

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

BEFORE THE COMMISSION

'98 JUL 13 P2:47

In the Matter of )

YANKEE ATOMIC ELECTRIC CO. )

(Yankee Nuclear Power Station) )

OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATIONS STAFF

Docket No. 50-029-LA

July 10, 1998

**NEW ENGLAND COALITION ON NUCLEAR POLLUTION'S  
BRIEF ON APPEAL OF LBP-98-12**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.714a, the New England Coalition on Nuclear Pollution ("NECNP") hereby files its brief on appeal of LBP-98-12, the Licensing Board's Memorandum and Order (Decision on Standing), which denies NECNP's request for a hearing on Yankee Atomic Electric Company's ("YAEC's") License Termination Plan ("LTP") for the Yankee Rowe Nuclear Power Station ("Yankee Rowe"). The Licensing Board's decision must be reversed, because it arbitrarily ignores relevant information unequivocally demonstrating NECNP's standing to intervene, unlawfully refuses to credit the accuracy of NECNP's uncontroverted assertions, and unlawfully rejects the relevance of NECNP's concerns to demonstrate its standing. Moreover, the Licensing Board unlawfully ruled that YAEC's authority to utilize dry cask storage is already licensed. Finally, the Commission should take review of the NRC Staff's abject failure to comply with the decommissioning rule's requirement for the provision of a public meeting on LTP's, and order the Staff to hold a new meeting that provides adequate public notice and a reasonable opportunity to review relevant documents prior to the meeting.

## II. FACTUAL AND PROCEDURAL BACKGROUND

### A. Litigation of Decommissioning Activities and Decommissioning Plan for Yankee Rowe Reactor

On February 27, 1992, YAEC announced that it intended to permanently cease operations at Yankee Rowe. The Nuclear Regulatory Commission ("NRC" or "Commission") Staff granted YAEC's subsequent application for a Possession Only License ("POL") on August 5, 1992.

In late 1992, the NRC approved YAEC's undertaking of decommissioning activities known as the "Component Removal Program," despite the fact that YAEC had not submitted the decommissioning plan required by the NRC's regulations at that time. Citizens Awareness Network ("CAN"), one of the petitioners in this proceeding, successfully challenged the NRC's action in federal court. *Citizens Awareness Network v. NRC*, 59 F.3d 284 (1st Cir. 1995). The First Circuit Court of Appeals ruled that under the Atomic Energy Act, CAN was entitled to a hearing in connection with the NRC's decision to permit the early CRP activities. 59 F.3d at 295.

While the case was pending, YAEC submitted a Decommission Plan and associated revisions to the Final Safety Analysis Report ("FSAR"), which generally described YAEC's planned decommissioning activities. The Decommissioning Plan also assumed that spent fuel would be stored in the Spent Fuel Pit until the end of 1999, and then transferred to an on-site dry storage facility. FSAR at 6 (Rev. 6/95). The NRC Staff approved the Decommissioning Plan without a hearing, while the appeal to the First Circuit was pending.

Following the Court's decision, the Commission solicited public comment on how it should implement the Court's Remand order, and subsequently declared that it would offer the public the opportunity to request an adjudicatory hearing on the decommissioning plan. CLI-95-

14, 42 NRC 130 (1995). NECNP and CAN jointly requested a hearing, petitioned to intervene, and were granted standing to intervene, although the Board initially rejected all of their contentions. LBP-96-2, 43 NRC 61, 68-70 (1996). Following an appeal to the Commission, the Licensing Board admitted a contention relating to the choice between the DECON and SAFSTOR alternatives. LBP-96-15, 44 NRC 8 (1996).

Both the Licensing Board and the Commission rejected NECNP's and CAN's contentions challenging the adequacy of YAEC's decommissioning plan with respect to storage of spent fuel. Contention A(2) challenged YAEC's failure to perform any ALARA analysis of the occupational doses that would be incurred as a result of the dry cask spent fuel storage option assumed in the Decommissioning Plan. Citizens Awareness Network's and New England Coalition on Nuclear Pollution's Petition to Intervene and Supplemental Petition to Intervene at 7, 13 (November 5, 1995). Contention B(2) challenged the Decommissioning Plan's failure to adequately describe YAEC's plans for dry storage of High Level Waste pending completion of decommissioning. *Id.* at 14, 16 and note 31.

The Licensing Board rejected NECNP's and CAN's concerns on the ground that submittal of YAEC's plans for dry storage of spent fuel could be postponed until a later date for approval prior to the start of the activities. LBP-96-2, 43 NRC at 79. The Board reasoned that:

[W]hen and if YAEC chooses to close its Spent Fuel Pit and move to dry cask storage, that choice must undergo an agency approval process that provides for, among other things, consideration of whether there is compliance with ALARA objectives and a public hearing opportunity regarding the ISFSI application. *See* 10 C.F.R. §§ 72.44(d), 72.46; *see also Sacramento Municipal Utility District (Rich Seco Nuclear Generating Station)*, LBP-93-23, 38 NRC 200, 246 (1993) (given pendency of separate proceeding regarding ISFSI, contention asserting decommissioning plan environmental assessment inadequate because of lack of analysis for ISFSI emissions not admissible).



Id. On appeal, the Commission upheld the Board's refusal to admit dry cask storage issues on the ground that:

Petitioners inappropriately assume that YAEC plans to move the spent fuel from the pool into dry cask storage. The Commission has not approved any license amendment authorizing YAEC to do so, nor has the Licensee submitted an application for such an amendment. Indeed, YAEC has indicated several times in this proceeding that it has not yet made any decision whether to seek such an amendment. [footnote: YAEC recently announced that it has selected a company to design an interim dry cask storage facility for Yankee Rowe's spent fuel. However, YAEC indicated that it had 'not yet made the decision to actually build a dry cask storage facility at the Rowe site.' YAEC Press Release, issued May 16, 1996.] Our regulations do not require YAEC at the time it seeks approval of its decommissioning plan to decide whether it will move spent fuel into dry cask storage. Again, YAEC is dealing with uncertainties, and YAEC's inclination to defer this decision is hardly unreasonable.

CLI-96-7, 43 NRC 235, 257 (1996).

#### **B. Promulgation of 1996 Decommissioning Rule**

In mid-1995, the Commission published a proposed rule which would amend NRC regulations "on the decommissioning procedures that lead to the termination of an operating license for nuclear power reactors and release of the property." 60 Fed. Reg. 37,374 (July 20, 1995). According to the Commission, the rule would:

preserve the substantive elements of the current regulations, provide for greater public participation in the decommissioning process, and allow the licensee to perform decommissioning activities provided certain constraints are met. The proposed rule would make the decommissioning process more responsive to current licensing needs and improve the process in the areas of understandability, efficiency, and uniformity.

60 Fed. Reg. at 37,376. The Commission proposed three phases of decommissioning. During Phase I, the licensee would submit a post-shutdown decommissioning activities report ("PSDAR") describing the licensee's planned decommissioning activities, a schedule for their accomplishment, an estimate of decommissioning costs, and a discussion of whether the activities



were bounded by existing environmental impact statements. Id. The PSDAR would be subject to public comment and a public meeting, but not a hearing. Major decommissioning activities could be carried out without a license amendment. Id. Phase II would involve an optional storage period. 60 Fed. Reg. at 37,377. In Phase III, the licensee would submit a license termination plan ("LTP") near to the time of completion of decommissioning. Id. The LTP would contain:

a site characterization, a description of remaining dismantlement activities (if any), plans for site remediation, detailed plans for the final radiation survey, a description of the end use of the site (if restricted), an updated site-specific analysis of remaining decommissioning costs, and a supplement to the environmental report, as required by § 51.53, that describes any new information or significant environmental changes associated with the licensee's proposed activities.

Id. In short, the LTP would provide a blueprint for the final site characterization and cleanup activities necessary to permit termination of the license and release of the site for unrestricted use.

The proposed rule stated that the NRC would provide public notice of receipt of the LTP "as a license amendment," conduct a public meeting on the LTP, and offer the public an opportunity to request a hearing on the LTP. Id.

The Commission promulgated the final version of the rule, with limited changes, on July 29, 1996. 61 Fed. Reg. 39,278. As clarified by the Commission in the Final Rule:

The license termination plan provides documentation on the remaining activities necessary to terminate the license and includes consideration of remediation aspects that could involve license termination under either unrestricted or restricted release conditions (once the rulemaking on acceptable residual release criteria is final). The site characterization, description of the remaining dismantlement activities and plans for site remediation are necessary for the NRC to be sure that the licensee will have adequate funds to complete decommissioning and that the appropriate actions will be completed by the licensee to ensure that the public health and safety will be protected.

61 Fed. Reg. at 39,289. In this context, under the Final Rule, § 50.82(a)(9)(ii) of the Final Rule

required that an LTP "must include" the following:

- (A) A site characterization;
- (B) Identification of remaining dismantlement activities;
- (C) Plans for site remediation;
- (D) Detailed plans for the final radiation survey;
- (E) A description of the end use of the site, if restricted;
- (F) An updated site-specific estimate of remaining decommissioning costs; and
- (G) A supplement to the environmental report, pursuant to § 51.53, describing any new information or significant environmental change associated with the licensee's proposed termination activities.

The Final Rule also provided that following "notice to interested persons," the LTP would be approved, subject to appropriate and necessary license conditions, if it demonstrates:

that the remainder of decommissioning activities will be performed in accordance with the regulations in this chapter, will not be inimical to the common defense and security or to the health and safety of the public, and will not have a significant effect on the quality of the environment.

10 C.F.R. § 50.82(a)(10).

In promulgating the Final Rule, the Commission reiterated its intent to hold adjudicatory hearings on LTP's. Although the new rule eliminated the formerly-required hearing on a licensee's decommissioning plan, the Commission determined that "[a] more formal public participation process is appropriate at the termination stage of decommissioning because the final disposition of the site is determined at that time." 60 Fed. Reg. at 39,284. The Commission explicitly rejected a comment arguing that the public hearing was unnecessary and therefore should be eliminated. As the Commission explained:

With respect to the termination plan, the Commission recognizes that ongoing rulemaking proceedings may result in establishing criteria for the restricted release of sites. *Even if a hearing is not legally mandated at the termination stage as argued by some commenters, the Commission views it as appropriate to use the amendment process for approval of termination plans, including the associated opportunity for a hearing, to allow public participation on the specific actions required for license termination.* In particular, the

Commission has determined that, if a hearing is requested on the termination plan, the hearing must be completed before release of the site. This action will help ensure meaningful public input on any proposal for restricted release of the site.

61 Fed. Reg. at 39,289 (emphasis added).

### **C. Submittal of License Termination Plan for Yankee Rowe**

On May 15, 1998, YAEC submitted an LTP to the NRC Staff.<sup>1</sup> YAEC's cover letter to NRC, enclosing the LTP, summarizes the goals and content of the LTP as follows:

YAEC's intent is to complete the decommissioning of YNPS by safely and efficiently returning the site to a condition which permits release of the site for unrestricted use and termination of the 10 CFR Part 50 License. The License Termination Plan describes how decommissioning will be completed and the site restored to a "green field" condition in three phases. The License Termination Plan also includes a Final Status Survey Plan which presents the site release criteria.

Letter from Andrew C. Kadak, YAEC, to Morton Fairtile, NRC, re: License Termination Plan for Yankee Nuclear Power Station (May 15, 1997) (hereinafter "Kadak Letter"). Thus, the purpose of YAEC's LTP is to ensure that all remaining above-regulatory-limits radioactive contamination on the Yankee Rowe site is removed, such that the site can be restored to a "green field." Once cleanup is completed, the license will be terminated, the fence may be torn down, the property may be transferred to another owner for any conceivable use, and the general public may have access to the site.

The LTP generally sets forth the information required by 10 C.F.R. § 50.82(a)(9)(ii). While some of the information is already contained in the 1995 Decommissioning Plan and FSAR, the LTP provides significant new and/or more detailed information on such subjects as the characterization of existing radiological contamination on the site, YAEC's criteria for cleanup of

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<sup>1</sup>The LTP was later revised by submittal of December 31, 1997.



the site, YAEC's proposed strategy for final remediation of contamination, and the methodology and scope of the final status survey.

**D. NRC Public Meeting on License Termination Plan**

As required by 10 C.F.R. § 50.82(a)(9)(iii), the NRC Staff scheduled a public meeting on the LTP. On January 5, 1998, the NRC published a Federal Register notice of its intent to hold a public meeting on January 13, 1998 -- only eight days later. Moreover, although YAEC had filed a significant revision to the LTP on December 31, 1997, it was not available in the Local Public Document Room prior to the meeting. Moreover, despite the NRC's general policy of inviting the public to attend meetings between the Staff and licensees regarding licensing issues, the public was not included in two teleconferences between the Staff and YAEC regarding the Staff's questions on the LTP. *See* Amended Petition at 2. The NRC Staff rejected requests from the public that the NRC reschedule the meeting to a later date in order to provide the public with thirty days notice of the meeting date and 30 days in which to review the revised version of the LTP.

The public meeting started at 7 p.m. Although the building was available until 11 p.m., the moderator cut off all questions early in the meeting and concluded the meeting at 10 p.m., leaving many questions unanswered. Despite the fact that there was plenty of time for the NRC Staff to have answered the questions posed by the public, the Staff made no effort to prevent the moderator from prematurely truncating public questioning. Moreover, although many questions were posed in writing, the Staff did not answer these these questions, either during the hearing or in writing afterwards. *See* Letter from James Perkins, NECNP, to Secretary of the Commission, NRC (February 24, 1998) (hereinafter "Perkins Letter.")

### **E. Instant Proceeding for Approval of License Termination Plan**

On January 28, 1998, the NRC published a notice in the Federal Register, offering interested members of the public an opportunity to request a hearing regarding YAEC's LTP. 63 Fed. Reg. 4,308, 4,328. The notice also stated that the NRC Staff was proposing to make a finding of no significant hazards.<sup>2</sup>

NECNP responded to the Federal Register notice in a letter which objected to the no significant hazards finding and requested a hearing on the LTP. *See Perkins Letter*. Letters requesting a hearing were also filed by Citizens Awareness Network ("CAN") and the Franklin Regional Planning Board ("FRPB"). On March 25, 1998, the Licensing Board issued a Memorandum and Order which offered NECNP and other petitioners an opportunity to file amended petitions.

### **F. NECNP'S Amended Petition to Intervene**

In response to the Board's Memorandum and Order, on April 6, 1998, NECNP filed its "Amended Petition to Intervene in License Amendment Proceeding for the Yankee Nuclear Power Station, License Termination Plan" (hereinafter "Amended Petition"). As required by 10 C.F.R. § 2.714(a)(2), the Amended Petition addressed NECNP's standing and set forth the specific aspects of the proceeding on which NECNP sought to intervene.

As permitted by well-established NRC precedent, *see, e.g., Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 651, 68-70 (1996), NECNP asserted standing "on behalf of members who would suffer injury-in-fact from implementation of the proposed Yankee Rowe LTP." NECNP Amended Petition at 10-11. As stated in the Amended

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<sup>2</sup>No decision has been made yet on the proposed no significant hazards determination.

Petition, this injury-in-fact arises from the LTP's failure to provide adequate protection of the health and safety of NECNP members and the environment. Id. NECNP provided further explanation of the injury-in-fact by way of the outline and descriptive statement of the LTP's inadequacies which are included in the Amended Petition's identification of the specific aspects of the subject matter on which NECNP sought to intervene. Id. at 10-11 and note 6. As discussed in Section III.A of the Amended Petition, NECNP's concerns about the adequacy of the LTP relate to such issues as site characterization, radiological surveys, remaining dismantlement activities, site remediation, decommissioning funding, final status survey plan, and spent fuel storage. Amended Petition at 18-22. In a "descriptive" discussion of NECNP's concerns, NECNP provided more detail regarding these concerns. Amended Petition at 23-37.

In support of its representational standing, NECNP also attached the declaration of one of its members, Jean-Claude van Itallie. Declaration of Jean-Claude van Itallie, Member of the New England Coalition on Nuclear Pollution, Inc., Supporting Organizational Standing (March 26, 1998), Exhibit A to Amended Petition. As stated in his Declaration, Mr. Van Itallie has authorized NECNP to represent him in this proceeding. Id., par. 3. For over thirty years Mr. van Itallie has lived at the same residence, within six miles of the Yankee Nuclear Power Station. Id., pars. 1, 2. The property has been in his family for over fifty years. Id., par. 1. In the five-page Declaration, Mr. Van Itallie described in detail his concerns about both the potential health and safety and financial effects of an ineffectual cleanup of the Yankee Rowe site or an irradiated fuel accident. Id., pars. 6, 8. In addition, NECNP attached the Declaration of David A. Lochbaum (March 29, 1998), a nuclear engineer employed by the Union of Concerned Scientists, which addressed Mr. Lochbaum's concerns about the risks of spent fuel storage on the Yankee Rowe



site.

YAEC and the NRC Staff both opposed NECNP's hearing request, arguing that NECNP and the other petitioners lack standing to intervene. Response of Yankee Atomic Electric Company to Amendments to Petitions to Intervene (April 16, 1998) (hereinafter "YAEC Response"); NRC Staff's Response to New England Coalition on Nuclear Pollution's Amended Petition to Intervene (April 17, 1998) (hereinafter "NRC Staff's Response").

On June 12, 1998, the Licensing Board issued a Memorandum and Order (Decision on Standing), which denied standing to intervene to NECNP and the other two petitioners. The Board ruled that NECNP had not demonstrated the relevance or redressability of its concerns, and that NECNP had not sufficiently particularized its allegations of injury-in-fact. Thus, the Board concluded that NECNP lacked standing to intervene. LBP-98-12, slip op. at 6-10.

### **III. ARGUMENT**

#### **A. The Licensing Board Plainly Erred and Abused Its Discretion in Denying NECNP Standing to Intervene.**

##### **1. Standard of review**

Although the Commission generally defers to a Licensing Board's determination regarding standing, the Licensing Board must be reversed if its decision reflects legal error or an abuse of discretion. *Atlas Corporation* (Moab, Utah Facility), CLI-97-8, 46 NRC 21, 22 (1997). See also *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116 (1995) (Licensing Board decisions are entitled to "substantial deference" only where there has not been "a clear misapplication of the facts or law"); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-273, 1 NRC 492, 494

(1975) (standard for reversal of Licensing Board standing decisions is whether Board's conclusion is "irrational.") Here, as will be shown below, the Licensing Board committed clear legal and factual error in denying NECNP standing. Indeed, the Board's reasoning bears no rational relation to the information contained in NECNP's Amended Petition.

## 2. Standard for determining standing

Pursuant to 10 C.F.R. § 2.714(a)(2), a petition for hearing or intervention in a proceeding must "set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene." In evaluating claims of standing, the Licensing Board must "accept as true all material allegations of the [petition], and must construe the [petition] in favor of the [petitioner]." *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 286 (1995).

The Licensing Board recognized that compliance with § 2.714(a)(2) is evaluated against judicial concepts of standing, which "call for a demonstration that the proposed action will cause an injury in fact to the petitioner's interests." LBP-98-12, slip op. at 5, citing *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985). The injury alleged must be "concrete and particular," it must be "fairly traceable to the challenged action," and it must be redressable by a favorable decision. *Id.* at 5-6. Finally, the alleged injury must fall within the zone of interest protected by statute. *Id.*; see also *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993). The alleged injury may be "actual or threatened." *Cleveland Electric Illuminating Co.*, 38 NRC at 92, citing *Wilderness Society v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987).

**3. The Licensing Board misapplied the standard for determining standing, and arbitrarily ignored relevant facts.**

Although LBP-98-12 is not a model of clarity, the Board appears to have rejected NECNP's standing on two grounds: lack of redressability and failure to make a particularized claim of injury. LBP-98-12, slip op. at 6-10. Even a cursory examination of the record shows that the Board completely misapprehended the facts and misapplied the law with respect to these two issues.

Moreover, the Board's arbitrary denial of standing to NECNP in this proceeding has the effect of elevating the standing requirements for an LTP to a point that no person could obtain a hearing. As such it flies in the face of the decommissioning rule itself, which declares the Commission's commitment to provide a public hearing on LTP's. See Section II.B, *supra*, and 60 Fed. Reg. at 39,284, 39,289. A notice of hearing should not be read to "emasculat[e] the hearing process by offering a hearing that could not in fact likely be obtained." *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 12 (1993).

**a. NECNP's concerns regarding the effectiveness of YAEC's site cleanup plans are relevant and redressable.**

The Board summarized the van Itallie Declaration as follows:

The NECNP petition is supported by a declaration of an authorizing member, Jean-Claude Van Italle [sic], who expresses a concern for his health and safety through 'long term environmental effects of low-level radiation' and 'the long term effects of an ineffectual cleanup . . . or an irradiated fuel accident' on his property value. Mr. Van Italle [sic], who lives within six miles of the licensee's facility, also expresses a somewhat diffuse concern that the 'final site condition projected under the LTP . . . satisfy the NRC's criteria for general release.' See Declaration of Jean-Claude Van Italle [sic] at 1-3.

LBP-98-12, slip op. at 6. The Board agreed with the Licensee and Staff that the "above concerns are not relevant to the LTP and, not being redressable by the proceeding, are outside its



scope.” Id. In particular, the Board found that Mr. van Itallie’s concern that the final site conditions “satisfy NRC’s criteria for general release’ of the property” is not relevant or redressable because:

The licensee’s LTP advises that the site release criteria comply with NRC’s Site Decommissioning Management Action Plan of April 16, 1992 (57 Fed. Reg. 13,389) and with 10 C.F.R. § 20.1401(b). *See* LTP, Revision 1, A-7 (December 1997).

LBP-98-12, slip op. at 7.

The Board’s determination constitutes clear and reversible legal and factual error. First, the Board’s ruling is based on the legally erroneous supposition that the only issue that may be raised in this proceeding is whether the licensee has chosen the appropriate site release criteria. Although the Commission considered the choice of site release criteria to constitute an important issue, the regulation is written much more broadly than that. Section 50.82(a)(9)(ii) requires the submittal of information -- such as site characterization information, decommissioning funding information, and a plan for remediation and final site survey -- for the purpose of showing that:

the remainder of decommissioning activities will be performed in accordance with the regulations in this chapter, will not be inimical to the common defense and security or to the health and safety of the public, and will not have a significant effect on the quality of the environment.

10 C.F.R. § 50.82(a)(10). Thus, the scope of the hearing includes not just the adequacy of the criteria to be applied, but whether the licensee’s provisions for decommissioning funding, site characterization information, remediation plans, and final survey plan, are adequate to provide reasonable assurance that the site will be safe for unrestricted use once the license is terminated. Accordingly, contrary to the Board’s ruling, Mr. Van Itallie’s expressed concern regarding the health and safety and property value-related impacts of an “ineffectual cleanup” of the Yankee

Rowe site, and his concern that the "final site condition projected under the LTP . . . satisfy the NRC's criteria for general release," fall squarely within the scope of the hearing on the LTP. Mr. van Itallie's concerns are also eminently redressable through the denial of approval of the LTP or the imposition of license conditions.

Similarly, the Amended Petition's detailed concerns regarding deficiencies in YAEC's site characterization, remediation measures, and final site survey plan, are relevant to whether YAEC has made adequate provision for the ultimate cleanup of the site. These concerns include, for example,:

- the adequacy of the scope and methodology of YAEC's site characterization (Amended Petition at 18);
- the reasonableness of YAEC's description of remaining systems, structures, and components to be decommissioned (Amended Petition at 19-20);
- the adequacy of the plan for site remediation, including failure to utilize effective and inexpensive soil binding agents to reduce nuclide transport in disturbed sub-structure soils (Amended Petition at 20-21, 34);
- the adequacy of YAEC's characterization of the end use of the site (Amended Petition at 21);
- the adequacy of YAEC's estimate of the remaining decommissioning costs, including failure to support the cost estimate with information regarding the quantities of structures flooring, paving, sub-structure soil, and sub-paving soil which will require remediation (Amended Petition at 22, 35);
- the adequacy of YAEC's discussion of environmental changes associated with license termination activities, including the environmental impacts of water-borne transport of radioactive contamination from site buildings into the soil, and the effect of paving and soil compaction on runoff of contaminated water (Amended Petition at 22, 26-28); and
- the adequacy of YAEC's final status survey plan, including the reliability of extrapolating radioactivity levels from gross gamma scans, questions about YAEC's reliability to perform cleanup-related analyses raised by its poor track record at Maine Yankee, failure to provide for surveys of public landfills where radioactive trash may have been dumped,

inadequacies in proposed contamination sampling, and failure to address apparent leakage from the spent fuel pit (Amended Petition at 22, 28-29, 30-31, 35-37).

Each of these concerns manifestly is relevant to the required elements of the LTP (*see* 10 C.F.R. § 50.82(a)(9)(ii)), and to the ultimate determination of the LTP's adequacy to prepare the site for unrestricted release. The concerns are also redressable by a decision favorable to NECNP or by the imposition of license conditions. Accordingly, the Board's determination that NECNP's concerns are not relevant is facially irrational and should be reversed.

**b. The alleged harm to NECNP is real and particularized.**

The Board also plainly erred in finding that NECNP failed to allege a "particularized" claim of injury. LBP-98-12, slip op. at 8. In reaching its conclusion, the Board gave the Amended Petition an unlawfully and irrationally crabbed interpretation, failing to read the Amended Petition as a whole, to consider its assertions in conjunction with the assertions of the van Itallie Declaration, to accept the uncontroverted assertions of the Amended Petition, or to interpret the Amended Petition in the light most favorable to NECNP. *Georgia Institute of Technology*, LBP-95-6, 41 NRC at 286. Accordingly, the Board committed reversible error.

**(1) The Board plainly erred in ignoring the van Itallie Declaration's demonstration of NECNP's standing.**

First, the Board ignored the particularized claim of injury-in-fact contained in the van Itallie Declaration, which by itself provides sufficient basis to demonstrate NECNP's standing. Mr. van Itallie's assertion regarding his concern for his health and safety in the event that cleanup of the Yankee Rowe site is "ineffectual," taken together with his assertions that he is a long-time resident within six miles of the plant and walks and hikes in the area, are more than sufficient to demonstrate injury-in-fact. His concerns are particularized to the proposed licensing action,



because the purpose of the action is to restore the site to a "green fields" condition of "unrestricted" use, such that local residents like Mr. van Itallie can safely enter the site. *See* discussion in Section II.C, *supra*. If the site is not cleaned up in conformance with NRC criteria, but the license is terminated and the property released for unrestricted use, Mr. van Itallie and other local residents could be injured by radioactive contamination when they enter the site.

Under the circumstances, it is simply absurd to require a resident of the nearby area, who assertedly walks and hikes in the area, to do any more than express concern that the site is currently contaminated and that the contamination could affect his health and safety if it is not cleaned up in a manner that conforms to NRC safety standards. Because Mr. van Itallie has made these assertions, his Declaration should be held to constitute sufficient grounds for granting NECNP representational standing.

**(2) The Board plainly erred in ruling that NECNP's Amended Petition does not allege particularized injury-in-fact.**

The Board in part based its ruling on NECNP's failure to allege particularized injury on NECNP's outline and descriptive statement of the aspects on which it seeks to intervene. LBP-98-12, slip op. at 8-10. First, the Board addresses the outline. The outline provides a detailed listing of the aspects of the LTP which NECNP seeks to challenge, but is worded in phrases rather than sentences. *See* Section IV.A of the Amended Petition, at pages 18-23. For example, under the heading "Site characterization methodology/implementation in LTP," NECNP lists such issues as "[v]alidity of procedures utilized to characterize the site," "[r]easonableness of choice [of methodology]," "[s]cientific basis for choice [of methodology]," "ALARA suitability of choice [of methodology]," as well as numerous other issues. Amended Petition at 18. Apparently

faulting NECNP's outline for failing to explicitly assert that "the LTP is deficient" in connection with the concerns that it raises, the Board characterized the outline as "a number of nonconclusory generalized statements on the validity or adequacy of the elements of the LTP which are not particularized to any claimed injury." LBP-98-12, slip op. at 8.

The Board's characterization of the concerns raised in the outline as "nonclusory" elevates form over substance, myopically fails to consider the Amended Petition as a whole, and unlawfully fails to "construe the [petition] in favor of the [petitioner]." *Georgia Institute of Technology*, LBP-95-6, 41 NRC at 286. The Board simply ignored the fact that in Section III.B. of the Amended Petition, which is addressed to "Injury-in-Fact," NECNP specifically refers to the list of aspects on which it seeks to intervene in support of its assertion that the LTP "does not adequately protect NECNP members' health and safety or the health and safety of the environment."<sup>3</sup> Amended Petition at 10 and note 6. The Board also ignored the statement in note 6 that the identification of the specific aspects of the subject matter of the proceeding as to which NECNP wishes to intervene provides "an outline of LTP *inadequacies*." These aspects demonstrate the particular deficiencies in the LTP that could result in the inadequate cleanup of the site and the consequent risk of contamination to members of the public who use the property.<sup>4</sup> Id. (emphasis added).

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<sup>3</sup>In this respect, the Board also erred in asserting that the Amended Petition is deficient in that "aspects are not evaluated in the consideration of alleged injuries to substantiate standing rights." LBP-98-12, slip op. at 7-8. Because the Board actually went on to examine whether the aspects identified by NECNP support its standing, the Board's error has no substantive effect.

<sup>4</sup> In addition, the Board also ignored the obvious fact that NECNP would have no reason to identify "aspects" of the LTP on which it seeks to intervene unless it had concluded that those aspects to constitute deficiencies that threaten the health and safety of its members.

The Board also erred in asserting that the issues raised in the outline "are not particularized to any claimed injury." LBP-98-12, slip op. at 8. As noted above, at page 10, NECNP specifically asserts that the LTP fails to provide adequate protection to public and environmental health and safety. This claim of injury, as supported in detail by NECNP's outline of aspects on which it seeks to intervene, is more than sufficient to demonstrate the required "particularized injury-in-fact." In addition, NECNP makes a claim of injury-in-fact through Mr. van Itallie's declaration, which specifically alleges his concern about the impacts of a potentially "ineffectual" cleanup of the Yankee Rowe site on his health and safety and property values. The outline of the aspects on which NECNP seeks to intervene fleshes out the basis for Mr. van Itallie's health and economic concerns in great detail, which is more than sufficient to support NECNP's standing.<sup>5</sup>

Finally, the Board committed reversible legal and factual error in concluding that various issues raised in NECNP's descriptive listing of the aspects of the LTP on which it seeks to intervene (section IV.B of the Amended Petition at pages 23-37) lack particularity, or fail to assert injury to NECNP. LBP-98-12, slip op. at 9-10. For instance, the Board's assertion that NECNP's decommissioning funding concern "lacks particularity" is flatly belied by the Amended Petition, which specifically identifies the aspect in which YAEC lacks a sufficient basis for a decommissioning funding aspect, *i.e.*, YAEC's failure to quantify the amount of structure flooring, paving, sub-structure soil, and sub-paving soil, that must be remediated. LBP-98-12,

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<sup>5</sup>Moreover, by demonstrating that he is a longstanding resident of the community, and that he walks and hikes in the area, Mr. Van Itallie demonstrates that he personally is at risk of injury from inadequate cleanup of the site. Absent the presentation of controverting evidence by opposing parties, Mr. Van Itallie's statements regarding this potential injury must be accepted as true. *Georgia Institute of Technology*, LBP-95-6, 41 NRC at 286.



slip op. at 9, *citing* Amended Petition at 35. Thus, the Board's conclusion is plainly irrational. Similarly, an examination of NECNP's concern regarding the LTP's proposed methodology for decontamination demonstrates the capriciousness of the Board's ruling that the concern lacks "particularity" and provides "no demonstration of harm to the petitioner." LBP-98-12, *citing* NECNP Amended Petition at 36. As with many other equally well particularized issues, for example, NECNP is quite particular in alleging that YAEC's proposed surface contamination patterns "allow grossly contaminated patches and hot-spots to be overlooked." Amended Petition at 36. Contrary to the Board's apparent supposition, NECNP need not prove its assertion at this threshold stage of the proceeding.

**c. The alleged harm to NECNP is cognizable under NRC regulations and precedents.**

The Licensing Board also committed reversible error in ruling that numerous issues raised by NECNP are irrelevant for standing purposes because they fall outside the requirements of the regulations or Commission precedents. For instance, the Board's assertion that there is "no requirement in the regulations for the LTP to comply with NEPA" flatly ignores the requirement of 10 C.F.R. § 50.82(a)(9)(ii) that the LTP must include a "supplement to the environmental report, pursuant to § 51.53, describing any new information or significant environmental change associated with the licensee's proposed termination plan." The Amended Petition identifies significant environmental information not considered by YAEC in its LTP, such as the changes in site characteristics, including paving and compaction of soil, which are likely to affect the flow of contaminated groundwater. Amended Petition at 26-28. At this threshold stage of the proceeding, and in the absence of any controverting evidence by YAEC or the NRC Staff,

NECNP's assertion must be accepted as sufficient to confer standing.<sup>6</sup>

The Board also erred in dismissing NECNP's concerns regarding YAEC's trustworthiness to conduct accurate analyses, in light of previous anomalies in decommissioning survey results for Yankee Rowe and the botching of an emergency core cooling system computer code analysis for the Maine Yankee Atomic Power Station. Amended Petition at 29. Without explanation or supporting citation, the Board flatly asserts that: "Allegations of prior mistakes in conducting analytical surveys to reveal levels of contamination cannot be considered within the scope of the present proceeding or as a foundation for injury." LBP-98-12. The Board's position is not only irrational, but inconsistent with Commission precedent recognizing the relevance of a licensee's previous safety performance to the adequacy of a license application. *See, e.g., Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 19 (1993).

Furthermore, the Board irrationally dismissed NECNP's concern that, based on experience at other Yankee facilities, YAEC may have deposited radioactive waste in local landfills, on the ground that "[t]here is no requirement for the LTP to investigate offsite landfills." LBP-98-12, slip op. at 10, *citing* Amended Petition at 35-36. This ruling ignores the fact that one of the purposes of this proceeding is to determine whether YAEC's license should be terminated. No license should be terminated where there may be evidence that the licensee has caused radioactive

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<sup>6</sup>As additional grounds for denying standing based on this concern, the Board also asserted that "licensee notes in the LTP a compliance on environmental issues with its decommissioning plan." LBP-98-12, slip op. at 8 note 7. The validity of the licensee's claims in the LTP, however, are the very subject of the proceeding. For purposes of making the threshold determination of whether NECNP has standing, NECNP's specific challenge to the LTP must be accepted as true.

material to be deposited where it does not belong. The issue is squarely within the scope of the rule.

Accordingly, the Board arbitrarily and unlawfully ignored or misinterpreted substantial information presented in the Amended Petition and the van Itallie Declaration which demonstrates that the proposed LTP would cause injury-in-fact to NECNP and its members. NECNP has more than satisfied the NRC's requirements for establishing standing.

**B. The Commission Should Enforce LBP-96-2 and Clarify That YAEC Must Seek Licensing Approval Before Undertaking Dry Cask Storage.**

As discussed above in Section II.A, when NECNP tried to raise issues related to dry cask storage in the decommissioning proceeding in 1995-96, NECNP's concerns were dismissed. The justification provided by the Board was, in part, that YAEC had not yet made a decision as to whether to build a dry cask storage facility, and therefore the issue was prospective. LBP-96-2, 43 NRC at 79. Since that time, YAEC applied for a license amendment to permit certain changes to the technical specifications that would allow removal of spent fuel from the spent fuel pit to a combined storage-shipping cask and to enable the handling of the cask components and other hardware by the Yard Area Crane. *See* No Significant Hazards Notice, 62 Fed. Reg. 54,866 (October 22, 1997). However, YAEC has made no application for a license to construct a dry cask storage facility. Thus, no licensing of a dry cask storage facility has taken place, and no opportunity has arisen to challenge the safety or environmental risks of YAEC's proposal for dry cask storage.

Issuing a decision completely inconsistent with LBP-96-2, the Licensing Board in LBP-98-12 rejected as irrelevant all of NECNP's concerns regarding the hazards posed by spent fuel



storage pending license termination on the ground they are "activities previously licensed and considered in the licensee's decommissioning plan and approved therein." LBP-98-12, slip op. at 7 (emphasis added). Similarly, the Staff's Response to NECNP's Amended Petition states that "YAEC's Part 50 license gives it the authority to manage spent fuel and, in fact, gives it the authority under a general license to construct and operate an Independent Fuel Storage Installation." *Id.* at 5.

The effect of LBP-98-12 is to instantaneously deprive NECNP of any opportunity to raise dry cask storage related issues, by arbitrarily transforming the official characterization of these matters from prospective issues to issues that were decided in the past.

Nothing has happened that would alter the factual basis for the Licensing Board's statement in 1996. Instead, the Licensing Board has issued a new interpretation of the facts that completely undermines NECNP's hearing rights. If this aspect of LBP-98-12 is allowed to stand, it will subvert any remaining public confidence in the NRC's ability and good faith commitment to make decisions in an orderly manner that provides notice and reasonable opportunity to the public to be heard. The Commission should clarify that YAEC is not entitled to proceed with dry cask storage absent licensing of an ISFSI under 10 C.F.R. Part 72, with full safety and environmental reviews and the provision of an opportunity to request a public hearing.

**C. The NRC Failed to Comply with 10 C.F.R. § 50.82 In Its Conduct of the Public Meeting on YAEC's LTP.**

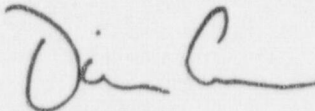
Pursuant to 10 C.F.R. § 50.82(a)(9)(iii), the NRC is required to "schedule a public meeting in the vicinity of the licensee's facility upon receipt of the license termination plan." The purpose of such a meeting is to "keep the public informed." 61 Fed. Reg. at 39,280. Contrary to

these requirements, the January 13, 1998, public meeting on the Yankee Rowe LTP was a sham. As discussed, supra, in Section II.D, the Federal Register notice of the meeting was published only eight days before the meeting. Although the application had been substantially revised prior to the meeting, the public received no opportunity to review the revised version of the LTP before the meeting. Nor was the public included in discussions of revisions to the LTP that took place between the NRC Staff and YAEC over the telephone. Questioning at the meeting was arbitrarily cut off. Questions asked on the record and submitted in writing were never answered. Thus, the public meeting was a hollow exercise rather than the informative session intended by the rule. The Commission should order the NRC Staff to notice and conduct a new meeting regarding the LTP, this time giving the public at least 30 days written notice of the meeting, and at least 30 days' opportunity to review all relevant licensing documents in the Local Public Document Room.<sup>7</sup>

#### IV. CONCLUSION

For the foregoing reasons, LBP-98-12 should be reversed, and NECNP should be granted intervenor status in this proceeding.

Respectfully submitted,



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<sup>7</sup>Although NECNP challenged the legal sufficiency of this meeting before the Licensing Board, the Board has disclaimed authority to decide the issue. LBP-98-12, slip op. at 3.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

'98 JUL 13 P2:47

In the Matter of

YANKEE ATOMIC ELECTRIC CO.

(Yankee Nuclear Power Station)

OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATIONS STAFF

Docket No. (s) 50-029-LA

**CERTIFICATE OF SERVICE**

I hereby certify that on July 10, 1998, copies of the foregoing NECNP's Notice of Appeal of LBP-98-12 and NECNP's Brief on Appeal of LBP-98-12 were served upon the following persons by US mail, first class:

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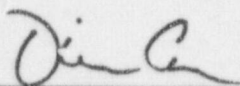
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