

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman  
Dr. Michael F. Kennedy  
Dr. Richard E. Wardwell

In the Matter of

ENTERGY NUCLEAR VERMONT YANKEE,  
LLC, AND ENTERGY NUCLEAR  
OPERATIONS, INC.

(Vermont Yankee Nuclear Power Station)

Docket No. 50-271-LA-3

ASLBP No. 15-940-03-LA-BD01

August 31, 2015

MEMORANDUM AND ORDER  
(Granting Petition to Intervene and Hearing Request)

The State of Vermont, represented by the Vermont Department of Public Service, challenges a license amendment request (“LAR”) filed by Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., (together “Entergy”) to replace certain license conditions on the decommissioning trust fund for Vermont Yankee Nuclear Power Station with similar regulatory requirements.<sup>1</sup> Because Vermont has standing,<sup>2</sup> submitted a timely petition, and has proffered two admissible contentions, the Board grants Vermont’s hearing request.

**I. BACKGROUND**

On September 4, 2014, Entergy submitted an LAR to replace plant-specific license conditions related to its decommissioning trust fund with “substantially similar” regulatory

---

<sup>1</sup> State of Vermont’s Petition for Leave to Intervene and Hearing Request (Apr. 20, 2015) [hereinafter “Petition”].

<sup>2</sup> Vermont has standing because Vermont Yankee is “located within the boundaries of the State” and “no further demonstration of standing is required.” 10 C.F.R. § 2.309(h)(2).

requirements.<sup>3</sup> The current plant-specific license conditions were imposed when the Commission approved Entergy's license transfer application in May 2002 and include the requirement to provide a 30-day notice before disbursing funds to allow the NRC the opportunity to reject a proposed expense.<sup>4</sup>

In its LAR, Entergy asserts that these conditions are no longer necessary in light of the decommissioning fund requirements in 10 C.F.R. § 50.75(h)(1)–(4), which were promulgated in December 2002 and govern reporting and recordkeeping rules for decommissioning trusts.<sup>5</sup> Because Vermont Yankee's license conditions predate the issuance of 10 C.F.R. § 50.75(h), the plant was grandfathered and allowed to keep its existing license conditions.<sup>6</sup> However, if Entergy amends any of its license conditions related to the decommissioning trust fund, from that point forward Entergy must comply with all of the requirements of 10 C.F.R. § 50.75(h).<sup>7</sup>

Under 10 C.F.R. § 50.75(h)(1)(iv), the decommissioning trust fund can be used only for decommissioning expenses,<sup>8</sup> defined as activities to remove a facility from service safely and reduce residual radioactivity at the site.<sup>9</sup> Under that same regulation, the licensee must provide

---

<sup>3</sup> Letter from Christopher J. Wamser, Site Vice President, to Document Control Desk, NRC, Proposed Change No. 310 Deletion of Renewed Facility Operating License Conditions Related to Decommissioning Trust Provisions, attach. 1, at 2 (Sept. 4, 2014) (ADAMS Accession No. ML14254A405) [hereinafter "LAR"].

<sup>4</sup> Id. at 1; see Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station); Order Approving Transfer of License and Conforming Amendment, 67 Fed. Reg. 36,269, 36,270 (May 23, 2002).

<sup>5</sup> LAR, attach. 1, at 2–6; see also Decommissioning Trust Provisions, 67 Fed. Reg. 78,332 (Dec. 24, 2002).

<sup>6</sup> 10 C.F.R. § 50.75(h)(5).

<sup>7</sup> Id.

<sup>8</sup> 10 C.F.R. § 50.75(h)(1)(iv) ("Disbursements or payments from the trust . . . are restricted to decommissioning expenses or transfer to another financial assurance method acceptable under paragraph (e) of this section until final decommissioning has been completed.").

<sup>9</sup> 10 C.F.R. § 50.2 ("*Decommission* means to remove a facility or site safely from service and reduce residual radioactivity to a level that permits—(1) Release of the property for unrestricted use and termination of the license; or (2) Release of the property under restricted conditions and

a 30-day notice for all withdrawals other than ordinary administrative expenses to operate the fund. Those notices are no longer required, however, once decommissioning has begun and withdrawals are made under 10 C.F.R. § 50.82(a)(8). Instead of providing notice before each decommissioning expense, the licensee submits a decommissioning cost estimate and timeline, called a Post Shutdown Decommissioning Activities Report (“PSDAR”), and annual reports on expenditures.<sup>10</sup> In addition to these reporting requirements, under 10 C.F.R. § 50.82(a)(8) a licensee cannot “reduce the value of the decommissioning trust below an amount necessary to place and maintain the reactor in a safe storage condition if unforeseen conditions or expenses arise” and the licensee must maintain its ability to “complete funding of any shortfalls in the decommissioning trust needed to ensure the availability of funds to ultimately release the site and terminate the license.”<sup>11</sup>

According to Entergy’s PSDAR, the company intends to spend \$817 million on “license termination” activities, \$368 million on spent fuel management, and \$57 million for site restoration,<sup>12</sup> for a total cost of \$1.2 billion. As of August 2014, the decommissioning trust fund held \$653 million.<sup>13</sup> Entergy predicts that accumulated interest will generate enough money for all costs by the mid-2060s.<sup>14</sup> If any money is left over at the end of decommissioning, 55% of it is to be returned to benefit the ratepayers of Vermont who paid into the fund.<sup>15</sup>

---

termination of the license.”); see also 10 C.F.R. § 50.82(a)(8)(i)(A) (“Decommissioning trust funds may be used by licensees if . . . [t]he withdrawals are for expenses for legitimate decommissioning activities consistent with the definition of decommissioning in § 50.2.”).

<sup>10</sup> 10 C.F.R. § 50.82(a)(8)(iii)–(v).

<sup>11</sup> 10 C.F.R. § 50.82(a)(8)(i)(B)–(C).

<sup>12</sup> Vermont Yankee Nuclear Power Station, Post Shutdown Decommissioning Activities Report, at 9, tbl. 2.2 (Dec. 2, 2014) (ADAMS Accession No. ML14357A110) [hereinafter “PSDAR”].

<sup>13</sup> Id. at 4.0.

<sup>14</sup> Id. at 2.1.3.

<sup>15</sup> Petition at 11 (citing attach. 2, Master Trust Agreement, Exs. D & E).

Because spent fuel management is not a decommissioning activity,<sup>16</sup> not all of Entergy's planned expenditures are allowable under NRC regulations. In addition to the LAR now before the Board, on January 6, 2015, Entergy submitted a request to the NRC Staff for three regulatory exemptions from 10 C.F.R. §§ 50.75(h)(1)(iv) and 50.82(a)(8)(i)(A) to allow the plant to use the decommissioning fund to manage its spent fuel and also to eliminate the 30-day-notice requirement that would otherwise apply to non-decommissioning expenses, such as spent fuel management.<sup>17</sup> The NRC Staff granted Entergy's exemption requests on June 17, 2015,<sup>18</sup> agreeing with Entergy that the fund has, or will have, enough money to pay for both spent fuel management and decommissioning and that providing 30-day notice of planned spent fuel cost disbursements is unnecessary to ensure adequate funds.<sup>19</sup> The NRC Staff concluded that the exemptions were categorically excluded from environmental review as administrative changes that did not increase the risk of public radiation exposure.<sup>20</sup>

Although the NRC Staff made all three of the requested exemptions effective immediately, only the exemption from 10 C.F.R. § 50.82(a)(8)(i)(A), relating to the withdrawal of spent fuel expenses, has an immediate effect.<sup>21</sup> Entergy's current license conditions require 30-

---

<sup>16</sup> 10 C.F.R. § 50.75(c) & n.1 (stating that the minimum amounts required for decommissioning trust funds "are based on activities related to the definition of 'Decommission' in § 50.2 of this part and do not include the cost of removal and disposal of spent fuel or of nonradioactive structures and materials beyond that necessary to terminate the license.").

<sup>17</sup> Letter from Christopher J. Wamser, Site Vice President, to Document Control Desk, NRC, Request for Exemptions from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) (Jan. 6, 2015) (ADAMS Accession No. ML15013A171) [hereinafter "Exemption Request"].

<sup>18</sup> Letter from James Kim, Project Manager, Plant Licensing IV-2 and Decommissioning Transition Branch, Division of Operating Reactor Licensing to Site Vice President (June 17, 2015) (ADAMS Accession No. ML15128A219).

<sup>19</sup> Id., encl. 1, at 5.

<sup>20</sup> Id., encl. 1, at 9 (citing 10 C.F.R. § 51.22(c)(25)).

<sup>21</sup> Id., encl. 1, at 11; see 80 Fed. Reg. 35,992, 35,995 (June 23, 2015); see id. at 35,993 ("The requested exemptions from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) would allow

day notification for all expenses (decommissioning or other) and a licensee cannot be exempted from license conditions.<sup>22</sup> An NRC licensee requires a license amendment to modify license conditions.<sup>23</sup> The two exemptions from 10 C.F.R. § 50.75(h)(1)(iv)—which allow Entergy to use the decommissioning trust fund for spent fuel management without providing a 30-day notification—have no practical effect because, unless the LAR is approved, 10 C.F.R. § 50.75(h) does not currently apply to Entergy. The NRC Staff's decision granting Entergy's exemption requests does not acknowledge the exemptions' reliance on this LAR (which was filed four months before the exemption requests).<sup>24</sup>

The NRC Staff accepted the LAR for review and informed the public of the opportunity to petition for a hearing in a Federal Register notice on February 17, 2015.<sup>25</sup> The Secretary of the Commission referred Vermont's timely petition to the Atomic Safety and Licensing Board Panel,<sup>26</sup> and this Licensing Board was established on May 1, 2015.<sup>27</sup> Entergy and the NRC Staff submitted answers opposing Vermont's April 20 hearing request on May 15,<sup>28</sup> and

---

ENO to use a portion of the funds from the Trust for irradiated fuel management without prior notice to the NRC . . .”).

<sup>22</sup> See GE-Hitachi Global Laser Enrichment LLC (GLE Commercial Facility), LBP-12-21, 76 NRC 218, 240 (2012) (“[I]n a limited number of appropriate circumstances the Staff may exempt an applicant from regulatory requirements . . .”) (emphasis added).

<sup>23</sup> 10 C.F.R. § 50.90.

<sup>24</sup> It is curious that the NRC Staff would approve a request to exempt a licensee from regulations which do not apply to the licensee (until the LAR is approved). It is even more curious that the NRC Staff purports to make such an exemption effective immediately.

<sup>25</sup> Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 80 Fed. Reg. 8355, 8359–60 (Feb. 17, 2015).

<sup>26</sup> Memorandum from Annette Vietti-Cook, Secretary of the Commission, to E. Roy Hawken, Chief Administrative Judge (Apr. 30, 2015) (ADAMS Accession No. ML15120A477).

<sup>27</sup> Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.; Establishment of Atomic Safety and Licensing Board, 80 Fed. Reg. 26,301 (May 7, 2015).

<sup>28</sup> Entergy's Answer Opposing State of Vermont's Petition for Leave to Intervene and Hearing Request (May 15, 2015) [hereinafter “Entergy's Answer”]; NRC Staff Answer to State of

Vermont filed its reply to those responses on May 22, 2015.<sup>29</sup> The Board heard oral argument regarding the admissibility of Vermont's four contentions on July 7, 2015.<sup>30</sup>

On July 6, 2015, Vermont moved for leave to file a new contention and to add the NRC Staff's approval of the exemptions as an additional factual basis to support admission of three of Vermont's previously filed contentions.<sup>31</sup> Entergy and the NRC Staff submitted answers on July 31, 2015, opposing admission of the new contention and the addition of the new factual basis,<sup>32</sup> to which Vermont submitted a reply on August 7.<sup>33</sup>

The NRC Staff has not completed its review of the LAR. At oral argument the NRC Staff stated that "it has not yet determined in this case whether [the Staff's environmental review] will be accomplished through an environmental assessment or through a categorical exclusion."<sup>34</sup> The NRC Staff also stated that the granted exemptions do not factor into the LAR review.<sup>35</sup>

---

Vermont Petition for Leave to Intervene and Hearing Request (May 15, 2015) [hereinafter "NRC Staff's Answer"].

<sup>29</sup> The State of Vermont's Reply to NRC Staff and Entergy Answers to Petition for Leave to Intervene and Hearing Request (May 22, 2015) [hereinafter "Reply"].

<sup>30</sup> Tr. at 1–78.

<sup>31</sup> State of Vermont's Motion for Leave to File a New Contention Including the Proposed New Contention and to Add Additional Bases and Support to Existing Contentions I, III, and IV (July 6, 2015) [hereinafter "Vermont's New Contention"].

<sup>32</sup> Entergy's Answer Opposing State of Vermont's New Contention V and Additional Bases for Pending Contentions I, III, and IV (July 31, 2015) [hereinafter "Entergy's Answer to New Contention"]; NRC Staff's Answer to the State of Vermont's Motion for Leave to File New and Amended Contentions (July 31, 2015) [hereinafter "Staff's Answer to New Contention"].

<sup>33</sup> State of Vermont's Reply in Support of Motion for Leave to File a New Contention and Add Bases and Support to Existing Contentions (Aug. 7, 2015) [hereinafter "New Contention Reply"].

<sup>34</sup> Tr. at 66.

<sup>35</sup> Tr. at 25.

## II. DISCUSSION

The Board evaluates contentions under the six requirements of 10 C.F.R. § 2.309(f)(1). In the context of a license amendment proceeding an admissible contention must (i) provide a specific statement of the issue of law or fact to be raised; (ii) explain briefly the basis for the contention; (iii) show that the issue is within the scope of the license amendment proceeding; (iv) demonstrate that the issue is material to the findings the NRC must make to support the LAR; (v) state concisely the alleged facts or expert opinions that support its position on the issue; and (vi) show that a genuine dispute exists with Entergy on a material issue of law or fact, with reference to the disputed portion of the LAR.<sup>36</sup>

Because the scope of license amendment proceedings is limited to the LAR, petitioners typically cannot challenge a Commission regulation<sup>37</sup> or seek a hearing on the merits of an exemption request.<sup>38</sup> However, there is no such restriction on raising an exemption-related issue if it is directly related to the LAR.<sup>39</sup> As the Commission has explained, an exemption “cannot remove a matter germane to a licensing proceeding from consideration in a hearing, assuming an interested party raises an admissible contention thereon.”<sup>40</sup>

---

<sup>36</sup> 10 C.F.R. § 2.309(f)(1); see FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 395–96 (2012).

<sup>37</sup> 10 C.F.R. § 2.335(a) (“[N]o rule or regulation of the Commission, or any provision thereof . . . is subject to attack . . . in any adjudicatory proceeding subject to [10 C.F.R. Subpart 2]” except as provided by the waiver provision in 10 C.F.R. § 2.335(b)); see Exelon Generation Co., LLC (Limerick Generating Station, Units 1 & 2), CLI-12-19, 76 NRC 377, 385–88 (2012).

<sup>38</sup> Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 & 2), CLI-00-5, 51 NRC 90, 94–98 (2000) (“Congress intentionally limited the opportunity for a hearing to certain designated agency actions—that do not include exemptions.”); see 42 U.S.C. § 2239(a)(1)(A).

<sup>39</sup> Private Fuel Storage, LLC (Indep. Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 467 n.3 (2001); see also Honeywell Int’l, Inc. (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 10 (2013) (ruling that an exemption request was subject to a hearing where the plant already had a license and was seeking an exemption from the decommissioning financial assurance requirements based on an earlier exemption that it had received during its license renewal).

<sup>40</sup> Id. at 467.

**1. Contention I**

**A. Summary of the Parties' Arguments**

Vermont first contends that:

Entergy's LAR involves a potential significant safety and environmental hazard, fails to demonstrate that it is in compliance with 10 C.F.R. §§ 50.75(h)(1)(iv) and 50.82[(a)](8)(i)(B) and (C), and fails to demonstrate that there will be reasonable assurance of adequate protection for the public health and safety as required by section 182(a) of the Atomic Energy Act (42 U.S.C. § 2232(a)) if the proposed amendment is approved.<sup>41</sup>

Entergy states in its LAR that it "has elected to subject its decommissioning trust agreement to the regulatory requirements for decommissioning trust funds that are specified in 10 CFR 50.75(h)."<sup>42</sup> The State takes exception to this and argues that Entergy's statement is incorrect because it plans to use the decommissioning trust fund for non-decommissioning expenses that are not allowed under 10 C.F.R. § 50.75(h)(1)(iv).<sup>43</sup>

First, Vermont asserts there are six expenses that do not qualify as decommissioning costs because they do not reduce radiological contamination at the site: (1) a \$5 million payment to Vermont as part of a settlement agreement; (2) emergency preparedness costs; (3) shipments of non-radiological asbestos waste; (4) insurance; (5) property taxes; and (6) replacement of structures related to dry cask storage, such as a bituminous roof.<sup>44</sup> Based on these allegedly improper expenses, the State asserts that there is a serious risk that the company will run out of money before it finishes decontaminating the site—exactly the sort of

---

<sup>41</sup> Petition at 3.

<sup>42</sup> LAR, attach. 1, at 1.

<sup>43</sup> Petition at 3–6.

<sup>44</sup> *Id.* at 9–10 (citing PSDAR, app. C, tbl. C, lines 1a.2.22, 1b.2.22, 1a.2.23, 1a.2.27, 1a.4.1, 1a.4.2, 2b.1.4). These costs are listed in the PSDAR, not the LAR, but Vermont argues that the PSDAR, the exemptions, and the license amendment are so "inextricably intertwined" that they can only be understood in combination. Petition at 6, 20–24.



risk that the agency's decommissioning trust fund regulations are intended to prevent.<sup>45</sup>

Accordingly, the State argues that the 30-day-notice requirement remains necessary to give the NRC the opportunity to reject the allegedly improper withdrawals before they occur.<sup>46</sup>

Vermont next alleges that Entergy's claim in the LAR that it will comply with the decommissioning trust requirements of 10 C.F.R. § 50.75(h) is erroneous because that regulation allows disbursements without notice only for withdrawals under 10 C.F.R. § 50.82.<sup>47</sup> Under 10 C.F.R. § 50.82(a)(8)(i)(B), licensees cannot make withdrawals that would "reduce the value of the decommissioning trust below an amount necessary to place and maintain the reactor in a safe storage condition if unforeseen conditions or expenses arise." According to Vermont, Entergy has not shown that it has considered such potential expenses, including indefinite storage of spent fuel and groundwater remediation.<sup>48</sup>

As factual support for this contention, Vermont attaches declarations from two state employees who allege significant omissions in Entergy's decommissioning cost estimate.<sup>49</sup> Anthony Leshinskie, the State Nuclear Engineer and Decommissioning Coordinator, asserts that Entergy has not demonstrated that it could continue storing spent fuel on site if the Department of Energy fails to provide a storage site by 2052 (which is when the PSDAR assumes all spent fuel will be removed).<sup>50</sup> Dr. William Irwin, a health physicist and the Radiological and Toxicological Sciences Program Chief at the Vermont Department of Health, opines that the cost estimates fail to explain how Entergy will provide money to remediate soil

---

<sup>45</sup> Petition at 1, 5.

<sup>46</sup> Id. at 5–6.

<sup>47</sup> Id. at 5.

<sup>48</sup> Id. at 5, 22–23 (citing 10 C.F.R. § 50.82(a)(8)(i)(B)–(C)).

<sup>49</sup> Id. at 7; see also Declaration of Anthony R. Leshinskie (Apr. 20, 2015) [hereinafter "Leshinskie Decl."]; Declaration of William Irwin (Apr. 20, 2015) [hereinafter "Irwin Decl."].

<sup>50</sup> Leshinskie Decl. at 3.

and groundwater issues, such as recently discovered strontium-90 leaks.<sup>51</sup> Given these alleged omissions, the State argues that the 30-day notification associated with the denial of the LAR would ensure that the fund is spent in ways that provide adequate assurance of public health and safety.<sup>52</sup>

In response, Entergy and the NRC Staff argue that Vermont's contention impermissibly challenges the agency's regulations because 10 C.F.R. § 50.75(h) allows Entergy to make its withdrawals through 10 C.F.R. § 50.82(a)(8) in lieu of providing a 30-day notice for decommissioning expenditures.<sup>53</sup> Entergy and the NRC Staff also assert that Vermont's contention raises issues tied to the exemptions and the PSDAR that are beyond the scope of this license amendment proceeding, which solely concerns approval of the LAR.<sup>54</sup> Both the NRC Staff and Entergy argue that Entergy's future compliance with the regulations is not within the scope of this proceeding because it is a decommissioning oversight matter.<sup>55</sup> Finally, Entergy argues that Vermont has not provided sufficient factual support to demonstrate a genuine dispute with the LAR.<sup>56</sup> The company argues that the State's contention is actually a challenge to the PSDAR and exemptions, not the LAR.<sup>57</sup>

Vermont replies that it is challenging Entergy's plan to contravene the regulations, not the regulations themselves.<sup>58</sup> The State likewise maintains that the Board should not ignore the

---

<sup>51</sup> Irwin Decl. at 3–5.

<sup>52</sup> Petition at 17.

<sup>53</sup> Entergy's Answer at 14–16; NRC Staff's Answer at 27–29.

<sup>54</sup> Entergy's Answer at 17–19; NRC Staff's Answer at 30–33, 35–36.

<sup>55</sup> Entergy's Answer at 17; NRC Staff's Answer at 56 n.261; Tr. at 47, 52.

<sup>56</sup> Entergy's Answer at 20–26.

<sup>57</sup> Id.

<sup>58</sup> Reply at 2–3.

obvious real-world consequences of approving the LAR, as demonstrated by the plans laid out in Entergy's exemption request and PSDAR.<sup>59</sup>

## **B. The Board's Ruling**

The Board concludes that this contention is admissible because Vermont has satisfied all six admissibility criteria of 10 C.F.R. § 2.309(f)(1). The first two criteria require little discussion. Per 10 C.F.R. § 2.309(f)(1)(i), Vermont has provided a specific statement of its contention.<sup>60</sup> To explain the legal foundation of its contention, Vermont has pointed to 10 C.F.R. § 50.75(h), 10 C.F.R. § 50.82(a)(8), and the Atomic Energy Act of 1954.<sup>61</sup> This brief explanation of the rationale underlying the contention is sufficient to satisfy 10 C.F.R. § 2.309(f)(1)(ii).<sup>62</sup>

### **i. Scope of the Proceeding**

With respect to scope, the Board concludes that Vermont's contention is not a challenge to the decommissioning trust fund regulations, nor does it raise impermissible oversight issues. Vermont's claim that Entergy's LAR contains incomplete and incorrect statements concerning its use of the trust fund is within the scope of this license amendment proceeding as defined in the notice of opportunity to request a hearing.<sup>63</sup> As that hearing notice states, Entergy seeks to remove license conditions on the basis that the company "has elected to subject its decommissioning trust agreement to the regulatory requirements for decommissioning trust funds that are specified in 10 CFR 50.75(h)."<sup>64</sup> In its challenge to the LAR, Vermont argues that

---

<sup>59</sup> Id. at 5–7.

<sup>60</sup> Petition at 3.

<sup>61</sup> Id. at 3–7; see 42 U.S.C. § 2232(a).

<sup>62</sup> See Progress Energy Fla., Inc. (Levy County Nuclear Power Plant, Units 1 & 2), LBP-09-10, 70 NRC 51, 99–100 (2009).

<sup>63</sup> Fla. Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 & 2), LBP-08-14, 68 NRC 279, 291 (2008).

<sup>64</sup> 80 Fed. Reg. at 8359.

Entergy's current decommissioning plans *contradict* this statement because they are not for uses permitted under 10 C.F.R. § 50.75(h) and thus Entergy's proposed license amendment is in contravention of 10 C.F.R. § 50.75(h).<sup>65</sup> Because applicants must provide information that is complete and accurate in all material respects,<sup>66</sup> Vermont's argument that Entergy's statements are erroneous is within the scope of the proceeding.

**a. Challenge to the regulations**

Vermont's contention is not a challenge to the regulations because, as the State explains, its argument concerns "the application of NRC regulations in this particular instance,"<sup>67</sup> not a generic challenge to the regulations. Vermont asserts that Entergy's LAR is neither correct nor complete insofar as Entergy purportedly intends to use the decommissioning fund for non-decommissioning expenses and fails to account for unforeseen expenses.<sup>68</sup> These alleged deficiencies concern 10 C.F.R. § 50.75(h)(1)(iv), which limits the fund to decommissioning-only expenses,<sup>69</sup> and 10 C.F.R. § 50.82(a)(8)(i)(B) and (C), which require the licensee to ensure that the site can be safely maintained and decommissioned, even in the face

---

<sup>65</sup> Petition at 6; 10 C.F.R. § 50.75(h)(5) ("If a licensee with existing license conditions relating to decommissioning trust agreements elects to amend those conditions, the license amendment shall be in accordance with the provisions of paragraph (h) of this section.").

<sup>66</sup> 10 C.F.R. § 50.9(a); see Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-07-12, 65 NRC 203, 207–08 (2007) ("We consider our current regulatory approach, of relying on our licensees to submit complete and accurate information, and auditing that information as appropriate, to be entirely consistent with sound regulatory practice.").

<sup>67</sup> Reply at 1 (emphasis removed).

<sup>68</sup> Petition at 3–6; Reply at 4–7.

<sup>69</sup> See Power Auth. of the State of New York (James A. FitzPatrick Nuclear Power Plant & Indian Point Nuclear Generating Unit No. 3), CLI-00-22, 52 NRC 266, 308 n.52 (2000) ("Decommissioning trusts are reserved for decommissioning as defined in 10 C.F.R. § 50.2.").

of unexpected costs.<sup>70</sup> Far from being a challenge to the regulations, the State is in fact arguing that Entergy's LAR, "if granted, would conflict with applicable NRC regulations."<sup>71</sup>

Vermont is correct that challenging a licensee's compliance with a regulation is not a challenge to the regulation itself. While it is true that section 50.75(h)(1)(iv) does not require a 30-day notice for decommissioning withdrawals made under section 50.82(a)(8), we understand Vermont's argument to be that the license amendment should be rejected, and the current notice requirement left in place, "[i]n light of stated indications by Entergy that it intends to try to use the [Nuclear Decommissioning Trust] Fund for expenses that are not allowed under applicable NRC regulations."<sup>72</sup> The State argues that "while the NRC might generally allow elimination of 30-day notice requirements at other plants, it should not be allowed when a plant is on the record stating an intention to make improper withdrawals from the decommissioning trust fund, as is the case here."<sup>73</sup> Vermont may rely on alleged inaccuracies and omissions in the LAR to challenge the LAR and to maintain the existing license conditions.

***b. The PSDAR and exemptions***

The Board next determines that we may appropriately consider Vermont's citations to the PSDAR and the exemptions as factual support for Vermont's allegation that Entergy plans to spend trust fund money on non-decommissioning expenses and has not demonstrated how it will account for unforeseen expenses. Vermont is not asking the Board to hold a hearing on the

---

<sup>70</sup> 10 C.F.R. § 50.82(a)(8)(i)(B); see USEC Inc. (Am. Centrifuge Plant), LBP-07-6, 65 NRC 429, 451 (2007) (explaining that NRC requires a contingency factor for decommissioning funds to "provide for unforeseen events that may happen during operations or decommissioning that could increase the overall costs of this activity."); see also Office of Nuclear Regulatory Research, NRC, Assuring the Availability of Funds for Decommissioning Nuclear Reactors, Regulatory Guide 1.159, at 11 (rev. 2 Oct. 2011) (ADAMS Accession No. ML112160012).

<sup>71</sup> Petition at 2.

<sup>72</sup> Id. at 3.

<sup>73</sup> Reply at 3.

merits of the PSDAR or the exemption requests, but instead to view both as “stated indications” of Entergy’s intention to depart from its regulatory obligations with respect to the decommissioning fund.<sup>74</sup>

We see no prohibition from considering the information contained in the PSDAR to the extent it relates to Entergy’s intentions. The PSDAR notifies the NRC and Vermont of Entergy’s plans and is a key part of the decommissioning regulations. Section 50.75(h)(1)(iv) allows a licensee to disburse funds without prior notice only if those expenditures comply with section 50.82; that section, in turn, requires Entergy to provide a PSDAR with “a description of the planned decommissioning activities along with a schedule for their accomplishment.”<sup>75</sup> Furthermore, Entergy cannot deviate from the PSDAR without first notifying the NRC and Vermont.<sup>76</sup> Given that the PSDAR is intended to provide notice to the public regarding decommissioning plans at Vermont Yankee,<sup>77</sup> Vermont may appropriately rely on it as an indication of Entergy’s plans.

Likewise, the Board may consider Vermont’s references to the exemptions as additional factual support for Vermont’s contention without addressing the merits of the NRC Staff’s decision to allow Entergy to use the decommissioning trust fund for spent fuel management.<sup>78</sup>

---

<sup>74</sup> Petition at 3; see id. at 9–10; Reply at 6 (“[T]he State’s evidence in fact shows that Entergy is on record—both in its PSDAR filing and in statements to the media—that it intends to use the nuclear decommissioning trust fund in ways that the State believes to be unlawful.”); cf. Entergy Nuclear Vt. Yankee, LLC, & Entergy Nuclear Operations, Inc. (Vt. Yankee Nuclear Power Station), LBP-15-18, 81 NRC \_\_, \_\_ (slip op. at 7) (May 18, 2015) (explaining that Vermont in that case challenged “the adequacy of Entergy’s exemption request and associated analyses”).

<sup>75</sup> 10 C.F.R. § 50.82(a)(4)(i).

<sup>76</sup> Id. § 50.82(a)(7).

<sup>77</sup> See Radiological Criteria for License Termination; Final Rule, 62 Fed. Reg. 39,058, 39,076 (July 21, 1997).

<sup>78</sup> Because the NRC’s decision to grant the exemptions is a matter of public record, we take notice that the exemptions have now been approved. See 10 C.F.R. § 2.337(f); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 74–75 (1991).

Vermont alleges that the purpose of the LAR makes sense only within the context of the related exemption request and the PSDAR.<sup>79</sup> First, Entergy submitted an LAR that would remove its current 30-day-notice license condition and subject its license to the regulatory requirements of 10 C.F.R. § 50.75(h). Four months later, Entergy requested an exemption from 10 C.F.R. § 50.75(h)(1)(iv). As Vermont states, “[t]he LAR purports to be substituting *all* of 50.75(h) for the current provisions in the Vermont Yankee license. In truth, the LAR is directly connected to an effort by Entergy to substitute only *part* of 50.75(h) for the current license provisions.”<sup>80</sup>

The NRC Staff insists that the exemptions should be considered entirely separate because one of the exemptions has an effect independent of the LAR.<sup>81</sup> However, this is not an explanation for why the Board should ignore that two of the granted exemptions are completely dependent on the LAR. These two exemptions from 10 C.F.R. § 50.75(h)(1)(iv) cannot take effect unless and until the LAR is approved. These exemptions are precisely the sort of directly related and dependent exemption-related issues that are within the scope of a license amendment proceeding, as the Commission explained in Private Fuel Storage.<sup>82</sup> In that case, an exemption from seismic planning regulations would go into effect only if the license was granted;<sup>83</sup> here, the exemptions from 10 C.F.R. § 50.75(h)(1)(iv) will go into effect only if the

---

<sup>79</sup> Petition at 1–2; Reply at 5.

<sup>80</sup> Reply at 9.

<sup>81</sup> Tr. at 72–73; see also Tr. at 21, 50–51.

<sup>82</sup> Private Fuel Storage, CLI-01-12, 53 NRC at 466–67; see Consumers Power Co. (Midland Plant, Units 1 & 2), CLI-74-3, 7 AEC 7, 12 (1974) (“We will not close our eyes to the fact that this proceeding, though separate from the earlier ones for some purposes, is merely another round in a continuing controversy as to whether the licensee can be reasonably expected to comply with our quality assurance regulations.”).

<sup>83</sup> Letter from Mark S. Delligatti, Senior Project Manager, Licensing Section, Spent Fuel Project Office, to John D. Parkyn, Chairman, Private Fuel Storage, L.L.C. (Sept. 29, 2000) (ADAMS Accession No. ML003755630) (“[T]here is a sufficient basis to grant an exemption to 10 CFR 72.102(f) at the time a license is issued for the Facility. Please note that the exemption will only be issued if the license is granted.”).

LAR is approved. The Commission has never instructed its licensing boards to ignore reality. Because granting the LAR would immediately cause the directly-related exemptions to go into effect, we conclude that this contention and its reference to exemption-related issues are within the scope of this proceeding.

***c. Oversight issues***

Entergy and the NRC Staff assert that Vermont seeks to raise compliance issues that are part of NRC's enforcement powers, and are thus not a challenge to the LAR.<sup>84</sup> Commission precedent is clear that the NRC Staff's ongoing enforcement of regulations and license conditions does not trigger hearing rights.<sup>85</sup> However, petitioners may challenge the correctness of a statement in the LAR that the applicant will comply with the regulations, if that challenge is supported by documentary evidence.<sup>86</sup> If a petitioner can provide a "sound basis" to dispute compliance-related statements in the LAR, then the contention is within the scope of the proceeding.<sup>87</sup>

It is clear to this Board that Vermont is neither challenging the adequacy of the decommissioning fund nor urging the Board to step in to prevent allegedly improper

---

<sup>84</sup> Tr. at 47, 52.

<sup>85</sup> Pac. Gas & Electric Co. (Diablo Canyon Power Plant, Units 1 & 2), CLI-15-14, 81 NRC \_\_\_, \_\_\_ (slip op. at 7–8) (May 21, 2015) (explaining why staff oversight is not a de facto license amendment subject to a hearing); Omaha Pub. Power Dist. (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC 329, 334 (2015) (same).

<sup>86</sup> See GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000) ("Absent [documentary] support, this agency has declined to assume that licensees will contravene our regulations.").

<sup>87</sup> Pac. Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-02-16, 55 NRC 317, 344 (2002) ("But [the] license application itself states that, after license transfer, there will be no operational changes and essentially no staff or management changes. [The petitioner] has not provided a sound basis to dispute the information provided in the application. Accordingly, we decline to admit this issue. We also note that the NRC has regulations requiring specific staffing levels and qualifications for the key positions necessary to operate a plant safely. We will not assume that licensees will contravene our regulations." (footnotes omitted)).



expenditures. Rather, Vermont argues that Entergy's plans demonstrate why the 30-day notice (which gives the NRC an opportunity to reject an expense before it is made) remains necessary.<sup>88</sup> As the NRC explained when it promulgated regulations that do not require notice for withdrawals made under 10 C.F.R. § 50.82(a)(8), "[t]he function of these procedural and administrative changes is merely to facilitate the orderly conduct of the licensee's business and to insure that information needed by the Commission to perform its regulatory functions is readily available."<sup>89</sup> Based on its allegations that Entergy's plans conflict with the regulations, Vermont argues that this justification for removing the 30-day notice is no longer applicable and would deprive the NRC of the chance to stop improper withdrawals before they occur.<sup>90</sup>

Licensing boards may not assume that a licensee intends to contravene NRC regulations,<sup>91</sup> but that is not the case here.<sup>92</sup> Rather, Entergy's LAR purportedly rests on a promise of planned compliance with those regulations that, Vermont maintains, is contradicted by Entergy's own publicly stated post-LAR plans. Thus, Vermont's allegations contradicting Entergy's claims in its LAR are within the scope of the proceeding because the challenge pertains directly to the LAR (which removes the 30-day notice requirement based on a decision

---

<sup>88</sup> Petition at 4; Reply at 5.

<sup>89</sup> Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, Proposed Rule, 45 Fed. Reg. 13,739, 13,745 (Mar. 3, 1980); see also Final Rule, 49 Fed. Reg. 9352, 9367 (Mar. 12, 1984).

<sup>90</sup> Petition at 5–6.

<sup>91</sup> See Fla. Power & Light Co. (St. Lucie Plant, Unit 2), CLI-14-11, 80 NRC 167, 178 & n.53 (2014) (declining to assume "ulterior motive" behind license amendment); U.S. Army (Jefferson Proving Ground Site), LBP-06-27, 64 NRC 438, 454 n.39 (2006) ("Intervenor references no instance in which the Licensee failed to comply with NRC regulations, nor does it state any facts to contradict the Licensee's stated intention — which has been accepted by the Staff — to submit to the Staff a decommissioning plan within 5 years.").

<sup>92</sup> See N. States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), LBP-08-26, 68 NRC 905, 938–42 (2008) (admitting contention that applicant had inadequately described aging management plan by relying on a promise of compliance with NRC orders instead of describing the plan).

to replace the preexisting conditions with the regulations), not to general oversight matters. Accordingly, Vermont's contention that Entergy's plans contradict its promised compliance in the LAR is an issue within the scope of this proceeding.

***d. Issues outside the scope***

Finally, as part of this contention, Vermont also raises several issues that are not admissible because they are outside the scope of this proceeding. First, Vermont's allegations that Entergy will violate state law or breach the master trust agreement are not within the scope of this license amendment proceeding.<sup>93</sup> If Entergy ultimately seeks to amend the master trust agreement that governs its decommissioning trust fund, the company must do so through a separate process, not an LAR.<sup>94</sup> Likewise Vermont's assertion that Entergy is breaking promises it made to Vermont during the license transfer and state litigation is also outside the scope of this proceeding. Matters within the purview of the Vermont Public Service Board are outside the jurisdiction of this licensing board, which is limited to considering only the LAR and NRC regulations.<sup>95</sup> Finally, the merits of the exemption request itself are also outside the scope of this proceeding.<sup>96</sup> The Board will consider the PSDAR and exemption request only insofar as they can serve as factual support for Vermont's challenge to Entergy's planned uses for the decommissioning trust fund. In no event will the Board consider any arguments regarding the correctness of the NRC Staff's decision to grant those exemptions.

---

<sup>93</sup> Petition at 11–17; see PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 & 2), CLI-07-25, 66 NRC 101, 104–07 (2007) (explaining that alleged violations of state law are outside the scope of, and not material to, an adjudicatory proceeding).

<sup>94</sup> Petition, attach. 2, Master Trust Agreement at 19.

<sup>95</sup> Id. at 7–8; see Susquehanna, CLI-07-25, 66 NRC at 104–07.

<sup>96</sup> Procedurally, this issue would have been much simpler if Entergy had submitted its LAR and exemption request together, in which case both would have been subject to a hearing request. See Honeywell, CLI-13-1, 77 NRC at 10 (“[W]hen a licensee requests an exemption in a related license amendment application, we consider the hearing rights on the amendment application to encompass the exemption request as well.”).

## ii. Materiality

The Board next concludes that Vermont has demonstrated that its contention is relevant to the findings NRC must make before approving the LAR because, in order to approve the license amendment, the NRC Staff must find that Entergy's LAR is in accordance with 10 C.F.R. § 50.75(h).<sup>97</sup> "Materiality" requires a petitioner to show why the alleged error or omission is of possible significance to the grant or denial of a pending license application.<sup>98</sup> This means that there must be some significant link between the claimed deficiency and the agency's ultimate determination whether granting the LAR will adequately protect the health and safety of the public and the environment.<sup>99</sup> In this case, the significant link between the claimed deficiency and the agency's determination is Entergy's statement in its LAR that "[t]his license condition is no longer needed, based on the provisions of 10 CFR 50.75(h) and [Entergy's] decision to comply with that section's decommissioning trust agreement requirements."<sup>100</sup> Vermont argues that Entergy's stated intentions do not comply with those requirements (for which it has already received a partial exemption).<sup>101</sup> This raises a material question concerning the LAR.

Vermont's arguments concerning 10 C.F.R. § 50.82 are also material to the NRC Staff's consideration of the LAR because elimination of the 30-day notice requirement rests on disbursements being made under section 50.82(a)(8).<sup>102</sup> If, as Vermont alleges, Entergy's

---

<sup>97</sup> 10 C.F.R. § 50.75(h)(5).

<sup>98</sup> Private Fuel Storage, LLC (Indep. Spent Fuel Storage Installation), LBP-98-07, 47 NRC 142, 179, aff'd, CLI-98-13, 48 NRC 26 (1998).

<sup>99</sup> Id. at 180.

<sup>100</sup> LAR, attach. 1, at 6.

<sup>101</sup> Petition at 3; Tr. at 11–12.

<sup>102</sup> 10 C.F.R. § 50.75(h)(1)(iv) ("After decommissioning has begun and withdrawals from the decommissioning fund are made under § 50.82(a)(8), no further notification need be made to the NRC."); see Petition at 5 ("[E]ven if Entergy were allowed to rely on 10 C.F.R. § 50.75(h), it could not avoid the 30 day notice requirement because it has not shown that it is in compliance with 10 C.F.R. §§ 50.82[(a)](8)(i)(B) and (C).").

planned disbursements are not in accordance with 10 C.F.R. § 50.82(a)(8), then all of the disbursements from the fund would require the 30-day notice that Entergy's LAR seeks to eliminate.<sup>103</sup> These allegations therefore raise material concerns about the option in the LAR that allows Entergy to make its disbursements under section 50.82(a)(8).<sup>104</sup> The Board "makes threshold decisions on materiality on a case-by-case basis, given the nature of the issue and the record presented before the Board."<sup>105</sup> In this case, Vermont's allegation that Entergy's plans are incompatible with section 50.82(a)(8) goes to the heart of the LAR, which removes the 30-day notice based on an assurance that the license conditions will be replaced by sections 50.75(h) and 50.82(a)(8). The correctness of that assurance is a genuine concern relative to the appropriateness of the LAR, and therefore the Board concludes that Vermont has shown the materiality of its contention.<sup>106</sup>

---

<sup>103</sup> Vermont's argument is that retaining the 30-day notice provision is important because if that 30-day provision stays in effect then (1) Entergy would continue to give the appropriate notice regarding expenses which are not decommissioning-related (as defined by section 50.2) consistent with sections 50.75(h)(1)(iv) and 50.82(a)(8)(i)(A), and (2) the NRC Staff would have the opportunity to deny any expenses that did not meet the section 50.2 definition of decommissioning expenses. Petition at 5–6.

<sup>104</sup> LAR, attach. 1, at 4.

<sup>105</sup> NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 329 (2012).

<sup>106</sup> See Calvert Cliffs 3 Nuclear Project, LLC, & Unistar Nuclear Operating Servs., LLC (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, 70 NRC 911, 922–23 (2009) (explaining materiality of applicant's compliance with NRC regulations).

### iii. Factual Support

Vermont presents essentially two lines of factual support for this contention: one concerning plans to use the fund for non-decommissioning expenses and the other regarding potential unforeseen costs. The Board addresses each in turn:

#### *a. Non-decommissioning expenses*

First, Vermont has identified documents and sources—primarily the PSDAR and a news article—indicating that Entergy plans to spend the trust fund on non-decommissioning costs that are not part of the granted exemptions.<sup>107</sup> Vermont points to six line items in the PSDAR that, it alleges, are non-decommissioning costs for which Entergy intends to use the decommissioning fund: (1) a settlement agreement payment, (2) emergency preparedness costs, (3) shipment of non-radiological asbestos waste, (4) insurance, (5) property taxes, and (6) replacement of a bituminous roof.<sup>108</sup> Vermont argues that these expenditures are not legitimate decommissioning costs because they “do not reduce radiological contamination at the site.”<sup>109</sup>

Regarding emergency planning costs, Vermont points to its comments on the PSDAR for further elaboration: “Expenses for emergency preparedness do not reduce radiological contamination at the site and are thus not proper uses of the [Trust] Fund. Entergy would therefore need an exemption (which has neither been requested nor granted) before it could withdraw [Trust] Funds for emergency preparedness expenses.”<sup>110</sup> Vermont alleges that Entergy is improperly planning to use the fund to pay for legal costs as well. According to a news article cited by Vermont, Entergy’s spokesman said that legal costs from Vermont’s

---

<sup>107</sup> Petition at 9–10; Reply at 6.

<sup>108</sup> Petition at 9–10 (citing PSDAR, app. C, tbl. C, lines 1a.2.22, 1b.2.22, 1a.2.23, 1a.2.27, 1a.4.1, 1a.4.2, 2b.1.4).

<sup>109</sup> *Id.* at 10.

<sup>110</sup> Petition, attach. 1, at 37 n.9.

challenge to Entergy's reduction in emergency planning are "part of our decommission[ing] costs" and "is money that's going to be coming from [the] trust fund."<sup>111</sup> The article paraphrases him as explaining that "[b]ecause the plant is no longer generating revenue, [the spokesman] said any legal costs the company incurs will come out of the decommissioning trust fund."<sup>112</sup>

These citations support Vermont's contention that approval of the LAR would prevent the State from objecting to improper expenditures before they occur by removing the current 30-day notice requirement.<sup>113</sup> Notwithstanding the granted exemptions, the decommissioning-only limitation on funds imposed by 10 C.F.R. § 50.75(h)(1)(iv) and § 50.82(a)(8)(i)(A) remains in place for all non-decommissioning costs other than "trust fund disbursements for irradiated fuel management activities."<sup>114</sup> This contention raises health and environmental concerns about the license amendment because the decommissioning fund exists to ensure that companies will be able to decontaminate the site.<sup>115</sup> As Vermont states, "[a]ssuring adequate funds for a reactor owner to meet its decommissioning obligations is part of the bedrock on which NRC has built its judgment of reasonable assurance of adequate protection for the public health and safety and protection of the environment."<sup>116</sup> The Board concludes that Vermont has provided sufficient factual support to challenge the correctness of Entergy's statement in the LAR that the company will comply with 10 C.F.R. § 50.75(h), which forms the basis for removing the 30-day notice

---

<sup>111</sup> Petition at 10 (quoting John Herrick, State appeals decision on Vermont Yankee emergency monitoring, Vt. Digger (Feb. 26, 2015, 6:49 PM), <http://vtdigger.org/2015/02/26/state-appeals-decision-on-vermont-yankee-emergency-monitoring/>).

<sup>112</sup> Id.

<sup>113</sup> Id. at 5–6.

<sup>114</sup> Exemption Request at 1.

<sup>115</sup> Petition at 1; see Honeywell, CLI-13-1, 77 NRC at 6; Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 256 (1996) ("[C]laimed deficiencies in a decommissioning plan must have health and safety significance in order to be admissible.").

<sup>116</sup> Petition at 1.

requirement. These allegations provide the “sound basis” and documentary support required to support a contention asserting that a licensee will contravene the NRC’s regulations.<sup>117</sup>

***b. Unforeseen expenses***

Next, the State points to groundwater remediation and indefinite storage of spent fuel as two major costs not contemplated by Entergy, and thus asserts that the lack of 30-day notice in the LAR conflicts with Entergy’s regulatory duty to provide notice for any withdrawal not made in accordance with 10 C.F.R. § 50.82(a)(8).<sup>118</sup> As factual support, Vermont relies on the recent discovery of strontium-90, a decay product of nuclear fission, in the groundwater near Vermont Yankee.<sup>119</sup> Vermont notes that, because the PSDAR was written before this discovery, it does not account for the potential cost of soil or groundwater remediation.<sup>120</sup> In developing the decommissioning cost estimate, Entergy concluded that such remediation was unnecessary because “only tritium had migrated into the groundwater” and tritium decays quickly into non-radioactive helium.<sup>121</sup> The PSDAR does not account for the possibility of strontium-90 leaks.

Vermont asserts that this omission could have expensive consequences for decommissioning based on the expert opinion of Dr. Irwin, a health physicist. He opines that “[m]any long-lived radionuclides are likely to be found in soils and groundwater far from the small excavation made to repair the leaks that likely allowed reactor condensate to enter into the site soils for many years.”<sup>122</sup> And based on his knowledge of similar radionuclide

---

<sup>117</sup> Diablo Canyon, CLI-02-16, 55 NRC at 344; Oyster Creek, CLI-00-6, 51 NRC at 207.

<sup>118</sup> Petition at 5.

<sup>119</sup> Id. at 22 (citing Vermont Department of Health Communications Office, Strontium-90 Detected in Ground Water Monitoring Wells at Vermont Yankee (Feb. 9, 2015), [http://healthvermont.gov/news/2015/020915\\_vy\\_strontium90.aspx](http://healthvermont.gov/news/2015/020915_vy_strontium90.aspx)).

<sup>120</sup> Id.

<sup>121</sup> Id. (citing PSDAR, Site Specific Decommissioning Cost Estimate, at 3.4.9).

<sup>122</sup> Irwin Decl. at 4.

discoveries at Maine Yankee, Connecticut Yankee, and Yankee Rowe during their decommissioning, Dr. Irwin alleges that “[t]he presence of strontium-90 or other long-lived radionuclides could greatly increase the costs of decommissioning and site restoration.”<sup>123</sup> Furthermore, he explains that “[t]he recent discovery of strontium-90 in groundwater raises additional concerns regarding soil contamination that may enter the groundwater and move in a way that threatens public health, safety, and the environment.”<sup>124</sup>

Dr. Irwin questions whether Entergy has accounted for these types of unforeseen costs, noting that “Entergy’s Decommissioning Cost Estimate only addresses so-called contingencies that are ‘almost certain to occur.’”<sup>125</sup> Contrary to the company’s cost estimate, Dr. Irwin asserts that “[a]ctual contingencies—such as the discovery of strontium-90 and other radionuclides in places not previously thought to be contaminated—have historically led to enormous escalations in decommissioning costs.”<sup>126</sup> Thus he argues that Entergy has not shown that it has considered potential cost increases given the company’s decision to classify “the discovery of unexpected levels of contaminants, [and] contamination in places not previously expected,” as a “financial risk” that is not included in the decommissioning cost estimate.<sup>127</sup> Insofar as any such withdrawals fail to satisfy 10 C.F.R. § 50.82(a)(8), they would require a 30-day notice.

Though the NRC Staff describes Vermont’s claims about strontium-90 as “speculative,”<sup>128</sup> we conclude that they are adequately supported by references to water

---

<sup>123</sup> Id. at 5.

<sup>124</sup> Id. at 11.

<sup>125</sup> Id. at 7 (quoting PSDAR, Site Specific Decommissioning Cost Estimate at xii (“The cost elements in the estimate are based on ideal conditions; therefore, the types of unforeseeable events that are almost certain to occur in decommissioning, based on industry experience, are addressed through a percentage contingency applied on a line-item basis.”)).

<sup>126</sup> Id. at 8.

<sup>127</sup> Id. (citing PSDAR, Site Specific Decommissioning Cost Estimate at 3.3.2).

<sup>128</sup> NRC Staff’s Answer at 43, 47.



monitoring conducted by the Vermont Department of Public Health and an expert opinion.<sup>129</sup> While Strontium-90 is currently present at the site at levels below the Environmental Protection Agency's limits, Vermont questions whether additional leaks of strontium-90 or other radionuclides are the type of unforeseen expense for which Entergy must prepare.

As the Commission has explained, “[a] licensee could satisfy this [unforeseen expense] criterion by demonstrating that it has sufficient funds in either its decommissioning fund or other available funds to maintain the status quo at the facility, that is, maintain safety in the defueled, shutdown condition.”<sup>130</sup> Contrary to the NRC Staff's argument that the regulations concern safe storage of spent fuel, not groundwater remediation,<sup>131</sup> keeping radionuclides below the EPA limit is necessary to maintain public safety at a decommissioning facility.<sup>132</sup> Given the demonstrated existence of these leaks, Vermont has provided sufficiently supported expert opinion to show at the contention admissibility stage why this inadvertent release of radionuclides is enough of a risk to public health and safety to warrant “merits” consideration as an unforeseen expense.<sup>133</sup>

Finally, Vermont asserts that Entergy's assumptions about the long-term storage of spent fuel fail to demonstrate how the company will ensure “the availability of funds to ultimately

---

<sup>129</sup> According to his curriculum vitae, Dr. Irwin is a certified health physicist with education and work experience in radiological and toxicological sciences. Petition, attach., Curriculum Vitae of William E. Irwin (undated). We conclude that Dr. Irwin has enough knowledge in the subject area to proffer an expert opinion for the purposes of determining contention admissibility. See Progress Energy Fla., Inc. (Levy County Nuclear Power Plant, Units 1 & 2), CLI-10-27, 71 NRC 2, 40–41 (2010).

<sup>130</sup> Use of Decommissioning Trust Funds Before Decommissioning Plan Approval; Draft Policy Statement, 59 Fed. Reg. 5216, 5217 (Feb. 3, 1994) (“It should be noted that this criterion is also pertinent to the normal, end-of-life decommissioning; licensees are to accommodate the possibility of unforeseen occurrences by providing for contingencies.”).

<sup>131</sup> NRC Staff's Answer at 45.

<sup>132</sup> See S. Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 264–65 (2007) (explaining that exposure below regulatory limits did not harm the public).

<sup>133</sup> Irwin Decl. at 3–8; see Yankee Nuclear, CLI-96-7, 43 NRC at 256 (1996).

release the site and terminate the license.”<sup>134</sup> The PSDAR assumes that the Department of Energy “will begin to take irradiated fuel from Vermont Yankee by 2026, [and] that all irradiated fuel will be eliminated from the Vermont Yankee site by 2052.”<sup>135</sup> Given ongoing litigation on this issue and “NRC’s explicit recognition in [the Continued Storage] Rule that spent fuel may be stored indefinitely at each reactor site,” Dr. Irwin opines that Entergy’s cost estimate is deficient “because it fails to explain how it would address the contingency of indefinite onsite storage, including all safety and environmental concerns regarding transferring fuel into new dry casks every 100 years.”<sup>136</sup>

This argument concerning Entergy’s alleged failure to demonstrate the financial ability to store spent fuel indefinitely provides additional factual support for Vermont’s contention. As the NRC Staff acknowledges, the potential consequences of insufficient off-site storage for spent fuel was precisely one of the unforeseen conditions that 10 C.F.R. § 50.82(a)(8)(i)(B) was promulgated to address.<sup>137</sup> And Vermont has correctly noted that the indefinite storage of spent fuel on-site is a very possible outcome, as demonstrated by the assumptions underlying the Continued Storage Rule.<sup>138</sup> Together, this information provides sufficient support for Vermont’s assertion that Entergy’s plans in the LAR contravene the applicable regulations and justify keeping in place the current 30-day notice requirement.

#### **iv. Genuine Dispute**

By identifying and adequately supporting its contention that Entergy’s plans for the trust fund contradict its promise in the LAR to follow 10 C.F.R. § 50.75(h), Vermont has

---

<sup>134</sup> Petition at 5 (quoting 10 C.F.R. § 50.82(a)(8)(i)(C)).

<sup>135</sup> Id.; see PSDAR, Site Specific Decommissioning Cost Estimate at 2.2.

<sup>136</sup> Irwin Decl. at 3.

<sup>137</sup> NRC Staff’s Answer at 45 (citing 59 Fed. Reg. at 5217).

<sup>138</sup> Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238, 56,245 (Sept. 19, 2014).

demonstrated a genuine dispute with the applicant.<sup>139</sup> The State adequately challenges the representations of compliance in the LAR on the two bases discussed in the factual support section: first, that the LAR's statement that Entergy has decided to comply with 10 C.F.R. § 50.75(h) conflicts with the company's plans for the trust fund,<sup>140</sup> and second, that the LAR's deletion of the 30-day notice is incompatible with the requirement that withdrawals account for "unforeseen conditions or expenses" or otherwise ensure the "availability of funds to ultimately release the site."<sup>141</sup>

This is a valid contention. Contrary to Entergy's argument, the LAR does not simply delete several license conditions.<sup>142</sup> Rather, the LAR deletes those license conditions and replaces them with the requirements for decommissioning trust funds: "After decommissioning has begun and withdrawals from the decommissioning fund are made under § 50.82(a)(8), no further notification need be made to the NRC."<sup>143</sup> The Commission's generic determination that the 30-day notice is unnecessary for public health and safety rests on the assumption that the regulatory provisions as a whole provide adequate assurance of public health and safety.<sup>144</sup> Vermont's allegations that Entergy's plans contravene those regulations, in particular the regulatory requirement to provide notice of the planned use of decommissioning trust funds for

---

<sup>139</sup> See Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989) ("The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate." (emphasis added) (quoting Conn. Bankers Ass'n v. Bd. of Governors, 627 F.2d 245, 251 (D.C. Cir. 1980))).

<sup>140</sup> 10 C.F.R. § 50.75(h)(1)(iv).

<sup>141</sup> Petition at 5 (quoting 10 C.F.R. § 50.82(a)(8)(i)(B)–(C)); see 10 C.F.R. § 2.309(f)(1)(i)–(ii).

<sup>142</sup> See Entergy Answer at 16, 19.

<sup>143</sup> 10 C.F.R. § 50.75(h)(1)(iv).

<sup>144</sup> See 67 Fed. Reg. at 78,336 (explaining Commission's view that 30-day notice is unnecessary because it "duplicate[s] [the] notification requirements at § 50.82").

non-decommissioning activities go to the heart of whether this LAR can be approved and thus challenge the material accuracy of the LAR.<sup>145</sup>

Although Entergy states that it “has elected to subject its decommissioning trust agreement to the regulatory requirements for decommissioning trust funds that are specified in 10 CFR 50.75(h),”<sup>146</sup> the LAR’s summary is limited to explaining how the existing license conditions “are addressed in the regulations.”<sup>147</sup> Nowhere does the LAR discuss in practical, real-world terms how Entergy will follow the regulations, particularly in light of its granted exemptions. Normally this would not be an issue because the Board does not assume that licensees will fail to comply with the regulations in the absence of documentary support,<sup>148</sup> but Vermont has provided that support here in the form of an official filing with the NRC, a spokesman’s statements concerning non-decommissioning expenses, and an expert opinion on the likelihood of cost overruns.<sup>149</sup> Vermont’s factual allegations and documentary support satisfy the requirement of demonstrating a genuine dispute concerning the completeness and correctness of the LAR and whether the LAR will ensure adequate protection of public health and safety.<sup>150</sup> Accordingly, this contention is admissible.

Any hearing will be limited to the necessity of a 30-day notice requirement in light of the specific factual issues that Vermont’s petition alleges will reduce the fund to such an extent that

---

<sup>145</sup> See Petition at 2, 6–7; Reply at 5–7.

<sup>146</sup> LAR, attach. 1, at 1.

<sup>147</sup> Id. at 3–6.

<sup>148</sup> Oyster Creek, CLI-00-6, 51 NRC at 207 (“Absent [documentary] support, this agency has declined to assume that licensees will contravene our regulations.”).

<sup>149</sup> Petition at 9–10.

<sup>150</sup> See Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-05-15, 61 NRC 365, 381–82 (2005) (“We find that the Board had a sufficient basis to find that Petitioner had made the showing required to indicate an inquiry in depth was warranted and admit such a contention, even though this may have been a close question.”).

the plant cannot be maintained in a safe condition, i.e., (1) the six line items from the PSDAR that Vermont alleges to be non-decommissioning costs,<sup>151</sup> (2) the legal costs associated with Entergy's reduction in emergency planning,<sup>152</sup> and (3) the potential for unforeseen costs associated with radionuclide releases and indefinite storage of spent fuel.<sup>153</sup> The parties' evidence will center on the actions these line items entail, on whether Entergy does in fact intend to use the decommissioning fund for the line items and legal costs, and on the magnitude of potential expenses associated with radionuclide releases and indefinite storage of spent fuel at Vermont Yankee. All other issues, including the sufficiency of the decommissioning fund itself, are outside the scope of this proceeding.

## **2. Contention II**

Vermont next contends that "Entergy's proposed amendment is untimely."<sup>154</sup> The State argues that when 10 C.F.R. § 50.75(h) went into effect in 2003, Entergy had a choice at that time either (1) to keep its current license conditions or (2) to bring its license into compliance with section 50.75(h).<sup>155</sup> Because Entergy chose to maintain its license conditions for 12 years, Vermont argues that the company is now time-barred from taking advantage of the reduced requirements of section 50.75(h).<sup>156</sup>

---

<sup>151</sup> Petition at 9–10.

<sup>152</sup> Id. at 10.

<sup>153</sup> Id. at 5, 22–23.

<sup>154</sup> Id. at 17.

<sup>155</sup> Id. at 19–20.

<sup>156</sup> Id.

This contention is not admissible because there is no time limit on when a licensee such as Entergy can seek an amendment to the license conditions relating to its decommissioning trust fund.<sup>157</sup> In 10 C.F.R. § 50.75(h)(5), the NRC stated that:

The provisions of paragraphs (h)(1) through (h)(3) of this section do not apply to any licensee that as of December 24, 2003, has existing license conditions relating to decommissioning trust agreements, so long as the licensee does not elect to amend those license conditions. If a licensee with existing license conditions relating to decommissioning trust agreements elects to amend those conditions, the license amendment shall be in accordance with the provisions of paragraph (h) of this section.<sup>158</sup>

The plain language of this text does not impose a time restriction on when a licensee can seek amendment of the conditions of its decommissioning trust fund. It merely states that those amendments, whenever they occur, must bring the license into compliance with 10 C.F.R. § 50.75(h).

### **3. Contention III**

Vermont's third contention concerns the relationship between this LAR and Entergy's related exemption request:

Entergy's proposed amendment must be considered in conjunction with a directly related exemption request because if the exemption request is granted there will not be reasonable assurance of adequate protection of the public health and safety as required by section 182(a) of the Atomic Energy Act (42 U.S.C. § 2232(a)).<sup>159</sup>

Vermont argues that the Board should consider whether Entergy is requesting the LAR to seek a regulatory exemption that would allow it to use the trust fund for non-decommissioning expenses.<sup>160</sup> As things now stand, Entergy would not be able to seek an exemption from the

---

<sup>157</sup> See Minor Changes to Decommissioning Trust Fund Provisions, Direct Final Rule, 68 Fed. Reg. 65,386, 65,387 (Nov. 20, 2003) (noting the "intent of the Commission that individual licensees should have the option of retaining their existing license conditions.").

<sup>158</sup> 10 C.F.R. § 50.75(h)(5).

<sup>159</sup> Petition at 20.

<sup>160</sup> Id.

current license conditions because only regulations, not license conditions, are subject to the exemption process.<sup>161</sup> But, according to Vermont, “[t]he exemption request presumes the LAR will be granted, and then asks for an exemption from the very regulations Entergy is relying on in this LAR.”<sup>162</sup>

As the Board explained above, we will consider the exemption request as a document supporting Vermont’s factual assertions. However, unlike Contention I, Vermont argues here that Entergy’s exemption request does not provide adequate assurance of public safety. As expressed by Vermont, this issue is outside the scope of this proceeding because it concerns the merits of the exemption requests (and their subsequent approval).<sup>163</sup> Whether the NRC Staff was correct to grant the exemption request is not an issue for this Board to decide.<sup>164</sup>

#### **4. Contention IV**

Vermont’s fourth contention concerns the necessity of conducting an environmental review under the National Environmental Policy Act (“NEPA”):

The proposed amendment should be denied because Entergy has not submitted an environmental report as requ[i]red by 10 C.F.R. §§ 51.53(d) and 51.61 and it has not undergone the required NRC Staff environmental review pursuant to 10 C.F.R. §§ 51.20, 51.70 and 51.101 and, despite Entergy’s claim to the contrary, is not categorically excluded from that review under 10 C.F.R. § 51.22(c).<sup>165</sup>

---

<sup>161</sup> See 10 C.F.R. § 50.12(a) (“The Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of the regulations.”).

<sup>162</sup> Petition at 24.

<sup>163</sup> See Private Fuel Storage, CLI-01-12, 53 NRC at 463 (explaining that exemptions “ordinarily do not trigger hearing rights” when “[a]n already-licensed facility [is] asking for relief from performing a duty imposed by NRC regulations”); Vt. Yankee, LBP-15-18, 81 NRC at \_\_\_ (slip op. at 7) (May 18, 2015) (declining to review “the adequacy of Entergy’s exemption request and associated analyses”).

<sup>164</sup> The fact that NRC Staff has now granted the exemptions does not change our analysis of this contention or Contention IV. See Vermont’s New Contention at 7.

<sup>165</sup> Petition at 26.

Vermont argues that Entergy's LAR is more than simply a request to change recordkeeping or administrative procedures—both of which are categorically excluded from environmental review under 10 C.F.R. § 51.22(c)(10)(ii). Instead, Vermont asserts that what is at stake here are the potential environmental effects of running out of money needed to decommission the site.<sup>166</sup>

The State asserts that Entergy is unlawfully segmenting its decommissioning plans into smaller steps to avoid the comprehensive environmental review required by NEPA.<sup>167</sup> Furthermore, Vermont argues that these changes, when considered together, go beyond mere recordkeeping because the current notification process allows the NRC and Vermont to ensure that the fund will be used to protect the environment.<sup>168</sup>

The NRC Staff argues that Entergy does not need to submit an environmental report until the company submits its license termination plan at the end of decommissioning.<sup>169</sup> At oral argument the NRC Staff stated that “it has not yet determined in this case whether [the Staff's environmental review] will be accomplished through an environmental assessment or through a categorical exclusion.”<sup>170</sup> Entergy asserts that the LAR is merely administrative in nature, and thus categorically excluded from any NEPA review under 10 C.F.R. § 51.22(c)(10)(ii), which covers changes to “recordkeeping, reporting, or administrative procedures or requirements.”<sup>171</sup>

---

<sup>166</sup> Id. at 27.

<sup>167</sup> Id. at 28–31.

<sup>168</sup> Id. at 27; Reply at 17.

<sup>169</sup> NRC Staff's Answer at 54.

<sup>170</sup> Tr. at 66.

<sup>171</sup> Entergy Answer at 38–42; NRC Staff's Answer at 49–50; see Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, Proposed Rule, 45 Fed. Reg. 13,739, 13,745 (Mar. 3, 1980) (“The function of these procedural and administrative changes is merely to facilitate the orderly conduct of the licensee's business and to insure that information needed by the Commission to perform its regulatory functions is readily available.”); Final Rule, 49 Fed. Reg. 9352, 9367 (Mar. 12, 1984).



Although Vermont challenges the absence of an environmental report from Entergy, the State has not pointed to any regulation that requires one. Under 10 C.F.R. § 51.53(d), an applicant need not submit an environmental report until the final stage of decommissioning as part of its license termination plan.<sup>172</sup>

To the extent that Vermont is challenging the NRC Staff's environmental analysis, this contention is premature. The NRC Staff informed us at oral argument that they have not yet completed their environmental analysis.<sup>173</sup> If Vermont seeks to challenge the NRC Staff's environmental analysis (which may come in the form of a categorical exclusion), the State may file a timely motion to add a new contention once that analysis is complete.<sup>174</sup> We instruct the NRC Staff to inform the other parties and the Board when this analysis is finished.

## **5. Contention V**

### **A. Summary of the Parties' Arguments**

After the NRC Staff granted Entergy's exemption request, Vermont moved for leave to file a new contention concerning the material accuracy of the LAR. Vermont's new contention reads as follows:

The license amendment request should be denied because it is no longer accurate within the meaning of 10 C.F.R. §§ 50.9 and 50.90, does not meet the requirements of 10 C.F.R. § 50.75(h)(5), and because Entergy is no longer in compliance with other provisions of 10 C.F.R. §§ 50.75(h) and 50.82(a)(8)(i)(a).<sup>175</sup>

Vermont argues that the new contention is timely because it was filed ten days after the Federal Register notice informing the public that the NRC Staff had granted Entergy's exemption

---

<sup>172</sup> Although Vermont invokes 10 C.F.R. § 51.61 in this contention, it is irrelevant here because Entergy is not submitting an application for an independent spent fuel storage installation.

<sup>173</sup> Tr. at 66.

<sup>174</sup> See Crow Butte Res., Inc. (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 350–51 (2009).

<sup>175</sup> Vermont's New Contention at 4.

requests.<sup>176</sup> Based on the granted exemptions, Vermont argues that Entergy's LAR is not complete and accurate in all material respects: "Entergy asserts that the LAR, if approved, will be in compliance with the terms of 10 C.F.R. § 50.75(h). However, in light of the recently approved exemption granted to Entergy, the LAR will no longer be in compliance with all the provisions of that section, but rather has been exempted from them."<sup>177</sup> Vermont asserts that this statement is material because 10 C.F.R. § 50.75(h)(5) "allows substitution of the regulatory requirement for the license provisions only when they are substantially identical."<sup>178</sup> In this instance, the substituted license provisions are not similar, according to the State, because the granted exemptions have removed a significant component of Entergy's obligations under these regulations.<sup>179</sup>

Entergy and the NRC Staff assert that the new contention is untimely because Vermont was aware of the substance of the exemption request at the time the State filed its petition.<sup>180</sup> Given that the approved exemptions do not differ from the requested ones, they argue that the act of granting them is not new or material information.<sup>181</sup> Both also challenge Vermont's motion on admissibility grounds, arguing that the exemptions are a separate and independent process that is beyond the scope of the proceeding,<sup>182</sup> and immaterial to information that the NRC Staff will consider when reviewing the LAR.<sup>183</sup> Entergy argues that the contention is an impermissible

---

<sup>176</sup> Id. at 2–3.

<sup>177</sup> Id. at 4.

<sup>178</sup> Id. at 6.

<sup>179</sup> Id.

<sup>180</sup> Entergy's Answer to New Contention at 7–9; Staff's Answer to New Contention at 15–19.

<sup>181</sup> Entergy's Answer to New Contention at 8–9; Staff's Answer to New Contention at 15–16.

<sup>182</sup> Entergy's Answer to New Contention at 11–12; Staff's Answer to New Contention at 22.

<sup>183</sup> Entergy's Answer to New Contention at 15; Staff's Answer to New Contention at 20–21.

challenge to the regulations because 10 C.F.R. § 50.75(h)(5) does not contain “any requirement to consider exemptions from Section 50.75(h) that would be applied only after the LAR is granted.”<sup>184</sup> The NRC Staff adds that the exemptions play no role in the safety evaluation of the LAR because the NRC Staff “will only evaluate the exchange of the [Vermont Yankee] decommissioning trust license condition provisions for the decommissioning trust regulations, *in their entirety*.”<sup>185</sup> As the NRC Staff stated at oral argument, the Staff reviews the LAR “just to see that the correct license conditions in the license are deleted and that the correct regulatory provisions from the regulations are assumed by the licensee.”<sup>186</sup>

Vermont replies that “[t]he *request* for an exemption is different from the *granting* of an exemption,” making its new contention timely.<sup>187</sup> The State maintains that approval of the exemptions is material and within scope because the Board must “look at what regulatory regime actually applies if the LAR is granted.”<sup>188</sup>

## **B. The Board’s Ruling**

### **i. Timeliness**

As an initial matter, the Board concludes that Vermont’s contention is timely because the NRC Staff’s decision to grant the exemptions was new and material information. Although the substance of the exemption request has been available since January, that information is only relevant to the substantive merits of the exemption request, which Vermont is not challenging here. The State’s argument focuses on how the approval of the exemptions “creates a

---

<sup>184</sup> Entergy’s Answer to New Contention at 15–16.

<sup>185</sup> Staff’s Answer to New Contention at 21.

<sup>186</sup> Tr. at 25.

<sup>187</sup> New Contention Reply at 3.

<sup>188</sup> Id. at 8.

markedly different factual picture than the one presented in the LAR.”<sup>189</sup> When Vermont filed its petition on April 20, 2015, it would have been impossible to predict if and when the exemptions would be granted.<sup>190</sup> Indeed, *had* Vermont proposed this exact contention in its original petition, Entergy and the NRC Staff would have been justified in calling it premature.<sup>191</sup> The NRC Staff’s approval of the exemption request is a new fact that was “previously unavailable” at the time Vermont filed its petition.<sup>192</sup>

The purpose of the timeliness rules is not to trap petitioners into a no-win situation where a contention is called premature if filed in the original petition and untimely if petitioners wait for a potential event to actually transpire.<sup>193</sup> The goal is an efficient hearing process that considers factual issues when they become available; thus the proper time to submit a new contention is when new facts emerge.<sup>194</sup> Here, the fact underlying Vermont’s new contention (that the

---

<sup>189</sup> Vermont’s New Contention at 3.

<sup>190</sup> Even the NRC Staff was unable to explain why the exemptions were granted before the LAR. Tr. at 40 (“[T]he staff has a number of activities that they are currently engaged in and their work progresses as best it can given the inputs that they get from various office[s] and for, you know, a lot of reasons activities get delayed somewhat.”).

<sup>191</sup> See Union Electric Co. (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 167–68 (2011) (explaining that requests for a generic NEPA analysis were premature because the NRC evaluation of the Fukushima Dai-ichi events was still ongoing).

<sup>192</sup> See Pa’ina Hawaii, LLC (Materials License Application), CLI-10-18, 72 NRC 56, 87–88 (2010) (explaining that contention was timely because it relied on testimony marking the ‘first time’ the NRC Staff had addressed the impacts of transportation accidents at the site).

<sup>193</sup> See Powertech USA, Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-13-9, 78 NRC 37, 86–88 (2013) (concluding that a contention was timely where NRC Staff argued that it was filed too late and the applicant argued it was filed too early); Shaw Areva Mox Servs. (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 503–05 (2008) (Farrar J., concurring) (describing prematurity/belatedness dilemma where a petitioner filing a contention about an expected event “will be told it is premature, on the ground that the problem it portends has not yet been realized. If, on the other hand, they do not file it, they will later be told they are too late, on the ground that the earlier document should have served to trigger their action.”).

<sup>194</sup> La. Energy Servs., L.P. (Nat’l Enrichment Facility), CLI-05-21, 62 NRC 538, 539 (2005) (“By their nature, the timeliness of late-filed contentions turns on fact-specific considerations, such as when new documents or information first became available and how promptly intervenors reacted.”).

exemptions had been approved) did not occur until June 23, 2015. Vermont filed the new contention ten days after the NRC published notice of the exemptions in the Federal Register. This was a reasonable amount of time for action.<sup>195</sup>

## ii. Admissibility

Applying the six admissibility criteria of 10 C.F.R. § 2.309(f)(1), the Board concludes that Contention V is admissible as a legal contention. Initially we note that, as was the case with its Contention I, Vermont has supplied a specific statement of its contention and explained its basis in 10 C.F.R. §§ 50.9 and 50.90.<sup>196</sup> Below we consider the other four contention admissibility factors outlined in section 2.309(f)(1).

### a. Scope

As we discussed in Contention I,<sup>197</sup> Vermont's argument that the LAR is incorrect and incomplete is squarely within the scope of this proceeding under 10 C.F.R. § 2.309(f)(1)(iii) because the regulations are clear that the applicant must "fully describ[e] the changes desired" in the LAR,<sup>198</sup> and that the LAR must be "complete and accurate in all material respects."<sup>199</sup> It is true that Vermont relies on the exemptions as a factual predicate for its challenge, but that does not turn its dispute over the LAR's accuracy into a challenge to the merits of the exemptions.<sup>200</sup>

---

<sup>195</sup> Pa'ina, CLI-10-18, 72 NRC at 87 (finding 30 days to be a reasonable deadline); see 10 C.F.R. § 2.306(a) (excluding holidays and weekends from the date calculation).

<sup>196</sup> Vermont's New Contention at 4; see 10 C.F.R. § 2.309(f)(1)(i)–(ii).

<sup>197</sup> See supra section II.1.B.i.

<sup>198</sup> 10 C.F.R. § 50.90.

<sup>199</sup> Id. § 50.9(a); see Fla. Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 & 2), LBP-08-14, 68 NRC 279, 283–84 (2008).

<sup>200</sup> See supra section II.1.B.i.b.

Nor is this contention a challenge to the regulations, as Entergy suggests.<sup>201</sup> Entergy argues that the company “seeks to do only what has been approved by the Commission through rulemaking.”<sup>202</sup> But Vermont’s allegation is that Entergy has provided incorrect information in its application—something that is prohibited by NRC regulations.<sup>203</sup> In particular, Vermont disputes the overarching statement in the LAR that “[t]he provisions in 10 CFR 50.75(h) include substantially similar decommissioning trust requirements as those found in [Vermont Yankee] [Operating] License Condition 3.J.”<sup>204</sup> Vermont asserts that this statement is materially wrong: “Entergy explicitly describes its LAR as replacing existing license conditions with regulations that are ‘substantially similar.’ This is empirically false. If this LAR is granted, Entergy’s current license conditions will not be replaced with similar provisions because Entergy has been exempted from them.”<sup>205</sup> An argument about the correctness of statements in the LAR is not a challenge to the regulations. While the Board takes no position on the merits of Vermont’s claim that these statements are false, we agree with Vermont that an applicant must describe the changes desired by noting planned exemptions directly relevant to the LAR.<sup>206</sup>

---

<sup>201</sup> Entergy’s Answer to New Contention at 15–16.

<sup>202</sup> Id. at 15.

<sup>203</sup> See Pac. Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-11-32, 74 NRC 654, 668 n.31 (2011).

<sup>204</sup> Vermont’s New Contention at 6 (citing LAR, attach. 1, at 2).

<sup>205</sup> New Contention Reply at 8 (citing LAR, attach. 1, at 2) (footnote omitted).

<sup>206</sup> Unlike the dispute in Diablo Canyon over updating an environmental report with information that was previously unknown to the applicant, see LBP-11-32, 74 NRC at 668 & n.31, Vermont alleges here that the LAR and exemptions were both known to Entergy as part of its concerted effort to remove the licensing conditions and parts of 10 C.F.R. § 50.75(h). See Petition at 6–7; see also Tr. at 11 (“Entergy could have said directly in its LAR what it was planning to do and the State then would have had a right to a hearing on whether Entergy’s proposal would adequately protect public health, safety and the environment. But Entergy did not do that. Instead, Entergy chose to submit an application that is missing critical information.”).

**b. Materiality**

The extent to which 10 C.F.R. § 50.75(h) actually applies to Vermont Yankee depends on both the LAR and the exemptions.<sup>207</sup> The Board thus agrees with Vermont that the approval of the exemptions is material to the Staff's LAR review process and its resulting findings. First, 10 C.F.R. § 50.75(h) applies to Vermont Yankee only if the LAR is granted. Second, if Entergy's LAR is granted, the exemptions from 10 C.F.R. § 50.75(h)(1)(iv) take immediate effect, allowing Entergy to make \$225 million in withdrawals for spent fuel management without providing advance notice.<sup>208</sup> The LAR and exemptions each provide some changes on their own, but only the two interacting together allow Entergy to use the decommissioning fund for spent fuel management without providing 30-day notices for its expenditures,<sup>209</sup> as shown in this diagram:

---

<sup>207</sup> Vermont's New Contention at 4; see 10 C.F.R. § 2.309(f)(1)(iv).

<sup>208</sup> The Board disagrees with Entergy that this amount of money—which represents over a third of the decommissioning fund's current balance and nearly one-fifth of total projected expenditures for shutting down Vermont Yankee—can be described as a “narrow” exemption. See Tr. 30–31.

<sup>209</sup> See Tr. at 40 (“We [Entergy] have an exemption that's sitting there not applicable to anything. When the thing, meaning the license amendment, if and when it comes into being, then the exemption will apply to it.”).

	Exemptions Granted	Exemptions Not Granted
<b>LAR Approved</b>	<ul style="list-style-type: none"> <li>- Entergy may use fund for spent fuel management<sup>210</sup></li> <li>- Entergy need not provide 30-day notice for decommissioning or spent fuel expenses</li> </ul>	<ul style="list-style-type: none"> <li>- Entergy cannot use fund for spent fuel management</li> <li>- Entergy need not provide 30-day notice for decommissioning expenses</li> </ul>
<b>LAR Not Approved</b>	<ul style="list-style-type: none"> <li>- Entergy may use fund for spent fuel management</li> <li>- Entergy must provide 30-day notice for decommissioning and spent fuel expenses</li> </ul>	<ul style="list-style-type: none"> <li>- Entergy cannot use fund for spent fuel management</li> <li>- Entergy must provide 30-day notice for decommissioning expenses</li> </ul>

Because the NRC Staff plans to review the exemptions and LAR separately,<sup>211</sup> it appears the NRC Staff will examine the safety implications of each separate request without considering the interactions between the two.<sup>212</sup> The NRC Staff asserts information about the exemptions is immaterial because it plans to review the LAR as if 10 C.F.R. § 50.75(h) applied in its entirety.<sup>213</sup> But, in fact, this is an outcome that cannot occur because the exemptions have already been granted and are effective immediately.<sup>214</sup> The NRC Staff’s assertion that 10 C.F.R. § 50.75(h) applies in its entirety (on the theory that an exemption does not actually remove the regulation) elevates form over substance by ignoring the actual, substantive effect

<sup>210</sup> This chart describes regulatory obligations. The Board takes no position on whether Entergy would be allowed to make spent fuel payments under the current Master Trust Agreement because that agreement is outside the scope of this proceeding.

<sup>211</sup> Staff’s Answer to New Contention at 24 (“[F]or the two requests, two different and unrelated safety findings have to be made.”).

<sup>212</sup> Tr. at 50–51 (“The staff is treating these as two separate actions.”).

<sup>213</sup> Staff’s Answer to New Contention at 24.

<sup>214</sup> To whatever degree the mere pendency of Entergy’s exemption requests would have failed to support a contention like the one proffered by the State, the NRC Staff’s grant of those exemptions seemingly removes any question about whether their effect needs to be considered as part of the LAR review process.



of the granted exemptions.<sup>215</sup> As Vermont argues, “all parties to this proceeding know full well what happens if the Board grants this LAR—the current license conditions will not be replaced with requirements from 50.75(h).”<sup>216</sup> We agree with Vermont that its contention is material because it concerns the real-world consequences of approving the LAR.<sup>217</sup>

Requiring the LAR to describe the desired changes in light of the granted exemptions provides the agency with the complete and accurate information the NRC Staff needs to review the LAR. This obligation to fully describe the desired changes is not a mere technicality. As the courts have long explained, those “dealing with their government must turn square corners.”<sup>218</sup> If the LAR discussed the exemptions, as Vermont argues it must,<sup>219</sup> then the NRC Staff would have the information necessary to review both together and consider whether the current license conditions should be replaced by 10 C.F.R. § 50.75(h) as exempted. Based on the significant connection between the LAR and the regulations as exempted, Vermont has sufficiently shown that the existence of the exemptions is “material to the findings the NRC must make to support the action that is involved in the proceeding.”<sup>220</sup>

---

<sup>215</sup> See Progress Energy Fla., Inc. (Levy County Nuclear Power Plant, Units 1 & 2), CLI-10-2, 71 NRC 27, 36–38 (2010) (declining to elevate form over substance with respect to precise wording of petitioners’ contention).

<sup>216</sup> New Contention Reply at 8; see also Tr. at 30, 75 (referring to the granted exemptions as the “elephant in the closet.”).

<sup>217</sup> See Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-691, 16 NRC 897, 910 (1982) (“[M]ateriality depends on whether the information is capable of influencing the decisionmaker—not on whether the decisionmaker would, in fact, have relied on it.”).

<sup>218</sup> See Gilmore v. Lujan, 947 F.2d 1409, 1412 (9th Cir. 1991) (quoting Rock Island, Ark., & La. Ry. Co. v. United States, 254 U.S. 141, 143 (1920)).

<sup>219</sup> Vermont’s New Contention at 4–6; New Contention Reply at 7–11.

<sup>220</sup> 10 C.F.R. § 2.309(f)(1)(iv).

**c. Factual Support**

As we explain more fully below, this contention frames a legal dispute over the meaning of 10 C.F.R. § 50.75(h)(5)'s direction that a "license amendment shall be in accord with the provisions of paragraph (h) of this section." Vermont nonetheless provides a factual framework for this legal contention in its assertion that the LAR is incorrect because Entergy's statements contradict the practical effects of the granted exemptions.<sup>221</sup> Vermont summarizes its factual challenge as follows:

Entergy cannot deny that its LAR explicitly represents that '[t]he provisions in 10 CFR 50.75(h) include substantially similar decommissioning trust requirements as those found in [Vermont Yankee] [Operating] License Condition 3.J.' Far from an off-hand remark, that is the entire thrust of this LAR. The explicit statement about 50.75(h) being 'substantially similar' is followed by multiple references to where specific license conditions are 'addressed' by the regulations. This culminates in a three-and-a-half page table illustrating where each specific license condition is 'addressed' by a specific regulation. Entergy asserted that the LAR involved only 'administrative changes to the license that will be consistent with the NRC's regulations at 10 CFR 50.75(h)' and that '[t]he proposed amendment is confined to administrative changes for providing consistency with existing regulations.' As the State's motion explains, now that the exemption has been granted, these representations are inaccurate. Entergy's license conditions will not be replaced by 'substantially similar decommissioning trust requirements.'<sup>222</sup>

This explanation is adequate for the purposes of contention admissibility.<sup>223</sup> By pointing to the exemptions and the LAR, Vermont has adequately supported its statement that the LAR is legally deficient in light of the granted exemptions.<sup>224</sup>

---

<sup>221</sup> Vermont's New Contention at 3 (citing LAR, attach. 1, at 4).

<sup>222</sup> New Contention Reply at 9–10 (citing LAR, attach. 1, at 2–8) (footnotes omitted).

<sup>223</sup> See S. Nuclear Operating Co. (Vogle Electric Generating Plant, Units 3 & 4), CLI-11-8, 74 NRC 214, 221 (2011) ("[T]he evaluation of a contention that is performed at the contention admissibility stage should not be confused with the evaluation that is later conducted at the merits stage of a proceeding. At the contention admissibility stage, a Board evaluates whether a petitioner has provided sufficient support to justify admitting the contention for further litigation. The facts and issues raised in a contention are not 'in controversy' and subject to a full evidentiary hearing unless the proposed contention is admitted.").

<sup>224</sup> See 10 C.F.R. § 2.309(f)(1)(v).

**d. Genuine Dispute**

Finally, the Board concludes that Vermont has identified a genuine legal dispute concerning the accuracy of the LAR and the requirements of 10 C.F.R. § 50.75(h)(5). That dispute is whether a license amendment can “be in accordance with the provisions of paragraph (h) of [10 C.F.R. § 50.75]”<sup>225</sup> where a plant is already exempt from two provisions of 10 C.F.R. § 50.75(h)(1)(iv). Because this challenge has not arisen before, neither the Commission nor any licensing board has had the opportunity to interpret the meaning of 10 C.F.R. § 50.75(h)(5). This is a legal issue for the Board to address.<sup>226</sup>

Relying on Massachusetts v. NRC, the NRC Staff argues that exemptions do not actually modify the regulations because the ability to request an exemption is part of the regulations themselves.<sup>227</sup> But Massachusetts v. NRC concerned a temporary exemption, and the court clearly stated that “[t]his is not a situation in which the NRC permanently exempted the licensee from following a specific license requirement.”<sup>228</sup> Here, by contrast, Entergy seeks to replace specific license conditions with permanent exemptions from the regulations, which is the precise situation that the court distinguished in Massachusetts v. NRC. And even more notably, the regulations at issue are not part of the regulatory requirements that apply under Entergy’s current operating license. Entergy is not “operating in accordance with its unaltered license” by “chang[ing] which rule applie[s] for a brief period of time.”<sup>229</sup> Entergy is instead amending its

---

<sup>225</sup> 10 C.F.R. § 50.75(h)(5).

<sup>226</sup> U.S. Dep’t of Energy (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 590 (2009).

<sup>227</sup> Staff’s Answer to New Contention at 24–25 (citing Massachusetts v. NRC, 878 F.2d 1516, 1519, 1521 (1st Cir. 1989); Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 & 2), CLI-00-5, 51 NRC at 94–98 (ruling that an exemption did not modify the license because the ability to request an exemption is part of the license itself)).

<sup>228</sup> Massachusetts v. NRC, 878 F.2d at 1521.

<sup>229</sup> Id.

license to place the plant under the force of regulations from which it will—immediately and permanently—become partially exempt without addressing this in the LAR.<sup>230</sup>

Entergy maintains that this contention does not demonstrate a genuine dispute, arguing that “[t]he LAR is independent and separate from *how the regulations are applied*, which is addressed by the regulations themselves as exempted.”<sup>231</sup> But this argument runs counter to the reality that the regulations and exemptions both depend on approval of the LAR. If Entergy “fully describe[d] the changes desired” (i.e. deletion of the license conditions and application of the regulations as exempted), the LAR would not “be in accordance with” 10 C.F.R. § 50.75(h). We agree with Vermont that “[w]hen the exemption was granted, the situation presented in Entergy’s LAR—a one-for-one swap of its license conditions for regulations—moved from being hypothetical to being *counterfactual*.”<sup>232</sup> This serious legal question about what the LAR actually does demonstrates a genuine dispute and shows that an “inquiry in depth” is warranted.<sup>233</sup>

Because there does not appear to be a factual dispute between the parties on this matter, the Board intends to decide the legal issues on the basis of briefs and oral argument. The primary issue for briefing will be whether an LAR is “in accordance with the provisions of paragraph (h) of [10 C.F.R. § 50.75]”<sup>234</sup> where a plant is already exempt from two provisions of 10 C.F.R. § 50.75(h)(1)(iv). Briefing schedules will be set out in a subsequent order. The Board recognizes that a decision on the legal question presented in Contention V may obviate the

---

<sup>230</sup> This decision does not consider whether the reasoning of the Commission’s Private Fuel Storage and Honeywell decisions would extend to a licensee who sought exemptions after receiving approval of an LAR that made the license subject to 10 C.F.R. § 50.75(h). Entergy elected to request exemptions from 10 C.F.R. § 50.75(h) during the pendency of its LAR before the NRC Staff. Because Entergy chose this route, its exemptions raise material questions directly connected to an agency licensing action.

<sup>231</sup> Entergy’s Answer to New Contention at 11.

<sup>232</sup> New Contention Reply at 12.

<sup>233</sup> See Yankee, CLI-05-15, 61 NRC at 381; see also High-Level Waste Repository, CLI-09-14, 69 NRC at 590.

<sup>234</sup> 10 C.F.R. § 50.75(h)(5).

need for a hearing on the closely related factual matters raised in Contention I. Accordingly, after ruling on Contention V, the Board intends to provide the parties with an opportunity to move for summary disposition.

### III. ORDER

For the reasons described above, the Board grants the hearing request and admits Contentions I and V. The Board denies the request with respect to the admission of Contentions II, III, and IV.

An appeal of this Memorandum and Order may be filed within 25 days of service of this decision by filing a notice of appeal and an accompanying supporting brief under 10 C.F.R. § 2.311(b). Any party opposing an appeal may file a brief in opposition. All briefs must conform to the requirements of 10 C.F.R. § 2.341(c)(3).

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD

*/RA/*

---

William J. Froehlich, Chairman  
ADMINISTRATIVE JUDGE

*/RA/*

---

Dr. Michael F. Kennedy  
ADMINISTRATIVE JUDGE

*/RA/*

---

Dr. Richard E. Wardwell  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
August 31, 2015

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
)  
ENTERGY NUCLEAR VERMONT YANKEE, LLC ) Docket No. 50-271-LA-3  
AND ENTERGY NUCLEAR OPERATIONS, INC. )  
)  
(Vermont Yankee Nuclear Power Station) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ASLB MEMORANDUM AND ORDER LBP-15-24 (Granting Petition to Intervene and Hearing Request)** have been served upon the following persons by the Electronic Information Exchange.

U.S. Nuclear Regulatory Commission  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3 F23  
Washington, DC 20555-0001

William J. Froehlich, Chairman  
[William.Froehlich@nrc.gov](mailto:William.Froehlich@nrc.gov)

Dr. Michael F. Kennedy  
[Michael.Kennedy@nrc.gov](mailto:Michael.Kennedy@nrc.gov)

Dr. Richard E. Wardwell  
[Richard.Wardwell@nrc.gov](mailto:Richard.Wardwell@nrc.gov)

Nicole Pepperl, Law Clerk  
[Nicole.Pepperl@nrc.gov](mailto:Nicole.Pepperl@nrc.gov)

U.S. Nuclear Regulatory Commission  
Office of Commission Appellate  
Adjudication  
Mail Stop: O-7H4M  
Washington, DC 20555-0001  
[ocaamail@nrc.gov](mailto:ocaamail@nrc.gov)

U.S. Nuclear Regulatory Commission  
Office of the General Counsel  
Mail Stop: O15D21  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
Beth Mizuno, Esq.  
Mitzi Young, Esq.  
Jeremy Wachutka, Esq.  
Daniel Straus, Esq.  
Edward Williamson, Esq.  
John Tibbetts, Paralegal  
[beth.mizuno@nrc.gov](mailto:beth.mizuno@nrc.gov)  
[mitzi.young@nrc.gov](mailto:mitzi.young@nrc.gov)  
[jeremy.wachutka@nrc.gov](mailto:jeremy.wachutka@nrc.gov)  
[daniel.straus@nrc.gov](mailto:daniel.straus@nrc.gov)  
[edward.williamson@nrc.gov](mailto:edward.williamson@nrc.gov)  
[john.tibbetts@nrc.gov](mailto:john.tibbetts@nrc.gov)

Vermont Department of Public Service  
112 State Street – Drawer 20  
Montpelier, VT 05620-2601  
Aaron Kisicki, Esq.  
Kyle Landis-Marinello, Esq.  
[aaron.kisicki@state.vt.us](mailto:aaron.kisicki@state.vt.us)  
[kyle.landis-marinello@vermont.gov](mailto:kyle.landis-marinello@vermont.gov)

DOCKET NO. 50-271-LA-3

**ASLB MEMORANDUM AND ORDER LBP-15-24 (Granting Petition to Intervene and Hearing Request)**

U.S. Nuclear Regulatory Commission  
Office of the Secretary of the Commission  
Mail Stop: O-16C1  
Washington, DC 20555-0001  
Hearing Docket  
[hearingdocket@nrc.gov](mailto:hearingdocket@nrc.gov)

Entergy Services, Inc.  
101 Constitution Ave., NW  
Washington, DC 200012133  
Susan Raimo, Esq.  
[sraimo@entergy.com](mailto:sraimo@entergy.com)

Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Avenue NW  
Washington, DC 20004  
Paul M. Bessette, Esq.  
Stephen Burdick, Esq.  
Ryan Lighty, Esq.  
[pbessette@morganlewis.com](mailto:pbessette@morganlewis.com)  
[sburdick@morganlewis.com](mailto:sburdick@morganlewis.com)  
[rlighty@morganlewis.com](mailto:rlighty@morganlewis.com)

[Original signed by Brian Newell ]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 31<sup>st</sup> day of August, 2015