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From: Edward F. McTiernan, NYS DEC

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New York State Department of Environmental Conservation
Office of General Counsel, 14th Floor
625 Broadway, Albany, New York 12233-1500
Fax: (518) 402-9018
Website: www.dec.ny.gov



Joe Martens
Commissioner

August 20, 2012

Cindy Bladey
Chief, Rules, Announcements, and Directives Branch
Office of Administration
Mail Stop: TWB-05-B01M
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Re: Draft Supplement to Supplement 38 to the Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Draft Report for Comment dated June 2012 (NUREG-1437; Supplement 38, Vol. 4); 77 Fed. Reg. 40091 (July 6, 2012)

Dear Ms. Bladey:

On behalf of the New York State Department of Environmental Conservation ("NYSDEC"), please accept the following comments regarding the U. S. Nuclear Regulatory Commission's ("NRC") *Draft Supplement to Supplement 38 to the Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Draft Report for Comment* dated June 2012 (NUREG-1437; Supplement 38, Vol. 4) ("Draft Report"). NYSDEC appreciates the efforts of NRC Staff to augment the record of the Final Supplemental Environmental Impact Statement so that it may consider new data, analyses, and comments from various sources. Although NYSDEC Staff concur with NRC Staff's conclusions in some respects, NRC Staff's decision to continue its reliance on out of date entrainment and impingement data, without requiring production of more current data into the record and incorporating that into its analysis to make its findings with respect to entrainment and impingement impacts is inconsistent with the National Environmental Policy Act ("NEPA") and associated Council on Environmental Quality ("CEQ") and NRC regulations and reflects a fundamental error in regulatory judgment that infects other aspects of the NRC's relicensing review. Moreover, NRC Staff should expand the scope of its environmental review and include a thorough analysis of the environmental impacts of severe accidents at the Indian Point facilities on water resources and the alternatives to mitigate such impacts.

NRC Staff's Draft Report corrects a mathematical error concerning entrainment and impingement field data (see "Technical Review of FSEIS for Indian Point Nuclear Generating Unit Nos. 2 and 3" [AKRF 2011b]). However, this correction overlooks the fact that the foundational data base for entrainment and impingement at Indian Point Units 2 and 3 is more than 25 years old and out of date (i.e., entrainment or impingement data have not been collected at Indian Point since 1987), providing an inadequate basis for determining the gravity and harm to be accorded to this adverse environmental impact under NEPA.

NRC Staff's expressed purpose in this stage of its NEPA review was to conduct an analysis that is "more holistic than a general fisheries biology approach." However, the data on which NRC Staff appears to rely and the approach that NRC Staff undertook in the June 2012 Draft Report was precisely that: a general fisheries approach, relying heavily on the Hudson

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River Monitoring Program data. See Final Supplemental EIS, at H-13. The underlying analytical error committed by NRC Staff during this review process was that it failed to obtain appropriate and timely data to accomplish this stated purpose. Thus, NRC's NEPA analysis has necessarily failed to accomplish that goal.

A full and complete NEPA analysis requires that a thorough and temporally relevant study be conducted to collect data for determining the potential impacts of entrainment and impingement over the proposed relicensing term. NRC regulations contemplate preparing a supplement to a final environmental impact statement when, in NRC Staff's opinion, preparation of a supplement will further the purposes of NEPA. 50 C.F.R. § 51.92(b); 40 C.F.R. §§1500.1(b), 1502.22, 1502.24. (CEQ regulations provide that, when an agency is conducting an EIS, it must make clear where there are gaps in relevant information due to incomplete or unavailable information and take steps to remedy such gaps or, relevant information cannot be obtained, identify its relevance to evaluating the reasonably foreseeable significant adverse impacts on the human environment [40 C.F.R. §1502.22], and must insure the "professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements." [40 C.F.R. §1502.24]). See also the Draft Report, Executive Summary, p. ix.

The NRC is thus obligated to ensure the timeliness, currency and quality of data supporting its NEPA analyses. However, NRC Staff have not required Entergy to perform the aforesaid data gathering; NYSDEC brought this fundamental failure to expand the data base to the NRC's attention in its May 26, 2011 comments on the Final Supplemental EIS for the License Renewal for Indian Point Unit Nos. 2 and 3 on pages 18 and 19. Current assessment is critical. The Hudson River's fish community and habitat has changed significantly since the 1980s, and the NRC's failure to require that the applicant produce data reflecting those changes necessarily undermines the integrity of any entrainment and impingement impact analysis with respect to Indian Point.

In the NEPA context, courts have consistently rejected the use of data more than ten years old, that measures a vital aspect of the cumulative environmental effects of past and current usage, or affects a decision resulting in a serious environmental impact. See, e.g. *Lands Council v. Forester of Region One of the United States Forest Serv.*, 395 F.3d 1019, 1031 (9th Cir. 2005) (holding that the use of 13-year-old trout habitat information prevented an accurate impact assessment of the project); *Sierra Club v. U.S. Dep't of Agriculture*, 1995 U.S. Dist. LEXIS 21507, *39 (S.D. Ill. Sept. 25, 1995) (rejecting the use of 10-year-old songbird population data when more recent data should have been gathered).

Courts have also been hesitant to approve decisions based on old data that is vital in determining the cumulative effect of past and current land use. For example, the U.S. Court of Appeals for the 9th Circuit has confirmed the need for a supplemental EIS where new scientific evidence about the impact of logging on the survival of the Northern Spotted Owl was available. See, *Portland Audubon Society v. Babbitt*, 998 F.2d 705 (9th Cir. 1993). Lacking that information, including recent scientific developments, "[t]he existing Timber Management Plans [did] not adequately address the impact of the individual planned timber sales on the survival of the northern spotted owl subspecies." *Id.* at 709. In *Lands Council*, the court cited the importance of evidence of current conditions in determining the cumulative effect of past and current timber harvesting on trout habitat and population, finding "the data about the habitat of the Westslope Cutthroat Trout was too outdated to carry the weight assigned to it." *Lands Council*, 395 F.3d at 1031. Similarly, in *Sierra Club* the court took issue with the use of outdated songbird population data, which was used as an indicator to monitor population trends in general. *Sierra Club*, LEXIS at *39. Also, the U.S. District Court for the District of Washington rejected data precisely because it pre-dated the effects on at-risk species of

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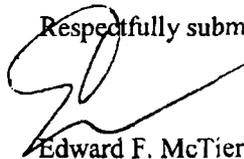
disturbances caused by timber harvesting, and required the agencies involved to conduct full, accurate species reviews on all species protected by the "Survey and Manage" program before it could be eliminated. *Conservation Northwest v. Rey*, 674 F. Supp. 2d 1232, 1252-1253 (D. Wash. 2009).

Here, the 1987 data relied on by NRC Staff concerning the environmental impacts caused by Indian Points Unit 2 and Unit 3 diversion of water is obviously stale and universally recognized by regulators to be out of date, yet NRC Staff has not informed its own environmental analysis and decision making by requiring the submission of current, more relevant data. Without serious consideration of data representing the present impacts associated with entrainment and impingement from Indian Point Unit 2 and Unit 3, the NRC's final NEPA analysis and NEPA recommendation regarding Entergy's application for license extension will not be supported by sufficient and more accurate scientific information.

Accordingly, the NYSDEC therefore respectfully requests that NRC forego finalization of the Draft Report and direct Entergy to obtain comprehensive and timely data and to allow a meaningful assessment of the current nature and extent of adverse impacts from Indian Point Unit 2 and Unit 3 associated with entrainment and impingement.

Moreover, given the impacts caused by the recent multi-reactor severe accidents in Japan, the NYSDEC respectfully requests that NRC review the potential environmental impacts of severe accidents involving the Indian Point reactors and spent fuel pools on surface waters and drinking water resources in the 50 miles surrounding the Indian Point site and explore alternatives to mitigate such impacts.

Respectfully submitted,



Edward F. McTiernan
Deputy Counsel

cc: IndianPoint.EIS@NRC.gov