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ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

July 25, 2012

Allison MacFarlane, Chair Kristine L. Svinicki William C. Ostendorff
George Apostolokis William D. Magwood, IV

U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Re: Indian Point Nuclear Generating Station, Unit 2 and Unit 3
Docket Nos. 50-247-LR/50-286-LR; ASLBP No. 07-858-03-LR-BD01

Dear Chairman MacFarlane and Commissioners:

As the Commission may be aware, on June 26, 2012, the United States Court of Appeals for the District of Columbia Circuit issued a ruling in *Vermont Dep't of Public Service, et al. v. United States et al.*, No. 11-1168, which dismissed the Vermont Department of Public Service's allegation that the United States Nuclear Regulatory Commission erroneously renewed a nuclear power plant operating license in the absence of a Federal Water Pollution Control Act ("Clean Water Act") Section 401 water quality certificate. The D.C. Circuit's dismissal was based solely on grounds that the Vermont Department of Public Service had not exhausted its administrative remedies. The State of New York ("State") submitted an amicus brief in that matter in support of the Vermont Department of Public Service. The State and the Department of Environmental Conservation ("DEC" or the "Department") have repeatedly raised Entergy's failure to obtain a 401 water quality certificate in the Indian Point relicensing proceeding (Docket Nos. 50-247-LR/50-286-LR; ASLBP No. 07-858-03-LR-BD01). We believe that these efforts are sufficient to establish that the State and DEC have exhausted their administrative remedies. Nevertheless, in light of the D.C. Circuit's decision, and without in any way acknowledging that the Commission can properly review New York's process for issuing Clean Water Act Section 401 water quality certifications, the State and DEC wish to again notify the Commission that (1) Congress requires that any applicant for a nuclear power plant operating license obtain a § 401 water quality certificate,[1] (2) in New York State, a § 402 permit is not the equivalent of a § 401

[1] In addition, Indian Point must receive a federal consistency determination from the State pursuant to the Coastal Zone Management Act (16 U.S.C. §§ 1451–1464) before NRC may issue operating licenses authorizing the operation of Indian Point Unit 2 and Indian Point Unit 3 beyond their initial 40-year term. NRC may not issue a license renewal prior to the issuance of

certificate, (3) Entergy's existing § 401 certificate is currently out of compliance with the Clean Water Act and cannot be extended into a new licensing term, (4) a new § 401 certificate is required, and (5) New York State timely denied the Applicant's request for a § 401 certificate in April 2010.

Congress requires that any applicant for a nuclear power plant operating license obtain a § 401 water quality certificate

A federal agency may not issue a license for an activity resulting in a discharge to navigable waters absent a valid state certification pursuant to section 401(a)(1) of the Clean Water Act. *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) ("There is no doubting that FERC is bound by federal law to refuse a [hydroelectric power plant] license application that is unsupported by a valid state certification under section 401"); *Alcoa Power Generating Inc., v. FERC*, 643 F.3d 963, 965, 966 (D.C. Cir. 2011) ("[a] precondition of licensing is receipt of a State certification"); *see also PUD No. 1,* 511 U.S. at 707; *S.D. Warren Co. v. Maine Bd. of Envt'l Prot.*, 547 U.S. 370, 380 (2006); *Alabama River Alliance v. FERC,* 325 F.3d 290, 299 (D.C. Cir. 2003).

The section 401 certification requirement applies to an application to renew a federal license, just as it does to an application for an initial license. *See S.D. Warren Co.*, 547 U.S. at 380 (applying section 401 to an application for license renewal); *Alcoa Power Generating Inc*., 643 F.3d at 965 (holding that a State had not waived its authority to submit a certification in a license renewal proceeding); *FPL Energy Maine Hydro LLC v. FERC*, 551 F.3d 58, 60 (1st Cir. 2008). NRC's regulations recognize that section 401 applies to renewal licenses for nuclear power plants. 10 C.F.R. §§ 50.54(aa), 10 C.F.R. 54.33(c); *see also id.* § 2.4 (defining "license" to include a renewal license).

In issuing section 401 certifications for federal licenses, States act as "deputized regulators of the Clean Water Act," *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 164 (2d Cir. 2008), exercising the authority conferred by Congress "to give the states veto power over the grant of federal permit authority for activities potentially affecting a state's water quality." *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 99-100 (1st Cir. 1989). As a result, federal courts have consistently held that federal agencies must include state certification conditions in federal permits and lack authority to reject, modify or adjudicate them. *See, e.g., U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992) ("[The federal agency] may not alter or reject conditions imposed by the states through Section 401 certificates."); *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1218 (9th Cir. 2008) ("[A] federal licensing agency lacks authority to reject [water quality certification] conditions in a federal permit."); *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 110-11 (2d Cir. 1997) ("[The federal agency] does not possess a roving

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the federal consistency concurrence by DOS pursuant to 16 USC 1456(3)(A), which requires that "No license or permit shall be granted by the Federal agency until the state or its designated agency [DOS] has concurred with the applicant's certification…" Federal regulations at 15 C.F.R. Part 930 sets forth these procedures. A federal determination is no substitute for the State determination.

mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401."). To comply with section 401, an application must reflect the action pending in front of the federal agency, and must be based on the specific activities which demonstrate the facility's compliance with state water quality standards. Thus, an application to renew a license cannot be granted on the basis of a state certification issued in connection with an application for a prior operating license.

In New York State, a § 402 permit is not the equivalent of a § 401 certificate

NRC's 1996 Generic Environmental Impact Statement stated that "issuance of an [National Pollution Discharge Elimination System or] NPDES permit by a state water quality agency implies certification under Section 401." NUREG 1437 (1996), Generic Environmental Impact Statement for License Renewal 4-4. NRC's 2009 Draft GEIS states more accurately that "NRC recognizes that some states include a 401 certification in the NPDES permit. (NUREG 1437 (2009), Section 3.5.1.2). While this may be true in some states, it is not true in New York.

In New York, reviews conducted pursuant to section 401 are broader in scope than 402 reviews, in order to ensure compliance with all of New York's water quality standards. As the United States Supreme Court emphasized in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), a State has authority under section 401(a) to examine whether an applicant for a federal license or permit who proposes to conduct an activity that may result in a discharge to navigable waters will comply with the applicable provisions of sections of the Clean Water Act (33 U.S.C. §§ 1311, 1312, 1313, 1316, and 1317). *See* 33 U.S.C. §1341(a). These sections predominantly address effluent limitations and could also be the subject of a NPDES permit under section 402. However, it would be a mistake, and inconsistent with the intent of Congress, to focus only on effluent limitations and ignore the focus in section 401(d) that brings within a state's certification role the authority to set forth in its certifications "any other appropriate requirement of state law." Such "other appropriate requirement(s) . . . shall become a condition on any Federal license or permit subject to the provisions of this section." 33 U.S.C. §1341(d). Section 401(d) thus allows a state to impose designated uses or, as characterized in New York State, "best usages," that are not strictly effluent standards but adhere to the principle of classifying waters at their highest uses for humans, terrestrial and aquatic species and protecting that classification and usage in order to meet the essential goals of the Clean Water Act.[2] Thus the Supreme Court's instructs that a NPDES permit, or a state's equivalent permit, is not adequate to assure full and complete compliance with a state's water quality standards when viewed through the applicable provisions of section 401(d).

[2] Section 101(a) of the Clean Water Act states that "it is the objective of this chapter to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251.

Entergy's 1982 § 401 certificate does not comply with the Clean Water Act and cannot be extended into a new licensing term; therefore, Entergy must apply for and receive a new § 401 certificate

As DEC discussed in the April 2, 2010 denial letter that was served on the Board and parties, DEC issued a 1982 water quality certificate[3] that indicates that compliance with the joint SPDES permit issued contemporaneously for Units 2 and 3 at that time constituted compliance with the State's water quality standards. The proper inquiry on renewal is whether the facilities presently comply with State water quality standards. DEC cannot make such a determination based upon a SPDES permit that was last issued in 1987, particularly since that permit does not conform with existing legal requirements pertaining to Best Technology Available. The 1982 § 401 WQC does not consider several relevant and applicable State water quality standards to which the facilities are subject and for which the Department must make a determination as part of Entergy's current § 401 WQC application. In particular, compliance with the requirements of 6 NYCRR Parts 701 and 704 is not referenced in the 1982 § 401 WQC for Units 2 and 3. Consequently, Entergy may not rely upon the terms of the 1982 § 401 WQC in order to demonstrate its current compliance with State water quality standards.

New York State timely denied the Applicant's request for a § 401 certificate in 2010.

On April 2, 2010, the New York State Department of Environmental Conservation ("DEC" or the "Department") timely denied the joint application. DEC brought this denial to the Atomic Safety and Licensing Board's attention via a letter filed April 19, 2010,[4] to Staff's attention in its comments on Staff's Final Supplemental Environmental Impact Statement[5] and to the Director of License Renewal's attention in recent Entergy-initiated correspondence.[6] The Staff has recognized the State's denial in its Final Supplemental Environmental Impact Statement (FSEIS). *See* FSEIS at xv ("On April 2, 2010, the New York State Department of Environmental Conservation (NYSDEC) issued a Notice of Denial regarding the Clean Water Act Section 401 Water Quality Certification. Entergy has since requested a hearing on the issue, and the matter will be decided through NYSDEC's hearing process. If the operating licenses are not renewed then IP2 and IP3 must be shut down at or before the expiration date of their current operating licenses which expire September 28, 2013, and December 12, 2015, respectively.").

The Chair of the Indian Point Atomic Safety and Licensing Board, Judge McDade, stated

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[3] Further details about the history of the SPDES permit and water quality certificate are found in DEC's April 2, 2010 denial letter, annexed hereto.

[4] It does not appear that the NRC has uploaded this letter to its ADAMS public document repository. *See* http://adams.nrc.gov/wba/. The letter is attached, along with its cover emails to the relicensing service list, including the judges.

[5] New York State Department of Environmental Conservation Comments on the NRC Staff's Final Supplemental Environmental Impact Statement (June 21, 2011) ML11179A09.

[6] Letter, Commissioner Joseph J. Martens to Brian E. Holian (June 23, 2011) ML11181A151; Letter, John L. Parker to Brian E. Holian (July 15, 2011) ML11200A052.

during an April 19, 2010 prehearing conference that the Board could not speak to the impact of DEC's denial letter on the relicensing proceeding.[7] The State respectfully agrees with Chairman McDade. It is the State's position that decisions on and surrounding water quality certifications the State issues under the Clean Water Act, are outside the Atomic Safety and Licensing Board's authority and are an exclusive right and obligation granted to States by Congress.

The State and/or DEC have raised Indian Point's lack of a § 401 certificate numerous times in this proceeding

On May 26, 2011, DEC submitted the New York State Department Of Environmental Conservation Comments On The NRC Staff's Final Supplemental Environmental Impact Statement For The License Renewal Of Indian Point Units 2 And 3, Buchanan, New York alleging NEPA insufficiency because *The NRC Staff Failed to Acknowledge the Direct Impact of New York State's Denial of a Clean Water Act Section 401 Water Quality Certificate for the License Renewal of Indian Point*, On June 21, 2011 Entergy submitted a response to DEC's Comments to Staff's Final Supplemental Environmental Impact Statement (ML11179A092).

On June 23, 2011, the DEC Commissioner sent a letter to Brian Holian, Director of License Renewal stating that "Section 401 of the federal Clean Water Act (33 U.S.C. § 1341) requires Entergy, as an applicant for a federal license, to provide the NRC with a certification from the State of New York that its discharges into the Hudson River will meet all applicable State water quality standards. … As Commissioner of Environmental Conservation of the State of New York, I am informing you that the Department's Chief Permit Administrator acted on Entergy's application for the section 401 water quality certification within the one-year period proscribed by the Clean Water Act by denying that application. Therefore, not only has the State of New York not waived its opportunity to determine Entergy's application for a water quality certification, it has expressly denied that application." The Commissioner sent this letter in response to an Entergy letter to Mr. Holian which inaccurately stated that "NYSDEC has waived its opportunity to certify Entergy's compliance with state water quality standards by failing to act on Entergy's WQC application within one year as required by the Clean Water Act."[8]

On July 15, 2011, DEC again submitted a letter to Brian Holian to reiterate, in rebuttal to a point Entergy made in an intervening letter, that "[t]he Clean Water Act requires Entergy to obtain a section 401 Water Quality Certification in the context of the license renewal of Indian Point Units 2 and 3, Buchanan, New York. The Department has denied that application." DEC wrote a similar letter again on August 11, 2011.[9] Most recently, the State on February 9, 2012 advised the Board, in response to a Board order dated February 3, 2012 asking parties to advise

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[7] Transcript, Indian Point Prehearing Conference (Apr. 19, 2010), 899:15 – 900:1, ML101160416.

[8] Letter NL-11-073, from Fred Dacimo, Vice President Operations License Renewal, Entergy Nuclear Northeast, to Brian E. Holian, Director, License Renewal, U.S. Nuclear Regulatory Commission (June 21, 2011), at 2 (ML11175A165).

[9] Letter, John Parker, DEC Regional Counsel, DEC Region 3, to Brian E. Holian, Director, License Renewal, U.S. Nuclear Regulatory Commission (August 11, 2011) 11305A011.

on issues which could impact the hearing schedule, that

> The Indian Point facilities must obtain a State-issued permit for the intake and discharge of water pursuant to the Clean Water Act and the New York State Environmental Conservation Law and a State-issued certification pursuant to the Clean Water Act § 401 before NRC may issue operating licenses authorizing the operation of Indian Point Unit 2 and Indian Point Unit 3 beyond their initial 40-year term. As the Board is aware, the State has denied Indian Point's request for a Clean Water Act § 401 certification. In addition, Indian Point must receive a consistency determination from the State pursuant to the Coastal Zone Management Act before NRC may issue operating licenses authorizing the operation of Indian Point Unit 2 and Indian Point Unit 3 beyond their initial 40-year term.[10]

For all of the foregoing reason, the State and DEC believe that nothing further is required to satisfy the D.C. Circuit's exhaustion requirements and to the extent now required by the D.C. Circuit, that the State has put the Commission on notice of its obligation to ensure that the Applicant obtains a current § 401 water quality certificate prior to issuing a renewed operating license for Indian Point Units 2 and 3. As of the date of this writing, no such certificate exists.

Respectfully submitted,

Signed (electronically) by

Signed (electronically) by
Janice A. Dean
Assistant Attorney General
Office of the Attorney General
for the State of New York
120 Broadway, 26th Floor
New York, New York 10271
(212) 416-8459

Signed (electronically) by
Edward McTiernan
Deputy General Counsel
New York State Department of
Environmental Conservation
625 Broadway
Albany, New York 12233
(518) 402-9185

cc: The Atomic Safety and Licensing Board
All individuals, parties, and NRC offices on the Service List

Encl.

[10] State of New York Response to Board's Request for Information (Feb. 9, 2012) ML12040A356.