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VIA FED EX AND E-MAIL

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

Re: Indian Point Nuclear Generating Unit Nos. 2 & 3, Docket Nos. 50-247 and 50-286
(Clean Water Act § 401 Water Quality Certification)

Dear Mr. Holian:

I am writing on behalf of Riverkeeper, Inc. ("Riverkeeper") to express disagreement with the representations made by Entergy Nuclear Operations, Inc. ("Entergy") last week, via letter dated June 21, 2011,¹ concerning an alleged waiver of the requirements of Section 401 of the Clean Water Act ("CWA") in the above-referenced matter. As a party-intervenor in both the Indian Point license renewal proceeding and the New York State administrative proceeding initiated by Entergy to contest the New York State Department of Environmental Conservation's ("DEC") explicit denial of the required CWA § 401 Water Quality Certification ("WQC"), Riverkeeper has a strong interest in correcting the gross distortions presented in Entergy's June 21, 2011 submission. Accordingly, please accept the following as Riverkeeper's response to Entergy's filing on this matter, which clarifies the salient issues.

Simply put, DEC has *not* waived the certification requirement of CWA § 401 in relation to the Indian Point license renewal proceeding. The requirements of CWA § 401 may only be deemed waived when the State agency "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year)"² In relation to the proposed federal operating license renewal of the Indian Point nuclear power plant, DEC received Entergy's application for § 401 certification on April 6, 2009. Less than a year later, on April 2, 2010, DEC affirmatively acted upon this request by denying Entergy's application due to a

¹ Letter from Fred. R. Dacimo (Entergy) to Brian E. Holian (NRC), NL-11-073, Re: Clean Water Act Section 401 Water Quality Certification Waiver, Indian Point Nuclear Generating Unit Nos. 2 and 3, Docket No. 50-247 and 50-286, License Nos. DPR-26 and DPR-64 (June 21, 2011).

² 33 U.S.C. § 1341(a)(1).

number of violations of State water quality standards and other applicable State laws resulting from the proposed activity.³ Despite Entergy's blatant mischaracterization of this action as a "proposed" denial, it is clear that DEC acted in precisely the manner contemplated by the plain language of the statute and controlling precedent and guidance.⁴

The fact that Entergy *chose* to dispute DEC's action and request a hearing in the matter has no bearing whatsoever on whether DEC properly acted upon Entergy's application within the statutory one-year time limit. Indeed, a hearing on a CWA § 401 determination is not mandated by New York State law, and had Entergy chosen not to take advantage of the administrative hearing process, there would be no possible question that DEC acted upon the § 401 application within the required one-year timeframe. As one State court aptly explains:

Although the [applicant] had every right to pursue a review, we do not construe [CWA] section 401 as contemplating that an applicant may benefit from the running of the one year period while review is taking place, at the applicant's instance, of the denial of certification by the entity that is statutorily designated to make that decision.⁵

If this rationale did not prevail, project applicants could make calculated moves to avoid the requirements of CWA § 401 altogether by essentially extending the process to force a manufactured waiver. This would completely contravene the entire purpose of CWA § 401, and deny States their right and authority to perform an assessment of whether or not proposed federal

³ As explained by DEC Commissioner Martens via letter dated June 23, 2011, DEC Chief Permit Administrator William Adriance, who issued the denial of Entergy's request for CWA § 401 WQC, is duly authorized to act on § 401 applications. Letter from Joseph J. Martens (DEC) to Brian E. Holian (NRC), Re: Indian Point License Renewal, Docket Nos. 50-247, 50-286, State of New York Denial, Clean Water Act Section 401 Water Quality Certification (June 23, 2011), at 1-2.

⁴ For example, EPA's CWA § 401 Handbook delineates the four options available to certifying agencies when reviewing a request for § 401 certification: "grant, condition, deny *or* waive." U.S. Environmental Protection Agency, Office of Wetlands, Oceans, and Watersheds, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (April 2010), available at http://water.epa.gov/lawsregs/guidance/cwa/upload/CWA_401_Handbook_2010_Interim.pdf (last visited June 27, 2011), at 9, 11 ("The central component of §401 certification is the state or tribe's decision to grant, condition, deny *or* waive certification. . . . States and tribes are authorized to waive §401 certification, either explicitly, through notification to the applicant, or by the certification agency not taking action) (emphasis added). Clearly, DEC took an appropriate action by denying the CWA § 401 certification request within the statutory time limit. Moreover, the time limit set forth in CWA § 401 "was meant to ensure that 'sheer inactivity by the State . . . will not frustrate the Federal application.'" *Alcoa Power Generating, Inc. v. FERC*, 2011 U.S. App. LEXIS 9041, *25 (D.C. Cir. 2011) (citing House Conference Report, H.R. Rep. 91-940) ("[T]he purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401"); see also *Little Lagoon Pres. Soc'y, Inc. v. United States Army Corps of Eng'rs*, 2008 U.S. Dist. LEXIS 66557, *70 (S.D. Ala. Aug. 29, 2008) ("Congress built a waiver mechanism into the CWA [§ 401] to prevent state agencies from exercising a pocket veto by sitting on certification requests indefinitely without making a decision, leaving the proposed project to die on the vine). This is clearly not the case here, where DEC actively sought necessary information in order to perform the appropriate assessment pursuant to CWA § 401, and then ultimately made a formal determination on Entergy's application on April 2, 2010.

⁵ *City of Klamath Falls v. Envtl. Quality Comm'n.*, 119 Or. App. 375, 377-78, 851 P.2d 602, 604 (Or. Ct. App. 1993).

projects comply with relevant State regulations, laws, and standards. It is, thus, clear that the administrative hearing process does not have to be completed in order for DEC's April 2, 2010 denial to be considered the requisite "action" on Entergy's CWA § 401 application.⁶

For the foregoing reasons, it would be arbitrary, capricious and in contravention of law for NRC to accept Entergy's contorted position that the requirements of CWA § 401 have been waived in the Indian Point license renewal proceeding. Moreover, CWA § 401, "the prime bulwark" of the cooperative federalism scheme envisioned by the United States Congress in the CWA, is essential for preserving critical state authority over relevant water quality related issues.⁷ NRC cannot subvert this established regulatory framework in reliance on the misleading, unsupported claims made in Entergy's June 21, 2011 submission.

Thank you for your consideration.

Sincerely,



Deborah Brancato
Staff Attorney

cc: (via U.S. Mail and E-mail)

William Dean, Regional Administrator, NRC Region 1
John Boska, NRR Senior Project Manager
Paul Eddy, NYS Department of Public Service
Andrew Stuyvenberg, NRC License Renewal Environmental Project Manager
Sherwin Turk, NRC Office of General Counsel
Elise Zoli, Esq., Counsel for Entergy

⁶ See, e.g., *Alcoa Power Generating, Inc. v. FERC*, 2011 U.S. App. LEXIS 9041, *29 (D.C. Cir. 2011) ("Nowhere in Section 401 is it stated that a certification must be fully effective prior to the one-year period much less prior to licensing; it requires only that a State 'act' within one year of an application and that a certification be 'obtained.'")

⁷ *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 373, 385 (2006).