ORAL ARGUMENT SCHEDULED MAY 9, 2012

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

No. 11-1168 Consolidated with 11-1177

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

JOINT REPLY BRIEF OF VERMONT DEPARTMENT OF PUBLIC SERVICE AND NEW ENGLAND COALITION, INC.

Christopher M. Kilian, Esq.
Anthony N.L. Iarrapino, Esq.
Conservation Law Foundation
15 East State St. #4
Montpelier, VT 05602
802.223.5992
Pro Bono Counsel for New England Coalition

Anthony Z. Roisman, Esq.
National Legal Scholars Law Firm
241 Poverty Lane, Unit 1
Lebanon, NH 03766
603.443.4162

John Beling, Esq.
112 State Street
Montpelier, Vermont 05620-2601
802.828.3167
Counsel for State of Vermont Department of Public Service

TABLE OF CONTENTS

Contents

A. NRC's *Post-Hoc* Rationalization Does Not Cure its CWA Violation and this Court has Consistently Barred *Post-hoc* Rationalizations. 1

B. A Section 402 Permit is Not a Substitute for a Section 401 Certification. 4

II. ENVY'S RELIANCE ON THE 42-YEAR-OLD WQC IS NOT COGNIZABLE AND LACKS MERIT 7

A. NRC has Disavowed Adopting the Rationale Urged by ENVY. 7

B. ENVY's 1970 WQC Arguments Lack Merit. 9

III. A JUDICIAL REMEDY FOR NRC'S PATENT §401 VIOLATION IS APPROPRIATE 13

IV. IT IS APPROPRIATE FOR THIS COURT TO ADJUDICATE THIS APPEAL ON THE MERITS. 14

A. Vermont Did Not "Procedurally Default" on its §401 Claim. 17

B. Vermont and NEC Were Not Obliged to Exhaust Their §401 Claim. 21

CONCLUSION 27

CERTIFICATE OF COMPLIANCE WITH APPELLATE RULE 32 28

CERTIFICATE OF SERVICE 29

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES

Ad Hoc Comm. of AZ-N.M.-TX-FL Producers of Gray Portland Cement v. United States, 13 F.3d 398 (Fed. Cir. 1994) 4

Alcoa Power Generating, Inc. v. FERC, 643 F.3d 963 (D.C. Cir. 2011) 4, 6, 15, 26

American Rivers v. FERC, 129 F.3d 99 (2d Cir. 1997). ..... 12 , 26

ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978). 25

Bethesda Hosp. v. Bowen, 485 U.S. 399 (1988) 26

City of Santa Clarita v. Dep't of Interior, 249 F. App'x 502 (9th Cir. 2007) 26

Confederated Tribes & Bands of the Yakima Indian Nation v. FERC, 746 F.2d 466 (9th Cir. 1984) 13

Gage v. AEC, 479 F.2d 1214 (D.C. Cir. 1973) 27

GMC v. EPA, 168 F.3d 1377 (D.C. Cir. 1999) 22

HUD v. Rucker, 535 U.S. 125, 132-33 (2002) 11

In re Dominion Nuclear Connecticut, Inc., LBP-08-09, 67 NRC 421 (2008) 19

In re Entergy Nuclear Vermont Yankee, LLC, CLI-07-16, 65 NRC 371 (2007) 20

In re Philadelphia Electric Co., LBP-82-43a, 15 NRC 1423 (1982) 19

In re Public Service Co. of New Hampshire, LBP-75-61, 2 NRC 693 (1975) 19

In re Vermont Marble Co., 648 A.2d 381, 387 (Vt. 1994) 3

In re Virginia Electric & Power Co., LBP-08-15, 68 NRC 294 (2008) 19

In re Wisconsin Elec. Power Co., CLI-74-45, 8 AEC 928 (1974) 19

Kaemmerling v. Lappin, 553 F.3d 669, 675 (D.C. Cir. 2008) 24

Keating v. FERC, 927 F.2d 616, 622 (D.C. Cir. 1991) 8, 14

Lake Carriers' Ass'n v. EPA, 652 F.3d 1 (D.C. Cir. 2011) 26
Macmillan Pub. Co. v. NLRB, 194 F.3d 165, 168 (D.C. Cir. 1999) 11
Marine Mammal Conservancy, Inc. v. Dep't of Agric., 134 F.3d 409 (D.C. Cir. 1998) 26
Montijo-Reyes v. United States, 436 F.3d 19 (1st Cir. 2006) 26
Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 10
North Carolina v. FERC, 112 F.3d 1175 (D.C. Cir. 1997) 1, 16
NRDC, Inc. v. Herrington, 768 F.2d 1355 (D.C. Cir. 1985) 11
NRDC v. Kempthorne, 525 F. Supp. 2d 115 (D.D.C. 2007) 25
Point Park Univ. v. NLRB, 457 F.3d 42, 50 (D.C. Cir. 2006) 11
S.D. Warren v. State of Maine, 547 U.S. , 126 S.Ct. 1843, 1846 (2006) 4, 14, 17
Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231 (3d Cir. 1980) 25
Thermal Sci., Inc. v. NRC, 29 F. Supp. 2d 1068 (E.D. Mo. 1998) 27
TVA v. Hill, 437 U.S. 153 (1978) 11
Vincent Indus. Plastics, Inc. v. NLRB, 209 F.3d 727 (D.C. Cir. 2000) 6
Woodford v. Ngo, 548 U.S. 81 (2006) 27

STATUTORY PROVISIONS

10 V.S.A. § 1004 3
33 U.S.C. § 1341 ..... 1, 3, 5, 6, 7, 9, 10, 14, 15, 16, 18, 24, 25
33 U.S.C. § 1341(a) 3, 7, 12, 18, 27
33 U.S.C. § 1341(a)(1) 3, 7, 12, 18, 27
33 U.S.C. § 1341(d) 8, 9, 12, 16
42 U.S.C. §1997e(a) 27
42 U.S.C. § 2133(c) 12

REGULATIONS

40 C.F.R. §121.2(a)(3) 9

40 C.F.R. §121.2(a)(4) 9

61 Fed. Reg. 28,467, 28,474 (June 5, 1996) 1, 3

LEGISLATIVE MATERIALS

1970 U.S.C.C.A.N at 2742..... 11

ARGUMENT

I. NRC VIOLATED THE CLEAN WATER ACT BY GRANTING A NEW OPERATING LICENSE FOR VERMONT YANKEE WITHOUT OBTAINING A REQUIRED §401 CERTIFICATION.

NRC violated CWA §401(a) by issuing a new license to ENVY, one that authorizes ENVY to operate VY for an additional 21 years, without first obtaining a new Water Quality Certification ("WQC") from Vermont and without even providing a rationale for its actions. Section 401(a) unambiguously obligates NRC to "obtain" a state WQC, and bars that agency from granting a license unless it obtains a WQC. 33 U.S.C. §1341(a)(1). NRC's own regulations make clear that "license" encompasses renewed licenses and thus NRC must comply with §401 in the relicensing process. *E.g.*, *Environmental Review for Renewal of Nuclear Power Plant Operating Licenses*, 61 Fed. Reg. 28,467, 28,474 (June 5, 1996) ("SOC") ("In issuing individual license renewals, the Commission will comply … with the provisions of Section 401 …"). The record is devoid of any WQC for a renewed license for VY. Thus, NRC failed to comply with §401(a)'s clear command.

NRC cannot show that *it* complied with §401 because ENVY failed to meet its own obligations under the CWA, which "place[s] the burden of requesting a state water quality certification on the license applicant." *North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir. 1997). Thus, by requiring applicants for new (or renewed) licenses to request a WQC from a state—and by obviating a state from undertaking any action absent such a request—the CWA preserves the state's

primary and exclusive authority over water quality. *Id.* For these reasons, unless and until ENVY applies to Vermont's Agency of Natural Resources ("VANR")—the State's designated authority for granting WQCs, Vermont is not obligated to take any action. Until ENVY initiates and satisfactorily completes the §401 process, and unless and until Vermont grants a §401 permit, NRC lacks any lawful power to issue the license challenged here.

A. NRC's *Post-Hoc* Rationalization Does Not Cure its CWA Violation and this Court has Consistently Barred *Post-hoc* Rationalizations.

NRC beseeches this Court to accept a *post-hoc* rationalization to excuse its failure to abide by the CWA's plain terms. NRC argues that its plenary power to issue a license, even without a state-issued WQC, "may reasonably be discerned" from a supposedly "explicit[]"—but never quoted—1996 "announc[ement]" that "in some circumstances" where a license applicant holds a §402 NPDES permit, NRC is authorized to substitute that permit for a state's §401 WQC. NRC Br. at 35 (citing "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," 1 NUREG-1437, at §4.2.1.1 (1996)("GEIS")). NRC argues the former "provides water-quality protections equivalent to those ensured by a state § 401 certificate." *Id.* NRC concedes that its §402 argument is a *post-hoc* rationalization. NRC Motion to Dismiss at 13 (admitting NRC's counsel formulated argument "without the benefit of the Commission's judgment."). Such *post-hoc*

rationalization "carries no weight on review." *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 739 (D.C. Cir. 2000) (internal citation omitted).

Moreover, the 1996 GEIS actually says something quite different. It states, without reasoning or citation to any authority, that "[o]f course, issuance of an NPDES permit by a state water quality agency," i.e., a §402 permit, "implies certification under Section 401."[1] GEIS at §4.2.1.1. Although NRC now seeks to convert this vague, conclusory, self-serving statement into a purportedly long-held Agency position, it does not cite to a single instance in which it—let alone a court--has enforced this "implie[d]" power. Furthermore, although NRC concedes this concept applies only "in some circumstances," NRC Br. at 35, it never explains what those circumstances are or why they obtain here.[2]

---

[1] When the Commission adopted certain portions of the GEIS, that did not include the language relied upon by NRC, it said "the Commission will comply, as has been its practice, with the provisions of Section 401 of the Federal Water Pollution Control Act" with no mention of a §402 permit implying or creating compliance with §401. SOC, 61 Fed. Reg. at 28,474.

[2] NRC prepared a Final Supplemental Environmental Impact Statement ("FSEIS") in this case, as part of its non-Clean Water Act review in this matter. NRC's FSEIS is almost 800 pages long and yet it never mentions §401 or WQCs from Vermont.

Contrary to NRC's mischaracterization, a VANR lawyer's "scoping comments" on the NEPA documents NRC prepared are a reservation of Vermont's broad authority under the CWA and VANR consistently has indicated that appropriate action by the State under the CWA "will" occur, and that Vermont's water quality will be secured through such state action. *See* CRI:743. These statements simply notified NRC that Vermont "will" act diligently pursuant to the CWA if and when ENVY applied for certification in compliance with Vermont's §401-based implementing regulations. These "comments" are not a "final determination" on a WQC by the VANR "secretary" or his designee under 10 V.S.A. §1004. *See In re Vermont Marble Co.*, 648 A.2d 381, 387 (Vt. 1994).

B. A Section 402 Permit is Not a Substitute for a Section 401 Certification.

Assuming *arguendo* that the Court considers NRC's *post-hoc* rationalization, it should reject it as contrary to the CWA. Indeed, contrary to whatever NRC may have assumed was "implied[ly]" true in 1996, the Supreme Court explicitly recognized, in 2006, that "the two sections [401 and 402] are not interchangeable, as they serve different purposes and use different language to reach them." *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 380 (2006). NRC has not explained why Congress would have created two separate processes if it had intended that one could substitute for the other. NRC's argument would "require adding terms to the statute that Congress has not included," something this Court cannot do. *Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 974 (D.C. Cir. 2011).

NRC's cavalier contention that CWA §402 permits can, "in some circumstances," take the place of §401 Certification necessarily admits of *other* "circumstances" in which §402 permits cannot substitute for §401 WQCs. Yet NRC fails to explain how it, reviewing courts, or interested citizens can differentiate when such substitution would or would not be appropriate. The only clue NRC offers came in its briefing on summary reversal where counsel relied on citation to Florida law. NRC Motion to Dismiss at 9 n.4. Unlike Vermont, Florida has chosen, in a subset of cases, to merge the §401 and §402 processes its state

agency administers. Fla. Admin. Code §62-343.070(9) (2011). Vermont has exercised its sovereign right to choose otherwise. Thus, Vermont's regulations set forth separate procedures for §402 permits and §401 "Certification[s]." VWPCR 13.2, 13.11.[3] NRC's "in some circumstances" formulation and its citation to Florida law, at most, supports a conclusion that each state, rather than the federal bureaucracy, is empowered to merge the §401 and §402 processes or to keep them distinct.

Moreover, NRC fails to grasp several key statutory distinctions between §401 and §402. First, unlike §402 permitting, §401 Certification is an express precondition on federal licensing. 33 U.S.C. §1341(a)(1) ("No license or permit shall be granted until the certification required by this section has been obtained ..."). "Through this requirement, Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval." *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991). No such inter-relationship exists between State §402 permitting and federal licensing.

Second, unlike §402 permits, the conditions in a §401 certification "shall become a condition on any Federal license or permit subject to the provisions of this section." 33 U.S.C. §1341(d). This unique aspect of §401 enhances protection of state waters by making the federal licensing agency a partner in the enforcement

[3] Cited in the Addendum to Petitioners' Opening Brief at 69 & 98.

of the "effluent limitations or other limitations and monitoring requirements…and any other appropriate requirement of State law set forth in such certification." *Id.* By contrast to §401(d), nothing in §402 obligates NRC to enforce a §402 permit's terms. Further, nothing in the 2011 license NRC issued to ENVY incorporates the §402 permit's terms expressly or by incorporation.

Third, §401(d) empowers states to include conditions based on "any other appropriate requirement of state law" in a §401 certification. 33 U.S.C. §1341(d). EPA regulations make clear that state authority goes beyond simply ensuring compliance with water quality standards. 40 C.F.R. §121.2(a)(3) & (4) (mandating that a certification "shall include" "any conditions which the certifying agency deems necessary and desirable with respect to the discharge of the activity" in addition to a statement that the activity "will not violate applicable water quality standards"); *Alcoa*, 643 F.3d at 971 ("[T]he Supreme Court construed States' Section 401 certification authority broadly to admit few restrictions on a State's authority to reject or condition certification."). Because neither ENVY nor NRC have fulfilled their respective §401 obligations, VANR has not had the opportunity to define conditions that it may deem "necessary or desirable" under "appropriate requirement[s]" of state law. 33 U.S.C §1341(d).

The Court should decline NRC's invitation to violate the separation of powers by rewriting the CWA and to usurp state authority by recasting Vermont's Water Pollution Control Regulations.

II. ENVY'S RELIANCE ON THE 42-YEAR-OLD WQC IS NOT COGNIZABLE AND LACKS MERIT.

A. NRC has Disavowed Adopting the Rationale Urged by ENVY.

ENVY claims that the 42-year-old, extra-record 1970 WQC for Vermont Yankee's original operational license satisfies the §401 Certification requirement for the new 2011 license. ENVY Brief at 20-34. ENVY's arguments, like NRC's arguments, represent *post hoc* rationalizations, and are wrong, both factually and legally. The Court need not reach them. ENVY's arguments are not cognizable by the Court because NRC has flatly admitted that it did not address or adopt them below: "The Commission has not had occasion to address whether Vermont Yankee's original §401 certification remains valid for license-renewal purposes, and thus takes no position on that question here." NRC Br. at 34.[4]

"It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). This Court has repeatedly reaffirmed this long-standing precept of administrative law. *E.g.*, *Point Park Univ. v. NLRB*,

[4] The record does not support NRC's claim that ENVY's application purported to rely upon Vermont Yankee's original WQC to demonstrate continued CWA compliance, NRC Br. at 14. The only document ENVY's Environmental Resport cited to support continued CWA compliance was the NPDES permit. *See* Vermont Yankee Nuclear Power Station License Renewal Application, App. E, *Applicant's Environmental Report*, 9-1 (Jan. 25, 2006).

457 F.3d 42, 50 (D.C. Cir. 2006) ("Nor can our Court fill in critical gaps in the Board's reasoning. We can only look to the Board's stated rationale. We cannot sustain its action on some other basis the Board did not mention."); *Macmillan Pub. Co. v. NLRB*, 194 F.3d 165, 168 (D.C. Cir. 1999) (same).

Courts have also declined to adopt rationales proffered by Intervenors upon judicial review where agencies have not relied on that rationale to support their decisions (or, as here, have disavowed consideration of a rationale). *NRDC, Inc. v. Herrington*, 768 F.2d 1355, 1397 n.40 (D.C. Cir. 1985) ("As we may sustain the agency's decision only on the rationale it offered, we cannot uphold the agency's result by adopting the new definition intervenors propose."); *Ad Hoc Comm. of AZ-N.M.-TX-FL Producers of Gray Portland Cement v. United States*, 13 F.3d 398, 401 n.8 (Fed. Cir. 1994) ("Although intervenors urge that we affirm the Court of International Trade judgment under the 'circumstances of sale' provision, we decline the invitation. It is well settled that an agency's action may not be upheld on grounds other than those relied on by the agency."); *SEC v. Chenery Corp.*, 318 U.S. 80, 93 (1943) (new rationale could not be adopted on judicial review because "such a claim … was explicitly disavowed by the Commission."). Given NRC's disavowal of adoption of the 1970 WQC "for license-renewal purposes," this Court should not entertain ENVY's arguments to the contrary.

B. ENVY's 1970 WQC Arguments Lack Merit.

Assuming, *arguendo*, that the Court considers ENVY's arguments, it should reject them as meritless. As explained below, the 1970 WQC for VY expires upon expiration or termination of VY's original operating license, is not valid for purposes of license renewal, and does not satisfy §401(a)(3).

First, as explained *supra*, ENVY is an "applicant" for a "federal license" within the meaning of §401(a)(1). Like the applicant for any license, new or renewed, ENVY is required to apply for and obtain a WQC from the relevant State agency as a prerequisite to NRC's issuance of a valid license. Here, ENVY did not apply for a new WQC.

Second, ENVY emphasizes the absence of an expiration date in the 1970 Certification.[5] ENVY argues this now 42-year-old Certification thus lasts forever. The plain text and operation of §401 refutes this argument. Section 401(d) provides that "[a]ny certification provided under this section … shall become a condition on any federal license or permit subject to the provisions of this section." 33 U.S.C. §1341(d). In effect, the WQC legally merges into the Federal license. Here, the

[5] The 1970 Certification is not a part of the record of this proceeding and ENVY's citation to its terms represents reliance on extra-record information prohibited by this Court. *See* Petitioners' Motion To Strike Four Extra-Record References Contained In Respondents' Recently Filed Amended Certified Index Of The Record And In Respondents' And Intervenors' Briefs filed 3/5/2012.

original operating license had an expiration date of March 21, 2012.[6] This 40-year term was the maximum allowed by the AEA. 42 U.S.C. §2133(c). Because the WQC becomes a condition on the Federal license as a matter of law, it expires upon the expiration of the Federal license.[7]

Third, §401(a)(3) only involves certifications obtained "with respect to the *construction* of any facility." 33 U.S.C. §1341(a)(3) (Emphasis added).[8] This clear and controlling language[9] limits §401(a)(3)'s applicability to previously-issued

---

[6] In the context of an analogous federal "relicensing" process for hydropower dams, which also require WQCs the 9th Circuit has noted:

> Relicensing, then, is more akin to an irreversible and irretrievable commitment of a public resource than a mere continuation of the status quo. Simply because the same resource had been committed in the past does not make relicensing a phase in a continuous activity. Relicensing involves a new commitment of the resource, which in this case lasts for a forty-year period.

Confederated Tribes & Bands of the Yakima Indian Nation v. FERC, 746 F.2d 466, 476-77 (9th Cir. 1984) (internal citations omitted).

[7] NRC issued the new operating license challenged here on March 21, 2011, one year before the expiration date. However, by its terms the license renewal supersedes the initial operating license. 10 C.F.R. §54.31(c). The prior license and the WQC supporting it thus ceased to exist.

[8] Congress reiterated throughout §401(a)(3) that the provision is limited to certifications issued with respect to construction licenses or permits: "certification obtained pursuant to paragraph (1) of this subsection with respect to the *construction* of any facility"; "because of changes since the *construction* license or permit certification was issued"; "operation of the facility with respect to which a *construction* license or permit has been granted." 33 U.S.C. §1341(a)(3) (Emphases added).

[9] The maxim *expressio unius est exclusio alterius* also supports the proposition that Congress limited §401(a)(3) to prior certifications issued for

certifications for construction licenses and permits. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664-67 (2007) (explaining the importance of interpreting statute according to its express terms).[10]

This Court recognizes the §401(a)(3) limitation ENVY ignores. *Keating* states that "under section (a)(3) of section 401, Congress created a presumption that a state certification issued for *purposes of a federal construction permit* will be valid for purposes of a second federal license related to the operation of the same facility." 927 F.2d at 623 (Emphasis added). The Second Circuit agrees:

---

construction permits and did not include certifications for prior operating licenses. *See TVA v. Hill*, 437 U.S. 153, 188 (1978).

[10] ENVY relies on a truncated version of the legislative history of §21(b) of the Water Quality Improvement Act of 1970. Courts may not consider such history unless the statute is facially unclear. *HUD v. Rucker*, 535 U.S. 125, 132-33 (2002). But ENVY has not met that condition. In addition, ENVY misrepresents that history. ENVY selectively focuses on House and Senate debates regarding different versions of the bill and Conference Report excerpts discussing each of those versions. ENVY, however, ignores the legislative history documenting the "substantially revised" version enacted into law after the Conference Committee expressly limited the scope of §21(b)(3) (which later became §401(a)(3)) to construction permits. ENVY selectively excerpts the legislative history to exclude the following from the final Conference Report:

> In the case where a Federal license or permit is required both as to the construction of a facility and its operation, the initial certification required for the construction license or permit shall fulfill the requirements of this subsection with respect to the certification for a Federal license or permit to operate that facility … .

Conf. Rep. No. 91-940 at 52, *reprinted in* 1970 U.S.C.C.A.N at 2742. This ultimate statement of legislative intent tracks perfectly with the adopted statute. Section 401(a)(3) applies only to initial certifications issued with respect to construction licenses and permits.

> §401(a)(3) governs a rather narrow class of cases of which this one is not a member: cases in which a license applicant has already obtained a state certification-and a federal license incorporating that certification-*in connection with the construction of a facility* and then seeks a federal operating license.

American Rivers v. FERC, 129 F.3d 99, 108 n.19 (2d Cir. 1997). (Emphasis added).

ENVY's §401(a)(3) argument also lacks factual support because VY's 1970 WQC was issued *three years after issuance of the construction permit* for the facility and in conjunction with the operating license. *See* CRI 737, "Final Environmental Statement related to operation of Vermont Yankee Nuclear Power Station"("FES") at I-1 (VY "filed with the AEC an application dated November 30, 1966, for a construction permit for the Vernon plant. On December 11, 1967, a provisional construction permit was issued by the AEC.") ENVY has no basis to claim that any WQC was issued for the construction permit.

Vermont issued the 1970 WQC with respect to the initial *operating* license and not "with respect to" the "construction license or permit" necessary to trigger §401(a)(3). The 1972 FES is "related to operation" of Vermont Yankee. CRI 737, Title Page. It makes clear that the facility's owners were required to comply with the water quality certification requirement then in law. *Id.* at xviii ("The applicant is required to comply with Section 21(b) of the Federal Water Pollution Control Act, as amended by the Water Quality Improvement Act of 1970."). Appendix I-A of the FES for the operating permit includes a detailed "Listing of Government

Agency Applications, Permits, and Actions Involving the Vermont Yankee Nuclear Power Station." CRI 737. This chronology indicates that the 1970 WQC was issued with respect to the initial operating license, *not* the construction permit.[11] Specifically:

• At A-4	8-24-70	Application to VWRB for certification that discharges into Connecticut River will not violate applicable water quality standards
• At A-1	11-13-70	Applicant submits Water Quality Certification
• At A-3	2-18-71	EPA (Boston Regional Office) letter to Massachusetts and New Hampshire advising of Water Quality Certification Issued by Vermont
• At A-5	4-21-71	Request to AEC from State of N.H. for hearing on Water Quality Certification

The statute's plain language, as applied to these facts, disposes of any claim that the 1970 WQC was issued with respect to the construction permit. Section 401(a)(3) is simply inapposite.

NRC's failure to adopt ENVY's §401(a)(3) rationale explains its failure to notify Vermont of any reliance on the old WQC. Without such notice to the State, NRC did not trigger any obligation for Vermont to respond under §401(a)(3).[12]

---

[11] Congress adopted the certification requirement in §21(b) of the Water Quality Improvement Act of 1970 three years *after* issuance of the 1967 VY construction permit.

[12] Section 401(a)(3) requires notice "shall be given" to the certifying agency (Vermont in this case) by NRC that NRC is relying on a prior construction permit-related 401 certification to "fulfill the requirements" of §401. 33 U.S.C. §1341(a)(3). "The 60–day time limit for state objection set out in that section is not triggered until the state receives notice from the second federal licensing authority that there is a pending license application *premised upon the state's earlier certification.*" *Keating*, 927 F.2d at 624, n.5 (Emphasis added).

NRC did not notify Vermont of its intention to rely on the 1970 WQC because it did not rely on the 1970 WQC when it issued the 2011 VY license. For all of these reasons, this Court should either not consider ENVY's §401(a)(3) argument or reject that argument as groundless.

III. A JUDICIAL REMEDY FOR NRC'S PATENT §401 VIOLATION IS APPROPRIATE.

The Supreme Court aptly has observed:

> State certifications under §401 are essential in the scheme to preserve state authority to address the broad range of pollution ... These are the very reasons that Congress provided the States with power to enforce "any other appropriate requirement of State law," 33 U.S.C. §1341(d), by imposing conditions on federal licenses for activities that may result in a discharge.

S.D. Warren Co., 547 U.S. at 386 (citations omitted). NRC's §401 violation infringes significantly on "the scheme to preserve state authority to address the broad range of pollution," *id.*, and cannot be allowed to stand.

Rather than respect the state's rights explicitly preserved by the CWA which guarantee Vermont that NRC would not take any action to proceed without obtaining a WQC unless it first advised Vermont of its intent to do so, NRC urges the Court to excuse its §401 violation as an error of form, not substance. It claims Vermont is not entitled to exercise its §401 authority absent a showing that Vermont would administer its authority to enhance protection of its water and wildlife. This puts the cart before the horse, would require the Court to usurp

Vermont's exclusive authority over the quality of its own waters, and to override Vermont's administrative and judicial processes. *See Alcoa*, 643 F.3d at 971 (recognizing that substantive issues arising under §401 are within the jurisdiction of state courts). Moreover, it would be contrary to Due Process for Vermont officials to speculate about the possible outcomes of an administrative process that ENVY has yet to initiate.

NRC's violation of §401 is anything but an error of form. Rather it goes to the very heart of the purpose of that Section. By ignoring its duty to inform Vermont of its intent to treat ENVY's §402 permit as a substitute for the required §401 permit, even after Vermont and NEC advised NRC that no renewed license could be issued unless a §401 certificate was issued by Vermont (*see* discussion *infra*), NRC deprived Vermont of sovereign rights preserved by §401. 33 U.S.C. §1341. Asserting that such actions are merely formalistic and lack substance mocks the rights preserved for Vermont by Congress in §401.

IV. IT IS APPROPRIATE FOR THIS COURT TO ADJUDICATE THIS APPEAL ON THE MERITS.

NRC and ENVY assert that Petitioners are not entitled to bring NRC's clear violation of the requirements of §401 to this Court for review because Petitioners failed to properly raise the issue before the NRC. Respondents' argument relies on the faulty premise that NRC has no duty under §401 unless a State or citizen reminds them of their duty. Not only did Petitioners remind NRC of its §401

obligations, as discussed *supra*, but NRC's duty is imposed by Congress, is an absolute and indefeasible one, and is in no way conditioned upon an outside entity asking or reminding NRC to undertake that duty.

In effect, Respondents exhaustion argument posits that Vermont, by not raising the §401 issue in a particular procedural format, has waived its §401 authority. But this Court has explained with regard to waiver, that §401 "clearly expresses a congressional intent to place the burden of requesting a state water quality certification on the license applicant. Only after a request has been made can a state waive its certification right, and then only by refusing to respond to the request within a reasonable period of time." *North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir. 1997);[13] 33 U.S.C. §1341(a). Because ENVY did not request a WQC from Vermont, Vermont could not and did not waive its rights.

NRC and ENVY also protest that Petitioners did not avail themselves of a particular procedure that could have led to adjudication of the §401 issue by an NRC Atomic Safety and Licensing Board ("ASLB"). As the following discussion demonstrates, NRC has long maintained that §401 issues are not cognizable before

---

[13] The legislative history for §401(a) bolsters the Court's plain language-based holding in *North Carolina* that there is only one procedural default by which a state could waive its §401 Certification authority:

> In order to insure that sheer inactivity by the State … will not frustrate the Federal Application … a requirement is contained in the conference substitute that if within a reasonable period, which cannot exceed one year, *after it has received a request to certify*, the State … fails or refuses to act on the request for certification, then the certification requirement is waived.

Conf. Rep. No. 91-940 *reprinted in* 1970 U.S.C.C.A.N at 2741(emphasis added).

the ASLB[14]; certainly, if such issues may not be raised in a particular administrative process, failure to use that futile process cannot bar appellate review.

Furthermore, Respondents ignore the facts that Petitioners did specifically advise NRC and ENVY of their §401 obligations on at least three occasions,[15] and that neither NRC nor ENVY made any effort to comply with those obligations or to address the merits of the issue in the proceedings below.

In the hundreds of pages of draft and final environmental impact statements issued in conjunction with the proposed new license there is not a single reference to §401. At no time did ENVY either seek or obtain a §401 certificate from Vermont or advise them that it considered either the 1970 WQC or the §402 permit to fulfill that obligation. And at no time did NRC advise Vermont that it believed NRC did not need to obtain a §401 certificate before it could issue a new operating

---

[14] NRC resolves a number of issues for renewed licenses even if they are not subject to ASLB hearings. 10 C.F.R. §54.27.

[15] *See* NEC's Opposition to ENVY's Motion to Strike Portions of NEC's Reply (7/20/2006) 7-8 ("§401 Water Quality Certification is jurisdictional and imposes an independent obligation on ENVY and the NRC, regardless of whether the need for certification is raised as a contention"); NEC'S Late Contention or, Alternatively, Request for Leave to Amend or File a New Contention (8/7/2006) 4-5 ("ENVY is on notice that its requested license extension cannot issue without a §401 Certification"); NEC's Reply to ENVY and NRC Staff Answers to NEC's Late Contention, or Alternatively, Request for Leave to Amend or File a New Contention (8/25/2006) 5-6 ("ENVY has an independent obligation to obtain a §401 certification, and the NRC is jurisdictionally limited to acting in conformity with §401 requirements. 33 U.S.C. § 1341; *S.D. Warren v. State of Maine*, 547 U.S. , 126 S.Ct. 1843, 1846 (2006)").

license for Vermont Yankee. In short, NRC, the party with the burden to comply with §401, never addressed the issue and appears in this Court bereft of any record evidence and any record rationale for its compliance failure.

A. Vermont Did Not "Procedurally Default" on its §401 Claim.

NRC says this Court must dismiss the CWA §401 claim, because Petitioners had ample "opportunities" to file that "claim[] properly before both the NRC's [ASLB]," and "the Commission [itself] on agency appellate review," and alleges that Petitioners completely failed to "take advantage of these opportunities to contest the NRC's position" in a timely manner, and thereby committed "procedural default." NRC Br. at 22, 27, and 26. NRC is wrong.

As a matter of fact, as noted above, Petitioners alerted NRC of the §401 claim several times.[16] NRC maintains Petitioners' filings were inexcusably tardy because Petitioners should have raised the same issue as part of initial Contentions to the ASLB and "[t]here is no reason to believe that CWA issues cannot be addressed in NRC license renewal hearings" inasmuch as "NRC's hearing process ... encompasses *any* claim of unlawfulness that would defeat issuing a license, including claims under ... the CWA itself." NRC Br. at 28-29 & fn.7 (emphasis in the original). NRC, however, has clearly held that the issue of whether an applicant possesses a required CWA authorization is not appropriate for consideration as a contention in NRC licensing proceedings.

---

[16] *See* n.15, *supra*.

> [I]n *Hydro Resources* [CLI-98-16, 48 NRC 119, 120 (1998),] the Commission made clear that licensing boards should not admit contentions alleging that the applicant must obtain permits from other agencies:
>
> > Whether non-NRC permits are required is the responsibility of bodies that issue such permits, such as ... or state and local authorities ... If [anyone] is concerned that [an NRC licensee] might not comply with the CWA or state or local requirements, it may communicate such concerns to the agencies that enforce those requirements.
>
> ... Because the proposed contention pertains to matters outside the NRC's jurisdiction, it is not within the scope of this proceeding.

In re Virginia Electric & Power Co., LBP-08-15, 68 NRC 294, 329 (2008) (footnotes omitted); *see also In re Dominion Nuclear Connecticut, Inc.*, LBP-08-09, 67 NRC 421, 447 n.151 (2008) (holding "inadmissible" a proposed contention that a prospective licensee lacked a CWA-required state permit because "even if" true that fact "would not be relevant for this [licensing] proceeding" and would be "outside the reach of the jurisdiction of this Board"); *In re Wisconsin Elec. Power Co.,* CLI-74-45, 8 AEC 928, 930 (1974) (rejecting a contention that AEC licensing proceedings should be suspended until a licensee had obtained a §401 certificate from a state, explaining that it had long been the Commission's "general rule [and] practice to pursue its administrative procedures" concurrently with "state ... proceedings," rather than risk "needless delay"); *In re Public Service Co. of New Hampshire*, LBP-75-61, 2 NRC 693, 1975 NRC LEXIS 28, *5-7 (1975)); *In re Philadelphia Electric Co.,* LBP-82-43a, 15 NRC 1423, 1430 (1982).

Not only does NRC ignore this case law but the four decisions NRC cites at NRC Br. at 29, fn.7 are not remotely on point. These decisions either involve issues other than whether the absence of a CWA authorization can be a valid contention, *i.e.,* claims under the National Environmental Policy Act, the National Historic Preservation Act, or the Native American Graves Protection and Repatriation Act, or support the view that issues related to CWA permits are outside the scope of NRC hearings. *Id.*; *See In re Entergy Nuclear Vermont Yankee, LLC,* CLI-07-16, 65 NRC 371, 377 (2007) ("Section 511(c)(2) of the [CWA] precludes us from either second-guessing the conclusions in NPDES permits or imposing our own effluent limitations—thermal or otherwise. Indeed, the Clean Water Act's legislative history indicates that Congress, when enacting Section 511(c)(2), specifically intended to deprive the NRC's predecessor agency (the Atomic Energy Commission) of such authority.")

NRC's well-established principle—that an applicant's possession of a required CWA authorization, or lack thereof, is not an appropriate issue for litigation in a licensing proceeding (even though NRC must obtain a §401 certification prior to issuance of an operating license)—renders meritless the argument that Petitioners' should have raised ENVY's lack of a §401 WQC as a contention in the licensing proceeding.

B. Vermont and NEC Were Not Obliged to Exhaust Their §401 Claim.

NRC also asserts this Court must dismiss Vermont's and NEC's §401 claims on exhaustion grounds because the "simple point" is that exhaustion "is the default process—it is presumptively required, whether an underlying statute provides for it or not." NRC Br. at 21. This argument is wrong, as it makes overgeneralizations no court ever has, disregards this Court's recent and nuanced guidance, and ignores the fact that Petitioners concerns were raised on three occasions; which NRC ignored at its peril.[17]

"'[E]xhaustion' now describes two distinct legal concepts" and two different "forms of exhaustion." *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004).[18] Neither "form" applies here.

---

[17] Preliminarily, NRC errs in arguing Petitioners have the burden on exhaustion. NRC Br. at 25-26. Defendants have the "burden of showing an administrative remedy available for [plaintiffs] to exhaust" and of proving that Petitioners inexcusably failed to exhaust such remedies. *Kaemmerling v. Lappin*, 553 F.3d 669, 675 (D.C. Cir. 2008).

[18] This Court has explained:

> Before ... *Darby v. Cisneros*, 509 U.S. 137 (1993), most federal courts followed the general rule that a party must exhaust available administrative remedies before challenging an administrative action in court. The rule was, for the most part, judicially-created. *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). ... *Darby* held that in cases in which the APA applies, requiring a party to exhaust administrative remedies is not a matter of judicial discretion. Rather, "an appeal to 'superior agency authority' is a prerequisite to

One "form of exhaustion" (called "statutory" or "non-jurisdictional") arises "when Congress requires resort to the administrative process as a predicate to judicial review. ... Whether a statute requires exhaustion is purely a question of statutory interpretation." *Avocados,* 370 F.3d at 1247. "[T]o mandate [this form of] exhaustion, a statute must contain 'sweeping and direct' statutory language indicating that there is no federal jurisdiction prior to exhaustion, or the exhaustion requirement is treated as an element of the underlying claim." *Id.* at 1248 (citation omitted).

This case does not qualify for statutory exhaustion, as Respondents cannot find "sweeping and direct" language in any relevant statute. Certainly, there is a "lack of an exhaustion requirement in the CWA." *GMC v. EPA*, 168 F.3d 1377, 1381 (D.C. Cir. 1999). *See also, Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 244 (3d Cir. 1980).[19] And there is no "direct"

> judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review."

Marine Mammal Conservancy, Inc. v. Dep't of Agric., 134 F.3d 409, 411 (D.C. Cir. 1998) (quoting *Darby v. Cisneros*, 509 U.S. 137, 154 (1993)).

[19] NRC ignores *GMC* and *Susquehanna,* preferring to rely on *NRDC v. Kempthorne*, 525 F. Supp. 2d 115 (D.D.C. 2007), and *City of Santa Clarita v. Dep't of Interior*, 249 F. App'x 502 (9th Cir. 2007), both cited in NRC Br. at 29. *Kempthorne* is inapposite as it never mentioned discretionary exhaustion. *Santa Clarita*—a four-paragraph conclusory, unsigned, unpublished, and "non-precedential" ruling—is even less persuasive as it provides no rationale why the "prudential exhaustion" doctrine barred a §401 claim, a ruling made more puzzling by the fact that §401 exhaustion was not at issue in the underlying court decisions.

mandate in the Administrative Procedures Act ("APA"), Atomic Energy Act ("AEA"), or Administrative Orders Review Act, *i.e.*, the Hobbs Act.[20] NRC says nothing about the APA, while the best NRC can say about the latter two statutes is that a defendant in one case *argued* that "the 'exhaustion' doctrine [is] implicit" in one or the other, NRC Br. at 22 (quoting *Gage v. AEC*, 479 F.2d 1214, 1218 (D.C. Cir. 1973)). But that is not the holding in *Gage*; instead, the Court disparaged defendant's "implicit" exhaustion argument as one based on "inconclusive" legislative history "that the Hobbs Act was originally intended to cover review of adjudicative orders." *Gage*, 479 F.2d at 1218.[21]

Avocados explained the second, non-statutory, "form of exhaustion" is "a judicially created doctrine" of discretion, one that "serves three functions: 'giving agencies the opportunity to correct their own errors, affording parties and courts

---

[20] Indeed nothing in the APA, AEA, or Hobbs Act "require[es] that a party exhaust NRC administrative remedies before resorting to judicial review." *Thermal Sci., Inc. v. NRC*, 29 F. Supp. 2d 1068, 1075 (E.D. Mo. 1998).

[21] The fact that NRC cannot find any language in the APA, AEA or the Hobbs Act that "direct[ly]" requires exhaustion distinguishes this case from other cited cases , such as *Woodford v. Ngo*, 548 U.S. 81 (2006), which both NRC and ENVY cite (NRC Br. 24 & 27, and ENVY Br. 14) for the "general rule" favoring exhaustion. *Ngo*, 548 U.S. at 90. They fail to note, though, that *Ngo*'s analysis was bottomed on a "specifically 'invigorated' exhaustion provision," 42 U.S.C. §1997e(a) of the "Prison Litigation Reform Act of 1995, [("PLRA")]," which "direct[ly]" commanded "No action shall be brought with respect to prison conditions under ... 42 U.S.C. §1983" until "administrative remedies ... are exhausted." *Ngo,* 548 U.S. at 84 (citations omitted).

the benefits of agencies' expertise, [and] compiling a record adequate for judicial review.'" 370 F.3d at 1247.

Avocados pointedly noted that "[o]ccasionally, exhaustion will not fulfill these ends. There may be no facts in dispute, the disputed issue may be outside the agency's expertise, or the agency may not have the authority to change its decision in a way that would satisfy the challenger's objections." *Id.* (Internal citations omitted). "In these circumstances, [a] court may, in its discretion, excuse exhaustion." *Id.*

Beyond the fact that there was no clear process for Petitioners to exhaust and that Petitioners alerted NRC to §401 requirements on several occasions, there are three additional reasons why, if exhaustion requirements applied, the instant dispute is the "occasional[]" case in which "exhaustion will not fulfill these ends" and is unnecessary. *Id.* Therefore, this Court should retain jurisdiction and reach the merits.

First, in this record there are "no facts in dispute," *id.*, regarding the gravamen of Petitioners' §401 claim. Thus, Petitioners have consistently asserted––and Respondents never have controverted—that:

1. ENVY is an "applicant for a Federal license ... to conduct an[] activity ... which may result in any discharge into the navigable waters," 33 U.S.C. §1341;
2. ENVY never sought or obtained "a certification from the State in which the discharge originates ... that any such discharge will comply with the applicable provisions" of the CWA and

appropriate requirements of state law, *id.*, with regard to the license renewal application;

3. ENVY never furnished NRC with such a "certification,"; and
4. NRC granted ENVY "a Federal license … to conduct an[] activity ... which may result in any discharge into the navigable waters." *Id.*

Because there are no facts in dispute, this Court need not defer to NRC's arguably more efficient fact-finding abilities. Tellingly, neither NRC nor ENVY makes such a claim.

Second, "the disputed issue[s]" in this case are purely legal ones, and thus lie "outside the agency's expertise." *Avocados*, 370 F.3d at 1247. Section 401(a)(1)'s relevant commands are unambiguous: "Any applicant for a Federal license ... shall provide the licensing … agency a certification from the State" and "No license … shall be granted until the certification required by this section has been obtained or has been waived." 33 U.S.C 1341(a)(1). The meaning of "shall" is well settled[22] and the task of construing the import of the rest of §401 is merely one of statutory interpretation, a job in which this Court's expertise exceeds any agency's. *See ASARCO, Inc. v. EPA*, 578 F.2d 319, 321 n.1 (D.C. Cir. 1978).

NRC also contends exhaustion is required here because a different CWA provision, §402, excuses their non-compliance with their §401 duties. NRC Br. at 30-39. As noted *infra*, this is one of several *post hoc* rationalizations that are now

[22] Indeed, the Supreme Court recently addressed the meaning of "shall" in the context of the CWA §402 holding that when the statutory pre-requisites are met "shall" means that the agency "does not have the discretion" to disobey the statutory mandate. *Nat'l Ass'n of Home Builders,* 551 U.S. at 661-62.

offered by counsel but never adopted by NRC in the record below. In addition, determining who is correct turns on construing the statutory language, a task more suitable for this Court than any agency, which explains why this Court reviews agency interpretations of law *de novo. Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011). This also explains why this Court and the First and Second Circuits have addressed federal agencies' non-discretionary §401 duties without deferring to those agencies' self-serving views of those duties. *See Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 5 (D.C. Cir. 2011); *Montijo-Reyes v. United States*, 436 F.3d 19, 25 (1st Cir. 2006); *American Rivers*, 129 F.3d at 102, 106-11.

Third and finally, contrary to the premise of NRC's arguments, Petitioners gave NRC numerous "opportunit[ies] to correct [its] own errors," *Avocados,* 370 F.3d at 1247, by timely presenting the undisputed fact that, on this record, ENVY did not possess a §401 certification and that no license could be issued without such a certification. *See* fn.15 *supra*. Because NRC spurned these "opportunities" to make a record of its position or conclusions on this issue, failing to even mention §401 certification in its Environmental Impact Statement or when it issued the operating license for ENVY, it would be futile for Petitioners to try again and thus wasteful to insist on exhaustion. *See Bethesda Hosp. v. Bowen*, 485 U.S. 399, 406-07 (1988).

Because neither statutory nor non-statutory exhaustion applies here, Vermont and NEC were not—and should not be—required to exhaust their administrative remedies; this Court ought to reach the merits.

CONCLUSION

For the foregoing reasons, the Petitions for review should be granted.

Respectfully submitted this 5th day of March 2012 by the undersigned:

/s/ Christopher M. Kilian
Christopher M. Kilian, Esq.
/s/ Anthony Iarrapino
Anthony Iarrapino, Esq. (on the brief)
Conservation Law Foundation
15 East State St. #4
Montpelier, VT 05602
802.223:5992 ph, 802.223.0060 fx
ckilian@clf.org
aiarrapino@clf.org
Pro Bono Counsel for New England Coalition

/s/ Anthony Z. Roisman
Anthony Z. Roisman, Esq.
National Legal Scholars Law Firm
241 Poverty Lane, Unit 1
Lebanon, NH 03766
603-443-4162 ph
aroisman@nationallegalscholars.com
Counsel for State of Vermont Department of Public Service

/s/ John Beling
John Beling, Esq.
Director
Department of Public Service
Public Advocacy Division
112 State Street
Montpelier, Vermont 05620-2601
(802) 828-3167
John.Beling@state.vt.us
Counsel for State of Vermont Department of Public Service

CERTIFICATE OF COMPLIANCE WITH APPELLATE RULE 32

This reply brief complies with Federal Rule of Appellate Procedure 32(a)(7)(A) because it does not exceed 7,000 words, excluding tables, certificates of counsel, and the addendum.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 Times New Roman 14-point font.

Dated this 5th day of March 2012

/s/ Christopher M. Kilian

Christopher M. Kilian, Esq.
Conservation Law Foundation
15 East State St. #4
Montpelier, VT 05602
802.223.5992 ph, 802.223.0060 fx
ckilian@clf.org
Pro Bono Counsel for New England Coalition

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2012, I electronically filed Petitioners' Reply Brief with the Clerk of the Court using the CM/ECF filing system.

Service of Petitioners' Reply Brief will be accomplished via the CM/ECF system to participants in this case that are registered CM/ECF users in consolidated Case No's. 11-1168 and 11-1177. The following non CM/ECF participants will receive service, postage prepaid, by United States mail:

Ms. Zoli, Elise Nigro
Goodwin Procter LLP
53 Exchange Place
Boston, MA 02109

Mr. Burns, Stephen Gilbert
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
One White Flint North
Rockville, MD 20852

Mr. Martin, Kevin Paul
Goodwin Procter LLP
53 State Street
Exchange Place
Boston, MA 02109

Dated this 5th day of March 2012

/s/ Christopher M. Kilian
Christopher M. Kilian, Esq.
Conservation Law Foundation
15 East State St. #4
Montpelier, VT 05602
802.223.5992 ph, 802.223.0060 fx
ckilian@clf.org
Pro Bono Counsel for New England Coalition