

March 27, 2015

VIA CERTIFIED MAIL
VIA E-MAIL

Chuck Schwer
Director
Waste Management & Prevention Division
Vermont Agency of Natural Resources
1 National Life Drive—Davis 1
Montpelier, VT 05620

**Re: Request for Information and Records,
Vermont Yankee Nuclear Power Station,
License No. DPR-28**

Dear Director Schwer:

On behalf of Entergy Nuclear Vermont Yankee, LLC (“Vermont Yankee”), this correspondence addresses the Vermont Agency of Natural Resources’ (“ANR”) March 6, 2015 Request for Information and Records (“RFI”), which Vermont Yankee received on March 10, 2015. *See* Letter from Chuck Schwer to Christopher Wamser (Mar. 6, 2015), at 2 (requesting response to RFI “within 14 calendar days of [Vermont Yankee’s] receipt of this letter” (boldface type omitted)). Vermont Yankee appreciated meeting with your staff on Thursday, March 19, 2015 to discuss the contents of the RFI and to address specific questions on the issues contained within and believes this was a positive first step in collaborating on issues affecting the non-radiological clean-up or remediation of the site (also called “site restoration”). At that meeting, Vermont Yankee requested an extension of the 14-day deadline due to the voluminous nature of and extensive effort required to address the RFI. Although we are disappointed that ANR declined Vermont Yankee’s request for an appropriate extension of the time within which to respond to the 47 separate requests (including sub-parts) in the RFI at the meeting, we do appreciate the three-day extension that you subsequently granted to Vermont Yankee. *See* Attachment A, Email from Chuck Schwer to Joseph Lynch (Mar. 23, 2015).

Vermont Yankee remains committed to appropriate and timely coordination with ANR Staff with respect to site restoration activities, consistent with the December 23, 2013 Settlement Agreement (“Settlement Agreement”), to which Vermont Yankee and ANR are parties. That said, as set forth below, we believe that the RFI is inconsistent with the Settlement Agreement and the parties’ intentions with respect to site restoration activities, as contemplated by more than a decade of Vermont Public

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Service Board (“PSB”) orders and memorialized in various agreements between and among Vermont agencies and Vermont Yankee. We are likewise concerned that the RFI necessarily involves ANR in the Nuclear Regulatory Commission (“NRC”) decommissioning process for the Vermont Yankee site. For all of these reasons, Vermont Yankee respectfully suggests that ANR reconsider the RFI and instead continue to work together collaboratively with a goal of providing additional information required by ANR and establishing a framework for the yet to be determined site restoration standards.

Site restoration, as that term has been employed with respect to Vermont Yankee since 2002, is designed to encompass and in fact encompasses Vermont state authority regarding the non-radiological remediation and release of the Vermont Yankee site, including all applicable Vermont authority identified in the RFI. *See, e.g.*, June 13, 2002 PSB Order, Docket 6545, at 32 ¶ 29 (“ENVY will comply with all state requirements regarding site restoration and has committed to full site restoration following decommissioning, unless it reuses the site. Tr. 4/1/02 at 130–32 (Wells); exh. DPS-42 at ¶¶ 3 and 9.”); Site Restoration Trust Agreement § 1.01(dd) (defining “Site Restoration” as “restoration of the site in accordance with Site Restoration Standards,” expressly “exclud[ing] activities required in order to meet the NRC’s criteria for Decommissioning”); *id.* § 1.01(gg) (defining the “Site Restoration Standards” to be employed in satisfaction of Vermont law). In other words, Site Restoration in compliance with Site Restoration Standards (as certified by the PSB, *id.* § 1.01(i)) represents the parties’ agreed-upon mechanism for conducting non-radiological site restoration under Vermont law. The mechanism for ANR’s participation is good faith and cost-effective negotiation of site restoration standards pursuant to the Settlement Agreement ¶ 8.

The Settlement Agreement is also explicit about the schedule for conducting Site Restoration: Site Restoration occurs only *after* the NRC decommissioning process has been completed. *See* Settlement Agreement ¶ 8 (“As used in this agreement, the period of ‘site restoration’ applies only to the period of time after radiological decommissioning has been completed to the satisfaction of the NRC.”); *id.* ¶ 9 (“ENVY shall commence site restoration . . . promptly after completing radiological decommissioning.”); Memorandum of Understanding Among Entergy, Vermont Public Service Board, and ANR dated Dec. 23, 2013 (“Memorandum of Understanding”), ¶¶ 5-6 (repeating statements concerning sequencing of site restoration made in ¶¶ 8-9 of the Settlement Agreement); Public Service Board Order dated Mar. 28, 2014, Docket No. 7862 (“PSB March 2014 Order”), at 83 ¶ 220 (“Site restoration costs and activities are not governed by NRC regulations, *as they come after license termination* and are outside the scope of the NRC definition of decommissioning.” (emphasis added)); *id.* at 88-89 (referring to “site restoration after decommissioning,” restoration “after closure and decommissioning,” Vermont Yankee’s commitment “to commence site restoration . . . ‘promptly’ after completing radiological decommissioning,” and the “agreement to promptly commence site restoration after the completion of radiological decommissioning”). The RFI requests the development of information and documents, including a “further characterization,” a “closure plan,” “further investigation,” and numerous “work plan[s],” *see* RFI, Nos. 3(c-d, f, g-k, o), that is in tension with the understandings reflected in the various

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orders and agreements since 2002, the schedule established in the Settlement Agreement, and most notably the Settlement Agreement's requirement to negotiate site clean-up standards.

The coordinated approach to non-radiological remediation during radiological decommissioning/license termination followed by Site Restoration activities is not only what has been agreed to, it is the only approach that makes sense. The comprehensive NRC decommissioning process will likely take decades to complete under the SAFSTOR decommissioning method that Vermont Yankee has selected. The details of the plan for completing that decommissioning remain under development. *See* Site Assessment Study at 41, 49 Table 8-1. Decommissioning will result in the removal of structures, known hazards and quantities of soil, which will address much of the non-radiological remediation needs as well. The successes at other decommissioning sites depended upon this approach that coordinated license termination activities required by NRC with non-radiological remediation to achieve conditions needed for Site Restoration and Closure. Until the NRC process is at the very least developed (and perhaps until it has been implemented), there can be no credible purpose, nor benefit, to detailed planning for the subsequent Site Restoration activities, including the remediation of the non-radiological conditions that by then simply may no longer exist.

Thus, while Vermont Yankee agreed to prepare a Site Assessment Study ("SAS") addressing non-radiological considerations in the Historical Site Assessment ("HSA"), a copy of which has been provided to ANR, the SAS was intended to be a factual depiction of the conditions at the site at the time of issuance and not a detailed plan for the eventual actions to address those conditions. *See* Settlement Agreement ¶ 6.¹ Vermont Yankee further agreed to begin discussing the Site Restoration Standards that will be employed during the future site restoration process. *See id.* ¶ 8 ("Following completion of the site assessment study [the parties] shall work in good faith to determine in a timely and cost-effective manner *overall site restoration standards...*" (emphasis added)); Memorandum of Understanding ¶ 5 (same). While the benefits of setting Standards for an effort that is not expected to commence for years might be questioned, Vermont Yankee remains committed to what it hopes will be a reasonable, evolving discussion consistent with the Settlement Agreement – one that is sensitive to NRC's and ANR's roles and the timeframes involved.

We are further concerned that the RFI reflects an effort by ANR to intrude impermissibly in the NRC decommissioning process.² The Settlement Agreement reflects NRC's primacy with respect to the site

¹ As the Site Assessment Study underscores, non-radiological conditions were comprehensively characterized in 2001 under ANR's oversight, and in any event are typical of an industrial facility. Thus, even if the site were not undergoing a comprehensive, NRC-directed decommissioning, on-site conditions are limited and present little cause for concern. This dynamic is the basis, in part, for ANR's limited involvement at this phase of the process.

² To avoid such inappropriate intrusion, "EPA Office of Solid Waste's policy is to encourage regional and State program implementers to coordinate RCRA [Resource Conservation and Recovery Act] cleanups with decommissioning, as appropriate, at those NRC sites subject to EPA's corrective action authority." Memorandum of Understanding Between the Environmental Protection Agency and the Nuclear Regulatory Commission, at 5 (2002).

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decommissioning. Within this context, ANR's effort in the RFI to force the development of documents that unavoidably relate to the NRC process, including by demanding a "closure plan" and numerous "work plan[s]," *see* RFI, Nos. 3(d, g-k, o, q-w), encroaches on preempted space. *See, e.g., Boeing Co. v. Movassaghi*, 768 F.3d 832, 840-41 (9th Cir. 2014) (recognizing that a state lacks authority, including under the Resource Conservation and Recovery Act ("RCRA"), to regulate the federal government's efforts to conduct radiological decontamination of a site); *Brown v. Kerr-McGee Chem. Corp.*, 767 F.2d 1234, 1240-42 (7th Cir. 1985) (recognizing that States also cannot regulate removal of waste, which comprises radiological and non-radiological materials that are intermixed or inseparable); *Missouri v. Westinghouse Elec., LLC*, 487 F. Supp. 2d 1076, 1086-88 (E.D. Mo. 2007) (holding that federal preemption precluded entry of a consent decree purporting to allow a State to regulate the removal of either radiological waste or mixed radiological and non-radiological waste from the site of a decommissioned nuclear power plant). Indeed, despite ANR's disclaimer of intent "to regulate any decommissioning or radiological activities at the Site," it is hard to see how an RFI with a 14-day return date demanding extensive detail about plans for Site Restoration that will not occur for years is not an effort by ANR to interject itself into the ongoing decommissioning process regulated by the NRC.³

Consistent with the above, we respectfully request that ANR continue the productive discussions begun at the March 19 meeting and, in the spirit of that meeting, work collaboratively with our technical staff to arrive at a mutually agreeable resolution of ANR's concerns. In the interim, Vermont Yankee hereby responds in Attachment C to the RFI requests with such information as is now available. Vermont Yankee notes, however, that a response to many of the requests contained in the RFI will require substantially longer time periods before a response can reasonably be expected, *e.g.*, because they are contingent on the outcome of future, NRC-driven events. Further, and consistent with the discussion above of Vermont's agreed-upon role in site restoration, Vermont Yankee appropriately limits its initial responses and provision of documents to non-radiological matters, and declines to respond to the extent that any of the requests call for a response or documents related to radiological matters. *See also* Letter from Chuck Schwer to Christopher Wamser (Mar. 6, 2015), at 2 ("To be clear, the Agency is not seeking to regulate any decommissioning or radiological activities at the Site."). Consistent with that approach, and with clarification provided by ANR Staff at the March 19 meeting, in interpreting the RFI

³ Certainly, ANR's refusal to grant more than a three-day extension of time to respond to the RFI is hard to understand as anything other than an exercise in brinksmanship – to assert authority for its own sake, rather than to approach the long-term radiological decommissioning and subsequent site restoration process in a coordinated and collaborative manner. Providing extensions is a normative regulatory response for sites with neither the complexity nor timeframes contemplated here, and federal courts take into account the reasonableness of the time afforded to respond to the RFI in assessing any penalty to be imposed. *See, e.g., United States v. Charles George Trucking Co., Inc.*, 642 F. Supp. 329, 332 & 334 n.4 (D. Mass. 1986) (noting that EPA required a response to its RFI relating to defendant landfill under the analogous provisions of the federal RCRA within 30 days, and that "[t]he reasonableness of the time afforded to the defendants is a factor to be considered in assessing the penalty"); *In re Mun. of Catano Dep't of Transp. & Pub. Works*, No. RCRA-02-2006-7116, 2007 WL 1933123, ¶ 17 (E.P.A. Apr. 17, 2007) (noting that EPA required a response within 30 days to its RFI relating to municipal used oil generator facility); *see also United States v. Livola*, 605 F. Supp. 96, 98 (N.D. Ohio 1985) (noting that EPA granted a 20-day extension to respond to its RCRA RFI relating to defendant's landfill).

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requests, Vermont Yankee also understands references to the "SAS" in certain requests to refer to the non-radiological HSA attached to the SAS. These qualifications also are reflected in Vermont Yankee's responses in Attachment C, as appropriate.

* * *

Again, Vermont Yankee appreciates your time and attention to this matter, so that we may come to agreement about the most reasonable way to proceed. Please do not hesitate to contact Chris Wamser if you have any questions.

Sincerely,

Elise N. Zoli (by PMO w/permission)

Elise N. Zoli

ENZ

Enclosures

cc: Christopher Wamser, Site Vice President, Vermont Yankee Nuclear Power Station,
Entergy Nuclear Operations, Inc.
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