

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

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NRC STAFF BRIEF IN RESPONSE TO CLI-07-01

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January 29, 2007

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NRC STAFF BRIEF IN RESPONSE TO CLI-07-01

INTRODUCTION

In accordance with the Commission's Memorandum and Order of January 11, 2007,<sup>1</sup> the NRC Staff ("Staff") hereby presents its views concerning the ruling set forth in LBP-06-20,<sup>2</sup> regarding the Atomic Safety and Licensing Board's admission of petitioner New England Coalition ("NEC") contention "NEC Contention 1." NEC Contention 1 challenges the Environmental Report ("ER") submitted by Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively "Entergy" or "the Applicant"), alleging that it failed to assess the environmental impacts of a proposed increase in thermal effluents from the Vermont Yankee facility. For the reasons set forth below, the Staff submits that, in admitting NEC Contention 1, the Licensing Board misinterpreted applicable NRC regulations. Accordingly, the Licensing Board's decision to admit NEC Contention 1 in LBP-06-20 should be reversed.

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<sup>1</sup> *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-01, 65 NRC\_\_ (January 11, 2007) (slip opinion).

<sup>2</sup> *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131 (2006) ("Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption)").

## BACKGROUND

### I. Vermont Yankee's NPDES Permit

As required by section 316(a) of the Federal Water Pollution Control Act ("FWPCA" or "Clean Water Act"), 33 U.S.C. § 1326 *et seq.*, Entergy possesses a National Pollutant Discharge Elimination System ("NPDES") permit from the Vermont Agency for Natural Resources ("VANR") for Vermont Yankee, which contains thermal effluent limitations applicable to the Vermont Yankee facility. Vermont Yankee's NPDES permit was due to expire on March 31, 2006. See ER at Attachment D. Before the permit expiration date, Entergy sought both renewal of the permit as well as an amendment from the VANR that would allow a one-degree increase in thermal discharges. See ER at 4-17. Although the permit's expiration date has passed, Vermont's timely renewal statute allows continued operation under the existing permit.<sup>3</sup>

Entergy's requested amendment was partially granted by VANR on March 30, 2006 ("March 30 Amendment").<sup>4</sup> In granting the amendment to Entergy's NPDES permit, VANR concluded that the increased thermal effluent limit would continue to assure the protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife, as required by

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<sup>3</sup> "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")).

<sup>4</sup> 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 March 30 Amendment at 4; Amended Fact Sheet at 4. The VANR permit amendment and accompanying Fact Sheet were docketed with the NRC on July 27, 2006. See Letter from Ted A. Sullivan, VYNPS to NRC, dated July 27, 2006 ("July 27 Letter") (forwarding License Renewal Application, Amendment 6) (Agencywide Document Access and Management System ("ADAMS") Accession No. ML062130080).

section 316(a) of the Clean Water Act.<sup>5</sup> An assessment of the impacts of operation under the new, higher effluent limits was included in an amended Fact Sheet attached to the amended permit.<sup>6</sup> NEC appealed the permit amendment to the Vermont Environmental Court, which, on August 28, 2006, granted a stay of the March 30 Amendment.<sup>7</sup> Therefore, Vermont Yankee is operating under its prior discharge limits pursuant to the timely renewal statute and awaiting ruling from the Vermont Environmental Court on the appeal of the March 30 Amendment.

## II. The NRC License Renewal Proceeding

Entergy filed its license renewal application in January 2006,<sup>8</sup> before VANR granted the March 30 Amendment allowing increased thermal effluent limits. Therefore, pursuant to 10 C.F.R. § 51.53(c)(3)(ii)(B), Entergy appended its then-current NPDES permit to its ER, but indicated that it had sought an amendment that would allow increased thermal effluent limits.<sup>9</sup>

Section 51.53(c)(3)(ii)(B) requires:

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 C.F.R. 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).<sup>10</sup>

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<sup>5</sup> See Entergy's Answer to [NEC's] Petition for Leave to Intervene (June 22, 2006) ("Entergy Answer") Attachment 2; *see also* July 27 Letter.

<sup>6</sup> *Id.*; *see also* Entergy Answer at 15 (citing Amended Fact Sheet at 6-7); ER (Rev. 1) at § 4.4.5.1.

<sup>7</sup> See [NEC]'s Motion to File Supplemental and New Authority (Aug. 29, 2006).

<sup>8</sup> See Letter from William F. Maguire, Entergy, to NRC, dated January 25, 2006 (ADAMS Accession Nos. ML060300082, [Application] ML060300085, Appendix E [ER] ML060300086).

<sup>9</sup> See Entergy License Renewal Application Appendix E "Environmental Report" at 4-17.

<sup>10</sup> NEC Contention 1 concerns Vermont Yankee's discharges into the Connecticut River, not its intake from the river. Thus, the aspects of 10 C.F.R. § 51.53(c)(3)(ii)(B) relevant to this contention are  
(continued...)



On May 26, 2006, after VANR granted the March 30 Amendment, NEC filed a timely intervention petition challenging the application in the instant proceeding.<sup>11</sup> NEC Contention 1, at issue here, alleges that Entergy's ER failed to assess the impacts of the increased thermal discharges, allowed by the recent permit amendment, over the requested twenty-year license extension. See NEC Petition at 10-13.

Entergy and the NRC Staff filed answers to NEC's petition.<sup>12</sup> 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 Clean Water Act precluded NRC from reviewing or imposing an effluent limitation different from the State's effluent limitation,<sup>13</sup> and, thus, NEC raised no material dispute. *Id.* at 12-14. The Staff noted that Entergy's ER 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 during the renewal period. See Staff Answer at 8. The Staff argued, however, that the submission of an amendment to

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<sup>10</sup>(...continued)

Section 316(a) of the Clean Water Act and heat shock, not Section 316(b), which regulates intake impacts such as impingement and entrainment.

<sup>11</sup> [NEC's] Petition for Leave to Intervene, Request for Hearing, and Contentions (May 26, 2006) ("NEC Petition").

<sup>12</sup> Entergy Answer; NRC Staff Answer to Request for Hearing of [NEC] (June 22, 2006) ("Staff Answer").

<sup>13</sup> 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.

Entergy's NPDES permit (as subsequently accomplished submission of the March 30 Amendment)<sup>14</sup> would render the contention moot. See *id.* at 9.

On June 29, 2006, NEC filed a reply, questioning whether a five-year NPDES permit (whether or not in timely renewal) was dispositive of whether Entergy adequately assessed the impacts of the renewal period and raising other matters beyond the scope of the original contention.<sup>15</sup> On July 27, 2006, Entergy formally amended its license renewal application to include the permit, as amended on March 30, in its ER.<sup>16</sup>

### III. The Licensing Board's Decision in LBP-06-20

On September 22, 2006, the Atomic Safety and Licensing Board ("Board") issued a Memorandum and Order, which, *inter alia*, admitted NEC Contention 1. See *Vermont Yankee*, LBP-06-20, 64 NRC at 175-182. A dissenting opinion was filed by Judge Wardwell. See Dissenting Opinion of Judge Wardwell on Admissibility of New England Coalition's Contention 1 (Environmental) ("Dissenting Opinion"), 64 NRC at 211.

The Board majority ruled that NEC Contention 1 raised a material issue concerning the sufficiency of Entergy's ER with respect to its 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." *Vermont Yankee*, LBP-06-20, 64 NRC

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<sup>14</sup> See July 27 Letter.

<sup>15</sup> [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.*

<sup>16</sup> See July 27 Letter. A July 28, 2006, letter sent by Entergy's counsel informing the Licensing Board and parties of this license renewal application amendment was stricken from the record of the proceeding as irrelevant and immaterial. See Order (Striking Entergy's Letter to the Board and Attached Materials), dated August 11, 2006.

at 178 (citing NEC Petition at 11). The Board rejected Entergy's claim that the contention was barred by the Clean Water Act, but acknowledged that the Act "bars NRC from reviewing or imposing effluent limitations, water quality certification requirements, or other FWPCA requirements." *Id.* at 180. The Board also questioned the status of Vermont Yankee'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 valid for five years, an "expired" permit was under appeal in the Vermont Environmental Court and the effectiveness of the permit had been stayed. *Id.* at 181. The Board concluded that litigation was necessary to resolve whether 10 C.F.R. § 51.53(c)(3)(ii)(B) could be satisfied by the NPDES permit. *Id.* at 181-82. The Board further questioned whether National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* requirements are met through 10 C.F.R. § 51.53(c)(3)(ii)(B), and concluded that regulatory interpretation was necessary. *Id.* at 181.

By contrast, the dissenting opinion agreed with the NRC Staff that the contention was admissible to the extent it alleged the Application was missing information, but argued that the omission had been corrected when Entergy docketed its amended permit. *Id.* at 211. The dissenting opinion concluded that Entergy had already met the 10 C.F.R. § 51.53(c)(3)(ii)(B) requirements, even while the permit was subject to an ongoing appeal, reasoning that 10 C.F.R. § 51.53(c)(3)(ii)(B) includes all requirements for an impact assessment in an ER and that no dispute was raised. *Id.* at 213-14. Specifically, it concluded that the required analyses were covered either by Category 1 (previously examined by the Staff on a generic basis) or Category 2 (site-specific impacts addressed by the NPDES permit), and that to require the Applicant to provide more was an impermissible challenge to the Commission's regulations and would raise issues outside the scope of a license renewal proceeding. *Id.* at 213-14.

Further, according to the dissenting opinion, the status of the NPDES permit on appeal was not an issue because if the amended permit were overturned on appeal, the contention

would be moot. *Id.* at 215. Further, the dissenting opinion viewed the five-year term of the VANR permit as providing on-going re-assessment of the increase in temperature, consistent with NRC regulations, the FWPCA, and NEPA, such that no additional analysis of thermal impacts was needed. *Id.* at 215-16. Finally, the dissenting opinion cited case law holding that NRC must take the permitting authority's evaluation at face value and not undertake an independent analysis. *Id.* at 217.

IV. Entergy's Petition for Review of LBP-06-20

On October 10, 2006, Entergy filed a petition seeking interlocutory review of the Licensing Board's decision to admit NEC Contention 1 in LBP-06-20. Petition at 1. Entergy identified four distinct issues raised by the decision: "(1) whether the NRC must independently assess aquatic impacts; (2) whether [10 C.F.R. § 51.53(c)(3)(ii)(B)] is applicable given the possibility that the NPDES permit amendment may be set aside on judicial review; (3) whether [section 51.53(c)(3)(ii)(B)] 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 must be assessed." Entergy Petition at 10-11.

On January 11, 2007, the Commission agreed to take review of the issue, exercising its *sua sponte* authority. *Vermont Yankee*, CLI-07-01, 65 NRC \_\_\_\_ (slip op. at 4-5).<sup>17</sup>

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<sup>17</sup> Pursuant to a subsequent Commission Order, briefs in response to CLI-07-01 are due January 29, 2007. See "Order" *Entergy Nuclear Vermont Yankee and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station) (unpublished) (Jan. 24, 2007).

## DISCUSSION

### I. Legal Standards

#### A. Legal Standards for the Admission of Contentions

To gain admission to a proceeding as a party, a petitioner, in addition to establishing standing, must proffer at least one contention that satisfies the admissibility requirements of 10 C.F.R. § 2.309(f). See 10 C.F.R. § 2.309(a); see *also* AmerGen Energy Company, LLC (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006). For a contention to be admissible, the petitioner must satisfy the following six requirements:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the . . . petitioner's position on the issue and on which the petitioner intends to rely at the hearing, together with references to the specific sources and documents on which the . . . petitioner intends to rely to support its position on the issue; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the . . . licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1)(i)-(vi). These contention requirements are “strict by design.” *Oyster Creek*, CLI-06-24, 64 NRC at 118. A contention that fails to comply with these requirements will not be admitted for litigation. *Id.*

Properly formatted contentions “must focus on the license application in question, challenging either specific portions of or alleged omissions from the application (including the SAR and ER).” *Louisiana Energy Services* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 57 (2004); *aff’d* CLI-04-25, 60 NRC 223 (2004) (“LES”). Additionally, “[a]ny contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed.” *Id.* at 57. Finally, “[w]ith limited exception, no rule or regulation of the Commission can be challenged in an adjudicatory proceeding.”<sup>18</sup> *Id.* at 54; *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003).

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<sup>18</sup> The Licensing Board in *LES*, LBP-04-14, 60 NRC at 54-55, provided a discussion of case law regarding challenges to regulations:

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.

B. License Renewal Environmental Review

In 1996, the Commission amended 10 C.F.R. Part 51 to establish environmental review requirements for license renewal applicants.<sup>19</sup> The environmental review for license renewal is divided into generic and plant-specific components. See 10 C.F.R. Part 51, Subpart A, Appendix B; *see also Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 11 (2001). Underlying the environmental review framework is an extensive, systematic study of the potential environmental consequences of operating a nuclear power plant for an additional 20 years. *Id.* (citing NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," Final Report, Vol. 1 ("GEIS")(May 1996)).

On many issues, the NRC found that it could draw generic conclusions applicable to all existing nuclear power plants, or to a specific subgroup of plants, issues referred to as "Category 1." *Id.* (citing 10 C.F.R. Part 51, Subpart A, App. B). License renewal applicants need not submit in their site-specific environmental reports an analysis of these generic Category 1 issues. See 10 C.F.R. § 51.53(c)(3)(i); *see also Statement on Policy of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998). For those issues, applicants instead may reference and adopt the generic environmental impact findings codified in Table B-1, Appendix B to Part 51. *Turkey Point*, 54 NRC at 11. Intervenor may not seek to litigate Category 1 issues because "[f]undamentally, any contention on a 'category one' issue amounts to a challenge to our regulation that bars challenges to generic environmental findings." *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station and Pilgrim Nuclear Power Station) CLI-07-03, 65 NRC \_\_\_ slip op. at 7 (January 22, 2007).

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<sup>19</sup> Final Rule, "Environmental Review for Renewal of Nuclear Power Plant Operating Licenses," 61 Fed. Reg. 28,467 (June 5, 1996).

All other environmental issues for which the Commission was not able to make environmental findings on a generic basis, are referred to as "Category 2" issues.

See 10 C.F.R. Part 51, Subpart A, App. B. License renewal applicants must provide a plant-specific review of these issues. *Turkey Point*, 54 NRC at 11. Further, the applicant must provide additional analysis for Category 1 issues in its ER if it is aware of new and significant information bearing on the applicability of the Category 1 finding at its particular plant. *Id.* (citing 10 C.F.R. § 51.53(c)(3)(iv)).

II. The Licensing Board Erred in Admitting NEC Contention 1

In its decision admitting NEC Contention 1, the Licensing Board misinterpreted Commission regulations. See *Vermont Yankee*, LBP-06-20, 64 NRC at 179-182. NEC Contention 1 argues that Entergy's ER failed to address the proposed increase in thermal effluent discharges. See NEC Petition at 10-11. Heat shock is the only impact of thermal effluent discharges that is identified as Category 2, *i.e.*, that must be addressed in a facility-specific ER. See 10 C.F.R. Part 51, App. B., Table B-1. Part 51 governs the contents of ERs and specifically provides that applicants should address heat shock by providing section 316(a) variances or equivalent state permits, and supporting documentation. See 10 C.F.R. § 51.53(c)(3)(ii)(B). As discussed below, regardless of the status of the March 30 Amendment on appeal, Entergy has met this requirement. In the event the March 30 Amendment is upheld, Entergy has provided its permit to the NRC, fulfilling its responsibility with respect to heat shock. On the other hand, in the event that the permit amendment is overturned, NEC Contention 1, which specifically seeks an assessment of the increased thermal effluents, will lack a basis. There would be no need to assess the impacts of an increase that is not authorized.



A. Heat Shock is the Only Thermal Discharge Impact Required to be Discussed in the Environmental Report

In admitting NEC Contention 1, the Licensing Board questioned whether “NEPA require[s] 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)?” *Vermont Yankee*, LBP-06-20, 64 NRC at 181. As set forth below, heat shock is the only Category 2 issue related to thermal effluents, *i.e.*, the only impact for which the applicant must provide an assessment.<sup>20</sup> While NEPA certainly requires an assessment of all of the environmental impacts of thermal discharges, all but heat shock have already been adequately addressed in the GEIS. Litigation of these Board questions contemplating assessment of issues other than heat shock would constitute an impermissible challenge to 10 C.F.R. § 51.53(c)(3)(i).

Several different environmental impacts associated with thermal effluents were evaluated in the GEIS and listed in Appendix B to 10 C.F.R. Part 51.<sup>21</sup> Only one such impact, heat shock, is a Category 2 issue that must be separately addressed in each applicant’s ER. See 10 C.F.R. Part 51, App. B, Table B-1. Furthermore, 10 C.F.R. § 51.53(c)(3)(ii) describes those analyses that environmental reports for license renewal must contain:

The environmental report must contain analyses of the environmental impacts of the proposed action, including the impacts of refurbishment activities, if any, associated with license renewal and the impacts of operation during the renewal term, for those issues identified as Category 2 issues in appendix B to subpart A of this part. *The required analyses are as follows:*

(emphasis added). The rule then lists those Category 2 issues required to be discussed in an

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<sup>20</sup> As discussed above, this obligation may be satisfied by providing the assessment of the permitting authority. See 10 C.F.R. § 51.53(c)(3)(ii)(B).

<sup>21</sup> 10 C.F.R. Part 51, App. B., Table B-1; see also GEIS § 4.2.2.

applicant's ER. Only one of the listed impacts, heat shock, involves the discharge of thermal effluents. See 10 C.F.R. § 51.53(c)(3)(ii)(B). Therefore, Entergy's ER need not provide an assessment of thermal discharge impacts other than heat shock. For heat shock, the applicant must provide its section 316(a) variance or equivalent state permit, which contains an assessment of impacts. *Id.* No other thermal discharge analyses are required.

It is clear from the Commission's recent holding in this same proceeding that license renewal applicants need not discuss Category 1 issues. *Vermont Yankee*, CLI-07-03, 65 NRC \_\_\_, slip op. at 7. To the extent NEC Contention 1 raises Category 1 issues, it "is not litigable" in this proceeding. See *Turkey Point*, CLI-01-17, 54 NRC at 19.

B. Entergy's Amended Environmental Report Meets the Part 51 Requirements for Heat Shock

As discussed above, for plants like Vermont Yankee that utilize once-through cooling, 10 C.F.R. § 51.53(c)(3)(ii)(B) requires license renewal applicants to provide a copy of their "316(a) variance in accordance with 40 C.F.R. part 125, or equivalent State permits and supporting documentation." The Commission explained its reasoning for this rule when proposing its license renewal environmental review regulations:

The permit process authorized by the FWPCA is an adequate mechanism for control and mitigation of these potential aquatic impacts. *If an applicant to renew a license has appropriate EPA or State permits, further NRC review of these potential impacts is not warranted.* Therefore, the proposed rule requires an applicant to provide the NRC with certification that it holds FWPCA permits, or if State regulation applies, current State permits. If the applicant does not so certify, it must assess these aquatic impacts.

Proposed Rule, "Environmental Review for Renewal of Operating Licenses," 56 Fed. Reg. 47,016, 47,019 (Sept. 17, 1991) (emphasis added). Providing the permit, along with its supporting documentation, is sufficient because "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 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 . . . .” 10 C.F.R. § 51.71(d) n.3. This regulatory framework is consistent with the line of cases interpreting Section 511(c) of the Clean Water Act, which hold that the NRC does not have the authority to independently review discharge limits or monitoring requirements, but instead, should rely on the assessment performed by the permitting authority.<sup>22</sup> The NRC is to take the assessment provided by the permitting authority “at face value.” *Carolina Power & Light Co.* (H. B. Robinson, Unit No. 2), ALAB-569, 10 NRC 557, 562 (1979).

The Staff did not originally oppose admission of NEC Contention 1 because, at that time, Entergy had not provided a copy of its March 30 Amendment, and therefore it had not provided the required assessment of the impacts of increased thermal effluent limitations. See Staff Answer at 8. The Licensing Board acknowledged in its decision that pertinent facts changed after the contention responses were filed. See *id.* at 181. First, Entergy formally amended its ER to include the March 30 Amendment, and second, the Vermont Environmental Court stayed the effectiveness of the March 30 Amendment. *Id.* However, the Board questioned “the meaning and status of [the] amendment to [Entergy’s] NPDES permit . . . given that the permit expired on March 31, 2006, is the subject of an appeal, and was recently stayed.” *Vermont Yankee*, LBP-06-20, 64 NRC at 181. The Board then went on to state that “[i]f the NPDES permit is valid and effective, then the first prong of 10 C.F.R. § 51.53(c)(3)(ii)(B) is satisfied. If

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<sup>22</sup> See *Tennessee Valley Authority* (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 NRC 702, 704 & n.6, 706-15 (1978) (FWPCA Amendments of 1972, 33 U.S.C. § 1251, *et seq.*, assign the responsibility for water pollution control criteria and regulating polluters to the Environmental Protection Agency and the States); see also *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 69 (1977), *aff’d* *Seabrook*, CLI-78-1, 7 NRC 1, 23-24 (1978), *aff’d sub nom. New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87, 98 (1st Cir. 1978) (The NRC “obeyed its FWPCA duties by deciding to accept as dispositive EPA determinations concerning” aquatic impacts of once-through cooling).

not, then the second prong requires Entergy to ‘assess the impacts on fish and shellfish resources resulting from heat shock.’” *Id.* This formulation errs by failing to consider the language of the contention.

The Board correctly noted that if the Vermont Environmental Court upholds the March 30 Amendment, allowing the increased thermal effluent limitations, there would be no remedy for NEC, as Entergy’s submission of the March 30 Amendment satisfies 10 C.F.R.

§ 51.53(c)(3)(ii)(B).<sup>23</sup> *Id.* However, the Board erred in the second part of its formulation because NEC Contention 1 is predicated on the increased thermal effluent limitations. See NEC Petition at 12-13 (“The specific issue of fact and law is whether Entergy’s [ER] sufficiently assesses the increased thermal discharges over the requested twenty-year license extension”). If the March 30 Amendment is not “valid and effective,” there would be no basis for the contention, as Vermont Yankee would not be permitted to increase its thermal effluents.<sup>24</sup> See Dissenting Opinion, *Vermont Yankee*, LBP-06-20, 64 NRC at 215. Under either scenario NEC Contention 1 is not litigable.

C. The Length of Vermont Yankee’s NPDES Permit Does Not Affect the Applicability of 10 C.F.R. § 51.53(c)(3)(ii)(B)

The Licensing Board also asked in its decision whether “Entergy satisf[ies] 10 C.F.R. § 51.53(c)(3)(ii)(B) and Part 51 in general” and whether “NRC satisf[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 182. As discussed by Entergy in its petition for interlocutory review, “section 316(a) variances are granted and implemented through NPDES permits,

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<sup>23</sup> See *also* Staff Answer at 9 (“The contention basis that remains, however, is the alleged absence of an assessment of the impacts of the discharge temperature increase, which can be cured by submission of the amended permit”).

<sup>24</sup> In the event the March 30 Amendment is overturned by the Vermont Environmental Court, the prior version of Entergy’s NPDES permit was provided as Attachment D to Entergy’s original ER and would fulfill the requirements of 10 C.F.R. § 51.53(c)(3)(ii)(B).

[which] must be issued for fixed terms not exceeding five years.” Entergy Petition at 16 (citing 33 U.S.C. § 1342(b)(1)(B)). NEC’s argument that the permit cannot be relied upon to assess the impacts of twenty years of renewed operation because it only covers a five-year period amounts to an impermissible challenge to the regulation. See 10 C.F.R. § 2.335(a). If NEC’s interpretation were correct, section 51.53(c)(3)(ii)(B), which simply requires an applicant to provide its permit, would be meaningless.

Further as Entergy and the dissenting opinion note:

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.

Entergy Petition at 17 (citing Dissenting Opinion, *Vermont Yankee*, LBP-06-20, 64 NRC at 215).

In fact, when the Commission promulgated this rule, it acknowledged that “[a]gencies 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.” 61 Fed. Reg. at 28,475. Similarly, if a five-year permit comes up for renewal, the permitting authority would not be constrained from strengthening or lessening restrictions in the permit, but such changes would remain subject to the requirements of section 316(a) of the Clean Water Act. See 40 C.F.R. §§ 125.70, 125.73(a). Despite acknowledging the possibility of changes to permits, the Commission required license renewal applicants to only provide the current permit. See 10 C.F.R. § 51.53(c)(3)(ii)(B). NEC, based on its position that a five-year NPDES permit is insufficient, seeks to impose a requirement greater than that in the NRC’s regulations.<sup>25</sup> Litigation of this issue would constitute an impermissible attack on a generic NRC requirement.

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<sup>25</sup> The Board’s question regarding whether the Staff may rely upon a five-year permit to assess twenty years of operation is premature. Intervention petitions must be based upon information available at the time of the petition is filed, such as the application or ER, so only concerns related to the ER can serve to support the contention at this stage. See 10 C.F.R. § 2.309(f)(2).

See *Millstone*, CLI-03-14, 58 NRC at 218. Thus, this aspect of the Licensing Board's decision cannot support admitting this contention for litigation.

CONCLUSION

For the foregoing reasons, the Commission should reverse the Licensing Board's decision to accept NEC Contention 1 for litigation.

Respectfully submitted,

***/RA/***

Steven C. Hamrick  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 29th day of January, 2007

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 BRIEF IN RESPONSE TO CLI-07-01" 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 29th day of January, 2007:

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**/RA/**

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