserted interest no more than hypothetical. Id. The reasoning on this point is the same for Mr. Catlin as it is for SUWA. Therefore, because Mr. Catlin lacks standing, SUWA cannot derive its standing from him and hence its petition must be denied.

¹³ Mr. Catlin states that other SUWA members have interests and engage in activities similar to his. Catlin Dec. ¶ 18. SUWA may not derive standing from potential harm to the asserted interests of any other members without their express consent. Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 396 (1979). Moreover, even if it could, those interests, as they parallel SUWA's and Mr. Catlin's, are too academic and are not legally valid as asserted over the land the Applicant's rail spur will traverse. See Catlin Dec. ¶ 18-19; see also Section I, supra.

C. SUWA Should Not Be Granted Discretionary Standing

SUWA alternatively asserts that it should be allowed discretionary intervention. SUWA Pet. at 12-14. SUWA is incorrect. The Commission's Pebble Springs factors weigh against discretionary intervention here. First, four of the six factors are drawn from the test for admitting late-filed petitions set forth in 10 C.F.R. § 2.714(a)(1), see Pebble Springs, CLI-76-27, 4 NRC at 616, and, as we show below, these factors weigh against SUWA. Section III, infra. Second, the other two factors, the nature of the petitioner's interests and the effect that the outcome of the proceeding may have upon them, are drawn from the factors set forth in 10 C.F.R. § 2.714(d) ordinarily used to determine whether a petitioner has standing. Pebble Springs, CLI-76-27, 4 NRC at 616; Turkey Point, ALAB-952, 33 NRC at 529. As shown above, these factors weigh heavily against SUWA, in that SUWA's interest, with respect to the area affected by PFS's rail spur, is legally non-existent or is at best conjectural. See Section II supra. Therefore, the issue on which SUWA would contribute to this proceeding is insubstantial and the Board should not allow it to intervene. See Pebble Springs, CLI-76-27, 4 NRC at 617.

III. SUWA'S PETITION IS UNJUSTIFIABLY LATE

SUWA's petition to intervene must also be denied because it is unjustifiably late. Petitions for leave to intervene were due September 15, 1997. 62 Fed. Reg. 41,099 (1997). Late petitioners must "demonstrate that a balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v) support accepting the petition." LBP-98-7, 47 NRC at 167. SUWA has not done so here, so its petition must be denied.

A. SUWA Lacks Good Cause for Late Intervention

The first factor is good cause for lateness. 10 C.F.R. § 2.714(a)(1)(i). SUWA lacks good cause in that it has waited too long to file its petition. PFS's amendment, on which SUWA bases its intervention and contentions, see SUWA Pet. at 9-10, was available to SUWA in the local public document room in Salt Lake City by early September. Moreover, SUWA's counsel had notice of the amendment by late September: she is also counsel for intervenor OGD and she discussed the amendment in the September 28, 1998 conference call with the Board. See Tr. at 977-78, 982. Counsel specifically stated that the new transportation route "might be [a] concern of people [who] are not intervenors right now," in that it will cross BLM land, id. at 977-78, and asked about "getting other parties . . . involved." Id. at 982. SUWA filed its petition more than 50 days after that.

There is no good cause for this delay. SUWA does not state when it learned of the amendment nor does it give any explanation for this delay. See SUWA Pet. at 10. The Board determined that the State lacked good cause for filing Utah Contention EE late when it was filed after an unexplained one-month delay. LBP-98-7, 47 NRC at 208. The Board should also determine that SUWA lacks good cause for its lateness given its unexplained delay here, particularly given the factual simplicity and narrow scope of the information SUWA relies on for the basis of its petition. SUWA Pet. at 1-2.¹⁴ Where a peti-

¹⁴ Finding of good cause for the delay between the availability of the information and the filing depends on the "scope and complexity of the 'new' information." Private Fuel Storage (Independent Spent Fuel Storage Facility), LBP-98-29, 48 NRC __, __, slip op. at 12 n.4 (Nov. 30, 1998). Here, the relevant information was merely the location proposed for the rail spur.

tioner lacks good cause, it must make a compelling showing on the other factors, which, as discussed next, SUWA has not done.

B. SUWA Fails to Make a Compelling Showing on the Other Factors

The second and fourth factors, which concern the protection of the petitioner's asserted interest by other means or parties, are to be accorded less weight than the third and fifth factors. LBP-98-7, 47 NRC at 208. Moreover, where a petitioner, like SUWA, has not shown that it has a valid interest, *i.e.*, standing, any support for accepting the petition based on these factors is further weakened. See Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 165 (1993). In any event, SUWA has other means to attempt to protect its interest. It can petition the responsible federal agency, BLM, to have the North Cedar Mountains recommended for wilderness designation; it can comment on the NRC's draft environmental impact statement; and it can continue to lobby and make proposals to Congress to have the land designated as wilderness. Therefore, these factors do not favor accepting SUWA's petition.

The third factor is whether the petitioner will make a strong contribution to the record. To satisfy this factor, a petitioner should, "with as much particularity as possible, identify its proposed witnesses, and summarize their proposed testimony." LBP-98-7, 47 NRC at 208 (citations omitted). Here, SUWA identifies two potential witnesses to testify, SUWA Cont. at 5, but it discusses only briefly their possible testimony regarding the North Cedar Mountains generally and discusses not at all their testimony regarding the small parcel of land that the Low rail spur will actually traverse. See SUWA Pet. at 7, 13-14; SUWA Cont. at 3-5; Catlin Dec. ¶¶ 5-7. Therefore, SUWA has not shown that it will

make a strong contribution on issues relevant to this proceeding. See LBP-98-29, 48 NRC at __, slip op. at 13. Indeed, as discussed in Section IV.A.1, SUWA ignores completely the ER's evaluation of the potential impacts of the rail spur on its surrounding environs. SUWA's failure to show "particularized knowledge" of or concern for PFS's application and its effects weighs especially heavily against granting SUWA discretionary intervention. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 35 & n.4 (1998).

The fifth factor concerns the extent to which the petitioner's participation will broaden or delay the proceeding. Here, SUWA's participation will clearly delay the proceeding in that SUWA's petition comes more than one year after petitions were due and only three months before the close of discovery. See South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 888-89 (1981) (impact on discovery and potentially the hearing date a significant factor). Further, because SUWA raises issues not raised by other parties,¹⁵ its participation would broaden the proceeding as well. Id. at 891. Hence, this factor also weighs against accepting SUWA's petition.

In sum, all five factors weigh against accepting SUWA's late petition and it must therefore be denied.

¹⁵ Contentions filed by other intervenors concerning the Low rail spur were rejected by the Board. LBP-98-29 48 NRC at __, slip op. at 38-39. Furthermore those contentions concerned issues different from those raised by SUWA.

IV. CONTENTIONS

SUWA submits two contentions regarding PFS's Low rail spur. SUWA Cont. at 2, 5. Both, however, fail to satisfy NRC pleading requirements and thus must be denied.

A. SUWA Contention A

SUWA asserts that PFS fails to consider adequately the impacts of the Low rail spur and the associated fire buffer zone on (1) the wilderness character and (2) the potential wilderness designation of the North Cedar Mountains. SUWA Cont. at 2. SUWA claims further that (3) "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 Congress has an opportunity to evaluate it for wilderness designation. Id. We address each of these three subcontentions in turn below.

1. Impact on Wilderness Character of the North Cedar Mountains

SUWA claims that the amendment fails to consider adequately the impacts of the Low rail spur and the associated fire buffer zone on the wilderness character of the North Cedar Mountains, in that PFS fails to analyze the impacts that the construction and operation of the rail line will have on the North Cedar Mountains; fails to consider that the operation of the rail line will intrude upon the area's "outstanding opportunities for solitude;" and fails to adequately address the impact of the rail line "on the area's wildlife, wildlife habitat, plant life, and other ecosystem values." SUWA Cont. at 4-5.

This subcontention must be dismissed for lack of basis and for failure to show that a material dispute exists with the Applicant. First, SUWA provides insufficient basis to support its assertions that PFS has failed to address any environmental impacts of the Low

rail spur. SUWA cites only one document, the Catlin Declaration, that even mentions the PFS rail spur. See SUWA Cont. at 2-5. The Catlin Declaration, however, discusses the impact of the spur in only broad, conclusory terms. See Catlin Dec. ¶¶ 16-17. Mr. Catlin states, without providing any explanation or reasoned basis, that the rail spur "will irreversibly impair the wilderness character of the North Cedar Mountains," id. at ¶16, that it "will significantly intrude into the North Cedar Mountain roadless area," that it "will significantly intrude upon the area's currently 'outstanding opportunities for solitude,'" and that it will "have adverse impacts on the area's wildlife and plant life, . . . which are essential to the ecological health of the area." Id. at ¶ 17. Such statements, even if made by an expert, do not provide an adequate basis for a contention:

[T]he Board is not to accept uncritically the assertion that . . . an expert opinion supplies the basis for a contention. . . . [A]n expert opinion that merely states a conclusion (e.g., the application is "deficient," "inadequate," or "wrong") without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion as it is alleged to provide a basis for the contention.

LBP-98-7, 47 NRC at 181 (citations omitted). Therefore, the conclusory Catlin Declaration does not provide sufficient basis for this subcontention and it must be dismissed.¹⁶

This subcontention must also be dismissed for failure to show that a material dispute exists with PFS, in that it completely ignores the information in the ER concerning the potential environmental impacts of the Low rail spur. LBP-98-7, 47 NRC at 181. The

¹⁶ To the extent that SUWA relies on its inventory of the North Cedar Mountains area for basis, see SUWA Contentions at 3, it is insufficient, in that it does not show in any way the impact that the rail spur might or might not have on the land it will traverse.

ER addresses the impact of the rail line on the land (and vegetation), including the area of land to be temporarily cleared for construction and permanently cleared for the roadbed and buffer zone.¹⁷ It addresses the impacts of the rail line on livestock and their habitat.¹⁸ It addresses the impacts on resident wildlife species and their habitat and the measures that might be undertaken to mitigate those impacts.¹⁹ Concerning "opportunities for solitude," the ER directly addresses the rail spur's noise and visual impacts.²⁰ SUWA completely ignores all of this information and provides no factual basis to challenge the adequacy of the evaluations set forth in the ER. Therefore the subcontention must be dismissed.

2. Impact on Potential Wilderness Designation of the North Cedar Mountains

SUWA claims that PFS fails to consider adequately the impacts of the Low rail spur and the associated fire buffer zone on the potential wilderness designation of the North Cedar Mountains, "a tract of roadless [BLM] land." SUWA Cont. at 2. SUWA states that in 1998 it inventoried the North Cedar Mountains and has determined that the

¹⁷ Construction will temporarily disturb 621 acres and permanently remove 155 acres of the 271,000 acres of rangeland in Skull Valley (and over 1 million acres in Tooele County); a "minor" amount of land compared to the total acreage of such land. Moreover, "[t]here are . . . no unique vegetation habitat features in areas proposed for vegetation removal." ER at 4.4-1 to 3.

¹⁸ Effects will be minimal due to the small amount of land used and livestock's ability to cross the railroad tracks. ER at 4.4-2.

¹⁹ Construction will temporarily disturb wildlife but measures will be taken to avoid disturbing the habitats of sensitive species such as kit fox, burrowing owls, northern harriers, and ferruginous hawks and migratory species, such as the peregrine falcon, "should not be adversely affected." The impact of operating the rail line on local animal species "is expected to be minimal." ER at 4.4-3 to 4; see also ER at § 2.3.3.

²⁰ The maximum noise levels, downwind, five, seven, and ten miles from the railroad would be 31, 26, and 19 dBA, respectively. At closer locations, approximately two miles, the noise levels may occasionally reach 45 dBA. ER at 4.4-7 to 8. The rail line will be visually apparent only near developed areas near I-80 and from high elevations in the Cedar Mountains and will meet BLM's visual resource management classification for the area. Id. at 4.4-9.

area depicted on the map in its Exhibit 2 is suitable for wilderness designation and protection under the Wilderness Act. Id. at 2-3. SUWA claims that the impacts of the rail spur would make the area unsuitable for such designation. Id. at 4.

This subcontention must be dismissed for lack of specificity and for failure to show the existence of material dispute. SUWA's entire discussion of the suitability of the North Cedar Mountains area for designation as wilderness lacks sufficient specificity to show a material dispute regarding the small tract of land on the easternmost edge of this area through which PFS's rail line will pass. Id. at 2-5. In fact, the rail line avoids the Cedar Mountains proper by remaining in the lower elevations of Skull Valley. See Section I, supra. SUWA discusses the character of the North Cedar Mountains generally, in the broad conclusory terms of the Wilderness Act, but says nothing specific about the character of the particular parcel of land through which PFS's rail spur will pass in the lower elevations of Skull Valley. Id. at 3; Catlin Dec. ¶¶ 15-17. "For a proffered legal or factual contention to be admissible, it must be pled with specificity," LBP-98-7, 47 NRC at 178, which SUWA simply has not done.

Further, SUWA's assertion regarding the roadless and wilderness character of the land the rail spur will traverse is contrary to the administrative determination made by the responsible Federal agency, BLM. See Section I, supra.²¹ Because this Board must respect BLM's determination, see Hydro Resources, CLI-98-16, 48 NRC at __, slip op. at

²¹ As set forth there, BLM considered the North Cedar Mountains area for potential designation as wilderness and rejected it after an "intensive inventory," "because of lack of wilderness characteristics." 45 Fed. Reg. at 75,603-04.

2, SUWA's assertion can not give rise to a material dispute of fact in this licensing proceeding. Moreover, the possibility that, despite the foregoing, the North Cedar Mountains might someday be designated as wilderness is too speculative to give rise to a material dispute. For the area to be designated as wilderness, BLM would have to reverse its determination, the Secretary of the Interior and then the President would have to approve its recommendation to Congress, and/or Congress would have to pass a statute. Sections I & II.A.2 supra. SUWA has been trying to have this done for 10 years for the adjacent Cedar Mountains area to the south without success. Id. Speculation does not provide adequate basis for a contention. LBP-98-7, 47 NRC at 180; see Rancho Seco, CLI-93-3, 37 NRC at 145 (rejecting as speculative a NEPA contention premised upon "significant changes in governmental policy or legislation."). Therefore, this subcontention must be dismissed.

3. Preservation of the North Cedar Mountains in Its Current Natural State

SUWA asserts 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 Congress has an opportunity to evaluate the land for wilderness designation. SUWA Cont. at 2. It cites as basis its "Citizens' Wilderness Reinventory" and its intent to get Congress to designate the land as wilderness. Id. at 3.

This subcontention must be dismissed as outside the jurisdiction of the Commission. See Hydro Resources, CLI-98-16, 48 NRC at __, slip op. at 2 (the NRC should not resolve questions left to other regulatory bodies). The duty to review BLM lands, recommend them for designation as wilderness, and preserve them until Congress has determined whether or not to make such designation has been committed by statute to the Sec-

retary of the Interior (acting through BLM) -- not the NRC. 43 U.S.C. §§ 1702(e) and (g); 1782. Therefore, the NRC lacks jurisdiction to determine the suitability of the North Cedar Mountains for wilderness designation and this subcontention must be dismissed.²²

B. SUWA Contention B

SUWA claims that PFS "fails to develop and analyze a meaningful range of alternatives to the Low Corridor Rail Spur . . . that will preserve the wilderness character and the potential wilderness designation of . . . the North Cedar Mountains" SUWA Cont. at 5. SUWA puts forth as basis its belief that the area qualifies as wilderness. Id.

This contention must be dismissed for failure to show a material dispute of fact. First, it ignores relevant material in the application. LBP-98-7, 47 NRC at 181. PFS has, in fact, proposed three alternatives for transportation to the ISFSI from the Union Pacific rail line: (1) the Low rail spur, (2) the use of heavy haul trucks on Skull Valley Road, ER, Rev. 1 at § 4.3, and (3) a rail spur along Skull Valley Road, ER, Rev 0 at § 4.4. The ER has evaluated the environmental impacts of all three alternatives and has addressed impacts on land,²³ impacts on plant and animal species and their habitats,²⁴ noise and visual

²² Further, under the logic of SUWA's contention, if it or any other organization or individual believes that a tract of land qualifies and should be designated as wilderness, than nothing can be done to that land until Congress acts. Such is clearly not the intent of the FLPMA or the Wilderness Act and is directly contrary to provisions of those statutes where, as here, the federal agency charged with making recommendations to Congress for the designation of wilderness areas has determined that the area in question does not qualify for such designation. Once BLM drops an area from further wilderness consideration, it is no longer subject to the land use restrictions imposed by FLPMA during BLM's review. 45 Fed. Reg. at 75,603-04; see Babbitt, 137 F.3d at 1198 & n.2; 43 U.S.C. §§ 1782(a) and (c) (restrictions apply only to those lands "identified during the inventory [required by FLPMA] as having wilderness characteristics").

²³ ER, Rev 1 at 4.3-1, 4.4-1; ER, Rev 0 at 4.4-1-2.

²⁴ ER, Rev 1 at 4.3-2 to 4, 4.4-2 to 4; ER, Rev 0 at 4.4-2.

impacts ("solitude"),²⁵ and other impacts such as those on air quality and historical and cultural features.²⁶ SUWA has completely ignored these alternatives and the analysis PFS has performed in support of them and proposes no alternatives of its own.²⁷ Thus, this subcontention must be dismissed.

Second, this contention fails to show that a material dispute exists, in that its underlying premise is merely conjectural. As discussed, BLM has determined that the entire North Cedar Mountains region is not suitable for such designation. Section I, supra. Reversing that determination and having the land designated as wilderness would require a long and uncertain process, culminating in an act of Congress. Id. This possibility is simply too remote to serve as a premise for a contention concerning NEPA alternatives.

In Rancho Seco, the Commission rejected an assertion that NEPA required the licensee's decommissioning environmental report to consider the possibility of resumed operation of the plant under the "no action" alternative, because some version of "no action" would "preserve the potential for future operation." Rancho Seco, CLI-93-3, 37 NRC at 144-45. The Commission found such consideration unnecessary, in that operation could resume only after a string of uncertain events, including NRC decisions and a potential state referendum; it stated that "there is no need to consider alternatives of speculative feasibility or alternatives which could only be implemented after significant changes in

²⁵ ER, Rev 1 at 4.3-8, 4.4-7 to 9; ER, Rev 0 at 4.4-4 to 5.

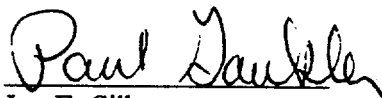
²⁶ ER, Rev 1 §§ 4.3.3, 4.3.8, 4.4.3, 4.4.8; ER Rev 0 §§ 4.4.3, 4.4.8.

²⁷ See Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 412 (1976) (petitioner must suggest at least a "colorable alternative" to those considered).

governmental policy or legislation or which require similar alterations of existing restrictions." Id. at 145-46 (quoting NRDC v. Callaway, 524 F.2d 79, 93 (2d Cir. 1975)).

Therefore, PFS should not be required to consider the possible designation of the land the Low rail spur would traverse as wilderness, as it could only be so designated after a significant policy change, effected through an uncertain process, followed by legislation. Thus, this contention must be dismissed.

Respectfully submitted,



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Dated: December 1, 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
)	
(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Answer to Request for Hearing, Petition to Intervene, and Contentions of Southern Utah Wilderness Alliance" 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 1st day of December 1998.

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