



STATE OF NEW YORK
DEPARTMENT OF STATE

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November 21, 2014

Fred Dacimo Vice President
Operations License Renewal
Entergy Nuclear Northeast Indian Point Energy Center
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Buchanan, NY 10511-0249

Purported Withdrawal of December 17, 2012 Coastal Zone
Management Act Consistency Certification
Indian Point Nuclear Generating Unit Nos. 2 & 3
NRC License Nos. DPR-26 and DPR-64
NRC Docket Nos. 50-247 and 50-286
New York State Department of State File #F-2012-1028

Dear Mr. Dacimo:

The Department of State is in receipt of your letter dated November 5, 2014, in which Entergy sought to withdraw the consistency certification that Entergy submitted to this agency and to the Nuclear Regulatory Commission (NRC) on December 17, 2012 in connection with the application to renew the operating licenses for Indian Point Nuclear Generating Unit Nos. 2 & 3. The Department has determined that your letter is insufficient to withdraw the consistency certification or to terminate the federal consistency review in the above referenced matter. In the absence of a mutually agreed-upon stay entered into between Entergy and the Department, the federal consistency determination in connection with the license renewal application will be rendered on or before December 31, 2014.

The Coastal Zone Management Act (CZMA) requires that coastal consistency review occur contemporaneously with a federal agency's license application review process.¹ Accordingly, a federal license applicant must submit its consistency certification to the federal agency and the State agency at the time the license application is submitted to the federal agency. 16 U.S.C. § 1456(c)(3)(A) provides in pertinent part:

After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone,

¹ 16 U.S.C. § 1456(c)(3)(A).

affecting any land or water use or natural resource of the coastal zone of that state **shall provide in the application** to the licensing or permitting agency **a certification** that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program. **At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data.**

(Emphasis added.) The federal agency is prohibited from approving a federal license or permit for an activity with reasonably foreseeable coastal effects unless the State concurs or the U.S. Secretary of Commerce overrides the coastal state's objection.²

Once a State agency has commenced the six-month review period, the CZMA does not contemplate or otherwise provide that the applicant or the State agency may unilaterally withdraw the consistency certification or terminate its review while an active federal agency review of the underlying application continues. The CZMA regulations contemplate termination of the consistency review process in three instances: (1) when the State agency makes a timely determination to concur, concur with conditions, or object to the consistency of the activity; (2) where the six month review period expires without the State agency's issuance of a consistency determination and concurrence is presumed; or (3) where the applicant withdraws, or the federal agency stops or stays review of, the underlying application pending before the federal agency.

In this last instance, the applicant is authorized to withdraw its permit or license application, not its coastal consistency certification. 15 C.F.R. § 930.51(f) states:

This subpart applies to active applications. If an applicant withdraws its application to the Federal agency, then the consistency process is terminated. If the applicant reapplies to the Federal agency, then a new consistency review process will start. If a Federal agency stops or stays the Federal license or permit application process, then the consistency review period will be stopped or stayed for the same amount of time as for the Federal application process.

No other statutory or regulatory provision allows an applicant to terminate the consistency review process by withdrawing the consistency certification from the State agency while the application remains active before the federal agency.³

The CZMA requires the federal consistency review to be completed within a six-month review period – unless extended by mutual agreement.⁴ The Department is bound by 16 U.S.C. §

² *Id.*

³ The National Oceanic and Atmospheric Administration (NOAA) commentary about this rule explains: Section 930.51(f) clarifies the ramifications to the consistency process when an applicant withdraws its application for a federal approval or if the approving Federal agency stays the application review process. If the applicant withdraws its application, then the consistency process stops (since there is no longer a federal application to trigger consistency). If the applicant reapplies, then a new consistency review is required. Likewise, if the Federal agency stays its proceeding, then the consistency review process will be stayed for the same amount of time. This will avoid confusion as to what the consistency review period is in these cases.

65 Fed. Reg. 77124, 77145 (December 8, 2000). The commentary does not discuss the applicant's or state agency's authority to unilaterally terminate consistency review of a pending application in any other manner.

⁴ 15 C.F.R. § 930.60(b).

1456(c)(3)(A), which requires that "[a]t the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification."⁵ The CZMA presumes that a reviewing agency concurs with the applicant's proposed certification when an agency's consistency determination is not issued within the six-month timeframe.⁶

There are no provisions in the CZMA regulations that provide for an applicant to unilaterally stay the review or withdraw a consistency certification mid-review, only to resubmit at a later date of the applicant's choosing and restart the six-month review clock. The waste of government resources that would occur if such actions were allowed would be tremendous. The ramifications of such unilateral actions are even more pronounced where, as here, an expired license has been extended beyond its term.

As you know, at the time of Entergy's attempted withdrawal of its certification, the Department and Entergy were in discussions regarding an additional stay to provide sufficient time for review of additional materials submitted by Entergy to the Department, as well as further consultation between the Department and Entergy. The applicable regulations do not permit Entergy to stop the clock without a stay agreement or by unilaterally withdrawing its consistency certification without also withdrawing its pending application.

Because Entergy's withdrawal of its coastal consistency certification will only become effective if the underlying application to NRC is also withdrawn, the Department has concluded that the Department is still bound to complete its review and provide a determination by the previously-established deadline. In fact, if the Department does not decide whether the Indian Point license renewal is consistent with the New York State Coastal Management Program before December 31, 2014, the Department will be deemed to have concurred that the renewed operating licenses are consistent with the State's coastal policies. In that instance, the Department will have waived its responsibility to issue a consistency determination. In order to avoid such a result, the Department hereby informs Entergy that it intends to issue a consistency determination on or before December 31, 2014, unless Entergy and the Department are able to enter into a mutually agreeable stay agreement before that time.

Your November 4, 2014 letter relies in part upon the Department's prior decision to wait for NRC to issue a supplement to the Final Supplemental Environmental Impact Statement (FSEIS) concerning various aquatic impacts before the Department commenced the consistency review as support for Entergy's proposal that the Department should now await the NRC staff's issuance of another supplement to its Final Supplemental Environmental Impact Statement (FSEIS) before completing its consistency review and determination. In 2013, the Department considered the FSEIS (Volume 4) on aquatic impacts to be data and information necessary to commence the consistency review in this matter. When that FSEIS was received on June 20, 2013, the Department's consistency review of the application for renewal of the commercial operating

⁵ See also 15 C.F.R. § 930.62.

⁶ See 16 U.S.C. § 1456 (c)(3); 15 C.F.R. § 930.62. Federal consistency review requires that every applicant for a federal license for an action that affects New York's coastal zone secure the Department's concurrence before the license can be issued. (15 C.F.R. Part 930 Subpart D).

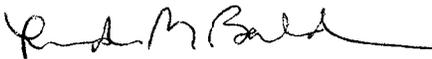
licenses for the nuclear facilities commenced. The Department has determined that the information to be addressed by the NRC in the second supplement is otherwise available and that it need not wait for the FEIS supplement to issue, now projected for March 2016.

Since the Department's receipt of the FSEIS, Entergy and the NYS Department of Environmental Conservation (DEC) have administratively litigated the Clean Water Act § 401 water quality certification denial. The most current fisheries and aquatic organism data associated with the intake and discharges from the Indian Point facilities have been presented during those hearings and are publicly available. In our October 2014 meeting, I invited Entergy to provide us with any additional data related to aquatic impacts that were not considered during the hearing.⁷ Entergy has not provided any new fisheries or aquatic data in response to my request. In fact, neither the NRC nor Entergy has described the new data that would be included in the supplemental FSEIS. The recent schedule proposed by the NRC provides absolutely no detail as to the type of data, reports or analysis that will be included in the supplemental FSEIS. In light of the paucity of information regarding the material that will be reviewed and analyzed in the supplemental FSEIS, a decision by the Department to postpone its consistency review for an additional 15 months would be unwarranted.⁸

Your letter also points to Entergy's withdrawal of the consistency certification for the James A. FitzPatrick Nuclear Power Plant as precedent for the withdrawal of its consistency certification in this relicensing matter. The Department disagrees with Entergy's position because Entergy's withdrawal and resubmission of the FitzPatrick consistency certification each took place prior to the start of the Department's consistency review in that matter. Accordingly, Entergy's reliance on its prior actions in connection with the FitzPatrick facility's relicensing do not have any bearing on whether it may unilaterally withdraw its consistency certification in this matter.

The Department remains open to negotiations with Entergy for a further stay and to continue consultation regarding the impact, if any, of the operation of the Indian Point facilities on the enforceable policies of the New York Coastal Management Program. In view of the limited amount of time remaining for the Department to complete its review and issue a determination in this matter, please advise the Department no later than December 1, 2014, whether Entergy intends to seek a reasonable stay and continue consultations.

Sincerely,



Linda M. Baldwin

⁷ See 15 C.F.R. § 930.60(c).

⁸ Your letter attempts to make a unilateral determination of what documents constitute "necessary data and information," a role reserved for the State agency pursuant to 15 C.F.R. § 930.58(a). In fact, any information that becomes available after the commencement of the six-month review is "additional information" that a "shall not extend the date of commencement of State agency review." See 15 C.F.R. § 930.60(c). Entergy cannot determine what constitutes "data and information" required by the Department to commence and complete the consistency review process.

Cc:

Michael Wentzel, Environmental Project Manager, U.S. Nuclear Regulatory Commission

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