

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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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	)	
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	)	<b>Request for Adjudicatory Hearing</b>
	)	<b>On Notice of Denial</b>
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**Introduction**

Pursuant to 6 NYCRR §621.10(a)(2), Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC and Entergy Nuclear Operations, Inc. (collectively, “Entergy”) respectfully request an adjudicatory hearing on the New York State Department of Environmental Conservation (“NYSDEC”) staff’s (“Staff”) putative April 2, 2010 Notice of Denial (the “Notice”) of Entergy’s Joint Application (the “Application”) for a Clean Water Act (“CWA”), §401 (“§401” or “Section 401”) Water Quality Certification (“WQC”) associated with the renewal of the Nuclear Regulatory Commission’s (“NRC”) operating licenses for Indian Point Units 2 and 3.

As a matter of New York law, Entergy is a mandatory party to the requested adjudicatory hearing, and any legal or factual issue that relates to a matter cited by Staff as a basis to deny the Application that is contested by Entergy constitutes an adjudicable issue. *See, e.g.*, 6 NYCRR §624.5(a) (identifying mandatory parties); 6 NYCRR §624.4(c)(ii) (identifying adjudicable issues). The legal and factual issues contested by Entergy are organized respectively below.

Section I addresses those threshold legal issues which Entergy respectfully requests should be briefed and resolved prior to the commencement of the adjudicatory hearing, in accordance with 6 NYCRR §624.4(b)(5)(iii) (requiring a ruling on the merits of any legal issue that does not depend upon the resolution of disputed issues of fact within 30 days of the issues conference or the receipt of written submissions thereafter). The resolution of one or more of these legal issues could eliminate the need for an adjudicatory hearing; therefore, in the interest of administrative efficiency, these dispositive legal issues should be resolved within the above-defined time frame established by §624.4(b)(5)(iii). Should the Administrative Law Judge(s) (“ALJs”) assigned to this matter decline to allow threshold briefing and resolution of any issue in Section I, Entergy respectfully requests that each such issue be identified as an issue for adjudication, as each constitutes a dispute between Entergy and Staff on a matter related to Staff’s denial of the Application.

Section II identifies those issues involving material factual disputes with Staff that should be identified as issues for hearing. Entergy respectfully reserves the right to modify or supplement the issues identified in Sections I and II through the issues conference and any post-issues conference briefing authorized prior to the issues ruling. *See* 6 NYCRR §624.4(b)(2)(iii)-(iv) (purpose of issues conference is, among other things, to determine whether legal issues exist and whether disputed issues of fact meet the standards for adjudication).

## **Background**

Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC are the owners of Indian Point Units 2 and 3 (collectively, “Indian Point” or the “Stations”), respectively. Entergy Nuclear Operations, Inc. is the operator of the Stations. Unit 2 operates subject to and with the benefit of NRC operating license DPR-26 with a nominal expiration date of September 28, 2013 (the “Unit 2 License”). Unit 3 operates subject to and with the benefit of NRC operating license DPR-64 with a nominal expiration date of December 12, 2015 (the “Unit 3 License,” and with the Unit 2 License, the “NRC Licenses”). On April 30, 2007, Entergy submitted a timely joint application to the NRC to renew the NRC Licenses for an additional 20 years of operations (the “NRC Application”). Pursuant to 10 C.F.R. §§2.109(b) and 54.31(c), the Stations will continue to operate under the current NRC Licenses until a final decision is made on the NRC Application.<sup>1</sup>

In conjunction with the NRC Application, Entergy submitted the Application to NYSDEC on April 6, 2009. In its response (“Entergy’s RFI Response”) to a May 13, 2009 Request for Information from NYSDEC Staff related to the Application (the “RFI”), and subsequent correspondence from Staff, Entergy submitted supplemental Application materials on June 12, 2009; July 9, 2009; September 9, 2009; October 19, 2009; November 3, 2009; November 13, 2009; December 23, 2009; February 12, 2010; March 15, 2010; and March 22, 2010. On February 26, 2010, Staff determined that the Application was complete, and public notice of the completeness determination was published on March 5, 2010. On April 2, 2010, Staff issued the Notice.

## **Legal Framework Governing the Application**

Entergy’s Application requests the issuance of a WQC under §401. Section 401(a) provides in relevant part:

Any applicant for a Federal license or permit to conduct an activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate ... that any such discharge will comply with the applicable provisions of sections [301, 302, 303, 306, and 307 of the CWA]. ... If the State ... fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.<sup>2</sup> No license or permit shall be granted until the certification required

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<sup>1</sup> Entergy holds a valid §401 WQC (“Existing WQC”) without an expiration date that governs operations under the NRC Licenses; to avoid potential confusion, the Existing WQC is not the subject of the Application or this request for adjudicatory hearing.

<sup>2</sup> The determination of whether a State has waived its rights to certify under §401 is within the discretion of the federal licensing agency, in this case, the NRC. *See, e.g., In re Northern States Power Company (Minnesota)*,

by this section has been obtained or waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State

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As part of a certification issued under §401(a), a State may include certain conditions consistent with §401(d) which provides as follows:

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under sections [301 and 302 of the CWA], standard of performance under section [306 of the CWA], or prohibition, effluent standard, or pretreatment standard under section [307 of the CWA], and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

NYSDEC administrative decisions have adopted the substantive standard set forth in federal regulations for the issuance of a WQC under §401 of the CWA: “A certification must include a statement that ‘there are *reasonable assurances* that the activity *will be conducted* in a manner which will not violate applicable water quality standards.’” In the Matter of Erie Boulevard Hydropower L.P., Decision of the Deputy Commissioner, 2006 WL 2951127 (N.Y.Dept.Env.Conserv. October 6, 2006) at \*7 (*quoting* 40 C.F.R. §121.2(a)(3)) (emphasis supplied). The activity in question is the continued operation of the Stations for an additional 20 years beyond the nominal expiration dates of the NRC Licenses (the “License Renewal Period”). Again, for purposes of clarity, the activity in question is not the current operation of the Stations under the current NRC Licenses, but, rather, their operations during the License Renewal Period.

### **Section I – Threshold Legal Issues**

The legal issues precipitated by the Staff’s Notice that do not involve issues of disputed fact are summarized below. Allowing threshold legal briefing is consistent with NYSDEC regulations, and avoids the needless waste of public and private resources in proceeding to adjudication before addressing potentially dispositive legal issues. Specifically, 6 NYCRR Part 624 of NYSDEC’s regulations, which constitutes the hearing procedures for this proceeding, require the timely resolution of legal issues that do not involve issues of disputed facts. After the issues conference, or as soon as practicable thereafter, but in no event later than 30 days after the issues conference or the receipt of written submissions thereafter, the ALJ must, among other things, rule on the merits of any legal issue. 6 NYCRR §624.4(b)(5)(iii). The issues raised by Entergy in this section do not require the resolution of disputed facts, and, therefore, must be resolved within the time period established by NYSDEC regulation. Entergy respectfully requests a briefing schedule to more fully address and resolve these issues prior to

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Docket No. STN 50-484, 6 N.R.C. 1232, 1340-41 (Dec. 23, 1977), *In re Gulf States Utilities Company (River Bend Station, Units 1 & 2)*, Docket Nos. 50-458, 50-459, 2 N.R.C. 419, 427-28 (Sept. 2, 1975).

commencement of the adjudicatory hearing. Again, to the extent these issues are not resolved by briefing in advance of the adjudicatory hearing, Entergy respectfully requests that they be made issues for adjudication.

1. NYSDEC Staff cannot deny the Application where, as here, the Stations hold, and must at all times during the License Renewal Period hold, a valid and enforceable SPDES permit in order to operate.

In its Notice, NYSDEC Staff rejected Entergy's position that compliance with a SPDES permit provides reasonable assurances of compliance with New York water quality standards ("WQS"). *See* Notice, pp. 14-16. As detailed below, Entergy contests this conclusion because, at all times during the License Renewal Period, the Stations must operate subject to and with the benefit of a SPDES permit which, as a matter of law, provides reasonable assurances of compliance with WQS in satisfaction of §401.

The Environmental Conservation Law ("ECL") prohibits the discharge of pollutants from any outlet or point source – such as the Stations' discharge canal – into the waters of the State without a SPDES permit. ECL §17-0803. Entergy currently holds SPDES permit No. 0004472 (the "SPDES Permit"), the renewal and NYSDEC-initiated modification of which is the subject of an ongoing adjudicatory hearing before two NYSDEC ALJs (the "SPDES Proceeding"). The Department routinely has affirmed the existence and legal effect of this SPDES Permit, including in the Notice. *See, e.g.*, Notice, p. 6 ("[B]y operation of the State Administrative Procedures Act (SAPA), the 1982 SPDES permit for Units 2 and 3 is still in effect today."). Thus, there is no dispute that Entergy currently operates, and throughout the License Renewal Period must operate, subject to and with the benefit of the SPDES Permit, including, as explained below, as that SPDES Permit may be renewed, amended, or modified from time to time. *See* Notice, pp. 6-7 ("Currently, the [Stations] are still subject to the provisions of the 1987 SAPA-extended SPDES permit.").

As required by the CWA, SPDES permits must apply, and insure compliance with, §301, 302, 306 and 307 of the CWA. *See* 33 U.S.C. §1342(b)(1)(A) (defining obligations of delegated State programs, such as NYSDEC's); ECL §§ 17-0105 and 17-0811 (SPDES permits must require compliance with: "effluent limitations" promulgated by the federal government, *i.e.*, effluent limitations promulgated under §§301 or 302 of the CWA; standards of performance under §306 of the CWA; and toxic and pretreatment effluent standards under §307 of the CWA). In addition, ECL §17-0811 states that SPDES permits issued by the Department "*shall include provisions requiring compliance with the following, where applicable: ... (5) any further limitations necessary to insure compliance with water quality standards adopted pursuant to state law.*" (emphasis supplied). Water quality standards adopted pursuant to state law are authorized by §303 of the CWA. *See* 33 U.S.C. §1313. Thus, all tolled, SPDES permits must "insure compliance with" §§301, 302, 303, 306 and 307 of the CWA – the very same sections of the CWA to which a State must certify compliance under §401.

The General Provisions of the SPDES Permit (and all SPDES permits) include an express statement that compliance with a SPDES permit constitutes compliance with water quality standards. *See* 6 NYCRR §750-2.1(b) (incorporated in all SPDES permits) ("Upon issuance of a SPDES permit, a determination has been made ... that compliance with the specified permit

provisions will reasonably protect classified water use and assure compliance with applicable water quality standards.”). The ECL is mandatory and unequivocal in requiring that SPDES permits “insure” compliance with WQS, eliminating any potential that a SPDES-permitted facility could be authorized to operate in non-compliance with WQS. Thus, there can be no doubt that the legal obligation to obtain a SPDES permit in order to operate the Stations during the License Renewal Period offers a reasonable assurance of operating in compliance with WQS during that period.

NYSDEC’s regulations underscore this point. They specifically state that “[u]pon issuance of a SPDES permit, a determination has been made on the basis of a submitted application, plans, or other available information, that compliance with the specific permit provisions *will reasonably protect classified water use and assure compliance with applicable water quality standards.*” 6 NYCRR §750-2.1(b) (emphasis supplied); *see also* 6 NYCRR §750-2.1(k) (discharges authorized by a SPDES permit are deemed in compliance with ECL Article 17, Titles 5, 7 and 8 and the regulations promulgated thereunder). Thus, as a matter of NYSDEC regulations, compliance with the limitations established in a SPDES permit “assure compliance” with applicable WQS.<sup>3</sup>

Indeed, the Department’s single-page 1982 WQC for Indian Point states that the Stations’ compliance with its SPDES permit is compliance with WQS. *See* 1982 WQC. That existing WQC states in its entirety:

The New York State Department of Environmental Conservation hereby certifies, pursuant to Section 401 of the Federal Water Pollution Control (the Act) [sic], that compliance with the terms of the attached SPDES Permit #NY-0004472 for Consolidated Edison Company of New York, Inc.’s Indian Point Units Nos. 1 and 2 and for Power Authority of the State of New York’s Indian Point Unit No. 3 Nuclear Power Plants will result in compliance with all applicable provisions of Section 208(e), 301, 302, 303, 304, 306 and 307 of the Act and the appropriate provisions of state law. This certification supersedes and replaces all prior certifications pursuant to Section 401 of the Act.

Thus, the legal conclusion that SPDES permits provide reasonable assurances of compliance with WQS is supported by Indian Point’s existing, undisputed WQC.

NYSDEC Staff suggests that circumstances surrounding the Department’s obligations under a specific WQS, *i.e.*, 6 NYCRR §704.5, require a different conclusion. However, as the Staff expressly concedes in its Notice (based on settled New York law), “[i]n order to obtain a SPDES permit from the Department, the facilities *must demonstrate* that their CWISs use the best technology available [(‘BTA’)] to minimize environmental harm.” *See* Notice, p. 5 (*citing Matter of Entergy Nuclear Indian Point v. NYSDEC*, 23 AD3d 811 (3d Dept. 2005), *appeal dismissed in part and denied in part* 6 NY3d 802 (2006); Hudson Riverkeeper Fund, Inc. v.

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<sup>3</sup> Moreover, the Department has taken no material enforcement action against Indian Point with respect to its SPDES permit, and therefore cannot reasonably suggest that Entergy’s compliance history necessitates additional precautionary action on its Application. *See, e.g.*, ECL, §17-0303; 6 NYCRR §622.1; Entergy’s RFI Response, Exhibit N (Compliance Chart).

Orange and Rockland Utilities, Inc., 835 F.Supp. 160 (S.D.N.Y. 1993)) (emphasis supplied). Thus, and indisputably as a matter of law, when NYSDEC last issued Entergy's SPDES permit, it *necessarily* made a BTA determination – under §704.5, which – as the Department concedes – existed at that time (promulgated in 1974) and has not been amended since. *See* Notice, p. 6, fn. 6.<sup>4</sup> As Staff likewise acknowledges in its Notice, NYSDEC sustained its SPDES BTA determination through February 1998 in each of five serially issued, judicially approved “stipulations of settlement and judicial consent orders, entered in Albany County Supreme Court [Index No. 0191-ST3251].” *See* Notice, pp. 5-6. Indeed, NYSDEC cannot – as a matter of law – enter into a judicially approved consent order that contravenes its obligations under New York law,<sup>5</sup> and never has suggested that it acted in contravention of its governing New York law, including §704.5, in issuing Indian Point's SPDES permit or entering into the consent orders. Rather, for purposes of this Tribunal's determination on this legal issue, NSYDEC is presumed to have acted in accordance with law. *See* Local Number 93, International Association of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501, 526 (1986) (parties cannot agree to take action that conflicts with or violates the statute upon which the complaint was based).<sup>6</sup>

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<sup>4</sup> *See also* SPDES Permit, p. 11: “The Hudson River Settlement Agreement, dated December 19, 1980, is annexed to this permit as Appendix 2 and is incorporated herein as a condition to this permit. The Settlement Agreement *satisfies New York State Criteria Governing Thermal Discharges*. The Agreement for Installation of Modified Ristroph Screens at Indian Point Units 2 & 3, dated October 31, 1988 is annexed to this permit as Appendix 3 and is incorporated herein as a condition to this permit. The Agreement for Installation of Modified Ristroph Screens at Indian Point Units 2 & 3 implements Section 2.F of the Hudson River Settlement Agreement and *satisfies New York State Criteria Governing Thermal Discharges*.”

<sup>5</sup> Thus, though not material to this Tribunal's resolution of this legal issue, when NYSDEC Staff suggests, in the Notice, that final BTA determinations were “effectively postponed” under the consent orders, what the Department omits to mention is that NYSDEC advocated before the Albany Supreme Court that the consent order resolution was appropriate and conformed to New York law. *See* Notice, p. 6. We understand that NYSDEC Staff may decide to advocate for cooling towers in the SPDES Proceeding and in this proceeding, but their current preferences do not, and cannot, as a matter of law allow them to deny that: (1) NYSDEC Staff affirmed the Stations' current configurations from 1981 until 2003, when it *first* proposed cooling towers in a draft permit that is the subject of the pending SPDES Proceeding; and (2) that the proposed SPDES permit is not final, and therefore of no legal effect, until the SPDES Proceeding is resolved and a final NYSDEC permit issued in accordance with law. *See, e.g.*, Notice, p. 15 (“The 2003 SPDES permit ... accurately reflects the Department's *preliminary determination* ... [and] is currently the subject of an ongoing adjudicatory proceeding ...”) (emphasis supplied). We are aware of no legal basis for the proposition that NSYDEC Staff's aspirations form the basis for denial of a WQC in the face of a current, administratively continued SPDES permit.

<sup>6</sup> To that end, when NSYDEC Staff maintains, in the Notice, that the 1987 permit did not require the installation of technology in satisfaction of §704.5, that statement is irreconcilable with NSYDEC's legal obligations. *See* Notice, p. 7 and note 4 *supra*. While not material to this Tribunal's resolution of this legal issue, it is also incorrect, as NYSDEC does not dispute both that the Hudson River Settlement Agreement (“HRSA”) remained effective in 1987, and that it required the installation, at Indian Point, of various technologies, including variable and dual-speed pumps, Ristroph screens, and an extensive fish return system, among other operational limitations. *See also* SPDES Permit, p. 11: “The Hudson River Settlement Agreement, dated December 19, 1980, is annexed to this permit as Appendix 2 and is incorporated herein as a condition to this permit. The Settlement Agreement *satisfies New York State Criteria Governing Thermal Discharges*. The Agreement for Installation of Modified Ristroph Screens at Indian Point Units 2 & 3, dated October 31, 1988 is annexed to this permit as Appendix 3 and is incorporated herein as a condition to this permit. The Agreement for Installation of Modified Ristroph Screens at Indian Point Units 2 & 3 implements Section 2.F of the Hudson

Finally, NYSDEC has affirmed this position – of issuing WQC that defer to or incorporate current and future SPDES permit (and SPDES permit proceeding) BTA determinations – for all of the other nuclear units in New York. Specifically, Ginna, Nine Mile and James A. FitzPatrick Nuclear Power Plants were issued WQCs for their respective NRC license renewals that expressly deferred the decision on the “best technology available” under 6 NYCRR §704.5 to the SPDES process:

**Best Technology Available (BTA) Determination.** Pursuant to 6 NYCRR Part 704 and Section 316(b) of the Clean Water Act a Best Technology Available (BTA) determination *will be conducted for the facility as part of the renewal of the State Pollutant Discharge Elimination (SPDES) permit.* The BTA determination is based on whether the facility meets the regulatory criteria to minimize adverse environmental impacts to aquatic species. Biological studies will be required by the SPDES permit, and will be used by the Department to determine whether additional measures are needed to achieve BTA. As necessary, Mitigation Plans will need to be developed, submitted, and completed in consultation with Department staff.

NYSDEC WQC 7-3556-0013 for Nine Mile Point Nuclear Station LLC (June 21, 2006), p.2 (emphasis supplied); *see also* NYSDEC WQC 8-5434-00010 for Ginna Nuclear Power Plant (October 7, 2003), p. 2 (substantially similar statement); NYSDEC WQC 7-3556-00020 for James A. FitzPatrick Nuclear Power Plant (July 23, 2008), pp.2-3 (substantially similar statement). This was the proper course for Staff to pursue then, and no reasonable basis for Staff to proceed differently exists now; *i.e.*, NYSDEC Staff cannot deny the Application, because BTA under §704.5 has not been finally determined in the SPDES Permit proceeding. Instead, NYSDEC should issue a WQC that reflects Entergy’s obligation to comply with the outcome of the SPDES renewal proceeding (and any subsequent renewal of the SPDES Permit), just as it did with respect to the Nine Mile, Ginna and FitzPatrick Nuclear Power Plants. Stated otherwise, the Department’s standard procedure in issuing WQCs to date for other nuclear facilities undergoing license renewal has been to issue a WQC that expressly defers to and incorporates the station in question’s future SPDES permit proceedings, specifically referencing the Department’s need for timely determinations under WQS relating to cooling water intake structures and thermal discharges.

In short, the crux of a WQC determination is “that ‘there are *reasonable assurances* that the activity *will be conducted* in a manner which will not violate applicable water quality standards.’” In the Matter of Erie Boulevard Hydropower L.P., Decision of the Deputy Commissioner, 2006 WL 2951127 (N.Y.Dept.Env.Conserv. October 6, 2006) at \*7 (*quoting* 40 C.F.R. §121.2(a)(3)) (emphasis supplied). New York law governing SPDES permits echoes the Department’s WQC obligations, by requiring that SPDES permits both “insure” and “assure compliance” with WQS. Because the Stations cannot operate without a SPDES permit during the License Renewal Period, the SPDES permit both “insures” and “assures” that operations during that period – the “activity” for which the Application for a WQC was submitted – will

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River Settlement Agreement and *satisfies New York State Criteria Governing Thermal Discharges.*” In other words, Indian Point’s 1987 SPDES permit contains *exactly* what the Department determined, in accordance with New York law, that it should contain to satisfy §704.5 when it finally issued that permit.

comply with applicable WQS. For these reasons and consistent with its past precedent, NYSDEC Staff already has the requisite assurances regarding WQS to issue the WQC, and the Department must approve Entergy's Application.

Based upon the above, the proposed issue for resolution as a matter of law is: Whether NYSDEC Staff improperly denied the Application where, as here, the Stations already possess and must at all times during the License Renewal Period hold a valid and enforceable SPDES permit in order to operate? The resolution that Entergy requests is prompt issuance of a final WQC that simply requires, just as has been the case for every other nuclear facility in New York state, compliance with Indian Point's SPDES permit, including any renewed SPDES permit following the SPDES Permit proceeding, the trial for which is scheduled to commence in January 2011 and is expected to be resolved prior to the commencement of the License Renewal Period.

To the extent this resolution is not made prior to the commencement of this adjudicatory Proceeding, as detailed below, Entergy requests a process for resolution of the WQC in this Proceeding that both (1) does not duplicate the pending SPDES permit proceeding; and (2) defers to the outcome of that proceeding on all issues to be decided in that proceeding, *e.g.*, BTA under §704.5. To the extent that this Tribunal declines to defer in whole or in part to the SPDES Permit proceeding, Entergy hereby incorporates all legal and factual issues identified in that SPDES Permit proceeding, including the application of the State Environmental Quality Review Act ("SEQRA"), and the record of that proceeding, here.<sup>7</sup>

2. NYSDEC is preempted from denying the Application on the basis of the release of radiological materials regulated under the Atomic Energy Act by the NRC.

In its Notice, NYSDEC Staff asserts that "the discharge of radiological substances ... from the Indian Point site into a water of the State, here the Hudson River, are 'deleterious substances' and could impair the water for their best usage," and that "radiological leaks have the potential to impair the best use of the water designated in 6 NYCRR §701.11." *See* Notice, p.10. Entergy contests this basis for denial, as a matter of law, because the release of materials regulated by the NRC under the Atomic Energy Act ("AEA materials") from NRC-licensed facilities is reserved to the federal government; and state agencies, such as NYSDEC, are preempted from regulating such releases. As such, NYSDEC cannot ground a WQC denial on radiological issues as a matter of law.

Specifically, and as detailed in Entergy's RFI Response, *see* pp. 11-17, settled law provides that the federal government occupies the field of regulatory authority over radiological discharges from NRC-licensed nuclear power plants, including to surface water and groundwater. *See, e.g., Northern States Power Company v. State of Minnesota*, 447 F.2d 1143, 1149 n.6, 1154 (8th Cir. 1971) (holding that "the federal government has exclusive authority under the doctrine of pre-emption to regulate the construction and operation of nuclear power plants, which necessarily includes regulation of the levels of radioactive effluents discharged

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<sup>7</sup> Rather than attach the entire record of the SPDES Proceeding to date, Entergy respectfully requests that such a catalogue be established only to the extent required after this Tribunal has addressed the legal issues identified here.

from the plant”)<sup>8</sup>, *aff’d summarily by the U.S. Supreme Court, Minnesota v. Northern States Power Co.*, 405 U.S. 1035 (1972); *reaffirmed Train v. Colorado Public Interest Research Group, Inc.*, 96 S.Ct. 1938, 1945, n. 12 (“States are precluded from playing any role in several significant areas of regulation, including the setting of limitations on radioactive discharges from nuclear power plants”); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm.*, 461 U.S. 190, 212 (1983) (holding, in the context of the adequacy of spent fuel pools, that the “Federal Government maintains complete control of the safety and ‘nuclear’ aspects of energy generation .... [T]he Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States”); *United States v. City of New York*, 463 F.Supp. 604, 609, 614 (S.D.N.Y. 1978) (applying the reasoning of *Northern States* to conclude that “the federal government has exclusive authority under the doctrine of preemption to regulate the construction and *operation of* nuclear reactors, which necessarily includes licensing for radiological health and safety”) (emphasis supplied). Because the federal government occupies the field, absent a delegation of authority to the contrary not present here, NYSDEC is preempted from regulating in this area or undertaking inspections of the plants themselves. See *County of Suffolk v. Long Island Lighting Company*, 728 F.2d 52, 56 (2d Cir. 1984) (exclusive NRC authority “necessarily includes the authority to inspect nuclear power plants”).

Accordingly, NYSDEC Staff cannot assert, as a basis for denial of the Application, the discharge of AEA materials from the Stations. Based upon the above, the proposed issue for resolution as a matter of law is: Whether NYSDEC Staff’s purported denial of a WQC based on the potential release of radiological materials regulated under the Atomic Energy Act by the NRC is preempted, and therefore prohibited, by federal law?

3. The release of AEA materials from an NRC-licensed facility is not subject to regulation under §401 of the CWA.

As noted above, the Application before NYSDEC is governed by §401. Section §401(a)(1) provides, in relevant part, that:

[a]ny applicant for a Federal license or permit to conduct any activities including, but not limited to, the construction or operation of facilities, which may result in any *discharge* into *navigable waters*, shall provide the licensing or permitting agency a certificate from the State in which the discharge originates or will originate, ..., that any *such discharge* will comply with the applicable provisions of sections [301, 302, 303, 306 and 307 of the CWA]. ...

(emphasis supplied).

When used without qualification, the CWA defines the term “discharge” as “a discharge of a *pollutant*, and a discharge of *pollutants*.” 33 U.S.C. §1362(16) (emphasis supplied). The CWA further defines “discharge of a pollutant” and “discharge of pollutants,” in relevant part, as “any

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<sup>8</sup> The Eighth Circuit stated that it reached its conclusion in *Northern States* based upon “examination of the statutory language alone,” and the court’s analysis of the “wealth of legislative history accompanying the 1959 amendment” was only to resolve any doubt that remains. 447 F.2d at 1150.

addition of any *pollutant* to *navigable waters* from a point source.” *Id.* at §1362(12) (emphasis supplied).<sup>9</sup> The Supreme Court has held that materials regulated under the AEA are not “pollutants” within the CWA’s definition of “pollutant” and that, when Congress adopted the CWA, it intended that the NRC would continue to have exclusive jurisdiction to regulate the discharge of AEA materials. *See Train*, 96 S.Ct. 1938, 1945, n. 12. Thus, the discharge of AEA materials is not subject to regulation under §401 or any other section of the CWA. Moreover, none of the sections of the CWA cross-referenced in §401(a) impose requirements or include discharge standards for radioactive effluents from licensed nuclear facilities, because such effluents are not regulated anywhere under the CWA.

Thus, and consistent with the position articulated in Entergy’s RFI Response, *see pp.* 17-18, Staff’s denial of the Application on the basis of radiological discharges from the Stations is contrary to law. Based upon the above, the proposed issue for resolution as a matter of law is: Whether NYSDEC improperly denied Indian Point’s WQC, because the release of AEA materials from an NRC-licensed facility is not subject to regulation under §401 of the CWA?

4. As a matter of law, 6 NYCRR §701 does not apply to alleged impacts of cooling water intake structures.

In its Notice, NYSDEC Staff asserts that:

the withdrawal of cooling water by Units 2 and 3 cause significant adverse environmental impact upon aquatic organisms, particularly fish eggs, larvae, and fish. The continued operation of Units 2 and 3 in once-through cooling mode for an additional 20 years, as proposed by Entergy in its Joint Application, would continue to exacerbate the adverse environmental impact upon aquatic organisms caused by the facilities’ CWISs. Consequently, the continued operation of Units 2 and 3 would be inconsistent with the best usage of the Hudson River in 6 NYCRR §701.11 for fish, shellfish, and wildlife propagation and survival.

Notice, pp. 10-11 (internal citations omitted); *see also* Notice, p.11 (“the adverse environmental impact from the operation of Indian Point’s CWISs to the Hudson River impair the best use of the water designated in 6 NYCRR §701.11. In particular, the withdrawal of approximately 2.5 billion gallons of Hudson River water per day and the mortality of nearly one billion aquatic organisms per year from the operation of Units 2 and 3 are inconsistent with fish propagation and survival.”).

Entergy contests this basis for denial of the Application, because 6 NYCRR §701 does not impose any requirement or limitation on cooling water withdrawals or cooling water intake structures with respect to compliance with the best usages of the Hudson River (*i.e.*, Class SB surface waters), and, therefore, cannot be a basis for denial of the Application. According to 6 NYCRR §701.1, “[t]he *discharge of sewage, industrial waste or other wastes* shall not cause impairment of the best usages of the receiving water as specified by the water classifications at

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<sup>9</sup> The term “navigable waters” is defined as “the waters of the United States, including territorial seas.” *Id.* at §1362(7). The term “navigable waters” does not include groundwater.

the location of discharge and at other locations that may be affected by such discharge.” (emphasis supplied). The remainder of Part 701 defines the best usages of each classification of surface waters and groundwaters (6 NYCRR §§701.2 through 701.18) and describes the instances in which NYSDEC may establish discharge restriction categories (6 NYCRR §§701.19 through 701.24). Thus, Part 701 is strictly limited to the impacts associated with the discharge of sewage, industrial waste or other wastes on the best usages of New York waters. Consequently, there is no basis to deny the Application under Part 701 due to alleged impacts of water withdrawals or cooling water intake structures. Accordingly, NYSDEC Staff’s denial of the Application on these grounds is contrary to law.

Based upon the above, the proposed issue for resolution as a matter of law is: Whether NYSDEC improperly denied Indian Point’s WQC, because 6 NYCRR §701 does not apply to alleged impacts of cooling water intake structures?

5. NYSDEC cannot deny the Application on the basis of alleged taking of endangered or threatened species in violation of ECL Article 11.

In its Notice, NYSDEC Staff asserts that “[t]he taking of shortnose sturgeon by the operation of the Indian Point facilities is unlawful and also impairs the best usage of the waters of the Hudson River for propagation and survival of sturgeon. Accordingly, the Department has determined that Units 2 and 3 are not in compliance with ECL Article 11 and, therefore, in accordance with 6 NYCRR §608.9(a)(6), must deny the §401 WQC application.” *See* Notice, p. 23. Entergy contests this basis for denial of the Application, because neither §401, nor 6 NYCRR §608.9(a)(6), permits NYSDEC to deny on the basis of alleged non-compliance with ECL Article 11.

As described above, the certification required under §401(a) must issue if there are reasonable assurances that the proposed federally licensed activity – in this case, the operation of the Stations during the License Renewal Period – will comply with §§301, 302, 303, 306, and 307 of the CWA. ECL Article 11 is, of course, not among these sections of the CWA, and, therefore, is not a proper basis to deny the Application.

In addition, Staff asserts that 6 NYCRR §608.9(a)(6) “requires an applicant to demonstrate compliance with all ‘State statutes, regulations and criteria other wise applicable to such activities.’” *See* Notice, p. 22. This is not correct. What §608.9(a)(6) actually says – including its introductory language – is as follows:

(a) Water quality certifications required by section 401 of the Federal Water Pollution Control Act, Title 33 United States Code 1341 (see subdivision [c] of this section). Any applicant for a federal license or permit to conduct any activity, including but not limited to the construction or operation of facilities that may result in any discharge into navigable waters as defined in section 502 of the Federal Water Pollution Control Act (33 USC 1362), must apply for and obtain a water quality certification from the department. The applicant must demonstrate compliance with sections 301-303, 306 and 307 of the Federal Water Pollution Control Act, *as implemented by the following provisions: ...*

- (6) State statutes, regulations and criteria otherwise applicable to such activities.

(underlining in original; italics supplied). Thus, the language of §608.9(a)(6), read in its entirety, is consistent with the language of §401, in that it requires a demonstration of compliance with those New York statutes, regulations and criteria *that implement §§301-303, 306 and 307 of the CWA*. The Notice does not assert, nor can it, that ECL §11-0535 implements any of the referenced provisions of the CWA, because the taking of endangered or threatened species is regulated under an entirely separate federal statute – the Endangered Species Act. Thus, alleged non-compliance with ECL §11-0535 is not a legal basis for denial of the Application, and Staff’s denial of the Application on this basis is contrary to law.

Moreover, Staff’s reference to 6 NYCRR §701.11 in relation to the impingement and entrainment of sturgeon is equally contrary to law. As discussed above, Part 701 is strictly limited to impacts associated with the discharge of sewage, industrial waste or other wastes on the best usages of New York waters and there is no basis to deny the Application under Part 701 due to alleged impacts of impingement and entrainment. Thus, Staff’s resort to this provision in the context of the impingement and entrainment of sturgeon does not cure its legal invalidity.

Based upon the above, the proposed issue for resolution as a matter of law is: Whether NYSDEC improperly denied Indian Point’s WQC, because NYSDEC cannot deny the Application on the basis of alleged taking of endangered or threatened species in violation of ECL Article 11 or 6 NYCRR §701.11?

6. NYSDEC Staff has not satisfied SEQRA.

In its Notice, NYSDEC Staff does not address the role of the State Environmental Quality Review Act, ECL §08-0101 *et seq.* (“SEQRA”), in the processing of the Application. However, in its Notice of Complete Application, Staff indicated that the Application was a Type II Action and, on that basis according to Staff, not subject to review under SEQRA. In contrast, Staff expressly concluded that the application of §704.5 to the Stations in the SPDES Permit proceeding (among other proposed conditions) is subject to review under SEQRA, a conclusion with which the ALJs in that proceeding and the Assistant Commissioner agreed. *See, e.g.*, SPDES Proceeding, Issues Ruling, pp. 37-39; SPDES Proceeding, Interim Decision of the Assistant Commissioner, pp. 36-41. Indeed, the parties to that SPDES Proceeding are in the process of preparing and submitting SEQRA reports, as directed by the Interim Decision and pursuant to a schedule established by the ALJs at this very time. For example, Attachment A, prepared by NERA Economic Consulting and incorporated herein by reference, discusses the potential impacts of decisions under §704.5 on electric system reliability, electricity prices, and the ability of New York to achieve its ambitious air pollution and climate change goals.

NYSDEC Staff has offered no basis, nor explanation, of their position that the application of §704.5 in the SPDES Permit proceeding is subject to SEQRA, while application of the very same provision at the very same Stations is SEQRA-exempt as a so-called “Type II” action, and we have identified no reasonable basis for concluding that Staff’s characterization is proper on

its face or in light of prior Assistant Commissioner and ALJ rulings in the related SPDES matter. *See also* Draft BTA Policy, pp. 7 (concluding that draft BTA Policy will not have a significant adverse impact on the environment). Staff also has not expressly deferred to, nor incorporated, the SEQRA outcome of the SPDES Proceeding into this proceeding in a manner that reasonably could eliminate the need for a secondary SEQRA proceeding. Finally, Staff has not indicated that they will adopt the future federal Supplemental Environmental Impact Statement (“FSEIS”) being prepared by the NRC pursuant to ECL §08-0111 and expected to be issued in August 2010.

As such, Entergy must raise Staff’s compliance with SEQRA as a legal issue for resolution in the adjudicatory hearing, mirroring a request made – and confirmed – by the Assistant Commissioner in the SPDES permit proceeding under the same law and facts. *See* 6 NYCRR §624.4(c)(6)(i)(a) (authorizing ALJ review of determination by Staff not to require the preparation of an environmental impact statement). Based upon the above, the proposed issue for resolution as a matter of law is: Whether, absent express deferral to the pending SEQRA analysis in the SPDES Proceeding or the NRC’s FSEIS, Staff properly has established their compliance with SEQRA?

## **Section II – Factual Issues for Adjudication**

Consistent with 6 NYCRR §624.4(c)(2), the following represent contested or disputed issues of fact relating to matters cited by NYSDEC staff as a basis to deny the Application, and, therefore, should be advanced for resolution in an adjudicatory hearing.

1. NYSDEC Staff’s denial of the Application on the grounds that Entergy has not demonstrated compliance with thermal discharge law is arbitrary, capricious, and not in accordance with applicable law.

The Notice states that “the Department has determined to deny Entergy’s application for a WQC because the supporting materials do not currently demonstrate compliance with the referenced thermal standards and criteria. *The Department could reconsider its position on this issue should Entergy provide a verified thermal model that demonstrates compliance with the applicable thermal criteria.*” *See* Notice, p.13 (emphasis supplied). In its Notice, Staff also indicates that “noncompliant ‘thermal discharges’ ... into a class SB water also impair the water for its best usage particularly where, as here, primary and secondary contact recreation is concerned.” *See* Notice of Denial, p.11. It is not clear whether NYSDEC Staff is implying that thermal discharges from the Stations during the License Renewal Period would in fact not comply with the applicable thermal criteria of Part 704. To that end, we request that this Tribunal obtain clarification from NYSDEC staff on their position with respect to thermal discharges. To the extent NYSDEC Staff indicates that it actually denied the Application on this basis, Entergy contests that basis for denial as arbitrary, capricious and not in accordance with law. The materials provided in the Application and supplemental information submitted by Entergy provide reasonable assurances that the Stations will comply with applicable thermal discharge criteria during the License Renewal Period. Moreover, Staff’s Notice provides no rationale whatsoever that thermal discharges from the Stations impair the water for its best

usage, or evidence that it has the requisite thermal expertise or has performed any thermal analysis.

While Entergy appreciates that NYSDEC Staff remains open to continuing discussion of Entergy submissions and may not have reached a denial on these grounds, Entergy nonetheless contests this basis for denial, because the Application and supplemental material provided to Staff demonstrates that there are reasonable assurances of compliance with applicable thermal discharge criteria during the License Renewal Period. More specifically, Entergy has provided empirical (in-River) thermistor monitoring and a fully calibrated, verified three-dimensional thermal model that demonstrate compliance with applicable thermal criteria, including under worst case conditions (represented by the 99th percentile or worse) experienced in the River; therefore, Staff's decision to deny the Application is contrary to the evidence, unreasonable and inconsistent with applicable law. For further technical support to identify this issue for adjudication and all disputed thermal statements in the Notice, *please see* Attachment B which is incorporated herein by reference; Attachment B represents the technical response to the Notice prepared by Applied Science Associates, Inc., a leading expert on thermal discharges and the authors of the underlying thermal studies.

Based upon the above, the proposed issue for resolution after an adjudicatory hearing is: Whether the proposed denial of Indian Point's WQC Application based on thermal considerations is supported in fact and law?

2. NYSDEC Staff's denial of the Application based upon speculative releases of AEA materials is arbitrary, capricious, and not in accordance with applicable law.

As discussed above, Entergy contests Staff's attempt to deny the Application based upon the release of AEA materials from the Stations – such a denial is pre-empted by federal law and inconsistent with §401. In addition, Staff's stated basis for the denial is entirely speculative:

While Entergy maintains that radiological assessments of ongoing radioactive leaks to the Hudson River have not yielded any indication of potential adverse environmental or health risk, the discharge of radiological substances (including, but not limited to, radioactive liquids, radioactive solids, radioactive gases, and stormwater) from the Indian Point site into a water of the State, here the Hudson River, are 'deleterious substances' and *could impair* the water for their best usage. ... In addition, radiological leaks *have the potential to impair* the best use of the water designated in 6 NYCRR §701.11. Accordingly, the Department has made a determination to deny the §401 WQC application for Units 2 and 3 based upon a failure to comply with this State water quality standard and best use of the water.

Notice of Denial, p. 11 (emphasis supplied).

Entergy contests this stated basis for denial as well. The phrase "deleterious substances" appears in 6 NYCRR §703.2 as a component of a narrative water quality standard. For Class SB waters, "taste-, color- and odor-producing, toxic and other deleterious substances" are prohibited "in amounts *that will* adversely affect the taste, color or odor thereof, or *impair the waters for*

*their best usages*” (emphasis supplied). In the Notice, however, Staff asserts that releases of AEA materials “could impair” or “have the potential to impair” the best use of Class SB waters defined in §701.11. Thus, Staff has not applied the correct legal standard, which requires a finding that radiological releases “will impair the waters for their best usages.” Accordingly, Staff’s denial of the Application on this basis is arbitrary, capricious, and not in accordance with applicable law.

Applying the proper standard of §703.2, the Application and supplemental materials provide reasonable assurances of compliance with this narrative water quality standard. The Notice itself acknowledges that the Application “maintains that radiological assessments of ongoing radioactive leaks to the Hudson River have not yielded any indication of potential adverse environmental or health risk,” but provides no contrary findings or other rationale for contradicting the materials in the Application and supplemental materials. *See Notice, passim.*

Publicly available information, including a report from NYSDEC and the New York State Department of Health (“NYSDOH”), directly contradict Staff’s speculation. In May 2008, the NRC concluded, “Our inspection determined that *public health and safety has not been, nor is likely to be, adversely affected, and the dose consequence to the public that can be attributed to current on-site conditions associated with groundwater contamination is negligible.*”<sup>10</sup> (emphasis supplied). NYSDEC and NYSDOH drew the same conclusions relative to the lack of any impact to fish or to people after the completion of an extensive independent radiological assessment of fish in the river in 2007. In their report “Measurement of Strontium-90 (90Sr) and Other Radionuclides in Edible Tissues and Bone/Carapace of Fish and Blue Crabs from the Lower Hudson River, New York”<sup>11</sup> these agencies conclude:

The conclusion of the DEC is that there is no measurable difference in Sr-90 concentrations in fish flesh or bone between fish caught near IPEC and those caught in unaffected areas of the river, i.e., *no measurable impact to Sr-90 concentrations in fish from the site groundwater entering the Hudson.* This reinforces the previous determination made by the DOH that *there is no public health concern, relative to Sr-90, related to eating fish caught in the Hudson River.*

In addition, the DEC’s Division of Fish, Wildlife and Marine Resources reviewed currently available guidance on impacts to wildlife from radioactive materials in the environment and compared those guidance values with the concentrations of radionuclides detected in the fish samples from this study. *They concluded that the levels of radionuclides - including 90Sr - were two to five orders of magnitude lower than criteria established for protection of freshwater ecosystems.*

(emphasis supplied).

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<sup>10</sup> INDIAN POINT NUCLEAR GENERATING UNITS 1 & 2 - NRC INSPECTION REPORT NOS. 05000003/2007010 and 05000247/2007010

<sup>11</sup> <http://www.dec.ny.gov/chemical/61837.html>.

Based upon the above, the proposed issue for resolution after an adjudicatory hearing is: Whether the proposed denial of Indian Point's WQC Application based radiological considerations is supported in fact and law?

3. NYSDEC Staff's denial of the Application on the basis of alleged non-compliance with §704.5 is arbitrary, capricious, and not in accordance with law.

In its Notice, NYSDEC Staff provides four separate bases for denial of the Application relating to 6 NYCRR §704.5. Entergy contests each of these bases as follows:

a) *Compliance with 1987 SPDES Permit*

NYSDEC Staff indicated that:

compliance with the 1987 SAPA-extended SPDES permit does not, and cannot, demonstrate compliance with the BTA requirement of 6 NYCRR §704.5. That 5-year SPDES permit is now nearly 25 years old and, because of the provisions of the now-expired HRSA, does not mandate the installation of any technology to reduce the adverse impact of entrainment from the operation of the CWISs for Units 2 and 3. Thus, the provisions of, and continued operation under, the 1987 SPDES permit for Indian Point do not comply with existing legal requirements.”

*See* Notice, p.14. As discussed above, Entergy contests Staff's characterization of the terms of the current SPDES permit and its alleged non-compliance with §704.5 (which is the subject of an ongoing NYSDEC adjudicatory hearing related to the renewal and NYSDEC-initiated modification of the SPDES Permit). Nonetheless, however, the relevant question for purposes of Entergy's Application is not whether the current SPDES permit comports with §704.5, but whether the renewed SPDES permit (and any subsequent renewals) with which Entergy must comply during the License Renewal Period provides reasonable assurances of compliance with §704.5 during the License Renewal Period. As acknowledged in the Notice itself, the determination of the best technology available for minimizing adverse environmental impacts under §704.5 is a central issue in the ongoing adjudicatory hearing on the renewal of the SPDES Permit currently scheduled for hearing in January 2011. *See* Notice, p. 15. As Entergy has stated previously, Entergy will abide by the outcome of that administrative proceeding and any subsequent judicial appeals, because that outcome will be reflected in the renewed SPDES Permit with which Entergy must comply in order to operate the Stations. Moreover, as discussed above, SPDES permits issued by the Department must insure compliance with WQS. Thus, compliance with §704.5 is reasonably assured during the License Renewal Period, irrespective of NYSDEC Staff's views of Entergy's current SPDES permit.

In addition, NYSDEC has acknowledged the primacy of the SPDES permit in establishing “best technology available” requirements under §704.5. Specifically, Ginna, Nine Mile and James A. FitzPatrick Nuclear Power Plants were issued WQCs for their respective NRC license renewals that deferred the decision on the “best technology available” under 6 NYCRR §704.5 to the SPDES process:

**Best Technology Available (BTA) Determination.** Pursuant to 6 NYCRR Part 704 and Section 316(b) of the Clean Water Act a Best Technology Available (BTA) determination will be conducted for the facility as part of the renewal of the State Pollutant Discharge Elimination (SPDES) permit. The BTA determination is based on whether the facility meets the regulatory criteria to minimize adverse environmental impacts to aquatic species. Biological studies will be required by the SPDES permit, and will be used by the Department to determine whether additional measures are needed to achieve BTA. As necessary, Mitigation Plans will need to be developed, submitted, and completed in consultation with Department staff.

NYSDEC WQC 7-3556-0013 for Nine Mile Point Nuclear Station LLC (June 21, 2006), p.2 (emphasis supplied); *see also* NYSDEC WQC 8-5434-00010 for Ginna Nuclear Power Plant (October 7, 2003), p. 2 (substantially similar statement); NYSDEC WQC 7-3556-00020 for James A. FitzPatrick Nuclear Power Plant (July 23, 2008), pp.2-3 (substantially similar statement). NYSDEC Staff offers no basis in the Notice for abandoning its consistent historic practice, but rather should issue a WQC that reflects Entergy's obligation to comply with the outcome of the SPDES renewal proceeding (and any subsequent renewal of the SPDES Permit), just as it did with respect to the Nine Mile, Ginna and FitzPatrick Nuclear Power Plants. Moreover, as discussed in subsection (b) below, NYSDEC took this very same approach with respect to Indian Point in 1982, and offers no credible basis for distinguishing its current action, underscoring the appropriateness of issuance of Indian Point's WQC.

b) *Compliance with 1982 WQC*

NYSDEC Staff asserts that "Entergy may not rely upon the terms of the 1982 §401 WQC in order to demonstrate its current compliance with State water quality standards." Notice, p. 16. Entergy contests this basis for denial, because it is arbitrary, capricious and contrary to law.

Entergy submitted to Staff a copy of the current WQC for the Stations, issued by NYSDEC in 1982 (the "Existing WQC"). The Existing WQC states in its entirety:

The New York State Department of Environmental Conservation hereby certifies, pursuant to Section 401 of the Federal Water Pollution Control (the Act) [sic], that compliance with the terms of the attached SPDES Permit #NY-0004472 for Consolidated Edison Company of New York, Inc.'s Indian Point Units Nos. 1 and 2 and for Power Authority of the State of New York's Indian Point Unit No. 3 Nuclear Power Plants will result in compliance with all applicable provisions of Section 203(e), 301, 302, 303, 304, 306 and 307 of the Act and the appropriate provisions of state law. This certification supersedes and replaces all prior certifications pursuant to Section 401 of the Act.

In the cover letter to Entergy's RFI Response, Entergy explained to NSYDEC Staff that the Existing WQC was further evidence that compliance with the terms of the SPDES Permit, as it may be amended as a result of the current adjudicatory proceeding and from time to time thereafter, provides reasonable assurances of compliance with the applicable provisions of the

CWA and all appropriate provisions of state law. *See* Entergy’s RFI Response, Cover Letter, pp. 2-3. While Entergy maintains that the current configuration and operation of the Stations is sufficient to comply with §704.5 both now and during the License Renewal Period, Entergy need not prevail in that argument in order for NYSDEC staff to approve the Application. It is enough that the SPDES permit that results from the ongoing adjudicatory proceeding must, as a matter of law, insure compliance with §704.5. For NYSDEC Staff to take the contrary view calls into question the Department’s ability to implement and enforce its SPDES program. In a nutshell, Entergy is confident that the renewed SPDES Permit that emerges from the SPDES permit proceeding and, if required, the New York courts will provide reasonable assurances of compliance with §704.5, and that NYSDEC staff have provided no contrary evidence or effectively called into question their own SPDES process or outcomes.

Thus, the import of the 1982 WQC is not that it assures compliance with WQS for all time. Instead, it confirms that the SPDES Permit – as renewed, amended or modified from time to time – is the appropriate vehicle for implementing §704.5, as NYSDEC Staff concluded for the Ginna, Nine Mile and FitzPatrick Nuclear Power Plants.

c) *A closed-cycle cooling system is not an “available” alternative.*

According to its Notice, NYSDEC Staff “has concluded that conversion from a once-through cooling system to a closed-cycle cooling system, while expensive and involving a potentially lengthy construction process, is nevertheless an available and technically feasible technology for Units 2 and 3 to meet the BTA requirement of 6 NYCRR §704.5 and comply with this State water quality standard.” Notice, p.17. Again, this very issue is being adjudicated before NYSDEC ALJs, and the Notice does nothing more than affirm – albeit in vague terms – NYSDEC Staff’s position in that proceeding (which Entergy contests). Accordingly, the Notice is arbitrary and capricious and not in accordance with law because, among other things, it cannot treat as resolved (as if in a final SPDES permit) the very issue – based upon the same set of facts – now proceeding through adjudication within the Department. Indeed, the Notice does not even purport to conduct a BTA analysis consistent with prior NYSDEC precedent and the Interim Decision or address the potentially insurmountable regulatory obstacles to constructing and operating closed cycle cooling (*e.g.*, compliance with air quality requirements).

As stated previously, NYSDEC Staff’s position that it “cannot defer its determination on the facilities’ present compliance with State water quality standards based upon a SPDES permit that was last issued in 1987” is off the mark. The relevant question is whether the outcome of the SPDES Permit proceeding assures compliance with §704.5 going forward and through the License Renewal Period, to which the answer certainly is yes. For further technical support to identify this issue for adjudication and all disputed statements in the Notice, *please see* Attachments C and D which are incorporated herein by reference; Attachment C represents the technical responses to the Notice prepared by Enercon, leading experts on cooling systems, and Attachment D represents the technical responses to the Notice prepared by Normandeau Associates, Inc., LWB Environmental, Inc., AKRF, Inc. and Applied Science Associates, Inc., leading experts on aquatic biology and the respective authors of the relevant underlying studies. In addition, *please see* Attachment A which is incorporated herein by reference; Attachment A represents the technical summary of the impacts to electric system reliability and electricity

pricing associated with a conversion of the Stations to closed cycle cooling, a topic required to be addressed more fully in the SPDES Proceeding as part of the analysis under §704.5. *See* SPDES Proceeding, Interim Decision of the Assistant Commissioner, p. 10.

d) *Cylindrical wedge-wire screens are a reasonable alternative intake technology.*

In its Notice, NYSDEC staff asserted that “the proposal to use cylindrical wedge-wire (“CWW”) screens at Units 2 and 3, as set forth in the Alternative Technology Report, does not comply with the BTA requirement of §704.5, because such proposal would only reduce, but not minimize, adverse environmental impact to aquatic organisms from operation of the facilities.” Notice, p.18. Once again, Entergy contests this basis for denial of the Application, because this very issue is being adjudicated before NYSDEC ALJs, the Notice does nothing more than restate NYSDEC Staff’s position in that proceeding which Entergy contests, with the result that Staff have not followed proper procedures for reaching a BTA determination.

Moreover, Entergy contests NYSDEC Staff’s factual conclusion that cylindrical wedge-wire screens are not a reasonable alternative intake technology and do not minimize adverse environmental impacts consistent with §704.5. Indeed, the Environmental Protection Agency identified this fine mesh/cylindrical wedge wire screens “as the most appropriate compliance technology” for the Stations. *See* 60 Fed. Reg. 41646 and Appendix A. For further technical support to identify this issue for adjudication and all disputed statements in the Notice, *please see* Attachments C and D which are incorporated herein by reference.

Therefore, the proposed issue for resolution after an adjudicatory hearing is: Whether the proposed denial of Indian Point’s WQC Application on the basis of alleged non-compliance with §704.5 is supported in fact and law?

4. NYSDEC Staff’s decision to deny the Application for alleged non-compliance with ECL §11-0535 due to impingement and entrainment of shortnose and Atlantic sturgeon is arbitrary, capricious, and not in accordance with law.

In its Notice, NYSDEC Staff asserts that operation of the Stations results in the impingement and entrainment of shortnose and Atlantic sturgeon and, therefore, a “take” of these species under ECL §11-0535. *See* Notice, p. 22. According to the Notice, “[t]he taking of shortnose sturgeon by the operation of the Indian Point facilities is unlawful and also impairs the best usage of the waters of the Hudson River for propagation and survival of sturgeon. Accordingly, the Department has determined that Units 2 and 3 are not in compliance with ECL Article 11 and, therefore, in accordance with 6 NYCRR §608.9(a)(6), must deny the §401 WQC application.” *Id.*, p. 23. Entergy contests this basis for denial of the Application because it is arbitrary, capricious and not in accordance with law.

Even if there were a requirement to demonstrate that impingement and entrainment of sturgeon at Indian Point does not impair the waters of the Hudson River for sturgeon propagation and survival, the empirical evidence confirms that any such impingement and entrainment – to the extent it occurs at all – does not impair sturgeon propagation and survival. For further

technical support to identify this issue for adjudication and all disputed statements in the Notice, *please see* Attachment D which is incorporated herein by reference.

Based upon the above, the proposed issue for resolution after an adjudicatory hearing is: Whether the proposed denial of Indian Point's WQC Application based on the alleged impairment of the waters of the Hudson River for sturgeon propagation and survival due to the alleged impingement and entrainment of sturgeon by the Stations is supported in fact and law?

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As detailed above and in the Attachments, Entergy respectfully requests an adjudicatory hearing on the Staff's Notice of Denial, pursuant to 6 NYCRR §621.10(a)(2). In accordance with 6 NYCRR §624.4(b)(5)(iii), the legal issues identified in Section I above should be scheduled for resolution by the ALJ(s) within 30 days following the issues ruling or any written submittals authorized by the ALJ(s) following the issues ruling. As described above, these legal issues include the following:

1. Whether NYSDEC Staff improperly denied the Application where, as here, the Stations already possess and must at all times during the License Renewal Period hold a valid and enforceable SPDES permit in order to operate?
2. Whether NYSDEC Staff's purported denial of a WQC based on the potential release of radiological materials regulated under the Atomic Energy Act by the NRC is preempted, and therefore prohibited, by federal law?
3. Whether NYSDEC Staff improperly denied Indian Point's WQC, because the release of AEA materials from an NRC-licensed facility is not subject to regulation under §401 of the CWA?
4. Whether NYSDEC Staff improperly denied Indian Point's WQC, because 6 NYCRR §701 does not apply to alleged impacts of cooling water intake structures?
5. Whether NYSDEC Staff improperly denied Indian Point's WQC, because NYSDEC cannot deny the Application on the basis of alleged taking of endangered or threatened species in violation of ECL Article 11 or 6 NYCRR §701.11?
6. Whether, absent express deferral to the pending SEQRA analysis in the SPDES Proceeding or the NRC's FSEIS, NYSDEC Staff properly have established their compliance with SEQRA?

In addition, to the extent not fully resolved on the legal issues above, Entergy respectfully requests the prompt scheduling of an adjudicatory hearing to address all disputed issues of fact, which include the following:

1. Whether the proposed denial of Indian Point's WQC Application based on thermal considerations is supported in fact and law?
2. Whether the proposed denial of Indian Point's WQC Application based radiological considerations is supported in fact and law?

3. Whether the proposed denial of Indian Point's WQC Application on the basis of alleged non-compliance with 6 NYCRR §704.5 is supported in fact and law?
4. Whether the proposed denial of Indian Point's WQC Application based on the alleged impairment of the waters of the Hudson River for sturgeon propagation and survival due to the alleged impingement and entrainment of sturgeon by the Stations is supported in fact and law?

Entergy reserves the right to modify or supplement these legal and factual positions at the issues conference or in any written submissions authorized by the ALJ(s) following the issues conference.