

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7082

Petition of Entergy Nuclear Vermont Yankee,)
LLC and Entergy Nuclear Operations, Inc. for a)
certificate of public good to construct a dry-fuel-)
storage facility at the Vermont Yankee Nuclear)
Power Station, in Vernon, Vermont)

Order entered: 6/6/2006

ORDER RE: MOTION FOR RECONSIDERATION

I. INTRODUCTION

On May 10, 2006, the New England Coalition ("NEC") filed a Motion to Reconsider asking that the Public Service Board ("Board") modify one portion of the April 26, 2006, Order in this proceeding. Specifically, NEC argues that the Board should require Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, "Entergy VY") to construct an earthen berm, or its structural equivalent, on at least two sides of the proposed dry-fuel-storage facility. Citizens Awareness Network ("CAN") supports NEC's Motion. Entergy VY and the Department of Public Service ("Department") oppose modification of the April 26 Order.

In this Order, we deny NEC's Motion for Reconsideration and affirm our previous ruling. As we found in the April 26 Order, the evidence, while not conclusive, raises questions as to whether the construction of a berm on the north and east sides of the proposed dry fuel storage facility is feasible. On the issue of a structural equivalent to the berm, there is no evidence showing the potential size, shape, design or location of such a structure, so we have no basis for concluding whether such a structure would be reasonable. We also find, as we did previously, that construction of a berm will not materially enhance the safety at the Vermont Yankee Nuclear Power Station ("Vermont Yankee").

II. DISCUSSION

In the April 26, 2006, Order, we considered several alternatives to Entergy VY's proposal for the dry-fuel-storage facility. These included siting the storage pad in a different location, underground storage, and the possibility of constructing a berm on the north and east sides of the storage pad to shield the facility. We concluded that Entergy VY's proposed siting, with construction of a visible barrier was reasonable.

NEC now asks us to reconsider our decision to reject the construction of a berm. NEC presents several arguments in support of its Motion. First, NEC asserts that the evidence supports the conclusion that construction of a berm or its equivalent on the north and east sides is feasible. As a result, NEC asserts that the conclusion in the April 26 Order that a berm could not be feasibly cited is erroneous and unsupported by the evidence.

Second, NEC maintains that the construction of an earthen berm or its structural equivalent would enhance the public good by reducing the likelihood of a cask breach due to a terrorist attack or aircraft impact. NEC faults the Board for not adopting a finding embodying this conclusion, which it states is uncontroverted. Third, NEC contends that the Board's conclusion that a berm would provide little or no security benefit is not based upon any specific findings in the Order. CAN echoes NEC's arguments.

Entergy VY counters that NEC's motion is essentially a relitigation of issues already decided by the Board, which Entergy VY states is not the purpose of a motion to reconsider. Entergy VY maintains that the Board's findings and conclusions concerning alternatives are supported by the record. Moreover, Entergy VY disagrees with NEC's contention that the Board erred by not adopting the finding NEC proposed, asserting that the Board did not have to make negative findings on each point raised by NEC. Entergy VY also contends that the conclusion and condition requested by NEC are not supported by the evidence and relate to radiological safety, an issue on which the Board is preempted by federal law. Finally, Entergy VY asserts that NEC's motion is appropriately considered as a request to modify findings under V.R.C.P. 52(b) rather than a motion for reconsideration under Rule 59(e).

The Department maintains that, while NEC has asserted that a berm is feasible, it has presented no evidence to support that contention or to support the concept of a "structural

equivalent to a berm." In addition, the Department contends that the Board correctly found that NEC had not shown that a berm would provide appreciably greater protection. Finally, the Department asserts that NEC has cited no legal authority for its stated principle that the Board was required to make a finding based upon the evidence that a berm would produce increased safety.

A. Feasibility of Constructing a Berm

NEC's first issue relates to the feasibility of constructing a berm or its equivalent. In the April 26 Order, we considered NEC's proposal to construct a berm on the north and east sides of the dry-fuel-storage facility, concluding that:

It is not clear that such a berm could be constructed within the limited space available, particularly with the location of the transfer path. A berm could be constructed if the pad were located elsewhere on the site, but NEC also has not shown that a berm would provide appreciably greater protection.¹

As NEC notes, we did not adopt specific findings supporting this conclusion, nor did any party ask us to adopt specific findings as to feasibility. Our conclusion, however, reflects our weighing of all of the evidence related to installation of a berm — and specifically, the *lack* of evidence to support a finding that construction of a berm would be feasible — and is supported by the record.

First, no witness testified that construction of a berm was feasible within the space available at Vermont Yankee. The most direct testimony on the subject was presented by Entergy VY witness Hoffman, who testified that "there's not a lot of room to put a berm in."² In addition, Mr. Sherman testified under cross-examination that he could not say that it was difficult or impossible to place an earthen berm around the storage pad.³ Neither testimony is conclusive, nor is the testimony of NEC's witness who stated that he did not know whether a berm could be sited.⁴ The testimony of these witnesses led directly to the conclusion we reached in the Order and quoted above — namely that it was unclear whether a berm could feasibly be constructed.

1. Order of 4/26/06 at 25.

2. Tr. 1/31/06 at 77 (Hoffman).

3. Tr. 2/10/06 at 77 (Sherman).

4. Tr. 2/10/06 at 14–15 (Resnikoff).

In the reconsideration motion and comments, neither CAN nor NEC point to any evidence that would lead us to conclude that a berm is feasible. Instead, they rely upon the testimony of Mr. Sherman (who recommended against constructing a berm) and the site plans, noting that the proposed storage pad would be 200 feet from the river, which would allow ample space. Our perusal of these plans, however, does not convince us to alter our previous conclusion. CAN is correct that the pad is approximately 200 feet from the river, which would appear to provide sufficient space for a berm on the east side. However, the site plan shows a sloping bank, so that the pad is only about 100 feet from the top of the slope. This would appear to require construction of the berm in only about 100 feet, a portion of which would need to be preserved for the transfer path. Moreover, the testimony concerning aesthetics indicated that, to blend into the environment, such a berm should be constructed at approximately a 5-to-1 ratio, which would appear to require all 100 feet of space just to get to the top of the berm. Reducing the slope to a 3-to-1 ratio to match the slope of the river bank would still require at least 60 feet of space.⁵ In either case, we cannot conclude based upon the record evidence that sufficient space exists.

NEC's proposal would also entail construction of a berm on the north side. Here, the site plan indicates that the berm, if constructed to conform to the aesthetics considerations noted above, would have to be constructed through the current low-level-waste storage area, requiring relocation of that facility. No party presented evidence suggesting where that facility could be relocated.

As an alternative to a berm, NEC and CAN ask the Board to require that Entergy VY construct its structural equivalent. Neither NEC nor CAN, however, point to any specific evidence on what such a structure would entail. There is no testimony showing where it may be located (other than a general reference to the north and east sides). Except for a brief conversation on cross-examination with Mr. Sherman in which NEC's representative suggests the possibility of a double-walled structure,⁶ there is no testimony on the shape, construction, or size of such a structure. NEC's witness did suggest the possibility of storage in a building or

5. Tr. 1/30/06 at 169–171 (Vissering).

6. See tr. 2/10/06 at 77–78 (Sherman).

otherwise hardened facility, but the record shows that the Nuclear Regulatory Commission has not licensed storage of the dry casks in buildings.⁷ The limited testimony on this issue means that, even if we were persuaded that additional shielding was appropriate, we have no basis in the record on which to determine what Entergy VY should construct, let alone to affirmatively conclude that such a structure could be feasibly designed and sited.

B. Safety

NEC's second assertion is that a berm or its structural equivalent would enhance safety at Vermont Yankee by increasing the protection of the dry-fuel-storage packs. If we were convinced that such a structure would measurably enhance safety, we might direct Entergy VY to construct a structure other than the visible barrier that Entergy VY proposed and we accepted. The evidence does not support such a conclusion.

We recognize that a berm may provide additional protection for the dry casks themselves relative to a structural barrier. Our consideration of safety issues, however, is not limited to the dry casks, but must consider how the modifications to the facility to enable the storage facility and the storage facility itself may affect the safety of Vermont Yankee as a whole. Here, as we stated in the April 26 Order, the evidence does not show that a berm or other structure, while it may provide additional protection for the dry casks themselves, would materially enhance the safety at the Vermont Yankee site as a whole. As the state's nuclear engineer explained, the likelihood of an event that would threaten the dry casks, such as a terrorist attack, is remote. In such a circumstance, the visual barrier will make targeting more difficult. The storage casks themselves are robust. More significantly, the dry-fuel-storage casks are only one potential target at Vermont Yankee; other, more prominent, features exist which would not be screened by the berm.⁸ We are thus not persuaded that the safety of the plant as a whole would be materially enhanced by the construction of a berm or its structural equivalent.

7. Tr. 1/30/06 at 108 (Singh).

8. Tr. 2/10/06 at 102–106 (Sherman).

B. Procedural Issues

In addition to its substantive arguments, NEC faults the April 26 Order for failing to adopt one finding and for relying upon conclusions which NEC alleges to be unsupported. We do not accept NEC's claims. First, NEC has cited no authority for the proposition that we are required to make an affirmative finding on every uncontested issue, whether that issue is material to our decision or not. Instead, the Vermont Supreme Court has stated that the findings of the Board (or a Court) must demonstrate what was decided and how the decision was reached.⁹ The Board need not make findings on every factual issue, but rather only those findings that are essential to the disposition of the case.¹⁰ In addition, the Board need not rule individually on each requested finding; the record must only demonstrate that we considered such findings.¹¹ As we explain above, the finding requested by NEC was not essential to our resolution of Entergy VY's petition. We acknowledge that a berm may have a minor improvement on the safety of the dry casks themselves. But as we explained, we find no basis to conclude that construction of a berm as part of the project will materially improve the safety at Vermont Yankee as a whole, which is the relevant consideration.

Second, contrary to NEC's contention, our rejection of the possibility of constructing a berm was supported by the record. The evidence on the feasibility of constructing a berm is, at best, inconclusive, as demonstrated by the citations we discussed above.¹² Similarly, we relied upon our consideration of the testimony, which was cited in the April 26 Order, in reaching the conclusion that a berm would not materially enhance the safety of Vermont Yankee. This analysis meets the requirements for findings enunciated by the Supreme Court.

We do not need to reach the argument raised by Entergy VY that NEC's motion should be considered under V.R.C.P. Rule 52 rather than Rule 59(e). In fact, it appears to be both, asking for a change in the findings, while simultaneously seeking reconsideration of the conclusions we

9. *In re Village of Hardwick Electric Department*, 143 Vt. 437, 444–45 (1983); *Roy v. Mugford*, 161 Vt. 501, 507–11 (1994).

10. *Investigation into General Order No. 45 Notice filed by Vermont Yankee Nuclear Power Corp.*, Docket 6545, Order of 7/11/02 at 24 (citing *Roy v. Mugford*).

11. *In re Village of Hardwick Electric Department*, 143 Vt. at 444–45.

12. We recognize that, although we based our decision on the issue of feasibility upon the testimony that we describe, we did not specifically reference those segments of the testimony. This Order provides the citations.

reached. Moreover, as Entergy VY acknowledged in its comments, the standard of review under both provisions is similar.

III. CONCLUSION

For the reasons explained above, we deny NEC's Motion to Reconsider.

SO ORDERED.

Dated at Montpelier, Vermont, this 6th day of June, 2006.

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

OFFICE OF THE CLERK

FILED: June 6, 2006

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: Clerk@psb.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.