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Joe Martens
Commissioner

August 11, 2011

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

Re: Indian Point License Renewal, Docket Nos. 50-247, 50-286
State of New York Denial, Clean Water Act Section 401 Water Quality Certification

Dear Mr. Holian:

I am writing on behalf of Commissioner Joe Martens in response to the July 29, 2011 letter to you from Fred Dacimo, Vice President, Entergy Nuclear Northeast. As you know, the July 29th letter is the third that Mr. Dacimo has written to you in the past five weeks. For the reasons stated below, and for those stated in the previous responsive correspondence of the New York State Department of Environmental Conservation, New York State timely denied Entergy's application for a Clean Water Act Section 401 Water Quality Certification on April 2, 2010 relating to the license renewal of Indian Point Units 2 and 3, located in Buchanan, New York. The Dacimo / Entergy correspondence does not change this fact.

Mr. Dacimo's most recent letter again argues Entergy's new-found theory that the Department has somehow "waived" its right to review the application for the Section 401 Water Quality Certification. As Commissioner Martens stated in his June 23, 2011 letter to the Commission, the law and the facts do not support Entergy's newly proffered theory of a "waiver." For the following reasons, the State of New York *has not* "waived" its Section 401 review obligation – the State has *denied* Entergy's application for the Water Quality Certification within the one-year time period required by the Clean Water Act.

New York's Action on Entergy's Application for a Section 401 Water Quality Certification Was Timely Because New York Acted on the Application within One Year.

As the Department has previously communicated to you, Clean Water Act Section 401 requires Entergy to obtain a Water Quality Certification from the State as part of its license renewal application for Indian Point Units 2 and 3. Entergy applied to this Department for the Water Quality Certification on April 6, 2009. The Department denied that application on April 2, 2010, which was within one year of Entergy's submission of the application. *See* Letter from Commissioner Martens to B. Holian, dated June 23, 2011; *see also* Letter from J. Parker to B. Holian, dated July 15, 2011, with attached Letter from M. Sanza to M. Villa and D. O'Connell, dated July 1, 2011.

Entergy's selective argument does not dispute that New York State's act of denial of the certification application was timely. Similarly, Entergy does not address judicial precedent that also runs counter to its new found theory. Though the Department's denial was within one year of Entergy's submission of its application, federal precedent suggests that the one-year period did not begin to run until February 26, 2010, which was the date that the Department deemed the application complete and was more than 10 months after Entergy submitted the application.[1] Thus, the Department's denial on April 2, 2010 arguably would have been timely if made as late as February 26, 2011, the one year period after Entergy cured the deficiencies in its application documents it submitted to the Department.

As illustrated in the enclosed Timeline, the milestone events related to the Department's denial of Entergy's application for the Section 401 Water Quality Certification included the Department's requests for additional information; Entergy's submission of additional information; the Department's determination of completeness; and the Department's issuance of the denial. Despite Entergy's delay in providing sufficient and necessary information for the application to be deemed complete, the Department offered a reasoned and detailed basis for the denial of the Water Quality Certification application as required by federal law. In sum, the Department's review and denial, and all of these events, occurred well within the requisite one-year period under the Clean Water Act.

Entergy Availing Itself of New York's Administrative Process Subsequent to the State's Timely Denial Does Not Convert New York's Timely Denial into a "Waiver."

Entergy is attempting to conflate the Clean Water Act one-year action period with the subsequent New York State administrative hearing process – a hearing process expressly requested by Entergy – to magically wipe away New York's timely denial of its application for a Section 401 Water Quality Certification. Not only does this effort fail on the facts and the law, Entergy's current novel theory is belied by the fact that it has not withdrawn its hearing request to the Department despite its "waiver" claim.

After the Department denied Entergy's application for the Section 401 Water Quality Certification, Entergy requested an administrative hearing to challenge that denial. This administrative process *subsequent to* the Department's denial is provided for by the State Uniform Procedures Act and does not alter the legal consequences of New York's April 2, 2010 denial. Indeed, Entergy offers no controlling legal authority for such a proposition. Instead, Entergy's sleight of hand suggests that because New York has an otherwise robust administrative process for review of agency decisions *subsequent to when the administrative agency takes the action* on the Section 401 application, the Department's decision on the application cannot be the agency action required by the Clean Water Act. Entergy's new theory has no merit. State and Federal law and existing legal precedent establish clearly that Entergy's subsequent request for additional review to challenge New York's denial cannot alter the fact that the State met the Clean Water Act requirement for that denial.

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1 The Fourth Circuit recently held that the one-year period does not even commence until an application is deemed valid. *AES Sparrows Point LNG, LLC v. Wilson, 589 F.3d 721 (4th Cir 2009)* (holding that the Army Corps of Engineers properly determined that the State of Maryland had not waived its right to review a Section 401 application for a water quality certification when the State issued its decision within one year of a *valid* application).

The State administrative hearing process that reviews the agency's action to deny the certification application often occurs over a much lengthier timeframe – well beyond one year. The State's subsequent administrative process contrasts to the Water Quality Certification application determination, which is a product of federal law. In fact, as illustrated in the enclosed Timeline, the numerous milestone events attendant to the administrative hearing process here demonstrate that this process could not be concluded within one year.

Under New York's administrative process that follows a decision on a Section 401 Water Quality Certification application, numerous milestone events occur in a typical Uniform Procedures Act proceeding. Here, they include the applicant's submission of a Request for Adjudicatory Hearing; the Department's publication of Notice of Public Comment Period; Legislative Public Hearing and Issues Conference; the Department's convening of a Legislative Public Hearing and Issues Conference; the parties' submission of closing and reply briefs; the ALJ's Ruling on proposed Issues for Adjudication and Petitions for Party Status and Scheduling Order; the parties' submission of Pre-filed Direct and Rebuttal Testimony; and the holding of the adjudicatory hearing. *See Attached Timeline.* As demonstrated by the Timeline, the subsequent administrative process cannot occur within one year, let alone in conjunction with the Department's review of the Section 401 application and its action to grant or deny the application. New York State law does not contemplate that result, nor does the Clean Water Act require it.

In previous correspondence, the Department has made clear that Courts have acknowledged that a state's action on a Section 401 Water Quality Certification application is distinct from an agency's subsequent review process, and that the subsequent review process is not subject to the one-year period. *See City of Klamath Falls v. Environmental Quality Commission, et al.*, 119 Or. App. 375, 377-378, 851 P.2d 602, 604 (1993); *affirmed City of Klamath Falls v. Environmental Quality Commission, et al.*, 318 Ore. 532, 870 P.2d 825 (1994) (stating that "[a]lthough the [applicant] had every right to pursue a review, we do not construe 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"); *see also FPL Energy Main Hydro LLC v. Dept. of Envtl. Protection*, 2007 Me. 97, 926 A.2d 1197, 1203 (Supreme Judicial Court of Maine, 2007), *cert denied* 128 S. Ct. 911 (2008) (stating that "[t]here is no indication . . . that Congress intended for all in-state appeals to be completed within the same one-year deadline. If Congress intended to impose such extreme time pressure, it would have used specific language to that effect.").

The fact that Entergy has availed itself of the administrative review opportunity that involves a number of milestones that necessarily occur beyond one year should not be used as a sword by Entergy. Simply stated, Entergy controlled whether it would opt for the administrative process subsequent to the denial. Now, Entergy wants the Commission to recognize its creative re-writing of the requirements of the Clean Water Act that courts have rejected. New York's administrative procedure following a denial, however, does not alter the fact that the State of New York acted on Entergy's application, and that the action was timely.

I note, too, that Entergy's newly proffered theory of "waiver" also comes over a year into the Uniform Procedures Act process that Entergy availed itself of under New York State Law (after New York's timely denial) with Entergy's filing of a request for an adjudicatory hearing on April 29, 2010.

Entergy seeks to avail itself of every possible avenue in support of its application in the license renewal process for the nuclear generating facilities at Indian Point Units 2 and 3. Entergy has the option to pursue that path, but having chosen to do so, it must abide by the consequences and not use it as a sword in an unfounded attempt to undo a program that Congress delegated to the State more than 30 years ago. Moreover, and for the reasons stated above, Entergy cannot ignore the express provisions of the Clean Water Act, judicial interpretations of those provisions, and the legal determinations, reasonably made, of the New York State Department of Environmental Conservation.

Please let me know if you have any questions about the State's timely denial of Entergy's application for a Section 401 Water Quality Certification for the 20-year license renewal of Indian Point Units 2 and 3.

Very truly yours,

John L. Parker

cc: By U.S. Mail

Commissioner Joe Martens, Department of Environmental Conservation
William Dean, Regional Administrator, NRC Region 1
John Boska, NRR Senior Project Manager
Paul Eddy, NYS Department of Public Service
NRC Resident Inspector's Office
Andrew Stuyvenberg, NRC License Renewal Environmental Project Manager
Sherwin Turk, NRC Office of General Counsel
Fred R. Dacimo, Vice President Operations, Entergy Nuclear Northeast

State of New York
Department of Environmental Conservation

Federal Clean Water Act Section 401 Water Quality Certification
Application for Indian Point Units 2 and 3

Timeline

Section 401 Water Quality Certification Process – Milestones to DEC's Timely Denial

April 6, 2009	Entergy submits Section 401 Water Quality Certification (WQC) Application to NYS Department of Environmental Conservation (NYSDEC)
May 13, 2009	DEC sends Request for Additional Information to Entergy
June 12, 2009 - March 22, 2010	Entergy submits additional information to NYSDEC
February 26, 2010	NYSDEC determines Section 401 WQC Application "complete"
March 4, 2010	NYSDEC publishes Notice of Completeness in NY Environmental Notice Bulletin (ENB)
April 2, 2010	NYSDEC denies Section 401 WQC Application
April 6, 2010	*One year from date Entergy submitted its Section 401 WQC Application*

Post-Section 401 Denial Process – Milestones in Subsequent Administrative Process

April 29, 2010	Entergy requests adjudicatory hearing on NYSDEC's Denial
June 9, 2010	NYSDEC publishes Notice of Public Comment Period, Legislative Public Hearing, and Issues Conference in ENB on Entergy's hearing request
July 20, 2010	Legislative Public Hearing held in Cortlandt Manor, NY
July 21, 2010	Issues Conference held in New Paltz, NY
September 24, 2010	Post-Issues Conference Closing Briefs filed by the parties
October 29, 2010	Post-Issues Conference Reply Briefs filed by the parties
December 13, 2010	Ruling on Proposed Issues for Adjudication and Petitions for Party Status and Scheduling Order setting initial adjudicatory hearing date
February 26, 2011	*One year from date NYSDEC determined Entergy's Section 401 WQC Application "complete"*
July 22, 2011	Pre-filed direct testimony filed by the parties
September 28, 2011	Pre-filed rebuttal testimony to be filed by the parties
October 17, 2011	Adjudicatory hearing begins on NYSDEC Denial of Section 401 WQC Application