



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
NORTHEAST REGION  
55 Great Republic Drive  
Gloucester, MA 01930-2276

OCT 14 2011

David J. Wrona, Branch Chief  
Projects Branch 2  
Division of License Renewal  
Office of Nuclear Reactor Program  
US Nuclear Regulatory Commission  
Washington, DC 20555-0001

RE: Biological Opinion for License Renewal of the Indian Point Nuclear Generating Unit Nos. 2 and 3

Dear Mr. Wrona:

Please find enclosed a copy of NOAA's National Marine Fisheries Service's (NMFS) Biological Opinion (Opinion) on the effects of the operation of the Indian Point Nuclear Generating Station Units 2 and 3 (Indian Point, IP2 and IP3) pursuant to a renewed operating license that the Nuclear Regulatory Commission (NRC) proposes to issue to Entergy Nuclear Operations, Inc. (Entergy). This Opinion is based upon our independent review of NRC's Biological Assessment (BA) dated December 2010, the *Final Generic Environmental Impact Statement for License Renewal of Nuclear Plants (FEIS), Supplement 38 Regarding Indian Point Nuclear Generating Unit 2 and 3* dated December 2010, permits issued by the State of New York, information submitted to NMFS by Entergy and other sources of information. In this Opinion, NMFS concludes that the operation of IP2 and IP3 during the extended operating period may adversely affect but is not likely to jeopardize the continued existence of endangered shortnose sturgeon.

In our August 26, 2011, letter transmitting the draft Opinion, we echoed concerns raised by the State of New York regarding the significant uncertainty regarding the proposed action. Hearings related to the State Pollution Discharge Elimination System (SPDES) permit for IP2 and IP3 as well as New York's denial of a Clean Water Act Section 401 Water Quality Certificate begin this week. In our August letter we asked you to consider withdrawing your request for consultation until issues related to the uncertainties of future operations of the operation of IP2 and IP3 could be resolved. As you requested, we have completed consultation, considering effects of the proposed action, as defined by NRC staff in the FEIS and BA. It is our understanding that you are prepared to reinstate consultation with NMFS should any of the criteria for reinstatement be met (see below), including a change in the operations of IP2 and/or IP3 resulting from the hearings regarding the SPDES permit and 401 certificate or the pending hearings with the Atomic Safety and Licensing Board.



Our Opinion includes an Incidental Take Statement (ITS). Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. “Otherwise lawful activities” are those actions that meet all State and Federal legal requirements, including any state endangered species laws or regulations, except for the prohibition against taking in ESA Section 9. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered to be prohibited under the ESA provided that such taking is in compliance with the terms and conditions of this Incidental Take Statement.

This ITS exempts the following take:

- A total of 6 shortnose sturgeon (dead or alive) impinged at the Unit 1<sup>1</sup> intakes (trash bars or screens) during the period September 28, 2013 – September 28, 2033;
- A total of 104 shortnose sturgeon (dead or alive) impinged at Unit 2 (trash bars or Ristroph screens) during the period September 28, 2013 – September 28, 2033; and,
- A total of 58 shortnose sturgeon (dead or alive) impinged at Unit 3 (trash bars or Ristroph screens) during the period December 12, 2015 – December 12, 2035.

This ITS applies to the extended operating period, beginning at the date that the facility begins to operate under the terms of a new license and extending through the expiration date of that license. NRC staff has indicated it is unlikely that any renewed licenses would be issued prior to the expiration date of the existing licenses. As such, NMFS anticipates that this amount of take will occur at IP2, from September 28, 2013, until September 28, 2033, and IP3 from December 12, 2015, until December 12, 2035. The exemption from Section 9 prohibitions would apply only during that time period as well. If it becomes clear that renewed licenses will be issued prior to the expiration dates of the existing licenses, please contact my staff to discuss options for revising the ITS or reinitiating consultation to exempt incidental take during the entire extended operation period, as appropriate.

The ITS specifies reasonable and prudent measures necessary to minimize and monitor take of shortnose sturgeon. The measures described in the ITS are non-discretionary, and must be undertaken by NRC so that they become binding conditions for the exemption in section 7(o)(2) to apply. NRC has a continuing duty to regulate the activity covered by this Incidental Take Statement. If NRC (1) fails to assume and implement the terms and conditions or (2) fails to require the applicant, Entergy, to adhere to the terms and conditions of the Incidental Take Statement through enforceable terms that are added to the renewed license, the protective coverage of section 7(o)(2) may lapse. In order to monitor the impact of incidental take, NRC or the applicant must report the progress of the action and its impact on the species to the NMFS as specified in the Incidental Take Statement [50 CFR §402.14(i)(3)] (See U.S. Fish and Wildlife Service and National Marine Fisheries Service’s Joint Endangered Species Act Section 7 Consultation Handbook (1998) at 4-49).

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<sup>1</sup> As explained in the Opinion, water withdrawn through the Unit 1 intakes is used for service water for the operation of IP2.

This Opinion concludes formal consultation for the proposed action as currently defined. Reinitiation of this consultation is required if: (1) the amount or extent of taking specified in the ITS is exceeded; (2) new information reveals effects of these actions that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) project activities are subsequently modified in a manner that causes an effect to the listed species that was not considered in this Biological Opinion; or (4) a new species is listed or critical habitat designated that may be affected by the identified action. As explained above, we expect NRC to request reinitiation of consultation should any changes be proposed for the operation of IP2 and/or IP3 that would cause effects to shortnose sturgeon not considered in this Opinion. We expect that if a decision is made to install cooling towers, cylindrical wedge-wire screens, or any other technology associated with the intakes, for example, that consultation will be reinitiated, given that effects to shortnose sturgeon from the construction or installation of these technologies as well as the effects of operation with these technologies in place, could be very different than the effects considered in this Opinion.

On October 6, 2010, NMFS published two rules proposing to list four distinct population segments (DPS) of Atlantic sturgeon (*Acipenser oxyrinchus oxyrinchus*) as endangered (i.e., New York Bight, Chesapeake Bay, Carolina, and South Atlantic) and one DPS as threatened (Gulf of Maine) under the ESA (75 FR 61872; 75 FR 61904).


Once a species is proposed for listing, the conference provisions of the ESA may apply. As stated at 50 CFR 402.10, “Federal agencies are required to confer with NMFS on any action which is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat. The conference is designed to assist the Federal agency and any applicant in identifying and resolving potential conflicts at an early stage in the planning process.”

We have information, provided by NRC in the December 2010 BA, on past impingements of Atlantic sturgeon at IP2 and IP3. It is likely that impingement of Atlantic sturgeon continues to occur, and would continue to occur during the extended operating period if no modifications to the current intakes were mandated. Should the proposed listing be finalized, consultation would need to be reinitiated. In the meantime, NMFS will continue to work on a conference Opinion. NMFS has not made any determination at this time whether the proposed action would or would not be likely to jeopardize any DPS of Atlantic sturgeon.

As stated in our letter transmitting the draft Opinion, this Opinion only analyzes the operation of Indian Point from approximately 2013 to 2035 under the same conditions that appear in the existing license and SPDES permit, and the analysis and conclusions cannot be interpreted to apply to a different time period or different set of operating conditions. It would not be appropriate to use the Opinion as an indication of a “worst-case scenario,” given the Opinion’s analysis and determinations may need to be modified as the definition of the proposed action and its effects, the environmental baseline, and the status of species protected under the ESA all may change. Additionally, this Opinion is not a substitute for any outstanding coordination that may remain with the State of New York regarding any State endangered species laws or regulations.

Should you have any questions regarding this Biological Opinion please contact Julie Crocker of my staff at (978)282-8480. NMFS appreciates your assistance with the protection of threatened and endangered species. I look forward to continued cooperation with NRC during future Section 7 consultations.

Sincerely,



for Patricia A. Kurkul  
Regional Administrator

Enclosure

CC: Stuyvenberg, Logan – NRC

EC: Crocker– F/NER3  
Williams, GCNE

File Code: Sec 7 NRC – Indian Point Relicensing  
PCTS: F/NER/2009/00619