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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

ENTERGY'S BRIEF ON REVIEW OF LBP-06-20

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Dated: January 29, 2007

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Pursuant to the Commission's January 11, 2007 Memorandum and Order,[1] Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (hereinafter collectively referred to as "Entergy") submit this brief on review of the Atomic Safety and Licensing Board's split decision[2] admitting NEC Contention 1 into the Vermont Yankee Nuclear Power Station ("VYNPS") license renewal proceeding. As discussed herein, the Licensing Board majority clearly erred in admitting this contention, which, if litigated, would require an assessment of the thermal impacts of plant effluent already evaluated by the State of Vermont. Admitting this contention is contrary to both the NRC's rules and the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq. ("Clean Water Act"). Under the NRC rules, a license renewal applicant is not required to assess thermal impacts if it provides a Clean Water Act § 316(a) [33 U.S.C. § 1326(a)] variance, or equivalent State permits and supporting documentation, as Entergy did in its license renewal application. Such an assessment is not required because Section 511(c) of the

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[1] CLI-07-01, 65 N.R.C. ___ (Jan. 11, 2007).

[2] Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption), LBP-06-20, 64 N.R.C. ___, slip op. at 47-57 (Sept. 22, 2006). Judges Karlin and Elleman authored the majority opinion admitting NEC Contention 1. Judge Wardell issued a Dissenting Opinion. LBP-06-20, Dissenting Opinion of Judge Wardwell on Admissibility of New England Coalition's Contention 1 (Environmental) ("Dissenting Opinion").

Clean Water Act, 33 U.S.C. § 1371(c)(2), as interpreted by both the Commission and the court, requires the NRC to accept the permitting agency's evaluation at face value. Because the Licensing Board majority's decision was inconsistent with both NRC rules and federal statute, it should be reversed and Contention 1 dismissed.

The issue presented is whether the Licensing Board may admit a contention that is barred both by the Clean Water Act and by the NRC rules. This is an important issue because the Commission promulgated its license renewal rules to resolve issues generically in order to make its proceedings more efficient and predictable, and specifically limited any inquiry into thermal impacts in accordance with Section 511(c) of the Clean Water Act. However, the Licensing Board majority simply declined to follow the NRC rules and controlling precedent, apparently believing that controlling precedent "got it wrong."[3] If the Commission's rules and precedents are not followed, the stability of the NRC's license renewal proceedings, and indeed the NRC's adjudicatory process in general, would be seriously reduced.

STATEMENT OF CASE

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

The discharges of liquid effluents from VYNPS are currently governed by NPDES permit 3-1199, issued by the Vermont Agency of Natural Resources ("VANR"), which is authorized by the U.S. Environmental Protection Agency ("EPA") to implement the permitting program under the Clean Water Act.[4] This permit establishes thermal effluent limitations pursuant to Section 316(a) of the Clean Water Act, 33 U.S.C. § 1326(a). NPDES permit 3-1199 expired on March 31, 2006, but remains in effect because of a timely application for renewal still pending before

[3] Transcript of Oral Arguments (Aug. 1, 2006) at 271 (hereinafter cited as "Tr.").

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

VANR. See Entergy's Answer to New England Coalition's Petition for Leave to Intervene, Request for Hearing, and Contentions (June 22, 2006) ("Entergy's Answer") at 11 n.4 and Att. 1; Environmental Report, Rev. 1 ("ER") at § 4.4.5.1.

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

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

> The Applicant's predictive analysis for the Demonstration indicates that the approved temperature increase will create

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

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

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

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

B. The NRC License Renewal Application

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

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

10 C.F.R. § 51.53(c)(3)(ii)(B).[7]

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[6] In reaching these determinations, the VANR relied on input and staff from the Vermont Department of Fish and Wildlife and the Vermont Department of Conservation in conducting its reviews. Amended Fact Sheet at 4. In addition, VANR solicited and received input from the New Hampshire Fish and Game Department and the U.S. Fish and Wildlife Service. Id. VANR also retained a third-party consultant to assist it with its review who had "extensive experience in the review of §316(a) demonstration studies." Id.

In accordance with this provision, Entergy's Application provided the NPDES permit which constituted Vermont's 316(a) variance for the thermal discharges permitted at the time. Following issuance of the March 30, 2006 amendment to the NPDES permit approving the 1°F increase in the thermal limit, and after initial pleadings in this proceeding, Entergy submitted a revision to the ER providing the amended NPDES permit constituting the 316(a) variance for the increased limit, and included the supporting documentation (the Amended Fact Sheet and a Responsiveness Summary[8]) which contained the VANR's assessment of the aquatic impacts associated with the permitted thermal effluent. Entergy's Answer to New England Coalition's Late Contention (Aug. 17, 2006); ER (Rev. 1) § 4.4.5.1 and App. E.

C. Procedural History

On March 27, 2006, the Nuclear Regulatory Commission ("NRC" or "Commission") published a Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing ("Notice") regarding the Application. 71 Fed. Reg. 15,220 (Mar. 27, 2006). On May 26, 2006, NEC submitted its Petition for Leave to Intervene, Request for Hearing, and Contentions ("NEC Petition"), which advanced six contentions, including NEC Contention 1, alleging that "Entergy Failed to Assess Impacts To Water Quality." The gravamen of NEC's contention is that the Application does not sufficiently analyze the aquatic impacts from the 1°F increase in thermal effluent approved by VANR in the March 30, 2006 amendment to the NPDES permit (now under judicial review by the Vermont Environmental Court).[9]

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[7] The reference in this provision to Clean Water Act § 316(b) pertains to cooling water intake design and thus relates to whether there is a need to assess entrainment and impingement effects. NEC Contention 1 does not raise these issues.

[8] Responsiveness Summary for Draft Amended Discharge Permit No. 3-1199 for Entergy Nuclear Vermont Yankee ("Responsiveness Summary"), included in Appendix E to the ER (Rev. 1).

[9] NEC Petition at 10-11.

Entergy opposed NEC Contention 1 on several grounds, including that it impermissibly challenged the NRC's license renewal rules and was barred by the Clean Water Act. Entergy's Answer at 11-18; Tr. at 261-76. Under the NRC rules at 10 C.F.R. § 51.53(c)(3)(ii)(B), an applicant is not required to assess thermal impacts if it provides a Section 316(a) variance or equivalent state permit, which Entergy has done. Entergy's Answer at 12. In response to NEC's suggestion that NEPA required Entergy and the NRC to evaluate the thermal impacts notwithstanding the issuance of the NPDES permit, Entergy explained that 10 C.F.R. § 51.53(c)(3)(ii)(B) is intended to be consistent with Section 511(c) of the Clean Water Act, 33 U.S.C. § 1371(c)(2) (2004), which (as discussed below) long-standing precedent has interpreted as mandating that the NRC accept an NPDES permitting agency's assessment of aquatic impacts at face value as dispositive. See Entergy's Answer at 13-14.

Because Entergy had not yet revised the ER to include the amended NPDES permit assessing and authorizing the one degree increase, the NRC Staff initially did not object to the admission of a contention alleging the absence of an assessment of the impacts of the discharge temperature increase.[10] However, the NRC Staff Answer indicated that this omission would be cured and the contention mooted by the submission of the amended permit.[11] Entergy subsequently addressed the NRC Staff's position by incorporating the amended NPDES permit and supporting documentation into a revision to the ER on July 27, 2006.[12]

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

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

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

NEC filed a reply to the Entergy and NRC Staff answers.[13] Entergy moved to strike portions of this Reply as raising concerns beyond the original scope of Contention 1.[14] The NRC Staff supported this motion,[15] which was granted in part by the Board. LBP-06-20, slip op. at 57.[16],

A prehearing conference which included oral argument on NEC Contention 1 was held on August 1 and 2.[17] Subsequent to the prehearing conference, NEC sought to amend its contention.[18] Entergy and the NRC Staff opposed this request,[19] which the Board eventually denied.[20]

In addition, following the Vermont Environmental Court's decision staying the amended NPDES permit, NEC submitted a motion to file supplemental authority concerning this development.[21] Entergy responded to this motion.[22] The Board then rendered its decision in LPB-06-20, which included a majority ruling admitting NEC Contention 1. Judge Wardwell issued a dissenting opinion regarding the admissibility of this contention.[23]

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

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

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

[16] Entergy does not challenge this portion of the Licensing Board majority's decision.

[17] Tr. at 248 to 293.

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

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

[20] Memorandum and Order (Denying New England Coalition's Motion to Amend Contention 1 and Motion for Reconsideration of Contention 1) (Oct. 30, 2006).

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

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

[23] NEC filed a motion for reconsideration of the part of the Licensing Board majority's decision admitting NEC Contention 1. New England Coalition, Inc.'s Motion for Leave to File Motion for Reconsideration (Oct. 2, 2006). Both Energy and the NRC Staff responded in opposition to the motion. Entergy's Answer to [NEC]'s Motion for Reconsideration of Board Rulings on NEC Contentions 1 and 5 (Oct. 12, 2006); NRC Staff Response to [NEC]'s Motion for Leave to File Motion for Reconsideration (Oct. 13, 2006). On October 30, 2006, the

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

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

Licensing Board denied NEC's motion. Memorandum and Order (Denying New England Coalition's Motion to Amend Contention 1 and Motion for Reconsideration of Contention 1) (Oct. 30, 2006).

On October 10, 2006, Entergy petitioned the Commission for interlocutory review of the Licensing Board majority's decision to admit NEC Contention 1.[24] On January 11, 2007, the Commission accepted review of this decision.[25]

ARGUMENT

I. THE CLEAN WATER ACT BARS NEC CONTENTION 1

NEC's Contention 1 should not have been admitted because it is inconsistent with and barred by Section 511(c) of the Clean Water Act. As interpreted by both the Commission and the court, Section 511(c) requires the NRC to adopt the NPDES permitting agency's assessment of the impacts of releases authorized under the Clean Water Act. Here, NEC's Contention 1 simply seeks a second forum to collaterally attack the VANR's assessment, which is exactly what Section 511(c) prohibits.

A. Longstanding Commission Precedent Holds That an NPDES Permitting Agency's Assessment of Aquatic Impacts Should Be Accepted As Dispositive

Section 511(c) of the Clean Water Act provides:

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

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[24] Entergy's Petition for Interlocutory Review of LBP-06-20 Admitting New England Coalition's Contention 1 (Oct. 10, 2006).

[25] Memorandum and Order, CLI-07-01 (Jan. 11, 2007). By Order dated January 24, 2007, the Commission granted NEC's Motion to extend the brief filing deadline to January 29, 2007.

33 U.S.C. § 1371(c)(2) (2004).

Longstanding Commission precedent interpreting this provision holds that the NPDES permitting agency's assessment of impacts should be taken at face value and accepted as dispositive. In Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 N.R.C. 33, 69 (1977), the Appeal Board determined that it was "justified in accepting" the determination by the EPA[26] that the Seabrook nuclear plant's once-through cooling system would "'assure the protection and propagation of a balanced, indigenous population of fish, shellfish and wildlife in and on the receiving waters'" and that "the marine environment impacts of once-through cooling are small." Id. at 69-71. According to the Appeal Board, it was justified in accepting the EPA's findings "without independent inquiry of [its] own" because the 1972 amendments to the Clean Water Act adding Section 511(c) forbid the NRC from "go[ing] behind either [EPA-imposed] standards or the determination by EPA or the State that the facility would comply with them." Id. at 70-71 (emphasis added).

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

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

Later, in Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 N.R.C. 702, 712-13, 715 (1978), the Appeal Board again held that Federal licensing agencies are not to second-guess EPA[27] by undertaking independent analyses. The Appeal Board extensively reviewed the legislative history of Section 511(c) the Clean Water Act. As summarized by the Appeal Board, the legislative history provides that

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

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

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

Subsequently, Carolina Power & Light Co. (H. B. Robinson, Unit No. 2), ALAB-569, 10 N.R.C. 557, 561-62 (1979) held that, where the EPA or an authorized state has assessed the aquatic impacts in approving a plant's cooling water system, the NRC must take that assessment at face value. More recently, an NRC licensing board explicitly held that "the NRC has been barred by statute from making substantive determinations regarding compliance with the Clean Water Act." Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 N.R.C. 81, 93 n.55 (citing Section 511(c)(2) of the Clean Water Act), aff'd, CLI-04-36, 60 N.R.C. 631 (2004).

Thus, NRC and judicial decisions applying Section 511(c) have uniformly held that the NRC must accept an NPDES permitting agency's assessment of aquatic impacts as dispositive and must not duplicate that assessment or perform its own independent review.

B. The State of Vermont Has Assessed The Environmental Impact of VYNPS's Thermal Effluent, Which The NRC Must Accept As Dispositive

In this case, VANR has issued a 316(a) variance and assessed the environmental impacts stemming from VYNPS's thermal effluents, including those of the 1 degree increase in maximum effluent temperature, which it authorized. The VANR determined that (1) the existing discharge under the thermal effluent limitations in effect had resulted in "no appreciable harm" to the aquatic biota; (2) the proposed increased thermal effluent limits would continue to assure the protection and propagation of a balanced indigenous population of shellfish, fish and wildlife during their period of operation; and (3) "there will be no significant impact from the proposed discharge on the aquatic biota that are present in the area affected by the proposed discharge." ER, App. E (Amended Fact Sheet at 4-5).

Under Section 511(c) of the Clean Water Act and its interpretation in the cases cited above, the NRC must accept these findings as dispositive. NEC's Contention seeking a further NRC assessment is inconsistent with Section 511(c) and therefore does not raise a permissible issue for consideration in the VY license renewal proceeding.

C. The Licensing Board Majority Misinterpreted Section 511 and Erred in Failing to Follow Controlling Precedent

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

The majority's reading of Section 511(c) was clearly erroneous for two reasons. First, NEC Contention 1 seeks an assessment of the impacts of the 1°F increase in the thermal effluent limitation established by the VANR in the March 30, 2006 amendment to the VYNPS NPDES permit. Thus, NEC Contention 1 directly seeks review of an effluent limitation established under the Clean Water Act. This is exactly what Section 511(c)(2)(A) prohibits.

Second, the majority neither acknowledged nor discussed controlling precedent holding that the NPDES permitting agency's assessment of impacts, and not just its approval of effluent limitations, should be taken at face value and accepted as dispositive. The case law could not be clearer. In Seabrook, the Appeal Board determined that it was justified in the permitting agency's 316(a) findings and assessment without independent inquiry because Section 511(c) forbids the NRC from "go[ing] behind either [EPA-imposed] standards or the determination by

EPA or the State that the facility would comply with them." Seabrook, ALAB-422, 6 N.R.C. at 69-71 ("emphasis added"). The Commission affirmed this decision to "accept and use without independent inquiry EPA's determination of the magnitude of the marine environmental impacts from the cooling system in striking an overall cost-benefit balance for the facility." Seabrook, CLI-78-1, 7 N.R.C. at 23-24 ("emphasis added"). The First Circuit likewise affirmed, holding that the NRC did not "shirk its NEPA duties" but rather "obeyed its [Clean Water Act] duties by deciding to accept as dispositive EPA determinations concerning" the aquatic impact of Seabrook Nuclear Plant's once through cooling system. New England Coalition on Nuclear Pollution, 582 F.2d at 98 (emphasis added). In Yellow Creek, the Appeal Board held that Federal licensing agencies are not to second-guess EPA by undertaking independent analyses. Yellow Creek, ALAB-515, 8 N.R.C. at 712-13, 715. And in Robinson, the Appeal Board held that, where the EPA or an authorized state has assessed the aquatic impacts in approving a plant's cooling water system, the NRC must take that assessment at face value. Robinson, ALAB-569, 10 N.R.C. at 561-62.

Thus, Commission and judicial precedent clearly holds that Section 511(c) does more than merely prohibit the NRC from imposing its own effluent limitations. Rather, Section 511(c) requires the NRC to accept an NPDES permitting agency's assessment of aquatic impacts as dispositive and not to duplicate that assessment or perform its own independent review. An independent NRC assessment "going behind" the VANR's 316(a) variance and potentially undercutting the VANR's findings on which that variance is based would be just as much an attack on the thermal effluent limitations established by the permitting agency as would the NRC's establishment of its own effluent limitations.

The Licensing Board majority appeared to be of the opinion that this precedent was simply wrong and could be disregarded. During the prehearing conference, the chairman opined:

> This is Public Service's New Hampshire case. I've read that. The Atomic Licensing Appeal Board, back in 1977, got it wrong. That's not what the law is. 511 doesn't do that.

Tr. at 271. A licensing board, however, is not free to disregard a decision of the Appeal Board, particularly one that was affirmed by both the Commission and First Circuit. Licensing Boards are bound to comply with directives of a higher tribunal, whether or not they agree with them. Any other alternative would be contrary to the limits in the delegated authority of licensing boards and would unacceptably undermine the rights of the parties. South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-710, 17 N.R.C. 25, 28 (1983). Where a matter has been considered by the Commission, it may not be reconsidered by a Board. Commission precedent must be followed. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 N.R.C. 451, 463-65 (1980).

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

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

10 C.F.R. § 51.71(d) n.3 (2006). Thus, as the dissenting opinion in LBP-06-20 correctly observed, this provision does not require the NRC to independently assess aquatic impacts.

Dissenting Opinion at 9. Rather, it directs the NRC to utilize the permitting agency's assessment in weighing the overall cost and benefit of a license renewal application, consistent with Section 511(c).

In sum, the Licensing Board majority erred in failing to follow precedent and in its view that NRC must independently assess the impacts of effluent releases already evaluated and authorized by the NPDES permitting agency. Where as here an applicant has provided the NPDES permitting agency's assessment, that assessment must be accepted as dispositive, and there is no room for any contention seeking additional analysis.

II. THE NRC RULES BAR NEC CONTENTION 1

NEC Contention 1 is also barred by the NRC's license renewal rules, which are written so as to be consistent with Section 511(c). In particular, 10 C.F.R. § 51.53(c)(3)(ii)(B) requires an assessment of heat shock only if an applicant is unable to provide a 316(a) variance, or equivalent State permits and supporting documentation. Here, Entergy provided a 316(a) variance and supporting documentation. NEC's contention asserting that more was needed is nothing more than an attack on the sufficiency of the NRC rules. A contention which challenges an NRC rule is not admissible. 10 C.F.R. § 2.335.[28]

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

> The Commission has considered the impacts of license renewal on aquatic ecology and, in doing so, has reviewed existing NPDES

[28] A contention which "advocate[s] stricter requirements than those imposed by the regulations" is "an impermissible collateral attack on the Commission's rules" and must be rejected. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 N.R.C. 1649, 1656 (1982); see also Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 N.R.C. 397, 410, aff'd in part and rev'd in part on other grounds, CLI-91-12, 34 N.R.C. 149 (1991).

> permits . . . . Agencies responsible for existing permits are not constrained from reexamining the permit issues if they have reason to believe that the basis for their issuance is no longer valid. The Commission does not have authority under NEPA to impose an effluent limitation other than those established in permits issued pursuant to the Clean Water Act.

61 Fed. Reg. 28,467, 28,475 (June 5, 1996) (emphasis added).[29] Accordingly, the NRC's rules explain:

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

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

Entergy's Application provided the NPDES permit which constituted Vermont's 316(a) determination for the thermal discharges permitted at the time, and Entergy subsequently

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[29] Similarly, when it first proposed this provision the Commission explained:

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

56 Fed. Reg. 47,016, 47,019 (Sept. 17, 1991) (emphasis added).

provided the amended permit constituting the 316(a) determination for the thermal discharge with the 1°F increase.[30] Therefore, under the NRC rules, no further analysis was required.

Despite Entergy's compliance with the Clean Water Act and 10 C.F.R. § 51.53(c)(3)(ii)(B), the Licensing Board majority admitted NEC Contention 1 because it perceived the existence of three additional issues: (1) whether the rule should be applied given the possibility that the NPDES permit amendment may be set aside on judicial review; (2) whether the rule may be satisfied by an NPDES permit that is only issued for 5-year terms and therefore does not cover the same period as license renewal; and (3) whether there are thermal impacts other than heat shock that should be assessed. As discussed below, none of these issues represents a litigable concern, but rather go to the validity of 10 C.F.R. § 51.53(c)(3)(ii)(B) and thus amount to impermissible challenges to that rule. 10 C.F.R. § 2.335(a).

A. The Status of The NPDES Permit Does Not Raise A Material Issue

The majority conceded that, "[i]f the NPDES permit, which addresses the increased thermal impact of the [VYNPS] facility, is valid and effective, then the first prong of 10 C.F.R. § 51.53(c)(3)(ii)(B) is satisfied." LBP-06-20, slip op. at 55-56. However, the majority erroneously reasoned, '[i]f not, the second prong requires Entergy to 'assess the impact on fish and shellfish resources resulting from heat shock.'" LBP-06-20, slip op. at 56. The majority overlooked the fact that, if after judicial review the Vermont Environmental Court were to vacate the amended NPDES permit, or if for some reason the VANR does not include this increase in the thermal limit when it renews VYNPS's NPDES permit, there will be no increase in the thermal effluent for either Entergy or the NRC Staff to assess and there will be nothing left to litigate.

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[30] Letter from T. Sullivan, supra note 12.

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

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

Dissenting Opinion at 6. Moreover, under the NRC rules what is important is that the VANR has assessed the thermal impacts and made Section 316(a) findings supporting the thermal effluent limitations established for VYNPS, not whether the NPDES permit is under judicial review. Indeed, in the Seabrook decision in which the Commission affirmed the acceptance of the NPDES permitting agency's assessment without independent inquiry, the Commission explicitly noted that the EPA decision on which the Commission relied in the proceeding was under judicial review at the time. See Seabrook, CLI-78-1, 7 N.R.C. at 26 n.41. Therefore, the instant case is not distinguishable. The expert NPDES permitting agency's assessment of the aquatic impact is dispositive and must be respected by the NRC.

B. The 5-Year Term of The NPDES Permit Does Not Negate The NRC Rule

The majority's concern that the NPDES permit will expire before the license renewal term (LBP-06-20, slip op. at 56-57) also provides no grounds to disregard 10 C.F.R. § 51.53(c)(3)(ii)(B). Indeed, this concern simply challenges the validity of the NRC's rule and, if accepted, would essentially write 10 C.F.R. § 51.53(c)(3)(ii)(B) out of existence. Section 51.53(c)(3)(ii)(B) provides that an Applicant shall provide a "316(a) variance . . . or equivalent State permits and supporting documentation." Section 316(a) variances are granted and implemented through NPDES permits,[31] and NPDES permits must be issued for fixed terms not

[31] 40 C.F.R. § 125.70 (This subpart describes the factors, criteria and standards for establishment of alternative thermal effluent limitations under section 316(a) of the Act in permits issued under section 402(a) of the Act [i.e.,

exceeding five years. 33 U.S.C. § 1342(b)(1)(B). To suggest that the 316(a) variances in these permits may not be relied upon because they have a shorter duration than the license renewal term would render 10 C.F.R. § 51.53(c)(3)(ii)(B) meaningless.

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

Nor is there any apparent means for the VANR's assessment to be exceeded during the period of extended operation. As the Commission has previously explained,

> The Commission has considered the impacts of license renewal on aquatic ecology and, in doing so, has reviewed existing NPDES permits.... Agencies responsible for existing permits are not constrained from reexamining the permit issues if they have reason to believe that the basis for their issuance is no longer valid.

61 Fed. Reg. at 28,475 (June 5, 1996). As applied to the instant case,

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

Dissenting Opinion at 6.

In sum, the 5-year review of a permit's conditions strengthens the NRC's reliance on the VANR's assessments. If there is a change in environmental conditions or in other sources

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NPDES permits]). See also 40 C.F.R. § 125.73(a) ("Thermal discharge effluent limitations or standards established in permits. . . .") (emphasis added).

affecting the river in the future, the 5-year permitting process provides a mechanism to reassess the thermal effluent limitations and adjust them if necessary. In this case, for instance, the VYNPS NPDES permit will be up for renewal several times during the license renewal term. The VANR will thus have multiple opportunities to ensure that the effluent limits remain adequate to assure the protection and propagation of a balanced indigenous population of shellfish, fish and wildlife. In short, the NPDES permitting process mandated by the Clean Water Act is more protective than the NEPA review process and, thus, can properly be relied upon to ensure the continual validity of the VANR's findings.

C. Thermal Effects Other Than Heat Shock Are Category 1 Issues

The Licensing Board majority's conclusion that there may be thermal effects other than heat shock (LBP-06-20, slip op. at 56) to be considered is inconsistent with the regulations. First, all thermal effects other than heat shock are Category 1 issues. See 10 C.F.R. Part 51, App. B, Table B-1, classifying as Category 1 issues: (1) altered thermal stratification of lakes; (2) temperature effects on sediment transport capacity; (3) scouring caused by discharged cooling water; (4) eurotrophication; (5) low dissolved oxygen in the discharge; (6) cold shock; (7) thermal plume barrier to migrating fish; (8) distribution of aquatic organisms; (9) premature emergence of aquatic insects; (10) gas supersaturation (gas bubble disease); (11) losses from predations, parasitism, and disease among organisms exposed to sublethal stresses; and (12) stimulation of nuisance organisms (e.g., shipworms). A license renewal applicant's environmental report is not required to contain analyses on Category 1 issues. 10 C.F.R. § 51.53(c)(3)(i). Further, Category 1 issues may not be raised in a license renewal proceeding absent a waiver of the NRC rules. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 N.R.C. 3, 12 (2001). Admitting NEC Contention 1 based

on a concern that there may be effects other than heat shock that need to be considered is simply a challenge to the NRC's Category 1 findings and to 10 C.F.R. § 51.53(c)(3)(i).

In any event, in opposing Entergy's Petition for Interlocutory Review of LBP-06-20 admitting NEC Contention 1, NEC now states that "Contention 1 addresses Entergy's failure to adequately assess whether increased thermal discharges to the Connecticut River during the renewed license will result in fish mortality due to heat shock, a Category 2 Environmental issue. . . ."[32] Therefore, by its proponent's own admission, impacts other than thermal shock are not within the scope of the contention and provide no basis for admitting it into the license renewal proceeding.

CONCLUSION

For the reasons set forth above, the Commission should reverse the Licensing Board majority's decision and dismiss NEC Contention 1.

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Dated: January 29, 2007

[32] New England Coalition, Inc.'s Opposition to Entergy's Petition for Interlocutory Review of LBP-06-20 admitting NEC Contention 1 (Oct. 20, 2006) at 1-2 ("NEC Opposition"). Entergy too has understood NEC's Contention 1 as intending to raise heat shock. See Entergy's Answer at 18 ("The only instances of demonstrated adverse temperature effects on shad population cited by [NEC's expert] are those of 'temperature shock' caused by rapid temperature increases of nine degrees (68° to 77°F) or eighteen degrees (68° to 86°F)."). The only other thermal effect that could conceivably be gleaned from NEC's contention was the effect on shad migration allegedly resulting from thermal barriers. This is specifically a Category 1 issue. 10 C.F.R. Part 51, App. B, Table B-1.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Brief on Review of LBP-06-20" dated January 29, 2007, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 29th day of January, 2007.

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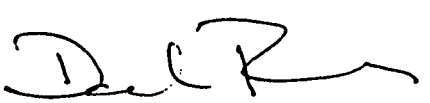

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