

STATE OF VERMONT

ENVIRONMENTAL COURT
DOCKET NO. 89-4-06 Vtec

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In Re: Entergy Nuclear Vermont Yankee's)
Amended Discharge Permit)
Permit Number: 3-1199)
)

**NEW ENGLAND COALITION'S MOTION FOR A STAY AND MEMORANDUM
IN SUPPORT OF CONNECTICUT RIVER WATERSHED COUNCIL'S
MOTION FOR STAY**

NOW COMES The New England Coalition, by and through its counsel, and hereby moves for a stay of the amended NPDES discharge permit No. 3-1199 issued by the Vermont Agency of Natural Resources to Entergy Vermont Yankee LLC (Entergy) on March 30, 2006. The New England Coalition (NEC) joins and adopts as its own the Motion for Stay filed by the Connecticut River Watershed Council (CRWC) with this Court on June 16, 2006. As stated by CRWC in its Motion, a stay is necessary to maintain the status quo and prevent irreparable harm. NEC limits its comments to the balance of hardships and public interest factors in the accompanying Memorandum of Law.

Signed and dated in Royalton, Vermont this 28th day of June, 2006.

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In Re: Entergy Nuclear Vermont Yankee’s)
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**NEW ENGLAND COALITION’S MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR STAY**

New England Coalition joins and adopts as its own Connecticut River Watershed Council’s Memorandum of Law in Support of Motion for Stay, and respectfully offers the following comments on Parts II.D and E of CRWC’s Memorandum.

I. The Balance of Hardships Tips Decidedly in Favor of a Stay

NEC asserts that CRWC has shown that there is a strong possibility of harm to the American shad if the stay is denied, and that this harm is irreparable. See Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 545 (1987) (“[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable”).

A. The Harm to Entergy is Merely Financial

On the other hand, if a stay were granted by this court, the resulting harm to Entergy would be wholly financial. Entergy states, in its cover letter requesting the

NPDES permit amendment that is at issue in this appeal, that allowing the increase in thermal discharge limits would “[f]acilitate increased power generation...” by limiting the use of the cooling towers. See Appendix A, attached hereto. In other words, if the stay is granted, Entergy would be forced to use its cooling towers for their designed purpose and the electricity consumed by those towers would not be available for sale. This harm to Entergy is economic and therefore by definition not irreparable. See National Parks & Conservation Association v. Babbitt, 241 F.3d 722, 738 (9th Cir. 2001) (finding that a cruise ship’s loss of expected revenue does not outweigh “potential irreparable damage to the environment”). See also State of Ohio ex rel. Celebrezze v. Nuclear Regulatory Commission, 812 F.2d 288, 291-292 (6th Cir. 1987).

B. Entergy Can Continue the Uprate if the Stay were Granted

Although Entergy has attempted to separate the two issues, the Extended Power Uprate (EPU) which was the subject of Vermont Public Service Board Docket No. 6812 and this requested NPDES permit amendment are linked. The EPU began this spring and the Vermont Yankee Plant continues to operate at 120% of its original thermal capacity. Only a portion of the extra heat produced by the reactor attributable to the EPU can be converted into electricity; the rest must be removed by the plant’s cooling system. All waste heat produced by the reactor is removed through one of the following: (i) a closed cycle system utilizing cooling towers and requiring electrical power input, (ii) an open-cycle system bypassing the cooling towers entirely and discharging waste heat to the Connecticut River, or (iii) a hybrid system where only some of the heated water is discharged to the river. See Final Environmental Assessment and Finding of No Significant Impact, 71 Fed .Reg. 4614-01 (CRCW’s Appendix H). If the stay were

granted, Entergy would be forced to reduce the use of the cheaper, open cycle system and increase reliance on the cooling towers. As pointed out by CRWC, Entergy has stated that it planned to do just that if the requested permit amendment were not granted. See CRCW's Appendix H, p. 4, column 2. See also Petition of Entergy Nuclear Vermont Yankee, LLC, Vermont Public Service Board Docket 6812, Final Order at note 26 and accompanying text (3/15/2004) (available at <http://www.state.vt.us/psb/orders/2004/files/6812fnl.pdf>) (noting that "...if ANR does not modify the NPDES permit, Entergy will need to use the cooling towers more frequently").

Alternatively, Entergy retains the option of returning the reactor to pre-EPU conditions. Prior to the EPU, the Vermont Yankee reactor produced sufficient power to fulfill its contracts with the state of Vermont and to sell excess power on the New England grid. As asserted by the Vermont Department of Public Service in its Petition to Intervene in N.R.C. Docket No. 50-271 (regarding the EPU):

"...there is no apparent compelling reason that requires [Entergy] to request a 20% power uprate of Vermont Yankee. Vermont Yankee is performing adequately and economically at its current power level. There is no power shortage in New England. There is no way that Vermont Yankee's power 20% uprate could be found to be necessary." See Appendix B, pp. 17-18, attached hereto.

C. The Harm to Entergy of a Stay Results from Self-Imposed Risks

Entergy began the increase of power at the Vermont Yankee reactor (the EPU) without knowing the result of its application for the NPDES permit amendment at issue in this appeal. In doing so, Entergy took the risk that the permit amendment might not be granted, or might be delayed or stayed. This risk was self-imposed and such risks should

not be given much weight in balancing the burdens for a stay motion. See Cuomo v. U.S. Nuclear Regulatory Commission, 772 F.2d 972, 977 (D.C. Cir. 1985) (holding that a nuclear plant owner's expenses incurred in anticipation of a license grant were self-imposed risks and are "not properly the subject of inquiry on a motion for stay"). See also St. Albans Co-op. Creamery, Inc. v. Glickman, 68 F. Supp. 2d 380, 390-391 (D. Vt. 1999) (discussing how a failure to mitigate foreseeable losses due to a potential injunction is a self-imposed risk).

II. The Public Interest Strongly Favors a Stay

New England Coalition agrees with the assertions made by CRWC in Section II.E of its Memorandum of Law in support of its motion for stay. NEC avers that a stay would be in the public interest for two additional reasons.

First, it is in the public's interest to ensure that the Vermont Agency of Natural Resources (ANR) accurately interprets the Clean Water Act and Vermont's Water Quality Standards (VWQS). CRWC has argued, and NEC joins in the argument, that ANR's actions have violated the law by not making the required findings to support an expanded mixing zone for thermal discharges from Vermont Yankee. See CRWC's Memorandum at 12. Also, NEC submits that ANR failed to comply with the VWQS in not considering, nor requiring Entergy to consider, reasonable alternative methods and locations for discharge of the extra waste heat from reactor. See VWQS 1-04.A.2. Ensuring that government agencies comply with the law is a public interest of the "highest order." Seattle Audubon Society v. Evans, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991).

Second, as CRCW notes, the public has an interest in the electricity produced by Vermont Yankee. However, consumers of electricity in Vermont will not be directly affected by a stay in this instance since the most likely result is that Entergy may have to increase the use of the cooling towers at the plant. Even if Entergy is forced to reduce its output to pre-EPU conditions, Vermont consumers will not be adversely affected. According to the Public Service Board's Order in Docket 6812, the "uprate of Vermont Yankee is not required for the purpose of serving load within the state of Vermont." See Order of 3/15/2004 at 21. Entergy sells the additional power arising from the EPU to any purchaser in New England. See id. The marginal public interest of increased power availability to the New England grid is far outweighed by the public's interest in avoiding irreparable harm to the American shad and other Connecticut River species.

In addition, NEC would like to point out that using river water to cool nuclear reactors will become more and more unfeasible during the summer months as global warming continues. During the August 2003 heat wave in France, officials were unable to draw enough cold water from the rivers to cool their reactors and, instead of reducing power output, were permitted to discharge the super-heated water back into the rivers. See Appendix C, attached hereto (available at <http://www.berkeleydaily.org/article.cfm?archiveDate=11-18-03&storyID=17770>).

It is practically undisputed that the earth's climate is getting hotter. Entergy even uses this contention as a public relations tactic to garner support for nuclear power. As global warming continues, and the threat of extreme weather increases, Entergy and the state of Vermont ought to be conservative and not rely on the continued availability of cold river water to cool the reactor.

Conclusion

For the above reasons, NEC respectfully requests that the court enter an order staying the effective date of the amended permit No. 3-1199 pending appeal.

Signed and dated in Royalton, Vermont this 28th day of June 2006

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NEC'S MOTION FOR STAY

List of Appendices

- Appendix A: Entergy's NPDES permit amendment application cover letter, dated February 17, 2003.
- Appendix B: Vermont Department of Public Service, Petition to Intervene in N.R.C. Docket No. 50-271 (Extended Power Uprate), August 30, 2004
- Appendix C: Paul Schwartz, Global Warming Threatens Nuke Power, The Berkeley Daily Planet, November 18, 2003, available at <http://www.berkeleydaily.org/article.cfm?archiveDate=11-18-03&storyID=17770>