



NUCLEAR REGULATORY COMMISSION

WASHINGTON, DC 20555 - 0001

CASE WAS ARGUED ON MAY 9, 2012

May 21, 2012

Judge Karen L. Henderson
Judge Judith W. Rogers
Judge Merrick B. Garland

c/o Mr. Mark Langer,
Clerk, United States Court of Appeals for the D.C. Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue NW
Washington, DC 20001-2866

Re: Vermont Dept. of Pub. Serv. v. NRC, No. 11-1168 (consol. with No. 11-1177)

Dear Judges Henderson, Rogers, and Garland:

This letter responds to the Court's May 9, 2012 Order directing the parties to file a post-argument submission addressing their "position on the status of the section 402 matter." At oral argument, the Court asked whether the Vermont Yankee nuclear power plant ("Vermont Yankee") currently possesses a valid, effective permit issued pursuant to Vermont's EPA-approved National Pollutant Discharge Elimination System ("NPDES") program under § 402 of the Clean Water Act, 33 U.S.C. § 1342. The answer to that question is yes.

As we noted in our brief (at 14 n.2), Vermont last renewed Vermont Yankee's § 402 permit in 2001. When issued, that permit was set to expire on March 31, 2006. But Entergy applied for a renewed § 402 permit 180 days before that deadline. Vermont law expressly provides that when a licensee submits a sufficient application for the renewal of a license at least 180 days before its expiration date, "*the existing license does not expire*" until the relevant state agency takes final agency action on the application and the period for judicial review runs out. 3 V.S.A. § 814(b). *See also* 3 V.S.A. § 801(b)(3) (a "license" as used in § 814(b) includes "any agency permit," such as a § 402 permit). In this respect, Vermont law is consistent with the federal Administrative Procedure Act's "timely-renewal" provision, 5 U.S.C. § 558(c). *See also* 40 C.F.R. § 122.6.

Thus, although Vermont officials have not yet issued or denied a renewed § 402 permit to Vermont Yankee, Entergy's timely application means that the existing § 402 permit remains valid. Indeed, in 2009, Vermont's own Attorney General told the Vermont Supreme Court that "Entergy...applied for [Vermont Yankee's] renewal permit on September 30, 2005 [and therefore] it is allowed to operate...until [Vermont's Agency of Natural Resources] rules on the renewal permit application." Brief of Appellee/Cross-Appellant State of Vermont, *In re Entergy Nuclear Vermont Yankee Discharge Permit 3-1199*, 187 Vt. 142 (2009) (No. 08-295) at 14 n.13 (citing 3 V.S.A. § 814(b)) (brief available at 2009 WL 1114797). The Vermont Supreme Court later confirmed this fact. *See In re Entergy Nuclear Vermont Yankee Discharge Permit 3-1199*, 187 Vt. 142, 150 n.4 (2009).

In summary, when NRC renewed Vermont Yankee's license, Entergy's application for a renewed § 402 permit was pending with Vermont's Agency of Natural Resources. That is still the case. But, as we explained above, under Vermont law the terms of Vermont Yankee's § 402 permit from 2001 continue to apply, given Entergy's timely application for a renewed permit. *See Record Appendix at 144-197* (copy of § 402 permit, as amended).¹

¹ While § 402 of the Clean Water Act provides that NPDES permits are for fixed terms not to exceed five years, *see* 33 U.S.C. § 1342(b)(1)(B), sometimes permits like Vermont Yankee's remain effective for longer periods while the responsible state agencies process the applications for renewed permits. For instance, the Millstone nuclear power plant's application for a renewed § 402 permit had been before the State of Connecticut for over eight years when NRC issued Millstone's renewed operating license in 2005. *See* U.S. Nuclear Regulatory Commission, Supplemental Environmental Impact Statement for License Renewal of Millstone Power Station Units 2 and 3, App. E, Table E-2 (2005), available at: <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/supplement22/sr1437s22app2.pdf> (relying on still-effective 1992 permit because renewal application submitted in 1997 remained pending with the relevant state agency).

Therefore, Vermont Yankee continues to possess a valid, effective permit under § 402 of the Clean Water Act.

Respectfully submitted,

_____/s/_____
JOHN E. ARBAB
Attorney
U.S. Department of Justice
Appellate Section
Environment & Natural Resources Div.
202-514-4046
John.Arbab@usdoj.gov

_____/s/_____
SEAN D. CROSTON
Attorney
U.S. Nuclear Regulatory
Commission
Office of the General Counsel
301-415-2585
Sean.Croston@nrc.gov