Entergy Nuclear Northeast
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Fred R. Dacimo
Vice President
License Renewal

December 20, 2007

Re: Indian Point Units 2 & 3
Docket Nos. 50-247 & 50-286
NL-07-156

U.S. Nuclear Regulatory Commission
ATTN: Document Control Desk
Washington, DC 20555-0001

SUBJECT: Entergy Nuclear Operations Inc.
Indian Point Nuclear Generating Unit Nos. 2 & 3
Docket Nos. 50-247 and 50-286
Supplement to License Renewal Application (LRA) – Environmental Report References

REFERENCES:

1. Entergy Letter dated April 23, 2007, F. R. Dacimo to Document Control Desk, "License Renewal Application" (NL-07-039)
2. Entergy Letter dated April 23, 2007, F. R. Dacimo to Document Control Desk, "License Renewal Application Boundary Drawings (NL-07-040)
3. Entergy Letter dated April 23, 2007, F. R. Dacimo to Document Control Desk, "License Renewal Application Environmental Report References (NL-07-041)
4. Entergy Letter dated October 11, 2007, F. R, Dacimo to Document Control Desk, "License Renewal Application (LRA)" (NL-07-124)
5. Entergy Letter November 14, 2007, F. R, Dacimo to Document Control Desk, "Supplement to License Renewal Application (LRA) Environmental Report References" (NL-07-133)

Dear Sir or Madam:

In the referenced letters, Entergy Nuclear Operations, Inc. applied for renewal of the Indian Point Energy Center operating license. The LRA Appendix E references documents used in the preparation of the Environmental Report. The purpose of this letter is to provide additional

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documents in response to the questions raised by the NRC team during the Environmental audit conducted in September 2007.

Enclosed is a copy of the additional documents which are provided to aid the NRC staff in the review of the application.

This letter contains no new commitments. If you have any questions, or require additional information, please contact Mr. Robert Walpole at 914-734-6710.

I declare under penalty of perjury that the foregoing is true and correct. Executed on Dec 20, 2007.

Sincerely,

Fred R. Dacimo
Vice President
License Renewal

Enclosures:

1. Memorandum in Support of State Respondent's Motion to Consolidate and Dismiss Petitions
2. Supporting Information – Hudson River Studies
3. Impingement Data – Unit 2 and Unit 3; 1975-1980; 1981-1990
4. Supplemental Ristroph Studies from 1985 and 1985-1991
5. Entrainment Abundance Data 1981, 1983, 1985-1987

cc: with Enclosures (CD-ROM)

Mr. John Boska, NRR Senior Project Manager
Mr. Bo M. Pham, NRC Senior Project Manager
Ms. Jill Caverly, NRC Environmental Project Manager

cc: without Enclosures

Mr. Samuel J. Collins, Regional Administrator, NRC Region I
Mr. Paul Eddy, New York State Department of Public Service
NRC Resident Inspector's Office
Mr. Paul D. Tonko, President, New York State Energy, Research, & Development Authority

ENCLOSURE 1 TO NL-07-156

Memorandum in Support of State Respondent's Motion to Consolidate and Dismiss Petitions

ENTERGY NUCLEAR OPERATIONS, INC.
INDIAN POINT NUCLEAR GENERATING UNIT NOS. 2 & 3
DOCKET NOS. 50-247 AND 50-286

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of the Application of
ENTERGY NUCLEAR INDIAN POINT 2, LLC, and
ENTERGY NUCLEAR INDIAN POINT 3, LLC, as
respective owners of Indian Point 2 and Indian Point 3, and
joint applicants for the Indian Point SPDES permit renewal,

Petitioner-Plaintiffs,

For a judgment pursuant to Article 78 of the Civil Practice
Law and Rules,

- against -

THE NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION and ERIN CROTTY,
as Commissioner, New York State Department of
Environmental Conservation,

Index No. 6747/03

Respondent-Defendants,

MIRANT BOWLINE, LLC, as owner of Bowline Point 1 and
2 and applicant for the Bowline SPDES permit renewal,
DYNEGY ROSETON, LLC, as operator of Roseton 1 and 2,
and DYNEGY NORTHEAST GENERATION, INC., as
applicant for the Roseton SPDES permit renewal,

Respondent-Defendants.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of the Application of
MIRANT BOWLINE, LLC

Petitioner-Plaintiffs,

For a judgment pursuant to Article 78 of the Civil Practice
Law and Rules,

- against -

THE NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION and ERIN CROTTY,
as Commissioner, New York State Department of
Environmental Conservation,

Index No. 6749-03

Respondent-Defendants,

ENTERGY NUCLEAR INDIAN POINT 2, LLC; ENTERGY
NUCLEAR INDIAN POINT 3, LLC; DYNEGY ROSETON,
LLC, and DYNEGY NORTHEAST GENERATION, INC.,

Respondent-Defendants.

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MEMORANDUM IN SUPPORT OF STATE RESPONDENTS' MOTION TO CONSOLIDATE AND DISMISS THE PETITIONS

Respondent-defendants New York State Department of Environmental Conservation ("DEC") and DEC Commissioner Erin Crotty ("State respondents") submit this memorandum of law in support of their motion: 1) to consolidate the above-captioned petitions pursuant to CPLR §602; 2) to have these cases heard by the Honorable Thomas Keegan, J.S.C., because they are directly related, in law and in fact, to the Brodsky v. Crotty matter pending before Justice Keegan; and 3) to dismiss the two petitions for lack of subject matter jurisdiction under CPLR §7801(1).

The petitions challenge and seek to annul DEC's June 25, 2003 Final Environmental Impact Statement ("FEIS") issued pursuant to this Court's May 14, 2003 Order in Brodsky v. Crotty, Index No. 7136-02 (S.Ct. Albany Co.) and the State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law § 8-0101, et seq. Petitioners seek additional relief, including requiring further SEQRA proceedings and – however inconsistent - an order in the nature of mandamus requiring DEC to immediately issue findings and a decision on their pending SPDES permit applications. Finally, the petitions also purport to seek declaratory relief, though only in a single citation to CPLR § 3001 in the first paragraph of each petition.[1]

[1] To the extent petitioners actually intended their petitions to also constitute complaints for declaratory judgment pursuant to CPLR § 3001, they must be converted into a CPLR article 78 proceeding since the conduct complained of involves DEC's administrative actions in compliance with SEQRA in issuing its June 25, 2003 FEIS. According to petitioners, DEC violated SEQRA in issuing its June 25, 2003 FEIS and is acting in excess of its authority and jurisdiction, the very subject matter of CPLR 7803(2). A declaratory judgment action is simply not the proper vehicle to review the FEIS, which despite petitioners' arguments to the contrary, is simply a component of the larger, ongoing DEC administrative process which must precede a final determination regarding petitioners' SPDES permit applications. Petitioners also retain the ability to bring a timely Article 78 proceeding at the close of the permit review processes and

These petitions should be considered together and consolidated pursuant to CPLR § 602 because they involve common questions of law and fact, as well as common parties. The petitions – which are nearly identical but for the additional three (3) causes of action in the Entergy matter – both challenge the DEC's June 25, 2003 FEIS and seek to annul it on identical grounds. Moreover, because these petitions are directly related to Justice Keegan's May 14, 2003 Order in Brodsky v. Crotty, and are outgrowths of the DEC's FEIS issued pursuant to that Order, judicial economy suggests that these two new petitions also be returnable before Justice Keegan.

Because there is no final agency action by DEC with regard to either Entergy's or Mirant's pending SPDES permit applications, the Court should reject the petition for lack of subject matter jurisdiction under CPLR § 7801(1). DEC's eventual decisions regarding petitioners' SPDES permit applications -- upon fully formed and adjudicated administrative records – are the final agency actions which would give rise to Article 78 jurisdiction. As discussed in the supporting affidavits of William G. Little, Associate Counsel, DEC ("Little Aff.") and Betty Ann Hughes, Environmental Analyst 3, DEC ("Hughes Aff.,"), that administrative review process is ongoing for both the Entergy Indian Point and Mirant Bowline permits.

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final DEC decisions on their applications. See, Greystone Mgt. Corp. v Conciliation & Appeals Bd., 62 NY2d 763, 765 (1984), aff'd 94 AD2d 614 (1st Dept 1983); Gaynor v Rockefeller, 15 NY2d 120, 131-132 (1965); Matter of Syracuse Brigadiers v State Racing & Wagering Bd., 275 AD2d 918, 919 (4th Dept 2000); Town of Fishkill v Royal Dutchess Props., 231 AD2d 511 (2d Dept 1996); DiMiero v Livingston-Steuben-Wyoming County Bd. of Coop. Educ. Servs., 199 AD2d 875, 877 (3d Dept 1993); lv denied 83 NY2d 756 (1994). See also Town of Bellmont v. NYSDEC, 284 A.D.2d 761 (3d Dep't 2001)(where an agency has regulatory authority, and the petitioner does not raise a constitutional challenge or demonstrate that resort to the administrative process would be futile, the petitioner is required to exhaust those remedies).

STATEMENT OF FACTS

State respondents' June 25, 2003 FEIS was issued in response to and in compliance with this Court's May 14, 2003, Order, which required that DEC issue the FEIS by July 1, 2003, and issue a draft SPDES permit for the Entergy Indian Point Units 2 and 3 by November 14, 2003. See Little Aff., ¶ 3, Exhibits 1 and 2. The draft SPDES permit for Entergy Indian Point Units 2 and 3 was issued on November 12, 2003. See Little Aff., ¶ 4, Exhibit 3.

Since November 12, 2003, DEC has been facilitating and overseeing the public comment and administrative process which will lead to DEC issuing a final SPDES permit. As provided in the November 12, 2003 Environmental Notice Bulletin publication of the draft permit, DEC is presently conducting a 90-day public comment period, which ends on February 6, 2004. DEC has set public legislative hearings on January 28 and 29, 2004 in White Plains, New York. In anticipation of a probable adjudicatory hearing, DEC has scheduled an "issues conference" at the same location on March 3 and 4, 2003. If necessary, the issues conference will be extended through March 5, 2004, with a decision regarding whether the parties have raised issues that require administrative adjudication to be made thereafter. It is likely that the draft permit will change as a result of the administrative process. See Little Aff., ¶ 5.

DEC has not yet issued a draft SPDES permit for Mirant Bowline. Accordingly, the administrative process for that SPDES permit application has not progressed beyond the joint FEIS. When DEC issues a draft SPDES permit for Mirant Bowline, it is likely that the draft permit will be subject to additional administrative proceedings similar to those in the Entergy Indian Point matter. See Hughes Aff., ¶ 2, 4-9, 23.

ARGUMENT

POINT I

THE ENTERGY AND MIRANT PROCEEDINGS SHOULD BE CONSOLIDATED PURSUANT TO CPLR § 602 AND RELATED TO THE PENDING LITIGATION BEFORE JUSTICE KEEGAN

These petitions should be considered together and consolidated pursuant to CPLR § 602 because they involve common questions of law and fact, share common parties and are nearly identical, but for the additional three (3) causes of action in the Entergy matter.[2] Both Entergy and Mirant challenge the DEC's June 25, 2003 FEIS and seek to annul it identical grounds. Moreover, relating the cases to Brodsky v. Crotty, and assigning them to Justice Keegan is appropriate because these petitions are directly related to Justice Keegan's May 14, 2003 Order in that pending case, and these petitions are outgrowths of the DEC's FEIS issued pursuant to that Order. See Little Aff., ¶¶ 3-5; Hughes Aff., ¶ 4-7. In the interests of judicial economy, State respondents respectfully suggest that these two petitions be returnable before Justice Keegan as related cases.

CPLR § 601 provides that when actions involving a common question of law or fact are pending before a court, that court may order a joint trial, order the actions consolidated, and may make other orders designed to avoid unnecessary costs or delay. CPLR § 602. Absent a showing of prejudice to a substantial right, consolidation is warranted. See Cushing v. Cushing, 85 A.D.

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[2] The Entergy petition includes six (6) causes of action challenging DEC's 1992 Positive Declaration, for the alleged lack of timely SEQRA findings, lack of substantive regulatory authority under the federal Clean Water Act §316(b) and related State regulations, requiring the additional review only because of public pressure, and the failure of the FEIS to sufficiently address cumulative impact and to take a "hard look" at specific issues. The Mirant petition is a streamlined version of the same, challenging only the 1992 Positive Declaration, lack of timely SEQRA findings and failure to take a "hard look" at the same issues identified in Entergy. Much of the text of the two petitions is similarly identical.

2d 809, (3d Dep't 1981). Where there is clear identity of between actions involving the same underlying administrative record, consolidation is warranted. See e.g. Rent Stabilization Ass'n of New York City v. State Division of Housing and Community Renewal, 252 A.D.2d 111 (3d Dep't 1998); Business Council of New York State, Inc. v. Cooney, 102 A.D.2d 1001 (3d Dep't 1984). Consolidation is also appropriate where the matters arise from the same transaction or occurrence. See e.g. Seaboard Contracting & Material , Inc. v. Dep't of Envtl. Conservation, 132 A.D.2d 105 (3d Dep't 1987) (court should have consolidated proceedings by a mining permit applicant seeking issuance of permit and separate action against town to invalidate ordinance banning mining).

These petitions easily meet the test for consolidation, and consolidation will assist the State respondents and the Court – and likely the power generators as well – to address these issues in an economical and efficient manner. Because Justice Keegan is already familiar with the underlying facts and history of the Hudson River power plants by virtue of his decisions in the Brodsky v. Crotty matter, which is still pending before him, State respondents respectfully submit that assignment of these cases to him will best serve the parties' and the Court's interests.

POINT II

THE COURT LACKS SUBJECT MATTER JURISDICTION UNDER ARTICLE 78 BECUASE THERE IS NO FINAL AGENCY ACTION

DEC has taken no final agency action on either the Entergy Indian Point or Mirant

Bowline SPDES permit applications. See Little Aff., ¶¶ 1, 3-6, 11, 20, 29, 32; Hughes Aff., ¶¶ 2, 4-9, 14-15, 18, 20, 23. The DEC's June 25, 2003 FEIS, while constituting the presumptive conclusion of the agency's joint SEQRA review for the named plants' SPDES permit applications, does not constitute final agency action cognizable under CPLR § 7801(1). Accordingly, at this preliminary stage of the administrative process, neither the Entergy or Mirant petitioners may maintain these Article 78 proceedings. Instead, the actions which may serve as a proper jurisdictional basis for Article 78 proceedings are DEC's final determinations regarding petitioners' SPDES permit applications, following an administrative hearing process specific to each application. Unless and until permits are issued or denied, the proper forum for review of petitioners' issues is the ongoing DEC administrative process.

SEQRA is a statute that requires an additional layer of environmental review in an agency's exercise of its administrative authority, and that environmental review is subject to judicial review only after final agency action. SEQRA requires governmental decision makers throughout the State to consider in advance the environmental consequences of their actions and to weigh alternatives and mitigate environmental harm. As recognized in DEC's regulations, "The basis purpose of SEQRA is to incorporate the consideration of environmental factors into the existing planning, review, and decision making process of State regional and local government agencies at the earliest possible time." 6 NYCRR § 617.1(c) (emphasis added); see also ECL § 8-0109. The Second Department has described SEQRA as an "alarm bell" whose purpose is to alert responsible public officials to potential environmental consequences before the officials have reached ecological points of no return. Rye Town/King Civic Assn. v. Town of Rye, 82 A.D.2d 474, 481 (2d Dept. 1981). As the Third Department has

recognized, "[T]he overriding purpose of SEQRA is to assure that the decision maker has considered pertinent environmental information before making a final decision ..., and an environmental impact statement ... is the means by which such information is conveyed." Seymour v. County of Saratoga, 190 A.D. 2d 276, 279 (3d Dept. 1993) (emphasis added).

Through the enactment of SEQRA, the Legislature created "an elaborate procedural framework" governing the evaluation of the environmental ramifications of a project or action before that project or action is authorized. Matter of King v Saratoga County Bd. of Supervisors, 89 N.Y.2d 341, 347, 653 N.Y.S.2d 233 (1996). In assessing the significance of a proposed action under SEQRA, the lead agency must "thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation." See 6 NYCRR 617.7 [b][3], [4]; N.Y. City Coalition to End Lead Poisoning, Inc. v. Vallone, 100 N.Y.2d 337, 763 N.Y.S.2d 530 (2003).

SEQRA itself does not contain a provision for judicial review; rather, it is ancillary to and a component of the specific agency action. DEC's regulations make clear that compliance with SEQRA is a necessary pre-condition to valid governmental action. 6 NYCRR § 617.3(a) ("No agency involved in an action shall carry out, fund, or approve the action until it has complied with the provisions of SEQR"). At the same time, compliance with SEQRA, in and of itself, is not a sufficient condition for valid governmental action since the action agency "must still render a final decision as to the action, over and above the requirements of SEQRA." See Gerrard, Environmental Impact Review in New York, § 1.03[2] & fn. 24; accord Cedarwood

Land Planning v. Town of Schodack, 954 F. Supp. 513, 523 (N.D.N.Y. 1997) ("approval of the final EIS is not approval of the project itself"), affirmed, 1998 U.S. App. LEXIS 22157 (2d Cir.1998). Stated differently, the submission of a final EIS "merely requires the involved agencies (i.e., those with discretionary authority to approve an action) to assess the environmental impacts of a proposed action, and to take such impacts into account in approving or disapproving a project." Cedarwood, 954 F.Supp at 523. A final EIS simply "form[s] the basis for the decision whether to undertake or approve such action." Town of Henrietta v. DEC, 76 A.D.2d 215, 430 N.Y.S.2d 440, 445 (4th Dep't 1980).

The proper procedural vehicle to challenge a SEQRA determination made in a permit review process is in a timely Article 78 proceeding. "For a challenge to administrative action to be ripe for adjudication, the administrative action sought to be reviewed must be final, and the administrative harm must be direct and immediate." Weingarten v. Lewisboro, 77 N.Y.2d 926, 928 (1991), citing Church of St. Paul & St. Andrew v Barwick, 67 N.Y.2d 510, 519-520, (1986), cert. denied, 479 U.S. 985 (1986), and de St. Aubin v Flacke, 68 N.Y.2d 66, 75 (1986). In Church of St. Paul & St. Andrew, the Court of Appeals set forth the criteria for determining when a controversy is not ripe for judicial resolution and should be dismissed. In examining whether litigation is ripe for judicial review, the Court stated:

> The concept of finality requires an examination of the completeness of the administrative action and a pragmatic evaluation of whether the "decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury"

67 N.Y.2d at 519 (citations omitted). The Court of Appeals summarized that the focus of the inquiry into ripeness is on "the finality and effect of the challenged action and whether harm

from it might be prevented or cured by administrative means available". Id. at 521.

Here, the test for Article 78 finality articulated by the Court of Appeals in Matter of Essex County v. Zagata, 91 N.Y.2d 447 (1998), is not satisfied by either the Entergy or Mirant petitions. In Essex County, the court stated that an agency determination is final when three conditions are satisfied: 1) the agency position is definitive; 2) the position inflicts actual, concrete injury; and 3) the agency action is "complete," i.e., no further agency proceedings might alleviate or avoid the injury. 91 N.Y.2d at 453-54. See also Matter of Zagata v. Freshwater Wetland Appeals Bd., 244 A.D.2d 343, 344 (2d Dep't 1997), lv. granted, 91 N.Y.2d 813 (1998), appeal withdrawn, 95 N.Y.2d 792 (2000) (interim decisions to deny permit demand and to hold hearing not ripe for judicial review as permit review process was still ongoing).

Application of the Essex County test to the common facts presented by the Entergy and Mirant petitions in the present case demonstrates that neither presents a final agency action to review. First, there is no definitive agency position with respect to either SPDES permit renewal application, as the substantive review processes are ongoing. Second, the issuance of the June 25, 2003 FEIS did not and cannot cause petitioners any "actual or concrete injury" because no substantive action or approval of any project component accompanied it. The FEIS was not, standing alone, determinative of the outcome of either SPDES permit application pending before DEC. The FEIS did not authorize or prohibit petitioners from undertaking regulated activity. Third, the DEC's permitting "action" for Entergy Indian Point and Mirant Bowline are clearly not complete, as further agency actions may alleviate or avoid the claimed injuries. Indeed, subsequent to the FEIS, DEC issued a draft SPDES permit for the Entergy Indian Point Units 2 and 3 on November 12, 2003, and has commenced its public administrative process to review

and adjudicate that draft permit. As described in the Little Affidavit, the public administrative process for the Indian Point SPDES permit is poised to commence in earnest at the end of January 2004. Little Aff., ¶¶ 4-5. The DEC has not yet even issued a draft permit for Mirant Bowline, so that petition is even more "premature" than the Entergy petition. See Hughes Aff., ¶¶ 4, 23.

Where, as here, the alleged harm of an agency determination may be "prevented or significantly ameliorated by further administrative action or by steps available to the complaining party," Essex County, 91 N.Y.2d at 453 (quoting Church of St. Paul, 67 N.Y.2d at 520), the matter is not "final" for purposes of Article 78 jurisdiction. It is likely that the Entergy draft permit, which contains the specific mitigative findings and BTA determination, could change as a result of the administrative process; any change in the underlying action could engender additional administrative review, including additional environmental review. Little Aff., ¶¶ 5, 20, 29, 32. DEC has taken no action which has had a definitive impact causing an actual, concrete injury on the Entergy or Mirant petitioners until it makes final decisions on their permit applications. See Little Aff., ¶ 6; Hughes Aff., ¶ 23. DEC's obligation to review continues until the time of a final determination to undertake, fund or approve a proposed action. See 6 NYCRR §§ 617.7(e)(1) and (f)(1). Accordingly, as the Third Department has recognized, finality for purposes of Article 78 jurisdiction does not occur until an agency is committed to a course of action and actually approves a project. See Save the Pine Bush v. Town of Guilderland, 220 A.D.2d 90, 94-95 (3d Dep't 1996), leave denied, 88 N.Y. 2d 815 (1996) (statute of limitations to challenge zoning board decision ran from issuance of permit, not the earlier completion of the SEQRA process); see also Cedarwood, 954 F. Supp at 523 (acceptance of FEIS does not give rise

to a "vested right").

Until recently, decisions of New York courts have viewed a SEQRA determination as an intermediate step in an agency's review of an application rather than as a final determination. Accordingly, the accepted rule for finality in SEQRA matters has been that the statute of limitations runs from the final approval of the agency's regulatory action, not from a SEQRA determination such as a determination of significance, which is generally acknowledged as "merely a preliminary step in the decision-making process." See Gerrard, Environmental Impact Review in New York, § 7.02[4][c].[3] Before the final approval of a proposed action, a matter is not ripe for judicial review on SEQRA grounds. See Matter of Ogden Citizens for Responsible Land Use v. Planning Bd., 224 A.D.2d 921 (4th Dep't 1996)(negative declaration and preliminary site plan approval not ripe for review until final decision rendered); Matter of Group for South Fork v. Wines, 190 A.D.2d 794 (2d Dep't 1993) (conditioned negative declaration is a mere preliminary step); Matter of Haggerty v. Planning Bd., 166 A.D.2d 791, 792 (3d Dep't 1990), aff'd on memo below, 79 N.Y.2d 784 (1991)(approval of a site plan and not the negative declaration triggers limitations period for raising SEQRA claims); Matter of Save the Pine Bush v. Planning Bd. of City of Albany, 83 A.D.2d 741, 742 (3d Dep't 1981)(article 78 proceeding challenging negative declaration was timely when determinations by the planning board and its common council were "determinations regarding environmental impact [that] are conditions precedent to the final determination." 83 A.D.2d at 742; Matter of City of Schenectady v. Flacke, 100 A.D.2d 349, 354-55 (3d Dep't)(negative declaration is merely a condition precedent

[3] Mr. Gerrard's publication is generally recognized as the preeminent treatise on New York State's SEQRA law.

to final determination), lv. denied, 63 N.Y.2d 603 (1984); Town of Yorktown v. New York State Dep't of Mental Hygiene, 92 A.D.2d 897 (2d Dep't), aff'd on memo below, 59 N.Y.2d 999 (1983)(negative declaration a preliminary step and matter is ripe for review only when final certificate of approval issued). The Appellate Divisions have also held that a positive declaration is not a final agency action ripe for judicial review. See Matter of Sour Mtn. Realty v. New York State Dep't of Envtl. Conservation, 260 A.D.2d 920 (3d Dep't 1999), lv denied, 93 N.Y.2d 815 (1999); Matter of PVS Chems. v. New York State Dep't of Envtl. Conservation, 256 A.D.2d 1241 (4th Dep't 1998).

Two highly fact-specific SEQRA decisions by the Court of Appeals have recently introduced uncertainty into SEQRA practice for agencies, applicants and the courts. See Matter of Gordon v. Rush, 100 N.Y.2d 236, 2003 N.Y. LEXIS 1311 (2003); Matter of Stop the Barge v. NYCDEP, 2003 N.Y. LEXIS 4004 (2003). However, the atypical fact patterns in these two cases are distinguishable from the normal permitting agency scenario presented by the instant petitions and the body of SEQRA precedent. In Gordon, lead agency DEC had issued a negative declaration and tidal wetlands permit for a bulkhead in August and September 1993, respectively. Pursuant to 6 NYCRR 617.6(b)(3)(iii), the town board, as an involved agency, was bound by the lead agency's negative declaration and could not require separate or further environmental review. Nevertheless, the town board, in derogation of this mandate in the SEQRA regulations, in January 1995 issued a resolution declaring itself lead agency to conduct SEQRA review and a positive declaration. Petitioners in Gordon commenced an article 78 proceeding, challenging the town board's determination and its jurisdiction to conduct further SEQRA review. The Court of Appeals, applying the finality principles articulated in Essex County, held that the Board's

January 1995 resolution was ripe for judicial review, based upon the peculiar factual circumstances in which one agency issues a second determination of significance contrary to the original determination by the lead agency. Since the town board had no legal authority to issue the positive declaration – its actions being ultra vires on their face – and no further facts could clarify the record or alter the impact on petitioners, the proceeding challenging the local board's jurisdiction and determination of significance was determined to be ripe for review.

More recently, in Stop the Barge, the Court of Appeals again considered when a SEQRA determination was "final" and ripe for review for purposes of determining the timeliness of and Article 78 proceeding, but in the unique context of the New York City Department of Environmental Protection("NYCDEP") acting as SEQRA lead agency for a DEC air permit.[4] In that case, NYCDEP had conducted an environmental review and issued a Conditioned Negative Declaration in February 2000. Some 10 months later, in December 2000, the State DEC issued an air permit under ECL Article 19, incorporating the Conditioned Negative Declaration. Petitioners sued after DEC issued the permit, challenging the SEQRA determination as well as the permit. The supreme court dismissed the petition as against the NYCDEP and DEC for untimeliness; the Third Department affirmed in part and reversed as against DEC, finding the petition timely as against DEC under a separate statutory analysis. On petitioners' subsequent appeal, the Court of Appeals found that, on the specific facts presented, the statute of limitations as to the action against NYCDEP's Conditioned Negative Declaration commenced upon the issuance of the negative declaration, presumably because the City was taking no further action.

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[4] The NYCDEP and State DEC have entered into a memorandum of agreement which provides for the City's lead agency status for DEC permits within the City's physical boundaries and jurisdiction.

Two Third Department cases, which predated Gordon and Stop the Barge, deviated from the established body of case law on similarly fact-specific, local zoning grounds. See Matter of City of Saratoga Springs v. Zoning Bd. of Town of Wilton, 279 A.D.2d 756, 759 (3d Dep't 2001), lv. granted, 96 N.Y.2d 715 (2001), appeal withdrawn 96 N.Y.2d 915 (2001); Matter of McNeill v. Town Bd. of Town of Ithaca, 260 A.D.2d 829, 830 (3d Dep't 1999) appeal denied 93 N.Y.2d 812 (1999) (statute of limitations on SEQRA review in local land use challenge is triggered by the filing of the decision which represents the final determination of SEQRA issues). State respondents respectfully submit that the Third Department's analysis in those cases was erroneous .[5]

The Court of Appeals and Third Department decisions which addressed unusual facts thus reached conclusions facially at odds with the general rule of Article 78 finality have given rise to considerable confusion, particularly where a party is attempting to gauge whether a matter is ripe or "final" for purposes of CPLR § 7801(1) and thereby triggers the running of the statute of limitations. Unfortunately, the Court of Appeals did not take the opportunities offered by Gordon and Stop the Barge to clarify this issue. Therefore, those decisions are now being read by the bar as not only to allow but to require a party to sue on a preliminary SEQRA finding or lose the ability to challenge it. State respondents submit that the two petitions in these proceedings may be products of this confusion, as counsel for petitioners may have had certain

[5] In fact, State respondents had obtained permission from the Court of Appeals to participate as an amicus in the Saratoga Springs appeal to address this very issue. However, the case was settled by the parties prior to the completion of briefing. In Stop the Barge, the State respondents sided with the petitioners on the same point, and argued that a matter involving SEQRA is not "final" for purposes of Article 78 jurisdiction until the final permitting action is taken by the agency.

concerns about timely filings and preservation of claims.

In this context, and more globally, this issue of finality in matters involving SEQRA needs to be addressed by the courts in a straightforward and practical manner. If not resolved conclusively, premature and piecemeal litigation against State and local government entities – such as the instant petitions – will become the norm throughout the State courts. Such litigation will bog down agency decision-making processes (akin to a "permanent filibuster") and clog the courts needlessly, particularly at the Supreme Court level. Because Albany County is the venue of many Article 78 matters involving SEQRA, this Court may be particularly hard hit by the tide of piecemeal litigation. The position of State respondents not only preserves the integrity of the administrative processes in which SEQRA is being employed, it also promotes judicial economy by ensuring that final actions are reviewed on a complete record prepared by a governmental entity, not on a selective, piecemeal basis. See e.g. Matter of Town of Coeymans v. City of Albany, 237 A.D.2d 856, 857 (3d Dep't), lv. denied, 90 N.Y.2d 803 (1997)(to allow review of interim SEQRA determinations "would subject the entire SEQRA process to unrestrained review which could necessarily result in significant delays in what is already a detailed and lengthy process")

Petitioners' remedy lies in timely Article 78 proceeding, following issuance of final determinations by DEC regarding their respective SPDES permit applications.[6]

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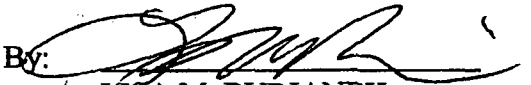
[6] Petitioners have the ability to raise these same issues in their respective DEC administrative processes, and exhaust their remedies in that context before raising the issues in an Article 78 proceeding. Young Men's Christian Assn. v. Rochester Pure Waters Dist., 37 N.Y.2d 371, 375 (1975). Based on the principle of primary jurisdiction, it recognizes that a reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not presented to the agency and deprives the agency of an opportunity to consider the matter, make its ruling, and state the reasons for its action. YMCA, 37 NY2d at 375. As

CONCLUSION

For the foregoing reasons, the petitions should be consolidated pursuant to CPLR § 602, heard by Justice Keegan and dismissed for lack of subject matter jurisdiction under CPLR §7801(1), because the DEC has taken no final agency action with respect to either the Entergy Indian Point or Mirant Bowline SPDES permit applications. Should the Court decline to dismiss the petitions, State respondents respectfully request 30 days following service of Notice of Entry to answer.

Dated: January 19, 2004
Albany, New York

ELIOT SPITZER
Attorney General
Attorney for State Respondents
The Capitol
Albany, New York 12224

By: 

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the Court of Appeals has stated, the exhaustion rule:

> furthers the salutary goals of relieving the courts of the burden of deciding questions entrusted to an agency ... preventing premature judicial interference with the administrators' efforts to develop, even by some trial and error, a coordinated, consistent and legally enforceable scheme of regulation and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its expertise and judgment.

Watergate II Apts. v. Buffalo Sewer Auth., 46 N.Y.2d 52, 57 (1978). See also Xerox Corp. v Department of Taxation & Fin., 140 AD2d 945, 946-947 (4th Dep't 1988), lv. denied, 72 N.Y.2d 809 (1988)(a "party must exhaust its administrative remedies particularly when the administrative process has already been commenced").

ENCLOSURE 2 TO NL-07-156

Supporting Information – Hudson River Studies

ENTERGY NUCLEAR OPERATIONS, INC.
INDIAN POINT NUCLEAR GENERATING UNIT NOS. 2 & 3
DOCKET NOS. 50-247 and 50-286

ENCLOSURE 3 TO NL-07-156

Impingement Data – Unit 2 and Unit 3; 1975-1980; 1981-1990

ENTERGY NUCLEAR OPERATIONS, INC.
INDIAN POINT NUCLEAR GENERATING UNIT NOS. 2 & 3
DOCKET NOS. 50-247 and 50-286

ENCLOSURE 4 TO NL-07-156

Supplemental Ristroph Studies from 1985 and 1985-1991

ENTERGY NUCLEAR OPERATIONS, INC.
INDIAN POINT NUCLEAR GENERATING UNIT NOS. 2 & 3
DOCKET NOS. 50-247 and 50-286

ENCLOSURE 5 TO NL-07-156

Entrainment Abundance Data 1981, 1983, 1985-1987

ENTERGY NUCLEAR OPERATIONS, INC.
INDIAN POINT NUCLEAR GENERATING UNIT NOS. 2 & 3
DOCKET NOS. 50-247 and 50-286