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*Admitted in:* MA, ME

July 6, 2023

**VIA ELECTRONIC AND OVERNIGHT MAIL**

Ruth.a.burke@maine.gov

Susan Lessard, Chair  
c/o Ruth Ann Burke  
Board of Environmental Protection  
17 State House Station  
Augusta, ME 04333-0017

Re: Maine Yankee Pollution Control Property Tax Exemption Application, A-1166-75-A-X  
Appeal by the Town of Wiscasset  
Response to Appeal

Dear Chair Lessard:

On behalf of our client, Maine Yankee Atomic Power Co., please find attached a Response to Appeal from the Town of Wiscasset.

Sincerely,



Brian M. Rayback

Enclosure

cc: Service List (5/10/23)

**STATE OF MAINE  
BOARD OF ENVIRONMENTAL PROTECTION**

IN THE MATTER OF:

MAINE DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

MAINE YANKEE AIR POLLUTION CONTROL  
PROPERTY TAX EXEMPTION APPROVAL

A-116-75-A-X

CERTIFICATION OF AIR POLLUTION  
CONTROL PROPERTY TAX EXEMPTION

**RESPONSE TO APPEAL FROM TOWN OF WISCASSET**

On behalf of Maine Yankee Atomic Power Company (“Maine Yankee”), we respectfully request that the Board reject the Town of Wiscasset’s (“Town”) appeal. The Department of Environmental Protection (“Department”) issued a well-reasoned decision (“Decision”) finding Maine Yankee’s Independent Spent Fuel Storage Installation (“ISFSI”) is an air pollution control facility because its primary purpose is to confine radionuclides and, therefore, the ISFSI qualifies for a property tax exemption. Thus, the Department Decision is correct.

The Town’s appeal (“Appeal”) makes four major arguments: (1) the ISFSI’s primary purpose is storage, not confinement; (2) the Department incorrectly found that radionuclides are industrial air pollutants; (3) the Department incorrectly articulated the primary purpose test; and (4) the Department incorrectly applied the primary purpose test to the ISFSI. We will address each of these arguments in turn.

**BACKGROUND**

From 1972 until 1997, Maine Yankee operated a 900-megawatt nuclear power plant in Wiscasset. The plant was shut down in 1997. From 1997 through 2005, Maine Yankee “decommissioned” the Wiscasset site, which involved removing the nuclear reactor and other plant structures and restoring the property to stringent clean-up standards. Maine Yankee now operates at the same site a facility known as an ISFSI that safely stores nuclear waste in accordance with a license from the U.S. Nuclear Regulatory Commission (“NRC”), granted pursuant to 10 C.F.R. Parts 71 & 72. The ISFSI replaced the previous waste storage system, a spent fuel pool, which Maine Yankee used prior to decommissioning. See Maine Yankee Application at 1.

## I. Maine Yankee’s Air Pollution Control Facility.

The ISFSI was constructed to store on a temporary basis nuclear waste generated at the Maine Yankee plant. Under a contract that the U.S. Department of Energy (“DOE”) signed with all nuclear plant owners, as well as the Nuclear Waste Policy Act, the DOE was to have taken title to the waste and disposed of it off-site. That has not occurred, in part because DOE does not have an operating disposal facility at this time. In the meanwhile, Maine Yankee is required to store the spent nuclear fuel and other nuclear waste from the decommissioned power plant in accordance with its license and regulations from the NRC. [REDACTED]; 10 C.F.R. Parts 71 & 72.

The ISFSI is an approximately 11-acre open-air facility with an adjacent security and operations building. The facility has 64 Transportable Storage Canisters (“TSCs”), which are large cylinders made of stainless steel, that contain nuclear waste removed from Maine Yankee’s spent fuel pool during decommissioning. The nuclear waste at Maine Yankee’s ISFSI is composed mostly of spent nuclear fuel rods and also includes additional waste from the decommissioning process, known as Greater than Class C Waste. The fuel rods are hollow metal tubes that contain fuel pellets. During fuel rod manufacturing, the tubes, which are known as “cladding,” are loaded with fuel pellets. After loading, the small gap between the cladding and the pellets is backfilled with inert gas and the cladding is welded shut. See Steve Nesbit, *Maine Yankee Spent Fuel Storage at 1* (November 10, 2022) (“Nesbit Report”).<sup>1</sup>

Maine Yankee’s nuclear waste was first loaded into each TSC while under water in the spent fuel pool. Once loaded with nuclear waste, the TSC lid was placed on top and welded to the shell. The TSC was then drained of water and backfilled with inert gas. Each TSC is housed inside a massive concrete and steel cask known as a Vertical Concrete Cask (“VCC”). Each VCC sits on an engineered concrete pad. See Nesbit Report at 5-6; see also Brian Haagensen, *The Elimination of Air Pollution from Spent Nuclear Fuel Storage at 5* (November 10, 2022) (“Haagensen Report”).<sup>2</sup>

The TSCs, VCCs, and concrete pads form an integrated system that is primarily designed, constructed, and operated to prevent the emission of radionuclides from nuclear waste into the atmosphere. See Nesbit Report at 7-10; see also Haagensen Report at 6-16. Radionuclides – which are unstable atoms that spontaneously emit radiation and can exist as a solid, liquid, or gas – are emitted from the nuclear waste that is left over from the operation of the former nuclear power plant at Maine Yankee’s site. When emitted into the air, radionuclides can be ingested or inhaled into the human body, exposing people to dangerous levels of radiation for long periods of time. Radionuclides that are released into the environment are especially

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<sup>1</sup> Steve Nesbit has spent over 40 years working as a nuclear engineer for Duke Energy Corporation and as an independent consultant.

<sup>2</sup> Brian Haagensen has spent 47 years working in the nuclear power field, 15 of which included working as a nuclear regulator for the NRC, including as an inspector for ISFSIs at other decommissioned nuclear power plants.

problematic because they can travel on air currents for many miles to locations where the radiation they emit cannot be shielded and the time of exposure cannot be limited. See Haagensen Report at 2-3; *see also* Nesbit Report at 3. Because of the danger radionuclides pose, they are classified under the Clean Air Act and Maine's air regulations as hazardous air pollutants. See 40 C.F.R. § 61.01(a) (designating radionuclides as a hazardous air pollutant); 06-096 CMR 137 § 1(F) & App. A (requiring reporting of emissions of hazardous air pollutants, including radionuclides).

The TSCs, VCCs, and concrete pads work together to confine radionuclides through several measures.

First, the TSCs, VCCs, and concrete pads are highly engineered to ensure radionuclides are confined during both normal and accident conditions. The TSCs' air-tight design is intended to prevent radionuclides from escaping from each TSC. The TSCs are engineered not to have any openings from which radionuclides can escape and the inert gas in each TSC helps ensure that radionuclides do not leak from the nuclear waste by preventing degradation of the cladding and canister that contains the nuclear waste. Furthermore, the TSCs and VCCs are designed to withstand physical impacts from explosions and natural disasters. Likewise, the concrete pads are engineered to ensure that each VCC stays safely upright in a variety of conditions, including tornados, earthquakes, and hurricanes. See Nesbit Report at 7; Haagensen Report at 16; *see also* Decision at 3-4, 6-7.

Second, the TSCs and VCCs work together to remove decay heat – heat that is generated from radiation emitted by nuclear waste that is absorbed inside the TSCs – to prevent the nuclear waste from overheating. See Haagensen Report at 6 (“Most of the radiation that is emitted from spent nuclear fuel is absorbed inside the canister, which creates heat, called ‘decay heat’”). Brackets in each TSC are designed to transfer heat from the nuclear waste to the TSC shell. Once heat is transferred to the TSC shell it is then dispersed through the VCC's natural convection cooling system. Each VCC is designed with inlet port penetrations at the bottom of the VCC, outlet port penetrations at the top of the VCC, and an annular gap between the VCC and the TSC. When the TSC shell becomes hot with decay heat, it warms the air in the annular gap causing the air to rise and exit through the outlet port penetrations. Meanwhile, cool air enters the annular gap through the inlet port penetrations thereby cooling the TSC and the nuclear waste. See Nesbit Report at 6, 9; Haagensen Report at 6-7; *see also* Decision at 3, 5.

Finally, the TSCs and VCCs prevent the waste from achieving criticality, which is an uncontrolled nuclear reaction. See Haagensen Report at 7 (“Under certain conditions spent nuclear fuel can create a self-sustaining fission reaction which is known as a state of criticality”). The orientation of the nuclear waste and the presence of neutron absorber materials in each TSC function to prevent criticality. Similarly, the spacing and orientation of the VCCs prevents the nuclear waste from reaching criticality. See Nesbit Report at 8-9; Haagensen Report at 5-10; *see also* Decision at 2.

The TSCs, VCCs, and concrete pads also provide radiation shielding. Additionally, the TSCs are designed to transport the nuclear waste to a final depository site, should that ever occur. *See* Nesbit Report at 4, 9; Haagensen Report at 9-10; *see also* Decision at 2-3, 5. These functions are secondary to the confinement function.

## II. Air Pollution Control Facilities Are Exempt from Property Tax.

By statute, “air pollution control facilities,” certified as such by the Commissioner of Environmental Protection, and “all parts and accessories thereof” are exempt from both personal and real estate property tax. 36 M.R.S. §§ 655(1)(N) (personal property) & 656(E)(2) (real estate). The Legislature defined an air pollution control facility for this purpose as “any appliance, equipment, machinery, installation or structures installed, acquired or placed in operation primarily for the purpose of reducing, controlling, eliminating or disposing of industrial air pollutants.” *Id.* at § 656(E)(2)(a). Although the Legislature has not defined the scope of “all parts and accessories,” the Department has long interpreted that language to include “all associated piping, electrical, concrete, insulation and structural installations necessary for the construction and operation” of a pollution control facility. *See* Decision at 3.

Thus, the exemption applies to facilities whose primary purpose is air pollution control. In interpreting this statutory requirement, the Maine Supreme Judicial Court has stated that the primary purpose test “connotes a basic, fundamental or principal purpose as opposed to one which is secondary or merely incidental.” *Statler Industries Inc. v. Board of Environmental Protection*, 333 A.2d 703, 706 (Me. 1975).

The most recent Maine Supreme Judicial Court case to address the primary purpose test, *Town of Jay vs. Androscoggin Energy, LLC*, explains how it is applied, as follows:

First, the Board [of Environmental Protection] (“Board”) must determine the functions of the facility . . . If the facility serves no pollution control function, then of course the Board must deny an exemption. . . If the facility serves dual functions, however, then the Board must determine the facility’s primary function . . . If the facility’s primary function is pollution control, then the Board must grant an exemption . . . Conversely, if pollution control is merely a secondary function, then the Board must consider various factors, including taxpayer motivation, to determine the facility’s primary purpose . . . If the primary purpose for installing the facility is pollution control, then the Board must grant an exemption.

*Town of Jay v. Androscoggin Energy, LLC*, 822 A.2d 1114, 1119 (Me. 2003) (internal citations omitted).

[REDACTED]

In preparation for the settlement agreement's expiration, in November of 2022, Maine Yankee again sought certification that the TSC, VCC, and concrete pad components of the ISFSI are air pollution control facilities. The Department issued the Decision on March 31, 2023, finding that the TSCs are air pollution control facilities and the VCCs and concrete pads are "parts and accessories" to the TSCs, thereby concluding that those portions of the ISFSI have a primary function of controlling industrial air pollutants. See Decision at 3, 5-6. On April 28, 2023, the Town appealed the Decision.

The Board previously certified the same portions of the ISFSI that are at issue here as air pollution control facilities for purposes of the sales and use tax exemption pursuant to 36 M.R.S. § 1760(30) in 2001. [REDACTED] Although a different statute, the language of the sales and use tax exemption at issue in that matter is functionally identical to the language of the property tax exemption that is at issue here.<sup>3</sup>

## DISCUSSION

### I. The ISFSI's Primary Purpose Is Confinement.

Throughout its Appeal the Town weaves in the argument that the multi-million dollar ISFSI, subject to NRC licensing and hundreds of pages of regulations establishing complex engineering requirements, is nothing more than a fancy storage facility. This is like saying the primary purpose of a bank vault is to store money, not to protect it from theft. If the primary purpose of the ISFSI were simply to store nuclear waste, that function could be accomplished by burying the waste in a hole in the ground or putting it on a shelf in a warehouse. See Haagensen Report at 10 (noting if radionuclide confinement were not necessary, nuclear waste could be stored through other, lower-cost solutions). Rather, the trick is to store nuclear waste *safely*. The primary challenge for safely storing nuclear waste is ensuring radionuclides remain confined despite the waste's slow degradation and the potential for unusual but predictable events, such as hurricanes, earthquakes, and explosions, so that the radionuclides do not threaten human health or the environment. See Haagensen Report at 6 (ensuring confinement is "the most

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<sup>3</sup> Even though the pollution control exemptions for the sales and use tax and property tax are technically based in different statutory provisions, and thus the 2001 decision is not automatically binding here, the Maine Supreme Judicial Court recognizes that the "standards and procedures are the same." *International Paper v. Board of Environmental Protection*, 1999 ME 135, ¶ 15, n.3, 737 A.2d 1047. We suggest, therefore, that the Board's prior decision under the sales and use tax exemption is more relevant to the Board's deliberations in this case than the precedent cited by the Town from different states.

difficult and important challenge” and is therefore “the driving factor from both an engineering and a public health and environmental perspective”).

As Maine Yankee’s expert, Steve Nesbit, observed in his supplemental report:

The Town writes as if the function of storage can be separated from the prevention of harm to the public from radionuclide emissions, in normal or accident conditions, from the ISFSI. It cannot. Safe storage is the focus of NRC regulations, and storage cannot occur at all until safety is assured through the licensing process. Thus, the dry storage system provides *safe storage* of used nuclear fuel. The safety is provided by the TSC, the VCC, and the concrete storage pad working in concert to achieve the safety functions described on pp. 8-9 of my report, chief among which is confinement of radionuclides within the TSC to prevent airborne releases. *See Steve Nesbit, Maine Yankee Spent Fuel Storage Supplement 1 at 4 (March 17, 2023) (“Nesbit Supplemental Report”).*

Thus, the primary purpose of the ISFSI is to *safely* store nuclear waste by ensuring radionuclide confinement.

## **II. The Department Correctly Found That Radionuclides Are Industrial Air Pollutants.**

The Town argues that the Department erred when it found that radionuclides are industrial air pollutants within the meaning of the pollution control property tax exemption statutes.<sup>4</sup> The Town agrees with the Department that radionuclides are air pollutants, acknowledging that radionuclides are regulated by the Department as hazardous air pollutants. *See Appeal at 16.* Yet the Town claims radionuclides are not *industrial* air pollutants and reads-in an unstated exclusion in the pollution control property tax exemption statutes for industrial air pollutants generated by nuclear facilities. *See id.* at 16-17. This interpretation of the pollution control property tax exemption statutes is unsupported by both the language and legislative history of those statutes.

The Town first argues that because Maine Yankee does not have an air license from the Department and instead the ISFSI is regulated by the NRC, the Department should not have found that the radionuclides generated by Maine Yankee’s nuclear waste are industrial air pollutants. *See id.* at 16-17. The Town seemingly acknowledges that the legislative history of the pollution control tax exemption statutes does not support this claim,<sup>5</sup> yet argues that the

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<sup>4</sup> The Town ends its Appeal with this argument, but because whether radionuclides are industrial air pollutants is a threshold question, we will address this point before we address the Town’s other arguments.

<sup>5</sup> In the Appeal, the Town characterizes its description of the circumstances surrounding the enactment of the pollution control property tax exemptions as “legislative history.” However, this is misleading. As

*circumstances* surrounding the enactment of these statutes somehow suggest that the legislature intended industrial air pollutants to exclude air pollutants generated by nuclear facilities. *See id.* at 17.

As an initial matter, the air pollution tax exemption statutes say nothing about requiring an air license from the Department to qualify for certification.<sup>6</sup> *See* 36 M.R.S. §§ 655(1)(N) & 656(1)(E)(2). Instead, the statutes simply require that a facility's primary purpose be to reduce, control, eliminate or dispose of industrial air pollutants. *See id.*

Furthermore, the Town stretches too far in asking the Board to consider the "circumstances" surrounding the enactment of the pollution control tax exemption statutes to determine whether the word "industrial" includes nuclear facilities. Maine courts have repeatedly explained that "the starting point in interpreting a statute is the statutory language itself" and that "[u]nless the statute reveals a contrary legislative intent, the plain meaning of the language will control its interpretation." *Murphy v. Board of Environmental Protection*, 615 A.2d. 255, 258 (Me. 1992). Further, "[t]o that end, the particular words used in the statute must be given their *plain, common and ordinary meaning.*" *Id.* (emphasis added).

The radionuclides confined by Maine Yankee's ISFSI were generated by a 900-megawatt nuclear power plant and are now being safely stored at that same site; it is hard to imagine these radionuclides do not fall squarely within the plain meaning of the term "industrial."<sup>7</sup> *See* Nesbit Supplemental Report at 1 ("The argument that radionuclides from electricity production are not industrial in origin seems to defy plain English and common sense.")

The Town next claims that radionuclides should not be considered industrial air pollutants because the ISFSI does not provide the "economic benefit that industry typically brings." *See* Appeal at 17-18. Instead, the ISFSI is "more like a dump or transfer station." *See id.* at 17. Even if it were true, this argument would be irrelevant. First, under the pollution control property tax exemption statutes, the threshold requirement is that *radionuclides must be industrial air pollutants*, not that the pollution control facilities themselves are industrial. Second, neither the plain language nor the Department's long-standing interpretation of the pollution control property tax exemption statutes require pollution control facilities to provide a certain level of economic benefit. *See* 36 M.R.S. § 656(1)(E)(2) ("Facility means a disposal

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the Town acknowledges in its February 15, 2023, Comment in Opposition to Certification of the ISFSI, the legislative history is silent on the meaning of industrial air pollutants. *See* pg. 3

<sup>6</sup> The ISFSI does not require an air license because even uncontrolled emissions of radionuclides, which weight almost nothing, would be well below the thresholds to trigger licensing of 10 pounds per hour or 100 pounds per day. *See* 06-096 CMR 115 § 1(B)(2)(c).

<sup>7</sup> For example, nuclear electrical power generation is assigned its own North American Industry Classification System (NAICS) number – 221113 – along with other major types of electrical generating facilities. The website Dictionary.com provides that the word "industrial" means "of, pertaining to, of the nature of, or resulting from industry." The word "industry" is then defined as "the aggregate of manufacturing or technically productive enterprises in a particular field;" "any general business activity [or] commercial enterprise;" and "trade or manufacture in general."



system or any treatment works, appliance, equipment, machinery, installation or structures . . .”). Third, there is nothing in the statutes to suggest that something like a dump or transfer station cannot also be a pollution control facility. Indeed, the Department has certified such facilities as pollution control facilities in the past. [REDACTED]

Thus, for the reasons stated above, the Department correctly concluded that radionuclides are industrial air pollutants.

### III. The Department Correctly Articulated and Applied the Primary Purpose Test.

The Town also argues that the Department failed to correctly articulate and apply the primary purpose test to Maine Yankee’s ISFSI in its Decision. We disagree.

#### A. The Department Correctly Articulated the Primary Purpose Test.

The Town first attacks the Department’s articulation of the primary purpose test, claiming that the Department does not “accurately” capture the test. See Appeal at 4. As an initial matter, the Department’s Decision sets forth the test articulated in the *Town of Jay* case for pollution control cases. See Decision at 5. The Town apparently does not dispute that this is the correct test, given that it cites the *Town of Jay* case in its Appeal, and so it is difficult to tell how, exactly, the Town thinks the Department failed to properly articulate it.

The Town appears to be arguing that the Department reads the individual steps of the *Town of Jay* test incorrectly. It claims that the Department should have considered the ISFSI’s actual use and actual pollution control effect and Maine Yankee’s purpose for installing the ISFSI when the Department analyzed the primary function of the ISFSI. See Appeal at 4. We agree that to determine its primary function, the Department may consider the actual use and actual pollution control effect of the ISFSI. See Decision at 5 (evaluating functions of ISFSI to determine ISFSI’s actual use and pollution control effect).

The Department was correct, however, not to consider Maine Yankee’s *purpose* for installing the facility – which requires the same analysis as evaluating Maine Yankee’s “motive” – at this step. The Maine Supreme Judicial Court has clarified that a factfinder must consider a taxpayer’s motive only after the factfinder has already evaluated the primary function of the facility. See *International Paper Co. v. Board of Environmental Protection*, 37 A.2d 1047, 1053 (Me. 1999) (noting that a factfinder must determine the taxpayer’s motive only after the factfinder determines the actual use and pollution control effect of a facility, and further that *if the facility’s primary function is pollution control, then the Board must grant an exemption*) (emphasis added); see also *Town of Jay*, 822 A.2d at 1119 (Me. 2003) (“If pollution control is merely a secondary function, then the Board must consider various factors, including taxpayer

motivation, to determine the facility's primary purpose"). Thus, because the Department found that the primary function of the ISFSI system is to control industrial air pollutants, under the *Town of Jay* decision, the analysis ended there and did not require consideration of Maine Yankee's purpose in installing the ISFSI. The Department, therefore, correctly interpreted and articulated the primary purpose test.

**B. The Department Correctly Applied the Primary Purpose Test.**

The Town then attacks the Department's application of the primary purpose test by arguing that (1) the Department should have found that the TSCs' primary function was storage; (2) the Department improperly construed "all parts and accessories" of the facility to include the VCCs and concrete pads; and (3) the Department should have considered Maine Yankee's motive in its Decision. While the arguments about the Department's characterization of the TSCs, VCCs, and concrete pads each fail in their own right, they also fail because they wrongly attempt to separate the ISFSI components into individual parts as if each could stand alone. On the contrary, the ISFSI is an integrated system and the TSCs, VCCs, and concrete pads must all work together to meet NRC requirements and engineering specifications for the safe storage of nuclear waste under both normal conditions and in extreme scenarios. *See e.g.*, Nesbit Report at 9-10 (describing how all three components function together to confine radionuclides).

**i. The Department Correctly Applied the Primary Purpose Test to the TSCs.**

The Town first argues that the primary function of the TSCs is to provide interim storage for nuclear waste pending final disposal in a federal facility. *See Appeal* at 6-7, 11-12 & 14. Providing very little supporting evidence or analysis, the Town claims that the actual use of the TSCs is storage, the TSCs' actual pollution control effect is minimal, and Maine Yankee's purpose for putting the TSCs into operation is temporary storage. *See id.* As an initial matter, Maine Yankee's motive for installing the TSCs is not relevant to determining their primary function. As reflected in the steps laid out in the *Town of Jay* decision, quoted above, determining motive is a separate inquiry from determining primary function. Second, we agree that the TSCs store nuclear waste. However, just as with the ISFSI, the TSCs themselves must *safely* store nuclear waste by confining radionuclides.<sup>8</sup> *See Nesbit Report* at 10 ("The design of a used fuel storage system would be quite different if it did not need to accomplish the primary safety function of confinement . . . [and] there would be no need for an impermeable TSC that is carefully engineered and manufactured out of corrosion resistant material to exacting standards").

The Town then argues that the TSCs' pollution control effect is minimal. Pointing to radionuclide emission data from the now decommissioned spent fuel pool, which shows there

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<sup>8</sup> As the Town notes, the manufacturer of Maine Yankee's dry storage system sums this up stating the ISFSI "has been engineered to simply provide an excellent and *safe* system for storing and transporting nuclear fuel." NAC International website visited 12/23/2003 (emphasis added).

were low<sup>9</sup> radionuclide emissions from the pool in 1998, the Town claims that there are no longer radionuclides in the nuclear waste or if there are, the radionuclides are not easily dispersible because they are confined by cladding. See Appeal at 6. However, the limited emissions from the spent fuel pool only proves that the pool was working as intended by preventing radionuclide emissions. It does not prove that there are no radionuclides available today to be emitted. See Nesbit Supplemental Report at 3 (explaining that there should not be significant emissions of radionuclides from spent fuel pools because of the spent fuel pool's design features); see also Testimony of Brian Haagensen Responding to the Town of Wiscasset Filing Dated 2/15/2023 at 4 (March 17, 2023) ("Haagensen Supplemental Report") (describing the spent fuel pool's design features which filter and remove radionuclides from spent fuel pool).

Additionally, radionuclides have half-lives that can span decades or even centuries; thus, radionuclides were present in Maine Yankee's nuclear waste in 1998 and continue to be present today. See Nesbit Supplemental Report at 2 (noting nuclear waste stays radioactive for millions of years because of the presence of radionuclides in the waste). Furthermore, radionuclides are easily dispersible. [REDACTED]

[REDACTED] If not for the additional protection provided by the TSCs or spent fuel pool, those radionuclides would be emitted into the atmosphere. See Haagensen Supplemental Report at 2 ("Although the cladding may have provided a fairly effective barrier to confine most of the radionuclides when it was first loaded into the canister, the cladding will degrade over time and the [nuclear waste] will release both fission products gasses volatiles and particulates into the cannister atmosphere . . .").

Second, the Town argues that because the Department concluded that the TSCs' functions are radionuclide confinement and radiation shielding, the Department failed to adequately consider the TSCs' other functions. See Appeal at 11-13. The Town's argument, however, fails on its face. As an initial matter, the TSCs perform the following functions: (1) radionuclide confinement; (2) protection of nuclear waste from external threats; (2) decay heat removal; (3) criticality control; (4) shielding; and (5) transportation. See Nesbit Report at 8-9; Haagensen Report at 5-9; see also 10 C.F.R. §§ 72.236(a)-(m).

In Part I.C. of its Decision, the Department acknowledges and discusses all the TSCs' functions that the Town claims the Department did not consider. See Decision at 2-3 (noting TSC's heat removal, criticality control, transport functions). The Department then concludes that the overall functions of the TSCs are radionuclide confinement and radiation shielding, and ultimately "that the primary function of the TSCs is confinement of radionuclides, which is a pollution control function." See *id.* at 3, 6. This finding is correct because, although the TSCs

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<sup>9</sup> The Town claims that there were *no* radionuclide emission from the spent fuel pool in 1998. However, this is untrue. The 1998 data show that radionuclides *other than tritium* were not emitted in detectable quantities. Thus, the data shows that at minimum the spent fuel pool did emit tritium, a type of radionuclide.

perform various functions, the TSCs perform those functions for the purpose of safely confining radionuclides. *See* Nesbit Report at 4, 7 (“Confinement is the primary safety function for dry storage systems . . . The other safety functions – structural integrity, heat removal, shielding and criticality control – support the confinement function . . .”); *see also* Haagensen Report at 4-5 (“confinement of radionuclides is clearly the primary purpose of the ISFSI because all other functions either directly support the confinement function or result from or are a byproduct of meeting the confinement function”).

Thus, the Department did not err in its analysis of the TSCs’ functions.

**ii. The Department Correctly Applied the Primary Purpose Test to the VCCs and Concrete Pads.**

The Town next turns to the VCCs and concrete pads, arguing that the Department should not have construed them as part of the overall air pollution control facility.

The Town first claims that the Department does not have jurisdiction to interpret the “all parts and accessory” language of the pollution control property tax exemption statutes. 36 M.R.S. § 656(1)(E)(2) (exempting air pollution control facilities and “all parts and accessories thereof”). The Town argues that the Department’s long-standing interpretation that the “all parts and accessory” language means “all associated piping, electrical, concrete, insulation and structural installations necessary for the construction, and operation” of pollution control facilities, is an “impermissible expansion” of the pollution control tax exemption. *See* Appeal at 9.

As an initial matter, it is blackletter law that the Department has the power to reasonably interpret the meaning of the statutes it enforces. *See Imagineering, Inc. v. Superintendent of Insurance*, 593 A.2d 1050, 1053 (Me. 1991) (giving deference to administrative agency on questions involving interpretation of statutes unless statutes plainly compel contrary result). Furthermore, the Department does not need to go through a rulemaking, as the Town seems to suggest, every time it interprets a statute. Just as it did for Maine Yankee’s tax exemption permit application, the Department must interpret statutory language whenever it approves or denies permits or takes any number of other actions assigned to it by the Legislature.

Additionally, the Department’s interpretation of the “all parts and accessories” language was reasonable here because the VCCs and concrete pads are essential to ensuring that the TSCs safely confine radionuclides. The Town misconstrues this fundamental point, claiming that the functions of the VCCs and concrete pads are not “necessary for the construction and operation” of the TSCs. *See* Appeal at 9. For example, the Town argues that the VCCs’ decay heat removal function proves that the VCCs do not have an air pollution control function because the heat removal function is “both independent of the TSCs and unrelated to containment of radionuclides.” *See* Appeal at 15. On the contrary, the VCCs’ decay heat removal function is essential to the confinement of radionuclides. *See* Nesbit Report at 9 (“By limiting TSC temperature, adequate heat removal . . . supports the structural integrity of the TSC and thus the confinement function”); *see also* Haagensen Report at 7 (Heat removal . . . supports

confinement because it helps to ensure that the barriers created by the . . . cladding and the canister do not break down, increasing the risk of a release of radionuclides”).

The Town’s arguments demonstrate its fundamental misunderstanding of the ISFSI and how it functions. The components of the ISFSI – the TSCs, VCCs and concrete pads – work together as a cohesive system to safely store nuclear waste and confine radionuclides. As Steve Nesbit explains:

The components of the [ISFSI] work together to accomplish the safety functions that are required to meet NRC regulations and thereby provide reasonable assurance of the adequate protection of public health and safety. For example . . . the VCC protects the TSC from environmental hazards (e.g., wind-blown missiles) that could damage the TSC and result in loss of confinement . . . . In another example, the concrete storage pad is engineered to be compatible with the seismic design of the [ISFSI] in order to protect against a loss of confinement due to damage from earthquakes. See Nesbit Report at 10.

The Department recognized the interconnection between the TSCs, VCCs, and concrete pads as evidenced by its description of the ISFSI system in its Decision. See Decision at 2-3 (describing how the TSCs, VCCs, and concrete pads work together to confine radionuclides and remove decay heat). Thus, the Department correctly concluded that the VCCs and concrete pads are parts and accessories to the TSCs because they play an essential role in protecting the TSCs from external threats so that the ISFSI system as a whole can continue to confine the radionuclides under both normal and accident conditions. If any of the ISFSI components were to fail, the risk of releasing radionuclides would increase to unacceptable levels.

The Town concludes by arguing that the Department’s interpretation of the “all parts and accessories” language creates a slippery slope out of the property tax pollution control exemption because all buildings that house air pollution control equipment would now qualify as parts and accessories to pollution control facilities. See Town’s Appeal at 11. However, this goes too far, and the Town’s concerns are not warranted. Unlike a building, the VCCs and concrete pads are specifically engineered to work together with the TSCs to manage nuclear waste by confining radionuclides, all per exacting NRC regulations.

For the reasons set forth above, the Department did not err when it found the VCCs and concrete pads were “parts and accessories” to the TSCs.

**iii. The Department Was Correct When It Did Not Consider Maine Yankee’s Motive for Installing the TSCs.**

Finally, the Town argues that because storage is the primary function of the TSCs, the Department should have evaluated Maine Yankee’s motive for installing them. See Appeal at 8-9. The Town also argues that the change from the spent fuel pool that existed while the power plant was operating to the ISFSI had “no discernible impact on reduction, control, or elimination

of air pollutants” and therefore the primary purpose of the TSCs “cannot be pollution control.” *See id.* at 9.

First, as discussed above, we disagree with the Town’s characterization of the applicable test. Under the test articulated in the *Town of Jay* decision, once the Department determined that the primary purpose is to confine radionuclides, Maine Yankee’s motives were no longer relevant. It did not need to consider Maine Yankee’s motives for installing the TSCs.

Second, why a taxpayer selects one pollution control method over another is irrelevant under the pollution control statutes. The statute simply does not allow the Department to compare an applicant’s motive for installing one type of air pollution equipment over another. *See Town of Jay*, 822 A.2d at 1119 (holding the motive analysis should follow the “narrowly focused scope of inquiry mandated by this statutory language”). Instead, the motive analysis merely requires that the taxpayer’s purpose for installing the equipment in question be pollution control. *See* 36 M.R.S. §§ 655(1)(N) & 656(1)(E)(2). Maine Yankee installed the ISFSI, including the TSCs, to safely confine radionuclides, as required by law, and therefore Maine Yankee’s motive was air pollution control.

### CONCLUSION

In sum, the Department did not err in its Decision to approve Maine Yankee’s pollution control property tax exemption application. Accordingly, we request that the Board of Environmental Protection uphold the Department’s Decision and reject the Town’s appeal.

Dated: July 6, 2023



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