

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



In the Matter of)
)
YANKEE ATOMIC ELECTRIC CO.)
)
(Yankee Nuclear Power Station))

Docket No. 50-029-LA
August 5, 1998

**NEW ENGLAND COALITION ON NUCLEAR POLLUTION'S
MOTION FOR LEAVE TO FILE REPLY BRIEF ON APPEAL OF LBP-98-12**

I. INTRODUCTION

The New England Coalition on Nuclear Pollution ("NECNP") hereby moves for leave to file the attached Reply Brief on Appeal of LBP-98-12, in response to the Brief of the Licensee Yankee Atomic Electric Company (July 17, 1998) (hereinafter "YAEC Brief"), and the NRC Staff's Response to New England Coalition on Nuclear Pollution's Appeal of LBP-98-12 (July 27, 1998) (hereinafter "NRC Staff Brief"). NECNP submits that leave to file a Reply Brief is necessary in order to allow NECNP to respond to arguments not anticipated by NECNP in preparing its Brief on Appeal of LBP-98-12 (July 10, 1998) (hereinafter "NECNP Initial Brief") and to address misstatements of law and facts by YAEC and the NRC Staff.

II. STATEMENT OF FACTS

On July 10, 1998, NECNP filed a notice of appeal and its Initial Brief, seeking reversal of LBP-98-12, the Licensing Board's Memorandum and Order (Decision on Standing), which denies NECNP's request for a hearing on Yankee Atomic Electric Company's ("YAEC's") License Termination Plan ("LTP") for the Yankee Rowe Nuclear Power Station ("Yankee Rowe").

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YAEC filed its responsive brief on July 17, 1998, and the NRC Staff responded on July 27, 1998.¹

III. ARGUMENT

NRC regulations at 10 C.F.R. § 2.714a, which govern appeals of orders wholly denying petitions to intervene, are silent on the question of whether reply briefs are allowed. Therefore, leave must be obtained in order to file a reply. *Nuclear Engineering Co.* (Sheffield, Ill. Low-Level Waste Disposal Site), ALAB-473, 7 NRC 737, 745 n. 9 (1978). NECNP moves for leave to file a reply brief on the following grounds:

1. The NRC has two regulations governing appellate briefs: 10 C.F.R. § 2.714a, and 10 C.F.R. 2.786 (for discretionary review of decisions and actions of presiding officers). Although neither of these regulations explicitly provides for the filing of reply briefs, the Commission routinely schedules reply briefs when it sets briefing schedules under 10 C.F.R. § 2.786. *See, e.g., Sequoyah Fuels Corporation* CLI-94-4, 39 NRC 187, 189 (1994); *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-7, 45 NRC 437, 438 (1997). Although the rationale for allowing reply briefs is not stated in these decisions, in other contexts the Commission has recognized the importance of permitting prospective intervenors to answer arguments that they could not have anticipated in their initial pleadings. *See Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-5654, 10 NRC 521, 524-25 (1979) (granting intervenors an opportunity to reply to oppositions to their contentions) (hereinafter “*Allens Creek*”).

¹Although YAEC filed its brief by first-class mail on July 17, the brief was not received by undersigned counsel for NECNP until ten days later, on July 27, 1998. It appears the extended delay was caused by the use of the wrong zip code on the address label of the envelope enclosing the brief.

Here, a Reply should be allowed because NECNP could not have anticipated all of YAEC's and the Staff's arguments, nor could it have anticipated their misstatements of law and fact. If NECNP is not allowed to be heard now, there will be no further opportunity to address the Commission on the arguments made by YAEC and the Staff in support of NECNP's complete dismissal from this proceeding. *See Allens Creek*, 11 NRC at 525. Therefore, NECNP's Reply Brief should be allowed.

2. NECNP's Reply Brief is being filed within a reasonable time after receipt of YAEC's and the Staff's briefs. Counsel for NECNP received YAEC's Brief on July 27, 1998, and the NRC Staff's Brief on July 28, 1998, and the Reply is being filed within seven working days of receiving both briefs. Seven working days is a reasonable period, considering that the Reply Brief makes a combined response to both YAEC's and the Staff's briefs, which total 37 pages.

Counsel for NECNP telephoned counsel for YAEC and asked whether YAEC would object to this Reply Brief on grounds of timeliness, given YAEC's error in serving its brief on counsel for NECNP. Counsel for YAEC responded that YAEC would have no objection to the motion being allowed.

IV. CONCLUSION

For the foregoing reasons, NECNP should be allowed to file the attached Reply Brief.

Respectfully submitted,



Diane Curran

HARMON, CURRAN, SPIELBERG & EISENBERG, LLP

2001 "S" Street N.W., Suite 430

Washington, D.C. 20009

202/328-3500

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I. INTRODUCTION

The New England Coalition on Nuclear Pollution ("NECNP") hereby files its Reply Brief on appeal of LBP-98-12, the Licensing Board's Memorandum and Order (Decision on Standing), which denies NECNP's request for a hearing on Yankee Atomic Electric Company's ("YAEC's") License Termination Plan ("LTP") for the Yankee Rowe Nuclear Power Station ("Yankee Rowe"). This Reply Brief responds to erroneous legal and factual assertions made in the NRC Staff's Response to New England Coalition on Nuclear Pollution's Appeal of LBP-98-12 (July 27, 1998) ("NRC Staff Brief"), and the Brief of the Licensee Yankee Atomic Electric Company (July 17, 1998) ("YAEC Brief"). It also responds to arguments not anticipated by NECNP in preparing its Brief on Appeal of LBP-98-12 (July 10, 1998) ("Initial Brief").

II. ARGUMENT

A. NECNP's Concerns Are Relevant and Redressable.

YAEC and the NRC Staff make similar arguments against NECNP's standing, both of which are grounded in the false supposition that NECNP has challenged the implementation rather than the content of the LTP. According to the Staff, the standing Declaration of NECNP

member Jean van Itallie “speaks *only* of the cleanup itself and his fears that it will be ineffectual and that the final site condition will not satisfy the NRC’s criteria for general release.” NRC Staff Brief at 5. (emphasis added). Thus, the Staff argues, “[w]hat seems to be of concern to Mr. van Itallie is the implementation of the LTP and not the plan itself.” *Id.* YAEC makes a similar argument, asserting that NECNP focuses on “performance” rather than the LTP itself. YAEC Brief at 11.

These assertions are patently incorrect. Mr. van Itallie expressly states in his Declaration that he “believe[s] that NECNP’s participation in a hearing on the Yankee License Termination Plan will help provide a critical perspective *that would lead to modifications of the plan.*” Van Itallie Declaration, ¶ 10 (March 26, 1998) (emphasis added). Thus, Mr. van Itallie’s Declaration makes it quite clear that his purpose in participating in this proceeding is to seek changes to the LTP that will ensure an effective cleanup of the site. Moreover, neither the language in the Declaration that is cited by the NRC Staff and the Board, nor any other language in the Declaration, suggests that Mr. van Itallie is interested only in the implementation of the LTP rather than the adequacy of its contents. The Staff’s interpretation of Mr. van Itallie’s Declaration, like the Board’s interpretation, is absurdly crabbed and taken out of context.¹

¹To bolster its claim, the Staff even goes so far as to mischaracterize LBP-98-12. According to the Staff, the Board “states that Mr. van Itallie is concerned that the final site *criteria* satisfy the NRC’s criteria for general release.” NRC Staff Brief at 5, *citing* LBP-98-12 at 7 (emphasis added). In fact, the Board correctly paraphrased Mr. van Itallie’s Declaration as expressing “concern that the final site *conditions* ‘satisfy . . . NRC’s criteria for general release’ of the property.” LBP-98-12 at 7 (emphasis added). The Board’s error lies not in paraphrasing Mr. van Itallie’s Declaration, but in leaping to the conclusion that if the LTP site release criteria comply with the NRC’s criteria, “there is nothing that can be redressed here on the petitioner’s concern.” *Id.* The Board’s reasoning begs the question raised by NECNP in its Amended Petition as to whether the LTP’s provisions for site surveys, identification of remaining decommissioning tasks, and decommissioning funding are adequate to provide reasonable

YAEC also argues that NECNP's standing claims are not relevant to the adequacy of the LTP, because they do not explicitly address two key elements of an LTP: the site selection criteria and the final site survey plan. YAEC Brief at 11. Thus, YAEC argues, NECNP's claims are not redressable because "[i]n substance, NECNP contended that its member would be injured, *not* if the plan were to be implemented, but only if it were *not* implemented." *Id.*

YAEC is correct solely in respect to the fact that NECNP has not challenged the adequacy of the LTP's site release criteria. YAEC simply misses the point of NECNP's standing claims: that YAEC failed to demonstrate that the Yankee Rowe site can and will be released in a condition that is safe for unrestricted use by NECNP members and the general public, because the various elements of the plan that are required by NRC regulations [*see* 10 C.F.R. § 50.82(a)(9)(ii)], including the final site survey plan, the description of remaining dismantlement activities, plans for site remediation, analysis of remaining decommissioning costs, and environmental information, are inadequate to ensure that decommissioning will be completed in a manner that satisfies NRC site release criteria. Contrary to YAEC's argument, the Amended Petition sets forth with particularity the inadequacies of the site survey plan. Amended Petition at 18-19, 21-22, 26-31, 34-37. It also addresses other inadequacies in the LTP. *Id.* at 19-22, 23-37. Thus, YAEC is wildly off-base regarding the "substance" of NECNP's claims.

assurance that the LTP site release criteria will, in fact, be satisfied.

Similarly, the NRC Staff mischaracterizes NECNP's Initial Brief. According to the Staff, NECNP "concede[s]" that the aspects of the LTP on which it seeks to intervene "challenge the implementation of the LTP, not whether it should be approved." NRC Staff Brief at 8, *citing* NECNP Brief at 19. Nowhere on page 19, or anywhere else in its Brief, does NECNP make such a concession. The Staff creates the alleged concession out of whole cloth.

B. NECNP's Concerns Are Real and Particularized.

- 1. NECNP has adequately asserted injury-in-fact from the risk that the LTP is inadequate to ensure restoration of the Yankee site to a "green fields" condition.**

On three grounds, the Staff disputes the particularity of NECNP's claim that it has standing because Mr. van Itallie and other local residents could be injured by radioactive contamination when they enter the Yankee Rowe site in the event that YAEC fails to meet its goal of restoring the Yankee Rowe site to meet NRC site release criteria and leaving it in a "green fields" condition. NRC Staff Brief at 7. First, the Staff contends, Mr. van Itallie never mentions his intentions to enter the site. *Id.* The Staff ignores Mr. van Itallie's statements that he has lived in the Yankee Rowe area for many years, and that he regularly walks and hikes in the area. Van Itallie Declaration, ¶¶ 1, 2, and 8. Such statements are sufficient to show injury-in-fact to Mr. van Itallie if the LTP is inadequate to ensure proper clean-up of the Yankee Rowe site. To hold otherwise would make a mockery of YAEC's promise to convert the Yankee Rowe site to a "green field," as the label clearly implies that the clean-up will allow the removal of the security fence and return of the Yankee Rowe site to the public commons. If the site is restored to a "green field," Mr. Itallie should be able to continue his walks and hikes in his community, without fearing he has crossed some invisible line and entered a dangerously contaminated zone.

Second, the Staff argues, Mr. van Itallie is not "guaranteed entry by the release for unrestricted use." NRC Staff Brief at 7. Contrary to the Staff's argument, Mr. van Itallie need allege no personal guarantee of future access to the Yankee site. The release of a site for unrestricted use indisputably constitutes a "guarantee" to the general public, including Mr. van Itallie, that whatever future use the Yankee Rowe site is put to, radioactive contamination on the

site will have been reduced to reasonably safe levels for that use. By releasing the site for unrestricted use, the NRC is relinquishing control over its safety, and allowing it to be freely given, traded or bartered in the marketplace, for the foreseeable future. Purchasers or donees of the site could include government agencies, public institutions, private entities, or individuals; and the users of the site could include the owner, guests or employees of the owner, or the general public. Although it is impossible to predict with certainty that Mr. van Itallie will be one of the users of the site, it is certainly reasonable to predict that, as a local resident who walks and hikes in the area, he will have some contact with the site in the future. Indeed, the very purpose of the NRC's site release criteria is to ensure that the site is safe for any and all individuals who may use the site in the future, including individuals who have no previous ties to the site and are unaware of present hazards. Thus, based on the NRC's own criteria, it is sufficient for Mr. van Itallie to state that he is a resident of the area and that he regularly walks and hikes in the area, in order to establish a reasonable likelihood of contact with the site in the future.

Finally the Staff argues that "if the site is not cleaned up in conformance with NRC criteria, it will not be released for unrestricted use." NRC Staff Brief at 7. This claim is absurdly tautological. One of the key purposes of NECNP's intervention in this proceeding is to challenge the comprehensiveness and adequacy of the LTP's site survey plan to identify all remaining contamination on the site. *See* Amended Petition at 17-37. The NRC Staff would not conduct its own site survey in deciding upon the safety of releasing the Yankee Rowe site for unrestricted release, but would rely on the very site survey whose adequacy NECNP seeks to challenge in this proceeding.

2. NECNP was not required to file an expert affidavit in support of its standing.

YAEC faults NECNP for failing to file an affidavit from a qualified technical expert regarding its concerns about the inadequacies in the site survey plan. YAEC Brief at 12-13. This argument improperly would elevate the threshold requirement for pleading standing to a summary disposition proceeding, or at the very least the standard for pleading contentions.²

YAEC demands that in order to demonstrate standing, NECNP must present an affidavit from an expert who is “sufficiently qualified to opine that a given site survey plan deficiency could result in harm to Mr. van Itallie.” YAEC Brief at 13, 15, 16, and note 20. In support of this argument, YAEC cites the Commission’s decision in *Sequoyah Fuels Corporation* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994). *Id.* at 16 note 20. YAEC correctly points out that standing was determined in that case based on technical expert affidavits, but neglects to make the crucial observation that the affidavits were filed *in response to expert affidavits submitted by the licensee*. See *Sequoyah Fuels Corporation* (Gore, Oklahoma Site), LBP-94-5, 39 NRC 54, 67 (1994). Native Americans for a Clean Environment (“NACE”), the petitioner in that case, initially filed a standing affidavit from one of its members, Ed Henshaw. Mr. Henshaw, a neighboring landowner, possessed no expert qualifications to support his concern that contaminated groundwater might spread to his property if the Sequoyah Fuels facility were not cleaned up properly. The Licensing Board summarized his affidavit as follows:

²NECNP notes that throughout its Brief, YAEC uses the term “contend” and “contention,” as if to subliminally suggest that the appropriate standard for measuring NECNP’s standing claims is the standard for evaluating contentions in 10 C.F.R. § 2.714. See YAEC Brief at 11, 12, 13, 14. Contrary to YAEC’s suggestion, threshold standing affidavits are not evaluated against this standard. The Commission must provide NECNP with a separate opportunity to submit contentions before making a final determination on standing, and must admit NECNP if it submits at least one admissible contention. 10 C.F.R. § 2.714(b).

To fulfill the requirement for alleging a particularized injury, NACE initially presented the Henshaw affidavit described earlier. That affidavit establishes NACE's authority to represent Mr. Henshaw's interests. In the affidavit, Mr. Henshaw also asserts that his home is adjacent to the radiologically and chemically contaminated Gore facility, which raises the possibility that contaminated groundwater and surface water will migrate onto his property. Because of this, he maintains that a failure to decontaminate the facility properly will have detrimental health and safety, economic and social impacts upon him and his family and that a failure of SFC and GA to provide funding in line with the October 1993 order will jeopardize proper decommissioning of the facility.

39 NRC at 67. The Licensing Board concluded that: "Standing alone, this affidavit likely would be sufficient to establish a concrete and particularized injury to Mr. Henshaw's AEA-protected health and safety interests that is fairly traceable to the action at issue in this proceeding." *Id.*

Only after the Licensee "controvert[ed] this affidavit with a series of affidavits from management and technical personnel" was NACE required to defend its standing with a technical affidavit.³ *Id.* at 68.

Like NACE, NECNP has submitted a standing affidavit from one of its members which: (a) expresses his concern about the potential ineffectualness of a proposed licensing action and resulting harm to his health; (b) states his hope that his organization's intervention will have a positive effect on the proposed action; and (c) gives his authorization to the organization to act as his representative. Neither YAEC nor the Staff has submitted an affidavit challenging the basis for the affidavit's assertions. Thus, "[s]tanding alone," the affidavit is sufficient to confer standing. *Sequoyah Fuels Corporation*, LBP-94-5, 39 NRC at 67. Moreover, in the absence of such a challenge, the affidavit's assertions must be accepted as true and adequate for purposes of

³ Even then, the Board took into account the fact that the proceeding was still at an early "threshold" stage, when it was inappropriate to reach the merits of the standing question. *Id.* at 68-70. Thus, the Board accepted NACE's standing based on the finding that it could not rule out the potential for offsite consequences as a result of contamination of the site. *Id.* at 71.

demonstrating standing. *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 286 (1995).

Finally, the van Itallie Declaration must be read together with the Amended Petition, which provides technical details regarding the deficiencies in the LTP that NECNP seeks to litigate. It would be absurd for the NRC to require every element of a petition to intervene to be set forth in affidavit form. Mr. van Itallie has authorized NECNP to represent him, and therefore may rely on NECNP to set forth in greater detail the substance of the concerns which led NECNP to petition to intervene.⁴

In further attempting to scuttle NECNP's standing, YAEC takes aim at NECNP's discussion of the final site survey plan. YAEC Brief at 15-18. Again putting on the blinders, YAEC focuses on the "descriptive aspects" of LTP deficiencies found in Section III.B of the Amended Petition [*id.* at 23-37], and completely ignores the "outline aspects" of LTP deficiencies found in Section III.A of the Amended Petition. *Id.* at 18-22. As explicitly stated in the Amended Petition, the descriptive aspects section constitutes "further elucidation" of the outline section, and "is not intended in any way to limit the aspects set forth" in the outline section. Amended Petition at 23. In the outline, NECNP lists numerous concerns about the adequacy of the LTP's site characterization and survey methodology, including the "[v]alidity of procedures utilized to characterize the site;" the "[n]ature, sufficiency, adequacy of methodologies used;" the

⁴YAEC contends that the Commission should disregard NECNP's appellate arguments regarding the relevance of the "aspects" section of the Amended Petition to NECNP's standing, on the ground that the issue was raised for the first time on appeal. YAEC Brief at 14. This argument should be rejected as facially absurd. As pointed out in NECNP's Initial Brief, the Amended Petition specifically referenced the "aspects" discussion in a footnote to the standing argument. *See* Initial Brief at 18, referencing Amended Petition at 11 note 6. Thus, the issue was addressed below.

“[c]hoice of [m]ethodologies,” the “[completeness” of the site survey, the “[adequacy of description” of the site survey, the “[a]dequacy of assay of activation analysis” of the survey; the “[a]dequacy and sufficiency of determination of background radiation levels;” the “[a]dequacy and sufficiency of soil and asphalt surveys,” and numerous other issues. Amended Petition at 18-19, 21-22 YAEC’s and the Board’s attempt to dismiss these concerns as “nonconclusory” are without merit. See NECNP Initial Brief at 17-19.

C. NECNP’s Environmental Concerns Are Relevant and Redressable.

The NRC Staff erroneously argues that NECNP’s environmental concerns are not relevant to this LTP proceeding, because they have already been addressed in YAEC’s Decommissioning Plan. NRC Staff Brief at 9-10. As discussed in NECNP’s Initial Brief at 20-21 and note 6, the Board rejected the relevance of NECNP’s environmental concerns for purposes of standing on the ground that *the Licensee* had asserted it is in compliance with environmental requirements. LBP-98-12 at 8 note 7. The Board was not entitled to rely on a bald assertion by the Licensee, which bears the burden of proof in this proceeding, to dismiss the relevance of NECNP’s claim. The Board’s error was particularly egregious in light of the fact that 10 C.F.R. § 50.82(a)(9)(ii) specifically requires an LTP to include a “supplement to the environmental report” describing “any new information or significant environmental change associated with the licensee’s proposed termination plan.”

D. NECNP Has Properly Raised Claims Concerning LBP-96-2 and the Public Meeting Before the Commission.

Both the NRC Staff's and YAEC's Briefs only serve to deepen the inconsistency of representations made in this proceeding regarding the status of the licensing of dry cask storage at the Yankee Rowe site. The NRC states that if and when YAEC wishes to build and maintain an ISFSI, it will apply for a license. NRC Staff Brief at 13. This assertion is completely inconsistent with the Staff's previous representation that "YAEC's Part 50 license gives it the authority to manage spent fuel and, in fact, gives it the authority under a general license to construct and operate an Independent Fuel Storage Facility." NRC Staff's Response to NECNP's Amended Petition at 5 (April 7, 1998). The assertion is also completely inconsistent with the Staff's representation, on page 14 of its Brief, that YAEC "may proceed with dry cask storage" under the general license which it already possesses. YAEC makes similarly inconsistent representations. YAEC Brief at 6 and 7.

These utterly inconsistent representations appear designed to foil any attempt by NECNP to obtain a review and hearing, under the Atomic Energy Act and the National Environmental Policy, of the safety and environmental impacts of dry cask storage at Yankee Rowe. Unfortunately, the Licensing Board appears to have been caught up in this shell game. Therefore, in the interest of complying with the AEA and NEPA, and preserving its credibility with the public, the Commission must, clarify the status of dry cask storage and clearly establish that dry cask storage will not be permitted at Yankee Rowe without a full safety and environmental review.

Finally, the Staff opposes Commission review of the NRC Staff's grossly inadequate

conduct of the January 13, 1998, public meeting regarding the LTP. NRC Staff Brief at 14. The Staff provides no reason for the Commission to deny its jurisdiction over the issue, and indeed the Commission is the only body that can correct the Staff's error.

III. CONCLUSION

For the foregoing reasons, NECNP's appeal should be granted, and it should be admitted as an Intervenor pending the submission of at least one admissible contention.

Respectfully submitted,



Diane Curran

HARMON, CURRAN, SPIELBERG & EISENBERG, LLP

2001 "S" Street N.W., Suite 430

Washington, D.C. 20009

202/328-3500



Jonathan M. Block

Main Street

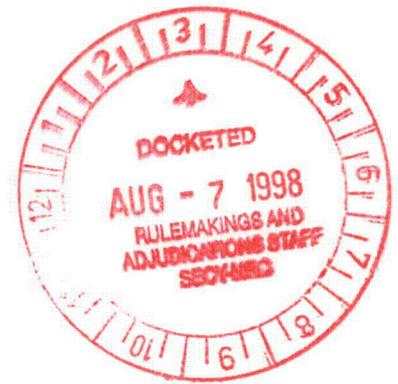
P.O. Box 566

Putney, VT 05346

802/387-2646

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Docket No. (s) 50-029-LA

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 1998, copies of the foregoing NECNP's Motion for Leave to File Reply Brief on Appeal of LBP-98-12 and NECNP's Reply Brief on Appeal of LBP-98-12 were served upon the following persons by US mail, first class:

Office of Commission Appellate Adjudication
US Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
James P. Gleason, Chairman,
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
US Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Thomas D. Murphy
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
US Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Thomas S. Elleman
704 Davidson Street
Raleigh, NC 27609

Ann P. Hodgdon, Esq.
Marian L. Zobler, Esq.
Office of the General Counsel
Mail Stop 0-15 B18
US Nuclear Regulatory Commission
Washington, DC 20555

R. K. Grad, III, Esq.
Thomas Dignan, Esq.
Ropes and Gray
One International Place
Boston, MA 02110

Jonathan M. Block, Esq.
Main Street
P.O. Box 566
Putney, VT 05346

James L. Perkins, President
New England Coalition on Nuclear Pollution
PO Box 545
Brattleboro, VT 05302

Adam Laipson
Franklin Regional Council of Governments
425 Main Street
Greenfield, MA 01301

Deborah B. Katz, President
Citizens Awareness Network, Inc.
PO Box 3023
Charlemont, MA 01339

Shirley Ann Jackson, Chairman
US Nuclear Regulatory Commission
Washington, DC 20555

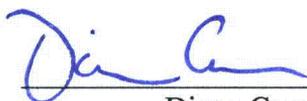
Kenneth C. Rogers, Commissioner
US Nuclear Regulatory Commission
Washington, DC 20555

Greta J. Dicus, Commissioner
US Nuclear Regulatory Commission
Washington, DC 20555

Dr. Nils Diaz, Commissioner
US Nuclear Regulatory Commission
Washington, DC 20555

Edward McGaffigan, Jr., Commissioner
US Nuclear Regulatory Commission
Washington, DC 20555

Rules and Adjudications Branch
US Nuclear Regulatory Commission
Washington, DC 20555



Diane Curran