Entergy Nuclear Northeast
Indian Point Energy Center
450 Broadway, GSB
P.O. Box 249
Buchanan, NY 10511-0249
Tel (914) 788-2055

Fred Dacimo
Vice President
Operations License Renewal

NL-11-081

June 30, 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. 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:

We write in response to the Commissioner of the New York Department of Environmental Conservation's ("NYSDEC" or the "Department") June 23, 2011 correspondence, regarding NYSDEC's waiver under § 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341, at Indian Point. Our goal is to ensure the Nuclear Regulatory Commission ("NRC") is properly advised of governing law and all relevant facts relating to NYSDEC's § 401 waiver for Indian Point.

First, the Commissioner's confirmation that the review of Indian Point's § 401 water quality certification ("WQC") application is subject to New York's Uniform Procedures Act ("UPA") and regulations (6 NYCRR Part 621), including those provisions requiring an adjudicatory hearing

before issuance of a final NYSDEC decision, underscores that the April 2, 2010 Notice of Denial ("Notice") is non-final as a matter of federal and state law, and therefore that a § 401 waiver has occurred with respect to Indian Point. *See* 33 U.S.C. § 1341(a) (requiring NYSDEC to comply with its hearing procedures on WQC applications); ECL §§ 70-0107(3)(d) and 70-0119(1) (applying UPA to WQC applications, and mandating hearings prior to final decisions on WQC applications with "reasonable likelihood" of denial).[1]

Second, initial decisions on WQC applications issued by Permit Administrators under New York law are indisputably non-final, because Permit Administrators are members of Department staff, i.e., without delegated final decision-making authority from the Commissioner. *See* 6 NYCRR § 624.2(k) (NYSDEC regulation for conducting UPA-based adjudicatory proceedings defining NYSDEC staff as follows: "Department staff means those department personnel participating in the hearing, but does not include the commissioner, any personnel of the Office of Hearings, the ALJ or those advising them."). Indeed, proposed or draft decisions of Permit Administrators are only "tentative," as NYSDEC staff expressly described Entergy's Notice in its official public notification, and not even entitled to deference by the Administrative Law Judges ("ALJs") conducting adjudicatory hearings on those decisions. *See, e.g.,* June 9, 2010 Environmental Notice Bulletin (characterizing Indian Point's Notice as a "tentative NYSDEC staff position"); *In the Matter of the Smithtown Water District*, 1996 WL 566384 (N.Y. Dept. Env. Conserv. 1996) ("An ALJ need not defer to a Regional Permit Administrator's decision. Not only is such a decision only tentative but every applicant has a right to a hearing after a denial. Although Regional Permit Administrators possess a certain amount of expertise in permit matters, it is not that expertise to which courts often defer; rather, it is the exercise of expertise by an agency as approved by the Commissioner or other head of the agency in final agency action that merits the deference of the courts.") (emphasis added). As such, under the plain language of NYSDEC's regulations (as interpreted by NYSDEC itself), initial decisions by Permit Administrators are non-final decisions by Department staff, subject to further necessary agency process – in this case, through a mandatory adjudicatory hearing – before a final decision on the permit is made by the Commissioner.

As if NYSDEC's own regulations were not clear enough, a review of New York caselaw and prior decisions by NYSDEC Commissioners confirms that initial decisions by Permit Administrators are preliminary and non-final. In *Zagata v. Freshwater Wetlands Appeals Board,* 244 A.D.2d 343, 344 (N.Y. App. Div. 1997), the New York Appellate Division held that initial permit denials by Department staff, through the Chief Permit Administrator, are non-final, affirming the underlying decision of the Commissioner in that permit proceeding. *Id.*; *see also In the Matter of PC Group, LLC, Applicant*, 2009 WL 2141503, at *9-14 (N.Y. Dept. Env. Conserv. 2009) (same). The court further explained that, at the time a notice of denial is issued by Department staff, "the Commissioner has had no opportunity to review the merits of the permit application," and that the only process afforded to an applicant who has received a notice of denial is an adjudicatory hearing before the ALJs, followed by a final decision by the Commissioner. *Zagata*, 244 AD.2d at 344. The

[1] Under the ECL § 70-0119 and the parallel NYSDEC regulation, 6 NYCRR §621.8, when NYSDEC staff determine that a permit application is complete, it must hold a timely "adjudicatory public hearing" prior to issuing its initial, non-final determination whenever there is "the reasonable likelihood that a permit applied for will be denied ... ." 6 NYCRR § 621.8(a). Department staff's issuance of the Notice without *first* holding the required adjudicatory public hearing was thus in violation of NYSDEC regulations. Moreover, issuance of a final decision in the absence of a prior mandatory hearing, as the Commissioner would have NRC believe occurred here, renders that decision unlawful. *See, e.g.,* 33 U.S.C. § 1341(a) (necessitating hearing where required by state law, as is undisputed here); *City of Long Beach v. Flacke*, 430 N.Y.S. 2d 131, 132 (2d Dept. 1980) (voiding NYSDEC permit decision based on failure to hold required public hearing).

same is true here: Entergy has received a Notice from NYSDEC staff, through the Chief Permit Administrator, but the Commissioner cannot legally review Entergy's WQC application until after the adjudicatory hearing process is completed.[2] In the face of the governing statute, NYSDEC's own regulations, the direction of New York courts and longstanding Commissioner precedent to the contrary, the Commissioner's unsupported assertion that the Notice is somehow a "final" decision is plainly incorrect as matter of law.[3]

The Commissioner's position also cannot be reconciled with NYSDEC's operative representation to the public of the non-finality of its staff-level Notice. In its June 9, 2010 public notification in the Environmental Notice Bulletin ("ENB"), the Department's official publication for NYSDEC notices under the UPA, Chief Administrative Law Judge James T. McClymonds expressly and officially characterized the Notice as the "Tentative NYSDEC Staff Position." *See, e.g.,* June 9, 2010 Environmental Notice Bulletin (emphasis supplied). *See* http://www.dec.ny.gov/ enb/enb.html (last consulted June 24, 2011). NYSDEC's ENB characterization was repeated in the newspaper notices required to inform the public of NYSDEC staff's proposed "tentative" action, and confirmed by then-NYSDEC Commissioner Grannis' contemporaneous written statements to New York legislators that the Notice was non-final: "The final WQC determination will be made based upon facts, science, and applicable laws and regulations." *See, e.g.,* June 30, 2010 correspondence from Commissioner Grannis to Assemblywoman Anne Rabbitt. NYSDEC's newfound claim that an avowedly "tentative," non-final staff-level "position" – so represented to the public and Entergy on an official basis – is somehow final is without any basis in law or fact.

Finally, Entergy likewise must correct the Commissioner's inaccurate suggestion that "until now, Entergy has not raised any issue of timeliness of the denial." Letter at 2. In fact, in its WQC application, Entergy expressly reserved its rights regarding § 401, stating: "[c]ompliance with § 401 may take any of several forms as a result of multiple exemptions and waiver provisions that are the province of NRC, and therefore not addressed here." April 3, 2009 correspondence from Elise N. Zoli to NYSDEC (enclosing Entergy's WQC application), p. 3, n.2. A year later, in Entergy's April 29, 2010 Request for Adjudicatory Hearing on the Notice, Entergy reiterated that the "determination of whether a State has waived its rights to certify under § 401 is within the discretion of the federal licensing agency, in this case, the NRC." Entergy's Request, p. 2, n.2. Thus, NYSDEC has been

---

[2] Even absent the clear law concerning the non-final nature of Department staff initial permit decisions, the Notice could not have been a final agency decision, as it was issued before NYSDEC completed its review of the application pursuant to the State Environmental Quality Review Act ("SEQRA"). As the *Zagata* court states, "the public's right to participate in environmental decision-making is embodied in the SEQRA legislation, and cannot be waived or forfeited by any party, including the DEC . . . . [T]he DEC decision, made without benefit of SEQRA review, is non-final by definition." *Zagata*, 244 A.D.2d at 345; *see also In the Matter of PC Group, LLC, Applicant*, 2009 WL 2141503, at *10 ("[T]he Commissioner held that a valid final decision about a permit application could not be made in the absence of a SEQRA determination . . . ."). There is no question that NYSDEC has not completed its SEQRA review of Entergy's WQC application, and therefore that the Notice is non-final.

[3] Indeed, Entergy has been informed by NYSDEC counsel that Commissioner Martens has recused himself from consideration of the merits of Entergy's WQC Application, consistent with the recusals of the prior Commissioner, who delegated sole authority to act on Entergy's Application to Assistant Commissioner Jared Snyder (mirroring a pattern of Commissioner recusals established in Entergy's SPDES permit renewal proceeding). Given that Commissioner Martens is not the authorized decision maker for the WQC proceeding (the legal basis for assigning deference to a Commissioner decision), Entergy questions the legal effect of Commissioner Martens purporting to speak about the finality of a NYSDEC staff Notice.

expressly on notice from the onset of the WQC proceeding of Entergy's right to challenge NYSDEC's decision-making timeliness in the proper forum, before the NRC, and the matter is now before the NRC."

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

Sincerely,

FRD/cbr

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
Mr. Joseph J. Martins, NYSDEC Commissioner