

RAS 4672

July 18, 2002

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

July 23, 2002 (1:25PM)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of: )  
)  
Pacific Gas and Electric Co. )  
)  
(Diablo Canyon Power Plant Independent )  
Spent Fuel Storage Installation) )

Docket No. 72-26-ISFSI

ANSWER OF PACIFIC GAS AND ELECTRIC COMPANY TO AMENDED PETITION TO  
INTERVENE OF PEG PINARD AND AVILA VALLEY ADVISORY COUNCIL

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.714(c), Pacific Gas and Electric Company ("PG&E"), applicant in the above-captioned matter, hereby files its answer to the Amended Petition to Intervene filed by Peg Pinard and the Avila Valley Advisory Council ("AVAC") on July 8, 2002 ("Amended Petition").<sup>1</sup> As discussed below, Petitioner AVAC has not yet demonstrated standing to intervene in this matter. PG&E does not challenge Ms. Pinard's standing to intervene in an individual capacity. However, before Ms. Pinard may be admitted as a party in this proceeding, she must proffer at least one admissible contention.

<sup>1</sup> In addition, the Amended Petition advises the Licensing Board and the other participants that petitioner Lorraine Kitman intends to take part in this proceeding as a member of the San Luis Obispo Mothers for Peace, rather than as an independent participant. (Amended Petition at 1.) PG&E interprets this statement as a withdrawal of Ms. Kitman's petition for leave to intervene and request for hearing dated May 10, 2002. Accordingly, PG&E requests that the Licensing Board accept and approve Ms. Kitman's withdrawal from the proceeding as an independent participant.

## II. BACKGROUND

This proceeding concerns PG&E's Application for a site-specific license under 10 C.F.R. Part 72 to store spent fuel and associated materials generated at the Diablo Canyon Power Plant ("DCPP") in a dry cask storage system at the DCPP site in San Luis Obispo County, California. In response to a notice of opportunity for hearing published in the *Federal Register* on April 22, 2002,<sup>2</sup> petitioners Pinard and AVAC filed a petition for leave to intervene and request for a hearing on May 22, 2002.<sup>3</sup> The Petition argued that Ms. Pinard has standing as a governmental entity based upon her position as a Supervisor for San Luis Obispo County. The Petition also requested that Ms. Pinard be allowed to participate in any hearing held in the proceeding as provided for in 10 C.F.R. § 2.715(c). Both PG&E and the NRC Staff opposed Ms. Pinard's standing to intervene.<sup>4</sup>

Similarly, it appeared in the Petition that AVAC was attempting to show standing based on its status as a quasi-governmental organization and as representing the San Luis Obispo County government and its citizens. As with Ms. Pinard, the Petition suggested that AVAC was eligible to participate in the proceeding as an interested governmental entity pursuant to 10 C.F.R. § 2.715(c). PG&E and the NRC Staff both argued that AVAC had no standing as of right

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<sup>2</sup> See Pacific Gas and Electric Co.; 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 (Apr. 22, 2002).

<sup>3</sup> See Petition of San Luis Obispo County Supervisor Peg Pinard and Avila Valley Advisory Council for Leave to Intervene and Request for Hearing, dated May 22, 2002 ("Petition").

<sup>4</sup> See 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 [Obispo] County Supervisor Peg Pinard and Avila Valley Advisory Council, dated May 30, 2002, at 7-8 ("NRC Answer"); Answer of Pacific Gas and Electric Company to the Petition for Leave to Intervene and Request for Hearing of San Luis Obispo County Supervisor Peg Pinard and Avila Valley Advisory Council, dated June 3, 2002, at 3-5 ("PG&E Answer").

in this proceeding as a government entity and does not qualify to participate under Section 2.715(c). (See PG&E Answer at 5-8; NRC Staff Answer at 8-9.)

### III. DISCUSSION

#### A. Standing of Ms. Pinard

The Amended Petition states that Ms. Pinard now seeks to intervene as a “private citizen, rather than in her capacity as a member of the San Luis Obispo [County] Board of Supervisors.” (Amended Petition at 2.) The Amended Petition attaches Ms. Pinard’s Declaration, in which she states that she resides in San Luis Obispo, within ten to fifteen miles of DCPP. (Pinard Decl. ¶ 1.) She states that she is “concerned that the construction and operation of a proposed Independent Spent Fuel Storage Installation [“ISFSI”] at [DCPP] will jeopardize the health and safety of myself and my family, and the value of our property.” (*Id.* ¶ 4.)

An individual petitioner in a Commission licensing proceeding related to spent fuel storage may base its standing upon a showing that his or her residence, or that of its members, is within “close proximity” to the storage facility. *Virginia Elec. & Power Co.* (North Anna Nuclear Power Station, Units 1 & 2), ALAB-522, 9 NRC 54, 56 (1979) (“zone of harm” is smaller for spent fuel pool expansion proceeding than a reactor operating license proceeding). Licensing boards have held that residence within 17 miles of a facility has been sufficient to establish standing in a case involving the proposed expansion in capacity of a spent fuel pool.<sup>5</sup> See *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25,

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<sup>5</sup> The line of NRC case law in this area concerning spent fuel pool expansion proceedings (as opposed to those concerning issuance of operating licenses to power reactors) seems most pertinent here, as dry cask storage involves a completely passive and unpressurized system (as does wet storage of spent fuel), whereas the power plant involves a complex combination of active and passive systems, structures and components.

29-31 (1999). Consequently, PG&E does not challenge Ms. Pinard's standing to intervene in this proceeding as an individual.

B. Standing of AVAC

The Amended Petition states that AVAC is now petitioning to intervene as a private entity, rather than as a governmental organization. (Amended Petition at 2.) Appended to the Amended Petition is the Declaration of Seamus Slattery, which states:

AVAC is a private organization formed to advise the San Luis Obispo County Board of Supervisors and other public decision-making bodies which may have jurisdiction over any aspect of planning and development in the Avila Valley area. As stated in AVAC's by-laws, the purposes of the organization include "[t]o advocate for the interests of the residents Avila Valley [sic] in public hearings, legal proceedings, and other civic decision making processes related to land uses, natural resource conservation, zoning, public services, circulation, public improvements, public safety and other aspects of harmonious community life and orderly development."

(Slattery Decl. ¶ 3.) Mr. Slattery's Declaration also indicates that AVAC has voted to intervene in this adjudicatory proceeding, and that he has authorized AVAC to represent him in the proceeding. (*Id.* at ¶ 4.) However, AVAC has not established that it has the authority to represent itself — or others — as a private organization, as opposed to a quasi-governmental entity.<sup>6</sup>

AVAC is an advisory body to the San Luis Obispo County Board of Supervisors. Its bylaws notwithstanding, AVAC has cited no authority for the proposition that AVAC is empowered to operate as a private organization representing Mr. Slattery and its other members.

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<sup>6</sup> Conversely, an organization acting as an intervenor may not claim to represent the public interest, in addition to representing the particular interests of its members. Thus, to the extent that AVAC would now purport to represent the Avila Valley community at large, it cannot do so. See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-77-11, 5 NRC 481 (1977); *Puget Sound Power & Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 & 2), LBP-82-74, 16 NRC 981, 984 (1982).

While AVAC's bylaws state that it is a private organization, no statutory or other legal basis is cited for this bylaw. Moreover, the bylaws are quite clear regarding the link to county government:

*The [AVAC] is a private organization formed to advise the San Luis Obispo County Board of Supervisors and other public decision-making bodies which may have jurisdiction over any aspect of planning and development in the Avila Valley area.*

Avila Valley Advisory Council Bylaws, Art. II, § 1, dated June 12, 2002 (emphasis added).

Neither the bylaws nor AVAC's filing clearly establish that AVAC has independent litigation authority or, indeed, any authority beyond its quasi-governmental role as an advisory body.<sup>7</sup>

The Amended Petition relies on another of AVAC's bylaws, stating that one of the advisory council's purposes is:

To advocate for the interest of the residents of Avila Valley in public hearings, legal proceedings and other civic decision-making processes related to land uses, natural resource conservation, zoning, public services, circulation, public improvements, public safety and other aspects of harmonious community life and orderly development.

Avila Valley Advisory Council Bylaws, Art. III, § 5. However, the bylaws were amended as of June 10, 2002, to incorporate this provision for the specific purpose of intervening in this proceeding.<sup>8</sup> Without articulating a legal basis for this purported authority, AVAC — an entity seemingly of limited powers — cannot unilaterally proclaim to act as a private entity on behalf

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<sup>7</sup> San Luis Obispo County has requested to participate in this proceeding as an interested governmental entity pursuant to 10 C.F.R. § 2.715(c). Both PG&E and the NRC Staff have indicated they have no objection to the County's participation in this regard. Because the communities represented by AVAC are located within San Luis Obispo County, the interests of those citizens are represented by the County in this proceeding. AVAC's authority is limited to advising the County supervisors with respect to the County's participation.

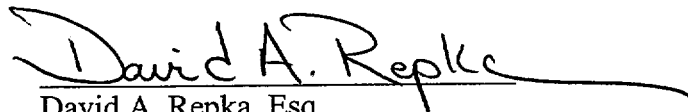
<sup>8</sup> See Meeting Minutes for Avila Valley Advisory Council Meeting of June 10, 2002 (appended hereto as Attachment 1) ("Motion to change by laws [sic] to add section 5 to Article III. Passed unanimously.")

of its members. Certainly, there has been no indication from San Luis Obispo County that it agrees that AVAC (or any other advisory council) has the authority to act as a private organization in litigation. Absent a more unequivocal showing, AVAC's petition to intervene as a private organization should be denied. Should Mr. Slattery wish to participate in this proceeding as an individual, he should so indicate in an appropriate filing.

IV. CONCLUSION

For the reasons set forth above, AVAC's amended petition to intervene and request for hearing should be denied. PG&E does not, at this time, challenge the standing of Ms. Pinard. However, Ms. Pinard cannot be admitted as a party to the proceeding until she has proffered at least one admissible contention. PG&E will respond to proposed contentions at the appropriate time.

Respectfully submitted,



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ATTORNEYS FOR PACIFIC GAS &  
ELECTRIC COMPANY

Dated in Washington, District of Columbia  
this 18th day of July 2002

**ATTACHMENT I**

**AVILA  
VALLEY  
ADVISORY  
COUNCIL**

P.O. Box 65  
Avila Beach  
CA 93424

[www.AvilaValley.org](http://www.AvilaValley.org)

**Meeting Agenda**

AVAC meets on the 2nd Monday of every month, 7-9 p.m. at the P.G.&E. Community Center, 6588 Ontario Road, Avila Beach, CA. Items for each agenda may be submitted two weeks in advance to the Executive Committee.

***Public Participation:*** Following discussion of each agenda item by Council, the Chair may allow public comment as time permits. Non-agenda concerns may be raised during the Public Comment period. Please limit remarks or questions to 3 minutes.

**Officers for 2002**

**Chair**

Seamus Slattery  
(Avila Beach)  
805-595-7262

**Vice Chair**

Teresa Tardiff  
(Avila Valley)

**Secretary**

Teresa Tardiff  
(Avila Valley)

**Members of  
Council**

**Avila Beach:**

Lisa Newton  
Maridel Salisbury  
Seamus Slattery  
John Salisbury (alt)

**Avila Valley:**

Teresa Tardiff  
Jan Taylor  
Carol Kiessig (alt)

**San Luis Bay Estates:**

Marguerite Bader  
Karla Bittner  
Sherri Gooding  
Nisan Matlin  
David Roark  
Ted Ivarie (alt)  
Hy Weiser (alt)

**See Canyon:**

Marylou Gooden  
Bill Tickell  
Lane Stuart (alt)

**Squire Canyon:**

Rob Bollay  
George Gibson  
Laurie Cantu (alt)

**Order of Business – Monday, June 10, 2002**

- |   |                        |
|---|------------------------|
| <b>Call to Order/Roll Call</b>                            | <b>Seamus Slattery</b> |
| <b>Approval of Minutes</b>                                | <b>Teresa Tardiff</b>  |
| <b>1.0 <u>Treasurer Report</u></b>                        | <b>Teresa Tardiff</b>  |
| <b>2.0 <u>County Reports</u></b>                          |                        |
| <b>2.1 County Supervisor, District 3</b>                  | <b>Peg Pinard</b>      |
| <b>2.2 County Staff</b>                                   | <b>James Caruso</b>    |
| <b>2.3 Sheriff's Department</b>                           | <b>Lt. Basti</b>       |
| <b>3.0 <u>Communications/AVAC Calendar</u></b>            | <b>Seamus Slattery</b> |
| <b>4.0 <u>Standing &amp; Ad Hoc Committee Reports</u></b> |                        |
| <b>4.1 Avila Beach Committee</b>                          | <b>Seamus Slattery</b> |
| <b>4.2 San Luis Bay Estates Committee</b>                 | <b>Nisan Matlin</b>    |
| <b>4.3 Transportation Committee</b>                       | <b>David Cantu</b>     |
| <b>5.0 <u>Presentations</u></b>                           |                        |
| <b>5.1 AVAC Intervener Status–Diablo Canyon</b>           |                        |
| <b>5.2 See Canyon Special Events</b>                      |                        |
| <b>6.0 <u>New Business</u></b>                            |                        |
| <b>6.1 Agenda items for July, 2002, meeting</b>           |                        |
| <b>7.0 <u>Old Business</u></b>                            |                        |
| <b>Adjournment</b>  | <b>Seamus Slattery</b> |

**Our Mission Statement**

The Avila Valley Advisory Council's (AVAC) Mission is to represent the interests of valley residents and enterprises, to monitor and guide development and to promote the general welfare of the community. To these ends, AVAC works to assure that essential public services keep pace with change and promotes the conservation of the natural beauty and resources in our woodlands, along the creek sides and around the bay.



**Avila Valley Advisory Council  
Minutes of Meeting June 10, 2002**

**Call to Order/Roll Call**

**Seamus Slattery**

Meeting called to order at 7:00 P. M.; a quorum was present.

**Members Present:** Maridel Salisbury, Seamus Slattery, John Salisbury, Teresa Tardiff, Jan Taylor, Bill Tickell, David Roark, Marguerite Bader, Sherri Gooding, Ted Ivarie, Karla Bittner, Marylou Gooden, and George Gibson.

**Members Absent:** Lisa Newton, Carol Kiessig, Nisan Matlin, Hy Weiser, Lane Stuart, and Rob Bollay.

**Approval of Minutes:**

**Teresa Tardiff**

Minutes approved as written.

**1.0 Treasurer's Report**

**Teresa Tardiff**

No changes.

**2.0 County Reports**

**2.1 Sheriff's Department**

**Commander Martin Basti**

Bicycle patrol will be on duty weekends in Avila. Drinking is going on in parks. May need to realign Front since there is an ordinance that does not allow drinking in Front street but it is okay in county parks and is already happening in the new Avila Park/playground area. Poisoned trees: no sheriff's record on tree investigation. SLBE still looking into problem. Sherri-motion to support Peg bringing issue of drinking in Park to Board of Supervisors. Motion Passed.

**3.0 Executive Committee/Communications**

**Seamus Slattery**

Avila Beach Report:

Modification in Mr. Rick's Plan.

1) Use basement space as event area

2) Use deck area

No conflict with Specific Plan. Approved by vote.

**4.0 Presentations**

**Spent fuel storage**

**Seamus Slattery**

AVAC was shown pictures of used fuel storage overpack container on a transporter. It will be attached to an on site slab. The proposed site is where the pools are now. It is visually accessible from the ocean. The containers will be loaded at the plant and then transported to the slab. It is intensely lethal material. The proposal was made under the old regulations, prior to September 11. No provision for security is required. Cask could be split open by shoulder held weapon, 4 miles away (outside of Coast guard patrol). County decided not to participate in NRC hearing as intervenor. Deadline for filing was morning following Supervisors' meeting. We are the only public agency to intervene. Many plants are applying for operation extension under President's Energy plan. There are 6 years left on pool. 138 casks allows for enough storage to extend operation until 2052. Temporary storage could be permanent storage. There may be no alternative. Intervenor status is administrative action. It gives you discovery rights. As intervenor we can make oral argument and file a brief. We need to get a by-law change. Avila Foundation has given grant of \$30,000.00. Other money commitments are available as well. We will be able to get liability insurance. We would like to pursue issues related to safety. In the licensing hearing the judge only allowed intervenor and parties to speak. Peg as 3rd district supervisor, and Seamus (on behalf of AVAC) are intervenors in the NRC hearing. Is there an opportunity for a governmental agency to intervene at a later time? Per Peg: would have to be huge change in circumstances. Congresswoman Capps asked NRC for extension for filing and was denied. Terry Taylor says there are people locally who are trained for haz material handling. Per James: County cannot deny permit for safety reasons. NRC pre-empts. Can look and advise NRC about findings. They would write a letter. NRC has environment department. What status doe PUC and

Coastal Commission have? PUC has rate setting authority. County has permitting jurisdiction and can appeal to coastal Commission if unhappy with County permit. Seamus would like to form intervenor committee. Motion made to approve AVAC intervention in NRC hearings on PG& E spent fuel request. Passed. Have to file contentions by mid-July. Motion to change by laws to add section 5 to Article III. Passed unanimously. Motion to incorporate and obtain liability insurance to protect board. Passed unanimously.

**Agenda items for July:** Mary Lou Gooden requests to have Communication issue on Agenda.

**6.0 Public Comment**

None.

Meeting adjourned at 8:55 p.m.

Secretary, Teresa Tardiff

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of: )  
)  
Pacific Gas and Electric Co. ) Docket No. 72-26-ISFSI  
)  
(Diablo Canyon Power Plant Independent )  
Spent Fuel Storage Installation) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the "ANSWER OF PACIFIC GAS AND ELECTRIC COMPANY TO AMENDED PETITION TO INTERVENE OF PEG PINARD AND AVILA VALLEY ADVISORY COUNCIL" have been served as shown below by electronic mail, this 18th day of July 2002. Additional service has also been made this same day by deposit in the United States mail, first class, as shown below.

Administrative Judge G. Paul Bollwerk, III  
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U.S. Nuclear Regulatory Commission  
Mail Stop O-16C1  
Washington, DC 20555-0001

Office of the Secretary  
U.S. Nuclear Regulatory Commission  
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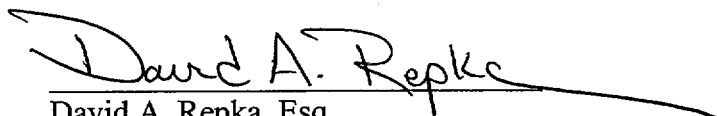
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