IPRenewal NPEmails

From: Gray, Dara F [DGray@entergy.com]
Sent: Monday, August 24, 2009 9:48 AM
To: Stuyvenberg, Andrew
Subject: RE: Interim Decision
Attachments: 62209 entergy 78 decision (3).pdf

Here you go:

Dara Gray, REM
Chemistry/Environmental

Indian Point Energy Center
(914) 736-8414
DGray@Entergy.com

From: Stuyvenberg, Andrew [mailto:Andrew.Stuyvenberg@nrc.gov]
Sent: Monday, August 24, 2009 9:36 AM
To: Gray, Dara F
Subject: RE: Interim Decision

Dara - I just started reading the interim decision you sent, and I'm afraid I was unclear about the decision I was looking for (my apologies). We have been unable to find a copy of the June 19, 2009, decision. We already have the August, 2008, interim decision.

If you happen to have a copy of the June 19, 2009, decision—and are able to share it—please forward a copy.

Thanks for your time, and apologies for any confusion,
Drew

From: Gray, Dara F [mailto:DGray@entergy.com]
Sent: Monday, August 24, 2009 6:57 AM
To: Stuyvenberg, Andrew
Subject: Interim Decision

Drew
As requested, here is the interim decision.

Dara Gray, REM
Chemistry/Environmental

Indian Point Energy Center
(914) 736-8414
DGray@Entergy.com

Hearing Identifier: IndianPointUnits2and3NonPublic_EX
Email Number: 1695

Mail Envelope Properties (DCB622189B67AD49AE39CD3ED1B4D99D05579848)

Subject: RE: Interim Decision
Sent Date: 8/24/2009 9:47:50 AM
Received Date: 8/24/2009 9:47:55 AM
From: Gray, Dara F

Created By: DGray@entergy.com

Recipients:
"Stuyvenberg, Andrew" <Andrew.Stuyvenberg@nrc.gov>
Tracking Status: None

Post Office: IPCEXETSP001.etrsouth.corp.entergy.com

Files	Size	Date & Time
MESSAGE	2161	8/24/2009 9:47:55 AM
62209 entergy 78 decision (3).pdf	110532	

Options
Priority: Standard
Return Notification: Yes
Reply Requested: Yes
Sensitivity: Normal
Expiration Date:
Recipients Received:

STATE OF NEW YORK
SUPREME COURT CHAMBERS
112 STATE STREET, ROOM 1350
ALBANY, NEW YORK 12207
(518) 285-8592
FAX (518) 487-5378

GERALD W. CONNOLLY
Judge

TARA A. KERSEY, ESQ.
Law Clerk

CATHERINE NELLS GUNN
Secretary

June 22, 2009

GOODWIN PROCTOR, LLP
Elise N. Zoli, Esq.
U. Gwyn Williams, Esq.
Robert H. Fitzgerald, Esq.
Emily B. Jennings, Esq.
Exchange Place
53 State Street
Boston, MA 02109

GOODWIN PROCTOR, LLP
Abigail K. Hemani, Esq.
620 Eighth Ave.
New York, New York 10018

HON. ANDREW M. CUOMO, New York State Attorney General
(Lisa M. Burianek, AAG)
NYS Department of Law - The Capitol
Albany, New York 12224

RIVERKEEPER, INC.
Victor M. Tafur, Esq.
828 South Broadway
Tarrytown, New York 10591

Re: Albany County Supreme Court
Entergy Nuclear Indian Point 2, LLC v. NYS DEC, et al.
Index No. 8513-08/RJI No. 01-08-ST9439

Dear Counselors:

Enclosed herewith is an executed Decision and Order with regard to the above referenced matter. The original together with all papers submitted is being forwarded to Ms. Burianek for filing.

Very truly yours,

Catherine Nells Gunn
Secretary to Judge

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
ENTERGY NUCLEAR INDIAN POINT 2, LLC, and
ENTERGY NUCLEAR INDIAN POINT 3, LLC, as
respective owners of Indian Point 2 and Indian Point 3,
and joint applicants for the Indian Point SPDES permit
renewal,

Petitioners,

For a judgment pursuant to Article 78 of the Civil Practice
Law and Rules,

-against-

DECISION and ORDER
Index No.: 8513-08
RJI: 01-08-ST9439

THE NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,
ALEXANDER B. GRANNIS, as Commissioner,
New York State Department of Environmental
Conservation, and J. JARED SNYDER, as
Assistant Commissioner, New York State
Department of Environmental Conservation,

Respondents.

(Supreme Court, Albany County, Motion Term)
(Gerald W. Connolly, Presiding)

APPEARANCES:

GOODWIN PROCTOR, LLP
Attorneys for Petitioners
Elise N. Zoli, Esq.
U. Gwyn Williams, Esq.
Robert H. Fitzgerald, Esq.
Emily B. Jennings, Esq.
Exchange Place
53 State Street
Boston, MA 02109

GOODWIN PROCTOR, LLP
Attorneys for Petitioners
Abigail K. Hemani, Esq.
620 Eighth Ave.
New York, New York 10018

HON. ANDREW M. CUOMO, New York State Attorney General
(Lisa M. Burianek, AAG)
Attorneys for State Respondents
NYS Department of Law - The Capitol
Albany, New York 12224

RIVERKEEPER, INC.
Victor M. Tafur, Esq.
828 South Broadway
Tarrytown, New York 10591

Connolly, J.:

Petitioners Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC seek review, pursuant to Article 78 of the CPLR, of certain determinations made in an August 13, 2008 Interim Decision issued by Assistant Commissioner J. JARED SNYDER of the New York State Department of Environmental Conservation ("DEC"). Respondents oppose the petition, *inter alia*, on the grounds that the matter is not ripe for review and, thus, seek dismissal of the petition. Additionally, Riverkeeper, Inc. was granted leave to intervene in this proceeding by Order of the Court dated March 6, 2009, and has opposed the petition, inter alia, for lack of ripeness, and, thus, also seek dismissal of the petition.

FACTS:

Petitioners own the Indian Point 2 and Indian Point 3 nuclear-powered electric-generating facilities (collectively referred to herein as the "Stations") located in Buchanan, New York, adjacent to the Hudson River. In order to offset the heat created by power generation, the

Stations are equipped with separate cooling water systems whereby water is withdrawn from the Hudson River, circulated past condenser coils to absorb generated heat and returned back into the Hudson River through a shared canal. Up to 2.5 billion gallons of water per day are withdrawn from the river. Specifically, there has been concern as to the extent to which such cooling structures may result in "entrainment" (i.e., passage of fish eggs and larvae through the intake structure) or "impingement" ("i.e., contact by larger fish with the screens or exterior of the intake structure) affecting fish and other aquatic species in the Hudson River.

Environmental Conservation Law ("ECL") §17-0701(1)[1] renders it unlawful for facilities, including nuclear electric generating facilities, to "discharge [] sewage, industrial waste or other wastes or the effluent therefrom, into the waters of this state" without first obtaining a written State Pollutant Discharge Eliminations System ("SPDES") permit from the Commissioner of DEC. Pursuant to Article 17 of the ECL, DEC has the authority, upon completion of an administrative process, to grant such SPDES permits to certain facilities that discharge into the Hudson River. 6 NYCRR Part 704 et seq. sets forth water quality standards that govern thermal discharges to State waters and, specifically, 6 NYCRR §704.5 provides that "[t]he location,

---

[1] NYS Environmental Conservation Law §17-0701(1) provides that:

1. It shall be unlawful for any person, until a written SPDES permit therefor has been granted by the commissioner, or by his designated representative, and unless such permit remains in full force and effect, to:

a. Make or cause to make or use any outlet or point source for the discharge of sewage, industrial waste or other wastes or the effluent therefrom, into the waters of this state, or

b. Construct or operate and use a disposal system for the discharge of sewage, industrial waste, or other wastes or the effluent therefrom, into the waters of the state, or make any change in, addition to or an extension of any existing disposal system or part thereof which would materially alter the volume of, or the method or effect of treating or disposing of the sewage, industrial waste or other wastes, or

c. Increase or alter the content of the wastes discharged through an outlet or point source into the waters of the state by a change in volume or physical, chemical or biological characteristics.

design, construction and capacity of cooling water intake structures, in connection with point source thermal discharges, shall reflect the best technology available for minimizing adverse environmental impact". In determining what constitutes the "best technology available" ("BTA") herein, DEC has utilized a four-step analysis incorporating the following determinations: (1) whether the facility's cooling water intake structure may result in adverse environmental impact; (2) if so, whether the location, design, construction and capacity of the cooling water intake structure reflect BTA for minimizing adverse environmental impact; (3) whether practicable alternate technologies are available to minimize the adverse environmental impact; and (4) whether the cost of practicable technologies are wholly disproportionate to the environmental benefits conferred by such measures.

The Stations operate subject to a joint SPDES permit issued by DEC in 1987. In 1992, applications were submitted for renewal of the SPDES permit for the Stations.[2] As part of such renewal process, on November 12, 2003, DEC circulated a Draft SPDES Permit and accompanying Fact Sheet for the Stations. The Draft SPDES Permit contains proposed modifications to the SPDES permit which include the installation of an alternative "closed-cycle" cooling system[3] (or, potentially, other equivalent alternative technology proposed by petitioners). The Fact Sheet provides that the Stations' present cooling water intake structures have an adverse environmental impact, and concluded that the alternative "closed-cycle cooling system" is the

---

[2]It has not been disputed that the 1987 SPDES permit has remained and will remain in effect with respect to the Stations until the instant renewal proceeding is concluded.

[3] As described in page 4 of the Interim Decision, "[c]losed cycle cooling systems recirculate the water taken from the water source (after allowing it to cool in a tower or reservoir). Water is added to the system only to replace the water that is lost through evaporation." As described in the Interim Decision, the Draft SPDES Permit requires the "implementation of measures that [DEC] has determined to be BTA for minimizing impacts to aquatic organisms from the cooling water intake system, including the installation of a closed cycle cooling system at the Stations".

site-specific BTA to minimize such adverse environmental impact. The Fact Sheet also specifies that such draft SPDES Permit is subject to a public review and comment period and an administrative hearing process (and adjudication of issues, if appropriate) before issuance of the final permit.

Petitioners disputed a number of provisions of the Draft SPDES permit and sought administrative adjudication of certain specified issues[4] including the question of whether, as a threshold matter, DEC demonstrated that the Stations' present cooling water intake structures have caused an "adverse environmental impact". Petitioners also raised issues concerning the BTA analysis employed by DEC. On March 3, 2004, two administrative law judges ("ALJs") presided over an "Issues Conference"[5] in order to hear arguments, *inter alia*, to determine whether certain issues of fact were adjudicable and to determine the existence and resolution of legal issues (that were not dependent on disputed issues of fact) (*see* 6 NYCRR §624.4(b)(2)).

On February 3, 2006, the ALJs issued their "Ruling on Proposed Issues for Adjudication and Petitions for Party Status" ("Issues Ruling"), holding, *inter alia*, that the issue of whether DEC had demonstrated that the Stations' cooling water intake structures have caused an "adverse environmental impact" was adjudicable.

---

[4]According to the Interim Decision, Intervenor Riverkeeper and other entities also proposed issues for adjudication.

[5]6 NYCRR 624.4(b)(2) provides, in pertinent part, that
(2) The purpose of the issues conference is:
(i) to hear argument on whether party status should be granted to any petitioner;
(ii) to narrow or resolve disputed issues of fact without resort to taking testimony;
(iii) to hear argument on whether disputed issues of fact that are not resolved meet the standards for adjudicable issues set forth in subdivision (c) of this section;
(iv) to determine whether legal issues exist whose resolution is not dependent on facts that are in substantial dispute and, if so, to hear argument on the merits of those issues; and
(v) to decide any pending motions.

In April of 2006, petitioners, DEC and intervenor Riverkeeper appealed aspects of the Issues Ruling to DEC Commissioner Grannis. In April of 2008, DEC Commissioner Grannis recused himself from the SPDES permit renewal proceedings and delegated his authority over the appeal to J. Jared Snyder, the Assistant Commissioner for Air Resources, Climate Change & Energy. The Assistant Commissioner issued the Interim Decision at issue in this case on August 13, 2008, resolving the appeals taken from the Issues Ruling. As part of such decision, the Assistant Commissioner determined that the issue of whether DEC had demonstrated that the cooling water intake structures of the Stations have caused an "adverse environmental impact" was not an adjudicable issue. The Assistant Commissioner opined that "he was satisfied that it had been established that Indian Point's cooling water intake structures cause an adverse environmental impact" and accordingly, such issue was not adjudicable. Further, the Assistant Commissioner noted that the central issue raised on the appeals of the Issues Ruling concerned the BTA analysis for the Stations, and, as part of the Interim Decision, revised the fourth step of the BTA analysis based upon the Second Circuit Court of Appeals decision in *Riverkeeper, Inc. v. United States EPA*, 475 F.3d 83 [2nd Cir., 2007]).[6]

Petitioners have brought the instant petition arguing that the Interim Decision constitutes DEC's final and definitive position on whether petitioners will be able to adjudicate these issues during the upcoming proceeding and seek review of that portion of the Interim Decision denying the adjudication of the issue of whether the Stations' cooling water intake structures have an

[6] Instead of the fourth prong providing for analysis of "whether the cost of practicable technologies are wholly disproportionate to the environmental benefits conferred by such measures", the Interim Decision provides that such prong would be reworded to provide for analysis of "whether the cost of the technology can reasonably be borne by the industry and, upon making the determination that it can, whether considerations of cost-effectiveness allow for selection of a less expensive but equally effective technology".

"adverse environmental impact" and seeking a court order staying proceedings pending, and reconsider the Interim Decision following, the issuance of the US Supreme Court's decision in *Entergy Corp. v. EPA*, Dkt. No. 07-588.[7]

Respondents and Intervenor Riverkeeper, Inc. argue in opposition to petitioners' motion, *inter alia*, that the matters raised in the petition are not ripe for review. Respondents assert that DEC has not taken any final agency action regarding the Indian Point SPDES permit and accordingly, the Court should not review the Interim Decision made as part of DEC's ongoing administrative proceedings with respect to the Stations.

RIPENESS:

"Administrative actions as a rule are not final unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process. To determine if agency action is final, therefore, consideration must be given to the completeness of the administrative action and a pragmatic evaluation [must be made] of whether the decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury. Thus, a determination will not be deemed final because it stands as the agency's last word

---

[7]The petition contains six causes of action: (1) by making factual findings regarding the existence of "adverse environmental impact" the Assistant Commissioners' decision violated petitioners' statutory right to adjudication of such disputed factual issue in violation of 6 NYCRR Part 624 and State Environmental Quality Review Act ("SEQRA"); (2) by ruling that DEC had established adverse environmental impact without allowing petitioners an opportunity to present evidence and fully developing the record, the Assistant Commissioner violated the State Administrative Procedure Act; (3) without allowing the full development of the record, the Assistant Commissioner's decision violated petitioners' right to constitutional due process; (4) the Assistant Commissioner made a legal determination concerning the threshold for adverse environmental impact improperly, thereby violating the State Administrative Procedure Act and 6 NYCRR Part 624 which provide petitioners the right to present arguments on issues of law and fact, and which exceeded the scope of his statutory authority as the ALJs had not ruled on this issue; (5) the Assistant Commissioner's finding that the Stations' cooling water intake structures result in "adverse environmental impact" was arbitrary and capricious and constituted an abuse of discretion; and (6) the Assistant Commissioner abused his discretion in modifying the issues to comport with the Second Circuit's decision in *Riverkeeper, Inc. v. United States EPA*, 475 F.3d 83 [2nd Cir., 2007]).

on a discrete legal issue that arises during an administrative proceeding. There must additionally be a finding that the injury purportedly inflicted by the agency may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party. If further agency proceedings might render the disputed issue moot or academic, then the agency position cannot be considered "definitive" or the injury "actual" or "concrete." (*Essex County v. Zagata*, 91 N.Y.2d 447, 453-454 [1998] [internal citations and quotations omitted]). "[F]inality, a prerequisite for the judicial resolution of an issue in the context of a CPLR article 78 proceeding ... does not occur until the decision-maker has arrived at a definitive position on the issue that inflicts an actual concrete injury" (*Town of Coeymans v. City of Albany*, 237 AD2d 856 [3rd Dept., 1997]).

In certain instances, a nonfinal determination may be subject to Article 78 review as where the decision may result in "irreparable damage which cannot be avoided without prompt judicial intervention" (*Martin v. Ambach*, 85 AD2d 869 [3rd Dept., 1981], *aff'd*, 57 NY2d 1001 [1982]).

Based upon a review of the record, the petition is premature as there has been no final administrative action in this matter. DEC has not completed its current administrative proceedings with respect to the renewal of the Indian Point 2 and Indian Point 3 facilities' SPDES permit as there has been no issuance of such SPDES permit, which would constitute final agency action.

Petitioner has made no showing that the Interim Decision has imposed an obligation, denied a right or fixed a legal relationship as a consummation of the administrative process. While, via the Interim Decision, DEC arrived at definitive positions concerning the existence of

an "adverse environmental impact" and the test to be utilized in DEC's BTA analysis pursuant to 6 NYCRR §704.5, there has been no sufficient showing that such determinations have resulted in irreparable damage to petitioners that may not be ameliorated by further administrative action nor that further agency proceedings may not render the disputed issue moot or academic.

While petitioners argue that actual, concrete injury exists as the Interim Decision requires petitioners to employ the BTA to mitigate the adverse environmental impact found by the Assistant Commissioner, thereby requiring petitioners to incur costs and burdens to employ the BTA, DEC has not yet issued the SPDES permit. While such costs and burdens may ultimately be required, it cannot be said that petitioners are required to take immediate action based upon the contested determinations of such Interim Decision nor that the issuance of such SPDES permit may not render the disputed issues moot or academic.[8] Until the completion of the administrative process, it is uncertain what the contents of the SPDES permit may be and, as noted by respondents, as the "regulatory status quo" will not change prior to the issuance of such SPDES permit, petitioners cannot demonstrate irreparable injury. Any apparent harm is dependent upon further administrative action which has not yet occurred. Further, petitioners admitted to the Court at oral argument that they would not concede that the current technology being used is not BTA.

Accordingly, as each of petitioners' claims arise out of the terms of the Interim Decision, and as it can not be said based upon the record before the Court that such Interim Decision

---

[8] The Court notes that petitioners assert in their Reply Memorandum of Law that "as a matter of practice, [petitioners] will now be required to retrofit the Stations' cooling water intake structures, which were constructed in connection with the rest of the plant, with the best technology available today. This obligation is not abstract; although the amount of the cost is not known at this time, there can be no doubt of the practical consequence that [petitioners] will incur a significant cost as a result of the Department's finding of adverse environmental impact.

constitutes a final determination as such determinations are contingent upon completion of the agency's administrative review process and issuance of the SPDES permit, petitioners claims are not ripe for review by the Court at this time.[9]

In light of the foregoing, the Court need not address the remaining contentions of the parties.

Therefore, it is hereby

ORDERED, that respondent and intervenor Riverkeeper's motions to dismiss the petition are granted for lack of ripeness and, accordingly, the relief requested in this action by petitioners is in all respects denied.

This shall constitute both the decision and the order of the Court. All papers, including this decision and order, are being returned to counsel for the respondents. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

SO ORDERED.
ENTER.

Dated: June 19, 2009
Albany, New York

Gerald W. Connolly
Acting Supreme Court Justice

[9]The Court notes that in light of the decision of the United States Supreme Court in *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 [April 1, 2009], petitioners' request for an order directing DEC to stay proceedings pending the issuance of such decision would be moot.

Papers Considered:

1. Order Granting Leave to Intervene dated March 6, 2009;

By Petitioners

1. Notice of Verified Petition dated October 14, 2008; Verified Petition with attached attachments including the Affidavit of Lawrence Barnthouse, PH.D. dated October 10, 2008;
2. Certification of Abigail Hemani dated December 3, 2008 with attachments 1-3;
3. Certification of Elise N. Zoli dated October 14, 2008 with accompanying exhibits;
4. Memorandum of Law in Support of Verified Petition;
5. Entergy's Reply To the Department's Corrected Verified Answer and Objections in Point of Law with accompanying exhibits which include, inter alia, a Reply Memorandum of law in Support of Verified Petition; Affidavit of John R. Young, PH.D. dated February 9, 2009;

By Respondents

1. Corrected Verified Answer, Objections in Point of Law and Return dated January 12, 2009;
2. Corrected Affidavit of Mark D. Sanza dated January 12, 2009 with accompanying exhibit;
3. Affidavit of Roy A. Jacobson dated January 8, 2009; and
4. Corrected State Respondents' Memorandum of Law;

By Intervenors - Riverkeeper, Inc.

1. Riverkeeper's Verified Answer and Objections in Point of Law dated January 9, 2009;
2. Attorney Affirmation of Victor M. Tafur in Support of Riverkeeper's Verified Answer and Objections in Points of Law;
3. Affidavit of Dr. Peter Henderson dated January 8, 2009 with accompanying papers;
4. Affidavit of John Mylod dated January 8, 2009; and
5. Memorandum of Law In Support of Verified Answer;