Nos. 11-1168 and 11-1177

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VERMONT DEPARTMENT OF PUBLIC SERVICE, and
NEW ENGLAND COALITION
Petitioners,

v.

UNITED STATES OF AMERICA, and
NUCLEAR REGULATORY COMMISSION
Respondents,

and

ENTERGY NUCLEAR OPERATIONS, INC., and
ENTERGY NUCLEAR VERMONT YANKEE, LLC
Intervenor-Respondents

INTERVENOR RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION FOR SUMMARY REVERSAL, AND INTERVENORS' RESPONDENTS' CROSS-MOTION FOR SUMMARY DISPOSITION

David R. Lewis
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street NW
Washington, DC 20037
(202) 663-8474
david.lewis@pillsburylaw.com

Counsel for Entergy

July 29, 2011

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, Intervenor-Respondents Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (collectively, "Entergy") hereby (1) oppose the Motion for Summary Reversal ("Motion") filed by the Vermont Department of Public Service ("DPS") and the New England Coalition ("NEC," and together with DPS, the "Petitioners"), and (2) cross-move the Court to summarily deny DPS' and NEC's petitions for judicial review. As explained in the Court's *Handbook of Practice and Internal Procedures* (April 2011) at 35, "summary affirmance is appropriate where the merits are so clear as to justify summary action." That standard for summary affirmance is satisfied here and requires denial of the two petitions.

Both petitions assert a single issue for appeal: that the U.S. Nuclear Regulatory Commission ("NRC") improperly issued to Entergy a renewed operating license for the Vermont Yankee Nuclear Power Station ("Vermont Yankee") without first receiving a water quality certification ("WQC") from Vermont pursuant to Section 401 of the Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. § 1341. This argument is wrong as a matter of both fact and law. As Petitioners' Motion concedes, Vermont *did* issue a WQC for Vermont Yankee during the construction of that plant. This WQC included no expiration date or other limitation preventing its use for the renewed license, and the ability to use WQCs for future licenses is explicit in Section 401(a)(3). This

WQC was provided to the NRC's predecessor agency when it was issued, was specifically referenced in the proceeding, and remains in NRC's files to this day.

Moreover, WQCs certify that a facility's operations will comply with certain state water quality standards and provisions of the Clean Water Act, and Vermont Yankee operates under a Vermont-issued National Pollutant Discharge Elimination System ("NPDES") permit establishing such compliance.[1] Either the existing WQC or the certification implicit in Entergy's NPDES permit, standing alone, satisfies NRC's obligations under Section 401. Entergy referenced both the existing WQC and its NPDES permit in its application to the NRC. Subsequently, the Vermont Agency of Natural Resources ("VANR"), which is the Vermont agency responsible for issuing WQCs, specifically informed the NRC, in language reflective of Section 401, that it possessed the requisite "assurance that the impacts of the permitted intake structures and discharges meet the applicable federal and state requirements." *See infra* at 9 & n.5.

As explained herein, however, the Court need not reach the question whether the existing WQC or NPDES permit supports license renewal because Petitioners did not preserve the issue. Federal law establishes straightforward procedures

---

[1] *See* Letter from T. Sullivan to NRC, License Renewal Application, Amendment 6 (July 27, 2006), available at http://wba.nrc.gov:8080/ves/ at Accession No. ML062130080 (enclosing Final Amended Discharge Permit #3-1199); *see also* 40 C.F.R. § 122.4(i).

under which a state, such as Vermont, may contest the granting of a license in general and the continued force of an existing WQC in particular. Vermont *never* followed these procedures: it never told the NRC that the existing WQC no longer provided assurance that Vermont Yankee would comply with state water quality standards, even when consulting with the NRC on required approvals and environmental issues; it never filed contentions with the NRC's Licensing Board in response to Entergy's reliance on the earlier WQC in its application for license renewal; it never filed contentions in response to NRC's environmental impact statements which indicated that a new WQC was not needed; and it never appealed the Licensing Board's relevant rulings to the full Commission as is required under NRC rules as a prerequisite for judicial review. To the contrary, VANR informed NRC that Vermont Yankee's compliance with water quality standards was assured.

Petitioner NEC did, at one point, attempt to raise a WQC issue, but did not do so in a manner comporting with NRC rules and thus failed to properly place any such issue in controversy. In particular, NEC included no contention concerning a WQC in its initial set of contentions filed with NRC, instead improperly raising the issue for the first time in a reply brief and later in an unsuccessful motion to amend an existing contention. The denial of the motion to amend was the last time NEC pressed the issue: It did not appeal the denial of the motion to amend the existing contention; it did not file new contentions raising the WQC issue in response to

NRC's environmental impact statements; and it never raised the absence of a WQC on administrative appeal from the Licensing Board to the Commission.

Accordingly, neither Petitioner has preserved the argument that they now press before this Court. Even if Petitioners had preserved this issue before NRC, they failed to file their petition with this Court within 60 days of the entry of the relevant final order, thus depriving this Court of jurisdiction under the Hobbs Act, 28 U.S.C. § 2341 *et seq*. For these reasons, the Court should reject Petitioners' request for summary reversal and instead summarily dispose of the two Petitions.

STATEMENT OF THE CASE

I. Vermont Yankee and Entergy's Application for License Renewal

Vermont Yankee is a nuclear power plant that began operation in 1972 under authorizations from the NRC's predecessor, the Atomic Energy Commission ("AEC"), and other governmental agencies. Among those authorizations was an operating license issued by the AEC. This license has a 40-year term ending March 21, 2012, but NRC rules permit a licensee to apply for license renewal to extend operations for an additional 20-year term. To that end, on January 25, 2006, Entergy submitted an application to the NRC requesting renewal of the operating license. *See In the Matter of Entergy Nuclear Vermont Yankee, LLC* ("*In re VY*"), LBP-06-20, 64 N.R.C. 131, 140 (2006) ("LBP-06-20") (Exhibit 1).

While the decision whether to license a nuclear station rests with the NRC, Congress reserved to the states limited rights to ensure compliance with their water quality standards. As relevant here, Section 401(a)(1) of the CWA states:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, ... that any such discharge will comply with the applicable provisions of sections [301, 302, 303, 306, and 307] of this title. .... No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence.

33 U.S.C. § 1341(a)(1). Federal law places no restrictions on the length of time for which a WQC is valid, nor does it state that a WQC issued with respect to plant construction or initial operations will not suffice for any renewal licenses.

Confirming that the certification process is intended generally to be necessary only once for a given facility, Section 401 goes on to provide that the original WQC issued with respect to a facility's construction will suffice for any future operating license, unless the state, within a short, statutorily-specified time period, notifies the licensing agency that for certain statutory reasons it does not. Section 401(a)(3) states, in most pertinent part:

> The certification obtained pursuant to paragraph (1) of this subsection 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 *unless, after notice to the certifying State* . . .

> *which shall be given by the Federal agency to whom application is made for such operating license or permit, the State . . . notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections* [*301, 302, 303, 306, and 307*] of this title....

33 U.S.C. § 1341(a)(3) (emphasis added).

In connection with the initial licensing of Vermont Yankee, Vermont issued a WQC dated October 29, 1970 – only a few months after the requirement of a WQC was enacted and while Vermont Yankee was still under construction. *See* Exhibit 2.[2] Petitioners repeatedly claim in their Motion that the "NRC never received nor sought" a copy of the certification. Motion at 11. That is demonstrably untrue. The 1970 WQC was submitted to AEC when it was issued and remains in NRC's files to this day. Indeed, it is publicly available from NRC's public document room (at Accession No. 027369).

Importantly, the 1970 WQC contains *no* terms, such as an expiration date, that would preclude its use in support of a renewal license. Indeed, at *no* point in

---

[2] Petitioners note that this WQC was issued by the Vermont Water Resources Board ("VWRB"), a state agency that since has been replaced by VANR, and suggest for that reason that the WQC somehow lacks legal effect. *See* Motion at 4 & n.3; 11. As this Court previously ruled in *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991), however, once a state has issued a WQC, its continued force and effect is a question of *Federal* law. A state cannot strip previously issued certificates of force by transferring responsibility for certifications to a different state agency. In any event, Petitioners' argument is all the more frivolous because the Vermont Department of Environmental Conservation (which is part of VANR) is the successor agency of VWRB, meaning that Petitioners' argument really hinges on a name change. See VT STAT. ANN. tit. 10, § 905b(21).

the NRC proceeding (or before) did Vermont ever suggest that the existing WQC could not be used in support of license renewal, as is presumed by § 401(a)(3).

Entergy's 2006 application for license renewal, consequently, explicitly identified and relied upon the existing WQC that had already been provided to the agency. In particular, the 2006 application included an environmental report (the "Environmental Report") required by NRC regulations. Pursuant to those regulations, an environmental report must:

> list all Federal permits, licenses, approvals and other entitlements which must be obtained in connection with the proposed action and shall describe the status of compliance with these requirements. The environmental report shall also include a discussion of the status of compliance with applicable environmental quality standards and requirements including, but not limited to, . . . thermal and other water pollution limitations or requirements which have been imposed by Federal, State, regional, and local agencies having responsibility for environmental protection.

10 C.F.R. § 51.45(d).

Consistent with this rule, Entergy's Environmental Report summarized Entergy's WQC status under the header "Water Quality (401) Certification." This section of the Environmental Report identified the existing WQC in support of Entergy's position that Section 401 was satisfied:

> 9.2.1 Water Quality (401) Certification
>
> With respect to applicants for a federal license to conduct an activity that might result in a discharge into navigable waters, Section 401 of the Clean Water Act (CWA) establishes certain requirements for certifications from the state that the discharge will comply with

> certain CWA requirements (33 USC 1341). *As reported in the [Final Environmental Statement] (1972), the Vermont Water Resources Board provided a water quality certification on October 29, 1970, as amended on November 26, 1971, reflecting its receipt of reasonable assurance that operation of Vermont Yankee will not violate applicable water quality standards.* In addition, the current and effective NPDES permit issued by the Vermont Agency of Natural Resources reflects continued compliance with applicable CWA standards. Excerpts of this permit are included in Attachment D.

Environmental Report at 9-1 (emphasis added).[3]

On February 6, 2006, NRC published notice of Entergy's application in the Federal Register; and a second notice of NRC's "acceptance" of the application was published on March 27, 2006. *See* 71 Fed. Reg. 6,102 (Feb. 6, 2006); 71 Fed. Reg. 15,220 (Mar. 27, 2006). The NRC also made Entergy's application, with its reference to the 1970 WQC and NPDES permit, publicly available on its website.[4]

At no point within 60 days of NRC's notice of Vermont Yankee's application did Vermont assert, pursuant to Section 401(a)(3), "that there is no longer reasonable assurance that there will be compliance" with water quality

---

[3] Petitioners' statement that Entergy "did not assert that either the old certification or the § 402 permit met 401 Certification requirements and did not list a 401 Certification as one of the permits it possessed when it filed its [Environmental Report]" (Motion at 4) is belied by the plain text of the Environmental Report quoted above. Petitioners' assertion that Entergy's "ER did not list a 401 Certification or discuss the 'status of compliance' with 33 U.S.C. § 1341" (Motion at 13) is inexplicable for the same reason.

[4] *See* http://www.nrc.gov/reactors/operating/licensing/renewal/applications/vermont-yankee.html. The Environmental Report is also available at http://wba.nrc.gov:8080/ves/ at Accession No. ML060300086.

standards. To the contrary, VANR, in a submission made to NRC on June 24, 2006 (shortly after expiration of the 60-day period), used language reflecting the "assurance" standard of Section 401(a)(3) in reporting that "[t]he requirements of the Clean Water Act and the NPDES permit *will provide assurance* that the impacts of the permitted intake structures and discharges meet the applicable federal and state requirements."[5]

Unsurprisingly and tellingly, Petitioners' Motion glosses over this history of consultation with VANR, the Vermont agency that Petitioners themselves describe as "the State's agent for purposes of CWA § 401 certification." Motion at 4 & n.3. Wholly ignoring the facts, they instead incorrectly assert that "[t]he record does not reflect any inquiry by NRC to either [Entergy] or the State of Vermont to verify [Entergy's] assertion or to determine if it applied to the required 401 certification." Motion at 6. Contrary to the Motion, the NRC not only met and consulted with VANR[6] but also formally solicited comments from relevant agencies (and the public) on the scope of its environmental review with the express purpose of

---

[5] Memorandum from Vermont Agency of Natural Resources to Nuclear Regulatory Commission, Scoping Comments for Vermont Yankee Nuclear Power Station License Renewal (June 23, 2006) at 1 (emphasis added), available at http://wba.nrc.gov:8080/ves/ at Accession No. ML061920476.

[6] *See* NRC Summary of Environmental Site Audit Related to the Review of the License Renewal Application for Vermont Yankee Nuclear Power Station (July 11, 2006), available at http://wba.nrc.gov:8080/ves/ at Accession No. ML061730397.

identifying "other environmental review and consultation requirements related to the proposed action." *See* 71 Fed. Reg. 20,733, 20,734 (Apr. 21, 2006). VANR's statement above was provided in response to this solicitation. Thus, Vermont had every opportunity to raise concerns with Entergy's reliance on the existing WQC and future compliance with water quality standards, but instead told the NRC that, with respect to water quality standards, it had nothing to worry about.

II. The NRC's License Renewal Proceedings and Hearings

A. The NRC's Licensing Procedures

The environmental report submitted as part of a license renewal application is only the first step in a lengthy environmental review by the NRC. The NRC uses information from the environmental report to prepare a site-specific environmental impact statement ("EIS"). *See* 10 C.F.R. §§ 51.71(d), 51.95(c). The NRC notices the draft EIS in the Federal Register, distributes it widely (including to appropriate state agencies) as part of an extended inter-agency consultation process, and invites public comment as well. *See* 10 C.F.R. §§ 51.71(d), 51.73, 51.74(a)(4). As with an applicant's environmental report, the draft EIS must "list all Federal permits, licenses, approvals, and other entitlements which must be obtained in implementing the proposed action and ... describe the status of compliance with those requirements." 10 C.F.R. § 51.71(c). After consulting with Federal and State agencies and receiving comments on the draft,

see 10 C.F.R. §§ 51.73, 51.74, the NRC prepares the final EIS. *See* 10 C.F.R. § 51.95(c).

The NRC provides administrative hearings to address disputes by any person regarding an application. *See* 42 U.S.C. § 2239(a). To obtain such hearing and party status, a person must file a petition specifying admissible "contentions" to be litigated. *See* 10 C.F.R. § 2.309(a). To be admissible, a contention must satisfy the pleading standards in 10 C.F.R. § 2.309(f)(1), which require among other things that the petitioner identify the bases for its contention.[7] NRC rules require contentions to address documents available when the petition is filed, such as the environmental report, but also allow a petitioner to file additional or amended contentions based upon new developments in the proceeding, such as issuance of the draft and final EIS. *See* 10 C.F.R. 2.309(f)(2).

Hearing requests are typically referred to an Atomic Safety and Licensing Board (a panel of three administrative judges). Following the issuance of an initial decision by the Licensing Board, a party may seek Commission review of whether the conduct of the proceeding involved any prejudicial error (*see* 10 C.F.R. § 2.341(b)(1), (b)(4)), such as error in denying the admissibility of a contention

---

[7] A contention may raise a genuine dispute with the applicant on any material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(vi). *See also Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1443 (D.C. Cir. 1984) (hearing opportunity must extend to "all material factors bearing on the licensing decision. . . ."), *cert. denied sub nom., Arkansas Power & Light Co. v. NRC*, 469 U.S. 1132 (1985).

previously committed by the Licensing Board.[8] Under the NRC's rules, a party to a proceeding *must* file a petition for Commission review to preserve judicial review of any Board action. *See* 10 C.F.R. §§ 2.341(b)(1), 2.1212.

B. The Vermont Yankee License Renewal Proceeding

On March 27, 2006, the NRC published a notice of opportunity for hearing with respect to the license renewal application for Vermont Yankee. *See* 71 Fed. Reg. at 15,220. In response, both DPS and NEC requested a hearing and submitted proposed contentions. LBP-06-20, 64 N.R.C. at 141. *None* of the contentions proposed by DPS or NEC challenged (or even mentioned) the discussion in Entergy's Environmental Report indicating that the 1970 WQC and NPDES permit satisfied Section 401. *See* LBP-06-20, 64 N.R.C. at 162, 167, 170 (identifying DPS contentions); *id.* at 175, 183, 187, 192, 196, 199 (identifying NEC contentions). Indeed, the contentions did not mention the need for a new WQC at all.[9]

---

[8] *See also Matter of Private Fuel Storage, LLC*, CLI-00-24, 52 N.R.C. 351, 353 (2000) (prior rulings denying admission of contentions are appealable after a Partial Initial Decision).

[9] In addition, DPS moved to adopt NEC's contentions (none of which related to the need for a WQC). The Licensing Board later granted this motion "to the extent that the ... NEC contentions have been admitted." LBP-06-20, 64 N.R.C. at 208. Because a contention that Entergy lacked a WQC was never "admitted" by the Licensing Board, DPS never adopted such an argument.

NEC Contention 1 did challenge whether the Environmental Report sufficiently assessed the impacts of thermal discharges into the Connecticut River. LBP-06-20, 64 N.R.C. at 175. Entergy opposed a hearing on this proposed contention, arguing that NRC regulations do not require the Environmental Report to include a discussion of thermal impacts if a copy of a current variance under Section 316(a) of the Clean Water Act, or an equivalent State permit, with supporting documentation is provided.[10] *Id.* at 176. In reply, NEC attempted to shift the focus of its contention, arguing for the first time that Entergy did not have a WQC. *See id.* at 182. The Board struck this portion of NEC's reply, explaining that it was improper for NEC to attempt "to raise an entirely new argument regarding the alleged need for a section 401 certification . . . in a reply." *Id.*[11]

NEC subsequently moved to amend NEC Contention 1 to add, as an additional basis supposedly supporting the original contention, the (incorrect) allegation that Entergy's Environmental Report made no mention of any effort to obtain a WQC. *In re VY*, Unpublished Memorandum and Order (Oct. 30, 2006) at 3 (Exhibit 3). The Licensing Board denied this motion because the need for a

---

[10] *See* 10 C.F.R. § 51.53(c)(3)(ii)(B); *see also* 33 U.S.C. § 1326 (allowing establishment of an alternative thermal effluent limitation).

[11] With respect to the other issues within the bounds of the original contention, the Licensing Board admitted NEC Contention 1. LBP-06-20, 64 N.R.C. at 178-182, 211-18. The admission of this contention was later reversed on administrative appeal. *See In re VY*, CLI-07-16, 65 N.R.C. 371, 383-90 (2007).

WQC was irrelevant to NEC's contention that Entergy had failed to assess thermal impacts. *Id.* at 7-8. [12]

This motion to amend Contention 1 was the last time in the NRC process that NEC would seek to raise the WQC issue.[13] NEC did not pursue any administrative appeals of the Licensing Board's decision denying leave to amend, nor did it take advantage of other opportunities to press the WQC question.

For example, when NRC issued its draft and final EIS, neither document identified the need for a new WQC in its listing of permits, consultations, and

---

[12] In opposing NEC's motion to amend its contention, Entergy also argued that NEC had failed to demonstrate any genuine dispute with the application:

> [Section] 401 certification is addressed in another section of the application ([Environmental Report] § 9.2.1), which NEC has never challenged. As a substantive matter, section 401(a)(3) of the Clean Water Act provides that a certification provided in connection with the construction of a facility fulfills the requirements with respect to "any other Federal license or permit required for operation of such facility. . ." 33 U.S.C. § 1341(a)(3).

Entergy's Answer to New England Coalition's Late Contention (Aug. 17, 2006) at 17, available at http://wba.nrc.gov:8080/ves/ at Accession No. ML062350138.

[13] Petitioners state that the "water quality issue [that they raised] was later ruled beyond the scope of the issues the NRC would allow to be addressed in the hearing portion of the relicensing proceeding." Motion at 5. Here, the Petitioners are referring to the original NEC contention that the environmental report did not sufficiently assess thermal impacts, *not* to any claim concerning the need for a WQC. At no point in this proceeding did the Licensing Board or Commission ever hold that the need for a WQC could not have been raised in the hearing through an appropriate, timely pleading.

approvals required in connection with continued operation.[14] Indeed, Petitioners make much of this in their own Motion. *See* Motion at 13-15. NEC could have sought to file new and/or amended contentions challenging the EIS on this basis, but it did not. Similarly, NEC's comments on the draft EIS did not mention any need for a new WQC (and neither did DPS' comments).

Further, after the Licensing Board issued its Partial Initial Decision (*In re VY*, LBP-08-25, 68 N.R.C. 763, 897 (2008) ("LBP-08-25," excerpts provided as Exhibit 4)), NEC did not take advantage of its right, *see supra* at 11-12, to appeal the Licensing Board's earlier procedural rulings with respect to the WQC. *See In re VY*, CLI-10-17, 72 N.R.C. __, slip op. at 6-7, 14 (July 8, 2010) ("CLI-10-17") (Exhibit 5) (showing that NEC only appealed rulings on one technical contention unrelated to the WQC). Indeed, NEC failed to appeal these rulings even though the Licensing Board's decision expressly provided that:

> With the exception of [one technical contention left open and unrelated to water quality] and the opportunity to seek reconsideration of facts officially and judicially noticed, this Partial Initial Decision shall constitute the final decision of the Commission forty (40) days after the date of its issuance, unless, within fifteen (15) days of its service, a petition for review is filed in accordance with 10 C.F.R. §§ 2.1212 and 2.341(b). Filing a petition for review [with the

---

[14] The draft EIS is available at http://wba.nrc.gov:8080/ves/ under accession No. ML063390344. The final EIS is available at Accession nos. ML072050012 and ML072050013. Appendix E of these documents identifies the required permits, consultations and approvals. Appendix A of the final EIS provides a summary of the comments received during the environmental review.

> Commission] is mandatory for a party to exhaust its administrative remedies before seeking judicial review. 10 C.F.R. § 2.341(b)(1).

LBP-08-25, 68 N.R.C. at 897.

On March 10, 2011, following resolution of the last admitted contention and denial of a motion to reopen the record on a new contention (having no relationship to the WQC), the Commission issued a Memorandum and Order in which it "*terminate[d]* this proceeding." *In re VY*, CLI-11-02, 73 N.R.C. __, slip op. at 18 (Mar. 10, 2011) ("CLI-11-02") (Exhibit 6) (emphasis added). This decision was served by email on all parties, including DPS and NEC.[15] Thereafter, on March 21, 2011, the NRC Staff issued the renewed license.

ARGUMENT

The Petitions and Petitioners' Motion rest entirely upon the incorrect premise that Vermont Yankee does not have a WQC under Section 401 of the Clean Water Act. *See* NEC Petition ("Entergy has neither applied for nor received a § 401 water quality certification from the State of Vermont ...."); DPS Petition ("NRC acted arbitrarily, abused its discretion, and violated the clear mandate of the

---

[15] The Commission also issued a press release informing the public that the Commission had "voted to conclude the legal proceeding regarding renewal of the [Vermont Yankee] operating license," and that the renewed license would be issued soon. NRC Press Release No. 11-041, "NRC Will Renew Vermont Yankee's Operating License for an Additional 20 Years" (March 10, 2010), available at http://wba.nrc.gov:8080/ves/ at Accession No. ML110691224. Therein, the NRC Chairman explained that "[t]his is the final step in the NRC's detailed technical and legal process of examining whether it's appropriate to issue a renewed license."

Clean Water Act ... by failing to have as part of the record of its decision" a WQC). As detailed above, Vermont Yankee does have a WQC, one upon which Entergy expressly relied in its license renewal application. Vermont led the NRC to believe no further certification was required, by advising the NRC – in language reflecting the standard under Section 401(a)(3) – that Vermont had "assurance" that discharges would meet both federal and State requirements. NRC was entitled to rely on this assurance in issuing the renewed license.

The CWA and NRC procedural rules provided Petitioners with numerous opportunities to contest the sufficiency of Entergy's existing WQC for purposes of license renewal. DPS availed itself of none of those opportunities, while NEC both raised the issue late and improperly, and then failed to pursue the administrative appeal required to preserve an issue for judicial review. Compounding Petitioners' failure to preserve the issue, Petitioners did not file their petitions within 60 days of the relevant NRC order as required under the Hobbs Act. Under this Circuit's standards for summary disposition, the Petitions should be denied without the need for full briefing and argument.

I. The Petitions Should Be Denied And Petitioners' Motion Rejected Because Vermont Yankee Has A Valid WQC

The supposed lack of a WQC for Vermont Yankee in the NRC's files is the linchpin of the Petitions and the Motion. According to the Motion, "NRC issued a renewed operating license to [Entergy] for Vermont Yankee without

receiving a 401 Certification and without determining whether a valid 401 Certification had been issued." Motion at 7. NRC, however, did receive a WQC for Vermont Yankee – the WQC identified in Entergy's Environmental Report, which is available in the NRC public document room. At no point in time has Vermont or anyone else questioned the "validity" of the existing WQC – which, of course, Vermont has in its own State files too.

That existing WQC, unquestionably possessed by the NRC, is sufficient to support the renewed operating license for Vermont Yankee. Under Section 401, no expiration date is placed on a WQC received from a state. Moreover, under Section 401(a)(3), there is a presumption, at most rebuttable, that a project in possession of a WQC continues to operate in compliance with applicable water quality standards. A state that previously issued a WQC in connection with construction of a facility has 60 days, following notice that an application has been filed for a subsequent license to operate a facility, in which to rebut that presumption. *See supra at* 5-6, quoting 33 U.S.C. § 1341(a)(3);[16] s*ee also* *Keating*, 927 F.2d at 624. Section 401(a)(3) belies Petitioners' assertion that "[i]n

---

[16] The fact that NRC may rely on a previously received WQC for purposes of future operating licenses contradicts Petitioners' strained argument that if NRC does not receive a new WQC then it cannot comply with a "ministerial obligation" to inform EPA of the WQC, so that EPA may inform other, potentially interested states. *See* Motion at 10. EPA and these other states received notice of the WQC when it was originally issued.

the absence of a 401 Certification *specific to the new license*, NRC was obligated by § 401 to reject the application" (Motion at 12) and also belies their assertion that "401 Certifications issued with respect to previous licenses are [not] applicable to renewed licenses." Motion at 15.[17]

In this case, Vermont received notice from the NRC that Entergy had filed an application for renewal of Vermont Yankee's operating license no later than March 27, 2006. *See supra* at 8. Entergy's publicly-available application clearly indicated that Entergy was relying on its existing WQC in support of its application for a renewal license. At no point within 60 days of March 27, 2006, however, did Vermont inform the NRC that, despite the 1970 WQC, "there is no longer reasonable assurance that there will be compliance with the applicable" water quality standards. Nor did Vermont ever assert that the existing WQC had expired or otherwise did not qualify for treatment under Section 401(a)(3). To the contrary, shortly after expiration of the 60-day deadline for contesting the existing

---

[17] Petitioners argue that "NRC regulations" demonstrate that water quality certificates do not apply to new licenses. *See* Motion at 15. Nothing they cite stands for that proposition; indeed, the cited regulations say nothing about water quality certificates at all. *See id.* at 15-17. The regulations instead state that the prior NRC *license* expires when a new *license* is issued. There is nothing in Section 401 or anywhere else in Federal law limiting the effectiveness of a WQC to the particular license for which it is issued. Under Section 401(a)(3), for example, whatever happens to the *license* is not dispositive; unless the State can demonstrate that changed circumstances preclude reasonably assured compliance with water quality standards, the WQC endures.

WQC, VANR advised NRC exactly the opposite: reflecting the very standard of Section 401(a)(3), VANR reported to NRC that "[t]he requirements of the Clean Water Act and the NPDES permit *will provide assurance* that the impacts of the permitted intake structures and discharges meet the applicable federal and state requirements." *Supra* n.5 (emphasis added).

It was reasonable for NRC (and Entergy) to view the wording of VANR's submission as Vermont's agreement that Entergy had complied with Section 401. Indeed, the fact that Vermont *never* raised the absence of a WQC during the five subsequent years of NRC proceedings confirms that Vermont's silence during the 60-day window and VANR's assertion that it had the requisite assurances under the Clean Water Act were anything but accidental.[18]

Petitioners argue, however, that "NRC was obligated to specifically inquire of Vermont whether what was purportedly a 401 Certification did in fact meet the § 401 requirements," and "there is no correspondence identified in which NRC asked Vermont ... whether [Vermont Yankee's] old certification or § 402 permit qualified as a 401 Certification under Vermont law." Motion at 11, 13. That is fatal to the renewed license, Petitioners assert, because it is a question of *state* law

---

[18] VANR's position was also rational, because the continually renewed requirements of the NPDES permitting process under § 402 of the Clean Water Act are designed to require compliance with the sections of the Act listed in § 401 and with state water quality standards.

"whether the prior certificate [Vermont Yankee] had obtained was the certification required by § 401 for relicensing." *Id.* at 10-11.

Petitioners' "no correspondence" argument is both legally and factually meritless. As a *factual* matter, Petitioners' argument never acknowledges the fact that the NRC met with, and solicited comments from, VANR, the Vermont agency that issues WQCs, in response to which VANR replied in writing that Vermont Yankee's compliance with state water quality standards was "assure[d]." As a matter of law, Petitioners' argument ignores Section 401(a)(3), which, as noted above, places the onus on the state to tell the NRC within 60 days whether the existing certificate should no longer be deemed sufficient. Here, Vermont never did that; again, VANR did the very opposite. Finally, Petitioners' argument ignores this Court's previous holding that the question of whether a previously issued WQC is sufficient for future operating licenses is a matter of *Federal* law, not state law. *See Keating,* 927 F.2d at 622. Except as provided in Section 401(a)(3), the State cannot revoke the effectiveness of a previously issued WQC.

The 60-day provision in Section 401(a)(3) reflects Congress's expectation that the question whether an existing WQC satisfies Section 401 will be addressed early in the relicensing process. As this Court has explained:

> The statute allows a state to revoke a prior certification only within a specified time limit and only pursuant to certain defined circumstances; if a state could revoke a prior certification at any time

> and for any (or no) reason, however, section 401(a)(3) would be rendered meaningless. Obviously, such a result would make no sense.

Keating, 927 F.2d at 623. A state cannot remain silent – or, as here, assure the licensing agency that water quality standards will be met – only to later raise the issue of the sufficiency of an existing WQC after a license has already been issued in reliance on that certificate. *See id.* at 623-24. Because Vermont did not move to revoke the existing WQC during the time permitted by Federal law, Petitioners cannot now deny the WQC's existence.

Accordingly, because both Petitions are based on an incorrect premise – that Vermont Yankee simply does not have a valid WQC – the Petitions, and Petitioners' Motion for summary reversal, must be denied. Likewise, because Vermont Yankee does have a valid WQC that Vermont did not act to revoke within the time allotted or for the reasons permitted by Federal law, as well as an NPDES permit assuring compliance with the water qualify standards as confirmed by the state, the Commission's decision should be summarily affirmed.

II. Petitioners Failed to Exhaust Their Administrative Remedies

Even putting aside the text of Section 401, Petitioners' Motion must be denied and summary affirmance given to the renewed license because neither DPS nor NEC exhausted their administrative remedies with respect to the arguments they now make. "[A]s a general rule . . . courts should not topple over administrative decisions unless the administrative body not only has erred, *but has*

erred against objection made at the time appropriate under its practice." *Woodford v. Ngo,* 548 U.S. 81, 90 (2006) (emphasis in original) (citation omitted). The administrative exhaustion requirement gives agencies "a fair and full opportunity" to adjudicate claims presented to them by requiring that litigants use "*all steps* that the agency holds out, and d[o] so *properly* (*so that the agency addresses the issues on the merits*)." *Id.* (emphasis added) (citation omitted). "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Id.* at 90-91 (footnote omitted).

The exhaustion requirement serves two important purposes. First, it protects against inappropriate judicial interference with administrative agencies' authority, "giv[ing] an agency 'an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court,' and it discourages 'disregard of [the agency's] procedures.'" *Id.* at 89 (citation omitted). Second, it promotes efficiency.

> Claims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court. In some cases, claims are settled at the administrative level, and in others, the proceedings before the agency convince the losing party not to pursue the matter in federal court.

Id.

As explained above, the NRC's regulations required the Petitioners' original hearing requests to include contentions based on Entergy's Environmental Report. 10 C.F.R. § 2.309(f)(2). The rules then provided an opportunity for new contentions to be filed after publication of the NRC's draft and final EIS. Id. Petitioners were given an opportunity for the administrative appeal of adverse determinations by the Licensing Board to the Commission and were explicitly told that they needed to file such an appeal to preserve their right to judicial review. *See supra* at 15-16.

Petitioners failed to comply with each of these procedural requirements and thus never exhausted their administrative remedies. DPS never, in any form or format, suggested the need for a new WQC or questioned the sufficiency of the existing WQC. It submitted no contentions concerning a WQC in response to the Environmental Report.[19] It never disputed VANR's assertion that compliance with Vermont water quality standards was assured. DPS was on notice from the draft and final EIS that the NRC Staff was prepared to issue a renewal license without a new WQC, yet filed no contentions in response to those documents either. Indeed,

---

[19] DPS' claim that "Vermont and NEC sought to raise the issue of the absence of the required 401 Certification" (Motion at 5) is incorrect. When DPS moved to adopt NEC's contentions, none of those contentions raised this issue. Further, when NEC later moved to amend one if its contentions to add the need for a WQC as additional basis, DPS made no attempt to adopt that amended contention. Moreover, the Licensing Board only permitted DPS to adopt admitted contentions, and no contention concerning the need for a WQC was ever admitted.

while Petitioners now claim that NRC's "failures" to discuss the WQC in the EIS "contravened [NRC's] own statements regarding how it would comply with the mandate of § 401 when evaluating proposed renewed licenses," Motion at 13, DPS never raised these failures with NRC through a contention, comments, or administrative appeal.[20] Throughout the license renewal process, DPS said and did nothing to suggest the need for a new WQC.

NEC likewise failed to include a contention related to Section 401 certification in its initial contentions. Instead, after improperly attempting to inject this issue in a reply brief, it sought to add the need for WQC certification as a further basis for its original contention alleging that Entergy's Environmental Report contained an insufficient assessment of thermal impacts. After the Licensing Board rejected NEC's improper attempts to shoehorn a new issue into an irrelevant contention, NEC made no attempt to submit any new contention directly asserting the need for a new Section 401 certification or challenging the discussion in the Environmental Report. While Entergy's pleadings had explained how the certification referenced in the Environmental Report satisfied Section 401 (*supra* n.12), NEC never once identified any alleged error in that position.

---

[20] Notably, the "contravention" of NRC regulations, as distinct from the requirements of Section 401, is not even identified as an issue in the Petitions.

Further, NEC never submitted any new contentions asserting the need for a new WQC in response to the draft or final EIS, nor did it seek to appeal the Licensing Board's rulings rejecting NEC's attempt to raise a WQC issue, as it was permitted to do and even though it was explicitly informed that an appeal was necessary to preserve a claim for judicial review. *See supra* at 15-16.

This is not a case of a mere foot fault. Petitioners studiously and repeatedly failed to make any effort to exhaust their available remedies before NRC. Having clearly failed to take "*all steps*" to raise this issue and do so *properly [] so that the agency addresses the issue[] on the merits*," *Woodford,* 548 U.S. at 90-91, the petitions must be denied.

III. The Petitions Are Untimely Under the Hobbs Act

Both the DPS and NEC Petitions and their Motion also must be denied because they were not filed within 60 days of the relevant final order reviewable under the Hobbs Act. The 60-day filing period prescribed by the Hobbs Act is jurisdictional. *See National Resources Defense Council v. NRC*, 666 F.2d 595, 602 (D.C. Cir. 1981). Here, the Commission's March 10, 2011 Memorandum and Order, CLI-11-02, constituted the relevant final order because it terminated the adjudicatory proceeding and, with it, DPS' and NEC's participation as parties. The DPS and NEC petitions for judicial review were filed on May 20, 2011 – seventy days after CLI-11-02 – and therefore cannot be entertained.

Final orders are those that impose an obligation, deny a right or fix some legal relationship. *Honicker v. NRC*, 590 F.2d 1207, 1209 (D.C. Cir. 1978) (per curiam), *cert. denied*, 441 U.S. 906 (1979).

> Generally, . . . an NRC order is final if it disposes of all issues as to all parties in the licensing proceeding, that is, if it consummates the agency's decisionmaking process and results in granting, denying, suspending, revoking, or amending a license.

Massachusetts. v. NRC, 924 F.2d 311, 322 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991). Final orders, however, are not necessarily the last order in a proceeding. *See Bethesda Chevy Chase Broadcasters, Inc. v. FCC*, 385 F.2d 967, 968 (D.C. Cir. 1967). Courts have recognized that NRC's final adjudicatory decisions are final orders reviewable under the Hobbs Act, even when license issuance has not yet occurred. For example, in *Environmental Law & Policy Center v. NRC*, 470 F.3d 676 (7th Cir. 2006), the Court held that an NRC decision resolving a party's contentions in a licensing proceeding constituted a final order, even though the NRC had not yet issued the license, because that order terminated the party's involvement in the proceeding. The adjudicatory decision thus "determined the [party's] rights, and legal consequences flowed from that determination." *Id.* at 681. There are a multitude of decisions in which the Courts have similarly granted review of such adjudicatory decisions, thus indicating the finality of the orders. *See, e.g., New Jersey Envtl. Fed'n v. NRC*, Case No. 09-2567, 2011 U.S. App. LEXIS 10021, at *17 (3d Cir. May 18, 2011) (judicial review following

Commission "Final Decision" affirming Licensing Board Initial Decision and denying intervenor's motion to reopen and petition for review); *National Whistleblower Ctr. v. NRC*, 208 F.3d 256, 258, 261 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) (judicial review of Commission decision affirming Licensing Board decision denying intervention).[21]

Here, CLI-11-02 terminated the adjudication and was clearly the final NRC Order that disposed of all issues that had been put in controversy. That order resulted in the renewed license being issued because with its issuance, the hearing requirements of Section 189 of the Atomic Energy Act had been fully discharged, all contested issues had been resolved in favor of the applicant, and the NRC Staff

---

[21] *See also Carolina Envtl. Study Group v. AEC*, 510 F.2d 796, 798 (D.C. Cir. 1975) (decision of Atomic Safety and Licensing Appeal Board became the final order); *Citizens v. Safe Power, Inc. v. NRC*, 524 F.2d 1291 (D.C. Cir. 1975) (review of final decision and order of Atomic Safety and Licensing Appeal Board); *San Luis Obispo Mothers for Peace v. NRC*, 635 F.3d 1109 (9th Cir. 2011) (following Commission's final adjudicatory decision, review of orders denying a "closed hearing" on sensitive information and rejecting certain contentions); *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006) (Commission decision denying petition for review of Licensing Board decisions was final order reviewable by the Court under 28 U.S.C. 2344); *Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999) (reviewing NRC final order denying request to intervene in licensing proceedings); *Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir.) (reviewing Commission order denying late-filed intervention in licensing proceeding), *cert. denied*, 498 U.S. 896 (1990); *Sierra Club v. NRC*, 862 F.2d 222 (9th Cir. 1988) (decision of Appeal Board affirming Licensing Board decision was final reviewable order). It should be noted that until 1991, when it was abolished, the NRC's Atomic Safety and Licensing Appeal Board presided over administrative appeals in NRC adjudicatory proceedings. 56 Fed. Reg. 29,403 (June 27, 1991).

was free under the NRC rules to issue the license *See* 10 C.F.R. § 2.340(a). As the Commission announced, CLI-11-02 constituted "the final step" terminating the legal proceeding and allowing the renewed license to be issued. *Supra* n.15.

Treating the final adjudicatory decision resolving the disputes that a party raised in a hearing as the relevant "final order" aligns the reviewable order with the requirement in 28 U.S.C. § 2344 that judicial review may only be sought by a "party aggrieved." Further, 28 U.S.C. § 2347(a) requires judicial review based on the record consisting of the pleadings, evidence adduced, and proceedings before the agency when the agency has held a hearing (as in this case). Therefore, the relevant, reviewable final order should be order that terminates the adjudication.

Construing "final order" as the final adjudicatory decision resolving the disputes that a party raised in a hearing, not license issuance, is also appropriate as a matter of policy. If the final adjudicatory order were not considered the final order under 28 U.S.C. §2344, then parties whose hearing requests are resolved (and thus, whose participation is ended) early in a proceeding would have to wait until license issuance to seek redress. Conversely, parties who unsuccessfully opposed licensing in an NRC hearing could delay seeking judicial review until after licensing issuance (which can occur much later if a hearing request is resolved early in a proceeding), thus threatening to unnecessarily disrupt or delay the licensed activity. Such outcomes would be inconsistent with the judicial

interest in insuring prompt review. *See Sierra Club*, 862 F.2d at 225 (recognizing the interest in prompt review).

CONCLUSION

For the foregoing reasons, this Court should deny Petitioners' Motion and summarily deny the Petitions.

Respectfully submitted,

/s/ David R. Lewis

David R. Lewis
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street NW
Washington, DC 20037
(202) 663-8474
david.lewis@pillsburylaw.com

Counsel for Entergy

Dated: July 29, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July, 2011, Intervenor-Respondents' Opposition to Petitioners' Motion for Summary Reversal and Intervenor-Respondents' Cross-Motion for Summary Disposition was served via the D.C. Circuit's Case Management/Electronic Case Files system. In addition, copies of the foregoing were also served by deposit in the U.S. mail, first class, postage prepaid, and by electronic mail, on the persons listed below, this same date.

John F. Cordes, Jr., Esq.
Solicitor
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
John.cordes@nrc.gov

Sean Croston, Esq.
Office of General Counsel
United States Nuclear Regulatory Commission
Washington, DC 20555-0001
Sean.Croston@nrc.gov

John E. Arbab, Esq.
Environmental & Natural Resources Division, Appellate Section
United States Department of Justice
Patrick Henry Building, Room 2121
601 D Street, NW
Washington, DC 20004
john.arbab@usdoj.gov

Anthony Z. Roisman, Esq.
National Legal Scholars Law Firm, P.C.
241 Poverty Lane, Unit 1
Lebanon, NH 03766
aroisman@nationallegalscholars.com

Christopher M. Kilian, Esq.
Conservation Law Foundation
15 East State St. #4
Montpelier, VT 05602
ckilian@clf.org

Tricia K. Jedele, Esq.
Conservation Law Foundation
55 Dorrance St.
Providence, RI 02903-2221
tjedele@clf.org

/s/ David R. Lewis
David R. Lewis