RAS 12233

September 8, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board



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| 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) | ) | |

**ENTERGY'S ANSWER TO NEW ENGLAND COALITION'S MOTION TO FILE SUPPLEMENTAL AND NEW AUTHORITY**

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (hereinafter collectively referred to as "Entergy") hereby answer the 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 ("Motion"), which NEC filed on August 29, 2006. NEC's Motion relates to and provides a copy of an August 28, 2006 decision of the Vermont Environmental Court staying the March 30, 2006 amendments to NPDES Permit No. 3-1199 for the Vermont Yankee Nuclear Power Station "(VYNPS"). Motion, Att. A (hereinafter the "Stay Decision").[1] NEC overstates the relevance of this decision, which does not affect the inadmissibility of NEC's aquatic contention.

NEC incorrectly asserts that "Entergy no longer has a current permit or CWA 316 determination, partial or otherwise." Motion at 1. While the Court has stayed the March 30,

[1] An amended stay decision was issued on September 1, 2006, and is attached. The amended decision allows Entergy a period of two weeks from the original order (specifically, until September 8, 2006,) to implement the order. Also, the amended decision limits the period of the stay to April 1, 2007 and indicates that an additional decision will need to be made, after further review of evidence presented, to determine whether any stay should exist during the summer of 2007.



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2006 amendments to the NPDES permit, the Court stated: "The Applicant will be able to operate under its previous permit during the pendency of its renewal permit application, as well during the pendency of the present appeal over its thermal effluent waiver amendment application." Stay Decision at 3. This was consistent with NEC's arguments before the Court, which sought the stay to "preserve the status quo of Applicant's previous permit conditions during this litigation." Id. at 2. Consequently, the permit as it existed prior to the March 30, 2006 amendments is in effect, and this permit contains a 316(a) variance for the thermal discharges currently authorized by that permit. Thus, VYNPS continues to have an NPDES permit and a 316(a) variance applying the thermal effluent limitations currently allowed.[2]

Further, the Court has not vacated the March 30, 2006 amendments and 316(a) variance, but merely stayed their effect to preserve the status quo pending judicial review. Contrary to NEC's assertion in the Motion at 1, Entergy's prior arguments concerning the inadmissibility of NEC's aquatic contention are not mooted by the Stay Decision. If the March 30, 2006 amendments are upheld on judicial review, there will necessarily be a valid 316(a) variance supporting the increased thermal effluent limitations. In other words, it is still appropriate for the NRC to rely upon the VANRs' findings supporting the 1°F increase in the thermal effluent

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[2] NEC cites 10 C.F.R. § 51.53(c)(3)(ii)(B) for the proposition that the § 316 determination must be "current." Motion at 3. In 10 C.F.R. § 51.53(c)(3)(ii)(B), the word "current" modifies "Clean Water Act 316(b) determinations" not at issue here. While the word "current" does not appear before "316(a) variance" in this rule, it is sensible to interpret the rule as requiring an applicant to provide the 316(a) variance applicable to the thermal discharges authorized by whatever NPDES permit is currently in effect. In this proceeding, Entergy has provided a 316(a) variance contained in the original NPDES Permit No. 3-1199, governing the thermal discharges authorized by the original permit (currently in effect as stated in the Stay Decision) and has provided a 316(a) variance for the increased limitations authorized by the March 30, 2006 amendments, which will apply if those amendments are upheld on judicial review. The supporting documentation included in the VYNPS license renewal application with this variance include the VANR's assessment of impacts relating to both the discharges authorized by the original permit and the discharges authorized (but stayed) by the March 30, 2006 amendments. Nothing more is required by 10 C.F.R. § 51.53(c)(3)(ii)(B).

limits, because that increase will only occur if the VANR's findings are sustained. If the March 30, 2006 amendments are vacated on judicial review, the increase would not occur, the base NPDES permit will remain intact, and no relevant controversy would remain in this proceeding.

NEC incorrectly asserts that "the Court determined that Appellants have a substantial probability of success on the merits." Motion at 1. Indeed, NEC purports to quote the Stay Decision as stating "[t]he Court concluded that Appellants 'demonstrate[d] a substantial probability that they will prevail on the merits." Id. at 2 (emphasis added). This was not the Court's determination or language. Rather, the Court found sufficient evidence to demonstrate a "substantial possibility" that appellants will prevail on the merits. Stay Decision at 2 (emphasis added). The Court did not determine that appellants' success was "probable," and certainly did not find that VANR's issuance of the permit amendments was "illegal" or "defective" as NEC suggests (see Motion at 2, 3).[3]

Finally, NEC incorrectly states that the "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." Motion at 3. The NRC Staff answer which NEC cites in support of this statement does not support NEC's characterization. The NRC Staff's answer indicated that "the alleged absence of an assessment of the impacts of the discharge temperature increase . . . can be cured by submission of the amended permit." NRC Staff Answer to Request for Hearing of New England Coalition (June 22, 2006) at 9

[3] To the contrary, the Court emphasized that it is not charged with determining whether the VANR's decision is supported by substantial evidence and was affording no presumption to the fact that the permit amendments were issued. Stay Decision at 2-3. The Court decided merely that NEC had created "a sufficiently substantial possibility to examine and weigh the other factors to be considered in whether or not to grant a stay." Id. at 2. In looking at other factors, the Court found no irreparable harm to Entergy, and therefore issued the stay. Id. at 3.

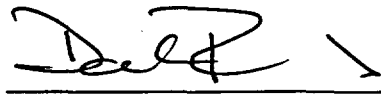
(footnote omitted). As NEC has previously acknowledged, Entergy has amended the VYNPS license renewal application to provide the amended permit containing the 316(a) variance, along with supporting documentation. The NRC may rely on that 316(a) variance and supporting documentation to assess the impacts of the potential increase, because that increase will only occur if VANR's findings are sustained. If the permit amendments are vacated, there will not be a temperature increase requiring an assessment.

In essence, NEC argues that the granting of a stay renders the March 30, 2006 amendments and 316(a) variance "now-worthless" (see Motion at 4) and contends that the impacts of the 1°F increase in the thermal effluent limits now under judicial review must therefore be assessed anew in the NRC license renewal proceeding. But contrary to NEC's assertion, the Court has not found the VANR's determinations to be "defective"(see Motion at 3) or "worthless." Rather, the VANR's determinations constitute an assessment of the aquatic impacts by a permitting authority, which under the NRC rules are to be considered in determining the magnitude of the impacts. 10 C.F.R. § 51.71(d) n.3. Moreover, a duplicative, independent review of these impacts remains exactly what section 511(c)(2) of the Clean Water Act (33 U.S.C. § 1371(c)(2)) and the NRC license renewal rules at 10 C.F.R. §§ 51.53(c)(3)(ii)(B) and 51.71(d) n.3 are intended to avoid. As long held, where the EPA or an authorized state has assessed the aquatic impacts in approving a plant's cooling water system, the NRC must take that assessment at face value. Carolina Power & Light Co. (H. B. Robinson, Unit No. 2), ALAB-569, 10 N.R.C. 557, 562 (1979). NRC may not undercut these judgments by undertaking independent analyses or setting its own standards. Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 N.R.C. 702, 712-13, 715 (1978). The NRC is not obligated to reach an independent judgment about matters determined by the

agencies with permitting authority under the Clean Water Act, but may accept their determinations as dispositive. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d. 87, 98-99 (1st Cir. 1978).

In sum, this NRC proceeding is not an appropriate forum to collaterally attack the VANR's determinations, or to duplicate either the VANR's assessment or the Vermont Environmental Court's judicial review of those determinations. The specific substantive expertise and authority over thermal effluent impacts reside in the VANR, and the judicial review before the Vermont Environmental Court provides an appropriate forum to ensure that the record is complete and the VANR's findings are correct. A duplicative NRC review would accomplish little. A Licensing Board should construe the scope of admissible concerns narrowly to avoid where possible the litigation of issues that are the primary responsibility of other agencies and whose resolution is not necessary to meet NRC's statutory responsibilities. Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 N.R.C. 119, 121-22 (1998). Thus, both the law and policy considerations compel the dismissal of NEC's contention.

Respectfully Submitted,



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Dated: September 8, 2006

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**NUCLEAR REGULATORY COMMISSION**

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Answer to New England Coalition's Motion to File Supplemental and New Authority" dated September 8, 2006, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, or with respect to Judge Elleman by overnight mail, and where indicated by an asterisk by electronic mail, this 8th day of September, 2006.

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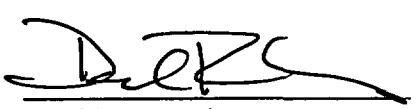

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Entergy Nuclear/Vt. Yankee Disch. Permit AmeDocket No. 89-4-06 Vtec

Enclosed find the Revised Decision and Order on the Motion to Stay.

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Co-Counsel for party 15, Daniel D. Dutcher

STATE OF VERMONT

ENVIRONMENTAL COURT

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| In re: Entergy Nuclear/ Vermont Yankee | } | |
| Thermal Discharge permit amendment | } | Docket No. 89-4-06 Vtec |
| (Appeal of Connecticut River Watershed Council, | } | |
| 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) | } | |
| | } | |

Amended 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.[1] 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[2] of 2007. The Court issued an order granting the stay on August 28, 2006. This is a revision of that order to clarify certain issues raised during the telephone hearing on August 28, 2006, and to separate the stay provisions applicable to the 2006 season from those applicable to the 2007 season, to make it unnecessary for the parties and the judicial system to spend time now on an interlocutory appeal, as that time may be better spent by the parties in their mediation and trial preparation work.

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,

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[1] 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.

[2] 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.

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 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 from now through 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. However, to preserve Applicant's rights to appeal the stay applicable to the 2007 season, we will issue the stay in two segments, as follows: The stay takes effect as of August 28, 2006, and remains in effect until April 1, 2007, or until further order of the Court issued before that date.

The stay is issued 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. In any event, a hearing will be scheduled in March, 2007, to determine whether an order should issue continuing the stay for the 2007 season; any order that issues as a result of that hearing will be appealable at that time.

Based upon representations made by the Applicant at the telephone hearing held on August 28, 2006, Applicant is granted a period of two weeks, that is, until Friday, September 8, 2006, within which to implement this order and safely shift the facility to the alternate mode of operation.

Accordingly, based on the foregoing, it is hereby ORDERED and ADJUDGED that Motion for Stay is GRANTED until further order of the Court or as otherwise provided above. A scheduling order addressing the parties' mediation and pretrial preparation

schedule will be issued shortly. The trial dates remain as reserved (see footnote 2 above) until further order of the Court.

Done at Berlin, Vermont, this 1st day of September, 2006.

Merideth Wright
Environmental Judge