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June 21, 2011 (1:30 p.m.)

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June 21, 2011

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U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

**Docket: Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating
Units 2 and 3), Docket Nos. 50-247-LR and 50-286-LR**

**Re: New York State Department of Environmental Conservation
Comments on the NRC Staff's Final Supplemental Environmental
Impact Statement**

Dear Administrative Judges:

On May 26, 2011, the New York State Department of Environmental Conservation ("NYSDEC") filed with the Atomic Safety and Licensing Board ("ASLB" or "Board") and participants to this proceeding "Comments on the NRC Staff's Final Supplemental Environmental Impact Statement for the License Renewal of Indian Points 2 and 3, Buchanan, New York" ("Comments"). The purpose of this letter is to provide Entergy Nuclear Operations, Inc.'s ("Entergy's") brief response to those comments, including clarification of certain statements made by NYSDEC regarding the status of Entergy's application to the NYSDEC for a Water Quality Certification ("WQC") in support of its license renewal application ("LRA") for Indian Point Nuclear Generating Units 2 and 3 ("IP2" and "IP3").

As an initial matter, it is not clear why NYSDEC filed its comments on the Final Supplemental Environmental Impact Statement ("FSEIS") with the ASLB and participants to the proceeding. While a party to a Nuclear Regulatory Commission ("NRC") proceeding has an obligation to advise the Board of new documents or information that may be relevant and material to the

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proceeding,¹ the new information should be specific to the issues in the adjudication.² Accordingly, any notification to the Board should identify the possible relationship between the document and issues before the Board.³ NYSDEC, however, does not explain the relationship between its comments and any admitted or pending contention before the Board, likely because the comments are general in nature and do not relate to any pending NYS contention. Nevertheless, in view of this ambiguity, Entergy believes it is important for it to document the following clarifications.

The Status of the Pending IP2 and IP3 WQC Application

In Section IV of the comments, NYSDEC refers several times to its “denial” of Entergy’s application for a WQC and asserts that “without resolution of the issues raised in DEC’s April 2, 2010 Section 401 water quality certification denial, Units 2 and 3 cannot be allowed to operate past the current license term.” See Comments at 11-12. NYSDEC also asserts that the NRC “ignore[d] the substance or legal consequences of New York’s Clean Water Act Section 401 denial[.]” *Id.* at 12. As described further below, NYSDEC’s characterization of the status of the WQC proceeding in this matter does not accurately reflect the factual and legal record of that proceeding or the NRC’s discussion of the WQC proceeding in the FSEIS.

Briefly, on April 3, 2009, Entergy submitted an application to NYSDEC under Section 401 of the Clean Water Act (“CWA”) for an updated WQC in connection with Entergy’s LRA for IP2 and IP3, with a reservation of rights regarding the applicability of Section 401. After Entergy submitted certain additional information in response to NYSDEC staff’s requests for additional information, on February 26, 2010, NYSDEC staff deemed the application complete and determined that it had all the information necessary to review Entergy’s WQC application. On April 2, 2010, NYSDEC staff issued a proposed notice of denial of Entergy’s application (the “Notice”).

NYSDEC staff’s Notice triggered a mandatory administrative adjudicatory hearing before NYSDEC Administrative Law Judges (“ALJs”) on the proposed Notice, the completion of which is a necessary precondition to issuance of NYSDEC’s final decision on Entergy’s WQC

¹ See *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-5, 37 NRC 168, 170 (1993) (citing *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 625 (1973)).

² See *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1358 n.6 (1984).

³ *Va. Elec. & Power Co.* (N. Anna Nuclear Power Station, Units 1 & 2), ALAB-551, 9 NRC 704, 710 (1979).

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application.⁴ Specifically, upon completion of the adjudicatory hearing, the ALJs must issue a report and recommendation to the NYSDEC Commissioner concerning Entergy's WQC application. It is only *after* receiving the report and recommendation from the ALJs that the NYSDEC Commissioner will issue a final decision on Entergy's WQC application.⁵

Under the current schedule, some though not all, of the contested issues relating to Entergy's WQC application are set for hearings beginning on September 12, 2011. However, hearings related to NYSDEC staff's proposed Best Technology Available ("BTA") for Entergy's cooling-water intake structures have yet even to be scheduled, because NYSDEC staff has not yet submitted to the ALJs its proposal for the precise technology it believes is BTA during license renewal (e.g., Wedgewire Screens).

Thus, NYSDEC staff's April 2, 2010 Notice is a preliminary, non-final determination on Entergy's WQC application. The non-final status of the Notice has been confirmed by NYSDEC staff repeatedly in filings before the ALJs. For instance, in its legal briefing before the ALJs, NYSDEC staff stated: "In the context of a § 401 WQC application, the DEC Commissioner, in the first instance, has the authority and responsibility to determine whether an applicant has complied with both the applicable provisions of the CWA and appropriate requirements of State law by virtue of the authority to attach limitations to the WQC."⁶ More recently, NYSDEC staff again confirmed that NYSDEC has not made a final determination on Entergy's WQC application, when it stated that "because the Indian Point nuclear facilities are located in the coastal area . . . the agency [NYSDEC] *cannot make a final determination* on the [WQC] until there has been a written finding that the action is consistent with applicable policies [relating to the Coastal Zone Management Act]."⁷

Thus, NYSDEC's comment that the NRC failed to assess the legal effect on NYSDEC staff's notice is incorrect; because the Notice is a preliminary, non-final decision, it has no legal effect on NRC's relicensing decision.⁸ As such, the FSEIS accurately reflects the status of the WQC

⁴ See 6 N.Y. Codes R. & Regs. § 621.10(a) (2011) ("NYCRR").

⁵ See ECL § 70-0109(3)(a)(ii); 6 NYCRR § 624.13.

⁶ NYSDEC Staff's Initial Post-Issues Conference Brief at 10 (Sept. 24, 2010); *see also id.* at 5-6 (NYSDEC's determination of compliance with state law).

⁷ Letter from Mark D. Sanza to ALJs at 2 (Jan. 28, 2011) (emphasis added).

⁸ New York law recognizes the lack of legal finality of a proposed staff permit decision as well. *See, e.g., Zagata v. Freshwater Wetlands Appeals Bd.*, 244 A.D.2d 343, 344 (N.Y. App. Div. 1997) (upholding denial of petition for judicial review on grounds that "the basic agency action complained of—the [Department Staff's] denial of

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proceeding as of the time it was issued. Specifically, the FSEIS states that “[o]n April 2, 2010, the New York State Department of Environmental Conservation (NYSDEC) issued a Notice of Denial regarding the Clean Water Act Section 401 Water Quality Certification. Entergy has since requested a hearing on the issue, and the matter will be decided through NYSDEC’s hearing process.” FSEIS at 1-8.

Fukushima

In Section III of the Comments, NYSDEC refers to the ongoing investigation of the accident at Fukushima, correctly noting that the extent of the damage to the plants from the earthquake is unknown at present and may not be known for some time. Nevertheless, it states that NRC must review the events at Fukushima that relate to seismic risks, emergency planning and evacuation, and spent fuel pools as significant and new information in a supplemental EIS in this proceeding. As discussed further below, there is no factual or legal basis for NRC to address such issues on an individual basis in the IP2 and IP3 license renewal proceeding given the ongoing, comprehensive actions already being taken by the Commission.

There is no doubt that the recent events in Japan are serious and tragic, but the issues referenced by NYSDEC are already being addressed comprehensively by the Commission on an industry-wide basis. The Commission has been closely monitoring the activities in Japan and reviewing all information available.⁹ In addition, the Commission is already conducting extensive reviews to identify and apply the lessons learned from the Fukushima accident.

Specifically, the Commission has created a Task Force, made up of current senior managers and NRC experts with relevant experience, to conduct both short-term and long-term analysis of the lessons that can be learned from the Fukushima accident. The Task Force has been directed to

- evaluate currently available technical and operational information from the events that have occurred at the Fukushima Daiichi nuclear complex in Japan to identify potential or preliminary near term/immediate operational or regulatory issues affecting domestic operating reactors of all designs, including their spent fuel pools, in areas such as protection against earthquake, tsunami, flooding, hurricanes; station blackout and a degraded ability to restore power; severe accident mitigation; emergency preparedness; and combustible gas control.

the permit application [is a] *preliminary agency response* . . . which can only be challenged at an adjudicatory hearing” (emphasis added)).

⁹ Statement by Chairman Jaczko to the Senate Environment and Public Works Committee and Clean Air and Nuclear Safety Subcommittee at 3 (Apr. 12, 2011).

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- develop recommendations, as appropriate, for potential changes to inspection procedures and licensing review guidance, and recommend whether generic communications, orders, or other regulatory requirements are needed.¹⁰

The longer term actions, which will begin as soon as NRC has sufficient technical information from the events in Japan with the goal of no later than the completion of the 90-day near-term report, will include evaluation of all technical and policy issues related to the event to identify potential research, generic issues, changes to the reactor oversight process, rulemakings, and adjustments to the regulatory framework that should be conducted by NRC. It will also include evaluation of potential interagency issues such as emergency preparedness.

Accordingly, the Commission is carefully examining the implications of Fukushima, including issues that relate directly the matters referenced in NYSDEC's comments.¹¹ Therefore, there is no support for NYSDEC's assertion that such matters must be considered now in any individual license renewal proceedings, including this proceeding.

Aquatic Impacts

With respect to NYSDEC's statements regarding potential aquatic impacts, the ASLB already has determined that issues that are the subject of the NYSDEC proceeding relating to Entergy's State Pollutant Discharge Elimination System ("SPDES") permit, including potential cooling water intake ("CWIS") and thermal discharge considerations, are not within the ASLB's jurisdiction.¹² To that end, NYSDEC's Comments that relate to Entergy's CWIS and thermal discharges—that is the majority of NYSDEC's Comments—are not properly before this Board.¹³

Even if these issues were properly before this Board, NYSDEC's Comments lack necessary scientific support (including the requisite references and citations establishing the basis for such claims). Moreover, NYSDEC's Comments contain omissions regarding the current status of Indian Point's compliance with New York water quality standards ("NYWQS"). Specifically,

¹⁰ Tasking Mem., COMGBJ-11-0002, NRC Actions Following the Events in Japan at 1 (Mar. 23, 2011).

¹¹ See also Emergency Petition to Suspend All Pending Reactor Licensing Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (Apr. 19, 2011) (filed by various petitioners including Hudson River Sloop Clearwater in this proceeding). That Petition, which includes issues similar to those raised by NYSDEC in its Comments, is currently pending before the Commission.

¹² See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43, 155-57 (2007).

¹³ See, e.g., Comments at 3, 12-22.

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NYSDEC is aware the following information that supports NRC's conclusions that no substantial aquatic impacts would result from Indian Point's continued *status quo* operations:

- (1) NYSDEC staff recently concluded, and informed the ALJs in the SPDES and WQC proceedings, that Entergy has provided all necessary thermal analysis for NYSDEC to reach the express conclusion that future operation of Indian Point will not contravene NYWQS.¹⁴
- (2) On April 20, 2011, the United States Environmental Protection Agency ("EPA") issued its revised, proposed Section 316(b) Rule regulating cooling water intake structures ("CWIS") at existing steam electric and other facilities.¹⁵ In the Revised Rule, EPA identified Entergy's current intake structure, including its optimized Ristroph screens and fish return system systems, as state-of-the-art on a nationwide basis for reducing potential impingement.¹⁶
- (3) NYSDEC staff's 2003 draft SPDES permit was rejected by NYSDEC's Assistant Commissioner, the operative decisionmaker in the NYSDEC WQC and SPDES proceedings, with the result that NYSDEC staff currently are under an obligation to issue a new proposed "best technology available" determination for Indian Point's CWIS.¹⁷ NYSDEC staff has not yet issued its proposed BTA. Indeed, NYSDEC staff confirmed that it had not done so, specifically

¹⁴ See Letter from Mark D. Sanza to ALJs (May 16, 2011) (based on Entergy's thermal submissions and alternative mixing zone, NYSDEC staff has "reasonable assurance" that Indian Point's future operations satisfy thermal NYWQS).

¹⁵ See National Pollutant Discharge, Elimination System—Cooling Water Intake Structures at Existing Facilities and Phase I Facilities, Proposed Rule, 76 Fed. Reg. 22,174 (Apr. 20, 2011) ("Revised Rule").

¹⁶ See, e.g., *id.* at 22,202-03 (acknowledging Ristroph screens, the system currently used at Indian Point, as the basis of the Revised Rule's fish protection requirements); see also EPA Technical Development Document for the Proposed Section 316(b) Phase II Existing Facilities Rule at 6-22 to 6-24, 6-31 to 6-33, 7-1 to 7-2, 9-3 (March 28, 2011) (in support of the Revised Rule) (screens at Indian Point are "state of the art"). Also, NYSDEC's reliance on EPA's 1976 position for Indian Point, a position that EPA abandoned in 1981 as a signatory of the Hudson River Settlement Agreement that authorized Entergy's once-through cooling operations, not only reflects a lack of candor, but ignores the subsequent three decades of information that has produced EPA's proposed rule lauding Indian Point's technology.

¹⁷ See, e.g., Interim Decision of the Assistant Commissioner, DEC No: 3-5522-00011/0004, SPDES No. NY-0004472, at 25-26 (NYSDEC Aug. 13, 2008) (rejecting NYSDEC staff's approach to alternative technologies, and substituting a mandate as follows: "If it determines that [Entergy's] proposed alternative may be substituted for closed cycle cooling, Department staff would, if appropriate, commence a proceeding to modify the [draft SPDES] permit accordingly. These permit provisions would allow for subsequent submission of alternative proposals, and the potential revisitation of the closed cycle cooling determination In light of the forgoing, Special Condition 28(c) and (d) would be rendered moot and, depending upon the adjudication, other provisions of the draft permit may similarly be rendered moot or otherwise require modification." (citations omitted)).

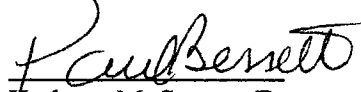
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stating that it had not selected closed-cycle cooling as its proposed BTA in the WQC proceeding.¹⁸ Thus, it is incorrect for NYSDEC to suggest in its Comments that NYSDEC has reached a CWIS BTA technology determination of closed-cycle cooling; indeed, NYSDEC staff has not yet offered its proposal, which will then be subject to adjudication before a final NYSDEC decision is issued.

Finally, NYSDEC staff in the WQC proceeding have indicated their commitment to relying on the FSEIS as adequate for state purposes. Therefore, it is not clear why NYSDEC now asserts in its comments that the FSEIS, for federal purposes, is "unsupportable and thus invalid." Comments at 4.

Respectfully submitted,



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cc: Service List

¹⁸ See, e.g., WQC Issues Conference Tr. 129 ("The department's denial letter of April 2nd does not mandate closed-cycle cooling at the facility. If the department had elected to select closed cycle cooling . . . for Entergy in its 401, it would have issued 401 with conditions, specifically the condition that they build, install, and operate cooling towers there. That is not what the staff's letter does at all.").

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket Nos. 50-247-LR and
)	50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.)	
)	
(Indian Point Nuclear Generating Units 2 and 3))	
)	June 21, 2011

CERTIFICATE OF SERVICE

I hereby certify that copies of the letter regarding the "New York State Department of Environmental Conservation Comments on the NRC Staff's Final Supplemental Environmental Impact Statement" were served this 21st day of June, 2011, upon the persons listed below, by first class mail and e-mail as shown below.

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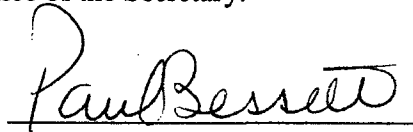
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* Original and 2 copies provided to the Office of the Secretary.

A handwritten signature in cursive script, reading "Paul Bessette", written in dark ink. The signature is positioned above a horizontal line.

Paul M. Bessette, Esq.