



NOV 25 2015

Delivered via email and mail

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Ms. Linda Baldwin
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Re: Response to Letter-Requests under the Coastal Zone Management Act in the
Matter of Entergy Nuclear Operation, Inc.

Dear Mr. Weisburst and Ms. Baldwin:

I am in receipt of your recent letters regarding the applicability of the New York State Department of State's November 6, 2015 objection under the Coastal Zone Management Act to Entergy Nuclear Operations, Inc.'s application to the Nuclear Regulatory Commission to relicense Entergy's nuclear power plants, Indian Point Units 2 and 3 (Project).¹ Entergy has asked that NOAA declare New York's objection invalid based on Entergy's earlier withdrawal of its CZMA federal consistency certification for the Project. New York disagrees that Entergy was permitted to withdraw its certification, and defends the validity of its objection. Both parties have indicated that holding this matter in abeyance may be prudent based on a pending state court proceeding, the outcome of which may bear directly on the disputed CZMA issues the parties have raised.

¹ Letters from Sanford I. Weisburst, Quinn Emanuel Urquhart & Sullivan, LLP, to David Kaiser, Senior Policy Analyst, Office for Coastal Management, NOAA (Nov. 10 and 25, 2015), and Linda Baldwin, General Counsel, New York Department of State, to David Kaiser, Senior Policy Analyst, Office for Coastal Management, NOAA (Nov. 24, 2015).



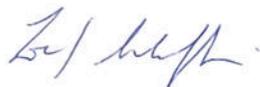
NOAA understands that New York's CZMA review of the relicensing of Entergy's Indian Point facilities is complex, and has been the subject of multiple disputed issues between Entergy and New York over the last several years. NOAA also is aware that in 2014, a New York state court determined that the New York Coastal Management Program, approved by NOAA in 1982, exempted Indian Point from future CZMA reviews through a "grandfather" clause.² That state-court decision has been appealed by New York and is now pending before the New York Court of Appeals.

I have been delegated authority to resolve procedural issues related to CZMA appeals. It is prudent to wait for the New York Court of Appeals decision, since the court's decision may be dispositive of the issues the parties have raised here. Under NOAA's regulations, I may grant an extension of time to file a Notice of Appeal and the Consolidated Record needed to commence an appeal for matters involving energy projects.³ I find that there is good cause for an extension of time in the current case.

Consequently, it is **ORDERED** that the date upon which Entergy would be required to file its Notice of Appeal to New York's November 6, 2015, objection is extended until 60 days after the final order of the New York Court of Appeals in the matter of *Entergy Nuclear Operation, Inc., et al., Respondents, v. New York State Department of State et al., Appellants*, Docket No. APL-2015-00152. I request that the parties file with me a joint status report 30 days prior to the expiration of the extended deadline to describe the parties' position on the necessity (if any) of further action by NOAA in this matter. This order is made without prejudice to any arguments the parties have made concerning the validity of New York's objection.

Please direct any questions the parties may have on this order to me, with a copy to Mr. David Kaiser, Senior Policy Analyst, Office for Coastal Management, NOAA, david.kaiser@noaa.gov.

Sincerely,



Lois Schiffer
General Counsel

cc: Sherwin Turk (NRC) Sherwin.Turk@nrc.gov

² *In the Matter of Entergy Nuclear Operations, Inc. v. New York State Department of State*, 999 N.Y.S.2d 207, slip op., Dec. 11, 2014.

³ See 15 C.F.R. § 930.127(i)(2).

STATE OF NEW YORK
DEPARTMENT OF STATE

In the Matter of the Petition of:

Response to Request for
Declaratory Ruling

ENERGY NUCLEAR OPERATIONS, INC.,
ENERGY NUCLEAR INDIAN POINT 2, LLC,
AND ENERGY NUCLEAR INDIAN POINT 3, LLC,
Petitioner,

For a Declaratory Ruling.

In a Petition dated November 5, 2012 and received on November 7, 2012, Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC (hereafter Entergy or Petitioner) requested a declaratory ruling from the Department of State (Department) pursuant to the State Administrative Procedure Act (SAPA) § 204.

SAPA § 204 provides that anyone may petition a state agency for a declaratory ruling “with respect to (i) the applicability to any person, property, or state of facts of any rule or statute enforceable by it, or (ii) whether any action by it should be taken pursuant to a rule.” The declaratory ruling usually must be rendered within 30 days of receipt of the petition and is binding upon the agency, unless it is altered or set aside by a court. By letter dated December 4, 2012, the petitioner and this agency agreed to a 30 day extension, with the ruling due no later than January 9, 2013.

SAPA § 204 requires each agency to prescribe by rule the form for petitions for declaratory rulings and the procedure for their submission, consideration and disposition. Department regulations at 19 NYCRR § 264.2(a) provides that “[o]n the petition of any person, submitted in accordance with this section, the Secretary of State may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it.” With respect to its binding effect, 19 NYCRR § 264.1(b) provides:

Generally, a declaratory ruling is a binding advisory opinion as to the applicability of a rule or statute to a particular state of facts, the purpose of which is to give guidance before rather than after the conduct in question occurs. Most

often, it addresses a set of operable facts which the petitioner poses as a future plan of action and can give binding assurance to the petitioner that certain consequences will flow from future conduct unless the declaratory ruling is set aside or modified by a court of competent jurisdiction or the law is changed by act of the Legislature. A declaratory ruling, however, will not extend or limit a rule or statute beyond that which might be reasonably deduced from the language of the rule or the statute in question. Where a declaratory ruling would be, in effect, a regulation then regulations will be published and properly promulgated.

Petitioner seeks a declaratory ruling “that IP2 [Indian Point Generating Station Unit 2] and IP3 [Indian Point Generating Station Unit 3] are not subject to review for consistency with the enforceable policies of New York’s Coastal Management Program.” See, Petition at ¶ 2. Entergy’s Petition and accompanying Memorandum of Law argue that the New York Coastal Management Program (CMP) exempts, through grandfathering, certain projects from the federal consistency requirements that would otherwise apply to Indian Point Unit 2 and Unit 3.¹

CMP Exemptions

The CMP contains language which provides a limited exemption for certain pre-existing projects from coastal zone management procedural and substantive requirements. In particular, page II-9-1 of the CMP, entitled Special Federal Program Requirements, contains a paragraph stating:

The projects which meet one of the following two criteria have been determined to be projects for which a substantial amount of time, money and effort have been expended, and will not be subject to New York State's Coastal Management Program and therefore will not be subject to review pursuant to the Federal consistency procedures of the Federal Coastal Zone Management Act of 1972, as amended: (1) those projects identified as grandfathered pursuant to State Environmental Quality Review Act at the time of its enactment in 1976; and (2) those projects for which a final Environmental Impact Statement has been prepared prior to the effective date of the Department of State Part 600 regulations [see Appendix A, DOS Consistency Regulations, NYCRR Title 19, Part 600, §600.3 (4)]. If an applicant needs assistance to determine if its proposed action meets one of these two criteria, the applicant should contact the Department of State.

Att. 1, New York State Coastal Management Plan at II-9-1. Petitioner asserts that the Indian Point Nuclear Generating stations were grandfathered under this paragraph and, accordingly, its

¹ There is another reactor at the site, Indian Point Unit 1 (IP1), that no longer has a license to operate.

license renewal application before the Nuclear Regulatory Commission (NRC) should not be subject to federal consistency review.

Consistency Review

The Coastal Zone Management Act (CZMA) does not provide for exceptions or exclusions from federal consistency review. All federal actions affecting land or water uses or natural resources of the coastal zone, including permit or licensing actions, are subject to federal consistency review. See, 16 USC §1456. Thus, in the federal scheme, no pre-existing actions have been exempted or “grandfathered.” The 1990 CZMA amendments clarified this inclusive scope, expressly providing that all federal agency activities meeting the “effects” standard are subject to CZMA consistency, without exclusion or exemption. See, Conference Report, H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess., 970-71; 136 Cong. Rec. H 8076 (Sep. 26, 1990). Since the CZMA’s intent is that all federal actions affecting the coastal area must be reviewed for consistency with the CMP, the Department must narrowly construe any exemption that would circumvent the statute and mandated review.

Procedural Posture

Several points are pertinent at the outset. The CMP text is not a “rule or statute enforceable by [the Department]” as it has neither been enacted by the State Legislature nor promulgated as a rule pursuant to SAPA. See SAPA 204; 19 NYCRR Part 264.1(b). Thus, the interpretation of the CMP is not an appropriate subject for a declaratory ruling. However, because the CMP directs the Department to assist applicants in determining whether their application meets one of the exemption criteria listed in the CMP, the Department responds for that purpose and its response is advisory only.

Exemption I

Projects Identified As Grandfathered Pursuant to the State Environmental Quality Review Act At the Time of Its Enactment In 1976

The Petitioner states that Indian Point Station Unit 2 (IP2) began operating in 1974, and Indian Point Station 3 (IP3) commenced operations in 1976 and, therefore, both facilities are

grandfathered under SEQRA.² By its terms, the CMP exemption from federal consistency narrowly applies to projects “*identified* as grandfathered pursuant to State Environmental Quality Review Act at the time of its enactment in 1976.”³ The exemption is not “automatic;” the relevant agency had to expressly identify the specific project as being exempt from SEQRA and the exemption from consistency is not coextensive with the SEQRA grandfathering provision.⁴ If a project is not identified on an agency’s exempt list, it is subject to SEQRA and, in turn, federal consistency.

SEQRA and its subsequent amendments obligated government agencies taking actions which could significantly affect the environment to identify those pre-existing projects and activities which would be excluded from SEQRA. To facilitate an orderly and phased implementation of SEQRA, state agency lists were to be provided to the Director of the Budget.

For the purpose of determining state agency actions approved prior to the effective date of article eight of the environmental conservation law, not later than August first, nineteen hundred seventy-six, each state agency shall submit to the director of the budget a list of projects which such agency deems to have been approved. The director of the budget shall review such lists to certify that substantial time, work and money have been expended on such projects and shall submit to the commissioner of environmental conservation an official list of projects which shall be deemed approved and therefore not subject to the provisions of such article eight.

Chapter 228 of the Laws of 1976 §5.

In its 1977 amendments to SEQRA, the Legislature further addressed the “grandfathered” project lists. See Chapter 252 of Laws of New York, 1977, §§ 9-14. These statutory provisions are discussed in Environmental Impact Review in New York:

[T]o help clarify the complicated phased implementation schedule ultimately enacted, the 1977 statutory amendments included several explanatory bill sections that were not codified in section 8-0117 of the E.C.L. These sections contained two important instructive features: (1) an administrative mechanism requiring each agency's chief fiscal officer to compile a list of projects which were undertaken or approved prior to SEQRA's effective dates, and (2) a set of definitions of "final approval" applicable to the varying state and local agency processes. Each agency's "certified" list of exempt projects was required to be

² SEQRA became effective Sept. 1, 1976 . L.1975, c. 612, § 2, as amended by L.1976, c. 228, § 4.

³ CMP page II-9-1(emphasis added).

⁴ ECL 8-0111 (5) (a).

available for public inspection. If an agency failed to include a direct agency project on its list, the project might nevertheless qualify as an excluded action if it could be demonstrated that "substantial time, work or money had been expended on the project" prior to the SEQRA effective date. [Citations omitted]

Gerrard at al. Environmental Impact Review in New York, § 2.01(5)(a)(2012).

The Department of State did not compile a list of grandfathered actions under SEQRA which would be excluded from federal consistency review pursuant to the Coastal Management Program, because the SEQRA directive pre-dated the 1982 CMP. Instead, the Department relied upon the lists of grandfathered SEQRA projects compiled by other state agencies.

The Power Authority of the State of New York (PASNY or NYPA), then owner of IP3, compiled a list of "actions approved by Power Authority of the State of New York prior to September 1, 1976, the effective date of the State Environmental Quality Review Act (SEQRA)". This list was certified by then-NYS Director of the Budget Howard Miller, and in his letter approving NYPA's list, Mr. Miller noted that: "The Director of the Budget has certified that substantial time, work and money have been expended on such listed projects (copy enclosed) and is submitting such certification together with the list of projects to the Commissioner of Environmental Conservation."⁵ Relevant here, certain activities and projects associated with NYPA's Indian Point No. 3 and James A. FitzPatrick nuclear generating facilities were placed on the NYPA's list. These activities and projects primarily concerned completion of work involving construction of buildings, modification of facilities and acquisition of easements. With respect to IP3, NYPA's list of pre-SEQRA actions included:

5. Completion of the Indian Point No. 3 Nuclear Power Plant, related transmission facilities and other associated facilities and modifications thereof and additions thereto including:

a) addition of the following facilities:

- i. Administration Building
- ii. machine shop for radioactive equipment
- iii. Auxiliary Boiler Building containing auxiliary boiler, water treatment facility, fire protection system pumps, and necessary auxiliary equipment
- iv. warehouse
- v. parking lot

⁵ See PDF attachment labeled NYPA's List of Actions.

- vi. tankage for fire protection system and addition to fire protection system
 - vii. guard house –security system modifications
 - viii. roads and drainage facilities
 - ix . sewage treatment facilities
 - x. enlargement of the spent fuel storage tank
- b) acquisition from Consolidated Edison of 25 acres of land for expansion of the site
- c) acquisition from Consolidated Edison of easements across the Indian Point No. 2 site which are needed to complete construction and to operate and maintain Indian Point No. 3 and additional facilities at the site.

Notably, NYPA’s enumerated list excluded from SEQRA review completion of construction and land acquisition activities at IP3. NYPA’s list of “grandfathered” activities did not exclude the operation and maintenance of the nuclear reactors and spent fuel pools. As a New York State public authority subject to SEQRA, as well as the then-owner of IP3, NYPA was uniquely situated to identify the activities it wanted to exclude from the reach of SEQRA on September 1, 1976, its effective date. NYPA’s focus – as reflected in its list - was completing construction of the IP3 buildings and facilities and acquiring the necessary easements. Completing construction of administrative buildings, transmission facilities and site infrastructure significantly differs from actual operation and maintenance of the IP3 reactors and spent fuel pools. It is apparent that NYPA did not intend that operation and maintenance of the reactors integral systems be included within the scope of “grandfathered” activities.

In the Petition for a Declaratory Ruling and the accompanying Memorandum of Law, Entergy states that the reactors were in operation and producing electricity at the time that SEQRA became effective on September 1, 1976.⁶ See, Petition, ¶8; Memorandum at 3.; see also ECL 8-0111 (5) (a) (exempts “[a]ctions undertaken or approved prior to the effective date of this article”). However, NYPA did not identify the operation and maintenance of either the Indian

⁶ “See Petition par. 8. (“IP2 began operating in 1974, and IP3 commenced operations in 1976, pursuant to licenses issued by the United States Atomic Energy Commission on September 28, 1973, and the United States Nuclear Regulatory Commission (“NRC”) on December 12, 1975, respectively, and permits issued by various New York agencies and localities before September 1, 1976. IP2 and IP3 hold NRC licenses to operate until 2013 and 2015, respectively.”). See also Memorandum of Law at 3 (“IP2 and IP3 began providing electricity to the citizens of New York in 1974 and 1976, respectively, pursuant to operating licenses granted by the NRC on September 28, 1973, and December 12, 1975, respectively.”).

Point Unit 3 or FitzPatrick nuclear stations among its SEQRA exclusions. As the purchaser of the Indian Point facilities, Entergy cannot now claim that the plants were grandfathered when the facilities' original owners did not assert their operations were exempt. In contrast to the assertions in the instant Petition, Entergy complied with both SEQRA and federal consistency requirements in the NRC's 2008 relicensing of the FitzPatrick station, which facility's nuclear operations also pre-dated SEQRA. Moreover, Entergy has not shown, nor is the Department aware, that any aspect of IP2 has been identified on an agency list as being grandfathered from SEQRA.

In fact, the regulatory history of the Indian Point nuclear stations demonstrates that neither NYPA (IP3), Consolidated Edison (IP2), nor Entergy considered the stations excluded from SEQRA for state permitting purposes. In April 1992, Consolidated Edison, NYPA and other Hudson River steam electric generators using once-through cooling water intake systems⁷ filed applications to renew the State Pollutant Discharge Elimination System (SPDES) permits with the Department of Environmental Conservation (DEC). On May 20, 1992, DEC issued a positive declaration pursuant to SEQRA requiring the three Hudson River steam electric generators to jointly prepare an environmental impact statement regarding the SPDES permit renewal applications, a draft of which they submitted to DEC in December 1999.

In conjunction with the sale of the IP3 and FitzPatrick nuclear stations to Entergy in 2000, NYPA conducted SEQRA and state agency consistency reviews in advance of the transactions. NYPA also filed a consistency certification with the Department of State, as the NRC's approval was necessary for the conveyance.⁸ In a letter dated March 31, 2000 from William V. Slade, Director of NYPA's Environmental Division, to the Department of State, NYPA acknowledged its SEQRA obligations and declared itself to be "lead agency" for purposes of SEQRA.

On March 28, 2000 the Trustees of the New York Power Authority ("Authority") declared the Authority to be the Lead Agency pursuant to the State Environmental Quality Review Act ("SEQRA") for the environmental review of the proposed sale of its nuclear generating facilities and associated agreements. Based upon the

⁷ The SPDES applications were for Roseton 1 & 2, Bowline 1 & 2, and Indian Point 2 & 3 Steam Electric Generating Stations, Orange, Rockland and Westchester Counties, NY.

⁸ 16 USC § 1456.

Trustee's review of the proposed action and its potential environmental, safety, health and socioeconomic impacts and the recommendations of staff, the Trustees determined that the action will not have a significant effect on the environment and that an Environmental Impact Statement need not be prepared in connection with the proposal. The Trustees further directed the Director, Environmental Division, to prepare, file and publish a Negative Declaration for the proposed action in accordance with the requirements of SEQRA.⁹

In 2001 Entergy acquired IP2 from Consolidated Edison.

Entergy's actions to acquire IP1 and IP2 from Consolidated Edison similarly acknowledged SEQRA's applicability. See, Affidavit of Marc J. Lawlor, Attachment 8 to Entergy Motion for Declaratory Ruling to NRC. In his affidavit in support of Entergy's relicensing application, particularly his assessment of previous state consistency determinations in conjunction with permitting and sale transfers of the Indian Point facilities, Mr. Lawlor discusses the SEQRA work that his firm was conducting for Entergy, including preparing a report entitled "Assessment of Alternative Technologies at the Indian Point Energy Center in Support of a State Pollutant Discharge Elimination Permit" for Entergy. That report states:

The SEQRA analysis is mandated by the current SPDES Adjudicatory Hearing Process, whereby Entergy and the other involved parties (e.g., NYSDEC) are to identify and assess the potential significant environmental impacts (those not previously evaluated) of the current once-through cooling system and other alternative technologies at IPEC.¹⁰

Mr. Lawlor reviewed the history of Indian Point's compliance with SEQRA and coastal consistency, and "relied upon" previous environmental reviews and permits issued for IP2 and IP3, concluding that prior state reviews and actions, including the 2000 NYPA and the 2001 PSC reviews for transfer of the facilities from the prior owners to Entergy, satisfied the facilities' consistency review requirements. Id.

Pursuant to Public Service Law §70, Public Service Commission (PSC) approval was necessary to effectuate a transfer of the Indian Point nuclear stations to Entergy, and

⁹ See PDF attachment labeled NYPA Slade letter to DOS.

¹⁰ See PDF July 30, 2012 Entergy Motion for Declaratory Ruling to NRC Attachment 8 (Attachment 8), Exhibit A, Lawlor Curriculum Vitae p. 2.

came following review of an Entergy-Consolidated Edison FSEIS prepared pursuant to SEQRA.¹¹ The Commissioners stated:

Under the State Environmental Quality Review Act (SEQRA), the consideration of the proposed sale of the Indian Point 1 and 2 Nuclear Generating Stations (IP1 and IP2) and related assets by Consolidated Edison Company of New York, Inc. (Con Edison) to Entergy Nuclear Indian Point 2, LLC (ENIP2) constitutes a subsequent action to the policy determinations in Case 94-E-0952.2 The companies jointly filed a petition for approval of the transaction pursuant to Public Service Law § 70 on January 12, 2001.

Based on the environmental analysis in the SEIS, the PSC's Order (effective August 31, 2001) authorized Consolidated Edison to sell to Entergy its Indian Point 1 unit (shuttered), the operating Indian Point 2 generating facility, three gas turbines, various ancillary facilities, the real estate in Buchanan where the facilities are located and the Toddville Training Center in Cortlandt.

Entergy advances inconsistent positions in this Petition (alleging that Indian Point is grandfathered under SEQRA) and in its pending motion for declaratory ruling before NRC, Docket #: 50-247& 50-286 (asserting that past state agency consistency reviews effectively substitute for DOS's federal consistency review).¹² In doing so, Entergy relies on the same State SEQRA and state consistency jurisdiction and regulatory history to advance its NRC relicensing application that it challenges here. This incongruence is underscored by the record. At no time during NYPA's ownership of the IP3 nuclear station did NYPA seek or treat its fundamental operations as being excluded from SEQRA or consistency review. Moreover, IP2 appears never to have been included on the "grandfathered" list of any state agency. Because the CMP exemption from federal consistency narrowly applies to projects "identified as grandfathered" from SEQRA, this exemption does not apply to Indian Point Units 2 or 3.

Exemption II

Projects for Which a Final Environmental Impact Statement

¹¹ See Attachment 8 to Entergy Motion for Declaratory Ruling to NRC, Lawlor Aff., Exhibit C, attaching the August 17, 2001 Order of the NYS Public Service Commission adopting and approving issuance of Final Supplemental Environmental Impact Statement in support of a Joint Petition to transfer Indian Point Generating Stations to wholly owned subsidiaries of Entergy (Case 01-E-0040).

¹² See 2012 Entergy Motion for Declaratory Ruling to the Atomic Safety and Licensing Board Panel (ASLB).

**Has Been Prepared Prior to the Effective Date
of the Department of State Part 600 Regulations**

Petitioner asserts that IP2 and IP3 were the subject of federal Final Environmental Impact Statements (FEISs) in 1972 and 1975, respectively, and are grandfathered from federal consistency review according to the second exception in the CMP:

The projects which meet one of the following two criteria have been determined to be projects for which a substantial amount of time, money and effort have been expended, and will not be subject to New York State's Coastal Management Program and therefore will not be subject to review pursuant to the Federal consistency procedures of the Federal Coastal Zone Management Act of 1972, as amended: ... (2) those projects for which a final Environmental Impact Statement has been prepared prior to the effective date of the Department of State Part 600 regulations [see Appendix A, DOS Consistency Regulations, NYCRR Title 19, Part 600, §600.3 (4)].

CMP at II-9-1 (emphasis added). The CMP exemption directly references and must be read in the context of 19 NYCRR § 600.3(4),¹³ which states:

“This Part shall not apply to actions for which a final environmental impact statement has been prepared or for which a determination has been made that the action will not have a significant effect on the environment, pursuant to NYCRR, Title 6, Part 617 [SEQRA] prior to the effective date of this Part.”

By this reference, the CMP clause (2) exemption adopts the same exemption provided in § 600.3(4), which exempts actions for which FEISs were prepared pursuant to 6 NYCRR Part 617 during the six -year interval between SEQRA’s September 1, 1976 effective date and the effective date of 19 NYCRR Part 600 on September 28, 1982. Contrary to Petitioners’ suggestions, the exemption does not relate to EISs prepared under the National Environmental Policy Act (NEPA), which have no relationship with the Part 600 regulations or state agency consistency review. It makes no sense to broadly exempt from federal consistency review all pre-existing projects for which a NEPA EIS has been prepared when the CZMA allows no such exemptions or exclusions. Thus, the CMP exemption must be understood as exempting projects for which a SEQRA EIS had been prepared, and which pre-existed, but would have otherwise have been subject to, the Part 600 regulations on its effective date.

¹³ Now codified at 19 NYCRR § 600.3(d).

The Department's Part 600 regulations pertain to state agency consistency review. State agency consistency and SEQRA are procedurally and substantively intertwined. Executive Law Article 42 effectively ties together the programs of state agencies by binding their actions to the coastal policies through consistency reviews. In Executive Law § 919 (3), the State Legislature directed the Commissioner of Environmental Conservation to amend the SEQRA regulations "to assure adequate consideration of impacts on the use and conservation of coastal resources." Various amendments were made to the SEQRA regulations, including those sections addressing the content of EISs, ensure that state agencies actions in the coastal area are consistent with the State's coastal policies or those of an approved local program.¹⁴

SEQRA is the procedural trigger for state agency consistency review. During the initial review of an action under SEQRA, state agencies are required to determine whether the action is located in the coastal area.¹⁵ If it is and the action is a Type I or unlisted action, the agency is required to evaluate possible impacts under coastal policies.¹⁶ The provision applies to all state agencies, whether acting as a "lead" or "involved" agency.¹⁷ Land development and related activities in New York's coastal area which involve direct state agency action or funding,¹⁸ or which require state permits for actions involving an environmental impact statement under SEQRA,¹⁹ or which are located within a community with a waterfront revitalization program,²⁰ are required to be consistent with the coastal policies in the Article 42 of the Executive Law. Moreover, the SEQRA regulations require written findings of coastal consistency, and mandates

¹⁴ See for example 6 NYCRR § 617.6(a)(5), § 617.9(b)(5)(vi) and § 6.17.11(e).

¹⁵ 6 NYCRR § 617.2(f) (definition of coastal area) and § 617.6(a)(5) (state agency determination as to whether the action is located in the coastal area).

¹⁶ Only those state agency actions which are considered to Type I or unlisted in accordance with SEQRA are subject to consistency review. 19 NYCRR § 600.2(b) and § 600.4.

¹⁷ 6 NYCRR § 617.6(a)(5) and 19 NYCRR Part 600.

¹⁸ Prior to undertaking direct and funding actions in the coastal area, state agencies must comply with the state consistency review obligation. Executive Law § 919(1).

¹⁹ State permit actions subject to SEQRA (Article 8 of the State Environmental Conservation Law) are required to be consistent with the coastal policies found in 19 NYCRR Part 600. The determination, about whether an action will have a significant adverse effect on the environment and about whether an EIS will be prepared, must be based on an analysis of the effects of the action on the coastal policies (6 NYCRR § 617.6(5) and 19 NYCRR § 600.4).

²⁰ State permit actions affecting coastal area policies but not the subject of an EIS or not subject to SEQRA (certain minor or ministerial actions) must be consistent with the coastal policies they are most likely to affect. This is accomplished through the application of the standards of several permit programs, notably wetland permits, erosion hazard area permits, dock permits, and water quality permits. For example, the State's Tidal Wetlands Act (Article 25 of the Environmental Conservation Law), through its broad purposes and performance standards, provides not just enforceable standards regarding the State's coastal policy regarding wetlands protection, but also, in part, enforceable coastal policies regarding public access and scenic quality. These several permit programs also provide the means of enforcing the relevant policies in the NYCMP.

that a state agency must make a written finding that its action in the coastal area is consistent with applicable state coastal policies before taking a final action.²¹

In sum, read in its proper procedural and substantive context, it is evident that the CMP's exemption is reserved for those EISs prepared pursuant to SEQRA before the 1982 effective date of the Part 600 regulations and state consistency requirements. The NEPA-based environmental reviews prepared for Indian Point 2 and 3 in 1974 and 1975, respectively, do not qualify to exempt the Indian Point facilities from consistency review under the Clause (2) language.

Material Changes Will Occur and Are Contemplated

In its Memorandum, Petitioner indicates that New York courts have applied the SEQRA exclusion to a project's permit renewals.²² Assuming for the sake of argument that the NRC licenses to operate the Indian Point nuclear stations were grandfathered from SEQRA review - which they were not - the activities at IP2 and IP3 and the regulatory landscape have substantially changed since the original licenses were issued 40 years ago so that federal consistency review is warranted and required.²³

As the New York Court of Appeals has recognized, an action that significantly modifies a previously grandfathered activity can revive the applicability of SEQRA. Salmon v Flacke, 61 NY2d 798, 798 (1984) (circumstances may exist where there has been "change in the level of operation so substantial as to be sufficient to remove an activity from the exclusion clause of the Environmental Conservation Law (ECL 8-0111, subd. 5[a]), notwithstanding that the basic nature of the activity remains unchanged."); see also Guptill Holding Corp. v Williams, 140 AD2d 12 (3d Dept.), appeal denied, 73 NY2d 820 (1988) (proposed renewal of mining permit involved significant change from operations covered by prior permit and justified DEC's SEQRA review of significant environmental effects). Entergy has represented in the underlying Petition that its application to the NRC to extend its operating licenses for an additional 20 years

²¹ 6 NYCRR § 617.11 (e).

²² Memorandum at 7 and 11-12 (citing Northeast Solite Corp. v. Flacke, 91 A.D.2d 57 (3rd Dept. 1983) and Fletcher Gravel v. Jorling, 179 A.D.2d 286 (4th Dept. 1992))

²³ The Atomic Energy Act of 1954 requires operators of nuclear reactors to obtain operating licenses from NRC. 42 U.S.C. §§ 2132-2134. Under that statute, operating licenses are issued for a period not to exceed forty years. Id. § 2133(c). In 1973 and 1975, Indian Point Unit 2 and Indian Point Unit 3 received licenses to operate for forty years. By their terms, those licenses expire in 2013 and 2015, respectively. In 1991, NRC promulgated regulations governing the renewal of operating licenses for terms of up to twenty years. 10 C.F.R. § 54.31(b); 56 Fed. Reg. 64,943 (Dec. 13, 1991).

“contemplates no material change in the footprint or facilities of the Indian Point plants; nor does it plan any changes in the design or operations of the plants during the anticipated license renewal period.”

See, Petition at par. 9 on p. 3 (referencing April 30, 2007 Relicensing Application).

However, Entergy’s assertion is not accurate.

Entergy now seeks permission to operate IP2 and IP3 20 years beyond their 40 year operating license. Petitioners’ application for a 20-year operating license states that Entergy will change operations at the plants should Entergy be successful in obtaining the requested license renewal. Notably, Entergy has already made or will make material changes in its operations of the plants as a result of its relicensing application and ASLB review.²⁴

Significant changes in operation have in fact taken place since the nuclear generating stations were licensed in the 1970s. As indicated in the DEC decision denying Entergy’s 401 Water Quality Certification (WQC),

[s]ince the original construction and operation of the Indian Point facilities in the 1970s, the CWISs [cooling water intake structures] have been retrofitted with certain technologies in order to mitigate some adverse environmental impact to aquatic organisms.

In that regard, both Units 2 and 3 are equipped with modified Ristroph-type traveling screens, fish handling and return systems, and low pressure screenwash systems intended to reduce the number of aquatic organisms injured and killed by being impinged by the facilities' CWISs each year. The facilities have also, on occasion, reduced flow as an operational measure in an attempt to reduce, but not minimize, the adverse environmental impact of entrainment from their CWISs. These flow reductions have been achieved by the operation of dual/variable-speed pumps on the CWISs and from limited outage periods for the purpose of maintaining and/or refueling the Indian Point facilities. The reductions in flow have resulted in some limited entrainment reductions, however, because Units 2 and 3 operate as baseloaded units, the reduction in water use afforded by these operational modifications is minimal, thereby resulting in only a small reduction in the number of aquatic organisms entrained by the facilities' CWISs each year.”

²⁴ See NUREG-1930, Supplement 1, Supplemental Safety Evaluation Report Related to the License Renewal of Indian Point Nuclear Generating Unit Nos. 2 and 3 (August 30, 2011) Appendix A (listing Entergy Commitment) ML11243A109.

Next, as a result of their operations, IP2 and IP3 have associated spent nuclear fuel pools that contain 40 years of nuclear waste. In submissions to the ASLB, Entergy has acknowledged that the spent fuel pools are leaking and the waste plume has reached the Hudson River.²⁵ The storage of 20 additional years of spent fuel will require substantial and significant changes in petitioners' waste storage practices, if only to safely accommodate the additional waste.

The recent decision in New York v. NRC, 681 F.3d 471 (D.C. Cir. 2012), not only underscores this issue, but reflects a change in the regulatory landscape in the review of nuclear generating station operations when compared to prior operations and reviews. In that case, the court held that the NRC failed to comply with NEPA when it attempted to update its Waste Confidence Decision in 2010 by adopting its Temporary Storage Rule to implement findings that spent nuclear fuel can be stored safely and without significant environmental impacts indefinitely after the end of the licensed life of a nuclear power plant. Writing for the court, Chief Judge Sentelle noted the problem:

Due to the government's failure to establish a final resting place for spent fuel, SNF is currently stored on site at nuclear plants. This type of storage, optimistically labeled "temporary storage," has been used for decades longer than originally anticipated. The delay has required plants to expand storage pools and to pack SNF more densely within them. The lack of progress on a permanent repository has caused considerable uncertainty regarding the environmental effects of temporary SNF storage and the reasonableness of continuing to license and relicense nuclear reactors.

681 F.3d at 474. The court vacated the Waste Confidence decision and the Temporary Storage Rule. In response, the NRC has halted issuing final decisions on new licenses and on license renewals for nuclear power plants in order to resolve the spent fuel waste issue.²⁶ This court decision and NRC's subsequent action directly affect Entergy's renewal application and practice of long term on-site storage of spent nuclear fuel at Indian Point. The long term (or even

²⁵ Entergy License Renewal Application, App. E, Environmental Report, § 5.1 (April 2007); also GZA Report Hydrogeological Site Investigation Report (January 2008).

²⁶ <http://www.nrc.gov/waste/spent-fuel-storage/wcd.html> . In response to the Court's decision, the Commission decided to stop all licensing activities that rely on the Waste Confidence Decision and Rule. (See Calvert Cliffs Nuclear Project LLC (Calvert Cliffs Nuclear Power Plant Unit 3) Memorandum and Order CL1-12-16 (August 7, 2012)). The NRC created a Waste Confidence Directorate within the Office of Nuclear Material Safety and Safeguards to oversee the drafting of a new Waste Confidence Environmental Impact Statement and Rule. The Commission has instructed the Directorate to issue the final Environmental Impact Statement and Rule by no later than September 2014

permanent) on-site storage of spent fuel at Indian Point, with attendant environmental and public health risks, are not reflected in Entergy's 20 year license extension application.

Finally, as a result of on-going SPDES permit renewal proceedings, substantial design and operational changes for IP2 and IP3 may occur, which changes would be considered during federal consistency review. This may involve the installation of cooling towers to reduce the plants' impacts to fish in the Hudson River. During the SPDES proceedings, Petitioner has proposed as an alternative to cooling towers a system of cylindrical wedgewire screens on 5 acres of the state-owned bed of the Hudson River adjacent to Indian Point. Whether the eventual decision is to require cooling towers, to allow Entergy the wedgewire screen alternative, or some combination thereof, material changes in the footprint, design or operations of the Indian Point plants, may well occur during the anticipated 20-year license renewal period. Moreover, those substantive and operational changes to the Indian Point facilities will fall squarely within the scope of consistency review with the enforceable policies of the Coastal Management Plan.

Conclusion

In conclusion, the exemption provided on page II-9-1 of the CMP does not apply to Entergy's re-licensing application filed with the NRC for Indian Point. Further, substantial changes in operations require application of consistency to Entergy's relicensing application. Federal consistency review allows consideration of the effects on the land or water uses and natural resources of the coastal area.



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