

NUREG-0750
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NUCLEAR REGULATORY COMMISSION ISSUANCES

February 1996



U.S. NUCLEAR REGULATORY COMMISSION

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Vol. 43, No. 2
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NUCLEAR REGULATORY COMMISSION ISSUANCES

February 1996

This report includes the issuances received during the specified period from the Commission (CLI), the Atomic Safety and Licensing Boards (LBP), the Administrative Law Judges (ALJ), the Directors' Decisions (DD), and the Decisions on Petitions for Rulemaking (DPRM).

The summaries and headnotes preceding the opinions reported herein are not to be deemed a part of those opinions or have any independent legal significance.

U.S. NUCLEAR REGULATORY COMMISSION

Prepared by the
Division of Freedom of Information and Publications Services
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Washington, DC 20555-0001
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Shirley A. Jackson, Chairman

Kenneth C. Rogers

Greta J. Dicus

B. Paul Cotter, Jr., Chief Administrative Judge, Atomic Safety and Licensing Board Panel

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Commission
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COMMISSION

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley A. Jackson, Chairman
Kenneth C. Rogers
Greta J. Dicus

In the Matter of

Docket No. 40-2061-ML

KERR-McGEE CHEMICAL
CORPORATION
(West Chicago Rare Earths
Facility)

February 21, 1996

The Commission considers a request by the Licensee to terminate this proceeding as moot and to vacate the proceeding's underlying decisions. Because this proceeding solely concerns the Licensee's request for onsite disposal of mill tailings, and all parties concur that the Licensee no longer seeks onsite disposal, the Commission terminates the proceeding as moot. The Commission chooses as a policy matter to vacate and thereby eliminate as precedent all three underlying decisions in this proceeding.

RULES OF PRACTICE: VACATUR

The Commission is not bound by judicial practice and need not follow judicial standards of *vacatur*.

ORDER

This proceeding came before the Commission in March 1991, when Kerr-McGee filed a petition for review of Atomic Safety and Licensing Appeal Board decision ALAB-944, 33 NRC 81 (1991). The proceeding concerns Kerr-McGee's application for NRC authorization to dispose of mill tailings by onsite

burial at its West Chicago Rare Earths facility. In ALAB-944, the Appeal Board reversed in part and vacated in part an Atomic Safety and Licensing Board decision that had approved onsite disposal. See LBP-89-35, 30 NRC 677 (1989). The period within which the Commission may act on Kerr-McGee's petition for review has been held in abeyance since July 3, 1991, at the joint request of Kerr-McGee, the State of Illinois (the State), and the City of West Chicago (the City), to allow for a negotiated settlement.

On December 9, 1993, Kerr-McGee moved to terminate this proceeding as moot, and to vacate the proceeding's underlying decisions: ALAB-944, and the earlier decisions of the Atomic Safety and Licensing Board, LBP-90-9, 31 NRC 150 (1990), and LBP-89-35, 30 NRC 677 (1989). Kerr-McGee indicated that it had abandoned its original plan to dispose of mill tailings on site in West Chicago and, to that effect, had contracted with Envirocare of Utah, Inc., to transfer the wastes to Utah. Kerr-McGee claimed that its commitment to pursue offsite disposal of the wastes rendered this proceeding moot.

The State and the City responded that although they did not oppose termination of the proceeding, *vacatur* of the underlying decisions was inappropriate. In particular, the State and the City questioned whether the proceeding indeed had become moot. Both parties expressed various doubts about Kerr-McGee's commitment to removing the wastes from the West Chicago site, citing such factors as the executory and conditional nature of Kerr-McGee's contract with Envirocare, and Kerr-McGee's continued related litigation in other forums.

The Commission recently requested and received updated status reports on this proceeding. All parties are now in agreement that this proceeding has become moot. Kerr-McGee states that it has begun shipping wastes from West Chicago to Utah. The State and the City are satisfied that Kerr-McGee "has clearly agreed to remove" the wastes from West Chicago. The Nuclear Regulatory Commission Staff, although not a formal party to the pending appeal, finds it "no longer realistic" to believe that the Commission will need to address a proposal for onsite disposal at the West Chicago site. Although the parties present differing theories on what factors or events rendered the proceeding moot, at bottom all agree that Kerr-McGee no longer intends to pursue onsite disposal, the subject of this proceeding. The Commission therefore agrees that the proceeding is moot.

Kerr-McGee also requests the Commission to vacate the underlying decisions in this proceeding. The NRC Staff concurs, urging the Commission to vacate "three unreviewed decisions involving highly controversial issues in the waste disposal area." The State and the City, however, oppose *vacatur*, claiming that this proceeding became moot only after Kerr-McGee in 1994 entered into a settlement agreeing to remove the mill tailings from the West Chicago site. Voluntary settlement, according to the State and City, deprives litigants of any claim to the equitable remedy of *vacatur*. Cf. *United States Bancorp Corp. v.*

Bonner Mall Partnership, 115 S. Ct. 386 (1994). Kerr-McGee and the NRC Staff do not agree that the 1994 settlement is what rendered the Commission proceeding moot, and instead argue that the proceeding became moot in 1990, when the Commission — over Kerr-McGee's objection — transferred regulatory jurisdiction over section 11(e)(2) byproduct material to the State of Illinois.¹

In short, the parties do not agree on precisely why this long-pending case is moot, but do agree that there no longer is any point to Commission review because of Kerr-McGee's commitment to move the mill tailings off site. The Commission, in any case, is not bound by judicial practice and need not follow the *Bancorp* ruling. In these circumstances, and because these unreviewed Board decisions involve complex questions and vigorously disputed interpretations of agency provisions for disposal of byproduct material, the Commission as a policy matter chooses to vacate and thereby eliminate as precedent all three underlying decisions in this proceeding. This will permit any similar questions that may come up to be considered anew, without the binding influence of an apparently controversial Appeal Board decision that the Commission has not had the occasion to review.

By vacating the decisions, the Commission does not intimate any opinion on their soundness. Without engaging in a full inquiry into the merits — which no party any longer requests, and the Commission sees no compelling reason to undertake on its own — the Commission cannot properly evaluate the analyses of the Licensing and Appeal Boards.

This proceeding is terminated as moot, Kerr-McGee's application for on-site disposal is deemed withdrawn, and the following decisions are vacated: ALAB-944, 33 NRC 81 (1991); LBP-90-9, 31 NRC 150 (1990); LBP-89-35, 30 NRC 677 (1989).

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of February 1996.

¹ Kerr-McGee challenged the transfer of jurisdiction in a D.C. Circuit lawsuit against the NRC. Kerr-McGee later withdrew the suit, apparently because of provisions in the 1994 settlement agreement with the State and City. Kerr-McGee, though, claims that the settlement agreement neither encompasses this Commission proceeding nor resolves numerous outstanding disputes with the State and City over the removal of the material.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley A. Jackson, Chairman
Kenneth C. Rogers
Greta J. Dicus

In the Matter of

Docket No. 40-8027-EA
(Decontamination and
Decommissioning Funding)

SEQUOYAH FUELS CORPORATION
and GENERAL ATOMICS
(Gore, Oklahoma Site)

February 27, 1996

The Commission grants the Intervenors' petition for review of the Atomic Safety and Licensing Board's Memorandum and Order approving a joint settlement agreement between the Licensee, Sequoyah Fuels Corp., and the NRC Staff. The Commission also permits the State of Oklahoma to file a brief *amicus curiae* to aid the Commission in its review of the Board's order.

**RULES OF PRACTICE: PARTICIPATION BY AN INTERESTED
STATE OR LOCAL GOVERNMENT**

A state that does not seek party status or to participate as an "interested state" in the proceedings below is not permitted to file a petition for Commission review of a licensing board ruling. If the Commission takes review, the Commission may permit a person who is not a party, including a state, to file a brief *amicus curiae*. 10 C.F.R. § 2.715(d).

MEMORANDUM AND ORDER

The Intervenor in this enforcement proceeding, Native Americans for a Clean Environment (NACE) and the Cherokee Nation, have filed a petition for Commission review of the Atomic Safety and Licensing Board's Memorandum and Order, LBP-95-18, 42 NRC 150 (1995). The State of Oklahoma also filed a petition for review and motion for leave to file an amendment to its original petition. The NRC Staff, the Licensee Sequoyah Fuels Corporation and its parent, General Atomics (GA), oppose Commission review. In accordance with the considerations discussed in 10 C.F.R. § 2.786(b)(4), the Commission has decided that review of LBP-95-18 is appropriate.

The record does not show, nor does the State of Oklahoma contend, that it is a party to this proceeding. It also did not participate as an "interested State" before the Licensing Board pursuant to 10 C.F.R. § 2.715(c). Therefore, it may not file its own petition for review.¹ Nevertheless, our regulations provide that if the Commission takes review of a Board order a person who is not a party may be permitted to file an *amicus curiae* brief, if the person requests by motion to file such a brief. 10 C.F.R. § 2.715(d). The Commission views the State's petition for review and subsequent motion as fulfilling this requirement. Accordingly, the State will be permitted, along with the parties, to provide a brief on the matters discussed below.

In LBP-95-18, a majority of the Board concluded that a joint settlement agreement between the NRC Staff and SFC is in the public interest. 42 NRC 150 (1995). Judge Bollwerk did not join the majority and in a separate statement raised several issues which in his opinion merited further inquiry before reaching a final conclusion about whether to approve the settlement agreement. 42 NRC at 156-59.

Answers to the following questions would aid the Commission in its review of this matter:

1. Does SFC lack the financial resources to provide any surety instrument to guarantee additional funds for cleanup beyond the \$750,000 letter of credit?
2. Under paragraph 5 of the agreement, what process does the NRC Staff intend to implement to ensure proper and timely review of SFC's annual audited financial statements?

¹ See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 468-69 (1991); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-583, 11 NRC 447, 448-49 (1980).

3. What prejudice, if any, will occur if the Commission were to delay final approval of a settlement with SFC until after the NRC Staff and General Atomics conclude their settlement negotiations?

Answers to these questions may address some of the inquiries raised by Judge Bollwerk in his separate statement. In their briefs, the parties and the State should also address the remaining matters raised by Judge Bollwerk.

Pursuant to 10 C.F.R. § 2.786(d), the Commission sets the following briefing schedule:

1. The Intervenors and the State (hereinafter "Petitioners") shall file their briefs within 21 days after service of this Order. Their briefs shall be no longer than 25 pages each.
2. The NRC Staff, SFC, and GA shall file their responsive briefs within 21 days after service of the Petitioners' brief. Their responses shall be no longer than 25 pages each.
3. Within 10 days after service of the responsive briefs, the Petitioners may file reply briefs. Their replies shall be no longer than 10 pages each.

Briefs in excess of 10 pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited. Page limitations on briefs are exclusive of pages containing a table of contents, table of cases, and of any addendum containing statutes, rules, regulations, etc.

IT IS SO ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 27th day of February 1996.

Atomic Safety and Licensing Boards Issuances

ATOMIC SAFETY AND LICENSING BOARD PANEL

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LICENSING BOARDS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Dr. Richard F. Cole
Dr. Peter S. Lam

In the Matter of

Docket No. 50-245-OLA
(ASLBP No. 96-711-01-OLA)

NORTHEAST NUCLEAR ENERGY
COMPANY
(Millstone Nuclear Power Station,
Unit 1)

February 7, 1996

MEMORANDUM AND ORDER
(Ruling on Intervention Petition)

We have before us the request for a hearing and petition to intervene in this proceeding on the license amendment application filed by Northeast Nuclear Energy Company (NNECO) for its Millstone Nuclear Power Station, Unit 1, which is located in New London County, Connecticut. The petition challenging the amendment was filed by We the People, Inc. (WTP), the Seacoast Anti-Pollution League (SAPL), the New England Coalition on Nuclear Pollution (NECNP), and Mr. Donald W. Del Core. Generally, the petition asserts that the proposed license amendment would permit the routine offloading of the full reactor core to the spent fuel pool during refueling which, in turn, would present a significant increase in the risk probability and consequences of an accident involving the spent fuel pool, thereby resulting in injury to the Petitioners.

For the reasons set forth below, the petition on behalf of Mr. Del Core and WTP is granted and the petition on behalf of NECNP and SAPL is denied.

BACKGROUND

On July 28, 1995, NNECO submitted a license amendment application seeking to add new technical specifications to its operating license for its Millstone Nuclear Power Station, Unit 1. The change would require that (1) the reactor be subcritical for at least 100 hours before the start of reactor refueling; (2) the spent fuel pool bulk temperature be maintained at less than or equal to 140°F; and (3) two trains of shutdown cooling be operable during reactor refueling operations. In a letter accompanying the application, NNECO states that these changes will permit the practice of full-core offloading as a normal end-of-cycle event.¹

On August 30, 1995, the Staff published in the *Federal Register* a proposed "no significant hazards determination" pursuant to 10 C.F.R. § 50.91 and a notice of opportunity for hearing concerning the amendment request.² In response to the notice, a timely request for hearing and petition to intervene was filed on behalf of WTP, SAPL, NECNP, and Mr. Del Core.³ The Applicant and Staff each filed answers opposing the petition⁴ and the Petitioners then filed a "Corrected Request." Besides making certain spelling and typographical corrections, this filing contained a list of twelve (12) "member supporters" associated with WTP living in the neighborhood of the Millstone plant and an assertion that Mr. Del Core would face increased risk to his person and property if the license amendment were granted.⁵ Thereafter, the Petitioners filed a Memorandum of Law in support of their petition.⁶ We then issued an order setting a final deadline for any further amendments to the petition.⁷ The Applicants and the Staff filed responses to the Petitioners' Memorandum⁸ and Petitioners subsequently filed on December 4, 1995, an affidavit of a WTP member.⁹

After challenging most of the factual allegations set forth in the Petitioners' filings, NNECO argues that neither the organizational Petitioners nor the indi-

¹ See Letter from J.F. Opeka, Executive Vice President, NNECO, to NRC, July 28, 1995 (Attachment III to NNECO's Answer to Request for a Hearing and Petition to Intervene (Oct. 13, 1995)).

² 60 Fed. Reg. 45,172 (Aug. 30, 1995).

³ Request for a Hearing and Petition to Intervene on Behalf of WTP, SAPL, NECNP and Donald Delcore [sic] (Sept. 28, 1995).

⁴ Northeast Nuclear Energy Company's Answer to Request for a Hearing and Petition to Intervene (Oct. 13, 1995) [hereinafter NNECO Answer]; NRC Staff Response to Request for a Hearing and Petition to Intervene on Behalf of WTP, SAPL, NECNP and Donald Del Core (Oct. 18, 1995) [hereinafter Staff Answer].

⁵ Corrected Request for a Hearing and Petition to Intervene on Behalf of WTP, SAPL, NECNP and Donald W. Del Core (Oct. 18, 1995) [hereinafter Corrected Request].

⁶ Memorandum of Law in Support of the Request for a Hearing and Petition to Intervene on Behalf of WTP, SAPL, NECNP and Donald W. Del Core, Sr. (Nov. 8, 1995) [hereinafter Petitioners' Memorandum].

⁷ Order (Nov. 7, 1995) (unpublished).

⁸ NNECO's Response to Supplemented Intervention Petition (Nov. 21, 1995) [hereinafter NNECO Response]; NRC Staff Response to Memorandum of Law in Support of the Request for a Hearing and Petition to Intervene on Behalf of WTP, SAPL, NECNP and Donald W. Del Core, Sr. (Nov. 21, 1995) [hereinafter Staff Response].

⁹ Affidavit of Glen Cheney.

vidual Petitioner has standing to intervene in this license amendment proceeding. For its part, the Staff generally does not address the factual merits of the Petitioners' allegations. Although the Staff argued that none of the Petitioners had standing to intervene,¹⁰ the Staff changed its position with respect to Mr. Del Core. In its latest filing, the Staff states that Mr. Del Core has arguably made (although not articulated very well) a case for standing based upon his allegation of radiological harm to his health, safety, and property.¹¹ Accordingly, the Staff no longer objects to Mr. Del Core's participation in the proceeding.

It is noted that on November 9, 1995, the Staff issued License Amendment 89 to NNECO for its Millstone Nuclear Power Station, Unit 1. That amendment did not add the technical specifications to the facility license requested by NNECO. Instead, the amendment added a license condition to the facility license that permits the same activities.

PETITIONERS' STANDING TO INTERVENE

The recital of the requirements for standing in the Commission's most recent decisions regarding standing are all quite similar. Hence, we quote the discussion from *Georgia Tech*, CLI-95-12, its most recent discussion on this subject:

Under section 189a of the Atomic Energy Act (AEA), the Commission must grant a hearing upon the request of any person "whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a). To determine whether a petitioner has alleged a sufficient interest to intervene, the Commission has long applied judicial concepts of standing. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993) (*Perry*). For standing, the petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision. See generally *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992); *Perry*, 38 NRC at 92. Injury may be actual or threatened. *Kelly v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995); *Wilderness Society v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987). . . .

An organization may base its standing on either immediate or threatened injury to its organizational interests, or to the interests of identified members. *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646-47 (1979). To derive standing from a member, the organization must demonstrate that the individual member has standing to participate, and has authorized

¹⁰ Staff Answer at 4-9.

¹¹ Staff Response at 9-10.

¹² See Letter to Judges Moore, Lam and Cole from Catherine L. Marco, Counsel for NRC Staff (Nov. 13, 1995) enclosing November 9, 1995 agency cover letter, Amendment 89, and the Staff's safety evaluation.

the organization to represent his or her interests. *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 390-96 (1979).¹³

To determine whether any of the Petitioners have the requisite standing to challenge NNECO's license amendment application, we first consider the three petitioning organizations, WTP, SAPL, and NECNP before considering the petitioning individual, Mr. Del Core.

According to the Petitioners' original and corrected intervention request, WTP is a Massachusetts-based nonprofit corporation with its principal office in Rowley, Massachusetts, whose primary purpose is to support employees of nuclear licensees and the NRC who may face retaliatory action for bringing forward allegations of license violations or nuclear safety issues. WTP alleges that the organization has worked with Millstone employees on safety issues and references one employee, George Galatis, as consulting with WTP on the Licensee's fuel offloading practices. The petitions state that individuals "associated" with WTP live in the "neighborhood" of the Millstone complex and it lists by name twelve members with addresses in Connecticut towns.¹⁴

Next, the petition states that SAPL is a New Hampshire nonprofit corporation with its principal place of business in Portsmouth, New Hampshire. It claims that SAPL has members living in Massachusetts and New Hampshire within 10 miles of the Seabrook nuclear facility and that SAPL participated as an intervenor in the licensing proceedings for the Seabrook Station. The petition further alleges that the operator of Seabrook Station, like NNECO, is a subsidiary of Northeast Utilities, so it can be expected that full-core offloading during refueling also will be undertaken at the Seabrook Station, thereby increasing the risk and consequences of a spent fuel pool accident at that nuclear plant.¹⁵

Finally, the petition declares that NECNP is a nonprofit corporation with its principal place of business in Brattleboro, Vermont, and that it has been an active voice in New England on nuclear safety issues for 25 years. It states that NECNP intervened in the Vermont Yankee and Seabrook licensing proceedings and that NECNP has members residing within 50 miles of both the Seabrook and the Millstone nuclear plants.¹⁶

Although an organization may have standing in its own right to intervene in an NRC adjudicatory proceeding, none of the three organizations has sought to demonstrate an injury to its organizational interests. Nowhere in the intervention petition, corrected request, or supporting memorandum do the Petitioners

¹³ *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995). See also *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72 (1994); *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994); *Perry*, 38 NRC at 92.

¹⁴ Request for Hearing at 4; and Corrected Request at 2-3.

¹⁵ *Id.* at 5-6.

¹⁶ *Id.* at 4.

identify any organizational interest of WTP, SAPL, or NECNP that is harmed or threatened with injury by the license amendment at issue. Thus, none of these organizations has standing in its own right to intervene. However, WTP, SAPL, and NECNP seek to establish standing to intervene as the representative of one or more of its members. For such representational standing the petitioning organization must show that at least one of its members suffers "immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit."¹⁷ Further, agency case law teaches that the organization must identify at least one member by name and address and provide "some concrete indication that, in fact, the member wishes to have that [member's] interest represented in the proceeding."¹⁸ Moreover, that concrete indication of representational authorization should be provided "preferably by affidavit."¹⁹

Here, two of the three petitioning organizations, SAPL and NECNP, have not complied in any respect with the requirements for establishing standing as representative of one of their members. The Corrected Request, as indicated, sets forth a list of names and addresses of twelve WTP members who purportedly live in the "neighborhood" of the Millstone plant, but the petition is silent with respect to the names and addresses of any SAPL or NECNP members. Accordingly, these Petitioners have provided no "concrete indication" from any member of their organizations that a representation of their interests has been authorized in this proceeding. This, despite the fact that their supporting memorandum recites the requisites for representational standing:

[t]o assert representational injury-in-fact, an organization must specifically identify individual members by name and address, identify how that member may be affected and show that the organization is authorized to request a hearing on behalf of the member. *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units No. 1 and 2), LBP-92-27, 36 NRC 196, 199 (1992).²⁰

Accordingly, SAPL and NECNP have failed to demonstrate that they have standing to intervene as the representative of one of their members.²¹

In considering WTP's standing posture, Petitioners' Corrected Request fails to establish that the twelve (12) WTP members, with Connecticut residences,

¹⁷ *Worth*, 422 U.S. at 511.

¹⁸ *Allens Creek*, 9 NRC at 393-96. See *Georgia Tech*, CLI-95-12, 42 NRC at 115.

¹⁹ *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-92-27, 36 NRC 196, 199 (1992).

²⁰ Petitioners' Memorandum at 5.

²¹ In addition to its failure to provide the name and address of a SAPL member and some evidence of representational authorization, the Petitioners' intervention petition also fails to set forth any interests of SAPL that relate to the Millstone facility -- the subject of this proceeding. Rather, SAPL's asserted interests all relate to the Seabrook facility and, as such, are clearly outside the scope of this proceeding as defined by the Commission's hearing notice.

authorized WTP to represent them in this proceeding. On December 4, 1995, WTP attempted to cure this deficiency by filing an affidavit of one of these members, Glen Cheney, wherein Cheney states that he and the other eleven members wished to be represented by WTP.

This filing ignores our scheduling order of November 7, 1995, wherein we stated that "the Petitioners shall have until Tuesday, November 14, 1995, to file any amended intervention petition. After that date, the Licensing Board will not entertain any further amended or corrected intervention request."²² Petitioners' counsel's letter stated that

[i]n view of the position of both the NRC staff and the Licensee, that the organizational petitioners need to file an Affidavit to represent the concerns of individuals residing within the area of the plant in question, I have obtained, and file herewith, the affidavit of Glenn Cheney, stating that he, and the other individuals listed on the corrected petition do desire to have their interests represented through We The People, Inc.²³

The Commission has declared in its *Statement of Policy on the Conduct of Licensing Proceedings* that "[f]airness to all involved in NRC adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations."²⁴ Petitioners' counsel has participated in NRC adjudicatory proceedings for 20 years,²⁵ and there is no excusing this deficiency based on a lack of familiarity with agency procedures.

The presiding officer in this proceeding elected not to hold a special pre-hearing conference and, as indicated, set November 14, 1995, as the cutoff date for amending petitions.²⁶ Being out-of-time, WTP should have addressed the five lateness factors required by 10 C.F.R. § 2.714(a)(3) on December 4, 1995, when it attempted to amend its petition by filing the Cheney affidavit.²⁷ Failing that, WTP has not demonstrated standing in this proceeding as a matter of right. However, as explained subsequently, in an effort to expedite and develop the record of this proceeding, the Board has decided to exercise its discretion and grant WTP's petition for intervention. We also hold that the amended petition's attempt to authorize representation by eleven (11) other individuals listed in Petitioners' Corrected Request of October 18, 1995, has no validity. Under the

²² Order (Nov. 7, 1995) at 2 (unpublished).

²³ Letter to Judges Moore, Lam, and Cole from Robert A. Backus, Backus, Meyer, Solomon & Rood, Manchester, NH (Dec. 4, 1995).

²⁴ CLI-81-8, 13 NRC 452, 454 (1981).

²⁵ See, e.g., *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-949, 33 NRC 484, 485 (1991); *id.*, LBP-76-4, 3 NRC 123 (1976).

²⁶ The Board presiding over this proceeding was reconstituted January 4, 1996.

²⁷ The Board was perhaps remiss in not granting a Staff December 12, 1995 request to respond to the Cheney affidavit, but in light of our denial of the late petition and the exercise of discretion in granting standing, we conclude that our mistake was not prejudicial.

Commission's practice, averments by one member of an organization by affidavit that other members have authorized representation would not satisfy the requirement that those members have given some "concrete indication" that a representation of their interest is authorized.²⁸

The Petitioners' Request for Hearing argues a case for standing under the Commission's proximity presumption for individuals who live within 50 miles of the Millstone plant. We turn to that argument because it forms the basis for the claim that Mr. Del Core has standing to intervene.

In construction permit and operating license proceedings, Commission case law recognizes a proximity presumption that persons who live, work, or otherwise have contact with the area around a nuclear plant have standing to intervene.²⁹ That presumption is based on an unsurprising premise, i.e., that the construction or operation of a nuclear power reactor carries with it "clear implications for the offsite environment"³⁰ so that individuals residing in reasonable proximity to the plant are likely in at least some small way to be injured in their persons or property by a plant accident, and thus such persons fall within the geographic zone of interests protected by the Atomic Energy Act.³¹ Similarly, agency case law recognizes the same presumption in license amendment proceedings that involve "major alterations to the facility with a clear potential for offsite consequences" or other circumstances that present "such obvious potential for offsite consequences."³²

According to the corrected intervention request, Mr. Del Core lives in Uncasville, Connecticut, within 20 miles of the Millstone plant, and he owns property within the Emergency Planning Zone for the facility. This clearly would be sufficient for gaining intervenor status in construction permit or operating license proceedings.

The Petitioners' case relies, in part, on the Appeal Board decision in ALAB-522.³³ That determination involved a license amendment to expand the capacity of the spent fuel pools at both of the North Anna nuclear power plants. In reversing the Licensing Board's ruling denying the petitioners intervention, the Appeal Board found the proximity presumption applicable. In this license amendment case, a residence near the Millstone plant also implicates the proximity presumption because the license amendment at issue, even though not involving a major alteration of the plant, may involve the potential for offsite

²⁸ *Allens Creek*, ALAB 535, 9 NRC at 396.

²⁹ See *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75; *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974).

³⁰ *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

³¹ See *River Bend*, ALAB-183, 7 AEC at 223-24 & n.5.

³² *St. Lucie*, CLI-89-21, 30 NRC at 329-30.

³³ *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54 (1979).

consequences. The petition alleges that an increase in heat load in the spent fuel pool presents the potential of offsite consequences if an accident were to occur. At this stage of the proceeding without more, it cannot be concluded that the potential safety issues involved in the offloading and storage of a full core is not comparable to the safety issues associated with a spent fuel pool expansion.

As previously indicated, the Petitioners allege in their corrected intervention request and supporting memorandum that the Millstone spent fuel pool has never been analyzed or approved for a routine full-core offloading as part of refueling. According to the Petitioners, the failure of any equipment important to safety, the loss of electrical power, or an earthquake could result in the loss of pool water inventory during an offload through pipe breaks, siphon effects, or boiling that, in turn, would uncover the stored fuel and expose those living near the plant to dangerous levels of radioactivity. In countering the Petitioners' claim of injury, NNECO argues that there has been no showing of offsite consequences from the license amendment and states that "Petitioners rely instead only on a muddle of factual errors and half truths regarding the authorized full-core offload to concoct a theory of injury."³⁴

Although the affidavits accompanying NNECO's opposition to the Petitioners' filings challenge almost all of the Petitioners' factual assertions, the most recent Commission ruling involving standing in the *Georgia Tech* case makes it evident that we are not to determine the essential validity of the asserted facts in ruling on intervention petitions.³⁵ Citing the recent decision of the United States Court of Appeals for the Sixth Circuit in *Kelly v. Selin*,³⁶ the Commission stated in *Georgia Tech* that "[t]o evaluate a petitioner's standing, we construe the petition in favor of the petitioner."³⁷

When we do that here, we conclude that the Petitioners have alleged at least an acceptable injury. Further, the Petitioners' alleged injury is traceable to the challenged license amendment and would be alleviated by a decision denying the requested license amendment. Thus, we find that Mr. Del Core and WTP, on the basis of the Board's discretion, have standing to intervene and their intervention petition is granted subject to the filing of at least one admissible contention.

As a final matter, it is necessary to delineate our evaluation of the factors guiding the Board's decision in exercising discretion to grant standing to WTP. See *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976). The major consideration of importance to the Board is that WTP's participation reasonably can be expected to assist in developing a sound record in the proceeding. The petition not only alleges

³⁴ NNECO Response at 10.

³⁵ *Georgia Tech*, CLI-95-12, 42 NRC at 115.

³⁶ 42 F.3d at 1508.

³⁷ CLI-95-12, 42 NRC at 115.

a previous involvement of the organization with Millstone employees on safety issues but specific consultation with employee George Galatis on offloading practices at the plant. These may involve safety issues in the proceeding and information that might not otherwise be available in the case. We have no basis for concluding that WTP's participation will broaden or delay the proceeding and, as set forth previously, a favorable ruling would redound to the benefit of WTP and its members.

CONCLUSION

For the foregoing reasons, it is hereby ORDERED that:

1. The request for hearing and petition to intervene filed on behalf of New England Coalition on Nuclear Pollution and Seacoast Anti-Pollution League is *denied*;

2. The request for hearing and petition to intervene filed on behalf of Donald W. Del Core, Sr., and We the People is *granted*, contingent upon the filing of an admissible contention as set forth in 10 C.F.R. § 2.714; and

3. The Petitioners above shall have 30 days from the date of service of this Order to file contentions.

In accordance with the provisions of 10 C.F.R. § 2.714a, this Order may be appealed within 10 days after its service.³⁸

THE ATOMIC SAFETY AND LICENSING BOARD

James P. Gleason, Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 7, 1996

³⁸ Copies of this Memorandum and Order have been sent this date to counsel for NNECO, WTP, SAPL, NECNP, and Donald W. Del Core by facsimile transmission and to Staff counsel by E-mail transmission through the NRC's wide-area network.

Directors'
Decisions
Under
10 CFR 2.206

DIRECTORS' DECISIONS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William T. Russell, Director

In the Matter of

Docket No. 50-029
(License No. DPR-3)YANKEE ATOMIC ELECTRIC
COMPANY
(Yankee Nuclear Power Station)

February 22, 1996

The Director of the Office of Nuclear Reactor Regulation denies in part and grants in part a petition dated January 17, 1996, submitted to the Nuclear Regulatory Commission (NRC) by Citizens Awareness Network and New England Coalition on Nuclear Pollution (Petitioners), requesting that the NRC take action with respect to five activities conducted by Yankee Atomic Electric Company (YAEC or Licensee) at the Yankee Nuclear Power Station in Rowe, Massachusetts (Yankee Rowe or the facility). The petition was also moot in part. The petition requests that the NRC comply with *Citizens Awareness Network Inc. v. United States Nuclear Regulatory Commission and Yankee Atomic Electric Co.*, 59 F.3d 284 (1st Cir. 1995) and immediately order: (A) YAEC not to undertake, and the NRC Staff not to approve, further major dismantling activities or other decommissioning activities, unless such activities are necessary to ensure the protection of occupational and public health and safety; (B) YAEC to cease any such activities; and (C) NRC Region I to reinspect Yankee Rowe to determine whether there has been compliance with the Commission's Order in CLI-95-14, 42 NRC 130 (1995), and to issue a report within 10 days of the requested order to Region I.

The Petitioners' request that shipments of low-level radioactive waste be prohibited is denied because that activity is permissible, prior to approval of a decommissioning plan, under the pre-1993 interpretation of the Commission's decommissioning regulations. Petitioners' request that four other activities be prohibited is moot, although the activities would have been permissible, prior

to approval of a decommissioning plan, under the pre-1993 interpretation of the Commission's decommissioning regulations. Additionally, Petitioners' request for an inspection of Yankee Rowe to determine compliance with CLI-94-14 and an inspection report was granted.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

An "Emergency Motion for Compliance with Circuit Court Opinion" (petition), dated January 17, 1996, was submitted by Citizens Awareness Network and New England Coalition on Nuclear Pollution (Petitioners). Petitioners requested that the United States Nuclear Regulatory Commission (NRC or Commission) take action with respect to activities conducted by Yankee Atomic Electric Company (YAEC or Licensee) at the Yankee Nuclear Power Station in Rowe, Massachusetts (Yankee Rowe or the facility).

By an Order of the Commission dated January 23, 1996, the Emergency Motion was referred to the NRC Staff for treatment as a petition pursuant to 10 C.F.R. § 2.206 of the Commission's regulations. The Commission ordered the Staff to respond to the emergency aspects of the petition in 10 days and to issue a decision on the petition as a whole within 30 days.

Petitioners request that the NRC comply with *Citizens Awareness Network Inc. v. United States Nuclear Regulatory Commission and Yankee Atomic Electric Co.*, 59 F.3d 284 (1st Cir. 1995) (*CAN v. NRC*). Specifically, Petitioners request that the Commission immediately order:

- (A) YAEC not to undertake, and the NRC Staff not to approve, further major dismantling activities or other decommissioning activities, unless such activities are necessary to assure the protection of occupational and public health and safety;
- (B) YAEC to cease any such activities; and
- (C) NRC Region I to reinspect the Yankee Nuclear Power Station in Rowe, Massachusetts (Yankee Rowe) to determine whether there has been compliance with the Commission's Order of October 12, 1995 (CLI-95-14), and to issue a report within ten days of the requested order to Region I.

As the bases for their requests, Petitioners state that:

- (1) *CAN v. NRC* requires the cessation, and prohibits commencement, of decommissioning activities at Yankee Rowe, pending final approval of the licensee's decommissioning plan after opportunity for a hearing. CLI-95-14 forbids YAEC from

conducting any further major dismantling or decommissioning activities until final approval of its decommissioning plan after completion of the hearing process;

- (2) *CAN v. NRC* obliges the Commission and the Staff to provide an opportunity to interested persons for a hearing to approve a decommissioning plan;
- (3) *CAN v. NRC* requires the Commission to reinstate its pre-1993 interpretation of its decommissioning regulations, *General Requirements for Decommissioning Nuclear Facilities*, 53 FR 24,018, 24,025-26 (June 27, 1988), limiting the scope of permissible activities prior to approval of a decommissioning plan to decontamination, minor component disassembly, and shipment and storage of spent fuel, if permitted by the operating license and/or 10 C.F.R. § 50.59. Under *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-90-08, 32 NRC 201, 207, n.3 (1990), this means that the licensee may not take any action that would materially affect the methods or options available for decommissioning, or that would substantially increase the costs of decommissioning, prior to approval of a decommissioning plan. Under CLI-91-2, 33 NRC at 73, n.5, and CLI-92-2, 35 NRC at 61, n.7, other decommissioning activities, in addition to major ones, are prohibited, including offsite shipments of low-level radioactive waste produced by decommissioning activities, until after approval of a decommissioning plan;
- (4) decommissioning activities permitted by NRC Inspection Manual, Chapter 2561, § 06.06, "Modifications or Changes to the Facility", before approval of a decommissioning plan are limited to maintenance, removal of relatively small radioactive components or non-radioactive components, and characterization of the plant or site;
- (5) YAEC is conducting decommissioning activities, with the approval of the NRC technical staff, in flagrant violation of *CAN v. NRC* and of CLI-95-14, thus threatening to render the decommissioning process nugatory and to deprive Petitioners of their hearing rights under Section 189a of the Atomic Energy Act;
- (6) by letter dated October 19, 1995, YAEC described nine decommissioning activities in progress, and by letter dated October 24, 1995, interpreted permissible "major" dismantling as removal of non-radioactive material required to support safe storage of spent fuel and of those portions of the facilities which remain, or to support future dismantlement;
- (7) by letter dated November 2, 1995, the NRC staff approved the activities described by the Licensee in its letter of October 19, 1995;
- (8) five of the nine activities approved by the NRC staff's letter of November 2, 1995, are major dismantling or other decommissioning activities, in the nature of Component Removal Project activities, prohibited, until after approval of a decommissioning plan, by *CAN v. NRC* and CLI-95-14. Petitioners object to: (a) completing removal of the remainder of the Upper Neutron Shield Tank; (b) removal of Component Cooling Water System pipes and components and Spent Fuel Cooling System pipes and components; (c) Fuel Chute isolation; (d) Spent Fuel Pool electrical conduit installation; and (e) radioactive waste shipments. Petitioners do not object to Waste Tank removal, Ion Exchange Pit cleanup, removal of Emergency Diesel Generators, or the Brookhaven National Laboratory Cable Sampling Project.

- (9) Petitioners advocate the SAFSTOR decommissioning alternative because it allows levels of radioactivity and waste volumes to decrease, thus reducing occupational and public radiation exposures, and lowering decommissioning costs;
- (10) NRC Inspection Report No. 50-29/95-05 (December 16, 1995) concludes that the issue whether activities observed were in compliance with CLI-95-14 is unresolved, but approves YAEC's proposed activities, contrary to the requirements of NRC Inspection Manual, Chapter 2561, §06.06, "Modifications or Changes to the Facility" (March 20, 1992); and
- (11) YAEC's criterion for permissible decommissioning activities, that any activity involving less than 1 percent of the on-site radioactive inventory is not "major" and may take place before approval of a decommissioning plan, violates *CAN v. NRC* because it would allow completion of decommissioning before any decommissioning plan could be approved in hearing, and constitutes unlawful segmentation under the National Environmental Policy Act.

By letter dated January 29, 1996, Yankee Atomic Electric Company responded to the petition. YAEC supplemented its response by letters dated February 15, 1996, February 21, 1996, and February 22, 1996, and by an E-mail message to the NRC Staff on January 31, 1996.

By letter dated February 2, 1996, the NRC Staff denied in part and granted in part Petitioners' requests for emergency action. The petition was also found moot in part. Petitioners' requests that the NRC take emergency action to order (A) YAEC not to undertake and the NRC Staff not to approve further major dismantling activities or other decommissioning activities, unless necessary to ensure the protection of occupational and public health and safety and (B) YAEC to cease any such activities were found moot in part and denied in part. Petitioners' request for emergency action to require NRC Region I to reinspect Yankee Rowe to determine whether YAEC has complied with the Commission's Order of October 12, 1995 (CLI-95-14), and to issue a report within 10 days after the Commission orders such an inspection, was granted.

Petitioners then requested the Commission to reverse the NRC Staff's February 2, 1996 decision on the emergency aspects of the petition. See "Citizens Awareness Network's and New England Coalition on Nuclear Pollution's Motion for Exercise of Plenary Commission Authority to Reverse NRC Staff 2.206 Decision, and Renewed Emergency Request for Compliance with Circuit Court Opinion." By Order dated February 15, 1996 (unpublished), the Commission declined to grant the emergency relief requested, as there was no showing that the Licensee would take any action before the issuance of a Director's Decision on February 22, 1996. The Commission directed the NRC Staff to address the arguments advanced by Petitioners in their February 9 motion in this Decision, with the exception of the new issues raised on page 13 of the motion, which are to be addressed in a supplementary 10 C.F.R. § 2.206 decision.

For the reasons discussed below, Petitioners' requests that the NRC prohibit YAEC from undertaking or continuing five of the nine activities evaluated by the NRC Staff's letter of November 2, 1995, are moot in part and denied in part. Of the nine activities, all with the exception of radioactive waste shipments were completed before submission of the January 17, 1996 petition. Accordingly, Petitioners' request for relief with respect to (1) completing removal of the remainder of the upper neutron shield tank, (2) removal of the component cooling water system pipes and components and spent fuel cooling system pipes and components, (3) fuel chute isolation, and (4) spent fuel pool electrical conduit installation is moot. Petitioners' request for relief with respect to radioactive waste shipments is denied. As explained below, all five contested activities were permissible, before approval of a decommissioning plan, under the pre-1993 interpretation of the Commission's decommissioning regulations, and thus are in compliance with *CAN v. NRC* and CLI-95-14. Petitioners' request that the NRC inspect Yankee Rowe to determine compliance with CLI-95-14, and issue an inspection report, was granted.

II. BACKGROUND

On February 27, 1992, YAEC announced its intention to cease operations permanently at Yankee Rowe. On August 5, 1992, the NRC issued a license amendment to limit the license to a possession-only license. 57 Fed. Reg. 37,558, 37,579 (Aug. 19, 1992).

In late 1992, YAEC proposed to initiate a Component Removal Project (CRP). On December 20, 1993, YAEC submitted a decommissioning plan based on a phased approach, starting with DECON, then SAFSTOR, and then finally dismantlement. Notice of Receipt of Decommissioning Plan and Request for Comments was published in the *Federal Register*. (59 Fed. Reg. 14,689 (Mar. 29, 1994)).

On January 14, 1993, and on June 30, 1993, the Commission issued two Staff Requirements Memoranda which, in pertinent part, interpreted the Commission's regulations to permit many decommissioning activities prior to approval of a decommissioning plan, as long as the activities do not violate the terms of the existing license or 10 C.F.R. § 50.59 with certain additional restrictions. See "Staff Requirements — Briefing by OGC on Regulatory Issues and Options for Decommissioning Proceedings (SECY-92-382), 10:00 a.m., Tuesday, November 24, 1992, Commissioner's Conference Room, One White Flint North, Rockville, Maryland (Open to Public Attendance)" (January 14, 1993) and "SECY-92-382 — Decommissioning — Lessons Learned" (June 30, 1993).

On several occasions between late 1992 and early 1994, CAN asked the NRC to offer an opportunity for an administrative hearing regarding decommissioning

activities conducted by YAEC at Yankee Rowe. The Commission denied each such request. CAN sought judicial review and challenged the denials and the January 14, 1993 interpretation of the Commission's decommissioning regulations.

On July 20, 1995, the United States Court of Appeals held that the Commission had: (1) failed to provide an opportunity for hearing to CAN, as required by section 189 of the Atomic Energy Act, in connection with the Commission's decision to permit the CRP decommissioning activities; (2) changed its pre-1993 interpretation of its decommissioning regulations without notice to the public and in violation of the Administrative Procedure Act; and (3) impermissibly allowed the Licensee to conduct CRP decommissioning activities prior to compliance with the National Environmental Policy Act requirement to conduct an environmental analysis or environmental impact statement. *CAN v. NRC*, 59 F.3d at 291-92, 292-93, and 294-95 (1st Cir. 1995). The court remanded the matter to the Commission for proceedings consistent with the court's opinion.

In response, the Commission issued a *Federal Register* notice advising: (1) that the Commission did not intend to seek further review of *CAN v. NRC*; (2) that the Commission understood that decision to require a return to the interpretation of NRC decommissioning regulations that were in effect prior to January 14, 1993; and (3) that the Commission was requesting public comments on whether the Commission should order YAEC to cease ongoing decommissioning activities pending any required hearings and any other matters connected with that issue. See 60 Fed. Reg. 46,317 (Sept. 6, 1995).

After consideration of comments filed in response to that notice, the Commission implemented *CAN v. NRC* by issuing CLI-95-14, 42 NRC 130 (1995). In CLI-95-14, the Commission reinstated its pre-1993 interpretation of its decommissioning policy, required the issuance of a notice of opportunity for an adjudicatory hearing on the Yankee Rowe decommissioning plan, held that YAEC may not conduct further "major" decommissioning activities at Yankee Rowe until approval of a decommissioning plan after completion of any required hearing, and directed YAEC to inform the Commission within 14 days of the steps it is taking to come into compliance with the reinstated interpretation of the Commission's decommissioning regulations. CLI-95-14, *supra*.

Pursuant to CLI-95-14, a proceeding is now under way to offer an opportunity for hearing on the Licensee's decommissioning plan for Yankee Rowe. Petitioners have sought intervention and a hearing.

As of July 20, 1995, when the court issued *CAN v. NRC*, YAEC had completed its Component Removal Project. In response to CLI-95-14, by letters dated October 19 and 24, 1995, YAEC identified nine ongoing activities that YAEC believed were permissible under *CAN v. NRC* and CLI-95-14.

In its letter of November 2, 1995, the NRC Staff evaluated those nine activities and found them permissible under the Commission's pre-1993 interpretation

of its decommissioning regulations, and thus under *CAN v. NRC* and CLI-95-14. The Staff also identified certain activities, although not proposed by the Licensee, which may not be conducted before reapproval of a decommissioning plan. Those activities include dismantlement of systems such as the main reactor coolant system, the lower neutron shield tank, vessels that have significant radiological contamination, pipes, pumps, and other such components, and the vapor container (containment). The Staff also identified segmentation or removal of the reactor vessel from its support structure as a major dismantlement not to be conducted until after the decommissioning plan is reapproved.

IV. DISCUSSION

A. The Nine Activities Were Permissible, Prior to Approval of a Decommissioning Plan, Under the Commission's Pre-1993 Interpretation of Its Decommissioning Regulations, and Thus Are Permissible Under *CAN v. NRC* and CLI-95-14

Petitioners contend that five of the nine activities evaluated by the NRC Staff's letter of November 2, 1995, are major dismantling or other decommissioning activities prohibited until after approval of a decommissioning plan, by *CAN v. NRC* and CLI-95-14. Specifically, Petitioners object to: (1) completing removal of the remainder of the upper neutron shield tank; (2) removal of component cooling water system pipes and components and spent fuel cooling system pipes and components; (3) fuel chute isolation; (4) spent fuel pool electrical conduit installation; and (5) radioactive waste shipments. Petitioners do not object to waste tank removal, ion-exchange pit cleanup, removal of emergency diesel generators, or the Brookhaven National Laboratory Cable Sampling Project. Petitioners acknowledge that completion of waste tank removal and ion-exchange pit cleanup are required for safety reasons. Petitioners also acknowledge that the removal of the emergency diesel generators is permissible because they are not radioactive, and that the Brookhaven National Laboratory Cable Sampling Project is a research project unrelated to decommissioning. Of the nine activities, all with the exception of radioactive waste shipments were completed before submission of the January 17, 1996 petition.

Under the Commission's pre-1993 interpretation of its decommissioning regulations, a licensee "may proceed with some activities such as decontamination, minor component disassembly, and shipment and storage of spent fuel if the activities are permitted by the operating license and/or § 50.59," prior to final approval of a licensee's decommissioning plan,¹ as long as the activity does not

¹ Statement of Consideration, "General Requirements for Decommissioning Nuclear Facilities," 53 Fed. Reg. 24,018, 24,025-26 (June 27, 1988).

involve major structural or other major changes and does not materially and demonstrably affect the methods or options available for decommissioning or substantially increase the costs of decommissioning. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-90-8, 32 NRC 201, 207 n.3 (1990); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 73 n.5 (1991); and *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 61 n.7 (1992).

Under the pre-1993 interpretation of the Commission's decommissioning regulations, examples of activities that were considered permissible and that were conducted at various facilities under a possession-only license before approval of a decommissioning plan included:

*Shoreham*²

- Core borings in biological shield wall
- Core borings of the reactor pressure vessel
- Regenerative heat exchanger removal and disassembly
- Various sections of reactor water cleanup system piping cut out and removed to determine effectiveness of chemical decontamination processes being used
- Removal of approximately half of reactor pressure vessel insulation and preparation for disposal
- Removal of fuel support castings and peripheral pieces removed and shipment offsite for disposal at Barnwell, South Carolina
- Reactor water cleanup system recirculation holding pump removed and shipped to James A. FitzPatrick Nuclear Power Plant
- Control-rod drive pump shipped to Brunswick Nuclear Station
- One full set of control-rod blade guides sold to Carolina Power and Light Company
- Control-rod drives removed, cleaned, and stored in boxes for salvage
- Process initiated for segmenting and removing reactor pressure vessel cavity shield blocks
- Process initiated for removal of instrument racks, tubing, conduits, walkways, and pipe insulation presenting interferences for decommissioning activities and/or removal of salvageable equipment

*Fort St. Vrain*³

- Control-rod drive and orifice assemblies and control rods removed from

² See Letter dated December 11, 1991, from John D. Leonard, Jr., Long Island Lighting Company, to U.S. Nuclear Regulatory Commission, Docket No. 50-322.

³ See Letter dated September 4, 1992, from Donald M. Warembourg, Public Service Company of Colorado, to the U.S. Nuclear Regulatory Commission, Docket No. 50-267.

core during defueling and shipped off site for processing or disposal as low-level waste

- All helium circulators removed and shipped off site for disposal
- Core region constraint devices (internals) removed and approximately one-half shipped off site for disposal
- About fifty core metal-clad reflector blocks (top layer of core) removed and stored in fuel storage wells
- Removal of remaining hexagonal graphite reflector elements, defueling elements, and metal-clad reflector blocks begun
- Prestressed concrete reactor vessel (PCR/V) top cross-head tendons and some circumferential tendons detensioned
- Some detensioned tendons removed from PCR/V
- Work initiated to cut and remove PCR/V liner cooling system piping presenting interferences to detensioning of PCR/V tendons
- Asbestos insulation completely removed from piping under PCR/V

Activities such as normal maintenance and repairs, removal of small radioactive components for storage or shipment, and removal of components similar to that for maintenance and repair also were permitted prior to approval of a decommissioning plan under the Commission's pre-1993 interpretation of the Commission's decommissioning regulations. See NRC Inspection Manual, ch. 2561, § 06.06 (Issue Date: 03/20/92).⁴

Of course, licensees are also permitted to complete or to conduct activities required for compliance with safety requirements before approval of a decommissioning plan. In addition, special consideration must be given to activities required to comply with other federal and state safety requirements. See Memorandum of Understanding Between the Nuclear Regulatory Commission and the Occupational Safety and Health Administration, "Worker Protection at NRC-licensed Facilities" (Oct. 21, 1988), 53 Fed. Reg. 43,950 (Oct. 31, 1988). See also NRC Inspection Manual, ch. 1007, "Interfacing Activities Between Regional Offices of NRC and OSHA." Petitioners concede that completion of activities already under way is permissible if completion is required for immediate safety purposes.

The Staff's November 2, 1995 letter evaluated the nine activities identified in YAEC's letter of October 19, 1995, based on the Commission's pre-1993

⁴ "Examples of modifications and activities, that are allowed during the post-operational phase [the interval between permanent shutdown and the NRC's approval of the licensee's decommissioning plan] are (1) those that could be performed under normal maintenance and repair activities, (2) removal of certain, relatively small radioactive components, such as control rod drive mechanism, control rods, and core internals for disassembly, and storage or shipment, (3) removal of non-radioactive components and structures not required for safety in the post-operational phase, (5) shipment of reactor fuel offsite, and (6) activities related to site and equipment radiation and contamination characterization."

interpretation of its decommissioning regulations,⁵ and determined that the nine activities were permissible before approval of a decommissioning plan.

Upon review of the petition and its supplement of February 9, 1996, the Staff took a fresh look at the nine activities and again found them to be permissible before approval of a decommissioning plan, under the pre-1993 interpretation of the Commission's decommissioning regulations, and thus under *CAN v. NRC* and CLI-95-14.

1. Completion of Removal of the Remaining Portions of the Upper Neutron Shield Tank

As stated in the NRC Staff's letter of November 2, 1995, completion of this activity was necessary to avoid a significant lead hazard to plant personnel due to lead dust or powder deposits on surfaces of the structure (particularly if the plant were to go into an extended SAFSTOR configuration, as desired by Petitioners). That contamination, if disturbed during Licensee maintenance activities or NRC inspections would pose a significant health hazard to Licensee and NRC personnel.

Petitioners object that this safety rationale is unsupported by factual information regarding actual lead levels in the tank and whether the lead levels violated OSHA standards.

Dismantlement of the upper neutron shield tank required cutting sections of the tank that had lead shielding. Cutting was completed before November 2, 1995, and lead cleanup was completed by November 8, 1995. Lead dust was created by dismantlement of the tank, already under way and completed before issuance of the November 2, 1995 Staff letter. Surface lead residue measurements in those areas ranged between 13,000 micrograms (μg)/ft² and 390,000 $\mu\text{g}/\text{ft}^2$.

The Licensee's operating procedures require the Licensee to implement industrial hygiene control methods as specified by the Occupational Safety and Health Administration in areas where there is potential for employee exposure to lead. Procedure No. AP-0713, "Lead Control Program," Revision 1 Major, § C ("Discussion"), at 3. The target for removable lead contamination is 200 $\mu\text{g}/\text{ft}^2$. *Id.*, "Discussion," § C, "Decontamination," at 4.

Lead dust resulting from dismantlement of the upper neutron shield tank was at a concentration such that surface lead contamination exceeded the target

⁵ Petitioners claim that YAEC's "1 percent" criterion for determining what constitutes major structural or other major change (and thus what activities are permissible before approval of a decommissioning plan) would allow completion of decommissioning before any decommissioning plan could be approved in hearing. The Staff does not accept or approve, and has not used this criterion to determine whether any YAEC activities, including the nine activities, are permissible before approval of a decommissioning plan.

for removable lead contamination.⁶ Licensee personnel were and are required to enter the area in order to conduct surveillances to monitor radioactive contamination and for compliance with fire protection requirements.

In view of the above, this activity was permissible for safety reasons, and, therefore, would have been allowed in a comparable situation before approval of a decommissioning plan, under the pre-1993 interpretation of the Commission's decommissioning regulations.

2. *Waste Tank Removal (Activity Decay and Dilution Tank)*

Petitioners concede that completion of this activity was required for safety reasons.

3. *Removal of Component Cooling Water System Pipes and Components and Spent Fuel Cooling System Pipes and Components*

Contrary to Petitioners' assertions, the Staff's February 2, 1996 letter did not "abandon" the November 2, 1995 rationale for finding this activity permissible. The Staff's February 2 letter repeated the November 2 rationale and provided a more detailed explanation for the Staff's conclusion that this activity is permissible under the pre-1993 interpretation of the Commission's decommissioning regulations.

The Licensee had installed a self-contained spent fuel pool cooling system, isolated from the fluid components and installed conduit to allow future electrical isolation from other systems, in order to enhance safety and integrity of the spent fuel pool for prolonged storage of fuel. As a result, the component cooling water system pipes and components and spent fuel cooling system pipes and components were rendered redundant and were no longer useful.

Removal of the no-longer-useful pipes and components was not decommissioning, but maintenance that would have been allowed, before approval of a decommissioning plan, under the pre-1993 interpretation of the Commission's decommissioning regulations.⁷ Petitioners erroneously contend that removal of

⁶The use of respiratory protection by workers would not have satisfied the Licensee's operating procedures. Until a determination is made that any employee working with lead will not be exposed to lead at the action level, respiratory protection is required. Procedure No. AP-0713, "Procedure," § C ("Lead Work Practices"), at 11. The action level is employee exposure, without regard to use of respirators, to an airborne concentration of lead of $30 \mu\text{g}/\text{m}^3$ of air calculated as an 8-hour time-weighted average, and the permissible exposure limit is $50 \mu\text{g}/\text{m}^3$ of air over an 8-hour time-weighted average, and $30 \mu\text{g}/\text{m}^3$ of air over a 10-hour time-weighted average. *Id.*, "Definitions," at 1. Between October 5, 1995, and October 11, 1995, airborne lead concentrations in the areas affected ranged between $3 \mu\text{g}/\text{m}^3$ and $2500 \mu\text{g}/\text{m}^3$. Between October 12, 1995, and October 26, 1995, airborne lead concentrations ranged between $1 \mu\text{g}/\text{m}^3$ and $250 \mu\text{g}/\text{m}^3$.

⁷Petitioners assert that the Staff provided no factual support for its conclusion that leaving the component cooling water system and spent fuel cooling system pipes and components in place would pose a safety hazard. Upon further review, the Staff has determined that removal was not necessary to prevent a safety hazard.

this equipment is not maintenance. Removal of replaced equipment (as opposed to removal of dismantled equipment not intended to be replaced) is a normal maintenance activity.

In view of the above, this activity was permissible, before approval of a decommissioning plan, under the pre-1993 interpretation of the Commission's decommissioning regulations.

4. Ion-Exchange Pit Cleanup

Petitioners concede that completion of this activity was required for safety reasons.

5. Fuel Chute Isolation

The Licensee made a commitment to NRC to complete a fuel chute isolation project, needed to enhance spent fuel pool integrity and long-term reliability, in response to NRC Bulletin 94-01, "Potential Fuel Pool Draindown Caused by Inadequate Maintenance Practices at Dresden Unit 1" (April 14, 1994). NRC Bulletin 94-01 explicitly identified potential siphon or drainage paths and freezing failures as hazards that could lead to drainage of the spent fuel pool.⁸ NRC Bulletin 94-01 required licensees to identify which of the suggested actions that the licensees would take to prevent such hazards, or to identify an alternative course of action, if the licensees needed to take such measures to bring themselves into compliance as described in NRC Bulletin 94-01.

YAEC's fuel chute isolation project eliminated a potential freezing threat and siphon path that could lead to drainage of the spent fuel pool. The NRC Staff determined actions taken to prevent potential siphon paths and freezing hazards connected with the fuel chute to be adequate. NRC Inspection Report No. 50-029/94-80 (Dec. 9, 1994).

Petitioners erroneously maintain that isolation of the upper fuel chute is not necessary to prevent a risk of siphoning or freezing, because the upper fuel chute lies above the fuel pool and cannot serve as a siphon for liquid in the pool. The fuel chute pipe originally ran from the lower lock valve at the outside wall at the bottom of the spent fuel pit (SFP) on a diagonal path to the outer shell of the vapor container (VC), through the shell and into the VC. During former plant operations a blank flange was inserted in the pipe, outside the VC shell, in order to maintain VC leak-tight integrity.

⁸ Requested action number 2 was: "Ensure that systems for essential area heating and ventilation are adequate and appropriate maintenance so that potential freezing failures that could cause loss of SFP water inventory are precluded." Requested action number 3 was: "Ensure that piping or hoses in or attached to the SFP cannot serve as siphon or drainage paths in the event of piping or hose degradation or failure or the mispositioning of system valves."

As part of the NRC Bulletin 94-01 project, one 8-foot length of this 12-inch-diameter fuel chute pipe was removed from the top of the lower lock valve and a blank flange placed over the lower lock valve so that the valve could be encased in concrete. This, in effect, made the valve part of the SFP wall. The removal of this section of pipe also eliminated a potential leak path through the pipe out of the SFP wall.

Isolation of the fuel chute, accomplished by removing the lowest flanged pipe section and sealing the lower portion of the fuel chute with concrete, eliminated a freezing and siphon hazard. Sealing the fuel chute with concrete prevents accumulation of water in the fuel chute. Accumulated water could freeze during severe winter weather and possibly damage the lower lock valve outside the spent fuel pool wall, thus opening a leak path near the bottom of the spent fuel pool.

Petitioners incorrectly maintain that the Licensee did not need to remove the upper fuel chute in order to comply with NRC Bulletin 94-01. The Licensee did not remove the upper fuel chute. The Licensee has fastened a blank flange at the wall of the VC by wedging open a flanged joint. This was a maintenance activity. This blank flange is normally in place and was removed, in the past, when fuel transfer operations took place. These transfers are now prohibited by the POL. The fuel chute isolation project was necessary to prevent potential siphon and freezing risks, was one of the actions determined to be an adequate response to NRC Bulletin 94-01, and brought the Licensee into compliance with NRC requirements.

In any event, this activity is not decommissioning, but maintenance and a safety upgrade that would have been allowed under the pre-1993 interpretation of the Commission's decommissioning regulations.

In view of the above, this activity was permissible, before approval of a decommissioning plan, under the pre-1993 interpretation of the Commission's decommissioning regulations.

6. *Removal of Emergency Diesel Generators*

Petitioners acknowledge that removal of the emergency diesel generators is a permissible activity prior to final approval of a decommissioning plan.

7. *Spent Fuel Pool Electrical Conduit Installation*

This activity involved underground installation of a power cable and its protective covering and did not involve the removal of radioactive material. The modification also enhanced the integrity and long-term safe storage of spent fuel in the spent fuel pool, by isolating spent fuel pool power supplies from potential

problems that could be caused by power circuits in other systems or heavy load impacts at the plant. The activity was part of the Licensee's overall project to enhance the safety of the spent fuel pool by establishing independent systems dedicated to spent fuel pool reliability.

The conduit installation was also consistent with NRC Bulletin 94-01, specifically the first requested action, which involves ensuring the integrity of structures and systems, necessarily including electrical systems, required for containing, cooling, cleaning, level monitoring and makeup of water in the spent fuel pool. The conduit installation project enhanced integrity of the spent fuel pool by ensuring operability and adequacy of structures and systems required for spent fuel pool integrity, specifically the electrical system.

Petitioners object that the November 2, 1995 letter implies that this activity is a decommissioning activity because it will provide a separate power supply for future decommissioning activities. Petitioners contend that there is no present threat to the integrity of the spent fuel pool, and that as long as the Licensee performs no major dismantlement activities, there is no immediate need for conduit installation.

While it is true that conduit installation will isolate the spent fuel power supply from potential problems associated with future decommissioning of other systems, conduit installation also serves the larger purpose of isolating spent fuel pool power supplies from potential problems that could be caused by power circuits in other systems at the plant, wholly apart from the conduct of any decommissioning activities. This activity represents a safety enhancement.

In view of the above, this activity was permissible, before approval of a decommissioning plan, under the pre-1993 interpretation of the Commission's decommissioning regulations.

8. *Brookhaven National Laboratory Cable Sampling Project*

Petitioners acknowledge that this activity is a research project unrelated to decommissioning.

9. *Radioactive Materials Shipments*

Under the pre-1993 interpretation of the Commission's decommissioning regulations and 10 C.F.R. § 50.59, the NRC has permitted shipment of radioactive waste and contaminated components prior to approval of a decommissioning plan, as long as it does not materially and demonstrably affect the methods or options available for decommissioning or substantially increase the cost of decommissioning, and because such shipments do not constitute a "major" activity.

NRC Staff practice prior to 1993 permitted activities such as shipment of waste or contaminated components at a permanently defueled facility pursuing decommissioning. Prior to approval of a decommissioning plan, the licensee may dismantle and dispose of nonradioactive components and structures not required for safety in the shutdown condition. After issuance of a possession-only license, the licensee also may dismantle and dispose of radioactive components not required for safety in the shutdown condition, provided that such activity does not involve major structural or other major changes and does not foreclose alternative decommissioning methods or materially affect the cost of decommissioning. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 471 (1991), approving Staff recommendations in SECY-91-129, "Status and Developments at the Shoreham Nuclear Power Station" (May 13, 1991). See also NRC Inspection Manual, ch. 2561, §§ 06.06, 06.07 (Mar. 20, 1992); Fort St. Vrain Nuclear Generating Station Amendment No. 82 to Facility Operating License No. DPR-34 (Possession-Only License, May 21, 1991); and Rancho Seco Nuclear Generating Station Amendment No. 117 to Facility Operating License No. DPR-54 (Possession-Only License, Mar. 17, 1992).

Petitioners contend that the February 2, 1996 letter of the NRC Staff applied the post-1993 interpretation of the Commission's decommissioning regulations to determine that shipment of low-level radioactive waste is permissible,⁹ based on the Staff's citation to SECY-92-382 and the associated June 30, 1993 SRM. The particular language Petitioners point to is:

Shipment of contaminated reactor internals needed for operation could proceed after issuance of a possession-only license because such components are not "major": *i.e.*, they are not needed to maintain safety in the defueled condition. See SECY-92-382, "Decommissioning — Lessons Learned" (November 10, 1992) and Staff Requirements Memorandum, "SECY-92-382 — Decommissioning — Lessons Learned" (June 30, 1993).

The Staff's February 2, 1996 letter derived this language from a discussion at pages 22-24 of SECY-92-382, "Decommissioning — Lessons Learned."

⁹ Petitioners incorrectly contend that the Staff's conclusion, that the methods or options available for decommissioning will not be materially or demonstrably affected because the Licensee's activities involve approximately 2.3 curies of residual activity, constitutes application of the Licensee's 1% criterion. The Licensee had proposed in its letter of October 24, 1995, that decommissioning activities involving less than 1% of the total curies of nonfuel components not including greater than Class C components, are not "major" decommissioning activities and thus are permissible under the pre-1993 interpretation of the Commission's decommissioning regulations. As previously stated, the NRC Staff does not accept or approve, and did not use, this criterion in its February 2, 1996 (or its November 2, 1995) letter to determine whether activities proposed by the Licensee, including shipping, are "major" activities for purposes of permissible decommissioning before approval of a decommissioning plan. See, *e.g.*, note 5, *supra*. The Staff in fact stated that since the Licensee's activities involve only 2.3 curies out of a total 4448 curies residual activity which must be decommissioned, shipment of low-level radioactive waste will not demonstrably affect the methods or options available for decommissioning.

The Commission had in fact permitted shipment of low-level waste prior to approval of a decommissioning plan under its pre-1993 interpretation of its decommissioning regulations, as explained above. SECY-92-382 accurately stated that the Commission had in fact permitted shipment of not only low-level radioactive waste and some components, but also some reactor internals, before approval of a decommissioning plan.¹⁰ The particular reference to "major" components in SECY-92-382 was in the context of permissible *shipment of waste*; that language did not define "major" for the purpose of determining what components may be *dismantled or removed* prior to approval of a decommissioning plan. No component can be shipped unless it is first removed or dismantled, and authority to ship a component already removed or dismantled does not *ipso facto* constitute authority to remove or dismantle the component in the first place. Likewise, the citation in the NRC Staff's February 2, 1996 letter to Petitioners was not intended to define "major" for the purpose of determining what components could be dismantled or removed prior to approval of a decommissioning plan, but referred to what could be shipped. The Staff's reference to SECY-92-382 was made in the context of permissible shipments only, not permissible component dismantling or removal. Regrettably, the Staff's February 2, 1995 reference to SECY-92-382 may have been insufficiently detailed to make the purpose of the reference clear.

In the case at hand, the Licensee's proposal was to ship low-level radioactive waste.¹¹ The NRC Staff's conclusion that the Licensee's proposal to ship radioactive waste¹² is permissible under the pre-1993 interpretation of the Commission's decommissioning regulations was based on the understanding that the proposal was to ship low-level radioactive waste, and was not intended to be and was not a determination that the removal or dismantling of major components was permissible under the pre-1993 interpretation of the Commission's decommissioning regulations,¹³ under *CAN v. NRC*, or under CLI-94-14.

¹⁰ See *Shoreham*, CLI-91-8, 33 NRC at 471. See also SECY-91-129, "Status and Developments at the Shoreham Nuclear Power Station (SNPS)," at 3 (May 13, 1991) (contaminated fuel support castings and peripheral pieces).

¹¹ Petitioners contend that there is no basis to determine the accuracy of the Licensee's estimate that it will make 54 shipments of low-level radioactive waste between October 1995 and July 1996. Petitioners, however, fail to set forth any facts or rationale that raise a question as to the reasonableness of the Licensee's estimate of the number of shipments.

¹² Petitioners state that neither YAEC nor the NRC Staff provided any information about the radioactivity levels in the 54 shipments that YAEC estimates it shipped and will ship between October 1995 and July 1996, and that the Licensee's January 29, 1996 estimate of 2.3 curies involved in activities already completed does not provide information about radioactivity levels of the 54 shipments that YAEC estimates it will have shipped before the end of July 1996. The Licensee has now provided that information and estimates the total radioactivity involved in the packaging and shipment of low-level radioactive waste between November 1, 1995, and July 1996, to be 1817 curies. See Letter dated February 21, 1996, from K.J. Heider, YAEC, to Morton B. Fairlie, NRC. The four contested activities, other than shipping, amounted to only approximately 8,2001 curies of residual radioactivity.

¹³ Petitioners assert that the NRC Staff's February 2, 1996 letter states that the shipment of low-level radioactive waste is permitted under the pre-1993 criteria because the radioactivity of the shipments amounts to 2.3 curies

(Continued)

The Commission's decisions in *Shoreham*, CLI-91-2, 33 NRC at 73 n.5, and *Rancho Seco*, CLI-92-2, 35 NRC at 61 n.7, do not, as Petitioners contend, prohibit shipment of low-level radioactive waste. No issue concerning such shipments was addressed in those decisions. The language cited by Petitioners paraphrases the general guideline, that "major dismantling and other activities that constitute decommissioning under the NRC's regulations must await NRC approval of a decommissioning plan," and is derived from the 1988 Statement of Consideration, "General Requirements for Decommissioning Nuclear Facilities," *supra*. As explained above, it was agency practice before 1993 to permit shipment of low-level radioactive waste and contaminated components before approval of a decommissioning plan.

Rather than store low-level radioactive waste on site for extended periods, it has long been agency policy that such waste should be shipped to disposal sites if the ability to dispose of waste at a licensed disposal site exists. Shipping of waste at the earliest practicable time minimizes the need for eventual waste reprocessing due to possibly changing burial ground requirements and reduces occupational and non-occupational exposures and potential accident consequences. NRC Generic Letter 81-38, "Storage of Low-Level Radioactive Wastes at Power Reactor Sites" (Nov. 10, 1981).

Petitioners contend that YAEC may not ship low-level radioactive waste because the Yankee Rowe possession-only license does not permit it.¹⁴ Although Petitioners are correct that no language in the Yankee Rowe POL explicitly states that shipment of low-level radioactive waste is authorized, the Yankee Rowe POL does authorize that activity. Section 1.H of the POL, issued August 5, 1992, authorizes Yankee Rowe to receive, possess, and use byproduct, source, and special nuclear materials in accordance with the Commission's regulations in 10 C.F.R. Parts 30, 40, and 70. Authority to ship low-level radioactive waste is conferred upon all byproduct material, source material, and special nuclear material licensees by NRC regulations in 10 C.F.R. Parts 30, 40, and 70. Byproduct materials licensees, source materials licensees, and special nuclear

or less out of the remaining 4448 curies of residual radioactivity to be decommissioned in the form of Class C or less waste. What the Staff said was that because the Licensee's activities involve approximately 2.3 curies of the remaining 4448 curies of residual radioactivity to be decommissioned in the form of Class C or less waste, shipment of low-level radioactive waste produced by the activities evaluated in the Staff's November 2, 1995 letter will not materially or demonstrably affect the methods or options available for decommissioning the Yankee Rowe site.

¹⁴ Petitioners claim that the Commission's decommissioning regulations prohibit low-level radioactive waste shipments that are not authorized by YAEC's license, citing the 1988 Statement of Consideration. See "General Requirements for Decommissioning Nuclear Facilities," 53 Fed. Reg. 24,025-26 (June 27, 1988). The Statement of Consideration makes no mention of shipment of low-level radioactive waste. The language cited gives examples of activities that licensees may conduct before approval of a decommissioning plan, but does not state or imply that the list is inclusive. "Although the Commission must approve the decommissioning alternative and major structural changes to radioactive components of the facility or other major changes, the licensee may proceed with some activities such as decontamination, minor component disassembly, and shipment and storage of spent fuel if these activities are permitted by the operating license and/or § 50.59." (Emphasis added.)

materials licensees, including Yankee Rowe, are authorized to transfer such material, as long as the recipient is authorized, see 10 C.F.R. §§ 30.41, 40.51, and 70.42, and as long as preparation for shipment and transport is in accordance with the requirements of 10 C.F.R. Part 71. See 10 C.F.R. §§ 30.34(c), 40.41(c), 70.41(a). In particular, § 2.C of the Yankee Rowe POL states that the POL is deemed to contain and is subject to 10 C.F.R. §§ 30.34 and 40.41. Accordingly, the POL authorizes the transport of low-level radioactive waste from Yankee Rowe.

Petitioners state that the "cardinal consideration" that determines whether a decommissioning activity is "major" should be the radiation dose it yields, not the radioactivity of the component involved,¹⁵ and thus the NRC Staff's February 2, 1996 letter erroneously relied upon the number of curies shipped rather than the radioactive doses involved in shipping low-level waste to determine whether the activity is permissible.¹⁶

The criteria for determining whether shipments of low-level radioactive waste will demonstrably affect the methods or options available for decommissioning have not been well defined. During review of the petition and its supplement, the NRC Staff has continued to examine the question of whether the Licensee's shipments of low-level radioactive waste will demonstrably affect the methods or options available for decommissioning. In this case, the Staff has now also compared the radiation dose involved in the packaging and shipping of the low-level radioactive waste with the radiation dose estimated for decommissioning of the Licensee's facility. This is because, under Petitioners' theory regarding the choice of the decommissioning option, as we understand it, it seems that adoption of a different decommissioning option would most likely be required to reduce dose. The Licensee estimates that the radiation dose involved in the packaging and shipment of low-level radioactive waste between November 1, 1995, and July 1996 to be 17 person-rem.¹⁷ The estimated total radiation

¹⁵ The Commission has not articulated as a criterion for determining what constitutes a "major" decommissioning activity, the radiation dose yielded by the activity, and Petitioners cite no authority for this argument. Nor has the Commission articulated the radioactivity involved as a criterion for determining what constitutes "major" decommissioning activity.

¹⁶ The Staff mistakenly understood the Licensee's letter of January 29, 1996, to mean that the activities evaluated by the Staff's November 2, 1995 letter involved 2.3 curies. The radioactivity involved in the four contested activities, other than shipping of low-level radioactive waste, amounted to approximately 8,200 curies of residual radioactivity. (Removal of the upper neutron shield tank involved less than 5 curies, and removal of the component cooling water system pipes and components and spent fuel cooling system pipes and components involved 1,200 curies. See Letter dated October 19, 1995, from Russell A. Mellor, YAEC, to Morton B. Fairlie, NRC. Fuel chute isolation involved 2 curies, and spent fuel pool electrical conduit installation involved no curies. See Letter dated February 21, 1996, from K.J. Heider, YAEC, to Morton B. Fairlie, NRC.) In addition, the Licensee estimated that since completion of the activities described in the NRC letter, activities have been authorized by the Licensee's Manager of Operations that remove components containing a total of 2.3 curies of radioactive material. See Letter dated January 29, 1996, from Andrew C. Kadak, YAEC, to William T. Russell, NRC.

¹⁷ See Letter dated February 21, 1996, from K.J. Heider, YAEC, to Morton B. Fairlie, NRC.

exposure for decommissioning the facility is 755 person-rem.¹⁸ The estimated dose from packaging and shipping is approximately 2% of the total dose from decommissioning. As can be seen, most of the dose will be incurred in activities other than shipment of low-level radioactive waste. As the Commission has previously held in this case, even potential dose reductions on the order of 900 person-rem, unless there is some extraordinary aspect to the case not apparent, cannot have ALARA significance such that one decommissioning option would be preferable to another.¹⁹ Accordingly, the Staff concludes that the Licensee's shipment of low-level radioactive waste will not demonstrably affect the methods and options available for decommissioning.

In view of the above, the shipments of low-level radioactive waste between October 1995 and July 1996, before approval of a decommissioning plan, is permissible under the pre-1993 interpretation of the Commission's decommissioning regulations.

B. The Five Contested Activities Will Neither Individually Nor Collectively Substantially Increase the Costs of Decommissioning

YAEC estimates the cost of shipment and disposal of all low-level radioactive waste between the October 1995 issuance of CLI-95-14 and the scheduled date of completion of the hearing in mid-July 1996, to be \$6.5 million, or approximately 1.75% of the estimated \$368.8 million total decommissioning cost. It would be speculative to conclude that the decommissioning method proposed by Petitioners, SAFSTOR, would be less expensive. There is no evidence that the Licensee's shipments will increase decommissioning costs or that continued storage of the waste will decrease the ultimate costs. Thus, the Staff concludes that YAEC's shipment of low-level radioactive waste will not substantially increase the costs of decommissioning.

Petitioners erroneously contend that the cost of shipments of low-level radioactive waste could be reduced by postponing the packaging and shipment of low-level waste, presumably because some waste would decay to levels such that the volume of waste that will require shipment would decrease. Delay will not significantly reduce the volume of waste shipped because the waste is not segregated by the radioactive isotope involved, and some of the radioactive isotopes involved have very long half-lives, i.e., nickel-63 has a half-life of 100 years. Cobalt-60, which has a half-life of 5.27 years, was the isotope selected by the Petitioners to postulate a reduction in waste volume. Moreover, delay could

¹⁸ Order Approving the Decommissioning Plan and Authorizing Decommissioning of Facility (Yankee Nuclear Power Station), "Environmental Assessment by the U.S. Nuclear Regulatory Commission Related to the Request to Authorize Facility Decommissioning," at 22.

¹⁹ CLI-96-1, 43 NRC 1 (1996).

possibly increase decommissioning costs because shipping and burial costs may increase.

The Licensee estimates costs for the five activities contested by Petitioners to be \$6.5 million for shipments of low-level waste between October 1995 and July 1996 and \$2.4 million for the four other contested activities,²⁰ for a total of \$8.9 million, or 2.1% of the \$368.8 million estimated total decommissioning costs. There is no evidence that these activities will give rise to consequences that will increase the total cost of decommissioning. Accordingly, the five contested activities will not substantially increase decommissioning costs, either individually or collectively.

C. Petitioners' Request for an Inspection and Inspection Report Was Granted

Petitioners' request for reinspection of Yankee Rowe to determine compliance with CLI-95-14 and for issuance of an inspection report was granted. NRC Region I inspected the Yankee Rowe facility for a second time on December 5-18, 1995, to determine compliance with CLI-95-14. NRC Inspection Report No. 50-029/95-07 was issued January 31, 1996. The Inspection Report concludes that the Licensee's activities were conducted in accord with the specifications of the Staff's November 2, 1995 letter. The first inspection was conducted in October 1995, before the provision of technical guidance or criteria to assist the Region in determining compliance with CLI-95-14. Subsequently, the NRC Staff issued its letter of November 2, 1995, evaluating the nine activities, all of which are permitted by *CAN v. NRC* and CLI-95-14, as explained above.

Petitioners claim that the January 31, 1996 Inspection Report merely repeats the Staff's erroneous interpretation of the Commission's decommissioning standards, and thus constitutes no relief. The inspection report explicitly states that the nine activities evaluated by the Staff's November 2, 1995 letter were inspected and that the Licensee limited the scope of its work to those activities. Petitioners' disagreement with the Staff's conclusion that the nine activities are in compliance with *CAN v. NRC* and CLI-95-14 does not constitute denial of Petitioners' request for an inspection and an inspection report to determine compliance with *CAN v. NRC* and CLI-95-14.

²⁰The Licensee spent \$610,000 on the four activities in the fourth quarter of 1995, which is approximately 25% of the estimated total cost for these four activities. See Letter dated February 15, 1996, from Russell A. Mellor to Morton B. Fairtile.

IV. CONCLUSION

For the reasons given above, Petitioner's request that shipments of low-level radioactive waste be prohibited is denied, and Petitioners' request that four other activities be prohibited is moot.²¹ Additionally, Petitioners' request for an inspection of Yankee Rowe to determine compliance with CLI-95-14 and an inspection report was granted.

As provided by 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review. The Decision will become the final action of the Commission 25 days after issuance, unless the Commission on its own motion institutes review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

William. T. Russell, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 22d day of February 1996.

²¹ Petitioners claim that the NRC erroneously found on February 2, 1996, that the request for emergency relief was moot in part. Petitioners assert that the Licensee continues to unlawfully ship low-level radioactive waste and that on January 29, 1996, the Licensee stated that it is considering whether to conduct seven activities, in addition to the nine evaluated by the Staff's November 2, 1995 letter. The February 2, 1996 letter of the Staff and this Decision explicitly denied Petitioners' request to prohibit shipment of low-level radioactive waste, and made no finding that this request is moot. The February 2, 1996 letter and this Decision explicitly state that Petitioners' request for emergency relief regarding the remaining four contested activities was moot because those activities had been completed before the submission of the petition. Nonetheless, both the February 2, 1996 letter and this Decision found that those four activities were permissible, prior to approval of a decommissioning plan, under the pre-1993 interpretation of the Commission's decommissioning regulations. Neither the Staff's February 2, 1996 letter nor this decision address the seven activities that the Licensee states it is now considering. The Staff will address those activities in a supplemental Director's Decision, as required by the Commission's order of February 15, 1996.