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

Order entered: 6/19/2013

ORDER RE: MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

On November 21, 2012, Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (together, "Entergy VY") filed a Motion for Partial Summary Judgment on Water Quality Issues Finally Litigated in Prior Proceedings and to Strike Prefiled Testimony and Other Evidence Pertaining to Such Issues.[1] The Department of Public Service ("Department"), Agency of Natural Resources ("ANR"), Windham Regional Commission ("WRC"), Vermont Natural Resources Council ("VNRC") and Connecticut River Watershed Council ("CRWC")[2] opposed the grant of summary judgment. Several of these parties also contested Entergy VY's statement of undisputed material facts.

In this Order, the Vermont Public Service Board ("Board") denies Entergy VY's Motion.

II. BACKGROUND

The Vermont Yankee Nuclear Power Station (the "VY Station") discharges non-contact cooling water into the Connecticut River. This discharge is subject to the requirements of the

1. The Summary Judgment Motion was accompanied by a Statement of Undisputed Material Facts in Support of Motion for Partial Summary Judgment.

2. VNRC and CRWC are jointly represented. In this Order, we refer to the two organizations collectively as CRWC.

federal Clean Water Act[3] (the "CWA") and Vermont law, including Vermont water quality standards ("WQS") promulgated under Section 303 of the Clean Water Act.[4] Under the CWA, Entergy VY must obtain a permit under the National Pollutant Discharge Elimination System ("NPDES"), which requires permits for discharges from point sources into waters of the United States. The federal Environmental Protection Agency ("EPA"), which is responsible for administration of the CWA, has authorized ANR to implement the NPDES program in Vermont. As a result, ANR, rather than the EPA, issues NPDES permits.

NPDES permits under the federal act are for a period up to five years.[5] Such a permit may be extended beyond its expiration deadline if the permittee has made a timely application and the new permit has not been issued (unless through fault of the applicant). During its term, an NPDES permit may be modified, suspended, or revoked "for cause."[6] NPDES permits must reflect both technology-based standards based upon the best available technology, to the extent that the EPA has promulgated them, and ensure compliance with state WQS. In the context of the VY Station, the discharge of heated water constitutes the discharge of a pollutant because heat is considered a pollutant and regulated by the NPDES permit.

Entergy VY's current NPDES permit for the VY Station was issued in 2001, with an expiration date of March 30, 2006. Entergy VY applied for a renewal permit on September 30, 2005, and , therefore, its permit continues in effect until the issuance of a new permit.[7]

At issue in the Summary Judgment Motion is not the original NPDES permit, but a modification that Entergy VY requested on February 20, 2003, to increase the thermal limits in the permit during the period from May 16 through October 14 each year by an additional one degree Fahrenheit. ANR approved the proposed increase on March 30, 2006, for the period

---

3. 33 U.S.C. §§ 1251 *et seq*.
4. 33 U.S.C. § 1313.
5. 40 CFR § 122.46.
6. *In re Entergy Nuclear/Vermont Yankee Thermal Discharge permit amendment,* Docket No. 89-4-06 VTec at 3 ("VEC Decision").
7. *Id.* at 5.

June 6 through October 14 each year, but denied the request for the period from May 16 through June 15.[8] ANR's decision was then appealed. The Vermont Environmental Court, after a *de novo* review, granted the modification for the same period as did ANR. The modification was then upheld on appeal to the Vermont Supreme Court.[9]

In this proceeding, several parties have raised issues concerning whether the discharge from the VY Station is consistent with the public good, even though it is presently authorized under Entergy VY's expired, but still effective, NPDES permit. In turn, Entergy VY objects to consideration of the impacts of the thermal discharge as part of our public good determination.

III. POSITIONS OF THE PARTIES

A. Entergy VY

Entergy VY asserts that the Board has no authority or jurisdiction to resolve the thermal discharge issues raised by other parties in this proceeding. According to Entergy VY, the discharges are fully regulated by ANR through its EPA-approved NPDES program and thus only ANR is authorized to administer that program. Entergy VY stresses that the NPDES permit issuance (and modification) process includes both ANR review and issuance of the permit, as well as the right for full judicial review of ANR's decision; a part of this judicial review is a full, *de novo*, evaluation of the proposed permit by the Environmental Court. Entergy VY contends that by satisfying the more specific statutory requirements of the NPDES program, Entergy VY necessarily satisfies any more general requirements arising from the Board's determination of whether operation of the VY Station after March 21, 2012, promotes the public good.

Entergy VY maintains that, even if the Board still retains some residual authority, the Board should defer to ANR, the agency with primary jurisdiction. Entergy VY contends that failure to do so could compromise the authorization granted to ANR under the CWA to administer the federal NPDES permit program. In a Supplemental Brief filed May 24, 2013, Entergy VY reiterated its view that, since ANR is now actively engaged in the permit renewal process, the Board should defer to ANR's review.

---

8. VEC Decision at 20–21.
9. *In re Entergy Nuclear Vermont Yankee Thermal Discharge Permit 3-1199*, 187 Vt. 142 (2009).

Finally, Entergy VY's Supplemental Brief asserts that no party has overcome the rebuttable evidentiary presumption that the Board has applied to an NPDES permit and ANR rules that there is not an undue adverse impact upon the environment .

Entergy VY also argues that the principles of res judicata and collateral estoppel "prohibit the Board from revisiting the issues that were finally determined in the prior litigation."[10] According to Entergy VY, ANR, CRWC, the New England Coalition, Inc., and the Department are precluded from raising concerns related to the thermal discharge from the VY Station into the Connecticut River. Entergy VY contends that parties had a full and fair opportunity to litigate thermal discharge issues before ANR (in the context of issuance of the NPDES permit amendment) and on appeal before the Vermont Environmental Court, and the Vermont Supreme Court. Entergy VY acknowledges that the Department was not a party to the prior litigation, however, it asserts that the general rule is that litigation by one agency is binding upon others unless there are important difference in the authority of the two agencies.

B. Department

The Department contends that Entergy VY is not entitled to summary judgment. The Department asserts that the prior Environmental Court proceeding in which examination of Entergy VY's NPDES permit was examined does not preclude claims raised in this proceeding by the Department, which was not a party to that prior case, nor does that proceeding prevent the Board from considering the water quality issues. The previous case, avers the Department, involved different parties, different claims and was subject to different legal standards. The Department asserts that it has different responsibilities than ANR and that the two agencies do not represent one single legal interest. The Department further maintains that Entergy VY is incorrect when it argues that the Board lacks jurisdiction over the water quality issues; according to the Department, the Board is authorized to consider water quality issues in determining whether issuance of a CPG to Entergy VY will promote the general good of the state. The Department also contends that the Board has made clear that an NPDES permit may create a

10. Entergy VY Motion at 4.

rebuttable evidentiary presumption, but that parties retain the ability to present counter arguments.

C. ANR

ANR contends that Entergy VY's assertion that the Board has no authority to consider water quality concerns in this proceeding and that those matters are exclusively within ANR's jurisdiction "is patently inconsistent with Vermont law."[11] ANR argues that the Board has broad authority to determine the public good under 30 V.S.A. § 231 and that, in the context of ongoing operation of a generating source, such a determination must address the environmental impacts associated with such operation. ANR asserts that such consideration necessarily incorporates examination of the Act 250 criteria incorporated in 30 V.S.A. § 248(b)(5), including the requirement that there will be no undue water pollution. Citing *In re Hawk Mountain Corp*., ANR maintains that this includes issues beyond compliance with applicable regulations and permits.[12]

ANR further argues that the doctrines of res judicata and collateral estoppel do not apply to the water quality evidence offered in this proceeding. ANR asserts that the Vermont Environmental Court's decision (and Vermont Supreme Court's review) examined only the narrow question of the amendment to an existing permit. By contrast, the inquiry before the Board, ANR contends, is the broader question of whether the continued operation of the VY Station promotes the general good of the state. ANR also maintains that res judicata does not apply where an agency's decision left open the possibility of reviewing the matter again. In this instance, the NPDES permit that Entergy VY had (which has expired but remains in effect) contemplated reassessment during the renewal process. Therefore, according to ANR, the previous rulings lacked the finality necessary to establish res judicata. Finally, ANR argues that the issue before the Board is not the same claim that was litigated previously. In particular, ANR points out that in the Vermont Environmental Court's review, parties were prohibited from exploring issues beyond the scope of the amendment request.

---

11. ANR Memorandum in Opposition at 1.
12. 149 Vt. 179, 182 (1988).

D. CRWC

CRWC argues that Entergy VY itself, rather than other parties, should be barred from relitigating the scope of Board review. CRWC cites the Board's decision in Docket 6812, in which the Board considered a petition from Entergy VY to modify the VY Station to enable an increase in the power output. At that time, CRWC assert, the Board ruled that environmental permits (in that case, the NPDES permit) were rebuttable presumptions in proceedings under Section 248 and that parties had the opportunity to present other evidence based upon the statutory criteria. According to CRWC, the Board did impose additional conditions requiring Entergy VY to reduce power production at a faster rate than required by the NPDES permit.

CRWC also contends that res judicata and claim preclusion do not apply because the Board's review under Section 231 includes different standards and subject matter than the NPDES permit process.

IV. DISCUSSION

A. Board Authority to Examine Water Quality Issues

Entergy VY's primary assertion is that the Board lacks authority to consider water quality impacts in this proceeding. This requires examination first of the scope of the Board's review under Vermont law. Entergy VY's petition in this Docket presents the question of whether the Board should amend a CPG under Section 231 to authorize Entergy Nuclear Vermont Yankee to own and Entergy Nuclear Operations to operate the VY Station after March 21, 2012.[13] By statute, the Board must decide whether the amendment will promote the general good of the state. Section 231 itself provides no more specificity.

Over time, the Board has examined a number of factors in determining whether a company's ownership or operation promotes the general good of the state. As we explained recently in Docket 7770:

---

13. The ownership and operation of the VY Station after March 21, 2012, is also limited by the Order approving the sale of the VY Station to Entergy VY in 2002. Docket 6545, Order of 6/13/02, Condition 8. That condition prohibited operation after March 21, 2012, unless Entergy VY had requested and been granted a new CPG. It is not necessary for the Board to amend Condition 8 in this proceeding as, if the Board grants Entergy VY's request, the limitations in Condition 8 will no longer have any effect.

> 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 making its public good assessment, the Board has examined a number of different criteria.[15] However, the Board has also made clear that these various factors are considerations to be

---

14. Docket 7770, Order of 6/15/12 at 23.

15. For example, see Docket 5900, *Joint Petition of New England Telephone & Telegraph Company, d/b/a NYNEX, NYNEX Corporation, and Bell Atlantic Corporation for approval of a merger of a wholly-owned subsidiary of Bell Atlantic Corporation into NYNEX Corporation*, Order dated 2/26/97 at 8–9, where the Board identified the following fifteen criteria.

1. Legal authority for the transaction from the Federal Communications Commission;
2. Availability of emergency services;
3. Compatibility with neighboring systems;
4. Terms and conditions of service would be just and reasonable;
5. Service quality;
6. Customer Service;
7. Quality of the facilities;
8. Rate of capital investment;
9. Financial stability and soundness;
10. Control of affiliate interests;
11. Competence of management;
12. Technical knowledge, experience and ability;
13. Business reputation;
14. Transaction should produce efficiencies;
15. Transition should not impair competition.

We have further attempted to synthesize these factors into groups, focusing on broad categories:

1. Whether the new company is competent.
2. Whether the new company is financially sound.
3. Whether the new company will act as a fair partner in business transactions with the citizens of Vermont.
4. Whether the new company will create new benefits for the state.
5. Whether the transaction will impair or obstruct competition.

Joint Petition of Northern New England Telephone Operations, Telephone Operation Company of Vermont, Enhanced Communications of Northern New England, and FairPoint Communications, Docket No. 7299, Order of 6/28/10, at 18–20; *Joint Petition of Green Mountain Power Corporation, Northern New England Energy Corporation, a subsidiary of Gaz Metro of Quebec, and Northstar's Merger Subsidiary Corporation for approval of a merger*, Docket No. 7213, Order of 3/26/07 at 9–10; *Joint Petition of Bell Atlantic Corp. and GTE Corp. for approval of Agreement and Plan of Merger*, Docket No. 6150, Order of 9/13/99 at 48–49.

weighed; ultimately, there is only one inquiry — whether granting the petition will promote the general good of the state.[16]

These criteria were developed, and have been applied, largely in the context of companies that deliver retail service. Thus, as Entergy VY has pointed out, some of these standards do not apply to a merchant generator that sells power only at wholesale. For example, the Board has previously recognized the differences between the considerations that apply to retail and wholesale utilities.[17]

At the same time, we must also recognize that the amendment of Entergy VY's CPG presents considerations that are different from those reviewed in past requests under Section 231 — namely, amendment of Entergy VY's CPG would have the effect of authorizing the operation of the VY Station for an additional 20 years. This is the result of two factors: (1) Entergy VY is a single asset company, so that absent authorization under Section 231, it has no authority to operate the VY Station; and (2) Entergy VY proposed — and the Board, relying upon that commitment — accepted the imposition of a time limit on operation of the VY Station, absent further Board action that granted Entergy VY authorization to own and operate the VY Station after March 21, 2012, for purposes other than decommissioning. Thus, unlike almost all prior Section 231 proceedings, the issuance of a CPG here could lead (among other things) to (1) extending the land use and environmental impacts of the VY Station, (2) the provision of greater economic benefit to the state of Vermont, and (3) altering the reliability of the power system — the type of impacts that are normally reviewed in Section 248 proceedings.

Entergy VY highlighted the direct linkage between an extension of its CPG and the factors normally reviewed in Section 248 proceedings at the time it acquired the VY Station. In its Brief arguing that the Board should approve the sale and grant Entergy VY a CPG, Entergy VY stated:

> As to the particular criteria the Board would consider in the CPG extension case, ENVY anticipates that the Board would review renewal of the CPG under the standard of "General good of the state" set forth in 30 V.S.A. §§ 201 and 231, as that standard would apply to the action for which approval is being sought, i.e.,

16. Docket No. 6150, Order of 9/13/99 at 48–49.
17. *In Re US Gen New England, Inc.*, Docket 7047, Order of 3/25/05.

> extension of ENVY's authority to operate the VY Station. *ENVY cannot predict at this time what may be encompassed by that standard in 2012, but believes it is a flexible standard that would include the relevant factors under 30 V.S.A § 248.*[18]

Entergy VY specifically cited to criteria (b)(2), (b)(3), (b)(4), and (b)(7) as being "more relevant," while noting (without explanation) that it expected that many of the factors dealing with environmental and aesthetic impacts would not apply.[19] But Entergy VY made clear that it:

> expects that any review in the future will encompass all relevant factors — that are not clearly preempted — that exist at that time under the rubric that the continued operation must promote the general good of the state.[20]

The consideration of whether there is an undue adverse impact upon water quality rests explicitly within the Board's jurisdiction in a Section 248 proceeding. For the reasons set forth above, it is also a relevant consideration in our determination in this proceeding as to whether it would promote the general good of the state to authorize Entergy VY to own and operate the VY Station through 2032. Put simply, issuance of a CPG to Entergy VY would permit continued operation of the VY Station. Such ownership and operation will result in continuing thermal discharges from the VY Station into the Connecticut River, which have the potential to affect water quality. It is therefore a relevant and appropriate factor for the Board to consider in deciding whether to grant Entergy VY a CPG.

B. Scope of Water Quality Review in Board Proceedings

As we have concluded that the Board has jurisdiction to consider water quality impacts, we turn next to the question of the scope of that jurisdiction. In Section 248 proceedings, which we use as a frame of reference here to inform our determination under Section 231, the question is whether the project will result in undue adverse environmental impacts. This includes consideration of Act 250 Criterion 1, which requires an applicant to demonstrate that there will not be undue water pollution.

---

18. Docket 6545, Entergy VY Brief at 14 (emphasis added).
19. Docket 6545, Entergy VY Brief at 14.
20. *Id.*, at 15.

The Board's review is not occurring in a vacuum, as other state agencies — most notably ANR — have independent jurisdiction. In the area of water quality, Entergy VY correctly points out that ANR has primary responsibility within the state of Vermont for many water quality issues, including administration of the NPDES permit program. However, as the Vermont Supreme Court has observed in the context of an Act 250 case, "Act 250 sets up concurrent jurisdiction between the various state environmental agencies and the Environmental Board."[21] In that same proceeding, the Supreme Court stated:

> First, we note that the purposes of Act 250 are broad: "to protect and conserve the environment of the state." To achieve this far-reaching goal the Environmental Board is given authority to conduct an independent review of the environmental impact of proposed projects, and in doing such the Board is not limited to the considerations listed in Title 10. Thus, even if we held that water quality standards are not Water Resources and Environmental Engineering Department regulations, the Environmental Board could still properly consider them when determining whether a land use permit should be granted.[22]

The same jurisdictional structure exists in the context of the instant Board proceeding and so the Supreme Court's analysis is applicable here as well; ANR's jurisdiction under state law is not exclusive.

The Board does, however, grant substantial deference to the actions of ANR within its area of jurisdiction. As Entergy VY itself observed in Docket 6812:

> The Board has recognized that compliance with applicable environmental regulations and permits creates a rebuttable presumption of satisfaction of the environmental criteria of § 248. Re: *Arrowhead Cogeneration Company, L.P.*, Docket No. 5323, Sept. 27, 1989 Order at 26. Discharge permits issued by the Department of Environmental Conservation are among those permits which are entitled to a rebuttable presumption of compliance when entered into the record. *Id*.[23]

This practice of deferring to ANR's permits and regulations does allow entities to seek to rebut the presumption. For example, in Docket 6812, Entergy VY proposed to increase the power output at the VY Station by approximately 20%. The additional heat that would be produced to create more electricity would also result in higher temperatures at times for the discharge of the

---

21. *In re Hawk Mountain Corp.*, 149 Vt. 179, 185, 542 A.2d 261, 265 (1988).
22. *In re Hawk Mountain Corp.*, 149 Vt. at 185 (citations omitted).
23. Docket 6812, Entergy VY Proposed Findings at 53.

heated, non-contact cooling water. Other parties requested that the Board impose additional limitations on the operation of the VY Station to protect fish in the river in the event of a failure of the cooling tower system. The Board agreed and required Entergy to reduce its power output rapidly in such circumstances. In response to Entergy VY's assertions that the existing NPDES permit limitations were adequate, the Board stated:

> Entergy is correct that the Board has afforded environmental permits a presumption; the Board has regularly relied on environmental permits issued by other agencies as prima facie evidence of compliance with the environmental criteria of Section 248. However, this presumption is rebuttable.[24]

ANR has pointed out that this is the same practice that has been employed in Act 250 proceedings. In *Re: Town of Stowe*, the Environmental Board reached the conclusion that the proposed project did not comply with Vermont law, including water quality standards, notwithstanding the existence of a permit authorizing the discharges issued by ANR.[25] The Environmental Court cited to its obligation to affirmatively find that the project would not "interfere with those uses which have actually occurred . . . or (ii) be inconsistent with the anti-degradation policy in the VWQS."[26] The Legislature subsequently amended Act 250 to require greater deference to ANR's technical determination, but as the Environmental Board subsequently stated, *In Re Stowe* "otherwise remains good law."[27]

In this proceeding, we would expect to accord the same deference to ANR's technical determination. But in the case of the NPDES permit, which expired in 2006 and since then has not been formally or conclusively reviewed by ANR, our deference to ANR is rebuttable.

We want to stress that there are sound reasons for this approach. ANR is responsible for implementing various environmental laws. In the context of the thermal discharge from Vermont Yankee, ANR examines the discharge in its role of administering the NPDES permit program. This entails applying technology-based standards and state water quality standards, as well as consideration of the standards for issuance of a variance under Section 316 of the Clean Water

---

24. Docket 6812, Order of 3/15/04 at 43.

25. #100035-9-EB, Findings of Fact, Conclusions of Law, and Order (May 22, 1998).

26. *In Re: Town of Stowe* at 42.

27. *Re: Village of Ludlow*, Land Use Permit Amendment #2S0839-2-EB, Findings of Fact, Conclusions of Law, and Order at 15.

Act. The Board's review is much broader; we must decide whether issuance of a CPG to Entergy VY promotes the general good of the state. Consideration of water quality and other environmental impacts, and compliance with the environmental laws, are factors in the decision, not necessarily the deciding issues. This consideration is guided by Section 248(b)(5), which states:

> with respect to an in-state facility, will not have an undue adverse effect on esthetics, historic sites, air and water purity, the natural environment, the use of natural resources, and the public health and safety, with due consideration having been given to the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K) and greenhouse gas impacts.

The Board's role is thus much broader than the ANR's focus in the NPDES permit issuance and more similar (but still broader) than that of the Environmental Board that the Supreme Court recognized in the *Hawk Mountain* decision cited above.

C. Board Authority to Issue an NPDES Permit

The next question is whether the Board's inquiry into water quality issues is in some manner barred or constrained by federal law or other provisions of state law that, as Entergy VY suggests, place exclusive jurisdiction with ANR. A significant portion of Entergy VY's Motion is based upon its assertion that the Board has no authority to issue an NPDES permit for the thermal discharge. Entergy VY's argument, while not explicitly stated, appears to be that any action the Board may take to examine whether there are undue adverse effects upon water quality or to potentially impose conditions on water quality discharges, effectively equates to the issuance of or a modification to an NPDES permit. We find no support for this broad assertion.

We agree with many of the assertions made by Entergy VY. ANR is the agency authorized by EPA to administer the NPDES permit program in Vermont. ANR, subject to review by the Vermont Environmental Court, issues NPDES permits and rules on variances under Section 316 of the Clean Water Act. ANR is also responsible for developing water quality standards. The Board does not have the authority to directly perform any of these functions.

Entergy VY suggests that consideration of issues related to water quality would, in essence, constitute issuance of an NPDES permit. Entergy VY has, however, provided no legal basis to support such an assertion. Certainly, the NPDES permit process must ensure that

technology-based limitations and water quality standards are attained by the permittee. A waiver under Section 316 for thermal discharge must satisfy the criteria of that section. All of these provisions are designed to ensure that adverse impacts on water quality are reduced to acceptable levels (as defined by the underlying federal and state law).

Nonetheless, even if the limitations in the NPDES permit are consistent with applicable law and Entergy VY complies with them, some pollutant discharge remains permissible. As we determined in Docket 6812, the NPDES permit did not address the short-term environmental impacts associated with a failure of the cooling towers. Such an event could have led to a violation of the NPDES permit, but the condition adopted by the Board helped ensure that the impact would not be unduly adverse.

Entergy VY highlighted the fact that even discharges in compliance with applicable law has impacts. In Docket 6812, Entergy VY sought to demonstrate that an increase in the power output at the VY Station would help reduce air pollution by displacing generating plants emitting greenhouse gases. It has presented similar evidence in this proceeding. As the Board found in the prior case (relying upon Entergy VY's witness):

> Air emissions from power plants contain certain pollutants, even after the treatment by air pollution equipment. These pollutants impose negative impacts on human health and the environment, often at no cost to the power plant that produces the emissions. These impacts impose costs upon society that are generally referred to as 'externalities.' Greene pf. 7/2/03 at 13.[28]

The Board has long recognized such externalities, but as Entergy VY has testified in multiple proceedings, they reflect societal impacts even after control.[29] While the question of whether the impacts of Entergy VY's thermal discharge are undue, even after compliance with the NPDES permit, is a factual one to be determined after hearing, the potential for an environmental impact nonetheless exists.

Moreover, the Clean Water Act itself does not limit the Board's jurisdiction. Section 1370 of 33 U.S.C. states that the Act should not "be construed as impairing or in any manner

---

28. Docket 6812, Order of 3/15/04, at 33.

29. *Investigation into Least-Cost Investment, Energy Efficiency, Conservation, and Management of Demand for Energy*, Docket 5270, Order of 4/16/90, Vol. II at 156-158 and Vol. III at 105-109.

affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

Entergy VY also advances the argument that, even if the exercise of authority by the Board does not run afoul of federal or state law, that principles of comity and priority should lead the Board to not exercise such authority in lieu of ANR, the agency with primary jurisdiction for these issues. However, Vermont law reflects concurrent jurisdiction. In the cases cited above, the Vermont Supreme Court has described such concurrent jurisdiction in the context of applying Act 250. The same analysis applies here. Entergy VY also fails to consider that the Board's practice of granting substantial deference to ANR permits and regulations reflects a desire to defer, where appropriate, to that agency's expertise in environmental matters.

The Board's exercise of jurisdiction is also consistent with the desires of ANR, to whom Entergy VY would have us defer. ANR has argued, persuasively, that the Board should consider whether there is an undue adverse environmental impact. As the Department observed in its brief, "it is illogical to assert that the Board should defer to ANR by rejecting ANR's testimony, as Entergy advocates." For similar reasons, we are not persuaded that we should now desist from considering the water quality issues because of the pending ANR permit renewal proceedings. As we have made clear above, the standards that apply for our proceeding and for an NPDES permit review are different.

D. Preclusion

Entergy VY argues that, in any event, the consideration of water quality issues is barred by the doctrines of *res judicata* and collateral estoppel. The Vermont Supreme Court described both of these doctrines in its consideration of an appeal from a Board decision in 2001:

> The doctrine of res judicata, also called claim preclusion,"bars the litigation of a claim or defense if there exists a final judgment in former litigation in which the 'parties, subject matter and causes of action are identical or substantially identical.'" The doctrine does not require that the claims were actually litigated in the prior proceeding; rather, it applies to claims that were or should have been litigated in the prior proceeding. . .
>
> The doctrine of collateral estoppel, also called issue preclusion, is similar in effect but more narrow in scope. It bars the relitigation of an issue, rather than a claim, that was actually litigated by the parties and decided in a prior case. The

> elements of collateral estoppel are: (1) preclusion is asserted against one who was a party in the prior action; (2) the same issue was raised in the prior action; (3) the issue was resolved by a final judgment on the merits; (4) there was a full and fair opportunity to litigate the issue in the prior action; and (5) applying preclusion is fair.[30]

The preclusion issues in this Docket arise from ANR's actions in amending Entergy VY's NPDES permit in 2006 and the subsequent appeals to the Environmental Court (*de novo*) and the Vermont Supreme Court. For a variety of reasons, we reject Entergy VY's assertion.

First, not all of the parties are the same. In particular, the Department was not a party to the 2006 proceeding. We understand that both ANR and the Department are part of the state of Vermont. Our statutes, however, reflect the fact that they are not the same entity representing identical legal and policy interests. For example, both the Department and ANR are separate parties to this proceeding. Section 248 makes ANR a mandatory party in those proceedings; the Department is already a party due to its responsibilities under 30 V.S.A. § 2. State law also assigns quite different responsibilities to the two agencies. ANR is charged with implementing the state's environmental laws. It's interaction with utilities occurs when the utility actions have potential environmental consequences. By contrast, the Department is responsible for representing the interests of the people of the state in utility-related proceedings. It's primary duties involve utility oversight and planning, with environmental consideration arising from the other duties.

Second, the underlying cause of action is different. In 2006, ANR, the Vermont Environmental Court and the Vermont Supreme Court were considering an NPDES permit amendment based upon Section 316 of the Clean Water Act. The Board's consideration of water quality in this case encompasses the narrow issues raised in the 2006 proceeding, but the Board's inquiry is broader – whether the issuance of the CPG to Entergy VY promotes the general good of the state. The water quality considerations in the Board's analysis are whether the issuance of that CPG could have undue adverse environmental impacts.

We recognize that some portions of the evidence may be similar. But there is no identity as to the issue for resolution, the cause of action, or the legal standards that apply.

---

30. *In re Central Vermont Public Service Corp.*, 172 Vt. 14, 20, 679 A.2d 668, 673 (2001).

The Board is also mindful that Entergy VY's claims arise in the context of an expired NPDES permit. Under the Clean Water Act, NPDES permits are issued for a term of five years. By law, they remain in effect if timely renewal is made (as appears to have occurred in this case). They are, by their nature, not a final resolution of the issue of the acceptable level of pollutant discharges. Here, the permit has been expired for more than seven years. The evidence on which it was based was older. As ANR argued in its Brief, the periodic review of NPDES permits and the scope of the permit review call into question the finality of judgment.

Furthermore, ANR is now actively reviewing evidence concerning the appropriate limitations in the next NPDES permit. Entergy VY is free to present whatever information it seeks to justify a permit with the same or different effluent limitations. All parties to this proceeding would have the right to raise precisely the same evidence and claims in the context of that pending permit renewal. Entergy VY's preclusion arguments would allow introduction of such evidence before ANR, but deny use of the same information here.

E. Failure to Overcome Rebuttable Presumption

Well after the comment period for the motion set by the Board, Entergy VY submitted a Supplemental Brief that raises a new assertion — that the evidence submitted by other parties does not overcome the rebuttable presumption in favor of the NPDES permit and ANR rules for demonstrating that there is no undue adverse water quality impact. Entergy VY contends that the initial testimony failed to overcome the presumption and maintains that the rebuttal testimony is not persuasive.

At this stage, we decline to reach the conclusion urged on us by Entergy VY. As we explained recently in connection with a similar evidentiary request from the Department , we see little value to our proceeding in issuing such a ruling at this time. Entergy VY remains free to explore this issue in briefing as it deems warranted once the evidentiary record has closed.

V. CONCLUSION

For the reasons set out above, Entergy VY's Motion for Partial Summary Judgment on Water Quality Issues Finally Litigated in Prior Proceedings and to Strike Prefiled Testimony and Other Evidence Pertaining to Such Issues is denied.

SO ORDERED.

Dated at Montpelier, Vermont, this 19th day of June, 2013.

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

OFFICE OF THE CLERK

FILED: June 19, 2013

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)