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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION '98 JUL 28 A10:35

BEFORE THE COMMISSION

OFFICE OF SECURITY
RULEMAKING AND
ADJUDICATIONS STAFF

In the Matter of)

YANKEE ATOMIC ELECTRIC COMPANY)

(Yankee Nuclear Power Station))

) Docket No. 50-029-LA
)
)
)

NRC STAFF'S RESPONSE TO NEW ENGLAND COALITION
ON NUCLEAR POLLUTION'S APPEAL OF LBP-98-12

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July 27, 1998

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INTRODUCTION

On July 10, 1998, the New England Coalition on Nuclear Pollution (NECNP) filed an appeal from the Atomic Safety and Licensing Board's "Memorandum and Order (Decision on Standing)," LBP-98-12, dated June 12, 1998. "New England Coalition on Nuclear Pollution's Brief on Appeal of LBP-98-12" (Brief). Pursuant to 10 C.F.R. § 2.714a(a), the Staff of the Nuclear Regulatory Commission (Staff) files this response. As discussed below, the Staff opposes NECNP's appeal and urges the Commission to deny it and to affirm the Licensing Board's decision in LBP-98-12.

BACKGROUND

On January 28, 1998, the Commission published a notice of opportunity for a hearing concerning Yankee Atomic Electric Company's License Termination Plan (LTP) for its Yankee Nuclear Power Station (YNPS). *Biweekly Notice: Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations, Yankee Atomic Electric*

Company, Docket No. 50-029, Yankee Nuclear Power Station, Franklin County, Massachusetts,
63 Fed. Reg. 4308-09, 4328 (1998).

On February 24, 1998, NECNP wrote a letter to the Commission's Secretary, in which NECNP requested a hearing. On March 6, 1998, the Secretary referred NECNP's request, along with three other letter requests, to the Atomic Safety and Licensing Board Panel's Chief Administrative Judge for appropriate action. On March 9, 1998, the Panel's Chief Administrative Judge established a Licensing Board to rule on the referred requests for hearing. 63 Fed. Reg. 13077 (1998).

On March 11, 1998, Yankee Atomic Electric Company (YAEC) filed its "Answer to Petition to Intervene and Request for Hearing of New England Coalition on Nuclear Pollution, Inc."; on March 16, 1998, the Staff filed its "Response to Requests for Hearing." On March 25, 1998, the Licensing Board issued a Memorandum and Order authorizing the filing of amended petitions to intervene and on April 6, 1998, NECNP filed such a petition. "New England Coalition on Nuclear Pollution, Inc. Amended Petition to Intervene in License Amendment Proceeding for the Yankee Nuclear Power Station License Termination Plan" (Amended Petition). YAEC filed a response on April 13, 1998, "Response of Yankee Atomic Electric Company to Amendments to Petitions to Intervene," and, on April 17, 1998, the Staff filed its response, "NRC Staff's Response to New England Coalition on Nuclear Pollution's Amended Petition to Intervene" (Staff Response).

On June 12, 1998, the Licensing Board issued its Memorandum and Order (Decision on Standing), LBP-98-12, *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), 47 NRC _____. On July 10, 1998, NECNP filed the instant appeal.

DISCUSSION

In its brief on appeal, NECNP argues that the Licensing Board erred in denying it standing. Brief at 1. A licensing board's determination regarding standing is entitled to substantial deference absent an error of law or an abuse of discretion. *International Uranium (USA) Corp.* (White Mesa Uranium Mill, Alternate Feed Material), CLI-98-6, 47 NRC 116, 118 (1998) citing *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116 (1995). The Licensing Board neither committed an error of law nor abused its discretion in LBP-98-12. The Commission should, therefore, deny NECNP's appeal and affirm LBP-98-12.

In its decision, in examining NECNP's assertions of standing on the basis of injury to its authorizing member, Jean-Claude van Itallie, as a result of the proposed action, the Licensing Board noted that Mr. van Itallie's expressed concern was for his health and safety through "long term environmental effects of low-level radiation" and "the long term effects of an ineffectual cleanup or an irradiated fuel accident on his property value." LBP-98-12 at 6. The Board also noted Mr. van Itallie's concern that the final site condition projected under the License Termination Plan satisfy the NRC's criteria for general release. *Id.* The Licensing Board correctly noted that Mr. van Itallie's concerns were not redressable in the proceeding and, thus, could not constitute the basis for standing. *Id.* at 6-7. The Licensing Board correctly cited the Commission's revised decommissioning rule, 10 C.F.R. § 50.82, and the statements of consideration published with it as establishing that the storage and maintenance of spent fuel are operational considerations and not within the scope of the License Termination Plan. *Id.* at 7. Regarding Mr. van Itallie's concern that the final site condition should satisfy NRC's criteria for

general release of the property, the Licensing Board found that the LTP's site release criteria complied with applicable regulations, namely the NRC's Site Decommissioning Management Action Plan of April 16, 1992 (57 Fed. Reg. 13384) and 10 C.F.R. § 20.1401(b). *Id.* Thus, according to the Board, Mr. van Itallie had not shown that he would suffer a redressable injury. *Id.* With regard to Mr. van Itallie's reliance on the expertise of David A. Lochbaum, whose affidavit described various spent fuel accidents, the Board reiterated that spent fuel matters were beyond the scope of a proceeding on a license termination plan. *Id.* NECNP could not, therefore, rely on Mr. Lochbaum's affidavit to establish standing. *Id.*

The Board examined at length the "aspects" addressed in NECNP's Amended Petition, even though, according to the Board, "aspects are not evaluated in consideration of alleged injuries to substantiate hearing rights." *Id.* at 7-8.

On appeal, NECNP argues that the Board erred in not finding NECNP's concerns regarding the effectiveness of YAEC's site cleanup plans relevant and redressable, in not finding the harm from the proposed action to NECNP real and particularized and in finding that the alleged harm to NECNP was not cognizable under NRC regulations. Brief at 12-22. NECNP also seeks to raise two matters that are not properly a part of this appeal, namely, 1) that the Commission should enforce what NECNP mistakenly regards as a commitment made by another licensing board in another proceeding and 2) that the Commission should require the Staff to redo the public meeting required by 10 C.F.R. § 50.82 (a)(a)(iii) according to NECNP's ideas regarding the proper conduct of such meetings. Brief at 22-24.

The Staff discusses the three matters raised by NECNP's appeal below. The Staff also addresses briefly the two matters raised by NECNP that are not properly on appeal here.

1. It was not error for the Licensing Board to find that Mr. van Itallie's concern that the final site condition satisfy the NRC's criteria for general release did not confer standing.

The heading under which NECNP addresses its first assignment of error to the Licensing Board's decision in LBP-98-12 is "NECNP's concerns regarding the effectiveness of YAEC's site cleanup plans are relevant and redressable." Brief at 13. However, although NECNP on appeal emphasizes the cleanup plans, in its Amended Petition, Mr. 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. See "Declaration of Jean-Claude Van Itallie, Member of the New England Coalition on Nuclear Pollution, Inc., Supporting Organization Standing," attached to Amended Petition, at ¶¶ 8, 10 (Van Itallie Affidavit). What seems to be of concern to Mr. van Itallie is the implementation of the LTP and not the plan itself. The passage from LBP-98-12, which was quoted out of context at 14 of NECNP's Brief, is, when read in context, eminently reasonable. The Board states that Mr. van Itallie is concerned that the final site criteria satisfy the NRC's criteria for general release. LBP-98-12 at 7. The Board also states that the LTP does exactly that, satisfy the NRC's criteria for general release. *Id.* Thus, the Board reasoned, there is nothing that could be redressed here, regarding NECNP's concern. *Id.*

Instead of acknowledging, however, that the Board correctly identified that Mr. van Itallie's interests are identical to those set forth in the LTP, NECNP inexplicably argues that the determination constitutes "clear and reversible legal and factual error" because the Board's ruling is "based on the legally erroneous supposition that the only issue that may be raised is whether the licensee has chosen the appropriate site criteria." Brief at 14. NECNP then lists other

information, such as site characterization information, decommissioning funding information, a plan for remediation and final site survey, required by 10 C.F.R. § 50.82(a)(9)(ii) to be in the LTP and argues that these issues are also relevant in this proceeding. *Id.* at 14.

The Board did not rule, however, that the only issue that may be raised is whether the licensee has chosen the appropriate site criteria. Rather, the Board ruled that, based on the concerns Mr. van Itallie raised in his Affidavit, Mr. van Itallie failed to articulate an injury in fact that could be redressed by a favorable decision in this proceeding. LBP-98-12 at 7. Mr. van Itallie did not assert an injury related to the information NECNP now raises on appeal. NECNP states that Mr. van Itallie's concerns are redressable through denial of approval of the LTP. However, if the LTP's site release criteria satisfy the Commission's regulations and Mr. Van Itallie/NECNP have urged no other reason to disapprove the LTP, the Board would have no basis for denying it. NECNP has, therefore, failed to demonstrate that the Board's decision was an abuse of discretion or based on an error of law.

NECNP also asserts that its Amended Petition detailed concerns regarding deficiencies in the LTP that are relevant and redressable by a favorable decision. Brief at 15-16. NECNP then goes on to list seven "concerns" it has about the LTP and argues that they are relevant to this proceeding. *Id.* NECNP, however, confuses the Board's decision as it relates to these concerns (identified as aspects in its Amended Petition). The Board did not rule that these concerns are not relevant to the proceeding, only that these concerns did not constitute a particularized and redressable injury in fact necessary, based on Commission case law, to confer standing. LBP-98-12 at 8-9 ("[W]e measure here whether NECNP's petition in this regard receives any

substance on standing from the assertions in the aspects.”). NECNP fails to demonstrate that the Board’s decision in this regard constituted an abuse of discretion or an error of law.

2. It was not error for the Licensing Board to find the alleged harm to NECNP not to be real and particularized.

NECNP states that Mr. van Itallie’s concerns are particularized to the proposed action in that the purpose of the action is to restore the site to a “green fields” condition of unrestricted use, such that local residents can safely enter the site. Brief at 16-17. NECNP states that if the site is not cleaned up in conformance with NRC criteria, Mr. van Itallie could be injured by radioactive contamination when he enters the site. *Id.* There are several things wrong with NECNP’s argument here. First of all, in his Affidavit, Mr. van Itallie never mentions his intentions to enter the site and Mr. van Itallie is not guaranteed entry by the release for unrestricted use. Secondly, and more important, if the site is not cleaned up in conformance with NRC criteria, it will not be released for unrestricted use. *See* 10 C.F.R. § 50.82(a)(11)(ii). In any event, NECNP’s argument, here, confirms that the Board correctly determined that Mr. van Itallie’s concern relates to whether the Licensee will comply with the NRC’s release criteria rather than whether the LTP is adequate. NECNP, therefore, fails to demonstrate that the Board’s decision constitutes an abuse of discretion or an error of law.

NECNP also argues that the Board, in part, based its ruling on NECNP’s failure to allege particularized injury in NECNP’s outline and descriptive statement of the aspects on which it sought to intervene. Brief at 18-20. According to NECNP, the Board ignored the fact that NECNP specifically referred to this list of aspects to support NECNP’s assertion that the LTP did not adequately protect NECNP’s members’ health and safety. *Id.* NECNP also asserts that the

Board ignored a footnote in its Amended Petition which provided that this list of aspects outlined LTP inadequacies. *Id.* According to NECNP, the inadequacies of the LTP could result in the inadequate cleanup of the site and risk contamination to members of the public who use the property. *Id.* Therefore, according to NECNP, it had identified an injury in fact sufficient to support standing in this proceeding. *Id.* NECNP also makes several statements that merely assert, without discussion, that the list of aspects is sufficient to demonstrate injury in fact. *See id.* at 19.

The Board, however, did not err in determining that the list of aspects was composed of nonconclusory statements that were insufficiently particularized to any claim of injury to establish standing. *See* LBP-98-12 at 8. As correctly determined by the Board, and unchallenged by NECNP, where an organization seeks to establish standing through a member who authorizes its representation, the injuries complained of must be particularized and capable of being redressed by a favorable decision. *Id.* at 8, *citing Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993). As conceded by NECNP (Brief at 19) these aspects challenge the implementation of the LTP, not whether it should be approved. It is the approval of the LTP that is the subject of this proceeding. Further, although NECNP claims in its Brief that the inadequate cleanup of the site raises a risk to “members of the public who use the property,” (Brief at 18) the only member of NECNP who has authorized NECNP to represent his interests has not alleged that he would, or could, use the site. Thus, NECNP failed to demonstrate that one of its members will suffer an injury in fact redressable by a favorable

decision. NECNP has, therefore, failed to demonstrate that the Board's decision in LBP-98-12 constituted an abuse of discretion or an error of law.¹

NECNP also claims that the Board erred in concluding the various issues raised by NECNP's descriptive listing of aspects lack particularity or fail to assert an injury in fact. Brief at 19 citing LBP-98-12 at 9-10. Other than merely asserting that the Board's decision is "plainly irrational," NECNP does not address the fact that these various issues simply did not specify a particularized, concrete injury in fact sufficient to confer standing.² *See id.* The Board's decision regarding these issues, as they relate to standing, is entitled to substantial deference and should be sustained.

3. The Licensing Board did not err in finding that NECNP had not identified any harm to its interests from the proposed action.

Under the heading, "The alleged harm to NECNP is cognizable under NRC regulations and precedents," NECNP argues that the Board erroneously ruled that numerous issues raised by

¹ NECNP also takes issue with the Board's determination that aspects should not be evaluated whenever considering whether a petitioner has established an injury in fact. Brief at 18 n.3 citing LBP-98-12 at 7-8. The Board in LBP-98-12, however, provided an extensive discussion of the Commission's pleading requirements as they relate to standing and aspects. *See* LBP-98-12 at 5-6. *See also* 10 C.F.R. § 2.714(a)(3) (requiring a petitioner to address its interests, that is standing, and to provide specific aspects or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene). Other than merely stating, in a footnote, that the Board was incorrect, NECNP fails to even attempt to explain how the Board's discussion in this regard was an abuse of discretion or an error of law. *See* Brief at 18 n. 3. In any event, as NECNP concedes, the Board did, in fact, examine NECNP's aspects to determine whether they supported standing. *See* LBP-98-12 at 8.

² NECNP also asserts that the Board is requiring it to prove its assertions at this stage of the proceeding. Brief at 20. The Board, however, did not require proof that NECNP's assertions were true, only that they be sufficient to allege a particularized injury in fact. *See* LBP-98-12 at 8.

it are irrelevant for standing purposes. Brief at 20. As an example, NECNP claims the environmental concerns raised as one of its “descriptive aspects” addressed in its Amended Petition at 26-28 are “sufficient to confer standing.” *Id.* at 20.

NECNP, however, misunderstands the Board’s ruling in this regard. Although the Board did state that there is no requirement in the regulations for the LTP to comply with NEPA, the Board goes on to note that, according to the Licensee, it is in compliance with the environmental issues in its decommissioning plan.³ LBP-98-12 at 8. NECNP’s concern, as stated in the Amended Petition, addresses not activities proposed in the LTP but activities already authorized in the decommissioning plan. Amended Petition at 26-28. Further, NECNP’s Brief speaks of “changes in site characteristics, such as, paving and compaction of soil.” Brief at 20. Because none of these activities are activities that would be authorized by approval of the LTP, none of them need be considered as activities having possible environmental consequences associated with the LTP. Thus, the Licensing Board’s statement that the LTP need not comply with NEPA may be cryptic; however, the ruling that NECNP’s NEPA concerns, as provided in its Amended Petition, fail to articulate an injury within the scope of the proceeding is correct.

NECNP also assigns error to the Licensing Board’s ruling that its aspect related to “YAEC’s trustworthiness to conduct accurate analyses is in question,” was beyond the scope of this proceeding. Brief at 21. NECNP claims that the Board’s position is not only irrational but

³ NECNP does recognize that YAEC states it is in compliance on environmental issues with its decommissioning plan. Brief at 21 n. 6. NECNP, however, would seek to litigate this statement in this proceeding. However, issues related to YAEC’s already approved decommissioning plan are outside the scope of this proceeding and do not support NECNP’s appeal.

inconsistent with Commission precedent “recognizing the relevance of a licensee’s previous safety performance to the adequacy of a license application.” *Id. citing Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 19 (1993).

Although NECNP correctly notes that the board in the *Diablo Canyon* decision ruled that the petitioners’ contention that the licensee’s surveillance and maintenance program was ineffective was admissible because the licensee relied heavily upon that program to support its amendment application, this decision does not establish that NECNP’s proposed aspect is within the scope of this proceeding. *See Diablo Canyon*, LBP-93-1, 37 NRC at 14, 19-20. NECNP’s aspect, as set forth in its Brief, refers to alleged problems at the Maine Yankee Atomic Power Station. Brief at 21. Maine Yankee is not operated by YAEC. Accordingly, *Diablo Canyon* does not indicate that the Board in this proceeding incorrectly ruled that NECNP’s aspect is not within the scope of this proceeding. Further, section 50.82(a)(9)(ii) requires that the LTP include detailed plans for the final radiation survey. This YAEC has done. NECNP’s concern, here, is how the LTP will be implemented. As discussed above, the implementation of the LTP is beyond the scope of this proceeding. The Board did not abuse its discretion or commit an error of law when it ruled that NECNP’s concern in this regard was outside the scope of the proceeding and insufficient to confer standing.

NECNP also states that the Board “irrationally” dismissed NECNP’s concern that YAEC may have deposited radioactive waste in local landfills on the ground that “There is no requirement for the LTP to investigate offsite landfills.” Brief at 21, citing LBP-98-12 at 10. In support of this assignment of error, NECNP inexplicably states, without reference to law or fact, that one of the purposes of the proceeding is to determine whether YAEC’s license should be

terminated. *Id.* This proceeding, however, does not concern whether or not the license should be terminated. Rather, the sole matter that the proceeding concerns is whether or not the LTP should be approved. The Licensing Board's disposition of this matter was rational and correct. It is NECNP's conclusion that deposition of radioactive waste in local landfills is "squarely within the scope" of the decommissioning rule that is incorrect.

4. NECNP's arguments concerning LBP-96-2 and the Staff's conduct of a meeting are not properly raised in this appeal.

As noted above, NECNP attempts to raise on appeal several matters that were not properly before the Licensing Board and that should not be heard on appeal. NECNP complains that LBP-98-12 is inconsistent with another licensing board decision, LBP-96-2. Brief at 22-23 citing *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 79 (1996). NECNP appears to believe that language in LBP-96-2 guaranteed it a hearing on any future Yankee application to construct and operate an onsite Independent Spent Fuel Storage Installation (ISFSI). NECNP regards LBP-96-2 as treating the issue of YAEC's possible construction of a dry cask storage facility as "prospective" and LBP-98-12's treatment of the same issue as "previously licensed." *Id.*

Actually the discussions in the two licensing board decisions are consistent. NECNP quotes one paragraph of LBP-96-2 concerning licensing under Part 72 and ignores the following paragraphs, which concern construction of an ISFSI under a general license pursuant to Part 72. *See Yankee Nuclear Power Station*, LBP-96-2, 43 NRC at 79. The licensing board ruled in LBP-96-2 that if YAEC chooses to close its Spent Fuel Pit and move to dry cask storage, its proposal must undergo an agency approval process. *Id.* If YAEC were to terminate its Part 50

license and seek to build and/or maintain an ISFSI, its application would be subject to an opportunity for a hearing. *See id. See also*, 10 C.F.R. § 72.46. The Board's ruling in LBP-98-12 that spent fuel management is outside the scope of this proceeding is consistent with LBP-96-2 in that, like the proceeding in LBP-96-2, this proceeding does not involve an application to store and manage spent fuel pursuant to Part 72.

NECNP also complains that since YAEC has not made an application for a license to construct a dry cask storage facility, there is no opportunity for NECNP to challenge YAEC's proposal for dry cask storage. Brief at 22. Apparently, NECNP believes, then, it should be able to challenge YAEC's potential use of dry cask storage in this proceeding. NECNP's own argument, however, supports the Board's decision that the storage of spent fuel is outside the scope of this proceeding. If YAEC has not made an application for a license to construct dry cask storage, how can NECNP complain that it has been denied an opportunity to request a hearing? As discussed above, and in LBP-96-2, if and when YAEC seeks to build and maintain an ISFSI after its Part 50 license is terminated, NECNP will have the opportunity to request a hearing.⁴

NECNP's argument here fails to demonstrate that the Board's decision in LBP-98-12 constituted an abuse of discretion or an error of law. LBP-98-12 is entitled to substantial deference and should be affirmed.

⁴ In addition to the opportunity to request a hearing if and when YAEC applies for a license under Part 72, NECNP also had the opportunity to request a hearing on YAEC's application for an amendment to its license to permit the removal of spent fuel from the Spent Fuel Pit storage racks into a combined storage/shipping cask and to enable handling of the cask components and other hardware by the Yard Area Crane. *See* 62 Fed. Reg. 54866, 54,879 (1997). NECNP did not seek to intervene and may not now raise concerns in this LTP proceeding that might have been admissible in a proceeding on that amendment. This amendment was issued on June 17, 1998. 63 Fed. Reg. 35986, 36002 (1998).

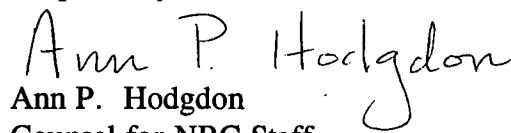
NECNP also states that the Commission should clarify that YAEC may not proceed with dry cask storage except under Part 72 with an opportunity to request a hearing. Brief at 23. The Commission's regulations are quite clear that YAEC may proceed with dry cask storage under a general license pursuant to 10 C.F.R. § 72.210. There is no need for the Commission to clarify YAEC's authority under this general license. In fact, to make the clarification NECNP requests would be inconsistent with the regulations. *See* 10 C.F.R. § 72.210. NECNP offers no reason to conclude the Board's decision in LBP-98-12 regarding spent fuel storage was an abuse of discretion or an error of law.

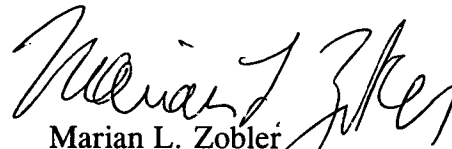
NECNP states that it challenged "the legal sufficiency" of the meeting the Staff conducted on the LTP in Massachusetts on January 13, 1998. Brief at 24, n.7. The Board correctly determined that the matter was outside its jurisdiction. *See* LBP-98-12 at 3. Although it reiterates its complaints regarding the public meeting, NECNP fails to demonstrate that the Licensing Board's treatment of this matter was an abuse of discretion or an error of law.

CONCLUSION

For the reasons discussed, the Commission should deny NECNP's appeal and affirm LBP-98-12.

Respectfully submitted,


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Dated at Rockville, Maryland
this 27th day of July, 1998

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Docket No. 50-029-LA

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO NEW ENGLAND COALITION ON NUCLEAR POLLUTION'S APPEAL OF LBP-98-12" in the above-captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the United States mail, first class, as indicated by an asterisk this 27th day of July, 1998:

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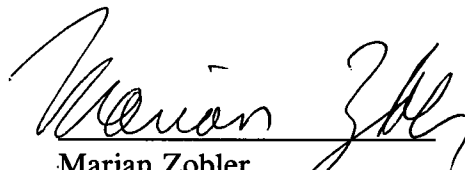
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