RAS 12141

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, LLC	)	Docket No. 50-271-LR
and Entergy Nuclear Operations, Inc.	)	ASLBP No. 06-849-03-LR
	)	
(Vermont Yankee Nuclear Power Station)	)	

ENTERGY'S ANSWER TO
NEW ENGLAND COALITION'S LATE CONTENTION

I. INTRODUCTION

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (hereinafter collectively referred to as "Entergy") hereby answer and oppose "NEC's Late Contention or, Alternatively, Request for Leave to Amend or File a New Contention" ("Motion") dated August 7, 2006. The Motion should be denied because the New England Coalition's ("NEC") proposed amendment to its Contention 1 is untimely and unsupported by a demonstration of compliance with the lateness criteria. Indeed, NEC's purported amendment to its contention appears nothing more than an improper attempt to provide a further reply to the arguments made in response to the original contention. Furthermore, even if NEC were permitted to amend its Contention 1, that contention should still be rejected as inadmissible.

II. PROCEDURAL BACKGROUND

Entergy submitted its application, dated January 25, 2006, requesting renewal of Operating License DPR-28 for the Vermont Yankee Nuclear Power Station (the "Application"). On March 27, 2006, the Nuclear Regulatory Commission ("NRC" or "Commission") published a

Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing ("Notice") regarding Entergy's application. 71 Fed. Reg. 15,220 (March 27, 2006).

On May 26, 2006, NEC filed a "Petition for Leave to Intervene, Request for Hearing, and Contentions" ("Pet.") in this proceeding. NEC Contention 1, as alleged in this Petition, asserted that Entergy failed to assess impacts to water quality (Pet. at 10). NEC asserted that the specific issue is whether Entergy's Environmental Report ("ER") sufficiently assesses the impacts of increased thermal discharges over the requested 20-year license extension.[1] Pet. at 12-13. NEC's reference to the increased thermal discharges pertains to the issuance by the Vermont Agency of Natural Resources ("VANR") of an amended NPDES permit[2] approving a 1°F increase in the thermal effluent limitations during period from June 16 through October 14. See Pet. at 10-11.

Entergy submitted "Entergy's Answer to New England Coalition's Petition for Leave to Intervene, Request for Hearing, and Contentions" ("Entergy's Answer") on June 22, 2006. Entergy responded that NEC Contention 1 is not admissible because 10 C.F.R. § 51.53(c)(3)(ii)(B) does not require a license renewal applicant's ER to assess certain aquatic impacts, including heat shock, if the applicant provides a 316(a) variance in accordance with 40 C.F.R. part 125, or equivalent State permits and supporting documentation. Entergy's Answer at 12. Entergy indicated that it had provided the Final Amended Permit constituting the 316(a)

[1] At the prehearing conference, NEC stated that this specific statement constituted its contention. Tr. 252.

[2] Final Amended Discharge Permit # 3-1199 (March 30, 2006) (hereinafter referred to as the "Final Amended Permit"), provided as Attachment 2 to Entergy's Answer, and as Attachment D to the ER as currently amended.

determination for the thermal discharge with the 1°F increase,[3] and also attached to its Answer a copy of the Final Amended Permit, Amended Fact Sheet No. 3-1199 (the "Fact Sheet"), and Responsiveness Summary 3-1199 (the "Responsiveness Summary"). Id. at 12 and Attachments 2-3. In addition, Entergy responded that NEC had failed to provide information demonstrating a genuine material dispute with the application. Entergy's Answer at 17-18.

NEC submitted "New England Coalition, Inc.'s Reply to Entergy and NRC Staff Answers to Petition for Leave to Intervene, Request for Hearing and Contentions" ("NEC Reply") on June 29, 2006. The NEC Reply did not contain any mention of the 316(a) variance and did not dispute that the Final Amended Permit constituted a 316(a) variance. See NEC Reply at 2-15. Instead, NEC sought to inject an entirely new argument that a certification under section 401 of the Clean Water Act is required. NEC Reply at 3-4, 6, 14. Entergy subsequently moved to strike the new arguments concerning the alleged need for 401 certification improperly raised for the first time in a reply. Entergy's Motion to Strike Portions of New England Coalition's Reply (July 10, 2006) at 9-11.

On July 27, 2006, Entergy amended its Application to reflect the issuance of the Final Amended Permit (which had been issued after the Application was filed). Vermont Yankee Nuclear Power Station, License No. DPR-28 (Docket No. 50-271), License Renewal Application, Amendment 6 (July 27, 2006), NRC ADAMS Accession No. ML062130080. This amendment made changes to section 4.4 of the ER identifying the Final Amended Permit and supporting documentation, providing the new thermal effluent limitations approved by that permit, and describing the VANR's findings supporting those effluent limitations. In addition,

[3] Entergy provided the Final Amended Permit to the NRC Staff in May 2006. See NRC Memorandum, Summary of Environmental Site Audit (July 11, 2006), NRC ADAMS Accession No. ML061730397, Encl. 2 (identifying documents provided during Site Audit).

the amendment revised Attachment D to the ER to attach the Final Amended Permit, the Fact Sheet and the Responsiveness Survey (the same documents that were attached to Entergy's Answer).

On July 28, 2006, Entergy submitted a letter to the Board and participants advising them of this and a similar amendment, and attaching copies On July 29, 2006, NEC objected to this letter. At the prehearing conference, the Board struck Entergy's submission.[4] Tr. 61.

A prehearing conference was held on August 1 and 2 to hear argument on the proposed contentions. At the prehearing conference, NEC argued for the first time that the Final Amended Permit did not constitute a 316(a) variance. Tr. 253, 256-57, 259, 261, 289-91. NEC also led the Board to believe that the Final Amended Permit is not in effect because it had been appealed. Tr. 291-92.[5]

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[4] In its Motion, NEC asserts that the Board "struck Entergy's amendments to its application for license renewal" and states that NEC is filing its Motion "in the event that the amendments are nonetheless posted on ADAMS and/or otherwise become part of this matter's record." Motion at 1 n.1. Entergy understands that the Board struck Entergy's July 28, 2006 letter to the Board. Entergy does not believe that the Board struck the amendments previously submitted to the NRC Staff, or indeed, that the Board could do so.

[5] NEC's statements during the prehearing conference referred confusingly to the "prior" permit remaining in effect and the "new" permit not having been issued yet. Tr. 291-92. However, Judge Karlin summarized what he understood NEC to be asserting as follows:

> MR. SHEMS: A new permit has been pending and has not issued, because the permit that was amended in March expired in March. It was amended the day before it expired.
>
> CHAIR KARLIN: Okay.
>
> MR. SHEMS: And so under our Administrative Procedure Act it remains in effect until there is a decision on the new permit application.
>
> CHAIR KARLIN: The old permit remains in effect. The new permit has been appealed, or the amended permit has been --
>
> MR. SHEMS: The amended permit has been appealed.
>
> CHAIR KARLIN: -- appealed, so that permit – it being appealed, it is not in effect. It follow the same as the federal rules. Its appeal automatically stays the effectiveness of the amended permit. The prior permit remains in effect under the Administrative Procedures Act, state Administrative Procedures Act. So that's like the federal rule, sounds like.

III. ARGUMENT

A. NEC's Motion Is Untimely and Unsupported By a Sufficient Showing on the Lateness Criteria

NEC's request to amend its Contention 1 should be denied, because the amended contention is untimely and NEC has not shown good cause for the request. Indeed, NEC's proposed amendment to its contention appears nothing more than an attempt to provide a belated reply to arguments that were presented two months ago in Entergy's Answer.

The Notice in this proceeding afforded interested persons 60 days in which to request a hearing and directed that any such petition must set forth the specific contentions sought to be litigated. 71 Fed. Reg. 15,220-21 (Mar. 27, 2006). Thus, contentions were due no later than May 26, 2006. Pursuant to 10 C.F.R. § 2.309(c), non-timely contentions will not be entertained absent a determination by the Board that the contentions should be admitted based on a balancing of eight factors. Of these factors, "good cause" for the failure to file on time is given the most weight. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 N.R.C. 551, 564 (2005). Similarly, 10 C.F.R. § 2.309(f)(2) provides that contentions may be amended or new contentions filed after the initial filing only with the 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 from information previously available; and

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

Tr. 292. NEC gave no indication that its assertions had been misunderstood.

NEC's attempt to justify its amended contention on that ground that Entergy has amended its ER is pretextual, because the amendment to the ER contains no information of which NEC was not already fully aware. In particular, NEC was aware that the Final Amended Permit had been issued when NEC filed its original contention. See Pet. at 11 ("The Vermont Agency of Natural Resources has issued a discharge permit allowing this increased thermal discharge."). NEC was also aware of the contents of the Final Amended Permit and the findings of the VANR, for NEC is one of the entities that is appealing the issuance of the Final Amended Permit to the Vermont Environmental Court. See Entergy's Answer at 16. Furthermore, one must presume that NEC was aware that 10 C.F.R. § 51.53(c)(3)(ii)(B) does not require that a license renewal applicant's ER assess aquatic impacts, including heat shock, if the applicant provides a 316(a) variance in accordance with 40 C.F.R. part 125, or equivalent State permits and supporting documentation. Thus, at the time it filed its original contention, NEC had all the information necessary to address whether 10 C.F.R. § 51.53(c)(3)(ii)(B) required Entergy's ER to contain a further assessment of thermal impacts.

Moreover, NEC assertion that "the fact that Entergy is characterizing the NPDES permit amendments as a CWA § 316 variance or determination is new information" (Motion at 4) is demonstrably wrong. Entergy's Answer, which was filed and served on NEC on June 22, stated that the Final Amended Permit constituted the 316(a) determination for the thermal discharge with the 1°F increase, that the Final Amended Permit had been provided to the NRC, and that the NRC rules require no further analysis.[6] Entergy's Answer at 12. Thus, NEC was fully aware of this position on June 22. If NEC believed that this argument provided grounds to amend its

[6] Indeed, the amendment to the ER simply incorporated the information and documents that had been provided in Entergy's Answer. Certainly, NEC does not identify any information in the ER amendment that was not already disclosed in Entergy's Answer.

contention, it should have moved for leave to do so within 10 days of Entergy's Answer, in accordance with 10 C.F.R. § 2.323(a), but NEC did not do so. Moreover, NEC had the opportunity to address this argument in its June 29, 2006 Reply (which it chose not to do) and did address this argument at the prehearing conference. See Tr. 253, 256-57, 259, 261, 289-91. In essence, NEC is now attempting to use the amendment to provide a written response that it could have included in its Reply, and to bolster the oral argument which it presented at the prehearing conference. The Board should not countenance NEC's attempt to have a third bite at the apple.

In addition, NEC's amended contention also seeks to introduce arguments and information that have no relationship to the ER amendment, or to Entergy's position that the Final Amended Permit and supporting documentation constitute a 316(a) variance obviating any further assessment under the NRC rules. For example, NEC seeks to incorporate the same new arguments on the need for 401 certification that it attempted to introduce in its Reply, which Entergy has moved to strike. Under the NRC rules, whether an assessment of aquatic impacts is required depends on whether the applicant has provided a 316(a) variance, not a 401 certification. See 10 C.F.R. § 51.53(c)(3)(ii)(B). Whether a 401 certification is required is therefore 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 and Entergy has not amended.

Similarly, NEC now attempts to provide a new Affidavit from Dr. Ross T. Jones. This new affidavit is taken from another proceeding, does not address Entergy's Application, and has no bearing on whether the Final Amended Permit and supporting documentation constitute a 316(a) variance, but simply challenges the conclusions in Entergy's previous demonstration

reports. Moreover, this affidavit is dated June 15, 2006, and there is no explanation why this information could not have been provided in NEC's original contention if it is indeed germane.

Entergy also observes that the Affidavit attached to NEC's Motion is in support of a motion for stay filed before the Vermont Environmental Court in the appeal of the Final Amended Permit. It is remarkable that NEC led the Board to believe that the Final Amended Permit was not in effect when NEC knew that a motion for stay was required. Obviously, if the Final Amended Permit was not effective upon appeal, no motion for stay would have been required.[7] It is unfortunate NEC saw fit to mislead the Board in this manner.[8]

Because NEC has not shown that its contention is based on information that was not previously available, its proposed amendment to Contention 1 cannot be accepted. 10 C.F.R. § 2.309(f)(2). Further, if a petitioner cannot show good cause, its demonstration on the other factors in 10 C.F.R. § 2.309(c)(1) must be compelling. Millstone, CLI-05-24, 62 N.R.C. at 565.

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[7] Vermont law does not provide for an automatic stay as a result of an appeal of a National Pollutant Discharge Elimination System ("NPDES") permit. See Vt. R. Env. Ct 5(e)("Unless the act or decision appealed from is automatically stayed pursuant to 10 V.S.A. § 8504(f)(1) by the filing of the appeal or a stay has been granted by the district commission pursuant to 10 V.S.A. § 6086(f), the court, after the notice of appeal has been filed may, on its own motion, or on motion of a party, stay the act of decision"). Section 8504(f)(1) only provides an automatic stay in two situations not applicable here – acts or decisions involving stream alteration permits or shoreline encroachment permits and the denial of interested person status. See 10 Vt. Stat. Ann. § 8504(f)(1). Indeed, NEC filed a motion to stay the Amended Permit on June 28, 2006, something it surely would not have done if the Amended Permit were, as suggested to the Board, automatically stayed.

Likewise, while NEC allowed the Board to understand that the Amended Permit would be automatically stayed under federal regulations, that law does not apply here. The VANR implements the NPDES program pursuant to 33 U.S.C. § 1342, and does so under its own procedural provisions relating to permit appeals. See, e.g., Vt. R. Env. Ct. 5(a)(1). Further, the federal rules do not apply to judicial review of contested state-issued permit conditions; rather, those regulations apply only to review within EPA or the state regulatory agency (if adopted by that state). The federal stay provision, 40 C.F.R. § 124.16, and 40 C.F.R. § 124.15, are omitted from the detailed list of federal procedural regulations that must be implemented by state NPDES permitting programs, 40 C.F.R. § 123.25(a), and Vermont has adopted no such provision voluntarily.

[8] The Motion similarly states that "[t]he amended permit has expired and remains only temporarily in effect." Motion at 2. This statement too shows that NEC knows that the amended permit is in effect.

NEC's attempt to address the other factors is vague and conclusory at best. Here, the NRC Staff must address aquatic impacts in its environmental impact statement, and NEC can certainly comment on that analysis when it is issued, or file new contentions if the standards in 10 C.F.R. § 2.309 are met. Further, NEC is already appealing the Final Amended Permit to the Vermont Environmental Court. Thus, there are multiple other means whereby NEC's interest will be protected. 10 C.F.R. § 2.309(c)(1)(v). Obviously, NEC's attempt to amend its contentions to inject new 401 certification issues and provide a new declaration from another proceeding would expand and delay this proceeding, and is entirely unrelated to the ER amendment. 10 C.F.R. § 2.309(c)(1)(vii). Finally, NEC identifies no special expertise that would assist in developing the record in this proceeding. 10 C.F.R. § 2.309(c)(1)(viii). Indeed, the numerous misstatements by NEC, both with respect to the effectiveness of the Final Amended Permit at the prehearing conference and as discussed below, belie NEC's ability to make any meaningful contribution.

B. NEC's Amended Contention Remains Inadmissible

Even if there were grounds to allow NEC to amend its Contention 1, which there are not, that contention should still be rejected because it is inadmissible. Contention 1 cannot be admitted because it challenges the NRC's rules at 10 C.F.R. § 51.53(c)(3)(ii)(B) and fails to demonstrate a genuine dispute on a material issue, in accordance with 10 C.F.R. § 2.309(f)(1)(vi).

As previously explained in Entergy's Answer at 11-18, Contention 1 is inadmissible because it challenges the NRC's license renewal rules at 10 C.F.R. § 51.53(c)(3)(ii)(B). That rule provides:

> 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.

Because Entergy has provided the State NPDES permit and supporting documents equivalent to a 316(a) variance, the NRC rule quoted above does not require Entergy's ER to assess aquatic impacts of heat in plant effluent.[9] NEC's contention that this assessment must be included in the ER is simply barred by this rule.

NEC attempts to side step this rule by asserting (as it did during the prehearing conference, Tr. 253, 256-57, 259, 261, 289-91) that the NPDES permit is not, by itself, a CWA 316 variance or determination (Motion at 2), but provides no support for this assertion. It should be noted that 10 C.F.R. § 51.53(c)(3)(ii)(B) requires a license renewal applicant to provide a 316(a) variance or "equivalent State permits and supporting documentation," thus recognizing that States use NPDES permits to grant 316(a) variances.[10] Indeed, the federal regulations governing 316(a) demonstrations, which Vermont is implementing, state:

> This subpart describes the factors, criteria and standards for establishment of alternative thermal effluent limitations under section 316(a) of the Act in permits issued under section 402(a) of the Act [i.e., NPDES permits].

40 C.F.R. § 125.70 (emphasis added); see also 40 C.F.R. § 125.73(a) ("Thermal discharge effluent limitations or standards established in permits. . . .") (emphasis added). In contrast, NEC provides no citation to federal or State law indicating that 316(a) variances are granted by

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[9] As Entergy's Answer previously explained, this provision is consistent with section 511 of the Clean Water Act and NRC and judicial precedent holding that where the NPDES permitting agency has assessed aquatic impacts, the NRC may accept that assessment in its NEPA analysis. See Entergy's Answer at 13-14. Entergy will not repeat that full discussion here, but incorporates it by reference.

[10] There is no dispute that Vermont is authorized by the EPA pursuant to section 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b), to administer its own permitting program for discharges into waters within the state's jurisdiction (see http://cfpub.epa.gov/npdes/statestats.cfm?view=specific), and that section 316(a) of the Clean Water Act, 33 U.S.C. § 1326(a), explicitly provides for issuance of 316(a) variances by a State.

different means or documentation, and likewise provides no example of any alternative means by which Vermont grants 316(a) variances. Thus, NEC fails to demonstrate that there is any genuine dispute that the Final Amended Permit and the supporting documentation that Entergy has provided constitute, or are equivalent to, a 316(a) variance.

Moreover, NEC provides no meaningful discussion of either the terms of section 316(a) or the findings that the VANR made in approving the thermal effluent limitations for VYNPS. Section 316(a) provides for the imposition by the EPA or State, as appropriate, of a thermal effluent limitation that is an alternative to technology-based or water-quality-based standards established under 301 of the Clean Water Act (for existing sources) or 306 of the Clean Water Act (for new sources), based on a demonstration that the alternative limitation "will assure the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife in and on that body of water." 33 U.S.C. § 1326(a). The Final Amended Permit establishes such alternative thermal effluent limitations (i.e., it contains thermal discharge limits lest stringent than Vermont Water Quality Standards), and thus can only be interpreted as a variance under section 316(a). The Fact Sheet accompanying and explaining the Final Amended Permit states:

- "The Agency's review of thermal discharges is governed by §316(a) of the Clean Water Act (CWA) and relevant portions of the Vermont Water Quality Standards. . . ." Fact Sheet at 3.
- "The Agency found that during the period from June 16 through October 14 the [thermal effluent] limits 'will assure the protection and propagation of a balanced indigenous population shellfish, fish and wildlife.'" Id. at 4.
- "The Reviewers agreed that the temperature increase would assure this balanced indigenous population during the period of June 16 through October 14. . . ." Id. at 5.

Thus, it is obvious on the face of these documents, as well as the Responsiveness Summary providing the VANR's responses to public comments, that the Final Amended Permit and

supporting documentation constitute the establishment of alternative thermal effluent limitations allowed by section 316(a) based on the demonstration required by section 316(a). NEC provides no basis to suggest otherwise.

Instead, NEC incorrectly asserts that the amended permit is not a "complete" 316 determination. NEC quotes the fact sheet as stating: "The 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." Motion at 2-3, quoting Fact Sheet at 5. NEC conveniently fails to include the previous sentences from the paragraph of the Fact Sheet containing and putting in context this statement. The full paragraph reads:

> The Reviewers concurred with the Applicant's retrospective analysis that the existing discharge, under the existing permitted thermal effluent limitations, resulted in "no appreciable harm" to the aquatic biota of the Connecticut River within the area influenced by the Applicant's thermal discharge during the period May 16 through October 14. However, in order to approve the requested increase in temperature, a *predictive* determination also needed to be made that the proposed limits would "assure the protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife." The Reviewers agreed that the temperature increase would assure this balanced indigenous population during the period of June 16 through October 14 but concluded there was limited information regarding whether migrating salmon smolt would be impacted by the increased thermal effluent limitations during the period of May 16 through June 15, the later part of the smolt outmigration period. The 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.

Fact Sheet at 4-5 (emphasis in original). Thus, the statement quoted by NEC does not indicate any incompleteness of the 316(a) determination for the increased thermal effluent limitation actually granted, i.e., the 1°F increase in the thermal effluent limitations approved for the period from June 16 through October 14. Rather, the statement quoted by NEC pertains only to the original proposal to allow a similar increase in the thermal effluent limitations from May 16

through June 15, which the VANR denied. Since the VANR denied the originally proposed increase for the period from May 16 through June 15, that increase will not occur and is no longer a proposed action requiring any evaluation under NEPA.

Elsewhere in the Motion, NEC falsely asserts that the "Fact Sheet issued with the permit specifically states that the permit amendments *do not* constitute a CWA § 316(a) variance, but only 'partially' meet § 316's requirements." Motion at 7 (emphasis in original), citing the Fact Sheet at 4-5. Contrary to NEC's representation, nowhere in the Fact Sheet is there any statement that the permit amendments do not constitute a CWA § 316(a) variance. Nor is there any statement in the Fact Sheet that the permit amendments "only partially meet § 316's requirements." Rather, the Fact Sheet states:

> The proposed changes to the thermal effluent limitations reflected in the draft permit are the result of the Agency's partial approval of the Applicant's § 316(a) demonstration request. The Agency found that during the period from June 16 through October 14, the limits will "assure the protection and propagation of a balanced indigenous population of shellfish, fish and wildlife." However the agency could not make the same finding for the period May 16 through June 15 based on existing data.

Fact Sheet at 4. Thus, this statement indicates that the VANR made the finding required by Section 316(a) for the portion of the amendment request that it granted. There is no implication in this statement that the Final Amended Permit only "partially" met 316(a) requirements. The only significance of the word "partial" in the VANR's statements is that there was a portion of the original request that was denied and is therefore no longer on the table or relevant.

NEC is also inaccurate in asserting that the "VANR found only that the 'existing [pre-uprate] permitted thermal limitations resulted in 'no appreciable harm' to the biota of the Connecticut River.'" Motion at 3 (emphasis added). As previously quoted: "The Agency found that during the period from June 16 through October 14 the limits will 'assure the protection and

propagation of a balanced indigenous population of shellfish, fish and wildlife.'" Fact Sheet at 4. Likewise, the Fact Sheet states: "The Reviewers agreed that the temperature increase would assure this balanced indigenous population during the period of June 16 through October 14 . . ." (Fact Sheet at 5), which is the period for which an increase was granted.[11]

In short, NEC's amended contention provides no information indicating that there is any genuine dispute that the Final Amended Permit and supporting documentation constitute a 316(a) variance. NEC's argument is based entirely on taking a few statements from the Fact Sheet egregiously out of context. Where a petitioner relies on a document as purported support for a proposed contention, a Licensing Board may and should scrutinize that document to determine whether on its face it supports the allegations. See, e.g., Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 N.R.C. 253, 265 (2004); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-02, 43 N.R.C. 61, 90 (1996). Here, NEC relies solely on the Fact Sheet, which on its face shows that the VANR made the findings required for a 316(a) variance with respect to the increase in the alternative thermal effluent limitation that was approved.

NEC also speculates that when the Final Amended Permit is renewed, any new permit will contain different conditions, because some recommendations of the Fish and Wildlife

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[11] The VANR also found:

> The Applicant's predictive analysis for the Demonstration indicates that the approved temperature increase will create insignificant changes in the thermal structure of the receiving waters affected by the project's discharge and that as a result the use of the waters by all species will be maintained and protected.
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> * * *
>
> The Agency has concluded that there will be no significant impact from the proposed discharge on the aquatic biota that are present in the area affected by the proposed discharge. The Agency therefore agrees with the Applicant's analysis that the use of the waters by all species present will be maintained and protected.

Fact Sheet at 6-7.

Service ("FWS") were allegedly not incorporated into the existing permit. Motion at 4. From this, NEC argues that the existing permit cannot serve as a CWA § 316 determination for the cumulative impacts of Entergy's requested additional 20-year license term. This faulty and speculative reasoning fails to establish any genuine, material dispute for many reasons. First, NEC does not identify or explain the relevancy of any FWS recommendations that were allegedly not adopted. If VANR did not adopt some proposed condition, it is presumably because VANR did not find the condition necessary to support its 316(a) determination. There is no dispute that VANR is the variance decisionmaker,[12] and no assertion that FWS has any regulatory authority over VYNPS' thermal discharge. Second, it is pure speculation on NEC's part that a new permit will contain different conditions – a matter solely within VANR's purview. Third, if additional conditions were imposed, it presumably would only strengthen the 316(a) determination. Finally, in its Responsiveness Summary, the VANR expressly rejected a comment that cumulative impacts had not been considered.

> The 316a Demonstration *has* considered cumulative effects as required under 40 CFR § 125.73 which states "This demonstration must show that the alternative effluent limitation desired by the discharger, considering the cumulative impact of its thermal discharge together with all other significant impacts on the species affected, will assure the protection and propagation of the balanced indigenous community..."
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> The discharge permit has required extensive ecological monitoring for over thirty years. This monitoring by its very nature includes the assessment of other sources (including the Vermont Yankee cooling water intake structure) upstream of the Vermont Yankee discharge. The 2004 Demonstration assessed the monitoring data from the 1990's through 2002 (i.e. the data not included in the previous 1978 and 1990 demonstrations). That assessment indicated the absence of prior appreciable harm, and the Agency agreed, during the annual period of June 16 – October 14.
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> By way of predictive analysis, assessment of the proposed thermal increase was obtained by a computer simulation model which was calibrated and confirmed from data collected from a set of continuous monitoring thermistors placed in the

[12] See note 10, supra.

> Vernon pool during May through October 2002. Other data included flow and temperature from permanent instruments. The purpose of this study was to determine what effects, if any, the proposed increase would have on the *existing* thermal structure of the river. Again, this data, by its nature, included the cumulative effects of other sources upstream of the discharge.

Responsiveness Summary at 2-3 (emphasis in original).

Consequently, NEC's whole argument boils down to an assertion that the NRC cannot rely on 316(a) variances to assess thermal impacts in license renewal proceedings because the NPDES permits containing those variances are only issued for five-year terms, not the 20-year period of extended operation. This argument flies in the face of 10 C.F.R. § 51.53(c)(3)(ii)(B), which does not require an assessment if a 316(a) variance is provided. Because 316(a) variances are granted and implemented through NPDES permits which must be issued for fixed terms not exceeding five years (33 U.S.C. § 1342(b)(1)(B)), NEC's argument would simply render section 51.53(c)(3)(ii)(B) meaningless and thus obviously constitutes an attack on the regulation prohibited by 10 C.F.R. § 2.335.

Further, even if the adequacy of the 316(a) variance were at issue in this proceeding (which as discussed above it is not), NEC provides no support suggesting that there will be any cumulative impacts in the period of extended operation that differ from the cumulative impacts evaluated in the 316(a) demonstration upon which the VANR based its findings and established the alternative thermal effluent limitations. Indeed, NEC does not provide any information even suggesting that a predictive analysis over a thirty-year period is either possible or meaningful. Thus, NEC fails to demonstrate that there is any genuine dispute concerning either the existence of unanalyzed cumulative impacts or the adequacy of a 316(a) determination as a basis for assessing such impacts.

Moreover, the five-year review of a permit's conditions are a strength supporting the conclusions that the conditions are protective, not a weakness. Because of this periodic review, there is a mechanism ensuring that limits remain adequate to assure the protection and propagation of a balanced indigenous population of shellfish, fish and wildlife. If there is a change in environmental conditions or in other sources affecting the river in the future, the five-year permitting process provides a mechanism to reassess the thermal effluent limitations and adjust them if necessary. Thus, the five-year review period supports rather than undercuts the agency's conclusions and the NRC's reliance thereon.

NEC's attempt to add new bases unrelated to Entergy's July 27, 2006 amendment to the ER also fails to establish any genuine dispute on a material issue relating to the contention. As previously discussed, NEC's assertions that a 401 certification is required have no relevance to the 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. As a substantive matter, section 401(a)(3) of the Clean Water Act provides that a certification provided in connection with the construction of a facility fulfills the requirements with respect to "any other Federal license or permit required for operation of such facility. . . ." 33 U.S.C. § 1341(a)(3).

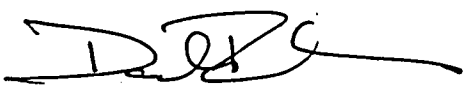
Similarly, the new Affidavit of Dr. Jones is from another proceeding seeking to stay the Final Amended Permit, does not address Entergy's license renewal application or the Environmental Report, and in any event merely advocates more studies. It is well settled that "neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention." System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 60

N.R.C. 277, 289 (2004), citing Fansteel, Inc., (Muskogee, Oklahoma, Site), CLI-03-13, 58 N.R.C. 195, 203 (2003).

IV. CONCLUSION

For the reasons stated above, NEC's request to amend Contention 1 should be denied. In the alternative, if the Board grants NEC leave to amend Contention 1, the contention should be rejected because it is inadmissible.

Respectfully Submitted,



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Dated: 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, LLC	)	Docket No. 50-271-LR
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 "Entergy's Answer to New England Coalition's Late Contention" dated August 17, 2006, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, or with respect to Judge Elleman by overnight mail, and where indicated by an asterisk by electronic mail, this 17th day of August, 2006.

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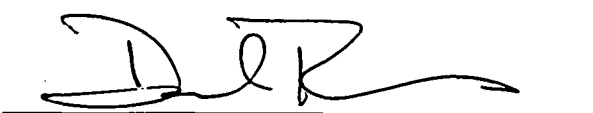

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