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Joe Martens
Commissioner

MEMORANDUM

VIA E-MAIL AND REGULAR MAIL

TO: Service List

FROM: Maria E. Villa, Administrative Law Judge

RE: Entergy Indian Point 2 and 3

DATE: October 18, 2013

This memorandum addresses Entergy's October 4, 2013 motion for judgment as a matter of law concerning permanent outages. The affirmation of Kevin P. Martin, Esq., of that same date (the "Martin Affirmation"), was attached to the motion, as well as eleven exhibits. Department Staff opposed the motion in the October 11, 2013 affirmation of Mark D. Sanza, Esq. (the "Sanza Affirmation").[1] Riverkeeper also opposed the motion in an October 11, 2013 memorandum of law, with attached exhibits. Three other parties submitted letters in support of Entergy's motion, including the African American Environmentalist Association ("AAEA") (letter dated October 9, 2013), the Independent Power Producers of New York ("IPPNY") (letter dated October 11, 2013), and the City of New York's Office of Long-Term Planning and Sustainability (the "City") (letter dated October 11, 2013).[2]

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[1] In its opposition, Department Staff raised a threshold procedural objection to the form of the motion, noting that Entergy's filing was not accompanied by an affidavit or affirmation stating the facts that were the basis of the motion. Section 624.6(c)(2) of 6 NYCRR provides that a motion "must clearly state . . . the facts on which it is based." Department Staff argued that the Martin Affirmation, which consisted of a single paragraph, was insufficient to satisfy this requirement because it did not make reference to the statements in the motion or offer supporting facts. Despite this deficiency, Entergy's motion will be considered, but in future the parties are directed to provide an affidavit or affirmation that sets forth the factual basis for any motion filed.

[2] An October 11, 2013 letter was also received from James T. Slevin, President, Utility Workers Union of America, Local 1-2, in support of Entergy's position. Because this letter was sent by a non-party, it will not be considered on this motion.

Entergy's motion was filed in response to Department Staff's September 12, 2013 letter to the ALJs and the parties (the "Staff Letter"), indicating that "Staff intends to present additional evidence on permanent forced periods of outages for fish protection as an additional BTA alternative for the Indian Point facilities in this proceeding." Staff Letter, at 1. Department Staff asserted that forced outages for fish protection had already been advanced to adjudication in the August 13, 2008 Interim Decision of the Assistant Commissioner. In addition, Department Staff stated that "[p]ermanent forced periods of outages have also been the subject of witness testimony and legal arguments advanced to date on cylindrical wedge-wire screen issues, as well as on the §401 WQC [Water Quality Certification] issues of compliance with water quality standards and best usage of surface water." Id. The Staff Letter went on to state that "Staff is obliged to proceed so that the SEQRA/water quality certificate and SEQRA decision-making record is sufficiently thorough to contain appropriate consideration of alternative measures for minimizing or mitigating unavoidable adverse environmental impacts." Id. Department Staff recommended that permanent outages be addressed during the time period when interim outages would be addressed, "with an understanding that it also implicates any decision selecting BTA." Id. at 2. In a September 12, 2013 e-mail, Riverkeeper stated that it agreed with Department Staff that "issues relating to the imposition of permanent outages as BTA or as a water quality-based entrainment control based on evidence previously adduced and the law of the case" would be most efficiently addressed as part of the adjudication of the interim outages issue. Riverkeeper September 12, 2013 e-mail (internal citations omitted).

During the September 26, 2013 conference call, the Staff Letter was discussed, and Entergy advised that it would be filing a motion. See September 26, 2013 Status Teleconference Transcript, at 14-25. A briefing schedule was set and submissions were timely received from the parties, as set forth above.

In its motion, Entergy argued that Department Staff's position contradicted the November 12, 2003 draft SPDES permit, "cannot be justified as required by law and is a gross misuse of this Tribunal's and the parties' time, money and effort over the last decade." Entergy Motion, at 1. Entergy went on to maintain that "any effort by DEC Staff to revise the bases for its April 2, 2010 draft denial of Entergy's requested water quality certification ("WQC") to include grounds relating to permanent outages has been waived as a matter of law, violates Section 401(a) of the Clean Water Act's ("CWA") one-year limitation on State action, and must be rejected." Id. at 1-2.

Entergy noted that the fact sheet that accompanied the draft SPDES permit stated that Department Staff had evaluated and rejected permanent outages as BTA for Indian Point. Entergy maintained that as a result, "for the duration of this proceeding, the public and all parties have operated under the same fundamental assumption *that permanent outages were not a part of this proceeding*." Id. at 2 (emphasis in original).

Entergy pointed out that on February 25, 2010, the ALJs directed the parties to advise the Service List of any alternative BTA proposals to be advanced in this proceeding, and that Department Staff was to advise as to any changes in its position with respect to BTA.

Entergy emphasized that no party identified forced periods of outages for fish protection. Entergy argued further that Department Staff did not raise permanent outages in the April 2, 2010 WQC Denial Letter, stating that closed-cycle cooling was the only available and technically feasible technology that would satisfy the BTA requirement of 6 NYCRR Section 704.5.

According to Entergy, this change in position would deprive the public of meaningful participation in the proceeding. Moreover, Entergy noted that "even if this damage to the public trust could be remedied, it does nothing to remedy the cost, loss of time and effort to Entergy and this Tribunal and the other parties of addressing closed-cycle cooling as BTA for nearly a decade." Id. at 4. At a minimum, Entergy maintained, "DEC Staff must officially advise all that it is no longer pursuing closed-cycle cooling, but has selected a new proposed BTA." Id. Entergy went on to assert that Department Staff "must meet its burden to establish the material new information that warrants it substituting, in the eleventh hour, permanent outages that it has known of since 2003 and previously rejected as failing to satisfy Section 704.5." Id. According to Entergy, this would require establishing a legal way to replace the Department's draft SPDES permit with a new proposed SPDES modification, invalidating the water quality certification denial to the extent it was grounded on closed-cycle cooling as BTA, "and most importantly developing a mechanism for including the public and all parties in the BTA issue from the beginning, one that does not restart the clock to delay this proceeding another decade." Id. at 5. Entergy sought a ruling that permanent outages had been waived and cannot be imposed as a SPDES permit modification (absent satisfaction of fundamental procedural requirements); that such outages cannot support the water quality certification denial; and that Riverkeeper waived its right to advance permanent outages as BTA.

Entergy noted that the draft SPDES permit contained a provision for interim outages of 42 unit days annually, during the time when the proposed BTA was being implemented. Entergy acknowledged that one of the Indian Point units already undertakes scheduled maintenance and refueling outages of approximately one month each year, and that this provision would not have a significant effect on plant operations. Entergy contended that the approximately two additional weeks of outages "would cause a significant economic impact to Entergy," but such outages would not necessarily be taken during the summer months and therefore would have less of an effect on Indian Point's generation during the period of highest demand. Id. at 7. Entergy went on to reiterate that throughout this proceeding, Department Staff had taken the position that interim outages were not a BTA proposal, and that Riverkeeper had also rejected permanent outages as BTA. According to Entergy, the WQC Denial Letter does not identify the failure to take permanent outages as a basis for denial, but rather identifies closed-cycle cooling as the only available and technically feasible technology that would satisfy Section 704.5 of 6 NYCRR.

Entergy went on to point out that Tetra Tech, Department Staff's consultant, did not identify permanent outages as a BTA alternative in the BTA report submitted in June of 2013, and that Riverkeeper's BTA report identifies only closed-cycle cooling as BTA. Entergy noted that the Staff Letter, and Riverkeeper's subsequent e-mail, do not specify what

period of permanent outages may be BTA, or the calendar dates on which such outages would occur.

Entergy argued that the Staff Letter's statements concerning the SEQRA process were misplaced. Entergy maintained that consideration of permanent outages as BTA in lieu of closed-cycle cooling was not mandated by SEQRA, in light of Department Staff and Riverkeeper's failure to advance permanent outages as a BTA alternative at the issues conference or in response to the ALJs' direction in May of 2010 to identify BTA proposals. Entergy asserted that Department Staff would still be required to establish the basis for adjudication of such outages, and comply with procedural requirements governing a permit modification, including public notice. Finally, Entergy set forth its arguments regarding the effect on consumers and electric system function and reliability, as well as increased power production by fossil fuel generating plants and the resulting increase in air emissions. Entergy asserted that, if Department Staff had raised outages as a potential BTA in November 2003, other parties might have sought to intervene in the proceeding, but now have been foreclosed from doing so with respect to the record developed to date.

Department Staff's opposition amplified the points raised in the Staff Letter. According to Department Staff, Entergy's claims that adjudication of outages as BTA would require an extensive and different witness group from those Entergy has retained were speculative and insufficient to support its claim to the relief sought. Department Staff went on to argue that permanent forced outages "are not a new concept," noting that an outage duration of up to six weeks was evaluated in the 1999 Draft Environmental Impact Statement ("DEIS"), which was the same as the outage provided for in the 1981 and 1987 SPDES permits. Department Staff noted that the June 2003 Final Environmental Impact Statement ("FEIS") further evaluated a 32-week forced outage, and that the draft SPDES permit fact sheet only discussed outages lasting for that duration. Department Staff stated that "[w]hile there is no mention or consideration of any period less than 32 weeks of generation outages for fish protection in the 2003 FEIS or Fact Sheet, such absence cannot be used by Entergy to preclude DEC staff from pursuing or considering any other lesser periods of outages as an alternative BTA proposal before the close of the record, particularly since, as noted above, the DEIS evaluated lesser periods of outages as well." Sanza Affirmation, ¶ 9.

Department Staff took the position that a draft permit and accompanying fact sheet are preliminary determinations, subject to change. Department Staff stated that Entergy had proposed only cylindrical wedge wire screens as BTA, and that Department Staff determined that this proposal "did not meet applicable BTA requirements, did not adequately mitigate environmental impacts, did not meet applicable water quality standards or regulations, and did not satisfy permitting standards." Id., ¶ 12. Department Staff went on to maintain that, as a result, Department Staff has been put in the position of having to undertake the role typically reserved for a project applicant, and identify, analyze, and propose alternatives to mitigate impacts. Department Staff concluded that "it is incumbent upon DEC staff to offer alternative BTA proposals in order to meet those requirements during the hearing process which, in this case, is also serving as the SEIS development process." Id., ¶ 13.

Department Staff pointed out that Entergy's BTA proposal, cylindrical wedge wire screens, had been modified following Entergy's 2010 SPDES proposal, and that none of these further modifications were subject to additional public notice and comment. Department Staff noted further that the public will still have opportunities to comment on the supplemental environmental impact statement that is being developed as part of the hearing process. Department Staff went on to note the iterative nature of the permit hearings process, citing to its review and assessment of thermal discharge and impact information that was not fully submitted until 2011. Upon review of this information, Department Staff determined that a defined thermal mixing zone could provide reasonable assurance of compliance with the Department's water quality standards and thermal discharge criteria. Observing that Entergy did not object to the proposed draft permit modification, or insist upon additional public notice and comment, Department Staff contended that Entergy's arguments in the instant motion were inconsistent with Entergy's position with respect to the thermal issue, which was addressed by Department Staff to Entergy's benefit.

According to Department Staff, "there can be no prejudice to Entergy (or to any other parties, for that matter) from a BTA proposal on permanent forced outages at the Indian Point facilities given the previous consideration of outages at the facilities in the 1999 DEIS and 2003 FEIS, and the fact that hearings on DEC staff's and Riverkeeper's BTA, including interim outages and outages for closed-cycle cooling construction periods, have yet to be conducted." Id., ¶ 14. Department Staff went on to contend that there had been no adjudication on the topic of interim outages, and consequently, no prejudice to Entergy to litigate the similar topic of permanent outages, where the primary difference is the length of time outages will be required or expected to take place. Moreover, Department Staff maintained that given the participation of other parties in the proceeding, including New York City, IPPNY, Central Hudson Gas & Electric, and the AAEA, "Entergy would be hard-pressed to substantiate that there was an interest that was not already represented or otherwise involved in these proceedings." Sanza Affirmation, ¶ 43. In addition, Department Staff noted that testimony on outages had already been presented at the hearings through its witness, William Charles Nieder.

Department Staff stated that it had not abandoned closed-cycle cooling as a BTA technology, but rather a recognition that the decision-maker could decline to select that technology for one or both of the units at Indian Point. Department Staff asserted that it was incumbent upon it to offer one or more BTA alternatives, since it had already evaluated and rejected cylindrical wedge wire screens, and particularly since a failure to consider alternatives would risk challenge in the courts.

Riverkeeper's opposition referred to Entergy's May 17, 2013 motion for leave to file a sur-rebuttal brief on the topic of best usages. Riverkeeper argued that the instant motion was another attempt by Entergy to "de-litigate" the evidence and arguments advanced by Department Staff and Riverkeeper during the best usages portion of the hearings. Riverkeeper Memorandum of Law, at 2. According to Riverkeeper, Entergy's motion with respect to permanent outages also sought to "re-litigate" the best usages issue. Riverkeeper maintained that Entergy failed to cite to any regulation or decision which would authorize the

Tribunal to grant the relief sought by Entergy, which Riverkeeper argued amounted to a "post-trial, pre-judgment ruling that Riverkeeper has somehow 'waived' its right to seek outages pursuant to 6 NYCRR § 701.11." Id., at 3. Riverkeeper went on to argue that other parties to the hearing had raised questions concerning the impacts of replacement power, and that Entergy could not now be heard to claim that the parties and the public were not on notice of the impacts of temporary or permanent closure of the Indian Point facility. Riverkeeper contended that Entergy did not have standing "to assert conjectural claims on behalf of unidentified 'non-parties' or to assert purely economic claims on its own behalf." Id. at 10, fn. 15.

According to Riverkeeper, "outages are a *consequence* of NYSDEC's 401 Denial on best usages grounds." Id., at 4-5 (emphasis in original). Riverkeeper contended that it raised the issue of outages in its petition for party status in the SPDES proceeding. In response, Entergy pointed out that Riverkeeper raised the issue of interim outages, but advanced closed-cycle cooling as its BTA proposal. Riverkeeper maintained further that outages are not a technology that was required to be disclosed in 2010, but rather are operational measures that Riverkeeper raised in its petition for full party status in the SPDES proceeding.

The AAEA stated that it felt "blind-sided and abused by this new recommendation," arguing that the permanent outage proposal was not raised as an issue for adjudication because Department Staff rejected it as BTA for Indian Point. AAEA Letter, at 1. According to the AAEA, the permanent outage recommendation, like closed-cycle cooling, "violates all of the environmental justice considerations related to adverse environmental impacts we presented at the issues conference." Id.

The City's letter stated that "the record in this proceeding reveals a complete lack of notice provided to the Tribunal and to the parties by Staff and Riverkeeper prior to September 12" that permanent outages would be under consideration as a possible BTA. City Letter, at 1. According to the City, important public health and safety issues would be implicated by Department Staff's proposal. The City stated that "even an elliptical reference to shutting down a plant supplying more than 2000 megawatts of electricity – and doing so with no direct air emissions – is hardly to be taken lightly." Id., at 2. The City noted that what Department Staff and Riverkeeper "essentially propose is to force the simultaneous shutdown of two key generation plants during the period of highest energy demand when the electricity grid is already under its greatest annual stress – the summer." Id.

The City's letter cited to two reliability studies prepared by the New York Independent System Operator ("NYISO"), acting jointly with the New York State Reliability Council ("NYSRC"). The City noted that, with oversight by the Federal Energy Regulatory Commission ("FERC"), the NYISO acts jointly with NYSRC "to ensure that electric system reliability in this State is maintained to the maximum degree possible." Id. The latest NYISO reliability analyses (the *2012 Reliability Needs Assessment* ("RNA"), dated September 18, 2012 and the *2012 Comprehensive Reliability Plan* ("CRP"), dated March 19, 2013) include analyses of possible future scenarios if Indian Point Units 2 and 3 were no longer in service. The RNA concluded that reliability violations would occur in 2016 if

Indian Point were retired at the latter of the two units' current license expiration, that electric system thermal violations would occur, and that voltage performance on the system would be degraded. The CRP stated that if the units were retired by the end of 2015, violations of transmission security and resource adequacy criteria would occur immediately.

The City went on to assert that "[w]hile the immediate issue here is obviously not permanent retirement but rather a seasonal forced outage of both Indian Point units," the extensive analysis undertaken by the NYISO was clearly relevant and could inform any assessment of the implications of this proposed BTA alternative. Id., at 3. In addition, the City pointed out the implications for air quality in the absence of Indian Point generation, inasmuch as peak summer demand "would almost certainly have to be drawn from other generation sources. As a practical matter, such available sources will likely be gas-fired, thus raising emissions of carbon, nitrogen oxides, and other pollutants." Id.

The IPPNY Letter raised similar reliability concerns, noting that Indian Point "is an essential component of New York's energy supply," providing more than 25 percent of the electricity for Westchester County and New York City. IPPNY Letter, at 1. The letter went on to note that during the summer of 2013, "New York State successfully met a new record peak demand for electricity by having every available generating facility in New York committed and online." Id. at 2.

Ruling:

Entergy's motion to preclude consideration of permanent forced outages is denied, and as indicated in Department Staff's September 12, 2013 letter, this BTA alternative will be adjudicated. While it would have been preferable for Department Staff to raise this alternative initially in the November 2003 fact sheet, or at the latest in 2010,[3] the need for a complete record for the decision-maker's review outweighs Entergy's argument that consideration at this point would be untimely.

The permanent forced outages BTA alternative will be subject to public notice. Department Staff and Riverkeeper's arguments that such notice is unnecessary are rejected. As was the case when Department Staff and Entergy reached agreement on a mixing zone as a means of addressing the thermal issue, public notice will be provided (see June 15, 2011 *Environmental Notice Bulletin* (notice of tentative determination to modify Special Condition 7.b of the existing draft SPDES permit)).

The fact sheet issued with the Department's November 12, 2003 draft SPDES permit states that generation outages were considered but rejected as BTA because the costs of such outages would be wholly disproportionate to the environmental benefits to be gained. Draft

[3] See February 25, 2010 memorandum from ALJ Villa to the Service List, with attached Sequence of Events, requiring submission of any alternative BTA proposals by Friday, May 21, 2010.

SPDES permit fact sheet, at 4.[4] Ten years have passed since the fact sheet was issued, and the parties now have the benefit of Department Staff and Riverkeeper's reports on closed-cycle cooling. At this juncture, Department Staff seeks to advance permanent outages as a BTA alternative. Accordingly, on or before **Friday, November 8, 2013**, Department Staff is to provide to the parties and the ALJs its offer of proof with respect to permanent forced outages as a BTA alternative. The offer of proof should include, but not be limited to, a specific, detailed explanation (incorporating a cost analysis) of the change from Department Staff's November 12, 2003 fact sheet, which found this alternative to be wholly disproportionate. In addition, the offer of proof must include the specific time periods of forced outages under consideration (both timing during the calendar year, and the duration of such outages). Finally, Department Staff must identify the witnesses who will be called to testify.

The hearings on closed-cycle cooling have not yet commenced, and the topics of interim measures, endangered species and thermal impacts remain outstanding. The hearings on closed-cycle cooling will of necessity take into account the concerns Entergy raised with respect to electric system reliability and economic impacts, as well as the consequences of increased air emissions from replacement generation sources, which was raised by the AAEA and other parties. When hearings on permanent forced outages take place, these concerns can be further evaluated, along with other subjects for inquiry related to this BTA alternative.

The closed-cycle cooling portion of the adjudicatory hearing, which will likely take place in early 2014, will not include this proposed BTA. The parties will complete the record with respect to closed-cycle cooling. Thirty days after testimony in the closed-cycle cooling hearings have concluded, a notice with respect to the issue of permanent outages will be published, setting dates for a legislative public hearing and issues conference. The public notice must make available all related documents, including but not limited to a fact sheet, as required by Sections 624.3(b) and 621.7(b)(7)(i)(a) of 6 NYCRR. Depending upon the issues with respect to permanent outages raised for consideration during the issues conference, the adjudicatory hearing may commence immediately following the issues conference. The issue of interim measures will also be adjudicated at that time. The hearing may also include adjudication of any remaining issues.

Consistent with Section 624.9(b)(2) of 6 NYCRR, Department Staff will have the burden of proof to show that this proposed modification is supported by the preponderance of the evidence. In addition, as required by the August 13, 2008 SPDES Interim Decision,

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[4] See November 13, 2003 Draft SPDES Permit, Biological Fact Sheet, Attachment B (Page 4 of 8), which states:

> "Generation outages are another way to reduce cooling water flow that could result in substantial decreases in fish mortality. Annual outages lasting 32 weeks would result in reductions in fish mortality similar to closed-cycle cooling. Since these generation outages would be necessary each year, the economic costs to the operator over a possible 30 year life of the plant (assuming twenty year license extensions after the 2013 and 2015 license expirations for Units 2 and 3, respectively) would represent approximately 62% of Indian Point's gross annual revenue. The Department considers these costs to be wholly disproportionate to the environmental benefits derived."

Department Staff, as the proponent of permanent forced outages, must present an analysis of the environmental impacts of the proposal pursuant to SEQRA. See August 13, 2008 Interim Decision of the Assistant Commissioner, at 40.

Any appeals of this ruling are to be filed following submission of Department Staff's November 8, 2013 offer of proof. The original and three copies of any appeal from this ruling must be received by Regional Director Eugene Kelly by no later than 4:00 p.m. on **Friday, November 22, 2013**, at the following address: Regional Director Eugene Kelly (att'n: Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services), New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-1010. Upon receipt, two copies will be forwarded to the ALJs. One copy of the appeal must be served upon each party on the Service List in the same manner and at the same time as the submission is sent to the Assistant Commissioner. Submissions should also be sent via electronic mail to the Service List, including the ALJs. Submissions sent via telefacsimile will not be accepted.

An original and three copies of any response to an appeal must be received by no later than 4:00 p.m. on **Friday, December 6, 2013**. One copy of the response must be served on each party on the Service List in the same manner and at the same time as the submission is sent to the Regional Director. Submissions should also be sent via electronic mail to the Service List, including the ALJs. Submissions filed via telefacsimile will not be accepted.

c: Administrative Law Judge Daniel P. O'Connell