

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

as corrected  
February 15, 2007

Pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, Petitioner San Luis Obispo Mothers for Peace ("SLOMFP") hereby moves the Court for an award of \$162,572.78 in attorneys fees and costs to be paid by the U.S. Nuclear Regulatory Commission ("NRC") and the United States. As required by Ninth Cir. Rule 39-2, this motion is supported by Form A.O. 291, which is attached. SLOMFP is entitled to an award of attorneys fees and costs under the EAJA because it meets the EAJA's eligibility requirements; it prevailed and achieved significant relief against the NRC in this case; the NRC's position was

not substantially justified; and there are no special circumstances that would make an award unjust.

## II. FACTUAL BACKGROUND

In this case, SLOMFP, the Sierra Club, and Peg Pinard ("Petitioners"), sought reversal of an NRC decision granting a license to Pacific Gas & Electric Company ("PG&E") for the operation of a new facility that would store spent reactor fuel on the site of the Diablo Canyon nuclear power plant.<sup>1</sup> Petitioners sought review of the NRC's refusal to comply with (a) the National Environmental Policy Act ("NEPA") by addressing the environmental impacts of an intentional attack on the proposed facility in its licensing decision, or (b) the hearing requirements of the Atomic Energy Act and the Administrative Procedure Act by granting Petitioners an adjudicatory hearing on the question of whether the NRC must prepare an environmental impact statement ("EIS") regarding the environmental impacts of an intentional attack on the proposed facility. Pursuant to the Atomic Energy Act, Petitioners also sought review of the NRC's refusal to improve the security of the entire Diablo Canyon site before licensing the spent fuel storage facility.

---

<sup>1</sup> Of the three petitioners in this case, SLOMFP was solely responsible for the attorneys fees and costs in the administrative proceeding, the appeal to the Ninth Circuit, and the defense of the Ninth Circuit's decision in the Supreme Court. Thus, SLOMFP is the sole petitioner for attorneys fees and costs under the EAJA.

The case was briefed in the spring and summer of 2004. In addition to briefs submitted by Petitioners and the NRC, PG&E filed a brief as intervenor-respondent. In addition, the Nuclear Energy Institute submitted an amicus brief in support of the NRC's position; and San Luis Obispo County and the Attorneys General of California, Massachusetts, Utah, and Washington submitted *amicus* briefs in support of Petitioners' position.

The case was not argued until over a year after the briefing, in October of 2005. Between the briefing and the oral argument, both Petitioners and the NRC submitted letters to the Court regarding relevant new judicial decisions and regulatory decisions by the NRC.

On June 2, 2006, this Court issued a decision denying Petitioners' claims with respect to the Atomic Energy Act and Administrative Procedure Act, but granting the petition for review with respect to Petitioners' NEPA claim. *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (2006).<sup>2</sup> The Court found that as a matter of law, the Commission's refusal to address the environmental impacts of an attack on the Diablo Canyon spent fuel storage facility in an EIS or environmental assessment ("EA") did not meet NEPA's reasonableness standard. *Id.*, 449 F.3d at 1035. The Court remanded the case to the NRC for further proceedings. *Id.*

---

<sup>2</sup> A copy of the decision is attached to Form A.O. 291.

After the Court issued its decision, the NRC and the United States moved for an extension of time to file a petition for rehearing or rehearing *en banc*. Although the Court granted the motion, the government did not seek rehearing. Instead, in the fall of 2006, PG&E petitioned the Supreme Court for a writ of certiorari in *Pacific Gas & Electric v. San Luis Obispo Mothers for Peace, et al.*, No. 06-466.<sup>3</sup> The Supreme Court denied the petition on January 16, 2007.<sup>4</sup>

### III. ARGUMENT

#### A. The Purpose of the EAJA is to Compensate Parties Who Enforce the Government's Compliance With the Law.

In enacting the EAJA, Congress sought to improve citizen access to the courts by reducing the deterrent effect of litigation expenses for those who successfully challenge government action. *United States v. 101.8 Acres of Land*, 716 F.2d 714, 720 (9<sup>th</sup> Cir. 1983). Congress recognized that “where parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable government action and also bear the cost of vindicating their rights.” H.R. Rep. No. 96-1418, 96<sup>th</sup> Cong., 2d Sess. at 10, reprinted in 1980 U.S.C.C.A.N. 4984, 4988-89. Thus, the EAJA provides that:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in

---

<sup>3</sup> The NRC and the United States filed a brief asserting that PG&E had not met the standard for granting certiorari.

<sup>4</sup> 2007 U.S. LEXIS 1028 (January 16, 2007). A copy of the Supreme Court's order is attached to Form A.O. 291, Attachment 1.

addition to any costs . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). The agency has the burden of proving that its position was substantially justified, by showing that its position has a reasonable basis in both fact and law. *Mendenhall v. NTSB*, 92 F.3d 871, 874 (9<sup>th</sup> Cir. 1996), citing *Pierce v. Underwood*, 487 U.S. 552, 556 (1988); *Barry v. Bowen*, 825 F.2d 1324 (9<sup>th</sup> Cir. 1987).

**B. SLOMFP is Eligible for Attorneys Fees and Other Expenses Under EAJA.**

An applicant is eligible for attorneys fees and other expenses under EAJA if (1) it is a prevailing party” that (2) incurred costs of litigation against the federal government and (3) meets applicable size or net worth criteria. 28 U.S.C. §§ 2412(d)(1)(A) and 2412(d)(2)(B). SLOMFP meets these standards for eligibility.

First, SLOMFP is a “prevailing party” under the EAJA because it has secured “a material alteration of the legal relationship between the parties.” *Perez-Arellano v. Smith*, 279 F.3d 791, 793 (9<sup>th</sup> Cir. 2002), citing *Buckhannon Bd. and Care Home, Inc., v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001). See also *United States v. Real Property Known as 22249 Dolorosa Street*, 190 F.3d 977 (9<sup>th</sup> Cir. 1999) (a party prevails if it “succeed[s] on any

significant issue in litigation which achieves some of the benefits of bringing suit.”

While a decision remanding an agency ruling for further consideration ordinarily would not warrant an EAJA award, this case meets the exception for cases deciding “significant legal principles affecting the substantive rights of the parties.” *National Wildlife Federation v. FERC*, 870 F.2d 542, 545 (9<sup>th</sup> Cir. 1989), quoting *Mantolite v. Bolger*, 791 F.2d 784, 787 (9<sup>th</sup> Cir. 1986).

Here, the Court addressed and rejected each of the NRC’s four legal rationales for its categorical refusal to considering the environmental impacts of intentional attacks on nuclear facilities in its licensing decisions. While it is not clear how the NRC will address the issue of the reasonable foreseeability of terrorist attacks on remand, the Court’s decision renders it impossible for the NRC to re-erect such a monolithic and impenetrable shield against public accountability for its environmental decisions through the NEPA decision-making process. Thus, the Court has made a “material alteration” to the legal relationship between the NRC and members of the public who seek NEPA review of the environmental impacts of intentional attacks on nuclear facilities. *Perez-Arellano v. Smith*, 791 F.2d at 793.

Second, SLOMFP incurred costs of litigation against the NRC as an agency of the federal government. See Declaration of Diane Curran, par. 6; Declaration of Morgan Rafferty, par. 6.

Third, SLOMFP satisfies the eligibility requirements of 20 U.S.C. § 2412(d)(2)(B). SLOMFP is a non-profit 501(c)(3) organization with a net worth of far less than \$7,000,000. Declaration of Morgan Rafferty, par. 1. In addition, it is an all-volunteer organization and therefore has no employees. *Id.*

**C. An Award of Fees is Mandatory Because the NRC's Position Was not Substantially Justified and No Special Circumstances Would Make an Award Unjust.**

This Court has held that “[o]nce a party’s eligibility has been proven, an award of fees under EAJA is mandatory unless the government’s position is substantially justified or special circumstances exist that make an award unjust.” *Love v. Reilly*, 924 F.2d 1492, 1495 (9<sup>th</sup> Cir. 1991), citing 28 U.S.C. § 2412(d)(1)A). The NRC bears the burden of demonstrating that its position was substantially justified, or that any special circumstances exist that would make an award unjust. *Love v. Reilly*, 924 F.2d at 1495.

**1. The NRC's position was not substantially justified.**

In determining whether the agency’s position was substantially justified, this Court evaluates the reasonableness of the underlying government action and the position asserted by the government in defending its action on appeal. *Wilderness Society v. Babbitt*, 5 F.3d 383, 388-89 (9<sup>th</sup> Cir. 1993). *See also Flores v. Shalala*, 49 F.3d 562, 569 (9<sup>th</sup> Cir. 1995). This Court has held that failure to do a proper NEPA analysis precludes a claim of substantial justification. *Thomas v. Peterson*,

841 F.2d 332 (9<sup>th</sup> Cir. 1988). If the government's position violates the Constitution, a statute, or its own regulations, a finding that the government was substantially justified "would be an abuse of discretion." *Meinhold v. U.S. Department of Defense*, 123 F.3d 1275, 1278 (9<sup>th</sup> Cir. 1997). The fact that the agency prevailed on another issue in the case does not prove the agency's position was "substantially justified." *Oregon Natural Resources Council v. Madigan*, 980 F.2d 1330, 1332 (9<sup>th</sup> Cir. 1992).

In no aspect could the NRC's position on the NEPA issue in this case be considered to be substantially justified. The Court rejected as unreasonable each of the four rationales offered by the NRC to justify its categorical refusal to consider the environmental impacts of terrorist attacks in its environmental decisions. First, the Court rejected the NRC's assertion that there was no reasonably close causal link between the NRC's licensing of the spent fuel storage facility and the physical impacts of a terrorist attack, concluding that the NRC's own policies and procedures, undercut its position that terrorist attacks are not reasonably foreseeable under NEPA. 449 F.3d at 1030-31.

Second, the Court ruled that NEPA does not allow the NRC to ignore the environmental impacts of terrorist attacks simply because their likelihood cannot be quantified. To the contrary, the Court found that the NRC's own actions show



it is capable of making a meaningful assessment of the likelihood of terrorist attacks. 449 F.3d at 1031-32.

Third, the Court rejected the NRC's assertion that Petitioners sought a "worst-case" analysis not required by NEPA. As the court observed, Petitioners did not "seek to require the NRC to analyze the most extreme (i.e., the 'worst') possible environmental impacts of a terrorist attack," but rather sought "an analysis of the range of environmental impacts likely to result in the event of a terrorist attack" on the dry storage facility. 449 F.3d at 1032-33.

Finally, the Ninth Circuit rejected as unreasonable the NRC's claim that "it cannot comply with its NEPA mandate because of security risks." The court found that while security considerations may permit or require modifications of some NEPA procedures to protect sensitive information, NEPA contains no waiver or exemption for security or defense-related issues. 449 F.3d at 1034-35, citing *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139 (1981).

"In sum," the Court concluded, "none of the four factors upon which the NRC relies to eschew consideration of the environmental effects of a terrorist attack satisfies the standard of reasonableness." 449 F.3d at 1035. The Court's conclusion makes clear that in no respect did it consider the NRC's position to be justified, let alone "substantially" justified.

**2. No special circumstances exist that would make an EAJA fee award unjust.**

The EAJA precludes an award of fees if “special circumstances make an award unjust.” 28 U.S.C. § 2412(d)(1)(A). The government bears the burden of demonstrating the existence of such special circumstances. In *Love v. Reilly*, this Court recognized that special circumstances might arguably render a fee award unjust where one of the petitioners in a case is a “free rider,” *i.e.*, a party “who is ineligible for fees under the EAJA but who ends up paying no fees because the other, eligible plaintiff pays them all through the court-awarded fees.” 924 F.2d at 1495. In this case, while one of SLOMFP’s co-Petitioners, the Sierra Club, is ineligible for EAJA fees, the participation of the Sierra Club was tangential to the lawsuit, and therefore does not render a fee award to SLOMFP unjust. *Louisiana ex rel. Guste v. Lee*, 853 F.2d 1219, 1225 (5<sup>th</sup> Cir. 1988) (“[I]f the ineligible party’s participation is nominal or narrow, then the eligible parties should not be denied the access that Congress sought to ensure by enacting the EAJA.”) *See also League for Coastal Protection v. Kempthorne*, slip op. at 6 No C-05-0991-CW (N.D. Ca. December 22, 2006) (full award granted to an eligible party where the co-plaintiff Sierra Club’s role in the litigation was “relatively minor” and was also “not material” because the case “would have been filed without it.”)<sup>5</sup>

---

<sup>5</sup> A copy of the District Court’s opinion is attached.

Similarly, in this case the Sierra Club's participation in this lawsuit was so tangential that it fails to show a "special circumstance" warranting denial or reduction of EAJA costs and fees to SLOMFP. The Sierra Club joined SLOMFP as a co-Petitioner only at the invitation of SLOMFP, which sought the Sierra Club's participation "in order to make a strong showing of support for our cause before the NRC and the Court." Declaration of Morgan Rafferty, par. 5. The Club would not have brought the litigation on its own, because the case was not among its conservation priorities. Declaration of Patrick Gallagher, par. 8. Moreover, SLOMFP would have brought the litigation regardless of whether it was joined as a co-Petitioner by the Sierra Club. Declaration of Morgan Rafferty, par. 5. SLOMFP led the litigation and took responsibility for all legal bills, raising funds through small grants and contributions by its members. *Id.* The incidental participation of the Sierra Club in this lawsuit does not rise to the level of a "special circumstance" that would make an award of fees to SLOMFP unjust. To the contrary, it would be unjust to deny SLOMFP, which took responsibility for the leadership and the costs of this lawsuit, an EAJA award in this case.

**D. The Amount of the Requested Award Is Reasonable.**

The EAJA requires a court to award "reasonable attorney fees." 28 U.S.C. § 2412(d)(2)(A). "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation

multiplied by a reasonable hourly rate.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (“*Hensley*”).

The fact that Petitioners did not prevail on all their claims should not result in a reduction of the fee awarded. “Where a plaintiff has obtained excellent results, [its] attorney should recover a full compensatory fee.” *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). “Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court’s rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee.” *Id.* Here, SLOMFP seeks compensation for the two legal theories under which it sought redress for the NRC’s refusal to entertain its request for consideration of the environmental impacts of an intentional attack on the Diablo Canyon spent fuel storage facility: its theory that the NRC violated NEPA by refusing to consider those impacts, and its theory that the NRC violated its own regulations by refusing to grant a hearing on the issue. While Petitioners did not prevail on the second theory, its victory on the first theory achieved the Petitioners’s overall goal of overturning the NRC’s unconditional refusal to allow public participation in any aspect of post-9/11 NEPA decision-making regarding protection of nuclear facilities against the threat of intentional attacks. The Court’s decision rejecting the NRC’s basis for refusing to address the environmental impacts of intentional attacks in its NEPA reviews of license applications was a major and “excellent” victory for the cause of public

participation in NRC licensing decisions, and therefore SLOMFP should be compensated for the entire effort. *Hensley*, 461 U.S. at 435. SLOMFP does not seek compensation for Petitioners' unsuccessful claim that the NRC violated the Atomic Energy Act by refusing to grant Petitioners a hearing on new security measures for the Diablo Canyon nuclear complex.<sup>6</sup>

**1. The hours spent were reasonable.**

SLOMFP requests compensation for a total of 340.8 hours spent on this appeal by its primary attorney, Diane Curran, and 36.2 hours spent by her partner, Anne Spielberg. Ms. Curran's declaration and detailed time records are attached. These submissions satisfy SLOMFP's burden of justifying the reasonableness of the hours claimed. *Hensley*, 461 U.S. at 437. The Court should find that the amount of the fee request is facially reasonable and commensurate with the success of the litigation and the relief obtained.

As counsel state in their declarations, they have contemporaneously maintained accurate records of time spent and expenses incurred in this matter. They have also carefully reviewed their time and have exercised prudent billing

---

<sup>6</sup> The time records attached to Ms. Spielberg's declaration omit the time she spent on the unsuccessful claim. Ms. Curran worked on the briefs as a whole. Because of the interrelated nature of the issues, Ms. Curran did not distinguish between claims in her time records. Therefore, Ms. Curran has reduced the number of hours for which she seeks compensation for briefing and oral argument preparation by 10%. The 10% reduction is based on the percentage of the Petitioners' briefs that were devoted to the unsuccessful claim.

judgment with regard to the time claimed, in the following respects. First, they have reduced the number of hours claimed for the briefing of the case, in order to account for the unsuccessful Atomic Energy Act claim for which SLOMFP does not seek compensation. Second, any time that could be construed as inessential has been reduced. Third, SLOMFP's request for fees excludes time spent by non-record attorneys who reviewed the pleadings and assisted Ms. Curran in preparing for oral argument. Finally, SLOMFP's request omits time spent by attorneys and paralegal staff on primarily clerical tasks, time spent on media matters, and time spent on a request for an extension of time in which to file Petitioners' brief. Thus, SLOMFP exceeded its obligation to omit time that is even possibly noncompensable. *See Democratic Party of Washington State v. Reed*, 388 F.3d 1281 (9<sup>th</sup> Cir. 2004).

**2. The rates requested by SLOMFP are reasonable.**

In 1996, Congress set a cap of \$125 per hour on the fee rate that could be recovered under the EAJA. 28 U.S.C. § 2412(d)(2)(A). That fee rate may be adjusted upward to account for the increased cost of living. *Id.* The current rate is calculated by dividing the Consumer Price Index ("CPI") by the CPI at the time the EAJA cap was set (100.0 in 1996 in the Baltimore-Washington, D.C. area) and then multiplying by the statutory rate. *Ramon-Sepulveda v. Immigration and Naturalization Service*, 863 F.2d 1458, 1462 (9<sup>th</sup> Cir. 1988).

The Court may also increase the rate above the statutory cap if it “determines that an increase in the cost of living or a special factor . . . justifies a higher fee.” 28 U.S.C. § 2412(d)(2)(A). Special factors include “the limited availability of qualified attorneys for the proceeding involved.” *Id.* To justify this enhancement, a petitioner must meet three criteria. First, the attorney must possess “distinctive knowledge and skills developed through a practice specialty.” *Love v. Reilly*, 924 F.2d at 1495, citing *Prius v. Bowen*, 869 F.2d 536, 541-42 (9<sup>th</sup> cir. 1989). Specialty practice areas requiring distinctive knowledge and skills include environmental litigation. *Love v. Reilly*, 924 F.2d at 1495. Second, “those distinctive skills must be needed in the litigation.” *Id.* Finally, the attorney’s specialized skills “must not be available elsewhere at the statutory rate.” *Id.*

As demonstrated by the attached declarations, SLOMFP’s primary attorney, Diane Curran, meets all three criteria for an enhanced fee. First, Ms. Curran possess distinct knowledge and skills developed through her practice specialty in the law relating to protection of public health, safety, security, and the environment from the unsafe operation of nuclear facilities. Declaration of Diane Curran, pars. 3, 4, 5; Declaration of Morgan Rafferty, par. 7; Declaration of Geoffrey Fettus, pars. 4-6. For over 20 years, Ms. Curran has represented environmental and civic organizations and state and local governments in NRC licensing and enforcement cases and in judicial appeals of NRC regulatory decisions. She is familiar with the

Atomic Energy Act, NEPA, and the NRC's vast and complex body of regulations implementing those statutes, and is nationally known as an expert in nuclear safety and environmental law. Declaration of Diane Curran, pars. 3, 4, 5; Declaration of Geoffrey Fettus, pars. 4-6; Declaration of Patrick Gallagher, par. 5.

Second, Ms. Curran's skills were needed in the litigation of this case.

Without her expertise, it is doubtful whether Petitioners would have succeeded in overturning the NRC's policy of refusing to consider the environmental impacts of terrorist attacks in its licensing decisions. Declaration of Morgan Rafferty, pars. 7, 8; Declaration of Patrick Gallagher, pars. 6, 7, Declaration of Geoffrey Fettus, par. 6, Declaration of Martin Malsch, par. 4.

Finally, Ms. Curran's skills are not available, in Washington, D.C., or elsewhere, at the statutory rate. Declarations of Morgan Rafferty, par. 7; Declaration of Patrick Gallagher, par. 6; Declaration of Geoffrey Fettus, par. 5, and Declaration of Martin Malsch, par. 4.

The appropriate level of enhancement of an attorneys fee award under the EAJA is the prevailing market rate. *Clevenger v. Chater*, 977 F. Supp. 776, 781, 786 (M.D. La. 1997). Given that no attorneys on the West Coast had the degree of experience or specialization needed to do the work, the District of Columbia, where Ms. Curran's office is located, is the "relevant community" for purposes of establishing the prevailing market fee. *Barjon v. Dalton*, 132 F.3d 496, 500 (9<sup>th</sup>



Cir. 1997). Therefore SLOMFP requests an enhanced fee award at the prevailing market rate for the District of Columbia, as follows:

Year	Rate	Hours	Fee
2004	\$480/hour	222	\$106,560
2005	\$525/hour	71.9	\$ 37,747.50

The requested fee rates are reasonable market rates for an attorney of Ms. Curran's experience and skill level, as attested to in the Declaration of Martin Malsch, par. 5; and the Declaration of Lynn Hargis, par. 6.

A number of hours were expended in this litigation that did not require specialized legal expertise in nuclear safety or environmental law. For those hours, SLOMFP is seeking attorneys fees at the statutory rate of \$125 per hour as increased by the cost of living in the Baltimore-Washington area. *See* the U.S. Department of Labor's website at [www.bls.gov/cpi](http://www.bls.gov/cpi). The time Ms. Curran and her partner, Anne Spielberg, expended for which SLOMFP is seeking fees at the statutory rate, rather than at the prevailing market rate, included recruiting State Attorneys General to participate as *amici*, consulting with clients, reviewing the index of the record for completeness, and preparing the EAJA application. Declaration of Diane Curran, par. 10.

**3. SLOMFP is entitled to the reasonable costs of their appeal.**

SLOMFP is also entitled to recovery of the necessary appeal expenses, such as filing fees, travel, printing, computerized legal research, and so on. *See Intrnational Woodworkers of America v. Donovan*, 792 F.2d 762, 767 (9<sup>th</sup> Cir. 1985). Petitioners seek a total of \$5,400.11 in necessary appeal expenses, as itemized in the Declaration of Diane Curran, par. 12. Some of the costs requested in this Petitioner were also requested in Petitioner's Bill of Costs, submitted June 14, 2006. Thus, if this Petition is granted in full, the Bill of Costs would be duplicative.

**IV. CONCLUSION**

For the foregoing reasons, Petitioner requests that the Court grant its request for attorneys fees and costs in the amount of \$162,572.78.

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

February 14, 2007

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

PACIFIC GAS & ELECTRIC CO.  
Intervenor-Respondent

---

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

Petitioner San Luis Obispo Mothers for Peace ("SLOMFP") hereby provides a list of errata to San Luis Obispo Mothers for Peace's Motion for Attorneys' Fees and Costs Pursuant to Equal Access to Justice Act (February 14, 2007). A corrected copy of the motion is attached to this errata sheet.

**Page Line Change**

- |   |    |  |
|---|----|--|
| 1 | 11 | change "requirements:" to "requirements;"  |
| 7 | 19 | delete " <i>United States v. Marolf</i> , 277 F.3d 1151, 1161 (9 <sup>th</sup> Cir. 2002)."                                |
| 7 | 19 | insert " <i>Wilderness Society v. Babbitt</i> , 5 F.3d 383, 388-89 (9 <sup>th</sup> Cir. 1993)" before " <i>See also</i> " |
| 8 | 1  | change "(9 <sup>th</sup> Cir. 1981)" to "(9 <sup>th</sup> Cir. 1988)"  |

**Page Line Change**

14 2 delete "by 10%"

14 18 change "(152.9 in 1996)" to "(100.0 in 1996 in the Baltimore-Washington, D.C. area)"

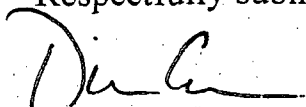
15 12 change "declaration" to "declarations"

16 11 insert a comma after "D.C."

16 17 change "La," to "La."

17 16 change "Attorney Generals" to "Attorneys General"

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

February 15, 2007

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

PACIFIC GAS & ELECTRIC CO.  
Intervenor-Respondent

---

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

Petitioner San Luis Obispo Mothers for Peace ("SLOMFP") hereby provides a list of errata to San Luis Obispo Mothers for Peace's Motion for Attorneys' Fees and Costs Pursuant to Equal Access to Justice Act (February 14, 2007). A corrected copy of the motion is attached to this errata sheet.

**Page Line Change**

- |   |    |  |
|---|----|--|
| 1 | 11 | change "requirements:" to "requirements;"  |
| 7 | 19 | delete " <i>United States v. Marolf</i> , 277 F.3d 1151, 1161 (9 <sup>th</sup> Cir. 2002)."                                |
| 7 | 19 | insert " <i>Wilderness Society v. Babbitt</i> , 5 F.3d 383, 388-89 (9 <sup>th</sup> Cir. 1993)" before " <i>See also</i> " |
| 8 | 1  | change "(9 <sup>th</sup> Cir. 1981)" to "(9 <sup>th</sup> Cir. 1988)"  |

**Page Line Change**

14 2 delete "by 10%"

14 18 change "(152.9 in 1996)" to "(100.0 in 1996 in the Baltimore-Washington, D.C. area)"

15 12 change "declaration" to "declarations"

16 11 insert a comma after "D.C."

16 17 change "La," to "La."

17 16 change "Attorney Generals" to "Attorneys General"

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

February 15, 2007

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

PACIFIC GAS & ELECTRIC CO.  
Intervenor-Respondent

**DECLARATION OF MARTIN G. MALSCH  
IN SUPPORT OF SAN LUIS OBISPO MOTHERS FOR PEACE MOTION FOR  
ATTORNEYS' FEES AND COSTS PURSUANT TO EQUAL ACCESS TO JUSTICE  
ACT**

Under penalty of perjury, I, Martin G. Malsch, declare as follows:

1. I am a partner in the law firm of Egan, Fitzpatrick & Malsch, PLLC. My firm represents corporate and governmental entities and individuals from foreign nations and the U.S. on matters arising before the U.S. Nuclear Regulatory Commission ("NRC"), the U.S. Department of Energy, the U.S. State Department, the U.S. Environmental Protection Agency, the U.S. Congress, various state agencies and public utility commissions and federal and state courts.
2. I obtained my law degree in 1968 from the University of Connecticut Law School. I am a member in good standing of the bars of the District of Columbia, the State of Connecticut, and the Commonwealth of Virginia.
3. I have been a partner with Egan, Fitzpatrick & Malsch since January of 2003. I also served as Senior Counsel to the firm from 1997 to 1999. From 2000 to 2002 I was Senior

Counsel in the Washington, D.C. Office of LeBouef, Lamb, Greene & MacRae, L.L.P. At Egan, Fitzpatrick and Malsch, and at LeBouef, Lamb, Greene & MacRae, L.L.P., I represented clients in regulatory proceedings before the NRC and in legal challenges to NRC and EPA regulatory decisions.

4. Between 1980 and 1997, I served as Acting General Counsel and Deputy General Counsel to the NRC. In that capacity, I was responsible for drafting every significant Commission-level adjudicatory decision, including decisions authorizing the licensing of the Diablo Canyon, Shoreham, and Seabrook nuclear power plants and the restart of Three Mile Island Unit 1. I was responsible for numerous rulemakings that addressed significant safety and environmental issues related to nuclear facility regulation. I also represented the agency in judicial review proceedings in various U.S. Courts of Appeals. I also served for a time as the NRC's Inspector General (Acting). Prior to 1980, I was the NRC's lead trial counsel in numerous contested nuclear plant construction permit and operating license hearings.

5. The purpose of my declaration is to attest to three factors relevant to Petitioners' entitlement to attorneys' fees and costs under the Equal Access to Justice Act ("EAJA"). First, successful litigation against the NRC generally requires a high degree of specialized knowledge and skill. Second, it is not usually possible to find attorneys with a high degree of knowledge and skill in the area of environmental law related to nuclear facility regulation, in the Washington, D.C. area or in any other part of the United States, who are willing to work for the statutory fee rates established by the EAJA. Third, the rates requested by San Luis Obispo Mothers for Peace ("SLOMFP") for legal work done by Diane Curran in this case are reasonable market rates for a person of Ms. Curran's specialized skills and years of experience.



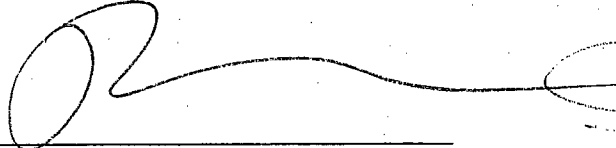
a. Based on my many years of experience as an attorney for the NRC, and later as an attorney for private clients in legal proceedings before the NRC and against the NRC, it is my opinion that successful environmental litigation against the NRC in the U.S. Court of Appeals requires a high degree of specialized knowledge and skill. The attorney must be familiar with the overlapping yet distinct requirements of the two principal statutes that govern protection of public health, safety, security and the environment from the impacts of nuclear facility operation: the Atomic Energy Act ("AEA") and the National Environmental Policy Act ("NEPA"). The attorney must also be familiar with a large and complex body of NRC technical regulations that implement the AEA and NEPA, as well as NRC cases interpreting the statutes and regulations. Finally, in order to make an administrative record that is adequate to support a judicial appeal, the attorney must be familiar with the NRC's complex procedural regulations for requesting hearings and presenting evidence before the NRC's Atomic Safety and Licensing Board. The level of knowledge that must be acquired in order to successfully and effectively litigate safety, security and environmental issues related to nuclear facilities takes many years to acquire.

b. I understand that in 2003, when Petitioners brought their case before the Ninth Circuit, the EAJA attorney fee rate (adjusted for the cost of living increase) was \$145.25/hour; and that over the following years the rate grew to \$159.63 in 2006. Only a limited number of lawyers in the United States have the specialized skills necessary to successfully litigate safety and environmental issues related to nuclear facilities, and most of them practice in the Washington, D.C. area. I am

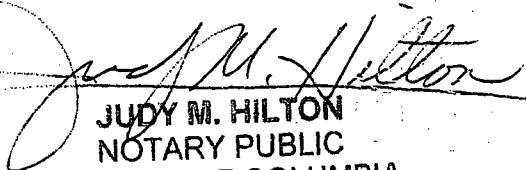
not aware of any, other than public interest lawyers who work *pro bono* or at steeply discounted rates, who would offer their services for such low hourly rates.

- c. In the course of my law practice, I have become familiar with the hourly rates charged by attorneys practicing nuclear safety and environmental law in the Washington, D.C. area. In my experience, the rates requested by SLOMFP for legal work done by Diane Curran in this case are reasonable market rates for a person of Ms. Curran's specialized skills and years of experience. The requested rates of \$ 450/hour for work done in 2003, \$ 480/hour for work done in 2004, \$525/hour for work done in 2005, \$550/hour for work done in 2006, and \$575/hour for work done in 2007, fall within the range of market rates for litigation of cases involving nuclear facility regulation in the Washington, D.C. area, and are within the range of rates charged by this firm for similar work for the same time period.

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.

  
\_\_\_\_\_  
Martin G. Malsch

February 23, 2007

  
JUDY M. HILTON  
NOTARY PUBLIC  
DISTRICT OF COLUMBIA  
My Commission Expires June 14, 2007

Subscribed and sworn  
before me this 23<sup>rd</sup> day of  
February, 20 07

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

PACIFIC GAS & ELECTRIC CO.  
Intervenor-Respondent

---

**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. I am a partner in the law firm of Harmon, Curran, Spielberg, & Eisenberg, L.L.P. My office is located at 1726 M Street N.W., Suite 600, Washington, D.C. 20036.
2. In 1985 I obtained a law degree *magna cum laude*, from the University of Michigan Law School, where I was a member of Order of the Coif and the Michigan Law Review. I am a member in good standing of the bar of Washington, D.C. and am also admitted to the U.S. Court of Appeals for the D.C. Circuit Court and the Ninth Circuit.

3. I have 22 years of experience practicing law on a wide variety of matters, including environmental law, civil rights law, constitutional law, and employment law. Following law school, from 1985-86, I clerked for the Hon. Raymond J. Pettine of the United States District Court for Rhode Island. From 1986-87, I was a Women's Law and Public Policy Fellow with the Georgetown University Law Center Sex Discrimination Clinic in Washington, D.C., where I litigated district court and appellate cases involving domestic violence and sex discrimination issues.


4. I joined Harmon, Curran, Spielberg, & Eisenberg, L.L.P. as an associate in 1987 and became a partner in 1990. The focus of my current practice at Harmon Curran, Spielberg & Eisenberg, L.L.P. is to advise nonprofit organizations on issues relating to employment law, employee contracts, organizational structure and governance, fundraising and contractual relationships, and other nonprofit issues. I have also represented and litigated on behalf of employees in cases involving issues of sex and race discrimination, sexual harassment, first amendment violations, and wrongful discharge. In addition, I have litigated on behalf of local and regional community groups to block illegal water pollution and excessive development in residential neighborhoods. I also have assisted with advice, strategy, and brief writing on behalf of numerous clients that the firm has represented in proceedings before the Nuclear Regulatory Commission and in the appellate courts.

5. I assisted Diane Curran in preparing Petitioners' case in this proceeding by reviewing and editing pleadings and correspondence, consulting with her on litigation strategy, and preparing her for oral argument. The total number of hours I spent on the case for which SLOMFP seeks attorneys fees under the EAJA was 36.2 hours: 27.4 hours in 2004, 7.8 hours in 2005, and 1 hour in 2007. An itemized statement of the time I spent on the case, based on my contemporaneous time records, is attached. The statement reflects my prudent billing judgment with regard to the time claimed. Therefore it does not include time that I consider to be inessential, including 2.7 hours I spent editing the part of the brief that argued an Atomic Energy Act claim on which Petitioners did not prevail.

6. The statutory EAJA fee for the type of work I performed is \$125/hour, augmented by a cost-of-living adjustment. The following table shows the hours I worked each year and the rate at which my time should be compensated under the EAJA:

Year	Hours	Rate	Total fee
2004	27.4	\$149.38	\$4,093.01
2005	7.8	\$155.37	\$1,211.88
2007	1.0	\$159.63	\$ 159.63
<b>Total</b>	36.2		\$5,464.52

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

February 14, 2007

**Itemized Statement of Hours spent by Anne Spielberg on  
San Luis Obispo Mothers for Peace v. NRC**

Hours	Date	Description
0.30	2/20/04	Discussion w/DC re: additonal argument for brief.
0.40	2/18/04	Discussion w/DC re: 9th circuit arguments.
0.60	2/23/04	Begin review of DC's brief.
3.80	2/24/04	Work on DC's 9th circuit brief.
2.80	2/25/04	Work on DC's brief; revise factual section; discuss issues with DC.
0.10	2/26/04	Discussion with DC re: issues.
2.40	3/5/04	Discussions with DC re: brief; review and edit brief.
1.70	3/9/04	Discuss brief with DC; work on DC's 9th cir. brief.
4.40	3/10/04	Work on DC's brief, including administrative law research.
1.60	3/11/04	Review DC's brief and discuss issues with her.
0.10	5/18/04	Discussion with DC re: opposing arguments.
0.20	6/15/04	Discussion w/ DC re: argument in brief.
0.10	6/17/04	Discussion W/DC re: reply brief argument.

Page 2

0.70	6/18/04	Begin review of reply brief.
3.00	6/19/04	Review reply brief.
0.40	6/23/04	Discussion w/ DC re: Reply Brief.
2.20	6/24/04	Review DC's revised reply brief; discuss issues w/ DC.
2.30	6/27/04	Review and revise additional section of reply brief.
0.30	7/27/04	Review response to supplemental filing and discuss with DC.
0.20	9/29/05	Review DC's drafts of letter to 9th Circuit.
0.30	10/5/05	Discussion with DC re: oral argument issues.
4.10	10/6/05	Review briefs and prepare questions for moot; moot court.
2.50	10/11/05	Discussion with DC re: issues; moot.
0.30	11/16/05	Review letter to Court and discuss with DC.
0.30	11/22/05	Review and revise DC's letter to court; discuss with DC.
0.10	11/23/05	Review revised letter to Court; discuss with DC.
0.50	2/11/07	Discuss EAJA fee petition w/ DC.
0.50	2/14/07	Review time records and edit fee declaration
36.20		



## CERTIFICATE OF SERVICE

I certify that on February 14, 2007, copies of the foregoing Motion for Attorneys' Fees and Costs Pursuant to Equal Access to Justice Act were served on the following by overnight or first-class mail as indicated below:

Kathryn E. Kovacs, Esq.  
Appellate Division  
Environment and Natural Resources  
United States Department of Justice  
P.O. Box 23795  
Washington, DC 20026  
(By first-class mail)

Charles E. Mullins, Esq.  
E. Leo Slaggie, Esq.  
John F. Cordes, Esq.  
Office of General Counsel  
United States Nuclear Regulatory Commission  
11555 Rockville Pike  
Rockville, MD 20852  
(301) 415-1606  
(By overnight mail)

David A. Repka, Esq.  
Winston & Strawn, LLP  
1700 K Street, NW  
Washington, DC 20006  
(202) 282-5726  
(By overnight mail)

  
Diane Curran