2014

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7862

Amended Petition of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., for amendment of their Certificate of Public Good and other approvals required under 30 V.SA. § 231(a) for authority to continue after March 21, 2012, operation of the Vermont Yankee Nuclear Power Station, including the storage of spent nuclear fuel	)))))))	Hearings at Barre, Vermont February 11-13, 2013 Hearings at Montpelier, Vermont February 14, 15, 18-22, 25, 26, June 17-21 and 24-28, 2013, and January 30 & 31, 2014

Order entered: 3/28/2014

PRESENT: James Volz, Chairman
David C. Coen, Board Member
John D. Burke, Board Member

APPEARANCES: *See Attachment A*

Table of Contents

I. Introduction. 2

II. Background. 6
A. Procedural History. 6
B. Public Comments. 10
C. Positions of the Parties. 12

III. Legal Framework. 16
A. Section 231 Standards. 16
B. Preemption. 18
C. NEC Procedural Objection. 25

IV. Findings and Discussion. 27
A. Findings Concerning Proposal and Entergy VY. 27
B. Fair Partner. 31
C. Financial Soundness. 44
D. Technical Competence. 50
E. Relationships with Other Utilities. 50

F. Section 248 Criteria. 51
(1) Orderly Development of the Region. 51
(2) Need. 54
(3) System Stability and Reliability.. 56
(4) Economic Benefit.. 57
(5) Aesthetics, Historic Sites, Air and Water Purity, the Natural Environment and Public Health and Safety. 61
(6) Least-Cost Integrated Resource Plan. 79
(7) Compliance with Electric Energy Plan. 79
(8) Service by Existing or Planned Transmission Line. 80
G. Storage of Spent Nuclear Fuel. 80

V. General Good of the State. 81
A. Decommissioning and Site Restoration. 82
B. Benefits of MOU. 91

VI. Conclusion. 94

VII. Order. 94

Attachment A: Appearances. 96

I. INTRODUCTION

In this Order, the Vermont Public Service Board ("Board") conditionally grants a request from Entergy Nuclear Vermont Yankee, LLC ("ENVY") and Entergy Nuclear Operations, Inc. ("ENO") (jointly, "Entergy VY" or the "Company") to amend their Certificate of Public Good ("CPG") to authorize Entergy VY to own and operate the Vermont Yankee Nuclear Power Station ("VY Station" or the "Plant") in Vernon, Vermont, until December 31, 2014. We find that Entergy VY's ownership and operation of the VY Station from March 21, 2012, through the end of this year, subject to a Memorandum of Understanding ("MOU")[1] among Entergy VY, the

1. Over the years, Entergy VY has entered into several memoranda of understanding in various proceedings. Many of these remain relevant and are cited herein. Unless otherwise specified, as used in this Order, "MOU" refers to the Memorandum of Understanding entered into by Entergy VY, the Department of Public Service, and the Agency of Natural Resources in this proceeding and filed with the Board on December 23, 2013. Other memoranda of understanding are referred to by the appropriate docket in which they were filed, *e.g.*, the "Docket 6545 MOU."

Vermont Department of Public Service ("Department" or "DPS"), and the Agency of Natural Resources ("ANR"), is in the best interest of the state of Vermont and thereby will promote the general good.

Extending the duration of the CPG under the terms of the MOU will provide several material benefits to the state that would not be attainable for Vermonters absent the MOU. Specifically, these benefits include:

- Entergy VY commits to pay the State $10 million over the next five years to promote economic development in Windham County, which will aid the area as jobs are lost following the closure of the VY Station.
- Entergy VY agrees to conditions that will ensure adequate site restoration and increase the likelihood that the site will be available for other uses more rapidly than the Nuclear Regulatory Commission ("NRC") would require. These include:

  (1) commitment to complete a site assessment study by the end of this year and to a process for developing the appropriate standard for site restoration that will be determined by the Board;

  (2) establishment of a separate, $25 million fund specifically for site restoration, supported by a guarantee by Entergy VY's parent corporation to provide additional funds if the site restoration fund falls below $60 million; and

  (3) a commitment to commence site restoration promptly after completing radiological decommissioning.[2]
- Entergy VY will pay $5.2 million in to the Clean Energy Development Fund ("CEDF") for clean energy development activities, with half of the funds to be used to benefit Windham County.
- Entergy VY has agreed to December 31, 2014, as the date on which its rights under this CPG to own or operate the VY Station for purposes other than decommissioning will terminate.[3]

We find that the realization of these benefits is in the best interests of Vermonters, notwithstanding the significant concerns raised by numerous parties in this proceeding. The

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2. In the Settlement Agreement among the MOU signatories, Entergy VY also committed to commence decommissioning within 120 days after it has made a reasonable determination that the funds in the Decommissioning Trust Fund are adequate to complete decommissioning and remaining spent nuclear fuel ("SNF") management activities.

3. The MOU specifies certain factual circumstances that could lead to operation for a short period thereafter.

value of these benefits is complemented by the short duration of the permission we are granting Entergy VY. This limited period of time is likely not longer than the interval of time we would have allowed Entergy VY for winding up its operations had we decided, in the absence of the MOU, to deny the Company's request to extend its time for operating in Vermont.

In 2002, the Board approved the sale of the VY Station to Entergy VY and issued a CPG authorizing ENVY to own and ENO to operate the VY Station. That right, however, was limited to operating the VY Station only until March 21, 2012, unless a new or renewed CPG for Entergy VY was first issued.[4] Entergy VY initiated this proceeding seeking such authorization.

The process of reviewing Entergy VY's request for, what at that time was a 20-year CPG, began in 2008 and has lasted over six years. In the last two years, it has involved unusually contentious litigation. During that time, significant concerns have been raised over whether Entergy VY's long-term operation and ownership of the VY Station would promote the general good. Principally, these questions have related to whether Entergy VY has been, and could, going forward, be, a company that lives by its commitments, adheres to legal requirements, including statutes and rules, provides accurate and timely information, and generally is a fair partner for Vermont. This question — which we examine in all proceedings where companies seek authorization to do business regulated by the Board — typically requires us to examine the company's performance and expectation about future activities and its willingness to deal candidly with its regulatory stakeholders.

In both of these areas, the evidence in this case has raised substantial questions. In its twelve years of operating in Vermont, Entergy VY has failed to comply with numerous Board orders and statutory requirements. It has failed to follow procedural requirements that protect the integrity of Board proceedings. The Company has engaged in unacceptable conduct that erodes public trust and confidence in its capacity to act in good faith and to engage in fair dealing; an investigative report prepared by Vermont's Attorney General concluded that Entergy VY "repeatedly misled State officials with direct misstatements and repeatedly failed to clarify

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4. *See* Docket 6545, Order of 6/13/02. The CPG authorized ownership and operation of the VY Station after March 21, 2012, solely for the purpose of decommissioning. Docket 6545, Order of 7/11/02 at 17.

misperceptions."[5] The Company's sustained record of misconduct has been troubling to observe over the years and has continued to trouble us as we determine whether to grant Entergy VY a license to operate.

If Entergy VY were planning to operate the VY Station for another twenty years as originally requested, its track record may well have led us to find that ownership and operation would not promote the general good. However, for economic reasons, Entergy VY has now decided to cease operations. The MOU reflects this decision. While its decision to cease operations by the end of next year does not excuse Entergy VY's past bad conduct, the decision does alter the perspective from which we contemplate that conduct, given that we are no longer assessing the legal and regulatory implications of granting an operating license for the long term. Considered in light of the short operational period remaining and the closure secured by the MOU on numerous outstanding matters, we find that granting the CPG extension subject to the conditions set out in the MOU is reasonable and in the best interests of the State.

Parties also have raised questions about other aspects of Entergy VY's continued operation of the VY Station, primarily the effect the thermal discharge from the VY Station will have on the Connecticut River. The operation of the VY Station uses large amounts of water for cooling the steam that is used to generate power. This water is discharged into the Connecticut River and is regulated by a permit under the National Pollutant Discharge Elimination System ("NPDES"). Several parties, including ANR, raised concern that even the authorized discharge from the VY Station is adversely affecting fish populations. Under the MOU, these issues will be addressed through the NPDES permitting process. We find this to be an acceptable — if imperfect — outcome, particularly since the remaining operating period and potential to impact the fish population is of limited duration.

Other parties had questioned whether Entergy VY could assure us that it had the financial resources to fulfill its commitment made at the time it acquired the VY Station to fully restore the site after the facility is closed. The MOU addresses these concerns in two ways. Entergy VY has agreed to a process under which the scope of its site restoration obligations would be fully defined. Entergy VY has also agreed to set aside $25 million earmarked for site restoration.

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5. Exh. Board-5 at 8.

These are material commitments that will help ensure timely and adequate restoration of the VY Station site.

Finally, it is important for the public to understand the limits of the Board's jurisdiction, and therefore what this decision does not do. The operation of the VY Station has long been controversial within Vermont. In this proceeding, the Board has heard from many members of the public urging us to direct the closure of the VY Station, on the one hand, or asking that we preserve the benefits of the power it generates, on the other. However, by law, this regulatory review necessarily focuses on the more narrow question of whether granting Entergy VY continued authority to own and operate the VY Station through the end of 2014 would promote the general good of the state. Therefore, we have not considered questions such as whether to order the closure of the VY Station, the merits of nuclear power, or any potential radiological safety concerns about the VY Station — these matters are outside our purview to regulate under current state and federal law. Rather, the issue for the Board is whether to authorize Entergy VY's continued ownership and operation of the VY Station for a brief period for purposes other than decommissioning.

II. Background

A. Procedural History

On June 13, 2002, the Board issued an Order in Docket 6545 authorizing the sale of the VY Station from the Vermont Yankee Nuclear Power Corporation ("VYNPC") to Entergy VY and granting a CPG authorizing ENVY to own and ENO to operate the VY Station until March 21, 2012 (the "6545 CPG").

On March 3, 2008, Entergy VY filed a petition, which became Docket 7440, for an amendment to the 6545 CPG and other approvals required under 10 V.S.A. §§ 6501-6504 and 30 V.S.A. §§ 231(a), 248 & 254, for authority to continue after March 21, 2012, its ownership and operation of the VY Station, including the storage of spent-nuclear fuel.

The Board held evidentiary hearings on Entergy VY's petition in May and June of 2009 and the parties filed final briefs on August 7, 2009. Under Section 248(e)(2) as it then existed, the Board was not, however, permitted to issue a final Order absent an affirmative vote by the

legislature to allow the Board to do so. As a result, several parties requested that the Board issue its decision not as a final Order, but instead as a report to the legislature. This request was pending with the Board when Entergy VY discovered tritium leaks at the VY Station and disclosed the existence of underground pipes containing radionuclides, which Entergy VY, under oath in Docket 7440, had testified were not believed to exist. The leaks prompted the Board to open Docket 7600 to consider what action, if any, the Board could or should take as to matters within its jurisdiction. The pipe disclosure caused the Board to require Entergy VY to correct the evidentiary record in Docket 7440 and discovery requests and to hold the docket in abeyance pending receipt of this information. The parties were requested to inform the Board when the record had been corrected and to propose how the Board should proceed to consider the changed record. Entergy VY filed its corrections in September 2010 but the parties did not file a proposal for moving forward in the docket, so the proceeding remained stayed.

In April, 2011, Entergy VY filed suit in federal district court challenging certain provisions relevant to the proceedings in Docket 7440. On January 20, 2012, the United States District Court for the District of Vermont entered a Decision and Order in *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. V. Shumlin et al*, Docket No. 1:11-cv-99 (the "District Court Decision").

On January 31, 2012, Entergy VY filed a Motion Seeking Issuance of a Final Decision and Order Granting a CPG in Docket 7440. On March 29, 2012, the Board issued an Order denying Entergy VY's motion on the grounds that it did not have a sound record on which to base a decision and directing that Entergy VY file a new amended petition.

On April 16, 2012, Entergy VY filed a new petition for an amended CPG and other approvals required under 30 V.SA. § 231(a) for authority to continue after March 21, 2012, its ownership and operation of the VY Station, including the storage of spent nuclear fuel (Entergy VY's "First Amended Petition"). In response to this Amended Petition, the Board opened this proceeding, Docket 7862. The First Amended Petition requested authorization to operate until March 21, 2032, or 20 years beyond the Docket 6545 CPG's expiration date.

On June 22, 2012, Entergy VY filed a Motion for a Declaratory Ruling Prescribing the Scope of the Proceeding ("Entergy DR Motion"). In the Entergy DR Motion, Entergy VY laid

out its arguments that certain potential matters which could come under consideration in the proceeding were preempted by federal law, and asked the Board to issue a declaratory ruling on the scope of the proceedings outlining what matters it determined to be preempted. On January 7, 2013, the Board issued an Order denying Entergy VY's request for a general ruling and instead indicating that it would review Entergy VY's objections in context of the specific evidence being objected to.

On October 5, 2012, the Board issued an Order granting intervenor status to the following entities which were parties in Docket 7440:[6] Conservation Law Foundation ("CLF"); Vermont Natural Resources Council and the Connecticut River Watershed Coalition (together, "VNRC/CRWC"); Vermont Public Interest Research Group ("VPIRG"); Windham Regional Commission ("WRC"); New England Coalition, Inc. ("NEC"); Green Mountain Power Corporation ("GMP"); Central Vermont Public Service Corporation ("CVPS"); Associated Industries of Vermont; Vermont Electric Cooperative, Inc.; TransCanada Hydro Northeast, Inc.; and the International Brotherhood of Electrical Workers, Local Union 300.[7] In addition, on April 26, 2013, the Board granted intervention to the Town of Vernon.

Two public hearings were conducted on November 7, 2012, in Vernon, Vermont and on November 19, 2012, at locations statewide via Vermont Interactive Technologies services ("VIT").

On November 21, 2012, Entergy VY filed a Motion for Partial Summary Judgment on water quality issues ("Entergy SJ Motion"). The Entergy SJ Motion requested that the Board issue a summary judgment on certain issues related to water quality on the basis that the issues had been previously litigated before the Vermont Environmental Court and the Vermont Supreme Court. This motion was denied by the Board on June 19, 2013. Also on November 21,

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6. Pursuant to the Board's Orders of March 29, 2012, in Docket 7440 and May 4, 2012, in this Docket, parties in Docket 7440 were to be granted automatic intervenor status, subject to the same limitations, if any, imposed upon the scope of their intervention in Docket 7440, if they filed with the Board a notice of appearance and statement of intent to be a party.

7. Our October 5, 2012, Order inadvertently omitted ANR as a party granted intervention. ANR had filed a notice of appearance (although it did not submit a formal statement of intent to be a party) and otherwise evidenced its intent to be a party in this proceeding and has been treated as a party throughout. We had intended to grant ANR party status as part of the earlier Order. To remove any uncertainty, we clarify that ANR is a party to this proceeding.

2012, Entergy VY filed an Objection to Admission of Prefiled Direct Testimony and Exhibits Submitted on Behalf of the Department of Public Service, Conservation Law Foundation, and New England Coalition (the "Entergy Objections Motion"). In the Entergy Objections Motion, Entergy VY objected to several elements of testimony filed by a number of parties in the Docket on the grounds that they were preempted by federal law. The objections included in the Entergy Objections Motion were taken under advisement by the Board.[8]

On February 8, 2013, the Department filed a Motion in Limine which requested that the Board require Entergy VY to state the federal authority it was relying on and the specific grounds when objecting to the admission of evidence on the grounds of preemption. On February 11, 2013, the Board issued an oral ruling directing Entergy VY to specify the grounds and basis of authority of its preemption objections.

Technical hearings were held from February 11, 2013, to February 26, 2013, and from June 17, 2013, to June 28, 2013, at the Barre Municipal Auditorium in Barre, Vermont, and at the Board's Hearing Room in Montpelier, Vermont.

An initial set of proposed findings of fact and legal briefs were filed by Entergy VY, the Department, ANR, CLF, VNRC/CRWC, VPIRG, WRC, and NEC on August 19, 2013.

On August 27, 2013, Entergy VY announced that it had decided to close the VY Station by the end of 2014 and amended its petition to request permission to own and operate the VY Station through December 31, 2014 (Entergy VY's "Second Amended Petition").

On October 25, 2013, Reply Briefs addressing the Second Amended Petition were filed by VNRC/CRWC, CLF, NEC, VPIRG, Entergy VY, the Department, ANR, and WRC. Comments on the Reply Briefs were filed by the Department, NEC, VPIRG, Entergy VY, and WRC on November 22 and 25, 2013. In its November 22 filing, the Department informed the Board that it was in the process of negotiating a memorandum of understanding with Entergy VY and promised to update the Board as negotiations progressed.

On December 23, 2013, the Department filed an MOU (the executed MOU) among itself, Entergy VY, and ANR (collectively, the "MOU Signatories"). In the MOU, the MOU

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8. The Board's determination on this and other matters related to the preemption objections of Entergy VY are discussed in pages 18 through 25, below.

Signatories agree that the extension of Entergy VY's CPG to operate through December 31, 2014, subject to the conditions described in the MOU, is in the general good of the state.

On January 2, 2014, the Board convened a status conference and thereafter issued an Order re: Schedule for Further Proceedings laying out the schedule for further proceedings in the Docket.

On January 14, 2014, a public hearing on the MOU was held at locations statewide via VIT.

On January 30 and 31, 2014, technical hearings on the MOU were convened in the Board's hearing room in Montpelier, Vermont. Entergy VY and the Department submitted additional prefiled testimony in advance of the technical hearing, and NEC submitted a prehearing memorandum.

On February 14, 21, and 24, 2014, final briefs regarding the MOU were submitted by Entergy VY, the Department (for itself and ANR), VNRC/CRWC, NEC, WRC, VPIRG and CLF.

B. Public Comments

Over the course of this Docket, the Board has received numerous public comments, in both written form and from speakers at the three public hearings. The Board sincerely appreciates receiving these comments from the many members of the public who took the time to share their views and perceptions. These comments have helped to guide the Board's attention to specific issues that otherwise might not have been raised in the case.

It is important to note, however, that Vermont law requires the Board to base its decision on the content of the formal evidentiary record as developed by the parties through the contested case process. Public comments cannot be treated as such formal evidence because they are not delivered under oath or subject to cross-examination pursuant to applicable rules of evidence and procedure. Nevertheless, public comments play a crucial role in helping ensure a thorough exploration of the factors which the Board should consider in crafting the evidentiary record. These comments also facilitate a better understanding for the Board of how its decision is likely to affect citizens across the State.

Prior to Entergy VY's announcement that it will close the VY Station at the end of 2014, the Board had received hundreds of public comments on both sides of the question of whether to renew Entergy VY's CPG. Of those urging the Board not to grant a CPG, a number of the comments were focused on radiological safety concerns — a subject which the Board is precluded from considering as a matter of federal law. However, other grounds for opposing the extension of a CPG addressed significant issues that are within the Board's jurisdiction, such as the impact of the VY Station's thermal discharge on the Connecticut River and whether or not Entergy VY has been and can be a fair partner to the State of Vermont. Members of the public who supported the issuance of a CPG primarily pointed to the economic benefit of the Plant and its value as a significant generator of low-carbon electrical power.

Subsequent to Entergy VY's submission of its request for an amended CPG and the execution of an MOU with the Department and ANR, public comments focused on a number of key areas. Many members of the public expressed concern that, given its past actions, Entergy VY could not be relied upon to keep the new commitments made in the MOU in addition to its existing obligations to the State of Vermont. Several commenters suggested that given the widely held perception in Vermont that Entergy VY is untrustworthy, the Company should not be granted a CPG under any circumstances.

Other commenters found the MOU inadequate or insufficient and recommended that the Board either reject the MOU on that basis or impose additional conditions on the Company. These commenters pointed to concerns regarding the safety of the decommissioning process and its ultimate outcome, the adequacy of funding for decommissioning, and the absence of a specific timetable for decommissioning. A number of commenters expressing these views specifically urged the Board to require that Entergy VY immediately remove all spent fuel from the spent fuel pools and place it into dry cask storage. Other commenters urged the Board to prevent Entergy VY from utilizing SAFSTOR[9] as a decommissioning method, and to instead require Entergy VY to commence decommissioning immediately upon the Plant's closure. Another area of concern for those who found the MOU insufficient was that it potentially allows Entergy VY to continue discharging significant amounts of waste heat into the Connecticut River. These

9. A detailed description of this method of decommissioning may be found in Finding 208 on p. 82.

commenters urged the Board to require that Energy VY operate the VY Station in closed cycle cooling mode for the remainder of the operational period to avert impacts from the thermal pollution.

Many of the members of the public who called upon the Board to approve the MOU pointed to the economic benefits provided by the MOU. These commenters pointed specifically to the economic transition funding included in the MOU, as well as the release of additional funding for the CEDF. These funds have the potential to help the region adjust to the economic impacts of the closure of the Plant.

Other supporters of the MOU pointed to the perceived benefits of maintaining operation of the VY Station for an additional nine months when compared with an immediate shutdown. These commenters emphasized the continued supply of low-carbon electricity that the Plant will produce, as well as the salaries that will be paid to Plant employees and taxes paid to the community and state. These commenters also noted that an additional nine months of operation will provide employees at the Plant and other workers whose incomes depend on Plant operation with more time to plan for and adjust to the Plant's eventual closure.

In addition to the above concerns, many other specific points have been raised by members of the public to which it is not possible for us to individually respond. This Order reflects that many of these issues were discussed at length during the course of our proceedings and have been central to our review of the MOU and our final decision.

C. Positions of the Parties

Entergy VY

Entergy VY maintains that the operation of the VY Station through the end of 2014, pursuant to the terms of the MOU, is in the general good of the State and thus an amended CPG should be granted. Entergy VY contends that the MOU further strengthens the argument that a CPG should be granted by directly addressing a number of the concerns which the Department and other parties had previously raised in the proceedings. Specifically, Entergy VY contends that the MOU's provisions providing dedicated funding for site restoration and establishing a process for developing site restoration standards will adequately address any concerns which

have been raised regarding the restoration of the VY Station site subsequent to the completion of radiological decommissioning. Entergy VY further contends that its MOU commitment to work with ANR through the NPDES process regarding its thermal discharge, in addition to the evidence previously presented in the case and the reduced period of operation being requested under the Second Amended Petition, are sufficient to ensure that operation of the VY Station will not cause undue water pollution. Entergy VY also maintains that the commitments made in the MOU to economic support for the region around the VY Station strengthen its argument that operation of the station through December 2014 is consistent with the orderly development of the region, and that Entergy VY's willingness to enter into the MOU and the commitments made therein demonstrate that Entergy VY can act as a fair partner for Vermont. Finally, Entergy VY argues that the MOU does not diminish other benefits of its ownership and operation of the VY Station, such as economic benefits and reductions in greenhouse gas emissions, and therefore the MOU should be approved and a CPG granted.

The Department/ANR[10]

Prior to the execution of the MOU, the Department and ANR argued that Entergy VY had failed to demonstrate that its ownership and operation of the VY Station was in the general good of the State. However, the Department and ANR now maintain that, subject to the terms of the MOU, the ownership and operation of the VY Station by Entergy VY is in the general good of the State. The Department and ANR argue that the approval of the MOU will provide the State with greater benefits than any plausible alternative, including benefits which the Board could not require on its own motion if it were to reject the MOU, and as such the general good of the State is best served by its approval. In the event the Board determines to reject the MOU, the Department suggests that the Board should adopt the conditions proposed in its October 25, 2013, brief, but recommends that any such conditions be made to conform as closely as possible to those conditions agreed upon in the MOU in order to best promote an orderly wind-down of the VY Station.

10. The Department and ANR filed their final brief jointly and we have accordingly discussed their positions together here.

CLF

CLF supports the Board's approval of the MOU on the grounds that it offers some limited benefits that would not be available absent such approval, such as Entergy VY's agreement to provide additional funds for site restoration and transitional economic development and the fact that Entergy VY has committed to shut down the VY Station by the end of 2014. CLF also notes that many of the provisions of the MOU have limited value due to a lack of specific commitments, the difficulty of enforcement, and the failure to establish a specific timeline for decommissioning and dismantlement. Notwithstanding, CLF argues that approval of the MOU is in the general good of the State.

VNRC/CRWC

VNRC/CRWC maintains that Entergy VY has failed to meet its burden to demonstrate that continued operation of the VY Station will not have an undue adverse effect on the water purity and natural environment of the Connecticut River. Based on this conclusion, VNRC/CRWC argues that the Board should either deny a CPG to Entergy VY or grant an amended CPG with the additional condition that Entergy VY operate the VY Station in closed-cycle mode to prevent excessive thermal discharge. In the event that the Board approves the MOU and grants an amended CPG without additional conditions beyond those envisioned in the MOU, VNRC/CRWC recommends that the Board only do so on the basis that the overall circumstances surrounding the MOU will promote the general good of the State given the limited mitigation contained therein, but not find that Entergy VY has met the criteria of 30 V.S.A. § 248(b)(5) as it relates to water pollution.

VPIRG

VPIRG maintains that Entergy VY has failed to demonstrate its trustworthiness and reliability and that the MOU provides very limited benefits to the State. VPIRG further contends that the site restoration provisions of the MOU are inadequate and unenforceable and that the Board could require more enforceable conditions on its own motion. Similarly, VPIRG contends that many of the other potential benefits of the MOU — such as the additional funding for

transitional economic assistance in Windham County and the requirement for a prompt assessment of the details and cost of site restoration — could in fact be required by the Board even if the MOU were rejected, and that any such requirements could be constructed to better serve the general good of the State than the provisions of the MOU. Given these perceived failings, VPIRG recommends that the Board not approve the MOU and instead issue an order either requiring that Entergy VY seek approval from the NRC to immediately initiate decommissioning at such time as the State requests, or requiring that an auction be held to find a new owner who will decommission the Plant in a timely matter.

WRC

WRC does not take a position on whether or not the Board should approve the MOU or grant an amended CPG to Entergy VY. However, WRC does raise a number of concerns which it contends should be addressed in any final order issued by the Board. WRC advocates that the Board take actions to ensure that decommissioning and site restoration are fully funded, occur on as swift a timeline as possible, and that responsibility for site restoration and decommissioning is held jointly and severally between ENVY, ENO and Entergy Corporation. WRC further advocates that the Board require that all structures, including those more than three feet below grade, be removed as part of site restoration and prohibit rubblization during site restoration.[11] WRC also recommends that the Board require that Entergy VY immediately move spent fuel from wet to dry storage or provide additional funds to the decommissioning fund to reflect the expected cost of moving spent fuel, as well as a number of other recommendations to ensure the expeditious and reliable decommissioning of the VY Station site.

NEC

NEC argues that the Board should not approve the MOU or grant an amended CPG on the grounds that Entergy VY has failed to demonstrate that it can act as a fair partner to the State of Vermont. While NEC states that some of the agreements contained in the MOU could provide

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11. The MOU defines rubblization as the "demolition of an above-grade decontaminated concrete structure into rubble that is buried on site." MOU at ¶ 5.

a benefit to the State, NEC contends that the Board cannot rely on any of the commitments made in the MOU given Entergy VY's past behavior. Accordingly, NEC urges the Board to reject the MOU and reiterates its arguments that Entergy VY should not be granted a CPG on the basis of its failure to demonstrate that it is a trustworthy partner to the State of Vermont and that it is has not shown that Plant operation will not have an adverse impact under a number of the criteria of Section 248. In addition, NEC expresses a number of concerns about the Board's process in considering the MOU, including the speed with which the Board has been asked to reach a decision on the MOU and what NEC contends was a limited opportunity to present further evidence. NEC particularly objects to the MOU Signatories' reservation of their rights to annul the agreement should the Board significantly modify it; in essence, NEC suggests that this provision has limited the ability of NEC and other non-signatory parties to fully participate in the Board's process.

III. Legal Framework

A. Section 231 Standards

In 2002, the Board issued the Docket 6545 CPG pursuant to 30 V.S.A. § 231, which authorized ENVY to own and ENO to operate the VY Station until March 21, 2012. Under the CPG, ENVY and ENO were authorized to own and operate the VY Station beyond March 21, 2012, solely for purposes of decommissioning.[12]

In the Second Amended Petition, Entergy VY requests that the Board amend its CPG under 30 V.S.A. § 231 to authorize ENVY to own and ENO to operate the VY Station after March 21, 2012, and until December 31, 2014, including all necessary incidents of such operation including without limitation the storage of spent nuclear fuel.[13] The issuance of a CPG under Section 231 requires that the Board find that it will promote the general good of the State.

The determination of whether an activity will promote the general good of the State requires an assessment and weighing of relevant factors by the Board based on the evidence in

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12. Docket 6545, CPG of 6/13/02, as amended by Order of 7/11/02 at 17. Section 231 generally requires anyone who "desires to own or operate a business over which the [Board] has jurisdiction" to petition the Board for a CPG.

13. Second Amended Petition at 5.

the record. The factors considered by the Board in making a general good finding necessarily vary from case to case depending on specific circumstances. Certain considerations related to the owner and operator of a business subject to the Board's jurisdiction are generally reviewed in every CPG proceeding. As the Board previously stated in another proceeding (and reaffirmed in an earlier Order in this proceeding):

> For a prospective direct or indirect owner, manager or operator of a business subject to the Board's jurisdiction, we apply certain suitability standards, which involve, as appropriate, assessments of technical and managerial competence, of financial strength and soundness, and of matters related to reputation and conduct (often stated as whether the owner, manager or operator will be a fair partner for Vermont).[14]

In this instance, in weighing the evidence, the following considerations appear to be especially relevant to the Board's determination: (i) the nature and short duration of the activity for which authority is sought; (ii) the effect of federal preemption on the Board's authority to consider issues related to radiological safety, including radiological decommissioning (which the Board has always acknowledged), in making a determination as to the general good of the State; (iii) the terms of the MOU; and (iv) available alternatives to the MOU.

In addition, as Entergy VY recognized before its acquisition of the VY Station and continues to acknowledge, it is appropriate for the Board, in light of the nature of the requested approval, to consider the criteria set forth in Section 248(b) in making a "general good" determination under Section 231.[15] Among other things, the time-limited nature of the CPG issued in 2002 with respect to the continued operation of the VY Station means that any extension of the period of authorized operation of the VY Station beyond March 21, 2012, may

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14. Docket 7770, *Petition re Acquisition of Central Vermont Public Service Corporation and Merger with Green Mountain Power Corporation*, Order of 6/15/12 at 23; Docket 7862, Order Re: Motion for Partial Summary Judgment (6/19/13) at 6-7. *See, also,* Docket 5900, *Petition of New England Telephone & Telegraph Company for approval of a merger of a subsidiary of Bell Atlantic Corporation into NYNEX Corporation*, Order of 2/26/97 at 7-8; Docket 7599, *Petition of Northern New England Telephone Operations, et al.*, Order of 6/28/10 at 18-20; Docket 7213, *Petition of Green Mountain Power Corporation, Northern New England Energy Corporation, a subsidiary of Gaz Metro of Quebec, and Northstars Merger Subsidiary Corporation for approval of a merger*, Order of 3/26/07 at 9-10; Docket 6150, *Petition of Bell Atlantic Corp. and GTE Corp. for approval of Agreement and Plan of Merger*, Order of 9/13/99 at 48-49.

15. Docket 6545, Entergy VY Brief (5/7/02) at 14; Docket 7862, Entergy VY's Supplemental Brief and Proposed Findings of Fact (2/14/14) at 9.

have effects under the criteria of Section 248(b) relevant to a Section 231 "general good" determination, such as land use and environmental impacts, economic benefits, need and reliability.[16]

It is important to note that Entergy VY is not now seeking a CPG under Section 248,[17] and that, therefore, the Board is not required to strictly apply the provisions of Section 248 in making a general good determination. The use of Section 248(b) criteria in the context of this proceeding is only to provide guidance and "a frame of reference" for the Board in evaluating and weighing a broad range of considerations that may be relevant in this case in making the determination of general good under Section 231.[18] It should also be obvious that the weight that the Board would accord to certain Section 248(b) criteria in the context of an extension of the existing CPG until December 31, 2014, could be very different than in the case of a 20-year CPG extension.

B. Preemption

Early in this case, Entergy VY filed two motions relating to the scope of preemption in this Docket, and its implications for developing the evidentiary record. We took both of these motions under advisement.[19] The first motion was filed in June of 2012, when the Company requested a declaratory ruling to define the scope of this proceeding and to place the Board and all parties "on notice at the outset of this proceeding of Entergy VY's positions on federal preemption and federal law."[20] The Company argued that the Atomic Energy Act ("AEA")

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16. Docket 7862, Order Re: Motion for Partial Summary Judgment (6/19/13) at 8-9.

17. Section 248(e)(2), which was enacted by Act 160, would have required Entergy VY, among other things, to obtain a CPG under Section 248 to permit operation after March 21, 2012. Act 160 has been determined to be preempted by the federal Atomic Energy Act. *Entergy Nuclear Vt. Yankee, LLC v. Shumlin* , 838 F. Supp. 2d 183, 242 (D. Vt. 2012), *aff'd in part, rev'd in part,* 733 F.3d 393 (2d Cir. 2013).

18. Docket 7862, Order Re: Motion for Partial Summary Judgment (6/19/13) at 8-9.

19. Our action in taking these motions under advisement was consistent with our previous decision in March of 2012 in Docket 7440 to reserve ruling on the scope of preemption as applied to the Company's request for relicensing until "we have a clear statement from Entergy VY specifying precisely what approvals it seeks from this Board and the bases for those approvals, and the specific evidence that the parties seek to introduce." Docket 7440, Order of 3/29/12 at 8.

20. *Motion for Declaratory Ruling Prescribing Scope of Proceeding,* dated June 22, 2012 at 1 (the "Entergy DR Motion").

preempts state regulation of a nuclear power plant with regard to nuclear safety concerns, and that this field preemption applies not only to state regulations that expressly invoke nuclear safety, but also those that focus on non-safety consequences of nuclear safety concerns and those that use a non-safety rationale as a "pretext" for a safety rationale.[21] Entergy VY maintained that, to avoid AEA field preemption, our ultimate decision in this case must be exclusively based upon "an independent, non-safety rationale" and cannot be based on "a stated rationale that is objectively implausible."[22] Thus, according to the Company, the Board has no jurisdiction to consider nuclear safety concerns and thus "may not rely upon any evidence regarding nuclear safety" in ruling on the CPG petition; nor may the Board consider "evidence concerning the economic consequences that inevitably flow from concerns relating to radiological health and safety. . . ."[23]

Later, building on the foregoing arguments, the Company filed a second motion in November of 2012, in which it extensively objected on grounds of preemption to the admissibility of much of the prefiled testimony of NEC, CLF and the Department.[24] Among other things, Entergy VY objected to evidence regarding: (1) regional power system reliability; (2) land use and aesthetics; (3) Vermont's Comprehensive Entergy Plan; (4) economic concerns; (5) tourism and the "Vermont brand"; (6) the financial soundness and viability of Entergy VY and the VY Station; and (7) whether Entergy is a "fair partner."[25]

Thereafter, during the technical hearings, Entergy VY consistently objected to lines of questioning on grounds of preemption, asserting broadly that the witnesses' answers could not be admitted into the record because there was no legitimate, non-preempted state regulatory purpose

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21. Entergy DR Motion at 2.

22. Entergy DR Motion at 2 and 5.

23. Entergy DR Motion at 4 (citing *Vango Media, Inc. v. City of New York*, 34 F.3d 68, 73 (2d Cir. 1994)).

24. *Objection to Admission of Prefiled Direct Testimony and Exhibits Submitted on Behalf of the Department of Public Service, Conservation Law Foundation, and New England Coalition*, dated November 21, 2012 "(Entergy Objections Motion.")

25. *See generally* Entergy Objections Motion.

to be served by offering it for the Board's consideration.[26] From Entergy VY's point of view, this evidence, along with the objected-to prefiled testimony, was strictly being offered to serve as a "pretext" for regulating radiological health and safety concerns by providing "implausible" rationales to deny the Company a CPG.

This Board has long recognized that federal law places limitations on the State's jurisdiction to regulate a nuclear generation facility.[27] The federal government has exclusive jurisdiction over radiological safety concerns (except for enumerated areas expressly ceded to the states, such as the authority to regulate the air emission of radiation).[28] The United States Supreme Court has held that this federal jurisdiction over radiological safety occupies the entire field.[29] The NRC "was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials" and "[u]pon these subjects no role was left for the states."[30] Finally, under traditional preemption principles, the Board's jurisdiction over nuclear power plants is limited to the extent that it directly conflicts with federal jurisdiction exercised by the NRC or would frustrate the purposes of the federal regulation.

Nonetheless, we find Entergy VY's characterization of the extent of federal preemption in this proceeding to be overbroad. The regulatory scheme applicable to nuclear generation facilities has been expressly described as one of *dual jurisdiction* — a framework within which the states retain significant authority. The Supreme Court has observed that Congress:

> intended that the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that states retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns.[31]

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26. *See, e.g.*, tr. 2/11/13 at 77 (reliability); tr. 2/11/13 at 95-96 (land use and aesthetics); 2/14/13 at 90 (Comprehensive Energy Plan); tr. 2/11/13 at 112 (economic concerns); tr. 2/11/13 at 34 (tourism); tr. 2/15/13 at 122 (financial viability); 2/15/13 at 68 (fair partner).

27. *See e.g.*, Docket 6545, Order of 6/13/02 at 121-123.

28. *Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 212 (1983)(hereinafter *"PG&E"*).

29. *Id.*

30. *PG&E* at 207.

31. *PG&E* at 205.

These other areas of state authority encompass traditional state concerns such as land use.[32] The *PG&E* decision notes that federal law explicitly preserves state authority to regulate these activities for other purposes:

> Nothing in this section shall be construed to affect the authority of any state or local agency to regulate activities for purposes other than protection against radiation hazards.[33]

The Supreme Court's ruling in *PG&E* and federal law thus reserves substantial jurisdiction to the State of Vermont over the VY Station — for instance, to impose site restoration standards — so long as the State (through the Board) does not regulate radiological health or safety and otherwise restricts the exercise of its jurisdiction to areas of traditional state concern. In turn, state regulatory authority may be lawfully exercised unless it directly conflicts with federal requirements.

Under Board precedent, the areas of traditional state concern are reflected in the criteria of 30 V.S.A. §§ 231 and 248, which are generally applicable standards that must be satisfied in order for the Board to issue a CPG permitting the ownership, operation and construction of generation facilities in this State.[34] The application of the Section 231 and Section 248 criteria is not preempted by federal regulation when these criteria are applied in the same way as they would be in the case of a non-nuclear exempt wholesale generator — a point which Entergy VY has conceded.[35] It then reasonably follows that there is no bar of preemption that absolutely forecloses the parties from offering the evidence they deem necessary to support their arguments regarding the criteria applicable to the review of Entergy VY's Second Amended Petition, just as they would with respect to any other petition for a CPG under Section 231 or Section 248.

While they have differed in approach and scope, the theory of the case presented by each party opposing Entergy's CPG petition has been that there is insufficient evidence to support affirmative findings under one or more of the applicable criteria of Section 231 or the Section 248 criteria that we previously determined should inform our judgment as to whether issuance of

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32. *PG&E* at 212.
33. *PG&E* at 199 quoting 42 U.S.C. § 2021(k).
34. *See* 30 V.S.A. §§ 231 and 248.
35. Entergy DR Motion at 7.

the CPG requested by Entergy VY will promote the general good of the State. The testimony to which Entergy VY has objected on grounds of preemption is addressed, among other things, to environmental concerns, economic or commercial considerations, issues of plant or system reliability, energy diversity, financial soundness, corporate character (i.e., "fair partner") and other non-radiological safety issues.[36] In our experience, these subjects are relevant to the legal criteria at issue in this proceeding and are well-within the Board's traditional state-law regulatory jurisdiction over in-state energy generation facilities and their operators.[37] Accordingly, to the extent it is directed at the criteria of Sections 231 and 248, we find the objected-to testimony to be relevant to our review in this Docket of the Company's petition for a CPG.

To the extent the objected-to evidence may be relevant to any non-preempted criteria and state regulatory objectives, the Company has argued throughout this case — but has never actually demonstrated — that this evidence can do no more than provide an "objectively implausible" basis for denying a CPG and therefore simply is designed to supply the Board with a "pretext" for exercising jurisdiction in the forbidden fields of radiological health and safety. However, in our view, the preemption objections which Entergy VY has framed in terms of "implausibility" and "pretext" are actually directed at the weight the Company believes the Board is legally permitted to give to the allegedly preempted evidence; these objections do not go to the admissibility *per se* of the evidence in terms of its facial relevance and materiality to the statutory considerations the Board must weigh in determining whether to grant Entergy VY a CPG.[38]

Having now had the benefit of reviewing all of the parties' arguments as briefed and the evidence offered in support thereof, we find no basis for sustaining Entergy VY's admissibility

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36. *See, e.g., generally,* Entergy Preemption Objections; *supra* n. 26.

37. *See, e.g.,* Docket 7833, Order of 2/11/14 (denying CPG); Docket 7770; Order of 6/15/12 (granting CPG); Docket 7628, Order of 5/31/11 (granting CPG); Docket 7270, Order of 12/21/07 (denying CPG). Significantly, Entergy VY has made no showing that the objected-to evidence departs from the scope and nature of evidence that is commonly offered for the Board's consideration in other CPG proceedings involving non-nuclear generation facilities.

38. Our conclusion on this point is reinforced by the fact that during the technical hearings, it became apparent that some of the Company's preemption objections were cast so broadly as to not allow that some of the objected-to evidence may be admissible to serve non-preempted evidentiary purposes. *See, e.g.,* tr. 2/11/13 at 10-12; 35-36; 41-46. In our view, this is a further reason to exercise our discretion in favor of admitting the objected-to evidence into the record.

objections, whether on grounds of facial preemption or upon the theories of "pretext" and "implausibility." Whatever the motive may have been in eliciting or offering the objected-to evidence for admission into the record, such motives are not germane to the Board's assessment of the admissibility of this evidence. Rather, as Entergy VY itself acknowledges, for purposes of crafting an evidentiary record in this proceeding, the controlling considerations are whether the evidence offered is relevant, material, or "of a type commonly relied upon by reasonably prudent men in the conduct of their affairs."[39] In turn, for purposes of Entergy VY's specific preemption concerns, the controlling consideration is what evidence the Board ultimately is persuaded to rely upon in supporting its findings and conclusions of law; the Board may not base its decision on the regulation of radiological safety.

Thus, we do not accept Entergy VY's argument that all of the objected-to evidence must be excluded because the mere admission and consideration of that evidence inevitably ordains the outcome of a final Board order that strays into improperly exercising jurisdiction in a preempted area. In our experience the public good determinations to be made in our proceedings are best made by affording every party a full and fair opportunity — subject to the applicable rules of procedure and evidence — to put on the evidence they believe will best support their theory of the case. We perceive no cause to treat this proceeding any differently.

Accordingly, for the foregoing reasons, we now overrule Entergy VY's preemption-based objections to the prefiled testimony of the Department, CLF, and NEC as set forth in the Entergy DR Motion and the Entergy Objections Motion. Additionally, for the same reasons, we now overrule Entergy's preemption-based objections to the answers elicited through cross-examination during the technical hearings. To the extent that any of this testimony was admitted into the record subject to our taking a preemption objection under advisement, it is now admitted without further preemption-based qualification.[40]

We turn next to Entergy VY's second objection to the admissibility of "fair partner" evidence, which the Company has argued should be excluded from the record because any "fair

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39. Entergy Objections Motion at 2 (*discussing* 3 V.S.A. § 810(1) and the Vermont Rules of Evidence).

40. Our ruling on preemption is not intended to alter, displace or disturb any other previous evidentiary ruling we have made to date in this proceeding.

partner" criteria are "impermissibly vague." According to Entergy VY, the "fair partner" criteria lack explicit standards to deter "ad hoc and subjective" decisionmaking by the Board, along with the attendant dangers of arbitrary and discriminatory application.[41] We do not find the Company's argument to be persuasive. Throughout this proceeding, Entergy VY has been represented by capable local counsel who is well-versed in the regulatory case law of Vermont,[42] as well as in our own prior orders on point, which we note the Company has extensively analyzed and has referred us to during hearings.[43] Moreover, the prefiled testimony, hearing transcripts and briefs reflect that there has been a clear understanding of the corporate behavior under scrutiny in this proceeding — the question of the Company's compliance with Vermont statutes, rules and Board orders, its willingness to fulfill its commitments, and the candor and accuracy of its statements to the Board, the State and to other parties in this case. Therefore, we are satisfied that Entergy VY has had fair notice sufficient to "provide people of ordinary intelligence a reasonable opportunity to understand what conduct" is expected of a "fair partner" in Vermont,[44] and that the failure to behave as a "fair partner" can result in the denial of a CPG.[45] Our assessment in this regard is borne out by the fact that Entergy VY has had no difficulty proposing affirmative findings to prove it is a fair partner.[46]

In any event, we find that Entergy VY's concern about the alleged vagueness of the "fair partner" criteria largely implicates due process considerations of notice and enforceability — essentially these are not evidentiary issues that are properly addressed by excluding information from the record. Thus, as with the preemption objections, we find the "void for vagueness" objection is actually directed at the weight the Company believes the Board is legally permitted to give to the "fair partner" evidence; this objection does not go to the admissibility *per se* of the

41. *See* Entergy Objections Motion at 5 (citing *Cunney v. Bd. of Trustees of Vill. Of Grand View, N.Y.*, 660 F.3d 612, 621 (2d Cir.2011)(citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000)); Entergy DR Motion at 14-15 (same).

42. *See In re Petition of Quechee Service Co., Inc.*, 166 Vt. 50, 62-63, 690 A2d. 354, 365 (1996)(approving Public Service Board's reliance on past conduct in judging CPG applicant's present fitness to operate regulated utility).

43. *See* Entergy VY Initial Brief dated 8/19/13 at 78-121; Entergy VY Reply dated 10/25/13 at 63-64.

44. *See Cunney*, 660 F.3d at 621 (citation omitted).

45. *See Re Quechee Services Co. Inc.*, Docket 5699, Order of 12/30/94, *aff'd* 166 Vt. 50 (1996).

46. *See* Entergy VY Proposal for Decision dated 8/19/13 at 27-28; Entergy VY Supplemental Proposed Findings dated 2/14/14 at 10-12.

evidence. Accordingly, we now overrule the "void for vagueness" objection to "fair partner" evidence as raised in the Entergy DR Motion and the Entergy Objections Motion. To the extent that any such prefiled testimony or any such testimony elicited during the technical hearings was admitted into the record subject to our taking the Company's "void for vagueness" objection under advisement, it is now admitted without further qualification on these "void for vagueness" grounds.[47]

C. NEC Procedural Objection

NEC takes exception to the fact that an MOU has been filed in the late stages of this proceeding which, if accepted by the Board, would result in a final order terminating the litigation on terms that were negotiated without input from NEC and other intervenors.[48] From NEC's point of view, the effect of these events has been that "the Board's authority to hear and independently rule on citizen concerns" has been "snatched out of the adjudicatory space and handed off to a minority of the parties for resolution in private talks well beyond the legal reach of the Board and the interveners . . . ."[49] NEC thus takes the position that the Board "must either reject the MOU outright or affirm the hearing rights of the interveners" by addressing their concerns in an order containing conditions beyond what is provided for in the MOU.[50] We think that NEC misconstrues the effect of the MOU and the Board's decision and therefore we reject NEC's argument.

First, it is unclear what NEC means when it refers to "affirming" hearing rights. Every party in this proceeding – including NEC – has received ample opportunity to conduct discovery, file testimony, conduct cross-examination and submit briefs arguing for their positions, both on the merits of the case as litigated in the winter and summer of 2013, and on the MOU that was filed by the Department, ANR and Entergy VY on December 23, 2013, as a proposed outcome for this case after five years of litigation. If NEC "failed to apprehend" until the end of the final

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47. Our ruling on this issue is not intended to alter, displace or disturb any other previous evidentiary ruling we have made to date in this proceeding.

48. New England Coalition's Briefs on the MOU dated 2/21/14 at 1-3 and 5-6 ("NEC MOU Brief").

49. NEC MOU Brief at 6.

50. NEC MOU Brief at 17.

day of the MOU technical hearings on January 31, 2014, that the merits of the MOU were under review for possible acceptance as the resolution of the litigation, then the cause of NEC's misapprehension does not lie with the Board's process: the MOU technical hearings were noticed for this very purpose; an opportunity was provided at a lengthy status conference four weeks before the MOU technical hearings for all parties to discuss the proposed scope of the MOU technical hearings; all parties were entitled to conduct discovery and to file supplemental testimony on the MOU; all parties were afforded an opportunity to conduct cross-examination during the two days of MOU technical hearings; all parties were entitled to brief their issues thereafter which could encompass not only the MOU, but also the parties' positions on the case as a whole, and non-signatories to the MOU were given an additional week to do so.[51] In any event, NEC has acknowledged that, "[a]s a practical matter, there is no guarantee that through the hearing process" the Board would have given the intervenors any more relief than the terms of the settlement that have been negotiated by the MOU Signatories.[52] What NEC fails to appreciate is that all parties had the right to present their case in testimony, cross-examine witnesses, and submit briefs on the full record of the case, not just the MOU. Therefore, we find no basis to conclude that NEC's "hearing rights" have in any way been compromised by the decision of this Board to accept a settlement in place of issuing a final judgment order.

Second, as we have repeatedly emphasized in this proceeding, the ultimate purpose is to determine whether or not the general good of the State will be promoted by granting Entergy VY an amended CPG to continue owning and operating the VY Station. The MOU embodies a settled consensus among the petitioner and the two state agencies with supervisory jurisdiction over the Company and the VY Station that the general good of the state indeed would be promoted through the realization of the benefits secured by the MOU, in exchange for the concessions made to reach that agreement. It is a proposed outcome for this Docket that has been

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51. *See Notice of Hearing* dated 12/23/13 ("the purpose of the status conference will be to discuss the parties' recommendations as to how to proceed in this docket in light of the filing of the Memorandum of Understanding . . . ."); *Order re: Schedule for Further Proceedings* dated 1/2/14 at 2 (establishing deadline for parties who did not sign MOU to file testimony or prehearing memoranda); *see generally* Docket 7862 tr. 1/2/14 (transcript from status conference).

52. NEC MOU Brief at 6.

brought before us for our consideration, following an opportunity for hearing and briefing from all parties – including NEC.[53] In accepting this MOU on its terms, we are exercising our independent judgment that it is in the public interest to do so, based on the findings we have made and conclusions of law we have reached in this decision. There is nothing unusual about our proceeding in this fashion. We therefore reject NEC's suggestion that our willingness to accept a settled outcome in a contested case proceeding signals any preferential treatment of any kind for the signatories of the MOU. NEC's position is puzzling at best, given that our process is entirely consistent with the Administrative Procedures Act, which governs how the Board conducts its proceedings and which expressly authorizes the Board to accept stipulations and settlements in order to informally dispose of contested cases.[54]

IV. FINDINGS AND DISCUSSION

A. Findings Concerning Proposal and Entergy VY

1. ENVY and ENO are indirect subsidiaries of Entergy Corporation. There are three intermediary affiliates above ENVY. They are Entergy Nuclear Vermont Investment Company, Entergy Nuclear Holding Company #3, and Entergy Nuclear Holding Company. Exh. CLF-JC-7 at 5; Docket 7404, Order of 6/24/10 at 9.

2. The VY Station is a 628 (winter)/604 (summer) megawatt electric capacity boiling water reactor located on approximately 148 acres of land along the Connecticut River in the Town of

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53. NEC's complaint that the MOU has somehow "supplanted" rather than "supplemented" the record basis for our decision on the merits is misplaced. NEC MOU Brief at 6. With the evident exception of NEC, all parties understood that, in light of the MOU filed in December of 2013, the focus of the Docket shifted to the following question: "is the MOU better than the alternative of going forward with the underlying case or not." Tr. 1/31/14 at 52 (Volz). At the end of the MOU technical hearings, it was pointed out to NEC that arguments in favor of attaching additional conditions to the MOU effectively were arguments in favor of not approving the MOU. Tr. 1/31/14 at 52 (Volz). At no time was NEC "instructed" to desist from proposing conditions or to abandon arguments based on evidence developed in the case before the MOU was filed. In any case, NEC cannot complain of any prejudice, given that we have fully considered all of NEC's filings in this case, including most recently the NEC MOU Brief, and have noted that the NEC MOU Brief incorporates by reference all of NEC's previous arguments and proposed findings, as well as many of those of other parties who originally opposed the Company's petition for a CPG. *See* NEC MOU Brief at 18.

54. 3 V.S.A. § 809(d)("Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.")

Vernon, Vermont. T. Michael Twomey, Entergy VY ("Twomey") pf. at 2; Harry L. Dodson, Entergy VY ("Dodson") pf. at 8; exh. EN-TMT-2 at 2.

3. The VY Station was originally constructed by VYNPC and was owned by VYNPC until 2002. Two Vermont electric distribution utilities, Central Vermont Public Service Corporation and Green Mountain Power Corporation, collectively held a majority ownership interest in VYNPC. Docket 6545, Order of 6/13/02 at 13.

4. The VY Station supplied about one-third of the electricity used in the state until the purchase power contracts with Vermont utilities expired in 2012. Exh. PSD-ASH-1 at 65-66.

5. On June 13, 2002, the Board approved, subject to certain conditions and exceptions, the sale of VY Station by VYNPC to Entergy VY, other related transactions, and a memorandum of understanding between the Docket 6545 petitioners and the Department. Entergy VY commited to pay a total of $180 million to VYNPC under the sale agreement with VYNPC. Docket 6545, Order of 6/13/02 at 23, 162-167.

6. On June 13, 2002, the Board issued an Order approving the sale and a CPG pursuant to 30 V.S.A. § 231(a) to ENVY to own and ENO to operate the VY Station until March 21, 2012. Under both the sale Order and CPG, ownership and operation of the VY Station beyond March 21, 2012, for other than decommissioning purposes, was prohibited absent issuance of a new or renewed CPG by the Board. Docket 6545, CPG (6/13/02); Docket 6545, Order of 7/11/02 at 17; Docket 6545, Order of 6/13/02 at 164 & 165; Docket 6545 MOU at ¶ 12; Docket 7440, Order of 3/19/12 at 2-5 & 15-19; Dockets 6545, 7082 and 7440, Order of 11/29/12.

7. The Board approved a power uprate project at the VY Station in 2004, which resulted in an increase in power generating capacity of 20 percent. Exh. PSD Cross-WC-15 at 3; Docket 6812, Order of 3/15/04.

8. The Board approved the construction of a dry fuel storage facility at the VY Station in 2006. Docket 7082, Order of 4/26/06.

9. The VY Station's federal operating license was scheduled to expire on March 21, 2012, after forty years of operation. In March 2011, the NRC granted the VY Station a license to operate for an additional 20 years, through March 2032. Twomey pf. at 4-5; exh. EN-TMT-2; exh. PSD-Cross-WC-15 at 3.

10. On March 3, 2008, Entergy VY filed a petition with the Board seeking authority to continue operation of the VY Station for an additional 20 years through March 21, 2032. Docket 7440, Petition of 3/3/08 at 2.[55]

11. On January 19, 2012, the United States District Court for the District of Vermont issued a decision holding that provisions of Act 160, codified at 30 V.S.A. § 248(e)(2), were preempted by the federal Atomic Energy Act, and enjoined the enforcement of these provisions. *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 838 F. Supp. 2d 183, 243 (D. Vt. 2012),

12. On March 29, 2012, the Board ordered that Entergy VY file the First Amended Petition and that a new docket be opened to consider the amended petition. Docket 7440, Order of 3/29/12 at 9.

13. On April 16, 2012, Entergy VY filed the First Amended Petition seeking Board approval to continue operations at the VY Station for 20 years beyond the current March 21, 2012, expiration date until March 21, 2032. The Board then opened this Docket to consider the First Amended Petition. First Amended Petition.

14. On August 14, 2013, the United States Court of Appeals for the Second Circuit issued a decision, part of which affirmed the decision of the District Court that provisions of Act 160 were preempted by the federal Atomic Energy Act. *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393 (2d Cir. 2013).

15. On August 27, 2013, Entergy VY announced that it would be closing the VY Station and filed the Second Amended Petition in this docket seeking Board approval to continue operations at the VY Station only until December 31, 2014. Second Amended Petition.

16. On December 23, 2013, Entergy VY, the Department and ANR entered into, and filed with the Board, the MOU regarding issues associated with the VY Station, Entergy VY's plans to close the VY Station, Entergy VY's continued operation of the VY Station through December 31, 2014, and the restoration of the VY Station site. Exh. Joint-1.

17. Under the MOU, Entergy VY agrees to cease all power generating operations at the VY Station, other than necessary emergency back-up generators, by December 31, 2014. Exh. Joint-1 at ¶ 2.

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55. *See* procedural history, above, for more information about Board proceedings in Docket 7440.

18. The MOU includes a limited option to extend operations through February 28, 2015, in response to "unexpected operational events" with the agreement of the Department and subject to the approval of this Board and the NRC. Exh. Joint-1 at ¶ 2.

19. Under the MOU, Entergy VY agrees to "operate the VY Station in accordance with its existing National Pollutant Discharge Elimination System ('NPDES') permit" and "to continue to pursue issues related to Entergy VY's thermal discharge through ANR's NPDES permitting process." Exh. Joint-1 at ¶ 4.

20. Pursuant to the MOU, Entergy VY will complete a site assessment study of the costs and tasks of site restoration, including a full assessment of all non-radiological conditions, and to deliver that study to the Department, ANR, and the Vermont Department of Health ("VDH") by December 31, 2014. Exh. Joint-1 at ¶ 5.

21. Under the MOU, ENVY commits to work with the Department, ANR, and VDH "in good faith to determine in a timely and cost-effective manner overall site restoration standards necessary to support use of the property without limitation (excepting any independent spent fuel storage installation ('ISFSI') and any perimeter related to it)"; such standards will prohibit ENVY from employing rubblization (i.e., demolition of decontaminated structures into rubble that is buried at the site) and require ENVY to address "removal of structures and radiological exposure levels." Exh. Joint-1 at ¶ 5.

22. Under the MOU, ENVY commits to "commence site restoration in accordance with the overall site restoration standards . . . promptly after completing radiological decommissioning." Exh. Joint-1 at ¶ 6.

23. Under the MOU, ENVY agrees to establish a trust fund dedicated to site restoration, to pay $25 million into the trust fund by December 31, 2017, and to "provide financial assurance, in the form of a parent guarantee from Entergy Corporation in the amount of $20 million for the Site Restoration Fund." Exh. Joint-1 at ¶ 7.

24. Under the MOU, ENVY (or any affiliate that may come to own the VY Station property) agrees to grant the State a right of first refusal before selling the VY Station property or any subpart thereof. Exh. Joint-1 at ¶ 8.

25. Pursuant to the MOU, within 30 days of a Board Order approving the MOU, ENVY will pay to Vermont's Clean Energy Development Fund ("CEDF") all money held in escrow arising from ENVY's quarterly payments related to the CEDF since March 21, 2012. Exh. Joint-1 at ¶ 9.

26. ENVY will pay approximately $5.2 million to the CEDF under the terms of the MOU. Exh. Joint-1 at ¶ 9.

27. Pursuant to the MOU, ENVY will "make a payment to the State of Vermont on or before April 1 of each [of the next five] year[s] in the amount of $2 million each year to promote economic development in Windham County, Vermont." Exh. Joint-1 at ¶ 11.

28. Under the MOU, Entergy VY is prohibited from challenging enforcement of any of "the obligations specifically and expressly undertaken" in the MOU as preempted by federal law. Exh. Joint-1 at ¶ 12; *see* tr. 1/30/14 at 77 (Recchia); tr. 1/31/14 at 139-140 (Twomey).

29. Under the MOU, Entergy VY agrees to withdraw its appeal to the Supreme Court of Vermont from this Board's decisions in Docket 7440 and, jointly with the Department, to recommend that this Board close Docket 7600. Exh. Joint-1 at ¶ 20.

30. The MOU provides that except as expressly stated in the MOU, all other agreements, Board orders and MOUs remain in full force and effect. Exh. Joint-1 at ¶ 17.

B. Fair Partner

Findings

Services to Vermont

31. For the term of the Purchase Power Agreement entered into following Entergy VY's acquisition of the VY Station in 2002, Entergy VY provided power to some Vermont utilities. Entergy VY provided stable rates for customers in Vermont, relieved the utilities of the risks associated with operating the VY Station, invested more than $400 million in the facility to maintain it as a reliable source of power for the New England region, and paid wages to the VY Station employees and taxes to local and state governments. Tr. 1/31/14 at 147 (Twomey).

32. As part of the Docket 6545 MOU, Entergy VY entered into an Access Memorandum of Understanding ("Access MOU") intended to provide the state Nuclear Engineer with access to

information necessary to monitor the VY Station's operation and management. Entergy VY has provided access in accordance with the Access MOU. Tr. 2/26/13, Vol. II, at 82-83 (Vanags).

33. Entergy VY has worked cooperatively with the State Nuclear Engineer. Tr. 2/26/13, Vol. II, at 110-111 (Vanags); tr. 6/19/13, Vol. II, at 116-117 (Vanags).

34. The VY Station has implemented a comprehensive tracking program to verify that Entergy VY is meeting its commitments to state regulators. *See* exh. EN Redirect-Buteau-2.

35. Entergy VY employees are active in their communities and regularly volunteer their time and labor to support local projects. Twomey pf. at 12.

36. Entergy VY provides approximately $300,000 to $400,000 annually to support local charities. Twomey pf. at 12.

Recent Performance

37. The VY Station will close at the end of the current fuel cycle whether or not the Board grants a CPG approving the MOU. Tr. 1/31/14 at 131-133, 162-163 (Twomey).

38. The much shorter operating period requested by Entergy VY's Second Amended Petition, in comparison with the 20-year CPG Entergy VY previously requested, reflects materially changed circumstances, and aligns many of the interests of Entergy VY and the State of Vermont. Tr. 1/30/14 at 113, 150-151 (Recchia).

39. The shorter operating period also will increase the likelihood that Entergy VY and the State will not arrive at different interpretations of Entergy VY's commitments to the State, including its commitments under the MOU. Christopher Recchia, DPS ("Recchia") pf. at 3; tr. 1/30/14 at 37, 106, 150-151 (Recchia).

40. The MOU establishes a clear schedule and specifies amounts for each payment that ENVY is required to make. Exh. Joint-1 at ¶¶ 7, 9, 11.

41. The existence of the MOU indicates that the parties to it have been able to restore a working relationship. According to the Department, high-level Entergy VY representatives have shown a positive evolution in their commitment to the State of Vermont. Recchia pf. at 3; Twomey supp. pf. at 19.

42. The MOU establishes a framework for developing site restoration standards. Exh. Joint-1 at ¶ 5.

43. The clarity with which the MOU specifies the payment schedule and the framework for setting standards in regard to site restoration will reduce any opportunity for Entergy VY to reinterpret its commitments to the State. Recchia pf. at 3; tr. 1/30/14 at 36-37, 106, 109-111, 150-151 (Recchia).

44. Entergy VY explicitly has waived its right to challenge as preempted by federal law an action to enforce the obligations it has assumed in the MOU. Tr. 1/31/14 at 139-140 (Twomey).

45. Entergy VY's commitment to (1) establish a Site Restoration Fund, (2) to make five annual payments to the State to foster economic development in Windham County, and (3) to work in good faith with the Department, ANR, and VDH to establish standards for site restoration support the conclusion that Entergy VY will operate as a fair partner to the State of Vermont. Recchia pf. at 3-4; tr. 1/30/14 at 113, 148-149 (Recchia).

Regulatory Compliance

46. At the time of the sale of the VY Station, various Entergy VY officials, including Michael Kansler, Senior Vice President and Chief Operating Officer of ENO and ENVY, testified that Entergy VY would agree that the Board's Order approving the sale and the CPG issued by the Board should be limited to a term of years ending with the VY Station's then-current license termination date (March 21, 2012) and that operation of the VY Station beyond its license termination date would be allowed only if the CPG has been renewed by the Board. Exhs. PSD-2 at 1, 26; PSD-3 at 3; PSD-5 at 8; PSD-6 at 7; PSD-7 at 31.

47. During Docket 6545, Entergy VY voluntarily executed a Memorandum of Understanding with the Department (as well as with Vermont Yankee Nuclear Power Corporation, Central Vermont Public Service Corporation, and Green Mountain Power Corporation) in order to secure the Department's support for Entergy VY's petition for a Certificate of Consent, an Order approving its purchase of the VY Station, and the CPG. Paragraph 12 of the Docket 6545 MOU provides as follows:

> Board Approval of Operating License Renewal: The signatories to this MOU agree that any order issued by the Board granting approval of the sale of VYNPS to ENVY and any Certificate of Public Good ("CPG") issued by the Board to ENVY and ENO will authorize operation of the VYNPS only until March 21, 2012, and thereafter will authorize ENVY and ENO only to decommission the VYNPS. Any such Board order approving the sale shall be so conditioned, and any Board order issuing a CPG to ENVY and ENO shall provide that operation of VYNPS beyond March 21, 2012, shall be allowed only if application for renewal of authority under the CPG to operate the VYNPS is made and granted. Each of VYNPC, CVPS, GMP, ENVY and ENO expressly and irrevocably agrees: (a) that the Board has jurisdiction under current law to grant or deny approval of operation of the VYNPS beyond March 21, 2012; and (b) to waive any claim each may have that federal law preempts the jurisdiction of the Board to take the actions and impose the conditions agreed upon in this paragraph to renew, amend or extend the ENVY CPG and ENO CPG to allow operation of the VYNPS after March 21, 2012, or to decline to so renew, amend or extend.

Exh. PSD-1.

48. The Board's June 13, 2002, Order approving the sale contained a Condition 8, which stated that "[a]bsent issuance of a new Certificate of Public Good or renewal of the Certificate of Public Good . . . Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. are prohibited from operating the Vermont Yankee Nuclear Power Station after March 21, 2012." The CPG issued at the same time specified that ownership and operation of the VY Station was not permitted after March 21, 2012. This latter provision was subsequently modified to allow ownership after that date, but only for the purpose of decommissioning. Docket 6545, Order of 6/13/02 at 164; Order of 7/11/02 at 17; Order of 7/15/02; CPG dated 6/13/02.

49. On March 19, 2012, the Board ruled, in response to Entergy VY's request for a declaratory ruling on this issue, that the limitation in the Docket 6545 Order approving the sale of the VY Station was a condition of the sale and not part of the on-going CPG renewal that Entergy VY had requested and that therefore the deadline was not extended by virtue of 3 V.S.A. § 814(b). Docket 7440, Order of 3/19/12 at 16-19.

50. Entergy VY has continued to operate the VY Station since March 21, 2012, notwithstanding Condition 8 of the Docket 6545 Order, its agreement in the Docket 6545 MOU, the absence of a new CPG, and the Board's rulings in Docket 7440 concerning the operation of Condition 8. Tr. 6/28/13 (Vol. II) at 19-20 (Hopkins); findings 47 through 49, above.

51. In an Order dated November 29, 2012, in Dockets 6545, 7082, and 7440, the Board found that Entergy VY has "voluntarily elected to continue operating Vermont Yankee even after the Board affirmatively stated that Condition 8 of the Sale Order and the applicable conditions in the DFS (dry fuel storage) Order and CPG were not extended by 3 V.S.A. § 814(b)." Order at 28.

52. In Docket 6545, an Entergy VY witness also represented that "ENVY and ENO expressly and irrevocably agree to waive any claim they or their affiliates may have that the jurisdiction of the Board to issue the CPG is preempted by federal law." Exh. PSD-06 at 8.

53. In the Docket 6545 MOU, Entergy VY "expressly and irrevocably" agreed to waive any preemption claim challenging "the jurisdiction of the Board" to grant or deny a CPG for operation beyond March 21, 2012. Exh. PSD-1 at ¶ 12.

54. In the Order approving Entergy's petition in Docket 6545, the Board found that Entergy VY had agreed "that the Board has complete jurisdiction to decide whether to renew ENVY and ENO's certificates of public good if they seek to run Vermont Yankee past the expiration of its present term." Docket 6545, Order of 6/13/02 at 133-134.

55. In Docket No. 7082, Entergy VY entered into an MOU which provided that Entergy VY would not raise preemption to prevent enforcement of its express obligations under the MOU. Exh. PSD-09 at 3.

56. On November 5, 2003, Entergy VY "requested permission from the Board to construct two buildings on concrete slab foundations." Docket 6812, Order of 2/18/05 at 5.

57. Five days later, Entergy VY "commenced the site preparation and installation of the two temporary structures" despite not having received the Board's permission or approval. Entergy VY did not notify the Board or the Department that site preparation had commenced until November 26, 2003. *Id.* at 5–7.

58. The Board imposed an $85,000 penalty on Entergy VY for violation of Section 248's prohibition against site preparation or construction absent prior Board approval. *Id.* at 19.

59. On June 21, 2005, Entergy VY and the Department entered into a Memorandum of Understanding pertaining to Docket 7082, in which Entergy agreed that "[m]onthly the

Company will manually conduct radiation surveillance of each [cask located on the Dry Fuel Storage pad]." Exh. PSD-09 at ¶ 5.

60. On July 31, 2009, Entergy VY informed the Board that Entergy had "not initiated monthly radiation surveillances of the . . . casks following the initial radiation surveillance conducted at the time each of the five casks were loaded." Exh. PSD-Cross-96 at 1.

61. On June 13, 2003, the Board issued an Order granting NEC's motion to compel in Docket 6812. The Board found that Entergy VY's "disingenuous . . . reading" and "selective quotation [of Rule 78] suggest[ed] a willingness to be less than forthright with this Board." Docket 6812, *Petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., for a certificate of public good to modify certain generation facilities at the Vermont Yankee Nuclear Power Station in order to increase the Station's generation output*, Order of 6/13/03 at 5.

62. Less than four months later, the Board issued another Order in Docket 6812 imposing a $50,911 sanction on Entergy VY for its failure to provide timely and complete discovery. The Board found that Entergy VY's "corrosive and bullying attitude . . . threaten[ed] an otherwise fair and open process" and that Entergy VY had made "frivolous" arguments to resist valid discovery requests. Docket 6812, Order of 10/7/03 at 8 and 12.

Accuracy of Representations

63. Beginning in the summer of 2008 and through much of 2009, Entergy VY personnel advised those who were conducting the Comprehensive Reliability Assessment that the VY Station had no underground piping systems carrying radionuclides. Entergy VY also made similar representations in response to discovery requests in Docket 7440. Exh. Board-5 at 1; exh. CLF-JC-4 at 50-60.

64. Relying on those representations, the Comprehensive Reliability Assessment concluded that "there are no underground piping systems carrying radionuclides" at the VY Station. Exh. Board-4 at 5.

65. On February 11, 2009, Entergy VY submitted a Response and Errata to the Comprehensive Reliability Assessment that did not correct that misstatement. Exh. CLF-JC-4 at 44.

66. Relying on the Comprehensive Reliability Assessment, the Public Oversight Panel reported on March 17, 2009, that "there were no systems with underground piping that carry radioactivity at VY." Entergy VY never addressed this statement. Exh. CLF-JC-4 at 68.

67. Senior Entergy VY officials, testifying in Docket 7440 in May, 2009, represented that they did not believe there was active piping in service at that time carrying radionuclides underground. Exhibit CLF-JC-4, at 73, 80; exh. Board-5 at 4-5.

68. According to a report by the Office of the Attorney General of Vermont, Entergy VY personnel had cause to know as early as May, 2009, that the representations concerning the underground piping were not accurate. Exh. CLF-JC-4 at 62, 64, 76, 84, 92-94; exh. Board-5 at 6 and Attachment 3, 4.

69. Entergy VY did not inform the Board that there in fact were underground pipes carrying radionuclides at the VY Station until January 13, 2010, after Entergy VY received a test result indicating the presence of tritium in a groundwater monitoring well. Exh. Board-5 at 1-2.

70. In a June 4, 2010, Oorder in Docket 7440, this Board sanctioned Entergy VY for its "misrepresentations" in discovery and in the evidentiary record, and ordered that it reimburse VPIRG, NEC, and WRC for costs incurred as a result of those misrepresentations. Docket 7440, Order of 6/4/10 at 10.

71. Following an investigation, the Office of the Attorney General determined that Entergy VY "and various of its personnel repeatedly misled State officials with direct misstatements and repeatedly failed to clarify misperceptions as to the existence of underground piping carrying radionuclides" at the VY Station. Exh. Board-5 at 8.

Discussion

As we explained in our June 19, 2013, Order in this Docket and discuss above in Section III.A., the Board has traditionally looked at a range of factors in ruling on a petition under Section 231 and determining whether the ownership or operation by a company promotes the

general good of the State. One of these criterion is whether the company will act as a fair partner with the State.[56] This inquiry encompasses past business activity, regulatory performance, business reputation, and fairness towards customers. Companies authorized to conduct business within the State are expected to comply with regulatory requirements, meet any commitments they make to the Board, the Department and other entities, and present accurate information.[57]

At the outset, we must put the fair partner consideration in context. As a matter of statute, the only decision the Board must make is a determination of whether the issuance of a CPG will promote the general good of the State. The various criteria that we have traditionally examined, and that we review in this Order, are considerations that the Board weighs in reaching the ultimate statutory determination. Unlike a proceeding under Section 248, in which the statute requires that an applicant demonstrate that it meets each of the Section 248(b) criteria, under Section 231, the only dispositive standard is the general good of the State. That is not to say that the Board-developed criteria are irrelevant. They are intended to capture the considerations that help to inform a determination of whether granting permission to a company to conduct business in Vermont promotes the general good. This includes the past and expected behavior of the applicant. Nonetheless, the fair partner standard must always be viewed in the broader context and the specific relief sought.

In this proceeding, the question of ENVY's and ENO's past activities — and how those past actions should inform our decision in this proceeding — has been highly contentious. For its part, Entergy VY acknowledges that there have been some instances where its actions have been inadequate. However, Entergy VY has consistently maintained that an evaluation of its full performance over the past twelve years shows that the shortfalls are not the norm. Entergy VY further asserts that denial of a CPG would be an unduly harsh punishment for the past actions, particularly in light of the Board's actions with regard to other companies that have fallen short on regulatory compliance and accuracy of representations. Entergy VY also highlights its recent successful negotiations with the Department on the MOU as evidence that it can successfully work with Vermont and regulators to produce a favorable result.

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56. Order of 6/19/13 at 7-8.

57. *Investigation into Citizens Utilities*, Dockets 5841/5859, Order of 6/16/97.

The Department originally raised significant concerns about Entergy VY's performance and, prior to Entergy VY's decision only to seek a CPG through the end of 2014, opposed issuance of a CPG. However, the Department has recently successfully negotiated the MOU with Entergy VY. The Department thus contends that the significance of those concerns and the appropriate weight the Board should attribute to them has changed in light of the shortened operational time frame Entergy VY now seeks and the substantive provisions of the MOU. The Department asserts that the brief remaining operational period means that fewer opportunities will exist for misunderstanding or reinterpretation of the commitments made to the State. Moreover, argues the Department, many of the responsibilities under the MOU occur in the near term so that Entergy VY's compliance track record can easily be assessed and undischarged obligations enforced. The Department also emphasizes the clarity and specificity of the MOU as being likely to address many concerns about potential reinterpretations. Finally, the Department characterizes Entergy VY's commitments under the MOU as indicating a willingness to work constructively with the State.

CLF originally took the position that Entergy VY's petition should be denied, because its actions in providing false information, failing to take adequate steps to correct and address known problems, and failing to honor its commitments demonstrated a clear lack of trustworthiness. Following negotiation of the MOU, CLF continues to maintain that Entergy VY has been an untrustworthy partner and argues that the Board cannot determine that the MOU provides sufficiently tangible enforceable commitments with meaningful benefits to Vermont. Nonetheless, CLF argues that the Board should approve the MOU, largely because the relief it had previously sought — denial of the CPG — will effectively occur at the end of 2014.

NEC asserts that, based upon its track record, Entergy VY should not be considered a fair partner. NEC maintains that the additional promises in the MOU cannot make up for previous broken promises. NEC further contends that there is no basis to conclude that Entergy VY has now become more trustworthy as all that has changed is Entergy VY's willingness to pay money.

VPIRG argues that Entergy VY's history of noncompliance, inaccurate statements, and unwillingness to meet obligations means that Entergy VY is not a fair partner for Vermont. The MOU, asserts VPIRG, does not address this past action. Instead, VPIRG asks the Board to adopt

one of two "enforceable, non-preempted alternatives" to relying upon Entergy VY as a good faith partner. One of these conditions would be a requirement that Entergy VY seek NRC approval of immediate decommissioning of the VY Station if and when the State requests. Alternatively, VPIRG suggests that the Board should solicit bids from other companies which may desire to own the VY Station and use the Decommissioning Trust Fund.

Entergy VY's regulatory performance as a fair partner presents a mixed history. For a dozen years, Entergy VY provided favorably priced power to Vermont utilities under purchase power agreements. Due to improvements after Entergy VY acquired the Plant, the VY Station materially improved its capacity factor, with the Vermont utilities receiving the benefit of the additional power output. Entergy VY has also lived up to its commitments under the Access MOU to provide the State Nuclear Engineer with information and access to the VY Station (although apparently this information flow became less as Entergy VY elected to pursue litigation). Entergy VY has also offered benefits to the local community, such as charitable contributions.

This performance history, however, has a different side when the Company's conduct apart from power sales is examined. The Board shares many of the concerns raised during this proceeding over Entergy VY's past actions and what they mean for future activity. These actions include the following:

- Entergy VY has failed to meet its commitment in the Docket 6545 MOU to cease operating on March 21, 2012, unless it had received Board approval. Entergy VY also failed to comply with the Board Order approving the sale of the VY Station to Entergy VY that included the same condition;[58]
- Entergy VY also did not meet commitments in the Docket 7082 MOU;
- Entergy VY violated state law prohibiting site preparation or construction prior to issuance of a CPG by the Board;

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58. Entergy VY has attempted to justify its actions by arguing that it has the right to continue operating under 3 V.S.A. § 814, and that the Vermont Attorney General had agreed with that view. The Board previously rejected Entergy VY's argument concerning Section 814 in orders issued March 19, 2012, in Docket 7440 and November 29, 2012, in Dockets 6545, 7082, and 7440. As to the Attorney General's position on Section 814(b), the Board has previously informed parties that throughout the federal litigation surrounding Entergy VY, the Attorney General did not consult with the Board on any matters. As a result, the Attorney General's position was not informed by the Board's perspective.

- Entergy VY's behavior in discovery and other actions has led to the Board imposing sanctions;
- Entergy VY failed to provide accurate information and correct that information once it had a good faith basis to believe it was incorrect or misleading.

This history is troubling and falls well below the level of conduct the Board expects of utilities authorized to conduct business in the State. Companies subject to the Board's jurisdiction are expected to comply with applicable law and regulatory commitments, particularly those commitments offered to other parties and the Board with the expectation that they would be relied upon in order to receive a benefit. As a witness for the Department expressed it: "Accurate information provided promptly is the lifeblood of any regulatory system."[59] Entergy VY did not meet these norms. Significantly, executives in the highest echelons of Entergy Corporation and Entergy VY itself understood that its performance was substandard.[60]

If Entergy VY were continuing to pursue a twenty-year license extension, the experience over the last twelve years might well have led the Board to deny a CPG. However, Entergy VY now seeks permission to operate the VY Station from March 21, 2012, through the end of this calendar year. We are persuaded that Entergy VY can realistically be expected to be a fair partner for the short remaining operating period. Therefore, it is reasonable to conclude that approval of the MOU and issuance of a CPG to Entergy VY for that remaining operating period is in the best interests of the State of Vermont.

The MOU and the short period of remaining operation present a number of features that, overall, persuade us that Entergy VY is likely to meet its obligations to the State of Vermont, including this Board, and can reasonably be relied upon to do so. We start with the MOU itself. This proceeding, and the last five years of litigation (since it was first revealed that Entergy VY

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59. Prefiled Surrebuttal Testimony of Peter Bradford at 2.

60. In an e-mail to Entergy Corporation Chief Executive Officer Wayne Leonard, Entergy Corporation Vice President Curt Hebert (who is a former Chairman of the Federal Energy Regulatory Commission) elaborated on what he described as a "broken culture":

> We did not get to this point because of poor communications strategy and lack of an advertising corporate giant. We are where we are because people were sloppy, arrogant and unwillingto recognize that what people outside of the nuclear facility think, matters more than they can ever imagine. . . . We continue to want to say no in the nuclear organization.

Exh. Board-19.

had not disclosed the existence of underground pipes containing radionuclides), have been highly adversarial and contentious — more so than other proceedings. Nonetheless, after the filing of the Second Amended Petition and the decision was announced to close the VY Station at the end of 2014, Entergy VY worked cooperatively with representatives of the State and arrived at a mutually satisfactory settlement. This demonstrates a willingness to deal fairly with the Department and ANR, which recent experience had called into question. Moreover, as part of the overall settlement, Entergy VY was willing to provide benefits that were not clearly obtainable through litigation, such as payments to the CEDF and financial commitments to aid Windham County.

In addition to the existence of the MOU, the Department highlights the fact that Entergy VY's commitments under the MOU are very specific. These specific commitments will make it more likely that Entergy VY will carry through with the MOU obligations. Furthermore, most of the specific commitments in the MOU must be met within a short time period. For example, the initial payment to the Site Restoration Fund of $10 million occurs upon issuance of the CPG. The opportunity for Entergy VY to fail to live up to its obligations is thus more limited and can be more readily addressed. One such potential for enforcement would be through modification or revocation of this Order in the event of a violation. This could result in substantial penalties, not just for the violation of this Order, but also for potential past violations. Specifically, our issuance of an amended CPG effectively ratifies Entergy VY's operation of the VY Station since March 21, 2012, notwithstanding the Docket 6545 Sale Order that proscribed such operation. This approval removes any potential exposure Entergy VY may have to penalties for failure to comply with a Board order or operation without a CPG. Failure to meet the MOU commitments could lead to modification of this Order that could effectively remove this ex post facto acceptance of Entergy VY's ownership and operation over the last two years and expose the Company to penalties for this conduct.

Considering that the CPG will run only for a short period of time, Entergy VY's opportunities for reneging on its commitments are also reduced. Many of the MOU commitments occur at or near the beginning of the CPG period. Entergy VY's initial $10 million to the site restoration fund, the $5.2 million CEDF contribution, and $2 million of the fund to

support Windham County occur within thirty days after issuance of this Order. This means that there will be fewer commitments that are on-going and potentially could not be met. We do not downplay the necessity that any public service company authorized to do business in Vermont possess the requisite corporate character to interact fairly with the State and its residents. Nonetheless, we must give reasonable consideration to the changed context where those potential interactions are now fewer, as they are for only the remaining nine months of the amended CPG.

Finally, on balance we are persuaded that the best interests of the State of Vermont favor approval of the MOU and the granting of a CPG. The MOU reflects material benefits for the State of Vermont, some of which could not be gained through litigation. These benefits, including financial commitments, the agreement to commence site restoration promptly after decommissioning, establishment of a process for defining site restoration standards now, establishment of a date certain for termination of operations, could not all have been obtained absent the MOU. Thus, denial of the CPG would be adverse to Vermont and its consumers. In addition, as CLF observes, denial is unlikely to actually alter operation of the VY Station. Even if we denied the CPG, we would likely provide the CPG holder (Entergy VY) time to wind down activities and sell its assets (i.e., the VY Station).[61] Effectively, this means that the VY Station might still operate through the end of 2014 even if the CPG was denied. By approving the MOU, the same outcome will come to pass, only with the added tangible benefits, which are enumerated throughout this Order.

VPIRG and NEC have raised concerns about our ability to rely upon Entergy VY to meet its commitments. VPIRG has proposed two possible conditions that it asserts are enforceable. However, VPIRG has not demonstrated how we could require Entergy VY to immediately request the NRC to commence decommissioning or on what basis (other than denial of a CPG) we could require an auction of the VY Station. More importantly, VPIRG has also not shown that either of these outcomes are superior for Vermonters to acceptance of the MOU. Under this approach, the State would forego the tangible benefits of the MOU that are described in this Order and would not derive other material benefits as a result.

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61. Cf. Quechee Services Co., Inc., Docket 5699, Order of 12/30/94, aff'd 166 Vt. 50 (1996).

C. Financial Soundness

Findings

72. On August 27, 2013, Entergy Corporation, the parent company, issued a press release announcing that it will shutdown and close the VY Station by the fourth quarter of 2014. Entergy Corporation cited financial factors including the impact of low natural gas prices on the wholesale price of electricity, plus the high-cost structure of the VY Station, as the basis for its decision. Exh. WRC-X; tr. 1/31/14 at 59-60 (Twomey).

73. In the first quarter of 2012, Entergy Corporation performed a fair value analysis of the undiscounted net cash flows expected to be generated by the VY Station due to uncertainty involving the continued operation of the Plant. Because of declines in the overall power markets and the projected forward prices for power, the analysis reflected probability-weighted undiscounted future cash flows as amounting to less than the VY Station's carrying value. As a result, Entergy Corporation recorded an impairment of $355.5 million to the carrying value of the Plant resulting in an estimated fair value of the Plant and related assets of $162.0 million as of March 31, 2012. Exh. PSD-Cross-MT-8 at 61; tr. 2/19/13, Vol. I, at 38-39 (Twomey); tr. 6/18/13, Vol. I, at 68-69, 71 (Twomey).

74. In early 2013, equity analysts at UBS Investment Research issued two analyst's reports involving Entergy Corporation's merchant nuclear fleet, Entergy Wholesale Commodities, highlighting continued cash deficits for the group and questioning the future financial viability of the VY Station. Exh. CLF-Redirect-1; exh. CLF-Redirect-2.

75. Until it discontinues operations, Entergy VY will continue to have operating revenues from the sale of the power generated by the VY Station. If natural gas prices rise, regional energy market prices and the revenue Entergy VY receives from the sale of its power also will rise. Twomey pf. at 16; tr. 2/14/13 at 136 (Tranen).

76. Entergy Corporation has made available to Entergy VY additional funds to enable the Plant to be operated safely and reliably. Tr. 6/18/13, Vol. I, at 84 (Twomey).

77. Entergy VY also maintains production interruption insurance, which may be used in the event operating revenues are not available due to an unplanned outage or similar event requiring

a complete shutdown of the VY Station. The present insurance would provide $3.5 million per week of coverage up to a maximum of $435 million. Twomey pf. at 16-17.

78. Since purchasing the VY Station, Entergy VY also has maintained a $35-million credit agreement with Entergy International Holdings, Ltd., LLC ("EIHL" and "EIHL Agreement"). This agreement serves as standby financial assurance and its primary purpose is to pay costs during the bridge period between an unplanned, premature shutdown of the Plant and access to funds from the VY Station's decommissioning trust fund. Twomey pf. at 17.

79. Entergy VY also maintains a second $35-million credit agreement with Entergy Global, LLC (formerly Entergy Global Investments, Inc.) ("EGI" and "EGI Agreement"), which serves as a revolving-credit facility to fund the VY Station's needs for working capital. Twomey pf. at 17.

80. Pursuant to its agreement in the Docket 6545 MOU, Entergy Corporation executed a $60-million guaranty to Entergy VY as a backstop to ensure that the VY Station has sufficient cash available to maintain the VY Station between any shutdown and access to the decommissioning funds (the "Entergy Guarantee"). Entergy VY expects that this amount will remain adequate to ensure that the Plant can be operated until Entergy VY may access 20 percent of the funds in the decommissioning trust fund. Twomey pf. at 17.

81. Entergy VY is required by the terms of its NRC license to maintain these credit facilities as they exist now. Twomey reb. pf. at 4.

82. The Entergy Corporation guaranty also requires that Entergy Corporation not reduce the aggregate credit available to Entergy VY under the EGI Agreement and the EIHL Agreement to less than $60 million. Twomey reb. pf. at 5.

83. Pursuant to the Entergy Guaranty, if the amount available to Entergy VY under the EGI Agreement is less than $25 million and/or the EIHL Agreement is less than $35 million, Entergy Corporation agrees that it will make available to Entergy VY the difference between the amount available under each of those agreements and $25 million and/or $35 million, respectively. Entergy Corporation, through the guaranty, also agrees that it will cause EGI and EIHL to perform their respective obligations under the agreements. Twomey reb. pf. at 5.

84. The Entergy Guaranty further provides that it remains in effect and is irrevocable, until such time as Entergy VY is no longer the owner or operator of the VY Station or Entergy VY has

submitted to the NRC a certification that fuel has been permanently removed from the reactor vessel and 90 days have passed since the NRC has received the post-shutdown decommissioning activities report. Twomey reb. pf. at 5.

85. Neither the EIHL Agreement, nor the EGI Agreement, nor the Entergy Guaranty states that the performance of only one, any combination, or all of these agreements is contingent upon the financial solvency of Entergy VY. Twomey reb. pf. at 6.

86. Entergy VY has sufficient funds to meet its financial obligations to the State of Vermont, including those under the MOU. Tr. 1/31/14 at 63 (Twomey).

87. Entergy VY committed to adequately fund and complete site restoration in the Docket 6545 MOU. Exh. PSD-01, at ¶¶ 3, 9.

88. Entergy VY has committed to pay $25 million to a Site Restoration Fund and to provide financial assurance in the form of a $20-million Entergy Corporation guaranty as part of its obligation under the Docket 6545 MOU and the related Docket 6545 Board Order dated June 13, 2002, to demonstrate that funding will be available for site restoration. Recchia pf. at 2; *see* exh. PSD-01, at ¶ 9; exh. Joint-1 at 4-5; Twomey supp. pf. at 18.

89. The MOU requires Entergy VY to pay specified amounts to the Site Restoration Fund by specified dates within the next four years, thereby reducing the risk that Entergy VY will be unable to satisfy its commitment. Recchia pf. at 4; tr. 1/30/14 at 37, 113 (Recchia); exh. Joint-1 at 4-5.

90. The $20-million Entergy Corporation parent guaranty will go into effect when the existing Entergy Guarantee, provided pursuant to the Docket 6545 MOU, is terminated. The $20-million Entergy Corporation guaranty helps assure that there will be sufficient funds for site restoration. If the funding required to complete site restoration exceeds the amounts available to Entergy VY from the Decommissioning Trust Fund (after payment of radiological decommissioning and SNF management costs) and from the Site Restoration Trust if it fails to reach $60 million, then Entergy VY can use the $20 Entergy Corporation guaranty as a backstop. Exh. Joint-1 at 4; *see* exh. EN-TMT-5; exh. PSD-01 at ¶ 13; tr. 1/31/14 at 110, 115 (Twomey).

91. The short duration of continued operation requested by Entergy VY's Second Amended Petition reduces the risk that issues related to Entergy VY's financial soundness will have a negative impact on the State. Recchia pf. at 4.

92. The $20-million guaranty will be terminated only in the event that the money in the Site Restoration Fund grows to $60 million. Exh. Joint-1 at 4; Recchia pf. at 3.

Discussion

In determining whether extending Entergy VY's CPG will promote the general good of the State under 30 V.S.A. § 231(a), the Board considers the financial soundness of the petitioner. Generally, we examine a utility's current and projected revenues, operating and free cash flows, debt load, and trends in equity. Where a utility has demonstrated the ability to generate sufficient cash flow for capital investments and satisfactory service, and has plausibly projected a positive or even a neutral trend on shareholder equity, we generally find that the company is financially sound.

On August 27, 2013, Entergy Corporation made an announcement that it intended to close the VY Station by year-end 2014 largely for financial reasons.[62] Entergy VY continues to have revenues from the sale of power. Moreover, Entergy VY does not exist in a vacuum and is part of a much larger and stronger corporate organization which bolsters the overall financial soundness of Entergy VY.[63] In Docket 6545, we found Entergy VY to be financially sound due in part to the financial strength of Entergy Corporation and the financial assurances and safeguards Entergy Corporation agreed to put into place.[64] Although current industry conditions have become more challenging for large utilities like Entergy, such as the impact of declining wholesale prices on the power markets, Entergy remains a very large, diversified, and financially stable company. As such, we have no basis to conclude, nor does the record indicate, that Entergy Corporation will suddenly terminate any inter-company support it provides to Entergy VY between now and the Plant's near-term closure in 2014. Moreover, Entergy VY and Entergy

62. Exh. WRC-X; tr. 1/31/14 at 59-60 (Twomey).

63. *Vermont Yankee Nuclear Power Corporation*, Docket No. 6545, Order of 6/13/02 at 4, 7.

64. *Vermont Yankee Nuclear Power Corporation*, Docket No. 6545, Order of 6/13/02 at 115, 117-120.

Corporation continue to be bound by the various specific guarantees and support mechanisms approved in our Order in Docket No. 6545, as well as the MOU and NRC regulations. These mechanisms lend further support to the conclusion that Entergy VY will remain financially sound over the short duration that the VY Station continues to operate, and up until the time Entergy VY accesses the Decommissioning Trust Fund.[65]

In addition, the financial assurances established in Docket No. 6545, in the form of credit agreements provided by EGI and EIHL totaling $70 million, plus Entergy VY's corporate guaranty of $60 million, will remain in place. As we concluded in our Order in that docket, we found that the financial assurances that Entergy Corporation had agreed to provide Entergy VY would be sufficient to ensure that Entergy VY has the resources it needs to operate and to eventually close and decommission the VY Station.[66] Despite the significant economic and financial challenges that have occurred since that time, those financial assurances remain unaffected and we conclude that we can continue to rely on them for the purposes of permitting the continued operation of the VY Station until its shutdown in 2014.

Aside from the inter-company support provided by Entergy Corporation, Entergy VY highlights the existing revenue stream from the Plant which it asserts is sufficient to meet its financial responsibilities. After Entergy VY shuts down, it argues that it can rely upon surplus revenues, supplemented by various corporate guarantees to safely shut down the VY Station and meet its obligations until it is able to access the Decommissioning Trust Fund. Following radiological decommissioning, Entergy VY states that it expects to have sufficient excess money in the Decommissioning Trust Fund to complete site restoration (assuming that the NRC grants Entergy VY permission to use such funds).

Entergy VY emphasizes that these commitments are augmented by the MOU. According to Entergy VY, the MOU (1) establishes a separate fund for site restoration, (2) provides an extra layer of assurance in the form of the Entergy Corporation Guaranty, which will remain in place so long as the Site Restoration Fund has less than $60 million in it, and (3) even though Entergy VY will begin decommissioning once the funds in the Decommissioning Trust Fund are

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65. Tr. 1/31/14 at 25, 63,105-107, 122 (Twomey).

66. *Vermont Yankee Nuclear Power Corporation*, Docket No. 6545, Order of 6/13/02 at 107.

sufficient for radiological decommissioning and spent fuel management (rather than continuing to delay decommissioning even after the funds are sufficient), the Decommissioning Trust Fund will be expended over time and interest will continue to be earned on the monies remaining in the fund, providing additional funding for site restoration.

The Department originally expressed concern about Entergy VY's ability to meet its financial obligations. Specifically, the Department focused on what it characterized as inadequate demonstration from Entergy VY that it would have sufficient funds to fully restore the VY station site, which Entergy VY committed to do as part of the Docket 6545 MOU.

The Department subsequently negotiated the MOU in this proceeding under which Entergy VY will establish the site restoration fund and provide a corporate guaranty. These commitments address the Department's concerns and go "a long way towards ensuring that Entergy VY will make good on its promise to fund and timely complete restoration of the VY Station site."[67]

We find the MOU addresses many of the concerns originally raised by the Department about Entergy VY's ability to meet its site restoration obligations. Entergy VY has now committed to set aside an additional $25 million specifically for site restoration. This money is expected to grow over time. In addition, Entergy Corporation has committed to augment this fund by an additional $20 million to the extent it falls below $60 million at the time it is needed. Collectively these provisions, in conjunction with residual funds in the Decommissioning Trust Fund, provide sufficient certainty that funds will be available when needed to restore the site.

Therefore, the evidence supports the conclusion that Entergy VY meets the financial soundness criterion. The Company will have continued revenues available to it for the remainder of this year through power sales. It then has corporate guaranties from the parent corporation, Entergy Corporation, and other affiliates in the event that Entergy VY has insufficient reserve funds on hand. These financial resources are expected to be adequate to fund the closure acitivities required by the NRC to enable access to the Decommissioning Fund. Lastly, the availability of inter-company funding from Entergy Corporation to Entergy VY (aside from the

67. DPS and ANR Brief at 13.

guarantees) provides additional assurance that Entergy VY will be able to wind down its operations as planned and to initiate decommissioning.

D. Technical Competence

Findings

93. Entergy VY operates one of the largest fleets of nuclear power plants in the United States. Twomey pf. at 2.

94. A study of the VY Station's reliability performed by Nuclear Safety Associates, consultants hired by the Department, evaluated various aspects of the VY Station. The resulting report, the Comprehensive Vertical Audit and Reliability Assessment ("CRA"), recommended operational and management changes, but found the Plant to be reliable. Entergy VY has implemented each of 93 recommendations concerning plant operations that resulted from the CRA. Tr. 2/26/13, Vol. I, at 31-33 (Buteau); tr. 2/26/13, Vol. II, at 84-85 (Vanags); exh. Board-2.

95. Since Entergy VY's acquisition of the VY Station in 2002, the Plant has operated at an average capacity factor, based on its net Maximum Dependable Capacity, above 93% from 2003 to 2011, a better capacity factor than achieved by the VY Station's previous owner. Twomey pf. at 2.

Discussion

Entergy VY has shown that it is an experienced and proficient nuclear power plant operator and has operated the VY Station since it purchased the generating facility in 2002. We find that Entergy VY has met this criterion.

E. Relationships with Other Utilities

Findings

96. Several Vermont distribution utilities purchased power from Entergy VY under a power purchase agreement that expired in 2012. Marc Potkin, Entergy VY ("Potkin") pf. at 12.

Discussion

Entergy VY has interacted with other Vermont utilities since it acquired the VY Station in 2002. Until 2012, Entergy VY sold power from the VY Station to VYNPC, the majority of which was owned by GMP and CVPS. It has also transmitted power through Vermont Electric Power Company, Inc. ("VELCO").

Over this time, Entergy VY has had disagreements with the Vermont utilities. For example, in Docket 6812-A, the Board considered a dispute related to the Ratepayer Protection Plan adopted as part of the Docket 6812 MOU. Evidence presented in this case explored a more recent dispute with GMP. However, the fact of business disagreements alone does not raise concerns about relationships with other utilities, even if they occasionally result in litigation.

Considering the totality of its history of interactions with Vermont utilities, we conclude that Entergy VY meets this criterion.

F. Section 248 Criteria

(1) Orderly Development of the Region

Findings

97. Continuing operations at the VY Station through December 31, 2014, will allow for an orderly wind-down of operations at the VY Station, thereby reducing some of the disruption that could occur if the facility closed abruptly. Recchia pf. at 6.

98. The MOU includes several provisions that could be beneficial to the orderly development of the region following the cessation of operations at the VY Station. Recchia pf. at 5-7; Twomey supp. pf. at 14-15; exh. Joint-1 at ¶¶ 5-9 and 11.

99. The MOU obligates Entergy VY to complete by the end of this year a site assessment study of the cost and tasks of site restoration of the VY Station site. Because of this obligation, Entergy VY will likely undertake this study earlier than it would have if it closed the VY Station in the absence of the MOU. Recchia pf. at 12; Twomey supp. pf. at 18; exh. Joint-1at ¶ 5.

100. The completion of a site assessment study before the end of this year has the benefit of "providing all stakeholders—including the Board—with better information" about site restoration early in the process. Recchia pf. at 12.

101. ENVY has committed to work cooperatively with the relevant State agencies to develop detailed site restoration standards necessary to support use of the property without limitation (excepting any independent spent fuel storage installation ("ISFSI") and any perimeter related to it), including restrictions on the demolition of decontaminated concrete structures into rubble that is buried on site. Recchia pf. at 6-7; Twomey supp. pf. at 18; exh. Joint-1 at ¶ 5.

102. The MOU includes a requirement that Entergy VY commence site restoration promptly after completing radiological decommissioning in accordance with site restoration standards developed in a process set forth in the MOU. Recchia pf. at 5-7; Twomey supp. pf. at 17; exh. Joint-1 at ¶ 6.

103. Entergy VY agrees in the MOU to establish a separate Site Restoration Fund and to deposit $25 million into the fund if the amendment to its CPG is granted. Entergy VY would make an initial $10 million deposit within 30 days of the issuance of the CPG and then deposit $5 million each year for the next three years. The MOU also requires Entergy Corporation, the corporate parent of ENVY and ENO, to provide financial assurance for the Site Restoration Fund in the form of a $20 million guarantee. That guarantee will remain in place until the Site Restoration Fund reaches $60 million in value. Twomey supp. pf. at 18; Recchia pf. at 3; exh. Joint-1 at ¶ 7.

104. The provisions of the MOU related to site restoration (paragraphs 5, 6 and 7) likely will make some or all portions of the VY Station property available sooner for productive reuse, consistent with the orderly development of the Town of Vernon and Windham County, than would be the case in the absence of the MOU. Recchia pf. at 6-7; exh. Joint-1 at ¶¶ 5-7.

105. The MOU also gives the state a right of first refusal to purchase the land of the VY Station site should Entergy VY decide to sell part or all of the land. This right of first refusal extends to any portion of the VY Station site offered for sale, if certain sections of the site are sold before other sections. This right of first refusal could assist in the orderly development of the region. Twomey supp. pf. at 12, 14-15; Recchia pf. at 7; exh. Joint-1 at ¶ 8.

Discussion

As discussed above, in making its determination of general good under Section 231 in this proceeding, the Board is considering the relevant criteria under Section 248(b), including the issue of whether the continued operation of the VY Station until December 31, 2014, will "unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality."

The VY Station is an existing facility that has operated on its site for more than forty years. An orderly wind-down of operations at the VY Station until the end of an operating cycle would seem appropriate for a variety of reasons under any circumstances unless the negative effects to the state of such continued operation through the end of the operating cycle outweighed the benefits to the state of an orderly wind-down of operations.

Even if the Board were to accept the Department's earlier argument that the continued operation of the VY Station for an additional twenty years would interfere with the orderly development of the region,[68] there is no evidence in the record that the continued operation of the VY Station through the end of this year will unduly interfere with the orderly development of the region or that it will have negative effects on orderly development that would outweigh the benefits of an orderly wind-down of operations at the VY Station.

In addition, in their supplemental testimony, the Department and Entergy VY emphasize the benefits provided by the MOU for orderly development of the region after the VY Station ceases operation at the end of this year. Entergy VY's commitments in the MOU increase the likelihood that the restoration of the VY Station site will be completed in accordance with appropriate standards and on a more timely basis than might otherwise be the case. Such outcomes from the site restoration process are consistent with the future orderly development of the region.

WRC, in its capacity as a regional planning body for Windham County, has proposed conditions related to decommissioning and site restoration related to Section 248(b)(1).

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68. DPS Initial PFD and Brief at Findings 248-251.

However, several of WRC's proposed conditions involve matters preempted by federal law that are clearly within the exclusive jurisdiction of the NRC.

We also observe that the Board has ultimate jurisdiction over non-radiological site restoration at the VY Station site. At the time of any Board review of site restoration standards, other parties in this docket and other interested persons will have the opportunity to provide comment on such standards. We also note that prior commitments, Board orders and MOUs with respect to site restoration at the VY Station and other post-operational matters remain in full force and effect.[69]

(2) Need

Findings

106. ISO-New England, Inc. ("ISO-NE") is responsible for the operation and reliability of the New England bulk power system, which is comprised of generating stations and the high voltage transmission system that delivers electricity to electric utilities and other load-serving entities. ISO-NE administers New England's wholesale energy market, centrally dispatches the generating stations, and directs the flow of electricity across New England's bulk power system. Seth G. Parker, DPS ("Parker") pf. at 5-6; Potkin pf. at 3-5; Robert Stein, DPS ("Stein") pf. at 3.

107. Entergy VY operates the VY Station as a wholesale merchant plant dispatching its power into the New England grid and selling its output under rules established by ISO-NE. The output of the VY Station is sold at a market rate (that is, the marginal clearing price) determined by an ISO-NE bidding process, subject to the adjustment to reflect the terms of any bilateral power agreements. Potkin pf. at 7-8; Stein pf. at 4-5.

108. The VY Station, as a baseload plant that operates at high capacity factors, has marginal prices for its output that are almost always below the market clearing price. Asa S. Hopkins, DPS (Hopkins") pf. at 29.

69. *See* exh. Joint-1 at ¶ 17.

Discussion

Among the Section 248(b) factors relevant in this case to the requested "general good" determination under Section 231 is whether the continued operation of the VY Station "is required to meet the need for present and future demand for service which could not otherwise be provided in a more cost-effective manner through energy conservation programs and measures and energy-efficiency and load management measures."[70] The Second Amended Petition clearly simplifies any need assessment.

Entergy VY is now seeking authority to operate the VY Station until December 31, 2014, by which time it expects the VY Station's current operating cycle will have ended.[71] As discussed elsewhere in this Order, the Board would likely have allowed a reasonable period for the VY Station to wind down its operations until the end of an operating cycle, even if the Board had denied Entergy VY's petitions for a CPG and regardless of whether Entergy VY had made a sufficient demonstration of need to satisfy the Section 248(b)(2) criteria in this proceeding for any extension of its CPG.

In any case, the VY Station will be selling its output into the New England market until December 31, 2014, and this power will almost certainly be bid into the market at a price that will ensure that it is dispatched during the short period of the facility's continued operation. Accordingly, the operation of the VY Station during this period should have some effect in displacing generators with higher marginal costs, thereby lowering regional electricity and energy prices and providing a benefit to Vermont ratepayers.

Historically, the Board has based its regional determination of need on the likelihood that the output of a generation facility will be dispatched on a regular basis to provide service to customers in the region.[72] In this and other recent proceedings, the Department has argued for

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70. 30 V.S.A. § 248(b)(2).

71. *See* MOU at 1, 2-3 (¶ 2).

72. Docket 6812, Order of 3/15/04 at 22 (VY Station Output Increase). *See, also,* the Board's recent Order in Docket No. 7833, *Petition of North Springfield Sustainable Energy Project LLC*, Order of 2/11/14 at 139:

> There is no evidence on which we can rely to find, for example, that the Project would produce energy at a cost that would ensure its dispatch into the regional market, resulting in the displacement of higher-cost generating units, or how the cost of power from the Project might influence regional wholesale prices in a way that would benefit Vermont.

somewhat different and, in the case of non-renewable generation sources, more stringent standards for determining the existence of a regional need for energy, capacity and reliability.[73] In view of the limited period of time for which Entergy VY is now seeking to operate until the end of its current operating cycle, the Board need not reach the question in this proceeding of whether, or to what extent, it is appropriate to adopt the Department's proposed standards related to the determination of a regional need. However, even if the Board were to agree that in the longer term there was no regional need for the VY Station because such regional need could be supplied more cost-effectively by energy efficiency measures,[74] such lower-cost energy efficiency measures could not be made available to the region in time to meet any regional need that the VY Station would otherwise meet during the brief period of its continued operation through the end of this year.

(3) System Stability and Reliability

Findings

109. ISO-NE has performed an assessment of upgrades necessary to ensure system reliability through 2020. Transmission upgrades will be required in the region whether or not the VY Station continues to operate. Tr. 2/14/13 at 25-26 (Tranen); tr. 6/20/13, Vol. I, at 27-28 (Tranen); tr. 6/21/13, Vol. II, at 59-60 (Parker).

110. In 2004, Entergy VY committed to take a number of actions required by ISO-NE in connection with the power uprate of the VY Station in order to ensure the absence of any adverse effect on the transmission system. Based in part on these commitments, the Board found that the power uprate would have no adverse impact on system stability and reliability. Jeffrey Tranen, Entergy VY ("Tranen") pf. at 10; Docket 6812, Order of 3/15/04 at 24.

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73. For example, *see* Dr. Hopkins' direct prefiled testimony in this Docket at 27-35.

74. *See* Hopkins pf. at 30:

> Based on this significant energy efficiency potential, and the fact that energy efficiency is a lower cost resource, I conclude that the plant does not meet a regional need for energy that could not be otherwise supplied more cost-effectively through energy efficiency.

111. The continued operation of the VY Station will not involve any further change in the electrical characteristics of the VY Station. Tranen pf. at 10-11.

Discussion

Among the Section 248(b) factors relevant in this case to the requested "general good" determination under Section 231 is whether the continued operation of the VY Station will adversely affect "system stability and reliability."[75] The evidence in the record supports the conclusion that the continued operation of the VY Station will not adversely affect system stability and reliability.

Witnesses for both Entergy VY and the Department addressed this issue. There was some disagreement among the witnesses as to the extent of the contributions that the operation of the VY Station makes to system stability and reliability and as to whether the costs of transmission upgrades might be somewhat more expensive with the VY Station in operation. Despite these disagreements, the parties that have presented evidence on this issue are in agreement that this criteria is satisfied. The Department has maintained throughout this proceeding that the continued operation of the VY Station will not adversely affect system stability and reliability.[76]

(4) Economic Benefit

Findings

112. Continued operation of the VY Station is expected to provide an economic benefit to the residents of Vermont that will continue for as long as the VY Station operates. Exh. EN-RWH-3; Richard Heaps, Entergy VY ("Heaps") pf. at 2; Heaps reb. pf. at 2-3; exh. EN-RWH-4; tr. 6/19/13, Vol. I, at 70, 101 (Heaps); tr. 6/18/13, Vol. II, at 240-242 (Unsworth); tr. 2/25/13 at 209, 232 (Hopkins); tr. 2/26/13, Vol. I, at 121 (Hopkins); tr. 2/26/13, Vol. II, at 14 and 18 (Rockler); tr. 2/22/13, Vol. II, at 82-84, 123-127 (Kavet).

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75. 30 V.S.A. § 248(b)(3).

76. Department's Initial Brief (8/16/13) at 116; Department's Final Brief (2/14/14) at 25.

113. The VY Station provides an economic benefit through (1) its $65.7 million in annual payroll, (2) its annual payment of taxes, and (3) the annual benefit from the avoidance of greenhouse gas emissions through its operation. Twomey pf. at 11; exh. EN-RWH-3; exh. EN-RWH-4; tr. 2/22/13, Vol. II, at 101-102, 112, 117-118 (Kavet).

114. Entergy VY's normal wage and income tax payments will continue for the period through December 2014, just as they have been throughout the VY Station's past operation. Twomey supp. pf. at 16.

115. The MOU provides for direct economic benefits in the form of payments and financial guarantees to the state: (1) $25 million for site restoration; (2) a further $20 million parent guarantee for the Site Restoration Fund; (3) more than $5 million for the CEDF; and (4) $10 million for economic development in Windham County. Twomey supp. pf. at 15; Recchia pf. at 8; exh. Joint-1 at 3-5.

116. The Vermont Agency of Commerce and Community Development ("ACCD") will use the economic development funds "to deploy the economic development payments as grants to organizations working directly in Windham County on economic development projects." Potential projects include an expansion of the Vermont Small Business Development Center advising position for Windham County, the creation of a high-tech co-working space to foster entrepreneurship, and the development of a machining apprentice program. Miller pf. at 2.

117. Another way the MOU increases the annual economic benefit is through the payment of approximately $5.2 million from the escrow fund into the CEDF, at least half of which is to be used for activities in or for the benefit of Windham County. Twomey supp. pf. at 15-16; Recchia pf. at 8; exh. Joint-1 at 4-5.

118. The projects funded by the payments that the MOU requires ENVY to make to the CEDF will result in economic benefits for the State, including job creation. Recchia pf. at 8.

119. The ACCD will award grants to projects that will create the most effective near-term results, are set up to respond to opportunities as they develop, and will best leverage grant funds. Lawrence Miller, DPS ("Miller") pf. at 2.

120. The ACCD has experience managing economic and community development grant programs and has existing relationships with local, state, and national development organizations and government agencies. Miller pf. at 2-3.

121. An orderly wind-down of operations at the VY Station over the course of approximately ten months will mitigate the effect an abrupt plant closure might have on the local economy. Recchia pf. at 8.

122. The MOU also presents a potential economic benefit through the right of first refusal on the real property on which the VY Station is located, as the State will be allowed to purchase the land at a fair market price and take advantage of any economic opportunity the VY Station property might present. Recchia pf. at 8.

Discussion

Under Section 248(b)(4), the Board must evaluate whether approving the MOU and issuing Entergy the CPG contemplated by the MOU will result in an economic benefit to the State and its residents. Section 248 does not require us to quantify exactly how much economic benefit the State would receive from approval of the MOU; we need only determine that there will be an economic benefit.[77] However, Section 231 also requires the Board to make an overall determination as to whether the MOU will promote the general good of the State. In making this determination, we must weigh the impacts and benefits of the MOU and find that the benefits outweigh the impacts. The MOU meets this criterion, and provides real and substantial economic benefits to the State of Vermont. If approved by the Board, Entergy VY will provide the following near-term (over the course of less than 4 years) economic benefits to the State of Vermont:

(i) $25 million for site restoration;

(ii) a $20 million guarantee that will remain in place until the Site Restoration Fund grows to at least $60 million;

(iii) more than $5 million for clean energy development through the CEDF; and

77. *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.*, Docket 6812, Order of 3/15/04 at 25.

(iv) $10 million for economic development.

These commitments represent significant amounts of money that Entergy VY might not be obligated to pay absent the MOU.[78] Each of those sums will provide a measurable positive economic benefit to the State. Combined, those payments help assure Vermont that important objectives will be advanced if we approve the MOU. In addition to those tangible economic benefits, the MOU provides for an orderly wind-down of operations at the VY Station over the course of a number of months that will avoid any jarring effect that abrupt plant closure might have on the local economy.[79]

The CEDF monies will fund development of renewable technology projects in Vermont, advancing the State's clean energy objectives, and creating economic benefits, including jobs.[80] The CEDF funds will provide not only economic benefits across the State, but a specific economic benefit to Windham County, as at least 50% of the funds that will be paid into the CEDF must be directed towards Windham County if the Board approves the MOU.[81]

As for the $10 million in economic development funds, not only does this sizeable amount of funding create an obvious economic benefit, the State, through the Agency of Commerce and Community Development, is prepared to put those funds to good use in Windham County if the Board approves the MOU.[82] The ACCD will work to ensure that the economic development funds will be directed towards projects that will leverage the funds to provide the most economic benefit for the State by selecting projects that promote effective near-term results, are set up to respond to opportunities as they develop, and will leverage economic development payments under the MOU with other grant funds.[83] This will result in funding available for projects that "have a near-term predictable impact in terms of increasing employment and increasing wages,"[84] as well as projects with more long-term regional effects.

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78. Recchia pf. at 4; tr. 1/31/14 at 144-145 (Twomey).
79. Recchia pf. at 8.
80. *Id.*
81. Exh. Joint-1 at 4-5.
82. Tr. 1/30/14 at 13-16 (Miller).
83. Miller pf. at 2-3.
84. Tr. 1/30/14 at 20 (Miller).

As noted above, the economic benefit requirement of the statute is satisfied when "a comparison of costs and benefits yields a net economic benefit to the State."[85] The prompt, substantial, and tangible economic benefits now offered by the MOU, are more than sufficient to satisfy this standard. Therefore, based on these facts, we conclude that the MOU will provide economic and fiscal benefits to the State and Windham County, and provide for a less disruptive transition once the VY Station ceases operation.

(5) Aesthetics, Historic Sites, Air and Water Purity, the Natural Environment and Public Health and Safety

In making a determination of the general good under Section 231, the Board may consider whether the continued operation of VY Station will have "an undue adverse effect on aesthetics, historic sites, air and water purity, the natural environment, the use of natural resources, and the public health and safety."[86] As provided in Section 248(b)(5), this assessment includes due consideration of the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K) and greenhouse gas impacts. The most significant contested issue related to Section 248(b)(5) criteria raised in this proceeding concerns the effect that continued thermal discharges into the Connecticut River would have on the natural environment and wildlife, particularly migrating fish species.

Water and Air Pollution

Criteria Related to Discharges of Heated Effluent into Connecticut River

[30 V.S.A. § 248(b)(5)]
[10 V.S.A. § 6086(a)(1)(A)-(C), (E)-(G), (a)(2), (a)(3)]

123. The continued, short-term operation of the VY Station will not cause undue air or water pollution and will comply with applicable regulations adopted by the Vermont Department of

85. *Entergy Nuclear Vermont Yankee*, Docket 7082, Order of 4/26/06 at 36.

86. 30 V.S.A. § 248(b)(5). *See* III. Legal Framework – A. Section 231 Standards, above. This consideration has greater relevance where the entity has a single operating facility, so that there is an integral link between authorization of a company to own and operate a business under Section 231 and potential environmental impacts.

Environmental Conservation ("VDEC"). This finding is supported by findings 124-157 and 171-192, below.

124. The VY Station is a boiling water nuclear reactor with a rated core thermal power level of 1,912 megawatts ("MW"), providing a gross electrical output of 620 MW. The remainder of the energy, 1,292 MW, must be removed as heat and discharged either as heated water (or effluent) from an outfall to the Connecticut River or as steam via mechanical draft cooling towers to the atmosphere. Marcia Greenblatt, DPS ("Greenblatt") pf. at 2.

125. The VY Station is located on the western shore of the Vernon Pool, an impoundment on the Connecticut River created by the Vernon Dam. Exh. EN-CS-3 at 1; exh. EN Cross-25; Greenblatt pf. at 2.

126. The Vernon Dam is a hydroelectric generation facility located approximately 0.5 miles downstream from the VY Station's thermal discharge outfall. Greenblatt pf. at 2; exh. EN-CS-7 at 2.

127. Installed in 1981, the Vernon Dam's fish passage facility, or "fish ladder," is located on the western shore adjacent to the powerhouse. Exh. EN Cross-1 at 2-2, 2-5, and 2-17.

128. The VY Station holds permits issued by the VDEC regulating water supply, domestic wastewater disposal, and stormwater runoff; those permits will be maintained, and their conditions will continue to govern the VY Station's use of water. Goodell pf. at 4.

129. The VY Station's thermal discharges have complied with its NPDES permit. Tr. 2/20/13, Vol. I, at 69-70 (Deen).

130. The VY Station uses water for the purpose of creating steam to generate electricity. The water used to generate steam is circulated within the VY Station in a closed-cycle (so that this water is not discharged back to the Connecticut River), and Entergy VY has no plans to change the operations of this system. John Goodell, Entergy VY ("Goodell") pf. at 4.

131. The VY Station also draws water from the Connecticut River for the purpose of cooling the water used to create steam. The cooling water system can operate in an open-cycle (all water discharged back to the Connecticut River), closed-cycle (with no discharge and heat dissipated through the cooling towers) or hybrid mode. The VY Station's withdrawal of cooling water from and its discharge of heated water into the Connecticut River is regulated by ANR under an

NPDES permit that ANR administers under the federal Clean Water Act ("CWA") and applicable Vermont law. Entergy VY has filed a timely application for renewal of the NPDES permit. Goodell pf. at 5, 11; *see generally* exh. ANR-EK-2; *In re Entergy Nuclear Vt. Yankee Discharge Permit 3-1199*, 2009 VT 124, ¶ 8 n.4, 989 A.2d 563.

132. The NPDES Permit is based on information, studies and data that are at least thirteen years old, while the amended portions of the Permit are based on studies and data that are at least eight years old. Tr. 2/13/13, Vol. II, at 74-76 (Goodell).

133. As of the time of hearings, ANR had not received sufficient data from Entergy VY to draft a new NPDES permit for the VY Station. Ernest Kelly, ANR ("Kelly") pf. at 9; tr. 2/21/13, Vol. II, at 69-70 (Kelly); exh. ANR-EK-3.

134. Thermal discharge is a pollutant that "influenc[es] fish performance and survival." Kenneth M. Cox, ANR ("Cox") pf. at 5-6.

135. Water temperature significantly affects fish behavior, health, growth, reproduction, and survival. Cox pf. at 5-6; exh. ANR-KC-7.

136. The location of the discharge of heated effluent into the Vernon Pool upstream and on the same side of the river as the Vernon Dam Fish Ladder and the downstream fish passage facilities, and uncertainty about the full mixing and extent of the thermal plume create the potential for impacts to fish. Cox pf. at 6.

137. To date, there have been issues concerning the adequacy of information defining the full extent and characteristics of the thermal plume from the VY Station and the potential impacts of that plume on certain fish species. Cox pf. at 3-4.

138. Under the MOU, Entergy VY must address with ANR through the NPDES permit process the issues related to its thermal discharge raised in this docket . Recchia pf. at 9-10; Twomey supp. pf. at 16; tr. 1/30/14 at 166-167, 181-182 (Twomey); tr. 1/31/14 at 36-37 (Twomey); exh. Joint-1 at ¶ 4.

139. Under the MOU, among the thermal discharge issues Entergy VY must address with ANR in the NPDES process is the possibility of operating the VY Station in closed cycle. Tr. 1/30/14 at 94-95 (Recchia); tr. 1/30/14 at 171-172 (Twomey); tr. 1/31/14 at 36-37 (Twomey); *see* exh. VNRC-CRWC-MOU-Cross 1 at 22.

140. Issues that may be evaluated as part of ANR's review could include concerns raised by the parties in this Docket, as well as issues raised by the Environmental Advisory Committee ("EAC"). Tr. 1/31/14 at 37 (Twomey).

141. The EAC, which has an advisory function concerning discharges from the VY Station, recommends implementation of closed-cycle cooling at all times at least until the outstanding concerns regarding the effects of the thermal discharge on biota in the River have been adequately assessed. Exh. VNRC-CRWC-MOU-Cross-1 at 6, 22.

142. The MOU establishes a cooperative process between Entergy VY and ANR in which certain concerns may be addressed on a short-term basis outside the normal permitting process and the appellate rights that pertain to that process. Tr. 1/30/14 at 176-177 (Twomey).

143. If ANR imposed a condition requiring closed-cycle cooling through the NPDES permit process, such a condition would not be inconsistent with the MOU. Under the MOU, Entergy VY retains the right to challenge such conditions. Tr. 1/31/14 at 37-38, 126 (Twomey).

144. Entergy VY's obligation in the MOU to address with ANR issues related to thermal discharge from the VY Station may allow ANR and Entergy VY to take up certain issues sooner, that is, on a "shorter term basis" than would be the case in the course of the ongoing NPDES permit renewal process. Tr. 1/30/14 at 176-177 (Twomey).

145. Once the VY Station stops producing power commercially, it will continue to draw service water from the Connecticut River, but at only 6 percent of its operating usage; as a result, the extent of the thermal discharge will greatly diminish after nuclear power generating operations at the VY Station cease. Tr. 1/30/14 at 98-99 (Recchia); exh. VNRC-CRWC-MOU-Cross 1 at 22.

Discussion

The Board's evaluation of the environmental impacts of issuance of a CPG to Entergy VY under Section 248(b)(5) includes an assessment of whether issuance of the CPG would result in undue adverse impact upon water quality. In the context of Entergy VY, this discussion is focused on the thermal discharge from the VY Station.

The VY Station has several discharges of pollutants into the Connecticut River. The most significant of these is the heated discharge of non-contact cooling water. To cool the steam used to generate energy, the VY Station continuously draws large quantities of water from the River. The cooling water absorbs much of the heat from the steam. This waste heat is then discharged back into the Connecticut River and is considered to be a pollutant under the CWA because of the temperature. Alternatively, Entergy VY can operate in a closed-cycle in which the water is not discharged, but instead cycles through the cooling towers to dissipate heat. In this proceeding, several parties raised concerns about the effects of the thermal discharge on the River.

Entergy VY has consistently maintained that the thermal discharge does not result in undue adverse water quality impacts. First, Entergy VY highlights the fact that its discharge is regulated by an NPDES permit issued by ANR and that it has complied with that permit. According to Entergy VY, the Board should defer to that permit as being protective of water quality, particularly since ANR is the agency with expertise over such issues. Second, Entergy VY presented evidence that, it contends, demonstrates that the thermal discharge is not adversely affecting fish species in the River.

Third, Entergy VY maintains that the MOU addresses outstanding concerns. Entergy VY argues that ANR's post-hearing reply brief that was filed before the MOU requested two conditions on any CPG: compliance with the NPDES permit and cooperation with ANR in the permitting process. According to Entergy VY, the MOU addresses both concerns, in particular because of the agreement to implement any agreed-to adjustments without the need for formal administrative processes.

At the time Entergy VY was seeking permission to own and operate the VY Station for an additional 20 years, the Department and ANR contended that Entergy VY failed to show that granting the 20-year CPG would not create an undue adverse impact on water purity and the natural environment. ANR, in particular, highlighted uncertainty about the impact of the thermal discharge on several fish species. With Entergy's Second Amended Petition and the shorter requested term of the CPG, ANR and the Department now maintain that the short-term nature of the ongoing permitted thermal discharge diminishes the concerns over water purity. Under the

MOU, which requires Entergy VY to pursue issues relating to the VY Station's thermal discharge with ANR through the NPDES permit process, these parties contend that ANR, the agency with the responsibility for and significant technical expertise on such issues, can adequately address thermal discharge issues. They assert that the MOU commits Entergy VY to address with ANR issues related to the thermal discharge on a "shorter term basis" than otherwise would be the case under the normal timeframe of the NPDES permitting process. Such examination would include the possibility of operating the VY Station in closed-cycle-cooling mode. The requirement to work with ANR, they argue, mitigates concerns about the effects on the natural environment associated with granting a CPG.[87]

VNRC/CRWC ask the Board to conclude that Entergy VY has failed to prove that the continued operation of the VY Station will not have an undue adverse effect on the water purity and the natural environment of the Connecticut River. VNRC/CRWC argues that Entergy VY relies upon its NPDES permit, but that the evidence submitted is adequate to rebut that presumption. Weighing that evidence, VNRC/CRWC urge us to find that the "outdated" permit is not sufficient to assure protection of the River. VNRC/CRWC adds that the recent analysis of the EAC, an advisory committee of governmental scientists, supports this conclusion; that panel advocated implementation of closed-cycle cooling. VNRC/CRWC contends that the MOU is not sufficient to assure that Entergy VY will cooperate with ANR. Therefore, they argue that the Board should deny the CPG, or, at a minimum, require such closed-cycle operation.

NEC argues that the Petitioners have failed to demonstrate that issuance of a CPG will not result in undue adverse water quality impacts. In particular, NEC focuses on the impact of the thermal discharge on American Shad. In light of the absence of benefits to Vermont other than financial gain, NEC argues that this impact is undue.

The evidence in this proceeding raises questions about the effect of the discharge from the VY Station on the Connecticut River. On the one hand, Entergy VY has complied with the limits in its NPDES permit. That permit was developed based upon the applicable legal requirements, including a variance under Section 316 of the federal Clean Water Act, which requires certain showings about the affect of the discharge on indigenous species.

87. Tr. 1/30/14 at 96 (Recchia).

Countering this information are various analyses suggesting that the increase in river temperature resulting from the discharge is such that various fish species are affected. These witnesses report smaller number of shad in many of the past years. They also question various assumptions about whether the actual thermal impact is being accurately measured and whether the actual stream impacts are fully known. ANR itself, the entity that issued the prior NPDES permit, questions whether it is adequately protective at the present time. Other scientific analyses, such as by state and federal governmental scientists on the EAC, are similar.

If the VY Station were going to operate for an additional eighteen years, this evidence might cause us to conclude that Entergy VY had not met its obligation to demonstrate that the discharge would not adversely affect the water quality. However, under the Second Amended Petition and the MOU, the VY Station will cease operations at the end of this calendar year. This means that the thermal discharge will occur for at most one spring spawning season, the period that all witnesses agree is the most sensitive for the various fish species in the river.

Through the MOU, the Department, ANR and Entergy VY have provided a mechanism to address these short-term concerns. Specifically, these parties have agreed that they will work through the thermal discharge issues as part of the NPDES permit renewal. But more importantly, as an Entergy VY witness testified, the process could allow ANR to address thermal discharges more quickly than through the permit, using other mechanisms.

We find the MOU's treatment of the water quality issues to be an acceptable result. This resolution contemplates that significant judgement will be brought to bear on this matter by the agency with the expertise and primary state responsibility over water quality. We also find it noteworthy that ANR, which had previously asked that we deny Entergy VY's petition on water quality grounds, is now persuaded that the administrative process set out in the MOU is workable and adequately protective of the environment. And we must stress, although there are concerns about the water quality impacts, the evidence does not support a finding that there is impairment of the Connecticut River. This is not to suggest that opponents had the burden of demonstrating such impairment; quite clearly, Entergy VY must show the absence of undue water quality impacts. For the short remaining operational period for the VY Station, we conclude that they

have met this showing, subject to the conditions in the MOU that establish a process whereby any issues can be addressed.

The VY Station is expected to continue to have a thermal discharge even after it terminates operations at the end of the year. Cooling water is still needed, but the water usage is expected to be only about six percent of current levels. No parties presented evidence suggesting that these remaining discharges could impair water quality. In any event, the MOU's methodology will allow these remaining thermal discharges to be addressed.

We understand VNRC/CRWC's position that we should order that Entergy VY implement closed-cycle operation. As these parties argue, such a condition would avoid the large permitted thermal discharge. For two reasons, we do not accept this recommendation. First, as discussed above, with the agreement to cease operations at the end of this year, the VY Station will have a thermal discharge for a limited time. Second, the evidence, while raising questions about the effects of the thermal discharge is also not sufficient to demonstrate that there is actual impairment.

Finally, CLF, while not opposing issuance of the CPG and approval of the MOU, observes that the MOU provisions fail to provide specific benefits or commitments on which the Board can rely to make a determination regarding the thermal discharge and water quality impacts. For the reasons set out above, we disagree. The MOU does not now require specific action. However, it does establish a process for resolution of such issues which Entergy VY has agreed to pursue. This process, and ANR's ability to impose requirements as a result, is sufficient to protect water quality for the short remaining operating period of the VY Station.

Greenhouse Gas Impacts

146. Nuclear electrical generation facilities such as the VY Station produce substantially fewer carbon emissions per kWh of electricity produced than coal or natural gas-fired power plants. Tr. 2/15/13, Vol. I, at 78-79 (Lester).

147. Electricity required to replace the power generated by the VY Station is likely to come primarily from natural gas-fueled generation sources and the marginal emission rate of electric

generation facilities in the ISO-NE region is approximately 900 lbs of carbon dioxide per MWh. Tranen pf. at 25.

148. Entergy VY is currently holding approximately $5.2 million of payments to the CEDF in escrow. Under the terms of the MOU, these payments will be released from escrow and paid into the CEDF within 30 days of a Board Order approving the MOU. Exh. Joint-1 at ¶ 9.

149. The purpose of the CEDF is "to promote the development and deployment of cost-effective and environmentally sustainable electric and thermal energy resources . . . ." Additional funding for the CEDF will be used to leverage private investment and fund additional development and deployment of such resources. Exh. PSD-ASH-01 at 142; tr. 1/30/14 at 138 (Recchia).

150. The additional resources funded by the CEDF funds currently held in escrow "will reduce the amount of energy generated from non-renewable sources and the carbon dioxide and other air pollutant emissions associated with that generation." Recchia pf. at 9.

Discussion

In regard to the greenhouse gas impacts of continued operation of the VY Station pursuant to the MOU, we find that approval of the MOU is expected to result in a greater reduction in total greenhouse gas emissions than would result either from an immediate shutdown or continued operation absent the commitments made in the MOU. Prior to Entergy VY's announcement of its intention to close the Plant at the end of December, 2014, witnesses for the Department suggested that the greenhouse gas emissions impacts of a closure of the VY Station could not be accurately determined to be positive or negative.[88] This is because in the long term, it is not clear what resources would replace the VY Station. However, in the short to medium term, the closure of the VY Station is expected to result in a net increase of greenhouse gas emissions given the current marginal emissions rate in the ISO-NE region and the likelihood that replacement power will come primarily from higher-emission natural gas units. As such, continued operation of the VY Station through December 2014 can be expected to result in less total greenhouse gas emissions than would be the case if the Plant were to not operate. In

88. *See* tr. 6/28/13, Vol. I, at 109 (Hopkins) and tr. 6/28/13, Vol. II, at 10-11 (Hopkins).

addition, we find that approval of the MOU will result in additional greenhouse gas emission reductions as a result of the release of funds to the CEDF to be used for new renewable energy or energy efficiency projects, which can be expected to displace existing sources of fossil fuel generation, providing further emissions reductions.

Air Pollution

151. Continued operation of the VY Station will not change the VY Station's air emissions and air emissions will comply with applicable regulations. Goodell pf. at 3-4, 6.

152. The VY Station is a registered source as defined by Section 5-801 of the State of Vermont Air Pollution Control Regulations and makes the required reports and payment of fees for the annual renewal of its Air Source Registration. Goodell pf. at 3.

153. The sources of emissions at the VY Station include two oil-fired boilers, an oil-fired hot-air furnace, and three existing diesel-powered emergency electric generators. Goodell pf. at 3.

154. These minor sources are typical systems for heating and emergency-backup power for a commercial/industrial site and are not directly related to the production of electricity. Goodell pf. at 3-4.

155. The Board recently approved installation of an additional blackout generator for the station, finding that it will not have an undue adverse effect on air purity. Docket 7964, *Pet. of Entergy VY for a Cert. of Pub. Good to Install a Diesel-Driven Station Blackout Elect. Generator*, Order of 6/6/13 at 18-19.

156. Air emissions from the VY Station include cooling tower drift, which contains particulate matter as well as treatment agents. Raymond Shadis, NEC pf. at 21-24.

157. There has been no adverse air quality impact from cooling tower drift. Tr. 6/27/13, Vol. I, at 66 (Thomas).

Discussion

NEC argues that Entergy VY has failed to meet its burden of demonstrating that issuance of a CPG will not result in undue air emissions. NEC points to the emissions of biocides and particulate matter in the cooling tower drift as being potentially adverse and dangerous.

Entergy VY maintains that its air emissions will not cause undue air pollution. According to Entergy VY, the air emissions at the VY Station have not changed and comply with applicable regulations. As to the cooling tower drift, Entergy VY maintains that there is no evidence that such drift is causing undue air pollution. Entergy VY also asserts that the NRC had reviewed the VY Station's cooling tower drift as part of the Plant's Site Specific Environmental Impact Statement and found that the drift did not involve pollutants that are sufficient in quantity for regulation.

The evidence supports the conclusion that there will not be undue air pollution from the VY Station. Issuance of an amended CPG is not expected to change the emissions from the VY Station. Moreover, we find no persuasive evidence that the existing emissions are causing undue air pollution at present.

Aesthetics

[30 V.S.A. § 248(b)(5)]
[10 V.S.A. § 6086(a)(8)]

158. The VY Station site is an industrial complex comprised of 148 total acres, 94 of which are developed, eight of which are marginally developed, and 46 of which are undeveloped. Dodson pf. at 8.

159. The VY Station has existed on its site for more than 40 years. Dodson pf. at 5 and 8.

160. No changes to the VY Station site are currently proposed as a result of, or associated with, continued operation of the VY Station that would alter the present visual character of the VY Station and the surrounding area. Dodson pf. at 5 and 8.

161. Continued operation of the VY Station will result in minimal incremental visual impacts. Dodson pf. at 8.

162. The main visible change that would result from the cessation of operations at the VY Station would be the elimination of the vapor plume. The vapor plume refers to the moist air

exiting the cooling towers that condenses into water vapor under certain atmospheric conditions. Dodson pf. at 5.

163. A cessation of operations at the VY Station would have a minimal effect on the visual character of the VY Station. There will be no significant improvement of scenic views until most of the structures at the site are removed. Dodson pf. at 5 and 31.

164. The MOU specifies the "removal of structures," which would include both above-ground structures and their underground foundations, as something to be addressed by the site restoration standards that Entergy VY, the Department, ANR, and VDH will develop. Recchia pf. at 9; exh. Joint-1 at ¶ 5; tr. 1/31/14 at 134-135 (Twomey).

165. The MOU creates a structure for cooperation on site restoration and provides additional assurance for the completion of site restoration. Recchia pf. at 9; exh. Joint-1 at ¶¶ 5-6.

166. The MOU provides that Entergy VY will complete a site-assessment study by the end of 2014. Using that site assessment, Entergy VY, the Department, ANR, and VDH will work in good faith to determine in a timely and cost-effective manner overall site restoration standards necessary to support use of the property without limitation. Exh. Joint-1 at ¶ 5.

167. Entergy VY commits in the MOU to promptly commence site restoration after the completion of radiological decommissioning. Exh. Joint-1 at ¶ 6.

168. The MOU provisions establishing a site restoration fund will help ensure that funds will be available to cover costs of site restoration, including removal of structures. Recchia pf. at 9; exh. Joint-1 at ¶ 7.

169. As a consequence of the MOU, site restoration work, including the removal of structures, will likely occur sooner than in the absence of the MOU. The removal of structures will have a positive influence on the aesthetics of the site and surrounding area. Recchia pf. at 9; exh. Joint-1 at ¶¶ 5-7; Dodson pf. at 5 and 31.

Discussion

The VY Station's structures will be present on the site and have an aesthetic impact for years to come whether or not the Board grants a CPG authorizing operation until December 31, 2014. Continued operation of the VY Station through the end of this year is not likely to have an

appreciable aesthetic impact. Given the prior existence of the VY Station, its continued operation during this brief period presents no undue adverse effect under the aesthetics criteria of Section 248(b)(5).

Any adverse aesthetic impact of the VY Station's continued operation through this year must also be considered in light of MOU provisions that may have a favorable effect in reducing the magnitude and duration of the adverse aesthetic impact of the VY Station. Provisions of the MOU, as set forth in the findings above, may favorably influence the timing of site restoration, including the removal of structures, and increase the likelihood that site restoration will be completed in accordance with agreed standards and with adequate funding.

Historic Sites

[30 V.S.A. § 248(b)(5)]
[10 V.S.A. § 6086(a)(8)]

170. No significant changes are proposed for the VY Station, and continued operation of the VY Station will have neither adverse nor undue impacts on historic sites. Dodson pf. at 9.

Outstanding Resource Waters

[10 V.S.A. § 1424(a)(d)]

171. The VY Station is located on the Connecticut River. The Connecticut River has not been designated an outstanding resource water by the Vermont Water Resources Board. Accordingly, the continued operation of the VY Station does not implicate this criterion. Goodell pf. at 18.

Headwaters

[10 V.S.A. § 6086(a)(1)(A)]

172. The VY Station site is not in the headwaters of a watershed characterized by steep slopes and shallow soils. The site is in the Connecticut River drainage area, which is greater than 20 square miles, and the site is at an elevation of approximately 252 feet above sea level. Goodell pf. at 6.

173. The VY Station area is not the watershed of a public water supply as designated by the Vermont DEC Water Supply Division. Goodell pf. at 6.

174. Surface water at the VY Station area does not have the opportunity to reach the bedrock aquifer in any significant amounts, and the VY Station is thus not located in a significant aquifer-recharge area. Goodell pf. at 6.

Waste Disposal

[10 V.S.A. § 6086(a)(1)(B)]

175. Entergy VY intends to operate the VY Station in accordance with all applicable regulations of the Vermont DEC regarding the disposal of waste. Goodell pf. at 6.

176. The issuance of an amended CPG to Entergy VY authorizing it to continue to own and operate the VY Station will not result in any physical changes to the VY Station's facilities, so continued operation will not create new, construction-related waste material or non-radiological harmful or toxic substances. Entergy VY intends to dispose of any non-radioactive waste at a certified, solid-waste-management facility in Vermont or another state. Goodell pf. at 6.

Discussion

The Board's consideration of waste disposal related to the continued operation of the VY Station has not included nuclear waste issues. These issues are primarily within the jurisdiction of the NRC and not of the Board.

Water Conservation

[10 V.S.A. § 6086(a)(1)(C)]

177. During the continued operation of the VY Station, Entergy VY, whenever feasible, intends to consider water conservation, incorporate multiple use or recycling where technically and economically practical, utilize the best available technology for such applications, and provide for continued efficient operation of these systems. Goodell pf. at 8.

Floodways

[10 V.S.A. § 6086(a)(1)(D)]

178. The issuance of an amended CPG to Entergy VY authorizing it to continue to own and operate the VY Station will not restrict or divert the flow of flood waters or endanger the health, safety, and welfare of the public or riparian owners during flooding. Goodell pf. at 8.

179. Other than the river-intake and discharge structures, the VY Station's structures, built at an elevation generally around 252 feet above sea level, are outside of the 100-year and 500-year floodplains. Goodell pf. at 8; exh. EN-JG-6.

Streams

[10 V.S.A. § 6086(a)(1)(E)]

180. Other than a small and unnamed, intermittent stream-drainage channel approximately 500-feet long located west of the VY Station area, the only waterway near the VY Station area is the Connecticut River. Goodell pf. at 9.

181. This seasonal stream is not likely to be affected by the continued operation of the VY Station, as it has been receiving Plant runoff since the original Plant's construction and remains in a stable condition. Goodell pf. at 9.

182. The issuance of an amended CPG to Entergy VY authorizing it to continue to own and operate the VY Station will maintain the natural conditions of streams and not endanger the health, safety, or welfare of the public or of adjoining landowners. Goodell pf. at 8-9.

Shorelines

[10 V.S.A. § 6086(a)(1)(F)]

183. Stormwater runoff from the VY Station site to the Connecticut River is through overland flow and from the existing stormwater system discharging directly to the river. Runoff to the Connecticut River is regulated under stormwater discharge operating permits and the VY Station's NDPES permit. Goodell pf. at 9.

184. The issuance of an amended CPG to Entergy VY authorizing it to continue to own and operate the VY Station will require periodic trimming of brush along the shoreline for security purposes. This activity is not likely to destabilize the soil. Goodell pf. at 10.

185. The issuance of an amended CPG to Entergy VY authorizing it to continue to own and operate the VY Station will have no additional impact on the Connecticut River shoreline or adjacent waters, or on recreational and other access to the water. Continued operation will not result in the removal of vegetation or destabilize the shoreline's bank. Goodell pf. at 8-9.

Wetlands

[10 V.S.A. § 6086(a)(1)(G)]

186. The issuance of an amended CPG to Entergy VY authorizing it to continue to own and operate the VY Station will not violate any rules of the Water Resources Board relating to significant wetlands. Goodell pf. at 10.

187. There are no mapped, Class I or Class II wetlands on the operational portion of the VY Station's site. Goodell pf. at 10; exh. EN-JG-4; exh. EN-JG-7.

188. The VY Station's site plan does show several small wetlands that are subject to the U.S. Army Corps of Engineers' jurisdiction. These wetlands are located in areas of the site that see little activity. Goodell pf. at 10; exh. EN-JG-4.

189. To ensure that wetland areas are not inadvertently affected in the future, wetland areas have been mapped to allow easy review prior to any site projects. Goodell pf. at 11; exh. EN-JG-8.

Sufficiency of Water and Burden on Existing Water Supply

[10 V.S.A. §§ 6086(a)(2) & (3)]

190. The VY Station's supply and use of water is governed by water supply/wastewater disposal permits and public water system permits. Goodell pf. at 8; exh. EN-JG-9.

Soil Erosion

[10 V.S.A. § 6086(a)(4)]

191. The VY Station is located on a relatively flat site above the Connecticut River and over the years has been engineered to establish stormwater-drainage systems and other erosion-stabilizing features. Ongoing stormwater discharges at the VY Station are authorized under ANR stormwater-operating permits. Goodell pf. at 12-13.

192. The issuance of an amended CPG to Entergy VY authorizing it to continue to own and operate the VY Station will not cause unreasonable soil erosion or reduce the capacity of the land underneath the VY Station to hold water. Goodell pf. at 13.

Transportation Systems

[10 V.S.A. § 6086(a)(5)]

193. The issuance of an amended CPG to Entergy VY authorizing it to continue to own and operate the VY Station will not cause unusual congestion or unsafe conditions with respect to transportation. Goodell pf. at 13-14.

Educational Services

[10 V.S.A. § 6086(a)(6)]

194. The issuance of an amended CPG to Entergy VY authorizing it to continue to own and operate the VY Station will have no additional impact on educational services. Goodell pf. at 14.

Municipal Services

[10 V.S.A. § 6086(a)(7)]

195. The issuance of an amended CPG to Entergy VY authorizing it to continue to own and operate the VY Station will not place an undue burden on the ability of the Town of Vernon to provide municipal or governmental services. Goodell pf. at 14-15.

Rare and Irreplaceable Natural Areas and Wildlife, Including Necessary Wildlife Habitat and Endangered Species

[10 V.S.A. § 6086(a)(8)]
[10 V.S.A. § 6086(a)(8)(A)]

196. The effect of the continued operation of the VY Station on the wildlife habitat and endangered species of the Connecticut River is discussed in findings 123 to 145, above.

197. The VY Station is wholly located in an area that has been previously and extensively developed since the late 1960s. Goodell pf. at 16.

198. The Vermont Fish and Wildlife Department reviewed its database in 2008 for documented occurrence of rare, threatened, and endangered species and significant natural communities in the vicinity of the VY Station site, and provided an update of this information in June 2012. The provided information indicates that the locations of the observed species and natural communities included in the database are not within the operational portions of the VY Station site. Goodell pf. at 15-16.

Development Affecting Public Investments

[10 V.S.A. § 6086(a)(9)(K)]

199. The issuance of an amended CPG to Entergy VY authorizing it to continue to own and operate the VY Station will not unnecessarily or unreasonably endanger the public or quasi-public investment in or materially jeopardize or interfere with the functioning, efficiency or safety of, or the public's use or enjoyment of, or access to the Connecticut River or any governmental or public utility facility, service, or lands. Goodell pf. at 17-18.

Public Health and Safety

[30 V.S.A. § 248(b)(5)]

200. The Chief of the Vernon Police Department and Chief of the Vernon Volunteer Fire Department have determined that continued operation of the VY Station will not have an undue adverse effect on non-radiological public health and safety. Goodell pf. at 18; *see* exh. EN-JG-10; exh. EN-JG-11.

Discussion

The Board's consideration of public health and safety issues related to the continued operation of the VY Station has not included any issues of radiological safety. These issues are within the jurisdiction of the NRC and not of the Board.

(6) Least-Cost Integrated Resource Plan
[30 V.S.A. § 248(b)(6)]

As the Board has found previously, Entergy VY is a wholesale utility that does not distribute or transmit electricity to the public, and thus is not required to submit an integrated resource plan pursuant to 30 V.S.A. § 218c.[89] Therefore, this criteria is not applicable.

(7) Compliance with Electric Energy Plan
[30 V.S.A. § 248(b)(7)]

Findings

201. Continued operation of the VY Station through December 31, 2014, pursuant to the MOU, is in compliance with the *Electric Energy Plan* approved by the Department under 30 V.S.A. § 202 (the Comprehensive Energy Plan or "CEP"). This finding is supported by findings 202 through 204, below.

202. The CEP does not state a position as to the closure of the VY Station. Exh. PSD-ASH-01 at 127.

203. The CEP establishes a goal of meeting 90 percent of the State's energy needs with renewable energy by 2050 and specifically recognizes the CEDF in contributing to the development of additional renewable resources within the state. Exh. PSD-ASH-01 at 3 and 142.

204. Entergy VY has agreed to release approximately $5.2 million in payments to the CEDF previously held in escrow, which will now be used to support renewable energy and energy efficiency resources in Vermont, thus furthering the renewable goals of the CEP. Twomey supp. pf. at 17; Recchia pf. at 9; exh. Joint-1 at ¶ 9.

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89. *See* Docket 6812, Order of 3/15/04 at 103; Docket 6480, Order of 6/27/01 at 7.

Discussion

Among the Section 248(b) factors relevant in this case to the requested "general good" determination under Section 231 is whether the continued operation of the VY Station is "in compliance with the electric energy plan approved by the Department under section 202 of this title, or that there exists good cause to permit the proposed action."[90] Prior to Entergy VY's filing of the Second Amended Petition and entrance into the MOU, and the associated reduced period of operation and commitment to release CEDF payments, the Department's witnesses raised questions as to whether granting a CPG to Entergy VY would meet this criteria on the grounds that nuclear energy is not a renewable resource and thus would not contribute to the 90 percent renewable energy goal.[91] However, in light of the reduced period of operation and, in particular, the agreement to release CEDF payments previously held in escrow by Entergy VY, it is evident that the approval of the MOU and a decision to grant a CPG will result in an increase in the availability of resources to fund new renewable projects and, as such, will be compliant with the CEP.

(8) Service by Existing or Planned Transmission Line
[30 V.S.A. § 248 (b)(10)]

205. The VY Station can be served economically by existing transmission facilities without undue adverse effects. Twomey pf. at 16.

206. The VY Station uses existing transmission facilities and does not impose additional costs on Vermont distribution utilities or customers. Twomey pf. at 16.

G. Storage of Spent Nuclear Fuel

In the MOU, Entergy VY, the Department and ANR agree that the Board should issue a CPG effective as of March 21, 2012, for the storage of SNF derived from operation after that date.

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90. 30 V.S.A. § 248(b)(7).

91. *See, e.g.*, Hopkins pf. (1/15/13) at 48-50.

At the time the Board authorized Entergy VY to construct a dry fuel storage facility for SNF, the Board included a condition limiting the cumulative total amount of spent fuel stored at the VY Station to the amount derived from the operation of the facility up to, but not beyond, March 21, 2012.[92] Entergy VY's Second Amended Petition contained a request for "such approvals from this Board as may be required" to operate the VY Station until December 31, 2014, "including all necessary incidents of such operation, including without limitation the storage of spent nuclear fuel." Entergy VY represents that the Board has the requisite authority under Section 231 to authorize the continued storage of SNF. In the alternative, Entergy VY also seeks SNF storage permission under Chapter 157 of Title 10.

We conclude that our statutory authority under Section 231 enables us to issue a CPG to Entergy VY authorizing the continued storage of SNF at the VY Station and removing the limitation in the Docket 7082 CPG. As we conclude that approval of the MOU is in the best interest of the State of Vermont, we also conclude that the clause in the Docket 7082 CPG that limits the cumulative total amount of spent fuel stored at the VY Station to the amount derived from the operation of the facility up to, but not beyond, March 21, 2012, should be given no further effect. This change, which is encompassed within the relief Entergy VY requested in the Second Amended Petition, is necessary to give effect to the Section 231 CPG we issue today.

V. General Good of the State

The issue before the Board in this proceeding is whether the issuance of a CPG to Entergy VY authorizing it to own and operate the VY Station through the end of this year (including all necessary incidents of such operation) will promote the general good of the State. In the previous sections, we have evaluated each of the criteria that we typically assess in deciding whether to issue a CPG under Section 231. In this section, we consider other factors that weigh on the question of whether issuance of a CPG promotes the general good of the state.

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92. Docket 7082, Order of 4/26/06 at 90.

A. Decommissioning and Site Restoration

Findings

207. Under NRC regulations, "DECON" is defined as "the alternative in which the equipment, structures, and portions of a facility and site containing radioactive contaminants are removed or decontaminated to a level that permits the property to be released for unrestricted use shortly after cessation of operations." Exh. EN-TLG-2 at viii.

208. Under NRC regulations, "SAFSTOR" is defined as "the alternative in which the nuclear facility is placed and maintained in a condition that allows the nuclear facility to be safely stored and subsequently decontaminated (deferred decontamination) to levels that permit release for unrestricted use." Under NRC regulations, decommissioning is required to be completed within 60 years, and longer time periods are considered only when necessary to protect public health and safety. Exh. EN-TLG-2 at ix.

209. There are three general stages in the decommissioning process: preparations; decommissioning operations and license termination; and site restoration. Exh. EN-TLG-2 at Section 2.

210. Radiological decommissioning activities will be funded by the Decommissioning Trust Fund. William A. Cloutier, Jr., Entergy VY ("Cloutier") pf. at 11.

211. The purpose of the Decommissioning Trust Fund is to meet NRC requirements for radiological decommissioning and license termination. Tr. 2/12/13, Vol. I, at 60-61 (Cloutier).

212. The fund was "set up for radiological decommission[ing]," and is intended "first and foremost, to ensure that the radiological remediation of the VY Station site and termination of the Plant's operating license is successfully completed, *i.e.*, decommissioning, as defined by the NRC." Tr. 2/12/13, Vol. I, at 60 (Cloutier); Cloutier pf. reb. at 12.

213. When the NRC reviews the adequacy of a decommissioning fund, it looks at the fund in relation to radiological decommissioning only, and does not assess adequacy with respect to additional state-related costs such as site restoration. Tr. 2/12/13, Vol. I, at 63 (Cloutier); tr. 6/17/13, Vol. I, at 76-77 (Cloutier).

214. A decommissioning-cost analysis is prepared to evaluate and capture the costs to decontaminate and dismantle a nuclear facility, under one or more scenarios, for the purpose of establishing the revenue requirements to complete such scenario(s). Cloutier pf. at 4.

215. A decommissioning scenario is typically based upon one or a combination of two of the NRC's approved decommissioning alternatives: DECON (prompt decommissioning) or SAFSTOR (deferred decommissioning). Cloutier pf. at 5.

216. TLG Services ("TLG"), an affiliate of ENVY and ENO, has prepared decommissioning cost analyses for the VY Station that it states follow standardized and industry-accepted processes and practices. Cloutier pf. at 2 and 5.

217. TLG does analyses for most of the utilities in the United States and a good number of nuclear facilities across the world. Tr. 2/12/13, Vol. I, at 43 (Cloutier).

218. TLG's analysis evaluated both prompt (DECON) and deferred (SAFSTOR) decommissioning alternatives. Cloutier pf. at 6.

219. The TLG analysis includes some costs for site restoration. Exh. EN-TLG-2 at xvi; Cloutier pf. at 10.

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. Exh. EN-TLG-2, Section 2 at 15; exh. PSD-CROSS-WC-15 at 10; tr. 6/17/13, Vol. I, at 14 (Cloutier).

221. Absent other funding sources, funds will be available for site restoration or other non-radiological purposes only if there is a surplus in the decommissioning trust fund at the conclusion of radiological decommissioning and NRC license termination. Tr. 2/12/13, Vol. I, at 64-65 (Cloutier).

222. Should the Decommissioning Trust Fund be exhausted by radiological decommissioning, funds for site restoration would need to be taken from "other sources," such as parental guarantees. Tr. 2/12/13, Vol. II, at 19-20 (Cloutier).

223. In the Docket 6545 MOU, Entergy VY committed to fully restore the site of the VY Station. Exh. DPS-01 at 3.

224. If the VY Station had shut down in 2012, there were not sufficient funds in the decommissioning trust to allow prompt decommissioning. Tr. 2/12/13, Vol. I, at 45 (Cloutier).

225. Since purchasing the VY Station, ENVY has maintained credit agreements and a parental guarantee from Entergy Corporation. Twomey pf. at 17; findings 78-85, above.

226. Entergy VY plans to fund the greenfielding of the VY Station through the Decommissioning Trust Funds. Entergy VY expects that there will be an adequate amount of money left over to allow Entergy VY to meet the site-restoration commitments that were established in the Docket 6545 MOU. Tr. 6/17/13, Vol. II, at 129-130 (Cloutier).

227. Pursuant to the Docket 6545 MOU, Entergy VY made various commitments. These commitments included to "report to the Board and to the Department the status of the decommissioning funds and the latest NRC calculation of such responsibility at the same time as such report is required by the NRC," to participate in public discussion on the adequacy of the decommissioning funds, to provide to the Department semi-annual reports regarding the status of the decommissioning fund, as reported to the fund managers, to update a site-specific decommissioning cost study at least once every five years, with the first study completed five years after the sale of the VY Station to Entergy, and to demonstrate at the time of each site-specific decommissioning cost study that "funding will be sufficient to accomplish decommissioning, including site restoration and spent fuel management." Exh. PSD-01 at 4-5.

228. Under Paragraph 6 of the Docket 6545 MOU, Entergy VY must update its decommissioning-cost estimate every five years. Tr. 6/17/13, Vol. II, at 22 (Cloutier).

229. Pursuant to its obligations under the Docket 6545 MOU, Entergy VY's affiliate, TLG, completed a decommissioning cost analysis in 2011. Exh. EN-TLG-2 at vii; tr. 2/12/13, Vol. I, at 45 (Cloutier); Cloutier pf. at 4.

230. The MOU provides additional assurance that Entergy VY will have sufficient funds to complete site restoration. Tr. 1/31/14 at 61, 63 (Twomey).

231. Prior to executing the MOU in this proceeding, Entergy VY had not identified any money or account specifically dedicated to fund site restoration. Tr. 2/12/13, Vol. I, at 67 (Cloutier); tr. 2/15/13, Vol. II, at 93-94 (Twomey).

232. Prior to executing the MOU, Entergy VY indicated it would make available for site restoration only any surplus amount that might remain in the nuclear Decommissioning Trust Fund after completing radiological decommissioning. Exh. PSD-12 at ¶ 3; tr. 2/12/13, Vol. I, at 64-65 (Cloutier).

233. In the MOU in this proceeding, Entergy VY has agreed to establish a fund dedicated to site restoration at the VY Station ("Site Restoration Fund"). Under the MOU, Entergy VY will contribute $10 million in cash or other equivalent financial instrument upon issuance of a CPG and $5 million on December 31 of each of the next three years. Exh. Joint-1 at 3-4; Recchia pf. at 2-3; Twomey supp. pf. at 18.

234. Entergy VY also commits to provide financial assurance, in the form of a parental guarantee from Entergy Corporation, in the amount of $20 million for the Site Restoration Fund, except that Entergy Corporation's obligation only occurs after the existing Entergy Corporation guarantee is terminated. Entergy VY also may eliminate the guarantee if the balance in the Site Restoration Fund exceeds $60 million. Exh. Joint-1 at 4; tr. 1/31/14 at 110 (Twomey).

235. If a CPG is issued and the MOU approved, Entergy VY has committed to decommission the VY Station once the Company reasonably determines that the funds in the Decommissioning Trust Fund are sufficient to complete radiological decontamination and dismantlement and remaining SNF management activities that the federal government has not yet agreed (or been ordered) to reimburse. Tr. 1/31/14 at 33-34 (Twomey); Twomey supp. pf. at 17-18; exh. Board-20 at 4.

236. If the Decommissioning Trust Fund continues growing at its historical rate, the fund could reach the $1.16 billion amount estimated by TLG Services (for a 2012 shutdown) as necessary to finance radiological decommissioning and SNF management at the VY Station in under 15 years. Tr. 1/31/14 at 142 (Twomey); Cloutier pf. at 7; exh EN-TLG-2, Section 3, at 24-25.

237. Although Entergy VY has agreed to commence radiological decommissioning as soon as the monies in the Decommissioning Trust Fund are sufficient for radiological decommissioning and SNF management, even after Entergy VY begins such decommissioning, it will not immediately spend the entirety of the fund, but plans to spend it as needed to finance

decommissioning tasks. The remaining funds in the Decommissioning Trust Fund are expected to continue to grow. Tr. 1/31/14 at 142 (Twomey); tr. 1/30/14 at 67-68 (Recchia).

238. Entergy VY has made plans to finance the remaining conditions in the MOU, even after the VY Station ceases operation. Tr. 1/31/14 at 58 (Twomey).

Discussion

At the present time, Entergy VY seeks permission to continue operating the VY Station through the end of this year. However, following closure of the VY Station, Entergy VY must decommission the Plant, as required by NRC regulations. This entails removal of SNF, initially to dry casks and eventually to a federal repository for such waste. Following removal of the fuel, the remaining structures are removed and the site is restored.

Many aspects of this process relate to radiological safety and therefore are strictly under the purview of the NRC as a matter of federal law. These aspects include issues concerning the SNF, the standards for radiological decontamination, and, significantly, the timing of the decommissioning. NRC rules allow a nuclear plant owner a substantial amount of time to complete the decommissioning process (up to 60 years). However, the standards and performance of site restoration remains within the state's jurisdiction.

At the time the VY Station was sold to Entergy VY, the owners had established a Decommissioning Trust Fund to finance the radiological decommissioning. As a part of the sale, that fund, along with risks associated with the fund adequacy, was transferred to ENVY. However, the Department also negotiated provisions in the Docket 6545 MOU that required Entergy VY to restore the site of the VY Station. The Board imposed further conditions, requiring that Entergy VY return all excess funds in the Decommissioning Trust Fund following site restoration. This latter provision was added to remove any incentive Entergy VY might have otherwise had to save money (with the expectation of keeping it), thereby encouraging maximum expenditure of these funds on site restoration.[93]

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93. This provision was subsequently modified to allow Entergy VY to retain half of any excess funds to the extent they were associated with added contributions to the Fund and earnings thereon. Docket 6545, Orders of 7/11/02 at 6-11 and 7/15/02.

In this proceeding, parties have raised concerns about the assurance of whether there will be sufficient funds available to completely restore the Vernon site. They have also disputed the site restoration standard that Entergy VY must meet. Entergy VY anticipates there will be sufficient excess funds in the Decommissioning Trust Fund after NRC requirements are met to fully accomplish site restoration. Entergy VY also maintains that the MOU provides several layers of protection that ensure that Entergy VY will be able to fully restore the site. The MOU establishes a separate fund for site restoration. This fund, which supplements any excess Decommissioning Trust Fund assets, is further supported by a parental guarantee. In addition, Entergy VY and the Department have agreed on a methodology to clarify the scope of site restoration obligations.

The Department originally raised substantial concerns over the adequacy of funds to complete site restoration. In the MOU, however, the Department and Entergy VY reached a number of agreements that, according to the Department, help to address their concerns. Like Entergy VY, the Department cites to the establishment of the Site Restoration Fund, supplemented by the Entergy Corporation guarantee as helping to ensure that funds will be available. The Department also highlights Entergy VY's agreement to a process for defining site restoration standards as a positive element. As a result, the Department contends that Entergy VY has adequately addressed issues associated with site restoration.

VPIRG maintains that the MOU significantly backtracks from previous Department positions. VPIRG cites to the Department's briefs earlier in this proceeding and asserts that the MOU does not provide sufficient assurances to address the concerns raised earlier by the Department. Moreover, VPIRG argues that the site restoration standards are "vague and unenforceable" and, more importantly, represent a departure from prior Board standards for nonradiological decommissioning. Finally, VPIRG asserts that Entergy VY's commitment to commence decommissioning as soon as funds are available is unenforceable. According to VPIRG, the Settlement Agreement needlessly leaves the decision on starting decommissioning to Entergy VY, without setting any objective criteria for enforcement.

CLF and NEC also maintain that commitments related to site restoration and timing of decommissioning are vague.

WRC raises a number of decommissioning/site restoration concerns. WRC questions whether the Decommissioning Trust Fund is adequate to permit Entergy VY from meeting all of its commitments. WRC also comments on various aspects of the decommissioning process, including the timing of decommissioning and the need for prompt removal of SNF from the spent fuel pool. WRC further argues that the Board should impose a condition prohibiting any delay in site restoration after decommissioning. WRC recommends that the Board require that site restoration include the removal of all structures, not simply the first three feet underground as Entergy VY has assumed. Finally, WRC asks that the Board strike the provision from the Docket 6545 Order that allowed Entergy VY to retain half of any excess funds in the Decommissioning Trust Fund.

The Board shares a number of the concerns as to whether Entergy VY's original testimony demonstrated that it had sufficient funds to fully restore the site of the VY Station after closure and decommissioning. The Department's witnesses, in particular, delineated a number of uncertainties. In addition, the exact standards for site restoration have not been established, adding to the uncertainty about the ultimate costs. Entergy VY has provided a certain amount of financial assurance in the form of guarantees from affiliates and its parent corporation. Entergy VY also anticipates being able to use excess money in the Decommissioning Trust Fund to meet site restoration obligations, but it was unable to quantify this excess. In the absence of the MOU, these uncertainties might have caused the Board to conclude that Entergy VY had not demonstrated that it could meet its Docket 6545 MOU commitment to fully restore the VY Station site.

The MOU puts in place two commitments that largely address these issues. Under the MOU, Entergy VY and the Department have established a process for assessing at an early stage and more comprehensively the site restoration costs and tasks. Entergy VY will initially conduct a site assessment study. Afterwards, Entergy VY has agreed to work with the Department, ANR, and VDH to determine site restoration standards. The parties anticipate that the Board will conduct a proceeding, probably in 2015, to determine the standards that will apply. Entergy VY has also committed to commence site restoration, in accordance with these standards, "promptly" after completing radiological decommissioning.

This process will enable the Board and parties to determine early in the post-operational period what standards will apply when Entergy VY eventually decommissions the VY Station site and restores it. The certainty will enable Entergy VY to better understand its financial needs for site restoration. Entergy VY can then plan to ensure that funds are adequate at the time they are needed. It will also avoid future litigation at the time of actual site restoration that could lead to delays.

The MOU also contains provisions to address the adequacy of funds for site restoration. As noted, Entergy VY anticipates that there will be excess money in the Decommissioning Trust Fund after compliance with NRC requirements. The MOU adds further funds, specifically targeted towards site restoration. Entergy VY commits to provide $10 million upon issuance of a CPG and $15 million over the next several years, so that by the end of 2017, the site restoration fund will have $25 million invested. This money is then expected to grow to provide a supplemental funding source. This fund is backstopped by a parental guarantee from Entergy Corporation to provide up to $20 million of additional funds (which can be eliminated if the site restoration fund balance exceeds $60 million).

We find that the MOU adequately addresses issues related to site restoration. Entergy VY has also made three other commitments that represent an enhancement from the status quo. First, Entergy VY's MOU agreement to promptly commence site restoration after the completion of radiological decommissioning will help ensure that the site is available for use as soon as feasible. Second, in the Settlement Agreement, Entergy VY has agreed to initiate decommissioning within 120 days after it "has made a reasonable determination" that it has sufficient funds to complete decommissioning and remaining SNF management obligations.[94] These agreements represent clear commitments to not unreasonably delay decommissioning and site restoration to the maximum 60-year period authorized by the NRC, but to instead return the site to other uses as soon as funds are adequate to do so. We therefore accept and rely upon them. Third, in the MOU, Entergy VY expressly acknowledges the State's jurisdiction over site restoration. We also observe that the Docket 6545 Order, as well as subsequent orders issued by the Board, contain conditions and specific commitments by Entergy VY concerning post-

94. Exh. Board-20 at 4.

operational matters, such as site restoration.[95] These requirements will remain in place.[96] For example, Entergy VY's commitments in connection with the Post Shutdown Decommissioning Activities Report to demonstrate the adequacy of funding and to provide "additional funds or other acceptable financial assurance to ensure funding will be sufficient to accomplish decommissioning, including site restoration and spent fuel management" in Docket 6545 would not be affected by a Board order approving the MOU.[97]

WRC raised several issues related to the timing of decommissioning itself. As we discuss above, radiological decommissioning is outside the Board's jurisdiction, so we do not address these issues.

WRC also asks that the Board modify the provision in the Docket 6545 MOU that calls for sharing of excess decommissioning funds between Entergy VY and the previous owners of the VY Station. We observe first that WRC did not file a request for such amendment in Docket 6545, which would be the proper recourse.

Turning to the merits of WRC's argument, we start by observing that it appears not to reflect the Board's Orders in that Docket. In that proceeding, the Department and Entergy VY did agree to a provision under which excess funds after decommissioning and site restoration would be shared between Entergy VY and the sponsors of the VY Station (55 percent of which would have gone to customers of GMP and CVPS). In the Board's Order approving the sale and Docket 6545 MOU, the Board specifically excluded from approval that provision of the Docket 6545 MOU and required (as condition 4 of the sale Order), that upon completion of decommissioning, any property in the Decommissioning Trust Fund be distributed for the benefit of the sponsors of the VY Station (i.e., the previous owners). On reconsideration, the Board modified this requirement so that it only applied to contributions from ratepayers (and growth

95. For example, *see* findings 111 and 112 of the Docket 6545 Order, based on testimony of Entergy VY committing to make future demonstrations of the adequacy of funding to accomplish site restoration and to provide additional funds or financial assurances to ensure sufficient funds for site restoration. Docket 6545, Order of 6/13/02 at 85-86.

96. The MOU provides that "[except as expressly stated in this MOU, all other agreements, Board orders and MOUs . . . remain in full force and effect." Exh. Joint-1 at ¶ 17.

97. Docket 6545 MOU (3/2/02) at 5 (¶ 9). *See*, also, findings 111-113 in Docket 6545, Order of 6/13/02 at 84-85.

from those contributions).[98] This meant that the Decommissioning Trust Fund that was transferred to Entergy VY as part of the sale, which had been ratepayer funded, was subject to the requirement that all excess ratepayer funds be returned. To the extent Entergy VY made additional contributions, those contributions and growth attributable to them would be shared.[99] WRC has not demonstrated why we should alter this arrangement.

Finally, WRC asks that we decide now that all structures, including their foundations, must be removed as part of the site restoration process. In light of the site assessment and process described in the MOU for defining site restoration standards, we find it unnecessary to specify part of the standard now and, therefore, decline to adopt WRC's suggestion.

B. Benefits of MOU

In its brief, VPIRG raises several concerns about the MOU in addition to those that we have specifically addressed above. VPIRG asserts that the benefits of the MOU are modest and that overall, they provide less protection to the public than would a decision on the merits. VPIRG points to various issues related to the timing of decommissioning and site restoration; these are discussed in the previous section. Further, VPIRG contends that the right of first refusal on any sale of land adds little to the State's eminent domain power. VPIRG also questions whether the economic development payments represent an incremental benefit, since they could be ordered by the Board in any event. As a result of these concerns, VPIRG argues that the public would be better served by an enforceable commitment by Entergy VY to seek NRC approval of the commencement of decontamination and dismantlement 60 days after a request from the Department or the Governor.

In reaching our decision, we have weighed the considerations put forward by VPIRG. Nonetheless, we are unpersuaded by VPIRG's argument that the public would be better served by rejection of the MOU and adoption of the condition VPIRG puts forward.

We start with VPIRG's proposed alternative — a condition requiring Entergy VY to seek NRC approval for the commencement of decommissioning upon request. This proposal would

98. Docket 6545, Orders of 7/11/02 at 6-13 and 7/15/02.

99. It is our understanding that, to date, Entergy VY has not made any incremental contributions.

seem to give the State substantial discretion. However, it is not clear that it actually provides more than cosmetic benefits. The decision to commence decommissioning is ultimately reserved to the NRC, not to Entergy VY or the State of Vermont. Neither the State nor the Board, as an instrumentality of the State, can direct the timing. Thus, even if the Board adopted VPIRG's suggested condition and Entergy VY made the request, if insufficient funds existed at that time, the NRC is unlikely to authorize decommissioning thus mooting the request. Moreover, it is not clear whether such a condition would be preempted, as it may intrude into radiological decommissioning.

By contrast, under the Settlement Agreement, Entergy VY has committed to seek NRC authorization within one hundred twenty days after it has made a reasonable determination that the funds in the Decommissioning Trust Fund are adequate to complete decommissioning and remaining SNF management activities.[100] This commitment achieves the same result as VPIRG seeks and has the benefit of Entergy VY having agreed to it.

We also conclude that although some of the provisions in the MOU may not individually have significant value, the MOU benefits in the aggregate will be substantial for the State of Vermont, and these benefits may well not have been obtainable through a litigated decision. This Order describes at length the benefits that the MOU facilitates, particularly relative to Entergy VY's original petition. We need not repeat them in detail, but they include various financial commitments relative to site restoration, clean energy development, and economic development in Windham County, and the establishment of a process for defining site restoration obligations. These benefits and the achievement of an agreement between Entergy VY and the State agencies on these and other matters are significant. Entergy VY's agreement to the conditions in the MOU and its assurances as to the availability of funding to meet its commitments under the MOU will provide more certain benefits than any realistic alternative.

It is also not clear that all of these benefits could have been obtained in the absence of the MOU. Entergy VY had contested proposals from the Department concerning the CEDF and

100. Exh. Board-20 at 4.

economic development in Windham County.[101] Given the MOU, the Board does not need to resolve these issues. These arguments, however, highlight that if the Board were to attempt to order such relief, such an order might have led to more litigation with an uncertain outcome. The MOU secures benefits to be realized through Entergy VY's commitments without further litigation risk and thus is preferable as a means of promoting the general good of the State.

We do not agree with VPIRG's dismissal of the MOU as providing only modest benefits.[102] This characterization misses the real questions — whether the MOU promotes the general good of the State and whether it provides benefits, be they "modest" or "material." The MOU does not purport to resolve post-operational issues, such as site restoration timing, funding and standards. Also, as VPIRG suggests, it is possible that portions of the MOU do not clearly provide benefits that are material to the State. For example, the value of the right of first refusal on the sale of the VY Station site may not be significant (although VPIRG has not established that the State could acquire the property through eminent domain). No party has presented evidence quantifying the potential value of the right-of-first-refusal. Nonetheless, this MOU provision clearly creates an opportunity that is of value to the State — one that did not exist before the MOU was negotiated. More broadly, the MOU significantly advances the resolution of numerous issues and therefore provides direct and valuable financial contributions to the general good of the State.

The evidence, especially when seen in light of the benefits to the State provided by the MOU, supports the conclusion that the continued operation through the end of the current operating cycle as part of an orderly wind-down of operations at the VY Station is substantially more beneficial to the State than the negative effects of this brief period of continued operation. Finally, no party, including VPIRG, has presented sufficient evidence that denying the CPG would be a better outcome for the State than that provided by approval of the MOU. As the Department states in its final brief, "the MOU provides benefits and certainty that conditions imposed by the Board sua sponte might not."[103]

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101. Entergy VY Supplemental Brief (11/22/13) at 12 and 16-19.
102. VPIRG's Final Brief (2/24/14) at 7-15.
103. DPS final brief (2/14/14) at 1.

VI. Conclusion

After carefully considering the positions of all the parties, we find that approval of the MOU will not only promote the general good of the State, but, is also the best option for the State under the circumstances. Accordingly, based on the foregoing, we find that Entergy VY's ownership and operation of the VY Station through the end of this year, in accordance with the terms of the MOU, will promote the general good of the State. In reaching this conclusion, we have relied upon Entergy VY's commitments in the MOU and our expectation that the Company will fulfill them.

VII. Order

It Is Hereby Ordered, Adjudged and Decreed by the Public Service Board of the State of Vermont that:

1. Amendment of the Certificate of Public Good issued in Docket 6545, held by Entergy Nuclear Vermont Yankee, LLC ("ENVY"), and Entergy Nuclear Operations, Inc. ("ENO") (ENVY and ENO are jointly referred to as "Entergy VY"), to authorize the ownership and operation of the Vermont Yankee Nuclear Power Station (the "VY Station") to include the period of March 21, 2012, through December 31, 2014, and the continued ownership of the VY Station thereafter solely for the purpose of decommissioning, will promote the general good of the State in accordance with 30 V.S.A. § 231(a), and we hereby so amend these companies' Certificate of Public Good.

2. Condition 4 of the Public Service Board's April 26, 2006, Order in Docket 7082, which states:

> The cumulative total amount of spent nuclear fuel stored at Vermont Yankee is limited to the amount derived from the operation of the facility up to, but not beyond, the end of the current operating license, March 21, 2012. This capacity may include on-site storage capacity to accommodate full core offload or any order or requirement of the Nuclear Regulatory Commission with respect to the fuel derived from these operations.

shall no longer apply. Condition 3 of the Certificate of Public Good issued to Entergy VY in that Docket on the same date and containing the same language shall no longer apply.

3. The Memorandum of Understanding ("MOU") among Entergy VY, the Vermont Department of Public Service, and the Vermont Agency of Natural Resources dated December 23, 2013, is hereby approved and the terms of the MOU are hereby incorporated as terms of this Order. Entergy VY shall comply with each of the provisions of the MOU (which is attached to, and incorporated into, this Order as Attachment B).

4. Without affecting any of Entergy VY's other obligations (including, but not limited to, its current and future obligations under condition 12 of the Public Service Board's Order of June 13, 2002, in Docket 6545, and Condition 5 of the CPG issued on the same date in Docket 6545), the requirement that Entergy VY submit a report by June 13, 2014, related to post-shutdown activities at the VY Station is waived.

Dated at Montpelier, Vermont, this 28th day of March, 2014.

s/ James Volz	)	PUBLIC SERVICE
s/ David C. Coen	)	BOARD
s/ John D. Burke	)	OF VERMONT

OFFICE OF THE CLERK

FILED: March 28, 2014

ATTEST: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and Order.

Attachment A: Appearances

John H. Marshall, Esq.
Nancy S. Malmquist, Esq.
Downs Rachlin Martin PLLC
for Entergy Nuclear Vermont Yankee LLC, and Entergy Nuclear Operations, Inc.

Kathleen M. Sullivan, Esq.
Robert Juman, Esq.
Sanford I. Weisburst, Esq.
Ellyde Roko, Esq.
Quinn Emmanuel Urquhart & Sullivan, LLP
for Entergy Nuclear Vermont Yankee LLC, and Entergy Nuclear Operations, Inc.

Robert Hemley, Esq.
Matthew B. Byrne, Esq.
Gravel and Shea, PC
for Entergy Nuclear Vermont Yankee LLC, and Entergy Nuclear Operations, Inc.

Gina Atwood, Esq.
Christopher Land, Esq.
Elise N. Zoli, Esq.
Paul E. Nemser, Esq.
William M. Jay, Esq.
Goodwin Procter LLP
for Entergy Nuclear Vermont Yankee LLC, and Entergy Nuclear Operations, Inc.

Geoffrey Commons, Esq.
Aaron Kisicki, Esq.
for the Vermont Department of Public Service

Rebecca Bact, Esq.
Felicia Ellsworth, Esq.
Mark C. Fleming, Esq.
H. David Gold, Esq.
Bonnie L. Heiple, Esq.
Robert C. Kirsch, Esq.
Christopher R. Looney, Esq.
Caitlin W. Monahan, Esq.
Mat Trachok, Esq.
Nathaniel Custer, Esq.
Wilmer Cutler Pickering Hale and Dorr LLP
for the Vermont Department of Public Service

Jon Groveman, General Counsel
Vermont Agency of Natural Resources
Catherine Gjessing, General Counsel
Vermont Department of Environmental Conservation
for the Agency of Natural Resources

Sandra Levine, Esq.
Zachary K. Griefen, Esq.
for Conservation Law Foundation

Jamey Fidel, Esq.
for Vermont Natural Resources Council & Connecticut River Watershed Council

James A. Dumont, Esq.
Law Office of James A. Dumont, Esq., PC
for Vermont Public Interest Research Group

William A. Nelson, Esq.
for Vermont Public Interest Research Group

Jared Margolis, Esq.
for New England Coalition, Inc.

Ray Shadis, *pro se*
for New England Coalition, Inc.

Christopher Campany, Executive Director
for Windham Regional Commission

Patricia O'Donnell, Selectboard Chair
for the Town of Vernon

Richard H. Coutant, Esq.
Salmon & Nostrand
for the Town of Vernon

Caroline S. Earle, Esq.
Law Office of Caroline S. Earle PLC
for International Brotherhood of Electrical Workers, Local Union 300

Peter H. Zamore, Esq.
Sheehey Furlong & Behm P.C.
For Green Mountain Power Corporation

Donald J. Rendall, Jr., General Counsel
Mari M. McClure, Esq.
Carolyn Browne Anderson, Esq.
for Green Mountain Power Corporation

Robert E. Woolmington, Esq.
Witten, Woolmington & Campbell PC
for TransCanada Hydro Northeast, Inc.

William Driscoll, Vice President
for Associated Industries of Vermont

Vermont Superior Court
Washington Civil Division
65 State Street
Montpelier, Vermont 05602
www.VermontJudiciary.org - Civil 828-2091, Small Claims 828-5551

ENTRY REGARDING MOTION

State of Vermont vs. Parkway Cleaners et al 480-7-10 Wncv

FILED 2014 APR -9 P 12:36 VT SUPERIOR COURT WASHINGTON UNIT

Title:

Motion (Joint) for Approval of Settlement Agree,

No. 9

Filed on: March 17, 2014

Filed By: Persampieri, Nicholas F., Attorney for:
Plaintiff State of Vermont Agency of Natural Resources
and Fournier Defendants.

Response: NONE

✓ Granted Compliance by__________________

___ Denied

___ Scheduled for hearing on: _________ at ________;Time Allotted _____

___ Other

As no other party has objected, the motion is granted.

[signature] 4/9/14
Judge Date

Date copies sent to: 4-9-14 Clerk's Initials [initials]

Copies sent to:
Attorney Nicholas F. Persampieri for Plaintiff State of Vermont Agency of Natural Re
Defendant Parkway Cleaners
Defendant Paul D. Gendron
Defendant Sandra L. Gendron
Defendant Paul D. Gendron and Sandra L. Gendron d/b/a Parkway
Attorney Mark G. Hall for Defendant Fournier Cleaners
Attorney Mark G. Hall for Defendant Harold N. Fournier
Attorney Mark G. Hall for Defendant Peggy J. Fournier
Attorney Mark G. Hall for Defendant Harold N. Fournier and Peggy J. Fournier d/b/a F

Attorney James P.W. Goss for Defendant Richard S. Daniels
Attorney James P.W. Goss for Defendant Hazen Street Holdings, Inc.
Attorney Matthew G Hart for party 11 Co-counsel
Attorney Matthew G Hart for party 10 Co-counsel
Attorney William F. Ellis for Third-Party Defendant Town of Hartford

STATE OF VERMONT

SUPERIOR COURT WASHINGTON Unit	CIVIL DIVISION Docket No. 480-7-10 Wncv

STATE OF VERMONT)
AGENCY OF NATURAL RESOURCES)
Plaintiff)
)
v.)
)
PARKWAY CLEANERS; PAUL D. GENDRON; SANDRA L. GENDRON; PAUL D. GENDRON and SANDRA L. GENDRON doing business as PARKWAY CLEANERS; FOURNIER CLEANERS; HAROLD N. FOURNIER; PEGGY J. FOURNIER; HAROLD N. FOURNIER and PEGGY J. FOURNIER doing business as FOURNIER CLEANERS; and RICHARD S. DANIELS; and HAZEN STREET HOLDINGS, INC.)
Defendants)

JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT AND DISMISSAL OF DEFENDANTS FOURNIER CLEANERS, HAROLD N. FOURNIER, PEGGY J. FOURNIER, AND HAROLD N. FOURNIER AND PEGGY J. FOURNIER DOING BUSINESS AS FOURNIER CLEANERS

Plaintiff, the State of Vermont Agency of Natural Resources ("State"), by and through Vermont Attorney General William H. Sorrell, and Defendants Fournier Cleaners, Harold N. Fournier, Peggy J. Fournier, and Harold N. Fournier and Peggy J. Fournier doing business as Fournier Cleaners (collectively, "Fournier Defendants"), jointly move for approval of the attached Settlement Agreement and Release and for dismissal of the Fournier Defendants.

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Montpelier, VT
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The State's claims against the other Defendants will remain pending following the Court's ruling on this joint motion. Granting the motion would, however, necessarily

eliminate the cross-claim for indemnification brought by Defendants Richard S. Daniels and Hazen Street Holdings, Inc. against the Fournier Defendants. *See* 10 V.S.A. § 6615(i) ("A responsible person who has resolved its liability to the State under this section through a judicially approved settlement . . . shall not be liable for claims for contribution or indemnification regarding matters addressed in the judicially approved settlement or in the agreement."). Granting the motion would also moot the Fournier Defendants' pending summary judgment motion.[1]

1. The State alleges that the Fournier Defendants are among the parties liable under 10 V.S.A. § 6615(a) for the costs of investigation, removal, or remedial action in connection with the release of hazardous materials at 7 Union Street, Hartford, Vermont ("the facility").

2. The Fournier Defendants dispute liability for the State's claims.

3. The State and the Fournier Defendants attended a Court-ordered mediation in this matter on December 17 and have now reached and signed a proposed Settlement Agreement, which, if approved by the Court, will resolve the dispute between them.

4. The proposed Settlement Agreement requires the Fournier Defendants to pay the State $100,000 toward the investigation and cleanup of the facility, in exchange for a release of liability from the State and the resulting protection from third-party claims for contribution or indemnification pursuant to 10 V.S.A. § 6615(i).

6. The State and the Fournier Defendants request that the Court approve the proposed Settlement Agreement and accompanying Release, thereby providing the Fournier

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[1] In the event that this joint motion is denied, the State respectfully requests, and the Fournier Defendants consent, that the Court should grant the State an extension of time (of at least 30 days from the Court's decision) to respond to and cross-move on the Fournier Defendants' summary judgment motion.

Defendants with protection from third-party claims for contribution or indemnification pursuant to 10 V.S.A. § 6615(i), as contemplated by the proposed Settlement Agreement.

7. The Attorney General, pursuant to 3 V.S.A. § 159, has general supervision of matters and actions in favor of the State and may settle such matters and actions as the interests of the State require.

8. The Attorney General has determined that the proposed Settlement Agreement and Release are in the State's interest and should be approved by the Court because:

(i) The proposed settlement provides an immediate source of funding for ongoing expenses of facility investigation and clean-up, including the operation and maintenance of air ventilation systems that are necessary to protect the health of inhabitants of nearby homes.

(ii) Although the State alleges that the Fournier Defendants are liable pursuant to 10 V.S.A. § 6615(a)(2) as persons who owned and operated the facility at the time of release of hazardous materials, the Fournier Defendants dispute this, and while a dispute remains as to whether there was a release during the time the Fournier Defendants owned and operated the facility, the State and the Fournier Defendants agree that the Fournier Defendants did not discharge pollution at the facility. Additionally, the Fournier Defendants are not the current owner or operator of the facility and thus are not liable under 10 V.S.A. § 6615(a)(1). *See, e.g.*, *In re Cuyahoga Equipment Corp.*, 980 F.2d 110, 119 (2d Cir. 1992) (CERCLA "aimed to encourage settlements," particularly when liability is disputed).

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(iii) The Fournier Defendants provided the State with financial disclosures demonstrating an inability to pay additional sums to any regulatory agency.

(iv) Pacific Employers Insurance Company, who issued a policy of liability insurance to the Fournier Defendants, has agreed to provide funding for the Settlement Agreement despite having asserted defenses to coverage, and the State agrees that considerable risk would be involved in attempting to demonstrate coverage should the matter proceed to further litigation.

(v) The proposed Settlement Agreement and Release are the result of good-faith, arms-length negotiations by the State and the Fournier Defendants through their respective counsel, and, if approved by the Court, will settle complex litigation, conserve the time and resources of the Court and the parties, and further the public policy favoring settlement. *See, e.g., Kellner v. Kellner*, 2004 VT 1, ¶ 10, 176 Vt. 571, 844 A.2d 743; *Dutch Hill Inn, Inc., v. Patten*, 131 Vt. 187, 192, 303 A.2d 811, 814 (1973).

For these reasons, the State and the Fournier Defendants respectfully request the Court to enter an order approving the attached Settlement Agreement and Release as a "judicially approved settlement" under 10 V.S.A. § 6615(i) and dismissing with prejudice all claims and cross-claims against Defendants Fournier Cleaners, Harold N. Fournier, Peggy J. Fournier, and Harold N. Fournier and Peggy J. Fournier, individually and doing business as Fournier Cleaners.

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GENERAL
109 State Street
Montpelier, VT
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DATED at Montpelier, Vermont this 17th day of March 2014.

STATE OF VERMONT

WILLIAM H. SORRELL

ATTORNEY GENERAL

by: [signature]
Nicholas F. Persampieri
Kyle H. Landis-Marinello
Assistant Attorneys General
109 State Street
Montpelier, Vermont 05602
(802) 828-3186

DATED at Montpelier Vermont this 17th day of March 2014.

FOURNIER CLEANERS, HAROLD N. FOURNIER, & PEGGY J. FOURNIER

By: PAUL FRANK + COLLINS P.C.

By: Mark Hall by Nicholas F. Persampieri with permission
Mark Hall, Esq.
David M. Poscius, Esq.
PO Box 1307, Burlington, VT 05402-1307
(802) 658-2311
mhall@pfclaw.com

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SETTLEMENT AGREEMENT

Following mediation with the assistance of Michael Marks, Esq., the Parties signing below have reached the following settlement agreement in reference to all of the issues among them arising out of or related to the following Lawsuit: *State v. Parkway Cleaners et al:* Docket No: 480-7-10 Wncv ("Lawsuit"). This Settlement Agreement shall not affect claims by the State against any of the litigants in the Lawsuit which are not Parties to this Agreement.

1. Payment. Harold N. Fournier and Peggy J. Fournier d/b/a Fournier Cleaners, ("Fourniers") shall pay the State of Vermont the sum of One Hundred Thousand Dollars ($100,000.00) within 30 days of the approval of the agreement as referenced below in Paragraph (3).

2. Dismissal. The Parties shall dismiss the Fourniers from the Lawsuit with prejudice. Each side shall bear its own costs and attorney's fees.

3. Release. The State is providing a full Site Release related to the property that is the subject of the Lawsuit ("Site") to the Fourniers and their alleged insurer, Pacific Employers Insurance Company ("PEIC") including a release from third party claims pursuant to 10 V.S.A. § 6615(i) in a form reasonably acceptable to all counsel. The release and this Settlement Agreement shall be approved by the Court pursuant to 10 V.S.A. § 6615(i) or this Agreement is null and void. Without limiting the foregoing, the Site Release shall cover all claims that were or could have been raised by the State against the Fourniers and/or PEIC in the Lawsuit for any reason related to the Site, extending to any unknown, undiscovered, and undiscoverable claims related to the Site, and all persons who could in any way be subjected to these claims, including principals, members, employees, agents, officers, shareholders and insurers of the Fourniers. The Release shall not affect rights of the State against any person or entity who is not a Party to this Agreement. The Fourniers shall assign to the State any right they may have to make a claim against any insurance policy, other than and expressly excluding PEIC and its parent, subsidiaries and assigns, discovered by the State subsequent to the date of this Agreement; claims assigned by this sentence shall not be released.

4. Other Agreements. The State acknowledges that the payment made pursuant to paragraph 1 is reasonable and fair because the Fourniers did not discharge pollution at the Site and they lack assets and insurance to pay additional sums to any regulatory agency. In consideration of its acknowledgment and the payment made pursuant to this Agreement, the State shall use its best efforts to persuade the United States Environmental Protection Agency (EPA) not to make any claim against the Fourniers or PEIC related to the Site. Furthermore, the State shall cooperate with reasonable requests by the Fourniers and PEIC to implement this paragraph. Best efforts shall include, but not be limited to, in the event that EPA seeks enforcement or cost-recovery related to the Site, the submission of correspondence from the Secretary of the Agency of Natural Resources or his or his designee to the EPA, in a form agreed to by the Fourniers and PEIC, specifically requesting that no action be taken against the Fourniers or PEIC relative to the Site. Also, if necessary, best efforts shall include, but not be limited to, sharing documentation with the EPA as to the likely known source of the contamination (including but not limited to operations of prior owners of the Site, including but not limited to Paul and Sandra Gendron) and taking any and all actions to persuade the EPA of the limited resources available to Fourniers. The Parties acknowledge that EPA is not bound by this Agreement, but that strict adherence to this agreement of cooperation by the State is a material term of this Agreement.

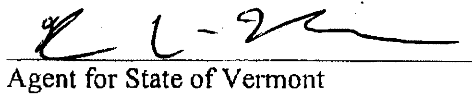
5. Miscellaneous. This Agreement represents a compromise to resolve pending litigation. By making this Agreement, no Party makes any admission, other than stated in paragraph 4, including, without limitation, claims for insurance coverage by the Fourniers against PEIC. This Agreement is a comprehensive agreement; all prior understandings and discussions are merged into this Agreement. This Agreement may only be amended by a written instrument signed by all Parties. The Parties shall execute such additional documents as are reasonably requested to implement this Agreement. This Agreement shall be interpreted under the laws of the State of Vermont. The presumption against the drafter shall not apply to the construction of this Agreement. Photocopies of this Agreement shall be as effective as the original. This Agreement shall be binding and enforceable against the successors, heirs and assigns of the Parties. All Parties were represented by counsel in the negotiation and drafting of this Agreement. The mediator does not provide legal advice to any

party. Any participation by the mediator in the drafting of this Agreement was in his capacity as mediator in recording mutually agreeable settlement terms, and does not constitute legal advice to any of the Parties.

6. Nothing contained in this Agreement shall preclude the Fourniers or PEIC from taking any action to obtain the contribution of any Person not a Party to this Agreement for costs incurred in connection with the lawsuit or Site, including but not limited to the Settlement Payment.

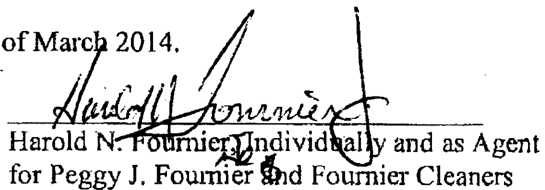
7. This Agreement may be executed in counterpart originals, all of which, when so executed and taken together, shall be deemed an original and all of which shall constitute one and the same instrument. Each counterpart may be delivered by facsimile or electronic mail, and a faxed or electronically mailed copy of a signature shall have the same force and effect as an original signature.

Dated at Montpelier, Vermont, this 10th day of March 2014.



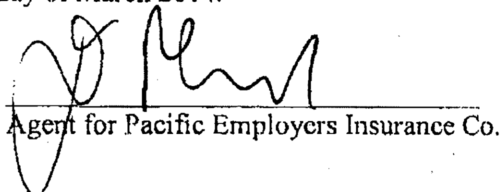
Agent for State of Vermont

Dated at SPRING, ~~Vermont~~ TEXAS, this 7 day of March 2014.



Harold N. Fournier, Individually and as Agent for Peggy J. Fournier and Fournier Cleaners

Dated at Philadelphia, Pennsylvania, this 5TH day of March 2014.



Agent for Pacific Employers Insurance Co.

Approved as to form:

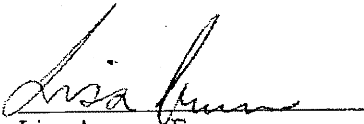
Dated at Montpelier, Vermont, this 10th day of March 2014.

Kyle Landis-Marinello, Esq.
Counsel for State of Vermont

Dated at Burlington, Vermont, this 7th day of March 2014.

Mark Hall, Esq.
Counsel for Fourniers

Dated at Philadelphia, Pennsylvania, this 5th day of March 2014.



Lisa Armon, Esq.
Counsel for PEIC

RELEASE

TO ALL TO WHOM THESE PRESENTS SHALL COME OR MAY CONCERN:

GREETINGS: KNOW YE, that the State of Vermont, Agency of Natural Resources, and any and all successors thereof ("the State"), for itself and for its predecessors and successors, in consideration for the payment of $100,000 by Pacific Employers Insurance Company ("PEIC"), and other good and valuable consideration, the receipt of which is hereby acknowledged, does hereby remise, release, and forever discharge Fournier Cleaners, Harold N. Fournier, Peggy J. Fournier, Harold N. Fournier and Peggy J. Fournier doing business as Fournier Cleaners, and PEIC, their respective predecessors, successors, assigns, parents, subsidiaries, directors, shareholders, officers, employees, agents, and representatives, from any and all manner of action and actions, administrative claims, grievances, cause and causes of action, suits, debts, dues, sums of money, accounts, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, costs, attorney's fees, penalties, and demands whatsoever, in law or in equity, which the State ever had, now has, or may have in the future, arising out of or on account of any hazardous waste or hazardous material that has been released on the premises of so-called Parkway Cleaners Site at 7 Union Street in Hartford, Vermont, as of the date of this Release ("the Parkway Cleaners Site Contamination"), including any and all migration of any portion of the Parkway Cleaners Site Contamination to any other property or to soil, groundwater, surface water, or any other receptor that has occurred or is occurring as of the date of this Release or that may occur subsequent to the date of this Release. Excepted from the foregoing and expressly not included in this Release is any claim the State may bring against an insurance company other than PEIC, its parents, subsidiaries, affiliates, and assigns, related to an insurance policy discovered by the State after the date of this Release. This Release includes, but is not limited to, the claims set forth by the State in an action filed in the Superior Court, Civil Division, Washington Unit entitled *State of Vermont, Agency of Natural Resources v. Parkway Cleaners, et al.*, Docket No. 489-7-10 Wncv.

The State acknowledges that the payment made by PEIC referenced herein is the compromise of claims that are disputed both as to liability and damages. It is not, and shall not, be deemed to be an admission of liability.

IN WITNESS WHEREOF, the undersigned has hereunto set its hand and seal this 17th Day of March 2014.

STATE OF VERMONT
AGENCY OF NATURAL RESOURCES

By: [signature]
Nicholas F. Persampieri
Assistant Attorney General

[signature]
Witness

STATE OF VERMONT
COUNTY OF WASHINGTON, SS.

On this the 17th day of March, 2014, before me personally appeared Nicholas F. Persampieri, known (or satisfactorily proven) to me to be the person who subscribed his name to the foregoing instrument and acknowledged that he executed the same as his free act and deed and the free act and deed of the State of Vermont.

[signature]
Notary Public
My commission expires 2-10-15

STATE OF VERMONT FILED

SUPERIOR COURT
WASHINGTON Unit

2010 JUL -1 P 2:42

CIVIL DIVISION
Docket No. 480-7-10Wncv

STATE OF VERMONT
AGENCY OF NATURAL RESOURCES
Plaintiff

v.

PARKWAY CLEANERS; PAUL D. GENDRON; SANDRA L. GENDRON; PAUL D. GENDRON and SANDRA L. GENDRON doing business as PARKWAY CLEANERS; FOURNIER CLEANERS; HAROLD N. FOURNIER; PEGGY J. FOURNIER; HAROLD N. FOURNIER and PEGGY J. FOURNIER doing business as FOURNIER CLEANERS; and RICHARD S. DANIELS; and HAZEN STREET HOLDINGS, INC.
Defendants

COMPLAINT

NOW COMES the plaintiff, the State of Vermont, by and through its attorney, Attorney General William H. Sorrell, and pursuant to 10 V.S.A. §8221, 10 V.S.A. §6615 and §6616, 12 V.S.A. §4711, the common law and the general equitable jurisdiction of the court brings this action against the past and present owners and operators of land and structures of a facility which had been formerly used for a dry cleaning business at 7 Union Street in the Town of Hartford, Vermont, (the Property) as set forth below, and complains as follows:

1. The Plaintiff State of Vermont, Agency of Natural Resources is a state agency with offices in Waterbury, Vermont.

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)9 State Street
[ontpelier, VT
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2. The defendant Parkway Cleaners was a dry cleaning business that owned or operated or controlled a facility at the Property from approximately 1977 until approximately 1988.
3. The defendant Paul D. Gendron was an owner of the Property, and an owner or operator or a person who controlled Parkway Cleaners, a dry cleaning business at the Property from approximately 1977 until approximately 1988.
4. The defendant Sandra L. Gendron was an owner of the Property, and an owner or operator or a person who controlled Parkway Cleaners, a dry cleaning business at the Property, from approximately 1977 until approximately 1988.
5. The defendant Fournier Cleaners was a dry cleaning business that owned or operated or controlled a facility at the Property from approximately 1988 until approximately 1995.
6. The defendant Harold N. Fournier was an owner of the Property, and an owner or operator or a person who controlled Fournier Cleaners, a dry cleaning business at the Property from approximately 1988 until approximately 1995.
7. The defendant Peggy J. Fournier was an owner of the Property, and an owner or operator or person who controlled Fournier Cleaners, a dry cleaning business at the Property, from approximately 1988 until approximately 1995.
8. The defendant Richard S. Daniel is an owner of or a person who controlled the Property from approximately 1995 until present, which was known to him to have been a facility formerly operated as a dry cleaning business, and for which he knew or had reason to know that a release or threatened release of hazardous materials had occurred or was occurring on the Property.
9. Defendant Richard S. Daniel attempted to transfer ownership of the.Property to Hazen Street Holdings, Inc. in approximately 2006. On information and belief, the transfer of

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the Property from Defendants Richard S. Daniels to Hazen Street Holdings, Inc. was without reasonably equivalent value and is invalid.

10. The defendant Hazen Street Holdings, Inc. is listed in the Town of Hartford land records as an owner of the Property from approximately 2006 to the present time, which was known to it to have been a facility formerly operated as a dry cleaning business, and for which it knew or had reason to know that that a release or threatened had occurred or was occurring on the Property.

11. Defendants Richard S. Daniels and Hazen Street Holdings, Inc. are identical for the purposes of fairness, equity and the public need.

12. The Property is contaminated with tetrachloroethene, also known as both tetrachloroethylene and perchchloroethylene, and commonly known as PCE or PERC, which was caused by releases from the operation of the dry cleaning business on the Property. PERC is a dry cleaning chemical and is a hazardous material and a hazardous waste as those terms are defined under Vermont law at 10 V.S.A. § 6602(16) (A) and §6602(4).

13. The Property and structures and improvements abutting and surrounding the Property, including the indoor air of residences, are contaminated with hazardous materials and hazardous wastes as a result of the release and disposal of hazardous materials and hazardous wastes during the period of time that the defendants Parkway Cleaners, Paul D. Gendron, Sandra L. Gendron, and Fournier Cleaners, Harold N. Fournier, and Peggy J. Fournier owned, operated or controlled a facility at the Property at which hazardous materials and hazardous wastes were disposed of, and which release continues to the present.

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14. The soil at the Property, and the soils abutting and surrounding the Property, are contaminated with hazardous materials and hazardous wastes as a result of the release and disposal of hazardous materials and hazardous wastes during the period of time that the defendants Parkway Cleaners, Paul D. Gendron, Sandra L. Gendron, and Fournier Cleaners, Harold N. Fournier, and Peggy J. Fournier owned, operated or controlled a facility at the Property at which hazardous materials and hazardous wastes were disposed of, and which release continues to the present.

15. The groundwater beneath the Property, and the groundwater beneath the real property and improvements abutting and surrounding the Property, are contaminated with hazardous materials and hazardous wastes as a result of the release and disposal of hazardous materials and hazardous wastes during the period of time that the defendants Parkway Cleaners, Paul D. Gendron, Sandra L. Gendron, and Fournier Cleaners, Harold N. Fournier, and Peggy J. Fournier owned, operated or controlled a facility at the Property at which hazardous materials and hazardous wastes were disposed of, and which release continues to the present.

16. The Defendants Richard S. Daniels and Hazen Street Holdings, Inc. own and control the Property at which a release and threatened release of hazardous materials and hazardous wastes exist.

FIRST CLAIM FOR RELIEF

-ABATEMENT PURSUANT TO 10 V.S.A. § 8221 AND 10 V.S.A. §6615-

17. The allegations set forth in paragraphs 1 through 16 are incorporated herein by reference.

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18. Each defendant, as set forth in paragraphs 2 through 11 above, is a person who is responsible and is strictly liable for abating the release or threatened release of hazardous materials from a facility at the Property, at which hazardous materials were disposed of, which occurred or is occurring during the time that each defendant was or is a person who did or now does own, or operate, or control a facility at the Property.

SECOND CLAIM FOR RELIEF

-COSTS INCURRED BY THE STATE PURSUANT TO 10 V.S.A. § 8221 AND 10 V.S.A. §6615-

19. The allegations set forth in paragraphs 1 through 18 are incorporated herein by reference.

20. Each defendant, as set forth in paragraphs 2 through 11 above, is a person who is responsible and is liable for the costs of investigation, removal and remedial actions incurred by the State of Vermont for abating the release of hazardous materials from a facility at the Property, at which hazardous materials were disposed of, which occurred or is occurring during the time that each defendant was or is a person who did or now does own, or operate, or control a facility at the Property.

THIRD CLAIM FOR RELIEF

-COMMON LAW PUBLIC NUISANCE-

21. The allegations set forth in paragraphs 1 through 20 are incorporated herein by reference.

22. The defendants have created a public nuisance by releasing and continuing to release hazardous materials from the Property to the soil and groundwater interfering with the common and general public interest.

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FOURTH CLAIM FOR RELIEF

-RELEASE PROHIBITION PURSUANT TO 10 V.S.A. § 8221 AND 10 V.S.A. §6616-

23. The allegations set forth in paragraphs 1 through 22 are incorporated herein by reference.

24. The release of dry cleaning chemicals, which are hazardous materials, from the facility during the time the facility was used as a dry cleaning business was a violation of 10 V.S.A. §6616 by the defendants Parkway Cleaners, Paul D. Gendron, Sandra L. Gendron, and Fournier Cleaners, Harold N. Fournier, and Peggy J. Fournier which prohibits the release of hazardous materials into the land of the state, and is a continuing violation by those defendants named in this paragraph for each day that the violation continues.

FIFTH CLAIM FOR RELIEF

-RELEASE PROHIBITION 10 V.S.A. §6616-

25. The allegations set forth in paragraphs 1 through 24 are incorporated herein by reference.

26. The release of dry cleaning chemicals, which are hazardous materials, from the facility during the time the facility was used as a dry cleaning business was a violation of 10 V.S.A. §6616 by the defendants Parkway Cleaners, Paul D. Gendron, Sandra L. Gendron, and Fournier Cleaners, Harold N. Fournier, and Peggy J. Fournier which prohibits the release of hazardous materials into the land of the state, and is a continuing violation by those defendants named in this paragraph for each day that the violation continues.

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SIXTH CLAIM FOR RELIEF

-CIVIL PENALTIES PURSUANT TO 10 V.S.A. §8221(b)(6)

FOR VIOLATIONS OF 10 V.S.A. §6616-

27. The allegations set forth in paragraphs 1 through 26 are incorporated herein by reference.

28. Pursuant to 10 V.S.A. §8221(b) (6), the defendants Parkway Cleaners, Paul D. Gendron, Sandra L. Gendron, and Fournier Cleaners, Harold N. Fournier, and Peggy J. Fournier are liable for civil penalties of not more than $50,000.00 for the violations of 10 V.S.A. §6616 concerning the release of hazardous materials, and $25,000.00 for each day that the violations continued.

Request for Relief

In accordance with 10 V.S.A. §8221(b), the Plaintiff requests that the court:

1. Declare that each of the defendants are jointly and severally liable for the abatement of the release and threatened release of hazardous materials from the soil and groundwater at and surrounding the Property at 7 Union Street in the Town of Hartford, Vermont;
2. Declare that each of the defendants are jointly and severally liable for the costs incurred by the State of Vermont for investigating, removing and remediating the contamination caused by the release and threatened release of hazardous materials at and surrounding the property at 7 Union Street in the Town of Hartford, Vermont which are necessary to protect and public health and the environment;
3. Declare that each of the defendants have created a public nuisance by the release and continuing release of hazardous materials at and from the Property.

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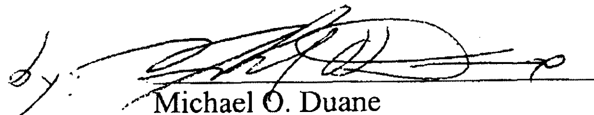
4. Order each of the defendants to abate the release and threatened release of hazardous materials from the soil and groundwater at and surrounding the property at 7 Union Street in the Town of Hartford, Vermont;
5. Order each of the defendants to pay the costs incurred and future costs that may be incurred by the State of Vermont for investigating, removing and remediating the contamination caused by the release and threatened release of hazardous materials at and surrounding 7 Union Street in the Town of Hartford, Vermont which are necessary to protect and public health and the environment, plus pre-judgment interest;
6. Order the defendants Parkway Cleaners, Paul D. Gendron, Sandra L. Gendron, and Fournier Cleaners, Harold N. Fournier, and Peggy J. Fournier to pay civil penalties to the State pursuant to 10 V.S.A. §8221(b) (6) of not more than $50,000.00 for the defendants' violation of 10 V.S.A. §6616 and not more than $25,000.00 for each day that the defendants' have failed to take action and allowed the contamination of the Property to continue.

Dated July 1, 2010 at Montpelier, Vermont.

WILLIAM H. SORRELL
ATTORNEY GENERAL
Attorney for the Plaintiff
State of Vermont



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05609

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

MAY 23 2014

ENTRY ORDER

2014 VT 50

SUPREME COURT DOCKET NO. 2013-180

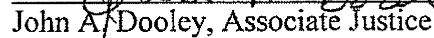
DECEMBER TERM, 2013

In re Appeals of ANR Permits in Lowell Mountain Wind Project (Energize Vermont, Inc., Appellants)	}	APPEALED FROM:
	}	Public Service Board
	}	
	}	DOCKET NO. 7628 A, B, C, D & E

In the above-entitled cause, the Clerk will enter:

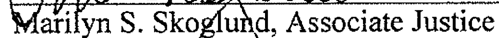
Affirmed.

FOR THE COURT:



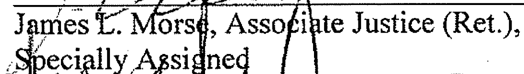
John A. Dooley, Associate Justice

Concurring:

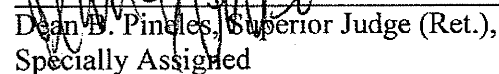


Marilyn S. Skoglund, Associate Justice

Geoffrey W. Crawford, Associate Justice



James L. Morse, Associate Justice (Ret.), Specially Assigned



Dean B. Pineles, Superior Judge (Ret.), Specially Assigned

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions by email at: JUD.Reporter@state.vt.us or by mail at: Vermont Supreme Court, 109 State Street, Montpelier, Vermont 05609-0801, of any errors in order that corrections may be made before this opinion goes to press.

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

MAY 23 2014

2014 VT 50

No. 2013-180

In re Appeals of ANR Permits in Lowell Mountain Wind Project (Energize Vermont, Inc., Appellants)

Supreme Court

On Appeal from
Public Service Board

December Term, 2013

James Volz, Chair

Nathan H. Stearns and C. Daniel Hershenson of Hershenson, Carter, Scott & McGee, P.C., Norwich, for Appellants.

Geoffrey H. Hand and Elizabeth H. Catlin of Dunkiel Saunders Elliott Raubvogel & Hand PLLC, Burlington, for Appellee Green Mountain Power, Inc.

William H. Sorrell, Attorney General, and Gavin J. Boyles, Assistant Attorney General, Montpelier, for Appellee Agency of Natural Resources.

PRESENT: Dooley, Skoglund and Crawford, JJ., and Morse, J. (Ret.), and Pineles, Supr. J. (Ret.), Specially Assigned

¶ 1. **DOOLEY, J.** Appellants Energize Vermont, Inc. and several individuals challenge the Vermont Public Service Board (PSB)'s affirmance of a permit issued by the Agency of Natural Resources (ANR), approving an operational-phase stormwater management plan for appellee Green Mountain Power (GMP), with respect to the Kingdom Community Wind Project (Wind Project) on Lowell Mountain in Lowell, Vermont. Although appellants raised a variety of challenges to the operational-phase permit, as well as other permits, on appeal to the PSB, the only issue maintained on appeal to this Court is the narrow one of whether ANR

complied with certain requirements of its own Vermont Stormwater Management Manual (VSMM) in granting the operational-phase permit. We affirm.

¶ 2. The facts of this case are undisputed. The Wind Project is a wind-powered electric generation facility involving twenty-one wind turbines, along with access roads, a substation, an operations building, and power lines. Because the project contains over twenty-seven acres of impervious surfaces, GMP is required to maintain a permit from ANR to regulate management of its stormwater runoff as long as the project is operational. 10 V.S.A. § 1264(a)(11). In granting the permit, ANR is required to ensure that the permit is "consistent with, at a minimum, the 2002 Stormwater Management Manual [VSMM]." Id. § 1264(e).

¶ 3. The VSMM contains regulatory requirements for stormwater treatment practices, known as STPs, which are designed to manage stormwater runoff. Because the parties' arguments rely in large part on the language of the VSMM, we describe the VSMM in detail here. The VSMM is divided into three sections. Section 1 is titled "Stormwater Treatment Practice Sizing Criteria." It sets out five distinct "treatment standards" for water quality, channel protection, groundwater recharge, overbank flood protection, and extreme flood protection. This appeal concerns only the Wind Project's compliance with the channel protection treatment standard.

¶ 4. Subsection 1.1.2 sets forth the standards for channel protection treatment. It begins: "To protect stream channels from degradation, storage of the channel protection volume (CP_v) shall be provided by means of 12 to 24 hours of extended detention storage (ED) for the one-year, 24-hour rainfall event." The subsection provides a bulleted list of criteria that "shall be applied" to evaluate channel protection volume and STPs for channel protection. The final bullet in this list states, "For projects that have disconnected the majority of impervious surfaces per use of the credits in Section 3 such that routing to a detention facility is not achieved, the

designer may use an alternative design standard." Section 3 of the VSMM addresses "Voluntary Stormwater Management Credits," which the parties agree GMP did not use. Subsection 1.1.2 further contemplates that the "treatment standard for channel protection shall be waived" for several situations which also do not apply to the present case. These are the only places in which subsection 1.1.2 explicitly contemplates exceptions to the channel protection standards it contains. The Wind Project's STP does not conform to the default channel protection standards contained in subsection 1.1.2 because it does not use extended detention storage.

¶ 5. Section 2 of the VSMM is titled "Acceptable Stormwater Treatment Practices." Subsection 2.1 is also titled "Acceptable STPs" and states: "This section outlines STPs that can be used to meet the . . . treatment standards set forth in section 1. These acceptable STPs can be used alone, or in combination, to meet the required treatment standards." VSMM 2.1. The Wind Project has not used an "acceptable STP" as defined by subsection 2.1.

¶ 6. Subsection 2.5 is titled "Alternative STP Designs." It states:

> The stormwater treatment field is rapidly evolving and new stormwater management technologies constantly emerge. A permit applicant may propose and [ANR] may allow the use of STPs other than those listed [above] if the permit applicant can demonstrate to [ANR]'s satisfaction that the proposed alternative STPs will attain the applicable treatment performance standards for [the five treatment standards contained in VSMM Section 1]. **Proposals for use of alternative treatment systems will require consideration of the design through the use of the individual permit application process.**
>
> There are two methods by which a designer may propose an alternative system design evaluation: through consideration of an existing-alternative system . . . ; or through a new design-alternative system proposed for use in Vermont.

Subsections 2.5.1 and 2.5.2 pertain to "Existing Alternative Systems" and "New-Design Alternative Systems," respectively. The parties agree that the Wind Project's stormwater treatment practices make up a "new-design alternative system," not an "existing alternative system."

¶ 7. Subsection 2.5.2 states:

> The performance standard for STPs shall meet the applicable treatment standards specified in section 1.1, and shall have the capability to achieve long-term performance in the field. For an alternative STP to be submitted to [ANR] for consideration, a designer's certification of compliance, including pertinent design information must be provided. This certification must provide details, with a reasonable level of surety, on how the system will achieve the requisite performance standards.
>
> . . .
>
> If a proposed alternative STP design is successfully approved by [ANR], then this alternative will be available for use by other permit applicants, if determined appropriate by [ANR].

¶ 8. The Wind Project uses an STP known as "level spreaders." The level spreaders function by collecting stormwater in a trough and then dispersing the water across a level edge, through a vegetated buffer. Level spreaders are not specifically referenced in the VSMM. Level spreaders do not meet the default requirements, under subsection 1.1.2, for channel protection because they do not use "extended detention storage." Rather, as described by the PSB, "A level spreader is a constructed feature which is used to convert concentrated runoff to sheet flow and release it in a non-erosive manner across a slope. Vegetated buffers are defined as the land areas immediately downslope of the level spreader which provide for the 'disconnection' of runoff from impervious surfaces to undisturbed natural vegetated terrain."

¶ 9. Appellants contend that the language of subsection 1.1.2 mandates the use of extended detention storage unless a project qualifies for an alternative design standard using VSMM section 3 credits. Under appellants' reading, the only way to use an alternative design standard to satisfy the channel protection requirement is by using the credits in section 3, which appellees have not done. Appellants argue that to allow ANR to interpret its manual differently would violate the plain meaning of the regulation and therefore would also violate our instruction that "[a]n administrative agency must abide by its regulations as written until it rescinds or

amends them. Otherwise, people will not know how to conduct their affairs." In re Peel Gallery of Fine Arts, 149 Vt. 348, 351, 543 A.2d 695, 697 (1988) (citation omitted). Appellants further argue that ANR may deviate from appellants' reading of the VSMM only if ANR amends the VSMM explicitly. For this proposition, they rely upon this Court's decision in Conservation Law Foundation v. Burke. 162 Vt. 115, 121, 645 A.2d 495, 499 (1993) ("If the Agency wishes to include an additional de minimis exception, it must do so explicitly.").

¶ 10. This appeal first went to the PSB pursuant to 10 V.S.A. § 8506. Review in the PSB was de novo, although the Board is required to apply "the substantive standards that were applicable before the secretary." Id. § 8506(e).

¶ 11. The PSB rejected appellants' argument. In keeping with the statutory standard of review, it gave no deference to ANR's permit decision. It did, however, defer to ANR's construction of its regulation, adopting a "compelling indication of error" review standard from In re Electronic Industries Alliance, 2005 VT 111, ¶ 7, 179 Vt. 539, 889 A.2d 729.

¶ 12. The PSB rejected appellants' argument for two main reasons. First, it held that section 1.1.2 of the VSMM does not have the meaning appellants attributed to it:

> significantly . . . the limiting word 'only' does not appear anywhere in Section 1.1.2, nor do we read this language to compel that the word 'only' was intended to be read into Section 1.1.2. Rather, we read Section 1.1.2 to simply state expressly that in the case of disconnected projects using Section 3 credits, the Alternative Design Standard may be used.

¶ 13. Second, it ruled that

> the Legislature intended only for stormwater discharge permits to be 'consistent' with the VSMM, as opposed to requiring strict compliance or conformity. The Vermont Stormwater Management Rule similarly states that permits shall be 'consistent' with the VSMM's treatment standards. Therefore, ANR has discretion to tailor an individual stormwater permit to achieve its intended purpose of protecting water quality so long as such permit is consistent with the VSMM and meets the other statutory criteria for discharge permits.

¶ 14. In conclusion, it held that ANR's interpretation of the VSMM to allow use of the Alternative Design Standard in this case was not erroneous. It explained that the "narrow reading sought by Appellants would lead to an irrational result in this case because it would require GMP to install structural STPs where they are not necessary to protect water quality, while causing additional environmental impacts through increased clearing." It therefore concluded that appellants failed to demonstrate that ANR's interpretation amounted to compelling error.

¶ 15. In commencing our own review, we must first determine the standard of review that applies in appeals from the PSB sitting in its appellate capacity.* As all parties noted, we generally give substantial deference to an agency's interpretation of its own regulations—in this case, ANR's interpretation of the VSMM. In re Peel Gallery of Fine Arts, 149 Vt. at 351, 543 A.2d at 697. "Absent a clear and convincing showing to the contrary, decisions made within the expertise of such agencies are presumed correct, valid and reasonable." In re Johnston, 145 Vt. 318, 322, 488 A.2d 750, 752 (1985). Interpretation of the VSMM is squarely within ANR's expertise as its authoring agency. This deferential standard remains on appeal, even after the PSB holds a de novo hearing on the matter.

¶ 16. In Town of Killington v. Department of Taxes, we deferred to the administrative decision of the Commissioner of Taxes even after a de novo trial in the superior court. 2003 VT 88, ¶ 5, 176 Vt. 70, 838 A.2d 91. We did so in part because of the "substantial deference that courts have traditionally accorded administrative agencies, particularly where, as here, a decision involves highly complicated . . . methodologies within the agency's area of expertise." Id. We

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* This is the first appeal from another agency heard by the PSB pursuant to 10 V.S.A. § 8506. In appeals from the PSB's decisions made within its original jurisdiction, we "accept as true all of the [PSB]'s findings that are not clearly erroneous, and, in reviewing the [PSB]'s conclusions, we defer to its particular expertise and informed judgment." In re Cent. Vt. Pub. Serv. Corp., 2006 VT 70, ¶ 3, 180 Vt. 563, 905 A.2d 616. This case, however, concerns an appeal from the PSB within its appellate capacity and not within its original jurisdiction.

also did so because this deference was "mirror[ed]" by a statutory provision granting significant discretion to the Commissioner. Id. Like Town of Killington, this case involves complicated methodologies within an agency's expertise. Also like Town of Killington, the statutory authorization for the permitting program delegates discretion to the implementing agency. See 10 V.S.A. § 1264(e)(1) ("The Secretary may issue . . . discharge permits for regulated stormwater runoff, as necessary to assure achievement of the goals of the program and compliance with . . . law . . . . The permit shall contain additional conditions, requirements, and restrictions as the Secretary deems necessary . . . ." (emphases added)). A separate statute requires that the PSB apply the "substantive standards" used by the secretary of ANR. 10 V.S.A. § 8506(e).

¶ 17. Like the PSB, we accord substantial deference to ANR's interpretation of the VSMM. As this is the same standard used by the PSB, we thus review the PSB's decision de novo. Travia's Inc. v. Dep't of Taxes, 2013 VT 62, ¶ 12, ___ Vt. ___, 86 A.3d 394 ("Where there is an intermediate appeal from an administrative body, this Court reviews the case under the same standard as applied in the intermediate appeal."). Appellees therefore bear the burden of showing that ANR's interpretation is "wholly irrational and unreasonable in relation to its intended purpose." Town of Killington, 2003 VT 88, ¶ 6.

¶ 18. We are not persuaded that ANR's interpretation of the VSMM is irrational or unreasonable in relation to its intended purpose. We agree with the PSB that the plain meaning of the regulation does not support appellants' argument. Appellants' argument rests on an extremely narrow interpretation of subsection 1.1.2 which we decline to follow, particularly in light of the intended purpose of the VSMM. Appellants point to the provision of subsection 1.1.2 that reads: "For projects that have disconnected the majority of impervious surfaces per use of the credits in Section 3 such that routing to a detention facility is not achieved, the designer may use an alternative design standard." Appellants read this provision as though it begins with

the word "only." As stated in their brief: " 'Per the use of the credits in Section 3' means that the only time an alternative design standard may be used to evaluate an STP's compliance with the Channel Protection Treatment Standard is when a project has . . . utiliz[ed] the credits in Section 3 of the VSMM." (Emphasis added.) In fact, appellants have added this restrictive gloss themselves. Appellants' addition of the word "only" to subsection 1.1.2 is not a "clear and convincing" showing that ANR's contrary interpretation is in error.

¶ 19. Given the deferential standard of review, this straightforward plain meaning analysis needs little elaboration. Appellants have not met their burden. We note, however, that our analysis is fortified by looking to the VSMM as a whole and the intent of the drafters. See Burke, 162 Vt. at 121, 645 A.2d at 499 (stating that we interpret regulations as a whole and look to the intent of the drafters to aid in our interpretation); In re Verburg, 159 Vt. 161, 164, 616 A.2d 237, 239 (1992) (stating that we rely on the intent of the drafters in interpreting regulations or statutes).

¶ 20. Reading the VSMM as a whole reinforces our understanding that this provision—allowing use of section 3 credits as a means of achieving a successful alternative design standard for purposes of the channel protection requirement—does not necessarily preclude other means of reaching the same end. Subsection 2.5, entitled "Alternative STP Designs," begins by acknowledging that the "stormwater treatment field is rapidly evolving and new stormwater management technologies constantly emerge." The clear implication of this preface is that ANR aims to be responsive to the need to evaluate new technologies as they arise and will not be bound by obsolete measures. The subsection continues, "the Agency may allow the use of [alternative] STPs . . . if the permit applicant can demonstrate to the Agency's satisfaction that the proposed alternative STPs will attain the applicable treatment performance standards for water quality, groundwater recharge, channel protection, overbank flood protection and extreme flood control." (Emphasis added.) The key word here is "applicable," a word which is used in

the same fashion in subsection 2.5.2, entitled "New-Design Alternative Systems." That subsection requires only that alternative STPs "meet the applicable treatment standards specified in section 1.1." (Emphasis added.) Given the cross-reference to subsection 1.1 generally, the subsection 1.1.2 default standard of extended detention storage for channel protection may not be an "applicable" standard for the alternative-design level spreader STP, because level spreaders use other means of protecting stream channels from degradation—namely dispersion and buffering.

¶ 21. This is not to say that new-design alternative systems are standardless. The VSMM has a more flexible, individualized system of evaluation for new-design alternatives. Subsection 2.5 states, in bold: "Proposals for use of alternative treatment systems will require consideration of the design through the use of the individual permit application process." This is in contrast with the general permit application process, which involves less scrutiny from ANR at the individual project level. 10 V.S.A. § 1264(e)(2) (providing for general stormwater permits that can be issued to a category of projects). For new-design alternative systems, the VSMM additionally requires a detailed plan of study regarding the project's actual stormwater impact to be completed within three years of the project's construction. If ANR finds the results of the study to be unsatisfactory, it can require the project to be rebuilt using acceptable STPs. All of these provisions, read as a whole, show that the VSMM is designed to allow flexibility for the evaluation and implementation of new technologies.

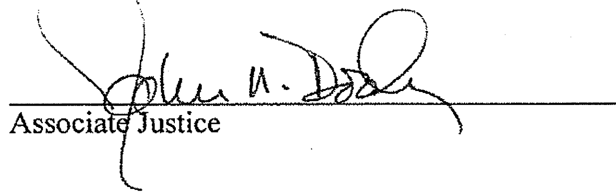
¶ 22. This interpretation is further supported by the legislative intent behind the stormwater permitting program. The statutory directives for the program state that stormwater management should use "structural treatment only when necessary;" that management strategies should be "tailor[ed] . . . to the region and the locale;" and that the permitting process should "provide[] for the evaluation and appropriate evolution of programs." 10 V.S.A. § 1264(a). The narrow reading advocated by appellants would be contrary to this intent because it would require

GMP to install extended detention storage where not environmentally necessary; to use strategies not tailored to the locale; and to cause the permitting program to adhere to rigid requirements rather than evolve. Notably, although GMP states that the level spreaders are fully installed and operational, appellants have abandoned on appeal any arguments that the level spreaders are environmentally inferior to other STP designs.

¶ 23. In sum, we find no clear and convincing error in ANR's interpretation of the VSMM to allow an operational stormwater permit for the Wind Project's level spreaders.

Affirmed.

FOR THE COURT:



Associate Justice

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
Docket No. Wncv

STATE OF VERMONT, Plaintiff,	)
	)
v.	)
	)
SISTERS AND BROTHERS INVESTMENT GROUP, LLP, Defendant.	)

PLEADINGS BY AGREEMENT

The State of Vermont, by and through Vermont Attorney General William H. Sorrell, and Defendant Sisters and Brothers Investment Group, LLP, hereby submit these pleadings by agreement pursuant to Vermont Rule of Civil Procedure 8(g).

THE STATE'S ALLEGATIONS

The Parties

1. The State of Vermont Agency of Natural Resources (ANR or the Agency) is a state agency with offices in Montpelier, Vermont.
2. Sisters and Brothers Investment Group, LLP (Defendant), is a Vermont-based limited liability partnership. Joseph Handy, Charles Handy, Anthony Handy, Joan Handy and Laura Handy are listed as the partners of the LLP with the Vermont Secretary of State.
3. Defendant is the owner of property at 110 Riverside Avenue in Burlington, Vermont which was used as a facility for the storage and disposal of hazardous materials and wastes.

Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609

4. Defendant is the lessee of an impounded car lot on Flynn Avenue in Burlington, Vermont.
5. Defendant is responsible for the generation, storage and disposal of hazardous wastes and materials.

Statutory and Regulatory Scheme

6. The Agency has the authority to regulate the storage and disposal of hazardous waste through 10 V.S.A., Chapter 159 and the Vermont Hazardous Waste Management Regulations (HWMR).
7. Pursuant to 10 V.S.A. § 8221, the Secretary of the Agency may bring an action in superior court to enforce Vermont's environmental laws. The action shall be brought by the Attorney General in the name of the State.

Facts relating to Defendant and Factual Allegations

8. On February 10, 2012, Defendant released hazardous materials (waste oil) onto the land of the state at a facility owned by Defendant at 110 Riverside Avenue in violation of 10 V.S.A. § 6616 and in violation of Vermont's HWMR. Defendant failed to immediately notify ANR about the release in violation of 10 V.S.A. § 6617.
9. On February 10, 2012, an Agency Spill Response Team was called to a spill at 110 Riverside Avenue in Burlington. The property is the former location of a business known as M&H Auto. At the time of the spill call, the property, owned by Defendant, was vacant.
10. The Agency's Spill Response Team arrived and observed what it believed to be a waste oil spill on the ground coming from a garage bay door at the 110 Riverside

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109 State Street
Montpelier, VT
05609**

Avenue property. The waste oil was migrating on the surface of the pavement down a slope along a curb and near a storm water catch basin that empties into the Winooski River.

11. Waste oil includes petroleum and is a hazardous material and hazardous waste under Vermont law.

12. The City of Burlington's Fire Department also responded to the spill at 110 Riverside Avenue and contained the spill using Speedi-Dry.

13. The Agency's Spill Response Team observed a sheen on the pavement near the building at 110 Riverside Avenue, pavement staining, and darkened soil in the path of the spill.

14. Joseph Handy told the Agency Spill Response Team that he believed a vehicle had jumped the curb and released the oil on the ground. Defendant had not contacted and notified ANR about the release.

15. Following the spill response on February 10, 2012, Agency staff conducted inspections of the 110 Riverside Avenue property on February 24, 2012 and March 1, 2012. Agency staff also inspected the impounded car lot on Flynn Avenue on March 1, 2012.

16. During one or more of these inspections, Agency staff found the following:

    a. Defendant was making no hazardous waste determinations for hazardous waste stored at the 110 Riverside Avenue property or the impounded car lot on Flynn Avenue. Forty-seven 55-gallon drums and numerous pint, gallon, 5-gallon, and approximately 30-gallon garbage cans were observed at the 110 Riverside Avenue property with unknown contents. Three 55-gallon drums were observed at the impounded car lot on Flynn Avenue with unknown contents. The drums were later sampled at the Agency's direction and found to contain hazardous waste.

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Montpelier, VT
05609

b. On February 17, 2012, seven 55-gallon drums were shipped by Environmental Products and Services on manifest number 004156299 FLW. Three of the drums were shipped using an incorrect EPA identification number. The EPA identification number used, VTR000006320, corresponds with a different Handy Petroleum property, located at 75 South Winooski Avenue in Burlington. Neither the appropriate site address nor the correct EPA identification number was listed on the manifest for the three incorrectly shipped drums. The manifest was signed by Joseph Handy. Agency records show that the time of the violations, Defendant had not provided an update that it was the owner and operator of the property located at 110 Riverside Avenue with the EPA identification number VTD988366498.

c. Hazardous waste was not stored upon an impervious surface at the 110 Riverside Avenue property.

d. Hazardous waste was stored out-of-doors at the 110 Riverside Avenue property and not within a structure that sheds rain and snow.

e. Hazardous waste subject to freezing and expansion was stored at the 110 Riverside Avenue property in containers or above ground tanks without mechanical or physical means employed to prevent freezing.

f. Some of the containers holding hazardous waste at both the 110 Riverside Avenue property and the impounded car lot at Flynn Avenue were observed to be in bad condition including, being rusted, dented and bulging.

g. During the February 24, 2012 inspection of the 110 Riverside Avenue property, at least 14 containers holding hazardous waste were observed to be open, had the top rusted open or had no lid or cover.

h. None of the hazardous waste containers at the 110 Riverside Avenue property or impounded car lot at Flynn Avenue were labeled.

i. During the February 24, 2012 inspection of the 110 Riverside Avenue property, an open 275-gallon tank containing a hazardous waste (used oil) was observed. The tank was neither marked nor labeled.

j. During the February 24, 2012 inspection of the 110 Riverside Avenue property, a 30-gallon poly garbage container holding broken universal waste (mercury containing lamps) was observed. Additional broken lamps were found along the south wall of the building.

k. During the February 24, 2012 inspection of the 110 Riverside Avenue property, a number of used universal waste lamps wrapped in tape were observed stored

Office of the ATTORNEY GENERAL
109 State Street
Montpelier, VT 05609

against a wall and not stored in a structurally sound container as required by the HWMR. Additionally, one box containing universal waste lamps was not sealed with tape.

l. During the February 24, 2012 inspection of the 110 Riverside Avenue property, 11 containers holding universal waste lamps were observed without any indication of how long the containers had been in storage at the property.

m. During the February 24, 2012 inspection of the 110 Riverside Avenue property, 11 containers holding universal waste lamps were observed as not being labeled or marked.

17. On August 31, 2012 and October 3, 2012, TMC Environmental, a company hired by Defendant to remove and dispose of the hazardous wastes from the Riverside Avenue and Flynn Avenue properties, documented the removal of 2,155 gallons of waste oil and solvents. Oily debris was combined into 8 drums for removal. Paint related waste was combined and packed into flex bins. Universal waste lamp fluorescent bulbs that were not broken were placed into boxes. The removal and disposal was documented in a manifest by TMC Environmental.

Violations

18. Under section 7-303 of the HWMR, any person who generates a waste shall determine if that waste is a hazardous waste.

19. Defendant violated HWMR 7-303 by failing to make hazardous waste determinations for waste stored at the 110 Riverside Avenue property and the impounded car lot on Flynn Avenue.

20. Pursuant to HWMR 7-304(a), no generator of hazardous waste shall treat, recycle, store, dispose of, transport, or offer for transport hazardous waste without having

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109 State Street
Montpelier, VT
05609**

obtained a permanent EPA identification number by notifying the Agency using the Vermont Hazardous Waste Handler Site ID Form.

21. Defendant violated HWMR 7-304 by offering seven 55-gallon drums for transport on February 17, 2012 by Environmental Products and Services on manifest number 004156299 FLW using an incorrect EPA identification number. Neither the correct site address nor the correct EPA identification number was listed on the manifest. Further, Defendant had not provided the Agency with information that it was the owner and operator of the property located at 110 Riverside Avenue.

22. HWMR 7-311(a)(1) requires, in part, that hazardous waste must be accumulated and stored upon an impervious surface.

23. HWMR 7-311(a)(2) specifies that hazardous waste containers may be stored out-of-doors only if they are within a structure that sheds rain and snow.

24. HWMR 7-311(a)(3) prohibits the storage of hazardous wastes that may be subject to freezing and expansion in containers or above-ground tanks unless mechanical or physical means are employed to prevent freezing.

25. Defendant violated HWMR 7-311(a)(1), 7-311(a)(2) and 7-311(a)(3) by storing hazardous waste at the 110 Riverside Avenue property that was: (i) not upon an impervious surface; (ii) out-of-doors and not within a structure that sheds rain and snow; and (iii) subject to freezing and expansion in containers or above ground tanks without mechanical or physical means to prevent freezing.

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26. HWMR 7-311(f)(2) requires that if a container holding hazardous waste is not in good condition, or if it begins to leak, the owner must transfer the hazardous waste from this container to a container that is in good condition.

27. Defendant violated HWMR 7-311(f)(2) by storing hazardous waste at the 110 Riverside Avenue property and the impounded car lot on Flynn Avenue in containers that were in bad condition, including rusted, dented and bulging containers.

28. Under HWMR 7-311(f)(4)(B), a container holding hazardous waste must always be closed during storage except when it is necessary to add or remove water.

29. Defendant violated HWMR 7-311(f)(4)(B) by storing hazardous waste at 110 Riverside Avenue in at least 14 containers which were observed to be open, had the top rusted open, or had no lid or cover.

30. HWMR 7-311(f)(1) requires that containers and packages used for the storage of hazardous waste shall be clearly marked from the time they are first used to accumulate or store waste.

31. Defendant violated HMWR 7-311(f)(1) by failing to mark numerous containers of hazardous waste at either the 110 Riverside Avenue property or the impounded car lot on Flynn Avenue.

32. HWMR 7-311(g)(1) provides that tanks used for the storage of hazardous wastes shall be clearly marked with the words "Hazardous Waste" and shall include the name and hazardous waste identification code(s) for the hazardous waste contained.

33. Defendant violated HWMR 7-311(g)(1) by storing hazardous waste at the 110 Riverside Avenue property in an open, 275-gallon tank without markings or labeling.

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109 State Street
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05609

34. Defendant is a small quantity handler of universal waste under the HWMR.

35. HWMR 7-912(b)(2) prohibits the storage of broken mercury containing lamps and the intentional breaking or crushing of mercury containing lamps.

36. Defendant violated HWMR 7-912(b)(2) by storing broken mercury containing lamps at the 110 Riverside Avenue property, both inside the property and along the exterior of the property building.

37. HWMR 7-912(d)(5)(A)(i) and (ii) requires that handlers of universal waste lamps must manage the lamps in a way that prevents the release of any universal waste or component of universal waste into the environment. This includes the packaging of universal waste lamps in containers that are structurally sound, adequate to prevent breakage, and compatible with the contents of the lamps. Containers must remain closed and must lack evidence of leakage, spillage or damage that could cause leakage. Full containers must be sealed with tape.

38. Defendant violated HWMR 7-912(d)(5)(A)(i) by storing used lamps against a wall at the 110 Riverside Avenue property, with the lamps wrapped in tape and not in a structurally sound container.

39. Defendant violated HWMR 7-912(d)(5)(A)(ii) by storing a box containing universal waste lamps at the 110 Riverside Avenue property that was not sealed with tape.

40. Pursuant to HWMR 7-912(f)(1), absent specific reasons provided in HWMR 7-912(f)(2), universal waste may not be accumulated for longer than one year from the date the universal waste is generated or received.

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Montpelier, VT
05609

41. Under HWMR 7-912(f)(3), handlers of universal waste must be able to demonstrate the length of time that the universal waste has been accumulated from the date it becomes a waste or is received.

42. Defendant violated HWMR 7-912(f)(1) and (3) by storing containers of universal waste at the 110 Riverside Avenue property without any indication of how long the containers had been in storage at the property.

43. HWMR 7-912(e)(6) requires that containers holding universal waste lamps must be labeled or marked clearly with one of the following phrases: "Universal Waste Lamp(s)," or "Waste Lamp(s)," or "Used Lamp(s)."

44. Defendant violated HWMR 7-912(e)(6) by storing containers holding universal waste lamps at the 110 Riverside Avenue property in containers that were not labeled or marked with one of the following phrases: "Universal Waste Lamp(s)," or "Waste Lamp(s)," or "Used Lamp(s)."

45. Section 6616 of Title 10 prohibits "the release of hazardous materials into the surface or groundwater, or onto the land of the state."

46. Section 6617 of Title 10 requires that any "person who has knowledge of a release or a suspected release and who may be subject to liability for a release ... shall immediately notify" the Agency.

47. Defendant violated 10 V.S.A. § 6616 by releasing hazardous materials onto the land of the state on February 10, 2012.

48. Defendant violated 10 V.S.A. § 6617 by failing to immediately notify the Agency of the release of hazardous materials on February 10, 2012.

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DEFENDANT'S RESPONSE TO THE ALLEGED VIOLATIONS

Defendant answers the preceding allegations as follows:

49. Defendant admits the allegations set forth in paragraphs 1-48.

50. By way of additional explanation, Defendant provides the following:

    a. Defendant alleges that several of the drum noted in paragraph 16(a) were left at the property by a prior tenant which engaged in the repair of automobiles; and

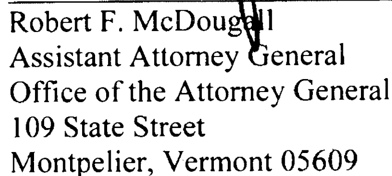
    b. Defendant alleges that the tank noted in paragraph 16(i) was used by the previous tenant for heating the building and that the used oil contained in it was generated by that tenant.

51. The State and Defendant have agreed to resolve the violations set forth herein through a Stipulation for the Entry of Consent Order which has been executed by the parties and is being filed in this action together with these Pleadings by Agreement.

52. Prior to the filing of this action, Defendant implemented appropriate hazardous waste management transport and disposal procedures at this location such that the Agency does not believe it necessary to have a formal compliance plan as part of the consent order resolving this action.

DATED at Montpelier, Vermont this 2nd day of July, 2014.

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: 

Robert F. McDougall
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609

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Montpelier, VT
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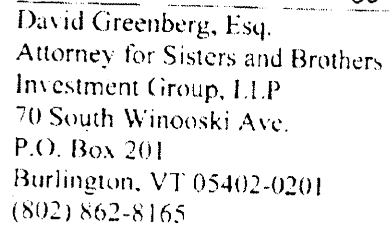
(802) 828-3186

DATED at Burlington, Vermont this 1st day of July, 2014.

SISTERS AND BROTHERS
INVESTMENT GROUP, LLP

By:
Joseph Handy, Manager

Approved as to form:



David Greenberg, Esq.
Attorney for Sisters and Brothers
Investment Group, LLP
70 South Winooski Ave.
P.O. Box 201
Burlington, VT 05402-0201
(802) 862-8165

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STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
Docket No. Wncv

STATE OF VERMONT,)
Plaintiff,)
)
v.)
)
SISTERS AND BROTHERS)
INVESTMENT GROUP, LLP,)
Defendant.)

STIPULATION FOR THE ENTRY OF CONSENT ORDER AND FINAL JUDGMENT ORDER

The parties, Plaintiff, the State of Vermont (the State), by and through Vermont Attorney General William H. Sorrell, and Defendant Sisters and Brothers Investment Group, LLP (Defendant), hereby stipulate and agree as follows:

WHEREAS, the State alleges in the Pleadings by Agreement filed in this action that Defendant violated Vermont's hazardous waste management regulations;

WHEREAS, the State further alleges in the Pleadings by Agreement filed in this action that Defendant also violated Vermont's environmental laws by releasing hazardous materials onto the land of the state and failing to immediately notify the Vermont Agency of Natural Resources of the release of hazardous materials;

WHEREAS, Defendant has admitted in the Pleadings by Agreement that it committed these violations of Vermont's hazardous waste management regulations and of Vermont's environmental laws;

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109 State Street
Montpelier, VT
05609

WHEREAS, the Attorney General pursuant to 3 V.S.A., Chapter 5 has the general supervision of matters and actions in favor of the State and may settle such matters as the interests of the State require;

WHEREAS, under 10 V.S.A. § 8221, Defendant is potentially liable for civil penalties of up to $85,000.00 for each violation and $42,500.00 per violation for each day the violation continued;

WHEREAS, the State considered the criteria in 10 V.S.A. §§ 8010(b) and (c) in arriving at the proposed penalty amount, including the degree of actual or potential impact on public health, safety, welfare and the environment resulting from the violations and that Defendant knew or had reason to know the violations existed;

WHEREAS, the Attorney General believes that this settlement is in the State's interest as it upholds the statutory regime of 10 V.S.A., Chapter 159 in which the violations occurred; and

WHEREAS, the Consent Order has been negotiated by and among the State and Defendant in good faith;

NOW, THEREFORE, the State and Defendant hereby stipulate and agree as follows:

1. The attached Consent Order may be entered by the Court;
2. The State and Defendant hereby waive all rights to contest or appeal the Consent Order and they shall not challenge, in this or any other proceeding, the validity of any of the terms of the Consent Order or of this Court's jurisdiction to enter the Consent Order; and

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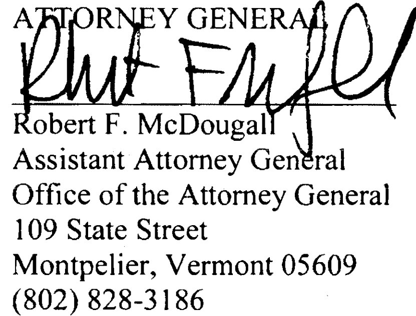
05609

3. The Consent Order sets forth the complete agreement of the parties, and it may be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties' legal representatives and approved by the Court.

DATED at Montpelier, Vermont this 1st day of July, 2014.

WILLIAM H. SORRELL
ATTORNEY GENERAL



By: ______________________
Robert F. McDougall
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3186

DATED at Burlington, Vermont this ______ day of __________, 2014.

SISTERS AND BROTHERS
INVESTMENT GROUP, LLP

By: ______________________
David Greenberg, Esq.
Attorney for Sisters and Brothers
Investment Group, LLP
70 South Winooski Ave.
P.O. Box 201
Burlington, VT 05402-0201
(802) 862-8165

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3. The Consent Order sets forth the complete agreement of the parties, and it may be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties' legal representatives and approved by the Court.

DATED at Montpelier, Vermont this _____ day of __________, 2014.

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: ______________________
Robert F. McDougall
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3186

DATED at Burlington, Vermont this 17th day of July, 2014.

SISTERS AND BROTHERS
INVESTMENT GROUP, LLP

By: ______________________
David Greenberg, Esq.
Attorney for Sisters and Brothers
Investment Group, LLP
70 South Winooski Ave
P.O. Box 201
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STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
Docket No. Wncv

STATE OF VERMONT,)
Plaintiff,)
)
v.)
)
SISTERS AND BROTHERS)
INVESTMENT GROUP, LLP,)
Defendant.)

CONSENT ORDER AND FINAL JUDGMENT ORDER

This action came before the Court pursuant to the parties filing of Pleadings by Agreement under Vermont Rule of Civil Procedure 8(g). Based upon those Pleadings by Agreement and the Stipulation for the Entry of Consent Order and Final Judgment Order, and pursuant to 10 V.S.A. § 8221 and the Court's inherent equitable powers, it is hereby ADJUDGED, ORDERED and DECREED as follows:

ADJUDICATION OF HAZARDOUS WASTE MANAGEMENT VIOLATIONS

1. Defendant Sisters and Brothers Investment Group, LLP (Defendant) is adjudged liable for violating the following Vermont Hazardous Waste Management Rules (HWMR):

    - Section 7-303 – failure to make hazardous waste determinations;
    - Section 7-304(a) – improper shipment of hazardous waste without an accurate permanent EPA identification number;
    - Section 7-311(a)(1), (2) and (3) – failure to follow storage area design standards;

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- Section 7-311(f)(2) – failure to properly manage condition of containers;
- Section 7-311(f)(4)(A) – use of improper containers;
- Section 7-311(f)(1) – failure to properly mark hazardous waste containers;
- Section 7-311(g)(1) – failure to properly mark storage tank;
- Section 7-912(b)(2) – improper breaking or crushing of mercury-containing lamps;
- Section 7-912(d)(5)(A)(i) and (2) – improper universal waste lamp storage;
- Section 7-912(f)(1) and (3) – failure to follow universal waste lamp time limit requirements; and
- Section 7-912(e)(6) – failure to properly label containers containing universal waste lamps.

2. Defendant is also adjudged liable for (i) violating 10 V.S.A. § 6616 by releasing hazardous waste (waste oil) onto the land of the state at a facility owned by Defendant at 110 Riverside Avenue in Burlington and (ii) violating 10 V.S.A. § 6617 by failing to immediately notify ANR about the release at 110 Riverside Avenue.

PENALTIES

3. For the violations described above, Defendant shall pay a penalty of seventy thousand dollars ($70,000.00).
4. Payment of the seventy thousand dollar ($70,000.00) penalty shall be made to the "State of Vermont" and shall be sent to: Robert F. McDougall, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, VT 05609. Payment of the seventy thousand dollar ($70,000.00) penalty shall be due as follows:

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(a) ten thousand dollars ($10,000.00) shall be paid no later than 14 days after the Court has approved this Consent Order and Final Judgment Order; (b) on the first of the month for six months, and starting with the first full month after the Court has approved this Consent Order and Final Judgment Order, Defendant shall pay ten thousand dollars ($10,000.00) until the total penalty of seventy thousand dollars ($70,000) has been paid in full.

5. Failure to pay the penalty on a timely basis as provided in paragraph 4 shall constitute grounds for the State to accelerate all payments then unpaid and all such payments shall be due immediately.

OTHER PROVISIONS

6. Defendant waives: (a) all rights to contest or appeal this Consent Order; and (b) all rights to contest the obligations imposed upon Defendant under this Consent Order in this or any other administrative or judicial proceeding involving the State of Vermont.

7. This Consent Order is binding upon Defendant and its successors and assigns.

8. Nothing in this Consent Order shall be construed to create or deny any rights in, or grant or deny any cause of action to, any person not a party to this Consent Order.

9. This Consent Order shall become effective only after it is entered as an order of the Court. When so entered by the Court, this Consent Order shall become a Final Judgment Order.

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10. Any violation of this Consent Order shall be deemed to be a violation of a judicial order, and may result in the imposition of injunctive relief and/or penalties, including penalties for contempt, as set forth in 10 V.S.A. Chapters 201 and 211.
11. The State of Vermont and the Court reserve continuing jurisdiction to ensure future compliance with all statutes, rules, and regulations applicable to the facts and circumstances set forth herein.
12. Nothing in this Consent Order shall be construed as having relieved, modified, or in any manner affected Defendant's obligations to comply with all other federal, state, or local statutes, regulations, permits or directives applicable to Defendant. The State reserves all rights, claims and interests not expressly waived herein.
13. This Consent Order may only be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties hereto or their legal representatives and approved by this. Alleged representations not set forth in this Consent Order, whether written or oral, shall not be binding upon any party hereto, and such alleged representations shall be of no legal force or effect.
14. Defendant shall not be liable for additional civil or criminal penalties with respect to the specific facts described herein or in the Pleadings by Agreement occurring before the effective date of the Order, provided that the Defendant fully complies with the terms of the Consent Order set forth above.

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SO ORDERED, and ENTERED as FINAL JUDGMENT.

DATED at Montpelier, Vermont this ___ day of __________, 2014.

____
Hon. Helen M. Toor
Washington Superior Court Judge

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STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
Docket No. Wncv

STATE OF VERMONT, Plaintiff,	)
	)
v.	)
	)
SISTERS AND BROTHERS INVESTMENT GROUP, LLP, Defendant.	)

PLEADINGS BY AGREEMENT

The State of Vermont, by and through Vermont Attorney General William H. Sorrell, and Defendant Sisters and Brothers Investment Group, LLP, hereby submit these pleadings by agreement pursuant to Vermont Rule of Civil Procedure 8(g).

THE STATE'S ALLEGATIONS

The Parties

1. The State of Vermont Agency of Natural Resources (ANR or the Agency) is a state agency with offices in Montpelier, Vermont.
2. Sisters and Brothers Investment Group, LLP (Defendant), is a Vermont-based limited liability partnership. Joseph Handy, Charles Handy, Anthony Handy, Joan Handy and Laura Handy are listed as the partners of the LLP with the Vermont Secretary of State.
3. Defendant is the owner of property at 110 Riverside Avenue in Burlington, Vermont which was used as a facility for the storage and disposal of hazardous materials and wastes.

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Montpelier, VT
05609

4. Defendant is the lessee of an impounded car lot on Flynn Avenue in Burlington, Vermont.
5. Defendant is responsible for the generation, storage and disposal of hazardous wastes and materials.

Statutory and Regulatory Scheme

6. The Agency has the authority to regulate the storage and disposal of hazardous waste through 10 V.S.A., Chapter 159 and the Vermont Hazardous Waste Management Regulations (HWMR).
7. Pursuant to 10 V.S.A. § 8221, the Secretary of the Agency may bring an action in superior court to enforce Vermont's environmental laws. The action shall be brought by the Attorney General in the name of the State.

Facts relating to Defendant and Factual Allegations

8. On February 10, 2012, Defendant released hazardous materials (waste oil) onto the land of the state at a facility owned by Defendant at 110 Riverside Avenue in violation of 10 V.S.A. § 6616 and in violation of Vermont's HWMR. Defendant failed to immediately notify ANR about the release in violation of 10 V.S.A. § 6617.
9. On February 10, 2012, an Agency Spill Response Team was called to a spill at 110 Riverside Avenue in Burlington. The property is the former location of a business known as M&H Auto. At the time of the spill call, the property, owned by Defendant, was vacant.
10. The Agency's Spill Response Team arrived and observed what it believed to be a waste oil spill on the ground coming from a garage bay door at the 110 Riverside

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Avenue property. The waste oil was migrating on the surface of the pavement down a slope along a curb and near a storm water catch basin that empties into the Winooski River.

11. Waste oil includes petroleum and is a hazardous material and hazardous waste under Vermont law.

12. The City of Burlington's Fire Department also responded to the spill at 110 Riverside Avenue and contained the spill using Speedi-Dry.

13. The Agency's Spill Response Team observed a sheen on the pavement near the building at 110 Riverside Avenue, pavement staining, and darkened soil in the path of the spill.

14. Joseph Handy told the Agency Spill Response Team that he believed a vehicle had jumped the curb and released the oil on the ground. Defendant had not contacted and notified ANR about the release.

15. Following the spill response on February 10, 2012, Agency staff conducted inspections of the 110 Riverside Avenue property on February 24, 2012 and March 1, 2012. Agency staff also inspected the impounded car lot on Flynn Avenue on March 1, 2012.

16. During one or more of these inspections, Agency staff found the following:

    a. Defendant was making no hazardous waste determinations for hazardous waste stored at the 110 Riverside Avenue property or the impounded car lot on Flynn Avenue. Forty-seven 55-gallon drums and numerous pint, gallon, 5-gallon, and approximately 30-gallon garbage cans were observed at the 110 Riverside Avenue property with unknown contents. Three 55-gallon drums were observed at the impounded car lot on Flynn Avenue with unknown contents. The drums were later sampled at the Agency's direction and found to contain hazardous waste.

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b. On February 17, 2012, seven 55-gallon drums were shipped by Environmental Products and Services on manifest number 004156299 FLW. Three of the drums were shipped using an incorrect EPA identification number. The EPA identification number used, VTR000006320, corresponds with a different Handy Petroleum property, located at 75 South Winooski Avenue in Burlington. Neither the appropriate site address nor the correct EPA identification number was listed on the manifest for the three incorrectly shipped drums. The manifest was signed by Joseph Handy. Agency records show that the time of the violations, Defendant had not provided an update that it was the owner and operator of the property located at 110 Riverside Avenue with the EPA identification number VTD988366498.

c. Hazardous waste was not stored upon an impervious surface at the 110 Riverside Avenue property.

d. Hazardous waste was stored out-of-doors at the 110 Riverside Avenue property and not within a structure that sheds rain and snow.

e. Hazardous waste subject to freezing and expansion was stored at the 110 Riverside Avenue property in containers or above ground tanks without mechanical or physical means employed to prevent freezing.

f. Some of the containers holding hazardous waste at both the 110 Riverside Avenue property and the impounded car lot at Flynn Avenue were observed to be in bad condition including, being rusted, dented and bulging.

g. During the February 24, 2012 inspection of the 110 Riverside Avenue property, at least 14 containers holding hazardous waste were observed to be open, had the top rusted open or had no lid or cover.

h. None of the hazardous waste containers at the 110 Riverside Avenue property or impounded car lot at Flynn Avenue were labeled.

i. During the February 24, 2012 inspection of the 110 Riverside Avenue property, an open 275-gallon tank containing a hazardous waste (used oil) was observed. The tank was neither marked nor labeled.

j. During the February 24, 2012 inspection of the 110 Riverside Avenue property, a 30-gallon poly garbage container holding broken universal waste (mercury containing lamps) was observed. Additional broken lamps were found along the south wall of the building.

k. During the February 24, 2012 inspection of the 110 Riverside Avenue property, a number of used universal waste lamps wrapped in tape were observed stored

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against a wall and not stored in a structurally sound container as required by the HWMR. Additionally, one box containing universal waste lamps was not sealed with tape.

l. During the February 24, 2012 inspection of the 110 Riverside Avenue property, 11 containers holding universal waste lamps were observed without any indication of how long the containers had been in storage at the property.

m. During the February 24, 2012 inspection of the 110 Riverside Avenue property, 11 containers holding universal waste lamps were observed as not being labeled or marked.

17. On August 31, 2012 and October 3, 2012, TMC Environmental, a company hired by Defendant to remove and dispose of the hazardous wastes from the Riverside Avenue and Flynn Avenue properties, documented the removal of 2,155 gallons of waste oil and solvents. Oily debris was combined into 8 drums for removal. Paint related waste was combined and packed into flex bins. Universal waste lamp fluorescent bulbs that were not broken were placed into boxes. The removal and disposal was documented in a manifest by TMC Environmental.

Violations

18. Under section 7-303 of the HWMR, any person who generates a waste shall determine if that waste is a hazardous waste.

19. Defendant violated HWMR 7-303 by failing to make hazardous waste determinations for waste stored at the 110 Riverside Avenue property and the impounded car lot on Flynn Avenue.

20. Pursuant to HWMR 7-304(a), no generator of hazardous waste shall treat, recycle, store, dispose of, transport, or offer for transport hazardous waste without having

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obtained a permanent EPA identification number by notifying the Agency using the Vermont Hazardous Waste Handler Site ID Form.

21. Defendant violated HWMR 7-304 by offering seven 55-gallon drums for transport on February 17, 2012 by Environmental Products and Services on manifest number 004156299 FLW using an incorrect EPA identification number. Neither the correct site address nor the correct EPA identification number was listed on the manifest. Further, Defendant had not provided the Agency with information that it was the owner and operator of the property located at 110 Riverside Avenue.

22. HWMR 7-311(a)(1) requires, in part, that hazardous waste must be accumulated and stored upon an impervious surface.

23. HWMR 7-311(a)(2) specifies that hazardous waste containers may be stored out-of-doors only if they are within a structure that sheds rain and snow.

24. HWMR 7-311(a)(3) prohibits the storage of hazardous wastes that may be subject to freezing and expansion in containers or above-ground tanks unless mechanical or physical means are employed to prevent freezing.

25. Defendant violated HWMR 7-311(a)(1), 7-311(a)(2) and 7-311(a)(3) by storing hazardous waste at the 110 Riverside Avenue property that was: (i) not upon an impervious surface; (ii) out-of-doors and not within a structure that sheds rain and snow; and (iii) subject to freezing and expansion in containers or above ground tanks without mechanical or physical means to prevent freezing.

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05609

26. HWMR 7-311(f)(2) requires that if a container holding hazardous waste is not in good condition, or if it begins to leak, the owner must transfer the hazardous waste from this container to a container that is in good condition.

27. Defendant violated HWMR 7-311(f)(2) by storing hazardous waste at the 110 Riverside Avenue property and the impounded car lot on Flynn Avenue in containers that were in bad condition, including rusted, dented and bulging containers.

28. Under HWMR 7-311(f)(4)(B), a container holding hazardous waste must always be closed during storage except when it is necessary to add or remove water.

29. Defendant violated HWMR 7-311(f)(4)(B) by storing hazardous waste at 110 Riverside Avenue in at least 14 containers which were observed to be open, had the top rusted open, or had no lid or cover.

30. HWMR 7-311(f)(1) requires that containers and packages used for the storage of hazardous waste shall be clearly marked from the time they are first used to accumulate or store waste.

31. Defendant violated HMWR 7-311(f)(1) by failing to mark numerous containers of hazardous waste at either the 110 Riverside Avenue property or the impounded car lot on Flynn Avenue.

32. HWMR 7-311(g)(1) provides that tanks used for the storage of hazardous wastes shall be clearly marked with the words "Hazardous Waste" and shall include the name and hazardous waste identification code(s) for the hazardous waste contained.

33. Defendant violated HWMR 7-311(g)(1) by storing hazardous waste at the 110 Riverside Avenue property in an open, 275-gallon tank without markings or labeling.

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05609

34. Defendant is a small quantity handler of universal waste under the HWMR.

35. HWMR 7-912(b)(2) prohibits the storage of broken mercury containing lamps and the intentional breaking or crushing of mercury containing lamps.

36. Defendant violated HWMR 7-912(b)(2) by storing broken mercury containing lamps at the 110 Riverside Avenue property, both inside the property and along the exterior of the property building.

37. HWMR 7-912(d)(5)(A)(i) and (ii) requires that handlers of universal waste lamps must manage the lamps in a way that prevents the release of any universal waste or component of universal waste into the environment. This includes the packaging of universal waste lamps in containers that are structurally sound, adequate to prevent breakage, and compatible with the contents of the lamps. Containers must remain closed and must lack evidence of leakage, spillage or damage that could cause leakage. Full containers must be sealed with tape.

38. Defendant violated HWMR 7-912(d)(5)(A)(i) by storing used lamps against a wall at the 110 Riverside Avenue property, with the lamps wrapped in tape and not in a structurally sound container.

39. Defendant violated HWMR 7-912(d)(5)(A)(ii) by storing a box containing universal waste lamps at the 110 Riverside Avenue property that was not sealed with tape.

40. Pursuant to HWMR 7-912(f)(1), absent specific reasons provided in HWMR 7-912(f)(2), universal waste may not be accumulated for longer than one year from the date the universal waste is generated or received.

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41. Under HWMR 7-912(f)(3), handlers of universal waste must be able to demonstrate the length of time that the universal waste has been accumulated from the date it becomes a waste or is received.

42. Defendant violated HWMR 7-912(f)(1) and (3) by storing containers of universal waste at the 110 Riverside Avenue property without any indication of how long the containers had been in storage at the property.

43. HWMR 7-912(e)(6) requires that containers holding universal waste lamps must be labeled or marked clearly with one of the following phrases: "Universal Waste Lamp(s)," or "Waste Lamp(s)," or "Used Lamp(s)."

44. Defendant violated HWMR 7-912(e)(6) by storing containers holding universal waste lamps at the 110 Riverside Avenue property in containers that were not labeled or marked with one of the following phrases: "Universal Waste Lamp(s)," or "Waste Lamp(s)," or "Used Lamp(s)."

45. Section 6616 of Title 10 prohibits "the release of hazardous materials into the surface or groundwater, or onto the land of the state."

46. Section 6617 of Title 10 requires that any "person who has knowledge of a release or a suspected release and who may be subject to liability for a release ... shall immediately notify" the Agency.

47. Defendant violated 10 V.S.A. § 6616 by releasing hazardous materials onto the land of the state on February 10, 2012.

48. Defendant violated 10 V.S.A. § 6617 by failing to immediately notify the Agency of the release of hazardous materials on February 10, 2012.

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DEFENDANT'S RESPONSE TO THE ALLEGED VIOLATIONS

Defendant answers the preceding allegations as follows:

49. Defendant admits the allegations set forth in paragraphs 1-48.

50. By way of additional explanation, Defendant provides the following:

    a. Defendant alleges that several of the drum noted in paragraph 16(a) were left at the property by a prior tenant which engaged in the repair of automobiles; and

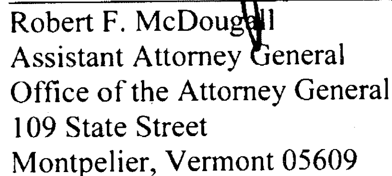
    b. Defendant alleges that the tank noted in paragraph 16(i) was used by the previous tenant for heating the building and that the used oil contained in it was generated by that tenant.

51. The State and Defendant have agreed to resolve the violations set forth herein through a Stipulation for the Entry of Consent Order which has been executed by the parties and is being filed in this action together with these Pleadings by Agreement.

52. Prior to the filing of this action, Defendant implemented appropriate hazardous waste management transport and disposal procedures at this location such that the Agency does not believe it necessary to have a formal compliance plan as part of the consent order resolving this action.

DATED at Montpelier, Vermont this 2nd day of July, 2014.

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: 

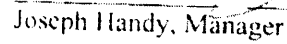
Robert F. McDougall
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

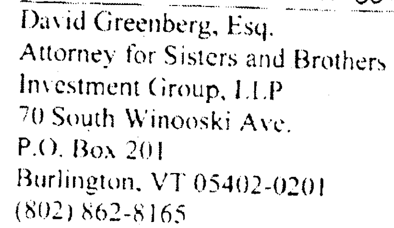
(802) 828-3186

DATED at Burlington, Vermont this 1st day of July, 2014.

SISTERS AND BROTHERS
INVESTMENT GROUP, LLP

By: 
Joseph Handy, Manager

Approved as to form:


David Greenberg, Esq.
Attorney for Sisters and Brothers
Investment Group, LLP
70 South Winooski Ave.
P.O. Box 201
Burlington, VT 05402-0201
(802) 862-8165

Office of the
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STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
Docket No. Wncv

STATE OF VERMONT,
Plaintiff,

v.

SISTERS AND BROTHERS
INVESTMENT GROUP, LLP,
Defendant.

STIPULATION FOR THE ENTRY OF CONSENT ORDER AND FINAL JUDGMENT ORDER

The parties, Plaintiff, the State of Vermont (the State), by and through Vermont Attorney General William H. Sorrell, and Defendant Sisters and Brothers Investment Group, LLP (Defendant), hereby stipulate and agree as follows:

WHEREAS, the State alleges in the Pleadings by Agreement filed in this action that Defendant violated Vermont's hazardous waste management regulations;

WHEREAS, the State further alleges in the Pleadings by Agreement filed in this action that Defendant also violated Vermont's environmental laws by releasing hazardous materials onto the land of the state and failing to immediately notify the Vermont Agency of Natural Resources of the release of hazardous materials;

WHEREAS, Defendant has admitted in the Pleadings by Agreement that it committed these violations of Vermont's hazardous waste management regulations and of Vermont's environmental laws;

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WHEREAS, the Attorney General pursuant to 3 V.S.A., Chapter 5 has the general supervision of matters and actions in favor of the State and may settle such matters as the interests of the State require;

WHEREAS, under 10 V.S.A. § 8221, Defendant is potentially liable for civil penalties of up to $85,000.00 for each violation and $42,500.00 per violation for each day the violation continued;

WHEREAS, the State considered the criteria in 10 V.S.A. §§ 8010(b) and (c) in arriving at the proposed penalty amount, including the degree of actual or potential impact on public health, safety, welfare and the environment resulting from the violations and that Defendant knew or had reason to know the violations existed;

WHEREAS, the Attorney General believes that this settlement is in the State's interest as it upholds the statutory regime of 10 V.S.A., Chapter 159 in which the violations occurred; and

WHEREAS, the Consent Order has been negotiated by and among the State and Defendant in good faith;

NOW, THEREFORE, the State and Defendant hereby stipulate and agree as follows:

1. The attached Consent Order may be entered by the Court;
2. The State and Defendant hereby waive all rights to contest or appeal the Consent Order and they shall not challenge, in this or any other proceeding, the validity of any of the terms of the Consent Order or of this Court's jurisdiction to enter the Consent Order; and

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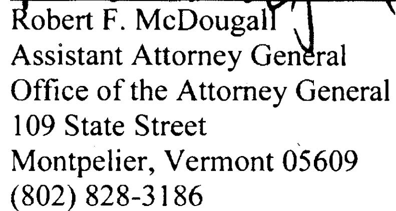
3. The Consent Order sets forth the complete agreement of the parties, and it may be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties' legal representatives and approved by the Court.

DATED at Montpelier, Vermont this 1st day of July, 2014.

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: 

Robert F. McDougall
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3186

DATED at Burlington, Vermont this ______ day of __________, 2014.

SISTERS AND BROTHERS
INVESTMENT GROUP, LLP

By: ______________________________

David Greenberg, Esq.
Attorney for Sisters and Brothers
Investment Group, LLP
70 South Winooski Ave.
P.O. Box 201
Burlington, VT 05402-0201
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Montpelier, VT
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3. The Consent Order sets forth the complete agreement of the parties, and it may be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties' legal representatives and approved by the Court.

DATED at Montpelier, Vermont this ____ day of __________, 2014.

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: ______________________
Robert F. McDougall
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3186

DATED at Burlington, Vermont this 17th day of July, 2014.

SISTERS AND BROTHERS
INVESTMENT GROUP, LLP

By: ______________________
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VT SUPERIOR COURT
WASHINGTON UNIT

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

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CIVIL DIVISION
Docket No. Wncv

STATE OF VERMONT,
Plaintiff,

v.

SISTERS AND BROTHERS
INVESTMENT GROUP, LLP,
Defendant.

FILED

CONSENT ORDER AND FINAL JUDGMENT ORDER

This action came before the Court pursuant to the parties filing of Pleadings by Agreement under Vermont Rule of Civil Procedure 8(g). Based upon those Pleadings by Agreement and the Stipulation for the Entry of Consent Order and Final Judgment Order, and pursuant to 10 V.S.A. § 8221 and the Court's inherent equitable powers, it is hereby ADJUDGED, ORDERED and DECREED as follows:

ADJUDICATION OF HAZARDOUS WASTE MANAGEMENT VIOLATIONS

1. Defendant Sisters and Brothers Investment Group, LLP (Defendant) is adjudged liable for violating the following Vermont Hazardous Waste Management Rules (HWMR):
   - Section 7-303 – failure to make hazardous waste determinations;
   - Section 7-304(a) – improper shipment of hazardous waste without an accurate permanent EPA identification number;
   - Section 7-311(a)(1), (2) and (3) – failure to follow storage area design standards;

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- Section 7-311(f)(2) – failure to properly manage condition of containers;
- Section 7-311(f)(4)(A) – use of improper containers;
- Section 7-311(f)(1) – failure to properly mark hazardous waste containers;
- Section 7-311(g)(1) – failure to properly mark storage tank;
- Section 7-912(b)(2) – improper breaking or crushing of mercury-containing lamps;
- Section 7-912(d)(5)(A)(i) and (2) – improper universal waste lamp storage;
- Section 7-912(f)(1) and (3) – failure to follow universal waste lamp time limit requirements; and
- Section 7-912(e)(6) – failure to properly label containers containing universal waste lamps.

2. Defendant is also adjudged liable for (i) violating 10 V.S.A. § 6616 by releasing hazardous waste (waste oil) onto the land of the state at a facility owned by Defendant at 110 Riverside Avenue in Burlington and (ii) violating 10 V.S.A. § 6617 by failing to immediately notify ANR about the release at 110 Riverside Avenue.

PENALTIES

3. For the violations described above, Defendant shall pay a penalty of seventy thousand dollars ($70,000.00).
4. Payment of the seventy thousand dollar ($70,000.00) penalty shall be made to the "State of Vermont" and shall be sent to: Robert F. McDougall, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, VT 05609. Payment of the seventy thousand dollar ($70,000.00) penalty shall be due as follows:

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(a) ten thousand dollars ($10,000.00) shall be paid no later than 14 days after the Court has approved this Consent Order and Final Judgment Order; (b) on the first of the month for six months, and starting with the first full month after the Court has approved this Consent Order and Final Judgment Order, Defendant shall pay ten thousand dollars ($10,000.00) until the total penalty of seventy thousand dollars ($70,000) has been paid in full.

5. Failure to pay the penalty on a timely basis as provided in paragraph 4 shall constitute grounds for the State to accelerate all payments then unpaid and all such payments shall be due immediately.

OTHER PROVISIONS

6. Defendant waives: (a) all rights to contest or appeal this Consent Order; and (b) all rights to contest the obligations imposed upon Defendant under this Consent Order in this or any other administrative or judicial proceeding involving the State of Vermont.

7. This Consent Order is binding upon Defendant and its successors and assigns.

8. Nothing in this Consent Order shall be construed to create or deny any rights in, or grant or deny any cause of action to, any person not a party to this Consent Order.

9. This Consent Order shall become effective only after it is entered as an order of the Court. When so entered by the Court, this Consent Order shall become a Final Judgment Order.

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10. Any violation of this Consent Order shall be deemed to be a violation of a judicial order, and may result in the imposition of injunctive relief and/or penalties, including penalties for contempt, as set forth in 10 V.S.A. Chapters 201 and 211.

11. The State of Vermont and the Court reserve continuing jurisdiction to ensure future compliance with all statutes, rules, and regulations applicable to the facts and circumstances set forth herein.

12. Nothing in this Consent Order shall be construed as having relieved, modified, or in any manner affected Defendant's obligations to comply with all other federal, state, or local statutes, regulations, permits or directives applicable to Defendant. The State reserves all rights, claims and interests not expressly waived herein.

13. This Consent Order may only be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties hereto or their legal representatives and approved by this. Alleged representations not set forth in this Consent Order, whether written or oral, shall not be binding upon any party hereto, and such alleged representations shall be of no legal force or effect.

14. Defendant shall not be liable for additional civil or criminal penalties with respect to the specific facts described herein or in the Pleadings by Agreement occurring before the effective date of the Order, provided that the Defendant fully complies with the terms of the Consent Order set forth above.

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Montpelier, VT 05609

SO ORDERED, and ENTERED as FINAL JUDGMENT.

DATED at Montpelier, Vermont this 1st day of August, 2014.

Hon. Helen M. Toor
Washington Superior Court Judge

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VT SUPERIOR COURT
WASHINGTON UNIT
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FILED

VERMONT SUPERIOR COURT
WASHINGTON UNIT
CIVIL DIVISION

STATE OF VERMONT AGENCY OF NATURAL RESOURCES, Plaintiff v. PARKWAY CLEANERS, et al., Defendants	Docket No. 480-7-10 Wncv

RULING ON MOTION TO DISMISS, MOTION TO ALTER, and CROSS-MOTIONS FOR SUMMARY JUDGMENT

In this case, the Vermont Agency of Natural Resources (ANR or the State) seeks the abatement and cleanup, including related damages and penalties, of hazardous waste related to a former dry cleaning business in the Town of Hartford. The Town is a party solely by virtue of Defendants Richard S. Daniels and Hazen Street Holdings, Inc.'s, third-party complaint for indemnity. The Town has filed a motion to dismiss that complaint for failure to state a claim. The Fournier defendants have filed a motion to alter, by which they seek reconsideration of the court's denial of their motion for default judgment against Mr. Gendron. Daniels has filed a motion for summary judgment seeking to establish that he cannot have liability as a current owner of the property and is not responsible for releasing any hazardous waste at the site. The State has filed a motion for summary judgment seeking to establish that Daniels has liability as the current owner of the site and the amount of past damages.

I. The Town's Motion to Dismiss the Third-Party Complaint

Briefly, the State alleges in its complaint the following. The contaminated site was owned by the Gendron defendants, who operated a dry cleaning business there, from 1977 to

1988. The Fournier defendants—who have settled with the State—bought the property from the Gendrons and operated a dry cleaning business there. At some point, the Fourniers ceased dry cleaning operations and became delinquent in property taxes. Daniels was the high bidder at the tax sale and took title with a quitclaim deed from the tax collector in 1995. He conveyed the property to Hazen Street Holdings, Inc. (HSH), in 2006. The State claims that the conveyance was an invalid attempt to avoid liability for the hazardous waste related to the dry cleaning operations.

After the State initiated this case, Daniels and HSH filed a third-party complaint against the Town for indemnity. They allege that at the time of the tax sale, the property was an unimproved, vacant lot, and Daniels had no reason to know that it was contaminated. They further allege that neither of them is responsible for ever having released any contaminants at the site. They claim that if they become liable to the State in this case, then they will be entitled to indemnification from the Town. A copy of the tax collector's deed by which Daniels acquired the property is attached to their complaint.

The Town argues that the mere issuance of the tax collector's deed by the Town tax collector to Daniels cannot establish any right to indemnification. In opposition to dismissal, Daniels and HSH concede that the Town itself never "took possession of" the property. They assert, however, that the tax collector's deed put the Town in the chain of title and that is an adequate basis for indemnification. The tax sale statute makes clear that the Town does *not* take title unless it buys the land at the sale. *See* 32 V.S.A. § 5259. It is also clear that the tax collector's deed conveys title "against the person for whose tax it was sold," not against the Town. Id. § 5261. Moreover, a purchaser at a tax sale "buys strictly under the rule of *caveat emptor*," and "there is no warranty on the part of the public body making the sale." Morse v.

King, 137 Vt. 49, 51 (1979).

The court is unable to discern any conceivable basis for indemnification. Under 10 V.S.A. § 6615(i), one person responsible for specific releases of hazardous waste or the contaminated site as a whole, id. § 6615(a)(1)–(4), has a statutory right to seek contribution or indemnity from any other responsible person. Yet there is no allegation in the third-party complaint that the Town is potentially responsible to the State for anything.

There also is no allegation in the complaint that points towards any basis for common law contractual or implied indemnification. No contractual provision is alleged. "While it is difficult to state a general rule that will cover all cases, implied indemnification is usually appropriate only when the indemnitee is vicariously or secondarily liable to a third person because of some legal relationship with that person or because of the indemnitee's failure to discover a dangerous condition caused by the act of the indemnitor, who is primarily responsible for the condition." White v. Queechee Lakes Landowners' Ass'n, Inc., 170 Vt. 25, 29 (1999). In relation to the pollution on the site, there is no allegation of any vicarious or secondary relationship or that the Town has any primary responsibility for the pollution.

As a matter of law, the mere issuance of a tax collector's deed quitclaiming a property to the highest bidder at a tax sale is insufficient to support a claim for indemnity for hazardous waste on the property against the town whose tax collector issued the deed. The motion to dismiss is granted.

II. The Fourniers' Motion to Alter

In March 2014, the State and the Fournier defendants filed a joint motion seeking approval of their settlement agreement. Settlement with the State immunizes a responsible party from claims for contribution from other responsible parties but has no effect on the settling

party's contribution claims against others. 10 V.S.A. § 6615(i). On April 9, 2014, the court approved the settlement agreement. On April 22, 2014, the Fourniers filed a motion for default on their contribution claim against Mr. Gendron. The court denied that motion, indicating that approval of the settlement agreement dismissed the Fourniers as parties in this case. The Fourniers then filed a "motion to alter," by which they seek reconsideration of the denial of their motion for default.

The Fourniers urge that they carefully retained their contribution claim against Mr. Gendron in the settlement agreement. That much is clear in the terms of the agreement. The Fourniers' intent to remain parties and pursue their contribution claim in this case is less clear. For example, the parties included in the title of the settlement approval motion a request for dismissal of the Fourniers. The text of the motion did not make clear that they sought dismissal of the claims against them and not dismissal as parties.

In any event, the confusion now is clarified. The Fourniers remain parties in this case for purposes of their contribution claim. Their motion to alter is granted, as is their April 22, 2014 motion for default.

III. The Summary Judgment Motions

In Daniels' summary judgment motion, he argues that the State has no evidence to support its claim that he has liability as a current owner of the property because he conveyed the property to HSH in 2006. He further argues that the State has no evidence that he released any contaminants while he owned the site, 1995 to 2006, or that any public nuisance exists. In its summary judgment motion, the State argues that Daniels has current owner liability because "current" represents the time at which the State's action accrued rather than when the lawsuit was filed. Alternatively, the State argues that the conveyance to HSH was a fraudulent transfer

under 9 V.S.A. § 2288 and, separately, HSH is Daniels' "alter ego" and the court should pierce the corporate veil and treat him as the current owner for purposes of this case. As an alternative to current owner liability, the State argues that Daniels is liable as a former owner for a release that occurred when he removed a building that used to house the dry cleaning business.[1] The State also seeks judgment on the amount of its past damages, prejudgment interest, and its requested injunction.

In making these arguments, both parties adopt the interpretation, as far it goes, of 10 V.S.A. § 6615 that appears in State v. Howe Cleaners, Inc., No 27-1-04 Wncv, 2006 WL 6047594 (Vt. Super. Ct. Mar. 10, 2006), *aff'd on other grounds*, 2010 VT 70, 188 Vt. 303. The court does the same for purposes of these motions. Under Howe Cleaners, the current owner of a contaminated site has complete liability to the State regardless of how or when the contamination occurred unless a statutory defense is available. Despite alleging in his answer and third-party complaint that he had no reason to know that the site was contaminated when he bought it, Daniels does not claim, even in the alternative, any statutory defense. *See* 10 V.S.A. § 6615(e) (describing the diligent owner defense). His argument is that he is a former owner, responsible at most for his own releases at the site, and there were no such releases. The first question posed by the motions, then, is whether Daniels will be treated as a current owner.[2]

A. The Undisputed Facts

In support of its motion, the State filed an extensive statement of undisputed facts with specific citations to the record and the affidavit of Patricia Coppolino, the ANR site manager responsible for the property since 2004. The State's statement generally conforms to the

[1] There is no such allegation in the complaint.

[2] The State asserts that if Daniels is determined to have current owner liability for the site, then it will not pursue its alternative public nuisance claim.

requirements of Rule 56(c). In response, Daniels asserts that the Coppolino affidavit—almost in its entirety—should be disregarded as self-serving and not based on personal knowledge. Daniels does not cite the specific evidence that he claims is inadmissible. That is not a proper way to dispute facts under Rule 56(c)(1)(A), which requires "specific citations to particular parts of the materials in the record." The affidavit is from an ANR employee who recites her credentials and responsibilities as site manager for the property at issue. The facts she sets forth are based upon either her direct involvement in the matter or the business records of ANR. There is nothing on the face of the affidavit to suggest that it lacks adequate foundation or is otherwise inadmissible. For purposes of the summary judgment motions, the court considers the State's facts to be undisputed. V.R.C.P. 56(e)(2).

The undisputed facts that are material to the issue of whether Daniels is a current or former owner are as follows. The Hartford site first was used as a dry cleaning facility in the late 1970s. Perchloroethylene, or PERC, is a hazardous material that was used in dry cleaning businesses at the time. PERC was dumped on the site or released from the dry cleaning equipment. The site and neighboring properties remain contaminated with high levels of PERC, presenting an immediate threat to human health and the environment.

Daniels acquired title to the site in 1995 following a tax sale. His winning bid was under $3,000. By then, the dry cleaning business had ceased but a building that housed the dry cleaning operation remained on the site. Otherwise, it was a vacant lot, which is how it remains. A few years after purchasing the property, Daniels tore down the building. He has made no other use of the property. In 2002, Daniels received a letter from an ANR employee indicating that the site was contaminated, or suspected of being contaminated, with PERC. By 2005, Daniels was meeting with Coppolino and others about it. He was asked to pay for certain

investigation work at the site and to arrange and pay for other work. On May 1, 2006, the State received the results of a soil gas sampling test that showed high levels of PERC.

At this time, the State mistakenly believed that the site was owned by RSD, one of Daniels' corporations, rather than Daniels himself. On June 5, 2006, the State sent a "first letter" to RSD formally indicating its liability under 10 V.S.A. § 6615 and requesting that it begin taking specific corrective action. The State quickly discovered that Daniels himself owned the property. It met with Daniels to show him the deed documenting that he owned the property and to make clear that the State was seeking to hold him personally responsible. Daniels expressed surprise that he owned the property. At some point, Daniels told the town manager that he was worried that his liability for the site might ruin him financially.

On October 6, 2006, Daniels conveyed the property to HSH, which he incorporated as a real estate holding company. Daniels is its president, director, and manager. HSH paid no consideration for the property and received no indemnification or other assurance against liability to the State under 10 V.S.A. § 6615. Daniels signed the Vermont Property Transfer Tax Return as the seller and as the agent for the buyer. HSH has no assets of any kind other than the property and no potential ability to clean up the site or satisfy any liability to the State. It has no business records other than the deed by which the site was conveyed to it and documents related to the environmental investigation and cleanup.[3] The State did not learn of HSH until late October 2006, when its name appeared in a work plan for the site produced by an environmental consultant. Both before and after the conveyance to HSH, Daniels has had possession and control over the site.

The State seeks past damages in this case of $283,458 and prejudgment interest of $209,627 (and counting). When the site was conveyed to HSH, it had a listed value of $23,100.

[3] The lack of other business records implies that it never issued any stock and has no shareholders.

Both Daniels and HSH are named defendants in this case. They are represented by the same attorney. HSH has not opposed Daniels' summary judgment motion which, if successful, would make HSH completely liable to the State for the pollution at the site.

B. Liability

The site itself obviously is not an "asset" that anyone would want or that the State is trying to reach to satisfy a liability. Ownership of the site is a tremendous liability due to the contamination and the current owner liability provision of 10 V.S.A. § 6615(a)(1). The State argues that Daniels is the "current owner" for purposes of section 6615 because he was the owner when the State's claim accrued, and alternatively that he is the current owner now because his transfer of the property to HSH was not legitimate. The parties debate the issue of when "current" ownership is measured.[4] Daniels maintains that he is a mere former owner.[5]

It is undisputed that Daniels owned the property at the time ANR sought to investigate the site, and at the time ANR first sought cleanup of the site. Thus, if "current owner" is measured at those times, as the Ninth Circuit held in California Dep't of Toxic Substances Control v. Hearthside Residential Corp., 613 F.3d 910 (9th Cir. 2010), the State has established that Daniels meets the "current owner" test. Alternatively, if the State can show that the court should pierce the corporate veil because Daniels' later transfer of the property was not legitimate, he would be the "current owner" even if that date is measured at the time litigation begins. The court concludes that it need not decide when "current" ownership is measured,

[4] The Waste Management Act does not use the expressions "current owner" and "former owner." Rather, the expression "owner or operator of a facility," 10 V.S.A. § 6615(a)(1), has been interpreted to mean the *current* owner or operator of the facility as distinct from the "person who at the time of release . . . owned or operated any facility," id. § 6615(a)(2), the *former* owner. The current owner has complete joint and several liability based purely on that owner's status as the current owner. Other potentially responsible parties, including former owners, have liability only in relation to releases of hazardous materials for which they are responsible.

[5] Daniels also argues that the State lacks evidence that he caused any specific releases. The court agrees this has not been proven.

because under either analysis the State has established that Daniels satisfies the test.

When the State took formal action against Daniels, he responded by creating a corporation that had no assets and transferred ownership of the site to the corporation. When the State sued Daniels, he claimed that the asset-free corporation, which could have no way of satisfying any liability or cleaning up the property, is the current owner.[6]

It is appropriate to pierce the corporate veil "to correct the use of the corporate form to evade legitimate claims." Agway v. Brooks, 173 Vt. 259, 264 (2001). "A standard test that has been applied in determining whether to pierce the corporate veil requires a court to consider: (1) whether a corporation was controlled by another to the extent it had independence in form only, and (2) whether the corporation was used as a subterfuge to defeat public convenience, justify wrong, or perpetrate a fraud." 1 Fletcher Cyc. Corp. § 41.30 (WL updated Apr. 2014); *see also* id. § 41.32 ("In cases of fraud, whether actual or constructive, the courts may regard the real parties responsible and grant relief against them or deny their claims and defenses based on the principles of equity. This is a principle older than the modern law of business corporations and does not depend on the regard or disregard of the corporation." (footnote omitted)).

The standard test is easily satisfied here. HSH has independence from Daniels personally in name only. There is no indication that it has any employees or shareholders. The only person associated with it other than Daniels is an employee of another of Daniels' corporations who is listed in corporate filings as its secretary. Daniels' decisions are its decisions. Daniels remains in control and possession of the site. Daniels clearly used HSH as an attempt to evade liability to the State as a current owner under 10 V.S.A. § 6615(a)(1). Daniels has not identified any purpose that HSH might have other than to shed Daniels' liability as a current owner. That is an

[6] As a defendant in this case, represented by the same counsel as Daniels, HSH has stood by silently as Daniels has essentially argued that it should be the one left holding the bag.

abuse of the corporate form.

As interpreted in the Howe Cleaners decision, a current owner has complete liability to the State regardless whether it caused the contamination. Former owners, who may be long gone by the time the State learns of the contamination, are responsible for their releases only. If a current owner could simply evade liability by transferring ownership of a contaminated site to an asset-free corporation of its own making, the purpose of 10 V.S.A. § 6615(a)(1) would be completely undermined. The statute obviously does not contemplate that.

Daniels, not HSH, is the current owner regardless of which time frame applies to that determination. 10 V.S.A. § 6615(a)(1). The court does not need to address the other issues related to liability in the State's motion. Daniels has raised no other defense to liability as a current owner. The State is entitled to summary judgment on Daniels' liability.

C. Damages

The State seeks summary judgment on past damages, prejudgment interest, and injunctive relief and indicates that it will seek future damages at a later time. It does not seek penalties against Daniels. The damages sought relate to environmental assessments and plans, air sampling, and the installation and maintenance of ventilation systems.

Daniels argues that the affidavit in support of these damages is inadmissible, but the court disagrees for reasons set forth above. However, Daniels raises a valid point with respect to the summary exhibit submitted as the total proof to support the requested damages of over $400,000 (including interest). Daniels failed to follow Rule 56's procedure for opposing summary judgment on the basis of needing further discovery -- *see* V.R.C.P. 56(d)(nonmovant must show "by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition" and obtain time for discovery) -- and the court could therefore deem the issue waived. However,

given the high dollar amount at stake, the court will permit discovery on the issue of the amount of damages and then a hearing to permit Daniels to challenge the figures.

In addition, the Fournier settlement contributed funds against the total liability. It is not clear that the State's accounting of past damages includes that contribution.

Moreover, while the State is entitled to an injunction requiring Daniels to undertake such further "investigation, removal and remedial action" as is reasonable and necessary, it has not provided language for the injunction that is "specific in terms." V.R.C.P. 65(d).

Order

(1) The Town's motion to dismiss is granted.

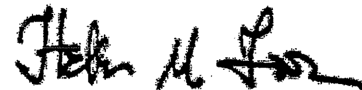
(2) The Fourniers' motion to alter is granted. The court's May 16, 2014 entry denying their motion for default is vacated. That motion for default against Paul D. Gendron is granted.

(3) Daniels' motion for summary judgment is denied.

(4) The State's motion for summary judgment is granted. Daniels has current owner liability in this case under 10 V.S.A. § 6615(a)(1).

(5) Daniels shall have ninety days to do discovery with regard to damages. A one-day hearing will be scheduled after November 5 on the issue of the amount of past damages, prejudgment interest, the amount to be credited from the Fournier settlement, and the terms of injunctive relief. The court urges the parties to seek to stipulate to some or all of these issues.

Dated at Montpelier this 5th day of August, 2014.



Helen M. Toor
Superior Court Judge

STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket No. 218-8-12 Oscv

STATE OF VERMONT

Plaintiff

v.

RICHARD M. NELSON

CYRIL NELSON and

NELSON FARMS, INC.

Defendants

AMENDED COMPLAINT FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES

NOW COMES the State of Vermont, Agency of Agriculture, Food and Markets and the Agency of Natural Resources, by and through its attorney, Attorney General William H. Sorrell, and pursuant to 6 V.S.A. § 1(a)(7), 6 V.S.A. § 4812(c), 10 V.S.A. § 1274(a) and 10 V.S.A. § 8221, and the court's general equitable jurisdiction, brings the following complaint against the Defendants Richard M. Nelson, Cyril Nelson and Nelson Farms, Inc..

PARTIES

1. The Plaintiff State of Vermont is a sovereign entity of which the Agency of Agriculture, Food and Markets and the Agency of Natural Resources are respectively created through 3 V.S.A. § 212(2) and 3 V.S.A. § 2802. The agencies

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cooperate and coordinate their efforts relating to agricultural water quality pursuant to 6 V.S.A. § 4810(b).

2. The Defendant Richard Nelson is a person who is engaged in farming in the Town of Coventry, Vermont in Orleans County. The Defendant is engaged in an agricultural operation located at Coventry Station Road in the Town of Coventry.

3. Defendant Cyril ("Cy") Nelson is a person who is engaged in farming in the Town of Coventry, Vermont in Orleans County. The Defendant is engaged in an agricultural operation located at Coventry Station Road in the Town of Coventry.

4. The Defendant Nelson Farms, Inc. is a Vermont corporation, engaged in the farm products business, and which owns the real property described in paragraphs 2 and 3 above. The officers and principals of Nelson Farms, Inc. are Douglas Nelson, Sr., Douglas Nelson, Jr., the defendant Richard Nelson, and the defendant Cyril Nelson.

FACTUAL AND LEGAL ALLEGATIONS

5. The Defendants' agricultural operation at Coventry Station Road milking facility involves, from time to time, the confinement, feeding, fencing, and watering of livestock, and the storage and handling of livestock wastes and by-products.

6. On June 8, 2009 the Agency of Agriculture, Food and Markets (Agency of Agriculture) notified the Defendant Richard Nelson that the silage leachate system on the farm was not being managed to prevent a discharge of wastes to the waters of the state. The Defendant was notified that silage leachate

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runoff from the farm feed bunker collected and flowed into a drain located in the feed bunker, that the drain was connected to a pipe which flowed to a stream of water, and that the system needed to be corrected.

7. The stream to which the silage leachate runoff was discharging is a water of the state.

8. On February 9, 2010 employees of the Agency of Agriculture and Agency of Natural Resources observed that the silage leachate system at the Defendants' farm had not been corrected to prevent discharges to waters of the state.

9. On April 6, 2010 the Defendant Richard Nelson was sent a written warning that the silage leachate runoff from the farm's feed bunks was entering a drain that was connected to a pipe that was discharging to the waters of the state, that the discharge was a violation of Vermont's accepted agricultural practices rules, and that corrective action needed to be taken immediately to prevent the discharge.

10. On May 21, 2010 an employee of the Agency of Agriculture observed that the silage leachate system at the Defendants' farm had still not been corrected.

11. On June 10, 2010 the Agency of Agriculture sent the Defendant Richard Nelson a written notice that the feed bunks at the farm were still designed in such a way to cause silage leachate runoff to drain into a pipe and discharge into waters of the state.

12. July 14, 2010 the Defendant Richard Nelson signed and entered into a written agreement with the Agency of Agriculture, wherein he agreed to correct the silage leachate drainage system on the farm.

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13. On August 17, 2010 employees of the Agency of Agriculture met with the Defendant Richard Nelson at the farm to discuss the need to correct the runoff from the silage leachate system and to offer him technical assistance in doing so.

14. On January 7, 2011 the Agency of Agriculture, Food and Markets issued an order to the Defendant Richard Nelson for, among other things, failing to abide by the written agreement to correct the discharges at the farm that he had entered into with the Agency of Agriculture.

15. On November 18, 2011 employees of the Agency of Agriculture, Food and Markets and Agency of Natural Resources observed that the drain from the silage bunkers was still connected to a drain and a pipe that runs towards a water of the state.

16. On March 20, 2012 employees of the Agency of Agriculture, Food and Markets and Agency of Natural Resources observed that the drain from the silage bunkers was still connected to a drain and a pipe that runs towards a water of the state.

17. On June 4, 2012, an employee of the Agency of Agriculture, observed silage leachate runoff discharging from a pipe at the Defendants' Coventry Station Road milking facility agricultural operation into a stream. The silage leachate runoff in the pipe came from the drain inside the concrete silage bunker at the Defendants' farm. The matter was thereafter referred to the Office of the Attorney General.

18. The Defendants' actions, as set forth, are a violation of Vermont's Accepted Agricultural Practices ("AAPs") which provide in section 4.01(a) that:

> Agricultural operations shall not create any direct discharge of wastes into the surface waters of the State from a discrete

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> conveyance such as, but not limited to, a pipe, ditch, or conduit without a permit from the Secretary of ANR.

and in section 4.01(b) that:

> Barnyards, manure storage areas, animal holding areas and production areas shall be managed or controlled to prevent runoff of wastes to adjoining waters, groundwater or across property boundaries.

19. 6 V.S.A. § 4812(c) provides that whenever the Secretary of Agriculture, Food and Markets believes that any person engaged in farming is in violation of the agricultural water quality laws in subchapter 2 of chapter 215 of title 6, or the rules adopted there under, an action may be brought in the name of the agency in a court of competent jurisdiction to restrain by temporary or permanent injunction the continuation or repetition of the violation. Vermont's Accepted Agricultural Practices ("AAPs"), referred to in paragraph15 above, were adopted as rules under the authority of 6 V.S.A. § 4810(a), subchapter 2 of chapter 215.

20. 6 V.S.A. § 1(a)(7) provides that the Secretary of Agriculture, Food and Markets may seek and obtain temporary or permanent injunctions to restrain a violation of any law administered by the secretary whenever there are reasonable grounds to be that the law has been or will be violated.

21. There are reasonable grounds to believe that the Defendants have and will violate Vermont's Accepted Agricultural Practices ("AAPs").

22. The Defendants' actions, as set forth above, are a violation of 10 V.S.A. § 1259(a) which provides that:

> No person shall discharge any waste, substance or material into waters of the state, nor shall any person discharge any waste, substance or material into an injection well or discharge into a publicly

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owned treatment works any waste which interferes with, passes through without treatment, or is otherwise incompatible with those works or would have a substantial adverse effect on those works or on water quality, without first obtaining a permit for that discharge from the secretary. This subsection shall not prohibit the proper application of fertilizer to fields and crops, nor reduce or affect the authority or policy declared in joint house resolution 7 of the 1971 session of the general assembly.

23. The Defendants did not have a permit from the Secretary of the Agency of Natural Resources to discharge waste in the form of silage runoff from the agricultural operation into the waters of the state.

24. 10 V.S.A. § 1274(a) provides, among other things, that if the Secretary of Natural Resources finds that any person has discharged or is discharging any waste in violation of chapter 47 of title 10 the secretary may bring suit to enjoin the discharge and to obtain compliance. It further provides that the court may issue a temporary injunction or order in any such proceedings and may exercise all the plenary powers available to it in addition to the power to, among other things, enjoin future discharges and levy civil penalties.

25. 10 V.S.A. § 8221 provides, among other things, that the Secretary of Natural Resources may bring an action in superior court to ensure compliance and obtain penalties to enforce the provisions of law specified in section 8003(a) of title 10 which includes, among other provisions, chapter 47 of title 10. It further provides that the court may grant temporary and permanent injunctive relief, and may, among other things, enjoin future activities, and order remedial actions to be taken to mitigate hazard to the environment, and levy civil penalties.

26. The Defendants' violation of Vermont's agricultural and environmental water quality laws can be remedied and is continuous and ongoing.

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PRAYER FOR RELIEF

WHEREFORE, the State of Vermont, through the Agency of Agriculture, Food and Markets and the Agency of Natural Resources, respectfully requests that the court grant the State injunctive relief as set forth herein to enjoin the Defendants' violations of Vermont's water quality and water pollution control laws and rules, and levy civil penalties, to wit:

1. Order the Defendants to cease and enjoin the Defendants from allowing or causing agricultural wastes from the Coventry Station Road milking facility agricultural operation to discharge to and into the waters of the state;

2. Order and enjoin the Defendants to prevent agricultural wastes from the Coventry Station Road milking facility agricultural operation to be discharged to and into the waters of the state;

3. Levy civil penalties against the Defendants jointly and severally in an amount not to exceed the limits contained in 10 V.S.A. § 8221(b)(6); and

4. Award the State its costs, and such further relief as the court deems just and equitable.

Dated: January 23, 2013.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: ______________________

Michael O. Duane
Assistant Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3178

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STATE OF VERMONT

SUPERIOR COURT
ORLEANS UNIT

CIVIL DIVISION
Docket No. 218-8-12 Oscv

STATE OF VERMONT,
Plaintiff,

v.

RICHARD M. NELSON, CYRIL NELSON, and NELSON FARMS, INC,
Defendants.

FILED SEP 23 2014 VERMONT SUPERIOR COURT ORLEANS UNIT

FINAL JUDGMENT ORDER

This action came before the Court pursuant to the parties filing of a Stipulation for the Entry of Final Judgment Order. Based upon that Stipulation. and pursuant to 6 V.S.A. § 1(a)(7), 6 V.S.A. § 4812(c), 10 V.S.A. § 8221 and the Court's inherent equitable powers, it is hereby ADJUDGED, ORDERED and DECREED as follows:

DISMISSAL OF DEFENDANTS CYRIL NELSON AND NELSON FARMS, INC.

1. Pursuant to V.R.C.P. 41(a), Defendants Cyril Nelson and Nelson Farms, Inc. are hereby dismissed with prejudice from this action.

ADJUDICATION FOR VIOLATIONS

2. Defendant Richard M. Nelson is adjudged liable for violating at the agricultural operations on Coventry Station Road in Coventry, Vermont:
    - Vermont's Accepted Agricultural Practices (AAPs) section 4.01(a) at various times from 2009-2011 by direct discharging waste into the surface waters of the state via a pipe which led from a sileage bunker drain to a nearby stream, without a permit from the Secretary of the Agency of Natural Resources;

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- Vermont AAP section 4.01(b) from 2009-2011 by failing to manage his feed bunks in a manner to prevent runoff of wastes into waters of the state by using a feed bunker at the farm which was designed in such a way to cause silage leachate runoff to drain into a pipe and discharge into waters of the state; and
- 10 V.S.A. § 1259(a) at various times from 2009-2011 by discharging waste in the form of silage runoff from the agricultural operations into the waters of the state without a permit from the Secretary of the Agency of Natural Resources.

PENALTIES

3. For the violations described above, Defendant Richard M. Nelson shall pay a civil penalty of thirty-three thousand dollars ($33,000.00).
4. Payment of the thirty-three thousand dollar ($33,000.00) penalty shall be made by check to the "State of Vermont" and shall be sent to: Robert F. McDougall, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, VT 05609. Payment of the thirty-three thousand dollar ($33,000.00) penalty shall be as follows: at the time that Defendant Richard M. Nelson signs the Stipulation for the Entry of Final Judgment Order, he shall provide the State with two checks, one for eleven thousand dollars ($11,000.00) dated on or before the date he signs the Stipulation, and a second for twenty-two thousand dollars ($22,000.00) dated August 20, 2014. Both checks shall be held in trust by the State until such time as the Court has approved and entered the Final Judgment Order. If for any reason the Final Judgment Order is not entered within sixty (60) days of the date that the last party signs the Stipulation, the checks shall be returned to Defendant Richard M. Nelson and

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full payment shall be due within ten (10) days following the Entry of Final Judgment Order, whenever that occurs.

5. In the event that Richard M. Nelson fails to pay the penalty described in paragraphs 3 and 4, such failure shall constitute a breach of this Final Judgment Order and interest shall accrue on the entire unpaid balance at twelve percent (12%) per annum. Defendant Richard M. Nelson shall also be liable for costs incurred by the State to collect any unpaid penalty amount.

OTHER PROVISIONS

6. The parties waive: (a) all rights to contest or appeal this Final Judgment Order; and (b) all rights to contest the obligations imposed upon Defendant Richard M. Nelson under this Final Judgment Order in this or any other administrative or judicial proceeding involving the State of Vermont.

7. This Final Judgment Order is binding upon the parties and all their successors and assigns.

8. Nothing in this Final Judgment Order shall be construed to create or deny any rights in, or grant or deny any cause of action to, any person not a party to this Final Judgment Order, including any State agencies, sub-divisions or other State entities.

9. This Final Judgment Order shall become effective only after it is entered as an order of the Court. When so entered by the Court, the Judgment Order shall be final.

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10. Any violation of this Final Judgment Order shall be deemed to be a violation of a judicial order, and may result in the imposition of injunctive relief and/or penalties, including penalties for contempt, as set forth in 10 V.S.A. Chapters 201 and 211.

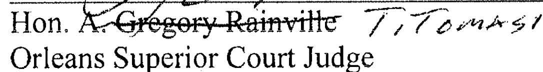
11. Nothing in this Final Judgment Order shall be construed as having relieved, modified, or in any manner affected Defendant Richard M. Nelson's obligations to comply with all other federal, state, or local statutes, regulations, permits or directives applicable to Defendant Richard M. Nelson.

12. This Final Judgment Order may only be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties hereto or their legal representatives and approved by this Court. Any representations not set forth in this Final Judgment Order, whether written or oral, shall not be binding upon any party hereto, and such alleged representations shall be of no legal force or effect.

13. Defendant Richard M. Nelson shall not be liable for additional civil or criminal penalties with respect to the specific facts described herein or in the Stipulation for the Entry of Final Judgment Order occurring before the effective date of the Order.

SO ORDERED, and ENTERED as FINAL JUDGMENT.

DATED at Newport, Vermont this 18th day of Sept., 2014.



Hon. ~~A. Gregory Rainville~~ T. Tomasi
Orleans Superior Court Judge

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STATE OF VERMONT

SUPERIOR COURT | CIVIL DIVISION

FRANKLIN UNIT | Docket No. Frcv

STATE OF VERMONT, AGENCY OF AGRICULTURE, FOOD and MARKETS, and AGENCY OF NATURAL RESOURCES,
Plaintiff,

v.

LEACH FARMS, INC.,
Defendant.

PLEADINGS BY AGREEMENT

The State of Vermont, Agency of Agriculture, Food and Markets, and Agency of Natural Resources, by and through Vermont Attorney General William H. Sorrell, and Defendant Leach Farms, Inc. hereby submit these pleadings by agreement pursuant to Vermont Rule of Civil Procedure 8(g).

THE STATE'S ALLEGATIONS

The Parties

1. The Agency of Agriculture, Food and Markets (AAFM) and the Agency of Natural Resources (ANR) are state agencies created through 3 V.S.A. § 212(2) and 3 V.S.A. § 2802, respectively.
2. Leach Farms, Inc. ("Defendant") is a Vermont-based domestic profit corporation. Allen Leach and William Leach are listed as the corporate officers with the Vermont Secretary of State.

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3. Defendant is the owner of the real property at 4785 Boston Post Road in Enosburg Falls, Vermont.
4. Defendant operates a dairy farm at the 4785 Boston Post Road property.

Statutory and Regulatory Structure

5. The protection of Vermont's waters, the permitting and management of discharges, maintenance of water quality, and control of water pollution is regulated through 10 V.S.A., Chapter 47.
6. The regulation of agricultural wastes as related to waters of the State occurs through 6 V.S.A., Chapter 215.
7. The AAFM and ANR cooperate and coordinate their respective efforts relating to agricultural water quality pursuant to 6 V.S.A. § 4810(b).
8. Section 1259(a) in chapter 47 of Title 10 provides, in part, that "[n]o person shall discharge any waste, substance or material into waters of the state … without first obtaining a permit for that discharge from the secretary [of ANR]."
9. Pursuant to Title 10, section 8221, the State may bring an action in superior court to enforce Vermont's environmental laws, including violations of chapter 47.
10. Pursuant to 6 V.S.A. § 4810(a)(1), the Secretary of AAFM has adopted Accepted Agricultural Practices (AAPs) to "address activities which have a potential for causing pollutants to enter the groundwater and waters of the state."
11. Under Vermont's AAPs, section 4.01(a), "[a]gricultural operations shall not create any direct discharge of wastes into the surface waters of the State from a discrete

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conveyance such as, but not limited to, a pipe, ditch, or conduit without a permit from the Secretary of ANR."

12. Under Vermont's AAPs, section 4.05(a), "[a]ll agricultural wastes including, but not limited to, chemicals, petroleum products, containers, and carcasses shall be properly stored, handled and disposed of, so as to minimize adverse water quality impacts."
13. Vermont's AAPs, section 2.20, define "wastes" as including but not limited to "sediments, minerals (including heavy metals), plant nutrients, pesticides, organic wastes (including livestock waste, mortalities, compost, feed and crop debris), waste oils, pathogenic bacteria and viruses, thermal pollution, silage runoff, untreated milkhouse waste and any other waste compound or material which is determined by the Secretary of ANR to be harmful to the waters of the State, or other wastes as defined in 10 V.S.A. § 1251(12).
14. Section 4812(c) of Title 6 provides that whenever the Secretary of AAFM believes that any person engaged in farming is in violation of the agricultural water quality laws of Title 6, chapter 215, or the rules adopted thereunder, an action may be brought in the name of the agency in a court of competent jurisdiction to restrain by temporary or permanent injunction the continuation or repetition of the violation. The court may issue temporary or permanent injunctions, and other relief as may be necessary to curtail any violations.

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Facts relating to Defendant and Factual Allegations

15. On November 19, 2013 at approximately 2 p.m., a witness observed three manure-spreading farm vehicles of Leach Farms near the Bogue Branch Brook (Bogue Brook), east of the intersection of Bogue Road and Boston Post Road (roughly south of Defendant's farm at 4785 Boston Post Road).

16. The three vehicles were: (1) a white truck with a silver hydraulic tipping manure spreader tank; (2) a green John Deere tractor pulling a red manure spreader/tank; and (3) a red Freightliner truck with a mounted green spreader tank. They are used in connection with Defendant's farming operations at the 4785 Boston Post Road property.

17. On November 19, 2013, the three spreaders were observed backing up to a tractor that had its manure pump inserted to the Bogue Brook. Each of the three spreaders was observed taking water from the Bogue Brook into its tank and then moving to a location approximately 100 yards downstream from the pump.

18. At the downstream location, each of the three spreaders discharged manure-laden water from its tank back into the Bogue Brook, apparently using the process to rinse out the spreader tanks.

19. The witness videotaped the November 19, 2013 discharges. Attachment A (video of discharges).

20. Each of the three spreaders were observed doing two such discharge-rinses on November 19, 2013. *See* Attachment A at: (a) white truck: 2:20 minutes (min.) and

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10:20 min.; (b) green John Deere tractor: 4:15 min. and 13:28 min.; and (c) red truck: 7:15 min. and 14:05 min. (times are approximate).

21. The John Deere tractor and the Freightliner truck were then observed travelling on the Bogue Road and Boston Post Road to Defendant's farm at 4785 Boston Post Road.
22. The Bogue Brook is a branch of the Missisquoi River. The Missisquoi River flows into Lake Champlain. Bogue Brook is a water of the state.
23. On January 3, 2014, Environmental Enforcement Officer (EEO) Ted Cantwell of ANR met with Allen Leach at the 4785 Boston Post Road property.
24. During the meeting with EEO Cantwell, Mr. Leach admitted that Defendant had routinely used the Bogue Brook pump and discharge process of manure-laden water into Bogue Brook to rinse out the spreader tanks. He stated that this had been the practice for years.
25. Mr. Leach admitted that on November 13, 2013, he was the driver of the red Freightliner truck. He stated that William Leach was driving the white truck and an employee of Defendant, Jesse Elwood, was driving the John Deere tractor.
26. Defendant does not have a permit from the Secretary of ANR or from the Secretary of Agriculture to discharge from the three spreaders into the Bogue Brook on November 13, 2013.

Violations

27. By discharging manure-laden water from the white truck with the silver hydraulic tipping manure spreader tank into the Bogue Brook on November 13, 2013 without a permit from the Secretary of ANR, Defendant violated 10 V.S.A. § 1259(a).

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28. By discharging manure-laden water from the green John Deere tractor with the red manure spreader/tank into the Bogue Brook on November 13, 2013 without a permit from the Secretary of ANR, Defendant violated 10 V.S.A. § 1259(a).
29. By discharging manure-laden water from the red Freightliner truck with the mounted green spreader tank into the Bogue Brook on November 13, 2013 without a permit from the Secretary of ANR, Defendant violated 10 V.S.A. § 1259(a).
30. By discharging manure-laden water from the white truck with the silver hydraulic tipping manure spreader tank into the Bogue Brook on November 13, 2013 without a permit from the Secretary of ANR, Defendant violated sections 4.01(a) and 4.05(a) of the Vermont AAPs.
31. By discharging manure-laden water from the green John Deere tractor with the red manure spreader/tank into the Bogue Brook on November 13, 2013 without a permit from the Secretary of ANR, Defendant violated sections 4.01(a) and 4.05(a) of the Vermont AAPs.
32. By discharging manure-laden water from the red Freightliner truck with the mounted green spreader tank into the Bogue Brook on November 13, 2013 without a permit from the Secretary of ANR, Defendant violated sections 4.01(a) and 4.05(a) of the Vermont AAPs.

DEFENDANT'S RESPONSE TO THE ALLEGED VIOLATIONS

Defendant answers the preceding allegations as follows:

33. Defendant admits the allegations set forth in paragraphs 1-32.

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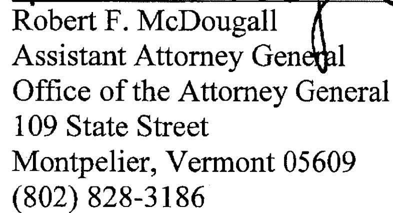
109 State Street
Montpelier, VT
05609

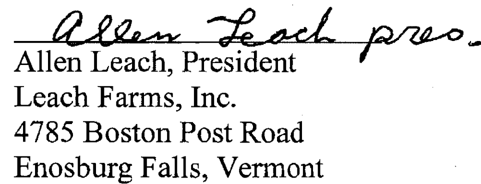
DATED at Montpelier, Vermont this 30th day of September, 2014.

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: 
Robert F. McDougall
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3186

DATED at Enosburg Falls, Vermont this 27 day of Sept., 2014.

LEACH FARMS, INC.

By: 
Allen Leach, President
Leach Farms, Inc.
4785 Boston Post Road
Enosburg Falls, Vermont

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ATTORNEY
GENERAL
109 State Street
Montpelier, VT
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STATE OF VERMONT

SUPERIOR COURT | CIVIL DIVISION

FRANKLIN UNIT | Docket No. Frcv

STATE OF VERMONT, AGENCY OF)
AGRICULTURE, FOOD and MARKETS,)
and AGENCY OF NATURAL)
RESOURCES,)
Plaintiff,)
)
v.)
)
LEACH FARMS, INC.,)
Defendant.)

STIPULATION FOR THE ENTRY OF CONSENT ORDER AND FINAL JUDGMENT ORDER

The parties, Plaintiff, the State of Vermont, Agency of Agriculture, Food and Markets, and Agency of Natural Resources (the State), by and through Vermont Attorney General William H. Sorrell, and Leach Farms, Inc. (Defendant), hereby stipulate and agree as follows:

WHEREAS, the State alleges in the Pleadings by Agreement filed in this action that Defendant violated Vermont's environmental laws by discharging agricultural waste into waters of the State without a permit from the Secretary of the Agency of Natural Resources;

WHEREAS, the State further alleges in the Pleadings by Agreement filed in this action that Defendant also violated Vermont's Accepted Agricultural Practices (AAPs) by: (a) creating a direct discharge into the surface waters of the State from a discrete conveyance without a permit; and (b) failing to handle agricultural wastes so as to minimize adverse water quality impacts;

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WHEREAS, Defendant has admitted in the Pleadings by Agreement that it committed these violations of Vermont's environmental laws and Vermont's AAPs;

WHEREAS, the Attorney General pursuant to 3 V.S.A., Chapter 5 has the general supervision of matters and actions in favor of the State and may settle such matters as the interests of the State require;

WHEREAS, under 10 V.S.A. § 8221, Defendant is potentially liable for civil penalties of up to $85,000.00 for each violation and $42,500.00 per violation for each day the violation continued;

WHEREAS, the State considered the criteria in 10 V.S.A. §§ 8010(b) and (c) in arriving at the proposed penalty amount, including the degree of actual or potential impact on public health, safety, welfare and the environment resulting from the violations and that Defendant knew or had reason to know the violations existed;

WHEREAS, the Attorney General believes that this settlement is in the State's interest as it upholds the statutory regimes of 10 V.S.A., Chapter 47, and 6 V.S.A., Chapter 215, in which the violations occurred; and

WHEREAS, the Consent Order has been negotiated by and among the State and Defendant in good faith;

NOW, THEREFORE, the State and Defendant hereby stipulate and agree as follows:

1. The attached Consent Order may be entered by the Court;
2. The State and Defendant hereby waive all rights to contest or appeal the Consent Order and they shall not challenge, in this or any other proceeding, the validity of

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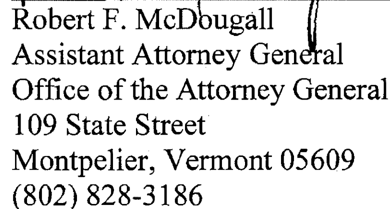
any of the terms of the Consent Order or of this Court's jurisdiction to enter the Consent Order; and

3. The Consent Order sets forth the complete agreement of the parties, and it may be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties' legal representatives and approved by the Court.

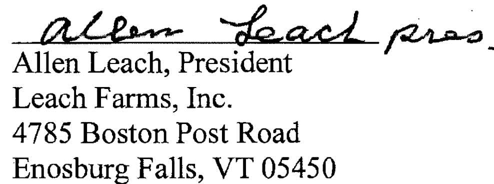
DATED at Montpelier, Vermont this 30th day of September, 2014.

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: 
Robert F. McDougall
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3186

DATED at Enosburg Falls, Vermont this 27 day of Sept, 2014.

LEACH FARMS, INC.

By: 
Allen Leach, President
Leach Farms, Inc.
4785 Boston Post Road
Enosburg Falls, VT 05450

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STATE OF VERMONT

SUPERIOR COURT | CIVIL DIVISION
FRANKLIN UNIT | Docket No. 388-10-14Frcv

STATE OF VERMONT, AGENCY OF AGRICULTURE, FOOD and MARKETS, and AGENCY OF NATURAL RESOURCES,
Plaintiff,

v.

LEACH FARMS, INC.,
Defendant.

Vermont Superior Court
NOV 19 2014
FILED: Franklin Civil

CONSENT ORDER AND FINAL JUDGMENT ORDER

This action came before the Court pursuant to the parties filing of Pleadings by Agreement under Vermont Rule of Civil Procedure 8(g). Based upon those Pleadings by Agreement and the Stipulation for the Entry of Consent Order and Final Judgment Order, and pursuant to 10 V.S.A. § 8221 and the Court's inherent equitable powers, it is hereby ADJUDGED, ORDERED and DECREED as follows:

ADJUDICATION OF VIOLATIONS

1. Defendant Leach Farms, Inc. (Defendant) is adjudged liable for violating 10 V.S.A. § 1259(a) by discharging manure-laden water into the Bogue Brook on November 19, 2013 without a permit from the Secretary of the Agency of Natural Resources. Each of the discharges from the three vehicles owned by Defendant, six discharges in total, is a separate violation of 10 V.S.A. § 1259(a) for which Defendant is adjudged liable.

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2. Defendant is adjudged liable for violating the following Vermont Accepted Agricultural Practices (AAPs) by discharging manure-laden water into Bogue Brook on November 19, 2013 without a permit:

   - Section 4.01(a) – direct discharge via a discrete conveyance to surface waters of the State; and
   - Section 4.05(a) – improper management of agricultural waste so as to not minimize adverse water quality impacts.

PENALTIES

3. For the violations described above, Defendant shall pay a civil penalty of forty thousand dollars ($40,000.00) within five (5) business days of the Court's issuance of the Consent Order and Final Judgment Order.
4. Payment of the forty thousand dollar ($40,000.00) penalty shall be made to the "State of Vermont" and shall be sent to: Robert F. McDougall, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, VT 05609.

OTHER PROVISIONS

5. Defendant waives: (a) all rights to contest or appeal this Consent Order; and (b) all rights to contest the obligations imposed upon Defendant under this Consent Order in this or any other administrative or judicial proceeding involving the State of Vermont.
6. This Consent Order is binding upon Defendant and its successors and assigns.

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Vermont Superior Court
NOV 19 2014
FILED: Franklin Civil

7. Nothing in this Consent Order shall be construed to create or deny any rights in, or grant or deny any cause of action to, any person not a party to this Consent Order.
8. This Consent Order shall become effective only after it is entered as an order of the Court. When so entered by the Court, this Consent Order shall become a Final Judgment Order.
9. Any violation of this Consent Order shall be deemed to be a violation of a judicial order, and may result in the imposition of injunctive relief and/or penalties, including penalties for contempt, as set forth in 10 V.S.A. Chapters 201 and 211.
10. The State of Vermont and the Court reserve continuing jurisdiction to ensure future compliance with all statutes, rules, and regulations applicable to the facts and circumstances set forth herein.
11. Nothing in this Consent Order shall be construed as having relieved, modified, or in any manner affected Defendant's obligations to comply with all other federal, state, or local statutes, regulations, permits or directives applicable to Defendant. The State reserves all rights, claims and interests not expressly waived herein.
12. This Consent Order may only be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties hereto or their legal representatives and approved by this. Alleged representations not set forth in this Consent Order, whether written or oral, shall not be binding upon any party hereto, and such alleged representations shall be of no legal force or effect.

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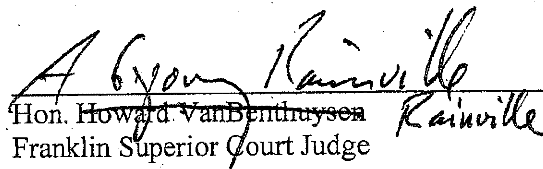
Vermont Superior Court
NOV 19 2014
FILED: Franklin Civil

13. Defendant shall not be liable for additional civil or criminal penalties with respect to the specific facts described herein or in the Pleadings by Agreement occurring before the effective date of the Order, provided that the Defendant fully complies with the terms of the Consent Order set forth above.

SO ORDERED, and ENTERED as FINAL JUDGMENT.

DATED at Montpelier, Vermont this 19 day of November, 2014.



Hon. ~~Howard VanBenthuysen~~ Rainville
Franklin Superior Court Judge

Vermont Superior Court
NOV 19 2014
FILED: Franklin Civil

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05609

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

NOV 21 2014

ENTRY ORDER

2014 VT 124

SUPREME COURT DOCKET NO. 2014-049

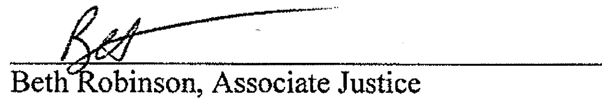
SEPTEMBER TERM, 2014

In re Goddard College Conditional Use	}	APPEALED FROM:
	}	
In re Goddard College Act 250 Reconsideration (Karen Bouffard, Appellant)	}	Superior Court, Environmental Division
	}	
	}	DOCKET NO. 173-12-12 Vtec

In the above-entitled cause, the Clerk will enter:

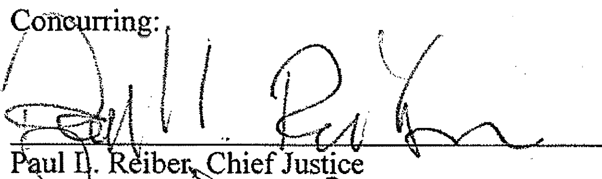
Affirmed.

FOR THE COURT:

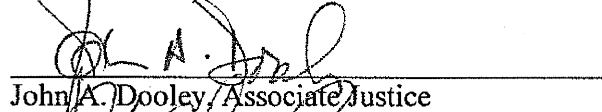


Beth Robinson, Associate Justice

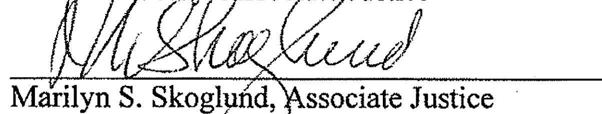
Concurring:



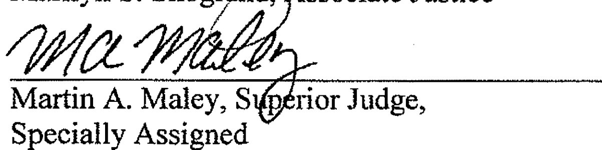
Paul L. Reiber, Chief Justice



John A. Dooley, Associate Justice



Marilyn S. Skoglund, Associate Justice



Martin A. Maley, Superior Judge,
Specially Assigned

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions by email at: JUD.Reporter@state.vt.us or by mail at: Vermont Supreme Court, 109 State Street, Montpelier, Vermont 05609-0801, of any errors in order that corrections may be made before this opinion goes to press.

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

NOV 21 2014

2014 VT 124

No. 2014-049

In re Goddard College Conditional Use

In re Goddard College Act 250 Reconsideration
(Karen Bouffard, Appellant)

Supreme Court

On Appeal from
Superior Court,
Environmental Division

September Term, 2014

Thomas G. Walsh, J.

Brice Simon of Breton & Simon, PLC, Stowe, for Appellant.

Geoffrey H. Hand and Elizabeth H. Catlin of Dunkiel Saunders Elliott Raubvogel & Hand, PLLC, Burlington, for Appellee.

William H. Sorrell, Attorney General, and Robert F. McDougall and Scot L. Kline, Assistant Attorneys General, Montpelier, for Amicus Curiae Vermont Natural Resources Board.

PRESENT: Reiber, C.J., Dooley, Skoglund and Robinson, JJ., and Maley, Supr. J., Specially Assigned

¶ 1. **ROBINSON, J.** This case raises the issue of whether Act 250 requires consideration of alternative siting in every case in which a party objects to a proposed land-use project on aesthetic grounds, pursuant to 10 V.S.A. § 6086(a)(8), without regard to the presence of competent evidence supporting alternative siting as a reasonable mitigating measure. Appellant Karen Bouffard (Neighbor), a neighboring resident, challenges the Superior Court, Environmental Division's grant of an Act 250 permit to Goddard College to build a woodchip heating system on its campus in Plainfield, arguing that the court failed to properly consider

measures to mitigate the aesthetic impact of the project by siting it elsewhere on the college property. We affirm.

¶ 2. The college obtained an Act 250 permit from District Environmental Commission No. 5 in 2012, authorizing it to replace individual oil-fired systems in each of twenty-three campus buildings with a new central woodchip boiler system on its campus in Plainfield. The project includes a 2,469-square-foot building, distribution pipeline, woodchip-storage area, and access roadway.

¶ 3. Several area residents appealed to the Environmental Division for de novo review. Residents raised several claims, and the court rejected each of them in an April 2013 decision on the college's motion for summary judgment and a January 2014 decision on the merits. With respect to Criterion 8 of Act 250, the court found that while there would be adverse aesthetic impacts from the project, these impacts would not be unduly adverse. Neighbor now appeals, challenging the Environmental Division's conclusions with respect to the aesthetics criterion. In particular, neighbor argues that the court erred in refusing to consider relocation of the project within the project tract, and that its analysis concerning mitigation of the project's adverse aesthetic impacts was not supported by adequate factual findings that are themselves supported by the record.

¶ 4. The Environmental Division "determines the credibility of witnesses and weighs the persuasive effect of evidence, and we will not overturn its factual findings unless, taking them in the light most favorable to the prevailing party, they are clearly erroneous." In re Vill. Assocs. Act 250 Land Use Permit, 2010 VT 42A, ¶ 7, 188 Vt. 113, 998 A.2d 712 (quotation omitted). We review "the environmental court's rulings on questions of law or statutory interpretation de novo." In re Grp. Five Invs. CU Permit, 2014 VT 14, ¶ 4, ___ Vt. ___, 93 A.3d 111.

¶ 5. Act 250 requires the district environmental commission, before granting a permit, to find that the proposed project meets ten statutory criteria. 10 V.S.A. § 6086(a). Criterion 8 requires, among other things, that the project "not have an undue adverse effect on the scenic or natural beauty of the area" or "aesthetics." Id. § 6086 (a)(8). Although the applicant has the burden of proof with respect to many of the Act 250 criteria, the burden of proof for Criterion 8 is "on any party opposing the applicant." Id. § 6088(b); see also In re Denio, 158 Vt. 230, 236, 608 A.2d 1166, 1170 (1992) (noting that § 6088(b) allocates burden to "party opposing the applicant . . . to show an unreasonable or adverse effect").[1]

¶ 6. In making Criterion 8 determinations, the district commissions and the Environmental Division, like this Court, apply the two-step Quechee test. In re Rinkers, Inc., 2011 VT 78, ¶ 9, 190 Vt. 567, 27 A.3d 334 (mem.) (applying test of In re Quechee Lakes Corp., Nos. 3W0411-EB & 3W0439-EB, slip op. at 17-18 (Vt. Envtl. Bd. Nov. 4, 1985), http://www.nrb.state.vt.us/lup/decisions/1985/3w0439-eb-fco.pdf). The first step is determining whether the project " 'will have an adverse impact on aesthetics and the scenic and natural beauty of an area because it would not be in harmony with its surroundings.' " In re Chaves Act 250 Permit Reconsider, 2014 VT 5, ¶ 23, ___ Vt. ___, 93 A.3d 69 (quoting In re Halnon, 174 Vt. 514, 515, 811 A.2d 161, 163 (2002) (mem.)). If the project will have an adverse impact, the second question is whether the adverse impact will be "undue." Rinkers, 2011 VT 78, ¶ 9. An adverse impact is "undue" if (1) the project "violates a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area," (2) the project "offends the sensibilities of the average person," or (3) "the applicant has failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed

[1] Neighbor relies on a 1986 decision of the former Environmental Board to argue that applicant bears the burden of persuasion on this issue. In re Thomas, No. 2W0644-EB, slip op. at 8 (Vt. Envtl. Bd. Feb. 18, 1986), http://www.nrb.state.vt.us/lup/decisions/1986/2w0644-eb-fco.pdf. We reject that holding as inconsistent with the applicable statute and case law.

project with its surroundings." In re Eastview at Middlebury, Inc., 2009 VT 98, ¶ 20, 187 Vt. 208, 992 A.2d 1014.

¶ 7. The Environmental Division found, and neither party contests on appeal that the project will have adverse impact. This case deals with the narrow issue of the third factor in the undue-impact analysis: whether the college failed to take reasonable and generally available mitigating steps to improve the harmony of the proposed project with its surroundings in a way that makes the project's impacts unduly adverse.

¶ 8. A generally available mitigating step "is one that is reasonably feasible and does not frustrate the project's purpose or Act 250's goals." In re Stokes Commc'ns Corp., 164 Vt. 30, 39, 664 A.2d 712, 718 (1995). Considering in detail the baseline character of the area and the evidence about the type, impact, and frequency of project effects, the trial court found that the college had taken "reasonable steps" to improve the harmony of the buildings with the surroundings. Specifically, the court found that project buildings would be similar in style, color, size, and scale to other buildings in the area; that the project was compatible with its surroundings ("fit"); that sporadic noise would be limited and not undue; and that vegetation and landscaping would reduce the visibility of the project. Neighbor does not challenge these findings on appeal.

¶ 9. Neighbor makes two arguments. The first is an evidentiary one. Neighbor contends that the Environmental Division "refused to" allow presentation of evidence on relocation of the project elsewhere on the campus as a generally available mitigating step. This contention is not supported by the record. There was no evidentiary ruling by the trial court denying neighbor the ability to present evidence of alternative project sites in support of the claim that reasonable, generally available mitigating steps were not taken. The college raised a hearsay objection after neighbor's attorney asked neighbor during her testimony whether any representatives of the college had made any statements about "other possible locations" for the

project. In response, neighbor argued that the question was relevant to whether the college had taken reasonable mitigating measures. The court expressed skepticism about the suggestion that re-siting the project qualified as a mitigating measure, rather than a new project, but allowed the testimony, stating: "[T]o the extent your examination leads to . . . other areas on their campus that they could propose this . . . I'm not going to strike that from the record. I'm not sure how much I will rely on that in my decision." Neighbor then testified that a representative of the college had told her that the college had previously considered, and rejected, other sites for the project. She did not proffer any further evidence on the subject. In sum, the only relevant evidentiary ruling made was in favor of neighbor, and neighbor was not barred in any way from presenting evidence on alternative sites.

¶ 10. Neighbor next argues that the Environmental Division erred substantively in its Criterion 8 determination that the aesthetic impact of the project would not be unduly adverse. Neighbor asserts that the court's analysis "lacks sufficient findings, or conclusions derived from evidence in the record, to support the contention that reasonabl[y] available mitigation occurred." Neighbor complains that "missing from the lower court's analysis" is an indication that the college or the court "thoroughly review[ed]" mitigating steps, "including relocation within the project tract."

¶ 11. We reject this claim. The trial court's analysis is well-grounded in substantial evidence derived from the record, and it is not arbitrary, capricious, or clearly erroneous. The court's lack of discussion regarding a relocation of the project to some other site on college's campus is not grounds for reversal here. We need not and do not decide the question raised by the court during the hearing below: whether alternative siting within a project tract may be considered as a reasonable mitigating measure (as opposed to a whole different project not

subject to consideration in an Act 250 permitting proceeding).[2] Assuming without deciding that the court can consider proposed alternative siting as a reasonable mitigating measure in the undue-impact analysis, neighbor in this case failed to produce any competent evidence to support an alternative siting argument.

¶ 12. As noted above, in Criterion 8 challenges, the burden of proof is on the party opposing the application to show an unreasonable or adverse effect. 10 V.S.A. § 6088(b). "[I]n the absence of evidence on the issue, or where the evidence is indecisive, the issue must be decided in the applicant's favor." Denio, 158 Vt. at 237, 608 A.2d at 1170. Simply put, in these cases it is the objecting party's job—not the applicant's or the court's—to adduce substantial evidence showing an unduly adverse effect on aesthetics or scenic views. That burden includes the duty to demonstrate the availability of reasonable mitigating steps to improve the project's harmony with its surroundings if the failure to take reasonable mitigating steps is a basis for an undue-adverse-impact challenge. Here, neighbor put forth almost no competent evidence on the issue of alternative siting. The only testimony transcribed for the record on appeal is neighbor's own. We assume it is the only testimony that potentially supports her contention. See V.R.A.P. 10(b)(1) ("By failing to order a transcript, the appellant waives the right to raise any issue for which a transcript is necessary for informed appellate review"); Evans v. Cote, 2014 VT 104, ¶ 7, ___ Vt. ___, ___ A.3d. ___ ("Without the transcript, this Court assumes that the trial court's findings are supported by the evidence."). At trial, neighbor testified that a college

[2] See In re Vt. Elec. Power Co., No. #7C0565-EB, slip op. at 4-5 (Vt. Envtl. Bd. Dec. 12, 1984), http://www.nrb.state.vt.us/lup/decisions/1984/7c0565-eb-lup.pdf (holding, in pre-Quechee decision, that potential alternative siting is not a permissible consideration under Act 250). But see In re Rinkers, Inc., No. 302-12-08 Vtec, slip op. at 21 (Vt. Envtl. Ct. May 17, 2010), https://www.vermontjudiciary.org/gtc/environmental/ENVCRTOpinions2000-2004/08-302c.Rinkers.dec.pdf ("[I]n the context of the aesthetics subcriterion of Act 250, an examination of alternative locations for a telecommunications tower is only relevant to determining whether [a]pplicants have taken the generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings."), aff'd, 2011 VT 78, 190 Vt. 567, 27 A.3d 334 (mem.).

representative told her "that there were at least two, possibly three other sites that [the college] considered before" selecting the site at issue, and that the college did not want to locate the project near historic buildings. Beyond this, neighbor presented no evidence that, for example, a suitable alternate site is "reasonably feasible" (i.e., it would not frustrate the project's purpose or Act 250's goals), or that the alternative satisfies the criteria under § 6086(a) and any other applicable permitting requirements. Because neighbor does not even remotely present substantial evidence on the issue of siting, we need not decide whether, to what extent, and under what circumstances shifting the location of a proposed project within the same tract may be a mitigating step under Criterion 8.

Affirmed.

FOR THE COURT:

Associate Justice

VT SUPERIOR COURT
WASHINGTON UNIT
CIVIL DIVISION

2014 NOV 12 A 11: 18

FILED

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION

State of Vermont Agency of Natural Resources Plaintiff,	)	
v.	)	Docket No. 635-10-13 Wncv Docket No. 33-1-14 Wncv
Reginald Riendeau Defendant.	)	

CONSENT ORDER AND FINAL JUDGMENT

Based upon the Stipulation for the Entry of Consent Order and Final Judgment, and pursuant to 10 V.S.A. § 8221 and the Court's inherent equitable powers, it is ADJUDGED AND ORDERED as follows:

1. For the Albany Site, Defendant is adjudged liable for violating 10 V.S.A. § 1259 by discharging materials to state waters without a discharge permit and 10 V.S.A. § 2625 for heavy cutting without filing a notice of intent or obtaining an authorization to proceed.
2. For the Wheelock Site, Defendant is adjudged liable for violating 10 V.S.A. § 1259 by discharging materials to state waters without a discharge permit and 10 V.S.A. § 913 and the Vermont Wetlands Rules for conducting silvicultural activities in a wetland without a permit.
3. For the violations described in Paragraph 1 and 2 above, Defendant shall:

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ATTORNEY
GENERAL
109 State Street
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05609

a. pay civil penalties of sixty thousand dollars ($60,000). Payment shall be made to the "State of Vermont" and sent to:

Thea Schwartz,
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609

b. engage a qualified forester to develop a harvest plan for each site of future logging activity in Vermont for a period of three years. Each site's harvest plan will be designed to assure Defendant's compliance with all legal requirements for logging and will include the laying out of landings, skid roads, logging roads, and water crossings and the identification of locations at which specific AMPs are to be implemented. Defendant shall comply with each site's harvest plan.

c. ensure that he or his forester notify the Forestry District Manager of the applicable district of the Department prior to the commencement of any logging activity in Vermont for a period of three years. Such notice shall be by email or other writing and shall be provided at least 5 days prior to the commencement of logging activity.

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4. Defendant waives: (a) all rights to contest or appeal the Stipulation for the Entry of Consent Order and Final Judgment; and (b) all rights to contest the obligations imposed upon Defendant by the Stipulation for the

Entry of Consent Order and Final Judgment in this or any other administrative or judicial proceeding involving the State of Vermont.

5. Nothing in the Stipulation for the Entry of Consent Order and Final Judgment and this Consent Order relieves or modifies Defendant's obligation to comply with Vermont state laws and rules regarding Vermont's water pollution control laws, including, but not limited to acceptable management practices for maintaining water quality on logging jobs in Vermont, and regarding the regulation of the heavy cutting of timber resources, including, but not limited to filing any required notice of intent to cut and obtaining any required authorization to proceed.
6. Any violation of this Consent Order shall be deemed to be a violation of a judicial order, and may result in the imposition of injunctive relief and/or penalties, including penalties for contempt, as set forth in 10 V.S.A. Chapters 201 and 211.
7. This Consent Order may be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties hereto or their legal representatives and approved by the Court. Any representations not set forth in the Consent Order, whether written or oral, shall not be binding upon any party hereto, and such alleged representations shall be of no legal force or effect.

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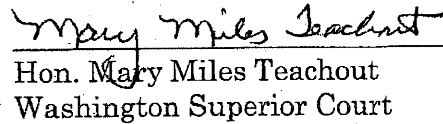
8. This Consent Order becomes effective only after it is entered as an order of the Court. When so entered by the Court, this Consent Order shall become a Final Judgment Order.

9. Each party shall be responsible for its own costs.

SO ORDERED, and ENTERED, as FINAL JUDGMENT.

Dated at Montpelier, Vermont this 7th day of November, 2014.



Hon. Mary Miles Teachout
Washington Superior Court

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VERMONT SUPERIOR COURT
WASHINGTON CIVIL DIVISION

STATE OF VERMONT Agency of Natural Resources Plaintiff, v. REGINALD RIENDEAU Defendant.	))))))))	Civil Action Docket No. __________

COMPLAINT FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES

Plaintiff, State of Vermont Agency of Natural Resources, by and through the Office of the Attorney General, files this complaint pursuant to 10 V.S.A. § 8221 and 3 V.S.A. § 157. The State alleges that Defendant violated 10 V.S.A. § 1259(a) by discharging material into the waters of the state without first obtaining a permit for such discharge. The State also alleges that Defendant violated 10 V.S.A. § 2625 by commencing a heavy cut of 40 acres or more without filing a notice of intent to cut and without obtaining an authorization to proceed. The State seeks preliminary and permanent injunctive relief and civil penalties. Venue is proper in Washington Superior Court.

THE PARTIES

1. Plaintiff State of Vermont Agency of Natural Resources (ANR) is a state agency with offices in Montpelier, Vermont.
2. Defendant Reginald Riendeau is a resident of Orleans, Vermont.

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LEGAL FRAMEWORK

10 V.S.A. § 1259

3. 10 V.S.A. § 1259(a) prohibits a person from discharging material into the waters of the state without first obtaining a permit for that discharge.
4. 10 V.S.A. § 1251 defines "waters" to include "all rivers, streams, creeks, brooks, reservoirs, ponds, lakes, springs, and all bodies of surface waters, artificial or natural, which are contained within, flow through or border upon the state or any portion of it."
5. Failure to follow the Acceptable Management Practices for Maintaining Water Quality on Logging Jobs in Vermont (the AMP's) resulting in a discharge to waters of the state without a permit violates 10 V.S.A. § 1259. Each day that a discharge continues is a continuing violation of § 1259.

10 V.S.A. § 2625

6. 10 V.S.A. § 2625(b) requires a landowner who intends to conduct a heavy cut of 40 acres or more on land owned or controlled by the landowner to file a notice of intent to cut with ANR's Department of Forests, Parks, and Recreation (the Department) at least 15 days before commencing a heavy cut unless an exemption listed in § 2625(c) applies.
7. 10 V.S.A. § 2625(d) provides that if a § 2625(c) exemption does not apply the Department shall review the proposed heavy cut and if it is in conformance with the applicable Department rules issue an authorization to proceed.

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8. A landowner who heavy cuts 40 acres or more without filing a notice of intent to cut and obtaining an authorization to proceed prior to commencing the heavy cut violates 10 V.S.A. § 2625.

FACTS

9. Defendant Reginald Riendeau co-owns approximately 253 acres of land located off Shuteville Road in the town of Albany, Vermont (the Property).
10. Defendant conducted a logging operation on the Property sometime after he co-purchased it in September 2010.
11. On a December 9, 2011 visit to the Property, the Department's employee Richard Greenwood observed that Defendant's logging activities had affected an unnamed stream on the eastern portion of the property (Eastern Stream). Greenwood returned on December 19, 2011 to confirm and document the water quality problems. On that visit, Greenwood observed that Defendant's failure to follow the AMP's resulted in discharges of sediment to the Eastern Stream, a water of the state. Defendant did not have a § 1259 discharge permit. Greenwood observed several inadequate stream crossings and that the crossings had not been seeded or mulched as required by the AMP's. Greenwood observed woody debris in several locations along the Eastern Stream. These conditions did not comply with the AMP's.
12. On December 13 and 19, 2011, Greenwood and the Department's employee Jason Nerenberg conducted a heavy cut investigation on the Property. As a result of the investigation, the Department determined that the portion of

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the Property that had been harvested up to the time of the investigation was heavy cut. This portion was more than 40 acres. Prior to commencing the logging operation, Defendant did not file a § 2625(b) notice of intent to heavy cut nor did he obtain a § 2625(d) authorization to proceed from the Department. No exemption to the requirement to obtain Department approval applied.

13. On or about January 10, 2012 the Department issued formal notice of the 10 V.S.A. § 1259 violations to Defendant. Defendant did not respond to the notice.

14. On a December 5, 2012 visit to the Property, Greenwood observed additional discharges to the Eastern Stream. He observed woody debris in the stream in more locations than he did on his December 9, 2011 visit and additional discharges at many locations along the stream from new skidder ruts. These discharges to the Eastern Stream resulted from Defendant's failure to comply with the AMP's.

15. On or about December 6, 2012, the Department sent Defendant a letter requesting that Defendant provide the Department with a formal plan to remediate the Property by the spring of 2013. Defendant has not provided the Department with a formal remediation plan. Greenwood spoke with Defendant several times about the problems on his Property. Defendant was aware of these problems and made statements about fixing them.

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16. On July 17, 2013, Greenwood and Agency of Natural Resources Environmental Enforcement Officer (EEO) Reginald Smith visited the Property. Greenwood observed several locations on the Eastern Stream where skidders had crossed that did not have crossing structures, or if they did have crossing structures, the structures failed to keep the skidders out of the stream. He observed sediment-laden water flowing downhill from skidder ruts and entering the Eastern Stream in several locations. He observed that water crossings had not been seeded or mulched after use in several locations. He observed woody debris in the stream in several locations. He observed failed waterbars and a lack of waterbars, allowing for runoff and sediment-laden water to enter the Eastern Stream. These discharges to the Eastern Stream resulted from Defendant's failure to comply with the AMP's.

17. On this same visit, Greenwood observed evidence of a major discharge into a second water of the state, Lamphean Brook, which is located on the western part of the Property. He observed that the discharge occurred due to the construction of a major skid road. He observed that the major skid road and the smaller skid roads connecting to it did not have culverts or adequate waterbars to prevent runoff from discharging into the brook. He observed that no seeding or mulching had been done. These discharges to Lamphean Brook resulted from Defendant's failure to comply with the AMP's.

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18. On October 1, 2013, EEO Smith returned to the Property and viewed the Eastern Stream and a portion of Lamphean Brook. Along the Eastern Stream, Smith observed no remediation since the July 17, 2013 visit (i.e., new waterbars had not been constructed, woody debris had not been removed, and seeding or mulching had not been done). He observed that there were additional discharges into Lamphean Brook during rain storms.

VIOLATIONS

19. Paragraphs 1-18 are re-alleged and incorporated by reference.
20. Defendant's failure to follow the AMP's resulting in discharges of material to waters of the State without a permit violates 10 V.S.A. § 1259(a). Each day that a discharge continues is a continuing violation of § 1259.
21. Defendant's heavy cutting of 40 acres or more without filing a notice of intent to cut and without obtaining an authorization to proceed violate 10 V.S.A. § 2625(j).

WHEREFORE, the State of Vermont seeks the following relief:

1. Civil penalties pursuant to 10 VSA § 8221 of not more than $85,000 for each of the violations of 10 V.S.A. § 1259(a), and of not more than $42,500 for each day each of these violations continued;
2. Civil penalties pursuant to 10 VSA § 8221 of not more than $85,000 for each of the violations of 10 V.S.A. § 2625, and of not more than $42,500 for each day each of these violations continued;

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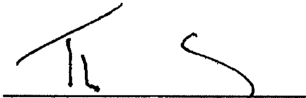
3. Preliminary and permanent injunctive relief to remedy the Property, including remediation as authorized by 10 V.S.A. §1272, and appropriate notice of future logging in the state by Defendant;
4. The award to the State of investigative costs of enforcement, court costs, and fees incurred in this litigation; and
5. Such other relief as this court deems just and appropriate.

Dated October 10, 2013 at Montpelier, Vermont.

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: 
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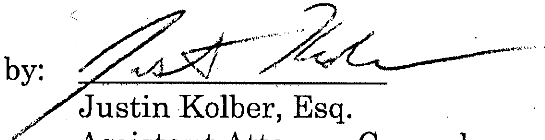
by: 
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VERMONT SUPERIOR COURT
WASHINGTON CIVIL DIVISION

STATE OF VERMONT Agency of Natural Resources Plaintiff, v. REGINALD RIENDEAU Defendant.	)))))))))	Civil Action Docket No. ________

STATE'S MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT OF MOTION

The State of Vermont, by and through the Office of the Attorney General, moves for a preliminary injunction, pursuant to V.R.C.P. 65, 10 V.S.A. §§ 1274(a) and 8221, and 3 V.S.A. § 157, requiring Defendant to remediate his logging operation site in Albany, Vermont to stop ongoing unpermitted discharges, and prevent future discharges, to waters of the state.

Memorandum of Law

Defendant Reginald Riendeau's failure to follow Vermont's Acceptable Management Practices for Maintaining Water Quality on Logging Jobs in Vermont (AMP's) at his logging operation site has resulted and continues to result in unpermitted discharges into waters of the state in violation of 10 V.S.A. § 1259(a). Despite repeated efforts by the Agency of Natural Resources (ANR) since at least January 2012 to work with Defendant to achieve compliance, Defendant has not complied. Absent injunctive relief now requiring remediation, there will be future discharges, particularly from fall and winter

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precipitation. Defendant has also violated 10 V.S.A. § 2625 by heavy cutting 40 acres or more without filing a notice of intent to cut and obtaining an authorization to proceed.

I. Factual Background

Defendant Reginald Riendeau co-owns approximately 253 acres located off of Shuteville Road in Albany (the Property) on which he conducted a logging operation sometime after purchasing the Property in September 2010. On December 9, 2011, Richard Greenwood, a State Lands Forester with the Department of Forests, Parks and Recreation (the Department), visited the Property to investigate a potential heavy cut. During this visit Greenwood observed that Defendant's logging activities had impacted an unnamed stream on the eastern portion of the Property (Eastern Stream). *See* Affidavit of Richard Greenwood ¶ 5. On December 19, 2011, Greenwood returned to the Property and confirmed several water quality violations. Greenwood specifically observed that inadequate skidder crossings allowed runoff to enter the Eastern Stream in many locations, woody logging debris was left in the stream, and no seeding or mulching had been done, resulting in heavy sedimentation. *Id.*

On or about January 4, 2012, the Department sent a letter to Defendant detailing at least twelve locations where discharges occurred as a result of Defendant's failure to implement AMP's. The letter informed Defendant that the Department had conducted a heavy cut investigation of the harvested area

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of the Property and that the results of the investigation suggested that approximately 107 acres had been heavy cut. On January 10, 2012, ANR issued a Notice of Alleged Violation (NOAV) to Defendant pursuant to 10 V.S.A. § 8006. The NOAV enclosed the January 4th letter, and alleged that Defendant had failed to properly implement AMP's and caused discharges into state waters without a permit in violation of 10 V.S.A. § 1259(a). The NOAV directed Defendant to complete remedial work to address the discharges by June 30, 2012, and requested a written response from Defendant. No response was ever received.

On December 5, 2012, Greenwood returned to the Property and observed water flowing through skid trails and skidder ruts and into the Eastern Stream, inadequate skidder crossings, and no seeding or mulching at any of the skidder crossings—all of which the January 2012 NOAV and letter had requested to be fixed. *See* Greenwood Aff. ¶ 7. On December 6, 2012, the Department sent another letter documenting the Property's condition and requesting a formal written plan for remediation by spring of 2013. *Id.* ¶ 8. No written response was received, but Defendant was aware of the problems, and said he was going to fix them. *Id.* ¶ 9.

On July 17, 2013, Greenwood and Environmental Enforcement Officer (EEO) Reginald Smith visited the parts of the Property identified on previous

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visits and again walked the Eastern Stream and observed the same conditions.[1] Specifically, Greenwood observed that: (a) stream crossings were inadequate; (b) no seeding or mulching had been done; (c) waterbars had failed or were nonexistent; (d) logging debris remained within the streambed; and (e) many skid trails were rutted and not filled in or smoothed out. *Id.* ¶ 10. As a result of Defendant's failure to comply with the AMP's, sediment and runoff would flow directly to the stream. *Id.* Greenwood then walked an additional skid road for the first time in the western part of the Property. He discovered another failed skidder crossing at Lamphean Brook, inadequate waterbars, and no seeding or mulching; any runoff during heavy rain would travel directly to Lamphean Brook. *Id.* ¶ 11. Greenwood noted that Lamphean Brook must be inspected for § 1259 violations just as had been done on the eastern portion of the Property. *Id.*

During the July 17, 2013 site visit, Department staff also observed that Defendant appeared to have heavy cut on the western side of Lamphean Brook. *Id.* ¶ 16. This is in addition to the 107 acres that the Department had investigated in December 2011. *Id.*

On October 1, 2013, EEO Smith returned to the Property, and viewed the Eastern Stream and a portion of Lamphean Brook. He observed that Defendant had not done any remediation since the July 17, 2013 visit, that new waterbars had not been constructed, woody debris had not been removed, and seeding and mulching had not been done. Affidavit of Reginald Smith ¶ 3. Smith also

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[1] On each of his site visits, Greenwood also took photos and identified map points of locations where AMP's had not been followed. These are referenced in, and attached to, the Greenwood Affidavit.

observed that discharges into Lamphean Brook are continuing during rain storms. *Id.* ¶ 4.

II. Legal Standards

In environmental enforcement actions brought under 10 V.S.A. § 8221, a preliminary injunction "*shall be obtained* upon a showing that there is a probability of success on the merits" and that a violation exists. 10 V.S.A. § 8221(c)(1) (emphasis added). "In such an action, the [State] need not demonstrate immediate and irreparable injury, loss or damage." *Id.* § 8221(c)(2).[2]

Section 8221 authorizes the Attorney General to bring enforcement actions for violation of any of the provisions of law specified in § 8003(a). Those provisions include: (1) the Vermont Water Pollution Control statute (10 V.S.A. § 1259) (prohibiting any discharge into waters of the state without a permit); and (2) the provision regulating heavy cutting (10 V.S.A. § 2625) (prohibiting cutting 40 acres or more of timber below the "C-line" stock, as defined by the U.S. Department of Agriculture, without filing a notice of intent to conduct such cutting). A "violation" includes "noncompliance with one or more of the statutes specified in section 8003 of this title, or any related rules, permits, assurances, or orders." 10 V.S.A. § 8002(9).

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[2] Even independent of § 8221, the State would not need to show irreparable harm to obtain preliminary relief. It must show only that the violation was substantial and knowing. *See Town of Sherburne v. Carpenter*, 155 Vt. 126, 131-32, 582 A.2d 145, 149 (1990) (injunction would issue in favor of the municipality unless zoning violation was "so insubstantial that it would be unjust and inequitable to require the removal of an offending structure through a mandatory injunction"). The violation here is neither insubstantial nor innocent. Further, it is resulting in ongoing environmental harm.

III. The State Is Entitled To A Preliminary Injunction

An injunction requiring immediate remedial measures and compliance with § 1259 is appropriate because water quality violations exist and the State is likely to succeed on the merits. *See* 10 V.S.A. § 8221(c). Defendant continues to violate the statutory scheme by failing to correct ongoing discharges to waters of the state even after repeated letters and a NOAV detailing how to comply. Defendant has not submitted a remediation plan as requested several times. Department staff has repeatedly observed the following failures to follow the AMP's, resulting in unpermitted discharges:

- Stream crossings, if constructed at all, were poorly constructed and failed to keep skidder vehicles out of the stream;
- Stream crossings have not been seeded and mulched;
- Waterbars have failed or are nonexistent;
- Logging debris remains in the streambed in several areas; and
- Skid trails are rutted, and have not been filled in and smoothed out.

See Greenwood Aff. ¶ 10. Absent remediation now, there will be future discharges as a result of fall and winter precipitation. *Id.* ¶ 15. Further, some discharges are ongoing, as observed in the most recent site visit on October 1, 2013. Smith Aff. ¶ 4. Injunctive relief is thus warranted now.

In addition, the State is entitled to a preliminary injunction requiring immediate remedial measures and compliance with § 2625(b) because violations exist and the State is likely to succeed on the merits. *See* § 8221(c). Defendant

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violated § 2625 by heavy cutting without filing a notice of intent and obtaining an authorization to proceed. Greenwood Aff. ¶ 16. It appears that Defendant has recently conducted another heavy cut. *See id.* Defendant's apparent repeated cutting of timber in violation of § 2625 warrants immediate relief now. Defendant should be ordered to provide notice to the Department before conducting any future logging in Vermont so that the Department may monitor Defendant's logging activities for compliance with state law.

IV. Relief Requested

The State respectfully requests that the Court grant the State's Motion and issue a preliminary injunction requiring the following:

A. Defendant shall implement the following remedial measures at the Property to protect water quality:

(1) Remove debris and woody material from streambeds;

(2) Install functioning waterbars on skid roads;

(3) Fill in and smooth out any rutted skid trails[3];

(4) Seed and mulch on 25 feet of either side of water crossings; and

(5) Take such other measures as necessary to prevent sediment, silt, and any runoff from discharging into waters on the Property.

B. In light of the Defendant's prolonged and repeated failures to implement the AMP's and remedial measures, despite being given

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[3] Items # 1-3 should be ordered to be done immediately, and by November 1, 2013, before fall rains and winter precipitation would exacerbate discharges. *See* Greenwood Aff. ¶ 15.

numerous opportunities, the remedial work at the Property shall be performed by a private forestry consultant retained by Defendant within 10 days of the Order, subject to the approval of the Department; the consultant shall submit a written plan to the Department for the remediation required in (A) above and upon approval, perform such remediation at the Property; and the consultant shall also inspect and document additional areas along Lamphean Brook and the Eastern Stream to confirm if other areas (not already identified in the attached Affidavits and map points) require additional remediation, and if so, include such areas in the written plan submitted to the Department for approval. *See* Greenwood Aff. ¶¶ 12-15.

C. Based on Defendant's repeated water quality violations and apparent heavy cutting, Defendant shall provide 30 days written notice to the Department of all future logging activities throughout Vermont prior to commencing such activities.

D. Such other preliminary and other relief as the Court deems appropriate to implement the above.

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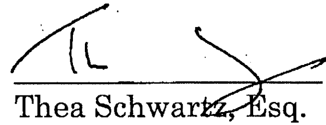
Dated October 10, 2013 in Montpelier, Vermont.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: 
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STATE OF VERMONT

SUPERIOR COURT
ORLEANS UNIT

CIVIL DIVISION
Docket No. 280-10-13 Oscv

STATE OF VERMONT, AGENCY OF AGRICULTURE, FOOD AND MARKETS and AGENCY OF NATURAL RESOURCES,
Plaintiff,

v.

NELSON FARMS, INC,
Defendant.

FILED
DEC 24 2014
VERMONT SUPERIOR COURT
ORLEANS UNIT

CONSENT ORDER AND FINAL JUDGMENT ORDER

This action came before the Court pursuant to the parties filing of a Stipulation for the Entry of Consent Order and Final Judgment Order. Based upon that Stipulation, and pursuant to 6 V.S.A. § 1(a)(7), 6 V.S.A. § 4812(c), 10 V.S.A. § 8221 and the Court's inherent equitable powers, it is hereby ADJUDGED, ORDERED and DECREED as follows:

ADJUDICATION FOR VIOLATIONS

1. Defendant Nelson Farms, Inc. is adjudged liable for the following violations of Vermont's agricultural and environmental laws and regulations at the agricultural operations at the Clydeside Farm and the Crystal Brook Farm:
   a. violating 10 V.S.A. § 1259(a) between March 28, 2013 and June 20, 2013 by discharging from the Crystal Brook Farm into waters of the state without a permit from the Secretary of the Agency of Natural Resources by allowing clean water from the farm's milkhouse plate cooler to mix with agricultural waste from the farm's production area and flow into the Crystal Brook;

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b. violating 10 V.S.A. § 1259(a) between May 6, 2013 and May 14, 2013 by discharging from the Crystal Brook Farm into waters of the state without a permit from the Secretary of the Agency of Natural Resources by allowing agricultural waste on the eastern side of the farm's production area to flow into a stream and then into the Crystal Brook;

c. violating 10 V.S.A. § 1259(a) between May 6, 2013 and June 20, 2013 by discharging from the Clydeside Farm into waters of the state without a permit from the Secretary of the Agency of Natural Resources by allowing agricultural waste, including silage leachate, spoiled feed and mortalities leachate, to mix with rainwater at the farm's production area and collect at a focal point from where it flowed downhill, into a ditch, and then into the Clyde River;

d. operation of the Clydeside Farm in violation of its MFO General Permit between March 18, 2013 and August 28, 2013 by discharging to waters of the state without a permit and failing to manage the farm in compliance with Vermont's AAPs; and

e. operation of the Crystal Brook Farm in violation of its MFO General Permit between March 18, 2013 and August 28, 2013 by discharging to waters of the state without a permit and failing to manage the farm in compliance with Vermont's AAPs.

2. All other violations alleged by the State in the Complaint for which Defendant has not been adjudicated liable are dismissed with prejudice. This Consent Order and Final

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Judgment Order does not affect any other potential violations by Defendant at the Crystal Brook Farm or Clydeside Farm not alleged in the Complaint.

PENALTIES

3. For the violations described above, Defendant shall pay a civil penalty of forty-five thousand dollars ($45,000.00).
4. Payment of the forty-five thousand dollars ($45,000.00) penalty shall be made by check to the "State of Vermont" and shall be sent to: Robert F. McDougall, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, VT 05609. Payment of the forty-five thousand dollars ($45,000.00) penalty shall be due in full no later than sixty (60) days after the 21-day public comment period has expired following the filing of the Stipulation and proposed Consent Order and Final Judgment Order. In the event that the payment is received by the State before the Court has approved the Consent Order and Final Judgment Order, the State shall hold the check in trust until approval. Should the Court reject the Consent Order and Final Judgment Order, the State will return the check to Defendant.
5. In the event that Defendant fails to pay the penalty described in paragraphs 3 and 4, such failure shall constitute a breach of this Consent Order and Final Judgment Order and interest shall accrue on the entire unpaid balance at twelve percent (12%) per annum. Defendant shall also be liable for costs incurred by the State, including reasonable attorney's fees, to collect any unpaid penalty amount.

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INJUNCTIVE RELIEF

6. Defendant is ordered to perform the following:
   a. Defendant shall not make any unpermitted discharge into waters of the State from the Crystal Brook Farm or the Clydeside Farm;
   b. Defendant shall submit to the State, in advance of any work, all future proposed improvements to the waste management system at the Crystal Brook Farm or the Clydeside Farm;
   c. Defendant shall have a professional engineer (P.E.) certify that all future work done to any waste management system on either the Crystal Brook Farm or the Clydeside Farm meets all applicable standards and shall submit the plans and P.E. certification to the State; Defendant shall comply with all applicable rules, permits and laws relating to the Clydeside Farm and the Crystal Brook Farm; and
   d. Defendant shall remain bound by all obligations contained in the Preliminary Injunction Order dated November 6, 2013, which are now incorporated by reference as a part of the Consent Order and Final Judgment Order

OTHER PROVISIONS

7. The parties waive: (a) all rights to contest or appeal this Consent Order and Final Judgment Order; and (b) all rights to contest the obligations imposed upon Defendant Nelson Farms, Inc. under this Consent Order and Final Judgment Order in this or any other administrative or judicial proceeding involving the State of Vermont.

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8. This Consent Order and Final Judgment Order is binding upon the parties and all their successors and assigns.

9. Nothing in this Consent Order and Final Judgment Order shall be construed to create or deny any rights in, or grant or deny any cause of action to, any person not a party to this Consent Order and Final Judgment Order, including any State agencies, subdivisions or other State entities.

10. This Consent Order and Final Judgment Order shall become effective only after it is entered as an order of the Court. When so entered by the Court, the Consent Order and Final Judgment Order shall be final.

11. Any violation of this Consent Order and Final Judgment Order shall be deemed to be a violation of a judicial order, and may result in the imposition of injunctive relief and/or penalties, including penalties for contempt, as set forth in 10 V.S.A. Chapters 201 and 211.

12. Nothing in this Consent Order and Final Judgment Order shall be construed as having relieved, modified, or in any manner affected Defendant's obligations to comply with all other federal, state, or local statutes, regulations, permits or directives applicable to Defendant.

13. This Consent Order and Final Judgment Order may only be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties hereto or their legal representatives and approved by this Court. Any representations not set forth in this Consent Order and Final Judgment Order,

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whether written or oral, shall not be binding upon any party hereto, and such alleged representations shall be of no legal force or effect.

SO ORDERED, and ENTERED as FINAL JUDGMENT.

DATED at Newport, Vermont this 23rd day of December, 2014.

Hon. ~~A. Gregory Rainville~~ T. Tomasi
Orleans Superior Court Judge

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STATE OF VERMONT

SUPERIOR COURT
ORLEANS UNIT

CIVIL DIVISION
Docket No. 280-10-13 Oscv

STATE OF VERMONT, AGENCY OF AGRICULTURE, FOOD AND MARKETS and AGENCY OF NATURAL RESOURCES,
Plaintiff,

v.

NELSON FARMS, INC,
Defendant.

STIPULATION FOR THE ENTRY OF CONSENT ORDER AND FINAL JUDGMENT ORDER

In order to resolve the allegations of the Complaint filed in the above-captioned matter, the parties, Plaintiff, the State of Vermont, Agency of Agriculture, Food and Markets and Agency of Natural Resources ("the State") by and through Vermont Attorney General William H. Sorrell, and Defendant, Nelson Farms, Inc., hereby stipulate and agree as follows:

WHEREAS, Defendant is a Vermont corporation, engaged in the farm products business, and which owns the Clydeside Farm located on Main Street in Derby Center, Vermont and the Crystal Brook Farm located at U.S. Route 5 in Derby Line, Vermont;

WHEREAS, Defendant is engaged in dairy farming at both locations;

WHEREAS, both the Crystal Brook Farm and the Clydeside Farm were classified as Medium Farm Operations (MFOs) by the Vermont Agency of Agriculture, Food and Markets (AAFM) during all times relevant to the Complaint;

WHEREAS, both farms were subject to the conditions of the MFO General Permit during all times relevant to the Complaint;

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WHEREAS, the State alleged in its Complaint filed in this action that Defendant violated Vermont's agricultural and environmental laws at the Clydeside Farm and Crystal Brook Farm between March 2013 and August 2013;

WHEREAS, the State alleged in its Complaint that Defendant violated section 1259(a) of Title 10 of the Vermont statutes between March 28, 2013 and June 20, 2013 by discharging from the Crystal Brook Farm into waters of the state without a permit from the Secretary of the Agency of Natural Resources by allowing water from the farm's milkhouse plate cooler to mix with agricultural waste from the farm's production area and flow into the Crystal Brook;

WHEREAS, the State alleged in its Complaint that Defendant violated section 1259(a) of Title 10 of the Vermont statutes between May 6, 2013 and May 14, 2013 by discharging from the Crystal Brook Farm into waters of the state without a permit from the Secretary of the Agency of Natural Resources by allowing agricultural waste on the eastern side of the farm's production area to flow into a stream and then into the Crystal Brook;

WHEREAS, the State alleged in its Complaint that Defendant violated section 1259(a) of Title 10 of the Vermont statutes between May 6, 2013 and June 20, 2013 by discharging from the Clydeside Farm into waters of the state without a permit from the Secretary of the Agency of Natural Resources by allowing agricultural waste, including silage leachate, spoiled feed and mortalities leachate, to mix with rainwater at the farm's production area and collect at a focal point from where it flowed downhill, into a ditch, and then into the Clyde River;

WHEREAS, the State alleged in its Complaint that Defendant operated its Clydeside Farm in violation of its MFO General Permit between March 18, 2013 and August 28, 2013

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by discharging to waters of the state without a permit and failing to manage the farm in compliance with Vermont's Acceptable Agricultural Practices (AAPs);

WHEREAS, the State alleged in its Complaint that Defendant operated its Crystal Brook Farm in violation of its MFO General Permit between March 18, 2013 and August 28, 2013 by discharging to waters of the state without a permit and failing to manage the farm in compliance with Vermont's AAPs;

WHEREAS, Defendant denied the alleged violations in the Complaint;

WHEREAS, the parties now desire to resolve the enforcement action via a stipulated Consent Order and Final Judgment Order of the Court;

WHEREAS, Defendant now admits that it committed these violations of Vermont's agricultural and environmental laws and regulations;

WHEREAS, under 10 V.S.A. § 8221, Defendant is potentially liable for civil penalties of up to $85,000.00 for each violation and $42,500.00 per violation for each day the violation continued;

WHEREAS, the Attorney General pursuant to 3 V.S.A., Chapter 5 has the general supervision of matters and actions in favor of the State and may settle such matters as the interests of the State require;

WHEREAS, the State has considered the criteria in 10 V.S.A. § 8010(b) and (c) in arriving at the proposed penalty amount, including the degree of actual or potential impact on public health, safety, welfare and the environment resulting from the violations and that Defendant knew or had reason to know the violations existed;

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WHEREAS, section 4860(a) of Title 6 provides that when any person fails to comply with any permit provision of a General Permit, the Secretary of AAFM may take enforcement action;

WHEREAS, enforcement action under 6 V.S.A. § 4860(a) may include revocation of coverage under a General Permit and other remedies as provided in the statute, including seeking and obtaining temporary or permanent injunctions to restrain a violation of any law administered by the Secretary of AAFM whenever there are reasonable grounds to believe the law has been or will be violated;

WHEREAS, the Attorney General believes that this settlement is in the State's interests as it upholds the statutory regime of Title 6, Chapter 215, and Title 10, Chapter 47, in which these violations occurred; and

WHEREAS, this Stipulation for the Entry of Consent Order and Final Judgment Order has been negotiated by and among the State and Defendant in good faith;

NOW, THEREFORE, the State and Defendant hereby stipulate and agree as follows:

1. The attached Consent Order and Final Judgment Order may be entered by the Court;
2. As a part of the settlement pursuant to the Consent Order and Final Judgment Order, Defendant admits to liability for the following at the agricultural operations at the Clydeside Farm and the Crystal Brook Farm:
   a. violating 10 V.S.A. § 1259(a) between March 28, 2013 and June 20, 2013 by discharging from the Crystal Brook Farm into waters of the state without a permit from the Secretary of the Agency of Natural Resources by allowing water from the

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farm's milkhouse plate cooler to mix with agricultural waste from the farm's production area and flow into the Crystal Brook;

b. violating 10 V.S.A. § 1259(a) between May 6, 2013 and May 14, 2013 by discharging from the Crystal Brook Farm into waters of the state without a permit from the Secretary of the Agency of Natural Resources by allowing agricultural waste on the eastern side of the farm's production area to flow into a stream and then into the Crystal Brook;

c. violating 10 V.S.A. § 1259(a) between May 6, 2013 and June 20, 2013 by discharging from the Clydeside Farm into waters of the state without a permit from the Secretary of the Agency of Natural Resources by allowing agricultural waste, including silage leachate, spoiled feed and mortalities leachate, to mix with rainwater at the farm's production area and collect at a focal point from where it flowed downhill, into a ditch, and then into the Clyde River;

d. operation of the Clydeside Farm in violation of its MFO General Permit between March 18, 2013 and August 28, 2013 by discharging to waters of the state without a permit and failing to manage the farm in compliance with Vermont's AAPs; and

e. operation of the Crystal Brook Farm in violation of its MFO General Permit between March 18, 2013 and August 28, 2013 by discharging to waters of the state without a permit and failing to manage the farm in compliance with Vermont's AAPs;

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3. Any other alleged violations listed in the Complaint not admitted above shall be dismissed with prejudice; the settlement does not affect any other potential violations by Defendants at Crystal Brook Farm or Clydeside Farm not alleged in the Complaint;
4. As a part of the settlement pursuant to the Consent Order and Final Judgment Order, Defendant agrees to the following injunctive relief:
   a. Defendant shall not make any unpermitted discharge into waters of the State from the Crystal Brook Farm or the Clydeside Farm;
   b. Defendant shall submit to the State, in advance of any work, all future proposed improvements to the waste management system at the Crystal Brook Farm or the Clydeside Farm;
   c. Defendant shall have a professional engineer (P.E.) certify that all future work done to any waste management system on either the Crystal Brook Farm or the Clydeside Farm meets all applicable standards and submit the plans and P.E. certification to the State;
   d. Defendant shall comply with all applicable rules, permits and laws relating to the Clydeside Farm and the Crystal Brook Farm; and
   e. Defendant shall remain bound by all obligations contained in the Preliminary Injunction Order dated November 6, 2013, which are now incorporated by reference as a part of the Consent Order and Final Judgment Order;
5. The Consent Order and Final Judgment Order has been negotiated by the State and Defendant in good faith;

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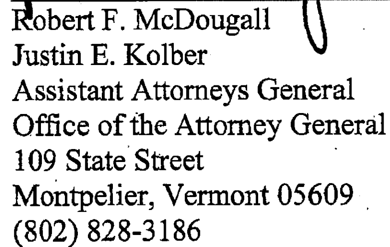
6. The State and Defendants hereby waive all rights to contest or appeal the Final Judgment Order and they shall not challenge, in this or any other proceeding, the validity of any of the terms of the Final Judgment Order or of this Court's jurisdiction to enter the Final Judgment Order; and

7. The Final Judgment Order sets forth the complete agreement of the parties, and it may be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties' legal representatives and approved by the Court.

DATED at Montpelier, Vermont this 21st day of November, 2014.

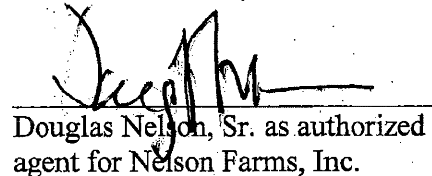
WILLIAM H. SORRELL
ATTORNEY GENERAL

By: 

Robert F. McDougall
Justin E. Kolber
Assistant Attorneys General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3186

DATED at Derby, Vermont this 20 day of November, 2014.

NELSON FARMS, INC.

By: 

Douglas Nelson, Sr. as authorized agent for Nelson Farms, Inc.

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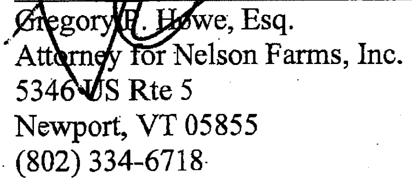
Approved as to form:



Gregory P. Howe, Esq.
Attorney for Nelson Farms, Inc.
5346 US Rte 5
Newport, VT 05855
(802) 334-6718

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STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket No. 280-10-13 Oscv

STATE OF VERMONT
Agency of Agriculture,
Food and Markets and
Agency of Natural Resources

Plaintiff

v.

RICHARD M. NELSON
and
NELSON FARMS, INC.

Defendants

FILED
NOV 6 - 2013
VERMONT SUPERIOR COURT
ORLEANS UNIT

PRELIMINARY INJUNCTION ORDER

The above-captioned matter came on before the court on Monday, October 21, 2013 for a hearing on a motion and application for a preliminary injunction filed by the plaintiff State of Vermont.

Appearing for the plaintiff State of Vermont were Assistant Attorneys General Michael O. Duane and Justin E. Kolber. Appearing for the defendants Richard M. Nelson and Nelson Farms, Inc. was Gregory P. Howe, Esq.

Before the taking of any evidence on the motion, the parties represented to the court, on the record, the terms of a stipulation and agreement that the court may enter an order, subject to the court's approval, of a preliminary injunction pending any final determination of the merits of the plaintiff's complaint.

Based upon that stipulation and agreement, it is hereby **ORDERED BY THE COURT:**

1. The Defendant shall not discharge any agricultural wastes from the production area of its Crystal Brook Farm in Derby Line to the waters of the state, in particular, to the Crystal Brook;

2. As soon as possible, but no later than October 29, 2013, the Defendant shall divert the milk house plate cooler output pipe water so that it does not flow onto the production area of the Crystal Brook Farm near the western side of the farm manure pit;

3. The Defendant shall immediately remove the 4-inch white PVC pipe that transects the berm on the eastern side of the production area of the Crystal Brook Farm;

4. The Defendant shall have and maintain a berm on the length of the eastern side of the production area of the Crystal Brook Farm that is impermeable in order to prevent any agricultural wastes from passing through, over or under the berm;

5. The Defendant shall develop and present to the Plaintiff by December 15, 2013 for the Plaintiff's approval, a plan to permanently eliminate the discharge of any agricultural wastes from the production area of the Crystal Brook Farm;

6. The Defendant shall not discharge any agricultural wastes from the production area of its Clydeside Farm in Derby Center to the waters of the state, in particular, to the Clyde River;

7. The Defendant shall, on an ongoing basis, remove all agricultural wastes and keep agricultural wastes from accumulating at the "focal point" of the Clydeside Farm production area, so-called in the Plaintiff's complaint.

8. The Defendant shall develop and present to the Plaintiff by December 15, 2013 for the approval of the Plaintiff, a plan to permanently eliminate the potential for any agricultural wastes accumulating at the "focal point" of the Clydeside Farm production area to discharge to the Clyde River.

9. The Defendant shall maintain one foot of "freeboard", or space, from the top level of any waste in the manure pit to the top of the manure pit at the Clydeside Farm;

10. The Defendant shall allow the employees and agents of the Plaintiff to enter upon the lands of the Defendant which are the subject of the action at all reasonable hours between 6:00AM and 9:00PM to inspect, measure, survey, photograph, test and sample the Defendant's land to determine whether there are any direct discharges from the production areas of the Defendant's Derby Line and Derby Center farms to the waters of the state. The employees and agents of the Plaintiff shall telephone Mr. Richard Nelson and Mr. Doug Nelson, Sr. to notify them, directly or by leaving a message, that they will be entering upon the lands. Nothing herein shall affect the specific authority granted under Vermont law for the Plaintiff to otherwise investigate violations of Vermont law.

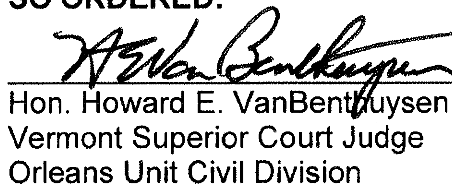
Plaintiff's counsel, by their signature below, also voluntarily dismiss Richard M. Nelson as a Defendant in this action, without prejudice, pursuant to Rule 41(a)(1) of the Vermont Rules of Civil Procedure, no answer having been filed by him. Plaintiff's voluntary dismissal of Richard M. Nelson is based upon the representations of the Defendants' counsel that the officers or principals of Nelson Farms, Inc. will not change as presently constituted during the pendency of this action, or that if Mr. Richard M. Nelson ceases to be an officer or principal of Nelson Farms, Inc. during the pendency of this action, he thereupon agrees he shall be considered at all times to be an agent of Nelson Farms, Inc. for the purposes of this action.

Service of this ORDER shall be effective upon the Defendant Nelson Farms, Inc. and its officers, agents, servants, employees, by service upon Defendant's attorney Gregory P. Howe, Esq. by the mailing a copy of this ORDER to him by the Clerk after entry.

This matter shall be set for a status conference in approximately 45 days with respect to the Plaintiff's complaint and any other matter that may properly come before the court.

Dated at Newport, Vermont this 6th day of ~~October~~ November, 2013.

SO ORDERED:

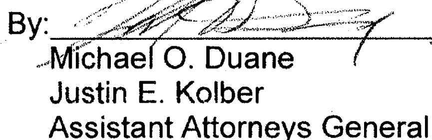


Hon. Howard E. VanBenthuysen
Vermont Superior Court Judge
Orleans Unit Civil Division

Approved as to form and the voluntary dismissal of Richard M. Nelson.

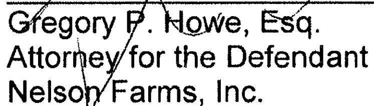
WILLIAM H. SORRELL
ATTORNEY GENERAL
Attorney for the Plaintiff
State of Vermont

Date: October 23, 2013

By: 
Michael O. Duane
Justin E. Kolber
Assistant Attorneys General

Approved as to form.

Date: 10/27/13



Gregory P. Howe, Esq.
Attorney for the Defendant
Nelson Farms, Inc.

STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket No. Oscv

STATE OF VERMONT
Agency of Agriculture,
Food and Markets and
Agency of Natural Resources

Plaintiff

v.

RICHARD M. NELSON

and

NELSON FARMS, INC.

Defendants

COMPLAINT FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES

NOW COMES the State of Vermont, Agency of Agriculture, Food and Markets and the Agency of Natural Resources, by and through its attorney, Attorney General William H. Sorrell, and pursuant to 6 V.S.A. § 1(a)(7), 6 V.S.A. § 4812(c), 10 V.S.A. § 1274(a) and 10 V.S.A. § 8221, and the court's general equitable jurisdiction, brings the following complaint against the Defendants Richard M. Nelson and Nelson Farms, Inc.

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PARTIES

1. The Plaintiff State of Vermont is a sovereign entity of which the Agency of Agriculture, Food and Markets and the Agency of Natural Resources are

respectively created through 3 V.S.A. § 212(2) and 3 V.S.A. § 2802. The agencies cooperate and coordinate their efforts relating to agricultural water quality pursuant to 6 V.S.A. § 4810(b).

2. The Defendant Richard Nelson is a person who is engaged in farming in the Town of Derby, Vermont in Orleans County. The Defendant is engaged in an agricultural operation located at Main Street in Derby Center known as the Clydeside Farm, and formerly known as the Hackett Farm. The Defendant is also engaged in an agricultural operation located at U.S. Route 5 in Derby Line known as the Crystal Brook Farm, and formerly known as the Kelly Farm. Richard Nelson directs the agricultural activities at both farms.

3. The Defendant Nelson Farms, Inc. is a Vermont corporation, engaged in the farm products business, and which owns the real property described in paragraph 2 above, and, through its agents, is engaged in the agricultural operation located at Main Street in Derby Center known as the Clydeside Farm, and formerly known as the Hackett Farm, and engaged in the agricultural operation located at U.S. Route 5 in Derby Line known as the Crystal Brook Farm, and formerly known as the Kelly Farm. Agents of Nelson Farms, Inc. are involved in the management of agricultural activities at both farms.

4. The officers and principals of Nelson Farms, Inc. are Douglas Nelson, Sr., Douglas Nelson, Jr., the defendant Richard Nelson, and Cyril Nelson.

5. Because of the number of mature dairy animals and young stock housed at each farm, both the Clydeside Farm and the Crystal Brook Farm are and

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were each operated by the Defendants under the coverage and authorization of the Vermont medium farm general permit.

FACTUAL AND LEGAL ALLEGATIONS

I.

Clydeside Farm

6. The Defendants' agricultural operation at the Derby Center Clydeside Farm facility involves the confinement, feeding, fencing, and watering of livestock, and the storage and handling of livestock wastes and by-products.

7. On March 18, 2013 Katie Gehr, an employee of the Agency of Agriculture, Food and Markets (Agency of Agriculture), observed that the manure pit at the Clydeside Farm was full to the brim and close to overflowing. The Defendant Richard Nelson was informed by Ms. Gehr that the "freeboard" clearance of the manure pit needed to be reduced to a one foot level below the brim in order to meet the required farm waste management system standards. The Defendant Richard Nelson stated to Ms. Gehr that he would move some of the manure from the pit at the Clydeside Farm to the manure pit at the Crystal Brook Farm in Derby Line in order to reduce the volume of manure in the pit.

8. On March 28, 2013 Katie Gehr of the Agency of Agriculture returned to the Clydeside Farm. She observed that manure had not been removed from the pit, and that the manure pit was then overflowing. She also observed that there was a hole in the berm of the manure pit, and that agricultural wastes were leaking out from the hole. She also observed that stormwater from a nearby farm field owned

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by the Defendants was mixing with water containing agricultural wastes from the manure pit and that the water containing agricultural wastes was flowing away from the barnyard production area in a defined path and into an area of wet soils adjacent to the Clyde River.

9. On March 28, 2013 Ms. Gehr spoke with the farm manger "Tony" and showed him where the manure pit had overtopped and where manure from the pit had flowed towards the Clyde River.

10. The Clyde River is a water of the state.

11. On May 6, 2013 several employees of the Agency of Agriculture and the Department of Environmental Conservation went to the Clydeside Farm and conducted a further inspection of the farm and observed that there was evidence that the manure pit had recently overtopped. Although there was no active discharge on that day, a rain storm or the addition of more agricultural wastes to the manure pit would cause the manure pit at the Clydeside Farm to overtop and flow away from the barnyard production area in a defined path and into an area of wet soils adjacent to the Clyde River and would cause a repetition of, and a future water quality violation to, the Clyde River as set forth above in paragraph 8.

12. They also observed on May 6, 2013 that a rain storm or the addition of more agricultural wastes to the manure pit would cause the manure pit at the Clydeside Farm to overtop and mix with any water from a nearby field and flow away from the barnyard production area in a defined path and into an area of wet soils adjacent to the Clyde River and would cause a repetition of and a future water quality violation to the Clyde River as set forth above in paragraphs 8 and 11.

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13. On May 6, 2013 employees of the Agency of Agriculture and the Department of Environmental Conservation also observed upon further inspection of the Clydeside Farm that silage leachate, spoiled feed, mortalities (dead cow) leachate and other agricultural wastes from the farm production area were mixing with clean water from barn roofs and from rain water onto the production area and flowing to a focal point in the production area and thence downhill from that focal point and into a gully and discharging directly into the Clyde River.

14. There was a significant volume of agricultural wastes, including a substantial amount of silage leachate, deposited in the flood plain of the Clyde River that clearly had and presently was on May 6, 2013 discharging directly from the production area of the Defendants' agricultural operation into the Clyde River. The Defendant Richard Nelson admitted that there was silage wastes deposited in in the Clyde River, and that the wastes came from the Defendants' farm.

15. On May 14, 2013 Katie Gehr of the Agency of Agriculture returned to the Clydeside Farm. She observed that the level of the manure pit had been lowered. She also observed on that day that an earthen berm had recently been constructed at the focal point where the silage leachate, spoiled feed and other agricultural wastes from the farm production area had previously been flowing towards the Clyde River in the gully referred to in paragraph 13 above.

16. On May 15, 2012 Ms. Gehr spoke with defendant Richard Nelson and told him that the earthen berm was only adequate as a temporary structure to contain the wastes from the production area of the farm, and that a permanent

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structure was needed to prevent a discharge. She also informed him that rain was in the forecast and a permanent correction was necessary to avoid a discharge.

17. On June 20, 2013 Katie Gehr, and another employee of the Agency of Agriculture, returned to the Clydeside Farm. She observed on that day that the temporary earthen berm referred to in paragraphs 15 and 16 above had indeed breached, and that silage leachate, spoiled feed and other agricultural wastes from the farm production area were once again flowing downhill from the focal point of the production area and into the gully referred to in paragraph 13 above and discharging directly into the Clyde River.

18. On August 27, 2013 employees of the Agency of Agriculture and the Department of Environmental Conservation returned to the Clydeside Farm. They observed on that day that the temporary earthen berm, which had previously breached, had been repaired. The newer earthen berm was blocking the agricultural wastes from leaving the focal point of the production area at the time of the visit. However, the earthen berm is inadequate, and the lack of a clean water diversion system from the roofs of the barns in the production area and the lack of a permanent waste management system in the focal point of the production area will cause an ongoing continuation and repetition of and a future water quality violation to the Clyde River.

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II.

Crystal Brook Farm

19. The Defendants' agricultural operation at the Derby Line Crystal Brook Farm facility involves the confinement, feeding, fencing, and watering of livestock, and the storage and handling of livestock wastes and by-products.

20. On March 18, 2013, when Katie Gehr of the Agency of Agriculture went to the Crystal Brook Farm with Defendant Richard Nelson to determine if there was capacity at the Crystal Brook Farm manure pit, she also observed that clean water from the milkhouse plate cooler in the farm production area was mixing with dirty water containing agricultural wastes.

21. On March 28, 2013, Katie Gehr of the Agency of Agriculture returned to the Crystal Brook Farm. She observed that water containing agricultural wastes from the area that she observed on March 18, 2013 was flowing away from the barnyard production area and was entering a defined channel and discharging into an area of wet soils and discharging directly into Crystal Brook.

22. Crystal Brook is a water of the state.

23. Ms. Gehr spoke with "Tony" the farm manager and showed him where the clean water containing agricultural wastes from the farm production area was flowing away from the production area and was entering a defined channel and discharging into an area of wet soils and directly into Crystal Brook.

24. On May 6, 2013 several employees of the Agency of Agriculture and the Department of Environmental Conservation went to the Crystal Brook Farm and

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observed: 1.) that spilled manure from a ramp near the western side of the manure pit, as well as other agricultural wastes, were mixing with clean water from the milkhouse plate cooler and flowing into a channel and discharging directly into Crystal Brook; 2.) that silage wastes and other agricultural wastes were mixing with surface water on the east side of the production area and that the water and wastes were flowing into a stream and then discharging directly into Crystal Brook at a second point; 3.) that spilled manure from two ramps on the eastern side of the manure pit had entered the stream and was also discharging directly into Crystal Brook at the same second point as noted in section 2.) above; 4.) that a barnyard waste management system was not being properly managed by the Defendants, and that manure was flowing between two barns and, if not properly managed or controlled, the runoff of wastes to the stream and into Crystal Brook would not be prevented; and, 5.) that a cow crossing area on the north side of the production area of the farm was not being properly managed by the Defendants, and that eroded soils and manure had entered into a swale and ,if not properly managed or controlled, would not prevent the runoff of wastes to the stream and into Crystal Brook.

25. The agency employees spoke with the Defendant Richard Nelson about their observations set forth in paragraph 24 above, and about the concerns that their observations raised regarding the effect on water quality. The agency employees stated to Mr. Richard Nelson that permanent corrections needed to be made to eliminate and prevent direct discharges from the production area of the

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farm, particularly the placement of a permanent concrete berm at the east side of the production area to which he agreed.

26. On May 14, 2013 Katie Gehr of the Agency of Agriculture returned to the Crystal Brook Farm. She observed on that day that clean water from the milkhouse plate cooler in the farm production area was still mixing with dirty water containing agricultural wastes and flowing away from the production area in a defined channel towards and discharging directly into Crystal Brook. She spoke with the farm manager "Tony" about diverting clean water away from the agricultural wastes in the production area in order to control discharges.

27. She also observed on May 14, 2013 that a permanent berm had not been installed on the east side of the production area of the farm in order to prevent the direct discharge of wastes from the production area into waters of the state. She observed on that day that agricultural wastes from the east side of the production area had entered into the stream, as described in paragraph 24 above, which then flows into Crystal Brook.

28. On June 6, 2013 Katie Gehr of the Agency of Agriculture returned to the Crystal Brook Farm with an employee of the U.S. Department of Agriculture Natural Resources Conservation Service. She observed on that day that clean water from the milkhouse plate cooler in the farm production area was still mixing with dirty water containing agricultural wastes and flowing away from the production area in a defined channel towards and still discharging directly into Crystal Brook. She also observed on that day that a permanent berm still had not been installed on the east side of the production area of the farm in order to prevent the direct

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discharge of wastes from the production area into waters of the state as described in paragraphs 24 and 27 above.

29. On June 20, 2013 Katie Gehr and another employee of the Agency of Agriculture returned to the Crystal Brook Farm. Ms. Gehr observed on that day that clean water from the milkhouse plate cooler in the farm production area was still mixing with dirty water containing agricultural wastes and flowing away from the production area into a defined channel towards and discharging directly into Crystal Brook.

30. She also observed on June 20, 2013 that manure from the improperly managed barnyard waste management system in the farm production area, as described in paragraph 24 above, was now migrating between the two barns and edging closer to the stream that feeds into Crystal Brook. She observed evidence of a recent discharge of agricultural wastes into the stream from that location of the production area, described in paragraph 24 above, which flows into Crystal Brook. On that day the wastes were being blocked from entering the stream by a temporary earthen berm.

31. She also observed on June 20, 2013 that a permanent berm still had not been installed on the east side of the production area of the farm in order to prevent the direct discharge of wastes from the production area into waters of the state as described in paragraphs 24 and 27 above.

32. On August 27, 2013 employees of the Agency of Agriculture and the Department of Environmental Conservation returned to the Crystal Brook Farm. They observed on that day that the milkhouse cooler plate clean water was still

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flowing into an area that had contained agricultural wastes. The area had been scraped of agricultural wastes at the time of the visit. The area is regularly used by the farm operation, and unless the milkhouse cooler plate water is diverted from the area, scraping the area will not prevent the direct discharge of agricultural wastes to Crystal Brook and will cause an ongoing continuation and repetition of and future water quality violations to Crystal Brook.

33. They also observed on that day that a temporary berm of sand had been placed on the east side of the production area of the farm in an effort to contain agricultural wastes from discharging into Crystal Brook on the day of the visit. Sand is not an impervious material, and the sand berm will not prevent the direct discharge of agricultural wastes into Crystal Brook and will cause an ongoing continuation and repetition of and future water quality violations to Crystal Brook.

34. They also observed on that day that the agricultural wastes in the production area within the barns had been scraped out and removed, but that the waste management system in that location of the production area of the farm needed to be permanently improved in order to prevent a continuation and repetition of and future water quality violations to Crystal Brook.

35. They also observed on that day that the cow crossing area on the north side of the production area of the farm had been fenced in order to narrow, but not prevent, the area where clean water can mix with water containing agricultural wastes and flow to an area of wet soils and into a ditch and thence to Crystal Brook.

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III.

36. The Defendants' discharges from the production areas of their agricultural operations at the Clydeside Farm in Derby Center and at their Crystal Brook Farm in Derby Line were done in violation of the Medium Farm Operation General Permit and the Medium Farm Operation Rules of the Secretary of Agriculture. Those Rules require at subchapter XI. B.1. that farm practices be in place to assure that there are no direct discharges of wastes from the production areas of farms to waters of the state. Those Rules also require compliance with Vermont's Accepted Agricultural Practices (AAPs).

37. The Defendants' actions, as set forth, are a violation of Vermont's AAPs which provide in section 4.01(a) that:

> Agricultural operations shall not create any direct discharge of wastes into the surface waters of the State from a discrete conveyance such as, but not limited to, a pipe, ditch, or conduit without a permit from the Secretary of ANR.

and in section 4.01(b) that:

> Barnyards, manure storage areas, animal holding areas and production areas shall be managed or controlled to prevent runoff of wastes to adjoining waters, groundwater or across property boundaries.

38. 6 V.S.A. § 4812(c) provides that whenever the Secretary of Agriculture, Food and Markets believes that any person engaged in farming is in violation of the agricultural water quality laws in subchapter 2 of chapter 215 of title 6, or the rules adopted thereunder, an action may be brought in the name of the agency in a court of competent jurisdiction to restrain by temporary or permanent injunction the continuation or repetition of the violation. Vermont's AAPs, referred to

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in paragraph 37 above, were adopted as rules under the authority of 6 V.S.A. § 4810(a), subchapter 2 of chapter 215.

39. 6 V.S.A. § 1(a)(7) provides that the Secretary of Agriculture, Food and Markets may seek and obtain temporary or permanent injunctions to restrain a violation of any law administered by the secretary whenever there are reasonable grounds to be that the law has been or will be violated.

40. The Defendants have and will violate Vermont's AAPs authorizing injunctive relief.

41. The Defendants' actions, as set forth above, are a violation of 10 V.S.A. § 1259(a) which provides that:

> No person shall discharge any waste, substance or material into waters of the state, nor shall any person discharge any waste, substance or material into an injection well or discharge into a publicly owned treatment works any waste which interferes with, passes through without treatment, or is otherwise incompatible with those works or would have a substantial adverse effect on those works or on water quality, without first obtaining a permit for that discharge from the secretary. This subsection shall not prohibit the proper application of fertilizer to fields and crops, nor reduce or affect the authority or policy declared in joint house resolution 7 of the 1971 session of the general assembly.

42. The Defendants did not have a permit from the Secretary of the Agency of Natural Resources to discharge agricultural wastes from the production areas of their agricultural operations into the waters of the state.

43. 10 V.S.A. § 1274(a) provides, among other things, that if the Secretary of Natural Resources finds that any person has discharged or is discharging any waste in violation of chapter 47 of title 10 the secretary may bring suit to enjoin the discharge and to obtain compliance. It further provides that the court may issue a

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temporary injunction or order in any such proceedings and may exercise all the plenary powers available to it in addition to the power to, among other things, enjoin future discharges and levy civil penalties.

44. 10 V.S.A. § 8221 provides, among other things, that the Secretary of Natural Resources may bring an action in superior court to ensure compliance and obtain penalties to enforce the provisions of law specified in section 8003(a) of title 10 which includes, among other provisions, chapter 47 of title 10. It further provides that the court may grant temporary and permanent injunctive relief, and may, among other things, enjoin future activities, and order remedial actions to be taken to mitigate hazard to the environment, and levy civil penalties.

45. The Defendants' violations of Vermont's agricultural and environmental water quality laws can be remedied, and are and have been continuous and ongoing.

PRAYER FOR RELIEF

WHEREFORE, the State of Vermont, through the Agency of Agriculture, Food and Markets and the Agency of Natural Resources, respectfully requests that the court grant the State injunctive relief as set forth herein to enjoin the Defendants' violations of Vermont's water quality and water pollution control laws and rules, and levy civil penalties, to wit:

1. Preliminarily and permanently order the Defendants to cease and enjoin the Defendants from allowing or causing agricultural wastes from their Derby Center

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Clydeside Farm and from their Derby Line Crystal Brook Farm agricultural operations to discharge to and into the waters of the state;

2. Preliminarily and permanently order and enjoin the Defendants to prevent agricultural wastes from their Derby Center Clydeside Farm and from their Derby Line Crystal Brook Farm agricultural operations to be discharged to and into the waters of the state;

3. Enjoin the Defendants to operate all waste management systems at their Derby Center Clydeside Farm and at their Derby Line Crystal Brook Farm in accordance with the applicable rules and standards adopted by the Vermont Agency of Agriculture and in accordance with the technical standards of the U.S. Department of Agriculture Natural Resources Conservation Service (NRCS) to the satisfaction of the Plaintiffs;

4. Enjoin the Defendants to submit an application for their Derby Center Clydeside Farm and for their Derby Line Crystal Brook Farm to the Secretary of Natural Resources for discharge permits pursuant to 10 V.S.A. § 1263(g);

5. Enjoin the Defendants to employ a qualified person, subject to the approval of the Plaintiffs, to ensure that there are no direct discharges from their Derby Center Clydeside Farm and from their Derby Line Crystal Brook Farm agricultural operations into the waters of the state;

6. Order that agents of the Plaintiffs may enter upon the land of the Defendants at all reasonable hours between 6:00 AM and 9:00 PM to inspect, measure, survey, photograph, test and sample the Defendants' land to determine

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whether the Defendants' continue to directly discharge from the farms' production areas into the waters of the state;

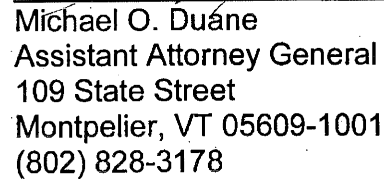
7. Levy civil penalties against the Defendants jointly and severally in accordance with 10 V.S.A. § 8221(b)(6) and § 1274(a); and

8. Award the State its costs, and such further relief as the court deems just and equitable.

Dated: September ___, 2013.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: 
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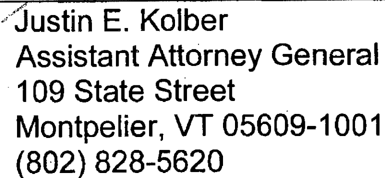
and: 
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STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket No. Oscv

STATE OF VERMONT
Agency of Agriculture,
Food and Markets and
Agency of Natural Resources

Plaintiff

v.

RICHARD M. NELSON

and

NELSON FARMS, INC.

Defendants

MOTION AND APPLICATION
FOR
PRELIMINARY INJUNCTION

NOW COMES the State of Vermont, Agency of Agriculture, Food and Markets and the Agency of Natural Resources, by and through its attorney, Attorney General William H. Sorrell, and pursuant to 10 V.S.A. § 8221, and the provisions of 6 V.S.A. § 1(a)(7), 6 V.S.A. § 4812(c), 10 V.S.A. § 1274(a), and Rule 65(b) of the Vermont Rules of Civil Procedure, moves the court for an order to preliminary enjoin the Defendants pending a final determination of the merits of this action to cease from allowing or causing agricultural wastes from their Derby Center Clydeside Farm and from their Derby Line Crystal Brook Farm agricultural operations to directly discharge to and into the waters of the state.

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As set forth in the affidavit of Kathryn M. Gehr, attached hereto and incorporated herein, the Defendants' farms have and will continue to directly discharge agricultural wastes from the production areas of their farms into ditches and into the Clyde River and Crystal Brook, respectively. The Defendants' actions are in violation of Vermont law. There are reasonable grounds to believe that Vermont's water quality laws have been and will be violated, that those discharges will continue and repeat until remediated unless the Defendants are preliminarily enjoined from directly discharging agricultural wastes into the waters of the state in the present and in the future.

Vermont agricultural laws expressly prohibit the direct discharge of wastes into waters of the state. Vermont's Accepted Agricultural Practices ("AAPs") Rules[1] provide that agricultural operations shall not create any direct discharge of wastes into the surface waters of the State from a discrete conveyance such as, but not limited to, a pipe, ditch, or conduit without a permit from the Secretary of Natural Resources. (AAPs 4.01(a)). In addition, barnyards, manure storage areas, animal holding areas and production areas shall be managed or controlled to prevent runoff of wastes to adjoining waters, groundwater or across property boundaries. (AAPs 4.01(b)).

Furthermore, Vermont environmental laws provide that no person shall discharge any waste, substance or material into waters of the state without first obtaining a permit for that discharge from the Secretary of Natural Resources. 10

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[1] Formally adopted rules have the force and effect of law. *Green Mt. Realty, Inc. v. Fish*, 133 Vt. 296, 298-299 (1975).

V.S.A. § 1259(a). The Defendants do not have a permit from the Secretary of Natural Resources for these discharges.

With regard to the environmental law Title 10 claims in this action, 10 V.S.A. §8221(c) provides that in any civil action, like this complaint, brought to enforce Vermont's water pollution control laws in chapter 47 of title 10 in which a preliminary injunction is sought, such relief shall be obtained upon a showing that there is the probability of success on the merits, and that a violation exists or that a violation is imminent and substantial harm is likely to result. It is not necessary in an action such as this for the State to demonstrate immediate and irreparable injury, loss or damage. Furthermore, any balancing of the equities may only affect the time by which compliance must be obtained, but not the necessity of compliance within a reasonable period of time. *Id.* § 8221(d). [2]

With regard to the agricultural law Title 6 claims in this action, the Vermont Supreme Court has adopted the view generally that in a statutory injunction case in which a governmental unit, like the State here, seeks to enjoin the violation of a statute, the State need only show that there is a violation and that the violation is substantial and not innocent. *Town of Sherburne v. Carpenter*, 155 Vt. 126, 129-132 (1990). The Court in *Carpenter* ruled that the trial court cannot weigh the injury to the public against the cost of compliance, as it is assumed that the public injury outweighs the private cost. *Id.* at 131.

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[2] Generally, the factors to be considered for the issuance of a preliminary injunction in a civil action between private parties, not applicable here, are: (1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the likelihood of success on the merits; and (4) the public interest. *In re: J.G.*, 160 Vt. 250, 255 n.2 (1993).

Here, there is a strong probability of success on the merits. Plaintiff's complaint, and the affidavit accompanying this application, set forth first hand observations that there has been, is, and will continue to be unlawful direct discharges into the waters of the state from the Defendants' farms unless fully remediated. Moreover, the Defendants' violations of Vermont agricultural and environmental law are clear. The Defendants were provided multiple opportunities to prevent the discharge of agricultural wastes into the waters of the state, and they failed to do so. The ongoing direct discharges and threats of direct discharges from the Defendants' farm operations have damaged and are threatening to damage the water quality of the Clyde River and Crystal Brook such that preliminary injunctive relief is warranted.

WHEREFORE, the Plaintiff respectfully requests that the matter be set for a hearing at a date, time and place for the Defendants to receive notice, that the Plaintiff's evidence be received by the court and that a preliminary injunction issue pending a final determination of the merits of this action commanding the Defendants to cease from allowing or causing agricultural wastes from the production areas of their farms to discharge into ditches and directly into the Clyde River and Crystal Brook, waters of the state, respectively, to wit:

1.) to create and maintain an impervious berm at the focal point of the production area of the Derby Center Clydeside Farm to prevent the runoff of agricultural wastes from the production area from directly discharging into the Clyde River;

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2.) to prevent the overtopping or leaking of the manure pit at the production area of the Derby Center Clydeside Farm from entering any ditches or other discrete conveyances and directly discharging agricultural wastes into the Clyde River, and to prevent any overtopping or leaking of the manure pit from mixing with stormwater runoff from the adjacent farm fields from entering any ditches or other discrete conveyances and directly discharging into the Clyde River;

3.) to maintain an impervious berm at the eastern end of the production area of the Derby Line Crystal Brook Farm to prevent the runoff of agricultural wastes from the production area from directly discharging into Crystal Brook;

4.) to maintain a fenced cow walkway at the north end of the production area of the Derby Line Crystal Brook Farm to prevent agricultural wastes from the production area of the farm from directly discharging into Crystal Brook;

5.) to divert the milkhouse plate cooler water in the south end of the production area near the manure pit at the Derby Line Crystal Brook Farm in such a manner to prevent agricultural wastes from mixing with it and directly discharging into Crystal Brook; and,

6.) Enjoin the Defendants to employ a qualified person, subject to the approval of the Plaintiffs, to ensure that there are no direct discharges from their Derby Center Clydeside Farm and from their Derby Line Crystal

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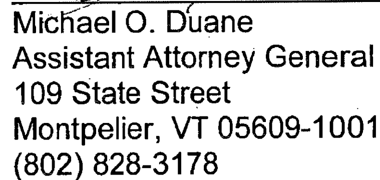
Brook Farm agricultural operations into the waters of the state during the pendency of this action;

7.) Order that agents of the Plaintiffs may enter upon the land of the Defendants at all reasonable hours between 6:00 AM and 9:00 PM to inspect, measure, survey, photograph, test and sample the Defendants' land to determine whether the Defendants continue to directly discharge into the waters of the state during the pendency of this action.

Dated at Montpelier, Vermont this 20 day of September, 2013.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL



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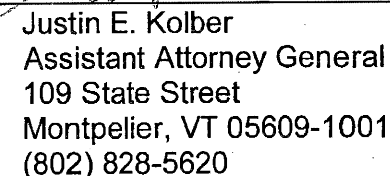

and: ______________________
Justin E. Kolber
Assistant Attorney General
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2015

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

JAN 09 2015

ENTRY ORDER

2015 VT 1

SUPREME COURT DOCKET NO. 2013-215

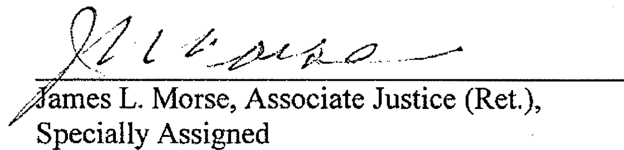
OCTOBER TERM, 2014

Natural Resources Board Land Use Panel	}	APPEALED FROM:
	}	
	}	
v.	}	Superior Court,
	}	Environmental Division
	}	
Donald Dorr, MGC, Inc., and Dorr Oil Company	}	DOCKET NO. 49-4-13 Vtec

In the above-entitled cause, the Clerk will enter:

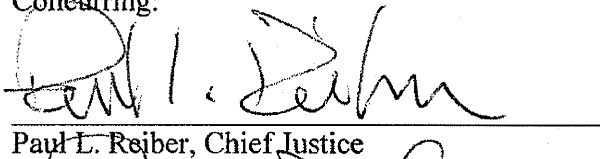
Affirmed.

FOR THE COURT:

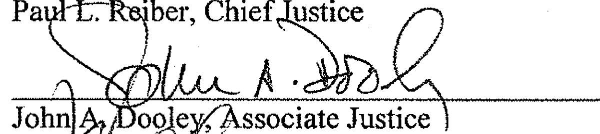


James L. Morse, Associate Justice (Ret.),
Specially Assigned

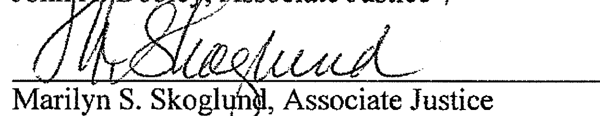
Concurring:



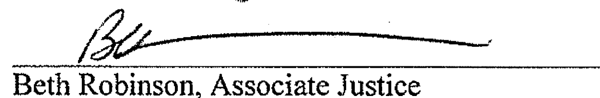
Paul L. Reiber, Chief Justice



John A. Dooley, Associate Justice



Marilyn S. Skoglund, Associate Justice



Beth Robinson, Associate Justice

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions by email at: JUD.Reporter@state.vt.us or by mail at: Vermont Supreme Court, 109 State Street, Montpelier, Vermont 05609-0801, of any errors in order that corrections may be made before this opinion goes to press.

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

JAN 09 2015

2015 VT 1

No. 2013-215

Natural Resources Board Land Use Panel	Supreme Court
v.	On Appeal from Superior Court, Environmental Division
Donald Dorr, MGC, Inc., and Dorr Oil Company	October Term, 2014

Thomas S. Durkin, J.

William H. Sorrell, Attorney General, and Gavin J. Boyles and Scot L. Kline, Assistant Attorneys General, Montpelier, for Petitioner-Appellee.

Nathan H. Stearns of Hershenson, Carter, Scott & McGee, P.C., Norwich, for Respondents-Appellants.

PRESENT: Reiber, C.J., Dooley, Skoglund and Robinson, JJ., and Morse, J. (Ret.), Specially Assigned

¶ 1. **MORSE, J. (Ret.), Specially Assigned.** This is an appeal from a judgment of the Superior Court, Environmental Division affirming an administrative finding of the Natural Resources Board (NRB) that respondents' gravel-extraction activities violated an Act 250 residential-subdivision permit. Respondents contend the ruling was in error because the permit had expired. We affirm.[1]

---

[1] Although the three respondents in this matter—Donald Dorr, Dorr Oil Company, and MGC, Inc.—raised some issues below relating to their individual and corporate responsibility, the trial court found that they had largely disregarded corporate formalities, and concluded that they were jointly and severally liable for the Act 250 violations. Respondents have not challenged this ruling on appeal. Thus, except for occasional references by name to a separate respondent for purposes of factual accuracy, we shall generally refer in this opinion to "respondents."

¶ 2. The material facts are largely undisputed, and may be summarized as follows. The subject property consists of two large parcels of land off of Route 7 in the Town of Manchester. Sand, rock, and gravel have been extracted from a portion of one or both parcels for decades. In September 1990, respondents' predecessor-in-interest received an Act 250 permit authorizing a nineteen-lot residential subdivision on the northern parcel (the "residential project tract"). Among other conditions, the Act 250 permit provided that it would expire one year from the date of issuance if the permittee had not demonstrated an intention to proceed with the project in accordance with 10 V.S.A. § 6091(b) (providing for the expiration of a permit if not "used" within three years), and otherwise would expire on October 1, 2020 unless extended by the District Environmental Commission. Other permit conditions prohibited any "changes . . . in the design or use" of the project without written approval of the district coordinator or commission, and specified that the permit and all conditions therein would "run with the land and . . . be binding upon and enforceable against . . . all assigns and successors in interest."

¶ 3. In September 1992, the district commission issued an amendment to the permit extending the time for construction of the project to October 1994. In June 1994, respondent Dorr Oil Company purchased the residential project tract. The warranty deed expressly referenced the Act 250 permit "and any and all amendments thereto." Shortly thereafter, respondent Donald Dorr—on behalf of Dorr Oil—applied for and received a further permit amendment extending the time for construction to October 1995.

¶ 4. During this period, another company operated by Dorr, respondent MGC, Inc., purchased the southerly parcel (the "adjacent tract"), and continued to operate a gravel pit "most or all" of which the trial court found was located on the adjacent tract. Dorr took no steps thereafter to begin the actual subdivision of the project tract or the development of an internal roadway.

¶ 5. In March 2006, following a property-tax reappraisal of the tracts by the Town of Manchester, respondents filed a request with the district commission to declare the Act 250

permit as abandoned through non-use. The commission, in response, issued a notice of intent to abandon the permit. The owners of a nearby residential property filed an objection, asserting that respondents had made a "material change" to the use authorized by the Act 250 permit by expanding gravel extractions activities onto the residential project tract. The commission then "tabled" the abandonment request "pending a jurisdictional opinion from the district coordinator on the material change question."

¶ 6. The district coordinator thereupon requested further information from the parties, visited the site with respondent Dorr and his attorney, and issued a draft jurisdictional opinion for comment. In January 2007, the coordinator issued a formal opinion, finding that the "Dorr gravel pit has expanded onto the parcel covered by [the Act 250 permit]," that this constituted "a material change to that permit," and therefore that "a permit amendment [was] required." Respondents neither appealed the jurisdictional opinion to the Environmental Division, as authorized by 10 V.S.A. § 6007(d)(4), applied for a permit amendment, nor abated the gravel extraction activities on the project tract.

¶ 7. Following respondents' inaction, in October 2008, the NRB chair issued an administrative order determining that respondents had violated conditions of the Act 250 permit by making a material change to the project without a land-use permit amendment. The order required respondents to pay a fine of $1,250 for the violation, file a complete Act 250 land-use permit amendment application, and cease all gravel pit operations on the project tract until the necessary permit approvals had been obtained. The order informed respondents of the right to request a hearing before the Environmental Division under 10 V.S.A. § 8012(a), and explained that absent such a request the administrative order would become a final judicial order under 10 V.S.A. § 8008(d). Again, respondents neither requested a hearing, filed an amendment application, nor terminated the gravel-pit operations. Accordingly, in November 2008, the trial court signed and entered an order providing that the administrative order had "become a final Judicial Order." Respondents did not appeal that judgment.

¶ 8. Several years later, in January 2013, the NRB issued a further administrative order finding that respondents had violated the 2008 administrative and judicial orders by failing to pay the fine or file a permit amendment. Shortly thereafter, with the trial court's approval, the NRB issued a follow-up emergency administrative order finding respondents in violation of the 2008 orders by virtue of their failure to terminate all gravel pit operations on the residential project tract.[2] See 10 V.S.A. § 8009(a), (b)(3) (authorizing issuance of an emergency administrative order when an activity or violation "presents an immediate threat of substantial harm to the environment" and the Environmental Division finds "a sufficient showing that grounds for issuance of the order exist"). The order directed respondents to cease all earth extraction and related activities until they received the required permit amendment.

¶ 9. Respondents requested a hearing on the emergency order, id. § 8009(d), which was held in early May 2013. At the conclusion of the hearing, the trial court granted the parties' joint request to submit follow-up memoranda, and issued a written ruling several weeks later. The court rejected respondents' principal defense to the order, predicated on their claim that they could not be held in violation of the Act 250 permit because it had expired, either by virtue of its express terms or by operation of law under 10 V.S.A. § 6091(b), which provides that non-use of permit for three years "shall constitute an abandonment . . . and the permit shall be considered expired." The court thus affirmed the administrative order, and issued a final judgment directing respondents to cease all gravel extraction activities on the residential project tract until they received a permit amendment.[3] This appeal followed.

¶ 10. Respondents renew their claim that the enforcement action and trial court judgment were based on an expired Act 250 permit, and therefore invalid. Although the trial court did not expressly consider the question of finality of judgments, we conclude that

[2] The trial court here noted that the NRB had "offered no explanation" for why it waited five years to commence these follow-up enforcement actions.

[3] The trial court denied a subsequent NRB motion to clarify or amend the judgment to include administrative penalties.

respondents' claim is barred by principles of res judicata. See Samplid Enters., Inc. v. First Vt. Bank, 165 Vt. 22, 28, 676 A.2d 774, 778 (1996) (where judgment was otherwise correct, we may affirm on rationale different from trial court). As we have often observed, under the doctrine of res judicata, or "claim preclusion, a final judgment in previous litigation bars subsequent litigation if the parties, subject matter, and causes of action in both matters are the same or substantially identical." Faulkner v. Caledonia Cnty. Fair Ass'n, 2004 VT 123, ¶ 8, 178 Vt. 51, 869 A.2d 103. The doctrine "bars parties from relitigating, not only those claims and issues that were previously litigated, but also those that could have been litigated in a prior action." Carlson v. Clark, 2009 VT 17, ¶ 13, 185 Vt. 324, 970 A.2d 1269 (quotation omitted). We have held, moreover, that so long as the parties have had an adequate opportunity to litigate, the doctrine applies as readily to administrative as judicial decisions when the agency acts in a judicial capacity and the requisite identity of parties and subject matter are otherwise met. In re Tariff Filing of Cent. Vt. Pub. Serv. Corp., 172 Vt. 14, 39, 769 A.2d 668, 687 (2001); Sheehan v. Dep't of Emp't & Training, 169 Vt. 304, 308, 733 A.2d 88, 91 (1999).

¶ 11. As we have explained, claim preclusion rests on the "fundamental precept that a final judgment on the merits puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever." Faulkner, 2004 VT 123, ¶ 8 (quotation omitted). The policies underlying the doctrine rest on the interests of consistency and repose. See Berisha v. Hardy, 144 Vt. 136, 138, 474 A.2d 90, 91 (1984) (characterizing res judicata's "final goals [as] the elimination of repetitive litigation and repose to litigants" (quotations omitted)). Requiring the litigation of all claims that could or should have been raised between the parties precludes later rulings that might "nullify the initial judgment or . . . impair rights established in the initial action." Carlson, 2009 VT 17, ¶ 16 (quotation omitted); see also Pomfret Farms Ltd. P'ship v. Pomfret Assocs., 174 Vt. 280, 284, 811 A.2d 655, 659 (2002) (noting that res judicata doctrine relieves parties of the "vexation of multiple lawsuits, conserves

judicial resources, and, by preventing inconsistent decisions, encourages reliance on adjudication" (quotation omitted)).

¶ 12. It is readily apparent here that respondents' claim—challenging the validity of the enforcement proceeding on the ground that the Act 250 permit had expired either by its terms or by operation of law—was one that could and should have been raised in the earlier administrative and judicial proceedings between the parties. As noted, the NRB commenced an enforcement action in 2008 which resulted in a final judicial order and judgment that respondents had "violated [the Act 250 permit] by making a material change to the permitted project tract without written approval," and a directive to respondents to terminate all gravel pit operations on the property until a permit-amendment application had been filed and approved.

¶ 13. A necessary predicate to the 2008 judgment and order was a valid Act 250 permit that was not abandoned by operation of law. Plainly, therefore, respondents' claim that the Act 250 permit had expired could and should have been raised in that proceeding; the fact that the abandonment request had been "tabled" a year earlier did not render the issue moot or irrelevant in the 2008 enforcement action. Allowing respondents to belatedly raise the expiration claim in this current enforcement action would thus result in unnecessary litigation and potentially undermine the 2008 judgment, in clear contravention of the fundamental goals of consistency, efficiency, and repose served by the claim-preclusion doctrine. Accordingly, we conclude that the claim is barred.[4]

¶ 14. Respondents further assert that—res judicata notwithstanding—if the permit had expired then the NRB and the courts were without subject matter jurisdiction over this Act 250 enforcement action, and therefore the abandonment claim could be raised "at any time." Myers v. Brown, 143 Vt. 159, 164, 465 A.2d 254, 257 (1983). "Subject matter jurisdiction" refers to

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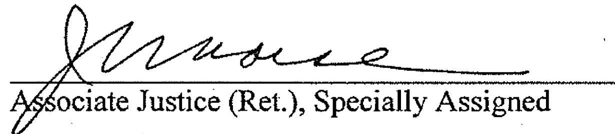
[4] Respondents also suggest, in passing, that the district coordinator lacked authority to address the abandonment issue in its 2007 jurisdictional ruling because NRB rules assign abandonment claims to the district commission. The argument is immaterial, as the issue plainly could have been raised in the 2008 enforcement proceeding.

the fundamental "power of a court to hear and determine a general class or category of cases." Lamell Lumber Corp. v. Newstress Int'l, Inc., 2007 VT 83, ¶ 6, 182 Vt. 282, 938 A.2d 1215. It is a concept easy to confuse with the simple authority to act, and we have, accordingly, been careful to limit the concept in Act 250 and other administrative contexts, where the agency generally exercises limited powers and "virtually any disagreement with its actions can be phrased in jurisdictional terms." In re Denio, 158 Vt. 230, 235, 608 A.2d 1166, 1169 (1992); accord Passion v. Dep't of Soc. & Rehab. Servs., 166 Vt. 596, 599, 689 A.2d 459, 463 (1997) (mem.); In re Wildcat Constr. Co., 160 Vt. 631, 632, 648 A.2d 827, 828 (1993) (mem.). This is not a case where the parties fundamentally "failed to adjudicate the case in the proper statutorily designated administrative tribunal before proceeding to the superior court." Brace v. Vergennes Auto, Inc., 2009 VT 49, ¶ 16, 186 Vt. 542, 978 A.2d 441 (mem.). Accordingly, we find no reason to exempt respondents' claim from the general claim-preclusion rules, and affirm the judgment on this basis.

Affirmed.

FOR THE COURT:



Associate Justice (Ret.), Specially Assigned