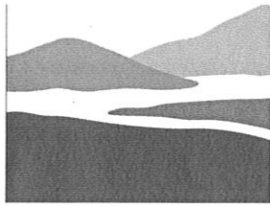

CONNECTICUT RIVER WATERSHED COUNCIL
The River connects us.
P.O. Box 206 Saxtons River, VT 05154

December 22, 2010

Peter Young, Chair
Vermont Natural Resources Board
National Life Records Center Building
National Life Drive
Montpelier, Vermont 05620-3201

VIA ELECTRONIC MAIL

Re: Water Quality Standards Revisions

Dear Chairman Young:

Thank you for the continued opportunity to provide comment and feedback in the Water Resources Panel's (WRP's) Vermont Water Quality Standards (VWQS) revisions process. Connecticut River Watershed Council (CRWC) submits this letter in response to the WRP's July 14, 2010 revisions under consideration, and Entergy's November 5, 2010 informal comments on those revisions. Specifically, this letter addresses the "Assimilation of Thermal Wastes" section of the VWQS. CRWC supports the WRP's proposed revisions to § 3-01 B.1.d.(1).[1]

As with our May 9, 2010 letter to the Natural Resources Board, the primary purpose of this letter is to correct confusing assertions made by Entergy in its most recent informal comments. In sum, Entergy's November 5th comments argue:

1) There is no need for revisions to the VWQS stating that discharges subject to thermal variances must comply with anti-degradation requirements and other discharge restrictions because the VWQS and the Clean Water Act's (CWA's) thermal discharge provision are essentially the same. Thus, applying one necessarily applies the other.
2) Adding language to the VWQS stating that discharges subject to thermal variances must comply with anti-degradation requirements and other discharge restrictions could "alter" a thermal variance in violation of state and federal law.
3) Courts would look upon a revision to the VWQS thermal discharge section as an attempt to change the law, which the WRP should avoid because the revision would conflict with the Vermont Supreme Court's 2009 decision in *In re Entergy Nuclear*.

[1] CRWC also supports the WRP's inclusion of "after opportunity for public hearing" in § 3-01 B.1.d.(4). As the WRP notes, this is a statutory requirement. It also ensures that there will be opportunity for public hearing in the event the thermal variance question ever arises outside the NPDES permit public process.

HEADQUARTERS: 413/772-2020 UPPER VALLEY: 802/869-2792 UPPER VALLEY E-MAIL: ddeen@ctriver.org
WEB: www.ctriver.org

As explained below, each of Entergy's arguments is based upon an incorrect interpretation of the law. First, Vermont's WQS are not the same as the CWA's thermal discharge provision, § 316(a), 33 U.S.C. § 1326(a). Rather, the VWQS regarding heat have multiple provisions - one of which reflects § 316(a) - and each of which must be applied in thermal variance decisions. Second, under the CWA, states may adopt WQS more stringent than the § 316(a) standard, and states have the discretion to deny or condition thermal variances that do not meet those standards. Third, under Vermont law the WRP's proposed revision would be interpreted according to its plain meaning, which is not a "change," but rather a clarification. Further, the revision is substantively valid under the CWA and the Vermont Supreme Court's decision in *In re Entergy Nuclear Vermont Yankee Discharge Permit 3-1199*, 989 A.2d 563 (Vt. 2009).

I. The thermal discharge section of Vermont's Water Quality Standards has multiple provisions, one of which is "essentially identical" to § 316(a) and each of which must be applied in thermal variance decisions.

In its November 5th letter, Entergy states several times that the Vermont Supreme Court has found the VWQS and the CWA thermal discharge provision to be "'essentially identical.'" *Entergy's Informal Comments on Proposed Revisions to the VWQS ("Entergy's Informal Comments")* 3-4, 5, 6 (Nov. 5, 2010) ("The VT Supreme Court expressly concluded, as a matter of law, that § 316(a) and the VWQS, which include the Thermal Variance Provision and the Anti-degradation Policy, are 'essentially identical,' so that any analysis performed under federal law necessarily satisfies Vermont law . . . . Indeed, as noted above, the VT Supreme Court has concluded, as a matter of law, that these two provisions, i.e., § 316(a) and § 3-01(B)(1)(d), are '*essentially identical*' . . . . The VT Supreme Court did not base its conclusion that § 316(a) and § 3-01(b)[sic](1)(d) were 'essentially identical' on facts particular to the Vermont Yankee decision, but rather on the Court's review and conclusions regarding the substance of these laws generically.") (citations omitted).

Entergy is correct that the Vermont Supreme Court found a portion of the VWQS to be "essentially identical" to CWA§ 316(a) as a matter of law. However, Entergy gravely mischaracterizes what that portion was. The Supreme Court looked at the thermal waste section of the VWQS, which allows the agency to specify temperature limits exceeding the VWQS for temperature if:

> (1) The discharge will comply with all other applicable provisions of these rules;
> (2) A mixing zone of 200 feet in length is not adequate to provide for assimilation of the thermal waste; and
> (3) After taking into account the interaction of thermal effects and other wastes, that change or rate of change in temperature will not result in thermal shock or prevent the full support of uses of the receiving waters.

Entergy Nuclear, 989 A.2d at 582 ¶ 47 (quoting VWQS § 3-01 B.1.d.).

The Court did *not* find that VWQS § 3-01 B.1.d. in its entirety was essentially identical to CWA § 316(a). Instead, the Court found that "the *last provision* of VWQS § 3-01 (B)(1)(d) – requiring demonstration of the protection and propagation of the BIP – is essentially identical to the

standard under [CWA § 316(a)]." *Entergy Nuclear*, 989 A.2d at 583 ¶ 50 (emphasis added). The Supreme Court made this finding in the context of deciding whether the Environmental Court had properly applied the VWQS to Entergy's thermal variance amendment. *Id.* The Supreme Court discussed each prong of VWQS § 3-01 B.1.d. separately, and held only that the last prong was "essentially identical" to CWA § 316(a). *Id.* Therefore, because the Environmental Court had applied CWA § 316(a), it had also applied the last provision of VWQS § 3-01 B.1.d. *Id.*

The distinction is important because it means that the other prongs of VWQS § 3-01 B.1.d. are not "essentially identical" to CWA § 316(a). Instead, each prong carries independent importance and must be applied separately, as the Supreme Court did. *See id.* This includes the first prong and the WRP's proposed revisions to the first prong ("The discharge will comply with all other applicable provisions of these rules, including, without limitation, anti-degradation requirements and other discharge restrictions.").[2]

II. Under the Clean Water Act, states may adopt Water Quality Standards more stringent than the standard in § 316(a), and states may deny or condition variances that fail to meet those Standards.

Entergy's second major argument, that the WRP's proposed revisions to VWQS § 3-01 B.1.d.(1) could "alter" a thermal variance, and that such alteration would violate state and federal law, is also flawed. First, as noted above, the VWQS already require that discharges subject to thermal variances comply with all other provisions of the VWQS, including anti-degradation requirements. Thus, any mechanisms the VWQS have to "alter" a thermal variance already exist and the proposed revisions would not change that.

Second, a variance is by definition a departure from substantive standards, and as such it is the variance that does not have the power to "alter" the standards. Instead, the CWA is explicit that states may adopt more stringent standards than those set forth in the CWA:

> Except as expressly provided in this chapter, nothing in this chapter shall . . . preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce . . . any standard or limitation regarding discharges of pollutants . . . except that . . . such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than . . . this chapter.

§ 510, 33 U.S.C. § 1370.

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[2] It is important to note here that, even if the WRP decided not to include its proposed revisions to § 3-01 B.1.d.(1) , the VWQS as currently written would require compliance with "all other applicable provisions" of the VWQS, including the anti-degradation requirements of the VWQS. This is consistent not only with the plain meaning of VWQS § 3-01 B.1.d.(1), but also with the Vermont Supreme Court's decision. *See Entergy Nuclear,* 989 A.2d at 583 ¶ 50, n.10 (finding that the Environmental Court had applied the anti-degradation policy through its analysis of VWQS § 3-01 and CWA § 316(a)).

Nothing in the CWA "expressly provides" that a state must allow for thermal variances at all. Instead, states have discretion to *deny* thermal variances that do not meet WQS.[3]

Similarly, nothing in the CWA "expressly provides" that state WQS regarding thermal discharges cannot be more stringent than CWA § 316(a). As put by the Vermont Supreme Court, "[f]ederal requirements for the content of state water quality standards represent a floor; state standards may, therefore, be stricter." *Entergy Nuclear*, 989 A.2d at 581 ¶ 46 (citations omitted). The Court also noted that the CWA requires "'[w]ater quality standards related to heat [to] be consistent with the requirements of [§ 316].'" *Id.* (quoting § 303(g), 33 U.S.C. § 1313(g)).

The Court's ensuing analysis indicated that it read "consistency" to require just what § 510 of the CWA requires: that state standards be at least as stringent as federal standards. The Court proceeded to discuss whether the Environmental Court had properly applied the three prongs of VWQS § 3-01 B.1.d.(1). *Id.* at 583 ¶ 50. It would have been unnecessary for the Supreme Court to conduct this analysis if the only relevant portion of the VWQS were the third prong – that is, the prong that was the "'Vermont equivalent'" of CWA § 316(a). *See id.* at 582 ¶ 49 (quoting Environmental Court). In other words, the VWQS need not be equivalent to CWA § 316(a) in order to be consistent with § 316(a); they must, however, be at least as stringent.

The authorities that Entergy cites for the proposition that state standards or limitations regarding heat must be identical to CWA § 316(a) are unpersuasive, as explained below.

1) *Weyerhaeuser Co. v. Costle* was an industry challenge to Environmental Protection Agency (EPA) regulations establishing technology-based limitations for pulp and paper mills. 590 F.2d 1011, 1018-19, 1031, 1062 (D.C. Cir. 1978) (upholding all but one provision and remanding that provision on procedural grounds). The Court mentioned § 316(a) while explaining the backdrop for the 1972 amendments to the CWA. *Id.* at 1043. The Court reasoned that it was proper for EPA to establish technology-based standards that would apply regardless of a receiving water's quality (i.e., even if the water quality was high) based on these new amendments. *Id.* at 1043-44. In most cases, a receiving water's quality could only be used to compel more stringent standards than technology-based standards might require. *Id.* at 1043 (citing § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C)). The lone exception, the Court explained, was § 316(a) - under which a receiving water's quality could be considered in relaxing standards. *Id.*

   The Court's point centered around *when* water quality could be considered in relaxing an effluent limitation (under § 316(a), yes; under technology-based standards, no). This point is already settled; no one disputes that a permitting agency may – indeed, must - consider water quality when deciding whether to grant a thermal variance. The Court did not decide, as Entergy suggests, that § 316(a) precludes the application of an anti-degradation policy or

[3] CWA § 316(a) is permissive; the permitting agency is not obligated to grant a thermal variance. The Administrator or a state counterpart *may* impose a less stringent thermal effluent limitation under certain circumstances; but it *need* not. § 316(a), 33 U.S.C. § 1326(a) ("whenever the owner or operator . . . after opportunity for public hearing, can demonstrate that any effluent limitation proposed for the control of the thermal component of any discharge . . . will require effluent limitations more stringent than necessary to assure the protection and propagation of a balanced, indigenous population of fish, shellfish, and wildlife . . . the Administrator (or, if appropriate, the State) *may impose* an effluent limitation that will assure the [BIP]") (emphasis added).

other state requirements to thermal variance decisions. *See Entergy's Informal Comments* at 7, 8.

2) In *Commonwealth Edison Co. v. Train*, the question before the Court was whether the EPA's anti-degradation regulation was ripe for review. 649 F.2d 481, 482 (7th Cir. 1980). The Court held that it was not because no obligations had yet been imposed upon the defendant utilities, and there would be other opportunities for the utilities to seek review. *Id.* at 484, 487. In dicta, the Court opined that EPA's anti-degradation regulation allowed thermal dischargers who met the § 316(a) test to avoid anti-degradation requirements. *Id.* at 484-85. However, the actual text of the regulation provides no such exemption. Instead, it requires consistency with CWA § 316(a). 40 C.F.R. § 131.12(a)(4) ("In those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 of the Act.") Like the CWA's consistency provision discussed above, this is more properly understood as representing a floor for water quality protections.

3) The other authorities that Entergy cites - an EPA handbook and an EPA General Counsel Opinion - are not law and are entitled to only limited deference, if any. *See, e.g., Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference. . . . Instead, interpretations contained in formats such as opinion letters are 'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade.'") (citations omitted).

   Neither of these authorities is particularly helpful or persuasive in its analysis, and therefore neither is particularly "entitled to respect." EPA's *Water Quality Handbook* contains one short paragraph summarizing the thermal discharge section of the federal anti-degradation policy. U.S. E.P.A., *Water Quality Handbook - Chapter 4: Antidegradation* § 4.2, *available at http://water.epa.gov/scitech/swguidance/waterquality/standards/handbook/chapter04.cfm*. It states that there is a statutory and legislative history "indicat[ion]" that § 316(a) limitations take precedence over other requirements of the Act, but does not explain this statement. *Id.*

   The 1976 General Counsel Opinion was issued during the Ford Administration as part of a § 401 certification process.[4] 76-12 Op. EPA Office Gen. Counsel, 1976 WL 25212 (1976). The remarks that Entergy references (regarding State insistence on WQS compliance despite successful 316(a) demonstrations) were necessarily tied up in the § 401 procedure where EPA, not the State, was the permit writer. *Id.* at *3. The Opinion did not explain why state insistence on compliance with WQS would be "contrary" to the CWA. In fact, for the reasons described above, the better and more logical reading of the Act is just the opposite. In any case, EPA must review and decide whether to approve or disapprove Vermont's WQS revisions in accordance with the CWA. § 303, 33 U.S.C. § 1313(c). It is premature to speculate on EPA's current position.

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[4] Section 401 of the CWA requires any applicant for a federal permit/license for any activity that results in a discharge to obtain certification from the State that the discharge will comply with, among other things, WQS. § 401, 33 U.S.C. § 1341(a)(1). The license/permit cannot be granted if the State denies certification. *Id.*

4) Finally, Entergy's characterization of other states as having "developed anti-degradation policies that consistently recognize their limited applicability to thermal variances" is inaccurate. *See Entergy's Informal Comments* at 10. For instance, Connecticut's administrative code[5] provides that the state agency may grant or deny alternate effluent limitations for thermal discharges in accordance with federal regulations. Conn. Agencies Regs. § 22a-430-4(q)(2)(A)(ii). As discussed above, these "federal regulations" are best seen as a floor. And, like the CWA, Connecticut's code is permissive (the agency "may" grant a variance, but it need not). The code also specifically states that "no variance may be granted which violates or results in a violation of . . . the Connecticut Water Quality Standards." *Id.* § 22a-430-4(q)(1)(B). In New Hampshire, the purpose of the anti-degradation regulations is to ensure that federal anti-degradation regulatory requirements are met. N.H. Admin. R. Ann. [WQ] 1708.01. As put by New Hampshire, one of those federal requirements is that, "where a potential water quality impairment is associated with a thermal discharge, the antidegradation provisions shall ensure that the requirements of section 316 of the Clean Water Act are met." *Id. at* 1708.01(e). This language suggests that New Hampshire properly views § 316(a) as embodying minimum – not maximum - requirements that must be "ensured" before a variance can be granted.

III. The WRP's proposed revision to § 3-01 B.1.d.(1) is not a change in the law, is substantively valid, and would be interpreted as such according to its plain meaning under Vermont law.

As the third major piece of its comments, Entergy cautions that the proposed revision to the VWQS would surely be seen as a change in the law that conflicts with the Vermont Supreme Court's decision in *Entergy Nuclear*, and the WRP should therefore abandon the revision. This argument lacks merit. First, the revision is substantively valid. As discussed above, it is in line with the CWA and the Vermont Supreme Court's opinion.

Second, the revision is not a change in the law. Rather, it is consistent with the Vermont Supreme Court's opinion and the VWQS as currently written. It is a clarification, and Vermont courts would interpret it as such. Vermont approaches statutory and regulatory interpretation like any other jurisdiction: it starts with the plain meaning of the language. *See In re Williston Inn Group*, 949 A.2d 1073, 1079 (Vt. 2008) (approaching regulatory construction and statutory interpretation in the same manner and stating that "[w]hen we can, we accomplish this by reference to the plain meaning of the regulatory language; other tools of construction are available to us should the plain-meaning rule prove unavailing") (citations omitted); *Jones v. Dep't of Employment Security,* 442 A.2d 463, 464 (Vt. 1982) ("In . . . interpreting the applicable statute, we are guided by certain rules of statutory construction. Foremost is the rule that when the meaning of a statute is plain on its face we must enforce it according to its express terms.").

Thus, any court interpreting the WRP's revisions would start first with the plain meaning of the revisions – not, as Entergy argues, with a presumption that the revisions constituted a change in the law.[6] Here, the meaning of the revision is clear. It is a phrase that gives examples ("anti-

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[5] Entergy's comments cited to the Connecticut General Statutes, but the applicable provision is actually in Connecticut's administrative code.

[6] A court would also give deference to the WRP's interpretation of its own revisions. *See CLF v. Burke,* 645 A.2d

degradation requirements") to help explain what already existing language ("all other applicable provisions") means:

> The discharge will comply with all other applicable provisions of these rules, including, without limitation, anti-degradation requirements and other discharge restrictions.

The rule that Entergy relies on - where there is a material change to a statute by amendment, the amendment is generally viewed as an intent to change the law, the contrary not appearing - is actually just one of many tools of statutory construction. The efficacy of this tool depends first upon there being a "material" change. *Rock of Ages Corp. v. Comm'r of Taxes*, 360 A.2d 63, 65 (Vt. 1976) (citations omitted). We do not have that here; the WRP's suggested explanatory revision to § 3-01 B.1.d.(1) is neither "material" nor a "change." *Cf. Diamond v. Vickrey,* 367 A.2d 668, 671 (Vt. 1976) (statutory amendment clearly restricted attorney general's investigatory powers by substituting "whenever he has probable cause to believe" to "whenever he believes"); *Rock of Ages,* 360 A.2d at 359 (change intended where legislature added new category of activities to "manufacture" provision of tax exemption law). Secondly, there must be nothing "contrary" appearing. *City of Winooski v. Companion,* 162 A. 795, 795 (Vt. 1932) (citation omitted). Here, as discussed, the plain meaning of the language is "contrary" to the position that the proposed revision would be a change in the law.

495, 499 (Vt. 1993) (court "employ[s] a deferential standard of review of an agency's interpretation of its own regulations. Its interpretation may be overcome only by compelling indications of error.") (citations omitted).

IV. Conclusion

For the reasons explained above, we respectfully request that the Water Resources Panel proceed with its proposed revisions to VWQS § 3-01 B.1.d. The revisions are helpful and clarifying, and the WRP has the authority to make them.

Sincerely,

David Deen, River Steward
Connecticut River Watershed Council

/s Laura Murphy
Laura Murphy
Staff Attorney & Assistant Professor
Environmental & Natural Resources Law Clinic
Vermont Law School
PO Box 96, Chelsea Street
South Royalton, VT 05068

Student Clinician
Amy Driscoll

Cc: Mark Lucas, Associate General Counsel, WRP
Jon Groveman, Counsel, VNRC
Catherine Gjessing, Associate General Counsel, DEC
Elise Zoli/Goodwin Procter, Counsel, Entergy