

April 26, 2013

VIA FEDEX

Ms. Kathleen M. Moser
Assistant Commissioner
Office of Natural Resources
New York State Department of Environmental
Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1010

Re: **Correspondence to Dr. Amy Hull at the Nuclear Regulatory Commission**

Dear Assistant Commissioner Moser:

Indirectly, we have received your March 25, 2013 correspondence to Dr. Amy Hull, Branch Chief of the Division of License Renewal for the Nuclear Regulatory Commission ("NRC") with respect to the National Marine Fisheries Service's ("NMFS") January 30, 2013 Biological Opinion and Incidental Take Statement relating to Indian Point. We understand from New York State Department of Environmental Conservation ("NYSDEC") staff that your correspondence is primarily intended to memorialize an area of disagreement between NYSDEC and NMFS regarding the federal agency's listing of Atlantic Sturgeon within New York State. Nonetheless, inasmuch as your correspondence is directed to NRC and relates to Indian Point, several corrections or clarifications are warranted. As such, on behalf of Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC and Entergy Nuclear Operations, Inc. (collectively, "Entergy"), this correspondence provides the necessary information to your office, to NRC and to NMFS.

By way of background, since 1979, Indian Point has possessed, and not exceeded, the take numbers set forth in NMFS' official biological opinion for shortnose sturgeon, as provided in sworn testimony to the United States Environmental Protection Agency ("USEPA"). *See, e.g.*, January 30, 2013 Biological Opinion/Incidental Take Statement ("BiOp/ITS") for Indian Point, p. 5 (recording, but distancing current NMFS decision makers from, the May 14, 1979 sworn testimony of Dr. Dadswell as "NMFS 'Biological Opinion on the impact of the utilities once through cooling system[s] on shortnose sturgeon,'" including a "no jeopardy" conclusion for Indian Point prior to implementation of the current

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Ristroph screen and fish return system). During the more than three decades of Indian Point operations, the shortnose sturgeon population has increased by approximately 400% to a status that NYSDEC and NMFS classify as relatively healthy. *See, e.g., id.* at p. 39 (also, referencing the “dramatic increase in abundance” and the fact that “[t]he best information available on the current status of the Hudson River population ... suggests the population is relatively healthy, large and particular in habitat use and migratory behavior.”) (citations omitted). Consistent with this undisputed information, on October 14, 2011, NMFS issued its then-final BiOp/ITS for shortnose sturgeon during the license renewal period. NYSDEC neither challenged, nor disputed that BiOp/ITS.

After issuing Indian Point’s October 14, 2011 BiOp/ITS for shortnose sturgeon, NMFS proposed the listing of Atlantic sturgeon, including in the Hudson River. NYSDEC officially opposed NMFS’ listing of Atlantic sturgeon as endangered. *See, e.g.,* February 3, 2011 correspondence from NYSDEC’s then-Assistant Commissioner for the Office of Natural Resources Chris Amato to NMFS Assistant Regional Administrator Mary Colligan (“The Hudson stock is arguably the largest stock of Atlantic sturgeon on the Atlantic coast. Juvenile abundance appears to have increased since New York State closed the sturgeon fishery in 1996 and mature fish are becoming *common*.”) (Emphasis supplied). Despite NYSDEC’s opposition, NMFS’s listing became effective on April 6, 2011, after which NMFS reopened its October 14, 2011 BiOp/ITS to consider Atlantic sturgeon, issuing a superseding final BiOp/ITS addressing both shortnose and Atlantic sturgeon on January 30, 2013.

NMFS’s January 30, 2013 BiOp/ITS reflects the undisputed scientific evidence that: (1) Indian Point does not entrain either sturgeon species, *see, e.g.,* January 30, 2013 BiOp/ITS, pp. 58-62 (“there is no probability of entrainment” of eggs, and likewise none for larvae, of either species); and (2) Indian Point’s impingement technology, consisting of state-of-the-art Ristroph screens and fish return systems designed under the direction and oversight of NYSDEC staff and in collaboration with Riverkeeper’s then-technical expert, does not result in impingement mortality, but rather safely and promptly “rescues” live sturgeon to the River. *Id.* at p. 14 (*quoting* Riverkeeper’s Dr. Ian Fletcher’s statement in his 1990 peer-reviewed, published paper characterizing Indian Point’s system as “the screening device most likely to impose the least mortalities on rescue of entrapped fish by mechanical means”). In short, there is no credible scientific support for the claim that Indian Point’s past operations have resulted or future operations will result in entrainment or impingement mortality to shortnose or Atlantic sturgeon.

Viewed in this context, the March 25, 2013 correspondence (the “Letter”), which appears not to have the benefit of input from Entergy or NYSDEC staff familiar with Indian Point operations and the pending SPDES and WQC proceedings, merits response. For ease, each point below corresponds to those numbered arguments in the Letter.

First, although unrelated to the January 30, 2013 BiOp/ITS, the Letter offers your office’s perspective on Indian Point’s water quality certification (“WQC”) status. That perspective contradicts the facts. It is undisputed that, on April 2, 2010, NYSDEC staff provided a proposed WQC Notice of Denial that

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precipitated a flurry of challenges from a variety of parties, including New York City, Westchester County, the Town of Cortlandt, Riverkeeper and Entergy. It is likewise undisputed that certain aspects of the WQC proceeding remain pending before two NYSDEC-appointed Administrative Law Judges (“ALJs”), the adjudication of which and recommended decision to the NYSDEC Commissioner’s designee, absent waiver or other NRC exemption determinations, is required for any final NYSDEC WQC. *See, e.g.*, August 10, 2008 Interim Decision, pp. 25-26 (“*This proceeding is the appropriate forum for a final BTA determination ...*”) and determining NYSDEC staff’s proposed SPDES conditions 28(c) and (d) “moot”) (emphasis supplied). Thus, the suggestion that NYSDEC has selected BTA for Indian Point is incorrect, and the reconfiguration, if any, of Indian Point’s cooling water intakes structures (“CWIS”) that is necessary to meet New York State water quality standards remains for the ALJs to adjudicate and then for the NYSDEC Commissioner’s designee to finally determine (in a WQC). In any event, NYSDEC’s failure to issue a final WQC within the timeframe required by the federal Clean Water Act already is squarely before NRC staff. The Letter’s efforts to bolster NYSDEC’s flawed waiver position have no place in the discussion regarding the final BiOp/ITS and, if they are to be made, should be directed to NRC staff hearing the waiver matter.

Second, we must disagree with the Letter’s suggestion that NMFS must consult with NYSDEC and failed to do so here. While we are aware of no such requirement, we are aware both that NYSDEC staff participated in the publicly noticed consultation with NMFS and provided written comments to NMFS on NMFS’s draft October 14, 2011 BiOp/ITS. *See* January 30, 2013 BiOp/ITS, p. 6 (referencing written comments received by New York State). Further, NYSDEC’s role in such matters historically has been minimal. Indeed, the current, effective Cooperative Agreement between NMFS and NYSDEC, entered into in April 1992 and last renewed in January 2010) expressly reserves to NMFS principal authority with respect to issuance of “take” permits. *See, e.g., National Marine fisheries Service Instruction 02-111-03 (April 20, 1992, renewed January 2010)*, 2(a) (“NYSDEC agrees not to engage in, or to issue a permit authorizing the taking of resident Federally listed endangered or threatened fish or wildlife ... without the prior issuance of a permit to the applicant by [NMFS]”). Indeed, NYSDEC counsel’s recent statement to the ALJs in a status conference related to the Indian Point SPDES and WQC proceedings underscores NYSDEC’s effective deferral to NMFS, including for the Hudson River power plants. The relevant portion of the exchange between NYSDEC counsel and the ALJs, as reflected in the transcript of that status conference, follows:

17 ALJ VILLA: Yes. I’m talking about
 18 Interrogatory Number 6, identify each and every
 19 person and/or entity who has applied to the
 20 Department for an incidental take permit pursuant to
 21 New York ECL Article 11 to take sturgeon in the
 22 Hudson. Is that a limited universe or is that a
 23 broad universes, if you know?
 24 MR. SANZA: That would be limited,

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1 because a lot of these applications might not have
2 been to DEC for Article 11, but they would have been
3 in conjunction with NMF, permits for take to NMFS,
4 National Marine Fisheries Service, under the
5 Endangered Species Act, Federal ESA permits. For
6 instance, I believe both the Dynegy Danksammer and
7 Dynegy Roseton plants have incidental take permits
8 from NOAA NMFS. *There would be no need for the DEC*
9 *to issue an endangered species permit for sturgeon*
10 *when they already have a permit to do that from the*
11 *Feds.*
12 *ALJ VILLA: So an Article 11 permit*
13 *would be duplicative of some federal authorization?*
14 *MR. SANZA: Right.*
15 *ALJ VILLA: All right.*

*In the Matter of Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC,
and Entergy Nuclear Operations Inc.'s Joint Application for CWA § 401 Water
Quality Certification, DEC App. Nos. 3-5522-00011/00030 (IP2) and 3-5522-00105/00031 (IP3), February
18, 2011 Status Conference, pp. 19-20 (Emphasis supplied).*

Viewed in this light, the notion that NMFS's issuance of its BiOp/ITS sidestepped NYSDEC's rights is inaccurate, unreasonable, and directly at odds with NYSDEC staff's position in the WQC proceeding.

Third, the Letter asserts, but provides no technical support for the statement, that water usage and impingement are not correlated for species, such as sturgeon, easily capable of avoiding the Indian Point cooling water withdrawals. The Letter is in error. NMFS properly determined that sturgeon subject to being collected and released, including in Indian Point's Ristroph screen and fish return system, are expected to consist largely of: (1) dead or moribund adult or large juveniles discarded by commercial or recreational fisherman as bycatch, or (2) smaller juveniles that are returned promptly and safely to the River. *See, e.g.,* January 30, 2013 BiOp/ITS, pp. 64 (linkage "reasonable"); 67 ("the only impingement at the trash racks that we anticipate is adult or large juvenile shortnose sturgeon that are dead or stressed"); ("shortnose sturgeon older than one year and larger than 28cm long should be able to avoid impingement"); 82-83 (comparable findings for Atlantic sturgeon, which are larger and less frequently in the Hudson River during their lifestage). Because of the status of these sturgeon, it is reasonable to expect that their collection relates to overall flow rates and volumes. In any event, Entergy's proposed Biological Monitoring Plan ("BMP"), submitted to NMFS on March 29, 2013 with a courtesy copy subsequently provided to relevant NYSDEC staff, will address and resolve this question.

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Fourth, the Letter's claimed concern about EFH species is not supported by science. *See, e.g.*, September 30, 2011 correspondence from the undersigned to NRC, submitting the technical report prepared by leading fisheries scientists Drs. Lawrence W. Barnhouse, Mark Mattson and Douglas Heimbuch (outlining significant errors in the EFH analysis). Further, as Riverkeeper's Robert F. Kennedy, Jr.'s testimony before the United States Congress – on the thirty year anniversary of the Clean Water Act – confirms: “The Hudson River has seen dramatic recovery since the 1960s. Back then, the River was considered an open sewer. *Today, it is the only large river in the North Atlantic that retains strong spawning stocks of its entire collection of historical migratory species.*” October 8, 2002 Testimony of Robert F. Kennedy, Jr. before the U.S. Senate Environment and Public Works Committee (citing to Riverkeeper website) (emphasis supplied). Even if EFH concerns were scientifically supported, which they are not, NMFS is not authorized to make any binding EFH determination with respect to Indian Point or any other federally licensed facility; rather, that authority rests solely with NRC. *See, e.g., Idaho County v. Evans*, No. CV02-80-C-EJL, 2003 U.S. Dist. LEXIS 23459 at *10 (D. Idaho 2003) (a federal agency need only respond to EFH conservation recommendations, not implement them); Magnuson-Stevens Act Provisions; Essential Fish Habitat (EFH); Final Rule, 67 Fed. Reg. 2343, 2362 (Jan. 17, 2002) (stating that “EFH Conservation Recommendations are not binding”).

Fifth, the Letter claims that NMFS improperly treated Indian Point's “fish mortality” as an unavoidable loss, when it should have required mitigation. This is incorrect. As noted above, Indian Point's impingement system is state-of-the-art, effective model for eliminating impingement mortality, as recognized in USEPA's national CWIS rulemaking and undisputed by NYSDEC staff in the pending WQC proceeding. *See, e.g.*, Environmental Protection Agency, National Pollutant Discharge Elimination System—Cooling Water Intake Structures at Existing Facilities and Phase I Facilities, 76 Fed. Reg. 22174, 22203-04 (Apr. 20, 2011). As such and doubtless, NMFS properly concluded that, in the absence of impingement mortality to sturgeon caused by Indian Point, mitigation beyond the substantial technology array that Indian Point already employs is not reasonable or warranted.

Sixth, the Letter takes issue with NMFS' characterization of New York State Atlantic sturgeon and take allocation. As noted above, NYSDEC opposed as unwarranted NMFS' listing of Atlantic sturgeon as endangered. Under the circumstances, it is difficult to imagine what scientific support NYSDEC can muster to suggest that Indian Point's operation adversely affects this intensively NYSDEC-managed species. Indeed, the Letter fails to note that the overwhelming source of actual Atlantic sturgeon mortality – a mortality that NYSDEC repeatedly declined to stop prior to 1996 – is fishing. *See, e.g.*, January 30, 2013 BiOp/ITS, p. 34 (NYSDEC staff “showed that the level of fishing mortality *from the Hudson River Atlantic sturgeon fishery exceeded the estimated sustainable level of fishing mortality for the riverine population ...*”) (citing NYSDEC staffperson Kahnle *et al.* 1998; 2007) (Emphasis supplied). Entergy's consultants have so advised NYSDEC staff of this excessive fishing mortality, since Indian Point took an industry-wide leadership position by designing and installing its state-of-the-art Ristroph screen and fish return system to rescue and return impinged sturgeon to the River. *See Young, et al., Management recommendations for a Hudson River Atlantic sturgeon fishery based on an age-structured population model*, pp. 353-365, in

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Smith, C. L. (ed.) *Fisheries Research in the Hudson River* (1988 State University of New York Press, Albany) (recommending a “that a sound management plan be formulated and implemented” in light of the “[t]he recent increase in sturgeon landings and interest in Atlantic sturgeon flesh and roe”).

In the final analysis, we understand that your office’s peripheral role in a multi-faceted process may have contributed to the misapprehension of important facts noted above. To that end, Entergy hereby offers to take the time to meet with your staff on these important ESA considerations, consistent with Entergy’s longstanding commitment to environmental stewardship. To better assist our ability to help your staff avoid comparable errors in the future, we also hereby respectfully request advance notice of future correspondence to any regulator regarding Indian Point.

Sincerely,



Elise N. Zerk

cc:

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

Ms. Lois James, Project Manager
Projects Branch 2
Division of License Renewal
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Mail Stop 0-11 F1
Washington, DC 20555

Melanie C. Wong, Chief
Environmental Review and Guidance
Update Branch
Division of License Renewal
Office of Nuclear Regulation
United States Nuclear Regulatory Commission
Washington, D.C. 20555-0001

National Marine Fisheries Service

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Northeast Region
55 Great Republic Drive
Gloucester, MA 01930-2276
Attention: John K. Bullard, Regional Administrator

Mr. Fred Dacimo
Vice President, License Renewal
Entergy Nuclear, Inc.
450 Broadway
Buchanan, NY 10511

William B. Glew, Jr., Esq.
Associate General Counsel – License Renewal
Entergy Services, Inc.
440 Hamilton Avenue
White Plains, NY 10601

Kelli M. Dowell, Esq.
Assistant General Counsel – Environmental
Entergy Services, Inc.
308 East Pearl Street
Suite 700
Jackson, MS 39201

Kathryn M. Sutton, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004