

Appellants have moved to stay the permit amendment, pending the conclusion of the merits of this appeal. The permit was issued on March 30, 2006, and allows the thermal discharge from Entergy Nuclear/Vermont Yankee to increase the temperature of the Connecticut River by an additional 1° F, within a defined measurement area or mixing zone, from June 16 through October 14 of each year.¹ Appellants argue that the stay will preserve the status quo of Applicants' previous permit conditions during this litigation, which is now scheduled to be heard in late January and early February² of 2007.

The Court must consider the movants' likelihood or substantial possibility of success on the merits of this de novo appeal, irreparable injury that may occur in the absence of the stay, whether the grant of the stay will substantially harm other parties, and whether the stay will serve the best interests of the public. In re Allied Power & Light Co., 132 Vt. 554, 556 (1974), as discussed by Justice Skoglund in issuing a stay during the pendency of the appeal in In re Stormwater NPDES Petition, Docket No. 2004-515 (Vt. Supreme Ct., April 7, 2005).

Appellants have come forward with sufficient evidence to demonstrate a substantial possibility that they will prevail on the merits; that is, a sufficiently substantial possibility to examine and weigh the other factors to be considered in whether or not to grant a stay. Unlike federal judicial review of agency action, no presumption is afforded the fact that the

¹ The underlying permit of which this is an amendment expired on March 30, 2006; the renewal permit process is ongoing and may result in the issuance of a renewal permit before the close of 2006. If and when an appeal is filed from the issuance of the renewal permit, we will consider whether it should be consolidated with the present proceedings. V.R.E.C.P. 2(b), and see V.R.E.C.P. 1.

² At present, the following dates are being reserved for this trial: January 24-26, January 30 and 31, February 1 and 2, February 6-9, and February 13-16. Please be prepared to discuss whether fifteen trial days will be sufficient and whether the parties will be able to use these specific dates.

permit amendment was issued. The Court is not charged with determining whether the ANR's decision is supported by substantial evidence in the record as a whole; rather, it is charged with considering the application de novo, applying the same substantive standards that the ANR is required to apply. The Applicant will bear the burden of proof that it qualifies for a waiver of the thermal effluent limitation otherwise applicable to it.

Appellants have shown sufficient potential for irreparable injury to American shad in the Connecticut River, both at present as the juveniles become accustomed to cooler water temperatures prior to their migration down the River in the fall, and in the summer of 2007 for the growth of the next generation of juveniles.


On the other hand, the grant of the stay will not substantially harm other parties. The consequence to the Applicant will only be a financial one, and consequently not irreparable by definition, in that energy that could otherwise have been sold will have to be expended on the operation of the cooling towers. The Applicant will be able to operate under its previous permit during the pendency of its renewal permit application, as well as during the pendency of the present appeal over its thermal effluent waiver amendment application. The public will view the plume of water vapor from the cooling tower, but no substantial harm has been shown to result from the mere visibility of the plume to the public. No evidence of drought conditions or impairment of the River, and consequently no substantial harm to the public interest, has been shown to be occurring during present conditions, due to the removal of the cooling water and its evaporation into the atmosphere.

The best interests of the public will be served by granting the stay so that it is not only in effect for September and the first half of October of 2006, but so that it remains in effect if this matter is not resolved by the time that adult American shad return to the River in April to spawn, for the 2007 component of the life cycle of the 2007 cohort of juvenile shad in the River.

This stay will remain in effect until further order of the Court, without prejudice to any motions to amend or lift the stay based upon evidence or arguments not already made to the Court in the present motion memoranda. The parties should expect that, if any motions are filed based on any potential trade-off of environmental consequences between the use of the air (that is, the cooling towers) and the use of the river water for cooling purposes, such motion will be scheduled for an evidentiary hearing.

Accordingly, based on the foregoing, it is hereby ORDERED and ADJUDGED that Motion for Stay is GRANTED until further order of the Court. We will hold a telephone conference this afternoon at 4:30 to discuss this order and the relative scheduling of any other necessary pretrial work, as well as the scheduled trial dates. If the parties wish to discuss moving any of the trial dates, to the extent possible they should be prepared at the conference with the unavailable dates for themselves and their witnesses from mid-February through mid-June of 2007.

Done at Berlin, Vermont, this 28th day of August, 2006.



Merideth Wright
Environmental Judge