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Fred Dacimo
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NL-12-112

August 6, 2012

NRC Chairman and Commissioners
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission
ATTN: Document Control Desk
Washington, DC 20555-0001

SUBJECT: Clean Water Act Section 401 Water Quality Certification Waiver
Indian Point Nuclear Generating Unit Nos. 2 & 3
Docket Nos. 50-247 and 50-286
License Nos. DPR-26 and DPR-64

REFERENCES:

1. Entergy Letter from Fred Dacimo to Brian E. Holian, NRC, "Clean Water Act Section 401 Water Quality Certification Waiver" (June 21, 2011) (NL-11-073) (ML11181A151)
2. Entergy Letter from Fred Dacimo to Brian E. Holian, NRC, "Clean Water Act Section 401 Water Quality Certification Waiver" (June 30, 2011) (NL-11-081) (ML11193A060)
3. Entergy Letter from Fred Dacimo to Brian E. Holian, NRC, "Clean Water Act Section 401 Water Quality Certification Waiver" (July 29, 2011) (NL-11-093) (ML11222A046)
4. Entergy Letter from Fred Dacimo to Brian E. Holian, NRC, "Clean Water Act Section 401 Water Quality Certification Waiver" (Sept. 13, 2011) (NL-11-105) (ML11265A225)

Dear Chairman Macfarlane and Commissioners:¹

Entergy Nuclear Operations, Inc. ("Entergy") received a copy of a letter to you dated July 25, 2012 and signed by Janice A. Dean, Assistant Attorney General for the State of New York and Edward McTiernan, Deputy General Counsel of the New York State Department of Environmental Conservation (the "July 25 Letter"). In this correspondence, Entergy responds briefly to the July 25 Letter and provides updated information regarding the status of ongoing administrative adjudicatory proceedings before Administrative Law Judges of the New York State Department of Environmental

¹ This letter is addressed to the Commissioners because it responds to a letter that was addressed to them. Ordinarily Entergy would address correspondence regarding a pending proceeding to Staff and, where a Board has been empanelled, to the ASLB and parties.

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Conservation (“NYSDEC”) that are necessary for NYSDEC to reach a final determination under Section 401 of the Clean Water Act and New York law.²

The July 25 Letter addresses matters pending before various agencies including the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) Staff. As a threshold matter, Entergy notes that the July 25 Letter does not raise any issues that are ripe for the Commission to address in the context of the ongoing Indian Point license renewal proceeding. More specifically, the July 25 Letter “again” purports to “notify the Commission” of the State of New York’s position that “a new §401 certificate is required” before the NRC may issue the renewed operating licenses sought in this proceeding and that “New York State timely denied the Applicant’s request for a § 401 certificate in April 2010.” July 25 Letter at 1-2. Entergy has explained in References 1 through 4 why no new § 401 certificate is required for purposes of Indian Point license renewal, citing the one-year deadline for final state action and express waiver provisions set forth in the Clean Water Act (see Section 401(a)(1), 33 U.S.C. § 1341(a)). We do not repeat those arguments here, as the dispute to which they pertain is not pending before the Commission itself.

The July 25 Letter also refers to “NYSDEC’s hearing process” without addressing the status of that process. July 25 Letter at 4. For purposes of clarity and completeness, Entergy notes that the referenced hearing process consists of consolidated evidentiary hearings before NYSDEC Administrative Law Judges on two matters, one relating to NYSDEC staff’s “tentative” draft water discharge permit issued in November 2003 and another relating to NYSDEC staff’s draft water quality certification denial issued in April 2010.

Since October 2011, hearings have been held on certain of the issues set for adjudication before NYSDEC. Issues relating to what NYSDEC staff and other intervenors, including Riverkeeper, may propose as “best technology available” for minimizing any adverse environmental impacts from impingement and entrainment of aquatic organisms remain to be identified by those parties and then litigated. While the trial has been conducted at least in part on certain issues (*e.g.*, radiological, best usages, and Entergy’s proposed best technology available), several issues remain to be assessed and, if the ALJs so determine, adjudicated (*e.g.*, thermal considerations, for which NYSDEC Staff and Entergy agree that compliance has been demonstrated, and endangered species matters, for which NYSDEC Staff have indicated they expect to issue a permit to Entergy). As a result, there is little expectation the NYSDEC proceedings will be resolved in the near future.

Finally, the July 25 Letter states the authors’ “belie[f]”:

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.

July 25 Letter at 6. To the extent the July 25 Letter raises the question whether New York State has exhausted its remedies, that question is premature.

² Another intervenor in the above-referenced proceeding, Riverkeeper, later wrote the Commission to “echo and support” the July 25 Letter. See letter, Deborah Brancato to Honorable Allison M. Macfarlane, July 26, 2012, at 1.

Should the NRC have any questions or require additional information regarding this issue, please contact me at (914) 254-2055.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Fred Dan". The signature is fluid and cursive, with a large, prominent "D" at the end.

FRD/cbr

cc: Mr. Brian E. Holian, Director, License Renewal
Mr. William Dean, Regional Administrator, NRC Region I
Mr. Douglas Pickett, NRR Senior Project Manager
Mrs. Bridget Frymire, New York State Public Service Commission
NRC Resident Inspector's Office
Mr. Sherwin Turk, NRC Office of General Counsel

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