Nos. 11-1168 and 11-1177

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

VERMONT DEPARTMENT OF PUBIC SERVICE, and
NEW ENGLAND COALITION
Petitioners,

v.

UNITED STATES OF AMERICA, and
NUCLEAR REGULATORY COMMISSION
Respondents,

and

ENTERGY NUCLEAR OPERATIONS, INC. and
ENTERGY NUCLEAR VERMONT YANKEE, LLC
Intervenor-Respondents

PETITIONERS' REPLY AND MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS AND INTERVERNOR'S CROSS-MOTION FOR SUMMARY REVERSAL

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SUMMARY OF THE ARGUMENT

Federal law requires that "No license or permit shall be granted [by a federal agency] until the certification required by this section [33 U.S.C. § 1341 (§401 of the Clean Water Act ("CWA")] has been obtained". On March 21, 2011, the Nuclear Regulatory Commission ("NRC") issued a new operating license to Entergy Nuclear Vermont Yankee ("ENVY") for operation of the Vermont Yankee ("VY") nuclear power reactor for 21 years. Prior to license issuance, the NRC did not make a single statement documenting that the required certification had been obtained or waived . Nothing in the pleadings filed by NRC or ENVY ("Respondents") in opposition to Petitioners' motion for summary reversal challenges that fact.

Not one argument in defense of the license issuance advanced by Respondents before this Court is based on statements made by NRC prior to license issuance. Instead, they are *post-hoc* rationalizations of counsel, a fact that NRC concedes in its brief. Not one of these arguments, even if cognizable by this Court, excuses NRC's failure to comply with the requirements of 33 U.S.C. § 1341 by obtaining a § 401 Certification ("WQC") prior to granting the 2011 licencse.

In a final attempt to avoid the inevitable conclusion that NRC illegally issued the license at issue, Respondents argue that Petitioners' challenge should be dismissed on timeliness or exhaustion grounds. These arguments are wrong as a

matter of law. Further, Petitioners made repeated efforts to raise the concern that the NRC must document compliance with §401 as a predicate to valid issuance a new license. Yet, after confirming that the NRC must assure compliance with the CWA before issuing a new license, NRC ignored its obligations and issued a new license without any demonstration of §401 compliance nonetheless. Petitioners timely filed this appeal.

On the record before the Court, the NRC's Clean Water Act violation is clear. The Court should grant Petitioners' motion for summary reversal.

I. NRC VIOLATED THE CLEAN WATER ACT

A. The Record in this Case Demonstrates NRC Failed to Satisfy its Ministerial Obligations Under Clean Water Act § 401(a)(1)

In violation of § 401(a) of the CWA, NRC issued a new license authorizing ENVY to operate VY for an additional 21 years without either seeking or obtaining a WQC from Vermont. NRC is obligated by the plain terms of § 401(a) to "obtain" a WQC or waiver prior to license issuance. *Id.* § 1341(a)(1). NRC failed to comply with § 401.

B. NRC's Actions Cannot Be Excused By *Post-Hoc* Rationalizations

Respondents refer to two arguments alleged to satisfy the CWA § 401 certification requirement: 1) that the 1970 WQC issued for the initial VY operating license can be relied on under §401(a)(3), and 2) that the § 402 permit Vermont issued to ENVY is an acceptable substitute for the required § 401 WQC. The

Vermont Agency of Natural Resources has not adopted either of these positions and has not issued or waived certification for the license renewal.[1]

Neither of these claims of compliance with § 401 was affirmatively set forth by the NRC prior to license issuance or in NRC's brief:[2] The vague references in the NRC brief, are merely *post-hoc* rationalizations created by counsel and intended to fend off summary reversal. NRC's brief concedes as much. NRC at 13 (admitting that counsel formulated arguments presented in the brief "without the benefit of the Commission's judgment."). Such *post-hoc* rationalization "carries no weight on review." *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 739 (D.C. Cir. 2000)(internal citation omitted). The nature of this Court's review of final agency action by agencies like NRC, is to "judge the propriety of

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[1] The ANR lawyer's scoping comment letter appended to NRC's motion is a reservation of state authority under the Clean Water Act broadly; ANR consistently indicated that appropriate action by the state under the CWA "will" occur, and that through such state action, assure that water quality is protected. *See* NRC Exh. E. These statements simply notified the NRC that the state "will" act diligently under the Clean Water Act if and when ENVY applied for certification in compliance with state § 401 regulations. The scoping comments are not a "final determination" on a water quality certification by the "secretary" of the Agency of Natural resources or his designee under 10 V.S.A. §1004. *See In re Vermont Marble Co.* 162 Vt. 355, 365 (1994); *see also*, *In re Buttolph*, 141 Vt. 601, 604-05 (1982).

[2] As part of its non-Clean Water Act review in this matter, NRC prepared an environmental impact statement pursuant to the National Environmental Policy Act ("NEPA") and its own regulations (10 C.F.R. Part 51). Its Final Supplemental Environmental Impact Statement ("FSEIS") (Pet. Attachment 1) is almost 800 pages long and yet it never mentions 33 U.S.C. § 1341 or water quality certification from Vermont.

such action solely by the grounds invoked by the agency" and not to "to substitute their or counsel's discretion for that of the Commission". *Burlington Truck Lines v. United States*, 371 U.S. 156, 169 (U.S. 1962). "If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis" because such action "would propel the court into the domain which Congress has set aside exclusively for the administrative agency". *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (U.S. 1947). NRC should be able to easily and clearly prevent summary reversal through a simple, clear reference to an affirmative statement in the record documenting compliance with §401 as a predicate to license issuance. Since every argument advanced in defense of NRC's failure to comply with CWA § 401 or as an explanation for why compliance was allegedly achieved represents a *post-hoc* rationalization by counsel it is argument this Court "may not consider," *Spectrum Health — Kent Cmty. Campus v. NLRB*, 2011 U.S. App. LEXIS 16161, at 18 (D.C. Cir. 2011). Instead, summary reversal is appropriate because NRC did not document compliance with § 401 prior to license issuance and cannot provide such documentation to the Court.

C. <u>The 1970 Certification Does Not Satisfy § 401 (a)(3)</u>

NRC vaguely refers to § 401(a)(3) of the CWA as a basis for urging the Court not to grant summary reversal and, instead to hear the merits of the Petitions

for Review. NRC at 8. ("[T]here is no case law deciding the question whether and how prior certifications apply in the context of license renewal"; "[C]ourts have [not] determined the meaning of § 401(a)(3) in the license renewal context."). ENVY substantively urges the Court to rely on § 401(a)(3) as a basis for rejecting summary reversal on the merits. In support of their reliance on §401(a)(3), both Respondents appended the WQC issued by the Vermont Water Resources Board on October 27th 1970 with respect to VY's initial operating license.[3] Section 401(a)(3) does not apply because it is limited to certifications obtained in connection with *construction permits*: the 1970 WQC was not, and could not have been, issued with respect to a construction permit for VY because that permit was issued in 1967.

Section 401(a)(3) is limited to a water quality certification obtained "with *respect to the construction* of any facility" and only such certification "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) (emphasis added).[4] This clear statutory language, limiting

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[3] The 1970 Certification was not a part of the record of this proceeding below and was not appended to the Application for the license or the FSEIS issued by NRC.

[4] Congress reiterated throughout §401(a)(3) that the provision is solely limited to certifications issued with respect to construction licenses or permits: "certification obtained pursuant to paragraph (1) of this subsection *with respect to the construction of any facility*"; "because of changes *since the construction license or*

applicability of § 401(a)(3) to previously-issued certifications for construction licenses and permits, is controlling. *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009); *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 664, ---, 168 L.Ed.2d 467 (2007).[5] This Court recognizes the limited reach of §401(a)(3). *Keating v. F.E.R.C.*, 927 F.2d 616, 623 (D.C. Cir. 1991)("under section (a)(3) of section 401, Congress created a presumption that a state certification issued for *purposes of a federal construction permit* will be valid for purposes of a second federal license related to the operation of the same facility."(emphasis added)). The Second Circuit has rejected the Federal Energy Regulatory Commission's attempt to extend §401(a)(3) beyond construction permits and licenses in stating:

> Contrary to the Commission's contention, *see* Brief of the Fed. Energy Regulatory Comm'n at 11 (stating that § 401(a)(3) "imposes specific limits on the ability of states to alter their certifications once they have been incorporated into a federal license"), § 401(a)(3) governs a rather narrow class of cases of which this one is not a member: cases in which a license applicant has already obtained a state certification-and a federal license incorporating that certification-*in connection with the construction of a facility* and then seeks a federal operating license.

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

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permit certification was issued"; "operation of the facility *with respect to which a construction license or permit has been granted*". *Id.* (emphases added).

[5] The maxim *expressio unius est exclusio alterius* also supports the proposition that Congress clearly limited §401(a)(3) to prior certifications issued for construction permits and did not include certifications for prior operating licenses. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 188 (1978).

Respondents admit the 1970 WQC was issued *3 years after the construction permit* for the facility was issued and while actual construction was already underway. NRC at 4 ("NRC's predecessor, the Atomic Energy Commission, issued a construction permit to Vermont Yankee's owners in 1967, and in 1970 Vermont Yankee's owners presented the Atomic Energy Commission with a §401 certification from Vermont."); ENVY at 6 ("In connection with the initial licensing of Vermont Yankee, Vermont issued a WQC dated October 29, 1970 – only a few months after the requirement of the WQC was enacted and *while Vermont Yankee was still under construction.*") Thus, any claim that the 1970 certification was issued for purposes of any federal construction permit is a factual impossibility. In addition, since Congress adopted the water quality certification requirement in Section 21(b) of the Water Quality Improvement Act of 1970 (33 U.S.C. § 1171(b)(1970)) the 1967 VY construction permit predated the predecessor language to what is now §401 by three years. The claim that the 1970 certification falls within the scope of section 401(a)(3) is therefore not only factually inaccurate, it is legally impossible.

Judicially extending the scope of §401(a)(3) to include prior certifications for operating permits would dramatically undermine the carefully crafted scheme of cooperative federalism set forth in the CWA and tip the balance of authority in favor of large federal bureaucracies to the detriment of state authority – the exact

opposite outcome intended by Congress under §401.[6] This construction would completely defeat Congress's intent to protect states' paramount water quality interests by adopting Section 401 in the first instance. *S.D. Warren v. Maine Board of Environmental Protection,* 547 U.S. 370, 386-87 (2006) (401 Certification is "essential in the scheme to preserve state authority" in the cooperative federalism scheme embodied in the CWA.).

Section 401(a)(3) is simply inapposite to this case and cannot serve as a *post hoc* basis for NRC's unlawful attempt to grant a new license for two more decades of operation at VY.

D. **A Section 402 Permit Is Not Equivalent To A Section 401 Certification**

NRC argues, in a footnote, that this case "potentially" raises the question of whether Vermont's permitting action under CWA § 402 can "subsume" a concededly "separate" certification requirement imposed by § 401. NRC at 9 n.4. As framed by NRC, the question "potentially" raised here is "whether Vermont's grant of an NPDES permit under § 402 subsumes any *separate* certification requirement under § 401, *as is true in many states*." NRC at 9 n.4 (emphasis

[6] Section 401 preserves states' rights in numerous Federal licensing programs that include license expiration and renewal. These programs include dredge and fill permits under section 404 of the CWA (33 U.S.C. §1344), EPA-issued discharge permits under section 402 of the CWA (33 U.S.C. §1342), and Federal Energy Regulatory Commission licenses issued under the Federal Power Act (16 U.S.C. § 797(e)). If the Court extends § 401(a)(3) to previously-issued operating permits and licenses, states would face unprecedented procedural and substantive burdens in seeking to effectuate their Congressionally-guaranteed certification authority.

added). The NRC's framing and its citation to Florida administrative law (tellingly, it offers no Vermont-specific citation) makes clear that it is up to each individual state, rather than the federal bureaucracy, to decide if and under what circumstances a state may choose to merge the "separate" 401 and 402 processes.[7] *See Alcoa Power Generating, Inc. v. F.E.R.C.*, 643 F.3d 963, 971 (explaining that "a State's decision on a request for Section 401 certification is generally reviewable only in State court, because the breadth of State authority under Section 401 results in most challenges to a certification decision implicating only questions of State law."). In the proceedings below, NRC addressed a similar question under the CWA in holding that "Section 511(c)(2) of the Clean Water Act does not give us the option of looking behind the agency's permit to make an independent determination as to whether it qualifies as a bona fide Section 316(a) determination." *Entergy Nuclear Vermont Yankee, LLC, et al.* (Vermont Yankee Nuclear Power Station) CLI-07-16, 65 N.R.C. 371, 387. Section 511(c)(2), and NRC's rationale, applies with equal force to limit NRC authority in the water quality certification context. 33 U.S.C. §1371(c)(2)(A). Even if there were

[7] Separate and distinct questions also not raised by this case are whether a state to which EPA has delegated permitting authority under the Clean Water Act may lawfully enact a merger of § 401 certifications and § 402 permits, and if so, how that may be done. That issue lies within the primary jurisdiction of EPA, the federal agency entrusted by Congress to oversee state implementation of NPDES permitting and enforcement authority under the CWA. 33 U.S.C. § 1342(b)-(d).

Vermont law to construe, that task would belong to Vermont courts in the first instance, not to NRC. *Alcoa*, 643 F.3d at 971.

The NRC cites no federal authority to support its *potential* argument on this point. The closest it comes is citation to a single sentence in a NRC *Generic Environmental Impact Statement* in which the NRC cryptically opined that "[o]f course, issuance of an NPDES permit by a state water quality agency implies certification under Section 401." NRC, Exh. H. Nowhere does the CWA contain the concept of "implied certification." Congress could have provided that a § 402 permit can, under certain circumstances, substitute for a § 401 certification; it did not. *See S.D. Warren Co.*, 547 U.S. at 380 ("the two sections [401and 402] are not interchangeable, as they serve different purposes and use different language to reach them"). Acceptance of NRC's argument would "require adding terms to the statute that Congress has not included," something this Court cannot do. *Alcoa*, 643 F.3d at 974.

II. ADJUDICATION OF THE SOLE CLEAN WATER ACT ISSUE RAISED BY THE PETITIONS IS APPROPRIATE IN THIS COURT

Throughout its brief, NRC acknowledges that Petitioners' claim arises under the Clean Water Act. *E.g.*, NRC at 2. The motions to dismiss fail precisely because they ignore the CWA's purpose and structure as well as the nature of the CWA claim raised by the petitions for review. This Court should grant Petitioners'

motion for summary reversal notwithstanding the flawed motions to dismiss on Hobbs Act and exhaustion grounds.

The prohibition contained in CWA § 401(a)(1) cannot be violated until a federal license is granted without a required WQC. 33 U.S.C. § 1341(a)(1)("No license or permit shall be granted *until* the certification required by this section has been obtained...")(Emphasis added). Because the § 401 certification process is intended to preserve and safeguard the right of a state and its citizens to condition federal licenses on any applicable and more stringent requirements of state law, federal licensing agencies are barred from adjudicating substantive issues arising under § 401. *Alcoa*, 643 F.3d at 971. Those substantive issues are settled in state administrative and/or judicial proceedings specific to § 401 certification.[8] *Id.* To comply with §401's prohibition, NRC need only fulfill the ministerial obligation of "obtain[ing]" a § 401 WQC (or confirmation of denial or waiver).

Once such state process defines the scope of the required certification (or upholds its denial by a state) and produces a final WQC to the applicant, the federal licensing agency can obtain the same. Nonetheless, the NRC violated the

[8] Vermont has adopted such procedures. *See, e.g.*, Vermont Water Pollution Control Regulations § 13.11 (designating the Commissioner of the Department of Environmental Conservation as the state's certification agent for § 401 purposes and setting forth administrative procedures specific to § 401 WQC) *available at* http://www.anr.state.vt.us/dec/ww/Rules/WPC/1974WPCregs.pdf.

CWA by issuing a new license without a WQC and did so without stating a basis on the record below.

A. Petitioners Properly Sought Timely Judicial Review Of NRC's Unlawful Decision To Issue The VY License Without A WQC

1. *Petitioners' Claim is Timely Filed Under the Hobbs Act*

ENVY correctly points out that, for Hobbs Act review in NRC cases, "[a] 'final order' is one that imposes an obligation, *denies a right*, or fixes some legal relationship, usually at the consummation of an administrative process." *Honicker v. U.S. Nuclear Regulatory Comm'n*, 590 F.2d 1207, 1209 (D.C. Cir. 1978) (Emphasis added). The violation Petitioners challenge did not occur until the NRC granted the license to ENVY on March 21, 2011, thereby denying Petitioners' the right to ensure protection of Vermont's water quality through the procedural and substantive safeguards Congress reserved to the states and their citizens in § 401. *S.D. Warren Co.*, 547 U.S. at 385 (recognizing the importance of § 401 in preserving state authority under the CWA); *see also City of Tacoma,* 460 F.3d at 68 (recognizing the importance of public participation rights afforded by § 401). It was at this point that Petitioners became "aggrieved" parties for purposes of Hobbs Act review. *See Water Transp. Ass'n v. I.C.C.*, 819 F.2d 1189, 1193-1194 (D.C. Cir. 1987) (explaining that, under the Hobbs Act, "a party aggrieved" is one who suffers an injury-in-fact within the zone of interests protected by statute and traceable to the action of the federal agency). Up until it actually granted the 2011

license to ENVY on March 21, NRC had not crossed a point of no return with respect to its ministerial obligations under CWA § 401(a)(1). *See Alcoa*, 643 F.3d at 967 (explaining that a claim is not ripe for review "until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." (internal quotations and citations omitted)). Petitioners filed for review within 60 days of the NRC's unlawful and final granting of the license; the appeal is thus timely under the Hobbs Act.

2. *There is no basis for the Court to apply an exhaustion analysis to the sole §401(a)(1) claim Petitioners raise*

Neither NRC nor Entergy argue that the Atomic Energy Act or the CWA contain a "'[s]weeping and direct'" provision "indicating that there is no federal jurisdiction prior to exhaustion," *Avocados Plus Inc. v. Veneman,* 370 F.3d 1243, 1248 (D.C. Cir. 2004). This is because "[t]here is no statute requiring that a party exhaust NRC administrative remedies before resorting to judicial review." *Thermal Science, Inc. v. U.S. Nuclear Regulatory Com'n*, 29 F.Supp.2d 1068, 1075 (E.D. Mo. 1998).[9]

[9] NRC's characterization of this Court's holding in *Natural Resources Def. Council v. NRC*, 66 F.2d 595, 601 n.42 (D.C. Cir. 1981) bears examination. At page 10-11 of its brief, NRC cites the case as standing for the proposition that "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.' " The cited case is not, however, an exhaustion case. Rather it applies the 60-day *jurisdictional* time limit of the Hobbs Act and relies on earlier cases recognizing

The cases cited by NRC and Entergy to support their exhaustion argument are readily distinguishable from the case at hand. *See Woodford v. Ngo*, 548 U.S. 81 (2006)(Court's exhaustion analysis arose in the context of the "Prison Litigation Reform Act," a statute containing an "invigorated exhaustion requirement" specifically designed to limit the number of prison litigation cases heard in federal courts); *Tesoro Ref. & Mktg. Co. v. FERC*, 552 F.3d 868, 871 (DC Cir. 2009)(exhaustion required under express terms of the Interstate Commerce Act). Since Petitioners' underlying claim arises under the CWA, exhaustion principles are not applicable.[10]

Petitioners were diligent and direct in asserting that without a § 401 Certification, NRC could not issue the new license:

- It is also important to note that §401 Water Quality Certification is jurisdictional and imposes an independent obligation on Entergy and the NRC, regardless of whether the need for certification is raised as a contention. 'Any applicant for a federal license or permit to conduct any activity including, but not limited to construction or operation of facilities, which may result in any

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that petitioners under the Hobbs Act must, in the ordinary case, have been parties to the underlying administrative action. 66 F.2d at 601-02.

[10] NRC regulations permit a party to file a petition for reconsideration of a final Commission decision, but stop short of making such a petition a prerequisite to judicial review. 10 C.F.R. § 2.345; *contrast with* 2.341(b)(1)(mandating a party to seek Commission review before seeking judicial review of a decision by a "presiding officer."). Also, neither the filing nor granting of a petition for reconsideration stays the effective date of the NRC decision, *id.* § 2.345(c), and thus it does not present a barrier to Petitions for review. *D.S.E., Inc. v. United States*, 169 F.3d 21, 27 (D.C. Cir. 1999). Any exhaustion analysis this Court may choose to conduct would not be jurisdictional.

discharge ... shall provide the licensing or permitting agency a certification from the state' that the discharge complies with state water quality requirements. 33 U.S.C. § 1341(a)(1). 'No license or permit shall be granted if certification has been denied by the State.' *Id.* In short, neither Entergy nor the NRC can escape § 401's obligations by simply claiming that it was not part of this (or any) contention."[11]

- Further basis demonstrating the inadequacy of Entergy's amended environmental report is the absence of a CWA § 401 Water Quality Certification. Entergy is on notice that its requested license extension cannot issue without a § 401 Certification. Yet, Entergy's amended environmental report makes no mention of any effort to seek and obtain §401 Certification."[12]

- Based on NEC's prior filings in this matter, Entergy is on notice that its requested license extension cannot issue without a Clean Water Act § 401 certification. Astonishingly, Entergy's Amendment 6 to its Environmental Report nonetheless makes no mention of this issue. . . . [n. 1] Additionally, Entergy has an independent obligation to obtain a § 401 certification, and the NRC is jurisdictionally limited to acting in conformity with § 401 requirements. 33 U.S.C. § 1341; S.D. Warren v. State of Maine, 547 U.S. , 126 S.Ct. 1843, 1846 (2006).[13]

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[11] New England Coalition, Inc.'s Opposition To Entergy's Motion to Strike Portions of New England Coalition's Reply (7/20/2006) at 7-8. (Attachment 8 [Attachments to this brief are continuously numbered with Attachments from Petitioners' previous filing])

[12] NEC'S Late Contention Or, Alternatively, Request for Leave to Amend or File a New Contention (8/7/2006) at 4-5 (Attachment 9). In opposing NEC's proposed new contention again raising the absence of a 401 Certification, neither NRC nor ENVY sought to defend the absence of such a Certification but merely asserted the issue was not within the proper scope of the hearings. Entergy's Answer to New England Coalition's Late Contention (8/17/2006) (Attachment 10); NRC Staff Answer Opposing NEC's Late Contention, or Alternatively, Request for Leave to Amend or File a New Contention (8/17/2006) (Attachment 11).

[13] New England Coalition Inc.'s (NEC) Reply to Entergy And NRC Staff Answers to NEC's Late Contention, or Alternatively, Request for Leave to Amend or File a New Contention (8/25/2006) at 5-6 (Attachment 12).

NRC ignored these arguments. Nonetheless, Respondents were both clearly on notice that Petitioners believed that Respondents had not fulfilled their § 401(a)(1) obligations. Surprisingly, NRC never advised Vermont, as it now vaguely implies for the first time to this Court, that it believed the 1970 operating license WQC met the requirements for certification for this new license. Similarly, it never refer to the "potential argument" that the Vermont-issued § 402 permit might imply § 401 certification; nor did NRC list the 1970 WQC as one of the permits possessed by ENVY when it issued its FSEIS (Vol. 2, Appendix E at Table E-2)(Attachment 1); nor did it mention any § 401 certificate in its nearly 800 page FSEIS.

NRC's decision to proceed with its administrative hearing process (as opposed to final license issuance), is consistent with its long-standing practice that allows the hearing process to proceed even if NRC has yet to obtain a WQC or waiver thereof. As early as 1974, the Atomic Safety and Licensing Board faced an argument by intervenor-NGOs that licensing proceedings for the Koshkonong nuclear power plant were premature because the Wisconsin Department of Natural Resources had not yet issued water quality certifications for the plants. *In the Matter of WISC. ELEC. POWER CO., et al.* (Koshkonong Nuclear Plant, Units 1 and 2) 8 A.E.C. 928, 930, 1974 WL 18995. AEC rejected that argument holding that, "[s]uch a proposal is unreasonable and will result in needless delay." *Id.*

Without denying the ultimate necessity of the missing § 401 water quality certifications, the AEC noted that "[A]s a general rule it is the practice of the Commission to pursue its administrative procedures while other state and local proceedings are under way." *Id.*

NRC expanded upon the scope of its "general rule" in 1982, when the issue arose again, this time in front of an NRC Hearing Board. *Philadelphia Electric Company* (Limerick Generating Station, Units 1 and 2), 15 N.R.C. 1423, 1470. There, the Board observed that "[i]n addition to NEPA concerns, we have heard arguments that we must suspend this proceeding until several agencies issue necessary permits for the supplementary cooling water system." *Id.* The Board again rejected the argument, expressly relying on the AEC's earlier 1974 decision. *Id.* In its order, the Board acknowledged that compliance with CWA § 401 must occur before the NRC can issue a license. *Id.* ("[I]t is true that the Applicant must have either certification from the state under section 401 of the Clean Water Act or a waiver by the state of the need for such certification before a license can issue"). It went on to hold, however, that questions about § 401 and other non-NRC permits are not within the scope of Board proceedings. *Id.* ("Nor is this the proper forum to litigate whether other agencies should issue permits.") The Board ruled that it could close its record without first finding that a license applicant has obtained a § 401 WQC or that the state certifying agency had waived its

certification right. *Id.* ("Therefore, we may close our record without a showing that all permits have been received."); *accord In the Matter of Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station), 61 N.R.C. 81, 93 (2004) ("While 10 C.F.R. § 51.45(d) requires an applicant seeking a license renewal to 'list all Federal permits, licenses, approvals, and other entitlements which must be obtained in connection with the proposed action,' it does not impose a requirement that the applicant actually possess such permits at the time of application.").[14]

Furthermore, the Board's ruling on NEC's § 401contention in this case signals NRC's continued adherence to the long-established "general rule" described above. The Board treated compliance with NRC's obligations under NEPA and its own regulations as one set of issues relevant to its proceedings while viewing NRC's § 401 obligations as an entirely separate matter. NRC Exh. D at 8-9 (holding that "CWA § 401 certification is simply an independent statutory requirement, and neither NEPA nor 10 C.F.R. Part 51 incorporates or requires it.").

NRC's "general rule" that it may close its adjudicative record without a showing that a § 401 WQC has been obtained is consistent with an understanding that its ministerial obligations under § 401(a)(1) do not require exercise of its technical expertise on matters of nuclear health and safety. Though conditions imposed by a certifying state through a WQC must become part of the license the

[14] The N.R.C. cited this precedent for this proposition in the licensing proceeding below. 65 N.R.C. at 20 n. 81 (Pet. Att. 5 at 20).

NRC ultimately issues, NRC's ruling cited above in this case confirms long-established law that it has no authority to modify or reject such conditions. *See also* 65 N.R.C. at 387 n. 77 (recognizing that NRC's regulations "rests on the presumption that we need not—indeed *cannot*—review and judge environmental permits issued under the Clean Water Act by EPA or an authorized state agency"). NRC need only transpose the state WQC conditions verbatim into the license it issues along with the other conditions relating to nuclear health and safety resulting from the adjudicative proceedings NRC conducts under NEPA and the AEA. *Alcoa*, 963 F.3d at 971. Thus, nothing in the CWA would prevent NRC from complying with § 401 after it closes its adjudicative proceedings but before it issues the license. Its failure to set forth any basis for compliance with §401 in this case, notwithstanding the reminder of its obligations raised by Petitioners 2006, resulted in a CWA § 401 violation that occurred only when it issued the VY license in 2011, not when the administrative hearings concluded.

B. Vermont Did Not Waive Its CWA 401 Certification Authority

Section 401 of the CWA bars a federal agency from issuing a license in the absence of a validly-issued § 401 certification or a valid statutory waiver. 33 U.S.C. § 1341(a)(1) The water quality certification authority is a state "veto" power over federal licenses and permits for activities resulting in discharges to waters. *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 99-100 (1st Cir. 1989);

Keating, 927 F.2d at 622 ("Through this requirement, Congress intended that the states would retain the power to block for environmental reasons, local water projects that might otherwise win federal approval.") Waiver of this right is carefully circumscribed.

The argument raised by the motions to dismiss is premised on the erroneous theory that Vermont essentially waived its right to insist on a § 401 Certificate by failing to exhaust its administrative remedies. Even if Vermont were guilty of that omission, which the previous discussion demonstrates it was not, it did not waive its rights under § 401(a)(1). Through § 401, Congress elevated the role of states in protecting water quality over other federal interests and agencies involved in granting licenses to conduct federally-regulated activities resulting in discharges to waters. *Alcoa*, 963 F.3d at 971 ("[T]he Supreme Court construed States' Section 401 certification authority broadly to admit few restrictions on a State's authority to reject or condition certification.") In so doing, Congress statutorily prescribed the one and only means by which a state could forfeit or "waive" its right to exercise its federally-sanctioned §401 certification authority. 33 U.S.C. § 1341(a)(1). As this Court has stated:

> This language clearly expresses a congressional intent to place the burden of requesting a state water quality certification on the license applicant. Only after a request has been made can a state waive its certification right, and then only by refusing to respond to the request within a reasonable period of time. VEPCO, the license applicant in this case, never requested that North Carolina provide a water quality certification for the proposed Pipeline

> Project. Therefore, under the plain language of Section 401(a)(1), North Carolina could not have waived its certification right.

North Carolina v. FERC, 112 F.3d 1175, 1184 (D.C. Cir. 1997). Congress emphasized that only a waiver accomplished in the manner set forth in §401(a)(1) could authorize a federal agency to grant a license in the absence of a 401 certification. *Id.* ("No license or permit shall be granted until the certification required by this section has been obtained or *has been waived as provided in the preceding sentence.*") (Emphasis added).

This specific statutory procedure controls and pre-empts this Court's application of judicially created principles of exhaustion. *See North Carolina*, 112 F.3d at 1185 ("We see no room for the doctrine of claim preclusion in such a precisely worded provision [401(a)(1)]."). The Supreme Court has held that the federal courts are constrained by expressed congressional intent when it comes to grafting exhaustion requirements on to carefully crafted statutory schemes. *Darby v. Cisneros*, 509 U.S. 137, 153 (1993) (" '[A]ppropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme.'" (quoting *McCarthy v. Madigan,* 503 U.S. 140, 144 (1992))). The statutorily mandated prerequisite for § 401 waiver is a request to the State for certification by the applicant, which has not occurred. *North Carolina*, 112 F.3d at 1184.

Vermont thus retains full rights to challenge the validity of Entergy's NRC license on grounds that it was granted in violation of § 401(a)(1).

Finally, the fact that § 401 certification requirements are well-known to the NRC, militates strongly against the equitable concerns underlying the doctrine of administrative issue waiver. The NRC precedent cited above discloses that NRC is wellaware of its CWA § 401 obligations to "obtain" a WQC before granting the 2011 license. It is not free to ignore that obligation, which necessarily requires it to create a record demonstrating its compliance with the CWA regardless of the participation of parties in NRC proceedings. Its failure to discharge its obligations under the CWA in this case justifies summary reversal in Petitioners' favor.

CONCLUSION

NRC violated its obligations under CWA § 401(a)(1) by granting a new license for VY without first obtaining a § 401 WQC from Vermont. NRC is unable to provide the Court with the most simple and straightforward defense to Petitioners motion for summary reversal – clear documentation of any rationale proving compliance with § 401. Its impermissible attempts to excuse such failure through *post-hoc* rationalization are without merit. Petitioners timely

filed for review in this Court. The Court should grant summary reversal in favor of Petitioners.

Respectfully submitted,[15] this 26th day of August 2011 by the undersigned:

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