ORAL ARGUMENT UNSCHEDULED

11-1168

11-1177(CON)

United States Court of Appeals for the District of Columbia Circuit

VERMONT DEPARTMENT OF PUBLIC SERVICE,

Petitioner,

v.

UNITED STATES OF AMERICA and NUCLEAR REGULATORY COMMISSION,

Respondents,

and

ENTERGY NUCLEAR OPERATIONS, INC. and
ENTERGY NUCLEAR VERMONT YANKEE, LLC,

Intervenors.

On Petition for Review of A Decision Of The
U.S. Nuclear Regulatory Commission

PROOF BRIEF FOR STATE OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE STATE OF NEW YORK

The Clean Water Act empowers States to adopt water-quality standards and review them periodically to establish and maintain the desired conditions and uses of waterways within their borders. The Act provides a means for States to implement their water-quality standards with respect to federal licensees by prohibiting federal agencies from granting any federal license for an activity that may discharge to a State's navigable waters unless the State has issued a certification affirming that the proposed activity will comply with the State's water-quality standards. Vermont's petition for review, challenging the March 2011 decision of the Nuclear Regulatory Commission to renew the operating license for the Vermont Yankee nuclear power plant, which discharges into the Connecticut River, presents the legal question whether NRC was required to deny an application for a license renewal that did not include a current state-certification directed at the application under consideration, or whether NRC could instead rely on a certification issued forty years earlier in connection with the application for the plant's initial operating license.

The State of New York, as *amicus curiae* pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, has a strong interest in confirming that the Clean Water Act mandates a *current* state-certification to ensure that any activity conducted in New York pursuant to a federal license comports with New York's water-quality standards. Many power-generating facilities in New York, including six commercial nuclear reactors and dozens of hydroelectric plants, require licenses from either NRC or the Federal Energy Regulatory Commission. The nuclear reactors in New York, like the Vermont Yankee reactor, withdraw cooling water from state waterways and then discharge it back into those waterways, impacting fish and other aquatic organisms. New York is also downstream of the Vermont Yankee plant, which discharges into the Connecticut River, which in turn flows into the Long Island Sound, and thus will be affected by NRC's relicensing of that plant without a current state-certification.

STATEMENT

A. State Water-Quality Standards Under the Clean Water Act

The Clean Water Act "is a comprehensive water quality statute designed to 'restore and maintain the chemical, physical, and biological

integrity of the Nation's waters.'" *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994) (citing 33 U.S.C. § 1251(a)). The Act "anticipates a partnership between the States and the Federal Government" to achieve that critical national objective. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

The Act establishes two basic water-pollution-control mechanisms. First, EPA promulgates guidelines for "effluent limitations," which are nationwide technology-based limitations on discharges of specified substances by point sources. 33 U.S.C. §§ 1311, 1314. Those guidelines are the basis for effluent limitations in permits issued to point sources by either EPA or by a State if its water-pollution-control statute has been approved by EPA. *Id.* § 1342.

Second, section 303 of the Act requires States to promulgate "water quality standards," which establish the desired condition of each particular waterway in the State. 33 U.S.C. §§ 1313. Water-quality standards supplement effluent limitations, "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *PUD No. 1*, 511 U.S. at 704 (quotation marks omitted).

A water-quality standard "consist[s] of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." *Id.* § 1313(c)(2)(A). In establishing water-quality standards, a State must consider a waterway's "use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes," as well as its "use and value for navigation." *Id.* EPA's regulations specifically require that water-quality standards include "an antidegradation policy to ensure that [e]xisting instream water uses and the level of water quality necessary to protect [those] uses [are] maintained and protected." *PUD No. 1*, 511 U.S. at 700; *see also* 40 C.F.R. § 131.12.

States are required to engage in a "continuing planning process" regarding their water-quality standards and to review the standards at least every three years. 33 U.S.C. § 1313(c), (e).

B. The Clean Water Act's State-Certification Requirement

Section 401(a)(1) of the Clean Water Act mandates that any applicant seeking a federal license "to conduct any activity" which "may result in any discharge into the navigable waters" must obtain "a certification from the State in which the discharge originates." 33

U.S.C. § 1341(a)(1). The state certification must affirm that the proposed discharge will comply with certain provisions of the Act, specifically including state water-quality standards established under 33 U.S.C. 1311. *Id.* Section 401(d) requires a certification to set forth effluent limitations and any other terms "necessary to assure that" the applicant will comply with the Act and "any other appropriate requirement of State law." *Id.* § 1341(d).

Section 401(d) also provides that the certification's requirements "shall become a condition" of the applicant's federal license. *Id.* Thus, section 401 makes it clear that Congress intended that a States' water-quality requirements be considered whenever a federal agency receives a license application involving a discharge to a State's waters. The legislative history further confirms Congress' intent, stating that "[t]he purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements." S. Rep. No. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3735 (1972).

By regulation, EPA has prescribed the required contents of a section 401 certification. 40 C.F.R. § 121.2(a). The certification must

affirm that the State has "examined the application made by the applicant to the licensing or permitting agency (specifically identifying the number or code affixed to such application) and bases its certification upon an evaluation of the information contained in such application which is relevant to water quality considerations." *Id.* The certification must also state that "there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards," and must identify "any conditions which the certifying agency deems necessary or desirable with respect to the discharge of the activity." *Id.*

C. NRC's Licensing of Nuclear Reactors

The Atomic Energy Act requires operators of nuclear reactors to obtain operating licenses from NRC. 42 U.S.C. §§ 2132-2134. The initial term of an operating license cannot exceed forty years. *Id.* § 2133. In 1991, NRC promulgated regulations governing the renewal of operating licenses for terms of up to twenty years. 10 C.F.R. § 54.31(b); 56 Fed. Reg. 64,943 (Dec. 13, 1991). A renewed license "become[s] effective immediately upon its issuance" and "supersede[s]" the existing license. 10 C.F.R. § 54.31(c).

NRC's regulations provide that the term "license" includes a "renewed license." *Id.* § 2.4. They also expressly recognize that an application, whether it involves an initial license or a renewal, must comply with section 401 of the Clean Water Act by providing a state water quality certification. 10 C.F.R. § 50.54(aa) (stating that an operating license "shall be subject to all conditions deemed imposed as a matter of law by sections 401(a)(2) and 401(d) of the [Clean Water Act]"); *see also* 10 C.F.R. § 54.33(c) (stating that 10 C.F.R. § 50.54 applies to all license renewals); *see also Environmental Review for Renewal of Nuclear Power Plant Operating Licenses*, 61 Fed. Reg. 28,467, 28,474 (June 5, 1996) ("In issuing individual license renewals, the Commission will comply, as has been its practice, with the provisions of Section 401").

ARGUMENT

NRC CAN RENEW A LICENSE ONLY IF IT HAS RECEIVED A CURRENT STATE-WATER-QUALITY-CERTIFICATION

It is beyond dispute that a federal agency may not issue a license for an activity resulting in a discharge to navigable waters absent a valid state certification pursuant to section 401(a)(1) of the Clean Water Act. *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) ("There is no doubting that FERC is bound by federal law to refuse a [hydroelectric power plant] license application that is unsupported by a valid state certification under section 401"); *Alcoa Power Generating Inc., v. FERC*, 643 F.3d 963, 965, 966 (D.C. Cir. 2011)("[a] precondition of licensing is receipt of a State certification"); *see also PUD No. 1,* 511 U.S. at 707; *S.D. Warren Co. v. Maine Bd. of Envt'l Prot.*, 547 U.S. 370, 380 (2006); *Alabama River Alliance v. FERC,* 325 F.3d 290, 299 (D.C. Cir. 2003).

This certification requirement applies to an application to renew a federal license, just as it does to an application for an initial license. *See S.D. Warren Co.*, 547 U.S. at 380 (applying section 401 to an application for license renewal); *Alcoa Power Generating Inc.*, 643 F.3d at 965 (holding that a State had not waived its authority to submit a

certification in a license renewal proceeding); *FPL Energy Maine Hydro LLC v. FERC*, 551 F.3d 58, 60 (1st Cir. 2008). Indeed, NRC's regulations recognize that section 401 applies to renewal licenses for nuclear power plants. 10 C.F.R. §§ 50.54(aa), 10 C.F.R. 54.33(c); *see also id.* § 2.4 (defining "license" to include a renewal license).

In issuing section 401 certifications for federal licenses, States act as "deputized regulators of the Clean Water Act," *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 164 (2d Cir. 2008), exercising the authority conferred by Congress "to give the states veto power over the grant of federal permit authority for activities potentially affecting a state's water quality," *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 99-100 (1st Cir. 1989). Federal courts have consistently held that federal agencies must include state certification conditions in federal permits, and lack authority to reject, modify or adjudicate them. *See, e.g., U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992) ("[The federal agency] may not alter or reject conditions imposed by the states through Section 401 certificates."); *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1218 (9th Cir. 2008) ("[A] federal licensing agency lacks authority to reject [water quality certification] conditions

in a federal permit."); *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 110-11 (2d Cir. 1997) ("[The federal agency] does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401.").

As demonstrated below, to comply with section 401, the state certification must be current and based on the specific application under consideration by the federal agency. Thus, an application to renew a license cannot be granted on the basis of a state certification issued in connection with an application for a prior operating license. This conclusion follows directly from the text of the Clean Water Act, particularly when that text is read in light of the fundamental statutory purpose to ensure that States can and do maintain the quality of their waterways in the face of ever changing circumstances. EPA's implementing regulations are equally clear.

1. The text of section 401 requires an applicant to submit a current state-certification before a license renewal may be granted. Section 401(a)(1) requires an applicant for "any activity" which "may result in any discharge into the navigable waters" to provide the licensing agency with a state certification that "any such discharge will

comply" with the Act, including state water-quality standards. 33 U.S.C. § 1341(a)(1). Because the phrase "any such discharge" refers to the discharge that "may result" from the activity for which the applicant seeks the federal license, the only reasonable reading of section 401(a)(1) is to require a certification regarding the proposed discharge resulting from the license then under consideration. Indeed, in *S.D. Warren Co.*, the Court emphasized that section 401 has "a broad reach, requiring state approval *any* time a federally licensed activity 'may' result in a discharge." 547 U.S. at 380 (emphasis added).

The other provisions of section 401 reinforce the conclusion that before a federal agency can issue a license, a current state-certification, directed at the application under consideration, is required. For example, section 401(a)(2) requires EPA to conduct a current assessment, based on a pending license application, of a proposed activity's impact on States *other* than the State where the discharge originates. 33 U.S.C. § 1341(a)(2). It provides that after the licensing agency receives the application and state certification, the agency must notify EPA of the application and certification, so that EPA may assess whether downstream States may be affected by the activity. *Id.* If so,

EPA must notify those other States, give them an opportunity to assess whether the activity would threaten their own water-quality standards, and, if necessary, hold a hearing to determine whether additional conditions should be imposed by the license. It would make no sense for section 401 to require EPA to undertake a current assessment of the impact of a discharge in States other than the State where the discharge occurs but to allow the federal agency considering the license to rely upon on a previously issued section 401 certification regarding the impact of the discharge in the State where the discharge occurs.

Moreover, section 401(a)(3) of the Act, 33 U.S.C. § 1341(a)(3), specifies one circumstance, not applicable here, in which an applicant may rely on a certification issued in connection with a prior application, and the Act cannot reasonably be read to permit reliance on an earlier certification in other circumstances that do not meet section 401(a)(3)'s terms. *See Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-617 (1980). Section 401(a)(3) provides that, if a licensee obtains a certification in connection with a "construction license or permit" for a particular facility, it is presumptively not required to obtain another certification when it subsequently applies for a "Federal license or permit required

for the operation of such facility," unless the State concludes that a new certification is needed due to changed circumstances. 33 U.S.C. § 1341(a)(3).[1] This exception makes sense, because the application for an initial operating license generally follows closely on the heels of the application for a construction permit, and a state certification issued in connection with the proposed construction naturally considers the impact of the facility's operation as well.

Although NRC and Entergy have suggested in prior filings in this Court that Vermont Yankee's renewal application may fall under section 401(a)(3),[2] the provision does not in fact apply here. The section 401 certification obtained by the plant's operator in 1970 was issued in

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[1] Congress enacted critical safeguards to ensure that, even when section 401(a)(3) applies, States are given the opportunity to assess the impact of the proposed activity in light of present circumstances. Thus, section 401(a)(3) expressly requires the federal licensing agency to notify the State of the application for the operating license, after which the State may inform the federal agency that "there is no longer reasonable assurance" that the facility will comply with the Act, due to changes in "(A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements." 33 U.S.C. § 1341(a)(3).

[2] NRC Response in Opposition at 8, filed July 29, 2011 [Docket Item 1321588]; Entergy Response in Opposition at 1, 5-7, filed July 29, 2011 [Docket Item 1321589].

connection with its first operating license, not its construction permit, which was issued in 1967. *See* Joint Br. of Vt. Dep't of Pub. Serv. and New England Coal. at 4 n.2; 32 Fed. Reg. 18,066, 18,067 (Dec. 16, 1967). Section 401 recognizes no exception for certifications obtained in connection with prior operating licenses. Nor would such an exception make sense, given that an initial application and a renewal application are often separated by several decades, as they are in this case.[3] Indeed, the NRC regulations first authorizing renewal of an operating license were promulgated more than twenty years after Vermont issued the certification on which NRC purported to rely here.

2. In addition to the text, the purpose of the Clean Water Act—and in particular the objectives of sections 303 and 401 of the Act—underscores that licensing agencies must require a current state-certification addressed to the application under consideration, and may

[3] Section 401(a)(6) created a limited, short-term grandfather rule excusing applicants for an operating license from submitting a state certification where actual construction of the facility began before April 3, 1970. 33 U.S.C. § 1341(a)(6). The statute expressly provided that any such operating license would terminate on April 3, 1973, unless a state certification was obtained in the interim. This further shows that Congress never contemplated that a licensing agency could excuse the need for a certification for a period approaching the twenty-year renewal term at issue here.

not approve applications based upon outdated certifications. The Supreme Court has made clear that section 401 grants a State full authority "to ensure compliance with state water quality standards" promulgated under section 303 of the Act, and specifically affirms the State's ability to require an applicant to adhere to standards regarding "water-quality criteria" and "designated uses" of the State's waterways. *PUD No. 1,* 511 U.S. at 714-15.

In light of these purposes, section 401(d) provides that the requirements imposed by a State's certification become a condition of the federal license. 33 U.S.C. § 1341(d). Because any such requirements are useful only if they reflect current circumstances—including the plant's current operations, the currently available technology for controlling the plant's discharge of pollutants, the current quality of the water into which the plant's discharges, and the State's current water-quality standards— they can be imposed only through a current certification. It is illogical to interpret section 401(d) to mean that, once a State issues a section 401 certification for a facility's initial operating license, the requirements of that certification are frozen and automatically incorporated into future licenses

regardless of whether changes in water quality, regulatory criteria, or plant operations may result in vastly different impacts on water quality.

Allowing a federal licensing agency to rely on a certification issued with respect to a prior license would also disserve the Clean Water Act's broader goal of restoring and maintaining the quality of the Nation's waters. 33 U.S.C. § 1251(a). To advance this goal, EPA requires state water-quality standards to include "a statewide antidegradation policy" which ensures that "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 C.F.R. § 131.12. A State will be able to meet the Act's goals and fully implement its antidegradation policy only if an applicant for a new license is required to obtain a current section 401 certification that reflects any improvements in the quality of the water into which the applicant discharges and imposes more stringent requirements if necessary to maintain the current quality.

3. EPA's regulation prescribing the necessary contents of a state certification—which is entitled to deference, *see PUD No. 1*, 511 U.S. at 712—further reinforces the conclusion that only a current

certification, directed to the specific application under consideration, complies with the statute. EPA requires a section 401 certification to affirm that the State has (1) examined the license application (identified by application number), and (2) based the certification "upon an evaluation of the information contained in such application which is relevant to water quality considerations." 40 C.F.R. § 121.2(a). By requiring a State to base its certification on the currently pending application, the regulation confirms beyond any doubt that a federal agency cannot rely on a certification issued in connection with an earlier license application.

CONCLUSION

For these reasons, New York supports Petitioners' request that the Court reverse NRC's renewal of Vermont Yankee's operating license and remand to NRC for further proceedings.

Dated: New York, N.Y.
November 28, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Oren L. Zeve, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 3,263 words and complies with the type-volume limitations of Rule 32(a)(7)(B).

/s/ Oren L. Zeve
Oren L. Zeve