RIVERKEEPER.
NY's clean water advocate

July 26, 2012

VIA E-MAIL and U.S. MAIL

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Re: Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-247-LR, 50-286-LR

Dear Honorable Commissioners of the NRC:

The purpose of this correspondence is to echo and support the letter submitted to the Commission by the State of New York ("State") yesterday, July 25, 2012, relating to respective obligations of both the U.S. Nuclear Regulatory Commission ("NRC") and Entergy Nuclear Operations, Inc. ("Entergy") to comply with Clean Water Act ("CWA") § 401 in the above-referenced proceeding. In light of a ruling by the United States Court of Appeals for the District of Columbia Circuit (*Vermont Dep't of Public Service, et al. v. United States et al.*, No. 11-1168) concerning the issuance of an NRC renewed operating license for a nuclear power facility in

Vermont despite the absence of a CWA § 401 water quality certification ("WQC"), though clearly not pertinent to the Indian Point license renewal proceeding, the State's letter clarifies the record with respect to applicable requirements and relevant and distinguishable circumstances in the instant case.

Riverkeeper Inc. ("Riverkeeper") is a party-intervenor in the Indian Point license renewal proceeding currently pending before an Atomic Safety and Licensing Board ("ASLB"), as well as in New York State proceedings currently pending before a tribunal of the New York State Department of Environmental Conservation ("NYSDEC") concerning (1) Entergy's State Pollutant Discharge Elimination System ("SPDES") permit renewal application and (2) Entergy's discretionary appeal of NYSDEC's April 2010 denial of Entergy's request for a CWA § 401 WQC, which Entergy applied for in connection with the proposed license renewal of Indian Point. Riverkeeper has a paramount interest in the outcome of these proceedings and, accordingly, in the correct interpretation and understanding of the relevant legal framework and regulatory requirements stemming from CWA § 401.

Riverkeeper fully supports and agrees with the State's July 25, 2012 letter concerning these issues, and offers the following additional relevant information.

Entergy Must Obtain a New § 401 WQC to Support the License Renewal of Indian Point

First, Riverkeeper completely agrees with the State, and controlling law clearly dictates, that CWA § 401 requires Entergy to obtain a new WQC before NRC may issue a renewed operating license for Indian Point. The plain language of CWA § 401 states that

> [a]ny applicant for a Federal license or permit to conduct any activity . . . 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 . . . that any such discharge will comply with [applicable State water quality standards]."[1]

This requirement indisputably applies to license *renewal* applications,[2] and in particular, to applications to renew a nuclear power plant operating license.[3]

In relation to Indian Point, a SPDES permit, issued pursuant to CWA § 402, is not sufficient to demonstrate compliance with the WQC requirements of § 401. Riverkeeper agrees with the State that CWA § 401 involves a *separate*, broader, inquiry than the one implicated by CWA § 402. In particular, CWA § 401 requires an *independent* assessment of whether the proposed activity *as a whole* (not simply the discharge that is the subject of a § 402 SPDES permit), will comply with relevant State water quality standards, *and*, by virtue of CWA § 401(d), any *other* appropriate State standards beyond those specifically enumerated in the CWA; thus, the State's §

[1] Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1341.

[2] *S.D. Warren Co. v. Maine Board of Envtl. Prot.*, 547 U.S. 370, 380, 126 S.Ct. 1843 (2006).

[3] *See* 10 C.F.R. §§ 2.4, 50.54(aa), 54.33(c).

401 inquiry involves as assessment of whether the proposed activity complies with numerical criteria, designated best usages of the waterway, the State's antidegradation policy, and any other relevant water quality related standards, such as endangered species laws.[4]

Notably, Entergy's "current," i.e. administratively extended 1987 § 402 SPDES permit does not demonstrate Indian Point is currently, or will be, in compliance with all applicable State standards, as required by CWA § 401. Indeed, simply operating pursuant to a SPDES permit does not automatically ensure that a permittee is in compliance and will remain in compliance with all relevant requirements.[5] This is exemplified by the situation at Indian Point, where, despite the fact that Entergy holds a SPDES permit, the continued operation of the plant results in violations of various numerical and narrative water quality standards.[6] Moreover, as CWA §

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[4] *See PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700, 711, 714-15 (1994) (holding that § 401(d) expands state authority to enforce any appropriate state standards beyond the specific requirements of the Clean Water Act; finding that the certifying agency has to make sure that the project is "consistent with both components [of the WQS], namely the designated use and the water quality criteria."); *see also Chasm Hydro, Inc. v. State Dep't of Envtl. Conservation*, 14 N.Y.3d 27, 30, 32 (N.Y. 2010) (acknowledging that consistency with designated uses is part of § 401 WQC); *Niagara Mohawk Power Corp. v. State Dep't of Envtl. Conservation*, 82 N.Y.2d 191, 197, 200-01 (N.Y. 1993) (acknowledging that water quality standards consist of both designated uses and numerical criteria, and that the state's job in a § 401 certification review is to ensure compliance with such water quality standards); *Port of Oswego Auth. v. Grannis*, 897 N.Y.S.2d 736, 739 (N.Y. App. Div. 2010) (acknowledging that § 401 WQC requires ensuring that waters will not be impaired for their best usages); *In re Application for a SPDES Permit by Mirant Bowline*, 2002 N.Y. ENV LEXIS 22, *46 (2002) (DEC, in the context of issuing a permit for an electric generating facility using a cooling water intake structure, acknowledging that EPA had recognized that under § 401, a state may impose requirements "necessary to ensure attainment of water quality standards, including *designated uses*, criteria, and antidegradation requirements.") (emphasis added); *In re Application of Erie Boulevard Hydropower, L.P., for a 401 Water Quality Certification for the School Street Project*, 2000 ENV LEXIS 88, *4 (2000) (acknowledging the holding in *PUD* that a State may impose conditions on 401 certifications insofar as necessary to enforce a designated use contained in the State's water quality standard); U.S. Environmetnal Protection Agency, Office of Wetlands, Oceans, and Watercheds, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (April 2010 Interim), http://water.epa.gov/lawsregs/guidance/cwa/upload/CWA_401_Handbook_2010_Interim.pdf (hereinafter cited as "EPA Water Quality Protection Tool"), at 18, 21 (EPA explaining that once a CWA § 401 is triggered, "the scope of analysis . . . can be quite broad" and acknowledging that "[a]nother relevant consideration when determining if granting 401 certification would be appropriate is the existence of state or tribal laws protecting threatened and endangered species, particularly where the species plays a role in maintaining water quality or if their presence is an aspect of a designated use.").

[5] 6 NYCRR § 750-2.1(b) ("*Satisfaction of permit provisions notwithstanding, if operation pursuant to the permit causes or contributes to a condition in contravention of State water quality standards or guidance values, or if the department determines that a modification of the permit is necessary to prevent impairment of the best use of the waters or to assure maintenance of water quality standards* or compliance with other provisions of ECL Article 17, or the Act or any regulations adopted pursuant thereto (see section 750-1.24 of this Part), *the department may require such a modification* and the Commissioner may require abatement action to be taken by the permittee and may also prohibit such operation until the permit has been modified pursuant to section 621.14 of this title.") (emphasis added).

[6] *See generally* Letter from William R. Adriance (Chief Permit Administrator) to Dara F. Gray (Entergy), Re: Joint Application for CWA § 401 Water Quality Certification NRC License Renewal – Entergy Nuclear Indian Point Units 2 and 3 DEC Nos.: 3-5522-00011/00030 (IP2) and 3-5522-00105/00031 (IP3) *Notice of Denial* (April 2, 2010), *available at*, http://www.dec.ny.gov/docs/permits_ej_operations_pdf/ipdenial4210.pdf; Riverkeeper, Natural Resources Defense Council, and Scenic Hudson Petition for Full Party Status and Adjudicatory Hearing (July 20, 2010), *available at* http://www.riverkeeper.org/wp-content/uploads/2010/07/RK-NRDC-SH-Petition-for-Full-Party-Status-Indian-Point-401-WQC-scanned.pdf. For example, Entergy is not currently in compliance with the New

303 requires States to review and update their water quality standards every three years,[7] certain New York State water quality standards may have been added or changed since the issuance of the last SPDES permit for Indian Point; it is, thus, patently impossible for the State agency to ensure compliance with current State standards by relying on a decades-old permit. As the tribunal assigned to the appeal proceeding related to Entergy's request for a CWA § 401 WQC ruled, the argument "that the existing SPDES permit is sufficient to establish compliance with applicable water quality standards is not persuasive. The fact that the Facilities currently hold a SPDES permit does not ensure that the requirements of CWA Section 401 have been or will be satisfied."[8]

In a similar vein, the fact that a SPDES permit renewal proceeding is currently pending before NYSDEC and will ostensibly result in a renewed SPDES permit at some point in the future, also is not sufficient to demonstrate compliance with CWA § 401 in relation to the proposed license renewal of Indian Point. Such a position simply fails to acknowledge that the CWA § 401 regulatory framework provides for an inquiry that is broader than what is at issue in a NYS SPDES proceeding pursuant to CWA § 402.[9] Given the comprehensive nature of the § 401 process, reliance upon a § 402 discharge permit patently fails to provide the requisite demonstration needed for a WQC to issue. Notably, this reality has borne out in the actual Indian Point state-related proceedings: the Indian Point SPDES permit renewal proceeding and the Indian Point CWA § 401 appeal proceeding do not have complete identity. In the former, the focus is primarily on compliance with the specific water quality standard set forth in 6 NYCRR § 704.5(b), and parallel federal law pursuant to CWA § 316(b), requiring implementation of BTA; in contrast, the inquiry in the CWA § 401 appeal proceeding is broader, and involves a specific assessment of whether the continued operation of Indian Point will violate various designated uses of NYS waters, narrative water quality standards, and other relevant State laws.[10] In sum,

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York State requirement that all cooling water intake structures "reflect the best technology available ["BTA"] for minimizing adverse environmental impact." 6 NYCRR § 704.5(b). Entergy's "current" permit, originally issued about 25 years ago, was premised upon the Hudson River Settlement Agreement ("HRSA"), which allowed the owners of Indian Point to essentially defer installing what had been determined to be BTA, that is, closed-cycle cooling. While the HRSA subsequently expired, due to a series of administrative renewals, Indian Point has continued to operate pursuant to the 1987 SPDES permit, which did not mandate the installation of closed-cycle cooling. Thus, Entergy is not in compliance with existing legal requirements, notwithstanding the fact that it technically holds a SPDES permit. This is underscored by the fact that in 2003, DEC initiated a SPDES permit modification, currently pending, in order to ensure that Entergy comes into compliance with the BTA requirement and install a closed-cycle cooling system at Indian Point, precisely as New York State's regulations envision. *See* 6 NYCRR § 750-2.1(b).

[7] 33 U.S.C. § 1313.

[8] In the Matter of the Application of Entergy Indian Point Unit 2, LLC and Entergy Indian Point Unit 3, LLC for a Water Quality Certificate Pursuant to Section 401 of the Federal Clean Water Act and Section 608.9 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York, Ruling on Proposed Issues for Adjudication and Petitions for Party Status, DEC Application Nos. 3-5522-00011/00030 (IP2) and 3-5522-00105/00031 (IP3) (December 13, 2010), at 20, 21, *available at*, http://www.dec.ny.gov/hearings/70809.html ("Issues Ruling").

[9] *See supra* note 4; *see also* Issues Ruling, *supra* note 8 at 21 (DEC tribunal ruling that "[a]s [DEC] Staff and Riverkeeper observed, the CWA Section 401 inquiry is necessarily broader than the inquiry undertaken in connection with the Facilities' SPDES permit renewal and modification.").

[10] *See generally* Issues Ruling, *supra* note 8. For purposes of moving forward to an adjudicatory hearing, the proceedings were joined in a narrow respect, i.e., for the limited purpose of developing a joint record for instances

abiding by the ultimate outcome of an ongoing Indian Point SPDES proceeding does not provide the requisite demonstration that a 20-year operating license extension of Indian Point will comply with all relevant New York State standards and is not an appropriate substitute for the comprehensive assessment required by CWA § 401.

Likewise, a previously issued WQC for Indian Point cannot serve to demonstrate compliance with CWA § 401 in relation to the proposed relicensing of the plant. In particular, the last WQC issued for Indian Point, i.e., a 1982 certification, was premised upon the now-expired Hudson River Settlement Agreement, and, as a result, did *not* include an independent determination of compliance with all relevant water quality standards and other appropriate state laws.[11] In fact, the 1982 certification relies upon a SPDES permit that does not conform to existing legal requirements.[12] Thus, this past WQC does not address the relevant inquiry, and certainly does not prove that the operation of Indian Point *currently* complies, *or will* comply, with all relevant applicable state standards. Entergy must apply for and receive a new § 401 WQC in order to do so.

Overall, applicable law and regulatory requirements, as well as the factual circumstances surrounding the operation of Indian Point plainly dictate that a *new* WQC pursuant to CWA § 401 is necessary in order for Entergy to obtain extended operating licenses for Units 2 and 3.

The State of New York has Affirmatively and Timely Denied Entergy's Request for a New CWA § 401 WQC

Riverkeeper supports and reiterates the State's explanation that in relation to the proposed license renewal of Indian Point, the record unambiguously establishes that on April 2, 2010, NYSDEC affirmatively denied Entergy's request for the required *new* CWA § 401 WQC.[13] As such, there has been *no waiver* of the requirements of CWA § 401, contrary to the gross mischaracterizations made by Entergy to the NRC via letter dated June 21, 2011.[14]

As Riverkeeper explained via a letter to Brian E. Holian (Director of License Renewal) dated June 28, 2011,[15] the requirements of CWA § 401 may only be deemed waived when the State

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where evidence was common to both proceedings. *See* Memorandum from Maria E. Villa (Administrative Law Judge) to Service List, Re: Entergy Indian Point SPDES Proceeding/Section 401 Permit Proceeding (July 15, 2011) at 4.

[11] *See supra* note 6.

[12] *See id.*

[13] *See* Letter from William R. Adriance (Chief Permit Administrator) to Dara F. Gray (Entergy), Re: Joint Application for CWA § 401 Water Quality Certification NRC License Renewal – Entergy Nuclear Indian Point Units 2 and 3 DEC Nos.: 3-5522-00011/00030 (IP2) and 3-5522-00105/00031 (IP3) *Notice of Denial* (April 2, 2010), *available at*, http://www.dec.ny.gov/docs/permits_ej_operations_pdf/ipdenial4210.pdf.

[14] 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, ADAMS Accession No. ML11175A165.

[15] Letter from Deborah Brancato (Riverkeeper) to Brian E. Holian (Director of License Renewal, US NRC), Re: Indian Point Nuclear Generating Unit Nos. 2 & 3, Docket Nos. 50-247 and 50-286 (Clean Water Act § 401 Water Quality Certification) (June 28, 2011) (no apparent ADAMS Accession No.).

agency "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) . . . .".[16] In relation to the proposed federal operating license renewal of the Indian Point nuclear power plant, DEC received Entergy's application for § 401 certification on April 6, 2009. Less than a year later, on April 2, 2010, DEC *acted upon* this request by denying Entergy's application due to a number of violations of State water quality standards and other applicable State laws resulting from the proposed activity.[17] This action did not constitute a "proposed" denial and it is clear that DEC acted in precisely the manner contemplated by the plain language of the statute and controlling precedent and guidance.[18]

Entergy subsequently *chose* to dispute DEC's action and request a hearing in the matter. However, this has no bearing whatsoever on whether DEC properly acted upon Entergy's application within the statutory one-year time limit. Indeed, a hearing on a CWA § 401 determination is not mandated by New York State law, and had Entergy chosen not to take advantage of the administrative hearing process, there would be no possible question that DEC acted upon the § 401 application within the required one-year timeframe. As one State court aptly explains:

> Although the [applicant] had every right to pursue a review, we do not construe [CWA] 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.[19]

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[16] 33 U.S.C. § 1341(a)(1).

[17] As explained by DEC Commissioner Martens via letter dated June 23, 2011, DEC Chief Permit Administrator William Adriance, who issued the denial of Entergy's request for CWA § 401 WQC, is duly authorized to act on § 401 applications. Letter from Joseph J. Martens (DEC) to Brian E. Holian (NRC), Re: Indian Point License Renewal, Docket Nos. 50-247, 50-286, State of New York Denial, Clean Water Act Section 401 Water Quality Certification (June 23, 2011), at 1-2, ADAMS Accession No. ML11187A054.

[18] For example, EPA's CWA § 401 Handbook delineates the four options available to certifying agencies when reviewing a request for § 401 certification: "grant, condition, deny *or* waive." EPA Water Quality Protection Tool, *supra* note 4, at 9, 11 ("The central component of §401 certification is the state or tribe's decision to grant, condition, deny *or* waive certification. . . . States and tribes are authorized to waive §401 certification, either explicitly, through notification to the applicant, or by the certification agency not taking action) (emphasis added). Clearly, DEC took an appropriate action by denying the CWA § 401 certification request within the statutory time limit. Moreover, the time limit set forth in CWA § 401 "was meant to ensure that 'sheer inactivity by the State . . . will not frustrate the Federal application.'" *Alcoa Power Generating, Inc. v. FERC*, 2011 U.S. App. LEXIS 9041, *25 (D.C. Cir. 2011) (citing House Conference Report, H.R. Rep. 91-940) ("[T]he purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under *Section 401*"); *see also Little Lagoon Pres. Soc'y, Inc. v. United States Army Corps of Eng'rs*, 2008 U.S. Dist. LEXIS 66557, *70 (S.D. Ala. Aug. 29, 2008) ("Congress built a waiver mechanism into the CWA [§ 401] to prevent state agencies from exercising a pocket veto by sitting on certification requests indefinitely without making a decision, leaving the proposed project to die on the vine). This is clearly not the case here, where DEC actively sought necessary information in order to perform the appropriate assessment pursuant to CWA § 401, and then ultimately made a formal determination on Entergy's application on April 2, 2010.

[19] *City of Klamath Falls v. Envtl. Quality Comm'n.*, 119 Or. App. 375, 377-78, 851 P.2d 602, 604 (Or. Ct. App. 1993); *see also FPL Energy Main Hydro LLC v. Dept. of Envtl. Prot.*, 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

If this rationale did not prevail, project applicants could make calculated moves to avoid the requirements of CWA § 401 altogether by essentially extending the process to force a manufactured waiver. This would completely contravene the entire purpose of CWA § 401, and deny States their right and authority to perform an assessment of whether or not proposed federal projects comply with relevant State regulations, laws, and standards. It is, thus, clear that the administrative hearing process does not have to be completed in order for DEC's April 2, 2010 denial to be considered the requisite "action" on Entergy's CWA § 401 application.[20]

Thus, the requirements of CWA § 401 have clearly not been waived in relation to the proposed relicensing of Indian Point.

The Necessity of a CWA § 401 WQC Has Been Raised in the Indian Point License Renewal Proceeding

Lastly, as discussed in the State's July 25, 2012 letter, the record in the Indian Point license renewal proceeding before the NRC clearly reflects the fact that Entergy currently lacks, and must obtain, a CWA § 401 WQC prior to obtaining extended operating licenses for Units 2 and 3.

Indeed, since the inception of the proceeding, all parties involved have, at various junctures, acknowledged and discussed the necessity for and/or status of Entergy's application for a CWA § 401 WQC to support the proposed relicensing of Indian Point. This includes, but is not limited to, the following:

- In Entergy's Environmental Report, submitted as part of Entergy's License Renewal Application dated on or about April 30, 2007, Entergy acknowledged that "NYSDEC has taken the position that it will require submission of an application for a *new* state water quality (401) certification in conjunction with the license renewal application" and that "[t]o initiate the approval process, Entergy will file the Joint Application for Permit with the NYSDEC for the water quality certification at a date determined by the NYSDEC";[21]
- In NRC Staff's draft supplemental environmental impact statement concerning Indian Point license renewal, dated December 2008, NRC Staff discussed NYSDEC's authority to make a determination relating to a water quality certification for the Indian Point license renewal proceeding;[22]

Congress intended for all in-state appeals to be completed within the same [CWA] one-year deadline. If Congress intended to impose such extreme time pressure, it would have used specific language to that effect.").

[20] *See, e.g., Alcoa Power Generating, Inc. v. FERC*, 2011 U.S. App. LEXIS 9041, *29 (D.C. Cir. 2011) ("Nowhere in *Section 401* is it stated that a certification must be fully effective prior to the one-year period much less prior to licensing; it requires only that a State 'act' within one year of an application and that a certification be 'obtained.'").

[21] Entergy's License Renewal Application, Appendix E, Applicant's Environmental Report § 9.4, *available at* http://www.nrc.gov/reactors/operating/licensing/renewal/applications/indian-point/2-ipec-lra-appendix-e_3-9.pdf.

[22] Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Volume 1, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Draft Report for Comment, Docket Nos. 50–247 and 50–286 (December 2008) at 4-8.

- Via letter dated April 19, 2010, NYSDEC informed the ASLB about NYSDEC's April 2, 2010 denial of Entergy's request for a CWA § 401 WQC;[23]
- During a conference call among the parties to the Indian Point license renewal proceeding convened on April 19, 2010, a representative of Riverkeeper informed the tribunal about NYSDEC's April 2, 2010 denial of Entergy's request for a CWA § 401 WQC; notably, the ASLB indicated that it could not speak to the impact of DEC's denial on the license renewal proceeding;[24]
- In NRC Staff's final supplemental environmental impact statement concerning Indian Point license renewal, dated December 2010, NRC Staff, at various locations, discussed NYSDEC's April 2, 2010 denial of Entergy's request for a CWA § 401 WQC, Entergy's request for a hearing related to that determination, and how "the matter will be decided through NYSDEC's hearing process;[25]
- On May 26, 2011, NYSDEC submitted comments to NRC on NRC Staff's final supplemental environmental impact statement concerning Indian Point license renewal; these comments discussed NYSDEC's April 2, 2010 denial of Entergy's request for a CWA § 401 WQC and NRC Staff's failure to adequately acknowledge the impact of this denial;[26]
- On June 23, 2011, in response to a letter from Entergy concerning an alleged waiver of the requirements of CWA § 401 in the Indian Point case (dated June 21, 2011), NYSDEC Commissioner Martens submitted a letter to the NRC Director of License Renewal reiterating NYSDEC's position that CWA § 401 requires a WQC in relation to the relicensing of Indian Point, and explaining how the State of New York clearly denied Entergy's application for such a WQC and had not waived its opportunity make a CWA § 401-related determination;[27]
- On June 28, 2011, Riverkeeper submitted a letter to the NRC Director of License Renewal, likewise in response to Entergy's allegations regarding waiver, explaining

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[23] Letter from J.L. Matthews (DEC) to ASLB, Re: License Renewal Proceeding for Indian Point Nuclear Generating Station, Unit 2 and 3, Docket Nos. 50-247 and 50-286, ASLBP No. 07-858-03-LR-BD01 (April 19, 2010).

[24] Transcript, Indian Point Prehearing Conference (Apr. 19, 2010), 899:15 – 900:1, ADAMS Accession No. ML101160416.

[25] Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Volume 1, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Docket Nos. 50–247 and 50–286 (December 2010), *available at* http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/supplement38/, at xv ("Two state-level issues (consistency with State water quality standards, and consistency with State coastal zone management plans) need to be resolved. 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."); *see id.* at xvii-xviii, 1-8, 2-27, 4-8 to 4-9, 4-30, 8-3, 9-5, A-151.

[26] New York State Department of Environmental Conservation Comments on the NRC Staff's Final Supplemental Environmental Impact Statement (May 26, 2011), ADAMS Accession No. ML11159A236.

[27] Letter from Commissioner Joseph J. Martens (DEC) to Brian E. Holian (NRC) (June 23, 2011), ADAMS Accession No. ML11187A054.

NYSDEC's clear denial of Entergy's application for CWA § 401 WQC and how the State had not waived any rights with respect to CWA § 401;[28]

- On July 15, 2011 and August 11, 2011, in response to additional correspondence from Entergy, NYSDEC again submitted letters to the NRC Director of License Renewal reiterating Entergy's obligation to obtain a WQC pursuant to § 401, and NYSDEC's explicit denial of Entergy's request for the necessary certification;[29]
- In response to an ASLB request for information about matters that may affect the hearing schedule in the Indian Point license renewal proceeding, on February 9, 2012, Riverkeeper informed the ASLB about the ongoing nature of the CWA § 401 WQC proceeding.[30] In response to the same request, the State informed the ASLB that an issue that may impact the hearing schedule in the proceeding was the fact that Entergy must obtain the necessary CWA § 401 WQC *before* NRC may issue renewed operating licenses, and that Entergy had yet to do so since NYSDEC had denied Entergy's application for such a certification;[31]

Thus, the parties in the Indian Point proceeding have amply presented and reserved the well-supported position that compliance with CWA § 401 is a prerequisite for the relicensing of Indian Point, and that Entergy has yet to obtain the necessary WQC.

For the reasons described in the State's July 25, 2012 letter and above, Riverkeeper concurs with the State that, to the extent it is now necessary in light of the D.C. Circuit court's recent ruling, the Commission is on notice of its responsibility to ensure that Entergy acquires a new CWA § 401 WQC prior to NRC issuing renewed operating licenses for the Indian Point reactors.[32]

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[28] Letter from Deborah Brancato (Riverkeeper) to Brian E. Holian (Director of License Renewal, US NRC), Re: Indian Point Nuclear Generating Unit Nos. 2 & 3, Docket Nos. 50-247 and 50-286 (Clean Water Act § 401 Water Quality Certification) (June 28, 2011) (no apparent ADAMS Accession No.).

[29] Letter from John L. Parker (DEC) to Brian E. Holian (NRC), (July 15, 2011), ADAMS Accession No. ML11200A052; Letter from John Parker (DEC) to Brian E. Holian (NRC) (August 11, 2011) (ADAMS Accession No. ML11305A021).

[30] Riverkeeper, Inc.'s Response to Atomic Safety and Licensing Board Request for Information (February 9, 2012), at 3, ADAMS Accession No. ML12040A354.

[31] State of New York Response to Board's Request for Information (February 9, 2012), ADAMS Accession No. ML12040A356.

[32] Please note, this letter is not intended to constitute a concession or acknowledgement that the Commission properly has jurisdiction to make determinations with respect to a license renewal applicant's compliance with CWA § 401, but is instead offered to clarify relevant facts and circumstances in light of the recent appellate court decision. Indeed, it is Riverkeeper's position that decisions relating to CWA § 401 are not properly within the purview of the NRC, but rather, are solely within the authority of the State, as a specific right granted by the U.S. Congress. *See S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 373, 385 (2006) (describing CWA § 401 as the prime bulwark" of the cooperative federalism scheme envisioned by the United States Congress in the CWA and as essential for preserving critical state authority over relevant water quality related issues).

Thank you for your consideration.

Respectfully submitted,

Signed electronically by Deborah Brancato
Deborah Brancato
Staff Attorney

Signed electronically by Phillip Musegaas
Phillip Musegaas, Esq.
Hudson River Program Director

cc: Indian Point Service List via NRC EIE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos.
	)	50-247-LR
Entergy Nuclear Operations, Inc.	)	and 50-286-LR
(Indian Point Nuclear Generating	)	
Units 2 and 3)	)	July 26, 2012
	)	

CERTIFICATE OF SERVICE

I certify that on July 26, 2012 copies of Riverkeeper's letter to the Commission regarding Clean Water Act § 401 water quality certification were served via hard copy and e-mail on the Commissioners listed below and the Secretary of the Commission, and electronically via the Electronic Information Exchange on the other recipients listed below:

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Signed (electronically) by Deborah Brancato
Deborah Brancato

July 26, 2012