

## IPRenewal NPEmails

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**From:** Gray, Dara F [DGray@entergy.com]  
**Sent:** Tuesday, January 10, 2012 5:14 PM  
**To:** Green, Kimberly; Curry, John J  
**Cc:** Turk, Sherwin; ksutton@morganlewis.com; Dacimo, Fred R.; Zoli, Elise N; Glew Jr, William; Dowell, Kelli  
**Subject:** RE Indian Point Biological Opinion  
**Attachments:** IP Part 182 NOIA1-09-12.pdf

Hi Kim

First let me introduce myself – I am the Environmental Lead at Indian Point. Although you were previously the Safety PM for our license renewal, I have only dealt with the environmental side of the house and we have not had an opportunity to work together in the past – so I thought an introduction would be helpful.

In keeping with my previous dealings with Drew Stuyvenberg, I wanted to keep you informed of any developments which could be related to Indian Point's License Renewal Environmental Issues. Therefore, I am forwarding to you a copy of the letter we received from NYSDEC in regards to their recently promulgated NYS Endangered Species Incidental Take Permits (historically, NYSDEC has relied on NMFS for regulating takes of endangered species but recently promulgated regulations which require a NYS Permit, as well. )

Since NMFS recently prepared a Biological Opinion regarding the potential for Indian Point to "take" shortnose sturgeon, this was submitted to NYSDEC as our application for a permit under NYSDEC (consistent with their practice of deferring to NMFS). The attached letter indicates that NYSDEC is requesting that we submit a formal application to them for the incidental take of shortnose sturgeon, which could occur as a result of IPEC operations. Our plan is to be fully responsive to NYSDEC's request and submit the additional information within the 60 day time frame outlined in the letter.

If you have any questions, please feel free to contact me. Due to the NYSDEC 401 Water Quality Certification hearings, I will be out of the office, so emails are the best way to reach me.

Thanks and look forward to working with you.

*Dara Gray, REM*

Chemistry/Environmental

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**From:** Gray, Dara F

**Created By:** DGray@entergy.com

**Recipients:**

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# New York State Department of Environmental Conservation

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Joe Martens  
Commissioner

January 9, 2012

Ms. Dara Gray

Entergy Nuclear Operations, Inc.

Indian Point Energy Center

450 Broadway, Suite 3

Buchanan, New York 10511

**Re: Notice of Incomplete Application and Request for Additional Information  
Application for Incidental Take Permit (pursuant to ECL §11-0535 and 6 NYCRR  
Part 182) – Entergy Nuclear Indian Point Units 2 and 3**

Dear Ms. Gray:

The New York State Department of Environmental Conservation (Department) has received the November 21, 2011, letter with attachments from Elise Zoli, Esq., on behalf of Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc. (Entergy), the applicant. The applicant requests that the Department either (1) accept an October 14, 2011, Biological Opinion from the National Marine Fisheries Service (NMFS) in satisfaction of New York State's requirement for an incidental take permit under Environmental Conservation Law (ECL) § 11-0535 and its implementing regulations at 6 NYCRR Part 182 (Endangered and Threatened Species of Fish and Wildlife; Species of Special Concern; Incidental Take Permits) or (2) treat the November 21<sup>st</sup> letter and attachments as an application for an incidental take permit under ECL § 11-0535 and 6 NYCRR Part 182 for the license renewal period of Indian Point Units 2 and 3. For the reasons stated below, this letter constitutes a Notice of Incomplete Application for an incidental take permit.

As an initial matter, Entergy indicates that the November 21, 2011, letter and attachments are a "supplement" to its April 6, 2009, application to the Department for a federal Clean Water Act § 401 Water Quality Certification (WQC), and that the Department should consider it as "an application for an incidental take permit for the taking of shortnose sturgeon during the license-renewal period."<sup>1</sup> However, Department staff conclude that the November 21, 2011, submission is not a "supplement" to a previously denied § 401 WQC application, but is a new application for an incidental take permit pursuant to ECL § 11-0535 and 6 NYCRR Part 182.

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<sup>1</sup> By letter dated April 2, 2010, the Department timely denied Entergy's Joint Application for a § 401 WQC for the NRC license renewal of the Indian Point nuclear facilities. One of the bases for the Department's denial of the § 401 WQC application was Entergy's lack of an incidental take permit for the taking of shortnose sturgeon from the operation of Indian Point Units 2 and 3. The April 2010 denial of Entergy's § 401 WQC application is the subject of ongoing administrative proceedings before the Department. See ALJ Villa's *Ruling on Proposed Issues for Adjudication and Petitions for Party Status on Entergy's § 401 WQC Application*, December 13, 2010 ([http://www.dec.ny.gov/docs/legal\\_protection\\_pdf/indianir.pdf](http://www.dec.ny.gov/docs/legal_protection_pdf/indianir.pdf)).



Additionally, the NMFS Biological Opinion, standing alone, does not satisfy New York's statutory and regulatory requirements for an incidental take permit application. As a basic matter, the New York statute and regulations require a description of the activity, and the NMFS Biological Opinion was premised upon an inaccurate description of the activity. The activity that the federal Nuclear Regulatory Commission (NRC) described for NMFS as part of those agencies' consultations under the federal Endangered Species Act was premised upon continued generation at Indian Point using a once-through cooling water intake system. See Biological Opinion, at 3. However, through the Department's administrative process, once-through cooling will either be replaced by closed-cycle cooling (the Department's preferred alternative) or cylindrical wedge-wire screens (Entergy's preferred alternative), or a combination of both. The NMFS Biological Opinion expressly states that the impacts from closed-cycle cooling and cylindrical wedge-wire screens have not been analyzed.

Similarly, NMFS's October 14, 2011, Biological Opinion is not a "renewal" of a prior Biological Opinion for the incidental take of shortnose sturgeon at Indian Point. NMFS made clear in its October 14, 2011, Biological Opinion that "incidental take associated with IP2 or IP3 has never been exempted." Biological Opinion, at 2. Therefore, based upon staff's analysis, the Department has determined that the proposed application for an incidental take permit is incomplete in accordance with 6 NYCRR § 182.11.

Upon review of Entergy's November 21, 2011, submission, Department staff concludes that it does not satisfy the requirements for obtaining an incidental take permit under ECL § 11-0535 and 6 NYCRR Part 182. The Department can approve an incidental take permit that includes the following:

#### **Request for Additional Information (Items Due Within 60 Days)**

**1. Completed Joint Application Form.** An applicant must provide the Department with all information required by § 182.11(c)(1). Entergy should complete and submit a Joint Application Form, available on the Department's website at <http://www.dec.ny.gov/permits/6222.html>. The completed permit application must be accompanied by an executed certification statement, required by § 182.11(c)(7).

**2. Endangered Species Impact Analysis, Mitigation Plan, and Implementation Agreement.** Pursuant to § 182.11(c)(3), (4), (5), (6), (d), and (e), the incidental take permit application must include an endangered or threatened species impact analysis, mitigation plan, and implementation agreement.

a. In the impact analysis, Entergy must accurately describe the activity and the impacts to the shortnose sturgeon from both construction and operation for the closed-cycle cooling alternative or cylindrical wedge-wire screen alternative. Department staff expects that the impact analysis can be accomplished with existing, available data and other information.

b. Once Entergy assesses the impacts, it must propose a plan to mitigate those impacts. 6 NYCRR § 182.11(d) sets forth the specific information that must be included in a mitigation plan. The plan must provide a successful enhancement of the species' subject population, successful enhancement of the species' overall population, or contribution to the recovery of the species within New York.



c. As part of its implementation agreement, Entergy must agree to support and undertake the following "Conservation Recommendations" listed on page 67 of NMFS's Biological Opinion:

- i. performing tissue analysis of dead shortnose sturgeon removed from the Indian Point cooling water intakes to determine contaminant loads, including radionuclides;
- ii. undertaking studies to document the presence of shortnose sturgeon in the broadest area affected by Indian Point's thermal plume to validate certain thermal assumptions in the Biological Opinion; and
- iii. performing in-water assessments, abundance, and distribution surveys for shortnose sturgeon in the Hudson River, including Haverstraw Bay.

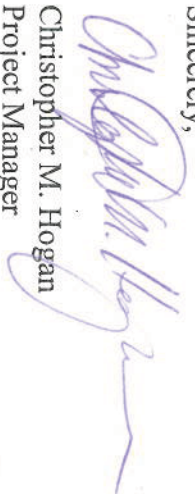
To satisfy (2)(c)(iii), Entergy can agree to either undertake a shortnose sturgeon distribution and habitat use survey in cooperation with and as directed by the Department's Hudson River Fisheries Unit, or it can agree to fund a distribution and habitat use survey that the Department is currently planning. This survey is a preliminary sonic tracking study of shortnose sturgeon, which will begin in the spring of 2012.

Pursuant to ECL Article 70 and 6 NYCRR Part 621 (Uniform Procedures), as applied through the operation of 6 NYCRR § 182.10 (Procedural requirements for incidental take permit applications and related matters), Entergy must provide the above-requested information and commitments within sixty (60) days of the date of this letter. If Entergy fails to provide complete responses to the above-requested information within that time period, the application may be deemed withdrawn or denied in accordance with regulation.

If the information that Entergy submits is fully responsive and meets the regulatory requirements, the Department expects to issue an incidental take permit pursuant to 6 NYCRR § 182.12. Note, however, that the Department's issuance of an incidental take permit to Entergy does not negate any other bases of the Department's April 2, 2010, denial of Entergy's request for a § 401 WQC under the federal Clean Water Act and the Department's regulations.

If you have any questions regarding this Notice of Incomplete Application, please do not hesitate to contact me.

Sincerely,



Christopher M. Hogan  
Project Manager

c: C. Nieder  
A. Kahnle  
K. Hattala  
D. Rosenblatt  
P. Kolakowski, P.E.  
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File

