

January 30, 2007 (7:35am)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In re: ENTERGY NUCLEAR VERMONT YANKEE, LLC)
& ENTERGY NUCLEAR OPERATIONS, INC.)
(Vermont Yankee Nuclear Power Station))

No. 50-271-LR
CLI-07-01

APPELLEE NEW ENGLAND COALITION'S BRIEF

QUESTIONS PRESENTED

1. Whether the ASLB properly admitted the New England Coalition's (NEC) Contention 1 under 10 C.F.R. §§ 2.309(f)(1), 51.53(c)(3)(ii)(B) and other applicable law.
2. Whether Entergy's arguments are without merit.
3. Whether full elucidation of the facts and Vermont law unique to this matter assists to resolve the Commission's potential concerns.

STATEMENT OF THE CASE

I. INTRODUCTION

This matter is the Commission's *sua sponte* review of the Atomic Safety and Licensing Board's (ASLB) September 22, 2006 decision to admit the New England Coalition's (NEC) Contention 1 for adjudication.¹ The ASLB properly admitted NEC's Contention 1 pursuant to 10 C.F.R. § 2.309(f)(1), and should now be permitted to adjudicate its merits.

In a nutshell, NEC's Contention 1 questions whether Entergy has complied with requirements of 10 C.F.R. §§ 51.45 & 51.53(c)(3)(ii)(B). These

¹ Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption), LBP-06-20, 64 N.R.C. 131 (Sept. 22, 2006).

rules define, in part, the content of Entergy's environmental report (ER) assessing the cumulative impact of thermal discharge from the Vermont Yankee plant's once-through cooling system, during the proposed renewed license term. Entergy's ER obligations "seed" the NRC Staff's ultimate evaluation of this issue under the National Environmental Policy Act (NEPA). Entergy's License Renewal Application proposes operation of the Vermont Yankee plant at twenty percent in excess of its original design capacity ("uprate operation"). Entergy and the NRC Staff must therefore assess the cumulative environmental impact of the increased thermal discharge to Vermont's Connecticut River that uprate operation will produce.

Entergy's effort to comply with its ER obligations under 10 C.F.R. §51.53(c)(3)(ii)(B) has been nothing more than its submission of: (1) a State of Vermont-issued NPDES permit that pre-dates NRC and State of Vermont approval of Vermont Yankee's uprate operation, and hence does not evaluate or authorize Entergy's proposed increase in thermal discharges at uprate operation levels; and (2) its effort, rejected and struck by an unappealed ASLB Order, to proffer a *tentative and partial* Vermont-issued NPDES permit amendment that is of no effect under Vermont law, and was found defective and preliminarily enjoined by a Vermont Court with specific jurisdiction over Vermont Clean Water Act permit decisions.

NEC's Contention 1 focuses on the inadequacy of Entergy's pre-uprate NPDES permit, and its partial permit amendment to satisfy 10 C.F.R. §

51.53(c)(3)(ii)(B). Entergy's arguments on petition for interlocutory review misconstrue NEC's Contention 1. Entergy principally mischaracterizes NEC's Contention 1 as raising policy issues of broad application and an impermissible challenge to the *validity* of 10 C.F.R. § 51.53(c)(3)(ii)(B). NEC does not challenge this rule, but rather contends that Entergy has not complied with it. Further, NEC's Contention 1 turns largely on issues specific to Vermont law and the facts of this situation, regarding the scope and legal status of the state-issued Clean Water Act NPDES permit and permit amendment that Entergy attempted to submit to satisfy 10 C.F.R. § 51.53(c)(3)(ii)(B). It is also important to note that Contention 1 raises at least one Category 2 environmental impact of Entergy's thermal discharge that is squarely within the scope of the ASLB proceeding: heat shock to fish. All issues within Contention 1's scope are plant-specific. Notably, neither Entergy nor the NRC Staff has argued that Contention 1 is outside the scope of the ASLB proceeding.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

On March 27, 2006, the Commission gave notice that it had accepted the January 25, 2006 license renewal application of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Entergy). 71 Fed. Reg. 15,220 (Mar. 27, 2006). Entergy seeks a 20-year extension of its Vermont Yankee Nuclear Power Station's operating license that would run from 2012 until March 21, 2032. NEC filed a Petition for Leave to

Intervene, Request for Hearing, and Contentions on May 26, 2006 (60 days from the Commission's Notice). The States of Vermont and Massachusetts also filed such petitions.

On June 5, the State of Vermont, a state with delegated authority to administer the Clean Water Act, gave notice of its adoption of NEC's Contention 1, and all other contentions filed by NEC.

On June 8, 2006, the Commission gave notice that it had established an ASLB for this matter. The ASLB held oral argument on admission of the contentions on August 1 and 2, 2006.

By Memorandum and Order dated September 22, 2006, the ASLB admitted four of NEC's six contentions including Contention 1. The three members of the ASLB were unanimous in their admission of NEC's contentions except that one Judge dissented from admission of Contention 1.

On October 10, 2006, Entergy sought interlocutory review of the ASLB's admission of Contention 1. Interlocutory review was unanimously denied by the Commission, however, three Commission members agreed to take *sua sponte* review.

By separate docket, Entergy was authorized to operate at 20% above the originally approved level (uprate) for the remaining five years of its license (until 2012). Entergy's application here seeks to continue operating at this higher level until 2032.

III. NEC CONTENTION 1.

Contention 1 is an environmental contention asserting that Entergy's Environmental Report (ER) fails to satisfy 10 C.F.R. § 51.53(c)(2)(ii)(B) and other applicable requirements of 10 C.F.R. § 51.45. Because Entergy utilizes a once-through cooling system, Entergy's ER:

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 cannot 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.

10 C.F.R. § 51.53(c)(2)(ii)(B).

NEC asserts that Entergy does *not* have a Clean Water Act (CWA) 316(a)² variance, 316(b) determination, or equivalent State permits and documentation supporting its "proposed action" – an increased thermal discharge into the Connecticut River through 2032. Nor has Entergy assessed the impacts of its proposed action on fish and shellfish resources

² An NPDES permit requires compliance with water quality standards. A CWA § 316(a) variance is not a permit, but a variance allowing deviation from water quality standards so that a permit can issue for a particular discharge. 33 U.S.C. § 1326(a), 40 C.F.R. § 125.73. Section 316(a) provides that:

With respect to any point source otherwise subject to the provisions of section 301 or section 306 of this Act [33 USCS § 1311 or 1316], whenever the owner or operator of any such source, after opportunity for public hearing, can demonstrate to the satisfaction of the Administrator (or, if appropriate, the State) that any effluent limitation proposed for the control of the thermal component of any discharge from such source will require effluent limitations more stringent than necessary to assure the projection [protection] and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made, the Administrator (or, if appropriate, the State) may impose an effluent limitation under such sections for such plant, with respect to the thermal component of such discharge (taking into account the interaction of such thermal component with other pollutants), that will assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on that body of water.

resulting from heat shock and impingement and entrainment, or otherwise assessed the cumulative impacts of its proposed increased thermal discharge over the next 25 years.

Based on the ER as it stood when NEC filed Contention 1, NRC Staff agreed that Contention 1 was admissible because Entergy's ER failed to provide the information required by 10 C.F.R. § 51.53(c)(2)(ii)(B). NRC Staff Answer to NEC Contentions (June 22, 2006) at 8. As explained below, where NEC and NRC Staff (and the ASLB dissent) diverge is on the significance of additional documents Entergy proffered on July 28, 2006, and whether such documents satisfy 10 C.F.R. § 51.53(c)(2)(ii)(B). *See id.* at 8, n. 5; Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption), LBP-06-20, 64 N.R.C. 131 (Sept. 22, 2006), slip op, dissent at 1 (asserting that Contention 1 would be admissible if Entergy does not obtain CWA permits allowing the increased thermal discharge).

IV. FACTS, ASLB PROCEEDINGS, AND STATE PROCEEDINGS.

Entergy's uprate operation produces more heat. Hence Entergy also seeks to increase its thermal discharge into the Connecticut River for its operation's duration. To do so, Entergy asked the Vermont Agency of Natural Resources to issue a CWA 316(a) variance and NPDES permit amendments allowing the Connecticut River to be heated by an additional 1 degree F. Notably, this additional degree would be measured 1.4 miles

downstream from Entergy's discharge. See NPDES Permit at 4-5, ¶¶ b-c (attached to Entergy's Answer to NEC Contentions (6/22/06)). The increased thermal discharge is thus quite substantial, particularly in its cumulative impact until 2032.

There is no dispute that Entergy has not conducted its own studies under 10 C.F.R. § 51.53(c)(3)(ii)(B). Entergy's effort to comply with this section rests solely on documents it has submitted. Entergy's ER includes a five-year NPDES permit amended on June 2, 2003, which expired on March 31, 2006. ER, Attachment D, VDEC Permit 3-1199. Remarkably, this expired NPDES permit did not reflect the Vermont Yankee plant's "uprate" operations (VY at 120% capacity and concomitant increased thermal discharge) -- the proposed action requested by Entergy for the duration of its twenty-year license. Attached to this NPDES permit is a "fact sheet" dated May, 2001 and amended May 2003. Both the permit and fact sheet reflect obsolete operations no longer proposed by Entergy. Neither addresses impacts of any increased thermal discharge (such as heat shock to fish). As such, the ER does not, nor could it, assess thermal discharge impacts from 2012 to 2032.

However, on February 20, 2003, Entergy filed an application with the Vermont Agency of Natural Resources to amend its NPDES permit to allow an increased thermal discharge. On March 30, 2006, ANR acted on this application. Entergy and a number of interest groups (including NEC

through separate counsel, and others opposed to Entergy's proposed increased thermal discharge) all appealed and cross-appealed ANR's action to the Vermont Environmental Court. As explained below, any effect or import of this ANR action was thereby nullified as a matter of Vermont law, Vermont's particular system of administering the CWA, and this matter's unique facts.

A brief description of the ANR action and its significance (or lack of significance) is nonetheless instructive as it illustrates Entergy's noncompliance with 10 C.F.R. §§ 51.45 & 51.53(c)(2)(ii)(B). ANR "reached a *tentative* decision" to amend Entergy's permit to allow some increase in the thermal discharge, but "denied" Entergy's application, in part, because Entergy failed to provide sufficient information on the impacts of its increased thermal discharge during the critical Spring smolt migration period. ANR Fact Sheet at 1, 4-5 (March 2006)(emphasis added). Importantly, ANR ordered more study of impacts on fish. *Id.*

Indeed, ANR's own experts as well as those from the U.S. Fish and Wildlife Service determined that they could not complete any decision on Entergy's requested CWA § 316 variance without further study.

The Reviewers concurred with the Applicant's **retrospective** analysis that the **existing** discharge, under the **existing permitted thermal effluent limitations**, resulted in "no appreciable harm" to the aquatic biota of the Connecticut River within the area influenced by the Applicant's thermal discharge during the period May 16 through October 14. **However, in order to**

approve the requested increase in temperature a *predictive* determination also needed to be made that the proposed limits would “assure the protection and propagation of a balanced and indigenous population of shellfish, fish, and wildlife.” The Reviewers agreed that the temperature increase would assure this balanced indigenous population during the period of June 16 through October 14 but concluded that there was limited information regarding whether migrating salmon smolt would be impacted by the increased thermal effluent limitations during the period of May 16 through June 15, the later part of the smolt outmigration period. The reviewers concluded that more information (i.e. actual field studies) was needed to make this determination and therefore the Agency has not granted this portion of the Applicant’s amended request.

Fact Sheet at 4-5 (emphasis added, italics in original). *See also* Exhibit 1, U.S. Fish and Wildlife Service letter to Vermont Agency of Natural Resources (March, 2006)(noting Entergy’s failure to provide information on migrating Atlantic smolt behavior and physiology under proposed conditions, questioning the “robustness” of Entergy’s data, and indicating the need for additional research on thermal impacts to juvenile shad).

On the eve of the August 1 and 2, 2006 oral argument before the ASLB, Entergy sought to amend its ER to include ANR’s March 30, 2006 action on its permit amendment application.³ However, the ASLB struck

³ Entergy sought to amend its ER with this information on Friday afternoon, July 28, 2006. Entergy’s filing was 110 pages and highly technical, requiring expert review. Oral argument on the contentions was held on Tuesday and Wednesday, August 1 and 2, 2006. On Saturday, July, 29, 2006, NEC objected to this last-minute and prejudicial filing. On August 1, 2006, confirmed by written Order dated August 11, 2006, the ALSB unanimously struck this information from the proceeding’s record.

Entergy's proffer. Further, as mentioned above, Entergy had at this point already appealed ANR's partial denial of its application to Vermont's Environmental Court. On appeal, Entergy claimed that there was no need or legal basis for further study. See, Exhibit 2, Second Revised Statement of Questions of Entergy Nuclear Vermont Yankee, LLC (June 13, 2006).

Under Vermont law, the Environmental Court hears appeals from ANR's action *de novo*. 10 V.S.A. §§ 1269, 8504(h). *De novo* means that the matter is heard as if ANR never acted. The Court explained this approach as it applies to Entergy's challenge to ANR's March 31, 2006 action, as follows:

However, even after having been given the opportunity to file a revised statement of questions in light of the fact that this matter is being considered *de novo* by the Court, Entergy Nuclear's revised Questions 4, 5, and 6 still reflect a misunderstanding regarding the scope of this appeal. In an appeal such as this one, the Court does not examine whether an applicant met its burden of proof in the administrative proceedings from which the appeal is taken. Rather, pursuant to V.R.E.C.P. 5(g) and 10 V.S.A. §8504(h), the Court proceeds *de novo* to hear all questions of law or fact, applying the substantive standards that were applicable before the ANR. Thus, what the Court will have before it at the trial in this case will be the merits of whether the requested increase in the thermal discharge should be approved, and, if so, what conditions should be imposed in connection with that approval. In connection with this task the Court has the same authority as the ANR, including to impose conditions as provided in 10 V.S.A. §1263(c), and is required to apply the same substantive standards as were applicable before the ANR.

Exhibit 3, *In re: Entergy Nuclear/ Vermont Yankee Thermal Discharge Permit Amendment*, Decision and Order on Pending Motions, Docket No. 89-4-06 (Jan. 9, 2007) at 14.

Further, on August 28, 2006, the Environmental Court stayed the March 31, 2006 permit amendments, concluding that there is a substantial likelihood that they are illegal, that the increased thermal discharge will cause irreparable harm to fish, and that a stay is in the public interest.

Appellants have shown sufficient potential for irreparable injury to American shad in the Connecticut River, both at present as the juveniles become accustomed to cooler water temperatures prior to their migration down the River in the fall, and in the summer of 2007 for the growth of the next generation of juveniles.

* * *

The best interests of the public will be served by granting the stay so that it is not only in effect from now through September and the first half of October of 2006, but so that it remains in effect if this matter is not resolved by the time that adult American shad return to the River in April to spawn, for the 2007 component of the life cycle of the 2007 cohort of juvenile shad in the River.

Exhibit 4, *In re: Entergy Nuclear/ Vermont Yankee Thermal Discharge permit amendment*, Decision and Order on Motion to Stay of Permit Amendment Pending Appeal, Docket No. 89-4-06 (August 28, 2006).⁴

This stay and the Court's pending *de novo* review fully supplant and nullify ANR's March 30, 2006 action. Entergy's February, 2003 application to amend its NPDES permit and obtain a 316(a) variance is now being decided by the Court *de novo*, as if no ANR action had ever been taken. Moreover, the Court has affirmatively stayed ANR's March 30, 2006 action as faulty to the point of meeting the stringent standard for a preliminary injunction.

⁴ As noted by the ASLB dissent, "heat shock occurs when aquatic biota that have been acclimated to cooler water are exposed to sudden temperature increases when artificial heating commences." Dissenting Opinion at 3, n. 5. The Environmental Court found irreparable harm to juvenile shad accustomed to cooler water prior to migration downstream into the thermal discharge, or in other words, heat shock.

Hence we come full circle. The sole authority governing Entergy's thermal discharge is the unamended February 20, 2003 NPDES permit, Attachment D to its ER. As held by the Environmental Court and conceded by Entergy: "The Applicant will be able to operate under its previous [unamended] permit during the pendency of its renewal permit application, as well as during the pendency of the present appeal over its thermal effluent waiver amendment application." E. Ct. Stay Decision at 3; Entergy's Answer to NEC's Motion to File New and Supplemental Authority (Sept. 8, 2006) at 2; *See also*, 3 V.S.A. § 814(b) (expired permit remains in effect until final agency action taken on timely application for renewal). As explained above, this permit does not consider or allow the proposed action at issue here -- an increased thermal discharge under uprate operation of the Vermont Yankee plant from 2012 to 2032.

In the meantime, NEC filed its Contention 1 on May 26, 2006. As required by 10 C.F.R. § 2.309(f)(2), Contention 1 was based on Entergy's ER, which, of course, failed to reflect any of the above facts. Nonetheless, Contention 1 was supported by the expert declaration of Ross Jones, Ph.D. stating, in part, that Entergy's proposed discharge could significantly increase American shad mortality for several reasons, including the fact that: "an episodic increase in temperature from 68 to 77 F over 48 hours reduces survival of yolk-sac and feeding stage larvae of American shad. The *temperature shock that results from an increase from 68 F to 86 F kills all*

larval shad.” New England Coalition’s Petition for Leave to Intervene, Request for Hearing, and Contentions (May 26, 2006), Exhibit 6, Declaration of Dr. Ross T. Jones at 6. Dr. Jones’s conclusions are all based on peer-reviewed studies. Importantly, these temperatures are well within the range of temperatures to be expected during open cycle cooling in the discharge vicinity. NPDES permit at 4, ¶ b.

NRC Staff concurred with admission of NEC’s Contention 1, agreeing that it raises a Category 2 issue within the proceeding’s scope, and otherwise meets the requirements of an admissible contention. Staff Answer To NEC Request for Hearing (June 22, 2006) at 7. Staff specifically agreed that the ER did not contain permits for the additional thermal discharge. *Id.* at 8.

Entergy’s answer to NEC’s Contention 1 rested almost entirely on the above-described March 31, 2006 ANR action, not on information in its ER. Entergy Answer (June 22, 2006) at 11-18. In fact, as explained above, Entergy did not attempt to incorporate the March 30, 2006 ANR action into the ER until July 28, 2006, and the ASLB struck that information from this proceeding’s record.⁵

⁵ Entergy’s Opposition and arguments here should be held to the standard set by 10 C.F.R. § 2.309(f)(2): “On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant’s environmental report.” Further, any response to a contention must be made within 25 days of a contention’s filing and “no answers will be entertained.” 10 C.F.R. § 2.309(f). Entergy’s July 28, 2006 “FYI letter” was filed several months after NEC’s May 26, 2006 contention.

On September 22, 2006, the ASLB admitted Contention 1. It recognized that Contention 1 is specific to the significance and legal status of documents unique to this matter:

Turning to the specifics of NEC Contention 1 and the pleadings, we see that they focus on a second set of regulatory issues that are narrower and more difficult than the Section 511(c) issue. For example, a key issue raised by the pleadings is whether Entergy has satisfied the requirement that renewal applicants with plants with once-through cooling water systems

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 cannot 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.

10 C.F.R. § 51.53(c)(3)(ii)(B). Entergy points to the March 30, 2006, amendment to its NPDES permit that was issued by the State of Vermont and claims that this document satisfies the first prong of Section 51.53(c)(3)(ii)(B). But the meaning and status of that amendment to the NPDES permit are unclear, given that the permit expired on March 31, 2006, is the subject of an appeal, and was recently stayed. Entergy Nuclear/Vermont Yankee Thermal Discharge Permit Amendment (State of Vermont Env'tl. Court, Docket No. 89-4-06 Vtec, August 28, 2006) (Appeal of Connecticut River Watershed Council, et al.). If the NPDES permit, which addresses the increased thermal impact of the Vermont Yankee facility, is valid and effective, then the first prong of 10 C.F.R. § 51.53(c)(3)(ii)(B) is satisfied. If not, then the second prong requires Entergy to "assess the impact on fish and shellfish resources resulting from heat shock." 10 C.F.R. § 51.53(c)(3)(ii)(B). Presumably, as specified by the NRC Staff, these factual issues will be confronted in the litigation of NEC Contention 1.

Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption), LBP-06-20, 64 N.R.C. 131 (Sept. 22, 2006), slip op. at 51 (footnote omitted).

The issues identified by the ASLB turn on issues of Vermont law currently under consideration by a Vermont court, and are driven, in large part, by this matter's unique facts. Respectfully, the ASLB dissent erred by not fully recognizing the Vermont Environmental Court's jurisdiction, and concluding that Entergy can stand before the ASLB and satisfy its ER obligations with a partial permit amendment that the Court considered sufficiently dubious to enjoin. NEPA, NRC rules, and comity with Vermont courts do not allow such a result.

ARGUMENT

I. INTRODUCTION.

The issue presented by NEC's Contention 1 is narrow and case specific. It addresses a Category 2 environmental impact, fits squarely within 10 C.F.R. § 51.53(c)(3)(ii)(B), and turns on the unique nature and legal status of documents submitted by Entergy in its remarkably weak effort to comply with § 51.53(c)(3)(ii)(B) when compiling its environmental report (ER).⁶ The ER relied on a 2003 NPDES permit that does not address the proposed increased thermal discharge under uprate operation for an additional 20 years.

⁶ Entergy agrees that the thermal discharge here is a Category 2 issue. Entergy ER at 4-16.

The permit amendment that Entergy now proffers as authority for such a discharge, and to comply with its ER obligations, has been nullified as factually inadequate by the Vermont Environmental Court's stay and is of no legal significance under Vermont's *de novo* review system.⁷ In short, the issue here is specific to this case and driven by questions unique to Vermont law -- the legal status under Vermont law of the Vermont-issued documents. Such documents cannot satisfy Entergy's obligations under 10 C.F.R. §§ 51.45 & 51.53(c)(3)(ii)(B) and the Commission's other ER requirements.

II. STANDARD.

Three standards govern this matter. First 10 C.F.R. § 2.309(f)(1) sets the general standard for admission of contentions – a minimal standard intended to assure comprehensive review. Second, 10 C.F.R. § 51.53(c)(3)(ii)(B) requires Entergy's application to provide the Commission and public with specific and relevant information regarding the impact of its thermal discharge on aquatic ecology. This information is the basis for the NRC's preparation of a Supplemental Environmental Impact Statement, as required under NEPA. Third, the issue here turns largely on Vermont's interpretation and implementation of the Clean Water Act pursuant to its delegated program.

A. General Standard for Admission of Contentions.

⁷ Further, the ASLB struck Entergy's effort to amend its ER to include the permit amendment. Entergy has not appealed or otherwise sought relief from that Order.

NRC rules governing admission of Contention 1 are intended to ensure that “full adjudicatory hearings are triggered only by those able to proffer at least some *minimal factual and legal foundation* in support of their contentions.” *Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3)*, 49 N.R.C. 328, 334 (1999)(emphasis added). An intervenor is not required to prove its case at the contention filing stage: “the factual support necessary to show that a genuine dispute exists need not be . . . of the quality as that is necessary to withstand a summary disposition motion.” Statement of Policy on Conduct of Adjudicatory Proceedings, 48 N.R.C. 18, 22 n.1 (1998), *citing, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process*, Final Rule, 54 F.R. 33168, 33171 (Aug. 11, 1989). A petitioner is only required to make “a minimal showing that the material facts are in dispute, thereby demonstrating that an inquiry in depth is appropriate.” *In Gulf State Utilities Co.*, 40 N.R.C. 43, 51 (1994), *citing, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process*, Final Rule, 54 F.R. 33168, 33171 (Aug. 11, 1989).

Specifically, proposed contentions must satisfy six requirements of 10 C.F.R. § 2.309(f)(1). This rule is intended to ensure that “full adjudicatory hearings are triggered only by those able to proffer at least some *minimal factual and legal foundation* in support of their contentions.” *Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3)*, 49 N.R.C. 328, 334

(1999)(emphasis added). Sections (1) through (6) below summarize the requirements of Section 2.309(f)(1).

1. Specifically State the Issue of Law or Fact to Be Raised

Section 2.309(f)(i) requires “a specific statement of the issue of law or fact to be raised or controverted.”

2. Briefly Explain the Basis for the Contention

Section 2.309(f)(ii) requires “a brief explanation of the basis for the contention.”

3. Contentions Must Be Within the Scope of the Proceeding

Section 2.309(f)(iii) requires petitioner to “demonstrate that the issue raised in the contention is within the scope of the proceeding.” The scope here is defined by 10 CFR Part 51 and NRC’s “Generic Environmental Impact Statement for License Renewal of Nuclear Plants” (NUREG-1437 (May 1996)). Some environmental issues are resolved generically for all plants, and such issues – classified in 10 C.F.R. Part 51, Subpart A, Appendix B as “Category 1” issues – are normally beyond the scope of a license renewal hearing. *In the Matter of Florida Power & Light Company (Turkey Point Nuclear Generating Plant, Units 3 and 4)*, 54 NRC 3, 15; 10 CFR § 51.53(c)(3)(i). The remaining issues in Appendix B, which are designated as “Category 2” issues, are issues for which (1) the applicant must make a plant-specific analysis of environmental impacts in its Environmental Report , 10 CFR § 51.53(c)(3)(ii), and (2) the NRC Staff

must prepare a supplemental Environmental Impact Statement, 10 C.F.R. § 51.95(c). Contentions concerning Category 2 issues are within the scope of license renewal proceedings. *Turkey Point Nuclear Generating Plant, Units 3 and 4*, 54 NRC at 11-13.

4. Contentions Must Raise a Material Issue

Section 2.309(f)(iv) requires “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.”

5. Contentions Must Be Supported by Facts or Expert Opinions

Section 2.309(f)(v) requires “a concise statement of the alleged facts or expert opinion which support the [] petitioner’s position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the [] petitioner intends to rely to support its position on the issue.” An Intervenor is not required to prove its case at the contention filing stage: “the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality as that is necessary to withstand a summary disposition motion.” Statement of Policy on Conduct of Adjudicatory Proceedings, 48 N.R.C. 18, 22 n.1 (1998), *citing, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process*, Final Rule, 54 F.R. 33168, 33171 (Aug. 11, 1989). Rather, petitioner must make “a minimal showing that the material facts are in

dispute, thereby demonstrating that an inquiry in depth is appropriate.” *In Gulf States Utilities Co.*, 40 NRC 43, 51 (1994), *citing*, *Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process*, Final Rule, 54 F.R. 33168, 33171 (Aug. 11, 1989).

6. Contentions Must Raise a Genuine Dispute of Material Law or Fact

Section 2.309(f)(vi) requires that petitioner:

Provide sufficient information to show that a genuine dispute exists with the applicant/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.

All that is needed is “a minimal showing that the material facts are in dispute, thereby demonstrating that an inquiry in depth is appropriate.” *In Gulf States Utilities Co.*, 40 NRC 43, 51 (1994), *citing*, *Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process*, Final Rule, 54 F.R. 33168, 33171 (Aug. 11, 1989).

B. NEPA and NRC Application Requirements.

Section 51.53(c)(3)(ii)(B) is clear. It provides that:

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 cannot 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). This rule allows an applicant to provide required information on the cumulative Category 2 impacts of thermal discharge, including heat shock, in one of three manners: (1) a “current,” meaning relevant and unexpired, 316(b) determination and, if necessary, a 316(a) variance, or (2) “equivalent State permits,” meaning permits that reflect the same substance and effect as a § 316(a) variance or § 316(b) determination, or (3) its own assessment of the “impact of the proposed action on fish” resulting from heat shock.

This rule’s simple purpose is to provide information required by NEPA regarding heat shock and entrainment. It also allows an applicant the flexibility to rely upon a state agency’s expertise if an agency already has relevant information. NEPA requires a “hard look” at all direct, indirect and cumulative impacts. *Calvert Cliffs’ Coordinating Committee, Inc. v. U. S. Atomic Energy Commission* 449 F.2d 1109, 1119, (D.C. Cir. 1971); *See also* 10 C.F.R. § 51.45(e) (requiring that an applicant’s environmental report “should not be confined to information supporting the proposed action but should also include adverse information.”).

Further, NEPA requirements and those for admission of a contention are consistent and minimal. An intervenor need not provide the information,

but only raise a substantial question as to whether a project *may* have a significant effect:

An EIS must be prepared if 'substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.' *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998) (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992)). "To trigger this requirement a 'plaintiff need not show that significant effects will in fact occur,' [but] raising 'substantial questions whether a project *may* have a significant effect' is sufficient." *Id.* at 1150 (quoting *Greenpeace*, 14 F.3d at 1332).

Ocean Advocates v. United States Army Corps of Eng'rs, 402 F.3d 846, 864-865 (9th Cir. 2005) (emphasis in original). In requiring "proof that the challenged federal project will have particular environmental effects, we would in essence be requiring that the plaintiff conduct the same environmental investigation that he seeks in his suit to compel the agency to undertake [under NEPA]." *Citizens for Better Forestry*, 341 F.3d 961, 972 (9th Cir. 2003) (quoting *City of Davis v. Coleman*, 521 F.2d 661, 670-71 (9th Cir. 1975)).

NRC requirements for raising a NEPA contention are entirely consistent with NEPA case law. All that is needed is "a minimal showing that the material facts are in dispute, thereby demonstrating that an inquiry in depth is appropriate." *In Gulf States Utilities Co.*, 40 NRC 43, 51 (1994), citing, *Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process*, Final Rule, 54 F.R. 33168, 33171 (Aug. 11,

1989); 10 C.F.R. § 2.309(f)(v) (only a “concise” statement of fact or expert opinion is required); *Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3)*, 49 N.R.C. 328, 334 (1999)(same). The Commission’s NEPA implementation rules place the burden of assessing the environmental effects of any license renewal squarely on the applicant. 10 C.F.R. §51.53(c)(2) & (3). *See also* 10 C.F.R. §51.71(d) (detailing NRC’s obligations in preparing DEIS). Certainly that burden on the merits, now at the contention stage, is not NEC’s, nor are the merits presently at issue.

C. The NRC Should Not Impede Vermont’s Delegated Administration of the Clean Water Act.

The issue here turns on whether Contention 1 meets the minimal standards for admission of a contention. This proceeding cannot be used to collaterally attack Vermont’s administration of the Clean Water Act by giving effect to actions that have no effect under Vermont law. Because Vermont administers the CWA, its adjudicatory interpretation and implementation of the Act is owed deference. *American Rivers, Inc. v. F.E.R.C.*, 129 F.3d 99, 107 (2d Cir., 1997) (“Before considering the Commission’s contentions regarding the CWA, we note that FERC’s interpretation of § 401, or any other provision of the CWA, receives no judicial deference under the [*Chevron*] doctrine because the Commission is not Congressionally authorized to administer the CWA.”) (citation omitted). Certainly, the Commission cannot allow, indeed must prevent, Entergy’s collateral attack of such decisions. Comity is due. *See, Alabama Rivers Alliance v. F.E.R.C.* 325 F.3d 290, 296

(D.C. Cir. 2003) at n. 7 (collateral estoppel bars relitigation of already decided CWA issues).

III. NEC'S CONTENTION 1 WAS PROPERLY ADMITTED.

The ASLB recognized that that Contention 1 falls squarely within 10 C.F.R. § 51.53(c)(3)(ii)(B). This rule serves at least three purposes. First, it gets a start on the NEPA process. Here, NEPA requires, in part, an assessment and hard look at the cumulative impacts on fish and shellfish of Entergy's increased thermal discharge during the license renewal period. Second, it puts the public and cooperating agencies on notice of the proposal's impact. Third, it serves as the seed for the NRC's draft environmental impact statement. Each function is critical if the NRC is to obtain the complete information requisite to preparation of an adequate Final EIS. Any failure of these functions gives rise to an admissible contention.

A. NEC Raises a Specific Issue of Law or Fact.

NEC challenges whether Entergy's Environmental Report assessed the cumulative Category 2 impacts of its increased thermal discharge during its proposed twenty-year license term, including the impact of heat shock. 10 C.F.R. § 2.309(f)(i). Specifically, NEC asserts that the proposed increased discharge would cause thermal shock to fish, and that Entergy failed to assess cumulative impacts of its proposed increased thermal discharge over the requested 20-year license term, and failed to satisfy 10 C.F.R. § 51.53(c)(3)(ii)(B). As discussed in Part II, above, Entergy's subsequent effort

to rely on the voided March 31, 2006 ANR permit amendments raises a host of other specific legal and factual issues, many recognized by the ALSB.

Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption), LBP-06-20, 64 N.R.C. 131 (Sept. 22, 2006), slip op. at 47-48, 52-55-56.

In any event, the Vermont Environmental Court's Order finds that heat shock (as defined by the Dissent) will cause irreparable harm under Entergy's proposed increased thermal discharge. Exhibit 4, *In re: Entergy Nuclear/ Vermont Yankee Thermal Discharge Permit Amendment*, Dissenting Opinion at 3, n. 5. The Environmental Court has the specific jurisdiction to make such a finding. This finding cannot be collaterally attacked here by asserting that the amended permit is at all effective. Comity is owed. *See Arkansas v. Oklahoma*, 503 U.S. 91, 101(1992) ("The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a)"). At the very least, the Environmental Court's finding confirms a specific and material issue warranting further ALSB exploration.

B. NEC Briefly Explains the Basis for Contention 1.

Section 2.309(f)(ii) requires "a brief explanation of the basis for the contention." NEC provides such an explanation. If anything, this explanation is now quite lengthy as a result of Entergy's aggressive efforts to avoid Contention 1. In sum, however:

NEC has satisfied 10 C.F.R. § 2.309(f)(2)(ii) by providing a "brief explanation of the basis" or logic underlying the contention – 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.

Id. at 52. In addition, NEC has explained its basis or logic for why Entergy cannot rely on the proffered state-issued permits to assess heat shock or otherwise satisfy 10 C.F.R. § 51.53(c)(3)(ii)(B). *Id.* at 55.

C. Contention 1 Is Within this Proceeding's Scope.

The Commission appears to have taken review of Contention 1's admissibility over concern that "admission of this contention appears to require additional analysis of a Category 1 issue." Memorandum and Order (Jan. 11, 2007) at 9. That is not the case. Contention 1 is concerned, at a minimum, with the cumulative impact of heat shock due to Entergy's thermal discharge, which is a Category 2 issue.⁸ New England Coalition's Petition for Leave to Intervene, Request for Hearing, and Contentions (May 26, 2006), Exhibit 6, Declaration of Dr. Ross T. Jones at 6; 10 C.F.R. Pt. 51, App. B, Table B-1.

Entergy itself concedes that the issue raised in Contention 1 is a Category 2 issue and, hence, within the scope of this proceeding. "Because of continuing concerns about thermal discharge effects and the possible need to modify thermal discharges in the future in response to changing environmental conditions, this is a Category 2 issue for plants with once-through cooling systems." E.R. at 4-16, § 4.4.4. Entergy, citing 10 C.F.R. §

⁸ Further development of the facts before the ASLB may reveal other Category 2 impacts of Entergy's discharge.

51.53(c)(3)(ii)(B), further concedes that heat shock “may be of moderate or large significance.” E.R. at 4-16, § 4.4.2. Entergy then specifically recognizes its obligations under 10 C.F.R. § 51.53(c)(3)(ii)(B). E.R. at 4-16, § 4.4.3.

“The issue of whether the ER complies with the provisions of 10 C.F.R. Part 51 relevant to Category 2 environmental matters is certainly ‘within the scope’ of a license renewal proceeding and ‘material,’ as required by 10 C.F.R. § 2.309(f)(1)(iii) and (iv), respectively.” Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption), LBP-06-20, 64 N.R.C. 131 (Sept. 22, 2006), slip op. at 52;⁹ *See also* NRC Staff Answer to NEC’s Request for Hearing (June 22, 2006) at 7.

Contention 1 squarely challenges Entergy’s failure to address Category 2 issues. NEC Petition for Leave to Intervene, Request for Hearing and Contentions (May 26, 2006) at 10-11; *Id.*, Exhibit 6, Declaration of Ross T. Jones at 6. NEC specifically asserts that the E.R. fails to assess these impacts, but rather “simply concludes that the impact of this increased thermal discharge is small because an NPDES permit may be issued.” *Id.* at 11, citing E.R. at 4-18 – 4-19. Indeed, the NPDES permit attached to the E.R. and any assessment of heat shock in the ER is based on pre-uprate operations. There is no assessment of Entergy’s proposed action. E.R. at 4-

⁹ The ASLB dissent asserts that NEC failed to specifically raise the heat shock issue. This is incorrect. *See*, New England Coalition’s Petition for Leave to Intervene, Request for Hearing, and Contentions (May 26, 2006), Exhibit 6, Declaration of Dr. Ross T. Jones at 6.

17 and Attachment D. In short, the E.R. fails to provide the information on heat shock required by 10 C.F.R. § 51.53(c)(3)(ii)(B).

Contention 1 also specifically challenges Entergy's anticipated reliance on the amended permit issued by ANR on March 31, 2006, even though the E.R. makes no mention of it. NEC Petition at 11.

D. Contentions Must Raise a Material Issue.

Section 2.309(f)(iv) requires "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." Contention 1 disputes Entergy's compliance with 10 C.F.R. § 51.53(c)(2)(ii)(B), clearly a material issue. Specifically, Contention 1 questions whether, under Vermont law, the documents Entergy has included in its ER constitute a current Clean Water Act 316(b) determination, 316(a) variance, or an equivalent state permit authorizing its proposed thermal discharge under uprate operation over the extended license term.

E. Fact and Expert Opinion Supports Contention 1.

There is no dispute that Dr. Jones is an expert and that his opinion, as stated in his declaration, supports Contention 1. NEC also provides specific facts: namely, it identifies the information Entergy provides (and fails to provide) in support of its ER.

F. Contention 1 Raises Genuine Disputes of Material Law and Fact.

Contention 1 raises material disputes of law and fact concerning whether Entergy's NPDES permit and partial permit amendment (now stayed and nullified) constitute an adequate assessment of the cumulative Category 2 environmental impacts of the Vermont Yankee plant's increased thermal discharges during the renewed license term, as required pursuant to 10 C.F.R. §§ 51.53(c)(2)(ii)(B), 51.45, and other applicable law. As discussed at length above, these questions largely turn on the status of Entergy's permits under Vermont law, per Vermont's delegated administration of the Clean Water Act.

Based on a correct understanding of Vermont law, the conclusion compelled by the Environmental Court's *de novo* authority and its stay of ANR's March, 2006 action on Entergy's permit amendment is that the permit amendment is wholly superseded and without any effect. It is a nullity not to be reinstated. Under this understanding, NRC Staff and even the ASLB dissent agree that Contention 1 is admissible:

I agree with the NRC Staff, however, that this contention would be admissible on the limited grounds that Entergy's approved NPDES permit from the State of Vermont Agency of Natural Resources was not included with the application . . . the amended NPDES permit was approved on March 30, 2006. On July 27, 2006, Entergy submitted a copy of the approved permit as Amendment 6 to the LRA, thus resolving the issue.

Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption), LBP-06-20, 64

N.R.C. 131 (Sept. 22, 2006), slip op., dissent at 1.¹⁰ In the absence of the March, 2006 permit amendment – and, per the Environmental Court’s assumption of jurisdiction, it no longer exists -- all but Entergy agree that Contention 1 is admissible.

Moreover, the ASLB dissent’s rationale for not giving full effect to the Vermont Environmental Court mirrors Entergy’s misunderstanding of the Court’s *de novo* authority that was specifically addressed and rejected by the Court. *Id.* at 6; Exhibit 3, *In re: Entergy Nuclear/ Vermont Yankee Thermal Discharge Permit Amendment*, Decision and Order on Pending Motions, Docket No. 89-4-06 (Jan. 9, 2007) at 14. The Court is acting in ANR’s stead. *Id.* Further, the Court has stayed the amended permit. The only authority in existence authorizing any discharge is Entergy’s unamended permit that fails to assess, much less authorize the proposed increased thermal discharge.

Further, and respectfully, the ASLB dissent does not give full effect to NEC’s rights in this proceeding. The dissent states that “if the approved NPDES permit is overturned, the license reverts back to the original effluent limitations in the previous permit, and the increased thermal discharge will not take place, rendering this contention moot.” Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption), LBP-06-20, 64 N.R.C. 131 (Sept. 22, 2006), slip op., dissent at 10. However, NEC had to file a timely contention based on

¹⁰ The ASLB Order striking Entergy’s July 27, 2007 submission from this proceeding’s record was unanimous. ASLB Order (Aug. 7, 2007). Giving effect to that Order is entirely consistent with the Vermont Environmental Court’s decisions.

Entergy's "proposed" action. 10 C.F.R. §51.53(c)(3)(ii)(B). NEC would like nothing better than no increased thermal discharge, but the mere potential that Entergy would otherwise fail cannot bar NEC from challenging Entergy's current and actual proposal.

The ASLB properly found that NEC's Contention 1 raises genuine disputes concerning legal and factual issues. NEC should be permitted to adjudicate these issues before the Board.

VII. ENTERGY'S RELIANCE ON CWA § 511 IS MISPLACED.

Entergy also argues that the CWA § 511 precludes NEPA review from looking beyond an NPDES permit. 33 U.S.C. § 1371(c)(2). Entergy misreads this provision. It only states that NEPA shall not be deemed to authorize federal agencies to review a state's water quality standards (effluent limitations) established under the CWA, or the adequacy of a § 401 water quality certification. *Id. See also* S.D. Warren, 126 S.Ct. at 1852, n.8. Requiring an adequate assessment is not a challenge to Vermont's Water Quality standards or the effluent limitations they establish. It is an independent obligation imposed by NEPA on federal agencies. *Calvert Cliffs' Coordinating Committee, Inc. v. U. S. Atomic Energy Commission* 449 F.2d 1109, 1119, (D.C. Cir. 1971). Entergy's argument is without merit.

VI. CONCLUSION.

Entergy's petition should be denied and the ASLB's admission of
NEC's Contention 1 affirmed.

January 29, 2006

New England Coalition

by: *Ron Shems by Karen Tyler*
Ronald A. Shems
Karen Tyler
SHEMS DUNKIEL KASSEL & SAUNDERS PLLC
For the firm

Attorneys for NEC

EXHIBIT 1



United States Department of the Interior

FISH AND WILDLIFE SERVICE
300 Westgate Center Drive
Hadley, MA 01035-9589



In Reply Refer To:
FWS/Region 5/ES

452 17 006

Jeffrey Wennberg, Commissioner
Vermont Agency of Natural Resources
Department of Environmental Conservation
103 South Main Street
Waterbury, Vermont 05671-0401

Dear Mr. Wennberg,

Thank you for your letter dated January 18, 2006, also sent to Lee Perry, New Hampshire Fish and Game Department (NHFGD), requesting clarification on the position of the U.S. Fish and Wildlife Service (Service) regarding a proposed increase of thermal discharge to the Connecticut River associated with the Entergy Nuclear Vermont Yankee Power Station (Entergy), located in Vernon, Vermont.

The State of Vermont Agency of Natural Resources (ANR) has issued a draft National Pollutant Discharge Elimination System (NPDES) amended permit that retains existing discharge limits from May 16 to June 15, but allows an increase in the thermal discharge to the Connecticut River from June 16 to October 14.

As part of the amendment request, Entergy performed a 316(a) Demonstration, comprised of both a retrospective analysis and a predictive determination. The former is needed to conclude that the project has caused no prior appreciable harm to the aquatic biota, and the latter is necessary to "assure the protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife."

A representative from the Service participated (in an advisory capacity) on a fisheries technical team that reviewed the Demonstration and provided comments and recommendations to the ANR through the Vermont Department of Fish and Wildlife. While the Service's trust resources include all interjurisdictional fish, including species resident to the project area, our efforts in assisting the ANR were focused primarily on migratory species. Based on our review of the Demonstration, the Service determined the following:

Retain the existing limits from May 16 to June 15

The Service found that the Demonstration lacked information regarding the potential impact the thermal effluent may have on migrating Atlantic salmon smolt behavior and physiology under either existing or proposed conditions. No studies specifically aimed at addressing these questions have been conducted since the current permit limits went into effect in 1990. Also, recent literature has shown a direct relationship between temperature and smolt physiology (McGinnis et al. 1999) and temperature and smolt behavior (Darbin, Zydlewski et al. 2005).

The Service supports denial of the requested increase during the smolt migration season until further information is gathered. We are pleased the ANR recently has requested that Entergy conduct smolt studies, and that Entergy already has initiated consultation on study design.

Allow an increase in thermal limits from June 16 to October 14

Monitoring of juvenile and adult American shad occurs annually as a condition of the current NPDES permit. The Demonstration retrospectively analyzed the long-term data set and concluded that the project had caused no prior appreciable harm to American shad. Further, Entergy's predictive analysis showed little or no change in available habitat over existing conditions, and that no survival thermal thresholds would be exceeded.

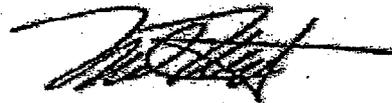
While the fisheries technical team was in general agreement with the Demonstration results, they brought to the attention of the ANR concerns regarding: (1) The robustness of the data used in the analyses; and (2) the need for future research to investigate potential thermal impacts on outmigrating juvenile shad.

Despite these concerns, the Service determined that it would not object to allowing a thermal increase from June 16 to October 14, provided that the amended permit contain conditions aimed at verifying the results of the predictive analyses and strengthening the monitoring program. As you are aware, the draft permit issued by the ANR does not include any new conditions related to American shad, and the only new condition related to the monitoring program is a requirement to perform an annual trend analysis.

In view of the above, the Service requests that the ANR revise the draft amended permit to contain the new conditions. If it is not possible to incorporate our recommendations into the amended permit, we ask that the ANR provide us with assurance that the conditions will be included in any renewed permit issued for the project (the current permit expires on March 31, 2006).

We look forward to working cooperatively with your agency and others to assure protection of anadromous fishery resources in the Connecticut River.

Sincerely,

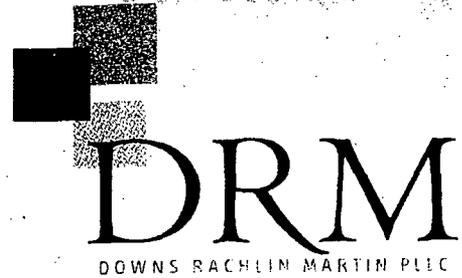


Marvin E. Moriarty
Regional Director

Enclosure

cc: **New England Field Office, Mike Bartlett**
Connecticut River Coordinator, Sunderland Office of Fisheries Assistance, Jan Rowan
Connecticut River Watershed Council
NHFGI, Lee Perry
NHFGI, Gabe Gries
Vermont Department of Fish and Wildlife, Ken Cox

EXHIBIT 2



ZACHARY R. GATES
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June 13, 2006

BY FIRST CLASS U.S. MAIL

Jacalyn M. Stevens, Court Manager
Vermont Environmental Court
2418 Airport Road, Suite 1
Barre, VT 05641

Re: In Re: Entergy Nuclear Vermont Yankee Discharge Permit, Permit Number 3-1199
Docket No. 89-4-06

Dear Ms. Stevens:

Pursuant to the Court's direction on May 24, 2006 and June 9, 2006, please find enclosed a Second Revised Statement of Questions of Entergy Nuclear Vermont Yankee, LLC. Thank you in advance for your assistance in this matter.

Sincerely yours,

Elise N. Zoli (by Zachary R. Gates)
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Enclosure
cc: Service List

STATE OF VERMONT
ENVIRONMENTAL COURT

In Re: Entergy Nuclear Vermont Yankee)
Discharge Permit)
Permit Number: 3-1199)

Second Revised Stmt. of Questions
Docket No. 89-4-06

**SECOND REVISED STATEMENT OF QUESTIONS
OF ENTERGY NUCLEAR VERMONT YANKEE, LLC**

Pursuant to Rule 5(f) of the Vermont Rules for Environmental Court Proceedings and the Court's direction on May 24, 2006 and June 9, 2006, appellant Entergy Nuclear Vermont Yankee LLC ("Entergy") hereby sets forth its Second Revised Statement of Questions to be determined on appeal.

1. Whether this Court lacks jurisdiction to determine issues on appeal other than those placed in question by the amendment to Permit No. 3-1199 and whether issues that are not relevant to the determination whether Entergy has met its burden with regard to the 1°F thermal discharge increase – including all issues that challenge the preexisting conditions of Entergy's NPDES permit – are outside the scope of this appeal, are raised in an untimely and procedurally incorrect manner, are inappropriate for resolution by this Court, and will serve only to unduly hinder and delay these proceedings.

2. Whether this Court may assign party status to any entity that did not file Comments on draft Permit No. 3-1199 and/or any entity that fails to raise issues within the jurisdiction of the Environmental Court and Agency of Natural Resources and relating to the amendment to Permit No. 3-1199.

3. Whether VWQS 1-03, VWQS 2-04, VWQS 3-01, and/or other Vermont water quality standards may be applied to Entergy's permit request, or whether the application of

VWQS 1-03, VWQS 2-04, VWQS 3-01, and/or other Vermont thermal water quality standards to Entergy's permit requests is contrary to law.

4. Whether Amended Discharge Permit No. 3-1199 may contain a provision that "[n]otwithstanding the temperature limits in table 6.c above, when the average hourly temperature at Station 3 equals or exceeds 85°F, the permittee shall, as soon as possible, reduce the thermal output of the discharge to the extent that the average hourly temperature at Station 3 does not exceed 85°F," Amended Permit No. 3-1199 Part I.A.6.c (hereinafter, the "85°F Thermal Limit"), and/or whether that 85°F Thermal Limit is contrary to law because Entergy has fully and completely met its burden, pursuant to CWA § 316(a) and 40 C.F.R. § 125.73(a), of establishing by a preponderance of the evidence that the alternative increased thermal discharge will assure the protection and propagation of the balanced indigenous population.

5. Whether Amended Discharge Permit No. 3-1199 may contain a provision approving the 1°F thermal discharge during the period of June 16 through October 14, but fail to contain a provision approving the 1°F thermal discharge during the period of May 16 through June 15, *see* Amended Permit No. 3-1199 Part I.A.6.c, and/or whether the restriction of the 1°F thermal discharge increase to the period of June 16 through October 14 is contrary to law because Entergy has fully and completely met its burden, pursuant to CWA § 316(a) and 40 C.F.R. § 125.73(a), of establishing by a preponderance of the evidence that the alternative increased thermal discharge will assure the protection and propagation of the balanced indigenous population.

6. Whether Amended Discharge Permit No. 3-1199, may contain a "Trend Analysis," consisting of:

a time series trend analysis consistent with the non-parametric Mann-Kendall test that was used in the permittee's § 316(a) Demonstration in Support of a Request for Increased Discharge Limits at Vermont Yankee Nuclear Power Station During May

through October, dated April 2004 (Normandeau Associates). The trend analysis shall statistically test for significant ($p < 0.05$) increasing or decreasing trends in the annual total catch per unit of effort for each of the nine representative important species collected since 1991 according to the schedule and methods required in the **Fish** section of Part IV. Each year's annual report shall include a long term trend analysis. Specifically this shall include an analysis of the current and preceding years back through 1991.

Macroinvertebrates: The annual report required under Part I.A.9 shall include a time series trend analysis consistent with the non-parametric Mann-Kendall test that was used in the permittee's § 316(a) Demonstration in Support of a Request for Increased Discharge Limits at Vermont Yankee Nuclear Power Station During May through October, dated April 2004 (Normandeau Associates). The trend analysis shall statistically test for significant ($p < 0.05$) increasing or decreasing trends in the annual total catch per unit effort (numbers of orgs/basket/30 days of deployment) for each of five macroinvertebrate abundance measures: total abundance; ephemeroptera; trichoptera; diptera; and crustacea. Analysis shall incorporate all rock basket data collected at stations 2 and 3 since 1996 according to the schedule and methods required in the Benthic **Macroinvertebrate** section of Part IV.

Amended Permit No. 3-1199 Part IV, p. 22, and/or whether the Trend Analysis required by Amended Discharge Permit 3-1199 is contrary to law because Entergy has fully and completely met its burden, pursuant to CWA § 316(a) and 40 C.F.R. § 125.73(a), of establishing by a preponderance of the evidence that the alternative increased thermal discharge will assure the protection and propagation of the balanced indigenous population.

7. Whether Amended Discharge Permit No. 3-1199 may vest the Environmental Advisory Council ("EAC") with oversight of the annual reports and studies required by the Trend Analysis, thereby imparting to the EAC the authority to modify the permit unilaterally, abdicating the regulator's statutory responsibility to issue and manage the permit. Amended Permit No. 3-1199 Part IV, pp. 22, 25.

ENTERGY NUCLEAR VERMONT
YANKEE, LLC

By Its Attorneys,

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802.225.5500

Signed and dated in Montpelier, VT this
13th day of June, 2006

Signed and dated in Montpelier, VT this
13th day of June, 2006

EXHIBIT 3

STATE OF VERMONT
ENVIRONMENTAL COURT

In re: Entergy Nuclear/ Vermont Yankee }
Thermal Discharge Permit Amendment } Docket No. 89-4-06 Vtec
(Appeal of Connecticut River Watershed Council, }
Trout Unlimited (Deerfield/Millers 349 Ch.), }
and Citizens Awareness Network) }
(Appeal of New England Coalition }
on Nuclear Pollution) }
(Cross-Appeal of Entergy Nuclear }
Vermont Yankee, LLC) }

Decision and Order on Pending Motions

Appellants Connecticut River Watershed Council, Trout Unlimited (Deerfield/Millers 349 Chapter), Citizens Awareness Network (Massachusetts Chapter) and New England Coalition on Nuclear Pollution, and Cross-Appellant Entergy Nuclear Vermont Yankee, LLC, appealed from a decision of the Vermont Agency of Natural Resources approving an amendment of a thermal discharge permit issued to Entergy Nuclear Vermont Yankee, LLC.

Appellants Connecticut River Watershed Council (CRWC), Trout Unlimited, and Citizens Awareness Network (CAN)¹ are represented by Patrick A. Parenteau, Esq., David K. Mears, Esq., and Justin E. Kolber, Esq.; Appellant New England Coalition on Nuclear Pollution (NECNP) is represented by Evan J. Mulholland, Esq.; Cross-Appellant-Applicant Entergy Nuclear Vermont Yankee, LLC (Entergy Nuclear) is represented by Elise N. Zoli, Esq., Barbara J. Ripley, Esq., Sarah Heaton Colcannon, Esq. and U. Gwyn Williams, Esq.; the Windham Regional Commission appeared through James Matteau and John Bennett; the Vermont Agency of Natural Resources (ANR) is represented by Catherine Gjessing, Esq. and Warren T. Coleman, Esq.; and the Water Resources Panel of the Vermont

¹ For the purposes of the discussion in this decision, these three Appellant organizations may be referred to collectively as "the CRWC Appellants."

Natural Resources Board is represented by John H. Hasen, Esq.

Procedural Context

Entergy Nuclear owns and operates a nuclear power station in Vernon, Vermont, located on the west shore of the Connecticut River at the Vernon Pool. The facility is a boiling water reactor which began operating in 1972. A portion of the thermal output of the facility produces electricity; the remainder is removed as heat through a circulating water system that passes by a condenser. The condenser cooling water is either discharged into the Connecticut River or into the atmosphere through mechanical draft cooling towers.

Discharges from the Entergy Nuclear facility into the Connecticut River are regulated under the National Pollutant Discharge Elimination System (NPDES) program, a federal program which the State of Vermont is authorized to administer. The relationship between the requirements of the federal statute and regulations and Vermont's Water Pollution Control Act and associated regulations is at issue in this appeal.

Pursuant to the federal and state statutes, discharge permits are issued for fixed terms not to exceed five years. 33 U.S.C. §§1392(a)(3), (b)(1)(13); 10 V.S.A. §1263(d)(4). Permit applicants may continue to operate pursuant to an expired permit while the renewal proceedings are pending. United States v. Con Agra, Inc., No. CV 96-0134-S-LMB at *20 (D. Idaho 1997) (unpublished). A renewal permit is required to be analyzed and "issued following all determinations and procedures required for initial permit application." 10 V.S.A. §1263(e).

In July of 2001, the ANR issued Discharge Permit No. 3-1199 (the 2001 Discharge Permit) to then-Vermont Yankee Nuclear Power Corporation., authorizing it to discharge condenser cooling water² into the Connecticut River, subject to temperature-related restrictions applicable to the following two periods each year: from October 15 through May 15, and from May 16 through October 14. The restrictions in the 2001 Discharge Permit

² The permit also authorizes and regulates the discharge of service water, low-level radioactive liquid, plant heating boiler blowdown, water treatment carbon filter backwash, stormwater runoff, and demineralized trailer rinsedown water, none of which is at issue in the present permit amendment application. In addition, the permit authorizes the discharge of cooling water from four service water pumps.

applicable from mid-October through mid-May regulated the maximum temperature in the river, the rate of change of the river temperature, and the increase of temperature above ambient levels, while the restrictions applicable from mid-May through mid-October regulated the allowable increase of temperature above ambient levels, as expressed in a chart relating the allowable increase to the specific ambient levels (Part I, §6(b)).

The 2001 Discharge Permit also established an Environmental Advisory Committee (EAC), comprising representatives of the Vermont, New Hampshire, and Massachusetts environmental and fisheries programs, plus the coordinator of the United States Fish and Wildlife Service's Connecticut River Anadromous Fish Program, and provided that the Vermont Yankee facility's Chemistry Manager or designee would serve as the Committee's administrative coordinator and secretary. The paragraph establishing the EAC (Part I, §11, at p. 7) stated that the EAC was "advisory in function" and required the permittee to meet with the EAC "as often as necessary, but at least annually, to review and evaluate the aquatic environmental monitoring and studies program" established in Part IV of the permit.

The 2001 Discharge Permit allowed the temperature-related restrictions to be modified during an emergency shutdown, and authorized experimental test programs with alternative thermal limits to be administered as approved by the EAC and authorized in writing by the ANR. The 2001 Discharge Permit allowed the Secretary of the ANR to "reopen and modify" the permit, after notice and opportunity for a hearing, "to incorporate more stringent effluent limitations for control of the thermal component" of the discharge, based on a determination that "open cycle operation is having an adverse effect [o]n resident or anadromous fish species in the river."

The 2001 Discharge Permit was amended shortly after its issuance to account for two existing stormwater discharge points. It was amended in 2002 due to the transfer of ownership of the Vermont Yankee facility to Entergy Nuclear. It was amended in 2003 to replace a named chemical, to add a monitoring location, and to modify the fish impingement sampling requirement (to collect samples from circulating water traveling screens) so this type of sampling is not required when temperatures are below freezing. It was amended in 2004 to allow an internal facility plumbing change to divert a certain amount of cooling water from another internal source to the service water pumps.

In February of 2003, Entergy Nuclear applied for the permit amendment that is the

subject of the present appeal: to increase the temperature of the Connecticut River by an additional one degree Fahrenheit (1° F), as determined at monitoring Station 3 as compared with upstream monitoring Station 7, during the entire mid-May through mid-October "summer" period. The ANR issued a Draft Amended Permit for public comment and held a public hearing in November of 2005.

On March 30, 2006 (making the amendment applicable to the then-not-yet-expired 2001 Discharge Permit), the ANR issued the 2006 Permit Amendment. It allowed the requested increase for the period from June 16 through October 14, but imposed the existing limitations of the 2001 Discharge Permit for the period from May 16 through June 15. The 2006 Permit Amendment included a new provision setting a limit on the maximum temperature in the river during the mid-June through mid-October period. Part I, §6(c), at p. 5. The 2006 Permit Amendment also included a new provision in Part IV (governing Environmental Monitoring Studies), at p. 22, requiring a new type of statistical analysis (time series trend analysis) to be performed on data already required to be collected, as part of the annual report already required to be provided by that section.

The 2006 Permit Amendment became part of the now-expired permit under which Entergy Nuclear is entitled to operate³ until that permit is superseded by the terms of the renewal permit now being considered by the ANR. At the telephone conference scheduled in the final paragraph of this decision, the parties should be prepared to discuss the current progress of and expected timetable for the renewal permit proceedings.

Several organizations participated in the ANR decisionmaking process on the 2006 Permit Amendment and have filed appeals of the March 30, 2006 ANR decision to issue the amended permit. Entergy Nuclear also filed a cross-appeal relating to the applicability of the Vermont Water Quality Standards and to the various conditions imposed in the 2006 Permit Amendment. This Court issued a stay of the effectiveness of the 2006 Permit Amendment during the latter portion of the 2006 season; any continuation of that stay for the 2007 season would have to be the subject of a renewed motion to stay.

³ The 2001 Discharge Permit, as amended, expired on March 31, 2006; Entergy Nuclear filed a renewal application which was deemed complete in September of 2005.

Motions Relating to Party Status

Entergy Nuclear has moved to dismiss the Citizens Awareness Network⁴ and the New England Coalition on Nuclear Pollution as parties.

The Citizens Awareness Network (CAN) is a Massachusetts nonprofit corporation whose stated organizational purpose is to educate the public about the effects of nuclear power on the environment, and to promote public discourse on the effects of nuclear power. CAN reports having 404 members who live within ten miles of the thermal discharge point at issue in this appeal, and 141 members who live in communities downstream of that point. Several of these members have submitted affidavits attesting to their use and enjoyment of the Connecticut River near the Entergy Nuclear Vermont Yankee facility; they engage in boating, fishing, and other forms of recreation, both in and along the banks of the River. At least one CAN member watches birds along the banks of the Connecticut River in the Vernon Pool and Turner's Falls areas, observing osprey and eagles that nest in the area. In their affidavits, CAN members have expressed their concerns that their use and enjoyment of the Connecticut River downstream of the Entergy Nuclear facility, and its surrounding environment and wildlife, will be adversely affected by the proposed permit amendment allowing an increased thermal discharge temperature, due to its effects on fish and other aquatic biota in the Connecticut River, and on the general water quality of the River.

New England Coalition on Nuclear Pollution (NECNP) is a nonprofit educational

⁴ Although the motion does not seek dismissal of appellants CRWC and Trout Unlimited, party status allows a party to appeal to the Supreme Court from an adverse decision of this Court. For that reason, we must proceed to address this motion despite the doctrine articulated in Watt v. Energy Action Educ. Found., 454 U.S. 151, 160 (1981) that it otherwise would not be necessary to address the standing of a party whose position is identical to that of CRWC and Trout Unlimited.

corporation whose members are concerned about the risks and effects of nuclear power on the New England natural environment and human population, that is, whose stated organizational purpose is to address the environmental impacts of nuclear power and to investigate the safety, suitability and environmental effects of nuclear power plants in New England. NECNP seeks to educate members of the public about these issues. NECNP members live in the region surrounding the Entergy Nuclear Vermont Yankee facility; some of these members boat, fish, and engage in other forms of recreation in the Connecticut River and on the river banks downstream of the Entergy Nuclear Vermont Yankee facility. Several of these members have submitted affidavits attesting to their use and enjoyment of the Connecticut River near the Entergy Nuclear Vermont Yankee facility. They allege that their use and enjoyment of the river would be adversely affected by an increase in the thermal discharge temperature limit for the facility. That is, they allege that a temperature increase in the thermal discharge from the Entergy Nuclear facility will adversely affect the flora and fauna that live in and depend upon the river, and would cause a decline in the population of American shad, Atlantic salmon, and other species that depend upon those fish, causing the members to experience a diminished river environment and making them less likely to visit the river.

Appeals of ANR decisions are governed by 10 V.S.A. §8504 and Rule 5 of the Vermont Rules for Environmental Court Proceedings. Under V.R.E.C.P. 5(d)(2), once an appellant has claimed party status as a person⁵ aggrieved pursuant to 10 V.S.A. §8504(a), that appellant is accorded party status unless the Court otherwise determines on its own motion, by ruling on a motion to dismiss, or by ruling on a motion to intervene.

A person is considered to be 'aggrieved' by an ANR decision if that person alleges "an injury to a particularized interest protected by the provisions of law listed in [10 V.S.A. §8503], attributable to [the decision on appeal], that can be redressed by the environmental court[.]" 10 V.S.A. §8502(7).

To determine whether CAN and NECNP have standing as organizations, it is necessary to examine the three criteria articulated in Parker v. Town of Milton, 169 Vt. 74,

⁵ As a threshold matter, as nonprofit corporations both CAN and NECNP qualify as "persons" under 10 V.S.A. §8502(6).

78 (1998). An organization has standing when “1) its members have standing individually; 2) the interests it asserts are germane to the organization’s purpose; and 3) the claim and relief requested do not require the participation of individual members in the action.” Id. We examine these criteria in the reverse order.

In the present case, the claim and relief requested do not require the participation of individual members of CAN and NECNP. That is, the issues in this appeal pertain to the interest of the members in the effect of the thermal discharge on the Connecticut River as those members may use or enjoy the river, and not as persons asserting a private claim for damages or nuisance. In addition, for the purposes of judicial efficiency, it is helpful to have each organization represent the interests of its individual members, rather than having a potentially large number of those individuals all participating individually. Compare 10 V.S.A. §§8502, 8504 with 24 V.S.A. §4465(4) (group must designate one person to serve as representative).

Entergy Nuclear argues that neither organization’s purpose is specifically related to water quality or the protection of fish habitat, or to litigation to advance those purposes. However, the “germaneness” requirement is not that stringent. To satisfy this requirement, the members’ asserted interests must simply be germane to each organization’s general purposes. Parker, 169 Vt. at 78. The members’ interests are not required exactly to mirror the organizational purpose. Id., Hunt v. Washington State Apple Adver. Comm’n, 432 U.S. 333, 343–44 (1977) (individual apple growers’ specific economic interests were germane to state apple advertising commission’s broader purpose of protecting and enhancing market for Washington apples).

The interests asserted by the members of both CAN and NECNP in this appeal are related to the effects of nuclear power plants on the local environment. These interests are germane to each organization’s respective purposes, which relate to the potential environmental effects of the generation of nuclear power in New England and at this facility in particular. CAN seeks to educate communities on the prevention of pollution from the generation of power from nuclear sources and to promote an environment where the free flow of ideas and discourse on nuclear and environmental issues is encouraged. CAN was organized in 1991 specifically to address water pollution issues affecting the Connecticut River, related to another nuclear facility on a tributary of the Connecticut River nearby in

Massachusetts; its interest in the outcome of this adjudication, therefore, is not abstract. Parker, 169 Vt. at 78.

NECNP's stated purposes include investigating the safety, suitability, and environmental effects of nuclear power plants; educating the public as to the nature and significance of nuclear power plants in New England; organizing activities designed to inform the public and appropriate governmental agencies of the hazards and risks associated with nuclear power plants; and participating in administrative agency hearings related to the licensing or permit approval for nuclear power plants in New England. Its interest in the outcome of this adjudication also is not abstract. Id.

Finally, it is necessary to determine whether CAN and NECNP members would have standing individually to bring the present appeals. This requirement, discussed in Parker, must be analyzed in light of the statutory standing requirements contained in §8502(7), which are specific to appeals to this Court. As provided in 10 V.S.A. §§8504(a) and 8502(7), the individual members must have alleged an injury to a particularized interest protected by the provisions contained in §8503, the injury must be attributable to the decision on appeal, and the claimed injury must be capable of being redressed by this Court.

Almost by definition, the claimed injury could be redressed by this Court in this de novo appeal. 10 V.S.A. §8504(a); V.R.E.C.P. 5(g). The injury complained of by CAN and NECNP is the ANR's decision to grant the 2006 Permit Amendment, allowing an increase in the thermal discharge from the Entergy Nuclear Vermont Yankee facility. As it is this Court that is responsible under 10 V.S.A. §8504(h) to rule anew on the permit amendment application, applying the substantive standards that were applicable before the ANR, the redressability requirement of 10 V.S.A. §8502(7) is met.

With respect to the requirement of alleging injury to a particularized interest attributable to the decision on appeal, individual members of both CAN and NECNP have submitted affidavits alleging various injuries to their particular interests protected by the state water pollution control statute. CAN members allege that their fishing, boating, and birdwatching ecological activities will be adversely affected by an increase in the temperature of the thermal discharge if the permit amendment is issued. NECNP members allege that their fishing, boating, and ecological activities will be adversely affected by an

increase in temperature, citing particular concerns about two species of fish that they allege will be adversely affected: the American shad and the Atlantic salmon. These allegations are specific and are sufficient to establish the threat of injury to the individuals' particularized interests in the Connecticut River itself and in the fish, birds, and other species that live in and near the River in the vicinity of the Entergy Nuclear Vermont Yankee facility discharge point. See U.S. v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 684-85 (1973); see also, Citizens' Comm. for Hudson Valley v. Volpe, 425 F.2d 97, 102-03 (1970).

CAN and NECNP members therefore have asserted a particularized injury that satisfies the standing requirements of the new statute under which these appeals are taken, 10 V.S.A. §8502(7). For the same reasons, CAN and NECNP have met the more general standing requirements for each organization to have standing under Parker, 169 Vt. 77-78.

Accordingly, Entergy Nuclear's Motion to Deny Party Status to CAN and NECNP is DENIED.

In addition to its motion to dismiss CAN and NECNP as parties, Entergy Nuclear filed a letter⁶ with the Court requesting clarification of the party status of the ANR, the Windham Regional Commission, and the Water Resources Panel of the Vermont Natural Resources Board. None of these parties is a party-appellant. The Court addressed this request as follows in an unpublished entry order dated October 3, 2006; it is reproduced here for completeness of the present published decision regarding party status:

The Agency of Natural Resources is entitled to party status in an appeal from an Agency decision as an affected agency under 10 V.S.A. §§8504(n)(2) and 8502(5)(F), and see §8504(f). The Windham Regional Commission is also a party by right. §§8504(n)(2) and 8502(5)(C). The Water Resources Panel of the Vermont Natural Resources Board is also entitled to party status in any

⁶ The Court noted in its October 3, 2006 entry order on this request that there is no provision in the Vermont Rules of Civil Procedure or the Vermont Rules for Environmental Court Proceedings for parties to make requests in letters addressed to the presiding judge, and that it assists the Court staff in properly docketing and tracking such requests if the requests are made in the form of motions.

appeal. 10 V.S.A. §8504(n)(3). Only parties bringing an appeal as an appellant or a cross-appellant may establish the issues on appeal; however, all parties may file motions, present evidence, cross-examine witnesses and otherwise participate.

Motions Relating to Scope of Appeal

Entergy Nuclear has moved to dismiss or narrow certain questions in the CRWC Appellants' Statement of Questions and in NECNP's Statements of Questions. The CRWC Appellants have moved to dismiss or narrow certain questions in Entergy Nuclear's Second Revised Statement of Questions. The ANR has moved to clarify and limit the scope of the appeal as to all three Statements of Questions.

The Appellants' questions may be grouped in the following categories: whether the permit amendment complies with the requirements of the federal Clean Water Act, 33 U.S.C. § 1251 et seq., and its implementing regulations related to thermal effluent (CRWC Appellants' Questions 1, 2, 3, 4, 5, and 9; NECNP Questions 1, 2, 3, 4, and 5); whether the permit amendment complies with the Vermont Water Pollution Control Act, 10 V.S.A. § 1250 et seq. (CRWC Appellants' Questions 6, 7, 8, and 9; NECNP Questions 1 and 6); and whether ANR's permitting process followed proper procedural requirements (CRWC Appellants' Question 8).

Entergy Nuclear's questions⁷ may be grouped as follows: the applicability of the Vermont Water Pollution Control Act to Entergy Nuclear's application for the permit amendment at issue (Question 3); the validity of certain conditions imposed by the ANR in its grant of the 2006 Permit Amendment (Questions 4, 5, and 6); and the nature of the Environmental Advisory Council's oversight of the monitoring program in relation to the

⁷ Entergy Nuclear withdrew Question 2 of its Statement of Questions, relating to party status, as none of the appellants failed to participate in the proceedings before the ANR. In addition, in its Question 1, Entergy Nuclear essentially outlined its arguments to dismiss certain of the issues raised by the other parties; this question therefore will be addressed only in the context of Entergy Nuclear's motions to dismiss, rather than being analyzed separately.

trend analysis required by the ANR in its grant of the 2006 Permit Amendment. (Question 7).

Applicability of Vermont Water Quality Standards and Vermont Statute to this Appeal (Entergy Nuclear's Question 3; CRWC Appellants' Questions 6 and 7; and NECNP's Questions 1 and 6)

Entergy Nuclear has moved to dismiss Questions 6 and 7 (and ANR has moved to dismiss Question 7) of the CRWC Appellants' Statement of Questions, and to dismiss Question 6 of the NECNP's Statement of Questions, to eliminate the issue of whether the proposed permit amendment meets the requirements of the Vermont Water Quality Standards through the state Water Pollution Control Act. Entergy Nuclear has also moved to dismiss that portion of Question 1 of the NECNP's Statement of Questions that addresses the same issue. In addition, Entergy Nuclear has moved to dismiss and ANR has moved to narrow the CRWC Appellants' Question 9, to the extent that it poses the question of whether Entergy Nuclear can meet its burden under the "applicable" provisions of state law to demonstrate that it is entitled to the proposed permit amendment. The CRWC Appellants have moved to dismiss Question 3 of Entergy Nuclear's Statement of Questions, which similarly claims that the Vermont Water Quality Standards do not apply to this proposed permit amendment.

Under the federal Clean Water Act, the United States Environmental Protection Agency (EPA) is the default permitting authority, although the Act allows states to implement their own regulatory programs if they receive EPA approval. 33 U.S.C. § 1342(b); 40 C.F.R. 123(d); Riverkeeper, Inc. v. United States Env'tl. Protection Agency, 358 F.3d 174, 200 (2nd Cir. 2004). As stated in the Clean Water Act,

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of

performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. § 1370. Even in a jurisdiction (unlike Vermont) in which EPA is the NPDES permitting authority, an applicant must obtain the state's certification that the discharge will comply with the federal act. In that certification, the state "may impose additional conditions in order to ensure compliance with state law, and those conditions become conditions of the federal permit." Riverkeeper, 358 F.3d at 201 (citing 33 U.S.C. § 1341(d)).

In a jurisdiction such as Vermont in which the state is the NPDES permitting authority, the plain language of § 1370 allows the state at least the same level of authority to require compliance with its own statutory and regulatory requirements before issuing a permit, as long as those requirements are not less stringent than those required by the federal act and as long as the permit meets the requirements of the federal act. See Riverkeeper, 358 F.3d at 201 (citing 33 U.S.C. § 1370).

The Vermont Water Quality Standards were adopted pursuant to the federal Clean Water Act as well as pursuant to the Vermont Water Pollution Control Act. See In re Clyde River Hydroelectric Project, 2006 VT 11, ¶3. Thus, to the extent they are not less stringent than the requirements in the federal Clean Water Act, and do not otherwise conflict with the federal statute as applied to this proposed amendment, the Vermont Water Quality Standards do apply to the Court's consideration of the proposed amendment.

The 1973 Zener memorandum does not suggest a different result. Rather, it advises that §316(a) is available to an applicant regardless of whether the permitting authority is a state or is the federal EPA. The memorandum traces the legislative history of §316(a), showing that it requires a case-by-case analysis of alternative cooling techniques, based on the particular local conditions including the characteristics of the particular receiving waters.

The memorandum advises that neither EPA nor a state could act arbitrarily and capriciously to withhold approval of a §316(a) waiver, if the applicant presented evidence showing that it met the criteria for a waiver and such evidence were not rebutted.

Accordingly, the motions to dismiss the CRWC Appellants' Questions 6 and 7 and to dismiss NECNP's Questions 1 and 6 are DENIED. We cannot determine in the abstract whether any particular requirement of the Vermont Water Quality Standards is less or more stringent than the federal standards, or conflicts with the federal Clean Water Act; rather, that determination must be made as those standards are applied to the evidence regarding the proposal before the Court.

Conditions Imposed by the ANR in its Permit Amendment Decision (Entergy Nuclear's Questions 4, 5, and 6)

Entergy Nuclear's Questions 4, 5, and 6 relate to whether the amended permit may contain certain conditions imposed by the ANR in the 2006 Permit Amendment. One condition required reduction of the facility's thermal discharge if the temperature of the river at a certain measuring station exceeds a certain limit (Question 4); another denied the requested increase during the one-month period from mid-May through mid-June (Question 5); and the third required a time series trend analysis to be performed and submitted annually for fish species and for macroinvertebrates (Question 6). Each question as stated in Entergy Nuclear's second revised⁸ statement of questions, is stated in terms of whether the respective condition is "contrary to law" because "Entergy has fully and completely met its burden . . . of establishing by a preponderance of the evidence that the alternative increased thermal discharge will meet" a certain standard.

However, even after having been given the opportunity to file a revised statement of questions in light of the fact that this matter is being considered de novo by the Court, Entergy Nuclear's revised Questions 4, 5, and 6 still reflect a misunderstanding regarding the scope of this appeal. In an appeal such as this one, the Court does not examine whether an applicant met its burden of proof in the administrative proceedings from which the appeal is taken. Rather, pursuant to V.R.E.C.P. 5(g) and 10 V.S.A. §8504(h), the Court proceeds de novo to hear all questions of law or fact, applying the substantive standards that were applicable before the ANR. Thus, what the Court will have before it at the trial in this case will be the merits of whether the requested increase in the thermal discharge should be approved, and, if so, what conditions should be imposed in connection with that approval. In connection with this task the Court has the same authority as the ANR, including to impose conditions as provided in 10 V.S.A. §1263(c), and is required to apply the same substantive standards as were applicable before the ANR.

As the amendment application is before the Court de novo in this appeal, the

⁸ These three questions were originally each stated in terms of whether the ANR had acted arbitrarily and capriciously in imposing these conditions.

question of whether any of these conditions should be imposed by the Court is simply premature, and is a matter for the trial on the merits of the permit amendment application. On the other hand, to the extent that the questions seek to establish the potential scope of any condition the Court might consider imposing, they ask for an impermissible advisory opinion at this time. See, Hunters, Anglers, and Trappers Ass'n of Vermont v. Winooski Valley Park Dist., 2006 VT 82, ¶18.

Accordingly, by or before January 17, 2007, Entergy Nuclear may again file restatements of these three questions (either separately or as a consolidated question) in terms that are appropriate for the Court's de novo role. Otherwise, these three questions will be dismissed at the telephone conference now scheduled for January 22, 2007, and the amendment application will proceed on its merits on the other remaining questions.

Opportunity for Public Review and Comment before the ANR (CWRC Appellants' Question 8)

Entergy Nuclear has moved to dismiss the CRWC Appellants' Question 8. This question asserts that ANR failed properly to consider public comments before issuing the permit amendment.

While in a de novo appeal it is generally not appropriate for this Court to review the inner workings of an agency or board's decision, this Court is empowered to remand jurisdiction to the agency or board in the case of procedural flaws that are so prejudicial that they prevented the parties from receiving fair consideration at the administrative level. V.R.E.C.P. 5(i) and its Reporter's Notes (noting that court can order remand "on its own motion in an appropriate case"); and see In re JLD Properties - WalMart St. Albans, Docket No. 132-7-05 Vtec (Vt. Env'tl. Ct., September 5, 2006).

However, in its proceedings on the merits of the amendment application, this Court is only required and authorized to apply the substantive standards that applied before the ANR, V.R.E.C.P. 5(g) and 10 V.S.A. §8504(h); the statute and rules do not direct it to apply the administrative procedural requirements. Thus, the Court would only examine whether any procedural errors occurred during the notice and comment period if such errors would not be cured by the presentation of evidence de novo to the Court.

Accordingly, on or before January 17, 2007, the CRWC Appellants shall file a more definite statement of Question 8 of their Statement of Questions, specifically stating any procedural deficiency within the scope of that question that affected the CRWC Appellants and showing why such deficiency cannot be cured within the opportunities for discovery, cross-examination, and the presentation of direct and rebuttal evidence that are available in proceedings in this Court. Unless such a showing is made, the CRWC Appellants' Question 8 will be dismissed at the telephone conference now scheduled for January 22, 2007, and the amendment application will proceed on its merits on the other remaining questions.

Issues Related to Provisions Approved in the 2001 Discharge Permit or in Amendments Prior to the Present Application (CRWC Appellants' Questions 1, 2, 3, and 4; NECNP's Questions 3, 4, and 5; and Entergy Nuclear's Question 7)

Entergy Nuclear has moved to dismiss or, in the alternative, to clarify the CRWC Appellants' Questions 1, 2, 3, and 4 and NECNP's Questions 3, 4, and 5, on the basis that they represent impermissible collateral attacks on the 2001 Discharge Permit and its earlier amendments, which were not appealed. Entergy Nuclear seeks a ruling that the phrase "existing thermal effluent limitation" as used in these questions refers to limitations in the 2001 Discharge Permit (as amended prior to this application) and does not encompass challenges to the terms of that permit. Similarly, the ANR argues that the doctrine of res judicata or collateral estoppel bars this Court from considering any issues related to the prior permits, other than those related to the proposed amendment.

The 2001 Discharge Permit and its amendments (prior to the present application) were not appealed and became final. However, unlike the appeals provision for zoning matters, 24 V.S.A. §4472(d), they are not subject to a statutory limitation that provisions of a prior unappealed permit may not later be contested "either directly or indirectly." Nevertheless, the reasoning discussed in Levy v. Town of St. Albans Zoning Bd. of Adjustment, regarding the evident underlying policy behind that provision is instructive: "that there should, in fairness, come a time when [administrative decisions] become final so that a person may proceed with assurance instead of peril." 152 Vt. 139, 141-43 (1989) (internal citation omitted)

In any event, only those elements of the 2001 Discharge Permit that pertain to the setting of a thermal effluent limitation are appropriate to be examined in the context of determining whether the proposed amendment should be approved under §316(a). That is, the existing thermal discharge provisions or other provisions of the 2001 Discharge Permit may not themselves be made more stringent in this proceeding, as this proceeding is limited to a determination of whether the proposed thermal discharge amendment should be approved.

However, this Court has authority to consider all potential conditions that could be necessary to ensure that the increased temperature proposed in the amendment would meet and continue to meet the criteria of §316(a), if the proposed amendment were to be approved. Taking an example from the conditions imposed in ANR's 2006 Permit Amendment, the duration of the increased-temperature period could be reduced, to eliminate the month from mid-May to mid-June, even though the so-called summer period from mid-May through mid-October could not have been altered in the original 2001 Discharge Permit.

We note that this entire argument applies only to the thermal discharge amendment at issue in the present appeal; that is, the renewal permit proceedings now in progress before the ANR may consider all the elements of the facility's discharge permit under all applicable present federal and state law. Regardless of whether the present appeal results in an amended thermal discharge or not, it only affects the expired permit under which Entergy Nuclear has authority to operate, and only until any renewal permit is issued. Accordingly, pursuant to V.R.E.C.P. 2(b), in the telephone conference scheduled in the final paragraph of this decision, the parties should be prepared to discuss whether it would be more efficient for the thermal discharge issues to be litigated only once, in the context of the renewal permit.

Under §316(a), Entergy Nuclear must meet its burden in seeking a waiver of the thermal effluent limitations by one of two methods: either by making a retrospective demonstration that there has been no "prior appreciable harm" or by making a prospective demonstration that, despite the occurrence of previous harm, the desired alternate effluent limitations will assure the propagation of a balanced indigenous community of shellfish, fish and wildlife. 40 C.F.R. § 125.73; In re Dominion Energy Brayton Point, L.L.C. (formerly

USGEN New England, Inc.), NPDES Appeal No. 03-12 (E.A.B. Feb. 1, 2006), 12 E.A.D. ____, available on Westlaw at 2006 WL 3361084. The occurrence of previous harm is an element of this second approach, as is the demonstration that the proposed alternative limitation will nevertheless have the desired ecological result. All evidentiary issues in the proceedings will be tested against these criteria.

A motion to dismiss “should not be granted unless it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief.” Lodge at Bolton Valley Condominium Ass’n v. Hamilton, 2006 VT 41, ¶4. As of this stage of the proceedings, Entergy Nuclear has not demonstrated that no evidence, facts or circumstances exist that could warrant the denial of the amendment, or could warrant the imposition of conditions on the amendment, including the conditions contested by Entergy Nuclear. Therefore, dismissal of these questions is inappropriate; rather, their resolution remains for the merits of the trial. Entergy Nuclear’s motion is therefore DENIED with respect to the CRWC Appellants’ Questions 1, 2, 3, and 4, and NECNP’s Questions 3, 4, and 5.

In turn, the CRWC Appellants and ANR have each moved to dismiss Entergy Nuclear’s Question 7, which relates to the scope of the Environmental Advisory Council’s authority to oversee and monitor the Environmental Monitoring Studies that may be required by the 2001 Discharge Permit and the proposed permit amendment.

Entergy Nuclear argues that the 2006 Permit Amendment as issued by the ANR improperly vests the Environmental Advisory Council with “authority to modify the permit unilaterally;” that is, that it unlawfully delegates the ANR’s statutory authority to oversee permit compliance.

First, the Environmental Advisory Council (EAC) and its role with respect to the Environmental Monitoring Studies required to be conducted by Entergy Nuclear, was established in the 2001 Discharge Permit and cannot now be collaterally attacked. That role is explicitly stated in the 2001 Discharge Permit as being advisory and consultative. Although the EAC may make recommendations to the ANR, it is the ANR under the 2001 Discharge Permit (and any amendments to it) that imposes any new requirements based on those recommendations.

Moreover, it appears from the terms of the 2006 Permit Amendment as issued by the ANR that no new field monitoring was required, and that all that Entergy Nuclear was required to do as a condition of that amendment was to conduct a new type of statistical analysis of the data which it already had to collect under the 2001 Discharge Permit, as amended.

More importantly, as the amendment application is before the Court de novo in this appeal, the question of whether such a condition should be imposed by the Court is simply premature, and is a matter for the trial on the merits of the permit amendment application. On the other hand, to the extent that the question seeks to establish the potential scope of any condition the Court might consider imposing, involving the Environmental Advisory Council in monitoring future compliance with any permit amendment that the Court might consider approving, it asks for an impermissible advisory opinion. See, Hunters, Anglers, and Trappers Ass'n of Vermont v. Winooski Valley Park Dist., 2006 VT 82, ¶18.

Accordingly, by or before January 17, 2007, Entergy Nuclear may again file a restatement of Question 7 in terms that are appropriate for the Court's de novo role. Otherwise, Entergy Nuclear's Question 7 will be dismissed at the telephone conference now scheduled for January 22, 2007, and the amendment application will proceed on its merits on the other remaining questions.

Whether Entergy Nuclear Will Be Able to Meet its Burden under the federal Clean Water Act and the Vermont Statute (CRWC Appellants' Question 9)

Entergy Nuclear has moved to dismiss and ANR has moved to clarify or limit the CRWC Appellants' Question 9, which poses the question of whether Entergy Nuclear can meet its burden under "all applicable substantive and procedural requirements of state and federal law" of demonstrating that it is entitled to the requested permit amendment. As to the procedural requirements of state and federal law, both motions are correct; the question should be narrowed to be limited to the applicable substantive requirements of state and federal law.

As so limited, this question asks nothing more nor less than the ultimate issue in this appeal: whether Entergy Nuclear qualifies for the permit amendment for which it has applied in this application. While it may be redundant in light of the other specific questions

in the Appellants' Statements of Questions, with the modifier "applicable" it does not exceed the scope of this proceeding and will not be dismissed.

However, Entergy Nuclear and the ANR are correct that it is difficult for the Court and the parties to determine, given the breadth of the CRWC Appellants' Question 9, which requirements of state (and federal) law they consider to be the "applicable" substantive requirements for this proceeding, beyond those already stated in the other questions in their Statement of Questions. Accordingly, on or before January 17, 2007, the CRWC Appellants shall file a more definite statement of Question 9 of their Statement of Questions, specifically stating what requirements of state and federal law are "applicable" to the proposed permit amendment, beyond those already raised by the other questions in their statement of questions. If no specific requirements are claimed to be "applicable" beyond those stated in the CRWC Appellants' other questions, the CRWC Appellants' Question 9 will be dismissed at the telephone conference now scheduled for January 22, 2007, and the amendment application will proceed on its merits on the other remaining questions.

Accordingly, based on the foregoing, it is hereby ORDERED and ADJUDGED that Cross-Appellant Entergy Nuclear Vermont Yankee's Motion to Deny Party Status to CAN and NECNP is DENIED, and the various parties' motions relating to the scope of the proceedings are ruled on as provided in each grouping of questions as discussed in this decision.

Time had been reserved in the Court's schedule for hearings on the merits of this appeal for March 13, 14, 15, 16, 20, 21, 22, 27, 28, 29, and 30, and April 3, 4, 5, and 6, although at the present time the Environmental Court's own courtroom is not available for the March 27 through 30 dates. In addition, the parties reported that, of those dates, March 13 through 16 are unavailable for Appellants' counsel and witnesses, and March 20 through 22 are unavailable for Entergy Nuclear's counsel and witnesses.

In the telephone conference scheduled for January 22, 2007 at 11:30 a.m. (see enclosed notice), the parties should be prepared to update the Court on the schedule of the renewal permit proceedings, and to discuss the relation of the issues in this proceeding to

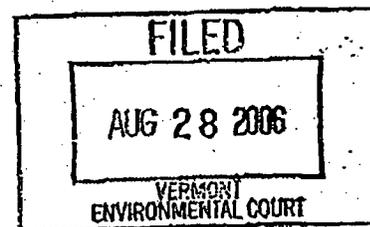
those in the renewal permit proceedings, with respect to this Court's obligations under V.R.E.C.P. 1 and 2(b). They should be prepared to discuss the potential for and timing of mediation, and whether hearing time in March or April should be allotted solely to the issue of whether to stay the 2006 Permit Amendment during the 2007 summer season.

Done at Berlin, Vermont, this 9th day of January, 2007.

Merideth Wright
Environmental Judge

EXHIBIT 4

STATE OF VERMONT ENVIRONMENTAL COURT



In re: Entergy Nuclear/ Vermont Yankee)	
Thermal Discharge permit amendment)	
(Appeal of Connecticut River Watershed Council,)	Docket No. 89-4-06 Vtec
Trout Unlimited (Deerfield/Millers 349 Ch.),)	
and Citizens Awareness Network))	
(Appeal of New England Coalition)	
on Nuclear Pollution))	
(Cross-Appeal of Entergy Nuclear)	
Vermont Yankee, LLC))	
)	

Decision and Order on Motion for Stay of Permit Amendment Pending Appeal

Appellants and Cross-Appellant appealed from a decision of the Vermont Agency of Natural Resources (ANR), approving an amendment of a thermal discharge permit issued to Entergy Nuclear Vermont Yankee, LLC. Appellants Connecticut River Watershed Council, Trout Unlimited (Deerfield/Millers 349 Ch.), and Citizens Awareness Network are represented by Patrick A. Parenteau, Esq., David K. Mears, Esq., and Justin E. Kolber, Esq.; Appellant New England Coalition on Nuclear Pollution is represented by Evan J. Mulholland, Esq.; Cross-Appellant-Applicant Entergy Nuclear Vermont Yankee, LLC is represented by Elise N. Zoli, Esq., Barbara G. Ripley, Esq., Sarah Heaton Concannon, Esq., and Gwyn Williams, Esq.; the Windham Regional Commission appeared through James Matteau and John Bennett, who are not attorneys; the Vermont Agency of Natural Resources is represented by Catherine Gjessing, Esq. and Warren T. Coleman, Esq.; and the Natural Resources Board is represented by John H. Hasen, Esq. and Daniel D. Dutcher, Esq.

Appellants have moved to stay the permit amendment, pending the conclusion of the merits of this appeal. The permit was issued on March 30, 2006, and allows the thermal discharge from Entergy Nuclear/Vermont Yankee to increase the temperature of the Connecticut River by an additional 1° F, within a defined measurement area or mixing zone, from June 16 through October 14 of each year.¹ Appellants argue that the stay will preserve the status quo of Applicants' previous permit conditions during this litigation, which is now scheduled to be heard in late January and early February² of 2007.

The Court must consider the movants' likelihood or substantial possibility of success on the merits of this de novo appeal, irreparable injury that may occur in the absence of the stay, whether the grant of the stay will substantially harm other parties, and whether the stay will serve the best interests of the public. In re Allied Power & Light Co., 132 Vt. 554, 556 (1974), as discussed by Justice Skoglund in issuing a stay during the pendency of the appeal in In re Stormwater NPDES Petition, Docket No. 2004-515 (Vt. Supreme Ct., April 7, 2005).

Appellants have come forward with sufficient evidence to demonstrate a substantial possibility that they will prevail on the merits; that is, a sufficiently substantial possibility to examine and weigh the other factors to be considered in whether or not to grant a stay. Unlike federal judicial review of agency action, no presumption is afforded the fact that the

¹ The underlying permit of which this is an amendment expired on March 30, 2006; the renewal permit process is ongoing and may result in the issuance of a renewal permit before the close of 2006. If and when an appeal is filed from the issuance of the renewal permit, we will consider whether it should be consolidated with the present proceedings. V.R.E.C.P. 2(b), and see V.R.E.C.P. 1.

² At present, the following dates are being reserved for this trial: January 24-26, January 30 and 31, February 1 and 2, February 6-9, and February 13-16. Please be prepared to discuss whether fifteen trial days will be sufficient and whether the parties will be able to use these specific dates.

permit amendment was issued. The Court is not charged with determining whether the ANR's decision is supported by substantial evidence in the record as a whole; rather, it is charged with considering the application de novo, applying the same substantive standards that the ANR is required to apply. The Applicant will bear the burden of proof that it qualifies for a waiver of the thermal effluent limitation otherwise applicable to it.

Appellants have shown sufficient potential for irreparable injury to American shad in the Connecticut River, both at present as the juveniles become accustomed to cooler water temperatures prior to their migration down the River in the fall, and in the summer of 2007 for the growth of the next generation of juveniles.

On the other hand, the grant of the stay will not substantially harm other parties. The consequence to the Applicant will only be a financial one, and consequently not irreparable by definition, in that energy that could otherwise have been sold will have to be expended on the operation of the cooling towers. The Applicant will be able to operate under its previous permit during the pendency of its renewal permit application, as well as during the pendency of the present appeal over its thermal effluent waiver amendment application. The public will view the plume of water vapor from the cooling tower, but no substantial harm has been shown to result from the mere visibility of the plume to the public. No evidence of drought conditions or impairment of the River, and consequently no substantial harm to the public interest, has been shown to be occurring during present conditions, due to the removal of the cooling water and its evaporation into the atmosphere.

The best interests of the public will be served by granting the stay so that it is not only in effect for September and the first half of October of 2006, but so that it remains in effect if this matter is not resolved by the time that adult American shad return to the River in April to spawn, for the 2007 component of the life cycle of the 2007 cohort of juvenile shad in the River.

This stay will remain in effect until further order of the Court, without prejudice to any motions to amend or lift the stay based upon evidence or arguments not already made to the Court in the present motion memoranda. The parties should expect that, if any motions are filed based on any potential trade-off of environmental consequences between the use of the air (that is, the cooling towers) and the use of the river water for cooling purposes, such motion will be scheduled for an evidentiary hearing.

Accordingly, based on the foregoing, it is hereby ORDERED and ADJUDGED that Motion for Stay is GRANTED until further order of the Court. We will hold a telephone conference this afternoon at 4:30 to discuss this order and the relative scheduling of any other necessary pretrial work, as well as the scheduled trial dates. If the parties wish to discuss moving any of the trial dates, to the extent possible they should be prepared at the conference with the unavailable dates for themselves and their witnesses from mid-February through mid-June of 2007.

Done at Berlin, Vermont, this 28th day of August, 2006.



Merideth Wright
Environmental Judge

**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, Michelle Cronin, hereby certify that copies of **APPELLEE NEW ENGLAND COALITION'S BRIEF**, in the above-captioned proceeding, were served on the persons listed below, by U.S. Mail, first class, postage prepaid; by Fed Ex overnight to Judge Elleman; and, where indicated by an e-mail address below, by electronic mail, on the 29th day of January, 2007.

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Attorneys for New England Coalition, Inc.

From: HearingDocket
To: mcronin@sdkslaw.com
Date: Tue, Feb 6, 2007 2:43 PM
Subject: RE: Today's filing

Thank you

>>> <mcronin@sdkslaw.com> 02/06/2007 2:34:47 PM >>>
Good Afternoon,

I can confirm that the correct document date is 01/29/07. Please excuse the error on page 32 and amend it if needed.

Thanks,
Michelle Cronin

-----Original Message-----

From: HearingDocket [<mailto:HearingDocket@nrc.gov>]
Sent: Tuesday, February 06, 2007 2:02 PM
To: mcronin@sdkslaw.com
Subject: Re: Today's filing

Ms. Cronin,

Please confirm the correct document date. Page 32 of the filing shows that the document date was 01/29/06. Although the certificate of service indicates that the filing was sent on 01/29/07, we need verification before we can make the document publicly available. Thank you.

Rulemakings and Adjudications Staff
Office of the Secretary of the Commission U.S. Nuclear Regulatory Commission

>>> <mcronin@sdkslaw.com> 01/29/2007 5:04:54 PM >>>
Dear Sir or Madam,

Attached please find an electronic copy of Appellee New England Coalition's Brief with Exhibits along with a Certificate of Service. This filing was sent out in hard copy by US mail today, January 29th, 2007.

Thank you,

Michelle Cronin
Administrative Assistant
Shems, Dunkiel, Kassel & Saunders, PLLC

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No virus found in this outgoing message.
Checked by AVG Free Edition.
Version: 7.5.432 / Virus Database: 268.17.14/657 - Release Date:
1/29/2007
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Version: 7.5.432 / Virus Database: 268.17.28/672 - Release Date: 2/6/2007

10:22 AM

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10:22 AM