UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE STATE OF VERMONT DEPARTMENT OF PUBLIC SERVICE and the NEW ENGLAND COALITION Petitioners, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and THE UNITED STATES OF AMERICA Respondents.	)	Nos. 11-1168 and 11-1177

RESPONDENTS' MOTION TO DISMISS AND OPPOSITION TO PETITIONERS' MOTION FOR SUMMARY REVERSAL

Pursuant to Federal Rule of Appellate Procedure 27 and Local Rule 27(c), the Nuclear Regulatory Commission (NRC) and the United States of America oppose petitioners' motion for summary reversal and move to dismiss the petitions for review.

Petitioners claim that NRC's decision to renew the operating license of the Vermont Yankee Nuclear Power Station is invalid under the Clean Water Act because NRC allegedly did not properly obtain a state water quality certification under § 401 of that Act. This allegation however raises complex and undecided Clean Water Act issues. Summary reversal therefore is inappropriate. Petitioners have not come close to "establish[ing] that the merits

of [their] case are so clear that expedited action is justified." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297–98 (D.C. Cir. 1987) (per curiam).

In addition, petitioners' Clean Water Act claim is not properly before this Court. Despite a full opportunity for an administrative hearing, petitioners did not timely raise their claim before NRC's Atomic Safety and Licensing Board, and they never brought it to the Commission at all. This is reason not only to deny summary reversal, but to dismiss the petitions for review altogether.

Background

Like many nuclear power plants, Vermont Yankee sits near a large body of water, the Connecticut River. Operators remove water from the river, use it to cool the reactor, and then return it to the river. Vermont Yankee must ensure that this "discharge" complies with applicable federal and state water quality laws.

1. The Clean Water Act

Under § 401 of the Clean Water Act, applicants for federal licenses or permits to conduct any activity that may result in any discharge to navigable waters must present the licensing agency with a certification from the state where their proposed discharge will originate. The state is to certify that the applicant's proposed discharge will comply with the relevant sections of the

Clean Water Act and the state's Water Quality Standards. 33 U.S.C. § 1341(a)(1). Section 401 empowers states to impose on a federal license any conditions "necessary to assure that any applicant for a federal license or permit will comply with any applicable [provisions of the Clean Water Act,] and any other appropriate requirement of state law set forth in such certification . . . ." 33 U.S.C. § 1341(d). Such conditions are part of the license or permit and are binding. *Id.*

The Act also provides that a water quality certification obtained "with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility." 33 U.S.C. § 1341(a)(3). If there is a change in the licensee's operations, water quality, or a state's water quality regulations, the state has sixty days to notify the federal licensing agency that the state no longer has the assurances required by § 401. *See id.* Such notice, in effect, revokes the applicant's § 401 certification.

A separate provision of the Clean Water Act, § 402, authorizes EPA to issue discharge permits under the "National Pollutant Discharge Elimination System" (NPDES). 33 U.S.C. § 1342(a). NPDES permits impose specific limits, conditions, and monitoring requirements on effluent discharges and "are for fixed terms not to exceed five years." 33 U.S.C. §§ 1342(a)(3) & (b).

Section 402 also has provisions allowing states to take over NPDES permitting authority from EPA, as Vermont did in 1974. *See* 33 U.S.C. § 1342(b).[1]

2. Vermont Yankee

NRC's predecessor, the Atomic Energy Commission, issued a construction permit to Vermont Yankee's owners in 1967, and in 1970 Vermont Yankee's owners presented the Atomic Energy Commission with a § 401 certification from Vermont.[2] *See* Letter from John A. Ritsher, Representing Vt. Yankee Nuclear Power Co., to U.S. Atomic Energy Comm'n (Nov. 13, 1970) (enclosing Vermont water quality certificate) (attached as Exhibit A). Thus, when the Atomic Energy Commission licensed Vermont Yankee for initial operation on March 21, 1972, the plant possessed a § 401 certification for continued operation.

Under the Atomic Energy Act, the maximum term for an operating license is "forty years from the authorization to commence operations." 42 U.S.C. § 2133(c). Thus, Vermont Yankee's original operating license was set to

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[1] In the case of Vermont Yankee's NPDES permit, prolonged challenges to the Vermont agency's NPDES decision delayed the effective date of Vermont Yankee's renewed permit. *See In re Entergy Nuclear Vermont Yankee Discharge Permit 3-1199*, 989 A.2d 563, 567–68 (Vt. 2009).

[2] Although Congress substantially reorganized the Clean Water Act in 1972, certifications issued before 1972 remain valid under a savings clause. *See* Federal Water Pollution Control Act Amendments of 1972 § 4(b), Pub. L. No. 92-500, 86 Stat. 816 (not codified, retained as a note to 33 U.S.C. § 1251).

expire on March 21, 2012. The plant's current owners, Entergy Nuclear Vermont Yankee, L.L.C. and Energy Nuclear Operations, Inc. (Entergy), applied for license renewal in 2006. *See generally Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131 (2006).

Among other things, NRC licensees applying for license renewal must submit a supplemental environmental report to assess the potential impact of continued operations and the "status of compliance with applicable environmental quality standards and requirements . . . imposed by Federal, state, regional and local agencies . . . ." 10 C.F.R. §§ 51.45(d) & 54.23. Entergy's environmental report assessed water quality compliance under the heading "Water Quality (401) Certification." *See* Entergy, Vermont Yankee Nuclear Power Station License Renewal Application, Appendix E, *Applicant's Environmental Report*, 9-1 (Jan. 25, 2006) (excerpt attached as Exhibit B). Entergy claimed that Vermont Yankee's original § 401 certification and possession of a "current and effective NPDES permit issued by [Vermont]" satisfied § 401 requirements. *Id.*

During the renewal proceedings, petitioners in this lawsuit (Vermont and the New England Coalition (NEC)), among others, brought several challenges to Entergy's license renewal application before NRC's adjudicatory hearing

tribunal, the Atomic Safety and Licensing Board. Only NEC "Contention 1," which Vermont adopted, discussed water quality issues. *See Entergy Nuclear Vermont Yankee, L.L.C.*, 64 NRC 131 (2006).

As originally submitted, Contention 1 alleged that Entergy's report did not properly consider the environmental effects of Vermont Yankee's continued thermal discharges. *See id.* at 175. Entergy opposed Contention 1. In its reply, NEC argued for the first time that Entergy had not complied with Section 401. *See id.*; *NEC's Reply to Entergy and NRC Staff Answers to Petition for Leave to Intervene, Request for Hearing, and Contentions* at 6 & 14 (June 30, 2006) (excerpt attached as Exhibit C).

Entergy successfully moved to strike Petitioners' § 401 argument as untimely and successfully opposed NEC's motion to amend Contention 1 to include the § 401 issue. *Entergy Nuclear Vermont Yankee, L.L.C.* (Vermont Yankee Nuclear Power Station), ASLBP 06-849-03-LR at 7-9 (Oct. 30, 2006) (unpublished order) (excerpt attached as Exhibit D). Neither NEC nor Vermont appealed this Board decision to the Commission.

The Commission granted Entergy's application for license renewal on March 21, 2011, and petitioners now seek to reverse that decision.

Argument

1. Petitioners Do Not Meet the Standard for Summary Reversal.

This Court has set a very high bar for summary disposition. The long-established default process for appellate decision-making is full briefing and oral argument. The Court takes summary action only in rare cases where the question raised on appeal is so simple, or its answer so obvious, that there would be no point to further argument:

> A party seeking summary disposition bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified. . . . [T]his court must conclude that no benefit will be gained from further briefing and argument of the issues presented. In addition, this court is now obligated to view the record and the inferences to be drawn therefrom in the light most favorable to [the nonmoving party].

Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 297–98 (quotation marks and citations omitted).[3] Petitioners have not met the "heavy burden" *Taxpayers Watchdog* established. Indeed, their motion for summary reversal does not acknowledge their heavy burden, or even mention *Taxpayers Watchdog* or equivalent authority The NRC reached its decision only after conducting extensive environmental review and discussions with public officials in

[3] *See, e.g., Kiska Constr. Corp. v. Wash. Metro. Area Transit Auth.*, No. 10-7127, 2011 U.S. App. LEXIS 7410 (D.C. Cir. Mar. 18, 2011) (per curiam); *Slovinec v. Am. Univ.*, No. 09-7107, 2009 U.S. App. LEXIS 28597 (Dec. 29, 2009) (per curiam). This Court has invoked the *Taxpayers Watchdog* "heavy burden" standard, according to our research, in at least 637 cases.

Vermont. Furthermore, the NRC decision is supported by a full administrative record. Thus, this is not the type of case that is suitable for summary reversal.

Petitioners argue that NRC's license renewal is invalid for two reasons. First, they contend NRC failed to obtain a § 401 certification and never asked for one. *See* Pet. Mot. at 11. Second, they charge that NRC failed to verify Entergy's § 401 certification claims. *Id.* at 9–10, *citing City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006).

To our knowledge, there is no case law deciding the question whether and how prior certifications apply in the context of license renewal. Nor have the courts determined the meaning of § 401(a)(3) in the license renewal context. The unresolved nature of these questions demonstrates that Petitioners' arguments are not self-evident and provide reason enough to deny summary reversal. The cases Petitioners cite fail to shed light on the issues presented. *In re Clyde River Hydro Electric Project*, 895 A.2d 736 (Vt. 2006), is inapposite because whether the Project's § 401 certification remained valid was not at issue. Likewise, this Court's decision in *City of Tacoma v. FERC* did not address the issue involved in this case. The petitioner in that case challenged the validity of Washington's certification procedures. *See City of Tacoma*, 460 F.3d at 67–68.

Indeed, in 2006, after Entergy had filed for license renewal, Vermont's Agency of Natural Resources informed NRC that "[t]he requirements of the Clean Water Act and the NPDES permit will provide assurance that the impacts of permitted intake structures and discharges meet the applicable federal and state requirements." Memorandum from Vermont Agency of Natural Resources to Nuclear Regulatory Commission (June 23, 2006) (excerpt attached as Exhibit F).

This case, in short, raises undecided questions on how the Clean Water Act's § 401 certification requirement applies to NRC license renewal decisions.[4] Petitioners' motion for summary reversal falls well short of showing that there would be "no benefit" to full briefing and argument, as contemplated by *Taxpayers Watchdog* and this Court's other summary disposition cases.

[4] The case potentially raises other questions as well, such as whether Vermont's grant of an NPDES permit under § 402 subsumes any separate certification requirement under § 401, as is true in many states. *See, e.g.*, Fla. Admin. Code Ann. r.62-343.070(9) (2011) (declaring that Florida NPDES permits are 401 certifications). *See also* U.S. Nuclear Regulatory Commission, *Generic Envtl. Impact Statement*, 1 NUREG-1437, at 4.2.1.1 (excerpt attached as Exhibit H). Contrary to petitioners' view (Pet. Motion 11 n.5), *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006), does not resolve the question. That decision held merely that an interpretation of "discharge" under § 402 is not controlling when applied to § 401. *See* 547 U.S. at 380.

2. Petitioners failed to exhaust their administrative remedies before filing for review in this Court.

Petitioners' Clean Water Act claim not only does not justify summary reversal but actually should be dismissed altogether due to petitioners' failure to exhaust an available administrative remedy at NRC—namely, the agency's hearing process for licensing actions. *See generally* 42 U.S.C. § 2239; 10 C.F.R. Part 2.

As a general rule, a "party must first raise an issue with an agency before seeking judicial review." *See Tesoro Refining and Marketing Co. v. FERC*, 552 F.3d 868, 872 (D.C. Cir. 2009). This Court has described that rule as a matter of "simple fairness." *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 211 (D.C. Cir. 2011), quoting *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952). Simply put, petitioners may not file a lawsuit after sitting on their hands when given the chance to properly raise issues before the agency.

A person participating in an agency proceeding cannot just stop in the middle of the process and, ignoring any remaining available steps, proceed directly to court. *See, e.g., Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (holding that a court should dismiss a lawsuit where the litigant did not fully exhaust administrative remedies). Accordingly, this Court has discouraged petitions by those "who had the opportunity to participate in the underlying Commission proceedings but who had failed to take advantage of it." *Natural Resources*

Defense Council v. *NRC*, 666 F.2d 595, 601 n.42 (D.C. Cir. 1981). *See also Natural Resources Defense Council v. Kempthorne*, 525 F. Supp. 2d 115, 124 (D.D.C. 2007) (requiring parties participating in agency proceedings to take advantage of all "substantial opportunit[ies]" to properly raise Clean Water Act certification claims with agency before filing lawsuit).

In this case, following the Licensing Board's initial rejection of Petitioners' amended Clean Water Act contention as improper, NRC regulations gave petitioners the opportunity to file a new, separate Clean Water Act contention, *see* 10 C.F.R. § 2.309(f)(2), or to seek Commission review of the Board's decision. *See* 10 C.F.R. §§ 2.341 & 2.1212. But petitioners chose to sit silently instead, while (in the case of petitioner NEC) continuing to pursue other issues before the Board.

Petitioners, in short, did not "use all the steps the agency holds out" to file "objection[s] . . . at the time appropriate under [NRC's] practice." *Woodford*, 548 U.S. at 90. Had they used the procedures established by NRC, they might have prevailed on some of their concerns—or at least have been better informed as to the NRC's position, leading them not to challenge the agency decision at all. To entertain their Clean Water Act suits now, several years later, would condone petitioners' unexplained failure to take advantage of their full opportunities to raise their objections before the agency.

The requirement to exhaust administrative remedies is both a matter of fairness—giving agencies and other interested parties an opportunity to address particular claims before they are presented to court—and a matter of sound judicial policy. The courts have pointed to many advantages to the rule that parties must fully contest issues at the agency level before seeking judicial review:

- The exhaustion doctrine "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency," by "ensur[ing] that agencies—and not the federal courts—take primary responsibility for implementing the regulatory programs assigned by Congress." *Ass'n of Flight Attendants-CWA, AFL-CIO v. Chao*, 493 F.3d 155, 158 (D.C. Cir. 2007), quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992).

- Ignoring exhaustion requirements would "encourage people to ignore an agency's procedures by allowing litigants who . . . could have petitioned the agency directly for the relief [sought] in this lawsuit" to "seek those forfeited administrative remedies from the court later." *Malladi Drugs & Pharms., Ltd. v. Tandy*, 552 F.3d 885, 890 (D.C. Cir. 2009) (citations omitted).

- Requiring "review within the [agency] gives the [agency] 'the opportunity to correct its own errors,' and thereby to avoid unnecessary litigation." *Benoit v. USDA*, 608 F.3d 17, 23 (D.C. Cir. 2010), quoting *McCarthy* at 145.

- Contesting all possible hearings before the agency "may produce a useful record for subsequent judicial consideration." *Id.*, quoting *McCarthy* at 145-46.

- "[A]gency proceedings 'generally . . . resolve claims much more quickly and economically' than courts.'" *Qwest Corp. v. FCC*, 482 F.3d 471, 475 (D.C. Cir. 2007), citing *Woodford v. Ngo*, 548 U.S. 81, 89 (2006).

These policies apply in full force here, where petitioners have asked this Court to resolve a Clean Water Act issue that they never presented to the Commission itself and presented only half-heartedly to the Commission's subordinate hearing tribunal, the Licensing Board. Indeed, petitioners' failure to bring their Clean Water Act contention before the Commission deprived the Commission of an opportunity to address these alleged defects and forces lawyers for NRC and the United States to defend NRC's position without the benefit of the Commission's judgment, an undesirable situation to say the least. *See, e.g., Nat'l Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145, 164 (D.C. Cir. 2010). This odd posture underscores the practical problems raised by the petitioners' failure to exhaust their administrative remedies before filing their petitions for review.

Conclusion

Petitioners' merits claims do not get over the high bar set by this Court for summary reversal in *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d at 297–98, and in many other cases. Summary reversal therefore should be denied. In addition, because petitioners failed to exhaust their administrative remedies before filing their lawsuits in this Court, the petitions for review should be dismissed.

Respectfully submitted,[5]

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[5] L. Sheldon Clark, a summer associate with the NRC's Office of the General Counsel, assisted in preparing this pleading.

CERTIFICATE OF SERVICE

I hereby certify that, on July 29, 2011, a copy of foregoing RESPONDENTS' MOTION TO DISMISS AND OPPOSITION TO PETITIONERS' MOTION FOR SUMMARY REVERSAL was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system, and parties may access the filing through that system. In addition, copies of the foregoing were also served through the U.S. mail, and by electronic mail, to all parties on July 29, 2011.

/s/
SEAN D. CROSTON