UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-247-LR and 50-286-LR
	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	
	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	July 30, 2012

MOTION AND MEMORANDUM BY APPLICANT ENTERGY NUCLEAR OPERATIONS, INC. FOR DECLARATORY ORDER THAT IT HAS ALREADY OBTAINED THE REQUIRED NEW YORK STATE COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW OF INDIAN POINT UNITS 2 AND 3 FOR RENEWAL OF THE OPERATING LICENSES

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For nearly 40 years, Indian Point Nuclear Generating Units 2 and 3 ("IP2" and "IP3") have been generating electricity for the New York Metropolitan Area safely, efficiently, and reliably. Since 1982, when the Department of Commerce approved the New York Coastal Management Program ("CMP")[1] pursuant to the Coastal Zone Management Act ("CZMA"), New York agencies have reviewed each plant numerous times for consistency with the New York CMP.[2] For example, New York State reviewed each plant for consistency with the CMP when affiliates of Entergy Nuclear Operations, Inc. ("Entergy") obtained ownership of IP3 and IP2 in 2000 and 2001 respectively.[3] Federal regulations allow further consistency review related to this license renewal proceeding for IP2 and IP3 only if, and to the extent that, license renewal "will cause an effect on any coastal use or resource substantially different than those" previously reviewed by the state. 15 C.F.R. § 930.51(b)(3). In light of the numerous prior state reviews, Entergy submits that no further consistency review is necessary or appropriate for license renewal.

Federal regulations vest authority in the federal licensing agency—here, the Nuclear Regulatory Commission ("NRC" or "Commission")—to determine whether the coastal effects from license renewal are substantially different than the effects previously reviewed by the state. *See* 15 C.F.R. § 930.51(e). Further, section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e), 10 C.F.R. § 2.319(r), and NRC precedent authorize the Atomic Safety and Licensing

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[1] NOAA, Ocean and Coastal Management in New York, http://coastalmanagement.noaa.gov/mystate/ny.html.

[2] *See* Lawlor Decl. ¶¶ 8-25 & Ex. B (Att. 8) (identifying and analyzing previous reviews of IP2 and IP3).

[3] *See* NYPA, Coastal Management Program: Federal Consistency Assessment Form, at ETR000022-23, *in* Negative Declaration (March 31, 2000) (Att. 6); NYSPSC, Order Adopting and Approving Issuance of Final Supplemental Environmental Impact Statement ("FSEIS"), attached FSEIS at ETR000054 (Aug. 17, 2001) (Att. 7).

Board ("Board") to resolve an important issue on which the parties disagree by issuing a declaratory order.[4]

Both Entergy's license renewal application, as originally filed, and the Final Supplemental Environmental Impact Statement ("FSEIS") issued by the NRC in this proceeding anticipated that license renewal of IP2 and IP3 would require a consistency determination by the State pursuant to the CZMA.[5] After discussions with the New York State Department of State ("NYSDOS"), which has responsibility for administering the CMP, Entergy re-evaluated how the CZMA applies to the pending renewal application. As a result of that re-evaluation, Entergy supplemented the Environmental Report appended to the License Renewal Application ("LRA") on July 24, 2012, to state that the application is not subject to further consistency review by New York State because renewal will not result in coastal effects that are "substantially different" than the effects previously reviewed by the State. *See* 15 C.F.R. § 930.51(b)(3).[6] During consultations pursuant to 10 C.F.R. § 2.323(b), the State asserted that Entergy's position is based on a misreading of the New York Coastal Management Program.[7]

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[4] *See Kan. Gas & Elec. Co.* (Wolf Creek Nuclear Generating Station), CLI-77-1, 5 NRC 1, 4-5 (1977), *aff'g* ALAB-321, 3 NRC 293, 298 (1976) (affirming Board's authority to grant declaratory relief in order to avoid delay); *Consumers Power Co.* (Big Rock Pt. Nuclear Plant), CLI–75–10, 2 NRC 188 (1975) (ruling on applicant's petition for declaratory order on effectiveness of a previously-issued amendment to its license); *Wash. Pub. Power Supply Sys.* (WPPSS Nuclear Projects No. 3 & 5), LBP-77-15, 5 NRC 643 (issuing declaratory order granting in part applicant's request for authorization to commence limited construction activities); *see generally* 10 C.F.R. § 2.319(p)-(q) (giving presiding officer "all the powers necessary" "to avoid delay and to maintain order," including powers to dispose of motions and issue orders).

[5] NUREG-1437, Supp. 38, Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, at 1-8 (Dec. 2010) ("NRC FSEIS") (Exh. NYS00133A) ("Two state-level issues, consistency with State water quality standards, and consistency with State coastal zone management plans, have yet to be resolved.").

[6] *See* Letter from F. Dacimo, Entergy, to NRC Document Control Desk, Supplement to License Renewal Application – Compliance with Coastal Zone Management Act (July 24, 2012) (NL-12-107) (Att. 1).

[7] As detailed in the attached Motion Certification, Entergy initiated consultation on July 24 and convened three conference calls—on July 25, 26, and 30, 2012—among the parties to this proceeding in an effort to seek resolution of the issues presented by this Motion. In addition, counsel for New York State and Entergy exchanged numerous

Accordingly, Entergy hereby requests, pursuant to 10 C.F.R. §§ 2.319, 2.323, and 2.1204, that the Board enter a declaratory order that further consistency review is neither necessary nor appropriate for renewal of the IP2 and IP3 operating licenses.[8] Entergy confronts grave "uncertainty as to its legal obligations"[9] either to submit to a burdensome consistency review process with the potential to force the closure of IP2 and IP3 in the event the State objects to Entergy's certification, or to decline to certify consistency and likewise risk closure of the plants in the event the NRC disagrees with Entergy's interpretation of the applicable regulations. This motion is both timely and warranted because "[n]o useful purpose can be served by forcing applicants to act at their peril to discover whether their actions would place them in legal jeopardy."[10] As explained more fully below, the requested declaratory order would remove this uncertainty, address an issue identified in the FSEIS, and resolve the dispute between Entergy and New York State regarding the need for an additional CZMA certification.

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supporting documents, and Entergy responded to various questions from the parties. *See* Motion Certification appended hereto. Although New York has requested continuation of consultations, Ms. Janice Dean of the New York Attorney General's Office has raised numerous objections to Entergy's legal interpretation of the State's CMP. In particular, she has stated that only NYSDOS is authorized to issue a federal consistency certification, that the CMP does not allow state consistency certifications to suffice for federal licensing actions, and that Entergy's legal position is based on erroneous interpretations of the State's regulatory program. Further, New York recently wrote to the Commission that the "NRC may not issue a license renewal prior to the issuance of the federal consistency concurrence by DOS pursuant to 16 USC 1456(3)(A)." Letter from Office of the Attorney General for the State of New York to Chairman MacFarlane and Commissioners, NRC, at 1 n.1 (July 25, 2012) (Att. 2). Thus, it appears highly unlikely that the Parties will be able to resolve the issues raised in this motion. Accordingly, Entergy believes it has in good faith satisfied its consultation obligations pursuant to 10 C.F.R. § 2.323(b).

[8] Entergy filed this motion within 10 days of docketing the supplement to its LRA. *See* 10 C.F.R. § 2.323(a); *see also FirstEnergy Nuclear Operating Co*. (Davis-Besse Nuclear Power Station, Unit 1), License Board Memorandum and Order (Denying Motion to Dismiss contention 1) (Jan. 10, 2012) (unpublished), *reconsideration denied*, License Board Order (Denying Motion for Leave to File a Motion for Reconsideration) (Jan. 30, 2012) (unpublished).

[9] *Wolf Creek*, CLI-77-1, 5 NRC at 4 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967)).

[10] *Id.* at 5; *see also Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 568 (2005) (discussing the NRC's "important policy supporting prompt decisionmaking—a policy that carries added weight in *license renewal* proceedings such as this one").

JURISDICTIONAL STATEMENT

As the federal licensing agency, the NRC is vested with exclusive responsibility to decide whether the coastal zone effects from license renewal are substantially different than those previously reviewed by the State. As the CZMA regulations promulgated by the National Oceanic and Atmospheric Administration ("NOAA") make clear: "[T]he determination of substantially different coastal effects under paragraph[] (b)(3) . . . of this section is made on a case-by-case basis *by the Federal agency* after consulting with the State agency, and applicant." 15 C.F.R. § 930.51(e) (emphasis added).[11] Although "[t]he Federal agency shall give considerable weight to the opinion of the State agency," it is the federal agency—here the NRC—that must make the decision. *Id.*[12]

When Entergy sought concurrence from New York on the proposition that no further consistency review of IP2 and IP3 is required, New York contended that Entergy was misinterpreting New York's CMP.[13] In this situation, section 5(e) of the APA, 5 U.S.C. § 554(e), authorizes the NRC to issue a "declaratory order to terminate a controversy or remove uncertainty." Like the Declaratory Judgment Act applicable in the federal courts, section 5(e) promotes predictability in the law by authorizing binding determinations "which dispose of legal

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[11] NOAA eliminated any doubt about the federal licensing agency's authority over this issue when it amended section 930.51(e) in 2006: "NOAA did not intend . . . to have the State agency make the decision on whether coastal effects are substantially different. Thus, to provide clarification, NOAA has amended the sections so that the Federal permitting agency makes this determination after consulting with the state and applicant." 71 Fed. Reg. 788, 795 (Jan. 5, 2006) (emphasis added).

[12] NOAA anticipated that a State might disagree with the federal agency, but made clear that "[i]f a State disagrees with a Federal agency's determination concerning substantially different coastal effects, then the State could either request NOAA mediation or seek judicial review to resolve the factual dispute." 71 Fed. Reg. at 795. Absent a mediated or court-ordered resolution, the federal agency's view prevails.

[13] *See* Note 7 above.

controversies without the necessity of any party's action at his peril upon his own views."[14] The NRC has used this authority to address looming controversies, emphasizing "[t]he costs to the applicants of either proceeding or of waiting because of uncertainty as to its legal obligations create the type of dilemma which declaratory relief is fashioned to resolve."[15] NRC precedent extends this declaratory authority to this Board.[16]

With the time for Entergy to submit a consistency certification—if one is needed—approaching, the current controversy is ripe for resolution by the Board. Entergy confronts grave "uncertainty as to its legal obligations"[17] to submit to a burdensome and redundant consistency review process. Because "[n]o useful purpose can be served by forcing applicants to act at their peril to discover whether their actions would place them in legal jeopardy," this motion is both timely and warranted.[18]

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[14] Final Report of the Attorney General's Committee on Administrative Procedure, at 30 (1941). Unlike the federal courts, however, federal agencies may issue declaratory orders without regard for the case or controversy requirement of Article III of the U.S. Constitution. *See*, *e.g.*, *Tenn. Gas Pipeline Co. v. FPC*, 606 F.2d 1373, 1380 (D.C. Cir. 1979).

[15] *Wolf Creek*, 5 NRC at 4 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967)).

[16] *See id.* at 4-5 (confirming that "[t]he Administrative Procedure Act, 5 U.S.C. 554(e), authorizes this Commission to issue declaratory orders 'to terminate a controversy or to remove uncertainty'" and acknowledging "the use of this authority as an efficient tool of administrative justice," and that "[t]he applicants' motion, made to a licensing board already constituted to hear their application," was proper); *see also Big Rock Pt.*, 2 NRC 188 (ruling on applicant's petition for declaratory order on effectiveness of a previously-issued amendment to its license). *WPPSS Nuclear Projects*, 5 NRC 643 (issuing declaratory order granting in part applicant's request for authorization to commence limited construction activities); *see generally* 10 C.F.R. § 2.319(p)-(q) (giving presiding officer "all the powers necessary" "to avoid delay and to maintain order," including powers to dispose of motions and issue orders).

[17] *Wolf Creek*, 5 NRC at 4 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967)).

[18] *Id.* at 5; *see also Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 &3), CLI-05-24, 62 NRC 551, 568 (2005) (discussing the NRC's "important policy supporting prompt decisionmaking—a policy that carries added weight in *license renewal* proceedings such as this one").

BACKGROUND

A. The Structure of the CZMA

In 1972, Congress passed and the President signed into law the CZMA, 16 U.S.C. §§ 1451–1465. As administered by NOAA under a delegation of authority from the Secretary of Commerce, the CZMA and its implementing regulations create a process by which participating states may review certain federal license or permit activities affecting their respective coastal zones for consistency "with the enforceable policies of approved State management programs." *Id.* § 1456(c)(3)(A). State coastal management plans become effective only upon approval by NOAA. *See* 16 U.S.C. §§ 1455(d), 1456(c)(3)(A); 15 C.F.R. §§ 923.1, 930.11(h). If the state determines that the proposed activity is not consistent with those enforceable policies, and if the Secretary of Commerce does not override the state's determination, then the federal licensing agency may not grant the requested license. *See* 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.64.

In ordinary circumstances, a consistency review of a federal license activity is triggered by a license applicant's certification that its activities will be consistent with a coastal management program's policies.[19] Not all license or permit activities are subject to the federal consistency certification requirement, however. In a case such as this one involving license renewal for activities previously subject to state consistency review, the CZMA regulations allow further consistency review only if the "[r]enewals . . . of federal license or permit activities *previously reviewed* by the State agency . . . will cause an effect on any coastal use or resource

[19] 15 C.F.R. § 930.60(a); s*ee also* LIC-203, Rev. 2, Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues at 7 (Feb. 17, 2009) (Exh. ENT000264) ("Federal consistency is documented in a Federal consistency certification, which must be submitted to the State or Federal licensing agency by applicants for Federal licenses that are likely to affect a State's coastal zone.").

substantially different than those *originally reviewed* by the State agency." 15 C.F.R. § 930.51(b)(3) (emphasis added); *see also* Luxton Decl. ¶¶ 10-13, 15-17, 19 (Att. 15).

B. New York's Coastal Management Program

The New York CMP was approved by NOAA and became effective in 1982 (Att. 3). The CMP designates NYSDOS as the agency "responsible for conducting the Federal consistency review process." CMP pt. II, § 4, at 3 (Att. 3). NYSDOS reviews proposed federal licenses for consistency with the 44 policies set forth in the CMP. *Id.* § 4, at 3; *id.* § 9.

Federal regulations recognize that NYSDOS may designate other state agencies to conduct consistency reviews in particular circumstances. *See* 15 C.F.R. § 930.11(o) ("[T]he term 'State agency' means the agency of the State government designated pursuant to Section 306(d)(6) of the [CZMA] . . . *or a single designee State agency appointed by the 306(d)(6) State agency*." (emphasis added)). Accordingly, the New York CMP grants other state agencies authority to conduct consistency reviews in particular situations. CMP, pt. II, § 4, at 3-4 (Att. 3) ("The State agency having jurisdiction over a proposed action is responsible for determining the consistency of that action with the coastal policies.").

State law creates a parallel consistency review process to ensure that state actions, including the issuance of state permits, are consistent with the CMP policies. *See id.* at 3-4, 7-9; *see also* N.Y. Exec. Law § 919(1) ("Actions directly undertaken by state agencies within the coastal area . . . shall be consistent with the coastal area policies of this article."). Each New York permitting agency is required to determine that the activity under review is consistent with the CMP before issuing a state permit. *See, e.g.*, CMP pt. II, § 4, at 4 (Att. 3). The CMP ensures such consistency through the procedures of the State Environmental Quality Review Act ("SEQRA"), N.Y. Envtl. Conserv. Law Art. 8, as implemented by regulations that were promulgated pursuant to the CMP in 1982. *See* CMP pt. II, § 4, at 7-9 (Att. 3) ("[T]he

procedures of [SEQRA] will insure that all State agency actions, of whatever type, will be consistent with [CMP] policies.").[20] Pursuant to these regulations, a "determination of consistency" with New York's coastal policies is a prerequisite for every state agency approval, permit, or other action in the coastal zone. 19 NYCRR § 600.4(a), (b).

Pursuant to the State's authority to vest other agencies in addition to NYSDOS with responsibility for conducting consistency reviews, the CMP provides that the New York State Department of Environmental Conservation ("NYSDEC" or "DEC")

> has the major responsibility for protecting the natural resources of the coastal area. . . . *In its permitting role*, *DEC reviews most activities that have the potential to impact coastal resources*. Those with the potential for significant impact are thoroughly reviewed in connection with the SEQRA process and *can be approved only after DEC has found that the activity will be consistent with the policies of the coastal management program*. This review will ensure comprehensive implementation of the program with respect to a wide variety of activities.

CMP pt. II, § 4, at 3 (Att. 3) (emphasis added). The CMP also lists the New York Power Authority ("NYPA") and New York State Public Service Commission ("NYSPSC"), among other state agencies, as having responsibility for assuring activities within their jurisdiction are consistent with the policies in New York's CMP. *Id.* at 3-4. The CMP expressly requires those other state agencies to determine that their actions are consistent with the policies of the CMP as part of the environmental review required by SEQRA. *See generally id.* at 7-9. This must occur

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[20] Much like the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, SEQRA requires the preparation of an Environmental Impact Statement ("EIS") for proposed actions that may have a significant effect on the environment, and a Negative Declaration for those that will not. In the case of a Negative Declaration, the regulations require the state agency to "file with [NYSDOS] a certification that such action will not substantially hinder the achievement of any of the coastal policies," or "[i]f the action will substantially hinder the achievement of any policy, the agency shall instead certify that [certain] requirements are satisfied." 19 NYCRR § 600.4(b). If an EIS is required, it must include "the action's consistency . . . with the applicable coastal policies" and the agency may not issue the permit or otherwise approve the action without "a written finding that the action is consistent with applicable policies." 19 NYCRR § 600.4(a); 6 NYCRR §§ 617.9(b)(5)(vi), 617.11(e). In either case, compliance with these requirements "constitutes a determination of consistency." 19 NYCRR § 600.4(a)-(b).

before the state agency takes any action, including the issuance of a permit. *See id*. Although NYSDOS maintains a monitoring and advisory role, it "is not authorized to override the decisions of its sister agencies." Id. at 3, 9.

The issuance of a permit by a state agency may also constitute the State's concurrence with a federal consistency certification. Federal regulations state that "the issuance or denial of relevant State permits can constitute the State agency's consistency concurrence or objection *if* the State agency ensures that the State permitting agencies . . . review individual projects to ensure consistency with all applicable State management program policies." 15 C.F.R. § 930.60(c) (emphasis added). Indeed, "if all management program enforceable policies are contained in State permit standards, then *usually the issuance of the relevant State permit(s) will be sufficient for determining consistency*." 65 Fed. Reg. 77124, 77129 (Dec. 8, 2000) (elaborating on 15 C.F.R. § 930.60(c)) (emphasis added). As shown, New York's program meets this condition. Thus, this Board must take into account *all* prior consistency reviews—state *and* federal—of IP2 and IP3 to determine whether the coastal zone effects due to license renewal are "substantially different" than those previously reviewed. *See* 15 C.F.R. § 930.51(b)(3), (e).

C. New York's Previous Consistency Reviews of IP2 and IP3

For nearly half a century, the State of New York was a steadfast proponent and facilitator—and, for a quarter century, a partial owner—of the Indian Point plants. In 1959, New York conveyed a portion of the Indian Point site to Consolidated Edison Company of New York, Inc. ("ConEd") for construction of Indian Point Unit 1 ("IP1"), and later IP2 and IP3.[21] In 1971, New York conveyed to ConEd a leasehold interest authorizing the plants to use Hudson River

[21] *See* Department of State, Letters Patent, *recorded in* Book of Patents No. 75, at 289 (Dec. 14, 1959) (Att. 4).

water, a lease that continues in effect today.[22] In 1974, to "help assure continuity of electric power for the people" of New York, the New York legislature authorized the acquisition of IP3 by the New York Power Authority ("NYPA").[23] IP2 began providing electricity to the citizens of New York in 1974, and similarly IP3 began providing electricity in 1976,[24] pursuant to operating licenses granted by the NRC on September 28, 1973, and December 12, 1975, respectively.

The CMP itself confirms the consistency of IP2 and IP3 with New York's coastal policies. The CZMA states as a national policy that state coastal management programs must provide for "adequate consideration of the national interest involved in . . . the siting of facilities such as energy facilities which are of greater than local significance." 16 U.S.C. § 1455(d)(8). State plans must have as one "required program element" a "planning process for energy facilities likely to be located in . . . the coastal zone . . ." *Id*. § 1455(d)(2)(H). In obtaining federal approval for the CMP in 1982, and for each amendment up to and including the most recent in 2006, New York relied on IP2 and IP3 as illustrations of its openness to energy facilities in the coastal zone and thus its compliance with these statutory mandates. *See* Part I.A. below.

In 2000, after owning and operating IP3 for 26 years through NYPA, New York authorized the transfer of IP3 to Entergy upon completion of a consistency review by the State.[25] Similarly, in 2001, the NYSPSC authorized ConEd to transfer IP1 and IP2 to Entergy, also

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[22] *See* Lease between NYSERDA and ConEd (July 1, 1971) (Att. 5).

[23] *See, e.g.*, N.Y. Pub. Auth. Law § 1001-a.

[24] Indian Point Energy Center License Renewal Application app. E, at 3-1 (Apr. 2007) (Exh. ENT00015B) ("IPEC LRA").

[25] NYPA, Coastal Management Program: Federal Consistency Assessment Form, at ETR000023, *in* Negative Declaration (March 31, 2000) (Att. 6) (certifying that "[t]he proposed activity complies with New York State's approved Coastal Management Program . . . and will be conducted in a manner consistent with such program.").

finding that transfer "consistent with applicable coastal zone policies" of New York.[26] These reviews are only two of the dozens conducted by state agencies.[27]

D. New York's Consistency Reviews of Other Nuclear Plant License Renewals

Indian Point is the fourth nuclear power site in New York to apply for license renewal, and is the only remaining applicant in the state awaiting final approval by the NRC. When the R.E. Ginna, Nine Mile Point, and James A. FitzPatrick facilities sought renewal of their operating licenses, they submitted concise, limited consistency certifications to NYSDOS. Among other things, each of their certifications:

- certified consistency based, in large part, on the absence of any change in the operation of the plant and/or the coastal effects that would result from renewal;
- analyzed consistency in the context of the continued operation of an existing facility, rather than the commencement of operation of a new or proposed facility;
- concluded that between 32 and 35 of the CMP's 44 enforceable policies were inapplicable in the circumstances, and explained why renewal was consistent with the remaining 9–12 policies in only a few sentences per policy; and
- contained no separate analyses of alternatives to license renewal.[28]

Moreover, the Nine Mile Point and FitzPatrick certifications expressly acknowledged that the continued operation of those plants would *not* be consistent with *all* applicable CMP policies.[29]

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[26] NYSPSC, Order Adopting and Approving Issuance of FSEIS, attached FSEIS at ETR000054 (Aug. 17, 2001) (Att. 7). IP1 ceased operation in 1974 and is not subject to the current license renewal proceeding.

[27] *See* Lawlor Decl. ¶¶ 8-25 (Att. 8) (analyzing previous consistency reviews of IP2 and IP3).

[28] *See* R.E. Ginna Nuclear Power Plant, Federal Consistency Certification, at ETR000129-31 (July 30, 2002) (Att. 9); Nine Mile Point Nuclear Station, Federal Consistency Certification, at ETR000153-56 (Aug. 6, 2004) (Att. 10); James A. FitzPatrick Nuclear Power Plant, Federal Consistency Certification, at ETR000193-99 (July 31, 2006) (Att. 11). An affiliate of Entergy is the licensed operator of the FitzPatrick plant.

[29] *See* Nine Mile Point Nuclear Station, Federal Consistency Certification, at ETR000155 (Aug. 6, 2004) (Att. 10) (explaining that heightened security concerns will preclude the public recreational use of coastal resources mandated by policies 21 and 22); James A. FitzPatrick Nuclear Power Plant, Federal Consistency Certification, at ETR000194 (July 31, 2006) (Att. 11) (same as to policy 9).

NYSDOS concurred with the Fitzpatrick and Ginna consistency certifications.[30] With regard to Nine Mile Point, NYSDOS concluded that continued operation satisfied the CMP's criteria for "general consistency concurrence" such that "further review of the proposed activity by [NYSDOS], and [NYSDOS]'s concurrence with an individual consistency certification for the proposed activity, *are not required*."[31] New York's streamlined approach to consistency review has been similar to that of states in 20 other license renewal proceedings for commercial nuclear power plants that affect the coastal zones of states other than New York. *See* Lawlor Decl. ¶¶ 26-27 & Ex. C (Att. 8).[32]

E. New York's Position Regarding IP2 and IP3

Under Entergy's operation during the past decade, IP2 and IP3 have achieved high levels of operational reliability, efficiency, and safety.[33] Today, IP2 and IP3 generate over 2,000 megawatts of electricity, and supply approximately 23% of the electric power that is delivered in the southeastern New York region.[34]

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[30] Letter from Sally Ball, NYSDOS, to Jim Costedio, Entergy Nuclear (July 24, 2008) (Att. 12) (concurring with the FitzPatrick certification); Letter from Sam Messina, NYSDOS, to Robert C. Mecredy, Rochester Gas and Electric Corporation (April 26, 2004) (Att. 13) (concurring with the Ginna certification).

[31] Letter from Jeff Zappieri, NYSDOS, to Timothy J. O'Connor, Constellation Energy (July 18, 2006) (Att. 14) (emphasis added).

[32] New Jersey initially objected to the Oyster Creek certification for lack of sufficient data, but ultimately concurred upon reconsideration. *See* Lawlor Decl., Ex. C (Att. 8).

[33] *See* Dacimo Decl. ¶¶ 9-10 (Att. 16); *see also* Nat'l Research Council of the Nat'l Academies, *Alternatives to the Indian Point Energy Center for Meeting New York Electric Power Needs*, at 1-11 (2006) (Exh. NYS000055) ("Since Entergy took over Indian Point, it has operated the plants extremely well. From 2003 to 2005, Unit 2 operated at a capacity factor of 96.6 percent and Unit 3 at 93.7 percent. The industry average is 89.6 percent. The two Indian Point reactors are among the lowest-cost generators in New York, and they operate whenever possible supplying base load power to the system. Together, they account for 5.3 percent of the total installed generating capacity in New York State, but they produce 10.1 percent of the electricity.") (citations omitted).

[34] *Id.* at S-2 (Exh. NYS000055).

This dispute arises because NYSDOS has stated its intention to conduct a comprehensive and uniquely in-depth consistency review of IP2 and IP3.[35] Such a review is inconsistent with its approach to license renewals of the other nuclear plants located in the New York coastal zone (*see* pp. 11-12 above), and is at odds with federal regulations circumscribing additional consistency reviews, *see* 15 C.F.R. § 930.51(b)(3).[36] This motion for declaratory order seeks enforcement of the federal regulation, which deems a consistency certification unnecessary for license renewal because IP2 and IP3 have been previously reviewed numerous times by the State, and there are no "substantially different" coastal effects arising from license renewal.

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[35] Consistent with its approach in reviewing other New York nuclear plants, NYSDOS's website outlines a consistency certification and review process that requires the applicant to submit only a completed Federal Consistency Assessment Form ("CAF"), an identification of coastal policies affected by an applicant's proposed activity (which is determined by the CAF), a brief assessment of the effects of the activity on the applicable policies; a statement indicating how the activity is consistent with each applicable policy, and "other necessary information and data" (which in past nuclear power plant reviews appears to have consisted of, at most, a copy of the Final Environmental Impact Statement). *See* NYSDOS, Federal Consistency (Att. 17), http://www.dos.ny.gov/communitieswaterfronts/consistency/federal.html (last visited July 27, 2012). Here, however, NYSDOS has additionally requested extensive analyses of a variety of alternatives, including a "no action" alternative (i.e., nonrenewal and closure of both IP2 and IP3), renewal for only a five-year period, replacement with an alternative source of generation (e.g., a natural gas plant), replacement of the existing circulating-water cooling system with cooling towers, and installation of wedge-wire screens.

[36] New York's differential treatment of IP2 and IP3 may reflect its stated intention to use every means possible to prevent license renewal in order to advance its perspective on public safety. *See, e.g.*, New York State Notice of Intention To Participate and Petition To Intervene, at 3 (Nov. 30, 2007), ADAMS Accession No. ML 0743400187 ("If the federal government will not take adequate steps to ensure public safety with respect to the Indian Point power plants, the State of New York will step into this void and use every legal tool and resource to force a full consideration of these issues."); New York State Energy Planning Board, 2009 State Energy Plan 64 (2009) (Att. 18) ("New York is opposing the license renewals for Indian Point Units 2 and 3 . . . due to significant safety and environmental impacts associated with their operation. . . . includ[ing] the adequacy of the evacuation plan . . . ; the risk of a terrorist attack on the spent fuel pools . . . ; the impact of earthquakes on the integrity of the facility . . . ; and the impact on aquatic life from the use of 2.5 billion gallons of Hudson River water each day . . . ."); Matthew Wald, *As Reactors Age, the Money to Close Them Lags*, N.Y. Times, March 23, 2012 at A11 (Att. 19) ("In New York, Gov. Andrew M. Cuomo has vowed to force the two operating reactors at another Entergy plant, Indian Point, 35 miles north of Midtown Manhattan, to shut down when their licenses expire in 2013 and 2015 by denying them state environmental permits."). As this Board knows, "[t]he field of public health and safety regulation of nuclear power generation has been occupied by Congress through the Atomic Energy Act, and therefore any regulation in that area by the states is preempted." *Consol. Edison Co. of N.Y. v. Pataki*, 292 F.3d 338, 352-53 (2d Cir. 2002).

ARGUMENT

Even though States may conduct limited supplemental consistency reviews in connection with certain license or permit renewals, the regulations are drafted to assure that "further review is limited to cases where . . . the *activity will be modified substantially* causing *new* coastal zone effects." 44 Fed. Reg. 37,142, 37,150 (June 25, 1979) (emphasis added). A core objective of the CZMA is to "minimize duplicative effort and unnecessary delays, while making certain that the objectives of the federal consistency requirements of the Act are satisfied." 15 C.F.R. § 930.1(c); *see also* 44 Fed. Reg. at 37,150 (importance of "avoiding unnecessary State agency review"). Agencies of New York have issued numerous consistency determinations for IP2 and IP3. Because license renewal will not cause the operation of IP2 and IP3 to be "modified substantially causing new coastal zone effects," *see* Dacimo Decl. ¶¶ 8-9, 13-19 (Att. 16). New York lacks jurisdiction to determine consistency of those operations with the CMP.

I. NEW YORK HAS REPEATEDLY DETERMINED THAT THE OPERATIONS OF IP2 AND IP3 ARE CONSISTENT WITH THE POLICIES OF THE CMP.

A. The CMP Itself Contains a Determination by NYSDOS that the Operations of IP2 and IP3 Are Consistent with the CMP.

To achieve approval of the CMP by NOAA, NYSDOS was required to show that the CMP "provides for adequate consideration of the national interest involved in . . . the siting of facilities such as energy facilities which are of greater than local significance." 16 U.S.C. § 1455(d)(8); *see also id.* § 1455(d)(2)(H).[37] In every version of the CMP since its adoption in

[37] *See also* 15 C.F.R. § 923.52 (detailing the requirements for establishing that the national interest in energy facilities is met in state plans); Energy and Government Facility Siting, NOAA (Att. 20), http://coastalmanagement.noaa.gov/ene_gov.html ("Meeting energy needs and increasing the United States' energy independence are two of the highest priority national issues of the [CZMA]."); *Connecticut v. Dep't of Commerce*, No. 3:04-cv-1271, 2007 WL 2349894, at *8 (D. Conn. Aug. 17, 2007) ("According to the NOAA regulations, the siting of coastal dependent energy facilities inherently has economic consequences beyond the immediate locality where the facility is located, that is, involves a significant national interest.").

1982 through the most recent CMP amendments in 2006, NYSDOS has made this showing, in part, by referring to the ongoing operations of nuclear plants, including IP2 and IP3, within the coastal zone:

> Many energy facilities are already situated in the State's coastal area, including steam-electric generating plants, transmission lines, oil storage tanks and LNG facilities. The Program's policies on energy are in accord with existing State laws and plans which address energy needs and environmental quality in a comprehensive manner.
>
> The State has demonstrated its recognition of the national interest in energy facilities by the number and scope of facilities already located in or planned for New York's coastal area. . . . [including] nuclear – 5 units.

CMP pt. II, § 9, at 3 (Att. 3). Because IP2 and IP3 are two of the five identified nuclear generating units,[38] NYSDOS expressly relied on the continued operation of IP2 and IP3 to satisfy the State's obligations under the CZMA.[39] If the operations of IP2 and IP3 were *inconsistent* with the CMP, then NYSDOS could not have relied on them to demonstrate New York's "recognition of the national interest in energy facilities." *Id.*

B. New York Previously Conducted Consistency Reviews of IP2 and IP3 When They Were Transferred to Entergy.

The Indian Point plants have undergone numerous consistency reviews by authorized agencies of the State of New York pursuant to the "network" of laws and regulations that implement the CMP. CMP pt. II, § 4, at 2 (Att. 3); *see also* Lawlor Decl. ¶¶ 8-25 (Att. 8)

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[38] There are currently *six* nuclear generating units in New York. It is likely that NYSDOS failed to add Nine Mile Point Nuclear Station's most recent reactor unit, which was first licensed in 1987, in its subsequent amendments to the CMP.

[39] Having relied on the operation of IP2 and IP3 to show NOAA that the CMP satisfied essential elements of the CZMA, New York cannot now excise the plants from the CMP without NOAA's approval. *See AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120, 127 (4th Cir. 2008) ("Until NOAA approves [the bill] or fails to take action after being presented with it, [the categorical ban on LNG terminals in Chesapeake Bay] is not part of Maryland's CMP . . . .").

(analyzing previous reviews of IP2 and IP3). One of the most comprehensive reviews occurred when the State of New York transferred its ownership of IP3 to Entergy in March 2000. *See id.* ¶¶ 9-12. Because the transfer required approval by both NYPA and the NRC, it was subjected to a thorough consistency review under both state law and the CZMA.

In approving the transfer, NYPA issued a Negative Declaration under SEQRA supported by a full environmental assessment ("EA"), a NYSDOS federal consistency assessment form ("Federal CAF"), and a NYSDOS coastal assessment form ("State CAF"). *See* NYPA, Negative Declaration (March 31, 2000) (Att. 6). NYPA's assessment considered not only the transfer itself, but also the "long term future operation" of the plant. *Id*. at ETR000044.[40] As required for both state and federal consistency purposes, 19 NYCRR § 600.4(b); 16 U.S.C. § 1456(c)(3)(A), NYPA certified that the "proposed activity complies with New York State's approved Coastal Management Program . . . and will be conducted in a manner consistent with such program." Federal CAF, at ETR000023, *in* NYPA, Negative Declaration (Att. 6). Of the 44 policies in the CMP, NYPA determined that IP3's operations affected only 8 of them, regarding coastal erosion, water quality, and air quality. The State determined that the plant's operations were consistent with each of these policies.

NYPA's consistency certification was a conclusive determination of consistency with CMP policies. 19 NYCRR § 600.4 (b). Moreover, the CMP identifies NYPA as one of the state agencies involved in management of New York's coastal resources, CMP pt. II, § 4, at 3-4 (Att.

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[40] *See id.* at ETR000044-45 (Att. 6) ("The biggest factor that will affect long term future operation is the competitive market system. That system will dictate how and when these facilities will operate in the future . . . . [T]o the extent that the competitive market dictates physical or operational changes at the facilities that affect safety or the environment, they will be subject to federal and/or state review and approval."); *see also id.* at ETR000035 ("Entergy's ability to operate the two facilities was scrutinized to assure that operation of these facilities continues at the level the facilities have attained in recent years under Authority supervision.").

3), and NYSDOS "had no objection to [NYPA] assuming the role of Lead Agency" for the review process, NYPA, Negative Declaration, at ETR000030 (Att. 6). Although the available records do not reflect that NYSDOS explicitly concurred with NYPA's certification, the NRC's approval of the transfer demonstrates that New York confirmed consistency with the CMP. 16 U.S.C. § 1456(c)(3)(A).

The following year, the State likewise found the transfer of IP2 to Entergy to be consistent with the CMP. *See* Lawlor Decl. ¶¶ 13-16 (Att. 8). On August 17, 2001, the NYSPSC issued an order adopting and approving a Final Supplemental Environmental Impact Statement ("FSEIS") addressing the potential site-specific impacts of ConEd's sale of IP1 and IP2 to Entergy. NYSPSC, Order Adopting and Approving Issuance of FSEIS ("FSEIS Order") (Aug. 17, 2001) (Att. 7). As required by the CMP's implementing regulations, *see* 19 NYCRR § 600.4(a); 6 NYCRR § 617.9(b)(5)(vi), the FSEIS included NYSPSC's determination that "the proposed transfer of Indian Point Unit 1 and Indian Point Unit 2 to Entergy" is "consistent with applicable coastal zone policies set forth in 19 NYCRR § 600.5 [*i.e.*, the New York coastal policies]." NYSPSC, FSEIS Order, at ETR00054 (Aug. 17, 2001) (Att. 7). Two weeks later, NYSPSC issued an order authorizing the transfer, which included a further "written finding" of consistency pursuant to CMP regulations, 6 NYCRR § 617.11(e):

> [T]he approval of the sale and transfer of Indian Point and related assets [to Entergy] . . . . is consistent with the applicable policies set forth in Article 42 of the Executive Law, as implemented by 19 NYCRR § 600.5, and will achieve a balance between the protection of the environment and the need to accommodate social and economic considerations.

NYSPSC, Order Authorizing Asset Transfer 11 (Aug. 31, 2001) (Att. 21). Like NYPA's determination and certification of consistency regarding the transfer of IP3, NYSPSC's consistency determinations regarding the transfer of IP2 were conclusive for state purposes. *See*

19 NYCRR § 600.4(b). And although the available records do not reflect whether ConEd or NYSPSC submitted a federal consistency certification, the NRC's approval of the transfer demonstrates that New York confirmed consistency with the CMP. 16 U.S.C. § 1456(c)(3)(A).

Through the 2000 and 2001 plant transfers, New York determined that the specific *operations* of IP2 and IP3 that affect the coastal zone are consistent with the CMP. *See* Lawlor Decl. ¶¶ 9-16 (Att. 8). In the Negative Declaration's "Description of Action," NYPA, with involvement by NYSDOS and NYSDEC, explained that "Entergy will acquire IP3 . . . in compliance with all applicable laws & regulations. [IP3], once under new ownership *will be required to continue to comply* with these & any other applicable laws & regulations." *See* NYPA, Negative Declaration, at ETR000002 (Mar. 31, 2000) (Att. 6). Further, NYPA explained that a principal focus of the transaction was Entergy's future operation of the plant. It stated:

> The transaction has been structured to minimize or eliminate any adverse environmental, safety, social or economic impacts that could be associated with the sale of the facilities. The agreement *to operate* the facilities under the terms of all existing regulatory permits *assures continued operation in an environmentally sound and safe manner*.

Id. at ETR000045 (emphasis added) (Att. 6). These statements demonstrate that the environmental review included the future *operation* of the plant following its transfer to Entergy, and not merely the transactional activity between NYPA and Entergy that ceased upon completion of the plant transfer.

For the 2001 transfer of IP2 to Entergy, the NYSPSC also analyzed the effects of the unit's operations on coastal resources. *See* NYSPSC, FSEIS Order, at ETR000084-101 (Aug. 17, 2001) (Att. 7). For example, as part of its analysis of impacts to coastal areas, the NYSPSC concluded:

> While improved *operations* could lead to increased water usage, [IP2] must remain within the bounds of its SPDES and other water permits.

> Accordingly, it can reasonably be concluded that that the Proposed Action [*i.e.*, sale] will not result in any additional potentially significant or likely adverse impacts to the coastal zone in the area surrounding IP2.

Id. at ETR000088 (emphasis added). The NYSPSC also stated that "it can be reasonably concluded that the IP2 will be *operated* in a superior manner . . . [T]he anticipated changes are likely to have either no or positive environmental impacts as a result of the sale." *Id*. at ETR000085 (emphasis added).

Neither of these previous consistency reviews by New York assumed or was contingent on a 40-year term for the plants' NRC operating licenses. Moreover, both the NYPA and NYSPSC reviews expressly contemplate that the operating licenses for IP2 and IP3 might be renewed. *See* NYPA, Negative Declaration, at ETR000035 (Jan. 6, 2000) (Att. 6) ("Since the permits [that will be transferred to the purchaser] are renewed periodically, the potential for a change in [a permit's] conditions exists regardless of who operates the facilities. However . . . . [a]ny revisions to federal permits would be subject to the requirements of NEPA, along with any permit requirements."); NYSPSC, FSEIS Order, at ETR000075 (Aug. 17, 2001) (Att. 7) ("[T]he ability of the owner of IP2 . . . to extend its license is subject to the NRC's review and approval. Should the sale be approved and [Entergy] decide at some point in the future to seek life extension, the NRC would commence a formal proceeding to consider the matter.").

C. Since the Transfers of IP2 and IP3 to Entergy, New York Has Repeatedly Determined that Their Operations Are Consistent with the CMP.

New York agencies have issued, and renewed, dozens of state permits to the Indian Point facilities. *See* Lawlor Decl. ¶¶ 23-25 (Att. 8). Since 1967, NYSDEC *alone* has issued more than 53 permits and renewals to those facilities covering issues related to dredging (2 permits), water

quality (7), water discharges (14), air emissions (11), petroleum storage (3), pesticide application (4), and mixed waste / hazardous substance generation and storage (7).[41] The vast majority of these permits were issued or renewed after the CMP became effective in 1982, and thus required the authorized state agency to find issuance consistent with the CMP as a matter of state law. *See* CMP pt. II, § 4, at 3-4, 7-9 (Att. 3); N.Y. Exec. Law § 919(1); 19 NYCRR § 600.4(a)-(b).

The FEIS prepared by NYSDEC and dated June 25, 2003, for IP2, IP3, and plants at two other facilities on the Hudson River further demonstrates that the plants' operations are consistent with the CMP. *See* Lawlor Decl. ¶¶ 21-22 (Att. 8). Even though it recognized that further environmental review would occur—and is, in fact, ongoing—with regard to the State Pollution Discharge Elimination System ("SPDES") permit renewals, NYSDEC concluded that "[t]he SPDES permit renewals that are the subject of this [F]EIS *will not result in any new effects on coastal zone policies*" and incorporated the "[c]oastal zone consistency forms . . . contained in DEIS appendix IV-5." NYSDEC, Final Environmental Impact Statement 23-24 (June 25, 2003) (Att. 22) (emphasis added). Among those forms is a State CAF prepared by NYPA on behalf of itself and ConEd, which were the original applicants for IP2 and IP3's SPDES permit renewals. That CAF concludes that renewal of the plants' SPDES permits will not "affect the achievement of [New York's] coastal policies." NYPA, Coastal Assessment Form, at ETR000212 (date illegible), *in* DEIS Appendix IV-5 (Att. 23).[42] In addition, NYSDEC prepared its own State CAF

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[41] The facilities have also received permits or certifications from other government entities, including the New York State Department of Health, the Westchester County Department of Health, and the Village of Buchanan, addressing environmental concerns.

[42] In the copy of NYPA's form that is contained in the DEIS appendix, Question C.1.a and NYPA's response thereto is obscured. *Id*. at ETR000213 (Att. 23). The question asks: "Will the proposed action be *located* in, or contiguous to, or have a *significant effect* upon any of the resource areas identified on the coastal area map: Significant fish or wildlife habitats?" It appears that NYPA likely checked the box for "Yes," given that it attached to the form a copy of CMP policy 7, which deals with protection of "significant coastal fish and wildlife habitats," below which NYPA

evaluating the coastal effects of renewing the permits. NYSDEC, State CAF (Feb. 11, 2000) (Att. 24); *see also* Lawlor Decl. ¶¶ 17-20 (Att. 8). Consistent with its oversight role, NYSDOS reviewed NYSDEC's Coastal Assessment Form and determined that "No Comments [were] Necessary." State Consistency Project Review Sheet 1 (March 9, 2000) (Att. 25).[43]

The CMP and its implementing regulations have required similar determinations for each of the dozens of state permits issued to IP2 and IP3 since 1982. Indeed, NYSDEC and other state agencies have issued 39 permits to the facilities since Entergy acquired IP3 in 2000. At least 21 of these permits are for IP2, 10 are for IP3, and the rest are applicable to the Indian Point facilities generally. As shown (pp. 7-8, 19), issuance of these permits required the responsible state agency, under NYSDOS's supervision, to find the proposed action consistent with the CMP. Thus, New York's previous CMP reviews of IP2 and IP3 cannot be seriously contested.

II. IP2 AND IP3 ARE NOT SUBJECT TO FURTHER CONSISTENCY REVIEW.

A. License Renewal Does Not Result in Substantial Modifications to the Plant Operations.

The focus of the CZMA is on review of *new* activities, not iterative review of activities already reviewed. As explained in the Senate Report, the CZMA

> assures that before a federal license or permit is issued to conduct any *new activity* in the coastal zone, directly, significantly and adversely affecting coastal waters, it will be reviewed by an appropriate State agency and a certification of compliance supplied. . . . *Emphasis is placed upon "new" activity.* This activity is after the date of enactment of the legislation. It will thus be appropriate to distinguish between new activities, such as the

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stated that "[t]he proposed activity will not affect any state designated significant fish and wildlife habitat." *Id.* at ETR000215 (Att. 23). NYPA thus acknowledged that IP2 and IP3 are located in, or contiguous to, a significant fish or wildlife habitat, while concluding that the activity will not adversely affect that habitat.

[43] *See* CMP, II-4, at 3 (Att. 3) ("[NYSDOS] will track actions proposed in the Coastal Area through the [SEQRA] process and will evaluate the consistency determinations made by State agencies. When appropriate, the Department will advise the agencies on the consistency of such actions with the coastal policies.").

> building of a new marina, or the dredging of a new channel, as opposed to the maintenance of existing facilities or activities begun prior to the enactment of the bill.

S. Rep. No. 92-753 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4793-94 (emphasis added).

In furtherance of this policy, and to "avoid unnecessary state agency review," NOAA has issued regulations that apply when "the State agency has previously reviewed a license or permit activity," and limit "further review to cases where . . . *the activity will be modified substantially causing new coastal zone effects*." 44 Fed. Reg. 37,142, 37,150 (June 25, 1979) (emphasis added). The binding CZMA regulations preclude further consistency review of previously reviewed activities unless those activities "will cause an effect on a coastal use or resource *substantially different* than those originally reviewed by the State agency." 15 C.F.R. § 930.51(b)(3) (emphasis added).[44] As shown (pp. 1, 3-4), the CZMA regulations assign jurisdiction to make the determination of substantially different coastal effects to the federal licensing agency—here, the NRC.

Entergy seeks renewal of the IP2 and IP3 operating licenses for the purpose of continuing their operations in the same manner as those units have operated for the last forty years. *See* Dacimo Decl. ¶¶ 9, 17 (Att. 16). The plants' operations have not changed, although the Indian Point site has undergone immaterial modifications since those units were transferred by New York and ConEd to Entergy over a decade ago. *Id*. ¶¶ 8-16. For each such modification, the plants received approvals or authorizations required by state law. *Id*. ¶¶ 14, 16.

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[44] The regulations also allow consistency review in connection with license renewals when the State has "*not* previously reviewed" the federal license or permit activities, or when the license renewal is "filed after and subject to management program changes not in existence at the time of original State agency review." 15 C.F.R. § 930.51(b)(1), (2) (emphasis added). As shown (pp. 9-10, 14-21), the "activities"—operation of IP2 and IP3—have been repeatedly and thoroughly reviewed, so the former does not apply. With regard to the latter, there have been no material changes to the CMP that are relevant here.

First, in 2004 Entergy replaced nearly 100 trailers and other temporary structures for administrative staff with a Generation Support Building (GSB). *Id*. ¶¶ 14-15. The GSB is four stories tall and is located east of the Hudson River behind several pre-existing structures, including the 334-foot tall superheater stack for IP1, the 250-foot tall reactor containment structures, and the 134-foot tall IP2 and IP3 turbine buildings. *Id.* ¶ 14; *see also* NRC FSEIS, at 2-2 to 2-5, 2-7 fig. 2-4 (Exh. NYS00133A). The GSB received its Certificate of Occupancy after unanimous approval by the Village of Buchanan Planning Board, which served as the Lead Agency for the structure's SEQRA review. *See* Village of Buchanan Resolution of Preliminary and Final Site Plan Approval (June 20, 2002) (Att. 26); *see also* Village of Buchanan Certificates of Occupancy Nos. 1685 (Oct. 24, 2003), 1700 (Jan. 9, 2004), and 1706 (Feb. 24, 2004) (Att. 27). The SEQRA review specifically analyzed the structure's storm water management, traffic, and visual impacts. *See id*.

Second, Entergy also constructed an Independent Spent Fuel Storage Installation ("ISFSI"), which is a 100 foot wide by 200 foot long pad located at the north end of IP2 and IP3. Dacimo Decl. ¶ 16 (Att. 16); *see also* NRC FEIS, at 2-8 (Exh. NYS00133A). The Village of Buchanan issued a Certificate of Occupancy for the ISFSI in March 2008. *See* Village of Buchanan Certificates of Occupancy No. 1879 (Mar. 2008) (Att. 28). Moreover, the ISFSI was anticipated by the NYSPSC as part of the FSEIS when IP2 was sold to Entergy by ConEd. *See* NYSPSC, FSEIS Order, at ETR000098-99 (Aug. 17, 2001) (Att. 7) ("Con Edison has initiated engineering and licensing activities to enable it to build an on-Site ISFSI. [Entergy] reported that it expects to continue Con Edison's ISFSI initiatives."); *see also* Dacimo Decl. ¶ 16 (Att. 16). As explained above (pp. 10, 16-18), NYSPSC determined that the sale of IP2, which included the plan to construct the ISFSI, was consistent with New York coastal policies and the CMP.

Third, as identified in the NRC FSEIS, Entergy anticipates that it will likely replace IP2 and IP3's reactor vessel heads and control rod drive mechanisms ("CRDMs") during the renewal period. *See* Dacimo Decl. ¶ 19 (Att. 16); NRC FSEIS, at 3-2 to 3-3 (Exh. NYS00133B). After evaluating the likely environmental impacts of the replacement activities, *id.* at 3-4 to 3-13, NRC Staff concluded that replacement of the reactor vessel heads and CRDMs during the renewal term "would have SMALL or no [environmental] impacts," especially in light of "the activities' limited scope and duration compared to the refurbishment programs identified in the GEIS," *id.* at 3-13. The impacts that might potentially affect the coastal zone within the scope of CMP policies are variously described as "none," "negligible," "of small significance," and even "reduced" below usual operating levels. *Id.* at 3-5 to 3-6.[45]

B. License Renewal Would Entail No Substantially Different Coastal Zone Effects Than Those Previously Reviewed.

Thus, the renewal of Indian Point's operating licenses would cause no modifications to the manner in which the plants will operate, and no "substantially different" coastal effects than those previously reviewed by the State. *See* Dacimo Decl. ¶¶ 8-9, 13-19 (Att. 16); Lawlor Decl. ¶¶ 8-25 (Att. 8). For these reasons, the federal CZMA regulations, which this Board is empowered to enforce, preclude New York from conducting a further consistency review. Accordingly, Entergy has already obtained the consistency review necessary for renewal of the operating licenses for IP2 and IP3.

[45] Perhaps most significantly, "[u]pon project completion, each unit's containment would be returned to its original configuration." *Id.* at 3-3.

CONCLUSION

For the reasons set forth above, Entergy urges this Board to enter a declaratory order that the NRC may renew the IP2 and IP3 licenses without requiring a further consistency certification or the State's concurrence therewith because renewal will not cause coastal effects that are "substantially different" than those that New York has previously reviewed.

Dated: July 30, 2012

Respectfully submitted,

Executed in accord with 10 C.F.R. § 2.304(d)

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	July 30, 2012

MOTION CERTIFICATION

I certify that I have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful.

On July 24, counsel for Entergy initiated consultation on Entergy's supplement to its License Renewal Application ("LRA") with the Nuclear Regulatory Commission's Office of General Counsel, the Office of the Attorney General for the State of New York, Riverkeeper, and Clearwater. *See* Consultation Emails, at ETR000216 (Att. 29). On July 25, 2012, the Parties held a meet and confer by conference call, during which I explained the legal and factual bases for Entergy's LRA supplement and its potential motion, and responded to questions from the Parties. *See id.* At the request of Janice Dean of the New York Attorney General's Office, the Parties held additional conference calls on July 26, 2012 and July 30, 2012. *See id.* at ETR000241, 247. During this time, I responded to at least three requests by email from Ms. Dean for additional information about the legal and factual bases of Entergy's LRA supplement and potential motion. *See id.* at ETR000217, 232, 252. Ms. Dean also supplied by email a 254-page document for Entergy's review and comment. *See id.* at ETR000242.

On behalf of the NRC's Office of General Counsel, Sherwin Turk stated to me that the NRC does not oppose the filing of Entergy's motion, but takes no position on the merits of it at this time. Although Ms. Dean claimed that New York had not yet formulated a position on Entergy's LRA supplement and potential motion by July 30, 2012, and that she continued to investigate state agency activities pertaining to Indian Point Nuclear Generating Units 2 and 3, she stated repeatedly that: (1) only the New York State Department of State has authority to issue a federal consistency certification; (2) 15 C.F.R. § 930.6(c), which allows state permits to constitute a state agency's consistency concurrence for federal licensing actions, is inapplicable to New York and its Coastal Management Program; and (3) Entergy's position relies on erroneous interpretations of the New York Coastal Management Program and the state's regulatory requirements. On July 25, 2012, New York also delivered a letter to the NRC stating that the "NRC may not issue a license renewal prior to the issuance of the federal consistency concurrence by DOS pursuant to 16 USC 1456(3)(A)." *See* Attachment 2, at 1 n.1. Ms. Dean requested continuation of consultations on these matters, and did not identify a date on which New York would provide its position on Entergy's LRA supplement or potential motion. Riverkeeper joined in New York's request. Clearwater has not taken a position on Entergy's motion.

It appears highly unlikely that the Parties will be able to reach resolution of the factual and legal issues raised in the motion. Accordingly, Entergy believes it has in good faith satisfied its consultation obligations pursuant to 10 C.F.R. § 2.323(b), and that efforts to reach an agreement on the motion have been unsuccessful.

Executed in accord with 10 C.F.R. § 2.304(d)

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	July 30, 2012

CERTIFICATE OF SERVICE

I certify that on July 30, 2012, copies of the foregoing Motion for Declaratory Order were served electronically via the Electronic Information Exchange on the following recipients:

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