

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

PRAIRIE ISLAND INDIAN
COMMUNITY,

Petitioner,

v.

UNITED STATES NUCLEAR
REGULATORY COMMISSION
and the UNITED STATES OF
AMERICA,

Case No.11-1057-ag (consolidated
with Case Nos. 11-1045, 11-1051,
11-056)

Respondents.

**Addendum to Agency Docketing Statement (U.S.C.A. Form 41):
Responses to Items 6(e)-(f)**

**1. Response to item 6(e): “Identify the basis of appellant’s/petitioner’s
claim of standing.”**

To demonstrate Article III standing, a party filing suit in federal court must demonstrate three elements: (1) injury in fact; (2) causation; and (3) redressability. *See Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). As for the first factor, the alleged injury must be “concrete and particularized.” *Allen v. Wright*, 468 U.S. 737, 756 (1984); *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 749-51 n. 16 (1972). The injury must also be

“actual or imminent.” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990), quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); see also *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *National Parks Conservation Ass’n v. Manson*, 414 F.3d 1, 4 (D.C. Cir. 2005). As for the second factor, a “causal connection” means simply that there is a direct cause between an alleged act and an alleged injury. See *Defenders of Wildlife*, 504 U.S. at 560, quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). And as for the third factor, it must be “likely,” as opposed to merely “speculative,” that any injury alleged can and will be “redressed by a favorable decision.” *Id.* at 560.

As a result of the NRC’s Temporary Storage Rule 75 Reg. 80,132 (Dec. 23, 2010) and Waste Confidence Decision Update, 75 Fed. Reg. 80,137 (Dec. 23, 2010), operators of nuclear reactors will be permitted to store spent nuclear fuel at nuclear generating facilities for 60 years beyond the licensed life of the facility without undergoing safety and environmental reviews. The Community challenges these decisions on the grounds that the NRC acted arbitrarily, abused its discretion, and violated both the national environmental policy and the federal government’s fiduciary obligation to protect tribal trust resources.

The Prairie Island Indian Community (the “Community”) has standing to challenge the NRC’s decisions. The Community is a federally-recognized, sovereign, self-governing Indian tribe, organized under the Indian Reorganization

Act of 1934. It is governed by a Constitution and Bylaws adopted by the resident members of the community on May 23, 1936 and approved by the Secretary of the United States Department of the Interior on June 20, 1936. The Community has a government-to-government relationship with the federal government. The federal government has a trust obligation in its dealings with federally-recognized Indian tribes, characterized by a fiduciary obligation of the highest solemnity.

Both injury in fact and causation are demonstrated by the proximity of the Prairie Island Nuclear Generating Plant (“PINGP”) to the Community’s homeland, and the potential for irreparable damage to it, should anything go wrong under the NRC’s new rules. The Prairie Island Reservation, is located at the confluence of the Vermillion and Mississippi Rivers, which has been the ancestral home of the Community for centuries. The PINGP is a recent addition to this ancient homeland. Approximately 1,900 acres of the Community’s reservation are located in the immediate vicinity of the PINGP, which itself is located adjacent to the Community’s core residential area. The PINGP is currently licensed for up to 48 “dry cask” spent fuel storage units at an Independent Spent Fuel Storage Installation (“ISFSI”), which is located approximately 600 yards from the nearest Community residences. To date, 29 dry casks have been loaded and placed on the ISFSI, and the owner of the PINGP anticipates needing to expand the ISFSI to accommodate a total of 98 dry casks over the PINGP’s lifetime—64 dry casks

through the proposed 20-year license renewal plus an additional 34 dry casks if the PINGP is decommissioned after the proposed renewal period.

The NRC's decisions directly and adversely affect the Community's members by extending the storage of high-level radioactive material directly next to the Community's residents, thousands of burial sites, ancient village sites, and culturally significant areas until, at a minimum, 60 years beyond the licensed life of the PINGP, or until at least 2094. The Community's homeland, moreover, is fixed as a result of the federal reservation policy, so that relocating from the land and the threats posed by storage of high level nuclear waste at PINGP is impossible.

Furthermore, spent fuel storage is susceptible to radiological release from a wide variety of conditions and the environmental and human impacts of such releases would be catastrophic to the Community and its members, threatening health and natural resources.

Finally, the Community's injury is directly redressable by this Court. This Court can address the Community's injury by requiring the NRC to devise a storage plan that meets the requirements of the AEA, NEPA, and the federal responsibility to the Community.

The Nuclear Regulatory Commission Atomic Safety and Licensing Board ("ASLB") has also found the Community had standing in the PINGP relicensing

proceeding. See *In the Matter of Northern States Power Company (Formerly Nuclear Management Company, LLC)*, (Prairie Island Nuclear Generating Plant, Units 1 and 2), Docket Nos. 50-282-LR, 50-306-LR (ASLBP No. 08-871-01-LR), 68 N.R.C. 905 (Dec. 5, 2008). The ASLB's analysis supporting the Community's standing is equally apt in this proceeding:

In its Petition, [the Community] states it is a federally recognized Indian Tribe with a 1,900-acre reservation situated just 600 yards north of PINGP. []. It further states that nearly half of the tribe's 767 members live on or near the reservation. []. Given the Indian Community's close proximity to the facility, [the Community] is concerned that renewal of the PINGP license might affect the health and safety of its members and might have a detrimental effect on the environment in which the Community is situated, especially as it relates to the protection of burial mounds and other areas of cultural, historical, or spiritual significance. [].

...

This Board easily concludes that PIIC has established organizational standing in accord with section 2.309(d). The [Community's] Petition, submitted by its counsel, declares it is a sovereign, federally recognized Indian Tribe, a factual representation that NRC Staff does not contest. Further, [the Community]'s reservation is located contiguous with the PINGP facility. A majority of tribal members live near the PINGP, clearly within the "zone of possible harm" from the nuclear facility. PIIC has signed a Memorandum of Understanding with the NRC, designating [the Community] as a cooperating agency for the environmental review of the LRA. []. And [the Community] has identified property, financial, and historical interests that may be affected by the pending Application. Thus, this Board finds that [the Community] has met the requirements of section 2.309(d) and has standing to intervene.

68 N.R.C. 905, 912-13 (citations omitted).

The ASLB properly acknowledged the Community's right to seek protection of its health and safety and environmental interests under the AEA and NEPA in the relicensing proceeding. Likewise, the Community has standing to challenge the NRC's generic determinations regarding the health and safety and environmental risks of spent fuel storage and disposal in this appeal. The interests raised in the ASLB relicensing proceeding are identical here, where Petitioners seek to ensure that the NRC's generic determinations regarding the health and environmental risks of spent fuel storage and disposal—on which the NRC relies in its individual licensing proceedings—fully comply with the requirements of the AEA and NEPA. Therefore, the ASLB's standing decision in the PINGP licensing establish adequately demonstrates the Community's standing to bring this Petition.

2. Response to item 6(f): “Are any other cases involving the same underlying agency order pending in this Court or any other?”

The following related cases (now consolidated with this one) are pending in U.S. Court of Appeals for the District of Columbia Circuit:

Case 11-1045 *State of New York et al. v. United States Nuclear Regulatory Commission, et al.*

Case 11-1051 *Natural Resources Defense Council v. United States Nuclear Regulatory Commission, et al.*

Case 11-1056 *Blue Ridge Environmental Defense League, et al., v. United States Nuclear Regulatory Commission, et al.*