UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR VERMONT YANKEE, LLC, and ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No. 50-271-LR
	)	
	)	ASLBP No. 06-849-03-LR
	)	
(Vermont Yankee Nuclear Power Station)	)	

NRC STAFF ANSWER TO ENTERGY'S PETITION FOR INTERLOCUTORY REVIEW OF LBP-06-20

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October 20, 2006

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(f)(2) and 10 C.F.R. § 2.341(b)(3), the staff of the Nuclear Regulatory Commission ("Staff") hereby responds to the Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively "Entergy") petition for interlocutory review of LBP-06-20.[1] Entergy's Petition for Interlocutory Review of LBP-06-20 Admitting New England Coalition's Contention 1 (October 10, 2006) ("Petition"). The Petition also includes an alternative request for the Commission to exercise its inherent supervisory authority. *See* Petition at 2. For the reasons set forth herein, the Staff submits the Petition should be denied on the grounds that the criteria for interlocutory review have not been met. The Staff, however, believes that the exercise of the Commission's inherent supervisory authority may be warranted.

BACKGROUND

On March 27, 2006,[2] the NRC published a notice of docketing and opportunity for hearing concerning Entergy's application, under 10 C.F.R. Part 54, for renewal of Operating

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

[2] 71 Fed. Reg. 15,220.

License No. DPR-28, for an additional 20 years beyond the current March 21, 2012 expiration date.[3] As relevant to the instant petition, the Application included an Environmental Report ("ER"), which appended the current National Pollutant Discharge Elimination System ("NPDES") permit from the State of Vermont, but indicated that a proposed permit amendment from the Waste Water Management Division of the Vermont Agency of Natural Resources ("VANR") would allow a one degree increase in thermal discharges. *See* ER at 4-17.[4] That amendment was partially granted by the VANR on March 30, 2006,[5] the day before the permit that was in timely renewal[6] was to expire.

The New England Coalition ("NEC") filed a timely intervention petition challenging the application.[7] NEC Contention 1, at issue here, alleged that Entergy's ER did not sufficiently assess the impacts of increased thermal discharges over the requested twenty-year license

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[3] *See* Letter from William F. Maguire, Entergy, to NRC, dated January 25, 2006 (Agencywide Document Access and Management System ("ADAMS") Accession Nos. ML060300082, [Application] ML060300085, Appendix E [Environmental Report] ML060300086).

[4] The NPDES permit was submitted in accordance with 10 C.F.R. § 51.53(c)(3)(ii)(B).

[5] The VANR granted the proposed one degree increase in thermal effluent limitations for the time period of June 16 through October 14, but postponed a decision on whether to grant the proposed increase for May 16 through June 15. *See* Amended Permit at 4; Fact Sheet at 4.

[6] The permit attached to Entergy's ER was due to expire on March 31, 2006. *See* ER at Attachment D. Since Entergy had previously applied for renewal, the permit is considered to be in timely renewal. *See* ER at 9-1. "When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court." 3 V.S.A. § 814(b); *see also* Letter from Carole Fowler, Administration and Compliance Section, VANR WWMD, to Lynn DeWald, Entergy, dated September 30, 2005 (Attachment 1 to Entergy's Answer to [NEC's] Petition for Leave to Intervene (June 22, 2006) ("Entergy Answer")).

[7] [NEC's] Petition for Leave to Intervene, Request for Hearing, and Contentions (May 26, 2006) ("NEC Petition").

extension. *See* NEC Petition at 13. Entergy and the NRC filed answers to the petition.[8] Entergy opposed admission of the contention, arguing that it impermissibly challenged 10 C.F.R. § 51.53(c)(3)(ii)(B) and section 511(c) of the Clean Water Act, 33 U.S.C. § 1371(c). Entergy Answer at 11. Entergy claimed that submission of its NPDES permit would provide Vermont's 316(a) determination, that no further analysis was required, that section 511(c) of the Federal Water Pollution Control Act (FWPCA or Clean Water Act)[9] precluded NRC from reviewing or imposing an effluent limitation different from the State's effluent limitation, and, thus, no material dispute with the application was raised. *Id.* at 12-14. The Staff noted that Entergy's Application did not include the then-current discharge permit, which authorized and assessed the one degree increase in thermal discharges, and thus did not object to the admission of the contention to the extent that it alleged Entergy's ER did not contain an assessment of the impact of that increased thermal discharge on American shad during the renewal period. *See* Staff Answer at 8. The Staff argued, however, that the submission of the amended permit issued March 30, 2006 would render the contention moot. *See id.* at 9.

On June 29, 2006, NEC filed a reply, disputing that a 5-year NPDES permit (whether or not in timely renewal) was dispositive of whether Entergy adequately assessed the impacts of the renewal period and raising matters beyond the scope of the original Contention.[10]

On September 22, 2006, the Atomic Safety and Licensing Board ("Board") issued a Memorandum and Order, which, *inter alia,* found Contention 1 admissible. *See* Order at 51-57.

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[8] Entergy's Answer to [NEC's] Petition for Leave to Intervene (June 22, 2006) ("Entergy Answer"); NRC Staff Answer to Request for Hearing of [NEC] (June 22, 2006) ("Staff Answer").

[9] Under section 402 of the FWPCA of 1972, 33 U.S.C. § 1342, NPDES permits are issued by the U.S. Environmental Protection Agency or by authorized States.

[10] [NEC's] Reply to Entergy and NRC Staff Answers to Petition for Leave to Intervene, Request for Hearing and Contentions (June 29, 2006) ("Reply") at 3-6. NEC argued that the previous permit expired and that the amended permit was subject to a stay request. *Id.*

The Board majority ruled that NEC Contention 1 raised a material issue concerning whether Entergy's ER contains a sufficient assessment of increased thermal discharges over the proposed renewal period and was supported by the basis statement 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.'" Order at 52 (citing NEC Petition at 11). The dissenting opinion by Judge Wardwell concluded that NEC Contention 1 was inadmissible because Entergy has addressed its previous omission of an assessment by providing, on July 27, 2006,[11] its amended permit that authorized the increased discharges and that, even if the permit was overturned on appeal, the permit originally included in the application would satisfy NRC requirements. *See* LBP-06-20, Dissenting Opinion of Judge Wardwell on Admissibility of New England Coalition's Contention 1 (Environmental) ("Dissenting Opinion").

On October 10, 2006, Entergy filed the instant motion, requesting that the Commission take interlocutory review of LBP-06-20 insofar as it admitted NEC Contention 1. Petition at 1. Entergy argues that the decision was "inconsistent with NRC rules and established precedent, and is thus clearly erroneous." *Id.* Entergy also argues that advancement of Contention 1 would 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 would affect the basic structure of the proceeding in a pervasive and unusual manner. *See id.* Accordingly, Entergy asks the Commission to review the Board majority's ruling on NEC Contention 1 and reverse that ruling in its entirety. *Id.* at 23.

Before addressing these arguments, it is helpful to recount the Board's rulings.

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[11] See Letter from Ted A. Sullivan, VYNPS to NRC, dated July 27, 2006 (forwarding License Renewal Application, Amendment 6) (ML062130080). As noted previously, the NPDES amended permit, issued on March 30, 2006, had a March 31, 2006 expiration date, but remained in timely renewal under Vermont law. *See* note 5, *supra*.

SUMMARY OF RULINGS

The majority admitted NEC Contention 1, concluding that it satisfied the criteria of 10 C.F.R § 2.309(f)(i-vi). Order at 52. The Board rejected as unreasonable the Staff's argument that the contention merely challenged the adequacy of Entergy's assessment of the one-degree increase. Order at 52 n.55. The Board also rejected the claim that the contention was barred by the FWPCA, but acknowledged that it "bars NRC from reviewing or imposing effluent limitations, water quality certification requirements, or other FWPCA requirements." Order at 54-55. The Board further questioned the status of VYNPS's NPDES permit relative to the 10 C.F.R. § 51.53(c)(3)(ii)(B) requirement to provide a *current* copy of the permit, in particular because the permit was only good for five years, an "expired" permit was under appeal in the Vermont Environmental Court and the effectiveness of the permit had been stayed. Order at 55-57. The Board concluded that litigation was necessary to resolve how or if 10 C.F.R. § 51.53(c)(3)(ii)(B) could be satisfied by the NPDES permit. Order at 55-56. The Board further questioned the interplay between Part 51 regulations and the permit in terms of how or if National Environmental Policy Act ("NEPA") requirements are met through 10 C.F.R. § 51.53(c)(3)(ii)(B), and concluded that regulatory interpretation was needed. Order at 56. The Board similarly questioned whether reliance on a five-year permit would satisfy the NRC's NEPA obligations. Order at 56-57.

By contrast, the Dissent agreed with the NRC Staff that the contention was admissible to the extent it alleged the Application was missing information, but opined that the omission had been corrected when Entergy docketed its amended permit. *See* Dissenting Opinion at 1. The Dissent concluded that Entergy had already met the 10 C.F.R. § 51.53(c)(3)(ii)(B) requirements, even while the permit was under an ongoing appeal. *Id.* at 4-5. Judge Wardwell reasoned that 10 C.F.R. § 51.53(c)(3)(ii)(B) includes all requirements for an impact assessment in an ER and that there was no dispute raised. *Id.* at 4. Specifically, he concluded that the required analyses

were covered either by Category 1 (contained in the GEIS) or Category 2 (site-specific impacts addressed by the NPDES permit). *Id.* He opined that to require the Applicant to do more was an impermissible challenge to the regulations, and would raise issues outside the scope of a license renewal proceeding. *Id.*

Judge Wardwell also opined that if Contention 1 was an attempt to raise issues other than a Category 2 issue related to thermal discharges (*i.e*., heat shock), NEC's contention could also be rejected as an impermissible challenge to the regulations. *Id.* at 5. The Dissent further concluded that the status of the NPDES permit was not an issue because if the permit were overturned on appeal, the contention would be moot. *Id.* at 6. With respect to the five-year term of an NPDES permit, the Dissent viewed that permit as providing on-going re-assessment of the increase in temperature, as being consistent with NRC regulations, the FWPCA and NEPA, such that if submitted, no additional analysis of thermal impacts was needed. *Id*. at 9-10. The Dissent noted that the case law states that NRC must take the evaluation at face value and not undertake an independent analysis. *Id.* at 9. The Dissent concluded that Entergy has provided all the information required by regulations, that the stayed status of the permit is not relevant, and that the Board cannot require any further evaluations because to do so would be a challenge to NRC regulations. *Id*. at 10-11.

DISCUSSION

I. Applicable Legal Standards

In cases where an appeal does not lie,[12] the Commission has the discretion to grant interlocutory review in limited circumstances. The Commission's regulations on interlocutory review provide that petitions for interlocutory review will be entertained by the Commission at the request of a party despite the absence of a referral or certification by the presiding officer only if

[12] An appeal lies where an intervention petition has been wholly denied or where another party claims an intervention petition should have been wholly denied. *See* 10 C.F.R. § 2.311(b) and (c).

the party demonstrates that the issue for which the party seeks interlocutory review:

> (I) Threatens the party adversely affected by it 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; or
>
> (ii) Affects the basic structure of the proceeding in a pervasive or unusual manner.

10 C.F.R. § 2.341(f)(2).

The Commission has rejected the argument that a mere increase in the burden of litigation constitutes "serious and irreparable" harm. *Connecticut Yankee Atomic Power Co*. (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 374 (2001). The Commission has stated that:

> It is well established in Commission jurisprudence that the mere commitment of resources to a hearing that may later prove to have been unnecessary does not constitute sufficient grounds for an interlocutory review of a Licensing Board order. See, *e.g., Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 138-39 (1987) ("Shoreham"); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 21-22 (1987); *Commonwealth Edison Co*. (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258, 259 (1973). Nor may a party obtain interlocutory review merely by asserting potential delay and increased expense attributable to an allegedly erroneous ruling by the Licensing Board. *See*, *e.g.*, *Virginia Electric & Power Co*. (North Anna Power Station, Units 1 & 2), ALAB-741, 18 NRC 371, 378 n. 11 (1983), and authority cited therein.

Sequoyah Fuels Corp. & General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61 (1994).

Absent a potential for truly exceptional delay or expense, an interlocutory review petition will be denied. *See Duke Power Co. et al.* (Catawba Nuclear Station, Units 1 and 2), ALAB-768, 19 NRC 988, 992 (1984). By contrast, immediate review would be appropriate where there is "the potential difficulty of unscrambling and remedying the impact of an improper disclosure in a lengthy, complex, and contentious proceeding, which spanned years of litigation, and has generated a massive record." *Georgia Power Co. et al*. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 184 (1995).

The Commission has also considered and rejected the argument that the increased

litigation burden caused by the allowance of a contention has a "pervasive effect" on the structure of the litigation. *See Haddam Neck*, CLI-01-25, 54 NRC at 374. "The basic structure of an ongoing adjudication is not changed simply because the admission of a contention results from a licensing board ruling that is important or novel, or may conflict with case law, policy, or Commission regulations. Similarly, the mere fact that additional issues must be litigated does not alter the basic structure of the proceedings in a pervasive or unusual way so as to justify interlocutory review of a licensing board decision." *Id.* at 374 n.13 (quoting *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 135 (1987)).

The Staff notes that the Commission's "'basic structure' standard comprehends disputes over the very nature of the hearing in a particular proceeding -- for example, whether a licensing hearing should proceed in one step or in two -- not to routine arguments over admitting particular contentions." *Exelon Generation Company, LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 467 (2004) (footnotes omitted). The Commission has viewed the creation of a second Board as worthy of an interlocutory review:

> The decision to create a second board is not unheard of in our practice, but it is certainly an unusual event, particularly where, as here, the Chief Judge reassigns to a second board threshold admissibility questions that already are ripe for decision by the initial Board. We agree with PFS and the NRC Staff that a ruling of this sort "affects the basic structure of the proceeding," by arguably mandating duplicative or unnecessary litigating steps, and therefore is reviewable now.

Private Fuel Storage, LLC. (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307, 310 (1998).

Additionally, the Commission has generally refrained from considering jurisdictional issues until a final ruling. In *Sequoyah Fuels*, the Licensing Board ruled that the jurisdictional issue cannot be resolved without further factual inquiry, and the Commission considered it premature to interject itself via an interlocutory appeal:

> Although a definitive ruling by the Licensing Board that the Commission actually has jurisdiction over GA in this proceeding might rise to the level of a pervasive or

> unusual effect upon the nature of the proceeding, the preliminary ruling on appeal here does not. The fact that an appealed ruling touches on a jurisdictional issue does not, in and of itself, mandate interlocutory review.

CLI-94-11, 40 NRC at 63.

The Commission recently noted its “longstanding general policy disfavors interlocutory review” and stated that it grants review under its "pervasive and unusual" effect standard "only in extraordinary circumstances." *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 63 NRC __ , slip op. at 7-8 (Sept. 6, 2006) (citing *Duke Energy Corp. (*Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 70 (2004) and *Private Fuel Storage, L.L.C* (Independent Spent Fuel Storage Installation), CLI-10-1, 53 NRC 1, 5 (2001)).

In addition to its ability to take interlocutory review of a Board decision, the Commission has "an inherent supervisory power over the conduct of adjudicatory proceedings, including the authority to provide guidance on the admissibility of contentions before licensing boards." *Consolidated Edison Co. of New York* (Indian Point, Unit 2), *Power Authority of the State of New York* (Indian Point, Unit 3), CLI-82-15, 16 NRC 27, at 34 (1982) (citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516-17 (1977); *United States Energy Research & Development Administration* (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 75-76 (1976)).

In *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-06-20, 63 NRC ___, slip op. at 7 (July 26, 2006) (footnote omitted), the Commission said:

> As we interpret the Boards' intention here, they plan to give a harder look at those issues that the Staff itself found problematic. That the Boards are looking for clues as to which areas these might be does not, standing alone, suggest to us that they intend to expand their role in a manner that would have a "pervasive and unusual effect on the litigation," necessitating interlocutory review.
>
> That being said, however, the Commission does have inherent supervisory power over its adjudications and may direct our licensing boards' conduct of proceedings. Because our licensing boards are conducting the first "mandatory"

> hearings this agency has held in more than two decades, we believe additional Commission guidance is necessary to ensure that the proper balance is struck between the boards' need to obtain information for their review and the burden that production of such information could impose on the NRC staff. We therefore accept review under our inherent supervisory power over adjudications.

As the previous discussion demonstrates, the threshold for the Commission either to take interlocutory review of a decision or to the exercise its supervisory authority over adjudications is a high one.

II. The Standards of 10 C.F.R. § 2.341(f) Are Not Met

A. Entergy Has Not Been Threatened with Immediate and Serious Irreparable Impact

Entergy has failed to meet the requirements of 10 C.F.R. § 2.341(f) in that it failed to show how admission of NEC Contention 1 threatened 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.

Entergy stated that the majority's decision would require Entergy to provide an assessment of thermal impacts that is not required by the NRC rules, but did not demonstrate how this would constitute an immediate and serious irreparable impact under § 2.341(f). Petition at 19. Entergy provided no legal authority to support the notion that performing the assessment constituted the kind of "immediate and serious irreparable impact" contemplated in 10 C.F.R. § 2.341(f)(2). *Id.* at 19. No expense or dollar value was pled in the Petition to show that it was a truly exceptional cost, *see* Petition at 19-22, and does not appear that an assessment would fall into the serious and irreparable categories discussed in the *Haddam Neck,* CLI-01-25, *supra*.[13]

[13] There is some question as to whether Entergy would, in fact, have to perform an assessment of thermal impacts in order to respond to the admitted contention, or whether Entergy could make arguments which would be essentially legal in nature to answer the questions the Board posed in its order admitting the contention. *See* Order at 56-57.

Entergy states that admitting Contention 1 would require Entergy to litigate the thermal effects in two proceedings (the NRC hearing and the judicial review before the Vermont Environmental Court) simultaneously, and that such duplicate litigation would be extremely burdensome. Petition at 20. It is well established that the mere commitment of resources to a hearing that may later prove to have been unnecessary does not constitute sufficient grounds for an interlocutory review of a Licensing Board order. *See Sequoyah Fuels*, CLI-94-11, 40 NRC at 61.

As an example of a burden, Entergy states that it might have to produce documents in the NRC proceeding, while at the same time responding to discovery requests in the State action. Petition at 20. Document production is not within the kind of "immediate and serious irreparable impact" contemplated in 10 C.F.R. § 2.341(f)(2). *See Haddam Neck*, CLI-01-25, 54 NRC at 374.

Entergy also states that duplicate litigation creates the risk of inconsistent decisions, which could delay and undermine the outcome (presumptively meaning that a loss in one litigation will negate the outcome in the other). *See* Petition at 20. Entergy does not state why each "outcome" could not be appealed. A party may not obtain interlocutory review merely by asserting potential delay and increased expense attributable to an allegedly erroneous ruling by the Board. *See Sequoyah Fuels*, CLI-94-11, 40 NRC at 61.

B. Entergy Has Not Shown That Admission of NEC Contention 1 Affects the Basic Structure of the Proceeding in a Pervasive or Unusual Manner

Entergy has not demonstrated that admission of NEC Contention 1 affects the basic structure of the proceeding in a pervasive or unusual manner as required in 10 C.F.R. § 2.341(f).

Entergy lists two reasons why it believes the Board's majority decision affects the basic structure of the proceeding in a pervasive and unusual manner: 1) It will require litigation of an issue that the NRC is barred from reviewing under the NRC rules and CWA; and 2) It requires

parties to litigate whether an NRC rule is valid. Petition at 19-20. Entergy's petition is silent with respect to a "basic structure" standard, and offers no legal authority illuminates the intent of the regulation.

Under *Haddam Neck*, the Commission rejected the argument that litigation of an area barred by NRC regulation results in affecting the basic structure of a proceeding in a pervasive or unusual manner. CLI-01-25, 54 NRC at 374. Similarly, requiring parties to litigate whether a rule is valid, which would be an impermissible challenge to NRC rules under 10 C.F.R. § 2.335(a), is also insufficient under *Haddam Neck*. *Id.*

Entergy simply states that, "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," without legal authority to support its statement. Petition at 22.

Entergy asserts that admission of NEC Contention 1 “would (for NRC purposes) essentially nullify the [State of Vermont Agency of Natural Resources] 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.” Petition at 19-20. Again, this does not satisfy the threshold in *Haddam Neck,* and cannot support review. *See Haddam Neck*, CLI-01-25, 54 NRC at 374 n.14.

III. Entergy Request for the Commission to Exercise Its Inherent Supervisory

Entergy requests that, if the Commission rejects Energy arguments for interlocutory review under 10 C.F.R. § 2.341(f), the Commission exercise its inherent supervisory authority over adjudication and review admission of NEC Contention 1. *See* Petition at 23 (citing *Clinton*, CLI-06-20, *supra,* slip op. at 7). While the Staff does not believe that the situation presented by this case is similar to that presented in *Clinton,* the Staff nonetheless believes that exercise of supervisory authority by the Commission is warranted, because the Board’s decision appears to

challenge the license renewal regulatory framework.

A. Scope of License Renewal Environmental Review

The scope of the environmental review for license renewal is limited in accordance with 10 C.F.R. §§ 51.71(d) and 51.95(c). *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 11-13 (2001). Consideration of environmental issues in the context of license renewal proceedings is specifically limited by 10 C.F.R. Part 51 and by the NRC's "Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants" (NUREG-1437) ("GEIS"). *Id.* A number of environmental issues potentially relevant to license renewal are classified in 10 C.F.R. Part 51, Subpart A, Appendix B as "Category 1" issues, which means that "the Commission resolved the[se] issues generically for all plants and those issues are not subject to further evaluation in any license renewal proceeding." *Turkey Point,* LBP-01-06, 53 NRC 138, 152-53, *aff'd*, CLI-01-17, 54 NRC at 11. The remaining issues, designated as "Category 2" in Appendix B, must be addressed by an applicant in its environmental report, and in the NRC's supplemental environmental impact statement for the facility at issue pursuant to 10 C.F.R. §§ 51.71(d) and 51.95(c). *Id*.

A contention that attempts to have the NRC impose discharge limits or monitoring requirements is not admissible because the NRC does not have the authority to impose such requirements. *See Tennessee Valley Authority* (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 NRC 702, 704 & n.6, 706-15 (1978) (FWCPA Amendments of 1972, 33 U.S.C. § 1251, *et seq.*, assigns the responsibility for water pollution control criteria and regulating polluters to the Environmental Protection Agency and the States). Similarly, a basis for a contention is inadmissible if it constitutes an impermissible challenge to Commission regulations. *See e.g. Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-06-22, 63 NRC __,

slip op. at 11 (Aug. 17, 2006) ("LES"); *LES,* LBP-04-14, 60 NRC 40, 54-55 (2004).[14]

B. Exercise of the Commission's Supervisory Authority Is Warranted for Administrative Efficiency

Entergy argues that the exercise of the Commission's inherent supervisory authority is needed to prevent the majority from "imposing unnecessarily burdensome or duplicative efforts on Entergy. Petition at 23. The Dissent also questioned whether admission of NEC Contention 1 was proper given that (1) the contention was either moot or failed to raise a material dispute, (2) the contention impermissibly sought to require Entergy to address thermal impacts beyond the limited Category 2 issue of heat shock and by a means other than an NPDES permit, or (3) the contention inappropriately raised a Category 1 issue. Dissenting Opinion at 10-11.

The Board's discussions on NEC Contention 1 appear to contemplate an impermissible challenge to 10 C.F.R. § 51.53(c)(3)(i) by requiring additional analyses of Category 1 issues which were generically determined. *See LES*, LBP-04-14, 60 NRC at 55 (noting that challenge to the Commission's regulations or rulemaking-associated generic determinations are

[14] A discussion of case law regarding challenges to regulations was in *LES,* LBP-04-14, 60 NRC at 54-55:

> With limited exception, no rule or regulation of the Commission can be challenged in an adjudicatory proceeding. See 10 C.F.R. § 2.335; *see also Dominion Nuclear Connecticut, Inc*. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003). By the same token, any contention that amounts to an attack on applicable statutory requirements or represents a challenge to the basic structure of the Commission's regulatory process must be rejected. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982) (citing *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20- 21 (1974)). Similarly, any contention that seeks to impose stricter requirements than those set forth by the regulations is inadmissible. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 395 (1987); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001). Additionally, the adjudicatory process is not the proper venue for a petitioner to set forth a contention that merely addresses his or her own view regarding the direction regulatory policy should take. *See Peach Bottom*, ALAB-216, 8 AEC at 21 n.33.

impermissible). The Board's discussions also appear to contemplate an impermissible challenge to 10 C.F.R. § 51.53(c)(3)(ii)(B) by requiring more than submission of a copy of current CWA § 316(b) determinations and, if necessary, a § 316(a) variance in accordance with 40 C.F.R. Part 125, or equivalent State permits and supporting documentation to satisfy Category 2 analyses requirements. *See* Order at 47-57.

Environmental issues relating to license renewal are divided into two categories. Category 1 issues are those issues for which the generic analysis of the issue may be adopted in each plant-specific review; Category 2 issues are those issues for which the analysis reported in the GEIS has shown that one or more of the criteria of Category 1 cannot be met, and therefore additional plant-specific review is required. 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1 n.2. Each license renewal applicant must submit an environmental report. An environmental report is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1. 10 C.F.R. § 51.53(c)(3)(i). An environmental report must contain analyses of the environmental impacts associated with license renewal and the impacts of operation during the renewal term for those issues identified as Category 2. 10 C.F.R. § 51.53(c)(3)(ii).

The only Category 2 issue related to thermal discharges and relevant to VYNPS design[15] is heat shock.[16] The regulatory framework for environmental issues sets forth the required analysis heat shock analysis by stating that the applicant must either submit a copy of its current CWA § 316(b) determinations and, if necessary, a § 316(a) variance in accordance with 40 C.F.R. Part 125, or equivalent State permits and supporting documentation, or if the applicant

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[15] The plant uses a once-through cooling heat dissipation system. *See* Order at 48.

[16] Table B-1 in Part 51, Subpart A, Appendix B lists other thermal effects as Category 1 including, cold shock, and the thermal plume as a barrier to migrating fish. Due to the lack of specificity of the contention, and NEC's filing, the Staff did not appreciate until reading the Board's dissent, that NEC contention 1 may well raise a Category 1 issue. The phrase "barriers to migration" was not used by NEC.

does not possess such a permit, the applicant must assess the impact of the proposed action on fish and shellfish resources resulting from heat shock and impingement and entrainment. 10 C.F.R. § 51.53(c)(3)(ii)(B). There are no other requirements explicitly related to the environmental report and the Category 2 heat shock issue.

The Board construed NEC Contention 1 as alleging that the ER failed to sufficiently assess the impacts of increased thermal discharges into the Connecticut River. Order at 47. In admitting this contention, the Board questioned the validity and effectiveness of Entergy's permit, and further asked:

> [W]hether 10 C.F.R. § 51.53(c)(3)(ii)(B) is the only requirement the applicant must meet. The regulation focuses only on "heat shock." Does NEPA require an assessment of all environmental impacts of thermal discharges into a river or only the "heat shock" impacts? Are the general ER requirements found at 10 C.F.R. §§ 51.45(c) and 51.53(c) displaced, or instead merely supplemented, by the more narrow 10 C.F.R. § 51.53(c)(3)(ii)(B)?

Order at 56. The Board asserted that these questions are "a matter of regulatory interpretation we need not reach today." *Id.*

The Board further questioned whether the 10 C.F.R. § 51.45(d) requirement that an applicant discuss the status of compliance with applicable environmental quality standards and requirements including, but not limited to, "thermal and other water pollution limitations or requirements" is satisfied by information Entergy has already submitted. Order at 56 n.58. In essence, the Board questions whether Entergy must prepare an assessment of thermal discharge impacts in addition to those performed for or by Federal or State permitting authorities and whether that assessment must address the entire license renewal period.[17] For reasons set out by the dissent, in the Staff's view, the regulatory requirements for the contents of an ER are clear. If the Board is raising these issues in contemplation of imposing stricter requirements

[17] In raising this issue, the Board may have viewed NEC's not merely as a challenge to the adequacy of Entergy's ER, but also as a challenge the Staff's yet to be published Supplemental Environmental Impact Statement..

than those set forth in the regulations, that action would be impermissible.[18] *See LES*, CLI-06-22, slip op. at 11, and cases cited therein.

The Commission should exercise its inherent supervisory authority because, as discussed above, the Board's discussion of NEC Contention 1 appears to contemplate an impermissible challenge to 10 C.F.R. § 51.53(c)(3)(i) and 51.45(c) and (d) by requiring additional analyses of Category 1 issues which were generically determined, or by requiring more than a copy of current State or Federal FWPCA permits and determinations for an applicant to satisfy Category 2 analyses requirements.

Although the Board did not explicitly rule in these areas, the Staff believes that, as a matter of administrative efficiency, the agency would benefit from a clear Commission determination regarding the requisite showing to satisfy these requirements.

CONCLUSION

For the foregoing reasons, the Commission should decline interlocutory review of the Board's decision to accept for litigation NEC Contention 1. In the interest of administrative

[18] For example, the Board's inquiry into whether a 5-year permit satisfies Entergy's obligations may constitute an impermissible challenge to 10 C.F.R. § 51.53(c)(3)(ii)(B). The Board observed that the NPDES permit and/or § 316(b) determination expires in five years, and concluded that whether 10 C.F.R. § 51.53(c)(3)(ii)(B) and Part 51 in general could be satisfied by the NPDES permit was "a legal and factual issue squarely raised by NEC Contention 1." Order at 56-57. As Entergy argued, the Board erred when it concluded that an assessment of the impact of heat shock on fish and shellfish would be required in that, even if the permit were vacated, the contention would be moot as the permit would revert to the pre-amendment discharge values. *Id.* at 15 (citing Dissenting Opinion at 6). Entergy also argues that the Commission must accept an NPDES permitting agency assessment, even if the permit is under review. *Id.*

efficiency, the Commission should exercise its inherent supervisory authority and provide guidance regarding requirements for analysis of thermal impacts and the required documentation and assessments for license renewal.

Respectfully submitted,

/RA/

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/RA/

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Dated at Rockville, Maryland
this 20th day of October, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR VERMONT YANKEE,	)	
LLC and ENTERGY NUCLEAR	)	Docket No. 50-271-LR
OPERATIONS, INC.	)	
	)	ASLBP No. 06-849-03-LR
(Vermont Yankee Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO ENTERGY'S PETITION FOR INTERLOCUTORY REVIEW OF LBP-06-20" in the above-captioned proceeding have been served on the following through electronic mail and with copies by deposit in the NRC's internal mail system, or through electronic mail with copies by deposit in the U.S. mail as indicated by an asterisk, this 20th day of October, 2006:

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