November 22, 2013

Susan M. Hudson, Clerk  
Vermont Public Service Board  
112 State Street - Drawer 20  
Montpelier, VT 05620-2701

Re: Docket No. 7862 – PSD Comments on Reply Briefs

Dear Mrs. Hudson:

Enclosed for filing with the Public Service Board are the Comments of the Public Service Department on Reply Briefs filed. These comments are being served on the parties electronically today.

Sincerely,

Geoffrey Commons  
Director for Public Advocacy

Enclosure

cc: Service List
STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7862

Amended Petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., for amendment of their Certificate of Public Good and other approvals required under 30 V.S.A. § 231(a) for authority to continue after March 21, 2012, operation of the Vermont Yankee Nuclear Power Station, including the storage of spent-nuclear fuel

VERMONT PUBLIC SERVICE DEPARTMENT
RESPONSE TO REPLY BRIEFS

November 22, 2013
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INTRODUCTION

The Department submits this brief to respond to certain conditions proposed by other parties in their reply briefs, and to inform the Board of the Department’s position as to whether the Board can or should impose those conditions.

For the reasons set forth in the Department’s initial and reply briefs, because of Entergy’s history of failing to abide by this Board’s orders (and Entergy’s revisionist post hoc interpretations thereof), should the Board issue a CPG, it must carefully draw any conditions it imposes on Entergy. Those conditions must: (i) ensure that the public good will be served by granting Entergy a CPG that ends on December 31, 2014; (ii) be clear and unambiguous, and offer as few opportunities as possible for Entergy to advance self-serving post-issuance interpretations of what constitutes “good faith” or “best efforts” (see Dep’t Reply at 28; Entergy Reply at 26 (denying that the “best efforts” standard is “very high”)); and (iii) be grounded firmly within the Board’s jurisdiction, such that any challenge to the Board’s authority to impose such conditions would be frivolous.

Certain of the conditions proposed by the other parties satisfy all three criteria and, in the Department’s view, should be imposed in addition to the conditions and framework proposed in the Department’s Reply. Other conditions—despite their often commendable policy goals—stray too close to the boundaries set by federal law as to create an unacceptable risk of a preemption challenge.\(^1\)

\(^{1}\) The Department’s decision not to support certain conditions due to the risk that Entergy would likely challenge those conditions on preemption grounds should not be construed as a concession that any of the conditions proposed by the other parties are in fact preempted by federal law.
I. THE DEPARTMENT SUPPORTS CERTAIN CONDITIONS PROPOSED BY VPIRG, WRC, ANR, and NEC

A. The Board Should Adopt The Notification Condition Proposed By VPIRG

VPIRG’s reply brief suggests—and the Department agrees—that the Board should impose the following notification requirements:

Entergy Nuclear Vermont Yankee and Entergy Nuclear Operations, and every assignee or successor thereof, shall provide to the Department of Public Service, no less frequently than every 12 months, commencing one year from the date of this Order, the following reports and information:

i. the value of the Decommissioning Trust Fund, including all expert reports in its custody or control which address the value of that Fund; and

ii. each Post Shutdown Decommissioning Report (PSDAR) it has submitted to the Nuclear Regulatory Commission;

iii. to the extent not addressed in the PSDAR, the detailed plans and methods by which decommissioning to meet Nuclear Regulatory Commission standards would be accomplished at this site for each of the decommissioning methods authorized by the Nuclear Regulatory Commission, including all expert reports in its custody or control which address those means of decommissioning;

iv. to the extent not addressed in the PSDAR, the expected cost of decommissioning to Nuclear Regulatory Commission standards using the DECON method and using every other method authorized by the Nuclear Regulatory Commission, including all expert reports in its custody or control which address those costs;

v. all proposals and plans by which to accomplish decommissioning to meet Vermont standards, including all expert reports in its custody or control which address these proposals or plans;

vi. the expected cost of decommissioning to meet Vermont standards, including all expert reports in its custody or control which address those costs; and

vii. these reports and information may be submitted pursuant to any necessary and appropriate protective orders consistent with the Board’s precedents and Vermont law.

2 The Department interprets the phrase “decommissioning to meet Vermont standards” to refer to the non-radiological portion of decommissioning, or site restoration, and supports VPIRG’s suggested notification requirements to the extent they are consistent with that interpretation.
There is no dispute that the Board has the authority to regulate site restoration activities. See, e.g., Dep’t Reply at 16-18; Entergy Reply at 7. Entergy admits that it has failed to allocate any funds specifically for site restoration, and instead intends to rely on any surplus that remains in the nuclear decommissioning trust fund after radiological decommissioning is complete. Entergy Br. at 31 n.13; Hearing Tr. 2/12/13 (Vol. I) at 64:22-65:3 (Cloutier) (“In the case of the VY Station, the decommissioning fund is not segregated into nuclear and site-restoration phase sub-accounts.”); Hearing Tr. 2/12/13 (Vol. I) at 67:6-10 (Cloutier) (confirming that Mr. Cloutier is “not aware of any fund that the VY Station has available to it that is dedicated solely to . . . site remediation costs”); Hearing Tr. 2/15/13 (Vol. II) at 93:21-24 (Twomey) (“I’m not aware that we have segregated specific money into a fund [for] site restoration. . . .”). Although Entergy has asserted on preemption grounds that the Board may not examine the sufficiency of the nuclear decommissioning trust fund, Entergy has structured its funding approach so that the Board necessarily must evaluate the sufficiency of the nuclear decommissioning trust fund in order to determine whether (and how much) money may be left over to pay for site restoration. The notification requirements that VPIRG has proposed would ensure that the Department receives meaningful progress reports and could monitor the availability of funds throughout the decommissioning and site restoration process. Should any shortfall develop that may impact funding for site restoration, the Department will be able to immediately notify the Board, allowing the Board to evaluate and take whatever steps it deems necessary to ensure that Entergy fulfills its site restoration obligations.
B. The Board Should Adopt the Site Restoration Conditions Proposed by WRC

Three of the conditions proposed by WRC fall squarely within the Board’s undisputed authority over site restoration activities. The Department recommends that the Board adopt those three conditions, in addition to the notification requirement discussed above and the conditions proposed in the Department’s Reply.

First, WRC proposes that if the Board becomes concerned that “Entergy VY is spending the trust fund imprudently in areas regulated by the NRC or Department of Energy (DOE),” that the Board “bring those matters to the attention of the appropriate federal authority[.]” WRC Reply at 8. The Department agrees. If Entergy is allowed to fund site restoration in the manner it has proposed,\(^3\) imprudent spending by Entergy will inappropriately reduce funding available for site restoration. See Entergy Br. at 31 n.13 (site restoration funds will come out of any surplus remaining in decommissioning fund). To preserve its authority over site restoration, ensure that Entergy will be financially capable of completing site restoration, and prevent ratepayers from being unfairly deprived of their share of surplus decommissioning funds, the Board should, when necessary, have a timely and meaningful opportunity to enlist the cooperation of federal regulators to monitor Entergy’s radiological decommissioning activities.

Second, the Board should examine closely the incentive structure created by the fund-sharing provision of the Docket 6545 MOU. WRC Reply at 26. Because Entergy already staked out the position that site restoration and radiological decommissioning activities can overlap (Hearing Tr. 6/17/2013 (Vol. I) at 77:14-78:3 (Cloutier)), the fund sharing set out in the Docket 6545 MOU could lead Entergy to manipulate the timing and accounting of those activities to

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\(^3\) As noted in the Department’s Reply (Dep’t Reply at 21), the Department does not agree that Entergy should be permitted to satisfy its site restoration funding obligations by financing site restoration solely through surplus funds from a non-segregated decommissioning fund.
maximize its own profits (or minimize its losses) to the detriment of the state. The Board should impose conditions with an eye to reduce or eliminate opportunities for such gamesmanship. If the Board adopts the Department’s proposal to require a stand-alone site restoration fund, this issue may be addressed by “delineat[ing] specific purposes for which the fund may and may not be used, and address[ing] how any funds remaining after site restoration is completed will be treated.” See Dep’t Reply at 41. For example, where Entergy otherwise would be required to undertake a future action as part of its radiological decommissioning work, Entergy should not be permitted to draw upon a separate site restoration fund for that activity, even if the work also addresses tasks that might be required for site restoration.

Third, the Department agrees with WRC that Entergy must “not delay site restoration[.]” WRC Reply at 26. Once radiological decommissioning has commenced, there will be no preemption-based concern if the Board requires site restoration to proceed concurrently with radiological decommissioning to the extent such work would not conflict with NRC requirements. At the very least, the Board should require Entergy to complete site restoration immediately following completion of radiological decommissioning. See Entergy Reply at 7 (“the Board does have nonpreempted authority over the post-nuclear, site-restoration phase of decommissioning”); *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n* (“*PG&E*”), 461 U.S. 190, 212 (1983) (“[T]he states exercise their traditional authority over . . . land use . . . .”). Indeed, the NRC recognizes that there can be overlap between site restoration and license termination activities (WRC Reply at 26; Hearing Tr. 6/17/2013 (Vol. I) at 77:14-78:3 (Cloutier)), and does not claim any authority over site restoration. See Hearing Tr. 2/12/13 (Vol. I) at 18:3-19, 60:23-61:18, 63:14-23 (Cloutier).
C. The Board Should Adopt the Conditions Proposed by ANR and NEC Designed to Protect Water Purity and the Natural Environment

Both ANR and NEC propose conditions which, if imposed by the Board, would address many of the concerns raised by the Department and other parties that the VY Station’s thermal pollution has an undue adverse impact on water purity and the natural environment. These conditions fall within the Board’s authority, independent of any concurrent authority of other Vermont agencies, to regulate effects on water purity and the natural environment. Order (6/19/13) at 7-12; see 30 V.S.A. § 248(b)(5). The Board should place such conditions on any CPG granted to Entergy.

First, ANR asks the Board to condition a CPG “on the requirement that ENVY cooperate fully with ANR, including cooperating in ENVY’s ongoing NPDES permitting process, and comply with all current and future information requests.” ANR Reply at 8. The Department proposed a similar condition in its reply brief, Dep’t Reply at 44, and agrees with ANR that prompt, complete answers to ANR’s outstanding and future requests for information will help to ensure that ANR is well-positioned to address the VY Station’s pending NDPES permit application for its thermal discharge into the Connecticut River environment. For example, Entergy’s cooperation in the ongoing NPDES permitting process will ensure that any limitations on the VY Station’s thermal discharge under a new NPDES permit are based on the most recent available information concerning the effect of the thermal discharge on the ecosystem and aquatic biota of the Connecticut River. ANR Reply at 7-8; see Prefiled Direct Testimony of Ernest Kelley at 9:1-22; Hearing Tr. 2/21/13 (Vol. II) at 69:14-70:1 (Kelley).

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4 ANR witness Kenneth Cox testified that Entergy has not been responsive to past ANR information requests. Prefiled Direct Testimony of Kenneth Cox at 6:19-7:3.
Second, the Department supports NEC’s recommendation that the Board condition any CPG on a requirement that the VY Station operate only in closed cycle. NEC Reply at 12. The elevated river temperatures associated with the VY Station’s thermal discharge have physiological effects on the fish populations in the Vernon and Turners Falls Pools. See Prefiled Direct Testimony of John Samuelian at 3:10-18; Cox Direct PFT at 5:19-6:6. In particular, higher river temperatures in the spring trigger adult American shad to spawn earlier than they normally would, causing them to stop their migration before reaching Vernon Pool. See Samuelian Direct PFT at 6:4-9; Hearing Tr. 2/20/13 (Vol. I) at 116:12-117:10 (Deen). And higher temperatures in the fall contribute to increased mortality among juvenile shad by delaying their outmigration. See Cox Direct PFT at 12:13-13:5; see Hearing Tr. 6/25/13 (Vol. I) at 76:15-18 (Barnthouse). In addition, operation of the VY Station’s cooling water intake system (CWIS) has an adverse effect on aquatic biota in Vernon Pool, injuring and killing fish and other organisms through impingement and entrainment. See Cox Direct PFT at 14:3-10. All of those negative impacts would be substantially mitigated, if not eliminated, by conditioning continued operation of the VY Station on the requirement that the plant operate in closed cycle only.

Entergy currently operates the VY Station in open- or hybrid-cycle mode to adjust the amount of heat rejected to the Connecticut River in conjunction with scheduled changes in the river flow rate. See Prefiled Surrebuttal Testimony of Peter Shanahan at 11:3-23. A condition requiring the VY Station to operate only in closed-cycle mode, as it was originally designed to operate and did operate when the VY Station first opened (Exhibit VNRC/CRWC-Reb-DLD-5, at 155), would minimize negative impacts and reduce the risk that the river environment will suffer adverse consequences because of Entergy’s practice of releasing the maximum
permissible thermal discharge to the river. Closed-cycle cooling involves little to no thermal discharge, Hearing Tr. 6/27/13 (Vol. I) at 21:13-24 (Thomas), and it is a primary means of reducing mortality by impingement and entrainment, see 76 Fed. Reg. 22173, 22198 (Apr. 20, 2011). As such, closed-cycle cooling largely eliminates concerns about the effects of higher temperatures and operation of the CWIS on American shad and other aquatic biota. See Dep’t Reply at 44. Thus, closed-cycle cooling would help ensure that the VY Station’s operation will not have an undue adverse effect on water purity or the natural environment.

II. WHILE SERVING GOOD POLICY GOALS, CERTAIN PROPOSED CONDITIONS COULD BE CONSTRUED AS BEYOND THE BOARD’S JURISDICTION

The Department, like the Board, is mindful of the limits of the Board’s jurisdiction and the scope of federal preemption. While the Department does not believe this to be the case, certain of the conditions proposed by VPIRG and WRC could be construed to touch upon areas of radiological decommissioning and safety; consequently, the Department has concerns that these conditions would be challenged by Entergy as beyond the Board’s jurisdiction and reaching into areas of exclusive federal concern. The Department therefore respectfully submits that, should the Board decide to grant Entergy a CPG predicated on Entergy’s compliance with certain conditions, the Board should not impose conditions that attempt to define or constrain the ways in which Entergy undertakes radiological decommissioning.

Both VPIRG and WRC recommend that any CPG granted to Entergy be conditioned upon a requirement that Entergy employ DECON, or prompt decommissioning, rather than SAFSTOR (delayed decommissioning). See WRC Reply at 16-17; VPIRG Reply at 3. The Department fully agrees that the public good would be best served by commencing and
completing decommissioning as soon as possible, both because DECON is less expensive than SAFSTOR (see WRC Reply at 20-21; Direct Prefiled Testimony of William A. Cloutier, Jr. at 7:11-15) and because prompt decommissioning minimizes uncertainty (see WRC Reply at 18 (quoting Direct Prefiled Testimony of Warren K. Brewer at 4:22-5:2)). Additionally, prompt decommissioning advances the public good by promoting earlier release and reuse of the site and minimizing near-term job losses. See Cloutier Direct PFT at 8:5-9, 9:11-12, 9:19-20 (describing how, for scenarios assuming shutdown in the same year, DECON scenarios resulted in availability of the site for alternative use 10-32 years before SAFSTOR scenarios); Hearing Tr. 2/12/13 (Vol. I) at 109:10-21 (Cloutier) (describing how employment “gradually dissipates” under DECON scenarios but “drops really fast” under SAFSTOR scenarios). However, if the Board imposed such a condition, the entire framework of the CPG could be vulnerable to attack based on federal preemption.5

The Supreme Court has recognized that state regulation that touches on nuclear safety concerns, but is grounded in a non-safety concern, is not preempted and is permissible. See PG&E, 461 U.S. at 213. Thus, a court could conclude that the Board has authority over determinations regarding the economic benefits to the state that would result from prompt decommissioning. However, especially because WRC, at least in part, bases its proposal on the fact that “prompt decommissioning produces less radiological waste,” see WRC Reply at 21, that condition would almost certainly expose a CPG granted by the Board to protracted federal litigation given Entergy’s penchant for advancing broad claims of preemption. See, e.g., Dep’t Br. at 9 (“In the course of this proceeding, Entergy has repeatedly made sweepingly overbroad

5 For similar reasons, the Department has reservations about adopting VPIRG’s proposed condition to require Entergy to seek NRC approval for decommissioning within 60 days of any request by the Department or the Governor. See VPIRG Reply at 3.
assertions of federal preemption by objecting to the admission of testimony and evidence offered by the Department and other parties[.]”).

While regulations in other states that have been held to be preempted were more directly tied to nuclear safety than the ones at issue here, exposing an otherwise non-controversial CPG to the possibility of invalidation would not be in the best interest of the State of Vermont or its citizens. See, e.g., *Maine Yankee Atomic Power Co. v. Maine Pub. Utilities Comm’n*, 581 A.2d 799, 804, 806 (Me. 1990) (law with stated purpose of “timely proper decommissioning of any nuclear power plant . . . to protect public health, safety and the environment,” was impermissible because “the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose’ as those sought by state regulation”); *Maine Yankee Atomic Power Co. v. Bonsey*, 107 F. Supp. 2d 47, 51 (D. Me. 2000) (“[T]he Board’s authority to regulate Maine Yankee’s decommissioning activities is preempted, and the Board’s current course [of monitoring a spent fuel plan] could well take it into preempted waters.”).

WRC also proposed other conditions that would structure the manner in which Entergy makes payments into the decommissioning trust fund. See WRC Reply at 11-13 (urging the Board to require Entergy to make a further payment into the fund to bring the fund to the amount VYNPS would have contributed had Entergy not taken over the VY Station); *id.* at 13-14 (suggesting that the Board require a payment into the decommissioning trust fund “in lieu of a PPA benefit for operations from March 21, 2012 until the time of closure”); *id.* at 14-16 (recommending that the Board require Entergy to make various types of payments into the decommissioning trust fund having to do with spent fuel storage and management). While the Department fully supports WRC’s goal—ensuring that the decommissioning trust fund reaches a
level sufficient to complete decommissioning as soon as possible—the Department respectfully submits that these conditions could raise the question whether the Board has the authority to require Entergy to structure its payments into the fund in particular manner. See *Maine Pub. Utilities Comm'n*, 581 A.2d at 805-806; *Bonsey*, 107 F. Supp. 2d. at 51. For these same reasons, the Department does not support WRC’s proposal that the Board open a new docket in part to handle approvals of withdrawal of decommissioning funds. See WRC Reply at 28-29.

The Department does not suggest that the conditions proposed by VPIRG and WRC described above are, in fact, preempted. However, the Department submits that the Board can and should issue a CPG predicated on conditions that do not lead the Board down a “course that could well take it into preempted waters,” *Bonsey*, 107 F. Supp. 2d. at 51, and that it would better promote the good of the State of Vermont if the Board issues a CPG that squarely falls within areas of undisputed state authority. A CPG that imposes conditions focused on acknowledged areas of state authority and concern, such as site restoration, transitional economic assistance, and state environmental requirements, is in the best interests of the State of Vermont and promotes the public good. See Dep’t Reply at 36-45.

III. CONCLUSION

For the reasons set forth in its reply brief, the Department recommends that the Board grant Entergy a CPG to operate the VY Station until December 31, 2014, conditioned upon Entergy’s compliance with the conditions delineated in that brief, and any other conditions the Board deems appropriate, including certain of the conditions proposed by WRC, VPIRG, ANR, and NEC as described in Part I, *supra*. 
Dated at Montpelier, Vermont, this 22nd day of November, 2013.

Respectfully submitted,

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