

August 17, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
ENTERGY NUCLEAR VERMONT YANKEE,)	Docket No. 50-271-LR
LLC, and ENTERGY NUCLEAR)	
OPERATIONS, INC.)	ASLBP No. 06-849-03-LR
)	
(Vermont Yankee Nuclear Power Station))	

NRC STAFF ANSWER OPPOSING NEC'S
LATE CONTENTION, OR ALTERNATIVELY, REQUEST FOR
LEAVE TO AMEND OR FILE A NEW CONTENTION

INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.309(h)(1) and 2.323(c), the Staff of the Nuclear Regulatory Commission ("Staff") hereby answers "NEC's Late Contention or, Alternatively, Request for Leave to Amend or File a New Contention," filed by the New England Coalition ("NEC") on August 7, 2006 ("August 7 Petition"). NEC's new amended contention is not timely under 10 C.F.R. § 2.309(f)(2) and NEC has not demonstrated that its contention should be admitted as a nontimely filing under section 2.309(c)(1). Finally, NEC's proposed contention is inadmissible because it challenges Commission regulations and does not demonstrate a genuine dispute on a material issue. 10 C.F.R. § 2.309(f)(1)(i)(vi). Thus, the Petition and NEC's motion for leave should be denied.

BACKGROUND

On January 25, 2006, Entergy submitted its License Renewal Application, along with its Environmental Report ("ER").¹ The Environmental Report included Entergy's then current

¹ See Letter from William F. Maguire, Entergy, to U.S. NRC, dated January 25, 2006 (Agencywide Document Access and Management System ("ADAMS") Accession Nos. ML060300082, ML060300085, ML060300086).

National Pollutant Discharge Elimination System (“NPDES”) permit from the State of Vermont, but indicated that Entergy had sought an amendment of its permit from the Wastewater Management Division (“WWMD”) of the Vermont Agency of Natural Resources (“VANR”). ER at 4-17. It further stated that the proposed permit amendment would allow for a one degree F increase in thermal discharge. *Id.* On March 30, 2006, the amendment was partially granted by the VANR WWMD.² The permit expired the next day, March 31, 2006.³ However, under the State of Vermont’s timely renewal provisions, the amended permit remains in effect until a decision is reached on the permit renewal application. 3 V.S.A. § 814(b).⁴ NEC has acknowledged that the amended permit is currently in effect. See August 7 Petition at 2.

On May 26, 2006 NEC filed its initial petition for hearing. New England Coalition’s Request for Hearing, Demonstration of Standing, Discussion of Scope of Proceeding and Contentions (May 26, 2006) (“May 26 Petition”). Among the proposed contentions in this petition was Contention 1, which alleged that Entergy had failed to assess the impacts of thermal discharge. May 26 Petition at 10. This contention rested upon the statement in the ER that Entergy planned to increase thermal discharges by one degree F. *Id.* The original contention acknowledged that the NPDES permit amendment had been granted and alleged that the ER did not include an assessment of the environmental impacts of the amended

² VANR granted the proposed increase in thermal effluent limitations for the time period of June 16 through October 14, but denied the proposed increase for May 16 through June 15. See Amended Permit at 4; Fact Sheet at 4.

³ See Amended Discharge Permit at 1, dated March 30, 2006 (provided in License Renewal Application (“LRA”) Amendment 6 and attached to Entergy’s Answer).

⁴ “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.” 3 V.S.A. § 814(b); *see also* “Letter from Carole Fowler, Administration and Compliance Section, VANR WWMD, to Lynn DeWald, Entergy Nuclear VT Yankee LLC,” dated September 30, 2005 (attached to Entergy’s Answer).

effluent limitations. *Id.* at 11. It further alleged that the amended permit is on appeal and that it “is valid for a maximum of five years [which] necessarily fails to provide any justification for the cumulative impact of the discharge over Entergy’s requested twenty-year license extension.”

Id.

The Staff did not oppose admission of NEC’s original Contention 1, because “[t]he Environmental Report, submitted in January 2006, did not include the discharge permit that authorizes the one degree increase and assesses the impacts of such increase, but indicates the amended permit request was pending.” NRC Staff Answer to Request for Hearing of New England Coalition (June 22, 2006) (“Staff Answer”) at 8. Entergy opposed admission of NEC’s Contention 1, provided a copy of its newly amended discharge permit, and claimed that the contention was inadmissible because the new permit was equivalent to a CWA § 316(a) permit, as required by 10 C.F.R. § 51.53(c)(3)(ii)(B). Entergy’s Answer to New England Coalition’s Petition for Leave to Intervene, Request for Hearing, and Contentions (June 22, 2006) at 11-12. That regulation reads as follows:

If the applicant's plant utilizes once-through cooling or cooling pond heat dissipation systems, the applicant shall provide a copy of current Clean Water Act 316(b) determinations and, if necessary, a 316(a) variance in accordance with 40 CFR part 125, or equivalent State permits and supporting documentation. If the applicant can not provide these documents, it shall assess the impact of the proposed action on fish and shellfish resources resulting from heat shock and impingement and entrainment.

10 C.F.R. § 51.53(c)(3)(ii)(B). On the same day that Entergy and the Staff filed their answers, the amended discharge permit became publicly available on ADAMS, the NRC’s document access system.⁵

In its reply to Entergy and the Staff, NEC acknowledged that “Entergy . . . appear[s] to

⁵ See Vermont Yankee Nuclear Power Station NPDES Final Amended Permit #3-1199. ADAMS Accession No. ML061730280.

argue that the recently issued NPDES permit is dispositive of whether the application contains an appropriate assessment of the . . . water quality impacts. New England Coalition Inc.'s Reply to Entergy and NRC Staff Answer to Petition for Leave to Intervene, Request for Hearing, and Contentions (June 29, 2006) at 4 ("Reply"). NEC responded to this by arguing that (1) the amended NPDES permit has expired; (2) there is a maximum duration of five years for a NPDES permit; (3) the March 30 permit amendments require extensive monitoring and studies; (4) Entergy has not applied for a § 401 Certification; and (5) the amended NPDES permit is under appeal. Reply at 4-6.

On July 27, 2006, Entergy formally docketed its amended permit with the NRC as Amendment 6 to the Vermont Yankee License Renewal Application ("LRA"). On July 28, 2006, Entergy provided notice of Amendment 6 to the Licensing Board and the participants in this proceeding. Ten days later, NEC filed the instant proposed new contention, and alternatively sought leave to file a new contention, or to amend Contention 1. August 7 Petition at 2.

DISCUSSION

I. Legal Standards for Admission of Late-Filed Contentions

The first step in addressing a new contention under NRC regulations is to determine if it is timely and otherwise meets the requirements of 10 C.F.R. § 2.309(f)(2). *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station) LBP-06-14, 63 NRC at __ (slip op. at 3-4) (2006). Late-filed contentions may be admitted with leave of the presiding officer only 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.

10 C.F.R. § 2.309(f)(2).⁶

Further, under Commission regulations, a nontimely contention may be admitted only upon the presiding officer's determination that it should be admitted after balancing the following eight factors, all of which must be addressed in the petitioner's 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.

10 C.F.R. § 2.309(c)(1).

Petitioners seeking admission of a late-filed contention bear the burden of showing that a balancing of these factors weighs in favor of admittance. *Baltimore Gas & Electric Co.*

(Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 (1998) (noting

⁶ While this is a NEPA contention and a different standard for NEPA contentions is set forth in section 2.309(f)(2), that different standard applies only where there is new information in Staff draft or final Environmental Impact Statements ("EIS") or Environmental Assessments ("EA"). Otherwise, when new information does not come from one of these stated sources, the criteria in section 2.309(f)(2)(i)-(iii) apply.

that the Commission has summarily dismissed petitioners who failed to address the factors for a late-filed petition). The first factor, whether good cause exists for the failure to file on time, is entitled to the most weight. *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993). Where no showing of good cause for the lateness is tendered, "petitioner's demonstration on the other factors must be particularly strong." *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, & 3), ALAB-431, 6 NRC 460, 462 (1977)). The fifth and sixth factors, the availability of other means to protect the petitioner's interest and the ability of other parties to represent the petitioner's interest, are less important than the other factors, and are therefore entitled to less weight. See *id.* at 74.⁷

In addition to fulfilling the requirements of 10 C.F.R. § 2.309(f)(2), a petitioner must also show that the late-filed contention meets the standard contention admissibility requirements. See *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-363 (1993). The NRC strictly limits the contentions that may be raised so that individual licensing adjudications are limited to deciding "genuine, substantive safety and environmental issues placed in contention by qualified intervenors." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999), quoting H.R. Rep. No. 97-177, at 151 (1981). In applying this standard, the Commission has noted that "to begin with, the subject of the contention must be appropriate for adjudication in an individual licensing proceeding," and that "[n]o contention is to be admitted for adjudication if it attacks

⁷ When these cases were decided, there were only five factors. The cases remain applicable, however, as they discuss the five factors most pertinent to this discussion. Factors (ii), (iii), and (iv), which relate to the petitioner's standing, were included in 2004. Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,239 (Jan. 14, 2004). The Staff did not challenge NEC's standing to participate in this proceeding. See Staff Answer at 3.

applicable statutory requirements or Commission regulations, if it raises issues that are not applicable to the facility in question, or it raises a question that is not concrete or litigable.”

Private Fuel Storage (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 129 (2004). In addition to these substantive requirements a petitioner seeking to raise a contention in an adjudicatory hearing must meet the strict pleading standards found in section 2.309(f)(1). *Id.*

This regulation requires a petitioner to:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (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 . . . ; and
- (vi) 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 reason for the petitioner's belief.

10 C.F.R. § 2.309(f)(1). Failure to comply with any of these requirements may be grounds for dismissing a contention. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

II. NEC's Proposed New Contention

NEC alleges that Entergy's ER "does not sufficiently assess the impacts of increased thermal discharges over the requested 20-year license extension." August 7 Petition at 2. NEC provides the following arguments to support its contention:

1. The permit amendments, on their face, do not constitute a CWA § 316 determination.
2. The amended permit has expired, remains only temporarily in effect and is being reviewed *de novo* on appeal.
3. The permit amendments require significant further study and any new permit will be issued with different conditions based upon the required studies.

Id.

III. NEC's Proposed New Contention is Not Admissible and Should be Rejected

NEC addresses the criteria found in 10 C.F.R §§ 2.309 (c)(1) and (f)(2)(i)-(iii). August 7 Petition at 6-10. However, NEC's late-filed contention meets neither the late-filed standards of section 2.309(f)(2) nor the nontimely standards under section 2.309(c)(1).

Therefore, NEC's late-filed contention is inadmissible.

A. NEC's Late Contention is Not Timely Under 10 C.F.R. § 2.309(f)(2)

The amendment of Entergy's NPDES permit to allow increased thermal effluent limitations is information that was previously available. 10 C.F.R. § 2.309(f)(2)(i). The permit was amended on March 30, 2006 and NEC relied upon its knowledge of the amendment in its original contention.⁸ See May 26 Petition at 11. Entergy's reliance upon this permit amendment to fulfill its regulatory requirements is also information that was previously available. Entergy's June 22 Answer indicated that it was relying upon the amended discharge

⁸ NEC attached to its August 7 Petition an affidavit of its expert witness, Dr. Ross Jones, dated June 15, 2006 in support of a Motion to Stay the effectiveness of the amended permit. This further demonstrates NEC was aware of the permit amendment several months ago.

permit to fulfill its requirement under NRC regulations to provide its 316(a) variance. See Entergy Answer at 12-13. In response, NEC raised the same arguments it would later raise in its August 7 Petition, demonstrating that NEC was aware of Entergy's reliance on June 22. See discussion of NEC's Reply *supra* at 3-4.

The Commission has stated that a petitioner has "an ironclad obligation" to examine publicly available documents to uncover information that may serve as the foundation of a contention." *Oconee*, CLI-99-11, 49 NRC at 338 (quoting Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989) ("intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention")).

Accordingly, NEC does not argue that the amendment of the permit is information that was not previously available. Instead, NEC claims that "the fact that Entergy has formally amended its environmental report to characterize the permit as a CWA § 316 variance is new, and could not have been reasonably anticipated," and thus "puts the NPDES amendments into play." August 7 Petition at 7, 8. NEC further argues that the act of amending the ER "represents a material change in both [Entergy's] legal theory concerning compliance with NEPA, and the facts it submits as alleged proof of compliance." *Id.* at 7, 10. NEC is correct that Entergy's act of amending its ER by providing its amended permit is new information that was not previously available. However, the amendment of the ER is not information that is materially different from information that was previously available. 10 C.F.R. § 2.309(f)(2)(ii). Therefore, it does not provide a sufficient reason for admitting a late-filed contention.

Entergy originally submitted its Environmental Report to the NRC Staff on January 25, 2006. In the ER, Entergy referenced 10 C.F.R. § 51.53(c)(3)(ii)(B), which requires a 316(a)

variance or equivalent permit, and attached a copy of its then-current Vermont NPDES discharge permit. ER at 4-16, 4-17, Attachment D. Any argument that NEC now raises about whether state NPDES permits are equivalent to 316(a) variances should have been raised based upon the original unamended permit that accompanied the unamended ER. For instance, NEC could have argued that (1) the state NPDES permit is not the equivalent of a 316(a) variance, or (2) the possibility that new permits will be issued with new conditions in the future demonstrates that the state permit is not sufficient under NEPA. In fact, in the original petition, NEC challenged the amended permit because it is on appeal and is only valid for five years. See May 26 Petition at 11. Thus, the arguments NEC now raises would have been equally applicable to the ER as originally submitted. Therefore, NEC has failed to make the required showing that, with respect to these arguments raised in both its May 26 and August 7 petitions, the amendment of Entergy's ER to incorporate its current permit represents materially different information. 10 C.F.R. § 2.309(f)(2)(ii).

Further, contrary to NEC's assertion, the amendment of Entergy's ER to include the amended permit could certainly have been anticipated. Entergy is required to submit its current discharge permit to the NRC. 10 C.F.R. § 51.53(c)(3)(ii)(B). Compliance with regulatory requirements is something that can be reasonably anticipated. However, even if that were not so, Entergy made clear on June 22, over a month before formally amending its ER, that it characterized its amended NPDES permit as equivalent to a 316(a) variance. See Entergy's Answer at 11-12. In its Answer, Entergy noted its obligation to provide a 316(a) variance or equivalent permit, attached a copy of its amended permit, and relied upon that permit to argue that it had complied with the regulation. *Id.* The fact that Entergy relied upon its amended discharge permit to fulfill its regulatory requirement is information that was previously available. 10 C.F.R. § 2.309(f)(2)(i). While many of NEC's arguments could have been raised based upon Entergy's original ER, each and every one should have been raised in a petition

addressing the late-filed contention standards, based upon Entergy's June 22 Answer. NEC's ironclad obligation to examine publicly available documents pertaining to the facility in question certainly includes Entergy's legal filings. See 54 Fed. Reg. at 33,170 citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982); vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

NEC's new contention has not been timely submitted. 10 C.F.R. § 2.309(f)(2)(iii). As discussed above, NEC knew about the permit amendment on May 26, when it filed its original petition. NEC knew on June 22 that Entergy viewed the permit amendment as meeting its obligation under 10 C.F.R. § 51.53(c)(3)(ii)(B), when Entergy so stated in its Answer. Because NEC knew this information 45 days before filing its August 7 Petition, NEC's new or amended contention is not timely.⁹

B. NEC's Nontimely Contention is Not Admissible Under 10 C.F.R. § 2.309(c)(1)

NEC's contention is inadmissible. Because NEC's contention is not based on information that is materially different from that which was previously available, NEC has not demonstrated good cause for its failure to file on time. 10 C.F.R. § 2.309(f)(1)(i). NEC argues that its interests may not be protected in any other way. August 7 Petition at 8. However, its original contention 1 raises many of the same arguments raised in the August 7 Petition. May 26 Petition at 11. NEC's inability to show good cause for its failure to file on time, is entitled to the most weight, and it has failed to meet its burden of showing that a balancing of these factors weighs in favor of admittance. See *State of New Jersey*, CLI-93-25, 38 NRC at 296.

⁹ Additionally, NEC references Entergy's obligation to provide a § 401 Certification. August 7 Petition at 4-5. This specific claim is untimely, because NEC made no attempt to explain why this issue was not raised in its initial petition, nor does it attempt to make the required showing that the information upon which this claim is based was not previously available, or materially different. 10 C.F.R. § 2.309(f)(2).

C. NEC Has Not Proffered an Admissible Contention

NEC's amended contention fails as a matter of law because it challenges NRC regulations, specifically 10 C.F.R. § 51.53(c)(3)(ii)(B). Further, the contention fails to demonstrate the existence of a genuine dispute on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi). Specifically, NEC has failed to provide support for its assertion that the assessment of thermal shock impacts it demands is, in fact, required by law. Therefore, the sufficiency of the assessment of thermal impacts in the ER is immaterial.

A contention "must show that a 'genuine dispute' exists with the applicant on a 'material' issue of law or fact." *Oconee*, CLI-99-11, 49 NRC at 333-34 citing 10 C.F.R. § 2.714(b)(2)(iii) (now 10 C.F.R. § 2.309(f)(1)(vi)). The dispute at issue is "material" if its resolution would "make a difference in the outcome of the licensing proceeding." *Id.* citing Final Rule, Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989).

While the Staff must provide an assessment of the impacts of thermal effluents in its EIS (see 10 C.F.R. § 51.71(d)), NRC regulations only require Entergy to provide a state permit that is equivalent to a 316(a) variance. 10 C.F.R. § 51.53(c)(3)(ii)(B). As demonstrated below, Entergy has provided its current 316(a) equivalent permit and therefore, the sufficiency of Entergy's ER assessment of thermal impacts is not material. 10 C.F.R. § 2.309(f)(1)(vi). To the extent that NEC's contention seeks to require Entergy to further assess these impacts, even though it has provided a current 316(a) equivalent permit, the contention impermissibly challenges NRC regulations. The Staff addresses each of NEC's arguments in sequence.

1. The Permit Amendments, On Their Face, Do Not Constitute a CWA § 316 Determination

The NRC's regulations governing the analyses required to be included in an applicant's ER for a license renewal application are found in 10 C.F.R. § 51.53(c). With respect to thermal

discharge, if an applicant uses once-through cooling and has a Federal Water Pollution Control Act ("FWPCA" or "the Clean Water Act") § 316(a) variance, or equivalent state permit, the applicant is required to provide the variance or permit and supporting documentation.

10 C.F.R. § 51.53(c)(3)(ii)(B).¹⁰ An applicant is only required to provide an assessment of thermal impacts if it cannot provide "a 316(a) variance in accordance with 40 CFR Part 125, or equivalent State permit." *Id.*

The Commission explained its reasoning when the rule was first proposed in 1991:

Aquatic impacts of entrainment, impingement, and heat shock are potential problems at plants with once-through or cooling-pond heat dissipation systems. However, plant operations and effluents that have the potential to cause these impacts are under the regulatory authority of EPA or (*sic*) State authorities. The permit process authorized by the FWPCA is an adequate mechanism for control and mitigation of these potential aquatic impacts. If an applicant to renew a license has appropriate EPA or State permits, further NRC review of these potential impacts is not warranted. Therefore, the proposed rule requires an applicant to provide the NRC with certification that it holds FWPCA permits, or if State regulation applies, current State permits. If the applicant does not so certify, it must assess these aquatic impacts.

Proposed Rule, Environmental Review for Renewal of Operating Licenses, 56 Fed. Reg. 47,016, 47,019 (Sept. 17, 1991). This reasoning is sensible in light of the purpose of environmental reports, which "is to inform the Staff's preparation of . . . an Environmental Impact Statement." *Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 396 (1995).

The only regulatory requirements for acceptance of a state permit are that it must be current, it must be equivalent to a 316(a) variance, and it must be accompanied by supporting documentation. 10 C.F.R. § 51.53(c)(3)(ii)(B). Therefore, the threshold question for this discussion is whether Entergy has provided a current state permit, with supporting

¹⁰ NEC, in its petition, incorrectly refers to nonexistent regulations such as 10 C.F.R. § 51.53(c)(3)(A) and 10 C.F.R. § 54.53(c)(3)(B). See August 7 Petition at 2, 5, 6. It never refers to the correct regulation, 10 C.F.R. § 51.53(c)(3)(ii)(B).

documentation, that is equivalent to a 316(a) variance under 40 C.F.R. Part 125. If it has, then this issue is not material and so the contention fails to demonstrate a genuine dispute on a material issue of law. 10 C.F.R. § 2.309(f)(1)(vi).

No definition of “equivalent” is provided in either the regulation or its regulatory history. 10 C.F.R. § 51.53(c)(3)(ii)(B). However, equivalent has been defined as:

- 1) Equal in value, force, amount, effect, or significance.
- 2) Corresponding in effect or function; nearly equal; virtually identical.

Black’s Law Dictionary 561 (7th ed. 1999). A state permit that is equivalent to a 316(a) variance in accordance with 40 C.F.R. Part 125 will (1) rely upon section 316(a) of the Clean Water Act for its legal basis, (2) apply the same regulatory standard as found in 40 C.F.R. Part 125, and (3) grant the same relief afforded under a 316(a) variance. A state permit meeting these three criteria will be equal in value, force, effect and significance to a 316(a) variance, and will have a corresponding effect and function of allowing an increased thermal effluent limitation under the Clean Water Act. Entergy’s Amended Discharge Permit incorporates each of these characteristics, and is a state permit that is equivalent to a 316(a) variance.

First, the Amended Permit relies upon FWPCA § 316(a) for its legal basis. The March 30 Amended Discharge Permit, on its face, grants a variance from thermal effluent limitations, “in compliance with the provisions of the . . . Federal Clean Water Act.” Amended Permit at 1. The Amended Fact Sheet, which provides background information and support for the amended discharge permit, cites to this same federal standard under the heading “Legal and Regulatory Basis for ANR’s Review,” which states, “the Agency’s review of thermal discharges is governed by § 316(a) of the Clean Water Act (CWA).” Amended Fact Sheet at 3.

Second, the Amended Permit applies the legal standard from 40 C.F.R. Part 125. Subpart H of that part “describes the factors, criteria and standards for the establishment of alternative thermal effluent limitations under section 316(a) of the [Clean Water] Act in permits

issued under section 402(a) of the Act. 40 C.F.R. § 125.70. Under 40 C.F.R. § 125.73, a discharger seeking to obtain less stringent thermal discharge effluent limitations must demonstrate that “the alternative effluent limitation it seeks, considering the cumulative impact of all other significant impacts, will assure the protection and propagation of a balanced, indigenous community shellfish, fish, and wildlife in and on the body of water into which the discharge is made.” 40 C.F.R. § 125.73(a). Under the heading “Findings of ANR’s Review Process,” the Amended Fact Sheet applies the federal standard found in section 125.73. *Id.* at 4. Specifically, VANR found that for the time period of June 16 through October 14, the amended effluent “limits will ‘assure the protection and propagation of a balanced indigenous population of shellfish, fish and wildlife’.”¹¹ *Id.*

Finally, the Amended Permit partially granted the increased thermal effluent limitation. Thus, the state permit is equal in effect and function to a 316(a) variance. The Amended Permit cites FWPCA § 316(a) for its legal basis, applies the federal regulatory standard from 40 C.F.R. § 125.73, and partially grants the variance allowing increased thermal effluents. There can be no genuine dispute that the amended permit attached as Amendment 6 to Entergy’s ER is a state permit that is equivalent to a 316(a) variance under 40 C.F.R. Part 125.

2. The Amended Permit Has Expired, Remains Only Temporarily in Effect and is Being Reviewed *de Novo* on Appeal

Entergy has provided a state permit that is the Vermont equivalent of a 316(a) variance. NEC raises the fact that the permit has expired, and the amendment is under *de novo* appeal. August 7 Petition at 2. However, in its very next sentence, NEC acknowledges that the

¹¹ See *also* Responsiveness Summary 3-1199 at 5 (“The conclusion of the 2004 316a Demonstration, with which the Agency concurs, is that the existing and proposed discharge assures ‘protection and propagation of a balanced indigenous population’ during the June 16 through October 14 time period”).

amended permit remains in effect while on appeal.¹² *Id.* Under NRC regulations, Entergy must provide only its *current* 316(a) variance or equivalent permit. 10 C.F.R. § 51.53(c)(3)(ii)(B). The fact that Entergy's permit may be only "temporarily in effect" does not mean that it is not current. There is no reasonable interpretation of the word "current" that would not include a permit that is "temporarily in effect."

By arguing that Entergy must do something more than provide its current permit, NEC is, in effect, challenging 10 C.F.R. § 51.53(c)(3)(ii)(B). A contention presents an impermissible challenge to the Commission's regulations by seeking to impose requirements in addition to those set forth in the regulations. *See Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001); *see also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996). The Commission has made a similar point several times, noting that "a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies." *Oconee*, CLI-99-11, 49 NRC at 334; *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003). NRC regulations require Entergy to provide an assessment of heat shock impacts only if a current 316(a) variance or equivalent state permit cannot be provided. 10 C.F.R. § 51.53(c)(3)(ii)(B). NEC's contention seeks to require this assessment even though Entergy has provided its current equivalent state permit, and thus is an impermissible attack on a generic NRC requirement. *See Turkey Point*, LBP-01-6, 53 NRC at 159.

¹² *See also* 10 V.S.A. § 8504, "Appeals to the environmental court." Subpart(f) of that section, entitled "Stays," notes that the filing of an appeal automatically stays the act or decision only in select situations, such as decisions involving stream alteration permits or shoreline encroachment permits, or the denial of interested person status by a board of adjustment, planning commission, or development review board. 10 V.S.A. § 8504(f)(1)(a), (b). The environmental court may also grant a stay upon petition or on its own motion. 10 V.S.A. § 8504(f)(2). Regardless of whether the amendment is stayed, Entergy has provided its current permit, because it has submitted both the pre- and post-amendment permits.

3. The Permit Amendments Require Significant Further Study and Any New Permit Will be Issued With Different Conditions Based Upon the Required Studies

NEC also asserts that any new permit will have different conditions not included in the current permit. August 7 Petition at 2, 4. This is simply not relevant to Entergy's obligation to provide its *current* permit. In its August 7 Petition, NEC points to no NRC requirement or NEPA caselaw to support its novel proposition that Entergy must provide a discharge permit that is valid through the end of the renewed license term (26 years from now), or that it must provide a permit that is not subject to change.¹³

In fact, when the Commission promulgated this rule, it acknowledged that "[a]gencies responsible for existing permits are not constrained from reexamining the permit issues if they have reason to believe that the basis for their issuance is no longer valid." Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,475 (Jun. 5, 1996). However, despite acknowledging the possibility of changes to permits, the Commission required license renewal applicants to provide only the current permit. 10 C.F.R. § 51.53(c)(3)(ii)(B). Again, NEC's contention seeks to require an assessment of heat shock impacts even though Entergy has provided its current 316(a) equivalent state permit, and thus amounts to an impermissible attack on a generic NRC requirement. See *Turkey Point*, LBP-01-6, 53 NRC at 159.

NEC baldly asserts that "the Vermont Agency of Natural Resources (VANR) explicitly states that the amended permit is not a complete § 316 determination." August 7 Petition at 2. However, NEC does not provide a citation for this statement. *Id.* Nowhere does VANR make

¹³ In its original May 26 Petition, which NEC incorporated by reference, it did cite to NEPA caselaw requiring agencies to take a "hard look" at impacts, including cumulative impacts, and the NRC requirement to include adverse information. May 26 Petition at 12. However, NEC has not clearly articulated why it believes compliance with 10 C.F.R. § 51.53(c)(3)(ii)(B) to be incompatible with its cited standards. Additionally, NEC has failed to clearly articulate the manner in which NEPA "hard look" caselaw, which, like NEPA, governs federal agencies, applies to Entergy.

this statement, explicitly or otherwise. To support this misrepresentation, NEC quotes a section of the Amended Fact Sheet that states: “[t]he reviewers concluded that more information (i.e. actual field studies) was needed to make this determination, and therefore the Agency has not granted this portion of the Applicant’s amended request.” August 7 Petition at 2-3 citing Amended Fact Sheet at 5. NEC refers to a section of the Fact Sheet that discusses the need for additional studies for the period of May 16 through June 15, the period for which the amendment was not granted. NEC fails to recognize the difference between a variance that has been granted and one that has been denied. As discussed above, Entergy is required to provide its current 316(a) variance or equivalent state permit. 10 C.F.R. § 51.53(c)(3)(ii)(B).

The permit, as it currently stands, includes the recently granted effluent limitation amendment for June 16 through October 14, but certainly does not include the denied amendment for May 16 through June 15. There is no reason for the Environmental Report, the NPDES permit, or the Fact Sheet to discuss the impacts of a variance that was not granted. NEC’s amended contention, which seeks to require the ER to assess impacts from effluents that are not currently authorized, simply does not make sense.¹⁴ To the extent that NEC seeks to require Entergy to provide an assessment for a variance that was not granted and that Entergy cannot currently utilize, NEC’s contention again seeks to force Entergy to provide more information than is required by regulation, impermissibly attacking a generic NRC requirement and fails to demonstrate a genuine dispute on a material issue. *See Turkey Point*, LBP-01-6, 53 NRC at 159; 10 C.F.R. § 2.309(f)(1)(vi).

¹⁴ NEC’s discussion of concerns expressed by the U.S. Fish and Wildlife Service (“USFWS”) is equally inapposite. *See* August 7 Petition at 3-4. First, the USFWS is not the permitting authority for Entergy’s state permit. Therefore, recommended studies that are not included in the Amended Discharge Permit are not relevant under 10 C.F.R. § 51.53(c)(3)(ii)(B). Second, the USFWS concerns cited by NEC were for the same period of time (May 16 - June 15) for which Entergy was not granted an increased thermal effluent limitation. *See* “Letter from Marvine E. Moriarty, Regional Director, USFWS to Jeffrey Wennberg, Commission VANR,” dated March 17, 2006 (Attachment 2 to August 7 Petition).

CONCLUSION

Based on the foregoing, NEC's petition is not based upon new information that is materially different from information that was previously available and is not timely.

10 C.F.R. § 2.309(f)(2). Further, NEC impermissibly challenges NRC regulations and fails to raise a material issue. 10 C.F.R. § 2.309(f)(vi). NEC's proposed contention should be rejected and its motion for leave denied.

Respectfully submitted,

/RA/

Steven C. Hamrick
Counsel for NRC Staff

Dated at Rockville, Maryland
this 17th day of August, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
ENTERGY NUCLEAR VERMONT YANKEE,)	Docket No. 50-271-LR
LLC, and ENTERGY NUCLEAR)	
OPERATIONS, INC.)	ASLBP No. 06-849-03-LR
)	
(Vermont Yankee Nuclear Power Station))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER OPPOSING NEC'S LATE CONTENTION" in the above-captioned proceeding have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system or, as indicated by an asterisk, by electronic mail with copies by U.S. mail, first class, or, as indicated by a double asterisk, by electronic mail with copies by overnight express mail, this 17th day of August 2006.

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