

UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
Before the Atomic Safety and Licensing Board

September 6, 2006 (3:37pm)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the matter of:

ENTERGY NUCLEAR VERMONT YANKEE, LLC ) Docket No. 50-271-LR  
and ENTERGY NUCLEAR OPERATIONS, INC. ) ASLB No. 06-849-03-LR  
Vermont Yankee Nuclear Power Station )  
License Renewal Application )

**NEW ENGLAND COALITION, INC'S (NEC) MOTION TO FILE SUPPLEMENTAL  
AND NEW AUTHORITY RE: NEC'S CONTENTION 1 and REQUEST FOR LEAVE  
TO AMEND CONTENTION 1 OR FILE A NEW CONTENTION**

Pursuant to 10 C.F.R. § 2.323, NEC hereby moves to submit new and highly pertinent supplemental authority likely to resolve the pending dispute regarding Contention 1 and/or its amendment. This information is critical to Entergy's Answer to NEC's contention 1 and to NEC's request for Leave to Amend Contention 1 or File a New Contention.

NEC moved to amend its Contention 1 (thermal impacts on water quality) or in the alternative file a new contention. Entergy and NRC staff opposed NEC's effort, in large part on the ground that the "partial" Clean Water Act § 316 variance submitted by Entergy is equivalent to an actual § 316 determination, and that the denial of the variance for Entergy's proposed action is immaterial. Entergy and NRC staff offered a nonsensical interpretation of 10 C.F.R. § 51.53(c)(3)(ii)(B) to support such grounds.

These arguments are now moot because Entergy no longer has a current permit or CWA § 316 determination, partial or otherwise. Late on the afternoon of August 28, 2006, the Vermont Environmental Court, pursuant to its *de novo* review authority, stayed the expired permit amendments (that remained in temporary effect) that authored Entergy's increased thermal discharge. A copy of the Court's decision is attached as Exhibit A. The Court determined that Appellants have a substantial probability of success on the merits,

namely that VANR's issuance of the now-expired permit amendments (and hence, ANR's rationale – the "partial" 316 determination) was illegal. It also concluded that there is a "sufficient potential for irreparable injury" to fish caused by the increased thermal discharge throughout their lifecycle. The Court concluded that Appellants "demonstrate[d] a substantial probability that they will prevail on the merits," Decision and Order on Motion to Stay Permit Amendment Pending Appeal (Attached) at 2, and that:

Appellants have shown sufficient potential for irreparable injury to American Shad in the Connecticut River, both at present as the juveniles become accustomed to cooler water temperatures prior to their migration down the River in the falls, and in the summer of 2007 for the next generation of juveniles.

*Id.* at 3. Any increased thermal discharge is now prohibited regardless of time of year because of the potential impact on American shad and juvenile fish.

The Court went on to conclude that:

The best interests of the public will be served by granting the stay so that it is not only in effect for September and the first half of October, but so that it remains in effect if this matter is not resolved by the time that American shad return to the River in April to Spawn, for the 2007 component of the life cycle of the 2007 cohort of juvenile shad in the River.

*Id.*

In sum, there is now no argument that Entergy does *not* have a current CWA § 316 determination or an equivalent permit. The Court has stayed the VANR's issuance of the now-expired amended permit. The Court "is charged with considering the [Entergy's] application *de novo*, applying the same substantive standards that the ANR is required to apply. The Applicant will bear the burden of proof that it qualifies for a waiver [§316 variance] of the thermal effluent limitation otherwise applicable to it." *Id.*

Entergy must “assess the impact of the proposed action on fish and shellfish resources resulting from heat shock and impingement and entrainment,” 10 C.F.R. § 51.53(c)(3)(ii)(B), because it has neither a current CWA § 316 determination, partial or otherwise (assuming that a partial determination exists), nor any equivalent permit authoring *any* increased thermal discharge. NRC Staff and NEC agree that Entergy has not performed the required cumulative impact assessment of its proposed increased thermal discharge for the 20-year period of its requested new license term. NEC Contention 1; Staff Answer to at 8 (June 22, 2006) (“The Staff does not object to the admission of this contention to the extent that it alleges that the Application does not contain an assessment of the impact of a one degree increase in thermal discharges on American shad during the renewal period.”)

Entergy or NRC staff may nonetheless argue that Entergy, for a moment, had a CWA § 316 variance. However, a partial determination is not the same thing as an actual determination. Full information is needed to make a complete § 316 determination and Entergy failed to provide the VANR with the information necessary for a complete determination. Amended Fact sheet at 4-5. The needed studies have been specified and requested. *Id.* More importantly, as NRC staff has repeatedly emphasized, the § 316 determination must be “current.” 10 C.F.R. § 51.53(c)(3)(ii)(B). There is no current determination, variance, or equivalent permit. And, to the extent that the VANR may have started down the road to issuing a determination, the Vermont Court has found it to be sufficiently defective to warrant a stay prior to review on the merits. A stay is an extraordinary remedy reserved for the few cases meeting the high standards requisite to a stay or preliminary injunction. Certainly, satisfaction of 10 C.F.R. § 51.53(c)(3)(ii)(B) requires more than provision of an incomplete and significantly defective document that is

wholly without legal effect. Indeed, CWA §316's purpose is to "assure protection and propagation" of fish. 33 U.S.C. § 1336(a). As explained above, the Court concluded that that ANR's incomplete document does the contrary; it establishes the potential for irreparable injury to fish and juvenile fish. Any effort to characterize this now-worthless document as "assur[ing] protection and propagation" of fish would strain credulity.

NEC's Contention 1, "Entergy's Environmental Report insufficiently assesses the impacts of increased thermal discharges over the requested twenty-year license extension. 10 C.F.R. § 2.309(f)(1)(i)." remains unchanged. This motion does not change or amend either NEC's Contention 1 or its proposed amended/new contention. It merely provides new authority. Therefore, there is no need to amend Contention 1 or file an amended or new contention.

In any event, providing this new authority would meet all of the criteria governing amended and/or late-filed contentions. This motion is being filed within 10 days of the occurrence giving rise to this motion -- the August 28, 2006 issuance of the Court's decision. 10 C.F.R. § 2.323. Such authority was obviously not available to NEC (or any other party) until the afternoon of August 28, 2006. It is highly relevant, likely moots or resolves pending issues regarding Contention 1, and streamlines and expedites this proceeding. Certainly, this supplemental authority does not delay the proceeding. No party is prejudiced by the attached public document. Indeed, the Applicant does not object to informing the Board of this decision. Further, fairness, accuracy, and a sound and complete record compel consideration of this new authority. There is no other forum available to NEC -- its contentions are pending before the ASLB and this supplemental authority is critical to NEC contentions. No other entity can rule on NEC's contentions. 10 C.F.R. §§ 2.309(f)(2) and (c)(1).

NEC reserves all rights to provide further analysis in the event that NRC Staff or Entergy take the unfounded and unnecessarily "form over substance" position that a citation of supplemental authority (*See F.R.App.P. 28(j)*) actually requires a new or amended contention -- a far more complex endeavor than doing the same before a Court of Appeals. Research into this issue does not justify such a position and it is not reasonably anticipated.<sup>1</sup>

The undersigned certifies that consent was sought from the parties by e-mail sent at noon on August 29, 2006 to all representatives for each party. The Vermont Department of Public Service, the Massachusetts Attorney General, and the Town of Marlboro have informed NEC that they do not object. Entergy and NRC staff do not object to a filing informing the Licensing Board of the stay, but reserve the right to respond to arguments in the motion concerning relevance or any other new assertions or allegations.

August 29, 2006

New England Coalition

by:

  
Ronald A. Shems

Karen Tyler (on the brief)

SEMS DUNKIEL KASSEL & SAUNDERS PLLC

For the firm

Attorneys for NEC

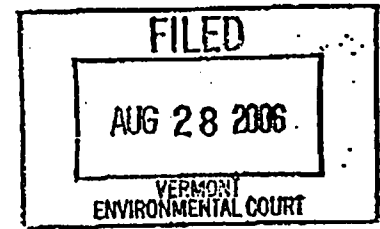
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Ray Shadis

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<sup>1</sup> On August 23, 2006, NRC Staff moved to submit new exhibits in the Vermont Yankee uprate proceeding (ASLBP No. 04-832-02-OLA) pursuant to 10 C.F.R. §§ 2.232(a) and 2.1204. Section 2.1204 is not relevant to this filing. NEC is moving here pursuant to § 2,232(a).

Attachment A

STATE OF VERMONT  
ENVIRONMENTAL COURT



In re: Entergy Nuclear/ Vermont Yankee	)	
Thermal Discharge permit amendment	)	
(Appeal of Connecticut River Watershed Council,	)	Docket No. 89-4-06 Vtec
Trout Unlimited (Deerfield/Millers 349 Ch.),	)	
and Citizens Awareness Network)	)	
(Appeal of New England Coalition	)	
on Nuclear Pollution)	)	
(Cross-Appeal of Entergy Nuclear	)	
Vermont Yankee, LLC)	)	

Decision and Order on Motion for Stay of Permit Amendment Pending Appeal

Appellants and Cross-Appellant appealed from a decision of the Vermont Agency of Natural Resources (ANR), approving an amendment of a thermal discharge permit issued to Entergy Nuclear Vermont Yankee, LLC. Appellants Connecticut River Watershed Council, Trout Unlimited (Deerfield/Millers 349 Ch.), and Citizens Awareness Network are represented by Patrick A. Parenteau, Esq., David K. Mears, Esq., and Justin E. Kolber, Esq.; Appellant New England Coalition on Nuclear Pollution is represented by Evan J. Mulholland, Esq.; Cross-Appellant-Applicant Entergy Nuclear Vermont Yankee, LLC is represented by Elise N. Zoli, Esq., Barbara G. Ripley, Esq., Sarah Heaton Concannon, Esq., and Gwyn Williams, Esq.; the Windham Regional Commission appeared through James Matteau and John Bennett, who are not attorneys; the Vermont Agency of Natural Resources is represented by Catherine Gjessing, Esq. and Warren T. Coleman, Esq.; and the Natural Resources Board is represented by John H. Hasen, Esq. and Daniel D. Dutcher, Esq.

Appellants have moved to stay the permit amendment, pending the conclusion of the merits of this appeal. The permit was issued on March 30, 2006, and allows the thermal discharge from Entergy Nuclear/Vermont Yankee to increase the temperature of the Connecticut River by an additional 1° F, within a defined measurement area or mixing zone, from June 16 through October 14 of each year.<sup>1</sup> Appellants argue that the stay will preserve the status quo of Applicants' previous permit conditions during this litigation, which is now scheduled to be heard in late January and early February<sup>2</sup> of 2007.

The Court must consider the movants' likelihood or substantial possibility of success on the merits of this de novo appeal, irreparable injury that may occur in the absence of the stay, whether the grant of the stay will substantially harm other parties, and whether the stay will serve the best interests of the public. In re Allied Power & Light Co., 132 Vt. 554, 556 (1974), as discussed by Justice Skoglund in issuing a stay during the pendency of the appeal in In re Stormwater NPDES Petition, Docket No. 2004-515 (Vt. Supreme Ct., April 7, 2005).

Appellants have come forward with sufficient evidence to demonstrate a substantial possibility that they will prevail on the merits; that is, a sufficiently substantial possibility to examine and weigh the other factors to be considered in whether or not to grant a stay. Unlike federal judicial review of agency action, no presumption is afforded the fact that the

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<sup>1</sup> The underlying permit of which this is an amendment expired on March 30, 2006; the renewal permit process is ongoing and may result in the issuance of a renewal permit before the close of 2006. If and when an appeal is filed from the issuance of the renewal permit, we will consider whether it should be consolidated with the present proceedings. V.R.E.C.P. 2(b), and see V.R.E.C.P. 1.

<sup>2</sup> At present, the following dates are being reserved for this trial: January 24-26, January 30 and 31, February 1 and 2, February 6-9, and February 13-16. Please be prepared to discuss whether fifteen trial days will be sufficient and whether the parties will be able to use these specific dates.

permit amendment was issued. The Court is not charged with determining whether the ANR's decision is supported by substantial evidence in the record as a whole; rather, it is charged with considering the application de novo, applying the same substantive standards that the ANR is required to apply. The Applicant will bear the burden of proof that it qualifies for a waiver of the thermal effluent limitation otherwise applicable to it.

Appellants have shown sufficient potential for irreparable injury to American shad in the Connecticut River, both at present as the juveniles become accustomed to cooler water temperatures prior to their migration down the River in the fall, and in the summer of 2007 for the growth of the next generation of juveniles.

On the other hand, the grant of the stay will not substantially harm other parties. The consequence to the Applicant will only be a financial one, and consequently not irreparable by definition, in that energy that could otherwise have been sold will have to be expended on the operation of the cooling towers. The Applicant will be able to operate under its previous permit during the pendency of its renewal permit application, as well as during the pendency of the present appeal over its thermal effluent waiver amendment application. The public will view the plume of water vapor from the cooling tower, but no substantial harm has been shown to result from the mere visibility of the plume to the public. No evidence of drought conditions or impairment of the River, and consequently no substantial harm to the public interest, has been shown to be occurring during present conditions, due to the removal of the cooling water and its evaporation into the atmosphere.


The best interests of the public will be served by granting the stay so that it is not only in effect for September and the first half of October of 2006, but so that it remains in effect if this matter is not resolved by the time that adult American shad return to the River in April to spawn, for the 2007 component of the life cycle of the 2007 cohort of juvenile shad in the River.



This stay will remain in effect until further order of the Court, without prejudice to any motions to amend or lift the stay based upon evidence or arguments not already made to the Court in the present motion memoranda. The parties should expect that, if any motions are filed based on any potential trade-off of environmental consequences between the use of the air (that is, the cooling towers) and the use of the river water for cooling purposes, such motion will be scheduled for an evidentiary hearing.

Accordingly, based on the foregoing, it is hereby ORDERED and ADJUDGED that Motion for Stay is GRANTED until further order of the Court. We will hold a telephone conference this afternoon at 4:30 to discuss this order and the relative scheduling of any other necessary pretrial work, as well as the scheduled trial dates. If the parties wish to discuss moving any of the trial dates, to the extent possible they should be prepared at the conference with the unavailable dates for themselves and their witnesses from mid-February through mid-June of 2007.

Done at Berlin, Vermont, this 28<sup>th</sup> day of August, 2006.

  
Merideth Wright  
Environmental Judge

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
Entergy Nuclear Vermont Yankee, LLC	)	Docket No. 50-271-LR
and Entergy Nuclear Operations, Inc.	)	ASLBP No. 06-849-03-LR
	)	
(Vermont Yankee Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

I, Michelle Cronin, hereby certify that copies of the NEW ENGLAND COALITION, INC'S, MOTION TO FILE SUPPLEMENTAL AND NEW AUTHORITY RE: NEC'S CONTENTION 1 and REQUEST FOR LEAVE TO AMEND CONTENTION 1 OR FILE A NEW CONTENTION, in the above-captioned proceeding were served on the persons listed below, by U.S. Mail, first class, postage prepaid; by Fed Ex overnight to Judge Elleman; and, where indicated by an e-mail address below, by electronic mail, on the 29th day of August, 2006.

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August 29, 2006

Office of the Secretary  
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Mail Stop O-16C1  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Re: In the Matter of Entergy Nuclear Vermont Yankee, LLC and  
Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power  
Station), Docket No. 50-271-LR, ASLBP No. 06-849-03-LR

Dear Sir or Madam:

Please find enclosed for filing in the above stated matter New England Coalition,  
Inc.'s Motion to File Supplemental and New Authority re: NEC's Contention 1 and  
Request for Leave to Amend Contention 1 or File a New Contention.

Thank you for your attention to this matter.

Sincerely,



Michelle Cronin, Clerical Assistant  
SHEMS DUNKIEL KASSEL & SAUNDERS, PLLC

Cc: attached certificate of service  
Enclosures