Entergy

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Fred Dacimo
Vice President
Operations License Renewal

NL-11-073

June 21, 2011

Mr. Brian E. Holian
Director, License Renewal
U.S. Nuclear Regulatory Commission
11555 Rockville Pike – Mailstop 011F1
Rockville, MD 20852

U.S. Nuclear Regulatory Commission
ATTN: Document Control Desk
Washington, DC 20555-0001

SUBJECT: Clean Water Act Section 401 Water Quality Certification Waiver
Indian Point Nuclear Generating Unit Nos. 2 & 3
Docket Nos. 50-247 and 50-286
License Nos. DPR-26 and DPR-64

REFERENCE:
1. Generic Environmental Impact Statement for License Renewal of Nuclear Plants Supplement 38 Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Final Report (December 2010), Sections 4.1.1-4.1.3, Office of Nuclear Reactor Regulation NUREG-1437, Supplement 38 ("FSEIS")
2. NYSDEC, Comments on the NRC Staff's Final Supplemental Environmental Impact Statement for the License Renewal of Indian Points 2 and 3, Buchanan, New York (May 26, 2011)

Dear Mr. Holian:

As the Nuclear Regulatory Staff ("Staff") is aware, on April 3, 2009, Entergy Nuclear Operations, Inc. ("Entergy") submitted an application to the New York State Department of Environmental Conservation ("NYSDEC") under Section 401 of the Clean Water Act ("CWA"), with a reservation of rights regarding applicability of Section 401, for an updated Water Quality Certification ("WQC") in connection with Entergy's license renewal application ("LRA") for Indian Point Nuclear Generating Units 2 and 3 ("IP2" and "IP3"). After Entergy submitted certain additional information in response to NYSDEC requests for additional information, on February 26, 2010, NYSDEC staff determined that Entergy's WQC application was complete. On April 2, 2010, NYSDEC staff issued a proposed notice of denial of Entergy's WQC application (the "Notice"). NYSDEC staff's Notice triggered an administrative adjudicatory hearing before NYSDEC Administrative Law Judges on the proposed Notice.

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In accordance with state law, that adjudicatory hearing must be completed prior to issuance of a final decision on Entergy's WQC application by the NYSDEC Commissioner. The preliminary issues conference in that proceeding (similar to a federal pretrial conference) has occurred, and discovery is ongoing, with certain issues slated for hearing commencing in September 2011 and expected to last several months. The FSEIS (Ref. 1) accurately reflects the current status of the WQC proceeding as described above. Specifically, the FSEIS states that "On 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.

The purpose of this letter is to advise the NRC that NYSDEC has waived its opportunity to certify Entergy's compliance with state water quality standards by failing to act on Entergy's WQC application within one year as required by the Clean Water Act. Thus, the Section 401 WQC issue has been resolved, as called for in the NRC FSEIS. FSEIS at xv. The factual and legal bases for NYSDEC's waiver of the Section 401 WQC are discussed fully in the enclosed memorandum.

Entergy is notifying NRC of NYSDEC's waiver at this time for several reasons:

First, Entergy is notifying NRC now because, as described in more detail in the attached memorandum, NYSDEC's waiver triggers certain requirements that NRC correspond with the U.S. Environmental Protection Agency ("EPA") regarding Entergy's LRA and NYSDEC's waiver, so that EPA can complete its necessary functions under the CWA and its accompanying regulations.

Second, despite various acknowledgements of the lack of finality of its WQC proceeding (noted in the enclosed memorandum), recent NYSDEC statements submitted to the Atomic Safety and Licensing Board ("ASLB") and parties in this proceeding incorrectly suggest that there has been a final "denial" decision on Entergy's WQC certification application. [*See Reference 2,* NYSDEC Comments on the NRC Staff's Final Supplemental Environmental Impact Statement for the License Renewal of Indian Points 2 and 3, Buchanan, New York, at 12 (May 26, 2011) (asserting that the NRC "ignore[d] the substance or legal consequences of New York's Clean Water Act Section 401 denial")]. Likewise, on a June 16, 2011 status conference call with NYSDEC Administrative Law Judges ("ALJs") in the WQC proceeding, counsel for the New York Public Service Department questioned whether a waiver had already occurred, and how it impacted the ongoing WQC proceeding (Transcript of June 16, 2011 Status conference at 22:6-9). For these reasons, advancing the issue can both address the fact that waiver has occurred and in a manner that is appropriate for this and the WQC proceeding.

Finally, as NRC is aware, a waiver determination does not alter Entergy's commitment to environmental stewardship and New York water quality standards, compliance with which is assured through Entergy's SPDES permit.

Should the NRC have any questions or require additional information regarding this waiver process, please contact me at (914) 788-2055.

Sincerely,

Fred R. Dacimo
Vice President Operations

FRD/cbr

Enclosures: Exhibits A, B, C, D and E
Memorandum, Entergy Indian Point: Clean Water Act & 401 Waiver dated June 20, 2011

cc: Mr. William Dean, Regional Administrator, NRC Region I
Mr. John Boska, NRR Senior Project Manager
Mr. Paul Eddy, New York State Department of Public Service
NRC Resident Inspector's Office
Mr. Andrew Stuyvenberg, NRC License Renewal Environmental Project Manager
Mr. Sherwin Turk, NRC Office of General Counsel

EXHIBIT A

ENTERGY NUCLEAR OPERATIONS, INC.
INDIAN POINT NUCLEAR GENERATING UNIT NOS. 2 & 3
DOCKET NOS. 50-247 AND 50-286

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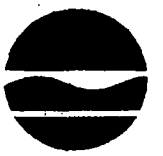


Joe Martens
Acting Commissioner

January 28, 2011

VIA ELECTRONIC MAIL
AND HAND DELIVERY

Hon. Maria E. Villa
Hon. Daniel P. O'Connell
Administrative Law Judges
New York State Department of
Environmental Conservation
Office of Hearings and Mediation Services
625 Broadway, 1st Floor
Albany, New York 12233-1550

Re: ***Entergy Nuclear Indian Point Units 2 and 3***
CWA Section 401 WQC Application Proceeding
NRC – Atomic Safety and Licensing Board's Dec. 3, 2010 FSEIS

Dear ALJs Villa and O'Connell:

This letter constitutes Department staff's filing in compliance with the *Ruling on Proposed Issues for Adjudication and Petitions for Party Status* dated December 13, 2010, issued in the Entergy Indian Point §401 WQC proceeding ("Issues Ruling"), and with item 3 of the Scheduling Order attached to the Issues Ruling. Specifically, page 9 of the Issues Ruling and item "3" of the Scheduling Order directed Department staff to:

> ". . . advise the ALJs and the parties as to whether the Nuclear Regulatory Commission, Atomic Safety and Licensing Board's December 3, 2010 Final Supplemental Environmental Impact Statement ('FSEIS') is sufficient for Department Staff to make the findings required by Section 617.11 of 6 NYCRR."[1]

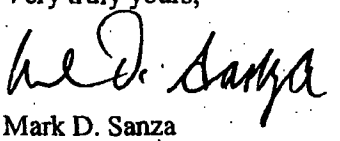
It is Department staff's position after due deliberation that, in conjunction with or as otherwise supplemented by the Final Environmental Impact Statement by the Department concerning the Applications to Renew SPDES Permits for Three Hudson River Power Plants accepted June 25, 2003, along with the Department's records of proceedings (administrative hearing records) for both the Entergy Indian Point SPDES permit (DEC No.: 2-5522-00011/00004) and Entergy Indian Point §401 WQC application (DEC Nos.: 3-5522-00011/0030 and 3-5522-00105/00031), as well as with the NRC's record of proceeding (hearing file and record) for Entergy's license renewal for Indian Point Units 2 and 3 (Docket

[1] Department staff notes that the December 3, 2010 FSEIS was prepared by staff of the NRC, not by the Atomic Safety and Licensing Board, and that such FSEIS is not yet actually "final."

Nos. 50-247-LR and 50-286-LR; ASLBP No. 07-858-03-LR-BD01), including but not limited to any contentions, attachments, reports, declarations, comments, and administrative hearings relating to or arising from the publication by the NRC Staff on December 3, 2010, of the FSEIS for the renewal of the Indian Point nuclear operating licenses, the NRC Staff's FSEIS (insofar as it may be further supplemented or amended by future proceedings noted herein) would be sufficient for the purpose of making findings as required by 6 NYCRR §617.11. Department staff notes that, consistent with the provisions of 6 NYCRR §617.15(c), a final decision by a Federal agency is not controlling on any agency decision on the proposed action, but may be considered by the agency. In addition, consistent with the provisions of 6 NYCRR §617.11(e), Department staff further notes that, because the Indian Point nuclear facilities are located in the coastal area (as defined in 6 NYCRR §617.2[f]), the agency cannot make a final determination on the proposed action until there has been a written finding that the action is consistent with applicable policies set forth in 19 NYCRR §600.5.

Thank you for your courtesies and attention to this matter.

Very truly yours,



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EDMS#390924v1

EXHIBIT B

ENTERGY NUCLEAR OPERATIONS, INC.
INDIAN POINT NUCLEAR GENERATING UNIT NOS. 2 & 3
DOCKET NOS. 50-247 AND 50-286

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application

-of-

Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC for a Water Quality Certificate pursuant to Federal Clean Water Act Section 401 and Section 608.9 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

DEC Application Nos.:
3-5522-00011/00030 (IP2)
and
3-5522-00105/00031 (IP3)

INITIAL POST-ISSUES CONFERENCE BRIEF BY THE STAFF OF THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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Dated: September 24, 2010

Warren Co. v. Maine Bd. of Envtl. Protection, 547 U.S. 370 (2006) (holding that states could regulate any activity altering the integrity of water in a federal licensing proceeding, *id.* at 383).

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. CWA § 401(d) provides that a WQC shall assure compliance "with any other appropriate requirement of State law." *See also* 6 NYCRR §608.9(a)(6). Read as a whole, the CWA evidences a comprehensive intent on the part of Congress to allow the states to manage their own environmental affairs within the framework established by the CWA. The objective of the CWA, set out in § 101(a) is " . . . to restore and maintain the chemical, physical and biological integrity of the Nation's waters." The states are given primary responsibility in meeting this objective in CWA § 101(b):

> "it is the policy of the Congress to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . ." *(emphasis added).*

The United States Supreme Court recognized that this policy was embodied in CWA § 401, finding that "[s]tate certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution." *S.D. Warren Co., supra,* at 383. In addition, CWA § 510 explicitly authorizes states to " . . . adopt or enforce . . . any requirement respecting control or abatement of pollution . . ." so long as the requirement is not less stringent than "an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance . . . in effect under the" CWA. *Id. (emphasis added).*

With this broad mandate, DEC may act to fulfill CWA § 101(a)'s objective in many ways. *See* CWA § 301(b)(1)(C). Thus, any more stringent State law, regulation or standard, including but not limited to water quality standards, may be employed by DEC in meeting the objectives of the CWA. As articulated by DEC Commissioner Biggane in a § 401 WQC proceeding for a proposed pump storage project nearly 40 years ago:

> "All provisions of the Environmental Conservation Law and all the rules and regulations thereunder which relate to the prevention, reduction and elimination of pollution, as well as the development and use of land and water resources, constitute
>
> > 'more stringent limitation[s] . . . established pursuant to any State law or regulation (under authority preserved by Section 510) . . . or required to implement any applicable water quality standard established pursuant to this Act. (Section 301[b][1][C])'."

See Matter of the Application of the Power Authority of the State of New York, for the Issuance of a Certification for the Construction and Operation of a Proposed Pumped Storage Project Near Breakabeen, Schoharie County, New York, *Commissioner's Direction to the Hearing Officer With Respect to Jurisdiction and Scope of Hearing,* March 22, 1974, at 5; *accord Power Authority of the State of New York v. NYSDEC and Biggane,* U.S. Dist. Ct., ND NY, 74 Civ 15 (Foley, J. 1974).

The DEC has a broad mandate from the Legislature to protect the environment. The Commissioner is the " . . . trustee of the environment for the present and future generations." ECL § 1-0101(2). The DEC and Commissioner are charged with carrying out ". . . the environmental policy of the state set forth in Section 1-0101 of this chapter." ECL § 3-0301(1). As such, the Commissioner is empowered, among other things, to:

> "[p]rovide for prevention and abatement of all water, land and air pollution including but not limited to that related to particulates,

> gases, dust, vapors, noise, radiation, odor, nutrients and heated liquids"

ECL §3-0301(1)(i) *(emphasis added).*

In that regard, it is noteworthy that the definition of "pollutant" that has been adopted in New York's water pollution control law is more stringent than the definition in the CWA and includes, among other things, "radioactive materials." *See* ECL § 17-0105(17); 6 NYCRR § 750-1.2(a)(66). Given the Legislature's enactment of ECL §§ 3-0301(1)(i), 17-0807(1) and 17-0105(17), as well as DEC's promulgation of 6 NYCRR § 750-1.3(a), the State has clearly determined that the discharge of radioactive materials into New York waters (groundwater and surface water) will, among other things, impair the quality of those waters and must be prohibited. Accordingly, DEC is obligated to enforce these water quality mandates in its determination on Entergy's § 401 WQC. *See* Matter of the Application of the Power Authority of the State of New York, for the Issuance of a Certification for the Construction and Operation of a Proposed Pumped Storage Project Near Breakabeen, Schoharie County, New York, *Commissioner's Direction to the Hearing Officer With Respect to Jurisdiction and Scope of Hearing,* March 22, 1974, at 5.

DEC's regulatory role in the context of a § 401 WQC for a federally regulated project or activity was recently addressed by the Court of Appeals in *Matter of Chasm Hydro, Inc. v. New York State Dept. of Envtl. Conservation,* 14 NY3d 27 (2010). In that case, which involved a FERC-regulated hydroelectric dam, the Court held that the issue of whether DEC is preempted by federal law in a § 401 WQC proceeding is to be addressed first in an administrative proceeding and then subsequent judicial review. *Id. at* 30. The Court held:

> " . . . the state's power to 'determine[] that construction and operation of the project as planned would be inconsistent with one of the designated uses' of the water should be determined, in the

> first instance, through the administrative process. In addition to the issues raised before this Court, the administrative proceeding should address whether the dam, as an exempt project, should be treated the same as a licensed project for the purpose of preemption analysis."

Matter of Chasm Hydro, supra, at 30 *(internal citation omitted).*

The Court of Appeals, like the court in *Karuk Tribe of Northern California v. California Regional Water Quality Control Bd.*, 183 Cal.App. 4th 330, 340 (2010) recognized that federal preemption is to be examined, in the first instance, in the administrative realm and that states have broad authority to deny or condition a § 401 WQC for a federally-licensed project based on state water quality requirements. *Id.* As noted by the court in *Karuk Tribe, supra,* there are two important differences between § 401 WQC authority and state permitting/licensing requirements:

> "First, the water quality certification requirements of section 401 of the Clean Water Act are established under federal law . . . . [W]here a federal law incorporates state requirements, it makes those requirements federal requirements. For purposes of federal preemption analysis, the substantive requirements of state law applied through the water quality certification analysis become requirements of federal law. . . . Second, states exercise water quality certification authority in connection with [a federal] licensing process. In this regard, conditions of certification are like the recommendations a state agency may make to [the federal agency] as part of the [federal] licensing process. . . . If a state agency recommends conditions of approval based on what state law would require if the state agency had authority to apply state law and [the federal agency] accepts those recommendations and adopts them as conditions of the [federal] license, the licensing process has effectively applied state substantive law requirements to the [federal] licensee. A water quality certification is similar, except that the state's conditions are not mere recommendations - - they are binding on [the federal agency]. With both non-binding recommendations accepted by [the federal agency] and binding certifications, the state's environmental requirements apply to the licensee through the [federal] licensing process and as conditions of the [federal] license."

Id. at 340, fn 6.

Here, DEC is applying state laws and regulations relating to radiological pollution and water quality, *i.e.*, ECL §§ 3-0301(1)(i), 17-0807(1), 17-0105(17), and 6 NYCRR § 750-1.3(a), in the context of a federal licensing process – NRC re-licensing of an existing nuclear facility. Contrary to Entergy's assertions, DEC's Denial Notice is not regulating, or attempting to regulate, radiation hazards or radiological health and safety from the operation of Indian Point under independent state authority. Rather, DEC's authority here stems from its legislative directive to abate and, ultimately put an end to, an ongoing nuisance and pollution, *i.e.*, the prohibited discharge of radiological materials from Indian Point into waters of the State. ECL §§ 3-0301(1)(i); 17-0105(2).

> ". . . While it is clear the state laws may not 'veto' projects licensed by the federal [agency] nor may the giving of a license be made contingent on the state's consent, that is, the state may not block the project completely, there is nothing therein indicating that regulatory state laws which do not achieve that end are not proper. There is nothing said about nuisances . . . Here we are concerned with the abatement of a nuisance, in a sense a local police measure. . . . The state has not even asked in the action that defendant cease operating its [facility]; it asks that they be so operated as to not create the danger to the public and the destruction of the fish."

Calif. Oregon Power Co. v. Superior Court, 45 Cal.2d 858, 868-869 (1955).

Similarly, here the Denial Notice is not an attempt to block the Indian Point facilities from operating. Instead, DEC is only exercising its statutory and regulatory police power to abate water pollution – an ongoing nuisance of radiological discharges – emanating from the Indian Point site as provided by ECL §3-0301(1)(i).[11] Tellingly, to date, neither the owners of Indian Point nor NRC have been able to successfully abate radiological releases from the

[11] *See also* July 9, 2010 letter from Stephen G. Burns, General Counsel of NRC to Jim Riccio, Nuclear Policy Analyst at Greenpeace concerning the issue of preemption of State laws at U.S. nuclear facilities (stating "when even the controversy has been over releases of tritium from nuclear plants, the agency [NRC] has generally avoided statements about what a State can and cannot do").

facilities to New York waters despite having been discovered as far back as 1994. *See* Issues Conference Exhibit 5 (January 7, 2008 GZA GeoEnvironmental, Inc. "Hydrogeologic Site Investigation Report" for Indian Point Energy Center). Yet, NRC acknowledges that it does not possess regulatory power to actually prevent radioactive leakages from nuclear facilities in the first instance.

> "While licensees are required to design systems to confine radioactive materials, NRC's regulatory framework does not explicitly state that all activities under a licensee's control must be accomplished with no leakage. Instead, when applying for a license from NRC, the applicant describes how radioactive material will be used, secured and controlled. . . . A thorough review of the licensing bases, both general and specific conditions, should be performed by NRC staff whenever a leak not associated with an approved discharge occurs as it may be a violation of applicable requirements, e.g., 10 CFR Part 50, Appendix I."

U.S. Nuclear Regulatory Commission, *Groundwater Task Force Final Report – June 2010,* at p. 4 *(emphasis added).*

At a minimum, the fact that radioactive leaks at Indian Point, including from a non-operating reactor (Indian Point Unit 1) have not been confined to the site, have migrated to New York waters, and have been ongoing for many years and continue at present without cessation, at least raises a question as to whether such discharges have been "approved" by NRC and whether the facilities are in violation of applicable requirements, *e.g.*, 10 CFR Part 50, Appendix I. *Id.; see also* Issues Conference Exhibit 5 (January 7, 2008 GZA GeoEnvironmental, Inc. "Hydrogeologic Site Investigation Report" for Indian Point Energy Center).

In any event, the DEC Commissioner is obligated, in the first instance, to determine in this administrative proceeding the scope and applicability of all state laws and regulations pertaining to Indian Point's radioactive pollution of State waters. Upon such determination, then and only then can Entergy raise its preemption argument in a court of competent jurisdiction.

Matter of Chasm Hydro, supra, at 30. Thus, Entergy's preemption argument is not ripe at this preliminary stage of the proceeding, and this issue must be the subject of a hearing in order to create a record for the Commissioner to render a determination.

(3) The release of AEA materials from an NRC-licensed facility is not subject to regulation under § 401 of the CWA.[12]

As noted, the State's definition of "pollutant" that has been adopted in New York's water pollution control law is more stringent than the definition in the CWA and includes, among other things, "radioactive materials." *See* ECL § 17-0105(17); 6 NYCRR § 750-1.2(a)(66). "Discharge" means any addition of any pollutant to waters of the State through an outlet or point source. 6 NYCRR § 750-1.2(a)(26). "Point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, vessel or other floating craft, or landfill leachate collection system from which pollutants are or may be discharged. ECL § 17-0105(16); 6 NYCRR § 750-1.2(a)(65).

Likewise, the definition of "waters" or "waters of the state" in New York is broader than the term "navigable waters" as used in the CWA, and includes lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic ocean within the territorial limits of the state of New York and all other bodies of surface or underground water, natural or artificial, inland or coastal, fresh or salt, public or private, which are wholly or partially within or bordering the state or within its jurisdiction. ECL § 17-0105(2); 6 NYCRR § 750-1.2(a)(97). The NRC recently acknowledged the competing

[12] This proposed legal issue was identified by Entergy in its April 29, 2010 hearing request and in its July 16, 2010 memorandum of law.

EXHIBIT C

ENTERGY NUCLEAR OPERATIONS, INC.
INDIAN POINT NUCLEAR GENERATING UNIT NOS. 2 & 3
DOCKET NOS. 50-247 AND 50-286

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application

-of-

Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC for a Water Quality Certificate pursuant to Federal Clean Water Act Section 401 and Section 608.9 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

DEC Application Nos.:
3-5522-00011/00030 (IP2)
and
3-5522-00105/00031 (IP3)

POST-ISSUES CONFERENCE REPLY BRIEF BY THE STAFF OF THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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Dated: October 29, 2010

(2) NYSDEC Staff's denial of the § 401 WQC application based upon speculative releases of AEA materials is arbitrary, capricious, and not in accordance with applicable law.
(3) NYSDEC Staff's denial of the § 401 WQC application on the basis of alleged non-compliance with 6 NYCRR § 704.5 is arbitrary, capricious, and not in accordance with law.

(4) NYSDEC Staff's decision to deny the § 401 WQC application for alleged non-compliance with ECL § 11-0535 due to impingement and entrainment of shortnose and Atlantic sturgeon is arbitrary, capricious, and not in accordance with law.

In its initial post-issues conference brief dated September 24, 2010, DEC staff attempted to address each of the legal and factual issues that had been identified previously by Entergy and which are listed above. To that extent, DEC staff will endeavor not to repeat prior arguments and positions in this reply brief. However, given Entergy's recent submission of its memorandum of law dated September 24, 2010, DEC staff is compelled to briefly address the following two topics of concern in further detail: (i) the release of radiological materials from the Indian Point site into waters of the State; and (ii) the adverse environmental impacts caused by operations of the Indian Point nuclear facilities.

I. The release of radiological materials from the Indian Point site into waters of the State.[8]

Based upon Entergy's application materials, the Denial Notice indicated that persistent, ongoing discharges of radiological materials, deleterious substances (including, but not limited to, radioactive liquids, radioactive solids, radioactive gases, and stormwater) from the Indian Point site into "waters of the state," consisting of groundwater and the Hudson River, can impair such waters for their best usages. *See* Denial Notice, at 11; *see also* ECL §§ 17-0105(2),

[8] Entergy identified this topic in threshold legal items "2 and "3," and factual issue "2" noted above.

17-0301, and 6 NYCRR §§ 701.11 and 703.2. ECL § 17-0807(1) explicitly prohibits "the discharge of any radiological . . . agent or high-level radioactive waste" into waters of the state.[9] It is undisputed and, in fact, Entergy has acknowledged that radioactive materials (including tritium, strontium-90, cesium, and nickel) from spent fuel pools, pipes, tanks and other systems, structures, and components at Indian Point have reached the Hudson River via groundwater flow from the site of the facilities and continue to do so. *See* Issues Conference Exhibit Nos. 2, 3, and 5; Denial Notice at 11; *see also* ECL § 17-0807(1) and 6 NYCRR § 750-1.3(a).

Nevertheless, Entergy contends that the federal government occupies the entire field of regulatory authority over radiological discharges from NRC-licensed nuclear power plants, whether such discharges are related to actual operations of the facility or not. However, Entergy failed to cite any authority for whether the discharge of radioactive materials, following nuclear operations and due solely to improper or inadequate storage, unintentional leaks, equipment breakdowns, defects, closed facilities, and lack of structural integrity of facility components, from the actual regulated site and into waters of the State (including groundwater and surface water) constitute an independent water quality regulatory basis that can be considered by DEC in the context of a federal licensing proceeding like Entergy's § 401 WQC application. *See PUD No. 1 of Jefferson County v. Washington Dept. of Ecology,* 511 U.S. 700 (1994); *see also S.D. Warren Co. v. Maine Bd. of Envtl. Protection,* 547 U.S. 370 (2006) (holding that states could regulate any activity altering the integrity of water in a federal licensing proceeding, *id.* at 383).

The DEC Commissioner, in the first instance, has the authority and responsibility to determine whether an applicant for a § 401 WQC has complied with both the applicable

[9]. Prohibited discharges in ECL § 17-0807 are not authorized and cannot be regulated by SPDES permit limitations or conditions. *See* 6 NYCRR § 750-1.3. Consequently, DEC is prohibited from issuing a SPDES permit for the "discharge of any radiological . . . agent or high-level radioactive waste" from Indian Point (or any other facility) because it would violate the provisions of another existing statute and regulation. 6 NYCRR § 750-1.3(a).

provisions of the CWA and other appropriate requirements of State law by virtue of the authority to attach limitations to the WQC. CWA § 401(d) provides that a WQC shall assure compliance "with any other appropriate requirement of State law." *See also* 6 NYCRR §608.9(a)(6). Read as a whole, the CWA evidences a comprehensive intent on the part of Congress to allow states to manage their own environmental affairs within the framework established by the CWA. The objective of the CWA, set out in § 101(a) is " . . . to restore and maintain the chemical, physical and biological integrity of the Nation's waters." The states are given primary responsibility in meeting this objective in CWA § 101(b):

> "it is the policy of the Congress to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . ." *(emphasis added).*

The United States Supreme Court recognized that this policy was embodied in CWA § 401, finding that "[s]tate certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution." *S.D. Warren Co., supra,* at 383. In addition, CWA § 510 explicitly authorizes states to " . . . adopt or enforce . . . any requirement respecting control or abatement of pollution . . ." so long as the requirement is not less stringent than "an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance . . . in effect under the" CWA. *Id. (emphasis added).*

With this broad mandate, DEC may act to fulfill CWA § 101(a)'s objective in many ways. *See* CWA § 301(b)(1)(C). Thus, any more stringent State law, regulation or standard, including but not limited to specific water quality standards, may be employed by DEC in meeting the objectives of the CWA. As articulated by DEC Commissioner Biggane in a § 401 WQC proceeding for a proposed pump storage project nearly 40 years ago:

> "All provisions of the Environmental Conservation Law and all the rules and regulations thereunder which relate to the prevention, reduction and elimination of pollution, as well as the development and use of land and water resources, constitute
>
> > 'more stringent limitation[s] . . . established pursuant to any State law or regulation (under authority preserved by Section 510) . . . or required to implement any applicable water quality standard established pursuant to this Act. (Section 301[b][1][C])'."

See Matter of the Application of the Power Authority of the State of New York, for the Issuance of a Certification for the Construction and Operation of a Proposed Pumped Storage Project Near Breakabeen, Schoharie County, New York, *Commissioner's Direction to the Hearing Officer With Respect to Jurisdiction and Scope of Hearing,* March 22, 1974, at 5.

The DEC has a broad mandate from the Legislature to protect the environment. The Commissioner is the " . . . trustee of the environment for the present and future generations." ECL § 1-0101(2). The DEC and Commissioner are charged with carrying out ". . . the environmental policy of the state set forth in Section 1-0101 of this chapter." ECL § 3-0301(1). As such, the Commissioner is empowered, among other things, to:

> "[p]rovide for prevention and abatement of all water, land and air pollution including but not limited to that related to particulates, gases, dust, vapors, noise, radiation, odor, nutrients and heated liquids"

ECL § 3-0301(1)(i) *(emphasis added).*

In that regard, it is noteworthy that the definition of "pollutant" that has been adopted in New York's water pollution control law is more stringent than the definition in the CWA and includes, among other things, "radioactive materials." *See* ECL § 17-0105(17); 6 NYCRR § 750-1.2(a)(66). Given the Legislature's enactment of ECL §§ 3-0301(1)(i), 17-0807(1) and 17-0105(17), as well as DEC's promulgation of 6 NYCRR § 750-1.3(a), it is clear that the State

has determined that the discharge of radioactive materials into New York waters (groundwater or surface water) will, among other things, impair the quality of those waters and is prohibited. Accordingly, DEC is obligated to enforce these water quality mandates in its determination on Entergy's § 401 WQC. *See* Matter of the Application of the Power Authority of the State of New York, for the Issuance of a Certification for the Construction and Operation of a Proposed Pumped Storage Project Near Breakabeen, Schoharie County, New York, *Commissioner's Direction to the Hearing Officer With Respect to Jurisdiction and Scope of Hearing,* March 22, 1974, at 5.

DEC's role in a § 401 WQC for a federally regulated project or activity was recently addressed by the Court of Appeals in *Matter of Chasm Hydro, Inc. v. New York State Dept. of Envtl. Conservation,* 14 NY3d 27 (2010). In that case, involving a FERC-regulated hydroelectric dam, the Court held that the issue of whether DEC is preempted by federal law in a § 401 WQC proceeding is to be addressed first in an administrative proceeding and then subsequent judicial review. Id. *at* 30. The Court held:

> " . . . the state's power to 'determine[] that construction and operation of the project as planned would be inconsistent with one of the designated uses' of the water should be determined, in the first instance, through the administrative process. In addition to the issues raised before this Court, the administrative proceeding should address whether the dam, as an exempt project, should be treated the same as a licensed project for the purpose of preemption analysis."

Matter of Chasm Hydro, supra, at 30 *(internal citation omitted). See also Karuk Tribe of Northern California v. California Regional Water Quality Control Bd.,* 183 Cal.App. 4th 330, 340 (2010).

In *American Rivers Inc. v. Federal Energy Regulatory Commission,* 129 F.3d 99 (2d Cir. 1997), the Second Circuit held that even FERC, despite its claimed pre-eminent role under the

Federal Power Act, may not eliminate State conditions in § 401 WQCs that it perceives as invalid, but must await an applicant's challenge in a "court of appropriate jurisdiction." FERC's only other recourse is to refuse the federal license altogether. Id.; *accord Roosevelt Campobello Intl. Park Commn. v. U.S. E.P.A.*, 684 F.2d 1041 (1st Cir. 1982). Clearly, the courts recognize that states are the appropriate entities to decide matters with respect to issuance of a § 401 WQC.

Here, DEC has applied state laws and regulations relating to radiological pollution and water quality, i.e., ECL §§ 3-0301(1)(i), 17-0807(1), 17-0105(17), and 6 NYCRR § 750-1.3(a), in the context of a federal licensing process – NRC re-licensing of an existing nuclear facility. Contrary to Entergy's assertions, DEC's Denial Notice is not regulating, or attempting to regulate, radiation hazards or radiological health and safety from the operation of Indian Point under independent state authority. Rather, DEC's authority stems from its legislative directive to abate and, ultimately put an end to, an ongoing nuisance and pollution, i.e., the prohibited discharge of radiological materials from Indian Point into waters of the State. ECL §§ 3-0301(1)(i); 17-0105(2).

> ". . . While it is clear the state laws may not 'veto' projects licensed by the federal [agency] nor may the giving of a license be made contingent on the state's consent, that is, the state may not block the project completely, there is nothing therein indicating that regulatory state laws which do not achieve that end are not proper. There is nothing said about nuisances . . . Here we are concerned with the abatement of a nuisance, in a sense a local police measure. . . . The state has not even asked in the action that defendant cease operating its [facility]; it asks that they be so operated as to not create the danger to the public and the destruction of the fish."

Calif. Oregon Power Co. v. Superior Court, 45 Cal.2d 858, 868-869 (1955).

Similarly, here the Denial Notice is not an attempt to block the Indian Point facilities from operating. Instead, DEC is exercising its statutory and regulatory police power to abate

water pollution – an ongoing nuisance of radiological discharges – emanating from the Indian Point site as provided by ECL §3-0301(1)(i).[10] Importantly, to date, neither the owners of Indian Point nor NRC have been able to successfully abate radiological releases from the facilities to New York waters despite discovery of releases as far back as 1994. *See* Issues Conference Exhibit 5 (January 7, 2008 GZA GeoEnvironmental, Inc. "Hydrogeologic Site Investigation Report" for Indian Point Energy Center). Yet NRC acknowledges that it does not possess regulatory power to actually prevent radioactive leakages from nuclear facilities in the first instance.

> "While licensees are required to design systems to confine radioactive materials, NRC's regulatory framework does not explicitly state that all activities under a licensee's control must be accomplished with no leakage. Instead, when applying for a license from NRC, the applicant describes how radioactive material will be used, secured and controlled. . . . A thorough review of the licensing bases, both general and specific conditions, should be performed by NRC staff whenever a leak not associated with an approved discharge occurs as it may be a violation of applicable requirements, e.g., 10 CFR Part 50, Appendix I."

U.S. Nuclear Regulatory Commission, *Groundwater Task Force Final Report – June 2010,* at p. 4 (ML101740509) *(emphasis added).*

Stated differently, NRC has not promulgated any regulation that prohibits the discharge of radionuclide contaminated fluids from underground pipes or structures into the groundwaters of a State. Thus, there is no applicable federal regulation that instructs the operators of Indian Point: "Thou shall not allow radionuclides to be discharged into the groundwater." Clearly, this

[10] *See also* July 9, 2010 letter from Stephen G. Burns, General Counsel of NRC to Jim Riccio, Nuclear Policy Analyst at Greenpeace concerning the issue of preemption of State laws at U.S. nuclear facilities (stating "when even the controversy has been over releases of tritium from nuclear plants, the agency [NRC] has generally avoided statements about what a State can and cannot do").

regulatory gap can be filled by New York's prohibition against discharge of radionuclide contaminated fluids into waters of the State.

Moreover, NRC's Nuclear Reactor Regulation (or "NRR") program considers that groundwater only exists in the saturated zone beneath the regional water table. *See Groundwater Protection Activities of the US Nuclear Regulatory Commission*, February 1987, at 7-1 (ML101550111) [NUREG-1243]. That view would exclude water in the vadose zone above the water table. *Id.* In contrast to the NRC's regulatory authority over uranium mines or high-level radioactive waste disposal, groundwater protection is simply not a primary concern at power reactor sites. In the words of NRC:

> "Groundwater protection at nuclear power plants is a subordinate concern compared with assuring that nuclear power plants are constructed and operated in a manner that protects the public health and safety. The major concern at nuclear power plants is large accidental releases of radionuclides to the atmosphere."

Id. at 7-2 *(emphasis added).*

Consequently, NRC has not placed an emphasis on preventing leaks and spills from buried or underground pipes and structures at nuclear power plants, such as Indian Point. *See* U.S. Nuclear Regulatory Commission, *Groundwater Task Force Final Report – June 2010,* at p. 4 (ML101740509).

At a minimum, the fact that radioactive leaks from Indian Point, including from a non-operating reactor (Unit 1), have not been confined to the site, have migrated to New York waters, and have been ongoing for many years and continue at present without cessation, raises a question as to whether such discharges have been "approved" by the NRC and whether the facilities are in violation of applicable requirements, *e.g.*, 10 CFR Part 50, Appendix I. *Id.; see*

also Issues Conference Exhibit 5 (January 7, 2008 GZA GeoEnvironmental, Inc. "Hydrogeologic Site Investigation Report" for Indian Point Energy Center).

Tellingly, even Entergy has argued that NRC does not regulate the discharge of radioactive fluids to the groundwater at the three Indian Point reactors. In the early 1970's the Atomic Energy Commission (precursor to the NRC) promulgated General Design Criteria to provide binding regulations controlling the design of nuclear power reactors. Entergy has taken the position that the General Design Criteria (or "GDC") set out in Appendix A to 10 C.F.R. Part 50 do not apply to Indian Point Units 1, 2, or 3. Thus, to the extent that the GDC provide any meaningful and enforceable regulation controlling the operation of a reactor and the release of radioactive material, Entergy's position is, and remains, that the GDC do not apply to any of the Indian Point facilities.

In any event, the DEC Commissioner is obligated, in the first instance, to determine in this administrative proceeding the scope and applicability of all state laws and regulations pertaining to Indian Point's radioactive pollution of State waters. Upon such determination, then and only then can Entergy raise its preemption argument in a court of competent jurisdiction. *Matter of Chasm Hydro, supra,* at 30. Thus, Entergy's preemption argument is not ripe at this preliminary stage of the proceeding, and the issue of preemption must be the subject of a hearing in order to create a record for the Commissioner to render a determination (that could ultimately be reviewed by a State court).

Thus, in accordance with CWA § 401(d) and 6 NYCRR § 608.9(a)(6), and in the absence of NRC regulations, DEC is explicitly authorized to prohibit and prevent the ongoing discharge of radioactive substances – defined as pollutants and deleterious materials – from the Indian Point site into waters of the State (groundwater and the Hudson River, *see* ECL § 17-0105[2])

because such discharges are prohibited by New York laws and regulations related to water pollution control and water quality. *See* ECL §§ 3-0301(1)(i), 17-0807(1), 17-0105(17), and 6 NYCRR § 750-1.3(a).

II. Adverse environmental impacts caused by the operation of the Indian Point nuclear facilities.[11]

DEC noted throughout Entergy's one-year § 401 WQC application process that a comprehensive thermal demonstration study had not been conducted for Indian Point Units 2 and 3 since the 1970s, had not been completed in a timely manner for the pending § 401 WQC application and, as a result, Entergy had not demonstrated that the facilities complied with applicable thermal standards and criteria (6 NYCRR §§ 701.1, 701.11, 703.2, 704.1, 704.2 and 704.5). *See* Issues Conference Exhibit No. 3; and Denial Notice at 11-13. Section 703.2 of 6 NYCRR also provides narrative water quality standards for specific water classes, such as Class SB saline surface waters. Included in DEC's list of parameters for narrative water quality standards are standards for "thermal discharges." 6 NYCRR § 703.2.

Entergy cannot dispute that Indian Point's thermal discharge stems from, and is connected with, the operation of the plant and CWISs for the facilities. The CWISs for the facilities, and associated thermal discharges, are regulated by and are also subject to the provisions of CWA § 316 and 6 NYCRR Part 704. As evident from the title of 6 NYCRR Part 704, "Criteria Governing Thermal Discharges," the location, design, construction and capacity of CWISs are regulated in the context of thermal discharges because they are inextricably linked and connected with one another. *See* 6 NYCRR § 704.5. Because thermal discharges in connection with CWISs cannot be separated from such CWISs, it is evident that thermal

[11] Entergy identified this topic in threshold legal items "4" and "5," and factual issues "1," "3," and "4" noted above.

EXHIBIT D

ENTERGY NUCLEAR OPERATIONS, INC.
INDIAN POINT NUCLEAR GENERATING UNIT NOS. 2 & 3
DOCKET NOS. 50-247 AND 50-286

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application of	**Ruling on Proposed Issues For Adjudication and Petitions For Party Status**
Entergy Indian Point Unit 2, LLC and Entergy Indian Point Unit 3, LLC	
for a Water Quality Certificate Pursuant to Section 401 of the Federal Clean Water Act and Section 608.9 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York.	DEC Application Nos. 3-5522-00011/00030 (IP2) and 3-5522-00105/00031 (IP3)
	December 13, 2010

Background

On April 6, 2009, the New York State Department of Environmental Conservation (the "Department" or "DEC") received a joint application for a federal Clean Water Act ("CWA") Section 401 Water Quality Certificate ("WQC") on behalf of Entergy Indian Point Unit 2, LLC, and Entergy Indian Point Unit 3, LLC (collectively, "Entergy" or "Applicant").[1] The joint application for a section 401 WQC was submitted to the Department as part of Entergy's April 30, 2007 federal license 20-year renewal request to the Nuclear Regulatory Commission ("NRC") for Indian Point Unit 2 and Indian Point Unit 3.[2] Section 401 conditions federal licensing of an activity which might cause a "discharge" into navigable waters on certification, from the State in which the discharge might originate, that the proposed activity would not violate federal or State water-protection laws. 33 United States Code ("U.S.C.") Section 1341(a). Accordingly, in order to grant a WQC, the Department must determine whether continued operation of the Indian Point facilities meets State water quality standards pursuant to CWA § 401 and section 608.9 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") (see Matter of Erie Boulevard Hydropower L.P., Decision of the Deputy Commissioner at 10, 2006 N.Y. Env. LEXIS 2951127, * 7 (Oct. 6, 2006) (noting that the Department must find that "there are reasonable assurances that the activity will be conducted in a manner which will not violate applicable water quality standards" in order to grant a WQC); citing 40 C.F.R. Section 121.2(a)(3)).

Indian Point Units 2 and 3 (the "Facilities" or the "Stations") are both Westinghouse four-loop pressurized water reactors (PWRs) with net capacities of 1,078 megawatts ("MWe") and 1,080 MWe of electrical power, respectively. The Indian Point facilities are located on the east bank of the Hudson River in the Village of Buchanan, Westchester County. Each unit utilizes a once-through condenser cooling water system, with the cooling water intake structures

[1] Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC are the owners of Indian Point Units 2 and 3, respectively. Entergy Nuclear Operations, Inc. is the operator of Units 2 and 3.

[2] The current operating licenses for Units 2 and 3 will expire in 2013 and 2015, respectively.

("CWISs") on the bank of, and a shared discharge canal to, the Hudson River. Once-through cooling systems operate by withdrawing water from a source, such as the Hudson River, then passing that water through a steam condenser one time and discharging the heated water back to the source. The maximum flow rate of the cooling system for each unit is 840,000 gallons of water per minute ("GPM"), for a combined intake capacity of approximately 2.5 billion gallons of Hudson River water per day. Pursuant to Section 701.11 of 6 NYCRR, the area of the Hudson River where the Facilities are located is classified as an SB saline surface water. The regulation provides that the "best usages of Class SB waters are primary and secondary contact recreation and fishing. These waters shall be suitable for fish, shellfish and wildlife propagation and survival."

By letter dated April 2, 2010, Department Staff denied the application, and the Applicant made a timely request for a hearing in a submission dated April 29, 2010 (the "Hearing Request"). Department Staff's denial (the "Denial Letter") concluded that the "location, design, construction and capacity" of the CWISs at the Facilities did not "reflect the best technology available ["BTA"] for minimizing adverse environmental impact," due to the cooling structures' entrainment and impingement[3] of aquatic organisms in the Hudson River. Denial Letter, at 13. To reduce impingement and entrainment of aquatic organisms, the Indian Point facilities currently operate with dual (Unit 2) and variable (Unit 3) speed pumps, modified Ristroph screens, and a fish return system, as well as certain flow limitations.

Department Staff offered the following reasons for its denial:

1. The Facilities' operation would continue to exacerbate the adverse environmental impacts upon aquatic organisms caused by the Facilities' CWISs, and would therefore be inconsistent with the best usage of the Hudson River for fish, shellfish and wildlife propagation and survival (see Section 701.11 of 6 NYCRR). The Denial Letter stated that "[i]n particular, the withdrawal of approximately 2.5 billion gallons of Hudson River water per day and the mortality of nearly one billion aquatic organisms per year from the operation of Units 2 and 3 are inconsistent with fish propagation and survival." Denial Letter at 11.

2. Leaks of radiological material, which Department Staff asserted are "deleterious substances" within the meaning of Section 703.2 of 6 NYCRR, have the potential to impair the best use of the Hudson River.

3. Noncompliant thermal discharges also impair the Hudson River for its best usage, "particularly where, as here, primary and secondary contact recreation is concerned." Denial Letter at 11. According to Department Staff, the materials Entergy submitted in support of its application do not currently demonstrate compliance with thermal standards and criteria (see Sections 704.1 and 704.2 of 6 NYCRR).

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[3] Impingement "occurs when larger aquatic organisms, like fish, are trapped and are injured or killed by the pressure from the flow of large volumes of water against a CWIS." Denial Letter, at 3, fn. 2. Entrainment "occurs when smaller aquatic organisms, like plankton, eggs, and larvae, are drawn into a [CWIS] and are injured or killed in the process." Id., at 3, n. 3.

EXHIBIT E

ENTERGY NUCLEAR OPERATIONS, INC.
INDIAN POINT NUCLEAR GENERATING UNIT NOS. 2 & 3
DOCKET NOS. 50-247 AND 50-286

STATE OF NEW YORK

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

- -X

In the Matter of the Application of

Entergy Indian Point Unit 2, LLC
Entergy Indian Point Unit 3, LLC

for a Water Quality Certificate

pursuant to Federal Clean Water Act
Section 401 and Section 608.9 of Title 6
of the Official Compilation of Codes,
Rules and Regulations of the State of New York

DEC Application Nos. 3-5522-00011/00030 (IP2) and
3-5522-00105/00031 (IP3)

- -X

PUBLIC HEARING

Tuesday, July 20, 2010

2:00 p.m.

Colonial Terrace

119 Oregon Road

Cortlandt Manor, New York

B E F O R E:

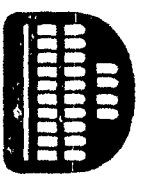
MARIA E. VILLA

Administrative Law Judge

DANIEL P. O'CONNELL

Administrative Law Judge

Reporter: Ashley L. Principe



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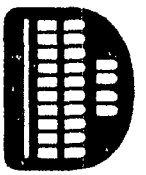
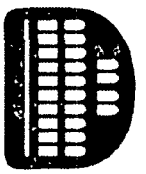


ALJ VILLA: Ladies and gentlemen, good afternoon. My name is Maria Villa. I'm an Administrative Law Judge with the New York State Department of Environmental Conservation's Office of Hearings and Mediation Services, and I've been assigned to conduct the legislative public hearing in this matter. The office of hearings and mediation services is a separate and distinct office within the department. It is separate from the program offices, the regional offices, and any of the divisions and counsel's office. Our sole function is to conduct hearings such as this one, to write recommendations based upon a hearing record, and when requested to provide mediation services.

This is a joint application by Entergy Indian Point Unit 2, LLC, and Entergy Indian Point Unit 3, LLC, referred to collectively as the applicant for a Water Quality Certificate pursuant to the federal Clean Water Act, Section 401 and Section 608.9 of Title 6 of the official



Memorandum, Entergy Indian Point: Clean Water Act & 401 Waiver dated June 20, 2011

ENTERGY NUCLEAR OPERATIONS, INC.
INDIAN POINT NUCLEAR GENERATING UNIT NOS. 2 & 3
DOCKET NOS. 50-247 AND 50-286

M E M O R A N D U M

To	Fred Dacimo, Vice President, License Renewal, Entergy Nuclear, Inc. Robert D. Sloan, Executive Vice President and General Counsel, Entergy Corporation Chuck D. Barlow, Associate General Counsel, Environmental, Entergy Corporation
From	John C. Englander and Elise N. Zoli, Goodwin|Procter LLP Kathryn M. Sutton and Paul Bessette, Morgan Lewis LLP
Re	Entergy Indian Point: Clean Water Act § 401 Waiver
Date	June 20, 2011

Introduction and Purpose

The purpose of this memorandum is to detail the legal reasoning behind our conclusion that the New York Department of Environmental Conservation ("NYSDEC") has waived its opportunity to act on Entergy's application for a Water Quality Certification ("WQC") under § 401 of the Clean Water Act ("CWA"), by virtue of the fact that the Commissioner of NYSDEC has failed to act on Entergy's application within one year. This memorandum also details why it is necessary to raise the issue of NYSDEC's waiver with the Nuclear Regulatory Commission ("NRC"), as that waiver triggers notification requirements from NRC to the United States Environmental Protection Agency ("EPA"), and further legal requirements by EPA to complete its regulatory obligations under the CWA in a reasonable timeframe after an NRC waiver determination.

Executive Summary and Conclusion

More than two years after Entergy submitted its WQC application to NYSDEC, and more than one year from NYSDEC's completeness determination for that application, Entergy is still at the beginning of NYSDEC's adjudicative process with no clear schedule for a final decision by the NYSDEC Commissioner. This is what Congress, in enacting § 401's one-year requirement, intended to avoid. Under the plain language of § 401, and the case law interpreting that provision, NYSDEC has waived its opportunity to certify Entergy's compliance with state water quality standards by failing to act on Entergy's application within one year. Furthermore, under the CWA and EPA regulations, upon NYSDEC's waiver the NRC has a requirement to communicate with EPA regarding the waiver, and EPA has additional regulatory obligations to fulfill. We therefore recommend that Entergy contact NRC to communicate that NYSDEC has waived, so that both NRC and EPA may fulfill their regulatory obligations.

Background

On April 30, 2007, Entergy submitted its License Renewal Application ("LRA") for Indian Point Units 2 and 3 ("IP2" and "IP3") to the NRC to renew the operating licenses for an additional 20-year period. On April 3, 2009, Entergy submitted an application to NYSDEC under § 401 of the CWA for an updated WQC ("Application") in conjunction with Entergy's LRA. On May 13, 2009, NYSDEC staff requested additional information from Entergy, to be produced by certain specified dates through February 2010. Through February 12, 2010, Entergy timely submitted detailed responses to NYSDEC staff's requests for additional information. On February 26, 2010, NYSDEC staff issued a "Notice of Complete Application," which stated that "[t]he Department, in accordance with 6 NYCRR Part 621 has determined the application for a Section 401 Water Quality Certificate submitted by Entergy Nuclear Northeast, LLC for Indian Point Units 2 and 3 is complete." On April 2, 2010, NYSDEC *staff* issued a *proposed* notice of denial of Entergy's Application (the "Notice").

NYSDEC staff's Notice triggered an administrative adjudicatory hearing before NYSDEC Administrative Law Judges ("ALJs") on the proposed Notice. *See* 6 New York Codes, Rules, and Regulations ("NYCRR") § 621.10(a). That adjudicatory hearing must be completed prior to issuance of a final decision on Entergy's WQC application by the NYSDEC Commissioner. *See* ECL § 70-0109(3)(a)(ii); 6 NYCRR § 624.13. The preliminary issues conference (similar to a federal pretrial conference) has occurred, and discovery is ongoing, with certain issues slated for hearing commencing in September 2011 and expected to last several months.

However, the adjudicatory hearing on other critical aspects of the Notice, including the adjudication of what is the "best technology available" for Indian Point's cooling water intake structures under 6 NYCRR § 704.5, has been deferred while the parties await rulings from the NYSDEC Commissioner on pending appeals in Entergy's related SPDES permit administrative hearing. It is uncertain when the Commissioner will issue such rulings in the SPDES proceeding. After completion of the adjudicatory hearing, the agency's ALJs will develop a recommended decision for review by the Commissioner, and the Commissioner will render a final agency decision. Further, in a recent filing before the ALJs in the WQC proceeding, NYSDEC staff took the position that "because the Indian Point nuclear facilities are located in the coastal area . . . the agency cannot make a final determination on the [WQC] until there has been a written finding that the action is consistent with applicable policies set forth in 19 NYCRR §600.5 [relating to the Coastal Zone Management Act]." *See* Letter from Mark D. Sanza to ALJs, dated January 28, 2011 (attached as Exhibit A). Therefore, *final* resolution of the WQC has been delayed indefinitely.

NYSDEC staff's issuance of its Notice on the eve of the one-year application deadline effectively foreclosed the reasonable possibility of final agency action by the Commissioner within the mandatory one-year period.[1] By issuing a proposed Notice, NYSDEC staff triggered

[1] Notably, NYSDEC staff did not observe its own regulatory schedule obligations and time limitations in its review of the Application and issuance of the Notice. *See, e.g.*, 6 NYCRR § 621.6 (completeness determinations).

a mandatory hearing process, as a condition precedent to the Commissioner's final decision on the matter. That final decision was not completed by one year from the date of the complete application; indeed, as of this date Entergy remains at the beginning of the agency's adjudicatory process.

Discussion of § 401

Apart from the various exemptions provided for under federal law, § 401 operates as a limited opportunity for a state to weigh in with respect to the effect of a federal licensing decision on state water-quality standards. Specifically, § 401 requires that an applicant for a federal license to operate a facility that will result in discharge into a state's navigable waters obtain a WQC from the state in which the discharge will originate and that any such discharge will comply with state water-quality standards. 33 U.S.C. § 1341(a). With the express goal of ensuring that the state's WQC determination would not unduly delay federal licensing processes, Congress provided that a state's § 401 authority is expressly time limited. Under § 401, the state must "act on" any application for a WQC within one year: "If the State ... 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 requirement of this subsection shall be waived with respect to such Federal application." *Id.*

New York State Has Failed to "Act On" Entergy's Application for a § 401 WQC by Issuance of a Final Decision.

New York law provides that only the NYSDEC *Commissioner* has the authority to issue or deny a § 401 WQC, and because the NYSDEC Commissioner has not made a decision on Entergy's WQC within one year of Entergy's application, NYSDEC has waived New York's certification right under § 401. In particular, the New York legislature has granted the NYSDEC Commissioner the sole authority to exercise New York's right to act on a WQC under § 401:

> It shall be the responsibility of the [Department of Environmental Conservation] . . . by and through the commissioner to carry out the environmental policy of this state . . . . In doing so, the commissioner shall have power to: . . .
> (b) Promote and coordinate management of water . . . resources . . . in connection with any license, order, permit, certification or other similar action."

New York Environmental Conservation Law ("ECL") § 3-301. To reach that final decision, the Commissioner of NYSDEC has established the following process:

NYSDEC regulations treat WQC applications as "permit requests," subject to the uniform procedures set forth in 6 NYCRR Parts 621 and 624. After receiving a permit application, a division within NYSDEC, known as "Department Staff," issues a draft permit or a notice that the permit applied for should be approved or denied. If Department Staff issues a notice of denial, or attaches significant conditions to the permit, then the applicant is entitled to a mandatory administrative hearing before NYSDEC ALJs. After the administrative hearing before the ALJs, the ALJs submit a report and recommendation to the Commissioner. 6 NYCRR § 624.13(a).

Under NYSDEC's regulations, the Commissioner then makes the "final decision" on the WQC application. *Id.* § 624.13(b); *see also Matter of Athens*, 2000 WL 33341184, at *8 (N.Y. Dept. Env. Conserv. June 2, 2000) ("The report of a hearing officer or an administrative law judge is a recommendation, and only a recommendation, to the head of the agency responsible for the final decision.").

As such, preliminary determinations on WQC applications, such as the initial Notice to Entergy on April 2, 2010, are not final.[2] They are interim steps in the process under which the NYSDEC Commissioner finally acts on the application. 6 NYCRR § 624.13(b).[3]

New York case law confirms that **only the Commissioner** has the authority to act on a WQC application. *See, e.g., Power Auth. of the State of New York v. Flacke*, 94 A.D.2d 69, 73 (3d Dep't 1983) (NYSDEC, "by its commissioner," denies § 401 certifications). Further, New York courts consistently have held that NYSDEC permit decisions cannot be appealed as final agency decisions until the Commissioner issues a final decision, underscoring that only the Commissioner has such authority. *See, e.g., Zagata v. Freshwater Wetlands Appeals Board,* 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 the permit application [is a] *preliminary agency response* . . . which can only be challenged at an adjudicatory hearing" (emphasis added)). As such, New York case law confirms that the preliminary Notice issued by NYSDEC Staff is not a final agency decision, and therefore that the Commissioner has not acted on Entergy's WQC application within one year.

Federal Legislative History and Case Law Confirms that NYSDEC Has Waived its § 401 Rights

Because the April 2, 2010 letter from Department Staff to Entergy is only a preliminary, non-final step in New York's administrative process, it cannot satisfy § 401's requirement that New York "act on" Entergy's WQC application within one year. A tentative or preliminary response, subject to further administrative process, is not the "action" contemplated by § 401. This is clear not only from § 401 and its legislative history, but also from federal case law and relevant agency decisions, which are in accord.

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2 The Department Staff has stated as much: "In the context of a § 401 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." Department Staff's Post-Issues Conference Br. at 10 (relevant pages attached as Exhibit B); *see also* Department Staff's Post-Issues Conference Reply Br. at 5-6 (relevant pages attached as Exhibit C) (same).

3 The ALJs have echoed the Department Staff, underscoring that their own recommended decision is non-final. *See, e.g.,* Ruling on Proposed Issues for Adjudication and Petitions for Party Status, at 2 ("By letter dated April 2, 2010, Department *Staff* denied the application, and the Applicant made a timely request for a hearing in a submission dated April 29, 2010.") (relevant pages attached as Exhibit D); Transcript of Public Hearing (July 20, 2010) at 3, Statement of Administrative Law Judge Villa (describing the "office of hearing and mediation services" as a "separate and distinct office within [NYSDEC] ...Our sole function is to conduct hearings such as this one, to write recommendations based upon a hearing record" to the Commissioner.) (relevant pages attached as Exhibit E).

The purpose of the one-year certification time limit, first enacted as § 21(a) of the Water Quality Improvement Act of 1970, is unambiguous.[4] Congress wanted to avoid state efforts to block or unduly delay federally licensed projects:

> "[T]his amendment guards against a situation where the water pollution control authority in the State in which the activity is to be located, or possibly in some other State, simply sits on its hands and does nothing. ***Any such dalliance could kill a proposed project just as effectively as an outright determination on the merits not to issue the required certificate.*** Thus while this bill would still permit one State to make a decision that would have extraterritorial effect upon another, ***at least now it cannot do so passively--it has to take affirmative action to consider the matter and to decide to withhold the certificate if it wants to defeat a proposed project.***" Statement of Congressman Holifield, 115 Cong. Rec. 9264-65 (emphasis added).

The legislative history is clear: the purpose of the one-year certification provision in § 401 is to ensure that the state cannot block a federal project by not making a final, timely decision on the merits of the WQC. This certification provision, and accompanying legislative history, has existed since 1970. As such, for more than forty years, states, including New York State, have been on notice that in order to comply with the terms of § 401, they must create a process for review of WQCs that results in a final decision within a year, or waive their right to certify.

In the federal decision most directly on point, *Airport Communities Coalition v. Graves*, 280 F. Supp. 2d 1207, 1214 (W.D. Wash. 2003), the court held that simply taking a step in the administrative process, when the full process would not be completed until after the one-year period, was inconsistent with the letter and spirit (as reflected in the legislative history) of § 401:

> [§401's] time limit was inserted in order to avoid a state from interminably blocking a federal permit by stalling the Section 401 certification. Whether a state begins to act but does not complete

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[4] Section 401 states that action must be taken "within a reasonable time period (which shall not exceed one year)," confirming Congress's view that one year was the outermost limit. 33 U.S.C. § 1341(a)(1). Certain federal agency regulations, *e.g.*, the United States Army Corps of Engineers, employ shorter waiver periods, underscoring the reasonableness of the one-year time period. *See* 33 CFR §§ 336.1(b)(8)(i), (iii) ("The state certification request must be processed to a conclusion by the state within a reasonable period of time. Otherwise, the certification requirements of section 401 are deemed waived." "If the state does not take final action on a request for water quality certification within two months from the date of the initial request, the district engineer will notify the state of his intention to presume a waiver as provided by section 401 of the CWA. If the state agency, within the two-month period, requests an extension of time, the district engineer may approve one 30-day extension unless, in his opinion, the magnitude and complexity of the information contained in the request warrants a longer or additional extension period. The total period of time in which the state must act should not exceed six months from the date of the initial request. Waiver of water quality certification can be conclusively presumed after six months from the date of the initial request."); *id.* § 325.2(b)(1)(ii) ("A waiver may be explicit, or will be deemed to occur if the certifying agency fails or refuses to act on a request for certification within sixty days after receipt of such a request unless the district engineer determines a shorter or longer period is reasonable for the state to act.").

> the issuance of a certification or whether the state entirely fails to act at all, the legislative history of Section 401 makes clear that either of those two situations was unacceptable to Congress because both result in delays in issuing Federal permits.

Id. at 1215-16; *see also Alcoa Power Generating Inc. v. FERC et al.*, -- F.3d --, 2011 WL 1642442 at *8 (D.C. Cir. May 3, 2011) (acknowledging the legislative intent that "[s]uch frustration would occur if the State's inaction, or incomplete action, were to cause the federal agency to delay its licensing proceeding." (emphasis added)).[5]

The reasoning of *Graves* directly applies here, where Department Staff's preliminary, non-final letter responding to Entergy's WQC application was simply the first step in the New York regulatory process under which the Commissioner ultimately makes a final determination. Moreover, that NYSDEC, and thus New York, has failed to "act on" Entergy's WQC application within one year is consistent with past NRC decisions holding that preliminary agency letters that do not amount to a final decision on a WQC application are insufficient for a state to satisfy its obligations under § 401. *See, e.g., Public Serv. Co. of Oklahoma, et al. (Black Fox Station, Units 1 & 2)*, LBP-78-26, 8 N.R.C. 102, 122-23 (1978), *affirmed on this issue*, ALAB-573, 10 N.R.C. 775, 783-85 (1979); *Gulf States Utils. Co. (River Bend Station, Units 1 & 2)*, LBP-75-50, 2 N.R.C. 419, 427-28 (1975). There is also no credible dispute that the federal licensing agency, here NRC, makes the waiver determination. *See Weaver's Cove Energy, LLC v. Rhode Island Dept. of Envt'l Management*, 524 F.3d 1330, 1334 (D.C. Cir. 2008) (explaining that it was the responsibility of the federal licensing agency, there the Army Corps, to determine whether a state waived its right to make a determination on a § 401 certification).

Recently, a federal district court has decided a nearly identical question in the context of a congressionally-mandated one-year period for the EPA to act on a permit request under the Clean Air Act. *See Avenal Power Center, LLC v. U.S. EPA*, --- F.Supp.2d ----, 2010 WL 6743488 (D.D.C. May 26, 2011). That case involved the interpretation of the Clean Air Act's counterpart to § 401, § 165, which requires a party seeking to construct a facility that will result in major emissions into the air to obtain a permit that any such emissions will not cause air pollution in excess of applicable air quality standards under the Clean Air Act (also known as a "Prevention of Significant Deterioration" or "PSD" permit). *Id.* at *1; 42 U.S.C. § 7475(a). As with § 401, Congress, in passing § 165 of the Clean Air Act, required that any application for such a permit application be granted or denied by EPA within one year. 42 U.S.C. § 7475(c).

Similar to the process set forth by the NYSDEC Commissioner, the Administrator of the EPA created a process for reaching a final decision on a § 165 permit. Under that process, the Regional Administrator of the EPA is the first to review the permit, followed by a public notice and comment period. *See* 42 C.F.R. § 142.19. After EPA reviews and responds to public comments, the EPA Regional Administrator reviewing the permit application must take action by granting or denying the permit application. *See* 42 C.F.R. §§ 124.15, 124.17-18. This decision by the Regional Administrator, however, is not a final decision of the EPA; that

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[5] While *Alcoa* involved a different question—the validity of a final agency grant of a WQC within the mandatory one year period, where such certification contained conditions that required actions after the one-year period—the Court underscored the importance of a final agency decision within the one year period.

decision is then subject to review by the EPA's Environmental Appeals Board ("EAB"), to which the EPA Administrator has granted authority to issue a final decision on a § 165 permit. *Id.* Importantly, not until the EAB has issued its final decision can a party seek judicial review of a decision on the permit. *Id.*

In February 2008, Avenal Power applied to the EPA Regional Administrator for a § 165 permit. *Avenal Power*, 2010 WL 6743488 at * 1. The Regional Administrator deemed the application complete on March 19, 2008. *Id.*[6] After extensive public comment, and various extensions of time and further administrative process, the EPA Regional Administrator continued its review of the proposed project through March of 2010, approximately two years after the application was deemed complete. *Avenal Power*, 2010 WL 6743488 at * 1.

Having gone far in excess of the statutory one-year period for review without a final decision from EPA in sight, Avenal Power filed suit in the district court for the District of Columbia, contending that EPA violated the statutory requirement that it act on the application within one year, seeking an order requiring EPA to issue a final decision. *Id.* In response, EPA argued that its process for issuing a final decision was proper. *Id.* at *3. Furthermore, EPA argued that the only action it was required to take to comply with the statute was to issue a "final" decision by the Regional Administrator, subject to review by the EAB. *Id. at* *2. The district court rejected EPA's argument, holding that Congress's mandate in § 165(c) made clear that the EPA Administrator was required to issue a final decision on the § 165 permit within one year. *Id.* at *2-3. In doing so, the district court noted that the EPA Administrator was permitted to set whatever procedure it deemed fit for coming to that final decision, including delegating final authority to the Regional Administrator or seeking guidance from the EAB on the permit application, but that § 165 required that such procedure result in a final decision, one that would either allow the project to go forward, or allow the decision to be appealed in federal court, to occur within the statute's mandated one-year period. *Id.* at *2. Accordingly, the court granted Avenal Power's petition, held that EPA had violated the statute, and ordered the EPA Administrator to make a final decision on the application within 90 days of the court's order. *Id.* at *3-4.

The situation faced by Avenal Power mirrors that faced by Entergy here. Section 401's requirement that an application for certification of compliance with state water quality standards be acted upon within one year is nearly identical to § 165's requirement that a permit of compliance with Clean Air Act air quality standards be acted on within one year.[7] As in *Avenal Power*, here the NYSDEC Commissioner created a process for reaching a final agency decision, starting with a preliminary decision by NYSDEC Staff, subject to review by the ALJs and a final decision by the Commissioner. Again as with *Avenal Power*, NYSDEC took some, non-final agency action within the one-year period, but did not reach a final agency decision within one

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[6] On June 16, 2009, the Regional Administrator issued a proposed § 165 permit, initiating the public comment period. *See* EPA Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Judgment on the Pleadings and in Support of Defendants' Cross-Motion for Summary Judgment, 2010 WL 4955101 (September 17, 2010).

[7] The statutes have one important difference: while under § 165, the applicant cannot commence construction of a project until the permit has been granted, under § 401 the federal agency is free to grant the requested license if the relevant state or federal agency has not finally acted on the application within one year.

year of the application. As the *Avenal Power* court found with EPA, the NYSDEC Commissioner is permitted to set forth whatever process he sees fit to reach a final decision, but is obligated to reach that final decision within one year. Having failed to do so, under the plain reasoning of *Avenal Power*, the state has waived certification under § 401.

The one state court decision which addresses what state action is sufficient to "act on" an application under § 401, *FPL Energy Maine Hydro v. Department of Environmental Protection*, 926 A.2d 1197 (Me. 2007), is consistent with the conclusion that NYSDEC has waived certification. In *FPL Energy*, the federal applicant applied for a WQC to Maine's Commissioner of Environmental Protection ("Commissioner"), the state agency granted the authority to act on WQCs. *Id.* at 1199, 1202. The Commissioner granted the WQC within the one-year time frame required by § 401. *Id.* at 1199. That final Commissioner decision was subject to appeal, either to state Superior Court or to the quasi-judicial Board of Environmental Protection ("BEP"). *Id.* at 1202. Intervenors appealed to the BEP, which overturned the final decision of the Commissioner, after the one-year period. *Id.* On further appeal to the state courts, FPL Hydro claimed that the existence of the right to appeal the final decision of the Commissioner to the BEP rendered the Commissioner's decision insufficient to "act on" the WQC application. The Maine Supreme Court rejected this argument, holding that while § 401 required the certifying agency (there the Commissioner) to act within one year, it did not require that all in-state appeals be completed in the one year period. *Id.* at 1203.

The Maine Supreme Court's[8] reasoning supports the conclusion that NYSDEC has waived certification here, because (as in *Avenal Power*) the Commissioner has failed to issue a final decision within the one-year time period. More specifically, in Maine (as in New York), the Commissioner must rule on WQCs. In the case of *FPL Hydro*, the Commissioner in fact did so within the one-year period; the only question presented was the effect that appeals of the Commissioner's final decision had on the certification decision. In New York, by contrast, it is undisputed that the NYSDEC Commissioner did not act on Entergy's WQC application within the one-year period. ALJ review of a preliminary determination by NYSDEC Staff in New York (like AEB review of a Regional Administrator's decision by EPA) is not appellate, but a required precursor to a final decision by the NYSDEC Commissioner, and in any event was not complete within one year. Thus, under *Graves, Avenal Power*, and *FPL Hydro* alike, NYSDEC Staff's Notice cannot be sufficient to "act on" the WQC application within the meaning of § 401(a).

We note that while New York has waived *certification* under § 401, the CWA places an independent obligation on Entergy to operate Indian Point in a manner that complies with state water quality standards. *See* ECL § 17-0801; *see also Public Serv. Co. of Oklahoma*, 8 N.R.C. at 123. Moreover, Indian Point is regulated under New York's SPDES program, through which NYSDEC must place conditions on the operation of Indian Point sufficient to ensure its operation will be consistent with the same state water quality standards that are the subject of

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[8] While we believe that the Maine Supreme Court's decision is consistent with our conclusion that NYSDEC has waived, there is a question as to the correctness of the Court's conclusion that ongoing state appeals after the one-year period under § 401 do not affect the waiver determination. Indeed, the First Circuit, in reviewing FPL Energy's federal court challenge to FERC's decision on waiver, questioned the correctness of the state of Maine's interpretation on this point. *See FPL Energy Maine Hydro LLC v. FERC*, 551 F.3d 58, 63 (2008).

§ 401.[9] As such, New York's waiver of § 401 certification will not affect Indian Point's legal obligations with respect to water-quality compliance.

NYSDEC's Waiver Has Material and Immediate Consequences to the Status of Entergy's Application, and to NRC's Obligations under Federal Law

NYSDEC's waiver of New York's § 401 certification has certain consequences relating to Entergy's pending LRA. As stated above, NYSDEC's waiver triggers requirements that NRC correspond with EPA regarding Entergy's LRA and NYSDEC's waiver, so that EPA can complete its necessary functions under the CWA and its accompanying regulations.

Specifically, pursuant to its authority to administer the CWA nationally, EPA has issued regulations that are binding on federal agencies, including NRC, that issue licenses subject to the requirements of § 401, in 40 CFR Part 121, entitled "State Certification of Activities Requiring a Federal License or Permit." *See City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 347 (1981) (noting EPA's authority as the agency charged with administering the CWA). Among those regulations is 40 CFR § 121.16, entitled "Waiver," which requires any licensing or permitting agency to notify EPA in writing of the failure of a state to act on a WQC request within one year, so that EPA can fulfill its CWA and corresponding regulatory obligations. These obligations include the requirement that the Regional Administrator review the application to determine if the applicant's discharge will affect the waters of any state other than the state which has waived (40 CFR § 121.13); notify such other affected state (40 CFR § 121.14); and hold hearings upon the objection of such an affected state (40 CFR § 121.14). Fairly construed, Entergy now must notify NRC that its application should be deemed submitted without an accompanying certification due to the State of New York's waiver. Doing so will allow NRC to satisfy the provisions of 40 CFR § 121.11. *See* 40 CFR § 121.11 ("Upon receipt from an applicant of an application for a license or permit without an accompanying certification, the licensing or permitting agency shall . . . (1) Forward one copy of the application to the appropriate certifying agency and two copies to the Regional Administrator.").

Conclusion

In sum, under the plain language of § 401, and the case law interpreting that provision, NYSDEC has waived its opportunity to certify Entergy's compliance with state water quality standards by failing to act on Entergy's application within one year. Furthermore, under the CWA and EPA regulations, upon NYSDEC's waiver the NRC has a requirement to communicate with EPA regarding the waiver, and EPA has additional regulatory obligations to fulfill. Again, we

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[9] *Compare* 33 U.S.C. § 1342(b)(1)(A) (SPDES permits must "apply, *and insure* compliance with, any applicable requirements of sections [301, 302, 306, and 307 of the CWA]" (emphasis added)); 33 U.S.C. § 1311(b)(I)(C) (CWA § 301 requirements must reflect "any more stringent limitation, including those necessary to meet water quality standards ... established pursuant to any State law or regulations ... or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter," i.e., under CWA § 303); *and* ECL § 17-0811 (SPDES permits must contain "effluent limitation[s]" and "any further limitations necessary to insure compliance with water quality standards") *with* 33 U.S.C.§ 1341(a)(1) (WQC provides that the federally licensed or permitted facility's "discharge will comply with the applicable provisions of [§§ 301, 302, 303, 306, and 307 of the CWA]").

therefore recommend that Entergy contact NRC to communicate that NYSDEC has waived, so that both NRC and EPA may fulfill their regulatory obligations.