UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
Jeff Baran

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

CLI-16-17

MEMORANDUM AND ORDER

The State of Vermont, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation (together, Petitioners) seek review of, and a discretionary hearing on, a number of issues associated with use of decommissioning trust funds at Vermont Yankee Nuclear Power Station.[1]

As discussed below, we have reviewed all the filings before us and considered Petitioners' claims in detail. We conclude that an adjudicatory hearing is not appropriate in the circumstances presented here; Petitioners have not identified, and we do not otherwise find, a *de facto* license amendment that would trigger an opportunity for a hearing under the Atomic Energy Act of 1954, as amended (AEA). Additionally, we decline to convene a discretionary

[1] *See Petition of the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation for Review of Entergy Nuclear [Operations], Inc.'s Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund* (Nov. 4, 2015) (Petition).

hearing to perform the various reviews requested by Petitioners. Petitioners' concerns about the use of decommissioning trust funds largely raise oversight matters that are appropriately addressed via requests for enforcement action under 10 C.F.R. § 2.206.

Petitioners also request a comprehensive environmental analysis of a variety of activities related to the decommissioning of Vermont Yankee by Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (together, Entergy). For the reasons discussed below, we deny this request in all respects save one. Because we find Entergy's exemption request for use of decommissioning funds for spent fuel management to be ineligible for a categorical exclusion under our rules implementing the National Environmental Policy Act (NEPA), we direct the Staff to perform an environmental review of that request.

I. BACKGROUND

We begin our decision with a brief overview of our regulations governing decommissioning funding, the requirements in place for Vermont Yankee, and recent activities that gave rise to the petition.

A. Regulations Governing Decommissioning of Nuclear Power Plants

Our decommissioning regulations require that applicants and licensees provide "reasonable assurance that funds will be available for the decommissioning process."[2] One method by which a licensee may demonstrate reasonable assurance is by setting up a decommissioning trust fund that is "segregated from licensee assets" and "in which the total

[2] 10 C.F.R. § 50.75(a).

amount of funds would be sufficient to pay decommissioning costs at the time permanent termination of operations is expected."[3]

The decommissioning process begins when the licensee certifies to the NRC Staff that it has permanently ceased operations and it has permanently removed fuel from the reactor vessel.[4] Our regulations require a licensee to submit a post-shutdown decommissioning activities report (PSDAR) prior to or within two years following the permanent cessation of operations.[5] The Staff will then notice receipt of the PSDAR, make the PSDAR available for public comment, and hold a public meeting on its contents.[6] This process does not give rise to a hearing opportunity.[7]

Ninety days after the Staff receives the PSDAR—assuming the Staff does not object to its contents—the licensee may begin "major decommissioning activities."[8] Pursuant to

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[3] *Id.* § 50.75(e)(1)(ii).

[4] *Id.* § 50.82(a)(1). The regulations define "decommission" as "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 termination of the license." *Id.* § 50.2.

[5] *Id.* § 50.82(a)(4)(i).

[6] *Id.* § 50.82(a)(4)(ii). The Staff presents comments received at the public meeting held on the PSDAR and makes available to the public a written transcript of the meeting. *See* "Standard Format and Content for Post-Shutdown Decommissioning Activities Report," Regulatory Guide 1.185, rev. 1 (June 2013), at 4 (ADAMS Accession No. ML13140A038) (Regulatory Guide 1.185).

[7] Ultimately, the licensee must submit a license amendment request in order to terminate its operating license; accordingly, at that stage, there is an opportunity for interested persons to request a hearing. 10 C.F.R. § 50.82(a)(9).

[8] *Id.* § 50.82(a)(5). A "major decommissioning activity" for a nuclear power plant such as Vermont Yankee is defined as "any activity that results in permanent removal of major radioactive components, permanently modifies the structure of the containment, or results in

10 C.F.R. § 50.82(a)(6), a licensee may not perform decommissioning activities that would (1) foreclose the release of the site for possible unrestricted use, (2) result in significant environmental impacts not previously reviewed, or (3) result in the lack of reasonable assurance that adequate funds will be available for decommissioning.

The PSDAR must include a site-specific decommissioning cost estimate.[9] Generally, once the licensee submits its decommissioning cost estimate, it is allowed "access to the balance of the [decommissioning] trust fund monies for the remaining decommissioning activities" with "broad flexibility."[10] But the regulations limit the use of a decommissioning trust fund in three ways:

> (A) The withdrawals [must be] for expenses for legitimate decommissioning activities consistent with the definition of decommissioning in [10 C.F.R.] § 50.2;
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> (B) The expenditure [must] not 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
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> (C) The withdrawals [must] not inhibit the ability of the licensee 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.[11]

As an additional safeguard, the Staff monitors the licensee's use of the decommissioning trust fund via its review of the licensee's annual financial assurance status reports. These reports

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dismantling components for shipment containing greater than class C waste in accordance with [10 C.F.R. § 61.55]." *Id.* § 50.2.

[9] *Id.* § 50.82(a)(4)(i).

[10] *See* Decommissioning of Nuclear Power Reactors; Final rule, 61 Fed. Reg. 39,278, 39,285 (July 29, 1996) (Decommissioning Final Rule).

[11] 10 C.F.R. § 50.82(a)(8)(i).

include the amount spent on decommissioning activities, the amount remaining in the fund, and an updated estimate of the costs required to complete decommissioning.[12] In the event of a shortfall between the remaining funds and the updated cost to complete decommissioning (discovered as a result of these annual status reports or otherwise), the licensee must provide additional financial assurance.[13]

Historically, rate regulators exercised oversight of decommissioning trust agreements. In view of deregulation, in 2002 we revised our regulations to take a more active oversight role over such agreements. The revisions were intended to provide "assurance that an adequate amount of decommissioning funds will be available for their intended purpose" at non-rate-regulated facilities.[14]

As relevant here, the rules promulgated in 2002 provided licensees with the option of maintaining existing license conditions or following the new requirements:

> The provisions of [10 C.F.R. § 50.75(h)(1)-(3)] 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 [10 C.F.R. § 50.75(h)].[15]

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[12] *Id.* § 50.82(a)(8)(v).

[13] *Id.* § 50.82(a)(8)(vi). The determination whether a shortfall exists takes into account a two-percent annual real rate of return. Relatedly, a licensee is required to submit to the Staff annual reports regarding the status of its funding for irradiated fuel management, including a plan to obtain additional funds to cover any expected shortfalls. *Id.* § 50.82(a)(8)(vii).

[14] Decommissioning Trust Provisions; Final rule, 67 Fed. Reg. 78,332, 78,332 (Dec. 24, 2002). *See generally* 10 C.F.R. § 50.75(h)(1)-(3) (providing standards for managing the decommissioning trust fund).

[15] 10 C.F.R. § 50.75(h)(5); *see* Minor Changes to Decommissioning Trust Fund Provisions; Direct final rule, 68 Fed. Reg. 65,386, 65,387 (Nov. 20, 2003).

In sum, a non-rate-regulated reactor licensee with decommissioning trust fund license conditions may elect either to maintain those conditions or to seek a license amendment to remove those conditions, in which case it would be subject to 10 C.F.R. § 50.75(h)(1)-(3).[16] These requirements likewise place restrictions on the management and use of the decommissioning trust fund.

Vermont Yankee Nuclear Power Corporation, the prior owner and operator of Vermont Yankee, was a rate-regulated utility. In October 2001, prior to the 2002 revisions to the decommissioning requirements discussed above, it sought to transfer the Vermont Yankee license to the non-rate-regulated entities Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. The Staff approved the transfer subject to several conditions related to the decommissioning trust fund, and these conditions were incorporated into the license.[17] Entergy retained the license conditions put in place at the time of the license transfer rather than electing to be governed by the 2002 regulations and thus, upon commencement of the events giving rise to the petition, decommissioning of the plant was not subject to 10 C.F.R. § 50.75(h)(1)-(3).

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[16] The revised regulations provide a streamlined process for licensees seeking license amendments to conform to the updated requirements. *See* 10 C.F.R. § 50.75(h)(4) (providing that a license amendment application that "does no more than delete specific license conditions relating to the terms and conditions of decommissioning trust agreements involves 'no significant hazards consideration'").

[17] *See* Order Approving Transfer of License for Vermont Yankee Nuclear Power Station from Vermont Yankee Nuclear Power Corporation to Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., and Approving Conforming Amendment (May 17, 2002), encl. 1, Order Approving Transfer of License and Conforming Amendment, at 3-6; encl. 3, Safety Evaluation (nonproprietary), at 8-9 (ML020390198).

B. Procedural Posture

1. License Amendment Proceeding Before the Atomic Safety and Licensing Board

In September 2014, Entergy submitted to the NRC a request to amend the Vermont Yankee operating license to delete the decommissioning trust fund license conditions.[18] As discussed above, approval of this request would have required Entergy to follow 10 C.F.R. § 50.75(h)(1)-(3) instead of the license conditions that were imposed upon the transfer of the plant to Entergy.[19] Four months later, while its license amendment request was still pending, Entergy requested an exemption from 10 C.F.R. § 50.82(a)(8)(i)(A) to allow it to make withdrawals from the Vermont Yankee decommissioning trust fund for certain irradiated fuel management costs.[20] The exemption request also sought to relieve Entergy from two of the requirements in 10 C.F.R. § 50.75(h)(1)(iv), which were to become applicable to Entergy (in place of its existing license conditions) upon issuance of the requested license amendment.[21] First, Entergy requested an exemption from the requirement that the decommissioning trust agreement provide that "disbursements … from the trust … [be] restricted to decommissioning expenses … until final decommissioning has been completed."[22] Second, Entergy requested an

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[18] Letter from Christopher J. Wamser, Site Vice President, Entergy Nuclear Operations, Inc., to NRC Document Control Desk (Sept. 4, 2014) (ML14254A405).

[19] The Staff published a notice of opportunity to request a hearing on the license amendment application. Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 80 Fed. Reg. 8355, 8656, 8359 (Feb. 17, 2015).

[20] *See* Letter from Christopher J. Wamser, Site Vice President, Entergy Nuclear Operations, Inc., to NRC Document Control Desk (Jan. 6, 2015) (ML15013A171) (Exemption Request).

[21] *Id.* at 2.

[22] 10 C.F.R. § 50.75(h)(1)(iv); *see* Exemption Request at 2.

exemption from the requirement that it provide thirty working days' advance notice to the NRC of intended disbursements.[23]

The Staff approved the exemption request in June 2015.[24] In so doing, the Staff determined that the exemption was eligible for a categorical exclusion and therefore required neither an environmental assessment (EA) nor an environmental impact statement (EIS) to comply with NEPA.[25] Thereafter, Entergy was permitted to make withdrawals from the Vermont Yankee decommissioning trust fund for spent fuel management expenses because it was exempted from 10 C.F.R. § 50.82(a)(8)(i)(A). But it was still required to provide thirty-day notices of withdrawals for non-administrative expenses because the Staff had not yet granted the license amendment request subjecting Entergy to 10 C.F.R. § 50.75(h)(1)(iv); the license condition requiring such notices remained in effect.[26]

Vermont sought a hearing on Entergy's license amendment request, which the Board granted.[27] Shortly thereafter, Entergy moved to withdraw its license amendment request and to dismiss the proceeding.[28] The Board granted the motion and imposed two conditions on the

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[23] Exemption Request at 2.

[24] Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station, 80 Fed. Reg. 35,992 (June 23, 2015) (Exemption Issuance); *see* 10 C.F.R. § 50.12 and section II.B., *infra*.

[25] Exemption Issuance, 80 Fed. Reg. at 35,994; *see also* 10 C.F.R. § 51.22(c)(25).

[26] *See Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-15-24, 82 NRC 68, 100 (2015).

[27] *See State of Vermont's Petition for Leave to Intervene and Hearing Request* (Apr. 20, 2015); *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); *Vermont Yankee*, LBP-15-24, 82 NRC at 104.

[28] *See Entergy's Motion to Withdraw its September 4, 2014 License Amendment Request* (Sept. 22, 2015) (Motion to Withdraw).

withdrawal: first, it directed Entergy to provide written notice to Vermont of any new license amendment application relating to the Vermont Yankee decommissioning trust fund at the time of the application.[29] Second, it directed Entergy to specify in its thirty-day notices if any of the proposed disbursements are to be used for particular expenses.[30]

2. The Instant Petition

On November 4, 2015, Petitioners filed before us the instant petition seeking "a robust, comprehensive, and participatory review of Entergy's use of the Vermont Yankee Nuclear Decommissioning Trust Fund."[31] Entergy and the Staff oppose the petition.[32] The petition is not

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[29] *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-15-28, 82 NRC 233, 244 (2015).

[30] *Id.* Those expenses, which were challenged as part of one of Vermont's contentions that was admitted, but not litigated, were: a five-million-dollar settlement payment, emergency preparedness costs, shipments of non-radiological asbestos waste, insurance, property taxes, and replacement of structures during SAFSTOR (e.g., a bituminous roof). *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-16-8, 82 NRC __, __ (June 2, 2016) (slip op. at 4 n.17); *see Vermont Yankee*, LBP-15-28, 82 NRC at 242. The Staff moved to vacate LBP-15-24, in which the Board had granted Vermont's hearing request. *See NRC Staff Motion to Vacate LBP-15-24* (Oct. 26, 2015). We granted the Staff's motion. *Vermont Yankee*, CLI-16-8, 82 NRC at __ (slip op. at 1).

[31] Petition at 1.

[32] *Entergy's Answer Opposing November 4, 2015 Petition Filed by the State of Vermont, Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation* (Dec. 7, 2015) (Entergy Answer); *NRC Staff Answer to the Vermont Petition for Review of Entergy Nuclear [Operations], Inc.'s Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund* (Dec. 7, 2015) (Staff Answer); *see Reply of the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation in Support of Petition for Review of Entergy Nuclear [Operations], Inc.'s Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund* (Dec. 17, 2015) (Petitioners' Reply). Entergy and the Staff request that we strike portions of Petitioners' reply. *Motion to Strike Portions of December 17, 2015 Reply Filed by the State of Vermont, Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation* (Dec. 28, 2015) (Entergy Motion to Strike); *NRC Staff Motion to Strike Portions of the December 17, 2015 Reply of the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation* (Dec. 28, 2015) (Staff Motion to Strike). The Commonwealth of Massachusetts and the States of Connecticut

contemplated by our procedural rules and, as set forth below, Petitioners have not established that they have a right to an adjudicatory hearing pursuant to AEA Section 189a. with respect to any of the issues they have raised. We nonetheless have considered the petition and all related filings as a discretionary exercise of our inherent supervisory authority over agency proceedings,[33] in large part because of the unusual posture of the matter, which concerns issues similar to those raised in a recent license amendment proceeding before the Board.

II. DISCUSSION

Petitioners request review of a number of discrete issues. We consider each in turn below.

A. Use of the Decommissioning Trust Fund

At the heart of the petition is Petitioners' concern that Entergy plans to use the decommissioning trust fund for impermissible purposes and that such expenditures may lead to premature depletion of the fund, which could in turn result in risk to public health, safety, and the

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and New Hampshire filed a joint reply to Entergy's and the Staff's answers. *See Reply of the Commonwealth of Massachusetts and the States of Connecticut and New Hampshire to NRC Staff's and Entergy's Answers to the Petition of the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation for Review of Entergy Nuclear [Operations], Inc.'s Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund* (Dec. 17, 2015). Entergy seeks to strike the States' Reply. *Motion to Strike Impermissible December 17, 2015 Reply Filed by the Commonwealth of Massachusetts and the States of Connecticut and New Hampshire* (Dec. 28, 2015).

[33] *See, e.g.*, *Union Electric Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 158 (2011). Because we have reviewed the petition in our supervisory capacity, we need not—and do not—address a number of procedural arguments advanced by the litigants that would merit further discussion in a traditional adjudicatory setting, with one exception. In their motions to strike portions of Petitioners' reply, both Entergy and the Staff request that, if we do not strike the requested material, we allow them an opportunity to respond. Entergy Motion to Strike at 5; Staff Motion to Strike at 5. Because we find that the record is sufficient to support our decision, no additional briefing was needed; we deny Entergy's and the Staff's requests.

environment.[34] Petitioners argue in particular that Entergy's planned use of the fund contravenes the terms of the Vermont Yankee operating license, NRC regulations, and the Master Trust Agreement.[35] Additionally, Petitioners note that a shortfall in the fund may create an economic risk for Vermont taxpayers.[36] Petitioners therefore request that we "review all of Entergy's requests for withdrawals from the Decommissioning Fund, and prohibit Entergy from making future withdrawals for expenses that do not meet the NRC's definition of decommissioning."[37]

With regard to Petitioners' general claim that Entergy's proposed expenditures will prematurely deplete the fund, as explained above, we promulgated our regulations to ensure that licensees would retain adequate funding to complete decommissioning. Moreover, our ongoing oversight of Entergy's compliance with our regulatory structure provides reasonable assurance that sufficient funds will be available to decommission Vermont Yankee in accordance with our regulations. As explained more fully below none of Petitioners' specific challenges persuades us otherwise.

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[34] Petition at 15.

[35] *Id.* at 12-13, 18-20, 23-25. Petitioners likewise contend that Entergy's use of the fund contravenes Federal Energy Regulatory Commission (FERC) regulations and certain rulings of the Vermont Public Safety Board. *Id.* at 24-25, 30-31. We lack jurisdiction over these matters and therefore decline to consider these arguments. *See PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101, 107 (2007) (denying an appeal claiming "that [the] NRC ought to concern itself with … matters within the jurisdiction of other state and Federal agencies"); *GPU Nuclear, Inc., Jersey Central Power & Light Co., and AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 211 (2000) (clarifying that the proper forum for an argument regarding rate regulation is the FERC or a state board of public utilities).

[36] Petition at 16.

[37] *Id.* at 59.

We first address the terms of the license itself. License condition 3.J.a.iii provides as follows:

> The decommissioning trust agreement must provide that no disbursements or payments from the trust, other than for ordinary administrative expenses, shall be made by the trustee until the trustee has first given the NRC [thirty] days prior written notice of payment. The decommissioning trust agreement shall further contain a provision that no disbursements or payments from the trust shall be made if the trustee receives prior written notice of objection from the Director of the Office of Nuclear Reactor Regulation.[38]

Additionally, license condition 3.J.a.iv states that "[t]he decommissioning trust agreement must provide that the agreement cannot be amended in any material respect without [thirty] days prior written notification to the Director of the Office of Nuclear Reactor Regulation."[39] Petitioners argue that Entergy's disbursements from the trust without notification to the Staff and the use of these funds for purposes other than decommissioning violate the terms of the license and materially amend the decommissioning trust agreement specified in the license condition—the Master Trust Agreement. They further contend that these actions constitute a *de facto* license amendment and assert that this *de facto* license amendment triggers a hearing opportunity.[40]

As an initial matter, any unilateral action taken by Entergy—including a disbursement from the trust fund—cannot in and of itself constitute a *de facto* license amendment. We have

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[38] Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Renewed Operating License No. DPR-28 (Mar. 21, 2011), at 7 (ML092110054) (License). The decommissioning trust license conditions are reproduced as an appendix to this decision.

[39] *Id.*

[40] *See* Petitioners' Reply at 11-12 ("Entergy should not be permitted to contravene the terms of its license, and the Staff should not be permitted to tacitly approve such contraventions."); Petition at 13 ("Entergy's [disbursements from the decommissioning trust fund without thirty days' prior written notice to the NRC and its amendment of the Master Trust Agreement] are in derogation of those license conditions.").

made clear that unilateral "licensee action without an NRC approval of an increase in authority or alteration of the terms of the license does not constitute a *de facto* amendment."[41] And the NRC's grant of an exemption from 10 C.F.R. § 50.82(a)(8)(i)(A)—"approving" the use of trust funds for a purpose other than decommissioning—does not amount to endorsement of conduct inconsistent with any provision of the Vermont Yankee license, including conditions 3.J.a.iii and 3.J.a.iv. The license does not preclude exemptions from regulations. Thus, issuance of an exemption from our *regulations* does not mean, as Petitioners suggest, that the Staff has approved an amendment to the license.[42] Petitioners have not established a right to a hearing with respect to their assertions about non-compliance with the license. Instead, Petitioners' assertions that Entergy's unilateral actions have contravened the terms of its license are properly raised through the enforcement process, as discussed below.

We turn next to Petitioners' assertions that Entergy has acted in violation of NRC rules. Petitioners argue that NRC rules prohibit the disbursement of decommissioning funds for certain costs that Entergy has included in its decommissioning cost estimate. Specifically, Petitioners object to Entergy's inclusion of a five-million-dollar settlement payment, emergency preparedness costs (including legal fees), shipments of non-radiological asbestos waste, insurance, property taxes, and replacement of structures during the time Entergy maintains

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[41] *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-15-14, 81 NRC 729, 735 (2015) (citing *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), CLI-14-11, 80 NRC 167, 173 (2014)).

[42] *See Massachusetts v. NRC*, 878 F.2d 1516, 1521 (1st Cir. 1989).

To the extent Petitioners argue (Petitioners' Reply at 11-12) that the Staff has tacitly approved Entergy's request to no longer make required notifications, they are incorrect. Entergy has withdrawn its license amendment application; as such, Entergy's obligations under its license to provide notice of disbursements remain in place. *See* note 56, *infra*.

Vermont Yankee in a safe storage condition (SAFSTOR).[43] Petitioners assert that, for these costs, use of decommissioning funds contravenes the requirement that such funds are only to be used for activities that "reduce residual radioactivity."[44] We find that, at bottom, Petitioners raise an issue of non-compliance that should be filed as a petition for enforcement action, and not as a matter before us or the Licensing Board.

To determine whether a particular expense may appropriately be used for decommissioning, it is appropriate to look to the governing regulations regarding the use of decommissioning trust funds. These regulations permit licensees to use decommissioning trust funds only for "legitimate decommissioning activities" consistent with the definition of decommissioning in 10 C.F.R. § 50.2.[45] Our rules, however, do not themselves define "legitimate decommissioning activities." The Staff, when reviewing notifications for withdrawal of funds to be used for decommissioning purposes, therefore must look to whether the activity or expense is directly related to the radiological decontamination of the facility or qualifies as an administrative expense consistent with our regulations and to the applicable license conditions.[46] In determining whether an expense is allowable, the Staff is informed by the

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[43] Petition at 20-21, 22. Petitioners also object to Entergy's inclusion of spent fuel management expenses in its decommissioning cost estimate. However, spent fuel management expenses are the subject of an exemption that the Staff has approved. *See* discussion *infra* at section II.B and note 56.

[44] Petition at 20 (citation omitted).

[45] 10 C.F.R. § 50.82(a)(8)(i)(A).

[46] *See id.* § 50.2; *see also* License at 7. Section 50.75(h)(1)(iv) contains this requirement for plants subject to that provision.

Statements of Consideration for the 1988 decommissioning rule and applicable regulatory guidance.[47]

The general objections lodged by Petitioners here do not reveal a manifest inconsistency with our rules warranting relief as part of our supervisory review. But we decline to make a broad statement about the propriety of a withdrawal to pay for any particular expense. The Staff reviews notifications of withdrawal of funds from decommissioning trusts on a case-by-case basis.[48] Petitioners may likewise challenge any individual notification via the section 2.206 process if they believe that a particular withdrawal is not authorized by the license or applicable

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[47] *See* General Requirements for Decommissioning Nuclear Facilities; Final rule, 53 Fed. Reg. 24,018 (June 27, 1988); *see also* Financial Assurance Requirements for Decommissioning Nuclear Power Reactors; Final rule, 63 Fed. Reg. 50,465 (Sept. 22, 1998); Decommissioning Final Rule, 61 Fed. Reg. at 39,278.

As Entergy correctly observes, NRC guidance contemplates classifying a number of the expenses Petitioners contest as decommissioning costs. Entergy Answer at 20-21 & nn. 90, 92-95 (citations omitted). For example, NUREG/CR-5884 classifies removal and disposal of asbestos as a "cascading cost"—that is, a cost associated with the removal of non-contaminated and releasable material in support of the decommissioning process. "Revised Analyses of Decommissioning for the Reference Pressurized Water Reactor Power Station" (Final Report), NUREG/CR-5884 (Nov. 1995), app. B, at B.34 & n.16 (ML14008A187). And Regulatory Guide 1.159 contemplates the inclusion of insurance in the decommissioning cost estimate. "Assuring the Availability of Funds for Decommissioning Nuclear Reactors," Regulatory Guide 1.159, rev. 2 (Oct. 2011), at 11 (ML112160012). Further, Regulatory Guide 1.202 contemplates including both property tax and insurance in the decommissioning cost estimate. "Standard Format and Content of Decommissioning Cost Estimates for Nuclear Power Reactors," Regulatory Guide 1.202 (Feb. 2005), at 9 (ML050230008). But these expenses may not be allowable uses for decommissioning trust funds in all circumstances.

[48] And we have directed that "the [S]taff should not allow the withdrawal of funds that have been deposited to meet NRC decommissioning objectives, as identified in a site-specific study as being necessary to complete radiological decommissioning or are necessary to satisfy the generic formula amounts set forth in 10 C.F.R. § 50.75(c)." Staff Requirements—SECY-02-0085—Recent Issues With Respect to Decommissioning Funding Assurance That Have Arisen as Part of License Transfer Applications and Other Licensing Requests (Jan. 3, 2003), at 1 (ML030030539).

regulations. To raise a sufficient challenge Petitioners must do more than they have done here. They must identify a particular disbursement and explain why it contravenes applicable requirements.[49]

Regarding the Master Trust Agreement, Petitioners argue as a general matter that it prohibits the use of the decommissioning trust fund for non-decommissioning expenses.[50] They point out that, by its terms, the "exclusive purpose" of the Master Trust Agreement is

> to accumulate and hold funds for the contemplated Decommissioning of the Station and to use such funds, in the first instance, for expenses related to the Decommissioning of the Station as defined by the NRC in its [r]egulations and issuances, and as provided in the licenses issued by the NRC for the Station and any amendments thereto.[51]

Petitioners are correct insofar as they assert that, pursuant to the Master Trust Agreement, decommissioning trust funds are in the first instance to be used for the purpose of decommissioning the Vermont Yankee site. But the "[r]egulations and issuances" that define whether this standard has been satisfied are not necessarily static; they may be amended or an

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[49] To the extent that the NRC has issued exemptions regarding use of the decommissioning trust fund to Entergy, Entergy's use of such funds consistent with approved exemptions would not violate NRC regulations. If Petitioners (or any person) seek to argue that a specific disbursement is inconsistent with an approved exemption, such a challenge likewise is appropriately raised via the section 2.206 process.

[50] Petition at 26-29. In framing their argument, Petitioners assert that "[b]oth entities that reviewed Entergy's proposed purchase of Vermont Yankee—the NRC and the [Vermont] Public Service Board—conditioned their approvals of the purchase on establishment of and compliance with a trust agreement to protect the Decommissioning Fund." *Id.* at 23. For the purpose of this petition, the rationale behind the authorization of Entergy's purchase of the facility is not relevant. The relevant inquiry is what the Master Trust Agreement requires and how the Agreement relates to Entergy's license for the facility and our governing regulations.

[51] *Id.* at 26 (emphasis omitted) (quoting Master Trust Agreement for Vermont Yankee Nuclear Power Station (July 31, 2002), § 2.01 (attached to Petition as Exhibit 1) (Master Trust Agreement)).

exemption may be issued without effecting an amendment of the Master Trust Agreement.[52] Accordingly, Entergy may use the trust funds consistent with the Master Trust Agreement, as modified by any exemptions that the NRC has approved. The use of decommissioning funds in these circumstances (that is, consistent with approved exemptions) does not contravene the terms of the Agreement.

Nor does Entergy's use of funds in accordance with the exemption effectuate an amendment to the Master Trust Agreement not authorized by either the Agreement itself or the corresponding portion of Entergy's license. Section 9.05(d) of the Master Trust Agreement states:

> [T]his Agreement cannot be amended in any material respect without [thirty] days' prior written notice to the [Director of the Office of Nuclear Reactor Regulation (NRR Director)]; provided, however, that if the Company receives prior written notice of objection from either the NRR Director or the [Director of the Office of Nuclear Material Safety and Safeguards], as appropriate, no such material amendment, modification, or alteration shall be made.[53]

This restriction reflects license condition 3.J.a.iv., which in turn states that "[t]he decommissioning trust agreement must provide that the agreement cannot be amended in any material respect without [thirty days'] prior written notification to the Director of the Office of Nuclear Reactor Regulation."[54] We understand this provision to mean that Entergy may not alter the terms of the Master Trust Agreement without prior notice to the NRC. But for the reasons stated above, this does not mean that use of the fund in accordance with an exemption somehow constitutes an alteration of the Master Trust Agreement. The license condition

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[52] For the same reason, Petitioners' arguments asserting that Entergy's actions violate license condition 3.J.a.i (Petitioners' Reply at 12) are unavailing. Issuance of an exemption does not render the form of the decommissioning trust agreement unacceptable to the NRC.

[53] Master Trust Agreement § 9.05(d).

[54] License at 7.

requiring Entergy to provide notice of an amendment to the Master Trust Agreement remains in place, and no provision of the Agreement has been amended.

In sum, use of the decommissioning trust funds must comply with our regulations, as exempted, and Entergy's license for the facility. As we explained with respect to Petitioners' arguments regarding the costs Entergy has included in its decommissioning cost estimate, challenges regarding the propriety of particular uses of the fund under the license or our regulations are appropriate for the Staff's consideration under section 2.206. Indeed, that is precisely what the 2.206 process is for. But in the absence of any demonstration that the NRC has approved conduct in derogation of Entergy's license, we deny Petitioners' request that we "review all of Entergy's requests for withdrawals from the Decommissioning Fund, and prohibit Entergy from making future withdrawals for expenses that do not meet the NRC's definition of decommissioning."[55]

B. Exemption Request

In addition to their general concerns about how decommissioning funds should be used, Petitioners challenge a particular exemption that allows Entergy to use decommissioning trust funds for irradiated fuel management and contend that Entergy is not entitled to such an exemption.[56] Essentially, Petitioners claim that spent fuel costs will reduce funds set aside for

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[55] Petition at 59.

[56] *Id.* at 31; *see* Exemption Issuance, 80 Fed. Reg. at 35,992. Entergy also sought—and the Staff granted—an exemption from 10 C.F.R. § 50.75(h)(1)(iv), which would have permitted Entergy to use the funds for spent fuel management without providing notice to the NRC. *See id.* But 10 C.F.R. § 50.75(h)(1)(iv) would only have applied to Entergy following the approval of the license amendment application discussed above. Because Entergy has now withdrawn that application, the exemption from 10 C.F.R. § 50.75(h)(1)(iv) has no effect. *See Vermont Yankee*, LBP-15-28, 82 NRC at 238.

decommissioning far beyond Entergy's estimates.[57] Petitioners argue that the Staff's approval of the exemption for Vermont Yankee was arbitrary and an abuse of discretion because Entergy's decommissioning cost estimate underestimates the cost of decommissioning the facility.[58] They further argue that Entergy underestimates the cost of spent fuel management.[59] And Petitioners generally challenge the NRC's practice of granting exemptions without providing an opportunity for a hearing.[60]

The Staff and Entergy both counter that the Staff's issuance of the exemption is not subject to a hearing.[61] As to the merits, Entergy asserts that Petitioners' arguments regarding the cost of decommissioning are "highly speculative, lack a basis in fact, and fail to satisfy the stringent 'clear and material error' standard—a required demonstration for a petition for reconsideration."[62] The Staff argues that Petitioners' concerns regarding depletion of the decommissioning trust fund are misplaced due to regulatory safeguards.[63]

As both the Staff and Entergy observe, exemption requests are not subject to a hearing opportunity under the Atomic Energy Act. AEA section 189a. states:

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[57] Petition at 43-47.

[58] *Id.* at 35-41. In this vein, Petitioners assert that Entergy did not demonstrate special circumstances justifying the exemption, as required by 10 C.F.R. § 50.12(a)(2). *Id.* at 31-35.

[59] *Id.* at 41-47.

[60] *Id.* at 33.

[61] Staff Answer at 33-34; Entergy Answer at 30.

[62] Entergy Answer at 32-34. Entergy examines Petitioners' arguments under 10 C.F.R. § 2.345, which governs petitions for reconsideration in adjudications; it argues that under these standards, the petition does not fulfill the regulatory requirements and is impermissibly late. *Id.* at 30-31.

[63] Staff Answer at 36-37.

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license ... and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees ... the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding ….[64]

As we have previously held, "[a]gency actions that are not among those listed [in section 189a.] do not give rise to a hearing right for interested persons."[65] Petitioners acknowledge this, but they note that "[a]lthough stand-alone exemption requests generally do not create hearing rights, hearings on exemption requests that are 'directly related' to a license amendment request are excepted from that general rule."[66] Petitioners argue that this case fits within that exception because of the interrelationship between Entergy's license amendment request and its exemption request. But the exception does not apply here because Entergy has withdrawn its license amendment request and the Board has approved that withdrawal.[67] Therefore, no active license amendment request remains that is arguably related to Entergy's exemption request.[68]

Although no hearing opportunity attaches to the exemption request, we briefly address the merits of Petitioners' arguments. As an initial matter, our current decommissioning process

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[64] 42 U.S.C. § 2239.

[65] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 466 (2001) (citing *Massachusetts*, 878 F.2d at 1516).

[66] Petition at 13 (citing *Private Fuel Storage,* CLI-01-12, 53 NRC at 476).

[67] Motion to Withdraw at 1; *Vermont Yankee*, LBP-15-28, 82 NRC at 244.

[68] Petitioners also request a hearing on the Vermont Yankee PSDAR. Petition at 59. Although the Staff solicited comments on the Vermont Yankee PSDAR, our regulations do not provide a hearing opportunity on it. 10 C.F.R. § 50.82(a)(4)(ii); *see* 42 U.S.C. § 2239. *See generally* Entergy Nuclear Operations, Inc., Vermont Yankee Nuclear Power Station Post-Shutdown Decommissioning Activities Report, 80 Fed. Reg. 1975 (Jan. 14, 2015).

expressly contemplates the issuance of exemptions from regulatory requirements applicable to operating reactors where the Staff determines that such exemptions are warranted.[69] Further, Petitioners are correct that, under our decommissioning rules, a licensee may not use decommissioning trust funds to pay for spent fuel management costs. Footnote 1 to 10 C.F.R. § 50.75(c) states that the minimum amounts required to demonstrate reasonable assurance of funds for decommissioning set forth in that section "are based on activities related to the definition of 'Decommission' in [10 C.F.R. § 50.2] and do not include the cost of removal and disposal of spent fuel or of non-radioactive structures and materials beyond that necessary to terminate the license."[70] To use decommissioning funds for spent fuel management at Vermont Yankee, Entergy was therefore required to seek an exemption from that provision. And the relevant question is not, as Petitioners assert, whether, in the abstract, issuing exemptions is an appropriate means of regulating but, rather, whether in this case approval of the exemption was warranted.

We therefore look to whether Entergy satisfied the criteria for obtaining an exemption pursuant to 10 C.F.R. § 50.12. That section permits the approval of an exemption provided that the exemption is authorized by law, will not present an undue risk to the public health and

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[69] *See* Staff Requirements—SECY-14-0118—Request by Duke Energy Florida, Inc., for Exemptions from Certain Emergency Planning Requirements (Dec. 30, 2014) (ML14364A111) (directing the Staff to continue reviewing exemption requests and providing recommendations to the Commission while proceeding with a rulemaking on decommissioning).

[70] *See also* 10 C.F.R. § 50.82(a)(8). Our regulations separately require a plan for fuel management following cessation of reactor operations, including funding. *See id.* § 50.54(bb).

safety, and is consistent with the common defense and security.[71] Additionally, special circumstances must be present before an exemption may be granted.[72]

For its part, the Staff reasonably determined that Entergy satisfied the requirements for the exemption. First, the Staff determined that Entergy's requested exemption was authorized by law.[73] Our regulations contemplate exemptions under appropriate circumstances, and the Staff found that the exemption requested would not result in violation of the AEA or NRC regulations.[74] Next, the Staff determined that the exemption presented no undue risk to public health and safety.[75] Entergy's exemption request stated that the contemplated use of part of the trust fund for irradiated fuel management would not "adversely impact [Entergy's] ability to terminate the [Vermont Yankee] license (i.e.[,] complete radiological decommissioning) … consistent with the schedule and costs contained in the [Vermont Yankee] updated Irradiated Fuel Management Program and PSDAR."[76] Entergy's request further stated that the probability of accidents, consequences of accidents, types and amounts of effluents that may be released offsite did not change with the proposed use of the trust fund in the exemption request.[77] Additionally, Entergy noted that there was no significant increase in occupational or public

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[71] *Id.* § 50.12(a)(1).

[72] *Id.* § 50.12(a)(2)(i)-(vi) (defining what may constitute special circumstances).

[73] Exemption Issuance, 80 Fed. Reg. at 35,993.

[74] *See* Exemption Request, attach. 1, at 9.

[75] Exemption Issuance, 80 Fed. Reg. at 35,993.

[76] Exemption Request, attach. 1, at 9.

[77] *Id.*

radiation exposure with the proposed use of the funds.[78] The Staff further found that the exemption was consistent with the common defense and security.[79] As Entergy's exemption request stated, the change would "not alter the scope of, or availability of sufficient funding for the [Vermont Yankee] security program and does not adversely affect the ability to physically secure the site and to protect special nuclear material."[80]

Petitioners contend that the Staff's regulatory findings rely on a number of faulty assumptions. Specifically, Petitioners claim that the exemption rests on an unreasonably low estimation of decommissioning costs because it does not "provide any contingency for discovery of additional contaminants, such as the discovery of strontium-90 in locations where that contaminant had not previously been identified."[81] Additionally, Petitioners assert that the exemption unreasonably truncates the likely cost of spent fuel management because it assumes that the Department of Energy will take possession of the spent nuclear fuel on site by 2052.[82] In support of this claim, Petitioners point to our recent Continued Storage Rule, which codified a generic environmental impact statement that (among other things) acknowledged that spent fuel could remain on site indefinitely.[83]

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[78] *Id.*

[79] Exemption Issuance, 80 Fed. Reg. at 35,993.

[80] Exemption Request, attach. 1, at 9-10.

[81] Petition at 36.

[82] *Id*. at 46.

[83] *Id*. at 46-47; *see* 10 C.F.R. § 51.23; "Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel" (Final Report), NUREG-2157, vol. 1 (Sept. 2014) (ML14196A105) (NUREG-2157).

As explained above, even after the Staff granted the exemption, the regulations still prohibit Entergy from making a withdrawal that would "inhibit its ability to complete funding of any shortfalls in the decommissioning trust," require Entergy to submit an annual financial assurance report, and require Entergy to provide additional funds if the report reveals insufficient funds to complete decommissioning.[84] Therefore, the applicable regulations provide reasonable assurance that adequate funds will remain to complete decommissioning by requiring Entergy and the Staff to monitor the projected cost of decommissioning and available funding and ensure more funding is available as needed. Moreover, as Entergy and the Staff observed, with regard to their decommissioning costs claim, Petitioners have not shown how the identified contaminants will elevate decommissioning costs.[85] Likewise, with regard to the fuel-costs claim, while the Continued Storage generic environmental impact statement acknowledges for purposes of NEPA that fuel could remain on site indefinitely, it finds the short-term period of storage most likely.[86] Therefore, we find that Petitioners have not demonstrated that in granting the exemption, the Staff relied on unreasonable assumptions.

Additionally, the Staff found that "special circumstances" within the meaning of 10 C.F.R. § 50.12(a)(ii) were present, because the application of the regulations in question—10 C.F.R. §§ 50.82(a)(i)(A) and 50.75(h)(1)(iv)—"would not serve the underlying purpose of the rule[s] or

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[84] *See supra* at 4-5 (citing 10 C.F.R. § 50.82(a)(8)(i)(C), (a)(8)(v), and (a)(8)(vi)).

[85] Entergy Answer at 32-33 (noting that the identified levels of strontium-90 at Vermont Yankee are below regulatory limits); Staff Answer at 43 & n.211 (same).

[86] NUREG-2157, app. B at B-2 (finding the short term period of storage, sixty years after a facility's license expires, to be the most likely scenario for onsite spent fuel storage).

[was] not necessary to achieve the underlying purpose of the rule[s]."[87] The Staff observed that the underlying purpose of the regulation "is to provide reasonable assurance that adequate funds will be available for radiological decommissioning of power reactors."[88] On that point, the Staff found that "there are sufficient funds in the [t]rust to complete legitimate radiological decommissioning activities as well as to conduct irradiated fuel management."[89]

As the Staff argued before the Board in the license amendment matter, Entergy's election to maintain Vermont Yankee in SAFSTOR helps to provide assurance that there will be sufficient funds for decommissioning.[90] Further, the regulatory limit on the interest rate licensees may use in funding projections is two percent.[91] The Staff noted that when a two percent return is applied to the current balance of the decommissioning trust fund, the projected funds at the end of the decommissioning period would be sufficient to fund both decommissioning and the irradiated fuel management expenses that are the subject of the

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[87] Exemption Issuance, 80 Fed. Reg. at 35,993; *see also* 10 C.F.R. § 50.12(a)(2)(ii).

[88] Exemption Issuance, 80 Fed. Reg. at 35,993; *see also* Exemption Request, attach. 1, at 10.

[89] Exemption Issuance, 80 Fed. Reg. at 35,994; *see also* Exemption Request, attach. 1, at 3-6 (providing a cash flow analysis and explaining that it "demonstrates that with earnings, the trust fund is sufficient to cover the estimated costs not only of radiological decommissioning but also the irradiated fuel management activities that are within the scope of the exemption requests").

[90] *NRC Staff Answer to State of Vermont Petition for Leave to Intervene and Hearing Request* (May 15, 2015), at 43-44 (Staff Answer to Vermont Intervention Petition). SAFSTOR "allows natural radioactive decay to proceed over time, which will reduce the amount of contamination and radioactivity that will have to be addressed in decommissioning and thus reduce the overall expense of decommissioning." *Id.* at 44 (citing "Decommissioning of Nuclear Power Reactors," Regulatory Guide 1.184, rev. 1 (Oct. 2013), at 4 (ML13144A840); "Staff Responses to Frequently Asked Questions Concerning Decommissioning of Nuclear Power Plants" (Final Report), NUREG-1628 (June 2000), at 5-7 (ML003726190)); *see also* Exemption Request, attach. 1, at 1, 7.

[91] 10 C.F.R. § 50.75(e)(1)(ii); *see* Staff Answer to Vermont Intervention Petition at 44.

exemption.[92] The Staff further stated that Entergy's decommissioning cost estimate employed "numerous conservatisms in its calculation of costs."[93] Ultimately, the Staff reasonably concluded that the period of decommissioning, the projected earnings of the fund, and the conservatisms in the decommissioning cost estimate provide assurance that sufficient funds will be available for decommissioning.

Petitioners argue that special circumstances are not present in this proceeding with regard to this exemption because the Staff has "granted [the] exemption to every nuclear power plant that has requested it."[94] Petitioners conclude, "The exemption cannot be the rule."[95] But, our regulations specifically delineate the circumstances in which we will find special circumstances, and whether other facilities have requested or received similar exemptions is not an enumerated factor.[96] Petitioners remind us that we have previously observed that exemptions are an "extraordinary equitable remedy to be used sparingly" in light of our robust rulemaking process.[97] But, this observation does not override the explicit language in our

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[92] Staff Answer to Vermont Intervention Petition at 44; *see also* Exemption Request, attach. 1, at 10.

[93] Staff Answer to Vermont Intervention Petition at 44 & n.197 (summarizing the conservatisms set forth in the decommissioning cost estimate such as "the use of a contingency factor, a work difficulty factor, the assumption that the [U.S. Department of Energy] will accept older irradiated fuel before it accepts newer irradiated fuel, and an estimate of the volume of soil to be removed for controlled disposal that is not adjusted downward for the natural decay of radionuclides over time").

[94] Petition at 32.

[95] *Id*. at 33.

[96] 10 C.F.R. § 50.12(a)(2).

[97] Petition at 32-33 (quoting *Honeywell International, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 9 (2013) (internal quotations omitted)).

regulations. We do not see any conflict between that principle and the agency's actions; the NRC has granted this exemption, to one part of our extensive regulatory structure, to a handful of plants. These exemptions are hardly the rule. Additionally, in light of our recent experience with decommissioning facilities, we commenced a rulemaking to update our regulations regarding decommissioning reactors.[98] As a result, the NRC continues to adhere to the principle that exemptions should be granted sparingly and is taking action to consider whether recently granted exemptions suggest a need to change our regulatory structure to ensure, in part, that the agency's use of exemptions remains appropriate.[99]

Finally, in granting the exemption, the Staff determined that special circumstances were present for another reason—Entergy's compliance with the rule would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated.[100] On that point, Entergy stated that preventing access to excess trust funds for irradiated fuel management "would create an unnecessary financial burden without any corresponding safety

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[98] Regulatory Improvements for Decommissioning Power Reactors, 80 Fed. Reg. 72,358 (Nov. 19, 2015) (Advance Notice of Proposed Rulemaking).

[99] As reflected in today's order, we have carefully considered the views expressed to us. While we are not persuaded by Commissioner Baran's dissenting views, we are mindful of the concerns he has raised. The full Commission has separately directed the Staff to consider options for addressing requests for decommissioning-related exemptions between now and the time the agency completes its larger decommissioning rulemaking. With respect to this matter, we have discretionarily provided the Petitioners and others a greater opportunity to participate than is contemplated by our regulations. *See supra* at 9-10. Moreover it would be unfair, and potentially arbitrary, to treat this request—one that meets the requirements for an exemption—differently simply because of where it falls in a series of similar requests. *E.g., Eagle Broad. Grp. v. FCC*, 563 F.3d 543, 551, 554 (D.C. Cir. 2009) (observing that "an agency may not treat like cases differently" (internal quotations marks omitted)).

[100] Exemption Issuance, 80 Fed. Reg. at 35,994; *see also* 10 C.F.R. § 50.12(a)(2)(iii).

benefit" because the amounts in the trust fund are adequate to cover both decommissioning activities and irradiated fuel management.[101] As noted above, the Staff agreed with this analysis, and we have identified no reason to second-guess this judgment.

We reiterate that the approval of this exemption is not the end of the story. NRC regulations require annual review of expenses and funding by both the Staff and the licensee through license termination.[102] This annual review provides an additional mechanism to assure that adequate funds will be available for decommissioning. If the NRC determines, as the result of this annual review, that costs of decommissioning exceed the remaining decommissioning funds, "then the licensee must provide additional financial assurance to cover the estimated cost of completion."[103]

In short, we have examined the record associated with the Staff's approval of the exemption. We conclude that the Staff followed the process set forth in 10 C.F.R. § 50.12 and

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[101] Exemption Request, attach. 1, at 11.

[102] Staff Answer to Vermont Intervention Petition at 44 (citing 10 C.F.R. § 50.82(a)(8)(v)); *see also* Exemption Request, attach. 1, at 7 (stating that the annual reporting requirements in 10 C.F.R. § 50.82(a)(8)(v) and (vi) will allow continual NRC oversight of the status of the trust fund if Entergy is not required to submit thirty-day notices of disbursements for irradiated fuel management).

[103] *See* Staff Answer at 36 (citing 10 C.F.R. § 50.82(a)(v)-(vii)). *See generally* "Summary Findings Resulting from the Staff Review of the 2013 Decommissioning Funding Status Reports for Operating Power Reactors," Commission Paper SECY-13-0105 (Oct. 2, 2013) (ML13266A084). The Staff recently completed its annual review of decommissioning funding status reports and concluded that, among other licensees, Entergy has demonstrated compliance with section 50.82(a)(8)(v)-(vii), thereby providing assurance that it is maintaining sufficient funds to safely decommission Vermont Yankee. *See* Memorandum from Anthony Bowers, Office of Nuclear Reactor Regulation, NRC, to Bruce A. Watson, Office of Nuclear Material Safety and Safeguards, NRC, "Summary of the 2016 Annual Review of Decommissioning Funding Status Reports for Plants in Decommissioning" (Oct. 4, 2016) (ML16274A027).

articulated a reasonable basis for granting the exemption. We therefore deny Petitioners' request that we reverse the Staff's approval of Entergy's exemption request to use decommissioning trust funds for spent fuel management expenses.

C. Request for Additional Detail in Notices of Disbursement

Petitioners next ask that we direct Entergy to provide additional information in its notices of disbursements or payments from the decommissioning trust.[104] As noted above, when the Board granted Entergy's motion to withdraw its license amendment request, it imposed a condition on the withdrawal requiring that Entergy specify in its notification to NRC that it is reimbursing itself from the decommissioning trust fund for certain expenses.[105] Petitioners assert that "[this thirty-day] notice requirement is necessary to protect against encroachments on the Decommissioning Fund, like those now pursued by Entergy."[106] They therefore request that we "require Entergy to provide detailed information supporting *all* proposed withdrawals from the Decommissioning Fund, not just those in the six categories that were the subject of the

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[104] Petition at 47. Condition 3.J.a.iii of the Vermont Yankee license states that the Master Trust Agreement shall prohibit disbursements from the trust other than for ordinary administrative expenses unless the trustee first gives the NRC thirty days' prior written notice. The Master Trust Agreement must also provide that the trustee may not make payments from the fund if the NRR Director objects in writing. License at 7.

[105] Petition at 47-48 (citing *Vermont Yankee*, LBP-15-28, 82 NRC at 244 (requiring that Entergy "specify in its [thirty]-day notice if the disbursement includes one of the six line items or legal expenses to which Vermont objected in its admitted contention")).

[106] *Id.* at 48.

license amendment proceeding."[107] Petitioners seek this information for past and future withdrawals from the fund.[108]

We decline to grant Petitioners' requested relief. The proper avenue for Petitioners' challenge—whether they seek more detail on a specific notification or greater specificity in the license condition, such that all notifications would require more detail—is to pursue an enforcement action under 10 C.F.R. § 2.206. Regarding the content of Entergy's notifications, Petitioners do not demonstrate that the information that Entergy currently provides is inadequate. Accordingly, we deny the request.

D. Environmental Requirements for Decommissioning Activities

Petitioners request a full environmental analysis of a variety of activities related to Entergy's decommissioning of the Vermont Yankee facility.[109] We provide the regulatory background and consider each of Petitioners' arguments below.

1. Regulatory Framework and Generic Environmental Impact Statement

In 2002, the NRC published an update to its generic analysis of decommissioning impacts—the Final Generic Environmental Impact Statement on Decommissioning of Nuclear

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[107] *Id.* at 49. When Entergy sought to withdraw its license amendment request, the State of Vermont requested that the Board impose a broad condition on that withdrawal: "Entergy shall provide [Vermont] all supporting documentation for the specific expenses for which Entergy has filed [thirty-day] notices from the Vermont Yankee Nuclear Decommissioning Trust Fund, and shall continue to provide that information for future withdrawals." *State of Vermont's Response to Entergy's Motion to Withdraw* (Oct. 2, 2015), at 3. The Board declined to do so. *Vermont Yankee*, LBP-15-28, 82 NRC at 242. To the extent that Petitioners seek to challenge the Board's disinclination to apply this condition to Entergy's withdrawals from the fund, the proper avenue for doing so would have been to challenge that aspect of LBP-15-28. *See* Entergy Answer at 35.

[108] Petition at 49.

[109] *Id.* at 50, 52-53.

Power Reactors.[110] Although this GEIS reflects the NRC's determination that decommissioning is not itself a major federal action, it serves to "to establish an envelope of environmental impacts associated with decommissioning activities."[111] This envelope defines the scope of permissible actions that a licensee who has entered the decommissioning process may take. As the NRC explained in the GEIS:

> [l]icensees can rely on the information in this [GEIS] as a basis for meeting the requirements in 10 [C.F.R. §] 50.82(a)(6)(ii). This requirement states that the licensee must not perform any decommissioning activity that causes any significant environmental impact not previously reviewed. Prior to conducting a decommissioning activity, the licensee must make a determination that the resulting environmental impacts fall within the bounds of this [GEIS] or of another EIS related to its facility.[112]

Licensees may rely on the Decommissioning GEIS only if the expected environmental impacts of a particular decommissioning activity are bounded by its analysis. If contemplated decommissioning activities are expected to result in environmental impacts *outside* the bounds of the Decommissioning GEIS (or a prior site-specific environmental review), then the licensee should apply for a license amendment and submit a supplemental environmental report as part of that application describing and evaluating the additional environmental impacts.[113] In that case, the Staff will review the report and prepare, as appropriate, either an environmental

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[110] "Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities, Supplement 1 Regarding the Decommissioning of Nuclear Power Reactors" (Final Report), NUREG-0586, Supplement 1, vols. 1-2 (Nov. 2002) (ML023470304, ML023470323, ML023500187, ML023500211, ML023500223) (Decommissioning GEIS) (supplementing the Final Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities, published in 1988).

[111] *Id.* at 1-1.

[112] *Id.* at 1-10 to 1-11.

[113] *Id.* at 1-11, 2-3.

assessment or an environmental impact statement.[114] In sum, the Decommissioning GEIS—consistent with our regulations—sets forth a structure by which a licensee submitting a PSDAR (and performing decommissioning activities consistent with that PSDAR) may rely on a previously performed environmental analysis so long as the impacts fall within the bounds of that analysis.[115]

As discussed above, the Staff provides an opportunity for public comment when a licensee submits its PSDAR.[116] But the PSDAR does not amend the license—and as such the licensee is not required to submit a corresponding environmental report.[117] In line with the Decommissioning GEIS, with respect to environmental impacts, a PSDAR must include "a discussion that provides the reasons for concluding that the environmental impacts associated with site-specific decommissioning activities will be bounded by appropriate previously issued environmental impact statements."[118] Later, at the license termination stage, the licensee must

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[114] *Id.* at 2-3.

[115] The Decommissioning GEIS provides guidance regarding which decommissioning activities fall within the scope of its analysis. Table 1-1 lists "[a]ctivities performed up to license termination and their resulting impacts as provided in the definition of decommissioning" and "[n]onradiological impacts occurring after license termination from activities conducted during decommissioning" as within the scope of the GEIS. *Id.* at 1-6.

[116] 10 C.F.R. § 50.82(a)(4)(ii); *see* Decommissioning Final Rule, 61 Fed. Reg. at 39,281 ("The purpose of the PSDAR is to provide a general overview for the public and the NRC of the licensee's proposed decommissioning activities until [two] years before termination of the license. The PSDAR is part of the mechanism for informing and being responsive to the public prior to any significant decommissioning activities taking place.").

[117] 10 C.F.R. § 50.82(a)(4)(i); *see id.* § 51.53(d); *see also* Decommissioning Final Rule, 61 Fed. Reg. at 39,284 ("A more formal public participation process is appropriate at the termination stage of decommissioning ….").

[118] 10 C.F.R. § 50.82(a)(4)(i); *see* Decommissioning Final Rule, 61 Fed. Reg. at 39,293. When taking actions under 10 C.F.R. § 50.59 following submission of the PSDAR, the licensee must notify the NRC in writing and provide a copy to the affected State, "before performing any

submit a license amendment request in order to terminate its license.[119] The Decommissioning GEIS, mirroring the regulations discussed above, contemplates assessing site-specific impacts at the license termination stage. The GEIS explains that the license termination plan must include a supplement to the previous environmental analysis describing any new information or significant environmental change associated with the proposed termination activities.[120]

Consistent with the process contemplated in the Decommissioning GEIS, Entergy's PSDAR for Vermont Yankee states that it "has concluded that the environmental impacts associated with planned [Vermont Yankee Nuclear Power Station] site-specific decommissioning activities are less than and bounded by the impacts addressed by previously issued environmental impact statements."[121] The PSDAR contains analysis of various environmental impacts and an explanation of how those impacts fall within the analysis in the Decommissioning GEIS.[122]

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decommissioning activity inconsistent with, or making any significant schedule change from," activities and schedules described in the PSDAR, "including changes that significantly increase the decommissioning cost." 10 C.F.R. § 50.82(a)(7).

[119] *See* Decommissioning Final Rule, 61 Fed. Reg. at 39,284. That request provides an opportunity for a hearing on the license termination plan. *Id.* at 39,284, 39,286.

[120] Decommissioning GEIS at 1-11, 2-4; *see* 10 C.F.R. §§ 50.82(a)(9)(ii)(G), 51.53(d); *see also id.* § 51.95(d).

[121] Letter from Christopher J. Wamser, Site Vice President, Entergy Nuclear Operations, Inc., to NRC Document Control Desk (Dec. 19, 2014), encl. § 5.0 (ML14357A110) (PSDAR).

[122] *Id.* §§ 5.1.1 to 5.1.18.

2. NEPA Analysis of PSDAR and Thirty-Day Notices

Petitioners contend that the Staff failed to perform NEPA review for several actions. First, they argue that the PSDAR requires a separate NEPA review.[123] Entergy and the Staff counter that the NRC's review of the PSDAR is not a major federal action that triggers NEPA review.[124] As support for their argument that the PSDAR requires a separate NEPA analysis, Petitioners cite *Citizens Awareness Network, Inc. v. NRC*, in which the First Circuit Court of Appeals held that decommissioning activities require NEPA compliance.[125] But *Citizens Awareness* predated the 1996 Decommissioning Final Rule. And as part of that rulemaking, the NRC expressly addressed the *Citizens Awareness* decision. The revised regulations addressed the court's decision by prohibiting any major decommissioning that results in environmental impacts outside of the bounds of previous environmental analysis (i.e., the Decommissioning GEIS or a site-specific EIS).[126] The NRC further explained that the updated rule also provides that a PSDAR must include a section discussing how the planned activities' environmental impacts will be bounded by previous environmental analysis.[127] Additionally, the licensee must provide written notice if the intended decommissioning activities are inconsistent with what the PDSAR describes.[128]

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[123] Petition at 52-53.

[124] Entergy Answer at 39-40; Staff Answer at 58.

[125] Petition at 52 (citing *Citizens Awareness Network, Inc. v. NRC*, 59 F.3d 284, 293 (1st Cir. 1995)).

[126] Decommissioning Final Rule, 61 Fed. Reg. at 39,286.

[127] *Id.*

[128] *Id.*

In promulgating the Final Decommissioning Rule, the NRC specifically considered and rejected the idea that review of the PSDAR should be defined as a major federal action under NEPA because environmental analysis of activities to be performed under the PSDAR will necessarily have been performed in accordance with prior site-specific or generic analysis.[129] Unless the environmental impacts of particular decommissioning activities will fall outside the previously performed analysis, the rule does not contemplate additional NEPA analysis at the PSDAR stage. As discussed above, Entergy's PSDAR for Vermont Yankee states that it "has concluded that the environmental impacts associated with planned [Vermont Yankee Nuclear Power Station] site-specific decommissioning activities are less than and bounded by the impacts addressed by previously issued environmental impact statements."[130] The PSDAR contains analysis of various environmental impacts and an explanation of how those impacts fall within the analysis in the GEIS.[131] Accordingly, Petitioners' reliance on *Citizens Awareness* to support its argument for a separate environmental analysis of the PSDAR is unavailing.[132]

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[129] *Id.* at 39,279, 39,283, 39,286; *see* Entergy Answer at 39-40.

[130] PSDAR § 5.0. As discussed above, while the Staff does not formally approve a licensee's PSDAR, it reviews the PSDAR. *See* Regulatory Guide 1.185 at 10 (noting that the Staff may find a PSDAR deficient if it proposes activities "that would result in a significant detrimental impact to the environment that is not bounded by the current environmental impact statements"); *see also* 10 C.F.R. § 50.82(a)(5) (prohibiting licensees from performing major decommissioning activities until ninety days after the Staff has received the PSDAR). Here, the Staff did not find Entergy's PSDAR deficient.

[131] PSDAR §§ 5.1.1 to 5.1.18.

[132] Moreover, as discussed above, the updated regulations "require[] a formal license termination plan by the licensee. The activities in the licensee's plan which do not meet the environmental criteria must be approved by the NRC by a license amendment that follows NRC procedures for amendments, including applicable hearing rights … and the preparation of environmental assessments." Decommissioning Final Rule, 61 Fed. Reg. at 39,286. Therefore,

Petitioners argue that because the Staff has the authority to "find the PSDAR deficient," the Staff's failure to do so in this instance converts its review of the PSDAR into a major federal action requiring NEPA review.[133] Petitioners cite *Ramsey v. Kantor*[134] for the proposition that an agency's failure to disapprove of plans when it has a mandatory obligation to review those plans renders its review a major federal action.[135] But in *Ramsey*, the failure of the agency to take action meant that the government entity's plan in that case attained the force of law.[136] By contrast, the fact that the Staff did not find Entergy's PSDAR deficient does not result in the PSDAR attaining the force of law.[137] Rather, as the Staff observes, the PSDAR does not permit Entergy to perform any task it could not already perform under 10 C.F.R. § 50.59.[138]

Petitioners separately argue that the Staff has NEPA responsibilities when it comes to its policing of Entergy's thirty-day notices prior to withdrawals from the decommissioning trust fund.[139] We disagree. An agency's NEPA obligations are triggered by agency action.[140] As

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our rules contemplate environmental analysis for any activities and impacts that have not previously been evaluated at a later stage of the decommissioning process.

[133] Petition at 53 (citations omitted).

[134] 96 F.3d 434 (9th Cir. 1996).

[135] Petition at 53.

[136] *Ramsey*, 96 F.3d at 445; *see* Staff Answer at 59.

[137] Staff Answer at 59 (citing *Anglers Conservation Network v. Pritzker*, 70 F. Supp. 3d 427, 442 (D.C. Cir. 2014)). And we find persuasive the Staff's argument that Entergy submitted its PSDAR "pursuant to regulatory provisions and in the rulemaking for those provisions, NEPA was considered and applied." *Id.* at 59 n.279.

[138] Decommissioning Final Rule, 61 Fed. Reg. at 39,279; *see* Staff Answer at 59.

[139] Petition at 53.

[140] *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) ("The statutory requirement that a federal agency *contemplating a major action* prepare … an environmental

Petitioners themselves state, "NEPA and applicable NRC regulations require environmental review before the *NRC acts* on matters affecting the quality of the human environment."[141] The thirty-day notices do not involve NRC action; they merely serve to apprise the NRC of expenditures that the licensee intends to take.[142] The notice requirement imposes obligations on Entergy; it requires neither Staff action nor approval.[143] Accordingly, the requirement that Entergy submit notices of proposed disbursements to the Staff does not warrant separate NEPA review.[144]

3. The Staff's Application of a Categorical Exclusion to Entergy's Exemption Request

Petitioners challenge the Staff's determination that issuance of the exemption to Entergy allowing use of the decommissioning trust fund for spent fuel management was eligible for a categorical exclusion, under 10 C.F.R. § 51.22(c)(25). They argue that the NRC is required to conduct a NEPA analysis in conjunction with the exemption request.[145] First, Petitioners assert

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impact statement serves NEPA's action-forcing purpose …." (emphasis added) (internal quotations and citations omitted)).

[141] Petition at 50 (emphasis added) (citing 10 C.F.R. § 51.20 and 42 U.S.C. § 4332).

[142] As discussed at length above, the Final Decommissioning Rule does not contemplate Staff approval of site-specific decommissioning expenditures that are bounded by prior environmental analysis. Final Decommissioning Rule, 61 Fed. Reg. at 39,286.

[143] *See* License at 7.

[144] In their reply brief, Petitioners claim that the Staff "places undue reliance on past environmental reviews … that presupposed that decommissioning [would be] accomplished with adequate funding from a decommissioning trust fund that had not been depleted by way of exemptions allowing the fund to be used for non-decommissioning expenses." Petitioners' Reply at 17. However, as noted above, the regulations applicable to Vermont Yankee after the exemptions provide reasonable assurance that adequate funds remain to complete decommissioning at the site. Therefore, we see no error in continuing to rely on previous environmental analyses, such as the Decommissioning GEIS.

[145] Petition at 52, 56-58.

that the Staff should have performed a cumulative impacts analysis when determining that the exemption's issuance was eligible for a categorical exclusion.[146] Second, they claim that Staff's analysis supporting the categorical exclusion "consisted merely of a recitation of the factors listed in 10 C.F.R. § 51.22(b) and 10 C.F.R. § 51.22(c)(25)."[147]

In response, Entergy disputes Petitioners' argument that "exemption requests … constitute 'major federal actions' within the meaning of NEPA."[148] Regarding the exemption itself, the Staff contends that Petitioners' arguments constitute an impermissible collateral challenge to our regulations governing categorical exclusions.[149] And both Entergy and the Staff assert that the application of a categorical exclusion was proper and that no cumulative impacts analysis was necessary.[150] As discussed below, on this issue we agree with Petitioners and direct the Staff to analyze the environmental impacts associated with the exemption request.

Our regulations provide that certain types of exemptions may be categorically excluded from environmental review. Specifically, the regulation from which the exemption is sought must involve one of the following: recordkeeping requirements; reporting requirements; inspection or surveillance requirements; equipment servicing or maintenance scheduling requirements; education, training, experience, qualification, requalification, or other employment suitability requirements; safeguard plans, and materials control and accounting inventory

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[146] *Id.* at 57-58.

[147] *Id.* at 57 (citing Exemption Issuance, 80 Fed. Reg. at 35,994).

[148] Entergy Answer at 40 (citing Petition at 52, 56-58).

[149] Staff Answer at 61.

[150] Entergy Answer at 41-42; Staff Answer at 65-66, 67-68.

scheduling requirements; scheduling requirements; surety, insurance, or indemnity requirements; or other requirements of an administrative, managerial, or organizational nature.[151]

Petitioners claim that the Staff's "analysis consisted merely of a recitation of the factors in 10 C.F.R. § 51.22(b) and 10 C.F.R. § 51.22(c)(25)."[152] We need not reach the adequacy of the Staff's analysis of the factors set forth in 10 C.F.R. § 51.22(c)(25)(i)-(v), because the sixth factor is dispositive of the question. With respect to 10 C.F.R. § 51.22(c)(25)(vi), the Staff determined that "[t]he requirements for using decommissioning trust funds for decommissioning activities … involve … other requirements of an administrative, managerial, or organizational nature."[153] Petitioners do not specifically question the Staff's analysis with respect to 10 C.F.R. § 51.22(c)(25)(vi). As part of our discretionary review of the exemption, however, we reviewed the Staff's reliance on the provision in this instance.

The terms "administrative," "managerial," and "organizational" are not defined in 10 C.F.R. Part 51. The regulatory history of section 51.22(c)(25) suggests that these terms refer to exemptions associated with ministerial changes rather than to exemptions with substantive effects, such as the one at issue here. The final rule promulgating the categorical exclusion for exemptions explained that "[f]or example, current ambiguities in the categorical

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[151] *See* 10 C.F.R. § 51.22(c)(25)(vi). In addition, an exemption may only be issued if none of the following is present: (1) significant hazards consideration; (2) significant change in the types or significant increase in the amounts of any effluents that may be released offsite; (3) significant increase in individual or cumulative public or occupational radiation exposure; (4) significant construction impact; and (5) significant increase in the potential for or consequences from radiological accidents. *Id.* § 51.22(c)(25).

[152] Petition at 57 (citing Exemption Issuance, 80 Fed. Reg. at 35,994).

[153] Exemption Issuance, 80 Fed. Reg. at 35,994.

exclusion regulations have created delays in licensee decisions when organizational name changes occur, because these decisions must await the completion of an [environmental assessment and finding of no significant impact]."[154] And the proposed rule stated that:

> [f]or example, the majority of the [environmental assessments and findings of no significant impact] addressed exemption requests concerning the following administrative issues: (1) Revising the schedule for the biennial exercise requirements for nuclear reactors in 10 CFR Part 50, Appendix E, Sections IV.F. 2.b and c; (2) Applying updated NRC-approved ASME Codes; and (3) Training and experience requirements in 10 CFR Part 35, ''Medical Use of Byproduct Material.''[155]

In our view, use of decommissioning funds for matters other than reduction of residual radioactivity is not analogous to the examples provided above. The regulatory history of the categorical exclusion for exemptions does not support considering an exemption from a substantive requirement an "administrative, managerial, or organizational matter," particularly where, as here, the Staff provides insufficient explanation for its conclusion. And the regulatory requirement is substantive in nature; it is intended to provide reasonable assurance that sufficient funds will be available for radiological decommissioning. For these reasons, we find that the requirement in section 50.82(a)(8)(i)(A) as applied in this instance is not administrative, managerial, or organizational in nature.

In sum, the Staff has not provided adequate support for its finding regarding 10 C.F.R. § 51.22(c)(25)(vi). Noting that the Staff has conducted environmental assessments for several

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[154] Categorical Exclusions From Environmental Review; Final rule, 75 Fed. Reg. 20,248, 20,250 (Apr. 19, 2010).

[155] Categorical Exclusions From Environmental Review; Proposed rule, 73 Fed. Reg. 59,540, 59,545 (Oct. 9, 2008).

exemptions of this type at other facilities,[156] we direct the Staff to conduct an environmental assessment to examine the environmental impacts, if any, associated with the exemption.[157] We deny Petitioners' remaining requests for further environmental review.[158]

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[156] *See, e.g.*, Duke Energy Florida, Inc.; Crystal River Unit 3 Nuclear Generating Plant, 80 Fed. Reg. 3662 (Jan. 23, 2015) (Crystal River Environmental Assessment); Southern California Edison; San Onofre Nuclear Generating Station, Units 2 and 3, 79 Fed. Reg. 42,837 (July 23, 2014); Environmental Assessment and Finding of No Significant Impact; Final Issuance: Dominion Energy Kewaunee; Kewaunee Power Station, 79 Fed. Reg. 25,156 (May 2, 2014).

[157] We expect that the Staff will undertake the environmental analysis promptly, including considering whether "public participation [is] deemed practicable or appropriate with respect to the challenged exemption." *See Brodsky v. NRC*, 704 F.3d 113, 122 (2d Cir. 2013). If the Staff's review results in a determination of significant impacts, the Staff should promptly notify us and, at that time, we may reconsider whether the exemption should be stayed or vacated.

[158] The Staff has undertaken a comprehensive rulemaking on the decommissioning process. Recognizing that Petitioners seek relief now, we nonetheless encourage Petitioners to participate in that rulemaking to the extent that their concerns extend to general plant decommissioning efforts. *See generally* Advance Notice of Proposed Rulemaking, 80 Fed. Reg. at 72,358.

III. CONCLUSION

For the foregoing reasons, we *direct* the Staff to analyze the environmental effects of the exemption request. We *deny* Petitioners' remaining requests for relief. As discussed above, Petitioners have not shown that they are entitled to a hearing under the Atomic Energy Act. Further, we decline to grant a discretionary hearing in this matter; we have reviewed Petitioners' claims as discussed in this decision and *decline to undertake* the other actions that Petitioners seek here. Petitioners raise challenges to oversight matters that are concerned with Entergy's compliance with the terms of its license. As discussed above, Petitioners' recourse in these circumstances is to seek enforcement action pursuant to 10 C.F.R. § 2.206 as discussed herein.[159]

IT IS SO ORDERED.

For the Commission

NRC SEAL

/RA/
Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 27th day of October 2016.

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[159] Other than the issues we have expressly resolved today, nothing in our decision should be understood to prejudice the Staff's resolution of any such enforcement action.

APPENDIX

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.

(Vermont Yankee Nuclear Power Station)

Docket No. 50-271

Renewed Facility Operating License; Renewed Operating License No. DPR-28

J. License Transfer Conditions

a. Decommissioning Trust

(i) The decommissioning trust agreement must be in a form acceptable to the NRC.

(ii) With respect to the decommissioning trust funds, investments in the securities or other obligations of Entergy Corporation and its affiliates, successors, or assigns shall be prohibited. In addition, except for investments tied to market indexes or other non-nuclear-sector mutual funds, investments in any entity owning one or more nuclear power plants are prohibited.

(iii) The decommissioning trust agreement must provide that no disbursements or payments from the trust, other than for ordinary administrative expenses, shall be made by the trustee until the trustee has first given the NRC 30 days prior written notice of payment. The decommissioning trust agreement shall further contain a provision that no disbursements or payments from the trust shall be made if the trustee receives prior written notice of objection from the Director of the Office of Nuclear Reactor Regulation.

(iv) The decommissioning trust agreement must provide that the agreement cannot be amended in any material respect without 30 days prior written notification to the Director of the Office of Nuclear Reactor Regulation.

(v) The appropriate section of the decommissioning trust agreement shall state that the trustee, investment advisor, or anyone else directing the investments made in the trust shall adhere to a “prudent investor” standard, as specified in 18 CFR 35.32(a)(3) of the Federal Energy Regulatory Commission’s regulations.

Commissioner Svinicki, Dissenting in Part

I fully join the majority position that the Petitioners have not provided a sufficient basis to find that the NRC unreasonably granted Entergy's exemption request. I dissent on the limited question of whether the Petitioners sufficiently supported their NEPA claim. I find that they have not. As a result, I would uphold the Staff's reliance on the categorical exclusion to satisfy NEPA.

Even when we have considered petitions not contemplated by our regulations, such as the instant one, we have still applied our normal rules for adjudication.[1] One such longstanding rule is our requirement that petitioners must raise specific challenges, both to fairly notify the other parties of the claims against them and to ensure that agency adjudications remain focused.[2] In this case, the Petition only asserted that the Staff's categorical exclusion analysis "consisted merely of a recitation of the factors listed," which falls far short of meeting our stringent pleading requirements.[3] The Petition does not challenge the Staff's analysis of any specific factor, let alone demonstrate why that analysis is lacking. Moreover, contrary to Petitioners' assertions, the Staff did not only recite the relevant factors but in fact explained why the exemption met each factor for a categorical exclusion in 10 C.F.R. § 51.22(c)(25)(vi).[4]

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[1] *See generally Callaway*, CLI-11-5, 74 NRC at 141.

[2] 10 C.F.R. § 2.309(f); *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 455-57, 472 (2006).

[3] Petition at 57.

[4] Exemption Issuance, 80 Fed. Reg. at 35,994. While the Staff's explanation for why the exemption met each factor is concise, the Staff's analysis is sufficient, particularly when read in context of the complete document, which explains why granting the exemption will not jeopardize Entergy's ability to decommission the Vermont Yankee site. *Id*.

While the Petitioners' reply brief may have provided additional detail and arguments, such efforts to rehabilitate an unsupported contention also contravene our longstanding procedural rules.[5] Moreover, even when given full consideration, the reply brief does not contain sufficient information to show that the categorical exclusion is inapplicable. Petitioners argue, "Staff is incorrect in claiming that the exemption it granted Entergy was from 'an administrative requirement that does not affect the environment.' It is more than just 'administrative' to approve the use of hundreds of millions of dollars that would otherwise be reserved for removing radiological contamination from a nuclear site."[6] But Petitioners' argument rests on the same error as the rest of their pleading; in granting the exemption, the Staff confirmed that adequate funding will be available to decommission Vermont Yankee and the Petitioners have not demonstrated any error in this conclusion. As a result, Petitioners have also failed to show how the exemption, which simply pertains to how Entergy will fund ongoing activities at Vermont Yankee, would have an impact on the environment or constitutes anything beyond administrative.

Finally, my colleagues note that the Staff prepared environmental assessments, as opposed to relying on a categorical exclusion, for similar decommissioning exemption requests.[7] But, the analyses in those documents are almost identical to the analysis the Staff provided in support of the categorical exclusion for Vermont Yankee. For example, in the most recent environmental assessment, the Staff noted, "[t]he proposed action involves exemptions from

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[5] *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004).

[6] Petitioners' Reply at 18 (quoting Staff Answer at 66).

[7] *E.g.*, Crystal River Environmental Assessment, 80 Fed. Reg. at 3662.

requirements that are of a financial or administrative nature and that do not have an impact on the environment."[8] The Staff justified this conclusion by explaining that because the agency's other regulations would provide a reasonable assurance that the decommissioning fund would be sufficient, "[t]here is no decrease in safety associated with the use of the Trust to fund activities associated with irradiated fuel management."[9]

For Vermont Yankee, the Staff's analysis of the categorical exclusion concluded that the exemption request met the requirements for a categorical exclusion because it involved "recordkeeping requirements, reporting requirements, or other requirements of an administrative, managerial, or organizational nature."[10] This conclusion is supported by the earlier discussion of the exemption request that determined that in light of the remaining regulations, the agency has assurance that adequate funds would be available to decommission Vermont Yankee.[11] Consequently, requiring the Staff to publish a new NEPA document that will simply reiterate the discussion in the earlier one strikes me as a needless exercise in formalism.

For the foregoing reasons, I respectfully dissent from my colleagues' decision to direct the Staff to prepare a new environmental analysis in this case but join them in the remainder of the decision.

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[8] *Id*. at 3663.

[9] *Id*.

[10] Exemption Issuance, 80 Fed. Reg. at 35,994.

[11] *Id*. at 35,993-94.

Commissioner Baran, Concurring in Part and Dissenting in Part

I concur in part with and dissent in part from the Commission's decision.

I respectfully dissent from sections II.A and II.B of the decision. I would vacate the decommissioning trust fund exemption in this case and remand Entergy's exemption request to the Staff for reconsideration as a rule using a public notice and comment process. However, I join section I of the majority decision and, recognizing that the Commission has allowed the exemption to remain in effect, I also join sections II.C and II.D of the Commission decision regarding Vermont's arguments on thirty-day notices and the need to prepare an environmental assessment.

In prior cases, the Commission has consistently held that, although NRC's regulations authorize exemptions, "we consider an exemption to be an extraordinary equitable remedy to be used only sparingly."[1] In *Honeywell,* the Commission explained:

> The reason for this high standard is simple. Every NRC regulation has gone through the rulemaking process, including public notice-and-comment, and its underlying rationale has been explained in our Statements of Considerations … Our exemption regulations are in place to provide equitable relief only when supported by compelling reasons – they are not intended to serve as a vehicle for challenging the fundamental basis for the rule itself.[2]

The Staff has granted two basic types of exemptions to decommissioning plants. Most exemptions are from regulatory requirements written to apply to operating reactors. Broadly speaking (and without opining on the merits of any particular exemption), the special circumstances justifying such exemptions are that the plant has shut down and many of the requirements for operating plants are unnecessary for or ill-suited to decommissioning plants.

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[1] *See, e.g.*, *Honeywell*, CLI-13-1, 77 NRC at 9 (internal quotation marks omitted) (citing, *inter alia*, *Washington Public Power Supply System* (WPPSS Nuclear Project Nos. 3 and 5), CLI-77-11, 5 NRC 719, 723 (1977)).

[2] *Id.*

The exemption in this case is different. The Staff granted Entergy an exemption from the decommissioning trust fund requirements in order to allow Entergy to use decommissioning funds for spent fuel management expenses—a non-decommissioning purpose. The Commission promulgated the applicable regulation specifically for decommissioning plants like Vermont Yankee. Section 50.82(a)(8)(i)(A) explicitly limits how a licensee may spend the money in a decommissioning trust fund. In promulgating the decommissioning rule, the Commission established the requirement to use decommissioning funds for only decommissioning activities to ensure that the fund would be adequate to complete the decommissioning tasks necessary to protect public health and safety.[3]

There are no special circumstances here warranting an exemption. The Staff points to a cash flow analysis to conclude that there is more money in the Vermont Yankee decommissioning trust fund now than is required by the formula in our regulations. But there is nothing unusual about that. This is the exact situation for which the rule was written. Our regulations require a minimum amount of funds in the account in given years to provide assurance that adequate funds will be available to eventually decommission the site. Every licensee complying with this requirement will necessarily have an amount equal to or greater than the minimum amount required in any given year. In fact, the regulations explicitly reference "an amount which may be more, but not less, than the amount" required by the formula established in the regulation.[4] And the amount in the account today is far less than will ultimately be required to complete decommissioning.

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[3] Decommissioning Final Rule, 61 Fed. Reg. at 39,289.

[4] 10 C.F.R. § 50.75(b)(1).

The Staff has granted exemptions from NRC's decommissioning trust fund regulation for five different decommissioning power plants—every power plant licensee that has requested this exemption—based on nearly identical analyses.[5] While there is no limit on the precise number of exemptions of a certain type that can be issued, the Commission has previously recognized that the agency should not erode a rule by the overuse of exemptions.[6]

Here, the Staff has effectively repealed a Commission-approved rule promulgated in accordance with the Administrative Procedure Act (APA) and replaced it with a new staff-generated rule without following the APA's requirements for public notice and an opportunity for comment and without Commission approval. Because the Staff has granted every decommissioning trust fund exemption requested on nearly identical bases, I conclude that the Staff's action is a *de facto* rulemaking that triggers the APA's rulemaking requirements.[7]

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[5] *See* Exemption Issuance, 80 Fed. Reg. at 35,992; Duke Energy Florida, Inc.; Crystal River Unit 3 Nuclear Generating Plant, 80 Fed. Reg. 5795 (Feb. 3, 2015) (Crystal River Exemption Issuance); Southern California Edison Company; San Onofre Nuclear Generating Station, Units 2 and 3, 79 Fed. Reg. 55,019 (Sept. 14, 2014) (SONGS Exemption Issuance); Zion Solutions, LLC; Zion Nuclear Power Station, Units 1 and 2; Exemption From Certain Requirements, 79 Fed. Reg. 44,213 (July 30, 2014); License Exemption Request for Dominion Energy Kewaunee, Inc., 79 Fed. Reg. 30,900 (May 29, 2014) (Kewaunee Exemption Issuance).

[6] For example, when the Commission promulgated the exemption provisions in section 50.12, it stated: "the Commission will exercise its discretion to limit exemptions in any particular area if the 'exceptions' to the rule threaten to erode the rule itself." Specific Exemptions; Clarification of Standards; Final Rule, 50 Fed. Reg. 50,764, 50,765 (Dec. 12, 1985).

[7] As the D.C. Circuit explained in *Environmental Defense Fund, Inc. v. Gorsuch*, "Scrutiny of a claimed exemption should be exacting where an agency seeks … to undo all it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal." *Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816-17 (D.C. Cir. 1983) (internal quotation marks omitted).

Consequently, I would vacate the exemption and remand it to the Staff for consideration as a rule.[8] One option would be for the Staff to use a rule of particular applicability when considering the exemption. As stated in the Attorney General's manual on the APA, the term "rule" in the APA "includes agency statements not only of general applicability but also those of particular applicability applying either to a class or to a single person."[9] I would direct the Staff to publish rules relating to decommissioning trust funds in the *Federal Register*. Further, I would direct the Staff to consider future requests for exemptions from the decommissioning trust fund requirements as rules until the broad decommissioning power reactor rulemaking is complete. This approach would ensure that the NRC is complying with the APA and in turn allow for greater public participation in the decommissioning process.

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[8] Entergy also requested and the Staff granted an exemption from the thirty-day notification requirement of section 50.75(h)(1)(iv) for intended disbursements from the decommissioning trust fund. Exemption Issuance, 80 Fed. Reg. at 35,992. Entergy withdrew the license amendment request that would have subjected it to 10 C.F.R. § 50.75(h)(1)(iv), and the license condition requiring such notices is still in effect. Therefore, this exemption does not have a practical effect for Vermont Yankee. However, the Staff granted exemptions from the thirty-day notification requirements of section 50.75(h)(1)(iv) and (h)(2) to three other decommissioning reactor licensees on the basis of nearly identical analyses. *See* Crystal River Exemption Issuance, 80 Fed. Reg. at 5795; SONGS Exemption Issuance, 79 Fed. Reg. at 55,019; Kewaunee Exemption Issuance, 79 Fed. Reg. at 30,900. The Commission specifically promulgated the requirements of section 50.75(h) for decommissioning plants. Therefore, this type of exemption also falls into the category of exemptions that should be addressed through notice and comment rulemaking.

[9] Attorney General's Manual on the Administrative Procedure Act (1947), at 13 (citation omitted).

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 **COMMISSION MEMORANDUM AND ORDER CLI-16-17** 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

Dr. Michael F. Kennedy
Michael.Kennedy@nrc.gov

Dr. Richard E. Wardwell
Richard.Wardwell@nrc.gov

Cooper J Strickland, Law Clerk
Cooper.Strickland@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O14A44
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Catherine L. Scott, Esq.
Beth Mizuno, Esq.
Mitzi Young, Esq.
Anita Ghosh, Esq.
Jeremy Wachutka, Esq.
Daniel Straus, Esq.
Matthew Ring, Esq.
John Tibbetts, Paralegal
catherine.scott@nrc.gov
beth.mizuno@nrc.gov
mitzi.young@nrc.gov
anita.ghosh@nrc.gov
jeremy.wachutka@nrc.gov
daniel.straus@nrc.gov
matthew.ring@nrc.gov
edward.williamson@nrc.gov
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
kyle.landis-marinello@vermont.gov

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COMMISSION MEMORANDUM AND ORDER CLI-16-17

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop: O-4F00
Washington, DC 20555-0001
Hearing Docket
hearingdocket@nrc.gov

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

Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue NW
Washington, DC 20004
Paul M. Bessette, Esq.
Stephen Burdick, Esq.
Raphael Kuyler, Esq.
Ryan Lighty, Esq.
pbessette@morganlewis.com
sburdick@morganlewis.com
rkuyler@morganlewis.com
rlighty@morganlewis.com

Entergy Services, Inc.
101 Constitution Ave., NW
Washington, DC 200012133
Susan Raimo, Esq.
sraimo@entergy.com

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

Dated at Rockville, Maryland
this 27th day of October, 2016