

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of:

Entergy Nuclear Operations, Inc., Vermont Yankee
Nuclear Power Station

Docket No. 50-271

**Petition of the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and
Green Mountain Power Corporation for Review of Entergy Nuclear Operation, Inc.'s
Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund**

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INTRODUCTION

The State of Vermont and its co-Petitioners respectfully request that the Nuclear Regulatory Commission conduct a robust, comprehensive, and participatory review of Entergy's use of the Vermont Yankee Nuclear Decommissioning Trust Fund.

Nuclear Regulatory Commission (NRC or Commission) regulations require that decommissioning funds be used only for radiological decommissioning. Those requirements advance the purpose of such funds: ensuring that there will be sufficient funds available for decommissioning and protecting against the radiological, environmental, and economic consequences of an improperly decommissioned nuclear power plant. Entergy Nuclear Operations, Inc. and Entergy Nuclear Vermont Yankee LLC (collectively, Entergy), however, have filed a multitude of separate requests to use the Vermont Yankee Nuclear Decommissioning Trust Fund (Decommissioning Fund or Fund) for purposes other than radiological decommissioning. Considered together, Entergy's actions threaten to undermine the radiological decommissioning work that is the very purpose of the Fund. Unless the Commission intervenes, Entergy will divert hundreds of millions of dollars from their intended purpose.

The purpose of this Petition is to have one authority—the Commissioners or a designated Atomic Safety and Licensing Board (ASLB)—address Entergy's interrelated requests in a coordinated manner. Such a proceeding is necessary to ensure adequate protection of public health and safety during the legally required decommissioning of Vermont Yankee. Without such a coordinated approach, Entergy may be allowed to seriously compromise the adequacy and integrity of the Decommissioning Fund.

A coordinated approach also is essential to meet the Commission's obligations under the National Environmental Policy Act (NEPA). The Commission must undertake a NEPA review to evaluate the significant potential environmental and economic consequences associated with the major federal action of allowing Entergy to divert hundreds of millions of dollars from the Decommissioning Fund.

The State of Vermont, its citizens, and its ratepayers have a direct interest in ensuring proper use of the Decommissioning Fund. The Vermont Yankee facility is located in Vernon, Vermont, and Vermont ratepayers paid into the Fund. Vermont and its citizens will be most at risk in the event of a shortfall in the Decommissioning Fund that prevents the site from being fully decontaminated and restored. That risk is radiological and environmental if the site is not fully decontaminated or properly managed before full radiological decontamination and license termination. That risk is also financial—there is no guarantee that Vermont taxpayers will not become the payers of last resort if the Decommissioning Fund is insufficient. Further, Vermont faces other potential harms springing from those risks, including damaging effects on its economy. Due to the breadth of Entergy's requests to use the Decommissioning Fund and the potentially far-reaching consequences associated with them, the Commission should undertake a single, comprehensive review of Entergy's Decommissioning Fund-related requests.

FACTUAL BACKGROUND

When Entergy bought the Vermont Yankee plant in 2002, included in that sale was the Decommissioning Fund, which then contained approximately \$310 million. With interest, the Fund grew to approximately \$665 million by the time Entergy closed Vermont Yankee in December 2014. The Fund now stands at approximately \$595 million. Entergy has never contributed to the Decommissioning Fund. It was created by charging Vermont ratepayers a fee

on every kilowatt-hour of power purchased from Vermont Yankee Nuclear Power Corporation and Green Mountain Power Corporation. Those utilities collected the principal funds that (with interest) constitute the entirety of the Decommissioning Fund. And those utilities have a direct 55% financial interest in any money remaining in the Fund after completion of radiological decommissioning.

As part of its purchase of Vermont Yankee, which required approval not only from the NRC but also from the Vermont Public Service Board, Entergy entered into a Master Trust Agreement. *See* Exhibit 1 (Entergy Nuclear Vermont Yankee, LLC Master Decommissioning Trust Agreement for Vermont Yankee Nuclear Power Station (July 31, 2002)). Like relevant regulations of the Commission,¹ and as discussed in more detail in Section I.b., *infra*, the Master Trust Agreement (and related orders from the Federal Energy Regulatory Commission (FERC) and the Public Service Board) limits the use of the Decommissioning Fund to legitimate decommissioning expenses. In response to requests by Entergy, the Master Trust Agreement allows use of the Decommissioning Fund for two non-decommissioning expenses—spent fuel management and site restoration costs—but with a critical limitation: Entergy promised that decommissioning funds would be available for such uses only *after* completion of decommissioning. Further, if excess funds do remain following decommissioning, Entergy promised that it would, before using those funds for spent fuel management costs, first seek reimbursement from the Department of Energy and only use the Decommissioning Fund for spent fuel management costs that were not reimbursed. Entergy also promised that, once

¹ Ensuring that decommissioning is completed before allowing any diversion of decommissioning funds for other purposes is embodied in NRC Regulations. *See, e.g.*, 10 C.F.R. §§ 50.75(h)(1)(iv), 50.82(a)(8)(i)(A). Those protections intentionally place the risk of inadequate funds for decommissioning where it belongs: on the plant owner, not on the host state or its citizens.

decommissioning and site restoration were complete, it would return 55% of all excess funds to Vermont Yankee Nuclear Power Corporation and Green Mountain Power for the benefit of the ratepayers whose contributions created the Fund. In sum, 55% of the difference between the amount of trust funds and the total amount of the expenditures allowed under the Master Trust Agreement *must* be returned to Vermont ratepayers.

Despite those promises, Entergy has made a number of recent attempts to use the Decommissioning Fund for improper purposes, including actions in direct contravention of the promises it made in 2002:

- On September 4, 2014, Entergy filed a license amendment request to allow it to cease providing 30 days' notice to the NRC or the State before Entergy makes withdrawals from the Decommissioning Fund (ADAMS Accession No. ML14254A405). The State petitioned to intervene in that proceeding (ADAMS Accession No. ML15110A484) (April 20, 2015 Petition), and obtained a favorable decision from an ASLB granting intervention and a hearing. *In re Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.*, Docket No. 50-271-LA-3, LBP-15-24 (Aug. 31, 2015). Rather than proceed with a hearing, which would require disclosing information about precisely how it seeks to use the Decommissioning Fund, Entergy moved to withdraw its license amendment request (ADAMS Accession No. ML15265A583). The State sought conditions on the withdrawal (ADAMS Accession No. ML15275A438). On October 15, 2015, the ASLB granted Entergy's requested withdrawal, but imposed some of the State's requested conditions, including a requirement that Entergy provide advance notice of certain types of withdrawals identified as improper by the State. *In re Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.*, Docket No. 50-

271-LA-3, LBP-15-28 (Oct. 15, 2015) (ADAMS Accession No. 15288A223). On October 26, 2015, NRC Staff moved to vacate the Board's underlying August 31, 2015 ruling (LBP-15-24). The State will oppose the Staff's requested vacatur.²

- On December 19, 2014, Entergy filed its Post-Shutdown Decommissioning Activities Report (PSDAR) and Decommissioning Cost Estimate (ADAMS Accession No. ML14357A110), as well as an Updated Decommissioning Funding Status Report (ADAMS Accession No. ML14358A250). NRC Staff approved the Updated Decommissioning Funding Status Report on October 5, 2015 (ADAMS Accession No. ML15274A379). As explained in more detail below, Entergy made clear in those documents and subsequent public statements that it intends to use the Decommissioning Fund for expenses that do not meet the NRC's definition of decommissioning. For instance, Entergy seeks to use the Decommissioning Fund for insurance payments, property taxes, and even legal fees for emergency planning litigation.³ None of those activities will reduce radiological contamination at the site.

² That proceeding is a good example of the problems created by Entergy's multi-faceted attempts to use the assets of the Decommissioning Fund improperly. While the Board appeared interested in the subject of the exemptions that were granted by NRC Staff, it felt constrained in its ability to address those issues substantively. *See Entergy*, LBP-15-24, at 18 & n.96 (holding that "the merits of the exemption request itself are . . . outside the scope of this proceeding," even though it "would have been much simpler" if Entergy had made its exemption request part of its license amendment request, "in which case both would have been subject to a hearing"). Those types of fragmentations underscore the importance of a comprehensive proceeding. *See id.* at 15 (holding that the exemptions Entergy requested separate from its license amendment request "are precisely the sort of directly related and dependent exemption-related issues that are within the scope of a license amendment proceeding").

³ Just months after the State notified the NRC and Entergy that those expenses are not allowed under NRC regulations, Entergy and the Nuclear Energy Institute submitted to NRC Staff proposed guidance on use of decommissioning trust funds. NEI-15-06 (May 2015) (ADAMS Accession No. ML15233A075). That proposed guidance puts forth an incorrect and overly broad view of the NRC's definition of decommissioning so as to encompass the very uses Entergy seeks. *See id.* at B-4 (claiming that "decommissioning" includes "maintaining

Further, Entergy improperly bases its calculations in those documents on the unsupported assumption that the U.S. Department of Energy (DOE) will remove all spent nuclear fuel from Vermont Yankee by 2052.

- On January 6, 2015, Entergy requested exemptions to use the Decommissioning Fund for spent fuel management expenses before radiological decommissioning is complete, and to eliminate related notification to the NRC (ADAMS Accession No. ML15013A171). NRC Staff granted those exemptions on June 17, 2015 (ADAMS Accession No. ML15128A219). The Petitioners challenged that decision in a petition filed August 13, 2015, with the U.S. Court of Appeals for the D.C. Circuit.

Entergy's rationale for seeking use of the Decommissioning Fund for the non-decommissioning costs of spent fuel management is that there will be an excess in the Fund after all decommissioning expenses are paid. That claim is based on demonstrably inaccurate assertions contained in Entergy's December 19, 2014, PSDAR. The State submitted extensive comments on the PSDAR, including detailed analyses challenging a number of Entergy's fundamental assumptions and conclusions. Exhibit 2 (Comments of the State of Vermont (March 6, 2015) (ADAMS Accession No. ML15082A234)). NRC Staff never provided a formal response to Vermont's concerns. Though the PSDAR has not been formally accepted, NRC Staff relied on the flawed analysis in the PSDAR to grant exemptions, release Entergy from parental guarantees, and defend proposed license amendments.

emergency preparedness capabilities, physical security, property taxes, insurance and fees for attorneys and consultants").

LEGAL BACKGROUND

Decommissioning funds are essential to the approval process for construction and operation of a nuclear power facility. The primary purpose of decommissioning funding—and the requirements that protect those funds—is to provide assurance that the nuclear power facility will be properly decommissioned and that the host state and its citizens will not pay twice for decommissioning the facility and returning the site to unrestricted use. Thus, NRC regulations explicitly prohibit the use of decommissioning funds for any purpose other than legitimate decommissioning expenses. 10 C.F.R. §§ 50.75(h), 50.82(a)(8)(i)(A).

The U.S. Court of Appeals for the Seventh Circuit recently held that “[t]he decommissioning of nuclear facilities is closely regulated by the Nuclear Regulatory Commission, and its regulatory authority embraces every potential malfeasance or misfeasance of assets dedicated to the decommissioning process.” *Pennington v. Zionsolutions LLC*, 742 F.3d 715, 719 (7th Cir. 2014) (Posner, J.). The Decommissioning Fund is an “asset[] dedicated to the decommissioning process.” *Id.* As “the designated policeman of decommissioners,” the NRC is one of the regulatory agencies that must ensure that asset is used appropriately. *Id.*

Additionally, NEPA requires an integrated approach to these matters. *See, e.g., Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1314 (D.C. Cir. 2014) (“The justification for the rule against segmentation is obvious: it prevents agencies from dividing one project into multiple individual actions each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.” (quotation and alteration marks omitted)). The Commission’s collective actions and inactions allow Entergy to use the Decommissioning Fund in ways that threaten the Fund’s ability to pay for actual decontamination of the site. That major federal action—allowing the diversion of money that should remain reserved for

decommissioning alone—creates significant potential environmental and economic consequences that trigger the need for NEPA review.

SCOPE OF REQUESTED REVIEW

The State of Vermont and its co-Petitioners request that the Commission convene a single proceeding, with opportunities for stakeholder participation, to review the use of the Decommissioning Fund for Vermont Yankee, to take all actions necessary to evaluate the various requests advanced by Entergy, and to ensure that Entergy complies with all applicable requirements pertaining to the Fund. At a minimum, the Commission should grant a hearing to allow Petitioners an opportunity to address the need to:

(1) reverse NRC Staff's June 17, 2015 grant of Entergy's exemption requests to use the Decommissioning Fund for spent fuel management expenses before radiological decommissioning is complete⁴;

(2) 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;

(3) require Entergy to provide detail in its 30-day notices;

(4) find Entergy's December 19, 2014, filings (PSDAR, Decommissioning Cost Estimate, and Updated Irradiated Fuel Management) deficient insofar as those filings contemplate using

⁴ That approval also granted Entergy's request to eliminate the 30-day notice requirement for withdrawals from the Decommissioning Fund for spent fuel management expenses, but that issue is now moot since Entergy has withdrawn its license amendment request relating to that requirement. Consequently, NRC Staff's decision granting the exemption request is overbroad and purports to allow something that Entergy's license does not: expenditures without prior notice. Notably, the Board stated that "[i]t is curious that the NRC Staff would approve a request to exempt a licensee from regulations which do not apply to the licensee (until the LAR is approved). It is even more curious that the NRC Staff purports to make such an exemption effective immediately." *Entergy*, LBP-15-24, at 5 n.24.

the Decommissioning Fund for spent fuel management and other non-decommissioning expenses before radiological decommissioning is complete;

(5) undertake the environmental review required by NEPA before deciding whether Entergy may proceed with non-compliant uses of the Decommissioning Fund; and

(6) take any other actions necessary to protect the Decommissioning Fund until radiological decommissioning is complete.

JURISDICTION

The Commission has jurisdiction to review the matters raised in this Petition. To begin, the Commission has general supervisory authority over all decisions (and inaction) by NRC Staff that are the subject of this Petition. Further, the issues raised in this Petition are license-related matters that, under the Atomic Energy Act and the Administrative Procedure Act, require a hearing. In addition, the Commission has interlocutory authority to address matters pending before an ASLB, and appellate authority over decisions of the Board. Although Entergy has now withdrawn its related license amendment request, the ASLB placed conditions on that withdrawal, and the Board's rulings in this matter remain open to appeal and to motions to vacate. Finally, the various actions (and inactions) at issue here threaten the financial ability of Entergy to decommission the Vermont Yankee plant. This constitutes a major federal action with significant environmental impacts and thus requires review under NEPA.

Supervisory authority. The Commission has authority to convene the comprehensive proceeding requested in this Petition. *See, e.g., Safety Light Corp., et al.* (Bloomsburg Site Decontamination & License Renewal Denials), 36 N.R.C. 79, 85 (Aug. 12, 1992) ("Even in the absence of a petition for review, the Commission retains its supervisory power over adjudications to step in at any stage of a proceeding and decide a matter itself."). This is an

“inherent supervisory authority even over matters in adjudication.” *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, & 4), 11 N.R.C. 514, 516 (Apr. 17, 1980).

The Commission often has exercised that authority even when review was not requested explicitly. *See, e.g., Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), 50-271-LR, CLI-07-01, 2007 WL 96998, at *1 (Jan. 11, 2007) (“[W]e have used *sua sponte* review as a vehicle to address unappealed issues or orders, to set a specific timetable, or otherwise customize our procedures for individual adjudications, to suspend a proceeding, to vacate an unreviewed board order after withdrawal of the challenged application, to decide whether to disqualify a presiding officer, to address an issue of wide implication, and to provide guidance to a licensing board.”). The Commission “exercise[s] [its] inherent supervisory authority over the conduct of proceedings to take *sua sponte* review” of important issues, including “*sua sponte* review” of Board’s intervention rulings “in the interest of expedition and economy of effort.” *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), 48 N.R.C. 129, 130 (Sept. 17, 1998).

This type of supervisory review is particularly appropriate when an “issue is novel and has broad implications for this and other proceedings.” *Id.* That is precisely the case here. Each issue raised by the State is novel and ripe for the Commission’s review. For instance, in connection with the issue of what expenses are legitimate “decommissioning” expenses that can be withdrawn from a decommissioning trust fund, the ASLB recently recognized that “Vermont and Entergy define the term [decommissioning] differently.” *Entergy*, LBP-15-28, at 11. The Board also recognized that Entergy’s withdrawal from that proceeding “leaves Entergy and Vermont’s legal dispute over the definition of decommissioning unresolved.” *Id.* at 12. Resolution of that novel issue “has broad implications for this and other proceedings.” *N. Atl.*

Energy Serv. Corp., 48 N.R.C. at 130. What constitutes appropriate use of a decommissioning trust fund affects not only Vermont Yankee and the Petitioners here, but also affects licensees and other interested parties to future proceedings involving other plants that have closed or will close. The proposed guidance document recently submitted by NEI signals the industry’s intent to attempt to utilize decommissioning trusts for non-decommissioning purposes. Further, Staff’s routine granting of exemptions to allow decommissioning funds to be used for such purposes demonstrates that the issues raised in this Petition are systemic and industry-wide, and therefore warrant review by the Commissioners.

In addition, because this Petition raises matters that require either adjudication or a rulemaking proceeding, the Commission can “exercise . . . [its] inherent supervisory authority over adjudications and rulemakings.” *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-11, 55 N.R.C. 260 (2002). Supervision is particularly appropriate in this case, given that many of the matters raised in this Petition have ramifications that extend beyond the one decommissioning trust fund at issue here. Thus, it is not only the State of Vermont that would benefit from guidance by the Commission, but also other host states and stakeholders. Further, a comprehensive review is warranted. The disjointed and siloed approach adopted by Entergy in seeking separate approvals for many of its actions—combined with its failure in some instances to seek approval at all—warrants Commission supervision to ensure a cohesive and comprehensive approach to these important matters.

License-related matters requiring a hearing. The matters raised in this Petition are license-related matters that, like license amendment requests, should be considered adjudications within the meaning of 5 U.S.C. § 551(7) of the Administrative Procedure Act. Those actions thus trigger hearing rights under that Act and under the Atomic Energy Act. *See* 10 C.F.R.

§ 2.104. Entergy's Vermont Yankee license contains a number of specific restrictions on its use of the Decommissioning Fund, including the following:

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

- (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.

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Docket No. 50-271, Facility Operating License No. DPR-28, Condition 3(J)(a)(iii); *see generally id.* at Condition 3 (noting that Entergy is also “subject to all applicable provisions of the Act and to the rules, regulations, and orders of the Commission now or hereafter in effect”).

The license specifically requires that Entergy “shall take all necessary steps to ensure that the decommissioning trust is maintained in accordance with the application for approval of the transfer of this license,” including “the requirements of the Order approving the transfer” and “the safety evaluation supporting the Order.” *Id.* at Condition 3(J). The Order approving the transfer and the accompanying safety evaluation both contain the requirements from Entergy's license listed above. *Order Approving Transfer of License and Conforming Amendment*, Docket No. 50-271 (May 17, 2002) (ADAMS ML#020390198); *Safety Evaluation By The Office Of Nuclear Reactor Regulation Proposed Transfer Of Operating 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 Conforming Amendment, Docket No. 50-271, at 7 (May 17, 2002).

As explained in this Petition, Entergy's actions are in derogation of those license conditions. And, except for the one license amendment request it now has withdrawn, Entergy has not filed any other license amendment requests to relieve itself of those conditions.

The requested comprehensive proceeding also should encompass Entergy's exemption requests. Although 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. *Private Fuel Storage, LLC*, CLI-01-12, 53 NRC 459, 476 (2001); *see also, e.g., Honeywell International, Inc.*, CLI-13-1, 77 NRC 1, 7 ("But when a licensee requests an exemption in a related license amendment application, we consider the hearing rights of the amendment application to encompass the exemption request as well."). Indeed, the ASLB recently noted that "[p]rocedurally, [it] would have been much simpler if Entergy had submitted its LAR [license amendment request] and exemption request together, in which case both would have been subject to a hearing request." *Entergy*, LBP-15-24, slip op. at 18 n.96. Although the Board did not believe it had authority to review the decision that Staff had already made on the exemption request, and although Entergy has now withdrawn from the license amendment proceeding, the Commission retains full supervisory authority over that matter and the related exemption request. It should exercise that authority to provide for a comprehensive proceeding.

Interlocutory and appeal authority over ASLB proceeding. The Commission also has interlocutory and appeal authority to address matters pending before an ASLB. *See, e.g., Private*

Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), 47 N.R.C. 307, 310 (June 5, 1998). Here, although Entergy withdrew its license amendment request, the Board imposed two conditions on that withdrawal. *Entergy*, LBP-15-28. One of those conditions is directly related to the subject matter of this Petition: because the Board agreed that the State had raised a “potentially meritorious issue” regarding whether Entergy can use the Decommissioning Fund for certain expenses, the Board has ordered Entergy to provide the State notice of any withdrawals from the Fund for certain expenses that the State identified as improper. *Id.* at 12. Entergy and NRC Staff both opposed that condition. Those parties are within the appeal period for asking this Commission to review the Board’s imposition of conditions.

Further, on October 26, 2015, NRC Staff filed a motion to vacate the Board’s August 31, 2015, decision (LBP-15-24). The State opposes vacatur of the August 31, 2015 decision, and that matter is thus also likely to appear before the Commission in the near future. Given that the Commission likely will have to address those issues regardless, it should do so in the comprehensive manner requested by Petitioners here.

NEPA review required. NEPA requires an integrated approach to the matters identified above. The fact that Entergy has chosen to present its related requests in a piecemeal fashion does not relieve the NRC of its duties under NEPA. The sum total of the NRC’s actions and inactions regarding the Decommissioning Fund constitute a major federal action. The NRC has an independent obligation to review Entergy’s various requests together, and to conduct a comprehensive NEPA-compliant analysis of the potential consequences associated with Entergy’s planned improper uses of the Fund.

REASONS FOR REVIEW

Consistent with Entergy's agreements and the Commission's rules, the Decommissioning Fund must be used *only* for decommissioning expenses until radiological decommissioning is complete, and otherwise must be held in trust for the ratepayers who paid into that Fund. The NRC must enforce the requirements in its regulations and in the Master Trust Agreement limiting uses of the Decommissioning Fund to expenses that meet the NRC's definition of decommissioning—namely, expenses that reduce radiological contamination at the site—until the site is decontaminated. The Petitioners seek the Commission's intervention to enforce these rules and undertakings.

Failure by the NRC to enforce its regulations protecting the Fund could result in a shortfall, placing public health and the environment at risk that the site will be left radiologically contaminated, or that decommissioning protocols, protections, and goals will not be fully achieved. *See, e.g., Entergy*, LBP-15-24 at 22 (holding that the State's contention that Entergy was using the Decommissioning Fund for unallowed uses "raises health and environmental concerns . . . because the decommissioning fund exists to ensure that companies will be able to decontaminate the site"). The NRC must consider the sum total of its individual approvals and Entergy's actions that cumulatively put the Fund in jeopardy.

Commission review is particularly important here because, unlike past plants that have undergone decommissioning, Entergy is a merchant-generator. It cannot impose additional costs on its ratepayers in the event of a shortfall (though, as discussed throughout this Petition, its actions threaten to deprive ratepayers of the refunds they are due). And there can be no doubt that shortfalls occur during decommissioning—some of them significant (such as at Connecticut Yankee). *See infra* Section II.b(i). Further, Entergy's Decommissioning Cost Estimate fails to

properly account for how it will pay for non-decommissioning expenses like property taxes and employee pension fund liabilities. Entergy's ability or inability to fund such liabilities bears directly on its ability to fund radiological decommissioning expenses if the Decommissioning Fund proves inadequate.

In addition to the radiological and environmental consequences of a shortfall in the Decommissioning Fund, a shortfall also creates an economic risk to Vermont taxpayers. *See, e.g., Entergy Nuclear Vermont Yankee LLC v. Shumlin*, 733 F.3d 393, 437 (2d Cir. 2013) (Carney, J., concurring) (“only the citizens of Vermont are faced with the fiscal consequences of the adequacy or inadequacy of Entergy's provisions to address potential financial dissolution”).

Failure by the NRC to protect the Decommissioning Fund would directly impact Vermont Yankee Nuclear Power Corporation and Green Mountain Power and their Vermont ratepayers who, under the Master Trust Agreement and the related FERC and Public Service Board orders, have a majority interest in any leftover funds. Given that interest, every time the NRC fails to prevent a withdrawal from the Decommissioning Fund for improper purposes or allows Entergy to be exempted from regulations designed to protect the assets of the Decommissioning Fund, Vermont ratepayers are adversely affected.

Entergy has—on at least two separate occasions—made clear that it will not commit to making up any shortfall in the Decommissioning Fund.⁵ Although NRC spokespeople have

⁵ Entergy has publicly stated that, although it expects the Decommissioning Fund to have enough money to decommission the plant, it will not commit to making up any shortfall and anticipates that there would be litigation between the State of Vermont and the company over any shortfall. *See* VTDigger.org, *Entergy Makes First Withdrawal from Decommissioning Fund*, <http://vtdigger.org/2015/02/11/entergy-makes-first-withdrawal-decommissioning-fund> (“If the fund comes up short, [the Entergy representative] said there would be litigation between the state and the company as to how to pay for it.”). When pressed further on the meaning of this testimony that was made to State legislators, the Entergy representative “said again . . . that he did not want Entergy committed to a promise that it would cover the cost if the project isn’t done

stated that the Commission would pursue Entergy's parent company in the event of any shortfall,⁶ those signals have been mixed,⁷ and, in any event, the NRC (and ultimately federal taxpayers) should not have to shoulder the burden of tracking down and recovering money from Entergy to replace funds that should never have been withdrawn in the first place.

In addition, NRC Staff recently approved Entergy's elimination of its parent guarantees for decommissioning. *Notice of Cancellation of Parent Company Guarantee* (Apr. 21, 2015) (ADAMS Accession No. ML15107A074). As the State explained in detail in its March 6, 2015 PSDAR Comments, Entergy's new proposed replacement guarantee is not an actual guarantee because it reduces to zero dollars at the very moment it is needed.⁸ The NRC Staff's cancellation of the existing parent guarantee appears to have occurred without analysis of the State's March 6, 2015 PSDAR Comments or the State's April 20, 2015 Petition challenging Entergy's financial assurances.

before the 2070s and funds are still short.” Associated Press, *Vermont Yankee official expects enough money to clean site* (Feb. 27, 2015), <http://www.washingtontimes.com/news/2015/feb/27/vermont-yankee-official-expects-enough-money-to-cl>.

⁶ See VTDigger.org, *Residents Seek Assurance from Feds on Vermont Yankee Decommissioning* (Feb. 22, 2015), <http://vtdigger.org/2015/02/22/residents-seek-assurance-feds-vermont-yankee-decommissioning> (“[w]e’re not going to just let them walk away. Even if it involved working with the Department of Justice to go after the parent company,” said NRC spokesperson Neil Sheehan. “Even if the company dissolves, they still have assets. Entergy owns a transmission company . . . and they own other nuclear power plants other than this.”).

⁷ For instance, NRC Staff recently approved—without any substantive analysis—a change in corporate form of one of Entergy's intermediate holding companies from a corporation to a Limited Liability Company. Letter from Douglas V. Pickett to Entergy (June 29, 2015) (ADAMS Accession No. ML15176A270).

⁸ See Exhibit 2 at 6-7 (explaining that because Entergy has committed only to providing “a total in parental assurance of up to 10% of the remaining trust fund balance or \$40 million, whichever is less,” the amount of the guarantee “decreases the lower the fund balance goes” and in fact becomes \$0 at the very moment the Fund is entirely depleted, since 10% of \$0 is \$0 (emphasis added)).

To fulfill its mandate that it protect against “every potential malfeasance or misfeasance of assets dedicated to the decommissioning process,” *Pennington*, 742 F.3d at 719, the Commission should bring together these separate proceedings and consider the interrelationship and cumulative effect of Entergy’s multiple Decommissioning Fund requests.

It is crucial for the Commission to resolve these matters now because Vermont Yankee is not the only merchant-generator entering decommissioning. *See N. Atl. Energy Serv. Corp.*, 48 N.R.C. at 130 (Commission review is particularly appropriate when an “issue is novel and has broad implications for this and other proceedings”). In addition to already closed plants, Entergy recently announced the upcoming closures of two other merchant-generator plants, the Pilgrim Nuclear Power Station and the Fitzpatrick Nuclear Power Plant. Thus, although a number of the issues raised here are specific to Vermont Yankee, many other stakeholders need to know what licensees can or cannot do with decommissioning funds.

I. The Decommissioning Fund cannot be used for costs other than radiological decommissioning.

a. Withdrawals from the Decommissioning Fund for expenses that do not meet the NRC’s definition of decommissioning are improper.

NRC regulations permit withdrawals of decommissioning funds only for “legitimate decommissioning activities consistent with the definition of decommissioning in [10 C.F.R.] § 50.2.” *Id.* § 50.82(a)(8)(i)(A). The NRC’s definition of “Decommission” is limited to activities that “reduce residual radioactivity.” 10 C.F.R. § 50.2. As the NRC has made clear, “[d]ecommissioning activities *do not include the removal and disposal of spent fuel* which is considered to be an operational activity or the removal and disposal of nonradioactive structures and materials beyond that necessary to terminate the NRC license.” *General Requirements for Decommissioning Nuclear Facilities*, 53 Fed. Reg. 24018-01, 24018 (1988) (emphasis

added). Further, decommissioning “do[es] not include the cost of demolition and removal of noncontaminated structures, storage and shipment of spent fuel, or restoration of the site.” *Id.* at 24028.

The NRC’s regulations on the creation and use of decommissioning funds explicitly state that those funds are intended only for radiological decontamination necessary for site closure: “[a]mounts [required to be set aside in the decommissioning funds] are based on activities related to the definition of ‘Decommission’ in § 50.2 of this part and do not include the cost of removal and disposal of spent fuel or of nonradioactive structures and materials beyond that necessary to terminate the license.” 10 C.F.R. § 50.75 n.1.

The NRC’s regulations on financial qualifications for nuclear decommissioning similarly specify that decommissioning funds are to be used for “only those decommissioning costs incurred by licensees to remove a facility or site safely from service and reduce residual radioactivity,” which does not include, “for example, the costs of dismantling or demolishing non-radiological systems and structures.” *Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance*, NUREG-1577, Rev. 1, at 16, § 2(A)(3) (1999); *see also, e.g.*, Proposed Director’s Decision at 5 (Mar. 27, 2015) (ADAMS Accession No. ML15040A161) (“The costs of spent fuel management, site restoration, and other costs not related to decommissioning are not included in the financial assurance for decommissioning for nuclear reactors.”); *Entergy*, 733 F.3d at 418 (“By regulation, decommissioning funds may not be used for non-decommissioning related expenses, such as spent nuclear fuel storage.” (quotation and alteration marks omitted)); *Entergy*, LBP-15-28, at 3 (“Without an exemption from the NRC, Entergy would be prohibited from using the

decommissioning fund for spent fuel management because it is not an allowable decommissioning expense under the regulations.”).

The NRC has made clear that, absent a waiver, only costs that “reduce residual radioactivity” can be withdrawn from a decommissioning fund. *Standard Review Plan for Decommissioning Cost Estimates for Nuclear Power Reactors*, NUREG-1713, Final Report, at 4, § (B)(3) (2004). Industry guidance is equally clear that “decommissioning trust funds are the property of customers (not the electric companies)” and are “dedicated *irrevocably* to decommissioning.” NEI, *The Facts about Nuclear Decommissioning Trust Funds*, <http://goo.gl/kpYsen> (emphasis added).

Entergy has indicated that it intends to use the Decommissioning Fund to reimburse itself not just for spent fuel management expenses, but also for other expenses that do not meet the NRC’s definition of decommissioning.⁹ For instance, Entergy’s Decommissioning Cost Estimate contains a number of non-decommissioning items, including:

- a. The \$5 million payment (lines 1a.2.22 & 1b.2.22) that Entergy is making to the State as part of a Settlement Agreement (Attachment 2 of the Vermont Yankee PSDAR);
- b. Emergency preparedness costs (*e.g.*, lines 1a.2.23 & 1b.2.23);
- c. Shipments of non-radiological asbestos waste (*e.g.*, lines 1a.2.27 & 1b.2.27);
- d. Insurance (*e.g.*, lines 1a.4.1 & 1b.4.2);
- e. Property taxes (*e.g.*, lines 1a.4.2 & 1b.4.3); and

⁹ See, *e.g.*, *Entergy*, LBP-15-24, at 28 (“Normally this would not be an issue because the Board does not assume that licensees will fail to comply with the regulations in the absence of documentary support, but Vermont has provided that support here in the form of an official filing with the NRC, a spokesman’s statements concerning non-decommissioning expenses, and an expert opinion on the likelihood of cost overruns.”); *id.* at 23 (holding that the State “provided the ‘sound basis’ and documentary support required to support a contention asserting that a licensee will contravene NRC’s regulations”).

f. Replacement of structures during SAFSTOR (*e.g.*, line 2b.1.4).

Entergy recently provided notice of its intent to withdraw approximately \$1.2 million from the Decommissioning Fund to pay its property taxes, and used the circular argument that because a cost like property taxes was included in its Decommissioning Cost Estimate, reimbursement from the Fund is therefore proper. Robert Audette, *Vermont Yankee seeks \$6.6 million from trust fund*, Brattleboro Reformer, Oct. 28, 2015, http://www.reformer.com/latestnews/ci_29035785/vermont-yankee-seeks-6-6-million-from-trust.

As the State explained in its March 6, 2015 comments, NRC regulations do not allow use of the Decommissioning Fund for the above expenses, since they do not reduce radiological contamination at the site. Exhibit 2 at 25-27; *see also, e.g.*, Standard Review Plan for Decommissioning Cost Estimates for Nuclear Power Reactors, NUREG-1713, Final Report, at 4, § (B)(3) (2004) (to meet the NRC’s definition of “decommissioning” and thus be a proper withdrawal from the Decommissioning Fund, the activity must “reduce residual radioactivity”).

Although an NRC Staff guidance document erroneously lists property taxes and “nuclear liability insurance” as part of a decommissioning cost estimate (*id.* at 29), that mistake does not alter the clear regulatory definition of decommissioning.¹⁰ In fact, the text of that same regulatory guidance document is clear that activities must “reduce residual radioactivity” to meet the definition of “decommissioning.” *Id.* at 4, § (B)(3). Under any analysis, property taxes and

¹⁰ Petitioners are unaware of any other written statement by the Commission or NRC Staff that provides any support for Entergy’s position that property taxes are an allowed expense. In fact, a recent news article referred to an NRC spokesperson as stating that “the commission had not determined whether property taxes were an allowable expense.” Rutland Herald, *Vt. Yankee must notify state of decommissioning fund withdrawals* (Oct. 20, 2015), <http://www.recorder.com/news/19086443-95/vt-yankee-must-notify-state-of-decommissioning-fund-withdrawals>.

insurance payments do not reduce radiological contamination. Thus, regardless of an incorrect example provided in a Staff guidance document, the law as established by NRC regulations is that property taxes and insurance payments are not legitimate decommissioning expenses; therefore they cannot be financed by a decommissioning fund.

As the State observed in its March 6, 2015 comments, Entergy has asserted a right to use the Decommissioning Fund not only for emergency preparedness expenses (which in itself is not allowed), but also for legal fees associated with those expenses. Exhibit 2 at 37 n.9 (citing VTDigger.org, *State Appeals Decision on Vermont Yankee Monitoring*, <http://vtdigger.org/2015/02/26/state-appeals-decision-on-vermont-yankee-emergency-monitoring>). An Entergy spokesperson stated that legal fees are “part of our decommission costs” and that “[t]his is money that’s going to be coming from [the] trust fund.” Entergy’s reasoning was that “[b]ecause the plant is no longer generating revenue . . . any legal costs the company incurs will come out of the decommissioning trust fund.” *Id.* Entergy cannot use its financial bottom line to validate using the Decommissioning Fund for whatever expenses it chooses. Legal fees have no logical connection to reduction of residual radioactivity and are not proper decommissioning expenses.

Entergy now also takes an overly broad view of what constitute spent fuel management expenses. For instance, its Decommissioning Cost Estimate lists “NEI Annual Fee” as a spent fuel management expense. *See* line 1a.2.38. Lobbying association fees are not a proper use of the Decommissioning Fund. Even after radiological decommissioning is complete and 55% of any excess funds are returned to Vermont ratepayers, Entergy promised in the Master Trust Agreement and elsewhere that remaining funds *still* would not be used for expenses of that type.

In sum, Entergy’s attempted uses of the Decommissioning Fund for non-decommissioning activities, including legal fees and lobbying association membership fees, are improper. In addition to violating applicable NRC regulations, Entergy’s actions create a significant safety risk. As the ASLB recently held, “the decommissioning fund exists to ensure that companies will be able to decontaminate the site.” *Entergy*, LBP-15-24, at 22. The Board concluded that the State had raised a valid contention that if Entergy is using the fund for non-decommissioning activities, it “raises health and environmental concerns.” *Id.*

Those concerns are heightened by the fact that Entergy’s Decommissioning Cost Estimate fails to account for a number of significant costs that are not only possible, but likely. Two significant expenses that are currently unaccounted for are the recent discovery of strontium-90 in places where it had not previously been found, and the possibility of spent fuel storage well beyond the 2052 date that Entergy chose as the year when all fuel will theoretically be removed from Vermont Yankee. The State recently presented evidence to the ASLB on both of these unaccounted-for expenses, and the Board agreed with the State that those issues raised a legitimate safety contention worthy of a hearing. *Entergy*, LBP-15-24, at 23-26. Entergy’s subsequent decision to withdraw from that proceeding has left these matters unresolved.

The Commission should exercise its authority to consolidate the referenced matters into a single proceeding so that it may consider their cumulative effects and fulfill its mandate to safeguard the Decommissioning Fund.

b. The Master Trust Agreement prohibits use of the Decommissioning Fund for non-decommissioning expenses.

Both entities that reviewed Entergy’s proposed purchase of Vermont Yankee—the NRC and the Public Service Board—conditioned their approvals of the purchase on establishment of and compliance with a trust agreement to protect the Decommissioning Fund. The NRC’s

approval explicitly required that the “decommissioning trust agreement must be in a form acceptable to the NRC.” *Order Approving Transfer of License and Conforming Amendment*, Docket No. 50-271 (May 17, 2002) (ADAMS ML#020390198). And NRC regulations require Entergy to comply with the Master Trust Agreement. 10 C.F.R. § 50.75(f)(1) and (2).

The Public Service Board included as a condition to its approval of the sale the requirement that Entergy return excess funds to ratepayers: “[u]pon completion of the decommissioning of Vermont Yankee, any property remaining in [Entergy’s] Decommissioning Trust funds shall be distributed by the Trustee for the benefits of the customers of Vermont Yankee’s sponsors.”¹¹

The Public Service Board made clear in a related ruling that “the disposition of any potential future excess decommissioning funds has expressly been an issue throughout this proceeding” and was “fully litigated” during the proceeding that led to approval of Entergy’s purchase of Vermont Yankee. *Order re: Motions to Alter or Amend, Enter Final Judgment, and Stay Pending Appeal*, Docket No. 6545 (July 30, 2002), at 6 n.17, <http://www.state.vt.us/psb/6545.htm>. In fact, the Public Service Board rejected a proposal that would have denied Vermont ratepayers their full 55% interest in any excess funds, finding that such a proposal was inconsistent with ratepayer expectations under provisions of the previous decommissioning trust that had been in place since 1988. *Final Order*, Docket No. 6545, at 36-

¹¹ *Investigation into General Order No. 45 Notice filed by Vermont Yankee Nuclear Power Corporation re: proposed sale of Vermont Yankee Nuclear Power Station to Entergy Nuclear Vermont Yankee, LLC, and related transactions*, Docket No. 6545 (June 13, 2002) at p.158, <http://www.state.vt.us/psb/6545.htm>, *aff’d*, *In re Proposed Sale of Vermont Yankee Nuclear Power Station*, 829 A.2d 1284 (Vt. 2003); *see also* Entergy’s 2002 Certificate of Public Good, Docket No. 6545 (June 13, 2002), Condition 2, <http://www.state.vt.us/psb/6545.htm> (same); Entergy’s 2014 Amendment to 2002 Certificate of Public Good, Docket No. 7862 (Mar. 28, 2014), at p.2, <http://psb.vermont.gov/sites/psb/files/orders/2014/2014-03/7862%20%20CPG%20Amendment.pdf>.

38. The Public Service Board concluded that “these funds were collected from ratepayers for a specific purpose and, if not needed for that purpose, should be returned” to ratepayers. *Id.* at 152.

FERC regulations also require the return of excess funds to the ratepayers who created the Decommissioning Fund. 18 C.F.R. § 35.32(a)(7). To date, Entergy has not obtained FERC approval to be excused from those requirements.

In sum, Entergy’s planned uses of the Decommissioning Fund are prohibited by Entergy’s operating license and by NRC regulations. Those improper uses also violate rulings and regulations of the Public Service Board and FERC. Entergy should not be permitted to defy those safeguards, or to circumvent them by strategically framing its actions to evade comprehensive review. The NRC should not facilitate Entergy’s disregard of its legal obligations. At a minimum, the Commission should require Entergy to provide proof that obligations imposed on it by State and other federal agencies will not be violated by what Entergy seeks NRC approval to do.

- i. The NRC has jurisdiction over the Master Trust Agreement and cannot allow Entergy to breach it.*

As explained in detail below, the Master Trust Agreement prohibits use of the Decommissioning Fund for non-decommissioning expenses. The NRC cannot authorize Entergy to breach the Master Trust Agreement to access the Decommissioning Fund for those prohibited purposes. The sole means by which Entergy could potentially utilize the Decommissioning Fund for non-decommissioning expenses at this time without breaching the Master Trust Agreement (though it still would violate NRC regulations) would be to amend the Master Trust Agreement.

NRC regulations and Entergy’s operating license require NRC approval for any material amendments to the Master Trust Agreement. *See* 10 C.F.R. § 50.75(h)(1)(iii) (the Master Trust

Agreement “*may not be amended* in any material respect without written notification” to—and lack of objection from—the NRC (emphasis added)). That notification must “provide the text of the proposed amendment and a statement of the reason for the proposed amendment.” *Id.*

Entergy’s operating license contains a parallel provision that “[t]he decommissioning trust agreement must provide that the agreement cannot be amended in any material respect without 30 days prior written notification” to the NRC. License Condition 3(J)(a)(iv). Other licensees have filed such notifications with the NRC when they wished to amend their trust agreements.¹² Entergy, on the other hand, has provided no such notifications to the NRC.

Interestingly, Entergy failed to mention in its January 6, 2015 exemption request (seeking to use the Decommissioning Fund for spent fuel management activities) the clear and legally binding Master Trust Agreement and its provisions that preclude the relief sought, or the fact that Entergy seeks to use the Decommissioning Fund to pay for certain expenses for which it later will pursue reimbursement from DOE.

- ii. *The Master Trust Agreement prohibits Entergy from using the Decommissioning Fund for non-decommissioning expenses.*

Consistent with applicable statutes and NRC regulations, the Master Trust Agreement places important limitations on disbursements from the Decommissioning Fund. 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 Regulations* and issuances, and as provided in the licenses issued by the NRC for the Station and any amendments thereto.

¹² See, e.g., Exelon Generation Letter to NRC, RS-13-152 (May 30, 2013) (ADAMS Accession No. ML13151A112).

Exhibit 1, § 2.01 (emphasis added).¹³

As explained above, NRC regulations clearly define “decommissioning” as reducing radiological contamination, and explicitly exclude expenses such as spent fuel management and site restoration. The Master Trust Agreement’s “exclusive purpose” is to uphold those NRC regulations by ensuring that the Decommissioning Fund is used in the first instance to reduce radiological contamination. That purpose is achieved by clear limitations on disbursements from the Fund to “costs, liabilities and expenses of Decommissioning or, if so specified, administrative expenses.” Exhibit 1, § 4.01.¹⁴

In fact, the Master Trust Agreement establishes a specific sequence that requires *completion* of all radiological decontamination and decommissioning activities before any other disbursements from the Decommissioning Fund are allowed. Exhibit 1, § 4.01 (only “[o]nce Decommissioning is completed” can the bank release Decommissioning Funds to Entergy for “Spent Fuel Costs and Site Restoration Costs”).

The Master Trust Agreement explicitly defines the “Completion of Decommissioning” as “plant *dismantlement and decontamination to NRC standards* plus the completion of additional

¹³ The Master Trust Agreement defines “Decommissioning” as “the removal of the Station from service and disposal of its components in accordance with Applicable Law.” Exhibit 1, § 1.01(j). The Master Trust Agreement recognizes that “decommissioning” may at times include activities that, though not directly reducing radiological contamination by themselves, are nevertheless necessary to allow radiological decommissioning and decontamination, such as the removal of spent fuel from the reactor to the spent fuel pool. Obviously, the reactor cannot be decommissioned and dismantled unless the fuel is removed.

¹⁴ Entergy notes that section 4.01 refers to spent fuel and site restoration costs “to the extent not included in Decommissioning.” That parenthetical statement does not mean that the Master Trust Agreement’s definition of “Decommissioning” includes all such costs. First, the language “to the extent not included” implies on its face that there are spent fuel costs that are not included in “Decommissioning.” Further, as explained below, the definition of “Decommissioning” in the Master Trust Agreement states that it includes “non-DOE spent fuel storage” expenses incurred during “pre-shutdown activities.” Exhibit 1, § 1.01(j). Those limitations cannot be reconciled with Entergy’s apparent position that “decommissioning” includes all costs of spent fuel management during the post-closure period.

activities agreed to or imposed in the course of [the sale docket] before the Vermont Public Service [Board] or pursuant to any subsequent law or proceeding, but *excluding spent fuel management and any site restoration.*” Exhibit 1, at Exhibit D-1 (Decommissioning Requirements) (emphasis added). The Decommissioning Fund could be used for spent fuel management and site restoration expenses only for those activities that occur *after* the completion of radiological decommissioning.

Even following completion of decommissioning, the Decommissioning Fund can be used only for expenses for which DOE is not responsible. At the time the Master Trust Agreement was signed—four years after DOE breached its contractual obligation to remove spent nuclear fuel from nuclear sites such as Vermont Yankee—it was clear that Entergy would have the ability to sue DOE for spent fuel management expenses. In fact, the U.S. Court of Appeals for the Federal Circuit has held that the Purchase and Sale Agreement for Vermont Yankee explicitly conferred rights to such lawsuits, and Entergy has since recovered tens of millions of dollars from DOE for spent fuel management expenses. *See Vermont Yankee Nuclear Power Corp. v. Entergy Nuclear Vermont Yankee, LLC*, 683 F.3d 1330 (Fed. Cir. 2012).

The Master Trust Agreement anticipated continuation of those lawsuits and set up a process to ensure that Entergy did not recover twice for spent fuel management expenses by using the Decommissioning Fund for expenses that it would later recover from DOE. Indeed, the definition of “Decommissioning” in the Master Trust Agreement states that it includes “*non-DOE* spent fuel storage.” Exhibit 1, § 1.01(j) (emphasis added). Similarly, the following provision addressing the “return of excess funds” from the NDT clearly requires Entergy to obtain all possible relief from DOE before it attempts to use Decommissioning Funds for spent fuel management expenses:

Return of Excess Funds in accordance with the second following paragraph, shall occur following the earliest of (i) the date Completion of Decommissioning has occurred and the Company has satisfied all of its responsibilities for spent fuel management and site restoration or (ii) the date on which Completion of Decommissioning occurs and any of the following occur: (x) *settlement* between the Company and the US Department of Energy (“DOE”) with respect to spent fuel management responsibilities for the Station, (y) *final resolution of litigation* by the Company against DOE with respect to spent fuel management responsibilities for the Station, or (z) *satisfactory performance by DOE* of its spent fuel responsibility with respect to the Station.

Exhibit 1, at Exhibit D-1 (Decommissioning Requirements) (emphasis added). That provision further provides that “excess funds” excludes costs “not otherwise payable by the federal government in accordance with (x), (y) or (z) above.” *Id.*

Years later, after inducing both the NRC and Public Service Board to allow it to purchase and operate Vermont Yankee, and without filing a related license amendment request (which would provide an opportunity for a hearing on the matter), Entergy attempts to introduce a different interpretation of the Master Trust Agreement. For instance, Entergy claims that Exhibit D (Decommissioning Requirements) of the Master Trust Agreement should effectively be ignored since it addresses only the “Completion of Decommissioning” and not the ability of the bank to disburse funds for decommissioning itself. *See* Entergy Feb. 9, 2015, Letter at 3. However, as discussed above, Section 4.01, which governs distributions by the trustee, contains limits and a sequencing of payments consistent with Exhibit D.

The Commission should reject this attempted *post hoc* reinterpretation of a trust document that Entergy signed when it purchased the plant—a reinterpretation that would allow Entergy to sidestep the limitations on use of the Decommissioning Fund, and subject the State of Vermont and its citizens to the potential consequences that decommissioning fund protections were designed to avoid.

iii. *Changes to the Master Trust Agreement also require FERC approval.*

In recent months, Entergy has asserted that only “FERC has the authority to determine the disposition of any excess trust funds.” *Id.* at 4. Entergy has never explained how it reconciles that new position with the agreements it made as part of the extensively negotiated and litigated NRC and Public Service Board sale proceedings in 2002. Regardless, if anything, FERC regulations provide yet another reason why the Master Trust Agreement must be interpreted as limiting Decommissioning Fund expenditures in the post-closure period to decommissioning activities as defined by NRC regulations.

Like their NRC counterparts, FERC regulations do not allow for use of the Decommissioning Fund for anything other than radiological decommissioning. “Absent express authorization of [FERC], no part of the assets of the [NDT] Fund may be used for, or diverted to, any purpose *other than to fund the costs of decommissioning* the nuclear power plant to which the Fund relates, and to pay administrative costs and other incidental expenses, including taxes, of the Fund.” 18 C.F.R. § 35.32(a)(6) (emphasis added). As both NRC and FERC regulations dictate, it is only once decommissioning activities are complete (and thus NRC oversight is complete) that any excess funds may be used for any other purposes. FERC regulations further provide that “[i]f the Fund balances exceed the amount actually expended for decommissioning after decommissioning has been completed, the utility shall return the excess jurisdictional amount to ratepayers, in a manner [FERC] determines.” *Id.* § 35.32(a)(7).

Entergy’s attempted uses of the Decommissioning Fund are at variance with FERC’s approval of the 2002 sale and transfer of the Decommissioning Fund. *See Vermont Yankee Nuclear Power Corp. et al.*, 98 FERC ¶ 61,122, *order on reh’g*, 98 FERC ¶ 61,358; *see also New England Coalition v. Vermont Yankee Nuclear Power Corp.*, 101 FERC ¶ 61,239, ¶ 26 (noting that although the sale order did not specifically address the issue of excess decommissioning

funds, “[18 C.F.R.] section 35.32 (a)(7) requires that any excess decommissioning funds will vest in the wholesale customers”).

II. Entergy is not entitled to an exemption to use the Decommissioning Fund for spent fuel management.

The NRC cannot grant an exemption that “present[s] an undue risk to the public health and safety.” 10 C.F.R. 50.12(a)(1). Entergy’s January 6, 2015 exemption request to use decommissioning funds for spent fuel management presents an undue risk because it diverts hundreds of millions of dollars that would otherwise be available to radiologically decontaminate the site.

No special circumstances are present that warrant granting an exemption, and the granting of the exemption therefore violates NRC regulations and Commission precedent. Further, even if special circumstances had been demonstrated, Entergy’s contention that the Fund will have an “excess” that it can use for non-decommissioning activities relies on a number of flawed and unsubstantiated assumptions.

a. Entergy fails to demonstrate special circumstances warranting an exemption.

The NRC “will not consider granting an exemption unless special circumstances are present.” 10 C.F.R. § 50.12(a)(2). Those circumstances are present only where: (1) applying the requirement in that particular case would not “serve the underlying purpose of the rule” or is not required to achieve that purpose; and (2) complying with the requirement would result in economic hardship. *Id.* Neither is true here.

The exemptions granted by Staff place public health and safety at risk by jeopardizing Entergy’s ability to pay for all necessary radiological decontamination activities. Enforcing the safeguards designed to protect decommissioning funding serves the purposes underlying those

rules—to ensure that adequate funding is available for radiological decommissioning. This case presents precisely the type of circumstance in which the NRC’s regulations should be enforced, not circumvented through an exemption.

Rather than limiting exemption requests to “special circumstances,” as NRC Staff is required to do, it has improperly granted this same exemption to every nuclear power plant that has requested it.¹⁵ An NRC spokesperson was recently quoted as confirming that “[a]ll of the plants that have permanently shut down in recent years have sought, and been approved for, the use of decommissioning funds for spent fuel storage costs.”¹⁶ That does not comply with the requirement in 10 C.F.R. § 50.12 that exemption requests will not even be “consider[ed]”—let alone granted—“unless special circumstances are present.” 10 C.F.R. § 50.12(a)(2). As the Commission has previously noted:

Although our regulations . . . authorize exemptions, we consider an exemption to be an “extraordinary” equitable remedy to be used only “sparingly.”

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 Consideration. Although our authority under the Atomic Energy Act of 1954, as amended (AEA), and other statutes to adopt rules of general application “entails a concomitant authority to provide exemption procedures in order to allow for special circumstances,” our rules presumably apply until an exemption requester has met the high burden we place upon such requests. Our exemption regulations

¹⁵ Entergy Nuclear Operations, Inc., Vermont Yankee Nuclear Power Station, 80 FR 35992-01 (June 23, 2015); Duke Energy Florida, Inc., Crystal River Unit 3 Nuclear Generating Plant, 80 FR 5795-01 (Feb. 3, 2015); Southern California Edison Company, San Onofre Nuclear Generating Station (SONGS), Units 2 and 3, 79 FR 55019-01 (Sept. 15, 2014); Zion Solutions, LLC, Zion Nuclear Power Station, Units 1 and 2, 79 FR 44213-01 (July 30, 2014); Dominion Energy Kewaunee, Inc., Kewaunee Power Station, 79 FR 30900-0 (May 29, 2014).

¹⁶ Associated Press, *Nuclear plants dip into dismantling funds to pay for waste* (Oct. 25, 2015), <http://bigstory.ap.org/article/9a80e8005c974c368bb942439c18e170/nuclear-plants-dip-dismantling-funds-pay-waste>.

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. Challenges to the rule itself are more appropriately lodged through a request for rulemaking.

Honeywell, CLI-13-01, 77 N.R.C. at 9.

The exemption cannot be the rule. Granting an exemption each and every time it is requested is hardly using that “extraordinary” option “sparingly.” The pervasive approval of exemptions from long-standing NRC regulations threatens the fundamental protections for decommissioning funds established in those regulations, and should be a red flag to the Commissioners to put an end to piecemeal review. If the industry and NRC Staff believe current regulations are not appropriate, they, just like the general public and states, must resort to rulemaking procedures to reform those regulations.

Further, exemptions have been granted routinely without first providing for any opportunity for a hearing, despite the clear impact of such exemptions on license conditions related to decommissioning funds. The Commission has squarely held that “exemption grants *do not* supersede hearing rights in licensing proceedings.” *Private Fuel Storage*, CLI-01-12, 53 NRC at 469 (emphasis added).¹⁷ The siloed approach Entergy has taken, with Staff’s approval, to modify its obligations regarding the Decommissioning Fund creates precisely the type of “inadequate attention to decommissioning financial assurance” that the Commission has warned “could result in significant adverse health, safety and environmental impacts.” *Honeywell*, CLI-

¹⁷ See also *id.* at 474 (“[T]he Commission’s rulemaking powers should not place the exemption itself beyond questioning in an otherwise litigable contention.”); *id.* at 467 n.3 (“We are aware of no licensing case where we have declared exemption-related safety issues outside the scope of the hearing process altogether.”).

13-01, 77 NRC at 7 (citing Final Rule: *General Requirements for Decommissioning Nuclear Facilities*, 53 Fed. Reg. 24018, 24019 (June 27, 1988)).¹⁸

Entergy also failed to demonstrate the economic hardship that is a prerequisite for an exemption. The economic hardship analysis focuses on whether complying with the rule would result in: (1) “undue hardship,” (2) “other costs that are significantly in excess of those contemplated when the regulation was adopted,” or (3) costs “that are significantly in excess of those incurred by others similarly situated.” 10 C.F.R. § 50.12(a)(2)(iii). None of those outcomes are present here.

Entergy claims that without the exemption, “it would be forced to provide additional funding that would not be recoverable from the trust fund until the [Vermont Yankee] operating license is terminated.” The alleged “harm” to Entergy is that it must advance money for spent fuel management and wait to be reimbursed for that money later, either from DOE or from excess in the Decommissioning Fund.¹⁹ That is exactly what Entergy promised to do in the Master Trust Agreement. Waiting for the federal government to reimburse it for managing spent fuel that it created while earning millions of dollars generating electricity at the plant does not qualify as a hardship. Further, those costs are not unique to Vermont Yankee nor to Entergy—every nuclear plant must manage the anticipated and necessary by-products of its generation activities.

Entergy’s exemption request is an effort to use the Decommissioning Fund as a bank until it can recover from DOE. Entergy cannot use the Decommissioning Fund as a source of

¹⁸ See also *id.* at 7 n.17 (noting that ““delays”” from inadequate funding ““may cause potential health and safety problems”” (quoting 53 Fed. Reg. at 24033)).

¹⁹ Although Entergy has claimed that spent fuel management expenses include items like its NEI dues, those are not valid spent fuel management expenses. All valid spent fuel management expenses accrued during the time of DOE’s breach should be recoverable from DOE.

funding for whatever expenses it chooses. It is Entergy's legal duty to manage its spent fuel without using funds that were specifically raised and reserved for decommissioning Vermont Yankee. It has not demonstrated economic hardship, and must look to DOE, not the Decommissioning Fund, for repayment of spent fuel management expenses.²⁰

In fact, FERC regulations and NRC guidance specifically provided an avenue for Entergy to create a separate trust fund segregated from the Decommissioning Fund if Entergy wished to use a trust account for spent fuel management expenses. *See, e.g.*, 18 C.F.R. § 35.3(c); NRC Regulatory Guide 1.159 at § 2.2.2.2 (Oct. 2003) (noting that “a trust agreement may contain both qualified and non-qualified decommissioning funds according to IRS Section 468A”); *see generally* 26 U.S.C. § 468A (restricting qualified funds to funds to be used for decommissioning). Entergy could have planned for spent fuel management costs through a separate trust account, but chose not to do so. It should live with its decision. Allowing Entergy instead to use the Decommissioning Fund would violate its obligations under the Master Trust Agreement, Public Service Board Orders, and NRC regulations.

b. Entergy's request was based on faulty assumptions.

NRC Staff's grant of an exemption to use decommissioning funds for spent fuel management based on Entergy's inadequately supported claim of “excess” funds in the Decommissioning Fund was arbitrary and an abuse of discretion. Although Entergy claims that the Decommissioning Fund has more than enough “excess” funds to radiologically decontaminate the site *and* pay for an anticipated \$225 million in spent fuel management

²⁰ As explained above, Entergy could seek to recover funds from the Decommissioning Fund for some spent fuel management expenses *after* the site is radiologically decontaminated and *after* it has exhausted its claims against DOE, at which point non-recovered expenses might come out of the fund. Entergy's January 6, 2015 exemption request attempts to flip the order of things in a way that is not allowed under NRC regulations or the Master Trust Agreement.

expenses, that assertion is fundamentally flawed. Entergy underestimated not only the cost of decommissioning, but also the cost of the spent fuel activities for which it seeks funding.

As noted above, Entergy's Decommissioning Cost Estimate fails to account for a number of significant costs that are not only possible, but likely. The State presented evidence to the ASLB regarding two significant expenses currently unaccounted for: the recent discovery of strontium-90, and the costs associated with potential spent fuel storage beyond 2052. The Board agreed with the State that these issues raised a legitimate safety contention. *Entergy*, LBP-15-24, at 23-26. Entergy, in turn, terminated that proceeding and has since done nothing to address those expenses, which remain unaccounted for.

i. Entergy underestimated the cost of decommissioning.

1. Entergy did not account for all environmental contamination costs.

Entergy's decommissioning estimate failed to account for all costs associated with environmental contamination at the site. NRC regulatory guidance specifically directs that "[t]he cost of remediating known environmental contamination should be included (soil, groundwater, surface water, etc.)" in a PSDAR. NRC Regulatory Guide 1.185 at 8. Entergy's PSDAR and Decommissioning Cost Estimate fail to meet that requirement.

Entergy's claim of an "excess" of funds fails to 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. Exhibit 3 at ¶ 6(e) (Declaration of Vermont Radiological and Toxicological Sciences Program Chief William Irwin, Sc.D., CHP, attached to State of Vermont's April 20, 2015 Petition, Docket No. NRC-2015-0029) at ¶ 6(e).²¹ The

²¹ See also Vermont Department of Health Communications Office, *Strontium-90 Detected in Ground Water Monitoring Wells at Vermont Yankee* (Feb. 9, 2015), http://healthvermont.gov/news/2015/020915_vy_strontium90.aspx.

Vermont Department of Health also found cesium-137, strontium-90, and other long half-life radioactive materials in soil samples taken in 2010.²² Entergy failed to analyze soil removal activities required near the advanced off-gas (AOG) building, including increased costs for handling and disposal of contaminated soil. *Id.* Entergy's Decommissioning Cost Estimate accounts only for tritium and fails to recognize or provide a contingency for other contamination:

It should be noted that no additional remediation of the soil in the vicinity of the AOG building was included, based upon the earlier remediation (soil removal) performed by Entergy VY and the findings from the GZA groundwater investigation that *only tritium had migrated into the groundwater*. Tritium is a low-energy beta emitter with a half-life of approximately 12.3 years, decaying to non-radioactive helium. As such, any residual sub-grade tritium is not expected to require any further remediation at the time of decommissioning in order to meet site release criteria.

Decommissioning Cost Estimate, § 3, page 12 (emphasis added; footnote omitted).

The identification of additional contaminants puts into question Entergy's claim in the PSDAR that previous excavation of the AOG leakage site eliminated the need to excavate deeper than three feet below grade. *See id.*; *see also id.* at § 3, page 13 (noting that foundations and building walls will only be removed "to a nominal depth of three feet below grade"). Many long-lived radionuclides are likely to be found in soils and groundwater far from the small excavation made to repair the leaks that likely allowed reactor condensate to enter into the site soils for many years. Exhibit 3 at ¶ 6(e). In addition, those same long-lived radionuclides are likely to be found in the structures, systems, and components left during SAFSTOR and then later decontaminated and dismantled. *Id.*

In that respect and others, the Decommissioning Cost Estimate is outdated and incorrect. It claims that "only tritium ha[s] migrated into the groundwater," in the AOG building area, which is inaccurate. Decommissioning Cost Estimate, § 3, page 12. The Decommissioning Cost

²² *See* http://healthvermont.gov/enviro/rad/yankee/laboratory_testing.aspx.

Estimate should have accounted for the likely contingency that other known contamination, such as strontium-90, would spread and require further remediation. Instead, it only addresses so-called contingencies that are “almost certain to occur.” *Id.* at xii. But actual contingencies—such as the discovery of strontium-90 and other radionuclides in places previously not thought to be contaminated—have historically led to enormous escalations in decommissioning costs (as was the case at Connecticut Yankee, for example, following the discovery of strontium-90 during the radiological decontamination and dismantlement phase). Exhibit 3 at ¶ 6(j). Similar conditions at Vermont Yankee would prove extremely problematic because Entergy intends to postpone that work until the end of its SAFSTOR period. Decommissioning Cost Estimate at xii.

Even if strontium-90 had not been discovered, other evidence indicates that soil contamination exists more than three feet below grade. *Id.* at ¶ 6(i). The October 2014 Site Assessment Study documents a 1991 leak in the chemistry lab drain line, AOG reactor condensate leaks confirmed in 2009, piping leaks between the radioactive waste building and the AOG building discovered in 2010, and other spills and leaks of radioactive materials. *Id.* The area between the Connecticut River, the intake structure, the discharge structure, and the reactor, turbine, and radioactive waste buildings may contain large volumes of contaminated soil requiring excavation to meet the derived concentration guideline levels for appropriate remediation in accordance with the Multi-Agency Radiation Survey and Site Investigation Manual. *Id.* Entergy has not accounted for any of those remediation expenses. *Id.*

The soils at Vermont Yankee also likely contain other long half-life radioactive materials, similar to those found in the decommissioning of both Maine Yankee and Connecticut Yankee. *See* Exhibit 3 at ¶ 6(g); *see also* Letter from Thomas L. Williamson, Maine Yankee Director of

Nuclear Safety and Regulatory Affairs to NRC (Jan. 16, 2002) (ADAMS ML020440651).

Carbon-14 has been a major issue in the decommissioning of other sites, such as Yankee Rowe, and is expected to be a concern in the decommissioning of future sites such as San Onofre.

Exhibit 3 at ¶ 6(g). Yet, Entergy has provided no explanation of why it believes carbon-14 will not be encountered while decommissioning Vermont Yankee.

Decommissioning also is likely to reveal unanticipated radioactive sources to be remediated. *Id.* at ¶ 6(h). For example, pockets of highly contaminated groundwater dammed up by existing structures were found at Maine Yankee, and a 25-foot-deep 225-foot-long excavation of soil was required around the reactor water storage tank at Connecticut Yankee. *Id.*

Entergy simply categorizes all of these types of potential expenses as “financial risks” and summarily notes that it “does not add any additional costs to the estimate for financial risk.” Decommissioning Cost Estimate § 3, page 6. Entergy’s Decommissioning Cost Estimate does not include any allowance or contingency for those types of issues. Further, because an adequate characterization of the site (radiological and non-radiological) has not been completed, Entergy cannot provide an accurate estimate of the scope of work and resulting costs for decommissioning. *Id.* at ¶ 6(a). Indeed, Entergy’s Decommissioning Cost Estimate explicitly recognizes (at page vii) that it “may not reflect the actual plan to decommission Vermont Yankee.”

When the State presented this evidence to the ASLB, the Board agreed that the “PSDAR does not account for the possibility of strontium-90 leaks.” *Entergy*, LBP-15-24, at 23. The Board cautioned that “keeping radionuclides below the EPA limit is necessary to maintain public safety at a decommissioning facility” and concluded that, “[g]iven the demonstrated existence of these leaks, Vermont has provided sufficiently supported expert opinion to show at the

contention admissibility stage why this inadvertent release of radionuclides is enough of a risk to public health and safety to warrant ‘merits’ consideration as an unforeseen expense.” *Id.* at 25.

In these circumstances, it is premature for Entergy to claim an “excess” in the Decommissioning Fund, and the NRC should not adopt the questionable assumptions underpinning Entergy’s claim to such an excess. No one will know whether there truly is an “excess” until the site has been fully radiologically decommissioned. That concept was central in the Master Trust Agreement and in the approval of Entergy’s purchase of the plant. That is precisely why the NRC’s regulations require that the Decommissioning Fund be used exclusively for radiological decommissioning until that work is complete. Approving Entergy’s requested exemptions undercuts the purposes of those NRC regulations, allows Entergy to break promises it made in relation to the sale proceeding, and violates the Master Trust Agreement.

2. Entergy also fails to account for other costs associated with the site.

Entergy’s Decommissioning Cost Estimate fails to properly account for how it will pay for non-decommissioning expenses like property taxes and employee pension fund liabilities. As a merchant-generator, Entergy’s ability or inability to fund such liabilities bears directly on its ability to fund radiological decommissioning expenses if the Decommissioning Fund proves inadequate. Entergy erroneously places all projected costs into three categories: NRC License Termination costs, Spent Fuel Management costs, and Site Restoration costs. The NRC should make clear that certain costs (such as those noted in Section I above) fall outside those three categories, and should require Entergy to add one or more appropriate categories for those costs. In addition to those items, any additional category would also capture expenses such as Entergy’s industry association expenses (*e.g.*, the “NEI Annual Fee” on line 1a.2.38 of Appendix C).

Regardless of how Entergy pays for those expenses, Entergy's assumptions are flawed. For instance, Entergy states in Appendix C of its Decommissioning Cost Estimate that it expects to pay only approximately \$7,000 per year in property taxes beginning in 2020 (*e.g.*, lines 2aa.4.2 & 2b.4.2). That is incorrect. Although Entergy notes that its payments under the generation tax will "cease once the plant is permanently shut down" (Decommissioning Cost Estimate § 3, page 18), Entergy fails to acknowledge that the generation tax is the basis for Entergy's current exemption from otherwise applicable state property taxes. Entergy has no basis for assuming that its current exemption from those taxes will continue once the generation tax ceases to provide revenue to the State of Vermont. Entergy similarly has no basis for its claim that local authorities will tax Vermont Yankee "as vacant land." Decommissioning Cost Estimate § 3, page 18. Entergy has not explained how it will pay for any property taxes that may apply either at the state or local level.

- ii. *Entergy underestimates the costs of spent fuel management, for which it wants to use "excess" funds.*

Ever since Entergy bought Vermont Yankee, it has paid for spent fuel management expenses without any reimbursements from the Decommissioning Fund. Entergy has financed those activities and then successfully sued DOE to recoup nearly all of its proper expenses. *See Vermont Yankee Nuclear Power Corp*, 683 F.3d 1330. Now that Vermont Yankee has ceased operations—and Entergy thus has access to the Decommissioning Fund for decommissioning expenses—it seeks to change course and begin withdrawing money from the Decommissioning Fund to cover its spent fuel expenses. Entergy provides no legally defensible connection between ceasing operations and using the Decommissioning Fund as a bank for spent fuel management expenses.

1. Allowing Entergy's exemption creates a dangerous incentive for nuclear power plants to defer spent fuel costs until after decommissioning begins.

Entergy's intended use of the Decommissioning Fund for spent fuel management expenses is not only contrary to NRC and FERC regulations and Master Trust Agreement requirements, but is also problematic in that it would create a dangerous incentive for owners of nuclear power plants to defer such costs until after plant closure. The NRC recently recognized that dry-cask storage is safer than spent fuel pools. COMSECY-13-0030 at 2 (Nov. 12, 2013) (recognizing "a minor or limited safety benefit" to dry-cask storage over spent fuel pools). If merchant-generators are routinely granted exemptions to use decommissioning funds for spent fuel management expenses—as they have been to date, *see supra* note 15 and surrounding text—they will be motivated to keep fuel stored in spent fuel pools as long as possible, rather than moving fuel to safer dry-cask storage. Although the NRC decided not to *require* plants to expedite the transfer of spent fuel to dry-cask storage at this time, it is entirely different for the NRC to affirmatively take actions that create an *incentive* for plants to choose a less safe option.

2. Entergy's plans for spent fuel management costs have no limit and rely on untenable assumptions regarding changes in law.

Just six years ago, Entergy represented to the NRC that "VY [Vermont Yankee] does not expect to have to use significant, additional decommissioning-trust funds to pay for [spent nuclear fuel] storage." *Update to Vermont Yankee Spent Fuel Management Plan*, Att. 1 at 2 n.1 (April 1, 2009) (ADAMS Accession No. ML091040287). But now, without explanation, Entergy's exemption request seeks to use an "estimate[d]" \$225.5 million for spent fuel management expenses. January 6, 2015 Exemption Request, Att. 1 at 2. This unexplained change of course is remarkable. Further, while Entergy has linked its exemption request to "those irradiated fuel management activities described in the updated Irradiated Fuel

Management Program that will be funded by the trust fund,” the “estimate[d] amount of \$225.5 million” does not appear to cap what Entergy can withdraw to pay for those activities. *Id.*

Rather, Entergy appears to have drafted its exemption request to allow access to an unlimited amount of Decommissioning Funds for spent fuel management expenses. *See id.* (referring to “the *estimate* for irradiated fuel management activities” (emphasis added)).

Granting Entergy’s exemption request sets a dangerous precedent and puts the Decommissioning Fund in jeopardy because there is no way to ensure that spent fuel expenses will remain below any alleged amount of excess money in the Decommissioning Fund. In all likelihood, spent fuel management expenses will greatly exceed Entergy’s estimate of \$225.5 million, since that estimate is predicated on the assumption that all spent fuel will be removed from the site by 2052. That assumption, which clearly affects overall spent fuel management costs, is contrary to federal law, historical and current political realities, and recent statements from NRC, the U.S. Court of Appeals for the District of Columbia Circuit, and the Public Service Board.

The NRC cannot accept and rely upon Entergy’s assumptions that require, among other things, changes to current law. Yet, according to the U.S. Government Accountability Office (GAO), a change to current law is precisely what would be required for DOE to begin accepting spent fuel in 2026 and complete removal by 2052, as Entergy assumes will occur. Entergy’s Updated Irradiated Fuel Management Plan and its cost estimates for spent fuel management expenses depend on DOE’s plan to attempt to site an interim storage facility by 2025. But Yucca Mountain will not open within the next 10 years, and the GAO has stated that an interim storage facility will require congressional action because “new legislative authority is needed for developing interim storage that is not tied to Yucca Mountain.” GAO 15-141, *Spent Nuclear*

Fuel Management at 20 (October 2014), <http://www.gao.gov/assets/670/666454.pdf>. Further, “experts and stakeholders generally [have] noted that because the Congress has not agreed on a new path forward for managing spent nuclear fuel since funding was suspended in 2010, nor have DOE officials proposed legislation requesting new authority, obtaining specific legislative authority in time to meet DOE’s proposed time frames might be challenging.” *Id.*²³ In other words, not only does Entergy’s spent fuel management plan require congressional action before it can be implemented, but it requires congressional action that has not yet even been proposed, and that would be “challenging” to get passed even if it was proposed. *See id.*

As the U.S. Court of Appeals for the District of Columbia recently held, the societal and political barriers to siting an offsite nuclear waste storage facility require the NRC to analyze the very real possibility that spent fuel will be stored onsite at plants like Vermont Yankee indefinitely. *See generally New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

The NRC itself recognized this possibility in its recently issued Continued Storage Rule, which includes an analysis of onsite spent nuclear fuel storage under an “indefinite timeframe to address the possibility that a repository never becomes available.” NUREG-2157 at iii. When the ASLB reviewed the evidence the State presented on this issue in the license amendment proceeding, it held that “Vermont has correctly noted that the indefinite storage of spent fuel on-site is a very possible outcome, as demonstrated by the assumptions underlying the Continued Storage Rule.” *Entergy*, LBP-15-24, at 26.

²³ Even if DOE were to receive legislative approval to site an interim storage facility, the GAO report lists several other challenges to the actual siting of such a facility. *Id.* at 19-37. These include technical challenges to transporting high-burnup fuel (which Vermont Yankee has), as well as the political and societal challenges that have historically proved insurmountable in past attempts to site nuclear waste storage facilities at Yucca Mountain and elsewhere.

Indeed, Entergy admits that its estimates are uncertain. It states in its Decommissioning Cost Estimate that, based upon a number of “performance assumptions,” it “anticipates” that spent fuel removal “could” be complete by 2052. *See* Decommissioning Cost Estimate at xi. The Decommissioning Cost Estimate identifies a number of the reasons that spent fuel removal is unlikely to occur by that time, including the fact that “the country is at an impasse on high-level waste disposal.” Decommissioning Cost Estimate at xiv; *id.* at § 1, page 5. Further, the prospect of an interim storage facility—which is a necessary prerequisite to Entergy’s spent fuel storage plan—is identified merely as one of the Blue Ribbon Commission on American’s Nuclear Future’s “recommendations” that “*may* impact decommissioning planning.” *Id.* at xv & § 1, page 6 (emphasis added). And the Decommissioning Cost Estimate concedes that Entergy’s spent fuel storage plan depends upon “the appropriate authorizations from Congress.” *Id.* An Entergy spokesperson recently admitted that “the timing” of decommissioning is uncertain because it “will depend on ‘the schedule from the DOE with regard to removal of spent fuel.’” Platts, *Inside NRC*, vol. 37 #7, at 4 (Apr. 6, 2015).

Additionally, in 2006 Entergy “agreed to” a condition in its Certificate of Public Good for a dry-cask storage pad that it said would address the possibility of spent nuclear fuel remaining onsite through as late as 2082. Order, Docket No. 7082, at 80-81 (Vt. Pub. Svc. Bd. Apr. 26, 2006), <http://www.state.vt.us/psb/orders/2006/files/7082fnl.pdf>; *see also* Certificate of Public Good, Docket No. 7082 (Vt. Pub. Svc. Bd. Apr. 26, 2006), <http://www.state.vt.us/psb/orders/2006/files/7082cpg.pdf>. Entergy has not explained why it now ignores that obligation and estimate.

Thus, Entergy’s use of 2052 as the date for completion of removal of spent nuclear fuel is not only unrealistic and dependent on a change to current federal law, but it is also directly

contrary to statements of the NRC, the Public Service Board, and the U.S. Court of Appeals for the D.C. Circuit. The NRC cannot accept and rely upon Entergy's improbable assumptions about what "could" happen to allow it to circumvent safeguards for the Decommissioning Fund.

3. Entergy incorrectly truncates spent fuel costs.

Any claimed "excess" in the Decommissioning Fund cannot cover the costs of spent fuel management if the NRC recognizes, as it must, that spent fuel could remain onsite after 2052. Granting Entergy's requested exemption "present[s] an undue risk to the public health and safety" in light of the possibility—or, perhaps more accurately, the probability—that Entergy will have to store spent fuel onsite for years, decades, or maybe even centuries beyond 2052. 10 C.F.R. 50.12(a)(1).

Entergy's request to withdraw money from the Decommissioning Fund is predicated on the assumption that it will incur no spent fuel management expenses after 2052. If Entergy is permitted to use the Decommissioning Fund to finance its spent fuel management activities, and those activities continue longer than expected, there is a real and significant risk it will not have the funding necessary to complete radiological decommissioning. Indeed, Entergy's claimed "excess" of approximately \$176 million at the end of decommissioning in 2076 predominantly disappears if Entergy includes the estimated annual expenses of \$4 million (and consequent lost interest) for spent fuel management from 2053 to 2076. Even if a small portion of those alleged "excess" funds remain in the Decommissioning Fund by 2076, those funds would not nearly suffice to finance ongoing spent fuel management expenses from that date forward.

Numerous flawed assumptions and omissions underpin Entergy's questionable claim that spent fuel expenses will be less than the alleged "excess" amount in the Decommissioning Fund. Although Entergy relies on the Continued Storage Rule in its PSDAR, it fails to address the NRC's explicit recognition in that Rule that spent fuel may be stored indefinitely at each reactor

site. Entergy further ignores that Rule's related assumption that each reactor operator would need a Dry Fuel Transfer Station to move spent fuel into new dry casks every 100 years. Nowhere does Entergy explain how it would address the contingency of indefinite onsite storage, including safety and environmental concerns regarding transferring fuel into new dry casks every 100 years. Finally, Entergy's PSDAR, Decommissioning Cost Estimate, and its January 6, 2015 exemption request fail to account for numerous potential expenses identified in the Rule, including: (a) the construction of a Dry Fuel Transfer Station; (b) the purchase of 58 new casks and all other labor and material costs for transferring the fuel every 100 years; and (c) the costs of maintaining security at the site indefinitely. The Commission should not permit Entergy to use portions of NRC rules to buttress its positions when convenient, but ignore other provisions of those very same rules when better suited to its claim that spent fuel activities will cost less than the Decommissioning Fund's alleged "excess."

III. The Commission should require Entergy to provide additional information in its 30-day notices of withdrawals from the Decommissioning Fund.

Entergy's September 4, 2014, license amendment request sought to eliminate the condition in Entergy's license requiring 30 days' notice for Decommissioning Fund withdrawals, and instead to replace that condition with the 30-day notice requirement in 10 C.F.R. § 50.75(h)(1)(iv). Relatedly, Entergy's exemption request presumed that the license amendment request would be granted, and asked for an exemption from that very regulation. After the State successfully intervened in the license amendment proceeding and was granted a hearing on two of its contentions (LBP-15-24), Entergy moved to withdraw from that proceeding. The ASLB granted withdrawal, but imposed some of the State's requested conditions, including a requirement that Entergy notify the State before reimbursing itself from the Decommissioning

Fund for certain types of expenses identified by the State as improper. *Entergy*, LBP-15-28. On October 26, 2015, NRC Staff moved to vacate the Board’s underlying August 31, 2015 ruling (LBP-15-24). The State will oppose the Staff’s requested vacatur.

The consolidated proceeding requested in this Petition should include any appeal by Entergy or NRC Staff of the Board’s ruling imposing conditions (LBP-15-28). Once the ASLB rules on NRC Staff’s motion to vacate, any appeal of that decision should be included in the consolidated proceeding requested by this Petition. The Commission should not abide Entergy’s claim that these matters are unrelated to its exemption requests. Although those proceedings are not identical, they are interrelated and should not be considered in isolation. As the ASLB recently noted, “[p]rocedurally, [it] would have been much simpler if Entergy had submitted its [license amendment request] and exemption request together, in which case both would have been subject to a hearing request.” *Entergy*, LBP-15-24, slip op. at 18 n.96. The Board also highlighted the connection between the two requests by agreeing with the State that the license amendment request went from “being hypothetical to being *counterfactual*” when the exemption requests were granted. *Entergy*, LBP-15-24, at 44 (quotation omitted).

The 30-day notice requirement is necessary to protect against encroachments on the Decommissioning Fund, like those now pursued by Entergy. The NRC, by ordering License Condition 3(J)(a)(iii), assured the public at the time of the sale that Entergy would have to provide notice before making any withdrawals from the Decommissioning Fund. Those notices provide the NRC with opportunities to exercise its oversight of the Decommissioning Fund, and provide the State and interested citizens with (somewhat more limited) opportunities to comment on and, when necessary, oppose, improper withdrawals from the Decommissioning Fund. That license requirement helps ensure compliance with applicable NRC regulations, which by

definition serve the NRC's overriding goal of protecting public health and safety by mandating adequate funding for radiological decommissioning.

The ASLB was correct to place conditions on Entergy's withdrawal from the licensing proceeding. The Board recognized that "Vermont and Entergy define the term [decommissioning] differently," and that Entergy's withdrawal from the proceeding "leaves Entergy and Vermont's legal dispute over the definition of decommissioning unresolved." *Entergy*, LBP-15-28, at 11-12. The Board further recognized that "not receiving notice of [Entergy's requested] expenses before they occur would create a legal harm by depriving Vermont of the chance to litigate this potentially meritorious issue." *Id.* at 12. Accordingly, the Board ordered Entergy to provide more detail in its 30-day notices. However, the Board limited that directive to only the six line items (plus legal costs) that were specifically identified in that proceeding as improper.

The Commission is not similarly constrained. In light of the above, the Commission should 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 license amendment proceeding. Requiring Entergy to provide a basic level of detail on how it intends to use the Decommissioning Fund will provide the public (including the State and its co-Petitioners) critical information that is otherwise unavailable. Further, that basic level of detail will assist the Commission in discharging its duty to "review, and possibly reject, a particular proposed expense"—a key function that the Board identified as the very root of the 30-day notice requirement. *See id.* at 3.

For these reasons, the Commission should exercise its inherent supervisory authority to order Entergy to provide additional information for both past and future withdrawals, and

consolidate any appellate issues from the ASLB proceeding with all other directly related matters raised in this Petition.

IV. The NRC’s oversight of Entergy’s use of the Decommissioning Fund is subject to the National Environmental Policy Act.

The NRC cannot permit Entergy to proceed with Decommissioning Fund withdrawals for purposes other than radiological decommissioning without performing a proper NEPA analysis of potential environmental impacts. As explained in detail in the State’s March 6, 2015 PSDAR comments, neither Entergy nor the NRC has conducted a NEPA-compliant analysis of the environmental impacts of Entergy’s planned decommissioning activities. *See* Exhibit 2 at 40-54.

a. Relevant NEPA requirements.

NEPA and applicable NRC regulations require environmental review before the NRC acts on matters affecting the quality of the human environment. 10 C.F.R. § 51.20; 42 U.S.C. § 4332. Specifically, NEPA requires federal agencies, including the NRC, to “examine and report on the environmental consequences of their actions.” *New York v. NRC I*, 681 F.3d 471, 476 (D.C. Cir. 2012). Courts have long held that NEPA requires “environmental issues to be considered at every important stage in the decision making process concerning a particular action.” *Calvert Cliffs’ Coordinating Comm., Inc. v. Atomic Energy Comm’n*, 449 F.2d 1109, 1118 (D.C. Cir. 1971). While NEPA is recognized as an “essentially procedural” statute, it is intended to ensure “fully informed and well-considered” decision-making. *Id.* Further, “NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” *Marsh v. Or. Natural Resources Council*, 490 U.S. 360, 371 (1989).

The U.S. Court of Appeals for the Second Circuit has held that “public scrutiny [is] an ‘essential’ part of the NEPA process.” *Brodsky v. NRC*, 704 F.3d 113, 120 (2d Cir. 2013)

(quoting 40 C.F.R. § 1500.1(b)). In *Brodsky*, the Second Circuit vacated the NRC’s decision to grant an exemption without the public comment and participation process that NEPA requires. *Id.* at 124 (concluding that the agency record was insufficient to show whether a reasoned basis exists for the NRC’s decision not to afford opportunity for public involvement).

At a minimum, NEPA requires an agency to prepare an environmental assessment to determine whether the proposed activity would “significantly affect[] the quality of the human environment” 42 U.S.C. § 4332; 40 C.F.R. § 1508.18. That analysis must include consideration of “(t)he degree to which the proposed action affects public health and safety”. 40 C.F.R. § 1508.27(b)(2); *see also Citizens Against Toxic Sprays, Inc. v. Bergland*, 428 F. Supp. 908, 927 (D. Or. 1977) (“No subject to be covered by an [environmental impact statement] can be more important than the potential effects of a federal [action] upon the health of human beings [and the environment].”); *Maryland-Nat’l Capital Park & Planning Comm’n v. U.S. Postal Service*, 487 F.2d 1029, 1039-40 (D.C. Cir. 1973) (agency must consider “genuine issues as to health” before deciding whether to prepare an environmental impact statement).

If the agency determines that the action is non-significant, it must prepare a finding of no significant impact explaining that finding. 40 C.F.R. § 1501.4; *id.* § 1508.14; *New York v. NRC I*, 681 F.3d 471, 476 (D.C. Cir. 2012); *Sierra Club v. Dep’t of Transp.*, 753 F.2d 120, 127 (D.C. Cir. 1985); *Theodore Roosevelt Conservation P’ship v. Salazar*, 616 F.3d 497, 503-04 (D.C. Cir. 2010) (explaining NEPA and its procedures in detail).

Conversely, if that process indicates that the action is significant, and the proposal involves a “major federal action”, the agency must perform a full environmental impact analysis. 42 U.S.C. § 4332(1)(C)(i); *see generally* 42 U.S.C. §§ 4321 *et seq.* “Major federal actions” are those with “effects that may be major and which are potentially subject to Federal control and

responsibility,” and include project approvals and other instances in which regulatory approval is a necessary precursor to an action. 40 C.F.R. § 1508.18.

NEPA dictates that, whenever an agency is faced with a close call on a significance determination, it should “err in favor of preparation of an environmental impact statement.” *National Audubon Soc. v. Hoffman*, 132 F.3d 7, 18 (2d. Cir. 1997) (reversing a decision by the U.S. Forest Service not to prepare an environmental impact statement because the Forest Service failed to consider the possible effects of the challenged action); *see also id.* at 18 (agencies should “err in favor of preparation of an environmental impact statement”). Thus, it is only when an agency’s action “‘*will not* have a significant effect on the human environment’” that an environmental impact statement is not required. *Id.* (quoting 40 C.F.R. § 1508.13).

b. The Commission is obligated to conduct a NEPA analysis.

The NRC’s grant of Entergy’s exemption requests, and other similar approvals, standing alone and in combination, constitute “major federal actions” within the meaning of NEPA. *See* 40 C.F.R. § 1508.18; *see also Citizens Awareness Network, Inc. v. NRC*, 59 F.3d 284, 293 (1st Cir. 1995) (“it is undisputed that decommissioning is an action . . . requir[ing] NEPA compliance”).

NEPA also applies more broadly to licensee proposals that “are *potentially* subject to Federal control and responsibility,” such as Entergy’s PSDAR. 40 § 1508.18 (emphasis added); *see also Citizens Awareness* at 293 (“[a]n agency cannot skirt NEPA or other statutory commands by essentially exempting a licensee from regulatory compliance, and then simply labelling its decision ‘mere oversight’ rather than a major federal action. To do so is manifestly arbitrary and capricious.”).

Indeed, “major federal actions” include those in which “the responsible officials *fail to act* and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.” 40 § 1508.18 (emphasis added). Under the Administrative Procedure Act, the requirements of NEPA apply equally to an agency’s failure to act as to an agency’s actions. 5 U.S.C. § 551(13); 5 U.S.C. § 706(1). In an analogous situation, the Ninth Circuit Court of Appeals held that when a federal agency has a “mandatory obligation to review” plans, the agency’s “failure to disapprove” of those plans constitutes “major federal action” triggering NEPA review. *Ramsey v. Kantor*, 96 F.3d 434, 445 (9th Cir. 1996).

There is no doubt that the NRC has authority over the decommissioning of nuclear power plants, and the NRC has explicitly recognized its authority to “find the PSDAR deficient.” NRC Regulatory Guide 1.185, *Standard Format and Content for Post-Shutdown Decommissioning Activities Report* at 10 (June 2013); 10 C.F.R. §§ 50.82, 50.75, 51.33, and 51.95. Nor is there any doubt that the NRC has authority (under its regulations, under the Master Trust Agreement, and under Entergy’s operating license) to stop improper NDT withdrawals.

Thus, although the NRC has taken the position that it need not formally approve a PSDAR and related Decommissioning Cost Estimate, it nevertheless has duties under NEPA to review the environmental impacts of decommissioning plans. The NRC also has NEPA responsibilities to police Entergy’s 30-day notifications for anticipated withdrawals. Those notices consistently fail to provide the detail necessary to determine whether the withdrawn funds are to be used to reduce radiological contamination at the site, or whether (as discussed above) some of those expenses are improper.

c. A comprehensive analysis is required.

The NRC must review the potential environmental and economic impacts of allowing the Decommissioning Fund to be used for purposes other than radiological decommissioning, thus greatly increasing the chances of a shortfall in the Fund that could leave the site radiologically contaminated.

A comprehensive analysis is required to avoid segmenting the review into discrete parts without looking at the full combined effects—an approach that NEPA does not allow. *See, e.g.*, 40 CFR 1508.25(a); *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1314 (D.C. Cir. 2014) (“The justification for the rule against segmentation is obvious: it prevents agencies from dividing one project into multiple individual actions each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.” (quotation and alteration marks omitted)); *see also, e.g., NRDC v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975) (NEPA is meant to provide “a more *comprehensive approach* so that long term and cumulative effects of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated, or accepted as the price to be paid for the major federal action under consideration” (emphasis added)). The NRC has previously underscored the value of a comprehensive NEPA analysis: “[w]hile NEPA does not require agencies to select particular options, it is intended to foster both informed decision-making and informed public participation, and thus to ensure that the agency does not act upon incomplete information, only to regret its decision after it is too late to correct.” *In Re Duke Energy Corporation (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units and 2)*, CLI-02-17, 56 N.R.C. 1, 10 (2002).

To satisfy NEPA, agencies are required to take a “hard look” at the environmental consequences of a proposed action. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*,

Inc., 462 U.S. 87, 97 (1983). A NEPA analysis must be comprehensive and must include all “potential environmental effects” associated with the proposed activities. *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n*, 449 F.3d 1016, 1030 (9th Cir. 2006). The State has specifically identified numerous potential environmental impacts that previously have not been evaluated (and thus cannot be bounded), including the discovery of strontium-90 after Entergy submitted its PSDAR. *Id.*; *see also* Exhibit 3 at ¶ 7. That discovery certainly requires analysis under NEPA. But NEPA also requires analysis of *potential* impacts, which must include, for instance, the storage of spent nuclear fuel beyond 2052. As the ASLB recently held, the “indefinite storage of spent fuel on-site is a very possible outcome, as demonstrated by the assumptions underlying the Continued Storage Rule.” *Entergy*, LBP-15-24, at 26. It thus requires NEPA review.

Agencies also are required under NEPA to consider the “effects” of a project or action on the “human environment,” which specifically includes an analysis of *economic* impact. 40 C.F.R. § 1508.8; *see also Calvert Cliffs’ Coordinating Comm., Inc.*, 449 F.2d at 1123 (discussing NEPA’s required balancing of economic and environmental costs).

As explained above and in related filings, there is a significant risk that the Decommissioning Fund will have a shortfall and will not be able to cover all of the costs of radiologically decontaminating the site if the NRC does not closely monitor withdrawals from that Fund. *See, e.g.*, Exhibit 3 at ¶ 8. Because Vermont ratepayers have a 55% interest in all leftover funds, there are enormous economic impacts to those ratepayers from Entergy’s failure to comply with NRC regulations and the Master Trust Agreement. Further, neither the NRC nor Entergy has taken into account the negative economic impacts to the surrounding area resulting from Entergy’s decision to use the maximum SAFSTOR period rather than a shorter SAFSTOR.

NEPA requires analysis of those types of considerations—Entergy cannot proceed with its decommissioning plans or its planned use of the Decommissioning Fund until such an assessment is performed.

d. Staff’s decision to grant a categorical exclusion was arbitrary and capricious pursuant to NEPA.

Staff incorrectly classified its exemption decision as categorically excluded from NEPA.²⁴ “Categorical exclusions, by definition, are limited to situations where there is an insignificant or minor effect on the environment.” *Alaska Ctr. For the Env’t v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999). Those exclusions apply only to “actions which do not individually or cumulatively have a significant effect on the human environment.” 40 C.F.R. § 1508.4.

i. Staff failed to support its conclusion that the action would have an insignificant effect.

Staff cannot “avoid [the NRC’s] statutory responsibilities under NEPA by merely asserting that an activity it wishes to pursue will have an insignificant effect on the environment.” *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986) (quotation omitted). Rather, an agency “must provide a reasoned explanation of its decision.” *Id.*; *see also, e.g., Alaska Ctr.*, 189 F.3d at 859 (“When an agency decides to proceed with an action in the absence of an EA or

²⁴ *See Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station*, 80 Fed. Reg. 35992-01 (June 23, 2015). The Agency determined that it was not required to prepare an environmental assessment (EA) or an environmental impact statement (EIS) because it was categorically excluded under 10 C.F.R. 51.22. Under 10 C.F.R. § 51.22, the granting of an exemption qualifies as a categorical exclusion provided that: (i) there is no significant hazards consideration; (ii) there is no change in the types or significant increase in the amounts of any effluents that may be released offsite; (iii) there is no significant increase in individual or cumulative public or occupational radiation exposure; (iv) there is no significant construction impact; (v) there is no significant increase in the potential for or consequences from radiological accidents; and (vi) the requirements from which an exemption is sought are among those identified in 10 C.F.R. 51.22(c)(25)(vi).

EIS, the agency must adequately explain its decision.”). Staff failed to provide such an explanation to support its approval. Its analysis 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). *See* 80 Fed. Reg. 35992-01, 35994. That checklist approach is the antithesis of the “reasoned explanation” that is required under NEPA and the Council of Environmental Quality guidelines. *See Jones*, 792 F.2d at 829.

ii. Staff failed to analyze cumulative impacts.

NEPA requires agencies to consider the cumulative impacts of their actions. *See, e.g.*, 40 C.F.R. § 1508.4. A cumulative impact is any “impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions.” 40 C.F.R. § 1508.7. Agencies must consider all foreseeable direct, indirect, and cumulative impacts before applying an established categorical exclusion. *See Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 23 (D.D.C. 2009); *see also, e.g., In the Matter of Northern States Pwr. Co.* (Prairie Island Nuclear Island Nuclear Generating Plant), 76 N.R.C. 503, 514 (2012) (ASLB agreed that cumulative impacts analysis of initial storage facility must take into account later application to expand storage facility, since it is “reasonably foreseeable” that the facility will be expanded).

NRC Staff failed to provide any analysis of cumulative impacts. In lieu of a “reasoned explanation,” Staff simply reasserted the requirements for a categorical exclusion under 10 C.F.R. § 51.22(c)(25) and provided conclusory statements supporting its position. *See* 80 Fed. Reg. 35992-01, 35994. That cursory support does not comply with NEPA.

Federal courts have reversed similar agency failures to analyze environmental impacts. For instance, in *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 2007), the Ninth Circuit held that the U.S. Forest Service inadequately assessed the environmental significance of a categorical

exclusion for fuel reduction projects in national forests throughout the United States. *Id.* at 1016. In particular, the Court held the Forest Service “failed to consider adequately the unique characteristics of the applicable geographic areas, the degree to which effects on the quality of the environment were controversial or the risks were unknown... and whether there existed cumulative impacts from other related actions.” *Id.* Despite the Forest Service’s analysis of certain data before applying the categorical exclusion, the court still found its evaluation to be “inadequate as a cumulative impacts analysis because it offer[ed] only conclusory statements that there would be no significant impact[s].” *Id.* at 1029. In addition, the Court rejected the Forest Service’s assessment of foreseeable environmental impacts, which is similar to the NRC’s conclusory analysis here, because the agency “summarily conclude[d], without citing hard data to support its conclusion, that there were no cumulative impacts.” *Id.* The court further emphasized that “this is precisely the reason why a global cumulative impact analysis must be performed.” *Id.*

Here, NRC Staff performed even less of an analysis and made an even more cursory evaluation than what the Forest Service presented in *Sierra Club*. Rather than determining the extent of foreseeable environmental impacts, Staff simply concluded that there were none. That is not the “hard look” at environmental consequences that NEPA requires. 42 U.S.C. § 4332(C); *Marsh*, 490 U.S. at 374.

In sum, the NRC cannot permit Entergy to proceed with its planned uses of the Decommissioning Fund without performing a proper NEPA-compliant analysis of the potential environmental impacts of withdrawals for purposes other than radiological decommissioning.

CONCLUSION AND RELIEF REQUESTED

For the reasons identified herein and in the State's expressly incorporated March 6, 2015 comments and other Exhibits, the NRC should grant the Petition and grant Petitioners a hearing encompassing all of Entergy's requested withdrawals for non-decommissioning expenses, including spent fuel management expenses, from the Vermont Yankee Decommissioning Fund.

Specifically, the NRC should provide a hearing to determine whether Entergy's proposed PSDAR and related filings, including its January 6, 2015 exemption request, are deficient insofar as Entergy seeks permission to spend Decommissioning Funds at this time on anything other than reducing radiological contamination at the site. At a minimum, the Commission should grant a hearing to allow Petitioners an opportunity to address the need to:

(1) reverse NRC Staff's June 17, 2015 grant of Entergy's exemption requests to use the Decommissioning Fund for spent fuel management expenses before radiological decommissioning is complete;

(2) 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;

(3) require Entergy to provide detail in its 30-day notices;

(4) find Entergy's December 19, 2014 filings (PSDAR, Decommissioning Cost Estimate, and Updated Irradiated Fuel Management) deficient insofar as those filings contemplate using the Decommissioning Fund for spent fuel management and other non-decommissioning expenses before radiological decommissioning is complete;

(5) undertake the environmental review required by NEPA before deciding whether Entergy may proceed with non-compliant uses of the Decommissioning Fund; and

(6) take any other actions necessary to protect the Decommissioning Fund until radiological decommissioning is complete.

Respectfully submitted, this 4th day of November 2015,

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