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INTRODUCTION

The Commonwealth of Massachusetts and the States of Connecticut and New Hampshire (collectively, “the States”) submit, pursuant to the Secretary’s November 10, 2015 Order, this Reply to respond to Answers submitted by both the Nuclear Regulatory Commission Staff (NRC Staff) and Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, “Entergy”) to the November 4, 2015 Petition of the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and the Green Mountain Power Corporation (collectively, “Petitioners”) for Review of Entergy Nuclear Operations, Inc.’s Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund (Petition).¹ While the Petition was filed to address issues at Vermont Yankee, it raises serious, never before adjudicated questions about the use of decommissioning trust funds that apply to every such fund in the nation, including the funds for Entergy’s Pilgrim Nuclear Power Station (Pilgrim) in Plymouth, Massachusetts, and the James A. FitzPatrick Nuclear Power Plant (FitzPatrick) in Scriba, New York—both of which are now slated for closure between 2016 and 2019. A decision to delay the resolution of these questions or, worse, a decision to adopt the NRC Staff’s and Entergy’s positions, would threaten to undermine nuclear plant owners’ ability to remediate the radiological contamination at plants that have ceased operations and shift the burden of doing so to the States’ taxpayers. For that reason, the Commission must exercise its general supervisory authority to address these issues now.

¹ Because this is not a formal proceeding and because the Secretary’s November 10, 2015 Order did not limit the persons who may file a reply in response to the Order (referring instead to “any answers” and “any reply to an answer”), the States, having serious concerns about how the positions NRC Staff and Entergy asserted in their Answers may affect the States’ distinct interests, file this timely Reply to address them. In the alternative, the States respectfully request that the Commission treat this filing as an amicus brief in support of Petitioners.

The States support the Petition. The interests of the States—two of which lie on Vermont’s border in very close proximity to Vermont Yankee and all three of which lie on the Connecticut River downstream of Vermont Yankee—are aligned with Vermont’s interests, because they could be directly harmed if Vermont Yankee is not decontaminated and would be directly harmed if the decommissioning trust funds for the plants in their states are insufficient to complete the decommissioning process. The States also have a unique interest, which they seek to ensure is recognized and considered in the Commission’s deliberations on the issues set forth in the Petition. Unlike Vermont, each of the States joining this Reply has an operational nuclear power plant located within its borders.² Each of those plants thus has the ability to take steps now to (1) transfer spent fuel into dry casks as soon as the spent fuel is ready for transfer rather than delaying that work until the plants cease operations³ and (2) plan for the payment of *non-*decommissioning activities after the plants cease operations and before the plants are radiologically decontaminated. By doing so, these plants can ensure that their decommissioning trust funds will be used solely to pay for legitimate decommissioning activities until the radiological decommissioning work is complete, as longstanding NRC regulations mandate. *See infra* pp.3-8.⁴

² *E.g.*, Pilgrim Nuclear Power Plant, Plymouth, Mass.; Millstone Nuclear Power Plant, Unit 3, Waterford, Conn.; Seabrook Nuclear Power Plant, Seabrook, N.H.

³ As the NRC has made clear, spent fuel management costs are considered “operational” costs and are costs that NRC requires plants to account for apart from their decommissioning trust fund assets. *See* General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018, 24,019 (June 27, 1988); *see also* 10 C.F.R. § 50.54(bb) (2015).

⁴ To be clear, the States do not object to the use of decommissioning trust funds that remain after the radiological contamination is eliminated. In addition, as explained below, they also do not object to the pre-radiological decontamination use of funds that were collected to perform non-decommissioning activities as long as the use of those funds complies with the NRC’s longstanding guidance. *See infra* pp.7-8 n.15.

This is a particularly pertinent concern for those plants within Entergy’s fleet that have recently announced that they will close (e.g., Pilgrim and FitzPatrick).⁵ For those plants, there will be increasing pressure on the NRC to permit the use of decommissioning trust funds for purposes more broadly related to site restoration and spent fuel waste management and storage—purposes that clearly do not constitute decommissioning as the NRC has defined that term. Unfortunately, the NRC’s overly lenient approach to allowing, either affirmatively or through acquiescence, plant owners to draw on their decommissioning trust funds to pay for non-decommissioning expenses before the decommissioning work is complete has created an untoward incentive for those plants not to plan for the payment of non-decommissioning expenses while they are in operation, and instead to wait until the decommissioning trust fund is the only asset directly available to them. The NRC’s approach is inconsistent with its own regulations and threatens both the environment and public health and safety.

ARGUMENT

I. NRC’S REGULATIONS DICTATE THAT TO PROVIDE ADEQUATE ASSURANCE OF PUBLIC HEALTH AND SAFETY NUCLEAR POWER FACILITY OWNERS MUST RESERVE DECOMMISSIONING TRUST FUNDS SOLELY FOR “DECOMMISSIONING” UNTIL A SITE IS RADIOLOGICALLY DECONTAMINATED.

Decommissioning trust funds are the means by which the NRC complies with its Atomic Energy Act (AEA) obligations to ensure that a licensee has the financial means to decontaminate its site and “provide adequate protection to the health and safety of the public.” 42 U.S.C.

§§ 2201(x)(1), 2232(a). Consistent with these obligations, in 1981, the NRC emphasized that a

⁵ In Massachusetts, for example, State legislators are so concerned about the sufficiency of Pilgrim’s decommissioning trust fund that they have introduced a bill that would require any nuclear power plant in Massachusetts to pay annually \$25 million into a state post-closure fund. *See An Act establishing funding to provide moneys for postclosure activities at nuclear power stations*, Sen. Doc. No. 1798 (Jan. 12, 2015), available at <https://malegislature.gov/Bills/189/Senate/S1798> (last visited Dec. 17, 2015).

“*high degree* of assurance is required from the nuclear facility licensee that adequate funds are available to decommission the facility” so that the agency can comply with its “responsibility to protect public health and safety.” Decommissioning Criteria for Nuclear Facilities; Notice of Availability of Draft Generic Environment Impact Statement, 46 Fed. Reg. 11,666, 11,667 (Feb. 10, 1981) (emphasis added). The NRC then explained that “[c]ompleting decommissioning and releasing the facility for unrestricted use eliminates potential problems of increased numbers of sites used for the confinement of radiological materials, as well as potential health, safety, regulatory and economic problems associated with maintaining the site.” *Id.* To better comply with this obligation, the NRC embarked on a ten year rulemaking effort to establish technical and financial criteria for decommissioning licensed facilities that serve as the foundation for today’s regulatory structure for decommissioning and decommissioning trust funds.⁶

One of the most fundamental decisions that the NRC made in its early efforts to ensure a “high degree” of financial assurance for decommissioning facilities was to define narrowly the term “decommission.” In the 1988 Final Rule, the Commission defined that term to mean “to remove (as a facility) safely from service and to reduce the residual radioactivity to a level that permits release of the property for unrestricted use and termination of the license.” 53 Fed. Reg. at 24,049 (codified at 10 C.F.R. § 50.2 (1989)).⁷ There, the NRC also expressly identified

⁶ General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018 (June 27, 1988); Decommissioning Criteria for Nuclear Facilities, 50 Fed. Reg. 5,600 (proposed Feb. 11, 1985); Decommissioning Criteria for Nuclear Facilities; Notice of Availability of Draft Generic Environment Impact Statement, 46 Fed. Reg. 11,666 (Feb. 10, 1981); Decommissioning Criteria for Nuclear Facilities, 43 Fed. Reg. 10,370 (advanced notice of proposed rulemaking Mar. 13, 1978).

⁷ The current definition of “decommission” is not materially different from the original 1988 definition, and reads: “[d]ecommission means to remove a facility or site safely from service and reduce residual radioactivity to a level that permits—(1) Release of the property for unrestricted use and termination of the license; or (2) Release of the property under restricted conditions and termination of the license.” 10 C.F.R. § 50.2 (2015).

activities that do not constitute decommissioning: “removal and disposal of spent fuel,” “removal and disposal of nonradioactive structures,” and [d]isposal of nonradioactive hazardous waste.” *Id.* at 24,019; *see also id.* at 24,028 (explaining that the Pacific Northwest Laboratory’s cost estimate did “not include the cost of demolition and removal of noncontaminated structures, storage and shipment of spent fuel, or restoration of the site”), 24,031 (same); 10 C.F.R. § 50.75(c) & n.1 (2015) (codifying list).⁸ Subsequent NRC statements have all confirmed that facility owners are allowed to use decommissioning trust funds solely for activities that reduce radiological contamination, not expenses like spent fuel management, removal of nonradioactive structures, disposal of nonradioactive hazardous waste, property taxes, insurance, or attorneys’ fees.⁹ In light of the definition’s plain meaning and NRC’s clear statements, Entergy’s reliance

⁸ The exclusion for the costs associated with the removal and disposal of spent fuel also includes the costs to manage the spent fuel while it is stored on site. *E.g., In re Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.*, Dkt. No. 50-271-LA-3, LBP-15-24, at 4, 82 NRC __ (Aug. 31, 2015) (“*In re Entergy I*, LBP-15-24, at __”); *see also* 10 C.F.R. § 50.54(bb) (requiring licensees to submit a plan detailing how they will manage and fund post-closure management of spent fuel “until title . . . and possession of the fuel is transferred to the Secretary of Energy for its ultimate disposal in a repository.”).

⁹ *See* NRC Regulatory Guide 1.184, Decommissioning of Nuclear Power Reactors, Rev. 1, at 6 (Oct. 2013) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13144A840) (listing the activities that do not qualify for use of Decommissioning Trust Funds); Decommissioning Trust Provisions, 67 Fed. Reg. 78,332, 78,340 (Dec. 24, 2002) (distinguishing between radiological and non-radiological decommissioning costs); Decommissioning Trust Provisions, 66 Fed. Reg. 29,244, 29,246 (proposed May 30, 2001) (“the decommissioning trust fund is reserved for decommissioning”); Mem. from William D. Travers, Exec. Dir. for Operations, NRC, to The Commissioners, Subj: Summary of Decommissioning Fund Status Reports (SECY-99-170) (Jul. 1, 1999), *available at* <http://www.nrc.gov/reading-rm/doc-collections/commission/secys/1999/secy1999-170/1999-170scy.html> (last visited Dec. 17, 2015) (“Decommissioning Fund Status Reports Mem.”) (stating that “the NRC specifically excludes” from the 10 C.F.R. § 50.2 decommissioning definition “costs of spent fuel management, demolition of non-radiological structures, and site restoration”); Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. 39,278, 39,285 (July 29, 1996) (“Radiological activities that go beyond the scope of decommissioning, as defined in § 50.2, such as waste generated during operations or demolition costs for ‘greenfield’ restoration, are not appropriate costs”); Use of Decommissioning Trust Funds Before Decommissioning

on NUREG/CR-5884,¹⁰ a report prepared by a private contractor on behalf of the NRC, to attempt to broaden the category of activities that fall within the plain meaning of the definition of “decommissioning” is misplaced. *See* Entergy Answer at 20-21.¹¹

NRC’s regulations make clear that decommissioning trust funds are “restricted to decommissioning expenses . . . until after decommissioning has been completed.” 10 C.F.R. § 50.75(h)(1)(iv) (2015); *see also id.* at § 50.82(a)(8)(i)(A) (2015). Yet, despite this clear directive and the Commission’s prior statements on the need for a high degree of assurance that funds will be available to decommission facilities, the NRC has, as NRC Staff emphasize, routinely granted exemptions from the NRC’s regulations that allow facility owners to use decommissioning trust funds for spent fuel management,¹² and has, as Entergy highlights, otherwise tacitly approved decommissioning trust fund use for purposes that clearly do not

Plan Approval; Draft Policy Statement, 59 Fed. Reg. 5216, 5217 (Feb. 3, 1994) (stating that ensuring that withdrawals are for “legitimate decommissioning activities as defined in 10 CFR 50.2 . . . would prevent funds from being used for activities that do not reduce radioactivity at the site”).

¹⁰ NUREG/CR-5884, Revised Analyses of Decommissioning for the Reference Pressurized Water Reactor Power Station (Nov. 1995) (ADAMS Accession No. ML14008A187).

¹¹ Notably, NRC Staff does not resort to this misplaced authority in their Answer. *See* NRC Staff Answer 1 - 69. Moreover, while Entergy argues that NUREG/CR-5884 is “entitled to special weight,” *see* Entergy Answer at 20 n.89, that document was, again, prepared by a contractor and thus does not constitute NRC’s own view of the meaning of the term decommission. And even if it were considered both an interpretation of that term *and* the NRC’s own interpretation of it, an agency interpretation that is inconsistent with its regulation, as would be the case here, is not entitled to any weight at all. *See League of Wilderness Defenders/Blue Mtns. Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1189 (9th Cir. 2002) (refusing to give any weight to two opinion letters because they lacked “the power to persuade”); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that formal agency interpretation of its own regulations is entitled to no weight if it is “inconsistent with the regulation.”).

¹² NRC Staff Answer at 24-25 & nn.113 & 114.

constitute legitimate decommissioning expenses.¹³ In other words, the narrow exception has become the de facto rule despite the NRC’s prior expressed concerns about the need to jealously protect decommissioning trust funds for their intended purpose until that purpose is achieved—concerns that are all the more real in a de-regulated world and when a plant is placed in “safe storage” and decontaminated within a sixty year period (e.g., SAFSTOR, *see* 53 Fed. Reg. at 24,021 (defining term)). Indeed, the Commission has recognized that the latter two issues necessitate increased funding assurance, because (1) de-regulated plants cannot collect decommissioning funds from ratepayers and will not generate any new revenue once they cease operations, and (2) it is impossible to predict all of the contingencies that could occur during a sixty-year period and how those contingencies will affect decommissioning costs.¹⁴

The NRC Staff claim that none of the issues raised in the Petition warrant Commission review because they are not “novel,” *see* NRC Answer at 24, but the fact that the NRC repeatedly has followed a path that is both inconsistent with its regulations and its own prior expressed conservatism regarding fund use makes it even more critical for the Commission to review them now.¹⁵ A mistake, of course, cannot be made right through mere repetition; instead,

¹³ Entergy Answer at 22 & n.100.

¹⁴ In 1996, for example, the NRC wrote that “with electric utility deregulation becoming more likely, it may need to require *additional* decommissioning funding assurance for those licensees that are no longer able to collect full decommissioning costs in rates or set their own rates.” 61 Fed. Reg. at 39,285 (emphasis added). In a similar vein, in 1988, the NRC noted, quite correctly, that there is “as great or greater need for assurance of funds over the extended timeframe involved with a facility in SAFSTOR when the facility is no longer a revenue producing asset.” 53 Fed. Reg. at 24,034.

¹⁵ For its part, Entergy argues that the fact that the decommissioning funds its predecessor collected from ratepayers included the cost to pay for property taxes, insurance, emergency planning fees, spent fuel management, and non-radiological decontamination costs demonstrates that all of those costs qualify as decommissioning costs. Entergy Answer at 23 n.101. That is wrong, however. In addressing this issue in 2002, the Commission explicitly acknowledged that State utility regulators had either allowed or required facilities to collect funds that went beyond

a mistake's repetition makes it all the more urgent to remedy. And even if that were not reason enough, an Atomic Safety Licensing Board (ASLB) Panel recently noted "that neither the Commission nor any licensing board has had the opportunity to interpret the meaning of 10 C.F.R. § 50.75(h)(5), and that there exists a genuine dispute over what costs constitute legitimate decommissioning expenses."¹⁶ In short, and as Petitioners correctly warn, the NRC's lenient approach to plant owner use of decommissioning funds for virtually any expense following cessation of power generation and before the completion of radiological decontamination has created a dangerous incentive for plant owners to plan to rely exclusively on their decommission trust funds to cover those expenses. *See* Petition at 42. That incentive puts public health and State taxpayers at risk and these issues thus require Commission consideration and action now.

II. NRC MUST ENSURE THAT NUCLEAR FACILITY OWNERS DISCLOSE ALL EXPENSES FOR WHICH THEY SEEK TO WITHDRAW MONEY FROM DECOMMISSIONING TRUST FUNDS PRIOR TO THE WITHDRAWAL AND MAKE THAT INFORMATION AVAILABLE TO THE PUBLIC TO PREVENT MISUSE OF THOSE FUNDS.

The NRC must ensure that nuclear facility owners disclose all expenses for which they seek to use decommissioning trust funds to prevent continued misuse of those funds and the serious implications that misuse poses for the environment and public health and safety. As the U.S. Court of Appeals for the Seventh Circuit has recognized, the NRC is "the designated policeman of decommissioners," and in that role it has the authority to address "every potential

the NRC's definition of decommission, concluded that those funds could be co-mingled with radiological decommissioning funds, and required, in those instances, facilities to create separate sub-accounts "so funds for each type of activity are appropriately identified." 67 Fed. Reg. at 78,339-40. These funds can appropriately be used by plant owners to pay for non-decommissioning costs prior to the completion of radiological contamination and the States do not take issue with this process as long as the plant owners account specifically for the use of these funds.

¹⁶ *In re Entergy I*, LBP-15-24, at 43; *see also In re Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.*, Dkt. No. 50-271-LA-3, LBP-15-28, at 11, 82 NRC __ (Oct. 15, 2015) ("*In re Entergy II*, LBP-15-28, at __").

malfeasance or misfeasance of assets dedicated to the decommissioning process.” *Pennington v. ZionSolutions LLC*, 742 F.3d 715, 719 (7th Cir. 2014). The NRC cannot perform that role properly, however, unless nuclear facility owners disclose the details of the expenses they seek to pay for with decommissioning trust fund assets *before* the withdrawal occurs. As explained more fully below, pre-disbursement notice is especially important for merchant reactor nuclear plants like Vermont Yankee and Pilgrim because they do not have direct access to any other source of funds once they cease operations and it would thus be complicated for NRC to remedy an inappropriate withdrawal *after* it occurs. *See* 53 Fed. Reg. at 24,034.

The risks associated with plants that do not have direct access to funds after they close is exacerbated by the manner in which some companies have organized their corporate structures and associated assets. By separating the parent entity’s assets from the plants themselves, these companies have complicated the NRC’s ability to reach the parent entity’s assets to remedy an unlawful decommissioning trust fund withdrawal or any trust-fund shortfall to ensure completion of the decommissioning process without the expenditure of public funds. Entergy, for example, has created a complex corporate structure in which one company, Entergy Holding Companies, LLC, holds the licenses to operate Entergy’s merchant plants but does not also own the plants, and separate limited liability companies hold the licenses to possess the plants.¹⁷ And all of those entities are then themselves separated from the parent entity—Entergy Corporation.¹⁸ In

¹⁷ *See* Ltr. from John J. Sipos, Assistant Attorney General, New York Attorney General’s Office, to Eric J. Leeds, Director, Office of Nuclear Reactor Regulation, Nuclear Regulatory Commission. re Dockets 50-333, 50-271, and 50-293 NRC Enforcement Proceeding No. 2013-0192, at 3-7 (Dec. 2, 2013 (corrected)) (ADAMS Accession No. ML15027A458) (explaining each entities role and providing a diagram of the structure).

¹⁸ *See* State of New York Comments on Proposed Decision, NRC Dkt. Nos. 50-333, 50-293, 50-271, at 13 (Apr. 27, 2015) (ADAMS Accession No. ML15268A260) (providing diagram of Entergy’s corporate structure).

this way, Entergy has attempted to shield the assets of its parent and affiliated entities from the potential liabilities associated with the limited liability companies that either own or operate its merchant reactors. Thus, if neither the NRC nor a State receives notice of a proposed inappropriate decommissioning trust fund withdrawal before the withdrawal occurs, it would unnecessarily complicate efforts to force the licensee to repay those funds into the trust because *its* only source of funds would be the trust. Or, even worse, if the limited liability company holding the license to possess the plant were to claim lack of funds, that claim would also complicate efforts to force the parent entity to fill that void. While the NRC Staff have argued that the NRC will “pursue Entergy” if there is a funding shortfall, it has not explained how it would do so and it has said nothing at all as to how it would remedy an unlawful withdrawal from a decommissioning trust fund. *See* NRC Staff Answer at 44.

In prior statements, the NRC has itself emphasized the importance of receiving pre-decommissioning trust fund disbursement notices. In 2002, for example, the Commission concluded “[w]ith respect to . . . 30-day notification for disbursements” that it “needs to have this information in a timely fashion . . . to effectively monitor licensees, especially when a licensee is not in decommissioning under the PSDAR or an approved license termination plan.” 67 Fed. Reg. at 78,335-36. And, in an earlier 1999 Memorandum to the Commissioners, the NRC’s Director of Operations stated that the NRC needs “to require more direct NRC oversight over the decommissioning trust funds” at non-rate regulated facilities, like Pilgrim.¹⁹ There, the Staff noted that it required the decommissioning trusts for two facilities, including Pilgrim, to be modified to include language that, *inter alia*, required the facility owners to “provide 30-day notice to the NRC of disbursements from the trusts and prohibit trust fund disbursements if the

¹⁹ Decommissioning Fund Status Reports Mem., *supra* note 9, at 3.

Director of NRR objects.”²⁰ In short, the Commission needs detailed, pre-disbursement notifications so that it can perform its regulatory functions and ensure that decommissioning of all licensed facilities will be accomplished in a safe and timely manner.

The ASLB Panel’s recent Memorandum and Order in *In re Entergy I*, LBP-15-24 granting Vermont’s request for a hearing on two contentions and the Panel’s later Order in *In re Entergy II*, LBP-15-28 allowing a conditional withdrawal of Entergy’s license amendment request (LAR) in that proceeding highlight the necessity of pre-disbursement notices and the need for the Commission to address the issues raised in the Petition now. After the Panel granted Vermont’s request for a hearing on “the necessity of a 30-day notice requirement in light of the specific factual issues that Vermont’s petition allege[d] will reduce the fund to such an extent that the plant cannot be maintained in a safe condition,” *In re Entergy I*, LBP-15-24, at 28-29; *see also In re Entergy II*, LBP-15-28, at 2 (defining issue), Entergy, supported by NRC Staff, asked to withdraw its LAR to avoid resolution of this issue. Despite the Panel’s conclusion that an actual dispute existed over the Entergy’s use of the Vermont Decommissioning Trust Fund and the importance of the 30-day notices to the NRC’s and Vermont’s efforts to evaluate those uses, remarkably, Entergy opted to provide even *less* information in its next thirty (30) day withdrawal notice to the NRC. *In re Entergy II*, LBP-15-28, at 9. In partial response to that fact, the Panel agreed to require Entergy to disclose details about six specific line items in its future 30-day notices so that those withdrawals can be “policed.” *Id.* at 11-12.²¹

²⁰ *Id.*

²¹ Those specific items are six line items in the Vermont Yankee Post Shutdown Decommissioning Activities Report (PSDAR) and the legal costs associated with an earlier proceeding. *In re Entergy II*, LBP-15-28, at 11. The six line items are: “(1) a \$5 million payment to Vermont as part of a settlement agreement; (2) emergency preparedness costs; (3) shipments of non-radiological asbestos waste; (4) insurance; (5) property taxes; and

All of this makes clear that the submission of detailed pre-decommissioning trust fund disbursement notices is necessary for the NRC to execute its obligations under AEA and existing regulations. In those instances where the licensee has an existing obligation to provide 30-day pre-disbursement notice, NRC staff should oppose any effort by the licensee to seek to eliminate that obligation through a LAR or by simply failing to comply with its existing trust agreement. But, in light of the NRC Staff's apparent acquiescence in facility owners' historically improper interpretation of what constitute legitimate decommissioning expenses, *supra* pp.6-7,²² the Commission must also ensure that the pre-disbursement notices detail all proposed expenses and make those notices readily available to States and the public. Public transparency is, after all, the hallmark of the most successful regulatory programs in the United States. Given the critical importance of the decommissioning trust funds to the achievement of radiological decontamination and the relationship of the success of that requirement to the environment and public health and safety and State treasuries, States and the public have a right to know whether those funds are being used lawfully for their intended purpose, and to call on the NRC to take action when they are being misused.

III. IF THE NRC ALLOWS NUCLEAR PLANT OWNERS TO USE DECOMMISSIONING TRUST FUNDS FOR NON-DECOMMISSIONING PURPOSES PRIOR TO COMPLETE RADIOLOGICAL DECONTAMINATION, THE NRC MUST COMPLETE A NEPA COMPLIANT-REVIEW OF THE POTENTIAL ENVIRONMENTAL CONSEQUENCES OF THAT DECISION.

The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347, is “our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a) (2015). The Act has

(6) replacement of structures related to dry cask storage, such as a bituminous roof.” *Id.* (citation omitted).

²² *See also In re Entergy I*, LBP-15-24, at 5 n.24 (noting that it is “curious that NRC Staff would approve a request to exempt a licensee from regulations which do not apply to the licensee” and that “[i]t is even more curious that the NRC Staff purports to make such an exemption effective immediately.”).

two purposes. *United States v. Coalition for Buzzards Bay*, 644 F.3d 26, 31 (1st Cir. 2011). “First, it ‘places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action.’” *Baltimore Gas & Electric v. NRDC*, 462 U.S. 87, 97 (1983) (citation omitted). “Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.” *Id.* (citation omitted). To achieve these purposes, NEPA “demands that a decisionmaker” take “a hard look” at “all significant environmental impacts before choosing a course of action,” *Sierra Club v. Marsh*, 872 F.2d 497, 502 (1st Cir. 1989). While the Act does not dictate particular results, its procedures are intended to “affect the agency’s substantive decision.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

The NRC Staff has determined not to comply with the Commission’s NEPA obligations, including the obligation to consider potential cumulative impacts, both in the context of its decision to exempt Entergy’s Vermont Yankee plant from certain decommissioning regulations and more generally from the issues raised by the Petition in its Answer here. Both Entergy and NRC Staff point to the 2002 *Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities* (NUREG-0586, Supplement 1) (Decommissioning GEIS) to support their positions. NRC Staff Answer at 56; Entergy Answer at 12, 37.²³ Neither Entergy nor the NRC Staff acknowledges, however, that the Decommissioning GEIS did not consider the potential environmental consequences of the costs of non-decommissioning activities, such as spent fuel management, or of withdrawing funds from decommissioning trust funds to pay for those costs. Indeed, the NRC states in the Decommissioning GEIS that “issues related to spent fuel

²³ *Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities* (NUREG-0586, Supplement 1) (Nov. 2002) (ADAMS Accession Nos. ML023470304, ML023470323, ML023500187, ML023500211, and ML023500223).

maintenance and storage (including costs) are outside the scope of this Supplement.”

Decommissioning GEIS at App. O-101 (ADAMS Accession No. ML023500211). Moreover, the ASLB effectively rebuffed NRC Staff’s and Entergy’s arguments on this point, concluding that “Vermont’s factual allegations and documentary support” demonstrate “a genuine dispute concerning the completeness and correctness of the LAR and whether the LAR will ensure adequate protection of public health and safety.” *In re Entergy I*, LBP-15-24, at 28.

Finally, it is undisputed that a decommissioning trust fund shortfall may pose significant environmental and public health and safety consequences. *See generally, e.g.*, 53 Fed. Reg. at 24,033. Yet, despite this real world consequence, NRC Staff have treated Entergy’s exemption and LAR requests, which explicitly and implicitly allow Entergy to withdraw funds from the Vermont Yankee decommissioning trust fund for non-decommissioning activities, as mere administrative matters and without consideration of previously unforeseen consequences. For example, as the ASLB also noted, with some NRC Staff concurrence, Vermont Yankee’s PSDAR “assumes that the Department of Energy ‘will begin to take irradiated fuel from [the plant] by 2026, [and] that all irradiated fuel will be eliminated from the Vermont Yankee site by 2052,’” but, in reality, “the *indefinite* storage of spent fuel on-site is a very possible outcome, as demonstrated by the assumptions underlying the Continued Storage Rule.” *In re Entergy I*, LBP-15-24, at 28 (emphasis added). And the exemption Entergy obtained to use decommissioning trust funds to manage spent fuel is hardly a matter of idle curiosity, since it plans to withdraw \$225 million from the fund—over a third of the current amount in the Vermont Yankee decommissioning trust fund—to cover spent fuel management costs. *Id.* at 39 & n.208. Far from requiring no environmental review at all, *see* NRC Staff Answer at 53-54, decisions that threaten to impair the long-term viability of the Vermont Yankee decommissioning trust fund (or

any other decommissioning trust fund) demand that the NRC take the “hard look” at all of the potential environmental consequences, including the cumulative impacts, that NEPA requires so that both the Commission and the public may be fully informed before the NRC makes its decision.

CONCLUSION

For the foregoing reasons, the States respectfully request that the Commission grant the relief Vermont has requested in its Petition, *see* Petition at 59-60, and to grant the States party status to appear and present their views on the issues raised by the Petition and in this Reply.

Dated: December 17, 2015

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

THE COMMONWEALTH OF
MASSACHUSETTS

MAURA HEALEY
ATTORNEY GENERAL

By: /s/ Seth Schofield
SETH SCHOFIELD
Assistant Attorney General
Environmental Protection Division
Senior Appellate Counsel
Energy and Environment Bureau
Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, MA 02108
Tel: (617) 963-2436
Fax: (617) 727-9665
seth.schofield@state.ma.us

Additional Counsel Listed on Next Page

THE STATE OF CONNECTICUT

GEORGE JEPSEN
ATTORNEY GENERAL

By: /s/ Robert Snook
ROBERT SNOOK
Assistant Attorney General
Office of the Attorney General
55 Elm Street, P.O. Box 120
Hartford, Conn. 06106
Tel: (860) 808-5107
robert.snook@ct.gov

THE STATE OF NEW HAMPSHIRE

JOSEPH A. FOSTER
ATTORNEY GENERAL

By: /s/ Peter C.L. Roth
PETER C.L. ROTH
Senior Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, NH 3301
Tel: (603) 271-3679
peter.roth@doj.nh.gov

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

_____)	
In the matter of:)	
)	
ENTERGY NUCLEAR VERMONT YANKEE, LLC)	Docket No. 50-271
AND ENTERGY NUCLEAR OPERATIONS, INC.)	
)	
(Vermont Yankee Nuclear Power Station))	
_____)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing “Reply of the Commonwealth of Massachusetts and the States of Connecticut and New Hampshire to NRC Staff’s and Entergy’s Answers to Petition of the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation for Review of Entergy Nuclear Operation, Inc.’s Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund” was served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above captioned docket.

/ Signed (electronically) by/
Seth Schofield
Assistant Attorney General
Environmental Protection Division
Senior Appellate Counsel
Energy and Environment Bureau
Office of the Massachusetts Attorney
General
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108
(617) 963-2436
seth.schofield@state.ma.us

Dated: December 17, 2015