

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of )

PRIVATE FUEL STORAGE, LLC )

(Independent Spent )  
Fuel Storage Installation) )

Docket No. 72-22-ISFSI

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NRC STAFF'S BRIEF IN RESPONSE TO APPLICANT'S  
APPEAL FROM MEMORANDUM AND ORDER GRANTING  
THE LATE-FILED PETITION TO INTERVENE FILED BY  
SOUTHERN UTAH WILDERNESS ALLIANCE (LBP-99-3)

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INTRODUCTION

On February 3, 1999, the Atomic Safety and Licensing Board issued its "Memorandum and Order (Granting Late-Filed Intervention Petition)," in which it granted the late-filed petition to intervene filed by Southern Utah Wilderness Alliance ("SUWA") and admitted one of the contentions filed by that organization.<sup>1</sup> LBP-99-3, 49 NRC \_\_\_\_, slip op. (Feb. 3, 1999). On February 16, 1999, Private Fuel Storage, L.L.C. ("Applicant" or "PFS") filed a "Notice of Appeal" and brief in support of its appeal from that decision, pursuant to 10 C.F.R. § 2.714a.<sup>2</sup>

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<sup>1</sup> See "Southern Utah Wilderness Alliance's Request for Hearing and Petition to Intervene" ("Petition") and "Southern Utah Wilderness Alliance's Contentions Regarding Private Fuel Storage License Application (the Low Rail Spur)" ("Contentions"), dated November 18, 1998. SUWA's Petition was supported by the "Declaration of Jim Catlin for Petitioner [SUWA]" ("Declaration").

<sup>2</sup> See "Applicant's Notice of Appeal of Order Granting the Southern Utah Wilderness Alliance's Petition for Intervention," and "Applicant's Brief on Appeal of Order Admitting Southern Utah Wilderness Alliance As An Intervenor" ("App. Br."), dated February 16, 1999.

In accordance with 10 C.F.R. § 2.714a(a), the NRC Staff ("Staff") hereby files its response to the Applicant's appeal from LBP-99-3. For the reasons set forth herein, the Staff submits that the Licensing Board erred (a) in finding that SUWA had demonstrated injury in fact and its representational standing to intervene in this proceeding, where SUWA's "injury" was based on the generalized assertion by one of its members that he has "frequently" visited and engaged in various specified activities in the area affected by the construction and operation of a rail spur to PFS' facility, and "will do so frequently" or "with some frequency" in the future, and (b) in finding that SUWA's Contention B constituted an admissible contention, where SUWA failed to identify any feasible alternative to the proposed rail spur that the Applicant had failed to consider. Accordingly, the Staff submits that the Licensing Board's Memorandum and Order should be reversed.

#### STATEMENT OF THE CASE

This proceeding involves an application filed by PFS on June 20, 1997, pursuant to 10 C.F.R. Part 72, for a license 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 ("ISFSI") to be constructed and operated on the reservation of the Skull Valley Band of Goshute Indians located in Tooele County, Utah. On July 31, 1997, the Commission published a notice and opportunity for hearing on the license application, in which it required that by September 15, 1997, "any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding" must file a written request for hearing and a

petition for leave to intervene.<sup>3</sup> Petitions for leave to intervene were duly filed by various organizations and individuals, and numerous contentions were then submitted. On April 22, 1998, the Licensing Board admitted five intervenors as parties to the proceeding, and approved 26 consolidated 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 an amendment to its license application which, *inter alia*, proposed a new rail spur in lieu of the rail spur along Skull Valley Road which it had previously proposed,<sup>4</sup> to be constructed and operated over public lands managed by the U.S. Bureau of Land Management ("BLM"), along a 32-mile corridor between Low, Utah and the Applicant's proposed site.<sup>5</sup> Contentions challenging the proposed rail spur were filed by three previously-admitted Intervenors, which the Licensing Board rejected on November 30, 1998, for failing to satisfy the late-filing criteria of 10 C.F.R. § 2.714(a)(1) and/or failing to satisfy the standards governing the admission of contentions, set forth in 10 C.F.R. § 2.714(b)(2). *See*

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<sup>3</sup> *See* "Notice of Consideration of Issuance of a Materials License for the Storage of Spent Fuel and Notice of Opportunity for a Hearing," 62 Fed. Reg. 41,099 (July 31, 1997).

<sup>4</sup> In its initial application, PFS had proposed the transportation of spent fuel to its site from the Union Pacific Railroad mainline via: (a) heavy-haul truck transportation on Skull Valley Road for approximately 24 miles, to a proposed site access road; and/or (b) a rail spur to be constructed along one side of Skull Valley Road (the location to be determined upon subsequent evaluation). *See* License Application, Rev. 0, Environmental Report at pp. 2.1-3, 3.2-5 - 3.2-6, and 4.4-1.

<sup>5</sup> *See* Letter to Director, Office of Nuclear Material Safety and Safeguards, from John D. Parkyn, Chairman, PFS, dated August 28, 1998.

*Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 307-08 (1998).<sup>6</sup>

On November 18, 1998, SUWA filed its petition for leave to intervene, two contentions, and the "Declaration of Jim Catlin." On December 1, 1998, responses in opposition to SUWA's Petition and Contentions were filed by the Staff and Applicant,<sup>7</sup> and a response in support of SUWA's Petition and Contentions was filed by the State of Utah.<sup>8</sup> On December 8, 1998, SUWA filed a reply to the Applicant's and Staff's responses, along with the "Second Declaration of Jim Catlin."<sup>9</sup> Oral argument on SUWA's Petition was conducted at a Prehearing Conference held on December 11, 1998 (Tr. 1050-1166). On February 3, 1999, the Licensing Board issued its Memorandum and Order, granting SUWA's Petition and admitting one of its contentions.

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<sup>6</sup> The Licensing Board's decision contains a concise summary of the changes proposed by the Applicant concerning the transportation of spent fuel to its site. *See PFS*, LBP-98-29, 48 NRC at 289. While the Board rejected the Intervenor's late-filed rail spur contentions, it permitted the basis for previously-admitted contention Utah B to be amended, to incorporate certain information concerning the Applicant's proposed intermodal transfer point (ITP). *Id.* at 307.

<sup>7</sup> *See* "Applicant's Answer to Petition to Intervene and Contentions of Southern Utah Wilderness Alliance," dated December 1, 1998 ("Applicant's Response"), dated December 1, 1998; and "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)" ("Staff's Response"), dated December 1, 1998.

<sup>8</sup> *See* "State of Utah's Response to Request for Hearing, Petition to Intervene and Contentions of Southern Utah Wilderness Alliance," dated December 1, 1998.

<sup>9</sup> *See* "Reply of [SUWA] to Staff and Applicant Responses to SUWA's Petition to Intervene, Request for Hearing and Contentions," dated December 8, 1998.

ISSUES PRESENTED

1. Whether the mere assertion by a petitioner for leave to intervene in a Commission adjudicatory proceeding, without any specificity whatsoever, that he "frequently" visited and engaged in specified activities in the area under consideration, and that he will do so "frequently" or "with some frequency" in the future, is sufficient to establish injury-in-fact and standing to intervene.
2. Whether the Licensing Board erred in granting a petition to intervene, where the petitioner's sole admitted contention asserted that the applicant failed to describe alternatives to its proposed rail spur route, but failed to identify any feasible alternative route that the applicant had not considered.

ARGUMENT

- I. The Licensing Board Erred in Finding That SUWA Had Established Representational Standing to Intervene.
  - A. Legal Principles Governing Standing to Intervene

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, suspending, or amending 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.

In addition, 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 the 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); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2, CLI-76-27, 4 NRC 610, 613-14 (1976). In order to establish standing, a petitioner must show that the proposed action will cause "injury in fact" to its interest, and that the injury is arguably within the "zone of interests" protected by the statutes governing the proceeding. *See, e.g., Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998).<sup>10</sup>

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<sup>10</sup> 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 (NEPA), 42 U.S.C. § 4321 *et. seq.* *See, e.g., Yankee, supra*, 48 NRC at 195-96; *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 (1998).

In order to establish injury in fact, a 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*, *supra*, 48 NRC at 195. Further, the petitioner must show an injury that is 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).<sup>11</sup>

In order for an organization to establish standing, it must either demonstrate standing based on the interest of the petitioning organization itself,<sup>12</sup> or representational standing based on the interest of one or more of its individual members who have authorized the organization to represent them in the proceeding. *Yankee*, 48 NRC at 195; *PFS*, 48 NRC at 31. Where the organization relies upon the interests of one of its members, it must show that: (1) the member possesses standing in his or her 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.

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<sup>11</sup> 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). Further, 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.

<sup>12</sup> An organization seeking to intervene in its own right must demonstrate palpable injury in fact to an organizational interest that is within the zone of interests protected by the AEA or NEPA. *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-30 (1991).

For the reasons set forth below, the Staff submits that the Licensing Board erred in finding that SUWA had demonstrated representational standing to intervene.

B. SUWA Failed to Establish Any Injury in Fact to Dr. Catlin's Interests, and Thus Failed to Establish Representational Standing to Intervene.

In its Petition, SUWA explained that it is a non-profit organization, interested in protecting roadless public lands managed by BLM that possess wilderness character as defined in the Wilderness Act of 1964, 16 U.S.C. § 1131 *et seq.* (Petition at 2), and asserted, *inter alia*, that it possesses representational standing to intervene.<sup>13</sup> In support of this assertion, SUWA provided Dr. Catlin's (initial) Declaration, in which he stated, *inter alia*, that he resides in Salt Lake

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<sup>13</sup> SUWA also sought to establish organizational standing to intervene. Inasmuch as the Licensing Board did not address the question of SUWA's organizational standing (*see* LBP-99-3, slip op. at 13), the Commission need not address this issue. Nonetheless, the Staff notes that SUWA's allegation of injury to its organizational interests essentially consists of its assertion that (a) it is dedicated to obtaining "wilderness" designation for BLM roadless areas including the area proposed for the Low Rail Spur, and to protecting wild roadless areas until Congress designates them as wilderness under the Wilderness Act of 1964, and (b) that construction and operation of the Low Rail Spur would preclude the North Cedar Mountains area from being classified as wilderness (Petition at 13-14). Such assertions fail to establish the organization's standing to intervene, in that they fail to show any distinct and palpable harm. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 734-35, 739 (1972) (holding that the Sierra Club lacked standing to challenge a development proposal approved by the U. S. Forest Service based on its aesthetic and ecological "interest" in preserving the area in its undeveloped condition, absent any showing that the Sierra Club was "among the injured"; a "mere interest in a problem" is insufficient, by itself, to establish standing); *accord, Wilderness Society v. Griles*, 824 F.2d 4, 12 (D.C. Cir. 1987). Similarly, Dr. Catlin's initial Declaration described SUWA's organizational activities, stating that the potential failure of the agency 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" (Declaration, ¶ 19); such assertions, however, concerning injury to a petitioner's informational and educational activities, does not establish injury in fact for standing. *See, e.g., Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, CLI-92-2, 35 NRC 47, 57-61 (1992), and cases cited therein.

County, Utah, and is a member in good standing of SUWA (Declaration at 1).<sup>14</sup> In describing the "injury" he would suffer due to the Applicant's construction and operation of the Low rail spur,

Dr. Catlin stated:

20. I have used and enjoyed the public lands and natural resources on BLM lands for many health, recreational, scientific, spiritual, educational, aesthetic, and other purposes and have used and enjoyed for these same purposes, the exact tract of lands contained in the North Cedar Mountains roadless area as depicted in Exhibit 2. My health, recreational, scientific, spiritual, educational, aesthetic, informational, and other interests will be directly effected [sic] 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.

21. The North Cedar Mountains roadless area possesses wilderness character and should be designated as wilderness. I will be harmed if the Low Rail Spur is constructed and operated. This construction and operation will eliminate the North Cedar Mountains from consideration as wilderness and will prevent these lands from receiving the increased management protection given to wilderness areas. In addition, the construction and operation of the Low Rail Spur will threaten the ecological values of the North Cedar Mountains. If these values are harmed, I too will be harmed.

Catlin Declaration, at 7; emphasis added.<sup>15</sup>

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<sup>14</sup> Dr. Catlin's initial Declaration did not indicate whether he authorized SUWA to represent him in this proceeding; this deficiency was cured in his Second Declaration, filed on December 8, 1998, in which he authorized SUWA to represent him (Second Declaration at 6).

<sup>15</sup> In his initial Declaration, Dr. Catlin also described various personal and organizational activities engaged in by unnamed members of SUWA in the area of the Low Rail Spur (Declaration, ¶ 18); these statements, however, could not support Dr. Catlin's or SUWA's standing to intervene in that they did not show that Dr. Catlin's personal interests might be harmed by the proposed licensing action. See, e.g., *Sierra Club*, 405 U.S. at 735 (the petitioner, himself, must be "among the injured").

The Applicant and Staff filed responses in opposition to SUWA's Petition, in which they expressed their views, *inter alia*, that Dr. Catlin's Declaration failed to demonstrate a concrete and specific injury to his interests as is necessary to establish injury in fact, in that his statements were vague and generalized, and lacked any supporting detail that would allow the Licensing Board (and the Commission) to find an injury to his interests that is "concrete and particularized." See Staff Response at 12-13; Applicant's Response at 12-13.

In the face of the Applicant's and Staff's opposition to its Petition, SUWA filed its Reply of December 1998, along with a "Second Declaration" by Dr. Catlin. Dr. Catlin's Second Declaration expanded upon his assertion of injury, stating as follows:

11. I have a personal interest in and have frequently visited, used and enjoyed the natural resources of the North Cedar Mountains and benches, including the section of this area that will be traversed by the proposed rail spur, for many health, recreational, scientific, spiritual, educational, aesthetic, and other purposes and will do so frequently in the future. I have visited these areas, including the exact tract of land within the North Cedar Mountains area that will be traversed by the proposed rail spur, and have developed an ongoing and deep bond with the land and its wilderness character which I will continue to cultivate in the future. I frequently enjoyed and will, in the future with some frequency, enjoy hiking, camping, birdwatching, study, contemplation, solitude, photography, and other activities in and around the North Cedar Mountains roadless area, including the exact tract of land -- the bench of the North Cedar Mountains -- over which the proposed rail spur will traverse. I will be personally harmed and my health, recreational, scientific, spiritual, educational, aesthetic, informational, and other interests will be directly affected 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, including the exact tract of land -- the bench of the North Cedar Mountains -- over which the proposed rail spur will traverse.

Second Declaration, at 4-5; emphasis added.

Thus, Dr. Catlin's Second Declaration amended his initial statement that "I have used and enjoyed" the area, by stating that he has "frequently" visited and enjoyed the area, and would do so "frequently" or "with some frequency" in the future.<sup>16</sup> However, while a pattern of "frequent" activities by a petitioner in an area may well establish injury in fact and standing to intervene,<sup>17</sup> nowhere in either of Dr. Catlin's declarations did he provide any specific information concerning

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<sup>16</sup> Dr. Catlin's Second Declaration also described the contacts of other, unnamed members of SUWA with the area, stating as follows:

10. Members of SUWA frequently visit, use and enjoy the natural resources of the North Cedar Mountain roadless area, including its benches and including the section of this area that will be traversed by the proposed rail spur, for many health, recreational, scientific, spiritual, educational, aesthetic, and other purposes and will do so frequently in the future. Sometimes SUWA members visit these areas for days at a time or several times within a relatively short period of time and develop an ongoing and deep bond with the land and its wilderness character which they hope to cultivate in the future. SUWA members frequently enjoy and will, in the future, with some frequency, enjoy hiking, camping, birdwatching, study, contemplation, solitude, photography, and other activities in and around the North Cedar Mountains roadless area including the exact tract of land -- the bench of the North Cedar Mountains -- over which the proposed rail spur will traverse.

Second Declaration at 3-4; emphasis added. The Licensing Board did not rely on these statements in assessing SUWA's standing to intervene (*see* LBP-99-3, slip op. at 13-20) -- nor could these statements establish SUWA's standing, since the affected members were unidentified, and there was no showing that they had authorized SUWA to represent them in this proceeding. *See, e.g., Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, GA), CLI-95-12, 42 NRC 111, 115 (1995); *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 390-96 (1979). Further, Dr. Catlin had not identified himself as one of the unnamed persons referred to in this statement. *See* n. 15, *supra*.

<sup>17</sup> *See generally, Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 95 (1993); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), LBP-82-4, 15 NRC 199, 204 n.7 (1982).

the number or "frequency" of his contacts with the area. On this basis, among others, the Staff and Applicant opposed SUWA's standing to intervene. See Tr. 1066-69, 1078-79, 1081-83.

In its Memorandum and Order, the Licensing Board took note of the lack of specificity in Dr. Catlin's statements, observing that "[a]ccording to PFS and the staff, Dr. Catlin's use of the word "frequently" to describe his past and future contacts with the Low Junction rail corridor is insufficiently particularized to establish the requisite concreteness for his asserted injury in fact. See Tr. at 1066-67, 1078-79." LBP-99-3, slip op. at 15-16. The Board swept these concerns aside, however, by adopting a dictionary definition of the term "frequently," and imputing that definition to Dr. Catlin's statements. The Board stated:

[W]e do not find convincing the PFS and staff assertion that Dr. Catlin has not shown sufficient contacts with the Low Junction rail corridor to establish a personal injury. Dr. Catlin, as was noted above, indicated in his affidavit that he had "frequently visited, used, and enjoyed" the area and planned to do so "frequently in the future." As used in this context, the root term "frequent" is defined in the dictionary as meaning "habitual" or "persistent." Webster's Third New International Dictionary 909 (unabr. 1976). While Dr. Catlin could have been more specific about the number of times he has traversed and otherwise used (and plans to use) the Low rail corridor lands in question,<sup>7</sup> his adoption of the term "frequently" in this context demonstrates that his bond with the area is sufficiently concrete to establish his standing and, consequently, that of his representative SUWA.

<sup>7</sup> In this connection, we are considerably less concerned about precision regarding a standing showing that is based on actual physical contact (i.e., hiking, camping, etc.) with the object of the purported injury, in this case the Low Junction rail corridor, than we would be for a standing showing based on distance from the object in question (i.e., reside "x" miles from the facility). An ongoing presence via physical contact can be adequately conveyed with a general term such as "frequently." General references regarding distance, however, will usually be inadequate to establish

the requisite concreteness. See Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 426-27, aff'd, CLI-97-8, 46 NRC 21 (1997).

LBP-99-3, slip op. at 19-20.

These determinations by the Licensing Board are in error. It is fundamental that a petitioner for leave to intervene bears the burden of establishing its standing to do so. See, e.g., *Atlas Corp. (Moab, Utah Facility)*, CLI-97-8, 46 NRC 21, 22 (1997); *Public Service Co. of New Hampshire (Seabrook Station, Unit 1)*, CLI-91-14, 34 NRC 261, 266-67 (1991). In resorting to the dictionary to define the term "frequently," and imputing that meaning to Dr. Catlin's allegations, the Licensing Board apparently sought to fill the void that existed due to SUWA's lack of specificity. However, despite Webster's dictionary definition, the record is bereft of any suggestion that Dr. Catlin used the word "frequently" with that definition in mind; nor, for that matter, did Dr. Catlin provide any explanation as to what he meant in using that term, or any specific information that would allow the Board to determine whether his contacts with the area proposed for use by the rail spur may properly be described as "frequent." In the absence of any specific information, there is no basis for the Licensing Board's conclusion that, in the present circumstances, "[a]n ongoing presence via physical contact can be adequately conveyed with a general term such as 'frequently.'" LBP-99-3, slip op. at 20 n.7.

In other cases, the courts have held that the use of generalized conclusions is insufficient to establish injury in fact. For example, in *United States v. AVX Corp.*, 962 F.2d 108 (1st Cir. 1992), the court held that generalized allegations of personal harm could not withstand a motion to dismiss. The court stated:

The averment has no substance: the members are unidentified, their places of abode are not stated; the extent and frequency of any individual use of the affected resources is left open to surmise. In short, the asserted injury is not anchored in any relevant particulars. The intervenor's papers do not contain an averment, much less a particularized showing, of the type of "concrete injury" that we have said is needed to confer standing in an environmental suit. . . . A barebones allegation, bereft of any vestige of a factual fleshing-out, is precisely the sort of speculative argumentation that cannot pass muster where standing is contested. See [FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990)].

*Id.* at 117; emphasis added.<sup>18</sup>

While the Licensing Board found that Dr. Catlin "could have been more specific about the number of times he has traversed and otherwise used (and plans to use) the Low rail corridor lands" (LBP-99-3, slip op. at 19; emphasis added), in fact, he was legally obliged to be more specific in order to demonstrate a "palpable and distinct" or "concrete and particularized" injury to his interests. Indeed, in other Commission proceedings, petitioners for leave to intervene have been required to specify the frequency of their contacts with the affected area. See, e.g., *Northern*

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<sup>18</sup> In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), the Supreme Court summarized the need for a specific factual showing as follows:

It is a long settled principle that standing cannot be "inferred argumentatively from averments in the pleadings," but rather "must affirmatively appear in the record." . . . And it is the burden of the "party who seeks the exercise of jurisdiction in his favor," "clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." Thus, petitioners in this case must "allege . . . facts essential to show jurisdiction. If [they] fail[] to make the necessary allegations, [they have] no standing."

*Id.* at 231; citations omitted. See also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, n.2 (1992) (requiring a showing of concrete plans or specificity as to when a petitioner planned to visit the area; use of the word "soon" was too indefinite to show an "actual and imminent" injury).

*States Power Co.* (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 316 (1989); *Combustion Engineering Co.* (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 145 (1989). Cf. *Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 425 n.8 (1977) (participation in specified activities "every several months" was "enough specificity to undergird petitioner's claim of standing").<sup>19</sup>

Moreover, the Licensing Board erred in its perception that a distinction exists between the specificity required to establish the distance from a petitioner's home or alleged activities to a nuclear facility, and the specificity required concerning the number or frequency of his contacts with the area, where at least some contact with the area is alleged. In this regard the Board stated, "we are considerably less concerned about precision regarding a standing showing that is based on actual physical contact (i.e., hiking, camping, etc.) with the object of the purported injury . . . th[a]n we would be for a standing showing based on distance from the object in question . . ." LBP-99-3, slip op. at 20 n.7, citing *Atlas Corp.* (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 426-27, *aff'd*, CLI-97-8, 46 NRC 21 (1997). Notwithstanding the Board's view, no legal basis for such a distinction exists. Just as a petitioner must specify the distance from a facility to his

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<sup>19</sup> The Commission has recently reiterated that each party to a proceeding is obliged to support its arguments with appropriate and accurate factual bases:

Parties are also obligated in their filings before the board and the Commission to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citation to the record. Failure to do so may result in material being stricken from the record or, in extreme circumstances, in a party being dismissed.

*Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998).

residence or activities and may not rely upon "general references" in order to establish "concreteness," *Id.*, a petitioner is likewise obliged to establish, with specific information, the frequency and/or duration of its contacts with an area in order to demonstrate a concrete and particularized injury. *See, e.g., AVX Corp.*, 962 F.2d at 117.

The decision in *Atlas*, cited by the Licensing Board here (slip op. at 20), is not to the contrary. In *Atlas*, the petitioner had alleged a number of various activities in and around the Colorado River (which at one point approaches the Atlas site) -- but failed to provide any specificity as to where those activities occurred, even in the face of "multiple opportunities" (including a specific request by the Board) for such information to be provided. *Atlas*, LBP-97-9, 45 NRC at 424, 426-27. Rather than providing specific information, the petitioner's activities were "all quantified with vague terms such as 'near,' 'close proximity,' or 'in the vicinity.'" *Id.* at 426. In those circumstances, the issue of distance became of primary concern, and the "frequency" of the petitioner's contacts with the area was not addressed. In contrast, in the instant proceeding, Dr. Catlin alleged a nexus with the affected area but failed to specify the frequency of his past or future contacts with that area, as was necessary to establish a "concrete" or "distinct and palpable" injury. Such a failure of proof should not be overlooked, particularly where SUWA has had several opportunities to quantify or otherwise explain his use of the vague term "frequently," even in the face of objections by the Staff and Applicant.

The Commission's previous decision in this proceeding, concerning the standing of the Confederated Tribes of the Goshute Reservation, supports this conclusion. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26 (1998). There, the Commission found that the Confederated Tribes had sufficiently established injury in

fact and standing to intervene, based on the duration and important nature of two members' visits to the area; in view of that specific information, the Commission could find that the visits were likely to be repeated in the future and that some injury to the petitioner's interests could occur. While the Commission was faced with conflicting evidence as to the precise number of visits (*Id.* at 31), that conflict was not material since even the Applicant's evidence as to the number of visits showed the visits were "commonplace" (*Id.* at 32). Moreover, other undisputed specific evidence as to the duration and nature of the visits (childcare and family visits) supported an inference that those visits would continue in the future. Accordingly, despite the lack of certainty as to the precise number of visits, the Confederated Tribes had shown its standing to intervene (*Id.*):

[T]he Confederated Tribes' standing does not depend on the precise number of the [individuals'] visits. It is the visits' length (up to two weeks) and nature -- for necessary child care and visiting relatives -- that establish a bond between the [individuals] and Skull Valley and the likelihood of an ongoing connection and presence sufficient for standing.

In contrast to the showing made by the Confederated Tribes, SUWA has made no showing whatsoever as to either the frequency or duration of Dr. Catlin's visits. Significantly, while Dr. Catlin's Second Declaration asserts that other unnamed members of SUWA "sometimes . . . visit these areas for days at a time or several times within a relatively short period of time" (*see* n. 16, *supra*), Dr. Catlin made no such assertion concerning the duration of his visits to the area.<sup>20</sup>

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<sup>20</sup> Even if Dr. Catlin had made a similar statement in describing his own contacts with the area -- *i.e.*, that he "sometimes . . . visit[s] these areas for days at a time or several times within a relatively short period of time," that statement is too vague to establish his standing to intervene. For example, the word "sometimes" could refer to visits that are years apart; and, without further specificity, an individual's use of the phrase "a relatively short period of time" is relative and subjective, at best, and could equally be used to refer to periods of days, weeks, months or years.

Thus, the Board lacked any specific factual basis upon which to conclude that Dr. Catlin had "an ongoing connection and presence" with the area surrounding the Low rail spur corridor. In these circumstances, the Licensing Board erred in finding that a "concrete" injury in fact was established by Dr. Catlin's use of the term "frequently" in describing the number and frequency of his activities in the area.<sup>21</sup>

Finally, the Staff notes that the Licensing Board's Memorandum and Order may have an unfortunate effect in the future, whereby any petitioner for leave to intervene in a Commission proceeding could henceforth easily circumvent its obligation to establish injury in fact by merely asserting that in its own, subjective view of the (undisclosed) facts, it "frequently" engages in activities in the affected area and will do so "frequently" or "with some frequency" in the future. Such an effect could nullify the judicial principles of standing which are at the core of the Commission's intervention requirements.

## II. The Licensing Board Erred in Finding That SUWA's Contention B Constitutes An Admissible Contention.

In order to grant SUWA's petition for leave to intervene, the Licensing Board was also required to find that SUWA had submitted at least one admissible contention. 10 C.F.R.

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<sup>21</sup> The Licensing Board's finding of an environmental-related injury, based on an alleged violation of NEPA, the Wilderness Act of 1964 and the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq.*, and the Board's discussion of *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir.1992), does not alter this conclusion. See LBP-99-3, slip op. at 16-17. Even if an alleged environmental injury may occur, a petitioner for leave to intervene must nonetheless show an injury that is personal as to him. See n. 15, *supra*. As set forth in the text above, in light of SUWA's failure to present any specific facts as to the frequency or duration of Dr. Catlin's visits to the area, it failed to demonstrate that Dr. Catlin will personally suffer any "distinct and palpable" or "concrete" injury in fact.

§ 2.714(b)(1). In examining SUWA's two proffered contentions, the Board found that one contention (Contention B) was admissible, in that "the contention and its supporting basis are sufficient to establish a genuine dispute adequate to warrant further inquiry." LBP-99-3, slip op. at 21.<sup>22</sup> For the reasons set forth below, the Staff submits that the Licensing Board erred in this determination. SUWA Contention B, and its entire supporting basis, stated as follows:

**CONTENTION B:**

**Statement:** 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.

**Basis:** SUWA incorporates as a basis for this Contention, the basis stated for Contention A. As was demonstrated in Contention A, despite the wilderness character of the North Cedar Mountains and its potential designation as wilderness pursuant to the Wilderness Act of 1964, PFS has failed to adequately develop and analyze a meaningful range of alternatives to the Low Rail Spur and the associated fire buffer zone on this roadless [area, *sic*] and the alignment of these proposed projects that will protect the wilderness character of the North Cedar Mountains and will preserve, for Congress, the opportunity to designate the area as wilderness pursuant to the Wilderness Act of 1964.

Contentions at 5-6.

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<sup>22</sup> In contrast, the Board found that SUWA's other contention (Contention A) was inadmissible. Contention A had alleged that the Applicant failed to consider the impacts of the proposed rail spur on the character and potential "wilderness" designation of the area through which it would pass. See Contentions at 2-5. SUWA, however, had failed to address the Applicant's discussion of rail spur impacts in its Environmental Report, or to indicate that any particular statements in that discussion were inadequate. The Licensing Board therefore correctly dismissed this contention, finding that SUWA had failed to provide "adequate factual or expert opinion support" for the contention, and/or failed "properly to challenge the PFS application, as amended." LBP-99-3, slip op. at 21.

As is clear from a reading of these statements (and of SUWA Contention A, referenced in the "Basis" for Contention B), contrary to the requirements set forth in 10 C.F.R. § 2.714(b)(2)(iii),<sup>23</sup> SUWA failed to address the Applicant's discussion of the rail spur and road transportation options in its Environmental Report (*see* ER § 2.1.2) or to identify how that discussion was deficient.

Further, contrary to the requirements of § 2.714(b)(2)(iii), SUWA failed to show a genuine dispute on a issue of of material law or fact, in that it failed to identify the existence of any specific feasible alternative to the Applicant's proposed rail spur that the Applicant failed to consider. To be sure, Dr. Catlin's Second Declaration asserts that an alternative rail spur could be built over an alignment that avoids the North Cedar "roadless area," along a route located two miles to the east of the Applicant's proposed corridor (Second Declaration at 3). However, Dr. Catlin and SUWA failed to observe that this alternative rail spur would have to traverse areas that are owned by the State of Utah (shown as shaded squares on Exh. 2 to SUWA's Petition).

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<sup>23</sup> That regulation provides, in pertinent part, as follows:

(2) . . . [T]he petitioner shall provide the following information with respect to each contention:

(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 [NEPA], the petitioner shall file contentions based on the applicant's environmental report. . . .

In light of the State's demonstrated opposition to the PFS ISFSI application and its actions seeking to prevent the transportation of spent fuel to the facility, SUWA has not shown that Dr. Catlin's proposed rail spur alignment is a reasonably feasible alternative to the rail spur proposed by PFS.

SUWA's failure to allege a feasible alternative to the Applicant's rail spur proposal is significant. The Supreme Court has recognized that "the concept of alternatives must be bounded by some notion of feasibility." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U. S. 519, 551 (1978). Further, the Commission has observed that its duty to consider alternatives, in an environmental impact statement, is subject to a "rule of reason" which "may well justify exclusion or but limited treatment" of particular sites. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 540 (1977). The Commission has further indicated that under NEPA's rule of reason, "there is no need to consider alternatives of speculative feasibility or alternatives which could only be implemented after significant changes in governmental policy or legislation or which require similar alterations of existing regulations." *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 145-46 (1993), citing *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 93 (2nd Cir. 1975).

Accordingly, notwithstanding Dr. Catlin's suggestion of an alternative rail spur corridor, SUWA has not shown any specific alternative transportation route that is feasible, other than the Skull Valley Road alternative described in the Environmental Report, which should have been considered by the Applicant. See SUWA Contentions, at 2-6. Thus, Contention B lacks the specific information required under 10 C.F.R. § 2.714(b)(2)(iii) to show that a genuine dispute of material fact exists with the Applicant, and the contention properly should have been rejected.

CONCLUSION

For the reasons set forth above, the Licensing Board erred in its determination to grant SUWA's petition for leave to intervene, based on its conclusions (a) that Dr. Catlin's use of the terms "frequently" and "some frequency" in describing his activities in the area sufficed to establish injury in fact, and (b) that SUWA had submitted an admissible contention. Accordingly, the Staff respectfully submits that the Licensing Board's Memorandum and Order granting SUWA's intervention petition should be reversed.

Respectfully submitted,

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for

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Counsel for NRC Staff

Dated at Rockville, Maryland  
this 26th day of February 1999

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of )

PRIVATE FUEL STORAGE L.L.C. )

(Independent Spent )  
Fuel Storage Installation) )

Docket No. 72-22-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN RESPONSE TO APPLICANT'S APPEAL FROM MEMORANDUM AND ORDER GRANTING THE LATE-FILED PETITION TO INTERVENE FILED BY SOUTHERN UTAH WILDERNESS ALLIANCE (LBP-99-3)" 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 Nuclear Regulatory Commission's internal mail system, as indicated by an asterisk, with copies by electronic mail, or by deposit in the United States mail, first class, as indicated by double asterisk, with copies by electronic mail as indicated, this 26th day of February, 1999.

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