ORAL ARGUMENT SCHEDULED FOR MAY 9, 2012

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

Nos. 11-1168 & 11-1177, consolidated

VERMONT DEPARTMENT OF PUBLIC SERVICE;
NEW ENGLAND COALITION,
Petitioners,
v.

U.S. NUCLEAR REGULATORY COMMISSION;
UNITED STATES OF AMERICA,
Federal Respondents.

ON PETITION FOR REVIEW OF A FINAL ORDER
OF THE U.S. NUCLEAR REGULATORY COMMISSION

FINAL BRIEF FOR THE FEDERAL RESPONDENTS

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March 19, 2012

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Counsel for the United States Nuclear Regulatory Commission (NRC) certifies the following with respect to the parties, rulings, and related cases.

A. *Parties*

The Vermont Department of Public Service is the petitioner in Case No. 11-1168, and the New England Coalition is the petitioner in Case No. 11-1177. NRC and the United States of America are the respondents. Entergy Nuclear Operations, Inc. and Entergy Nuclear Vermont Yankee, LLC ("Entergy") are

Intervenors in both cases, which have been consolidated. Riverkeeper, Inc., Scenic Hudson, Inc. and New York State are *amici* on the side of petitioners, while Energy Future Coalition is an *amicus* on the side of respondents.

B. *Rulings Under Review*

Petitioners seek review of the NRC's final order granting Renewed Operating Facility License No. DPR-28 for the Vermont Yankee Nuclear Power Station on March 21, 2011. *See* 76 Fed. Reg. 17,162 (March 28, 2011).

C. *Related Cases*

The NRC license renewal order on review was never previously before this Court or any other court.

Respectfully submitted,

/s/

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March 19, 2012

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GLOSSARY

AEC	Atomic Energy Commission
Board	Atomic Safety and Licensing Board (NRC)
CWA	Clean Water Act
Entergy	Entergy Nuclear Operations, Inc. and Entergy Nuclear Vermont Yankee, LLC
GEIS	Generic Environmental Impact Statement
NEC	New England Coalition
NEPA	National Environmental Policy Act
NPDES	National Pollutant Discharge Elimination System
NRC	Nuclear Regulatory Commission
SEIS	Supplemental Environmental Impact Statement
VANR	Vermont Agency of Natural Resources
Vermont	Vermont Department of Public Service
Vermont Yankee	Vermont Yankee Nuclear Power Station

JURISDICTIONAL STATEMENT

This Court has jurisdiction under the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, to review the Nuclear Regulatory Commission's (NRC) order granting a renewed operating license for the Vermont Yankee Nuclear Power Station (Vermont Yankee). Under 28 U.S.C. § 2342, the courts of appeals have exclusive jurisdiction over agency actions made reviewable by 42 U.S.C. § 2239(b), and § 2239(b) in turn makes agency actions specified in § 2239(a) reviewable. These actions include final orders entered in proceedings to grant a license. *See, e.g., Nuclear Info. & Res. Serv. v. NRC,* 509 F.3d 562 (D.C. Cir. 2007); *Natural Resources Defense Council, Inc. v. NRC*, 680 F.2d 810, 815 (D.C. Cir. 1982).

The Hobbs Act allows parties 60 days from a reviewable final order to file a petition for review. *See* 28 U.S.C. § 2344. Petitioners filed for review in this Court on May 20, 2011—60 days after NRC's March 21, 2011 final order granting Vermont Yankee's renewed operating license. Their petitions were therefore timely under the Hobbs Act.

ISSUES PRESENTED

1. **Exhaustion of Administrative Remedies.** NRC's hearing tribunal, the Atomic Safety and Licensing Board, received no admissible contention from petitioners or anyone else raising a Clean Water Act (CWA) challenge to the issuance of Vermont Yankee's renewed operating license. Nor did petitioners or anyone else raise a CWA issue of any kind before the Commission. Thus, neither the Board nor the Commission addressed the merits of petitioners' CWA concerns in the license-renewal proceeding. Were petitioners required to exhaust available administrative remedies at NRC regarding their CWA grievance before filing suit on that ground in this Court?

2. **Satisfaction of Clean Water Act Requirements**. Petitioners' opening brief argues that Vermont Yankee lacks a water-quality certification required by § 401 of the CWA. Vermont Yankee has a valid "NPDES" permit under § 402 of the CWA, and NRC's Generic Environmental Impact Statement for License Renewal (GEIS) states that the water-quality requirements of §§ 401 and 402 of the CWA are often coextensive. Petitioners nowhere have challenged the statement in the GEIS or argued that it does not apply in this particular case. If

this Court reaches the merits, did NRC act lawfully, with respect to the CWA, in renewing Vermont Yankee's operating license?

STATEMENT OF THE CASE

Vermont Yankee Nuclear Power Station (Vermont Yankee) is located five miles south of Brattleboro, Vermont. In 1972, the Atomic Energy Commission issued Vermont Yankee's initial operating license, which would expire after 40 years (in March 2012).

Therefore, on January 25, 2006, Entergy submitted an application for a 20-year renewal of Vermont Yankee's operating license, and NRC published a notice of an opportunity for an NRC hearing shortly thereafter. *See* 71 Fed. Reg. 15,220 (Mar. 27, 2006), Record Appendix ("RA") 46. The notice required any person who wished to participate as a party to file a petition for leave to intervene, stating specific contentions that the petitioner sought to litigate at a hearing before the NRC's Atomic Safety and Licensing Board (Board). *Id*. at RA47.

The Vermont Department of Public Service (Vermont) and the New England Coalition (NEC), among others, brought several challenges to Entergy's license renewal application before the Board. Only NEC

"Contention 1" discussed water-quality issues of any kind. *See Entergy Nuclear Vermont Yankee, LLC*, LBP-06-20, 64 NRC 131 (2006)(Board decision), RA302.

As originally submitted, Contention 1 alleged that the environmental report submitted as part of Entergy's license application did not properly consider the environmental effects of Vermont Yankee's continued thermal discharges into the Connecticut River under the National Environmental Policy Act (NEPA). *See* RA324. Entergy opposed Contention 1, arguing that it should not be admitted for an evidentiary hearing.

In its reply, NEC added a claim that Entergy had not complied with § 401 of the Clean Water Act (CWA), 33 U.S.C. § 1341, because it had not obtained a fresh § 401 water quality certification in connection with license renewal. *See id.*; *NEC's Reply to Entergy and NRC Staff Answers to Petition for Leave to Intervene, Request for Hearing, and Contentions* at 6 & 14 (June 30, 2006), RA69, RA77. Entergy successfully moved to strike petitioners' § 401 argument—raised for the first time in NEC's reply—as untimely and outside the scope of NEC's original NEPA contention. *See Entergy Nuclear Vermont Yankee, LLC*, LBP-06-20, 64 NRC 131, 182 (2006), RA328.

When NEC subsequently filed a motion to amend its NEPA-based Contention 1 to include the § 401 issue, Entergy asserted that "Whether a

§ 401 certification is required is … simply irrelevant to NEC's contention that Entergy failed to assess impacts to water quality. Further, 401 certification is addressed in another section of the application (ER § 9.2.1), which NEC has never challenged…." *See Entergy's Answer to New England Coalition's Late Contention* at 7 (August 17, 2006), RA241.

Although the Board found that NEC's § 401 claim was timely, it accepted Entergy's argument that § 401 compliance was irrelevant to the NEPA bases underlying NEC's Contention 1, and thus denied NEC's motion to amend Contention 1 to add that claim. *See Entergy Nuclear Vermont Yankee, LLC*, Memorandum and Order (October 30, 2006) (unpublished Board order), RA 435-436. Neither NEC nor Vermont sought Commission review of the Board's procedural decision or attempted to submit a separate, late-filed contention alleging a § 401 violation.

Almost five years later, after resolving other contentions filed by NEC and accepted for review by the Board, NRC concluded its adjudicatory consideration of Entergy's application and granted a renewed operating license for Vermont Yankee. *See* 76 Fed. Reg. 17,162 (March 28, 2011), RA903; *Entergy Nuclear Vermont Yankee, LLC*, CLI-11-02, 73 NRC __, 2011 WL 864757 (March 10, 2011), RA880.

Vermont and NEC then filed suit in this Court—making none of the arguments they had litigated to a conclusion on the merits at NRC, and claiming only that NRC erred by granting the license without requiring Entergy to first obtain another CWA § 401 certification.

STATUTORY AND REGULATORY BACKGROUND

1. Clean Water Act

Like most nuclear power plants, Vermont Yankee sits near a large body of water, the Connecticut River. Plant operators remove water from the river, use it to cool the reactor, and then return it to the river. Vermont Yankee must ensure that this "discharge" complies with applicable water-quality laws. In particular, the CWA is a source of many such water-quality requirements.

Under § 401(a)(1) of the CWA, applicants for federal licenses or permits to conduct any activity that may result in any discharge to navigable waters must "provide the licensing agency . . . a certification from the State in which the discharge . . . will originate." 33 U.S.C. § 1341(a). That state certification must determine that an applicant's proposed discharge will comply with the relevant provisions of CWA §§ 301, 302, 303 (which is also incorporated by reference in § 301), 306, and 307, as well as with the state's own water-quality standards and "any other appropriate water quality requirements," which

essentially become binding license conditions for the federal licensee. *See* 33 U.S.C. §§ 1341(a), (d). In addition, § 401(a)(1) declares that "[n]o license . . . shall be granted until the certification required by this section has been obtained." *Id*.

Section 401 also contains certain notification requirements. *See* 33 U.S.C. §§ 1341(b). In addition, it provides that, unless a state objects on specified grounds, a water-quality certification obtained "with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility." 33 U.S.C. § 1341(a)(3).

A separate provision of the CWA, § 402, authorizes EPA to issue discharge permits under the "National Pollutant Discharge Elimination System" (NPDES). 33 U.S.C. § 1342(a). NPDES permits issued under § 402 impose limits, conditions, and monitoring requirements on effluent discharges. Like § 401 certifications, NPDES permits require compliance with CWA §§ 301, 302, 303 (through incorporation by reference in § 301), 306, and 307, and relevant state water-quality standards (also through incorporation in § 301). *See* 33 U.S.C. §§ 1342(a)(1), (b)(1).

Section 402 also has provisions allowing states to take over NPDES permitting authority from EPA, as Vermont did in 1974. *See* 33 U.S.C. § 1342(b). Unlike § 401 certifications, which have no statutory expiration dates, state-issued NPDES permits are issued "for fixed terms not to exceed five years." 33 U.S.C. § 1342(b)(1)(B).

2. NRC's Intervention and Hearing Regulations

When NRC docketed Entergy's application for Vermont Yankee's renewed operating license, the agency indicated that its general standards for intervention at 10 C.F.R. § 2.309 would apply to any subsequent hearing. *See* 71 Fed. Reg. 15,221 (Mar. 27, 2006), RA47. Those standards allow prospective intervenors sixty days to file challenges to an application, known in NRC parlance as "contentions," that must include "a specific statement of the issue of law or fact to be raised or controverted," and "a brief explanation of the bases of each contention." *Id.*, citing § 2.309(f).

NRC regulations require that a license applicant's environmental report (which accompanies an application) contain a discussion of all applicable permits, "including . . . water pollution limitations or requirements." 10 C.F.R. § 51.45(d). Likewise, NRC regulations mandate that the agency's draft environmental impact statement for a renewed operating license must list the

permits and approvals required for renewal. *See* 10 C.F.R. § 51.71(c). And NRC's intervention standards provide that errors or omissions in an applicant's environmental report or the agency's draft or final environmental impact statement are appropriate grounds for a contention. *See* 10 C.F.R. § 2.309(f)(2); *Private Fuel Storage*, LBP-98-7, 47 NRC 142, 197-98 (1998) (admitting for hearing properly-filed contentions under 10 C.F.R. § 51.45(d) regarding proof of compliance with the CWA).

In addition, NRC's procedural regulations provide intervenors the opportunity to submit late-filed contentions or to reopen closed records under certain limited circumstances. *See* 10 C.F.R. §§ 2.309(c), (f)(2).

If the presiding officer at a licensing hearing (generally a three-judge panel of the NRC's Atomic Safety and Licensing Board) rejects some contentions as inadmissible but admits others, no immediate "appeal" lies as such, but at the end of the Board hearing process a party may challenge the merits result on the admitted contentions and the earlier, interlocutory, decision not to admit certain contentions. *See, e.g., South Texas Project Nuclear Operating Company*, CLI-10-16, 71 NRC__, 2010 WL 2505256 (June 17, 2010). NRC's regulations specifically provide a vehicle for such appeals—a petition

for review under 10 C.F.R. § 2.341, which must be filed within fifteen days of the Board's final merits decision.

All petitions for review "must contain" summaries of "the matters of fact or law" at issue, and must show how these matters "were previously raised before the presiding officer" at the hearing or "could not have been raised." 10 C.F.R. § 2.341(b)(2). As noted above, petitions for review may also challenge decisions by a presiding officer not to admit particular contentions for hearing. Finally, the same regulation mandates that parties "must file a petition for Commission review before seeking judicial review of an agency action." 10 C.F.R. § 2.341(b)(1).

3. NRC License-Renewal Reviews

Under 42 U.S.C. § 2133(c), a commercial nuclear power plant may be initially licensed for a term not to exceed 40 years. A license may be renewed upon expiration. *Id.*; 10 C.F.R. § 54.31(b). Requirements and standards for license renewal are contained in 10 C.F.R. Part 54. As the Third Circuit recently explained, the license renewal process focuses on aging issues. *See N.J. Envtl. Fed'n v. NRC*, 645 F.3d 220, 224 (3d Cir. 2011). NRC offers an opportunity for anyone whose interest may be affected by renewal of the operating license to request a hearing. *See* 10 C.F.R. § 54.27.

In addition, under the National Environmental Policy Act (NEPA), each federal agency must prepare an Environmental Impact Statement (EIS) before taking a major action that significantly affects the quality of the "human environment." 42 U.S.C. § 4332(2)(C). The renewal of a nuclear power plant's operating license requires an EIS under NRC regulations. *See* 10 C.F.R. § 51.20(b)(2).

The EIS required for license renewal at nuclear power plants covers both generic and plant-specific environmental impacts. As the Second Circuit explained, "Category I impacts" "are common to all nuclear power plants" and do not require plant-specific mitigation, while "Category II impacts require site-by-site evaluation. Since Category I impacts are common to each license renewal, the NRC has produced a Generic Environmental Impact Statement (GEIS) that applies to these common issues." *See New York v. NRC*, 589 F.3d 551, 553 (2d Cir. 2009), citing *Massachusetts v. United States*, 522 F.3d 115, 120 (1st Cir. 2008).

"The GEIS, combined with a site-specific EIS, constitutes the complete EIS required by NEPA for the major federal action of a plant's license renewal." *Id*. NRC issued the GEIS for license renewal in 1996, after a full

notice-and-comment process. *See* Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467 (June 5, 1996).

As relevant to this case, the 1996 GEIS says that "[u]nder Section 401 of the CWA (33 USC 1341), an applicant for a federal license or permit (the utility in this case) must obtain a state water quality certification." *See* 1 NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" at § 4.2.1.1 (1996), RA43. The GEIS adds that "issuance of an NPDES permit by a state water quality agency [under Section 402] implies certification under Section 401." *Id.* Vermont submitted a lengthy set of comments on the draft GEIS, but did not address the above statements.

In December 2006, NRC also published a draft supplemental (site-specific) environmental impact statement (SEIS) for Vermont Yankee and requested comments. *See* 71 Fed. Reg. 76,706 (Dec. 21, 2006), RA449. Appendix E of the draft SEIS listed the permits and approvals that NRC believed were required for license renewal. RA472. The list included a § 402 (NPDES) permit, but not a new § 401 certification. *Id.* Likewise, NRC's final SEIS did not identify any need for a new § 401 certification. *See* 72 Fed. Reg. 44,186 (Aug. 7, 2007), RA484, RA766. Petitioners did not comment on these lists.

STATEMENT OF THE FACTS

In December 1967, NRC's predecessor, the Atomic Energy Commission (AEC), issued an initial construction permit for Vermont Yankee. *See* RA35. By its terms, that initial permit expired on December 31, 1971. *See* Disputed Record Appendix ("DRA") 4. In April 1970, during Vermont Yankee's construction, the CWA became law. Four months later, Vermont Yankee's owners applied for a § 401 certification, which Vermont granted in October 1970. *See* Letter from John A. Ritsher to AEC (Nov. 13, 1970) (enclosing Vermont water-quality certificate), DRA1-2. In December 1971, the AEC renewed the construction permit for one year. *See* DRA3-4. Soon thereafter, the facility's construction ended, and the AEC then issued an initial operating license for Vermont Yankee on March 21, 1972.

Under the Atomic Energy Act, the maximum term for an operating license is "forty years from the authorization to commence operations." 42 U.S.C. § 2133(c). Because Vermont Yankee's original forty-year operating license was set to expire on March 21, 2012, Entergy applied for a renewed operating license in 2006. *See generally Entergy Nuclear Vermont Yankee, LLC*, LBP-06-20, 64 NRC 131 (2006), RA302.

As required by NRC regulations, Entergy's environmental report — which accompanied its application—assessed water-quality compliance under the heading "Water Quality (401) Certification."[1] *See* Vermont Yankee Nuclear Power Station License Renewal Application, App. E, *Applicant's Environmental Report*, 9-1 (Jan. 25, 2006), RA45. Entergy claimed that Vermont Yankee's original § 401 certification from 1970 and its possession of a "current and effective NPDES permit issued by [Vermont]"[2] indicated its "continued compliance with applicable CWA standards." *Id.*

During the renewal proceedings, Vermont and NEC, among others, brought several challenges to Entergy's license renewal application before NRC's adjudicatory hearing tribunal, the Atomic Safety and Licensing Board. The Board admitted for hearing several contentions filed by Vermont and NEC, but found others inadmissible. *See Entergy Nuclear Vermont Yankee, LLC*, 64 NRC 131 (2006), RA302.[3] Among the contentions found inadmissible in

[1] *See* 10 C.F.R. §§ 51.45(d) & 54.23.

[2] Vermont last issued a new NPDES permit for Vermont Yankee in 2001, but that permit has remained valid under Vermont's "timely-renewal" statute because Vermont Yankee applied for a new permit in 2006, which has not yet been acted on. *See* 3 V.S.A. § 814 (b). That 2006 application remains pending before the Vermont Agency of Natural Resources.

[3] The Board found inadmissible the only contentions submitted by the Massachusetts Attorney General and the Town of Marlboro, Vermont. *See* 64

part was NEC's "Contention 1," which was the only proposed contention that even mentioned CWA compliance, albeit only in a reply and attempted amendment, not in the original contention. *Id.* at 182, RA328.

As originally submitted, Contention 1 alleged that Entergy's report did not properly consider the environmental effects of Vermont Yankee's continued thermal discharges under NEPA. *See id.* at 175, RA324. Entergy submitted a filing opposing this Contention. NEC then filed a reply arguing for the first time that Entergy had not complied with § 401 of the CWA. *See id.*; *NEC's Reply to Entergy and NRC Staff Answers to Petition for Leave to Intervene, Request for Hearing, and Contentions* at 6, 14 (June 30, 2006), RA69, RA77.

Entergy successfully moved to strike petitioners' § 401 argument because it was first raised in a reply brief, *see* 64 NRC at 182, RA328, and then successfully opposed NEC's subsequent motion to amend Contention 1 to include the § 401 issue. On that motion, the Board ruled that § 401 was "simply irrelevant to [the rest of] NEC's contention that Entergy failed to

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NRC at 161, 201, RA338. Likewise, the Board rejected some of Vermont and NEC's contentions, but admitted five of their contentions for hearing. *Id.* at 162-201, RA318-338. Vermont and NEC settled one contention with Entergy, before Entergy eventually prevailed in several years of litigation before the Board and Commission regarding the merits of the remaining contentions. *See* CLI-11-02, 73 NRC __, 2011 WL 864757 (March 10, 2011); CLI-10-17, 72 NRC__, 2010 WL 2753783 (July 8, 2010); 68 NRC 763 (2008); 65 NRC 371 (2007).

assess impacts to water quality" under NEPA. *See Entergy Nuclear Vermont Yankee, LLC*, Memorandum and Order (October 30, 2006) (unpublished Board order), RA435-436.

Neither NEC nor Vermont then or later sought Commission appellate review of these procedural Board rulings. Moreover, the Board ruled that the § 401 issue was not submitted "too late" for adjudicatory consideration. RA435. This meant that petitioners might have pursued their § 401 claim as a stand-alone "late-filed" contention, but neither party ever did so.

Two months after the Board's last order on petitioners' abortive § 401 contention, NRC published the draft supplemental environmental impact statement (SEIS) for Vermont Yankee's license renewal and requested comments. *See* 71 Fed. Reg. 76,706 (Dec. 21, 2006), RA449. Appendix E of the draft SEIS identified the permits and approvals that NRC believed were required for license renewal, which included a § 402 (NPDES) permit but not a new CWA § 401 certification. RA472.

NRC provided a 75-day comment period and scheduled multiple public meetings regarding the draft SEIS. *See* 71 Fed. Reg. 76,707, RA450. Petitioners submitted no comments arguing for the necessity of a new § 401 certification and filed no new contentions before the Licensing Board based on the absence

of a new § 401 certification in the draft SEIS. (As noted above, in NRC practice, such contentions are permissible under 10 C.F.R. § 2.309(f)(2).) Similarly, petitioners filed no objections with NRC after the agency published the final SEIS, *see* 72 Fed. Reg. 44,186 (Aug. 7, 2007), RA484, which like the draft SEIS did not list a new § 401 certification in Appendix E. RA766.

After several years of litigation at NRC, all adjudicatory proceedings, including Board hearings and Commission decisions on appellate review,[4] concluded and the Commission granted Entergy's application for a renewed operating license on March 21, 2011. *See* 76 Fed. Reg. 17,162 (March 28, 2011), RA903. Petitioners now seek to reverse that decision.

SUMMARY OF ARGUMENT

The record contains no detailed Commission decision concerning petitioners' CWA grievance. That is because, despite extensive adjudicatory proceedings at NRC, petitioners essentially sat on their hands (with the exception of one half-hearted and then-abandoned attempt by NEC) when given numerous chances to properly raise their CWA compliance claims before the NRC's Atomic Safety and Licensing Board and the Commission.

[4] *See* CLI-11-02, 73 NRC __, 2011 WL 864757 (March 10, 2011); CLI-10-17, 72 NRC__, 2010 WL 2753783 (July 8, 2010); 68 NRC 763 (2008); 65 NRC 371 (2007).

Now, after years of silence, petitioners in effect ask this Court to undo a completed, five-year license-renewal proceeding on grounds never pursued at NRC. Petitioners simply defaulted on any CWA issues by failing to pursue them during NRC's adjudicatory process. Litigating these complaints now, for the first time in this Court, runs afoul of well-settled law that parties must exhaust all available administrative remedies before resorting to judicial review.

There is no reason to disregard the exhaustion doctrine in this case, as petitioners had every opportunity to pursue their claims at NRC. And had they done so, the agency may have granted them relief. Moving forward without a full agency record would potentially waste scarce judicial resources and encourage litigants to bypass NRC's hearing process, which is designed to create a record for judicial review and also to resolve disputes at the agency level, often avoiding judicial review.

This Court, in short, need go no further than the exhaustion-of-remedies doctrine to resolve this case against petitioners. But in the event this Court reaches the merits it should still rule against petitioners because their underlying legal claims are unpersuasive.

Vermont Yankee indisputably has a valid Vermont NPDES permit under § 402 of the CWA, as noted in Entergy's application for a renewed operating license from NRC. And NRC's Generic Environmental Impact Statement for License Renewal—issued in 1996 after a full notice-and-comment process (in which Vermont participated but did not raise objections on these grounds)—has long indicated the agency's position that in some cases, the water-quality protections of CWA §§ 401 and 402 are coextensive, such that a state-issued NPDES permit provides water-quality protections equivalent to those ensured by a state-issued § 401 certificate.

Given Entergy's application and the GEIS discussion of §§ 401 and 402, the thrust of petitioners' opening brief—that the record "offers no basis" for finding CWA compliance, *see* Pet. Brief at 3—is simply wrong. Notably, petitioners' brief ignores the Entergy submission and this part of the GEIS.

Petitioners also failed to present any plausible evidence of concrete harms to their interest in "ensur[ing] protection of Vermont's water resources." Pet. Brief at 2. Thus, even if there were any NRC error here on CWA compliance, the error was one of form rather than substance, and was harmless in the context of this case. Vermont remains capable even now of ensuring that

its water-quality standards will be enforced through its § 402 NPDES permit process. Petitioners have shown no prejudicial harm.

Finally, *amici* attempt to introduce several new arguments on the merits, but because these were not raised in petitioners' opening brief, they should not be considered now.

ARGUMENT

Standard of Review

Normally, whether a petitioner has sufficiently exhausted administrative remedies "is a question of law, which this court reviews *de novo*." *Artis v. Bernanke*, 630 F.3d 1031, 1034 (D.C. Cir. 2011) (citation omitted). Also, the Supreme Court has recognized that where "an agency's regulations . . . require issue exhaustion in administrative appeals . . . , courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues." *Sims v. Apfel*, 530 U.S. 103, 108 (2000).

This Court should not set aside the NRC's decision unless the Court finds it "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). To the extent that this Court finds it necessary to consider the meaning of § 401 of the Clean Water Act, its

"review of the Commission's interpretation of Section 401 is *de novo*."*Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011).[5]

I. *The Petitions for Review must be Dismissed because Petitioners Failed to properly Exhaust their Administrative Remedies before Seeking Judicial Review.*

1. Established law requires dismissal of the petitions for review. The petitions for review in this case should be dismissed because of petitioners' failure to exhaust their available administrative remedy at NRC—namely, the agency's full hearing process for licensing actions. *See generally* 42 U.S.C. § 2239(a); 10 C.F.R. Part 2. Simply put, petitioners may not file a lawsuit after sitting on their hands when given the chance to properly raise issues before the agency. This Court need go no further than that simple point in order to resolve this lawsuit.

For over 70 years, American courts have followed the basic rule of prudent judicial administration that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). Exhaustion, in other words, is the default process—it is presumptively required, whether an underlying statute provides for exhaustion or not. *See,*

[5] EPA is the federal agency directed by statute to administer the CWA. It has not addressed the merits of the question in this case.

e.g., Ass'n of Flight Attendants-CWA, AFL-CIO v. Chao, 493 F.3d 155 (D.C. Cir. 2007); *Boivin v. U.S. Airways, Inc.,* 446 F.3d 148 (D.C. Cir. 2006).

In the case of direct judicial review of NRC actions under the Hobbs Act, exhaustion is not simply prudential. The Act makes "party" status in an NRC proceeding—"and the 'exhaustion' doctrine implicit therein," *Gage v. AEC*, 479 F.2d 1214, 1218 (D.C. Cir. 1973)—a mandatory prerequisite to judicial review. *See* 28 U.S.C. § 2344. And an NRC rule expressly says that participants in NRC hearings first "must file a petition for Commission review before seeking judicial review of an agency action." 10 C.F.R. § 2.341(b)(1). Moreover, the petition for Commission review "must contain" descriptions of "the matters of fact or law" at issue, and must show how these matters "were previously raised before the presiding officer" at the hearing or "could not have been raised." 10 C.F.R. § 2.341(b)(2).

Here, petitioners neither filed their Clean Water Act claims properly before NRC's hearing tribunal, the Atomic Safety and Licensing Board, nor brought their claims before the Commission on agency appellate review. Instead, petitioners seek initial review in this Court, despite the longstanding exhaustion requirement. Where, as here, "an agency's regulations . . . require issue exhaustion in administrative appeals," the Supreme Court has noted that

courts generally "ensure against the bypassing of that requirement by refusing to consider unexhausted issues." *Sims v. Apfel*, 530 U.S. 103, 108 (2000).

In addition to its settled legal basis, the requirement to exhaust administrative remedies is a matter of "simple fairness." *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 211 (D.C. Cir. 2011), quoting *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952) (stating the "general rule that 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"). This is because the requirement gives agencies and other interested parties an opportunity to address particular claims before they are presented in court, and it is also a matter of sound judicial policy. This Court repeatedly has pointed to the many advantages of the default rule that parties must fully contest issues at the agency level before seeking judicial review:

- The exhaustion doctrine "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency," by "ensur[ing] that agencies—and not the federal courts—take primary responsibility for implementing the regulatory programs assigned by Congress." *Ass'n of Flight Attendants-CWA, AFL-CIO v. Chao*, 493 F.3d 155, 158 (D.C. Cir. 2007), quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992).
- Requiring "review within the [agency] gives the [agency] 'the opportunity to correct its own errors,' and thereby to avoid unnecessary litigation." *Benoit v. USDA*, 608 F.3d 17, 23 (D.C. Cir. 2010), quoting *McCarthy* at 145.

- Fully contesting all possible claims before the agency "may produce a useful record for subsequent judicial consideration." *Id.*, quoting *McCarthy* at 145-46.
- Ignoring exhaustion requirements would "encourage people to ignore an agency's procedures by allowing litigants who . . . could have petitioned the agency directly for the relief [sought] in [a] lawsuit" to "seek those forfeited administrative remedies from the court later." *Malladi Drugs & Pharms., Ltd. v. Tandy*, 552 F.3d 885, 890 (D.C. Cir. 2009) (citations omitted).
- "[A]gency proceedings 'generally . . . resolve claims much more quickly and economically' than courts.'" *Qwest Corp. v. FCC*, 482 F.3d 471, 475 (D.C. Cir. 2007), citing *Woodford v. Ngo*, 548 U.S. 81, 89 (2006).

These policies apply in full force here, where petitioners have asked the Court to resolve a CWA issue that they never presented to the Commission itself and did not press before the Commission's subordinate hearing tribunal, the Licensing Board.

Likewise, this Court overlooks a failure to exhaust agency remedies "only in the most exceptional circumstances." *Communication Workers of America v. AT&T*, 40 F.3d 426, 432 (D.C. Cir. 1994). Examples are excessive delay, agency bias, or a lack of agency authority to grant relief. *See Hettinga v. United States*, 560 F.3d 498, 503 (D.C. Cir. 2009). None of those circumstances is present here. Petitioners have never claimed otherwise.

Indeed, petitioners' failure to bring their CWA contention before the Commission deprived the Commission of an opportunity to address any alleged defects and forces lawyers for NRC and the United States to defend NRC's position without the benefit of the Commission's fully-considered judgment, an undesirable situation to say the least. *See, e.g., Nat'l Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145, 164 (D.C. Cir. 2010). This odd posture underscores the practical problem—a limited agency record and no specific agency response to petitioners' concerns—caused by petitioners' failure to exhaust their administrative remedies before seeking judicial review.

2. Petitioners' arguments on exhaustion are unpersuasive. Petitioners vigorously opposed our original Motion to Dismiss, which rested on their failure to exhaust administrative remedies at NRC. *See* Petitioners' Reply and Memorandum in Opposition to Respondent's Motion to Dismiss and Intervenor's Cross-Motion for Summary Reversal (August 26, 2011). Acting on our motion, this Court, by Order dated August 31, 2011, explicitly directed the parties "to address in their briefs the issues presented in the motions to dismiss rather than incorporate those arguments by reference."

Nevertheless, in their opening brief, petitioners essentially ignored this Court's directive. Indeed, the words "exhaust" or "exhaustion" appear

nowhere in their brief. Instead, they provide only remote and oblique allusions to the issue. *See, e.g.,* Pet. Brief at 6-7, 26-27.

We expect, however, that petitioners will use their reply brief to again oppose our exhaustion argument. Notwithstanding petitioners' failure to follow the Court's August 31 Order, which puts the government at a disadvantage, we can anticipate some of their responses based on their previous filings, which are addressed below.

In their opposition to our motion to dismiss, petitioners themselves warned of "*post-hoc* rationalizations created by counsel" that should "carr[y] no weight on review." Pet. Opp. 3-4. But this complaint surely "runs afoul of the Court's chutzpah doctrine." *See Caribbean Shippers Ass'n v. Surface Transp. Bd.*, 145 F.3d 1362, 1365 n.3 (D.C. Cir. 1998). The reason why the NRC record is mostly silent on petitioners' CWA claim is *petitioners' own failure* to bring it properly before NRC's Licensing Board or before the Commission. Petitioners' procedural default, and not any oversight by NRC, resulted in the underdeveloped record on the CWA issue.

Following the Licensing Board's initial rejection of petitioners' amended CWA contention as improper, NRC rules gave petitioners the opportunity to file a new, separate CWA contention, *see* 10 C.F.R. § 2.309(f)(2), or to seek

Commission review of the Board's procedural decision. *See* 10 C.F.R. §§ 2.341 & 2.1212. But petitioners chose to sit silently instead, while (in the case of petitioner NEC) continuing to pursue other issues before the Board and on appellate review before the Commission. *See* n.3, *supra.* [6]

Moreover, as petitioners' opening brief acknowledges, NRC's draft and final supplemental environmental impact statements for Vermont Yankee did not list a new § 401 certification as a permit required by law for Vermont Yankee's license renewal. *See* Pet. Brief at 7-8; RA472, RA766. Yet although they had 75 days to file comments contesting this position, the opportunity to present their claims in several public meetings, and a chance to file a new contention on these grounds before the Licensing Board under 10 C.F.R. § 2.309(f)(2), petitioners failed to take advantage of any of these opportunities to contest NRC's position on the necessity of a new § 401 certification.

Petitioners, in short, did not "use all the steps the agency holds out" to file "objection[s] . . . at the time appropriate under [NRC's] practice." *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (holding that a court should dismiss a lawsuit where the litigant did not fully exhaust administrative remedies). Had they

[6] Indeed, even in their brief in this Court, petitioners do not challenge the Board's procedural ruling that their attempt to modify their original NEPA-based contention to add the CWA issue was improper because it went beyond the scope of the original contention.

used the procedures established by NRC, petitioners might have prevailed on some of their concerns—or at least have been better informed as to the NRC's position, leading them not to challenge the agency decision at all.

To entertain CWA-based claims now, several years after petitioners abandoned such claims in NRC's proceedings, and where the Commission was never presented with such claims, would condone, and indeed reward, petitioners' unexplained failure to take advantage of their opportunities to raise their objections before the agency. For that reason, this Court has discouraged petitions by those "who had the opportunity to participate in the underlying Commission proceedings but who had failed to take advantage of it." *Natural Resources Defense Council* v. *NRC*, 666 F.2d 595, 601 n.42 (D.C. Cir. 1981).

Petitioners' opposition to our motion to dismiss maintained that adjudication of CWA claims must take place outside NRC's hearing process (Pet. Opp. 16-19), and they now state in their opening brief that "NRC has determined that the issue of compliance with the requirements of Section 401 is not an issue that is to be resolved in a license renewal hearing." Pet. Brief at 27 n.13. This is entirely incorrect.

There is no reason to believe that CWA issues cannot be addressed in NRC license renewal hearings, or that CWA issues are somehow immune

from ordinary exhaustion-of-remedies principles. Indeed, in cases involving other agencies, reviewing courts have had little difficulty in barring CWA claims for "failure to raise the issue during . . . earlier administrative proceedings." *Natural Resources Defense Council, Inc. v. Kempthorne*, 525 F.Supp.2d 115, 124 (D.D.C. 2007); *see also City of Santa Clarita v. DOI,* 249 Fed. Appx. 502, 505 (9th Cir. 2007).

Similarly, NRC's hearing process is *not* limited to claims under the Atomic Energy Act, as petitioners' brief implies, but encompasses *any* claim of unlawfulness that would defeat issuing a license, including (for example) claims under the National Environmental Policy Act, the National Historic Preservation Act, and the CWA itself.[7] Thus, NRC Licensing Boards have considered CWA claims in the past. *See, e.g., Private Fuel Storage*, LBP-98-7, 47 NRC 142, 197-98 (1998) (Board order admitting properly-filed contentions under 10 C.F.R. § 51.45(d) regarding compliance with, among other laws, the CWA).

[7] *See, e.g., Pacific Gas & Elec. Co.*, 68 NRC 509 (2008) (adjudicating NEPA claim); *Entergy Nuclear Vermont Yankee, LLC*, 65 NRC 371 (2007) (adjudicating CWA claim); *USEC, Inc.*, 63 NRC 433 (2006) (adjudicating NEPA and National Historic Preservation Act claims); *Hydro Resources, Inc.*, 50 NRC 3 (1999) (adjudicating Native American Graves Protection and Repatriation Act claim).

NRC's regulations at 10 C.F.R. § 51.45(d)—requiring applicants to list CWA permits (which Vermont Yankee's application did)—gave petitioners an obvious initial trigger point for litigating their CWA-compliance claim as part of the NRC hearing process. Indeed, briefly and ineffectively, petitioners attempted to do so through a CWA contention that they later abandoned.

Petitioners complain in their opening brief that, "[i]n opposing NEC's proposed new contention . . . raising the absence of a § 401 certification, . . . NRC [never] sought to defend the absence of such a Certification," but instead (successfully) attacked its procedural flaws. Pet. Brief at 7 n.6. But that complaint ignores this Court's settled rule that where a petitioner's "hearing arguments were not properly presented [under the agency's procedural rules], . . . the Commission was under no obligation to review them." *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 200 (D.C. Cir. 2003).

Notably, in rejecting petitioners' contention, NRC's Licensing Board did not rule that CWA claims were immaterial to licensing, or otherwise outside the scope of a license-renewal proceeding, but ruled merely that *these particular petitioners'* attempted contention was procedurally defective. *See Entergy Nuclear Vermont Yankee, LLC*, Memorandum and Order (October 30, 2006) (rejecting attempt to graft CWA claim onto pre-existing NEPA contention), RA435-36;

Entergy Nuclear Vermont Yankee, LLC, 64 NRC 131, 182 (2006) (rejecting attempt to raise new CWA claim in reply brief), RA328. Petitioners did not challenge the Board's procedural rulings on administrative appeal to the Commission (or, for that matter, in their brief in this Court).

In their opposition to our motion to dismiss, petitioners attempted to buttress their argument that CWA claims are not litigable at NRC by pointing out that NRC conducts its hearing process concurrently with state permitting processes, and does not hold hearings in abeyance to await the state outcome. Pet. Opp. 17-19. Petitioners also noted that NRC does not and cannot second-guess state determinations of clean-water standards. *Id*. at 18-19. But none of this is relevant here, where petitioners defaulted on their opportunity to bring their CWA grievance first to NRC—and deprived NRC of an opportunity to consider it—before coming to court.

By statute, the Licensing Board, analogous to a trial court, is the first step on the route to the courts of appeals. *See* 42 U.S.C. § 2241 (establishing the Board); 42 U.S.C. § 2239(b) (rendering NRC licensing decisions reviewable under the Hobbs Act). A potential litigant in court should not be permitted or encouraged to stand silent at the Board or at the Commission, or ignore NRC procedural rules; otherwise, courts of appeals would be compelled to review

legal issues in the first instance, without the benefit of the agency's views, and often with a deficient or non-existent administrative record on those issues.

Finally, in their opposition to our motion to dismiss, petitioners asserted that CWA claims like theirs can't be "waived" through a failure to exhaust NRC remedies, but only through the terms of § 401(a)(1) of the CWA. *See* Pet. Opp. 19-22. For this argument, petitioners invoked this Court's decision in *North Carolina v. FERC,* 112 F.3d 1175, 1183-1185 (D.C. Cir. 1997).

But § 401(a)(1) and *North Carolina* do not speak to the exhaustion-of-remedies doctrine, but merely to the manner in which a state may "waive" issuing an initial water-quality certification under the CWA. This case does not involve that statutory waiver or claim of such a waiver. At issue in this case is the significance of an existing § 401 or § 402 water-quality certification or permit, as petitioners themselves acknowledged in the "merits" portion of their opposition to our motion to dismiss (pp. 4-10). The simple fact is that petitioners never brought this issue before the Commission, despite having ample opportunity to do so.

NRC's specific and statutorily-required hearing process is the designated initial adjudicatory forum for dealing with grievances of all kinds regarding NRC license applications. Nothing in the CWA, Atomic Energy Act, or

Hobbs Act suggests that a litigant can ask a court of appeals for CWA review in the first instance, as petitioners attempt here.

Thus, these consolidated petitions for review should be dismissed for failure to exhaust available NRC remedies. The Court need go no further to decide this case.

II. *Petitioners have not Controverted NRC's longstanding Position with respect to Satisfying CWA Requirements through § 402 NPDES Permits*

Even assuming that this Court finds that petitioners have satisfied the exhaustion-of-remedies requirement, the Court should reject the arguments set forth in their opening brief, which are unpersuasive.

At the outset, we do not dispute petitioners' self-evident premise that NRC must comply with § 401 of the CWA, as it must comply with all other applicable laws, when issuing licenses. It is the remainder of petitioners' argument that is problematic. Petitioners' argument simply asserts that NRC failed to obtain a § 401 certification (from Entergy) before issuing Vermont Yankee's renewed operating license, and "never articulated any basis of compliance" with the CWA. Pet. Brief at 27.

Although the record contains no detailed Commission decision concerning petitioners' CWA grievance, it does include Vermont Yankee's

license-renewal application, which claimed compliance with § 401 on two grounds—Vermont Yankee's original § 401 certificate from Vermont and Vermont Yankee's existing § 402 (NPDES) permit. *See* Vermont Yankee Nuclear Power Station License Renewal Application, App. E, *Applicant's Environmental Report*, 9-1 (Jan. 25, 2006), RA45. 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.

The § 402 question is another matter. Petitioners acknowledge Vermont Yankee's valid § 402 permit, *see* Pet. Brief at 5, but argue that "[t]he record does not reflect that NRC accepted [this NPDES permit] as a substitute for actual compliance [with § 401] and certainly does not contain an affirmative statement from NRC that [Entergy] had otherwise demonstrated actual compliance with § 401 on any basis." *See id*. at 22-25. Petitioners are wrong.

CWA § 401 does not explicitly require NRC to make any "affirmative statement" of this nature. And unlike the case cited by petitioners in support of this argument, NRC's decision-making here was never properly "called into question" or "challenge[d]" before the agency. *Cf. City of Tacoma v. FERC*, 460 F.3d 53, 67-68 (D.C. Cir. 2006) (cited at Pet. Brief 23, 24). Likewise, the

Supreme Court has previously warned that courts and petitioners cannot "engraft[] their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 525 (1978).

In any event, while NRC had no occasion to explain its position on § 401 in detail, "the agency's path may reasonably be discerned." *See Wisconsin Pub. Power, Inc. v. FERC*, 493 F.3d 239, 273 (D.C. Cir. 2007), citing *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004). The record shows that NRC has long taken the position that § 402 permits can serve as a proxy for § 401 certificates, and the record supports use of such a proxy here.

Petitioners inexplicably overlook the fact that since 1996, NRC's Generic Environmental Impact Statement (GEIS) for License Renewal has explicitly announced the agency's position that in some circumstances a state's § 402 NPDES permit provides water-quality protections equivalent to those ensured by a state § 401 certificate. *See* 1 NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" at § 4.2.1.1 (1996), RA43. Consistent with the statement in the GEIS, the Supplemental Environmental Impact Statement for the Vermont Yankee

license renewal lists the § 402 NPDES permit (but not a new § 401 certification) as required for license renewal. RA766.

Although CWA §§ 401 and 402 are not identical, *see S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 380 (2006), both sections function in large part by requiring compliance with CWA §§ 301, 302, 303, 306, and 307, as well as the state's water-quality standards. Thus, in cases like the current one, where neither an affected state nor anyone else has pointed to water-quality protections available under § 401 that are not also available under § 402, it is reasonable to assume, as NRC did here, that a state's § 402 NPDES permit can act as, in effect, a proxy for a § 401 water-quality certification.

In this case, to the extent that § 401 might be understood to supply additional authority to states, Vermont—which has a federally-approved NPDES program—has never invoked any such authority, and therefore has not suffered any apparent injury to its general interest in "the protection of Vermont's water resources" (Pet. Brief at 2) that could not be addressed through the state's own § 402 permit process. Petitioners never contested NRC's general position on the inter-relationship between §§ 401 and 402, as reflected in the GEIS, in any filing or statement before NRC or in their opening brief in this Court. Thus, they have waived any challenge to NRC's

reliance on the GEIS here. *See, e.g., McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 647 F.3d 331, 335 n.7 (D.C. Cir. 2011).

Indeed, as petitioners' opening brief points out, during NRC's Vermont Yankee license renewal proceeding, Vermont's Agency of Natural Resources (VANR), responsible for Vermont's programs under §§ 401 and 402, explained to the NRC that "[t]he requirements of the Clean Water Act and the NPDES permit will provide assurance that the impacts of [Vermont Yankee's] permitted intake structures and discharges meet the applicable federal and state requirements." *See* Pet. Brief at 8. NRC was entitled to rely on this pronouncement by VANR, the authorized state water-quality agency. Although petitioners' brief maintains otherwise, *id.*, VANR's statement appears to support NRC's stated position that the § 402 NPDES permit, which incorporates CWA requirements, can be sufficient to ensure water quality. Notably, VANR's letter did not mention a need for a new § 401 certification.

Petitioners have never said, either at NRC or in this Court, how a new § 401 certification would improve water quality, given the existing § 402 permit. In these circumstances, even if there were error on NRC's part in not requiring a fresh § 401 certification, it was one of form rather than substance, and thus harmless, not warranting a judicial remedy. *See* 5 U.S.C. § 706 (on

judicial review, "due account shall be taken of the rule of prejudicial error"). As this Court recognized in another CWA case, "[i]n administrative law, as in federal and criminal litigation, there is a harmless error rule." *Jackson County v. FERC*, 589 F.3d 1284, 1290 (D.C. Cir. 2009), quoting *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659-60 (2007). "If the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration." *PDK Labs., Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004).

That is the case here. Were this Court to find that NRC technically should have required a second § 401 certification before relicensing Vermont Yankee, no judicial remedy is necessary. Petitioners have not explained what extra margin of water-quality protection Vermont would impose through a § 401 certificate that is not being achieved under the existing § 402 process. Vermont remains fully capable of ensuring that its water-quality standards will be enforced through Vermont Yankee's § 402 NPDES permit.

Finally, the *amici curiae* allied with petitioners attempt to introduce several CWA-compliance arguments not raised in petitioners' opening brief or in NRC's hearing process. *See, e.g.,* Brief of Amicus Riverkeeper and Scenic Hudson at 12-18 (disputing potential application of CWA § 401(a)(3) to this

case). But because petitioners did not properly exhaust their administrative remedies, the Commission has had little or no opportunity to address these merits issues. Moreover, this Court "will not consider" issues raised in *amicus* briefs but not raised in proceedings below "or by the parties to th[e] appeal." *Baptist Mem. Hosp. – Golden Triangle v. Sebelius,* 566 F.3d 226, 230 (D.C. Cir. 2009). *See Entergy Servs. v. FERC*, 319 F.3d 536, 545 (D.C. Cir. 2003) (new "statutory argument" raised in *amicus* brief but not in petitioner's brief "is not properly before the court"); *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001) (Court and federal respondents may disregard *amicus curiae*'s attempt to "implicate issues that have not been presented by the parties to the appeal").

Accordingly, we do not separately address the issues raised in the *amicus* briefs, except to the extent that they replicate the arguments in petitioners' opening brief.

CONCLUSION

Until it filed this lawsuit, Vermont had not independently raised any CWA water-quality issues at any point since it joined NEC's procedurally-deficient, half-hearted contention in the NRC hearing process several years ago. Neither Vermont nor NEC sought Commission review of the Licensing Board's decision dismissing that contention or ever submitted a properly-pled contention, presumably because they suffered no harm, given the substantive protections assured by Vermont's § 402 NPDES permit.

Rather than bringing their legal issues before the Commission, petitioners essentially sat idle until filing this lawsuit. This approach, if allowed by this Court, defeats the integrity of NRC's licensing process. Raising legal objections only after that process is over undermines and diminishes that process, creates confusion, and wastes scarce judicial resources.

NRC, moreover, did not err—and certainly did not err in a prejudicial sense—in not obtaining a new § 401 certificate from Entergy, given the existing water-quality protections in Vermont Yankee's § 402 NPDES permit and given Vermont's failure to identify how a new § 401 certification would further protect water quality in the state.

For the foregoing reasons, the petitions for review should be dismissed for failure to exhaust administrative remedies, or alternatively, denied on the merits.

Respectfully submitted,

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March 19, 2012

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

CERTIFICATE OF LENGTH OF BRIEF

I hereby certify that the foregoing Final Brief for Respondents U.S. Nuclear Regulatory Commission and United States of America contains **8,340** words, excluding the Table of Contents, Table of Authorities, Glossary, and Certificates of Counsel, as counted by the Microsoft Word 2007 program.

Respectfully submitted,

/S/
Sean D. Croston
Attorney

March 19, 2012

CERTIFICATE OF SERVICE

I hereby certify that on **March 19, 2012**, a copy of the foregoing Final Brief for the Federal Respondents was filed with the Clerk of the Court and served upon the following counsel of record in the case through the CM/ECF System:

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ADDENDUM OF STATUTES AND REGULATIONS

Except for the following, all applicable statutes, etc., are contained in the Brief for Petitioners.

The Vermont Statutes Online

Title 3: Executive

Chapter 25: ADMINISTRATIVE PROCEDURE

3 V.S.A. § 814. Licenses

§ 814. Licenses

(a) When the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases shall apply.

(b) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

(c) No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

(d) An agency having jurisdiction to conduct proceedings and impose sanctions in connection with conduct of a licensee or former licensee shall not lose jurisdiction if the license is not renewed or is surrendered or otherwise terminated prior to initiation of such proceedings. (1967, No. 360 (Adj. Sess.), § 14, eff. July 1, 1969; amended 1987, No. 229 (Adj. Sess.), § 1; 2001, No. 151 (Adj. Sess.), § 4, eff. June 27, 2002.)

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5 U.S.C.
United States Code, 2010 Edition
Title 5 - GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I - THE AGENCIES GENERALLY
CHAPTER 7 - JUDICIAL REVIEW
Sec. 706 - Scope of review
From the U.S. Government Printing Office, www.gpo.gov

§706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

Historical and Revision Notes

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

Abbreviation of Record

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: "This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title]."

28 U.S.C.
United States Code, 2010 Edition
Title 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART VI - PARTICULAR PROCEEDINGS
CHAPTER 158 - ORDERS OF FEDERAL AGENCIES; REVIEW
Sec. 2344 - Review of orders; time; notice; contents of petition; service
From the U.S. Government Printing Office, www.gpo.gov

§2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

(Added Pub. L. 89–554, §4(e), Sept. 6, 1966, 80 Stat. 622.)

Historical and Revision Notes

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
	5 U.S.C. 1034.	Dec. 29, 1950, ch. 1189, §4, 64 Stat. 1130.

The section is reorganized, with minor changes in phraseology. The words "as prescribed by section 1033 of this title" are omitted as surplusage. The words "of the United States" following "Attorney General" are omitted as unnecessary.

42 U.S.C.
United States Code, 2010 Edition
Title 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 23 - DEVELOPMENT AND CONTROL OF ATOMIC ENERGY
Division A - Atomic Energy
SUBCHAPTER IX - ATOMIC ENERGY LICENSES
Sec. 2133 - Commercial licenses
From the U.S. Government Printing Office, www.gpo.gov

§2133. Commercial licenses

(a) Conditions

The Commission is authorized to issue licenses to persons applying therefor to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export under the terms of an agreement for cooperation arranged pursuant to section 2153 of this title, utilization or production facilities for industrial or commercial purposes. Such licenses shall be issued in accordance with the provisions of subchapter XV of this division and subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this chapter.

(b) Nonexclusive basis

The Commission shall issue such licenses on a nonexclusive basis to persons applying therefor (1) whose proposed activities will serve a useful purpose proportionate to the quantities of special nuclear material or source material to be utilized; (2) who are equipped to observe and who agree to observe such safety standards to protect health and to minimize danger to life or property as the Commission may by rule establish; and (3) who agree to make available to the Commission such technical information and data concerning activities under such licenses as the Commission may determine necessary to promote the common defense and security and to protect the health and safety of the public. All such information may be used by the Commission only for the purposes of the common defense and security and to protect the health and safety of the public.

(c) License period

Each such license shall be issued for a specified period, as determined by the Commission, depending on the type of activity to be licensed, but not exceeding forty years from the authorization to commence operations, and may be renewed upon the expiration of such period.

(d) Limitations

No license under this section may be given to any person for activities which are not under or within the jurisdiction of the United States, except for the export of production or utilization facilities under terms of an agreement for cooperation arranged pursuant to section 2153 of this title, or except under the provisions of section 2139 of this title. No license may be issued to an alien or any any [1] corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

(f) [2] Accident notification condition; license revocation; license amendment to include condition

Each license issued for a utilization facility under this section or section 2134(b) of this title shall require as a condition thereof that in case of any accident which could result in an unplanned release of quantities of fission products in excess of allowable limits for normal operation established by the Commission, the licensee shall immediately so notify the Commission. Violation of the condition prescribed by this subsection may, in the Commission's discretion, constitute grounds for license revocation. In accordance with section 2237 of this title, the Commission shall promptly amend each license for a utilization facility issued under this section or section 2134(b) of this title which is in effect on June 30, 1980, to include the provisions required under this subsection.

(Aug. 1, 1946, ch. 724, title I, §103, as added Aug. 30, 1954, ch. 1073, §1, 68 Stat. 936; amended Aug. 6, 1956, ch. 1015, §§12, 13, 70 Stat. 1071; Pub. L. 91–560, §4, Dec. 19, 1970, 84 Stat. 1472; Pub. L. 96–295, title II, §201, June 30, 1980, 94 Stat. 786; renumbered title I, Pub. L. 102–486, title IX, §902(a)(8), Oct. 24, 1992, 106 Stat. 2944; Pub. L. 109–58, title VI, §621, Aug. 8, 2005, 119 Stat. 782.)

Amendments

2005—Subsec. (c). Pub. L. 109–58 inserted "from the authorization to commence operations" after "forty years".

1980—Subsec. (f). Pub. L. 96–295 added subsec. (f).

1970—Subsec. (a). Pub. L. 91–560 struck out requirement of a finding of practical value under section 2132 and substituted "utilization and production facilities for industrial or commercial purposes" for "such type of utilization or production facility".

1956—Subsec. (a). Act Aug. 6, 1956, §12, inserted "use," after "possess,".

Subsec. (d). Act Aug. 6, 1956, §13, inserted "an alien or any" after "issued to".

[1] So in original.

[2] So in original. Probably should be "(e)".

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United States Code, 2010 Edition
Title 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 23 - DEVELOPMENT AND CONTROL OF ATOMIC ENERGY
Division A - Atomic Energy
SUBCHAPTER XV - JUDICIAL REVIEW AND ADMINISTRATIVE PROCEDURE
Sec. 2239 - Hearings and judicial review
From the U.S. Government Printing Office, www.gpo.gov

§2239. Hearings and judicial review

(a)(1)(A) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections [1] 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 2133 or 2134(b) of this title for a construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

(B)(i) Not less than 180 days before the date scheduled for initial loading of fuel into a plant by a licensee that has been issued a combined construction permit and operating license under section 2235(b) of this title, the Commission shall publish in the Federal Register notice of intended operation. That notice shall provide that any person whose interest may be affected by operation of the plant, may within 60 days request the Commission to hold a hearing on whether the facility as constructed complies, or on completion will comply, with the acceptance criteria of the license.

(ii) A request for hearing under clause (i) shall show, prima facie, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and the specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety.

(iii) After receiving a request for a hearing under clause (i), the Commission expeditiously shall either deny or grant the request. If the request is granted, the Commission shall determine, after considering petitioners' prima facie showing and any answers thereto, whether during a period of interim operation, there will be reasonable assurance of adequate protection of the public health and safety. If the Commission determines that there is such reasonable assurance, it shall allow operation during an interim period under the combined license.

(iv) The Commission, in its discretion, shall determine appropriate hearing procedures, whether informal or formal adjudicatory, for any hearing under clause (i), and shall state its reasons therefor.

(v) The Commission shall, to the maximum possible extent, render a decision on issues raised by the hearing request within 180 days of the publication of the notice provided by clause (i) or the anticipated date for initial loading of fuel into the reactor, whichever is later. Commencement of operation under a combined license is not subject to subparagraph (A).

(2)(A) The Commission may issue and make immediately effective any amendment to an operating license or any amendment to a combined construction and operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility

involved is located. In all other respects such amendment shall meet the requirements of this chapter.

(B) The Commission shall periodically (but not less frequently than once every thirty days) publish notice of any amendments issued, or proposed to be issued, as provided in subparagraph (A). Each such notice shall include all amendments issued, or proposed to be issued, since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment (i) identify the facility involved; and (ii) provide a brief description of such amendment. Nothing in this subsection shall be construed to delay the effective date of any amendment.

(C) The Commission shall, during the ninety-day period following the effective date of this paragraph, promulgate regulations establishing (i) standards for determining whether any amendment to an operating license or any amendment to a combined construction and operating license involves no significant hazards consideration; (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located.

(b) The following Commission actions shall be subject to judicial review in the manner prescribed in chapter 158 of title 28 and chapter 7 of title 5:

(1) Any final order entered in any proceeding of the kind specified in subsection (a) of this section.

(2) Any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license.

(3) Any final order establishing by regulation standards to govern the Department of Energy's gaseous diffusion uranium enrichment plants, including any such facilities leased to a corporation established under the USEC Privatization Act [42 U.S.C. 2297h et seq.].

(4) Any final determination under section 2297f(c) of this title relating to whether the gaseous diffusion plants, including any such facilities leased to a corporation established under the USEC Privatization Act [42 U.S.C. 2297h et seq.], are in compliance with the Commission's standards governing the gaseous diffusion plants and all applicable laws.

(Aug. 1, 1946, ch. 724, title I, §189, as added Aug. 30, 1954, ch. 1073, §1, 68 Stat. 955; amended Pub. L. 85–256, §7, Sept. 2, 1957, 71 Stat. 579; Pub. L. 87–615, §2, Aug. 29, 1962, 76 Stat. 409; Pub. L. 97–415, §12(a), Jan. 4, 1983, 96 Stat. 2073; renumbered title I and amended Pub. L. 102–486, title IX, §902(a)(8), title XXVIII, §§2802, 2804, 2805, Oct. 24, 1992, 106 Stat. 2944, 3120, 3121; Pub. L. 104–134, title III, §3116(c), Apr. 26, 1996, 110 Stat. 1321–349.)

References in Text

The effective date of this paragraph, referred to in subsec. (a)(2)(C), probably means the date of enactment of Pub. L. 97–415, which was approved Jan. 4, 1983.

The USEC Privatization Act, referred to in subsec. (b)(3), (4), is subchapter A (§§3101–3117) of chapter 1 of title III of Pub. L. 104–134, Apr. 26, 1996, 110 Stat. 1321–335, which is classified principally to subchapter VIII (§2297h et seq.) of this chapter. For complete classification of this Act to the Code, see Short Title of 1996 Amendment note set out under section 2011 of this title and Tables.

Amendments

1996—Subsec. (b). Pub. L. 104–134 amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: "Any final order entered in any proceeding of the kind specified in subsection (a) of this section or any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950, as amended (ch. 1189, 64 Stat. 1129), and to the provisions of section 10 of the Administrative Procedure Act, as amended."

1992—Subsec. (a)(1). Pub. L. 102–486, §2802, designated existing provisions as subpar. (A) and added subpar. (B).

Subsec. (a)(2)(A), (C). Pub. L. 102–486, §2804, inserted "or any amendment to a combined construction and operating license" after "any amendment to an operating license".

Subsec. (b). Pub. L. 102–486, §2805, inserted "or any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license" before "shall be subject to judicial review".

1983—Subsec. (a). Pub. L. 97–415 designated existing provisions as par. (1) and added par. (2).

1962—Subsec. (a). Pub. L. 87–615 substituted "construction permit for a facility" and "construction permit for a testing facility" for "license for a facility" and "license for a testing facility" respectively, and authorized the commission in cases where a permit has been issued following a hearing, and in the absence of a request therefor by anyone whose interest may be affected, to issue an operating license or an amendment to a construction permit or an operating license without a hearing upon thirty days' notice and publication once in the Federal Register of its intent to do so, and to dispense with such notice and publication with respect to any application for an amendment to a construction permit or to an operating license upon its determination that the amendment involves no significant hazards consideration.

1957—Subsec. (a). Pub. L. 85–256 required the Commission to hold a hearing after 30 days notice and publication once in the Federal Register on an application for a license for a facility or a testing facility.

Effective Date of 1992 Amendment

Subsec. (a)(1)(B) of this section, as added by section 2802 of Pub. L. 102–486, applicable to all proceedings involving combined license for which application was filed after May 8, 1991, see section 2806 of Pub. L. 102–486, set out as a note under section 2235 of this title.

Authority To Effectuate Amendments to Operating Licenses

Section 12(b) of Pub. L. 97–415 provided that: "The authority of the Nuclear Regulatory Commission, under the provisions of the amendment made by subsection (a) [amending this section], to issue and to make immediately effective any amendment to an operating license shall take effect upon the promulgation by the Commission of the regulations required in such provisions."

Review of Nuclear Proliferation Assessment Statements

No court or regulatory body to have jurisdiction to compel performance of or to review adequacy of performance of any Nuclear Proliferation Assessment Statement called for by the Atomic Energy Act of 1954 [this chapter] or by the Nuclear Non-Proliferation Act of 1978, Pub. L. 95–242, Mar. 10, 1978, 92 Stat. 120, see section 2160a of this title.

Administrative Orders Review Act

Court of appeals exclusive jurisdiction respecting final orders of Atomic Energy Commission, now the Nuclear Regulatory Commission and the Secretary of Energy, made reviewable by this section, see section 2342 of Title 28, Judiciary and Judicial Procedure.

[1] So in original. Probably should be "section".

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United States Code, 2010 Edition
Title 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 23 - DEVELOPMENT AND CONTROL OF ATOMIC ENERGY
Division A - Atomic Energy
SUBCHAPTER XV - JUDICIAL REVIEW AND ADMINISTRATIVE PROCEDURE
Sec. 2241 - Atomic safety and licensing boards; establishment; membership; functions; compensation
From the U.S. Government Printing Office, www.gpo.gov

§2241. Atomic safety and licensing boards; establishment; membership; functions; compensation

(a) Notwithstanding the provisions of sections 556(b) and 557(b) of title 5, the Commission is authorized to establish one or more atomic safety and licensing boards, each comprised of three members, one of whom shall be qualified in the conduct of administrative proceedings and two of whom shall have such technical or other qualifications as the Commission deems appropriate to the issues to be decided, to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this chapter, any other provision of law, or any regulation of the Commission issued thereunder. The Commission may delegate to a board such other regulatory functions as the Commission deems appropriate. The Commission may appoint a panel of qualified persons from which board members may be selected.

(b) Board members may be appointed by the Commission from private life, or designated from the staff of the Commission or other Federal agency. Board members appointed from private life shall receive a per diem compensation for each day spent in meetings or conferences, and all members shall receive their necessary traveling or other expenses while engaged in the work of a board. The provisions of section 2203 of this title shall be applicable to board members appointed from private life.

(Aug. 1, 1946, ch. 724, title I, §191, as added Pub. L. 87–615, §1, Aug. 29, 1962, 76 Stat. 409; amended Pub. L. 91–560, §10, Dec. 19, 1970, 84 Stat. 1474; renumbered title I, Pub. L. 102–486, title IX, §902(a)(8), Oct. 24, 1992, 106 Stat. 2944.)

Codification

In subsec. (a), "sections 556(b) and 557(b) of title 5" substituted for "sections 7(a) and 8(a) of the Administrative Procedure Act [5 U.S.C. 1006(a), 1007(a)]" on authority of Pub. L. 89–554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

Amendments

1970—Subsec. (a). Pub. L. 91–560 required that two members of the board should have such technical or other qualifications the Commission deems appropriate to the issues to be decided.

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Title 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 55 - NATIONAL ENVIRONMENTAL POLICY
SUBCHAPTER I - POLICIES AND GOALS
Sec. 4332 - Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts
From the U.S. Government Printing Office, www.gpo.gov

§4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

(Pub. L. 91–190, title I, §102, Jan. 1, 1970, 83 Stat. 853; Pub. L. 94–83, Aug. 9, 1975, 89 Stat. 424.)

Amendments

1975—Subpars. (D) to (I). Pub. L. 94–83 added subpar. (D) and redesignated former subpars. (D) to (H) as (E) to (I), respectively.

Certain Commercial Space Launch Activities

Pub. L. 104–88, title IV, §401, Dec. 29, 1995, 109 Stat. 955, provided that: "The licensing of a launch vehicle or launch site operator (including any amendment, extension, or renewal of the license) under [former] chapter 701 of title 49, United States Code [now chapter 509 (§50901 et seq.) of Title 51, National and Commercial Space Programs], shall not be considered a major Federal action for purposes of section 102(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)) if—

"(1) the Department of the Army has issued a permit for the activity; and

"(2) the Army Corps of Engineers has found that the activity has no significant impact."

Ex. Ord. No. 13352. Facilitation of Cooperative Conservation

Ex. Ord. No. 13352, Aug. 26, 2004, 69 F.R. 52989, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Purpose*. The purpose of this order is to ensure that the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local

participation in Federal decisionmaking, in accordance with their respective agency missions, policies, and regulations.

Sec. 2. *Definition*. As used in this order, the term "cooperative conservation" means actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals.

Sec. 3. *Federal Activities*. To carry out the purpose of this order, the Secretaries of the Interior, Agriculture, Commerce, and Defense and the Administrator of the Environmental Protection Agency shall, to the extent permitted by law and subject to the availability of appropriations and in coordination with each other as appropriate:

(a) carry out the programs, projects, and activities of the agency that they respectively head that implement laws relating to the environment and natural resources in a manner that:

(i) facilitates cooperative conservation;

(ii) takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources;

(iii) properly accommodates local participation in Federal decisionmaking; and

(iv) provides that the programs, projects, and activities are consistent with protecting public health and safety;

(b) report annually to the Chairman of the Council on Environmental Quality on actions taken to implement this order; and

(c) provide funding to the Office of Environmental Quality Management Fund (42 U.S.C. 4375) for the Conference for which section 4 of this order provides.

Sec. 4. *White House Conference on Cooperative Conservation*. The Chairman of the Council on Environmental Quality shall, to the extent permitted by law and subject to the availability of appropriations:

(a) convene not later than 1 year after the date of this order, and thereafter at such times as the Chairman deems appropriate, a White House Conference on Cooperative Conservation (Conference) to facilitate the exchange of information and advice relating to (i) cooperative conservation and (ii) means for achievement of the purpose of this order; and

(b) ensure that the Conference obtains information in a manner that seeks from Conference participants their individual advice and does not involve collective judgment or consensus advice or deliberation.

Sec. 5. *General Provision*. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

George W. Bush.

[1] So in original. The period probably should be a semicolon.

U.S.NRC
United States Nuclear Regulatory Commission
Protecting People and the Environment

§ 2.1212 Petitions for Commission review of initial decisions.

Parties may file petitions for review of an initial decision under this subpart in accordance with the procedures set out in § 2.341. Unless otherwise authorized by law, a party to an NRC proceeding must file a petition for Commission review before seeking judicial review of an agency action.

Page Last Reviewed/Updated Thursday, January 12, 2012

U.S.NRC
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Protecting People and the Environment

§ 2.309 Hearing requests, petitions to intervene, requirements for standing, and contentions.

(a) *General requirements*. Any person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing. In a proceeding under 10 CFR 52.103, the Commission, acting as the presiding officer, will grant the request if it determines that the requestor has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section. For all other proceedings, except as provided in paragraph (e) of this section, the Commission, presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request for hearing and/or petition for leave to intervene, will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section. In ruling on the request for hearing/petition to intervene submitted by petitioners seeking to intervene in the proceeding on the HLW repository, the Commission, the presiding officer, or the Atomic Safety and Licensing Board shall also consider any failure of the petitioner to participate as a potential party in the pre-license application phase under subpart J of this part in addition to the factors in paragraph (d) of this section. If a request for hearing or petition to intervene is filed in response to any notice of hearing or opportunity for hearing, the applicant/licensee shall be deemed to be a party.

(b) Timing. Unless otherwise provided by the Commission, the request and/or petition and the list of contentions must be filed as follows:

(1) In proceedings for the direct or indirect transfer of control of an NRC license when the transfer requires prior approval of the NRC under the Commission's regulations, governing statute, or pursuant to a license condition, twenty (20) days from the date of publication of the notice in the Federal Register.

(2) In proceedings for the initial authorization to construct a high-level radioactive waste geologic repository, and the initial licensee to receive and process high level radioactive waste at a geological repository operations area, thirty (30) days from the date of publication of the notice in the Federal Register.

(3) In proceedings for which a Federal Register notice of agency action is published (other than a proceeding covered by paragraphs (b)(1) or (b)(2) of this section), not later than:

(i) The time specified in any notice of hearing or notice of proposed action or as provided by the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition, which may not be less than sixty (60) days from the date of publication of the notice in the **Federal Register**; or

(ii) If no period is specified, sixty (60) days from the date of publication of the notice.

(4) In proceedings for which a Federal Register notice of agency action is not published, not later than the latest of:

(i) Sixty (60) days after publication of notice on the NRC Web site at *http://www.nrc.gov/public-involve/major-actions.html*, or

(ii) Sixty (60) days after the requestor receives actual notice of a pending application, but not more than sixty (60) days after agency action on the application.

(5) For orders issued under § 2.202 the time period provided therein.

(c) Nontimely filings. (1) Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition and contentions that the request and/or petition should be granted and/or the contentions should be admitted based upon a balancing of the following factors to the extent that they apply to the particular nontimely filing:

(i) Good cause, if any, for the failure to file on time;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;

(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

(2) The requestor/petitioner shall address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing.

(d) Standing. (1) General requirements. A request for hearing or petition for leave to intervene must state:

(i) The name, address and telephone number of the requestor or petitioner;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and

(iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

(2) State, local governmental body, and affected, Federally-recognized Indian Tribe. (i) A State, local governmental body (county, municipality or other subdivision), and any affected Federally-recognized Indian Tribe that desires to participate as a party in the proceeding shall submit a request for hearing/petition to intervene. The request/petition must meet the requirements of this section (including the contention requirements in paragraph (f) of this section), except that a State, local governmental body or affected Federally-recognized Indian Tribe that wishes to be a party in a proceeding for a facility located within its boundaries need not address the standing requirements under this paragraph. The State, local governmental body, and affected Federally-recognized Indian Tribe shall, in its request/petition, each designate a single representative for the hearing.

(ii) The Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene will admit as a party to a proceeding a single designated representative of the State, a single designated representative for each local governmental body (county, municipality or other subdivision), and a single designated representative for each affected Federally-recognized Indian Tribe. In determining the request/petition of a State, local governmental body, and any affected Federally-recognized Indian Tribe that wishes to be a party in a proceeding for a facility located within its boundaries, the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene shall not require a further demonstration of standing.

(iii) In any proceeding on an application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, or an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 of this chapter, the

Commission shall permit intervention by the State and local governmental body (county, municipality or other subdivision) in which such an area is located and by any affected Federally-recognized Indian Tribe as defined in parts 60 or 63 of this chapter if the requirements of paragraph (f) of this section are satisfied with respect to at least one contention. All other petitions for intervention in any such proceeding must be reviewed under the provisions of paragraphs (a) through (f) of this section.

(3) The Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on requests for hearing and/or petitions for leave to intervene will determine whether the petitioner has an interest affected by the proceeding considering the factors enumerated in § 2.309(d)(1)-(2), among other things. In enforcement proceedings, the licensee or other person against whom the action is taken shall have standing.

(e) Discretionary Intervention. The presiding officer may consider a request for discretionary intervention when at least one requestor/petitioner has established standing and at least one admissible contention has been admitted so that a hearing will be held. A requestor/petitioner may request that his or her petition be granted as a matter of discretion in the event that the petitioner is determined to lack standing to intervene as a matter of right under paragraph (d)(1) of this section. Accordingly, in addition to addressing the factors in paragraph (d)(1) of this section, a petitioner who wishes to seek intervention as a matter of discretion in the event it is determined that standing as a matter of right is not demonstrated shall address the following factors in his/her initial petition, which the Commission, the presiding officer or the Atomic Safety and Licensing Board will consider and balance:

(1) Factors weighing in favor of allowing intervention--

(i) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record;

(ii) The nature and extent of the requestor's/petitioner's property, financial or other interests in the proceeding; and

(iii) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest;

(2) Factors weighing against allowing intervention--

(i) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(ii) The extent to which the requestor's/petitioner's interest will be represented by existing parties; and

(iii) The extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding.

(f) Contentions. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted, *provided further*, that the issue of law or fact to be raised in a request for hearing under 10 CFR 52.103(b) must be directed at demonstrating that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;

(vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief; and

(vii) In a proceeding under 10 CFR 52.103(b), the information must be sufficient, and include supporting information showing, *prima facie*, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety. This information must include the specific portion of the report required by 10 CFR 52.99(c) which the requestor believes is inaccurate, incorrect, and/or incomplete (i.e., fails to contain the necessary information required by § 52.99(c)). If the requestor identifies a specific portion of the § 52.99(c) report as incomplete and the requestor contends that the incomplete portion prevents the requestor from making the necessary *prima facie* showing, then the requestor must explain why this deficiency prevents the requestor from making the *prima facie* showing.

(2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner may amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents. Otherwise, contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that--

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

(3) If two or more requestors/petitioners seek to co-sponsor a contention, the requestors/petitioners shall jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention. If a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/petitioner, the requestor/petitioner who seeks to adopt the contention must either agree that the sponsoring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring requestor/petitioner a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

(g) *Selection of hearing procedures*. A request for hearing and/or petition for leave to intervene may, except in a proceeding under 10 CFR 52.103, also address the selection of hearing procedures, taking into account the provisions of § 2.310. If a request/petition relies upon § 2.310(d), the request/petition must demonstrate, by reference to the contention and the bases provided and the specific procedures in subpart G of this part, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures.

(h) Answers to requests for hearing and petitions to intervene. Unless otherwise specified by the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene--

(1) The applicant/licensee, the NRC staff, and any other party to a proceeding may file an answer to a request for a hearing, a petition to intervene and/or proffered contentions within twenty-five (25) days after service of the request for hearing, petition and/or contentions. Answers should address, at a minimum, the factors set forth in paragraphs (a) through (g) of this section insofar as these sections apply to the filing that is the subject of the answer.

(2) Except in a proceeding under 10 CFR 52.103, the requestor/petitioner may file a reply to any answer. The reply must be filed within 7 days after service of that answer.

(3) No other written answers or replies will be entertained.

(i) *Decision on request/petition*. In all proceedings other than a proceeding under 10 CFR 52.103, the presiding officer shall, within 45 days after the filing of answers and replies under paragraph (h) of this section, issue a decision on each request for hearing/petition to intervene, absent an extension from the Commission. The Commission, acting as the presiding officer, shall expeditiously grant or deny the request for hearing in a proceeding under 10 CFR 52.103. The Commission's decision may not be the subject of any appeal under 10 CFR 2.311.

[72 FR 49474, Aug. 28, 2007; 73 FR 44620, Jul. 31, 2008]

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U.S.NRC
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Protecting People and the Environment

§ 2.341 Review of decisions and actions of a presiding officer.

(a)(1) Except for requests for review or appeals under § 2.311 or in a proceeding on the high-level radioactive waste repository (which are governed by § 2.1015), review of decisions and actions of a presiding officer are treated under this section, provided, however, that no party may request a further Commission review of a Commission determination to allow a period of interim operation under 10 CFR 52.103(c).

(2) Within forty (40) days after the date of a decision or action by a presiding officer, or within forty (40) days after a petition for review of the decision or action has been served under paragraph (b) of this section, whichever is greater, the Commission may review the decision or action on its own motion, unless the Commission, in its discretion, extends the time for its review.

(b)(1) Within fifteen (15) days after service of a full or partial initial decision by a presiding officer, and within fifteen (15) days after service of any other decision or action by a presiding officer with respect to which a petition for review is authorized by this part, a party may file a petition for review with the Commission on the grounds specified in paragraph (b)(4) of this section. Unless otherwise authorized by law, a party to an NRC proceeding must file a petition for Commission review before seeking judicial review of an agency action.

(2) A petition for review under this paragraph may not be longer than twenty-five (25) pages, and must contain the following:

(i) A concise summary of the decision or action of which review is sought;

(ii) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not, why they could not have been raised;

(iii) A concise statement why in the petitioner's view the decision or action is erroneous; and

(iv) A concise statement why Commission review should be exercised.

(3) Any other party to the proceeding may, within ten (10) days after service of a petition for review, file an answer supporting or opposing Commission review. This answer may not be longer than twenty-five (25) pages and should concisely address the matters in paragraph (b)(2) of this section to the extent appropriate. The petitioning party may file a reply brief within five (5) days of service of any answer. This reply brief may not be longer than five (5) pages.

(4) The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

(i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(iii) A substantial and important question of law, policy, or discretion has been raised;

(iv) The conduct of the proceeding involved a prejudicial procedural error; or

(v) Any other consideration which the Commission may deem to be in the public interest.

(5) A petition for review will not be granted to the extent that it relies on matters that could have been but were not raised before the presiding officer. A matter raised sua sponte by a presiding officer has been raised before the presiding officer for the purpose of this section.

(6) A petition for review will not be granted as to issues raised before the presiding officer on a pending motion for reconsideration.

(c) (1) If a petition for review is granted, the Commission will issue an order specifying the issues to be reviewed and designating the parties to the review proceeding. The Commission may, in its discretion, decide the matter on the basis of the petition for review or it may specify whether any briefs may be filed.

(2) Unless the Commission orders otherwise, any briefs on review may not exceed thirty (30) pages in length, exclusive of pages containing the table of contents, table of citations, and any addendum containing appropriate exhibits, statutes, or regulations. A brief in excess of ten (10) pages must contain a table of contents with page references and a table of cases (alphabetically arranged), cited statutes, regulations and other authorities, with references to the pages of the brief where they are cited.

(d) Petitions for reconsideration of Commission decisions granting or denying review in whole or in part will not be entertained. A petition for reconsideration of a Commission decision after review may be filed within ten (10) days, but is not necessary for exhaustion of administrative remedies. However, if a petition for reconsideration is filed, the Commission decision is not final until the petition is decided. Any petition for reconsideration will be evaluated against the standard in § 2.323(e).

(e) Neither the filing nor the granting of a petition under this section stays the effect of the decision or action of the presiding officer, unless the Commission orders otherwise.

(f) Interlocutory review. (1) A question certified to the Commission under § 2.319(l), or a ruling referred or issue certified to the Commission under § 2.323(f), will be reviewed if the certification or referral raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding.

(2) The Commission may, in its discretion, grant interlocutory review at the request of a party despite the absence of a referral or certification by the presiding officer. A petition and answer to it must be filed within the times and in the form prescribed in paragraph (b) of this section and must be treated in accordance with the general provisions of this section. The petition for interlocutory review will be granted only if the party demonstrates that the issue for which the party seeks interlocutory review:

(i) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or

(ii) Affects the basic structure of the proceeding in a pervasive or unusual manner.

[72 FR 49476, Aug. 28, 2007]

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U.S.NRC
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Protecting People and the Environment

Preliminary Procedures

Classification of Licensing and Regulatory Action

§ 51.20 Criteria for and identification of licensing and regulatory actions requiring environmental impact statements.

(a) Licensing and regulatory actions requiring an environmental impact statement shall meet at least one of the following criteria:

(1) The proposed action is a major Federal action significantly affecting the quality of the human environment.

(2) The proposed action involves a matter which the Commission, in the exercise of its discretion, has determined should be covered by an environmental impact statement.

(b) The following types of actions require an environmental impact statement or a supplement to an environmental impact statement:

(1) Issuance of a limited work authorization or a permit to construct a nuclear power reactor, testing facility, or fuel reprocessing plant under part 50 of this chapter, or issuance of an early site permit under part 52 of this chapter.

(2) Issuance or renewal of a full power or design capacity license to operate a nuclear power reactor, testing facility, or fuel reprocessing plant under part 50 of this chapter, or a combined license under part 52 of this chapter.

(3) Issuance of a permit to construct or a design capacity license to operate or renewal of a design capacity license to operate an isotopic enrichment plant pursuant to part 50 of this chapter.

(4) Conversion of a provisional operating license for a nuclear power reactor, testing facility or fuel reprocessing plant to a full term or design capacity license pursuant to part 50 of this chapter if a final environmental impact statement covering full term or design capacity operation has not been previously prepared.

(5) [Reserved]

(6) [Reserved]

(7) Issuance of a license to possess and use special nuclear material for processing and fuel fabrication, scrap recovery, or conversion of uranium hexafluoride pursuant to part 70 of this chapter.

(8) Issuance of a license to possess and use source material for uranium milling or production of uranium hexafluoride pursuant to part 40 of this chapter.

(9) Issuance of a license pursuant to part 72 of this chapter for the storage of spent fuel in an independent spent fuel storage installation (ISFSI) at a site not occupied by a nuclear power reactor, or for the storage of spent fuel or high-level radioactive waste in a monitored retrievable storage installation (MRS).

(10) Issuance of a license for a uranium enrichment facility.

(11) Issuance of renewal of a license authorizing receipt and disposal of radioactive waste from other persons pursuant to part 61 of this chapter.

(12) Issuance of a license amendment pursuant to part 61 of this chapter authorizing (i) closure of a land disposal site, (ii) transfer of the license to the disposal site owner for the purpose of institutional control, or (iii) termination of the license at the end of the institutional control period.

(13) Issuance of a construction authorization and license pursuant to part 60 or part 63 of this chapter.

(14) Any other action which the Commission determines is a major Commission action significantly affecting the quality of the human environment. As provided in § 51.22(b), the Commission may, in special circumstances, prepare an environmental impact statement on an action covered by a categorical exclusion.

[49 FR 9381, Mar. 12, 1984, as amended at 53 FR 31681, Aug. 19, 1988; 53 FR 24052, June 27, 1988; 54 FR 15398, Apr. 18, 1989; 54 FR 27870, July 3, 1989; 57 FR 18392, Apr. 30, 1992; 66 FR 55790, Nov. 2, 2001; 72 FR 49509, Aug. 28, 2007]

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§ 54.23 Contents of application--environmental information.

Each application must include a supplement to the environmental report that complies with the requirements of Subpart A of 10 CFR Part 51.

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§ 54.27 Hearings.

A notice of an opportunity for a hearing will be published in the **Federal Register** in accordance with 10 CFR 2.105. In the absence of a request for a hearing filed within 30 days by a person whose interest may be affected, the Commission may issue a renewed operating license or renewed combined license without a hearing upon 30-day notice and publication in the **Federal Register** of its intent to do so.

[72 FR 49560, Aug. 28, 2007]

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§ 54.31 Issuance of a renewed license.

(a) A renewed license will be of the class for which the operating license or combined license currently in effect was issued.

(b) A renewed license will be issued for a fixed period of time, which is the sum of the additional amount of time beyond the expiration of the operating license or combined license (not to exceed 20 years) that is requested in a renewal application plus the remaining number of years on the operating license or combined license currently in effect. The term of any renewed license may not exceed 40 years.

(c) A renewed license will become effective immediately upon its issuance, thereby superseding the operating license or combined license previously in effect. If a renewed license is subsequently set aside upon further administrative or judicial appeal, the operating license or combined license previously in effect will be reinstated unless its term has expired and the renewal application was not filed in a timely manner.

(d) A renewed license may be subsequently renewed in accordance with all applicable requirements.

[72 FR 49560, Aug. 28, 2007]

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