

May 30, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

PACIFIC GAS & ELECTRIC CO.

(Diablo Canyon ISFSI)

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Docket No. 72-26-ISFSI

NRC STAFF'S RESPONSE TO REQUESTS FOR HEARING
AND PETITIONS TO INTERVENE FILED BY LORRAINE KITMAN,
SAN LUIS OBISPO MOTHERS FOR PEACE, AND SAN LUIS COUNTY
SUPERVISOR PEG PINARD AND AVILA VALLEY ADVISORY COUNCIL

INTRODUCTION

Pursuant to 10 C.F.R. § 2.714(c), the staff of the Nuclear Regulatory Commission ("Staff") hereby responds to the May 10, 2002, and May 22, 2002, requests for a hearing and petitions to intervene filed by Lorraine Kitman ("Ms. Kitman") and San Luis Obispo Mothers for Peace and other petitioners ("SLOMFP")¹, and San Luis Obispo County Supervisor Peg Pinard and Avila Valley Advisory Council ("Pinard and AVAC"). As more fully set forth below, the Staff believes that Ms. Kitman and SLOMFP have satisfactorily demonstrated their standing to participate in this proceeding and have properly identified specific aspects of the subject matter of the proceeding as to which they wish to intervene, in accordance with 10 C.F.R. § 2.714 and established legal requirements.² Accordingly, the Staff does not oppose the requests for hearing and petitions for

¹ In the Request for Hearing and Petition to Intervene, SLOMFP was joined by Cambria Legal Defense Fund; Central Coast Peace and Environmental Council; Environmental Center of San Luis Obispo; Nuclear Age Peace Foundation; San Luis Obispo Chapter of Grandmothers for Peace International; San Luis Obispo Cancer Action Now; Santa Margarita Area Residents Together; Santa Lucia Chapter of the Sierra Club; and Ventura County Chapter of the Surfrider Foundation.

² While the petitioners have identified specific aspects of the subject matter of the proceeding as to which they wish to intervene, not all of the issues which have been identified are properly within the scope of this proceeding. For example, several of Petitioner SLOMFP's members claim standing based upon the eventual transportation of the spent fuel from the ISFSI

leave to intervene filed by Ms. Kitman and SLOMFP, subject to their filing of at least one admissible contention, as required by 10 C.F.R. § 2.714(b). However, the Staff submits that Pinard and AVAC have failed to meet the Commission's standing requirements, and thus, the Staff opposes their Petition to Intervene.

BACKGROUND

On December 21, 2001, Pacific Gas and Electric ("PG&E") applied for a license, pursuant to 10 C.F.R. Part 72, to possess spent fuel and other radioactive materials associated with spent fuel in an independent spent fuel storage installation ("ISFSI"), to be constructed and operated at the applicant's Diablo Canyon Power Plant ("DCPP") site. On April 22, 2002, the Commission published a "Notice of Docketing; Notice of Proposed Action, and Notice of Opportunity for a Hearing for a Materials License for the Diablo Canyon Independent Spent Fuel Storage Installation." 67 Fed. Reg. 19,600 (April 22, 2002). The Notice stated that the license, if granted, will authorize PG&E to store spent fuel in a dry cask storage system at the applicant's DCPP site, for a license term of 20 years. The Notice further provided that by May 22, 2002, "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 a hearing and a petition for leave to intervene with respect to the subject materials license." *Id.* at 19601. In response to the Notice, requests for hearing and petitions for leave to intervene were filed by Ms. Kitman on May 10, 2002, and SLOMFP and Pinard and AVAC on May 22, 2002.

DISCUSSION

As noted above, Ms. Kitman and SLOMFP filed their Petitions pursuant to 10 C.F.R. § 2.714. For the reasons set forth herein, the Staff submits that both Petitioners have satisfied the

to a national repository. However, such issues fall outside of the scope of this proceeding. The Staff will address the admissibility of such issues, as appropriate, in its response to contentions.

requirements of 10 C.F.R. § 2.714 by satisfactorily demonstrating various cognizable interests which could be affected by the outcome of this proceeding.

A. Legal Requirements for Intervention

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

Id.; emphasis added.

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 or request for hearing, the presiding officer or Licensing Board is to consider:

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

Finally, a petition for leave to intervene must set forth "the specific aspect or aspects of the subject matter of the proceeding as to which the petitioner wishes to intervene," 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., Gulf States*

Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993); *Sacramento Municipal Utility District* (Ranch Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992), *review denied sub nom. Environmental Resources Conservation Organization v. NRC*, 996 F.2d 1224 (9th Cir. 1993).

In order to establish standing, a petitioner must show that the proposed action will cause "injury in fact" to the petitioner's interest and that the injury is arguably within the "zone of interests" protected by the statutes governing the proceeding. *See, e.g., Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993); *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266 (1991), *citing Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). 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. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985). To establish injury in fact and standing, the petitioner must establish (a) that he 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. *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988); *Vogtle, supra*, 38 NRC at 32; *Babcock and Wilcox* (Apollo, PA Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 81 (1993). 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). Finally, it must be likely, rather than speculative, that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Sequoyah Fuels*, 40 NRC at 71-72 (1994).

The injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. at 560. A petitioner must have a "real stake" in the outcome of the proceeding to establish injury in fact for standing. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48, *aff'd*, ALAB-549, 9 NRC 644 (1979). While the petitioner's stake need not be a "substantial" one, it must be "actual," "direct" or "genuine." *Id.* at 448. A mere academic interest in the outcome of a proceeding or an interest in the litigation is insufficient to confer standing; the requestor must allege some injury that will occur as a result of the action taken. *Puget Sound Power & Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 983 (1982), *citing Allied General Nuclear Services* (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976); *Puget Sound Power & Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-26, 15 NRC 742, 743 (1982). Similarly, an abstract, hypothetical injury is insufficient to establish standing to intervene. *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 252 (1991), *aff'd in part on other grounds*, CLI-92-11, 36 NRC 47 (1992).

It is axiomatic that a person may obtain a hearing or intervene as of right on his own behalf but not on behalf of other persons whom he has not been authorized to represent. *See, e.g., Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (individual could not represent plant workers without their express authorization); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977) (mother could not represent son attending university unless he is a minor or under legal disability); *Combustion Engineering, Inc.* (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 145 (1989) (legislator lacks standing to intervene on behalf of his constituents).

In order for an organization to establish standing, it must either demonstrate standing in its own right or claim standing through one or more individual members who have standing. *See*

Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995). Thus, an organization may meet the injury in fact test either (1) by showing an effect upon its organizational interests, or (2) by showing that at least one of its members would suffer injury as a result of the challenged action, sufficient to confer upon it "derivative" or "representational" standing. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646, 47 (1979), *aff'g* LBP-79-10, 9 NRC 439, 447-48 (1979). An organization seeking to intervene in its own right must demonstrate a palpable injury in fact to its organizational interests that is within the zone of interests protected by the Atomic Energy Act or the National Environmental Policy Act. *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-30 (1991). Where the organization relies upon the interests of its members to confer standing upon it, the organization must show that at least one member who would possess standing in his individual capacity has authorized the organization to represent him. *Georgia Institute of Technology*, 42 NRC at 115; *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 393-94, 396 (1979); *Babcock and Wilcox Co.* (Pennsylvania Nuclear Services Operations, Parks Township, PA), LBP-94-4, 39 NRC 47, 50 (1994).

B. Ms. Kitman and SLOMFP Have Satisfactorily Demonstrated Standing and Properly Identified Specific Aspects of the Proceeding

The Staff has reviewed the petitions filed by Ms. Kitman and SLOMFP and believes that they have satisfactorily demonstrated cognizable interests which could be affected by the outcome of this proceeding. Ms. Kitman and various members of SLOMFP have indicated that they reside in close proximity to the plant and that their health and safety could be affected by the outcome of this proceeding, either by the terms of any licensing action (SLOMFP) or by an accidental release

of radiation from the facility (Ms. Kitman and SLOMFP).³ Ms. Kitman asserts that the plant is "fifteen or so miles north - upwind - of the area we live," and she indicates that her home, her son's school and her office are all just a few miles apart. Likewise, various members of the variety of organizations comprising SLOMFP have attested to the proximity of their homes or regular activities to the facility - including some which are ten miles from the DCPD site.

"Injury in fact" has been established in that the petitioners have shown that they may personally suffer a distinct harm that is fairly traceable to the proposed licensing action, which is likely to be redressed by a decision favorable to them in the proceeding. Further, at least some of the interests identified by these petitioners are within the zone of interests sought to be protected by the Atomic Energy Act of 1954, as amended, or the National Environmental Policy Act. Accordingly, the Staff believes that these petitioners have satisfactorily demonstrated their standing to intervene in this proceeding.

C. San Luis Obispo County Supervisor Peg Pinard and Avila Valley Advisory Council Have Failed to Establish Standing to Intervene

An application of these concepts to the Petition filed by the San Luis Obispo County Supervisor Peg Pinard and Avila Valley Advisory Council ("Pinard and AVAC") demonstrates that they have not established their standing to intervene in this proceeding, in that they have not shown an "injury in fact" to their interests that is fairly traceable to the licensing of the ISFSI facility at the DCPD site. As discussed below, the Petitioners set forth certain information pertaining to their

³ Notwithstanding the Staff's view that the petitioners have established their standing to intervene, it should be noted that the regulations in 10 C.F.R. Part 72 reflect the Commission's determination that an accidental release of radiation associated with operation of an ISFSI is unlikely to have significant offsite consequences. See, e.g., 10 C.F.R. § 72.32(a) (requiring onsite emergency planning only, with provisions for coordination and communication with offsite authorities); Statement of Consideration, "Emergency Planning Licensing Requirements for Independent Spent Fuel Storage Facilities (ISFSI) and Monitored Retrievable Storage Facilities (MRS)," 60 Fed. Reg. 32,430 (June 22, 1995).

respective roles in the county government system, yet they fail to explain the exact nature of their representation.

It is unclear from the Petition if County Supervisor Pinard is attempting to gain standing based upon her elected position, or if she is intending for the Petition to represent the County's interests. On one hand, Ms. Pinard indicates that her interest in the proceeding is due to her position as "the senior elected official" of San Luis Obispo County. Pinard and AVAC Petition at 3. However, subsequently in her Petition, Ms. Pinard relies upon NRC's history of noting that "local governments have unique interests that have long been recognized by the NRC in granting standing to participate." *Id.* If Ms. Pinard is attempting to gain standing based upon her elected position, her request must fail. As noted above, an elected representative cannot establish standing to intervene on behalf of unnamed constituents. *Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility)*, LBP-89-23, 30 NRC 140, 145 (1989). If, on the other hand, Ms. Pinard is attempting to gain standing for the County, she has provided no evidence to indicate that she has been authorized to represent the County's interest in this regard. In fact, newspaper reports indicate that the San Luis Obispo County Board of Supervisors voted against seeking intervenor status in this proceeding. (Attachment A). Finally, there is no indication that Ms. Pinard wishes to intervene as a private citizen, nor any indication that she has the standing to do so.

AVAC's standing argument is likewise faulty. AVAC's standing claim apparently is based upon its status as an organization comprised of local residents which serves as an advisory council to San Luis Obispo County Supervisors. However, AVAC offers no information that either shows an effect of this ISFSI application upon its organizational interests, or shows that at least one of its members would suffer injury as a result of the challenged action sufficient to confer upon it "derivative" or "representational" standing. *See, e.g., Houston Lighting and Power Co. (South Texas Project, Units 1 and 2)*, ALAB-549, 9 NRC 644, 646, 47 (1979), *aff'g* LBP-79-10, 9 NRC 439, 447-48 (1979). In fact, Ms. Pinard and AVAC's Petition is not supported by any

affidavits that attest to the aforementioned standing requirements. Moreover, AVAC's Petition offers no evidence that the Advisory Council has authorized this Petition on its behalf, but the Petition is simply signed by the Chairman of AVAC, Mr. Seamus M. Slattery.

In sum, Ms. Pinard and AVAC's Petition, as submitted, does not meet the Commission's standing requirements. Therefore, this Petition for intervention should be denied.

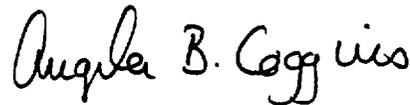
CONCLUSION

For the reasons set forth above, the Staff submits that Ms. Kitman and SLOMFP have satisfactorily shown a potential injury in fact to their interests within the zone of interests sought to be protected by the statutes governing this proceeding, and that they have therefore established their standing to intervene in this proceeding. Accordingly, the Staff submits that their Petitions for leave to intervene should be granted. However, the Staff finds no support for Pinard and AVAC's claim of standing, and thus, submits that their Petition for intervention be denied.

Respectfully submitted,



Stephen H. Lewis
Counsel for NRC Staff



Angela B. Coggins
Counsel for NRC Staff

Dated at Rockville, Maryland
this 30th day of May, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

PACIFIC GAS & ELECTRIC CO.)

(Diablo Canyon ISFSI))

) Docket No. 72-26-ISFSI
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO REQUESTS FOR HEARING AND PETITIONS TO INTERVENE FILED BY LORRAINE KITMAN, SAN LUIS OBISPO MOTHERS FOR PEACE, AND SAN LUIS COUNTY SUPERVISOR PEG PINARD AND AVILA VALLEY ADVISORY COUNCIL" have been served upon the following persons by United States mail, first class, or through the Nuclear Regulatory Commission's internal mail distribution as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**) on this 30th day of May, 2002.

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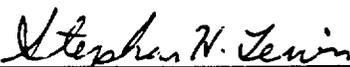
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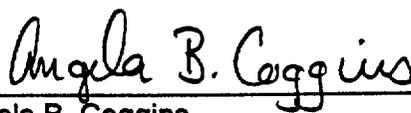
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SAN LUIS OBISPO TRIBUNE
May 22, 2002, Pg B-1

NUCLEAR REGULATORY COMMISSION

Supervisors vote against 'intervener' status on Diablo

COUNTY WON'T BE PARTY TO REVIEW OF WASTE STORAGE PROPOSAL

BY ANTONIO A. PRADO
THE TRIBUNE

A divided county Board of Supervisors will not seek an official role in the federal review of a proposed radioactive waste storage facility at the Diablo Canyon nuclear power plant.

In closed session Tuesday they voted 3-2 against requesting "intervener" status from the federal Nuclear Regulatory Commission.

The panel will decide whether plant owner Pacific Gas & Electric Co. can store spent fuel rods in above-ground dry casks, when the plant's wet-storage pools become full in 2006.

PG&E wants to build a series of concrete pads behind the power plant that will house as many as 138 casks containing spent nuclear rods from Diablo's two reactors.

Supervisors Katcho Achadjian, Harry Ovitt and Mike Ryan voted against seeking the special status from the NRC.

Board Chairwoman Shirley Bianchi and Supervisor Peg Finard, whose district includes the plant and neighboring Avila Beach, favored acting as an intervener.

The deadline for filing a request for intervener status is today.

Intervener status would have made San Luis Obispo County an official party to the NRC proceedings. That would have granted the county more time to comment on the dry-cask storage license application, and the opportunity to ask detailed questions before the commission.

Shocked at the board's vote, Seamus Slattery, chairman of the county's Avila Valley Advisory Council, said his panel might try to apply for intervener status. But he said it would be tough because of the cost and legal red tape involved.

"They just gave away any voice the county would have had," Slattery said. "This is the single biggest issue of danger facing this county."

Also upset was a spokeswoman for the local anti-nuclear group Mothers for Peace.

"Disappointment would be a major understatement," said Rochelle Becker. "The county had nothing to gain and everything to lose, including its credibility by refusing to intervene."

Supervisors revealed few details on what was discussed in the closed-session proceeding.

Pinard, who pressed county counsel James Lindholm to reveal the closed session's roll-call vote, blasted fellow board members who voted against intervention.

She noted that while the county must eventually decide whether to issue a coastal development permit for the proposed facility's construction, it'll be limited in its power.

"We are not allowed to address the issue of health and safety," Pinard said. "We are totally preempted by the NRC."

Please see DIABLO, B3

Bianchi said she was surprised by the vote. "I could not believe that we gave away our power," she said.

Ovitt said there are still issues with PG&E's proposal that must be discussed later. He didn't offer more details on his vote against intervention.

Ovitt suggested that Finard publicly gave away too much of what was discussed behind

I could not believe that we gave away our power.
Supervisor Shirley Bianchi
closed doors.
"It's like a poker game."
Ovitt said.
"You don't show your hand before it's time."

Achadjian said the potential cost and the timing of joining the NRC proceeding also played into the decision.

"We locally don't have the experts we need to advise us," Achadjian said, noting that nuclear industry experts could cost the county as much as \$600 an hour to hire. There was fear the cost could run into the tens or hundreds of thousands of dollars.

"It's unknown how long this will take," he said.

In hindsight, because the board's votes were revealed publicly, Achadjian said he wished the matter would have been discussed in public because of its importance.

"The entire discussion should have been in public," Achadjian said.

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NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

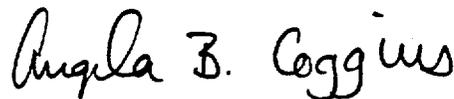
In the Matter of)
) Docket No. 72-26-ISFSI
PACIFIC GAS AND ELECTRIC CO.)
)
(Independent Spent Fuel Storage Installation))

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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Respectfully Submitted,



Angela B. Coggins
Counsel for NRC Staff

Dated at Rockville, Maryland
this 30th day of May, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
) Docket No. 72-26-ISFSI
PACIFIC GAS AND ELECTRIC CO.)
)
(Independent Spent Fuel Storage Installation))

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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District of Columbia Court of Appeals
Name of Party: NRC Staff

Respectfully Submitted,



Stephen H. Lewis
Counsel for NRC Staff

Dated at Rockville, Maryland
this 30th day of May, 2002

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NUCLEAR REGULATORY COMMISSION

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Docket No. 72-26-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NOTICES OF APPEARANCE" have been served upon the following persons by United States mail, first class, or through the Nuclear Regulatory Commission's internal mail distribution as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**) on this 30th day of May, 2002.

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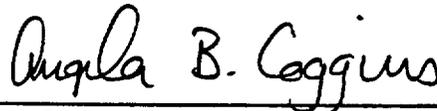
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