UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS OBISPO MOTHERS FOR PEACE, SIERRA CLUB, and PEG PINARD, Petitioners,	)	
v.	)	No. 03-74628
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents	)	

SAN LUIS OBISPO MOTHERS FOR PEACE'S REPLY TO FEDERAL RESPONDENTS' OPPOSITION TO MOTION FOR ATTORNEYS' FEES AND COSTS

In their opposition to Petitioner San Luis Obispo Mothers for Peace's ("SLOMFP's") application for an award of attorney's fees and costs under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, the Federal Respondents concede that SLOMFP is the "prevailing party" in this case, that it is eligible for attorneys' fees and costs under the EAJA, and that the costs and the number of hours submitted by SLOMFP's counsel in this case are reasonable. Federal Respondents' Response to Petitioners' Motion for Attorney's Fees and Costs at 4 (April 16, 2007) ("Response"). Nevertheless, the Respondents argue that SLOMFP is not entitled to an EAJA fee award because (a) the NRC's position was substantially justified, (b) SLOMFP failed to discount its request sufficiently to

account for the issues on which it did not prevail, and (c) SLOMFP has not justified an enhanced fee for its primary attorney. As demonstrated in this reply, these arguments are without merit.

I. ARGUMENT

A. The NRC's Position Was Not Substantially Justified.

This Court's decision in this case contradicts Respondents' claim that their position was "justified in substance or the main." Response at 5, citing *Pierce v. Underwood,* 487 U.S. 552, 565 (1988). The Court did not find plausible a single one of the Respondents' four separate rationales for refusing, as a matter of law, to consider the environmental impacts of intentional attacks on proposed nuclear facilities. As in *Thomas v. Peterson,* 841 F.2d 332, 336 (9th Cir. 1988), the Court's "unequivocal reversal" of the NRC's decision "strongly indicates" the government's position was not reasonable.

The Court's decision also faulted the NRC for failing to justify its position in the proceeding below. As the Court observed, the NRC "simply declare[ed] without support" its view that "as a matter of law, the possibility of a terrorist attack . . . is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA." 449 F.3d at 1030. The NRC also "failed to address" information presented by the petitioners that

contradicted its assertion. *Id.* Having failed even to attempt to support its position in the case below, the NRC has no ground to claim it was "substantially justified."

Nor is there any merit to the Federal Respondents argument that the question of whether NEPA requires the NRC to consider the effects of intentional attacks in environmental analyses for nuclear facilities was an issue of "first impression," spurred by the terrorist attacks of 9/11, on which "reasonable minds could differ." Response at 10, quoting *Edwards v. MacMahon,* 834 F.2d 796, 802-03 (9th Cir. 1987); *Gonzales v. Free Speech Coalition,* 408 F.3d 613, 621 (9th Cir. 2005).

1. This is not a case of first impression.

First, this case is not one of first impression. For over 20 years, the NRC has been considering, as a factual matter, whether to evaluate the environmental effects of intentional destructive acts on proposed nuclear facilities. Never, before this case, has it taken the unjustified position that such acts should be ignored categorically as a matter of law. In *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681 (1985), ("*Philadelphia Electric Co.*"), for example, the NRC evaluated whether to admit a contention demanding an EIS to consider the environmental impacts of sabotage against a nuclear power plant. The NRC implicitly assumed that sabotage constituted a cognizable environmental impact under NEPA, even as it concluded that as a factual matter, "the risk of sabotage is simply not *yet* amenable to a degree

of quantification that could be meaningfully used in the decisionmaking process." 22 NRC at 701 (emphasis added). The U.S. Court of Appeals for the Third Circuit affirmed this portion of the *Philadelphia Electric Co.* decision in *Limerick Ecology Action v. NRC,* 869 F.2d 719, 743-44 (3rd Cir. 1989) ("*Limerick*"), holding that that the NRC did not "act arbitrarily" in refusing to hold a hearing on the impacts of sabotage. The Court based its holding on the factual grounds that the petitioner had "proposed no meaningful method by which the NRC could either assess or predict sabotage risks," nor had it produced "any credible evidence or theory" that would "cast doubt" on the NRC's conclusion that the risk of sabotage is incapable of measurement. *Id.* More recently, in the *Private Fuel Storage* case, the Commission invoked *Limerick* by suggesting that a petitioner might have gained admission of a contention seeking an EIS for a proposed spent fuel storage facility had it provided "some method or theory by which the NRC could . . . enter[] into a meaningful analysis of the risk of sabotage despite its asserted inability to quantify the risk." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 351 (2002). Not until the instant case did the Commission unequivocally refuse to conduct such an inquiry.[1]

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[1] Respondents disingenuously suggest that SLOMFP might have obtained a hearing on the environmental impacts of an intentional attack on the proposed Diablo Canyon spent fuel storage facility if it had meet the *Limerick* test for presenting a method for a "meaningful analysis of the risk of sabotage." Response at 9. In fact, SLOMFP's contention in the NRC licensing proceeding met the

Every federal court that has examined the question of whether NEPA requires an environmental analysis of the impacts of intentional attacks on a federally built or licensed facility, including this Court, has applied essentially the same fact-based analytical test as *Philadelphia Electric Co.* and *Limerick. See City of New York v. Department of Transportation,* 715 F.2d 732, 750 (2nd Cir. 1982), appeal dismissed and cert. denied, 465 U.S. 1055 (1984) ("*City of New York*") (affirming the Department of Energy's factual conclusion that terrorist attacks on plutonium shipments were only "remote possibilities" posing an "unascertainable risk"); *NoGWEN Alliance v. Aldridge,* 855 F.2d 1380, 1385-86 (9th Cir. 1988) ("*NoGWEN*") (affirming the Air Force's factual conclusion that the likelihood that installation of an early warning system would increase the likelihood of a nuclear war was "remote and speculative"). Similarly, in this case, the Court reversed the NRC's decision for failure to make an "appropriate inquiry" into the question of whether terrorist attacks are "so 'remote and highly speculative' that NEPA's mandate does not include consideration of their potential environmental effects." *San Luis Obispo Mothers for Peace v. NRC,* 449 F.3d 1016, 1030 (9th Cir. 2006),

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Limerick test by quoting an NRC rulemaking notice which set forth a set of criteria used by the NRC to "perform a qualitative analysis of the potential for acts of malice or insanity." Petitioners' Contention EC-1, Excerpts of the Record at 69-71. The Commission dismissed SLOMFP's contention as a matter of law, without even mentioning the information presented by SLOMFP. On appeal, the Court agreed with SLOMFP that the NRC's own actions revealed its capacity to assess "likely modes of attack, weapons, and vulnerabilities of a facility" and thereby evaluate the potential for a terrorist attack. 449 F.3d at 1031.

cert. denied, 127 S.Ct. 1124 (2007) ("*SLOMFP v. NRC*"). Thus, contrary to Respondents' claim, the NRC's position was not substantially justified by a lack of "clear, controlling precedent." *See* Response at 5, citing *Minor v. U.S.* 797 F.2d 738, 739 (9th Cir. 1986).[2]

2. This is not a case on which reasonable minds could differ.

Second, the NRC's interpretation of the proximate cause analysis in *Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766 (1983) ("*Metropolitan Edison*") was not a matter on which "reasonable minds could differ." Response at 6. Respondents disregard this Court's conclusion that the Supreme Court "explicitly distinguished" *Metropolitan Edison* as involving a "different type of causation than that at issue in this case." *SLOMFP v. NRC,* 449 F.3d at 1029. The Court found that it was legally bound to follow the Supreme Court's "admonition" not to apply the *Metropolitan Edison* analysis to this case, thus demonstrating the unreasonableness of the Respondents' position.[3]

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[2] Nor is Respondents' argument supported by *Ground Zero Center for Non-Violent Action v. U.S. Navy,* 383 F.3d 1082 (9th Cir. 2004) ("*Ground Zero*"), or *Edwardsen v. Department of Interior,* 268 F.3d 781 (9th Cir. 2001) ("*Edwardsen*"). *See* Response at 8-10. *Ground Zero*'s fact-based holding that an accident potential of less than one in a million is not high enough to be reasonably foreseeable is consistent with *SLOMFP v. NRC, Limerick, NoGwen,* and *City of New York. Edwardsen*'s holding that NEPA does not require a worst-case analysis is both undisputed and irrelevant. *See* 449 F.3d at 1033-34.

[3] For the same reasons, *Department of Transportation v. Public Citizen,* 541 U.S. 752 (2004), cited by Respondents at page 8, is inapplicable to this case.

Moreover, the key difference here was not between "reasonable minds" but between the actions of the NRC's right and left hand. As the Court noted:

> . . . it appears as though the NRC is attempting, as a matter of policy, to insist on its preparedness and the seriousness with which it is responding to the post-September 11th terrorist threat, while concluding, as a matter of law, that all terrorist threats are 'remote and highly speculative' for NEPA purposes.[4]

As discussed above at pages 2-3, the NRC made no attempt to explain the blatant discrepancy between its NEPA position and its other regulatory actions.

B. The Respondents Have Not Demonstrated Special Circumstances That Make a Fee Award Unjust.

As discussed in SLOMFP's Motion for EAJA Fees, the fact that one of SLOMFP's co-Petitioners, the Sierra Club, is not eligible for an attorney fee award, should not disqualify SLOMFP from an award of fees. San Luis Obispo Mothers for Peace's Motion for Attorney's Fees and Costs Pursuant to Equal Access to Justice Act at 15-16 (as corrected on February 15, 2007) ("SLOMFP Motion"). The Respondents argue that "*[i]f* the Sierra Club's legal and financial resources played a role" in the success of this lawsuit, the Court should deny or reduce the amount of SLOMFP's attorney fee award. Response at 12 (emphasis added). Respondents fail to acknowledge or contest the statements by SLOMFP's primary counsel, SLOMFP's treasurer, and the director of the Sierra Club's

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[4] 449 F.3d at 1031. *See also* 449 F.3d at 1030, noting the "tenuous" nature of the NRC's internally contradictory position.

Environmental Law Program, that the Sierra Club played no legal or financial role in this litigation. *See* SLOMFP Motion at 11. Therefore they have failed to carry their burden of proof. *Love v. Reilly,* 924 F.2d 1492, 1495 (9th Cir. 1991).

C. SLOMFP Reasonably Discounted Its Fee Request.

Federal Respondents incorrectly argue that SLOMFP improperly seeks compensation for unsuccessful claims that are not related to the NEPA claim on which SLOMFP prevailed. Response at 13. To the contrary, all of the legal claims for which SLOMFP seeks compensation are closely related, because they were all designed to achieve the same ultimate legal aim: to reverse the NRC's refusal to consider the environmental impacts of an intentional attack on the Diablo Canyon spent fuel storage facility. SLOFMP achieved "excellent results" by obtaining a decision that invalidated the NRC's legal basis for refusing to consider the impacts of terrorist attacks in its environmental analyses or even to allow members of the public to seek consideration of those impacts in a public hearing. *Hensley v. Eckerhart,* 461 U.S. 424, 435 (1983). If, after the NRC issues its revised environmental assessment for the Diablo Canyon spent fuel storage facility, SLOMFP requests a hearing on the adequacy of the environmental assessment, the NRC will no longer be able to deny SLOMFP a hearing on the grounds invoked in this case. Thus, SLOMFP achieved the "desired outcome" of its Atomic Energy Act and Administrative Procedure Act, of removing the formidable barriers the

NRC had erected to consideration of its NEPA concerns. *Hensley v. Eckerhart,* 461 U.S. at 435.[5]

D. SLOMFP Meets the Standard for an Enhanced Fee Rate.

The Respondents fail to show that SLOMFP's primary attorney, Diane Curran, is not entitled to an enhanced fee for her unique expertise in environmental and nuclear safety issues. They cite no Ninth Circuit case contradicting the holding of *Love v. Reilly* that environmental law is a specialty practice area that qualifies for enhanced attorneys' fees. 924 F.2d at 1496. Moreover, in disputing the relevance of Ms. Curran's additional area of expertise in nuclear safety, security and licensing law, the Respondents fail to acknowledge the significant role that her knowledge played in this case. In particular, the contradiction between the NRC's NEPA position in this case and its post-9/11 policies, procedures and actions, which were pointed out in Ms. Curran's brief, played a central role in the Court's holding that the NRC's position was irrational. Respondents also fail to acknowledge the variety of arguments raised by the NRC's merits brief which called upon SLOMFP's counsel's knowledge of the relationship between the AEA and NEPA and the content of NRC regulations and policies. These arguments included the alleged adequacy of the NRC's post-9/11 security improvements

[5] In arguing that SLOMFP failed to explain the basis for reducing its requested award by 10% to account for another unsuccessful Atomic Energy Act claim, Federal Respondents overlook the information provided on page 13 and n.6 of SLOMFP's Motion.

under the AEA to substitute for NEPA compliance (NRC Brief at 42-43), the alleged risk of disclosure of sensitive security-related information (NRC Brief at 44-45), and the NRC's alleged inability to predict the likelihood of intentional attacks on nuclear facilities (NRC Brief at 36-39, 46-47). SLOMFP prevailed on these issues thanks to the unique level of expertise of its counsel. The fee enhancement is justified.

II. CONCLUSION

For the foregoing reasons, the Court should grant SLOMFP's motion for attorneys' fees and costs of $162,572.78, plus an additional $3,742.34 for fees and costs incurred in preparing this Reply, totaling $166,315.12.[6]

Respectfully submitted,

Diane Curran
Harmon, Curran, Spielberg & Eisenberg, L.L.P.
1726 M Street N.W., Suite 600
Washington, D.C. 20036
202/328-3500

May 4, 2007

[6] *See* SLOMFP's Supplemental Motion for Attorneys' Fees and Costs and attached Supplemental Declaration of Diane Curran and Supplemental Declaration of Anne Spielberg, filed simultaneously with this Reply. SLOMFP seeks $3,242.43 for legal work by Diane Curran, $335.22 for legal work by Anne Spielberg, and $166.63 for overhead costs.

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SAN LUIS OBISPO MOTHERS FOR PEACE, SIERRA CLUB, and PEG PINARD, Petitioners, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents PACIFIC GAS & ELECTRIC CO. Intervenor-Respondent	)	No. 03-74628

SAN LUIS OBISPO MOTHERS FOR PEACE'S SUPPLEMENTAL MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO EQUAL ACCESS TO JUSTICE ACT

I. INTRODUCTION

Pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, Petitioner San Luis Obispo Mothers for Peace ("SLOMFP") hereby supplements its motion for attorneys' fees and costs under the Equal Justice Act ("EAJA"), which was submitted to this Court on February 14, 2007, and corrected on February 15, 2007. SLOMFP augments its request for an award of $162,572.78 in attorneys fees and costs by an additional $3,575.71 in attorneys' fees and $166.63 in costs, which were incurred in the preparation of San Luis Obispo Mothers for Peace's Reply to Federal Respondents' Opposition to Motion for Attorneys' Fees

and Costs (May 4, 2007). The total in requested fees and costs is $166,315.12.

The additional fees and costs are as follows:

Diane Curran	20.3 hours at $159.63/hour	$3,240.49
Anne Spielberg	2.1 hours at $159.63/hour	$ 335.22
Federal Express		$ 166.63
TOTAL		$3,742.34

This Supplemental Motion is supported by the Supplemental Declaration of Diane Curran (May 4, 2007) and the Supplemental Declaration of Anne Spielberg (May 3, 2007).

Respectfully submitted,

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202/328-3500

May 4, 2007

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PACIFIC GAS & ELECTRIC CO. Intervenor-Respondent	)	

SUPPLEMENTAL DECLARATION OF DIANE CURRAN IN SUPPORT OF SAN LUIS OBISPO MOTHERS FOR PEACE'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO EQUAL ACCESS TO JUSTICE ACT

Under penalty of perjury, I, Diane Curran, declare as follows:

1. On February 14, 2007, I submitted to this Court a declaration in support of San Luis Obispo Mothers for Peace's Motion for Attorneys' Fees and Costs Pursuant to Equal Access to Justice Act. The declaration set forth, among other things, the hours and overhead costs I incurred in this case, for which SLOMFP seeks compensation under the Equal Access to Justice Act.

2. The purpose of this declaration is to supplement my February 14, 2007, declaration with a statement of the number of hours I spent preparing San

Luis Obispo Mothers for Peace's Reply to Federal Respondents' Opposition to Motion for Attorney's Fees and Costs ("SLOMFP's Reply").

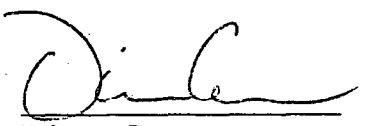
3. Between April 20 and May 4, 2007, I spent 20.3 hours researching and preparing SLOMFP's Reply. A breakdown of my hours is as follows:

Date	Task	Hours
4/20/07	Research and begin drafting reply to government opposition to fee petition	0.3
4/26/07	Research and draft reply to government opposition to fee petition.	6.0
4/27/07	Research and draft reply to government opposition to fee petition	6.0
4/29/06	Finish drafting reply to government opposition to fee petition	5.0
5/4/07	Revise and finalize reply to government opposition to fee petition	3.0
	Total	**20.3**

4. At the statutory rate of $159.63 per hour, my total fee for this work is $3,240.49.

5. In addition, my firm incurred $166.63 in overhead costs for overnight mail.

I declare, under penalty of perjury, that the foregoing facts are true and correct to the best of my knowledge.



Diane Curran

May 4, 2007

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UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents	)	
PACIFIC GAS & ELECTRIC CO. Intervenor-Respondent	)	

SUPPLEMENTAL DECLARATION OF ANNE SPIELBERG IN SUPPORT OF SAN LUIS OBISPO MOTHERS FOR PEACE'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO EQUAL ACCESS TO JUSTICE ACT

Under penalty of perjury, I, Anne Spielberg, declare as follows:

1. On February 14, 2007, I submitted to this Court a declaration in support of San Luis Obispo Mothers for Peace's Motion for Attorneys' Fees and Costs Pursuant to Equal Access to Justice Act. The declaration set forth, among other things, the hours and overhead costs I incurred in this case, for which SLOMFP seeks compensation under the Equal Access to Justice Act.

2. The purpose of this declaration is to supplement my February 14, 2007, declaration with a statement of the number of hours I spent reviewing and

editing San Luis Obispo Mothers for Peace's Reply to Federal Respondents' Opposition to Motion for Attorneys' Fees and Costs ("SLOMFP's Reply").

3. At the request of Diane Curran, I spent a total of 2.1 hours reviewing and editing SLOMFP's Reply (.3 hours on May 2, 2007 and 1.8 hours on May 3, 2007).

4. At the statutory rate of $159.63 per hour, my total fee for this work comes to $335.22.

I declare, under penalty of perjury, that the foregoing facts are true and correct to the best of my knowledge, and that any expressions of opinion are based on my best professional judgment.

Anne Spielberg

May 3, 2007

CERTIFICATE OF SERVICE

I certify that on May 5, 2007, copies of the foregoing San Luis Obispo Mothers for Peace's Reply to Federal Respondents' Opposition to Motion for Attorneys' Fees and Costs and San Luis Obispo Mothers for Peace's Supplemental Motion for Attorneys' Fees and Costs were served on the following by overnight or first-class mail as indicated below:

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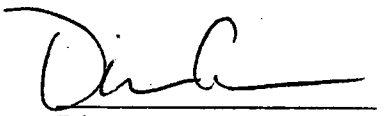

Diane Curran