



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

September 20, 2011

Ms. Patricia Kurkul, Regional Administrator  
National Oceanic and Atmospheric Administration  
National Marine Fisheries Service  
Northeast Region  
55 Great Republic Drive  
Gloucester, MA 01930-2276

SUBJECT: NATIONAL MARINE FISHERIES SERVICE LETTER DATED AUGUST 26, 2011, REGARDING THE ENDANGERED SPECIES ACT, SECTION 7 CONSULTATION FOR THE PROPOSED LICENSE RENEWAL OF INDIAN POINT NUCLEAR GENERATING UNIT NUMBERS 2 AND 3

Dear Ms. Kurkul:

I am writing in response to your letter dated August 26, 2011, regarding the draft Biological Opinion prepared by the National Marine Fisheries Service (NMFS) for the proposed license renewal of Indian Point Nuclear Generating Unit Numbers 2 and 3 (IP2 and IP3). As you are aware, the staff of the U.S. Nuclear Regulatory Commission (NRC or the staff) provided comments on the draft Biological Opinion by e-mail on September 6, 2011, and indicated that it would respond separately to the issues raised in your letter. This letter provides that response; in addition, the staff herein requests information from NMFS concerning an additional species (Atlantic sturgeon) that was not addressed in your letter dated August 26 or the draft Biological Opinion, for which the NRC staff had requested a NMFS response in its December 2010 Revised Biological Assessment.

*Response to NMFS Letter dated August 26, 2011*

In your letter dated August 26, 2011, you commented on a number of matters, including 1) the timing of the NRC's Endangered Species Act (ESA) Section 7 consultation with NMFS in light of the ongoing New York State Pollutant Discharge Elimination System permit (SPDES permit) proceeding, 2) the timing of the NRC's consultation with NMFS in light of the ongoing Clean Water Act Section 401 proceeding (also before New York State), 3) the NRC's legal authority to "approve and enforce conditions...to minimize, monitor, and report incidental take resulting from the operation of the facility," and 4) the NRC's "legal basis by which it retains discretionary involvement or control over the action in order to reinitiate consultation if [a Biological] Opinion is finalized and any criteria for initiation are met at a later date." The staff's views are set forth below.

I. Timing of the NRC's consultation in light of the ongoing SPDES proceeding

As your staff noted in the draft Biological Opinion, the SPDES permit currently in force for IP2 and IP3 was issued in 1987. That permit continues in force because the previous owners of IP2 and IP3 submitted a timely renewal application to the New York State Department of Environmental Conservation (NYSDEC). Since that application was submitted, IP2 and IP3, along with other Hudson River power plants, developed a draft environmental impact statement

(completed in 1999) and NYSDEC issued a final environmental impact statement (in 2003). NYSDEC issued a draft SPDES permit in 2003 and a revised draft permit in 2004. The SPDES permit has been, and remains, the subject of adjudication within the State of New York, and a final SPDES permit has not yet been issued. As a result, the 1987 permit - which had a stated term of five years - has now been in effect for 24 years. The NRC is not a party to the New York State litigation, and does not control the SPDES review or the New York adjudicatory processes. Because of the protracted litigation over the SPDES permit, the staff cannot determine with reasonable certainty when or if a new SPDES permit will enter into force, or what the terms of such a permit will be. Nonetheless, the NRC is required to move forward with its review of the license renewal application (LRA) for IP2 and IP3. As a result, the NRC has entered into consultation with NMFS under the ESA assuming that the existing SPDES permit continues in force during the term of a renewed operating license. As I explain in Section IV, below, the staff retains the authority to reinitiate consultation should a change to the SPDES permit meet the criteria for ESA Section 7 reinitiation.

## II. Timing of the NRC's consultation with NMFS in light of the ongoing New York State Section 401 proceeding

In your letter dated August 26, you noted that "the proposed action seems very uncertain given NYSDEC has denied Entergy's request for a Clean Water Act Section 401 Water Quality Certification based on its initial and amended application."

The staff is aware of the uncertainty that exists regarding the Clean Water Act (CWA) Section 401 Water Quality Certification request. The staff noted, in its December 2010 final supplemental environmental impact statement, that NYSDEC had issued a Notice of Denial regarding the CWA Section 401 Water Quality Certification on April 2, 2010. The staff also noted that the matter is currently subject to a NYSDEC adjudicatory process, the outcome of which is uncertain. Further, if the NYSDEC were to grant a Section 401 certification to Entergy, NYSDEC could later change or revoke the certification to consider new information or new technologies, among other reasons. The NRC is therefore unable to predict with reasonable certainty whether a water quality certification will be issued, what the terms of that certification might entail, or whether the certification would remain in effect, unchanged, throughout the term of a renewed NRC operating license (if renewed licenses were to be issued). As you may be aware, Entergy has asserted to the NRC (in a series of letters beginning on June 21 of this year) that New York State had waived its Section 401 certification authority because a final decision was not completed within one year after Entergy submitted its April 2009 Section 401 certification request. NYSDEC, however, has asserted that its April 2, 2010, letter formally denied certification to Entergy, and that Entergy's appeal from that denial does not alter the finality of the State's denial.

Notwithstanding the uncertain outcome of New York's Section 401 Water Quality adjudication, the NRC is required to move forward with its review of the LRA as submitted by Entergy. For this reason, the staff has undertaken to review the LRA, to issue a Biological Assessment (as later revised), and to enter into consultation with NMFS under the ESA without assuming a particular outcome of the Section 401 proceeding. Should the Section 401 certification issue be resolved, the staff would consider the effect of that outcome on the IP2 and IP3 operating licenses.

- III. The NRC's legal authority to "approve and enforce conditions...to minimize, monitor, and report incidental take resulting from the operation of the facility..."

The staff agrees with your assertion that the ESA creates different obligations for the NRC than does the CWA, and that the NRC's obligations under the ESA continue despite its lack of authority over CWA cooling systems issues. As you may know, the NRC has imposed requirements on a substantial number of operating nuclear reactors to protect endangered species. Our research indicates that NMFS or the U.S. Fish and Wildlife Service (FWS) have developed Biological Opinions for 15 nuclear power plants; 11 of these plants hold NRC licenses that contain reporting requirements related to the ESA. Further, six of these plants' licenses specifically require the licensees to comply with the terms and conditions of a NMFS Biological Opinion. Indeed, the NRC staff recently added a license condition at the license renewal stage for one of these facilities - Oyster Creek in New Jersey - after consultation with your staff.

In addition to those plants for which NMFS or FWS has developed a Biological Opinion, many plants' licenses, including the IP2 and IP3 licenses, contain requirements for licensees to report the occurrence or take of a species listed under the ESA. In the NRC's teleconference with NMFS on June 20, 2011, the NRC staff indicated that several NRC licenses contain references to the terms and conditions of a Biological Opinion. Following another teleconference on June 22, 2011, the NRC staff conveyed to your staff a copy of the existing IP2 and IP3 Appendix B technical specifications (part of the existing IP2 and IP3 licenses with which Entergy must comply now, and with which Entergy would have to continue to comply in the event the IP2 and IP3 licenses are renewed). These technical specifications require Entergy to report to NRC "any occurrence of an unusual or important event that indicates or could result in significant environmental impact causally related to plant operation," including "unusual mortality or occurrence of any species protected by the [ESA]."

As our consultation with NMFS progresses, the staff looks forward to developing appropriate language to ensure that the terms and conditions of NMFS's final Biological Opinion for IP2 and IP3 will be enforced.

- IV. The NRC's "legal basis by which it retains discretionary involvement or control over the action in order to reinitiate consultation if [a Biological] Opinion is finalized and any criteria for initiation are met at a later date."

The staff's legal authority over NRC licensees does not cease once the NRC has made a decision regarding license renewal. If the NRC ultimately issues renewed licenses for IP2 and IP3, the NRC will retain oversight of the plants' operations throughout the term of the renewed licenses. Further, if the NRC denies the license renewal application, the NRC will continue to oversee Entergy's possession of nuclear materials and its clean-up of the IP2 and IP3 site until it meets NRC's site release criteria.

To the extent that the IP2 and IP3 site continues to host NRC-licensed and -regulated activities (which would occur even in the absence of a renewed license), the NRC retains legal authority to enforce the license requirements or to take such other actions as it may deem to be appropriate. Thus, should any of the criteria for the reinitiation of consultation occur, the staff would reinitiate consultation, as it has done for other nuclear facilities in the past. As you may

know, the NRC reinitiated ESA Section 7 consultation for the Brunswick plant in North Carolina (in 1999), the Crystal River plant in Florida (2001), the Oyster Creek plant in New Jersey (2000 and 2005), the Salem and Hope Creek plants in New Jersey (1990, 1991, and 2010), the St. Lucie plant in Florida (2002 and 2005), and the Turkey Point plants in Florida (2011; consultation with FWS). Such actions would similarly be taken by the staff for IP2 and IP3, if necessary or appropriate.

*Request for Information on Atlantic Sturgeon*

In addition to the matters discussed above, the staff requests your views on a matter that was not addressed in your letter of August 26, 2011. Specifically, NMFS has not informed the staff of its views regarding effects of IP2 and IP3 operation on the Atlantic sturgeon. In this regard, your letter of February 16, 2011 (indicating that formal consultation had begun), noted that Atlantic sturgeon might be addressed in a formal conference between NMFS and the NRC. To date, the staff has received no communications from NMFS related to this species nor does a formal conference appear to have been initiated. The staff therefore requests that NMFS inform the NRC as to whether it intends to initiate a formal conference to address the impacts of IP2 and IP3 operation on the Atlantic sturgeon, or whether this matter should be considered to be resolved.

I appreciate this opportunity to address your concerns, and I look forward to continued coordination with you and your staff to protect Federally-listed species. I also look forward to completing formal consultations and receiving the final Biological Opinion related to shortnose sturgeon at IP2 and IP3, and any other ESA Section 7 consultation matters currently open between the Northeast Region of NMFS and the NRC.

Sincerely,

A handwritten signature in black ink, appearing to read "D. J. Wrona", followed by a horizontal line.

David J. Wrona, Chief  
Projects Branch 2  
Division of License Renewal  
Office of Nuclear Reactor Regulation

Docket Nos. 50-247 and 50-286

cc: Listserv

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*/RA/*

David J. Wrona, Chief  
Projects Branch 2  
Division of License Renewal  
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Letter to Patricia Kurkul from David J. Wrona dated September 20, 2011

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