

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**DOCKETED 08/13/02**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

PACIFIC GAS & ELECTRIC CO.)

(Diablo Canyon ISFSI))

Docket No. 72-26-ISFSI

ASLBP No. 02-801-01-ISFSI

NRC STAFF'S RESPONSE TO AMENDED PETITION TO INTERVENE
FILED BY PEG PINARD AND AVILA VALLEY ADVISORY COUNCILINTRODUCTION

Pursuant to 10 C.F.R. § 2.714(c), the staff of the Nuclear Regulatory Commission ("Staff") hereby responds to the Amended Petition to Intervene filed by Peg Pinard and Avila Valley Advisory Council ("AVAC") on July 8, 2002. As more fully set forth below, the Staff submits that Ms. Pinard and AVAC have now satisfactorily demonstrated their standing to participate in this proceeding.

BACKGROUND

On December 21, 2001, Pacific Gas and Electric ("PG&E" or "applicant") 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. 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, would 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, a request for hearing and petition for leave to intervene (“Petition”) was timely filed jointly by Ms. Pinard and Avila Valley Advisory Council (“AVAC”).¹ The NRC staff (“Staff”) and PG&E argued in their responses to the Petition that neither Ms. Pinard nor AVAC successfully demonstrated standing as their Petition failed to meet the Commission’s standing requirements and instead relied upon Ms. Pinard and AVAC’s unclear roles in the county government system.² Ms. Pinard and AVAC filed an “Amended Hearing Request and Petition to Intervene” on July 8, 2002.³ While the Staff originally anticipated responding to the Amended Petition in Staff’s forthcoming response to petitioners’ supplements⁴, for the sake of clarity, the Staff has decided to respond to the Amended Petition separately.

DISCUSSION

A. Standing of Peg Pinard

The Amended Petition indicates that Ms. Pinard “now seeks to intervene as a private citizen, rather than in her capacity as a member of the San Luis Obispo Board of Supervisors.” Amended

¹ 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”).

² 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 (“Staff Response”); 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 Response”).

³ See Petitioners’ Amended Hearing Request and Petition to Intervene, dated July 8, 2002 (“Amended Petition”).

⁴ In the Board’s June 6, 2002 Memorandum and Order (Initial Prehearing Order), the Board scheduled Applicant and Staff’s responses to the petitioners’ supplements to be filed on or before August 19, 2002.

Petition at 2. Ms. Pinard's Declaration in support of the Amended Petition, indicates that she resides within 15 miles of the DCCP and that she is "... concerned that the construction and operation of a proposed Independent Spent Fuel Storage Installation at the Diablo Canyon Nuclear Power Plant will jeopardize the health and safety of myself and my family, and the value of our property." Amended Petition, Pinard Declaration ¶¶ 1 & 4.

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. A petitioner may base its standing upon a showing that his or her residence or that of its members, is within the geographical zone that might be affected by an accidental release of fission products. *Louisiana Power and Light Company* (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 n.6 (1973). Residences within 17 miles of a facility have been found sufficient to establish standing in a case involving the proposed expansion in capacity of a spent fuel pool. *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29-31 (1999).

On these bases, because Ms. Pinard, as a private citizen, has met the Commission's standing requirements, the Staff does not oppose her standing to intervene in this proceeding.

B. Standing of AVAC

According to the Amended Petition, AVAC now seeks to intervene as a "private entity, not a governmental organization." Amended Petition at 2. Additionally, AVAC submitted the Declaration of Seamus Slattery, the Chairman of AVAC, who states that he resides within ten miles of the DCCP. Amended Petition at 2; Slattery Declaration ¶¶ 1 & 3. The Amended Petition states that AVAC has representational standing through Mr. Slattery, who has authorized AVAC to represent him in this proceeding. Amended Petition at 2; Slattery Declaration at ¶4.

Where an organization asserts a right to represent the interests of its members, "judicial concepts of standing" require a showing that: (1) its members would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its

purpose; and (3) neither the claim asserted nor the relief requested requires an individual member to participate in the organization's lawsuit. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 30-31, citing *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). Longstanding NRC practice also requires an organization to demonstrate that at least one of its members has authorized it to represent the member's interests. See *Private Fuel Storage, L.L.C.*, 48 NRC at 31-32. Because Mr. Slattery's Declaration establishes that he, individually, would have standing in this matter, and because nothing asserted in this matter would require an individual member of AVAC to participate in this lawsuit, it is the second prong of the *Hunt* test which is at issue here.⁵ [Amended Petition, Slattery Declaration]

The second prong of the *Hunt* test is whether the interest that the organization seeks to represent in a proceeding is germane to the organization's overall purposes. The "modest but sensible" test established by the D.C. Circuit Court of Appeals in interpreting the second factor of the *Hunt* test requires that "an organization's litigation goals be pertinent to its special expertise and the grounds that bring its membership together." See *Private Fuel Storage, L.L.C.*, 48 NRC at 33-34, citing *Humane Society of the United States v. Hodel*, 840 F.2d 45, 57-59 (D.C.Cir.1988). The purpose of the test is to ensure "a modicum of concrete adverseness by reconciling membership concerns and litigation topics by preventing associations from being merely law firms with standing." *Private Fuel storage, L.L.C* 48 NRC at 33-34.

Interpreting this Amended Petition in accordance with the *Hunt* test, the AVAC Bylaws demonstrate that part of AVAC's mission is to advise San Luis Obispo County and other public

⁵ Mr. Slattery's Declaration indicates that, in addition to living within 10 miles of the Diablo Canyon Nuclear Power Plant, he is "concerned that the construction and operation of a proposed [ISFSI] at the Diablo Canyon Nuclear Power Plant will jeopardize the health and safety of myself and my family, and the value of our property." Thus, Mr. Slattery, through his proximity to the proposed facility, has alleged an injury in fact within the zone of interests protected by the Atomic Energy Act.

decisionmaking bodies with jurisdiction over planning and development in the Avila Valley area of the interests of its members in ensuring that any such development is soundly planned. AVAC's Bylaws, Articles II and III. Because the pending license application involves an issue of planning and development - namely the construction and operation of an ISFSI at the DCPD site, it appears that AVAC's litigation goals are pertinent to its special expertise of representing the interests of its members regarding such issues. Moreover, because the NRC is a decisionmaking body with jurisdiction over the proposed ISFSI, it fits within AVAC's organizational purpose to advise the NRC of its members' interests as a party to this proceeding. Finally, as longstanding NRC practice dictates, Mr. Slattery has authorized AVAC to represent him in this proceeding. Amended Petition at 2; Slattery Declaration at ¶4.

Therefore, having met the requirements of the *Hunt* test, and having established that Mr. Slattery has authorized AVAC to represent his interests in the proceeding, the Staff does not oppose AVAC's standing in this matter.

CONCLUSION

For the reasons set forth above, the Staff submits that Ms. Pinard and AVAC 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 Amended Petition for leave to intervene should be granted.

Respectfully submitted,

/RA/

Stephen H. Lewis
Counsel for NRC Staff

Dated at Rockville, Maryland
this 12th day of August, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
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(Diablo Canyon Power Plant Independent)	ASLBP No. 02-801-01-ISFSI
Spent Fuel Storage Installation))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO AMENDED PETITION TO INTERVENE FILED BY 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 12th day of August, 2002.

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