RAS 12385

October 10, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
Entergy Nuclear Vermont Yankee, LLC	)	Docket No. 50-271-LR
and Entergy Nuclear Operations, Inc.	)	ASLBP No. 06-849-03-LR
	)	
(Vermont Yankee Nuclear Power Station)	)	

ENTERGY'S PETITION FOR INTERLOCUTORY REVIEW OF LBP-06-20 ADMITTING NEW ENGLAND COALITION'S CONTENTION 1

Pursuant to 10 C.F.R. § 2.341(f), Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (hereinafter collectively referred to as "Entergy") hereby request that the Commission review the Atomic Safety and Licensing Board's ("Board") split decision in LBP-06-20[1] admitting New England Coalition's ("NEC") Contention 1 in the Vermont Yankee Nuclear Power Station ("VYNPS") license renewal proceeding. The Board majority's decision admitting this contention is inconsistent with the NRC rules and established precedent, and is thus clearly erroneous. Should NEC Contention 1 advance, it would (1) cause Entergy immediate and serious irreparable harm, the impact of which could not be alleviated through a petition for review of the Board's final decision at the end of the proceeding; and (2) affect the basic structure of the proceeding in a pervasive and unusual manner. The litigation of NEC Contention 1 would result in a duplicative assessment of aquatic impacts, in contravention of Section 511(c) of the Federal Water Pollution Control Act ("Clean Water Act") and the NRC's rules. Such duplicative review would usurp the decision making authority of the Vermont

[1] Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption), LBP-06-20, 63 N.R.C. ___, slip op. at 47-57 (Sept. 22, 2006).

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Agency of Natural Resources ("VANR"), which is the NPDES permitting agency given primacy by Section 511(c), and the Vermont Environmental Court. It would also expose Entergy to the burden of litigating the same issues in two fora, result in litigation of matters within the State's exclusive jurisdiction, and create the potential for inconsistent decisions.

In the alternative, should the Commission find that the issues discussed herein do not meet the standards set forth in § 2.341(f), Entergy requests that Commission nonetheless accept review of NEC Contention 1 as a matter of discretion under its inherent supervisory power over adjudication.

Section I of this Petition provides brief background information. Sections II through V provide the information in support of this Petition prescribed by 10 C.F.R. § 2.341(b)(2)(i)-(iv), as required by 10 C.F.R. § 2.341(f)(2).

I. BACKGROUND

A. The NPDES Permit and § 316(a) Variance for Vermont Yankee

The discharges of liquid effluent from VYNPS are currently governed by NPDES permit 3-1199, issued by VANR, which is authorized by the EPA to implement the permitting program under the Clean Water Act.[2] This permit establishes thermal effluent limitations pursuant to § 316(a) of the Clean Water Act, 33 U.S.C. § 1326. NPDES permit 3-1199 expired on March 31, 2006, but remains in effect because of a timely application for renewal still pending before VANR. See Entergy's Answer to New England Coalition's Petition for Leave to Intervene, Request for Hearing, and Contentions (June 22, 2006) ("Entergy's Answer") at 11 n.4 and Att. 1; Environmental Report, Rev. 1 ("ER") at § 4.4.5.1.

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[2] Vermont is authorized by the U.S. Environmental Protection Agency ("EPA") pursuant to section 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b), to administer the NPDES permitting program for discharges into waters within the state's jurisdiction. See http://cfpub.epa.gov/npdes/statestats.cfm?view=specific.

In February 2003, Entergy applied to the VANR for an amendment to this NPDES permit to increase the thermal effluent limits by 1°F for the period from May 16 through October 14 of each year. This amendment was unrelated to renewal of the NRC operating license, but instead sought to facilitate increased power generation during summer time peak load periods, to improve operational flexibility by reducing the need for the Station to react to unexpected temporary reductions in river flow, to increase operational efficiency, and to reduce the frequency of operation of the VYNPS cooling towers. Entergy's Answer at 11 n.4.

On March 30, 2006, the VANR granted an amendment to the NPDES permit approving a 1°F increase in the thermal limitations during the period from June 16 through October 14, but denying such an increase during the period from May 16 through June 15. Id. at 11; ER (Rev. 1) at § 4.4.5.1. In an Amended Fact Sheet[3] accompanying the amended permit, the VANR concurred with the determination that the existing discharge under the thermal effluent limitations in effect at the time had resulted in "no appreciable harm" to the aquatic biota. Entergy's Answer at 15, citing Amended Fact Sheet at 4; ER (Rev. 1) at § 4.4.5.1. The VANR also agreed that, with its decision limiting the 1°F increase to the period from June 16 through October 14, the proposed limits would continue to assure the protection and propagation of a balanced indigenous population of shellfish, fish and wildlife during this period (Amended Fact Sheet at 4-5), as is required by § 316(a) of the Clean Water Act:

> The Applicant's predictive analysis for the Demonstration indicates that the approved temperature increase will create insignificant changes in the thermal structures of the receiving waters affected by the project's discharge and that as a result the use of the waters by all species will be maintained and protected.
>
> * * *

[3] The Amended Fact Sheet is included in Appendix E to the ER (Rev. 1).

> The Agency has concluded that there will be no significant impact from the proposed discharge on the aquatic biota that are present in the area affected by the proposed discharge. The agency therefore agrees with the Applicant's analysis that the use of the waters by all species present will be maintained and protected.

Entergy's Answer at 15, quoting Amended Fact Sheet at 6-7; ER (Rev. 1) at § 4.4.5.1.

NEC subsequently appealed the NPDES permit amendment to the Vermont Environmental Court. On August 28, 2006, the Vermont Environmental Court granted a stay of the amendment to preserve the status quo pending judicial review. See Entergy's Answer to New England Coalition's Motion to File Supplemental and New Authority (Sept. 8, 2006).

B. The NRC License Renewal Application

Entergy submitted its application for renewal of NRC Operating License DPR-28 for VYNPS in January 2006 ("Application"). 71 Fed. Reg. 15,220 (Mar. 27, 2006). The Application included an ER addressing the issues specified by 10 C.F.R. § 51.53(c)(3), including heat shock as required by 10 C.F.R. § 51.53(c)(3)(ii)(B), which provides:

> If the applicant's plant utilizes once-through cooling or cooling pond heat dissipation systems, the applicant shall provide a copy of current Clean Water Act 316(b) determinations and, if necessary, a 316(a) variance in accordance with 40 CFR part 125, or equivalent State permits and supporting documentation. If the applicant can not provide these documents, it shall assess the impact of the proposed action on fish and shellfish resources resulting from heat shock and impingement and entrainment. (Emphasis added.)

In accordance with this provision, Entergy's Application provided the NPDES permit, which constituted Vermont's § 316(a) variance for the thermal discharges permitted at the time. Entergy's Answer at 12. Following issuance of the March 30, 2006 amendment to the NPDES permit approving the 1°F increase in the thermal limit, and after initial pleadings in this proceeding, Entergy submitted a revision to the ER providing the amended NPDES permit constituting the § 316(a) variance for the increased limit, and included the supporting

documentation (the Amended Fact Sheet and a Responsiveness Summary) which contained the VANR's assessment of the aquatic impacts associated with the permitted thermal effluent. Entergy's Answer to New England Coalition's Late Contention (Aug. 17, 2006); ER (Rev. 1) § 4.4.5.1 and App. E.

C. Procedural History

On March 27, 2006, the Nuclear Regulatory Commission ("NRC" or "Commission") published a Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing ("Notice") regarding the Application. 71 Fed. Reg. 15,220 (March 27, 2006). The Notice permitted any person whose interest may be affected to file a request for hearing and petition for leave to intervene within 60 days of the notice. Id. at 15,220-21.

On May 26, 2006, NEC submitted its Petition for Leave to Intervene, Request for Hearing, and Contentions ("NEC Petition"), which advanced six contentions, including NEC Contention 1, alleging that "Entergy Failed to Assess Impacts To Water Quality." The gravamen of NEC's contention is that the Application does not sufficiently analyze the aquatic impacts from the 1°F increase in thermal effluent approved by VANR in the March 30, 2006 amendment to the NPDES permit and now under judicial review by the Vermont Environmental Court.[4]

Entergy's Answer opposed NEC Contention 1 on several grounds, including that it impermissibly challenged the NRC's license renewal rules and was barred by the Clean Water Act.[5] Under the NRC rules at 10 C.F.R. § 51.53(c)(3)(ii)(B), an applicant is not required to assess thermal impacts if it provides a § 316(a) variance or equivalent state permits, which Entergy has done. Entergy's Answer at 12. In response to NEC's suggestion that NEPA

[4] NEC Petition at 10-11.

[5] Entergy's Answer at 11-18; Tr. at 261-76.

required Entergy and the NRC to evaluate the thermal impacts notwithstanding the issuance of the NPDES permit, Entergy explained that 10 C.F.R. § 51.53(c)(3)(ii)(B) is intended to be consistent with section 511(c) of the Clean Water Act, 33 U.S.C. § 1371(c)(2) (2004),[6] which long-standing precedent has interpreted as allowing, indeed mandating, that the NRC accept an NPDES permitting agency's assessment of aquatic impacts at face value and as dispositive. See Entergy's Answer at 13-14.

Because Entergy had not yet revised the ER to include the amended NPDES permit authorizing and assessing the one degree increase, the NRC Staff initially did not object to the admission of a contention alleging the absence of an assessment of the impacts of the discharge temperature increase.[7] However, the NRC Staff answer indicated that this omission would be cured and the contention mooted by the submission of the amended permit.[8] Entergy subsequently addressed the NRC Staff's position by incorporating the amended NPDES permit and supporting documentation into a revision to the ER on July 27, 2006.[9]

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[6] Section 511(c) provides:

> (2) Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to –
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> (A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under section 1341 of this title; or
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> (B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.

33 U.S.C. § 1371(c)(2) (2004).

[7] NRC Staff Answer to Request for Hearing of New England Coalition (June 22, 2006) at 8, 9.

[8] Id. at 9 & n.6.

[9] Letter from T. Sullivan, VYNPS to NRC (License Renewal Application, Amendment No. 6) (July 27, 2006), ADAMS Accession No. ML062130080. Entergy provided a copy of the ER revision to the Board and parties (Letter from David R. Lewis to ASLB (July 28, 2006)), but the Board struck this submission. Order (Striking Entergy's letter to the Board and Attached Materials) (Aug. 11, 2006). However, the Board noted the ER revision in its decision. See LBP-06-20, slip op. at 55 n.57.

NEC filed a reply to the Entergy and NRC Staff Answers.[10] Entergy moved to strike portions of this answer as raising concerns beyond the original scope of Contention 1.[11] The NRC Staff supported this motion,[12] which was granted in part by the Board. LBP-06-20, slip op. at 57.

A prehearing conference which included oral argument on NEC Contention 1 was held on August 1 and 2.[13] Subsequent to the prehearing conference, NEC sought to amend its contention.[14] Entergy and the NRC Staff have each opposed this request.[15] NEC's request is still pending before the Licensing Board. See LBP-06-20, slip op. at 57 n.59.

In addition, following the Vermont Environmental Court's decision staying the amended NPDES permit, NEC submitted a motion to file supplemental authority concerning this development.[16] Entergy responded to this motion.[17] The Board then rendered its decision in LPB-06-20, which included a majority ruling admitting NEC Contention 1. Judge Wardwell issued a dissenting opinion regarding the admissibility of this contention.[18]

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[10] New England Coalition, Inc.'s Reply to Entergy and NRC Staff Answers to Petitions for Leave to Intervene, Request for Hearing, and Contentions (June 29, 2006).

[11] Entergy's Motion to Strike Portions of the New England Coalition's Reply (July 10, 2006).

[12] NRC Staff Answer to Entergy's Motion to Strike Portions of the New England Coalition's Reply (July 20, 2006).

[13] The oral argument on NEC Contention 1 is found in the transcript at pages 248 to 293.

[14] NEC's Late Contention, or Alternatively, Request for Leave to Amend of File New Contention (Aug. 7, 2006).

[15] Entergy's Answer to New England Coalition's Late Contention (Aug. 17, 2006); NRC Staff Answer Opposing NEC's Late Contention, or Alternatively, Request for Leave to Amend of File New Contention (Aug. 17, 2006).

[16] New England Coalition Inc.'s (NEC) Motion to File Supplemental and New Authority Re: NEC Contention 1 and Request for Leave to Amend Contention 1 of File New Contention (Aug. 20, 2006).

[17] Entergy's Answer to New England Coalition's Motion to File Supplemental and New Authority (Sept. 8, 2006).

[18] LBP-06-20, Dissenting Opinion of Judge Wardwell on Admissibility of New England Coalition's Contention 1 (Environmental) ("Dissenting Opinion")

II. SUMMARY OF THE DECISION FOR WHICH COMMISSION REVIEW IS SOUGHT

Entergy seeks review of the majority decision in LBP-06-20 admitting NEC Contention 1.[19] The majority held that NEC Contention 1 raised a material issue – "'whether Entergy's [ER] sufficiently assesses the impacts of increased thermal discharges over the requested twenty-year license extension'" – supported by a sufficient explanation of the bases – that "the ER contains an insufficient analysis of the thermal impacts in the Connecticut River and merely refers to an NPDES permit, which is under appeal, of allegedly uncertain status, and does not cover the twenty years covered by the proposed license renewal." LBP-06-20, slip op. at 52 (quoting NEC Petition at 11, 13). Because Entergy had challenged the admissibility of this contention sharply, the majority held the requirement for a genuine dispute was satisfied. Id.

In ruling that there were sharply disputed issues to be heard, the majority focused on four questions. First, the majority considered and rejected the argument that NEC Contention 1 is barred by Section 511(c) of the Clean Water Act. LBP-06-20, slip op. at 53-55. Second, the majority further questioned the "meaning and the status of [the] amendment to the NPDES permit . . . given that the permit expired on March 31, 2006, is the subject of an appeal, and was recently stayed." Id. at 55. Third, the majority questioned whether the express requirement contained in 10 C.F.R. § 51.53(c)(3)(ii)(B) "is the only requirement [Entergy] must meet." Id. at 56 (emphasis in original). Fourth, the majority questioned whether "Entergy satisf[ies] 10 C.F.R. § 51.53(c)(3)(ii)(B) and Part 51 in general," and whether "the NRC satisfy[ies] its NEPA duties, by simply attaching a copy of an NPDES permit that will expire before the NRC license renewal even takes effect[.]" Id. at 56-57.

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[19] LBP 06-20, slip op. at 47-82, 94 n.86.

III. STATEMENT WHERE MATTERS OF FACT OR LAW RAISED IN THE PETITION WERE PREVIOUSLY RAISED

The matters of fact and law raised in this Petition for review were raised before the Licensing Board. The portions of the record in which Entergy raised these matters consist of:

1. Entergy's Answer (June 22, 2006)
2. Entergy's Motion to Strike Portions of New England Coalition's Reply (July 10, 2006)
3. Letter from David R. Lewis to ASLB (July 28, 2006)
4. Entergy's Answer to New England Coalition's Late Contention (July 17, 2006)
5. Transcript of Oral Arguments at 261-76 (Aug. 1, 2006) ("Tr.")
6. Entergy's Answer to New England Coalition's Motion to File Supplementary and New Authority (Sept. 8, 2006)

IV. STATEMENT WHY THE MAJORITY DECISION WAS ERRONEOUS

The Board majority clearly erred in admitting NEC Contention 1. NEC Contention 1 is inadmissible because it challenges the NRC's license renewal rules at 10 C.F.R. § 51.53(c)(3)(ii)(B). That rule provides:

> If the applicant's plant utilizes once-through cooling or cooling pond heat dissipation systems, the applicant shall provide a copy of current Clean Water Act 316(b) determinations and, if necessary, a 316(a) variance in accordance with 40 CFR part 125, or equivalent State permits and supporting documentation. If the applicant can not provide these documents, it shall assess the impact of the proposed action on fish and shellfish resources resulting from heat shock and impingement and entrainment.

As previously explained, Entergy's Application provided the NPDES permit which constituted Vermont's § 316(a) variance for the thermal discharges permitted at the time, and Entergy subsequently provided the amended permit constituting the § 316(a) variance for the thermal discharge with the 1°F increase. Under the NRC rules, no further analysis was required.

10 C.F.R. § 51.53(c)(3)(ii)(B) is intended to be consistent with the limitations on the NRC's authority under section 511(c) of the Clean Water Act.[20] In promulgating this rule, the Commission stated:

> The Commission has considered the impacts of license renewal on aquatic ecology and, in doing so, has reviewed existing NPDES permits . . . . Agencies responsible for existing permits are not constrained from reexamining the permit issues if they have reason to believe that the basis for their issuance is no longer valid. The Commission does not have authority under NEPA to impose an effluent limitation other than those established in permits issued pursuant to the [Clean Water Act].

61 Fed. Reg. 28,467, 28,475 (Jun. 5, 1996). Accordingly, the NRC's rules explain:

> Where an environmental assessment of aquatic impact from plant discharges is available from the permitting authority, the NRC will consider the assessment in its determination of the magnitude of environmental impacts for striking an overall cost-benefit balance at the construction permit and operating license stages, and in its determination of whether the adverse environmental impacts of license renewal are so great that preserving the option of license renewal for energy planning decision makers would be unreasonable at the license renewal stage.

10 C.F.R. § 51.71(d) n.3 (2006). Thus, the NRC's rules require a license renewal applicant to provide the § 316(a) variance and supporting documentation constituting the NPDES permitting agency's assessment, which the NRC will adopt and factor into its EIS. A further analysis is required only if a § 316(a) variance and supporting documentation cannot be provided.

Despite Entergy's compliance with 10 C.F.R. § 51.53(c)(3)(ii)(B), the majority decision admitted NEC Contention 1 because it perceived the existence of several issues: (1) whether the NRC must independently assess aquatic impacts; (2) whether the rule is applicable given the possibility that the NPDES permit amendment may be set aside on judicial review; (3) whether

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[20] Dissenting Opinion at 10 ("the inability to review and alter the effluent limitations that has been built into the NRC regulations is consistent with the CWA Section 511(c).").

the rule and NEPA may be satisfied by an NPDES permit that is only issued for 5-year terms and therefore does not cover the same period as license renewal; and (4) whether there are thermal impacts other than heat shock that should be assessed. As discussed below, none of these "issues" represents a litigable concern – indeed, in large measure, these issues simply go to the validity of 10 C.F.R. § 51.53(c)(3)(ii)(B) and thus amount to impermissible challenges to that rule.

A. The Board Majority misapprehended the import of Section 511(c) of the Clean Water Act.

In ruling that NEC Contention 1 was admissible, the Board majority misinterpreted Section 511 as merely prohibiting the NRC from imposing its own effluent limitations, and not barring the NRC from assessing the impacts resulting from such standards. LBP-06-20, slip op. at 54. This interpretation implies that the NRC is required by NEPA to independently assess aquatic impacts notwithstanding the existence of an assessment by the NPDES permitting agency.

The majority's reading of Section 511 was clearly erroneous for two reasons. First, NEC Contention 1 seeks an assessment of the impacts of the 1°F increase in the thermal effluent limitation established by the VANR in the March 30, 2006 amendment to VYNPS's NPDES permit. Thus, NEC Contention 1 directly seeks review of an effluent limitation established under the Clean Water Act. This is specifically what Section 511(c)(2)(A) does not allow.

Second, the majority neither acknowledged nor discussed controlling precedent holding that the NPDES permitting agency's assessment of impacts should be taken at face value and accepted as dispositive. In Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 N.R.C. 33, 69 (1977), the Appeal Board determined that it was "justified in

accepting" the determination by the EPA[21] that the Seabrook Nuclear Plant's once-through cooling system would "'assure the protection and propagation of a balanced, indigenous population of fish, shellfish and wildlife in and on the receiving waters'" and that "the marine environment impacts of once-through cooling are small." Id. at 69-71. According to the Appeal Board, it was justified in accepting the EPA's findings "without independent inquiry of [its] own" because the 1972 amendments to the Clean Water Act forbid the NRC from "go[ing] behind either [EPA-imposed] standards or the determination by EPA or the State that the facility would comply with them." Id. at 70-71 (emphasis added).

The Commission affirmed the Appeal Board's decision to "accept and use without independent inquiry EPA's determination of the magnitude of the marine environmental impacts from the cooling system in striking an overall cost-benefit balance for the facility." Seabrook, CLI-78-1, 7 N.R.C. 1, 23-24 (1978). The First Circuit likewise affirmed, holding that the NRC did not "shirk its NEPA duties" but rather "obeyed its [Clean Water Act] duties by deciding to accept as dispositive EPA determinations concerning" the aquatic impact of Seabrook Nuclear Plant's once through cooling system. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 98 (1st Cir. 1978) (emphasis added).

Later, in Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 N.R.C. 702, 712-13, 715 (1978), the Appeal Board again held that Federal licensing agencies are not to second-guess EPA[22] by undertaking independent analyses. The

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[21] This case involved a § 316(a) variance issued by the EPA, because Massachusetts was not authorized to implement the NPDES permitting program.

[22] In Yellow Creek, the EPA was again the NPDES permitting agency, and the Appeal Board's decision focused on the EPA's responsibilities. The Appeal Board noted that these responsibilities may be given to the States in certain circumstances (Id. at 705), presumably referring to those instances where EPA authorizes a State to implement the NPDES permitting program. Because Section 511 applies broadly to preclude review of any effluent limitation or requirement established pursuant to the Clean Water Act, the Appeal Board's discussion

Appeal Board extensively reviewed the legislative history of Section 511(c) the Clean Water Act. As summarized by the Appeal Board, the legislative history provides that

> (1) "[Senator Baker's] amendment [to include the forerunner of Section 511(c)] would make it clear that for the purposes of making the kind of 'balancing judgment' required by NEPA, each individual Federal permitting and licensing agency would not be required to develop its own special expertise with respect to water quality considerations," Id. at 710 (quoting Senator Baker) (emphases added);
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> (2) "Section 511(c)(2) seeks to overcome that part of the Calvert Cliffs decision requiring [the Atomic Energy Commission] or any other licensing or permitting agency to independently review water quality matters" Id. at 711 (quoting Congressman Dingell) (footnote omitted); and
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> (3) "The whole concept of EPA is that environmental considerations are to be determined in one place by an agency whose sole mission is protection of the environment." Id. at 712 (quoting Senator Muskie) (emphasis added) (footnote omitted).

Based on its review of this legislative history, the Appeal Board determined that "Federal responsibility for water quality standards and pollution control . . . is shifted to EPA as its exclusive province." Id. Further, "the mandate to acquire 'expertise' in developing, setting, and enforcing effluent limitations and water quality standards is also given to EPA; Federal Licensing agencies are to rely on that agency when such matters are involved and not develop duplicate expertise on their own." Id. at 712-13 (emphasis added).

Subsequently, Carolina Power & Light Co. (H. B. Robinson, Unit No. 2), ALAB-569, 10 N.R.C. 557, 562 (1979) held that, where the EPA or an authorized state has assessed the aquatic impacts in approving a plant's cooling water system, the NRC must take that assessment at face value. More recently, an NRC licensing board explicitly held that "the NRC has been barred by

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should be read as applying equally to the determinations of State agencies implementing EPA-approved NPDES programs.

statute from making substantive determinations regarding compliance with the Clean Water Act." Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 N.R.C. 81, 93 n.55 (2004) (citing Section 511(c)(2) of the Clean Water Act), aff'd, CLI-04-36, 60 N.R.C. 631 (2004).

Thus, both NRC and judicial decisions applying Section 511(c) have uniformly held that the NRC must accept an NPDES permitting agency's assessment of aquatic impacts as dispositive and is not to duplicate that assessment or perform its own independent review. An independent NRC assessment "going behind" the VANR's § 316(a) variance and potentially undercutting the VANR's findings on which that variance is based would be just as much an attack on the thermal effluent limitations established by the permitting agency as would the NRC's establishment of its own effluent limitations.

The majority opinion referred to 10 C.F.R. § 51.71(d) n.3, which requires the NRC to weigh aquatic effects in its environmental impact statements. LBP-06-20, slip op. at 53. However, that provision also states:

> Where an environmental assessment of aquatic impact from plant discharges is available from the permitting authority, the NRC will consider the assessment in its determination of the magnitude of environmental impacts for striking an overall cost-benefit balance at the construction permit and operating license stages, and in its determination of whether the adverse environmental impacts of license renewal are so great that preserving the option of license renewal for energy planning decision makers would be unreasonable at the license renewal stage.

10 C.F.R. § 51.71(d) n.3 (2006). Thus, as the dissenting opinion in LBP-06-20 correctly observed, this provision does not require the NRC to independently assess aquatic impacts. Dissenting Opinion at 9. Rather, it directs the NRC to utilize the permitting agency's assessment

in weighing the overall cost and benefit of a license renewal application, consistent with Section 511(c).

Consequently, it is appropriate for the NRC to accept VANR's determination that there are no significant impacts on the aquatic environment from the VYNPS thermal effluents, with or without the proposed 1°F increase. It is that analysis that must be accepted "at face value" and incorporated into the NRC's cost/benefit NEPA analysis on the VYNPS license renewal. Allowing a hearing on the correctness of the VANR's findings would amount to exactly the type of review prohibited by Section 511(c).

B. The status of the NPDES permit does not raise a material issue

The majority conceded that, "[i]f the NPDES permit, which addresses the increased thermal impact of the [VYNPS] facility, is valid and effective, then the first prong of 10 C.F.R. § 51.53(c)(3)(ii)(B) is satisfied." LBP-06-20, slip op. at 55-56. However, the majority erroneously reasoned, "[i]f not, the second prong requires Entergy to 'assess the impact on fish and shellfish resources resulting from heat shock.'" LBP-06-20, slip op. at 56. The majority overlooks the fact that if, after judicial review, the Vermont Environmental Court were to vacate the amended NPDES permit, or if the VANR does not include this increase in the thermal limit when it renews VYNPS's NPDES permit, there will be no increase in the thermal effluent for either Entergy or the NRC Staff to assess.

Consequently, as the dissenting opinion observed, the possibility that the VANR's § 316(a) variance and assessment will be set aside raises no material issue:

> If the appeal is upheld and the NPDES permit is revoked, the effluent limitations revert back to the previous values and there will be no increase in thermal discharge, rendering this contention moot.

Dissenting Opinion at 6.

Moreover, under the NRC rules what is important is that the VANR has assessed the thermal impacts and made § 316(a) findings supporting the thermal effluent limitations established for VYNPS, not whether the NPDES permit is under judicial review. Indeed, in the Seabrook decision in which the Commission affirmed the acceptance of the NPDES permitting agency's assessment without independent inquiry, the Commission explicitly noted that the EPA decision on which the Commission relied in the proceeding was under judicial review at the time. See Seabrook, CLI-78-1, 7 N.R.C. at 26 n.41. Therefore, the instant case is not distinguishable. The NPDES permitting agency's expert assessment of the aquatic impacts must still be respected by the NRC.

C. The 5-year term of the NPDES permit does not negate the NRC rule.

The majority's concern that the NPDES permit will expire before the license renewal term (LBP-06-20, slip op. at 56-57) also provides no grounds to disregard 10 C.F.R. § 51.53(c)(3)(ii)(B). Indeed, this concern simply challenges the validity of the NRC's rule and if accepted would essentially write 10 C.F.R. § 51.53(c)(3)(ii)(B) out of effect. Section 51.53(c)(3)(ii)(B) provides that an Applicant shall provide a "316(a) variance . . . or equivalent State permits and supporting documentation." Section 316(a) variances are granted and implemented through NPDES permits,[23] and NPDES permits must be issued for fixed terms not exceeding five years. 33 U.S.C. § 1342(b)(1)(B). To suggest that the § 316(a) variances in these permits may not be relied upon because they have a shorter duration than the license renewal term would render § 51.53(c)(3)(ii)(B) meaningless.

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[23] 40 C.F.R. § 125.70 (This subpart describes the factors, criteria and standards for establishment of alternative thermal effluent limitations under section 316(a) of the Act in permits issued under section 402(a) of the Act [i.e., NPDES permits]). See also 40 C.F.R. § 125.73(a) ("Thermal discharge effluent limitations or standards established in permits. . . .").

Further, NEC never provided any basis showing that there will be any impacts in the period of extended operation that differ from the VANR's assessment. If NEC had information showing the § 316(a) variance could not be relied upon because aquatic impacts in the period of extended operation would be different, NEC should have presented that information and sought a waiver of 10 C.F.R. § 51.53(c)(3)(ii)(B), in accordance with 10 C.F.R. § 2.335(b). NEC did not.

Nor is there any apparent means for the VANR's assessment to be exceeded during the period of extended operation. As the dissenting opinion insightfully pointed out,

> VANR has the opportunity to re-address these effluent limits every five years during renewal of the NPDES permit, and to modify the parameters, if necessary, to protect the aquatic biota. In essence, the NPDES renewal period provides an on-going assessment of cumulative impacts throughout the life of the plant. Based on this, cumulative impacts have been addressed for this issue

Dissenting Opinion at 6.

In sum, the five-year review of a permit's conditions strengthens the NRC's reliance on the VANR's assessments. If there is a change in environmental conditions or in other sources affecting the river in the future, the five-year permitting process provides a mechanism to reassess the thermal effluent limitations and adjust them if necessary. In this case, for instance, the NPDES permit will be up for renewal several times during the license renewal term. The VANR will thus have multiple opportunities to ensure that the effluent limits remain adequate to assure the protection and propagation of a balanced indigenous population of shellfish, fish and wildlife. In short, the NPDES permitting process mandated by the Clean Water Act is more protective than the NEPA review process and, thus, can properly be relied to ensure the continual validity of the VANR's findings.

D. Thermal effects other than heat shock are Category 1 issues

The majority's concern that there may be thermal effects other than heat shock (LBP-06-20, slip op. at 56) raises no genuine issue. First, 10 C.F.R. § 51.53(c)(3)(ii)(B) defines as "heat shock" the Category 2 issue that an applicant must address, and an application cannot be challenged as inadequate if it provides the information required by the NRC rules. Second, 10 C.F.R. § 51.53(c)(3)(ii)(B) focuses on heat shock because other thermal effects have been determined in the Generic Environmental Impact Statement ("GEIS") for License Renewal of Nuclear Plants (NUREG-1437) to be small for all plants and are therefore classified as Category 1 issues in the NRC rules. See 10 C.F.R. Part 50, App. B, Table B-1, which codifies findings on the following Category 1 issues related to the discharge of heat in plant effluent: (1) altered thermal stratification of lakes; (2) temperature effects on sediment transport capacity; (3) scouring caused by discharged cooling water; (4) eurotrophication; (5) low dissolved oxygen in the discharge; (6) cold shock; (7) thermal plume barrier to migrating fish; (8) distribution of aquatic organisms; (9) premature emergence of aquatic insects; (10) gas supersaturation (gas bubble disease); (11) losses from predations, parasitism, and disease among organisms exposed to sublethal stresses; and (12) stimulation of nuisance organisms (e.g., shipworms). See also GEIS at 4-4 to 4-10; 4-14; 4-17 to 4-28.

Admitting NEC Contention 1 based on a concern that there may be effects other than heat shock that need to be considered is simply a challenge to the NRC's Category 1 findings and to 10 C.F.R. § 51.53(c)(3)(i), which provides that a license renewal applicant's environmental report is not required to contain analyses on Category 1 issues. While it is unclear whether NEC even raised heat shock as an issue,[24] as a factual matter, the only other thermal impact raised by

[24] Dissenting Opinion at 3 and n.5.

NEC in its Petition was the effect on shad migration allegedly resulting from thermal barriers. This is specifically a Category 1 issue. 10 C.F.R. Part 50, App. B, Table B-1. Category 1 issues may not be raised in a license renewal proceeding absent a waiver of the NRC rules. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 N.R.C. 3, 12 (2004).

V. INTERLOCUTORY COMMISSION REVIEW OF THE MAJORITY'S RULING ON NEC CONTENTION 1 IS REQUIRED

The Commission should exercise its discretion to review the majority's opinion, because the majority opinion is clearly erroneous, as discussed above. Indeed, in reaching its decision, the majority has departed from the NRC rules, which define the information that a license renewal applicant must provide, and has ignored well-established NRC and judicial precedent accepting as dispositive the assessment of NPDES permitting agencies on aquatic impacts.

The majority's erroneous ruling raises substantial and important issues of law and policy. By admitting this contention, the majority has usurped the decision making authority of the State, which is given primacy in this area by Section 511(c) of the Clean Water Act. As both a matter of law and as a matter of policy, the NRC should avoid duplicating an NPDES permitting agency's assessment of aquatic impacts, which is a matter within that agency's particular expertise and jurisdiction.

Interlocutory review is appropriate because the Board majority's decision threatens Entergy with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision. The majority's decision would require Entergy to provide an assessment of thermal impacts that is not required by the NRC rules. It would (for NRC purposes) essentially nullify the VANR's assessment,

developed over a multi-year permitting process, on which both Entergy and the NRC are entitled to rely, and would usurp the decision making authority of the VANR and Vermont Environmental Court.

Moreover, the majority's decision would require Entergy to litigate the thermal effects in two proceedings (the NRC hearing and the judicial review before the Vermont Environmental Court) simultaneously. Such duplicative litigation would be extremely burdensome. For example, Entergy would be required in the NRC proceeding to produce all documents relevant to the admitted contentions, while at the same time responding to discovery requests in the State action. Duplicative litigation also creates the risk of inconsistent decisions, which could delay and undermine the outcome.

Commission precedent explicitly holds that one of the primary reasons for the enactment of Section 511(c) was to prevent the burdens that would be associated with dual jurisdiction over water quality issues. In Seabrook, the Commission stated

> But perhaps the strongest reason for accepting as conclusive of EPA determinations of aquatic impact is to avoid protracted relitigation of these factual issues. Where litigants have one full and fair opportunity to contest a particular issue, they need not be given a second opportunity to reopen the whole matter before another tribunal where the same issue is relevant.

CLI-78-1, 7 N.R.C. at 26 (1978) (emphases added) (footnote omitted). The First Circuit agreed, holding that NEPA does not require the NRC to provide a "second forum" to that provided by the EPA for an intervenor to present its case. New England Coalition on Nuclear Pollution, 582 F.2d at 99. Further, the Robinson Appeal Board added that events since its decision in Yellow Creek

> teach that the staff and Boards can best expend their limited resources by concentrating on those questions which only this

> Commission can handle, rather than by duplicating the efforts of a sister agency in a field peculiarly within that agency's competence.

Robinson, ALAB-569, 10 N.R.C. at 561 (emphasis added).

Commission precedent is clear that neither the Applicant nor the NRC is required to duplicate the aquatic impact environmental assessments performed by the EPA or the state agency to which the EPA has delegated that authority.[25] "[T]o avoid protracted relitigation of these factual issues," Seabrook, CLI-78-1, 7 N.R.C. at 26, the Commission should determine, now, whether the majority appropriately admitted NEC Contention 1.

Interlocutory review is also appropriate because the Board majority's decision affects the proceeding in a pervasive and unusual manner. First, the majority's ruling will require the litigation of an issue that, under the NRC rules and the Clean Water Act, the NRC is barred from reviewing. Not only would the admission of this contention result in litigating the validity of the VANR's assessments, but also, as suggested by the majority opinion, the validity and effectiveness of the NPDES permit amendment. LBP-06-20, slip op. at 56 (". . .these factual issues will be confronted in the litigation of NEC Contention 1").

The Commission has made it clear that licensing boards should narrowly construe their scope to avoid where possible the litigation of issues that are the primary responsibility of other agencies. Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 N.R.C. 119, 121-22 (1998). The issues raised by NEC Contention 1 belong under the purview of the VANR and Vermont Environmental Court. Here, the amended NPDES permit is

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[25] Dissenting Opinion at 9 ("To require another analysis of alternatives on effluent limitations under NEPA would amount to an unnecessary and repetitive review of the water quality impacts already addressed by another permitting agency.")

currently under judicial review before the Vermont Environmental Court, and that court will determine whether the VANR's 316(a) findings are valid.

Second, the majority's ruling admitting NEC Contention 1 also appears to contemplate litigating whether 10 C.F.R. § 51.53(c)(3)(ii)(B) is valid. In admitting NEC Contention 1, the majority stated:

> NEC Contention 1 raises the issue of the dichotomy of the time periods covered by the respective permits. Entergy is asking for license renewal that will cover the period from 2012 to 2032. In order to comply with NEPA, NRC must assess the environmental impacts, including thermal water impacts, for the twenty years in question. Meanwhile, Entergy's NPDES permit (and/or [Clean Water Act] 316(b) determination), even once it is final and effective, will expire in five years. Under these circumstances, does Entergy satisfy 10 C.F.R. § 51.53(c)(3)(ii)(B) and Part 51 in general, and does NRC satisfy its NEPA duties, by simply attaching a copy of an NPDES permit that will expire before the NRC license renewal even takes effect? Again, this is a legal and factual issue squarely raised by NEC Contention 1.

LBP-06-20, slip op. at 56-57. As previously explained, Entergy has satisfied the explicit requirements of 10 C.F.R. § 51.53(c)(3)(ii)(B) by providing the required § 316(a) variances. The Board majority's ruling, in essence, questions whether it is appropriate for Entergy and the NRC Staff to do exactly what the NRC's rules say they must do. Further, the majority appears to contemplate litigating this alleged "legal and factual issue." Aside from being an impermissible, direct challenge of the Commission's rules, requiring the parties to litigate whether an NRC rule is valid would not only be unprecedented, but would undoubtedly have a pervasive and unusual affect on the license renewal proceeding. Therefore, the Commission should intervene in the instant proceeding, now, and reverse the majority's ruling admitting NEC Contention 1.

VI. IN THE ALTERNATIVE, THE COMMISSION SHOULD REVIEW LBP-06-20 UNDER ITS INHERENT SUPERVISORY POWER OVER ADJUDICATION.

Should the Commission determine that Entergy has failed to meet the standards set forth in 10 C.F.R. § 2.341(f)(2), it should, nonetheless, accept review of NEC Contention 1 under its inherent supervisory power over NRC adjudications. See, e.g., Exelon Generation Co. (Early Site Permit for Clinton ESP Site); System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-06-20, 63 N.R.C. ___, slip op. at 7 (July 26, 2006). For the reasons explained above, the Commission should exercise its inherent supervisory power to prevent the majority from "imposing unnecessarily burdensome or duplicative efforts" on Entergy. Id. at 2.

VII. CONCLUSION

For the reasons discussed herein, the Commission should take up review of the Board majority's ruling on NEC Contention 1 and reverse that ruling in its entirety.

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Dated: October 10, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
Entergy Nuclear Vermont Yankee, LLC	)	Docket No. 50-271-LR
and Entergy Nuclear Operations, Inc.	)	ASLBP No. 06-849-03-LR
	)	
(Vermont Yankee Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Petition for Interlocutory Review of the LBP-06-20 Admitting New England Coalition's Contention 1" dated October 10, 2006, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 10th day of October, 2006.

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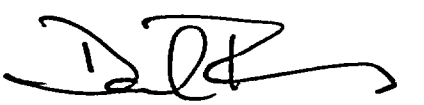

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