



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

July 30, 2020

Ms. Julie Crocker  
Endangered Fish Recovery Branch Chief  
Greater Atlantic Regional Fisheries Office  
National Marine Fisheries Service  
55 Great Republic Drive  
Gloucester, MA 01930

SUBJECT: REQUEST FOR THE NATIONAL MARINE FISHERIES SERVICE TO AMEND  
BIOLOGICAL OPINION NER-2012-2252 CONCERNING INDIAN POINT  
NUCLEAR GENERATING UNIT NOS. 2 AND 3

Dear Ms. Crocker:

The U.S. Nuclear Regulatory Commission (NRC) requests that the National Marine Fisheries Service (NMFS) amend the incidental take statement (ITS) of biological opinion NER-2012-2252 concerning Indian Point Nuclear Generating Unit Nos. 2 and 3 (IP2 and IP3) located on the eastern bank of the Hudson River in the village of Buchanan, Westchester County, New York. As explained below, the holder of the IP2 and IP3 licenses, Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc. (collectively, Entergy), was unable to perform impingement monitoring for shortnose sturgeon (*Acipenser brevirostrum*) and Atlantic sturgeon (*A. oxyrinchus oxyrinchus*) in April and May (i.e., spring) 2020 due to site access restrictions that Entergy implemented in response to the Coronavirus Disease 2019 (COVID-19) public health emergency (PHE). This request summarizes the impingement monitoring requirements of the ITS of the biological opinion, describes why Entergy was unable to perform the required monitoring, explains why scheduling make-up monitoring during the remainder of 2020 is not reasonable, and requests that the NMFS amend the ITS of the biological opinion accordingly.

#### Sturgeon Monitoring Requirements

On January 30, 2013, the NMFS issued a biological opinion for continued operations of IP2 and IP3 pursuant to their respective existing and proposed renewed operating licenses.<sup>1</sup> The ITS of that opinion exempted the incidental take of shortnose and Atlantic sturgeon from the prohibitions of Section 9 of the Endangered Species Act of 1973, as amended (ESA), subject to compliance with certain reasonable and prudent measures (RPMs) and terms and conditions (T&Cs).

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<sup>1</sup> NMFS. Endangered Species Act Section 7 Consultation Biological Opinion – Continued Operations of the Indian Point Nuclear Generating Station, Units 2 and 3, pursuant to existing and proposed renewed operating licenses. NER-2012-2252. January 30, 2013. Agencywide Documents Access and Management System (ADAMS) Accession No. [ML13032A256](#).

On November 27, 2017, the NRC requested to reinstate ESA Section 7 consultation to address the NMFS's designation of critical habitat for the Atlantic sturgeon and changes to the Federal action considered in the 2013 opinion, among other new information.<sup>2</sup> In response, on February 9, 2018, the NMFS amended the 2013 opinion and its ITS and issued a revised ITS.<sup>3</sup> On April 10, 2018, the NMFS provided the NRC with a complete package of the amended opinion and ITS.<sup>4</sup>

T&C 1 of the revised ITS states, in part, that Entergy must implement the following monitoring measures:

- 3 days per week (24-hours of sampling per day) of tank-based impingement monitoring of sturgeon to provide at least 12 non-consecutive 24-hour periods in April, May, September and October, for a total of a minimum of 50 days for the IP2 fish return system, for each year that IP2 remains in commercial operations.
- 3 days per week (24-hours of sampling per day) of tank-based impingement monitoring of sturgeon to provide at least 12 non-consecutive 24-hour periods in April, May, September and October, for a total of a minimum of 50 days for the IP3 fish return system, for each year that IP3 remains in commercial operations.
- ...
- ...We recognize that emergency situations related to unexpected plant outages or extreme weather conditions may interfere with the planned sampling schedule. If at any time, Entergy anticipates that a sampling day will be missed, they must report to NMFS, NRC and NYSDEC [New York State Department of Environmental Conservation] within 24 hours and, within 24 hours of the end of the emergency, provide an updated sampling schedule. Any missed days are to be scheduled in the same month, unless the month has ended in which case they are to be scheduled in the following month (e.g., if sampling was scheduled for April 30 and a Nor'easter created unsafe conditions for sampling to occur, that sampling must be rescheduled for the earliest possible date in May).

#### COVID-19-Related Interruption of Spring 2020 Sturgeon Monitoring

On November 26, 2019, and in accordance with T&C 1 of the revised ITS, Entergy provided the NMFS, the NYSDEC, and the NRC with a schedule of planned sturgeon impingement sampling days for 2020.<sup>5</sup> The spring 2020 schedule included 13 sampling days in April, 12 sampling days

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<sup>2</sup> NRC. Letter from B. Beasley, Environmental Review and NEPA Branch Chief, to K. Damon-Randall, NMFS. Subject: Request for Amended Incidental Take Statement and Concurrence with "Not Likely to Adversely Affect" Determination for Atlantic Sturgeon Critical Habitat Related to Indian Point Energy Center, Units 2 and 3, License Renewal. November 27, 2017. ADAMS Accession No. [ML17306A100](#).

<sup>3</sup> NMFS. Letter from M. Pentony, Regional Administrator, to B. Beasley, NRC. Subject: Amendment to the January 30, 2013, Biological Opinion Issued to NRC. February 9, 2018. ADAMS Accession No. [ML18051A316](#).

<sup>4</sup> NMFS. Letter from J. Crocker, Endangered Fish Recovery Branch Chief, to B. Beasley, NRC. Subject: Amended ITS for Indian Point Units 2 and 3. April 10, 2018. ADAMS Accession No. [ML18101A588](#).

<sup>5</sup> Entergy. E-mail from C. Garcia, Environmental Staff Specialist, to J. Crocker, NMFS, B. Grange, NRC, and M. Sanza, NYSDEC. Subject: Indian Point 2020 Sturgeon Impingement Sampling Schedule. November 26, 2019. ADAMS Accession No. [ML19338E346](#).

in May, and 1 contingency day in each of the two months. However, on March 26, 2020, Entergy notified the NMFS and the NRC that it would not be able to begin monitoring in accordance with that schedule because of the evolving COVID-19 situation.<sup>6</sup> Entergy explained that, consistent with New York Governor Andrew M. Cuomo's various Executive Orders, including those Orders establishing remote work requirements, and Entergy's pandemic procedure, it had curtailed access to the IP2 and IP3 site by external or third-party consultants performing non-essential or non-critical services to reduce the potential exposure of essential Entergy staff performing mission-critical functions and to otherwise manage COVID-19 risks. As a result, Normandeau Associates, Inc. (NAI) personnel that perform sturgeon monitoring would not be authorized by Entergy to access the IP2 and IP3 site. Entergy also explained that it did not have the capacity to perform the monitoring itself because those Entergy staff with the required expertise were either working remotely or otherwise assigned directly to COVID-19 response activities.

On April 11, 2020, the NMFS indicated that the provision for rescheduling sampling days that are missed due to an outage or emergency in T&C 1 of the revised ITS applies to the COVID-19 PHE.<sup>7</sup> The NMFS stated that it expected that Entergy would reschedule any missed sampling days as provided for in the revised ITS.

On April 13, 2020, the NRC confirmed its agreement with the NMFS's position regarding missed sampling days.<sup>8</sup> The NRC also stated that in the event that Entergy is unable to reschedule an adequate number of sampling days because the COVID-19 PHE response continues to limit site access for a significant portion of the year, Entergy or the NRC would notify the NMFS so that the NMFS and the NRC could determine the most appropriate path forward that will ensure continued compliance with the biological opinion.

To date, the COVID-19 PHE has required Entergy to continue implementation of its pandemic procedure, including the associated site access restrictions. Thus, Entergy was unable to conduct any of the 25 planned sampling days in spring 2020.

#### Rescheduling Missed Sturgeon Sampling Days

In emergency situations that preclude sampling, the revised ITS directs Entergy to provide an updated sampling schedule within 24 hours of the end of the emergency and to schedule any missed sampling days in either that same month or in the following month if the sampling month has ended. Strict compliance with these provisions would require Entergy to reschedule 25 sampling days in 2020; however, such rescheduled sampling is not reasonable, as explained below.

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<sup>6</sup> Jones Day. E-mail from E. Zoli, Partner, to B. Grange, NRC, J. Crocker and J. Williams, NMFS. Subject: Indian Point Monitoring. March 26, 2020. ADAMS Accession No. [ML20090C640](#).

<sup>7</sup> NMFS. E-mail from J. Crocker, Endangered Fish Branch Chief, to B. Grange, NRC. Subject: Indian Point Sturgeon Monitoring. April 11, 2020. ADAMS Accession No. [ML20104A305](#).

<sup>8</sup> NRC. E-mail from B. Grange, ESA Consultation Coordinator, to J. Crocker, NMFS. Subject: Indian Point Sturgeon Monitoring. April 13, 2020. ADAMS Accession No. [ML20104A367](#).

On June 30, 2020, Jones Day, on behalf of Entergy, submitted a letter to the NRC<sup>9</sup> that supports the below discussion. The Jones Day letter is also included as an enclosure to this letter.

#### *Permanent Cessation of Power Operations at IP2*

Rescheduling sampling days at IP2 is not possible because IP2 permanently ceased power operations on April 30, 2020, and Entergy permanently removed the fuel from the IP2 reactor vessel on May 12, 2020.<sup>10</sup> Accordingly, the IP2 circulating water system and associated Ristroph screen and fish return systems no longer operate, which precludes future impingement sampling at IP2. Entergy may occasionally undertake incidental, time-limited use of a single IP2 circulating water pump to facilitate radioisotope management and to meet other nuclear and operational requirements. However, because the timing of such incidental usage is not known, impingement sampling during such usage could not be reasonably planned. Moreover, the small amount of water withdrawal that would occur during such pump usage would not create conditions that would adequately substitute for the missed sampling. Thus, Entergy cannot reschedule missed sampling days at IP2. Accordingly, the remainder of this discussion only contemplates rescheduling missed sampling days at IP3, which remains in operation.

#### *Rescheduling Sampling at IP3 in April–June 2020*

Entergy cannot reschedule missed sampling days at IP3 in spring 2020 (i.e., April and May) or in the month following this period (i.e., June) as directed by the revised ITS because these periods have passed. During the entirety of these periods, Entergy operated the IP2 and IP3 site under its pandemic procedure, and the associated site access restrictions precluded the necessary personnel from performing sampling.

#### *Rescheduling Sampling at IP3 in July–August 2020*

Because Entergy continues to operate the IP2 and IP3 site under its pandemic procedure, the necessary personnel continue to be unable to access the site to perform impingement sampling. Entergy does not anticipate expanding site access until September 2020 at the earliest. Additionally, impingement sampling in July and/or August 2020, if possible, would also disproportionately affect certain fragile species that are present in the vicinity of the site in the summer. The U.S. Environmental Protection Agency defines “fragile species” to mean those species of fish and shellfish that are least likely to survive any form of impingement and that exhibit an impingement survival rate of less than 30 percent.<sup>11</sup> Impingement sampling, which requires additional handling and processing time, can further reduce survival rates. Fragile species that could be disproportionately affected by impingement sampling in July and/or August include bay anchovy (*Anchoa mitchilli*), blueback herring (*A. aestivalis*), alewife (*A. pseudoharengus*), and American shad (*A. sapidissima*). For these reasons, rescheduled sampling at IP3 during this period is not reasonable.

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<sup>9</sup> Jones Day. Letter from E. Zoli, Partner, to B. Grange, NRC. Subject: Sturgeon monitoring under January 30, 2013 Biological Opinion/Incidental Take Statement in connection with Indian Point, including the February 9, 2018 amendment. June 30, 2020. ADAMS Accession No. [ML20183A133](#).

<sup>10</sup> Entergy. Letter from A. Vitale, Site Vice President, to NRC. Subject: Certifications of Permanent Cessation of Power Operations and Permanent Removal of Fuel from the Reactor Vessel. May 12, 2020. ADAMS Accession No. [ML20133J902](#).

<sup>11</sup> Title 40 of the *Code of Federal Regulations*, Section 125.92(m).

### *Rescheduling Sampling at IP3 in September–October 2020*

If it is no longer operating under its pandemic procedure, Entergy intends to resume sturgeon impingement monitoring at IP3 in September in accordance with the T&Cs of the revised ITS. In September and October (i.e., fall) 2020, NAI will conduct 25 days of sampling in accordance with the IP3 2020 sampling schedule. Therefore, in order to make up the 25 missed spring 2020 sampling days during the fall 2020 period, Entergy would essentially need to sample continuously throughout the period. However, doubling the sampling effort would not achieve more complete or accurate information. In the revised ITS, the NMFS selected the prescribed sampling schedule because it is scientifically robust enough to allow the researchers performing the sampling to extrapolate total sturgeon impingement over the entire period. Therefore, the 25 days of scheduled sampling in fall 2020 is sufficient for this period. Additionally, adding sampling days to this period would not provide information on sturgeon impingement that may have occurred during the missed spring 2020 period or that may occur during any other time of the year. The doubling of sampling during fall 2020 would also result in unnecessary harm to fragile young-of-the-year and juveniles that migrate from the river to the ocean at this time. During this period, these affected species would include bay anchovy, blueback herring, alewife, American shad, Atlantic menhaden (*Brevoortia tyrannus*), and striped bass (*Morone saxatilis*). For these reasons, rescheduled sampling at IP3 during this period is not reasonable.

### *Rescheduling Sampling at IP3 in November–December 2020*

Available data indicates that sturgeon in the Hudson River migrate to the ocean in the fall and are unlikely to be present near the site in November and December (i.e., winter). In the biological opinion,<sup>1</sup> the NMFS indicates that shortnose sturgeon are most likely to be in the IP2 and IP3 action area in the summer (i.e., June–August), and that Atlantic sturgeon are most likely to occur in the action area from May through September. Therefore, monitoring in November and December would likely not be of scientific value because sturgeon would not be expected to be captured if sampling were conducted in these months. For these reasons, rescheduled sampling at IP3 during this period is not reasonable.

### *Status of NYSDEC Approval*

In its June 30, 2020, correspondence,<sup>9</sup> Jones Day indicates that Entergy would need to seek the NYSDEC's approval in order to reschedule missed sampling days not already specified in the 2020 sampling schedule. The NRC staff understands that Entergy has sought initial input from the NYSDEC concerning such rescheduling and that the NYSDEC has indicated that it is unlikely to give its approval for such rescheduling in the periods described above due to the potential for adverse impacts to fragile and other non-ESA species.

### Request to Amend the Revised Incidental Take Statement

On the basis of the foregoing discussion, the NRC requests that the NMFS amend the revised ITS to exempt, waive, or otherwise relieve the requirement for Entergy to perform impingement sampling in spring 2020, which Entergy has been wholly unable to perform as a result of the COVID-19 PHE. The NRC also requests that the NMFS exempt, waive, or otherwise relieve the requirement for Entergy to perform make-up sampling for the 25 missed sampling days because, for the aforementioned reasons, rescheduling the missed sampling is not reasonable.

Should you need to discuss this letter or any other matters related to ESA Section 7 consultation for IP2 and IP3, please contact me at 301-415-1042 or [briana.grange@nrc.gov](mailto:briana.grange@nrc.gov).

Sincerely,

A handwritten signature in black ink that reads "Briana Grange". The signature is written in a cursive, flowing style.

Briana A. Grange, Conservation Biologist & ESA  
Consultation Coordinator  
Environmental Review and License Renewal Branch  
Division of Rulemaking, Environmental,  
and Financial Support  
Office of Nuclear Material Safety  
and Safeguards

Docket Nos.: 50-247 and 50-286

Enclosure: Jones Day letter dated June 30, 2020 ([ML20183A133](#)).

cc: Listserv

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DATED: July 30, 2020

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**ADAMS Accession Nos.: Package: ML20191A140, Letter: ML20191A131, Enclosure: ML20183A133**

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