ORAL ARGUMENT IS NOT SCHEDULED.

Nos. 11-1168 and 11-1177

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

VERMONT DEPARTMENT OF PUBLIC 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.

On Petition for Review of a Decision of the U.S. Nuclear Regulatory Commission

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RIVERKEEPER AND SCENIC HUDSON'S AMICUS BRIEF SUPPORTING THE PETITIONERS AND ADVOCATING REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Except for the following, all parties, intervenors, and amici appearing in this Court are listed in the Brief of Petitioners Vermont Department of Public Service and New England Coalition, Inc., filed on November 14, 2011:

Amici

- State of New York

B. Ruling Under Review

References to the rulings at issue appear in the Brief of Petitioners Vermont Department of Public Service and New England Coalition, Inc., filed on November 14, 2011.

C. Related Cases

References to the related cases at issue appear in the Brief of Petitioners Vermont Department of Public Service and New England Coalition, Inc., filed on November 14, 2011.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, no corporation owns 10 percent or more of the stock of Riverkeeper, Inc., or Scenic Hudson, Inc.

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GLOSSARY

BADT	Best Available Demonstrated Control Technology
BAT	Best Available Technology Economically Achievable
NRC	Nuclear Regulatory Commission
Vermont Yankee	Vermont Yankee Nuclear Power Station

INTEREST OF THE AMICI

This is a case about whether the Nuclear Regulatory Commission ("NRC") can ignore Section 401 of the Clean Water Act, 33 U.S.C. § 1341, which governs the issuance of federal licenses for activities involving discharges into the navigable waters. Riverkeeper, Inc., and Scenic Hudson, Inc., ("the Amici") have a strong interest in the outcome of this case because the result advocated by the Respondents would potentially have a devastating impact on the quality of water not just in Vermont but also nationwide. In particular, the Amici fear that Entergy Corp. ("Entergy"), which operates the Vermont Yankee Nuclear Power Station ("Vermont Yankee") at issue in this case, as well as other plant owners, will attempt to ignore Section 401 in seeking reauthorization of other power plants located elsewhere in the United States, including in New York.

Riverkeeper, Inc., ("Riverkeeper") is a not-for-profit, public-interest advocacy organization dedicated to defending the Hudson River and its tributaries and to protecting the drinking-water supply of nine-million New York City and Hudson Valley residents. Riverkeeper's approximately 4,000 active members, many of whom reside in the Hudson Valley at or near the river, share a deep commitment towards the protection of the river's water quality and rich ecosystem, recreational and commercial fishing, swimming, boating, hiking, and additional aesthetic enjoyment. In order to protect the Hudson River from degradation and

misuse, Riverkeeper uses public advocacy, education, and litigation — most specifically to facilitate the enforcement of state and federal environmental laws, including the Clean Water Act.

Scenic Hudson, Inc., ("Scenic Hudson") is dedicated to protecting and restoring the Hudson River, its riverfront and the majestic vistas and working landscapes beyond, as an irreplaceable national treasure for America and a vital resource for residents and visitors. Scenic Hudson's approximately 20,000 members are regular users of the Hudson River for fishing, boating, and other activities, and Scenic Hudson has been an active participant in efforts to promote environmentally sound development and protection of the Hudson River Valley.[1]

INTRODUCTION

Although the Nuclear Regulatory Commission attempts to portray the issues in this case as "complex and undecided" (NRC Opp.[2] at 1), the issue before the Court is actually quite simple: The Petitioners ask this Court to prevent NRC from ignoring the plain language of Section 401 of the Clean Water Act, which requires

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no counsel for a party to this case authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. And no person — other than the amici, their members, or their counsel — contributed money that was intended to fund preparing or submitting the brief.

[2] Respondents' Motion to Dismiss and Opposition to Petitioners' Motion for Summary Reversal (Jul. 29, 2011) ("NRC Opp.").

the federal government to receive approval from affected states before issuing licenses for activities involving discharges into navigable waters. *See* 33 U.S.C. § 1341(a)(1).[3] The approval is generally known as a "Section 401 Certification," because under Section 401, the certifying state determines that the activity will, or will not, comply with the state water quality standards and other applicable law. After that determination, the state either grants the Section 401 Certification, grants

[3] Section 401(a)(1) provides: "*Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.* In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. *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. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be*" (emphasis added).

the Certification with conditions, or denies it. (Or if the state wishes not to make a determination, it may waive its certification rights under Section 401.)

Section 401 is part of a larger system of "cooperative federalism" created by the Clean Water Act, *see Nat'l Min. Ass'n v. Fowler*, 324 F.3d 752, 756 (D.C. Cir. 2003), which established national policies and standards to "restore and maintain" the nation's waters, while authorizing the states to impose their own — more stringent — regulations, as well. *See* 33 U.S.C. § 1251(a), (b); 33 U.S.C. § 1370 (allowing states to impose more stringent standards); *City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006) ("The Clean Water Act gives a primary role to states 'to block ... local water projects' by imposing and enforcing water quality standards that are more stringent than applicable federal standards."). Under this regime, NRC cannot issue a license without receiving the required state Section 401 Certification, and any conditions contained in a state's certification become federal conditions imposed in the federal license. 33 U.S.C. § 1341(d).

In this case, however, the Nuclear Regulatory Commission ignored the requirements of Section 401 and issued an operating license for Vermont Yankee without complying with Section 401. As explained in the Petitioners' opening brief, Entergy did not apply for or obtain a Section 401 Certification from

Vermont, a burden that Section 401 clearly places on Entergy,[4] but NRC issued it a license anyway. NRC's decision in this proceeding contains not a single mention of the Section 401 requirement — even though the Petitioners brought it to NRC's attention. As a result, NRC's decision to renew the Vermont Yankee license was unlawful, and the license is void. *See* 33 U.S.C. § 1341(a)(1) (License cannot be granted until "certification required by this section has been obtained" or waived).

Against this background, Entergy now argues that it was not required to obtain a Section 401 Certification. It notes that the previous owner obtained a Section 401 Certification in 1970 when the facility first obtained an operating license for the Vermont Yankee plant. Although the applicable standards have changed considerably since then on account of the Clean Water Act's technology-forcing requirements and evolving water-quality standards, Entergy nevertheless asks this Court to find that the certification obtained in 1970 for the prior license — more than 40 years ago — is still valid today. In other words, Entergy asks this Court to invent a rule that "the [Section 401] certification process is intended

[4] U.S. Environmental Protection Agency, Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes (Apr. 2010 interim), *available at http://water.epa.gov/lawsregs/guidance/cwa/upload/CWA_401_Handbook_2010_Interim.pdf* ("the onus for applying for water quality certification lies with the permit or license applicant, and waiver can not occur without a request for certification") ("*U.S. EPA Section 401 Guide*") (citing *North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir. 1997); *City of Fredericksburg v. FERC*, 876 F.2d 1109, 1111-12 (4th Cir. 1989)).

generally to be necessary only once for a given facility." Entergy Opp. at 5.[5] As a fallback, Entergy also suggests that it needed no Section 401 Certification because the permit it obtained in connection with a different Clean Water Act requirement — Section 402 — met the Section 401 requirements.

SUMMARY OF THE ARGUMENT

I. Section 401 makes clear that an applicant generally must obtain a Certification for *each* license or permit it receives. Entergy attempts to escape this requirement by invoking the statute's sole exception to this principle — Section 401(a)(3), 33 U.S.C. § 1341(a)(3), which provides that a Section 401 Certification for the *construction* of a facility is also valid for the facility's initial license to *operate* that facility. But that narrow exception does not apply here because Entergy's 1970 certification was for the operation, not the construction, of its facility. In any event, even if the 1970 certification had been for the "construction" of the Vermont Yankee plant, that would mean — at most — that Entergy could have used the certification to obtain its initial operating license in the 1970s — not that the certification could support a renewal of that license 40 years later.

[5] Intervenor Respondents' Opposition to Petitioners' Motion for Summary Reversal, and Intervenor Respondents' Cross-Motion for Summary Disposition (Jul. 29, 2011) ("Entergy Opp.").

Contrary to this straightforward and clearly limited statutory scheme, Entergy argues that once a facility obtains any Section 401 Certification, that certification is good for all subsequent licenses the facility ever needs, including license renewals decades or even a century later. This argument is contrary to the plain text of Section 401, which requires a state water-quality certification for each license application. And while Section 401(a)(3) does create a narrow exception to this principle, it merely allows a certification obtained for construction to support an application for the initial operating licenses. Nothing in the text of Section 401(a)(3) suggests that this exception applies to renewal applications decades or centuries later.

Even if the statutory text were less clear, Entergy's proposed interpretation must be rejected because it conflicts with the structure and purpose of the Clean Water Act, as well as the legislative history of Section 401. First, Entergy's interpretation conflicts with the structure and purpose of the Clean Water Act, which among other priorities designed to restore and maintain the Nation's waters, sets a "national goal" of eliminating the discharge of pollutants (33 U.S.C. § 1251) and imposes technology-dependent standards that become more stringent over time. Indeed, a fundamental tool used in the Act to improve water quality over time is to require the use of the best-available technology — a standard that necessarily becomes more stringent over time. *See* Section 1.D, *infra*. By

contrast, Entergy asks this Court to hold that Section 401 Certification is valid forever — essentially freezing the applicable standards to those in effect when a facility first seeks a license. This result is contrary to the statutory design. Similarly, as with the technology-based standards, water-quality standards today are very different from those governing in the 1970s. As such, Entergy's certification from 1970 says nothing about its compliance with the standards effective today.

Second, Entergy's proposal is inconsistent with the legislative history of Section 401, which shows that Congress *rejected* the very interpretation it asks this Court to adopt here. That history shows that Congress considered but ultimately rejected a version of Section 401 that would have codified the rule that Entergy now asks this Court to adopt. This Court should not allow Entergy to achieve in a court what was considered and rejected through the democratic process.

II. There is no merit to Entergy's argument that it does not need a Section 401 certificate because it has obtained a Section 402 permit. The Supreme Court has explained that the Section 401 and 402 processes "are not interchangeable," *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370, 380 (2006), and the text of Section 401 is inconsistent with the idea that Section 402 can substitute for Section 401. Indeed, elsewhere when Congress intended one certification or permit to substitute for another, it said so explicitly, and it said

nothing of the sort here. NRC claims that Florida has combined its analysis so that a Section 402 permit issued by that State serves as a Section 401 certificate as well, but Vermont has not done so, and this case involves Vermont rather than Florida.

ARGUMENT

I. NRC Could Not Issue a License to Operate the Vermont Yankee Plant Without First Receiving a Valid Section 401 Certification.

A. Entergy Must Obtain a New Section 401 Certification from Vermont before being Relicensed by NRC.

The Clean Water Act established a system of "cooperative federalism" in which both the states and the federal government impose water-quality standards, and the federal government works jointly with the states to establish and enforce those standards. *See Nat'l Min. Ass'n v. Fowler*, 324 F.3d 752, 756 (D.C. Cir. 2003) (describing the Clean Water Act as one of the "cooperative federalism" statutes); *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011) (The Clean Water Act "sought to expand federal oversight of projects affecting water quality while also reinforcing the role of States as the prime bulwark in the effort to abate water pollution.") (internal quotations omitted). The provision at issue in this case — Section 401, 33 U.S.C. § 1341 — is a crucial part of this system of cooperative federalism. It calls for states to participate in the issuance of federal permits for activities that potentially affect the navigable waters. Specifically, Section 401 states that "[a]ny applicant for a Federal license

or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate. . . .” 33 U.S.C. § 1341(a)(1). And “[n]o 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.” *Id.* The effect of this provision is clear: Section 401 “gives a primary role to states ‘to block ... local water projects’ by imposing and enforcing water quality standards that are more stringent than applicable federal standards.” *City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006). Moreover, it allows states to impose conditions on the issuance of a permit — conditions that then become a part of any federal permit ultimately granted. *Alcoa Power Generating Inc.*, 643 F.3d at 971 (citing 33 U.S.C. § 1341(d)).

In this case, NRC has sought to read the “cooperative federalism” right out of the statute. Indeed, in spite of the clear statutory directive, NRC issued an operating license to Vermont Yankee without receiving a Section 401 Certification from Vermont — and without so much as a mention of this requirement in its decision. Issuing an operating license without the required 401 Certification was a clear violation of Section 401, and as Vermont has explained in its opening brief, that violation was brought to NRC’s attention before NRC issued the license. Moreover, as a federal agency, NRC is charged with complying with the self-

executing provisions of a Congressionally enacted federal statute — even if not alerted to it by a state or citizens. Finally, because NRC's authority to issue a permit is contingent on its having received a valid Section 401 Certification, the license issued in this case is invalid. *See* 33 U.S.C. § 1341(a)(1) ("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. No license or permit shall be granted if certification has been denied by the State. . . ."); *Keating v. FERC*, 927 F.2d 616, 619 (D.C. Cir. 1991) ("The licensing authority of both FERC and the [Army] Corps [of Engineers] . . . is contingent upon compliance with a provision of the Clean Water Act, section 401(a)(1), which requires prior state environmental approval of proposed water projects.").

B. Entergy's 1970 Certification Does Not Fulfill the Section 401 Requirement for Subsequent Renewals.

Entergy does not even attempt to argue that it obtained or included a Section 401 Certification in conjunction with the license at issue here, nor can it cite any location in the record where NRC fulfilled its obligation to ensure that Entergy had obtained such a certification. Instead, Entergy seeks to defend NRC's blatant failure to comply with the Clean Water Act through a series of *post hoc* rationalizations. As Petitioners pointed out in prior filings with this Court, however, these *post hoc* rationalizations cannot support NRC's decision, which must be accepted or rejected only on the bases articulated in the licensing decision.

See Pet. Reply re Mot. for Summary Reversal at 2-4[6]. But as explained below, even if these *post hoc* rationalizations were entitled to consideration, they would fail because they are wrong on both the facts and the law.

Entergy's primary argument is that it should be excused from obtaining a Section 401 Certification here because it obtained such a certification in 1970 when it applied for an operating license for the facility. This argument is inconsistent with the text of Section 401, which requires a certification from "[a]ny applicant" for a relevant "Federal license or permit" and, with one current exception,[7] creates no exemption for applicants that previously received certifications. 33 U.S.C. § 1341(a)(1). But Entergy invokes the narrow exception to this general principle — Section 401(a)(3), which allows an applicant who receives a certification for *constructing* a facility to use the certification to obtain its initial operating licenses. Although Section 401(a)(3) "governs a rather narrow class of cases," *American Rivers, Inc. v. FERC*, 129 F.3d 99, 108 n.19 (2d Cir.

[6] Petitioners' Reply and Memorandum in Opposition to Respondent's Motion to Dismiss and Intervenor's Cross-Motion for Summary Reversal (Aug. 26, 2011) ("Pet. Reply re Mot. For Summary Reversal").

[7] Section 401(a)(6), 33 U.S.C. § 1341(a)(6), created a temporary exception for facilities which were already under construction as of April 1970, but that section is no longer relevant because "any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section." *Id.*

1997), Entergy asks this Court to transform it into a broad rule that "the certification process is intended generally to be necessary only once for a given facility." Entergy Opp. at 5. As explained below, however, this interpretation is contrary to the plain text of the statute, the purpose and structure of the Clean Water Act, and the legislative history of Section 401. Indeed, Entergy's proposed interpretation would allow what was supposed to be a narrow exception to the Section 401 process to swallow the rule itself.[8]

[8] For all these reasons, it should not be surprising that commentators and regulators alike have long understood Section 401 to require certifications in the context of relicensing proceedings. As the Washington Supreme Court recently explained, "[C]onditions in a § 401 water quality certificate are effective during the term of a federal license, and may be reevaluated or revised when a project is up for relicensing." *Pub. Util. Dist. No. 1 of Pend Oreille County v. State, Dept. of Ecology*, 51 P.3d 744, 764 (Wash. 2002) (en banc). Commentators have similarly found this conclusion to be self-evident: "Applicants for relicensing must seek a new section 401 certification." E.g. Christopher J. Eggert, *The Scope of State Authority Under Section 401 of the Clean Water Act After* PUD No. 1 v. Washington Department of Ecology, 31 Willamette L. Rev. 851, 870 n.150 (1995). And federal and state regulators have taken a similar view. For example, the U.S. Environmental Protection Agency ("EPA") notes in its nonbinding guidance to the states on the Section 401 process that when issuing a Section 401 Certification, states should consider the impact on water quality "for the life of the permit" at issue. *U.S. EPA Section 401 Guide*, supra note 4, at 17 ("Thus, it is important for the §401 certification authority to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project. For example, certification of a new hydroelectric dam subject to licensing by FERC would consider water resource implications of both the dam's construction and operation, for the life of the permit.") (footnotes omitted). This implies — as explained already — that a certification is good "for the life of the permit" at issue — not, as Entergy suggests, for all subsequent renewals. The State of Maine has reached the same conclusion: "In order for a hydropower project to be relicensed by FERC, the

C. Entergy's Interpretation Is Inconsistent with the Plain Text of Section 401.

Section 401 distinguishes between two important categories of federal licenses — licenses for the *construction* of a facility and licenses for the *operation* of that facility. *See* 33 U.S.C. § 1341(a)(1) (certification requirement applies to licenses involving both "the construction or operation of facilities"); *id.* § 1341(a)(3). Under the statute, "[a]ny applicant" for a relevant federal license must obtain and present a Section 401 Certification, with one current exception[9] created by Section 401(a)(3): if an applicant obtains a certification "with respect to the *construction* of any facility," that certification "shall fulfill the requirements of this subsection with respect to the certification in connection with any other Federal license or permit required for the *operation* of such facility. . ." *Id.* (emphasis added). Importantly, the certification that Entergy obtained in 1970 was not "with respect to the construction of" the Vermont Yankee facility. Indeed, as Entergy conceded in its application for the license at issue in this case, "the Vermont Water

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State must first certify that continued operation of the project will comply with Maine's water quality standards." Maine Department of Environmental Protection, *DEP Information Sheet: Hydropower Relicensing* (rev. Jan. 2009), *available at* http://www.maine.gov/dep/blwq/docstand/dams/hydro_FERC_process/is_hydro_relicensing.pdf. In short, it has long been understood that Section 401 requires a new certification each time a facility is relicensed. Entergy's assertions to the contrary should be rejected.

[9] The exception created by Section 1341(a)(6) is no longer relevant. See *supra* note 7.

Resources Board provided a water quality certification on October 29, 1970, as amended on November 26, 1971, reflecting its receipt of reasonable assurance that *operation of Vermont Yankee* will not violate applicable water quality standards."[10] (emphasis added). Indeed, the certification contains no mention of the *construction* of any facility and merely states that "*the nuclear-powered electric generating plant* . . . located in Vernon, Vermont from which a discharge into the Connecticut River will originate, will be conducted in a manner which will not violate any applicable water quality standards" (emphasis added). In other words, the Certification applies to discharges emanating from "the nuclear-powered electric generating plant" itself — not discharges related to the construction of the facility. It could hardly be otherwise: as Entergy concedes, construction of the facility was well underway when the Certification was issued, and Entergy's construction permit was issued in 1967 — long before Vermont Yankee's prior owners sought a Section 401 Certification. *See* Entergy Opp. at 4.

Faced with the inconvenient fact that its prior Section 401 Certification was not "with respect to the construction of any facility," Entergy attempts to finesse the issue by expanding the narrow language of Section 401(a)(3). Thus, it asks this

[10] *See* Entergy License Renewal Application App'x E at 9-1 § 9.2.1 (Certified Index No. 740), *available at* http://adamswebsearch2.nrc.gov/IDMWS/ViewDocByAccession.asp?AccessionNumber=ML060300086.

Court to hold that the Section 401 Certification process "is intended generally to be necessary only once for a given facility." Entergy Opp. at 5. But Section 401(a)(3) says no such thing, and courts have recognized that Section 401(a)(3) creates a narrow exception — not the broad rule sought by Entergy. *See American Rivers, Inc.*, 129 F.3d at 108 n.19 (characterizing exception as "narrow").

Nor would the outcome be any different if Entergy had obtained a certification in 1970 "with respect to the construction" of the Vermont Yankee facility. At most, such a construction certification would have been valid for Vermont Yankee's initial application for an operating license. *See Keating*, 927 F.2d at 623 ("Thus, 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). But as explained below, it would make little sense to conclude that a 1970s construction certification could be used to support the renewal of an operating license decades or even a century later. Not only is such an interpretation unwarranted from the text of the statute, but it would undermine the purpose of the Clean Water Act, and it is plainly inconsistent with the legislative history.

D. Entergy's Interpretation Would Undermine the Purpose and Structure of the Clean Water Act.

Setting aside the text of Section 401(a)(3) itself, Entergy's proposed interpretation is also inconsistent with the purpose and structure of the Clean Water Act, which is designed to force facilities to comply with increasingly stringent standards over time. Towards that goal, many of the Clean Water Act's standards are based on "what EPA determines to be the 'best available technology economically achievable' (known as the 'BAT') for existing discharging sources . . . and a different technology—the best available demonstrated control technology or 'BADT'—for new pollutant sources. . ." *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 557-58 (D.C. Cir. 2002), *supplemented sub nom. In re Kagan*, 351 F.3d 1157 (D.C. Cir. 2003). Because the best-available technology is always improving, the standards required by the Clean Water Act become progressively more stringent over time. Similarly, and fundamental to the Section 401 inquiry, states are required to review and modify their own water-quality standards at least once every three years in a "triennial review" process (*see* 33 U.S.C. § 1313(c); *see also id.* § 1314 (requiring EPA to revise standards periodically); and states are required to engage in a broader "Continuing planning process" consistent with the requirements of the Clean Water Act (see 33 U.S.C. §1313(e)).

The evolving nature of the standards is no accident; as this Court has explained, it is the "most salient characteristic" of the Clean Water Act:

> [T]he most salient characteristic of this statutory scheme, articulated time and again by its architects and embedded in the statutory language, is that it is technology-forcing. . . . The essential purpose of this series of progressively more demanding technology-based standards was not only to stimulate but to press development of new, more efficient and effective technologies. This policy is expressed as a statutory mandate, not simply as a goal.

Natural Res. Def. Council v. EPA, 822 F.2d 104, 123-24 (D.C. Cir. 1987).

Against this fundamental structure of "progressively more demanding technology-based standards," Entergy asks this Court to create a presumption that once a state issues a water-quality certification under Section 401, that certification is valid for all subsequent licenses the facility ever needs — even license renewals that occur decades or a century later. Such a presumption makes no sense in light of the evolving nature of the Clean Water Act's standards. Rather, Section 401(a)(3) was designed to create a narrow exception allowing a facility to use a construction certification to support its application for an initial operating license — an event that would typically occur within a short time period.

E. Entergy's Interpretation Is Inconsistent with the Legislative History.

Because the text and structure of the Clean Water Act are clear, there is no need to resort to the legislative history. But in case there were any doubt, the legislative history of Section 401 also demonstrates that Congress never intended to create the once-certified-always-certified standard that Entergy has proposed here. Section 1341(a)(3) was created as part of the Water Quality Improvement

Act of 1970, Pub. L. No. 91-224 (1970), which was subject to a number of rounds of negotiation and compromise. One issue of debate was whether or to what extent a Section 401 Certification obtained for one license should be valid for other licenses. Congress considered — and ultimately rejected — the idea proposed by Entergy: that a certification obtained for a facility is valid for all subsequent licenses.

A brief history of the Water Quality Improvement Act is instructive on this issue. An early version of the bill approved by the House Public Works Committee addressed the issue head-on. As the Committee explained in its report, this version of the bill provided that "in the case of multiple licenses or permits by one or more federal agencies for the same activity, if the applicant receives a certification for one agency, it need not obtain a certification for the other agency or for succeeding permits or licenses." H.R. Rep. No. 91-127, at 6 (1969), *reprinted in* 1970 U.S.C.C.A.N. 2691, 2697. Although the purpose of this language was to "eliminate duplicating certification requirements," the Committee emphasized that it also intended to "afford a safeguard against too broad a use of the single certification." *Id.*

On this last point — the safeguarding against the overbroad use of a single permit — the Committee's report made clear that it did *not* intend for a single certification to last for long periods of time, as Entergy advocates here. In fact, the

report noted that the Chairman of the Joint Committee on Atomic Energy had criticized the bill because he "questioned the need for certification for both the construction license and the operating license which the [Atomic Energy] Commission grants." *Id* at 2698. But the report concluded that a separate certification was necessary for each license, citing "the long period of time that elapses" between an application for a construction permit and the subsequent application for an operating license. *See id*. The Committee thus made clear that it did not intend for a certification to be used over long periods of time — and certainly not indefinitely, as Entergy proposes here. The House ultimately passed the bill without relevant changes to this section. *See* Conf. Rep. 91-940, at 25 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2712, 2737 (describing House's Section 11(b) language).

The Senate later attempted to amend the House's bill to create a regime similar to the one Entergy has proposed here. As described by the Conference Committee that was convened to reconcile the two versions of the bill, the Senate's language proposed that "a certification for federal license or permit for a particular facility or activity shall satisfy the requirement of certification for any later federal license or permit necessary for such facility . . . ." *Id.* at 2739. But in direct contradiction to Entergy's current assertion, the Conference Committee ultimately *rejected* this portion of the Senate's bill and adopted an entirely different — and

much more limited idea — the one that had been advocated by the Chairman of the Joint Committee on Atomic Energy. This idea was that "in the case where a federal license or permit is required both as to the construction of a facility and its operation, the initial certification required for the construction license or permit shall fulfill the requirements of this subsection with respect to certification for a federal license or permit to operate that facility . . . ." *Id.* at 2742.

In short, the Senate initially passed a version of the bill that would have codified exactly what Entergy seeks to accomplish here. But the Senate's proposal never made it past the Conference Committee and was ultimately rejected in the give and take that is part of the democratic process. *Cf. S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370, 380 (2006) (noting that technical definitions in the Clean Water Act were "worked out with great effort in the legislative process"). Thus, although Congress created a narrow exception to the Section 401 requirement, that exception was far narrower than the exception now sought by Entergy — in fact, Entergy's proffered exception attempts to swallow the rule. This Court should not allow Entergy to achieve by judicial fiat what it could not achieve through the democratic process. Congress considered and rejected the very idea Entergy now peddles before this Court, and that should end the analysis.

II. A Section 402 Certification Is No Substitute for a Section 401 Certification.

NRC's litigation counsel suggests in a footnote that this case "potentially raises" questions "such as whether Vermont's grant of an NPDES permit under § 402 subsumes any separate certification requirement under § 401, as is true in many states." (NRC Opp. at 9 n.4.) This case raises no such issues. For one thing, NRC did not issue a license under the theory that a Section 402 permit satisfied the requirements of Section 401, so this wrongheaded justification is merely a *post hoc* rationalization entitled to no consideration.

In any event, a Section 402 permit is no substitute for a Section 401 Certification. Section 402 of the Clean Water Act authorizes the EPA to issue permits for the discharge of pollutants (the discharge of which would otherwise be illegal, *see* 33 U.S.C. § 1311(a)). In many cases, the states have elected to administer this permitting process in lieu of EPA, *see* 33 U.S.C. § 1342(b), (c), as Vermont has done. Nevertheless, despite potential state involvement in both the 401 and 402 processes, the Supreme Court has explained that a Section 401 Certification and an NPDES permit under Section 402 "are not interchangeable, as they serve different purposes and use different language to reach them." *S.D. Warren Co.,* 547 U.S. at 380.

NRC does not even suggest that Congress intended to merge the two processes or that Congress intended a Section 402 permit to substitute for a Section

401 Certification. Nor could it: when Congress wished to make one permit a substitute for another, it did so explicitly. *Cf.* 33 U.S.C. § 1342(a)(4) ("All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title. . . ."). It did no such thing here, and created two separate processes — which it intended to be separate.

Instead, NRC claims that Florida has decreed that when it issues a Section 402 permit, the federal government may also consider this permit to be the state's certification under Section 401. *See* NRC Opp. at 9 n.4 (citing Fla. Admin. Code Ann. r. 62-343.070(9) (2011)). But even if this were accurate, Vermont has enacted no such regulation, and Vermont has explicitly told NRC that it did not issue a Section 401 Certification in this case. As a result, a Section 402 permit could not substitute for the Section 401 Certification that Entergy should have obtained in this case.

CONCLUSION

The order of the Nuclear Regulatory Commission should be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH RULE 32(a)

This brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting the portions described in Circuit Rule 32(a)(1), this brief contains 5,905 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: November 28, 2011 /s/ Christopher J. Wright

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2011, I caused the foregoing Brief of Amici Curiae Riverkeeper, Inc., and Scenic Hudson, Inc., to be filed electronically with the Clerk of the Court using the CM/ECF filing system.

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