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-11-093

July 29, 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:

This letter is to provide the July 15, 2011 memorandum and order (the "Order") of the New York Department of Environmental Conservation's ("NYSDEC" or the "Department") panel of Administrative Law Judges (the "ALJs") in Entergy Indian Point's water quality certification ("WQC") proceeding (Enclosed). This is done to ensure the Nuclear Regulatory Commission ("NRC") is properly advised of relevant information relating to NYSDEC's §401 waiver for Indian Point; furthermore, the Order provides further demonstration of NYSDEC's waiver under §401 of the Clean Water Act ("CWA"), 33 U.S.C. §1341.

First, the Order confirms that the question of NYSDEC's waiver of Indian Point's §401 is properly before NRC, stating "[t]he issue as to whether the Department has waived its obligations pursuant to Section 401 is now before the NRC." *See* Order, p. 2.

A128
NRR

Second, the Order confirms Entergy's position that New York's Uniform Procedures Act and NYSDEC's implementing procedures set forth in 6 NYCRR Part 624 apply to Entergy's WQC application; therefore, a final decision on Entergy's WQC application requires further adjudicatory process, to which Entergy and NYSDEC Staff, as well as other parties, now are subject. *See* Order, pp.2-4. In so holding, the ALJs confirm that Entergy's "right to a public hearing" on the NYSDEC Staff's April 2, 2010 Notice of Denial ("Notice") requires that a "record of the hearing" be developed, *see* Order, pp. 2 and 4, in the process of reaching a final decision on Entergy's WQC application. In the ALJs words, and underscoring the Department's future obligation, "it *will* be *necessary* to develop a ... record" in the WQC proceeding." *See* Order, p. 4 (emphasis supplied).

Third, the ALJs not only conclude that additional New York process before the ALJs must occur, but that this future process will allow and must consider the introduction of information post-dating the Notice. *See* Order, p. 3. The implication of the ALJs' finding cannot be overstated: Because NYSDEC's decision on Entergy's WQC application must account for information to be submitted in these future hearings (scheduled to being on September 12), it is clear that the Notice – issued in April 2010 -- cannot have been final agency action.

In sum, while the ALJs are careful not to address the waiver question directly, the Order as applied to the ongoing NYSDEC proceeding confirms that the Notice is non-final as a matter of New York law. Thus, the only logical conclusion from the Order is that a §401 waiver has occurred with respect to Indian Point. *See, e.g.,* 33 U.S.C. § 1341(a) (requiring New York to establish hearing procedures "to the extent it deems appropriate" on WQC applications); ECL §§70-0107(3)(d) and 70-0119(1) (applying the Uniform Procedures Act to WQC applications, and mandating hearings prior to final decisions on WQC application where there is "a reasonable likelihood" of denial); *Zagata v. Freshwater Wetlands Appeals Board,* 244 A.D.2d 343, 344 (N.Y. App. Div. 1997) (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); *see also In the Matter of PC Group, LLC, Applicant*, 2009 WL 2141503, at *9 (N.Y. Dept. Env. Conserv. 2009) (same).

Again, should the NRC have any questions or require additional information about the waiver process, please do not hesitate to contact me.

Sincerely,

John Cahill for FRD

FRD/sp

Enclosure: NYDEC Memoranda Re: Entergy Indian Point SPDES Proceeding/Section 401 Permit Proceeding

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. Joe Martens, Commissioner, NYS Department of Environmental Conservation
Mr. John L. Parker, Office of General Counsel, Region 3, NYS Department of Environmental Conservation

ENCLOSURE TO NL-11-093

NYDEC Memoranda Re: Entergy Indian Point SPDES

Proceeding/Section 401 Permit Proceeding

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

New York State Department of Environmental Conservation
Office of Hearings and Mediation Services, 1st Floor
625 Broadway, Albany, New York 12233-1550
Phone: (518) 402-9003 • **Fax:** (518) 402-9037
Website: www.dec.ny.gov

Joe Martens
Commissioner

MEMORANDUM

VIA E-MAIL AND REGULAR MAIL

TO: Service List

FROM: Maria E. Villa, Administrative Law Judge

RE: Entergy Indian Point SPDES Proceeding/Section 401 Permit Proceeding

DATE: July 15, 2011

This ruling addresses the parties' submissions concerning the status of the Section 401 Water Quality Certification ("WQC") application, and the scope of the adjudicatory hearing with respect to that application. The following submissions were received:

1. Entergy's June 21, 2011 letter to ALJs Villa and O'Connell;
2. Entergy's Initial Brief, dated July 1, 2011;
3. Department Staff's letter to ALJs Villa and O'Connell, dated July 1, 2011;
4. Riverkeeper's July 1, 2011 letter to ALJs Villa and O'Connell, enclosing Riverkeeper's letter to the NRC, dated June 28, 2011. That letter is described in greater detail below;
5. Entergy's Reply Brief, dated July 13, 2011;
6. Department Staff's July 13, 2011 letter to ALJs Villa and O'Connell; and
7. Riverkeeper's letter to ALJs Villa and O'Connell, dated July 13, 2011.

The submissions were in response to a briefing schedule established by the ALJs following a conference call on June 16, 2011, during which the parties discussed the status of the Section 401 WQC application.

Subsequently, by letter dated June 21, 2011 from Fred R. Dacimo, Vice President of Operations, Entergy Nuclear Northeast, to Brian E. Holian, Director, License Renewal, Nuclear Regulatory Commission ("NRC"), Entergy contended that the Department had waived its obligation under Section 401 of the Clean Water Act by failing or refusing to act on Entergy's April 6, 2009 request for a water quality certification within a reasonable time, not to exceed one year, after receipt of the application.

In response, Joseph Martens, Commissioner of Environmental Conservation, wrote to the NRC on June 23, 2011, stating that the Department acted within the one-year period prescribed by the Clean Water Act, and had not waived its opportunity to make a determination on the application.

As noted above, Riverkeeper submitted a July 28, 2011 letter to the NRC as well, contending that there had been no waiver. According to Riverkeeper, the administrative hearing process need not be complete in order for the Department's denial to be considered the requisite "action" on Entergy's application. Entergy submitted a response to the Commissioner's letter in correspondence dated June 30, 2011 to the NRC.

The issue as to whether the Department has waived its obligations pursuant to Section 401 is now before the NRC. The Department's administrative hearing on Entergy's application will proceed.

The discussion below addresses the scope of that administrative hearing, specifically, whether the evidence at the hearing is limited to the application, supporting materials, and other information relating to the operation of the Indian Point facilities that was considered by Department Staff at the time of the April 2, 2010 denial. For the reasons set forth below, this ruling concludes that the scope of the hearing may also include consideration of information received after the date of the denial.

Discussion

Section 401 of the Clean Water Act states that:

> [a]ny application for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. . . . Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications.

33 U.S.C. Section 1341(a)(1). The Department's Uniform Procedures regulations apply to water quality certification applications (see Section 621.4(e) of 6 NYCRR) and are governed by the hearing process established therein. Accordingly, an applicant whose Section 401 WQC application has been denied has a right to a public hearing on that denial. In this case, the record to be developed as part of the hearing on the Section 401 WQC has implications for the ongoing SPDES proceeding.

Department Staff maintained that "the evidence and proof at the hearing must be limited to Entergy's April 6, 2009 application and the supporting materials submitted to, and any information relating to the proposed operation of the Indian Point nuclear facilities (and its discharges into the Hudson River) that was considered by, the Department in rendering its April 2, 2010 denial."

Department Staff's July 1, 2011 letter to ALJs Villa and O'Connell, at 6. Department Staff asserted that this position was consistent with the Ruling on Issues and Party Status, issued on December 13, 2010.

Entergy argued that a complete factual record must be developed in order for the Assistant Commissioner to make a fully informed final decision, and that such record must of necessity include information provided subsequent to the Department's denial. Entergy argued that Department Staff's decision to deny Entergy's WQC application was non-final, and that the decision is subject to review in the adjudicatory hearing.

Entergy cited to Section 624.8(a)(4) of 6 NYCRR ("Order of Events"), which provides that the applicant will present its direct case and identify the application and "all supporting documents which are relevant to the issues to be adjudicated." Entergy also cited to the requirements for party status, arguing that "Part 624 requires that, in order to participate in the hearings, a party must offer evidence beyond simply the record of the application." Entergy's Reply Brief, at 2.

Entergy went on to observe that the Department has not yet completed its review of the application pursuant to the State Environmental Quality Review Act ("SEQRA"), noting that a valid final decision cannot be made in the absence of a completed SEQRA review. See Matter of PC Group, LLC, ALJ Ruling at 8, 2009 N.Y. Env. LEXIS 38, * 19 (June 26, 2009); Matter of PC Group, LLC, 2011 N.Y. Slip Op. 03073 (April 12, 2011) (Department's response to petitioner's five-day letter demand "did not constitute the final determination, since it was issued without the benefit of SEQRA review and, thus, was 'non-final by definition.'" (citations omitted)). Consequently, Entergy concluded that its application for a Section 401 WQC is still pending before the Department, and that Entergy was entitled to an adjudicatory hearing where evidence would be developed for the Commissioner to make a final determination.

Entergy also argued that Department Staff's assertions represented "a fundamental and inappropriate shift in position, and one that impermissibly prejudices Entergy." Entergy's Reply Brief, at 3. According to Entergy, if Department Staff is correct that no additional evidence may be introduced beyond that available as of the date of denial, no prefiled testimony could be received. Entergy pointed out that Department Staff, as well as the other parties, are in the process of preparing such testimony for submission. Entergy argued that Department Staff's statements at the legislative hearing, its comments at the issues conference and in post-issues conference submissions, and its discovery demands, were inconsistent with the viewpoint that evidence at the Section 401 WQC hearing must be restricted to information available to Department Staff at the time of denial.

Riverkeeper contended that the purpose of the hearing "is to determine whether, based on the information presented in Entergy's application, denial was appropriate. It is *not* to provide Entergy with a forum to attempt to cure the various deficiencies identified with its application . . . or to provide Entergy with an opportunity to somehow negotiate its way toward a 'final' certification." Riverkeeper's July 13, 2011 letter, at 2 (emphasis in original). Riverkeeper went on to note that, in contrast, the SPDES permit proceeding "has been, and will continue to be subject to an evolving set of information . . . Thus, any otherwise permissible and relevant information, regardless of when such information was generated or submitted, will be appropriate evidence in the context of the SPDES proceeding." Id. Riverkeeper concluded that as a result, "all admissible evidence, regardless of date, must be allowed to be offered by the parties," and that the ALJs would then consider that information in the context of the standards for each proceeding. Id.

In the alternative, Riverkeeper suggested that "the testimony for each SPDES issue, which may also be presented, in part or in full in the CWA § 401 proceeding, will be subject to an entirely new Scheduling Order such that additional rounds of testimony will be permitted at a later date which would include information without date limitations for purposes of the SPDES issues." Id. Finally, Riverkeeper emphasized that all of the issues that it proposed, and were advanced to adjudication in the Issues Ruling, are within the scope of the Section 401 WQC proceeding.

Ruling

Department Staff's view of the scope of the Section 401 WQC proceeding is unduly limited, given the nature of these applications and the fact that it has long been the practice of the Department at an adjudicatory hearing to admit evidence beyond that considered at the time of denial, if necessary to make any findings or determination required by law. See, e.g., ECL Section 70-0117(2). Nevertheless, there are limits to the evidence that may be offered following a denial, and it is within the ALJs' discretion to manage the hearing to exclude evidence that is irrelevant or inadmissible, given the posture of a particular application. See Section 624.8(b)(1)(viii), (x), and (xx) of 6 NYCRR.

In this case, it will be necessary to develop a joint record with respect to both the SPDES permit application and Section 401 WQC certification denial, which in some instances will require an examination of evidence common to both proceedings. For example, the question whether cylindrical wedge wire screens are the best technology available to minimize impingement and entrainment must be considered in connection with the SPDES permit as well as the Department's denial of Entergy's Section 401 application. At this juncture, the burden on the parties of providing or responding to information received in the year since the denial is outweighed by the need to assure that relevant information, or information common to both proceedings, is not excluded, and that the hearing goes forward as efficiently as possible.

With respect to Riverkeeper's Section 401 WQC issues, the issues as identified in the Issues Ruling are intended to include consideration of the topics articulated in Riverkeeper's petition. The evidence in support of those issues is subject to the customary requirements that it be relevant to the proceeding, for example, radiological impacts or best usages.

Prefiled testimony with respect to cylindrical wedge wire screens, best usages/endangered species, and radiological materials is to be served on or before Friday, July 22, 2011. Rebuttal prefiled is to be served on or before Monday, August 22, 2011.

c: Administrative Law Judge Daniel P. O'Connell