UNITED STATES
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In re:	Docket Nos. 50-247-LR and 50-286-LR
License Renewal Application Submitted by	ASLBP No. 07-858-03-LR-BD01
Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 April 5, 2013

STATE OF NEW YORK
RESPONSE TO ENTERGY'S REQUEST TO THE ATOMIC SAFETY AND LICENSING BOARD FOR A DECLARATORY ORDER CONCERNING COASTAL ZONE MANAGEMENT ACT ISSUES AND CROSS-MOTION FOR DECLARATORY ORDER

Office of the Attorney General
for the State of New York
The Capitol
State Street
Albany, New York 12224

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL COURT DECISIONS

TABLE OF AUTHORITIES

Page(s)

FEDERAL STATUTES

TABLE OF AUTHORITIES

Page(s)

FEDERAL ADMINISTRATIVE AGENCY REGULATIONS

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

STATE STATUTES

TABLE OF AUTHORITIES

Page(s)

STATE REGULATIONS

FEDERAL REGISTER NOTICES

ADMINISTRATIVE DECISIONS

TABLE OF AUTHORITIES

Page(s)

PRELIMINARY STATEMENT

Intervenor State of New York submits this Opposition to Applicant Entergy Nuclear Operations, Inc.'s July 30, 2012 Motion for Declaratory Order pursuant to Section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e). Entergy's argument, distilled to its essence, is that the requirement under the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1451, *et seq.*, for federal consistency review by the "State agency" has been satisfied by prior state consistency reviews performed under state law by New York governmental entities other than the State of New York Department of State (NYSDOS) on matters unrelated to the operating licenses. For the reasons outlined below, the State submits that the Board should deny Entergy's motion because: (1) Entergy's motion has been rendered moot by its recent filing of federal coastal certification materials with the NYSDOS; and (2) the Atomic Safety and Licensing Board (ASLB or Board) is without jurisdiction to decide the fundamental legal question Entergy raises, namely, whether various state consistency determinations issued over a number of years on unrelated matters can together satisfy the requirement for a federal consistency certification by the designated "State agency" under the CZMA, 16 U.S.C. § 1456(c)(3)(A).

Should the Board exercise jurisdiction over this matter, the State cross-moves for a declaratory order pursuant to Section 5(e) of the Administrative Procedures Act, 5 U.S.C. § 554(e), for a declaration that Entergy's License Renewal Application (LRA) is subject to federal consistency review under 15 C.F.R. Section 930.51, Subpart D of the U.S. Department of Commerce coastal management regulations. Specifically, the State seeks a declaration that

Indian Point's LRA is subject to federal consistency review by the NYSDOS as the U.S. Secretary of Commerce's approved delegate under the CZMA, 16 U.S.C. § 1456(c)(3)(A).[1]

PROCEDURAL HISTORY

Entergy's 2007 Environmental Report

On April 23, 2007, Entergy filed an application to the Nuclear Regulatory Commission (NRC) seeking to renew the operating licenses for two power generating facilities Indian Point Units 2 and 3. *See* http://www.nrc.gov/reactors/operating/licensing/renewal/ applications/indian-point.html#application (last visited Apr. 5, 2013). As part of that application, and as required by 10 C.F.R. § 51.53, Entergy submitted an Environmental Report (ER). *Id.* Among other things, Entergy's April 2007 Environmental Report stated that Entergy's application to renew the operating licenses would be subject to a federal consistency review by NYSDOS pursuant to the CZMA, 16 U.S.C. § 1456. *See* 10 C.F.R. § 51.45(d) (requiring applicant's Environmental Report to list all permits, licenses, and approvals that must be obtained in connection with the proposed action).

Entergy's 2012 Change to the Environmental Report

More than five years later, Entergy reversed course. On July 24, 2012, Entergy served the State of New York with copied correspondence and documentation that it had submitted to the NRC to update its ER and to supplement its April 2007 LRA pursuant to 10 C.F.R.

[1] The State notes that the Board's Scheduling Order imposes a 25-page limit on responses to motions. Scheduling Order (July 1, 2010), at 6, G.1. The State includes here a 21-page opposition to Entergy's motion, and includes its cross-motion within the same document for efficiency's sake.

§ 51.45(d). ML12207A122. In that correspondence, Entergy informed the NRC that it had concluded that its Indian Point LRA is not subject to federal consistency review by NYSDOS under the CZMA, 16 U.S.C. § 1456, because previous state coastal consistency reviews conducted by state agencies other than NYSDOS in 2000, 2001 and 2003 are legally equivalent to a federal consistency certification, review, and decision. *Id*.

On July 30, 2012, Entergy filed what it styled a Motion for Declaratory Order pursuant to Section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e) with the Board.

Scheduling Matters

On August 6, 2012, the State of New York filed a motion requesting an extension of time for the State to respond to Entergy's request for declaratory order. ML12219A417. On August 8, 2012, the ASLB issued an order that extended the response deadline to January 14, 2013, to avoid potential hearing conflicts. ML12221A401. Thereafter, on August 20, 2012, the State filed a motion requesting that any contention concerning Entergy's attempted revision of the Environmental Report would be timely if filed within 30 days of any Board ruling on Entergy's declaratory order request. ML12233A652. On August 31, 2012, the Board granted the State's motion. ML12244A484.

On January 7, 2013, the State filed an unopposed motion requesting that the response date to the declaratory order request be changed until March 22, 2013. ML13004A158. The Board granted this motion in an Order dated January 7, 2013. ML13007A065. On February 27, 2013, Riverkeeper filed a joint motion that among other things extended the date for submission of responses to Entergy's declaratory ruling request until April 5, 2013. ML13058A763. The Board granted the joint motion in an order dated February 28, 2013. ML13059A360.

NYSDOS Response to Entergy's July 24, 2012 LRA Supplements

By letter to NRC dated August 8, 2012, NYSDOS stated unequivocally that it has never conducted a federal consistency review of the operating licenses for Indian Point Units 2 and 3. *See* Att. 1, Letter dated August 8, 2012 from Susan L. Watson, General Counsel, NYSDOS, to Eric Leeds, Director of Nuclear Reactor Regulation, NRC. In that letter, NYSDOS explained that it is the single "State agency" designated pursuant to CZMA and its regulations,[2] and the only agency authorized to receive and administer grants and to make federal consistency determinations. NYSDOS further stated that the New York State Coastal Management Program does not allow delegation of its authority to a different state agency. *See* Att. 7 at II-9-11 to 15.

NRC Staff's Request for Additional Information

On August 13, 2012, NRC issued a Request for Additional Information ("RAI") to Entergy concerning the consistency review of the application to renew the operating licenses for Indian Point Units 2 and 3. Att. 2. On September 11, 2012, Entergy responded to the RAI, reaffirming the arguments it made in its request for declaratory ruling. Att. 3.

Entergy Submits a Proposed Coastal Zone Consistency Certification to NYSDOS

On December 17, 2012, Entergy submitted a letter and supporting materials, including a Federal Consistency Assessment Form and supporting information, to the New York State Secretary of State and the New York State Office of Coastal (sic), Local Government and Community Sustainability entitled "Consistency Certification for Entergy Nuclear Indian Point 2 and Entergy Nuclear Indian Point 3 License Renewal Application." Att. 4. Entergy stated that it was certifying consistency with the New York Coastal Management Program for purposes of its

[2] 1975 N.Y. Laws, ch. 464, § 47; 16 U.S.C. § 1455(d)(6) and § 1456 and 15 C.F.R. Parts 923 and 930.

April 23, 2007 LRA.[3] The designated "State agency" has six months to conduct review of complete federal consistency applications. 15 C.F.R. §§ 930.60; 930.62(a). On January 16, 2013, NYSDOS informed Entergy that its certification materials did not contain the necessary data and information for NYSDOS to commence the 6-month federal consistency review period because it did not contain Volume 4 of the Supplemental Final Environmental Impact Statement (SFEIS), analyzing aquatic impacts to coastal resources from the continued operation of the Indian Point Nuclear Generating Unit Nos. 2 and 3.[4] *See* Att. 5. By letter dated February 19, 2013, Entergy notified NYSDOS that SFEIS Volume 4 is anticipated to be available on or about April 30, 2013 and stated it would provide that report to NYSDOS when issued by the NRC Staff. Att. 6.

[3] Entergy submitted its application for its operating license renewal to NRC on April 23, 2007 and did not submit its federal consistency certification to NYSDOS until December 17, 2012, a total of 4 years and 9 months after filing its federal application for license renewal with the NRC, contrary to 15 C.F.R. § 930.57(a)("Following appropriate *coordination and cooperation with the State agency*, all applicants for required federal licenses or permits subject to State agency review shall provide in the application to the federal licensing or permitting agency a certification that the proposed activity complies with and will be conducted in a manner consistent with the management program. *At the same time*, the applicant shall furnish to the State agency a copy of the certification and necessary data and information"). 15 C.F.R. § 930.57(a). (Emphasis added).

[4] *See* 15 C.F.R § 930.58(a). In addition to the required necessary data and information that is to accompany an application submission for federal consistency to the designated state agency (15 C.F.R. § 930.58(a)(2)), NYSDOS also requires the submission of an Environmental Impact Statement prepared pursuant to the NEPA in accordance with its 2001 Routine Program Change. *See* 15 C.F.R. § 923.84; *see also* Att. 7 at. 26.

APPLICABLE STATUTES AND REGULATIONS

Atomic Energy Act

The Atomic Energy Act of 1954, 42 U.S.C. § 2014, *et seq.*, established the Atomic Energy Commission (AEC), which, among other responsibilities, regulated and provided oversight for commercial reactors. In 1974, Congress amended the Atomic Energy Act and separated the other aspects of its jurisdiction from that for commercial nuclear reactors, creating an agency which became the Department of Energy and the NRC. *See* Energy Reorganization Act of 1974 (P.L. 93–438), Title II. Among other tasks, the NRC was authorized to oversee the licensing and operation of nuclear steam generation facilities such as Indian Point. The statute provided that an original license term was of forty (40) years. *See* 42 U.S.C. 2133(c).

In the early 1980s, the NRC staff recognized that it needed to identify required information and the process for determining whether to grant an extension to the operating licenses of existing nuclear power facilities. Following reviews and research, in 1985 the NRC approved regulations relating to safety and technical requirements for extended operations in the context of license renewal. These regulations (10 C.F.R. Part 54) were adopted by the NRC and published in December 1991. 56 Fed. Reg. 64943 (Dec. 13, 1991). Industry dissatisfaction with the 1991 license renewal regulations led NRC to further revise the Part 54 regulations in 1995. 60 Fed. Reg. 22461 (May 8, 1995).

The NRC also adopted agency-specific National Environmental Policy Act (NEPA) environmental review regulations for license renewal proceedings that required the completion of an Environmental Report for an operation license renewal, but specifically exempted the transfer of an operating license. 10 C.F.R. Part 51. These regulations, which implemented NEPA for NRC actions and approvals, require an applicant for license renewal to conduct a

comprehensive environmental review of its facility and operations to determine whether the 20-year license extension will have a significant adverse effect on the environment. *See* 10 C.F.R. §§ 51.53(c); 51.20(b)(2). Applicants must prepare and submit an ER that includes a description of the proposed action, a statement of its purposes, a description of the environment affected, and discusses the impacts of the proposed action on the environment, in proportion to their significance; any adverse environmental effects which cannot be avoided should the proposal be implemented; and alternatives to the proposed action, among other things. 10 C.F.R. § 51.45(b); *see also* 10 C.F.R. §§ 51.45(c) and (d). The ER is also a catalog of required permits and approvals that must be obtained prior to license renewal. 10 C.F.R. § 51.45(d).

Coastal Zone Management Act

The Coastal Zone Management Act, 16 U.S.C. § 1451, *et seq.*, and its implementing regulations require that activities proposed under a federal license or permit be consistent with federally-approved coastal management programs in order for a federal agency to issue a license or permit. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. §§ 930.50, 930.64. That requirement is reflected in NRC's regulations. *See* 10 C.F.R. §§ 51.45(d), 51.53.

Under the CZMA, the federal government encourages coastal states and territories to develop coastal management plans that contain enforceable coastal policies to protect coastal resources. *See* 16 U.S.C. § 1453(a); 15 C.F.R. § 930.11(h); 15 C.F.R. § 923.1(c)(9). A state's coastal management program becomes effective upon approval by the U.S. Secretary of Commerce. 16 U.S.C. § 1455(d); 15 C.F.R. § 923.60. Prior to approving a state program, the Secretary of the U.S. Department of Commerce must find that state's Governor has designated a "single state agency" to receive grants and administer the management program. 16 U.S.C.

§ 1455(d)(6); 15 C.F.R. § 923.47 (emphasis added). In 1975, the New York State Legislature appointed NYSDOS the "single state agency" to accept federal funding to prepare and administer New York's Coastal Management Program. 1975 N.Y. Laws, ch. 464, § 47. Governor Hugh L. Carey codified NYSDOS's responsibilities to administer the coastal management program by signing the Waterfront Revitalization and Coastal Resources Act ("Waterfront Act") in 1981. *See* Executive Law Article 42 (added by Ch. 849 and 841 of the Laws of 1982); *see also* 15 C.F.R. § 923.47. New York State's Coastal Management Program was approved by the U.S. Secretary of Commerce and became effective on September 30, 1982. Att. 7. The New York State Coastal Management Plan identifies NYSDOS as the only State of New York state agency empowered to conduct federal consistency on behalf of the State of New York and to be eligible to receive CZMA grants to administer the State's Coastal Management Program. *See* Att. 7 at II-4-2 and 3; *see also* http://coastalmanagement.noaa.gov/mystate/ny.html (last visited Apr. 5, 2013).

New York's Waterfront Act and State Consistency Certification: The Networked Approach

The CZMA requires that each federally-approved Coastal Management Program provide "a mechanism to ensure that all State agencies will adhere to the program." 16 U.S.C. § 1455(d)(15); *see also* 15 C.F.R. § 923.1(c)(8). Unlike coastal states employing a coastal permit centralized structure, New York's program primarily uses a networked approach[5] – as

[5] New York's networked program, based on state agencies' existing regulatory jurisdictions, is different from state CZMA programs in Rhode Island and New Jersey, which operate through use of a single coastal permit that contain all of those states' enforceable coastal policies within one permit (state statute). *See* 15 C.F.R. § 923.43(b)(1) (providing for the establishment of comprehensive and specific coastal management legislation, such as a state coastal permit that contains all of the enforceable policies of the coastal program). New York State derives enforcement for its coastal policies (15 C.F.R. § 930.11(h)) through a "network" of existing state statutes and

codified in the Waterfront Act – and an array of statutes and regulations to provide a "mechanism to ensure that all state agency actions will adhere to the program."[6] 15 C.F.R. § 923.1(c)(8); *see* Waterfront Act, New York Executive Law § 919; 19 N.Y.C.R.R. §§ 600.3 and 600.4. New York also "integrates" municipally-prepared local waterfront revitalizations into the State's program.[7] New York's Coastal Management Program does not recognize any state permits as constituting federal consistency concurrence. *See* 15 C.F.R. § 923.43(b)(1); *compare* 15 C.F.R. § 923.43(b)(2). In New York, state agencies conducting activities within the state coastal area are required by the Waterfront Act and its implementing regulations to review *their own* proposed actions or approvals of activities to ensure that they are undertaken in a manner that is consistent with the State's Coastal Management Program. *See* Waterfront Act, New York Executive Law § 911(1); Att. 7, Section 3. A state agency may not "carry out, fund or approve an action" until it certifies compliance with the Waterfront Act. 19 N.Y.C.R.R. § 600.3.

Where a party objects to a New York state agency's finding through a state consistency review, conducted pursuant to 19 NYCRR §§ 600.3 and 600.4, in the state permitting process that an action is "not consistent with the state coastal policies," the challenge must be brought in

---

regulations, which are updated periodically through routine program changes (15 C.F.R. § 930.84). *See* Att. 7, Table 1, at pp. II-4-10-11.

[6] The CZMA and its regulations contemplate that coastal states and territories will choose one of three techniques (or a combination of them) to ensure compliance with a State's coastal policies. The techniques are loosely termed "centralized," "integrated" and "networked." *See* 16 U.S.C. § 1455(d)(11); *see also* 15 C.F.R. §§ 923.42 and 923.43.

[7] The LWRP Local Waterfront Revitalization Programs are integrated pursuant to 15 C.F.R. § 923.42 (Technique BA), section 915 of the Waterfront Act and the routine program change provisions at 15 C.F.R. § 923.84. *See* New York Executive Law Article 42.

New York State courts, where the standard of review is "arbitrary and capricious." *See* New York State Civil Practice Law and Rules, Article 78.

Federal Consistency Review

Following federal approval of New York's Coastal Management Program in 1982, proposed federal actions or approvals affecting land or water uses or the natural resources of the coastal zone are reviewed by NYSDOS for consistency with the State's 44 enforceable coastal policies. Att. 7; *see also* http://coastalmanagement.noaa.gov/consistency/media/ny.pdf (last visited Apr. 5, 2013). This interactive process encompassing coastal management program development and federal approval was explained in *American Petroleum Institute v. Knecht*, 456 F. Supp. 889 (C.D. Cal. 1978), *aff'd* 609 F.2d 1306 (9th Cir. 1979). In *API*, the court denied an injunction to enjoin the U.S. Secretary of Commerce's approval of the State of California's Coastal Program on the grounds that the program and its policies did not provide specific regulatory guidance to potential interested parties. The court found that "Congress never intended that...[the coastal management program] must provide a 'zoning map' which would inflexibly commit the state in advance of receiving specific proposals to permitting particular activities in specific areas." 456 F. Supp. at 919. Rejecting plaintiffs' arguments, the court explained that the federal consistency process contemplates a case-by-case interactive review of each activity, and Congress did not envision that "such programs establish such detailed criteria that private users be able to rely on them as predictive devices for determining the fate of projects without interaction between the relevant state agencies and the user." *Id.*

The CZMA provides for a paradigm of "reverse federalism," which means that a state with a federally-approved Coastal Management Program has the authority to review federal agency actions that have "effects" on the state's coastal resources or uses.[8] *See* 15 C.F.R. § 930.11(g). Because of its status as the "State agency," should NYSDOS, through an exercise of its federal consistency review authority, object to a proposed activity as being inconsistent with the state's coastal policies, the federal agency is barred from authorizing the action unless the NYSDOS's decision is overturned by the U.S. Secretary of Commerce. *See* 16 U.S.C § 1456(c)(3)(A); 15 C.F.R § 930.64. The Secretary can overturn a State objection if he or she finds that the activity is consistent with the objectives of the CZMA or is otherwise necessary in the interests of national security. 15 C.F.R. §§ 930.121; 930.122. If the Secretary overturns a State's objection, then the federal agency may issue its authorization or funding; if the Secretary does not overturn a state's objection, the federal agency cannot issue its authorization or funding. 15 C.F.R. § 930.130. The U.S. Secretary's decision may be appealed to federal court. 15 C.F.R. § 930.130(c).

---

[8] The "effects" test, as further codified in the Coastal Zone Act Reauthorization Amendments of 1990 (Pub. L. No. 101–508) is defined as

> any reasonably foreseeable effect on any coastal use or resource resulting from a federal action. … Effects are not just environmental effects, but include effects on coastal uses. Effects include both direct effects which result from the activity and occur at the same time and place as the activity, and indirect (cumulative and secondary) effects which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects are effects resulting from the incremental impact of the federal action when added to other past, present, and reasonably foreseeable actions, regardless of what person(s) undertake(s) such actions.

15 C.F.R. § 930.11(g). The CZMA also provides for a state to review federal agency action occurring outside of the state coastal area but still having "effects" on coastal resources or uses. *See* 15 C.F.R. § 930.53; *see also* 15 C.F.R. part 930 subpart I.

Application of the Coastal Zone Management Act to License Renewals

Nuclear operating license renewals are expressly included in the federal consistency review requirement. 15 C.F.R. §§ 930.51(b), (d).[9] The federal consistency requirements apply to (1) activities to be licensed that have not been previously reviewed by the "State agency" designated pursuant to Section 306(d)(6) of the CZMA; (2) renewals previously reviewed by the State agency that are subject to management program changes not in existence at the time of the prior review; and (3) renewals previously reviewed by the State agency that will cause "substantially different" effects than those reviewed by the State agency. *See* 15 C.F.R §§ 930.51 (b)(1)-(3). Thus, federal consistency applies to such operating licenses as Indian Point Units 2 and 3, which were not previously reviewed by NYSDOS (or any state agency). The consistency certification for the LRA has now been submitted to NYSDOS for federal consistency review. The federal licensing agency is directed to "*give considerable weight to the opinion of the State agency*," and "'*substantially different' shall be construed broadly to ensure that the State agency has the opportunity to review activities and coastal effects not previously reviewed*." 15 C.F.R.
§ 930.51(e)(emphasis added).

[9] Under the CZMA's implementing regulations, State agencies are required to "develop a list of federal license or permit activities which affect any coastal use or resource, including reasonably foreseeable effects, and which the State agency wishes to review for [federal] consistency with the management program." 15 C.F.R. § 930.53(a). The issuance of an operating license for a nuclear facility is a "listed" activity in the New York State Coastal Management Plan, requiring the submission of a federal consistency certification to NYSDOS. Att. 7, Table 2, at. II-9-20 (labeled, at Section II, "Licensing and certification of the siting, construction, and operation of nuclear power plants, pursuant to Atomic Energy Act of 1954, Title II of the Energy Reorganization Act of 1974 and the National Environmental Policy Act of 1969.").

INDIAN POINT REGULATORY HISTORY AND FACTUAL CONTEXT

The AEC, and its successor NRC, issued original licenses for Indian Point Units 2 and 3 in 1973 and 1975, respectively. Atts. 8, 9. Under the Atomic Energy Act, as it existed at the time, the plants were licensed for 40 years. Atomic Energy Act, § 103(c), 42 U.S.C. § 2133(c). The Indian Point operating licenses and related federal Clean Water Act (CWA) permit, known as a National Pollution Discharge Elimination System (NPDES) permit, required that the Indian Point facilities retrofit by 1980 to employ closed-cycle cooling to mitigate impacts from the facilities' once-through cooling water intake systems to the Hudson River and its ecology. Atts. 8, 9, 10; *see also* Att. 11 at 1-4. However, that requirement was postponed pursuant to agreement between the then-owners and operators of Indian Point (Consolidated Edison and the New York Power Authority) and three other Hudson River power generation facilities, and the federal and state regulating agencies.[10] *See* Att.11 at 7-12.

The U.S. Environmental Protection Agency (EPA) approved the State of New York's administration of the federal Clean Water Act's NPDES program on October 28, 1975. 40 Fed. Reg. 54462-63 (Nov. 24, 1975). In 1982, the New York State Department of Environmental Conservation (NYSDEC) issued a State Pollutant Discharge Elimination System (SPDES) permit to Indian Point and the other Hudson River facilities and incorporated the agreement's

[10] This agreement, known as the Hudson River Settlement Agreement (HRSA) established a process that postponed the implementation of closed-cycle cooling at Indian Point and the other Hudson River power plants for ten years, provided for comprehensive study of facility impacts to the Hudson River and its ecosystem and provided interim mitigation measures to reduce fish, larval and egg mortalities from impingement and entrainment on racks and screens at the plants' intake structures and cooling water systems. At Indian Point, the interim measures included seasonal "outages" and the installation of variable speed pumps. *See* Att. 11 at 7-10.

mitigation terms as conditions. NYSDEC has issued SPDES permit renewals to Indian Point since that time, and continued the mitigation conditions. *See* Att. 11 at 8-10, 12, 13.

On November 12, 2003, NYSDEC issued a draft SPDES permit for Indian Point Units 2 and 3, proposing the installation of closed-cycle cooling or its equivalent; a revised draft permit that also required closed cycle cooling was issued on March 1, 2004. *See* Atts.14, 15. On April 2, 2010, NYSDEC denied Entergy's application for a water quality certificate pursuant to Section 401 of the Clean Water Act.[11] Atts 16, 17. The draft SPDES permit and denial of Entergy's Clean Water Act § 401 water quality certification are the subjects of an ongoing administrative adjudication before DEC. *See* http:/www.dec.ny.gov/permits/57609.html (last visited Apr. 5, 2013).

Pursuant to the CZMA, the New York Legislature authorized NYSDOS to develop and implement the State's Coastal Management Program. *See* Att. 7. The New York Coastal Area, defined in Executive Law § 911 and illustrated on the Coastal Area Map (Executive Law § 914) was designated in 1982, and includes the tidal Hudson River. *See* Att. 7 at II-1-3; II-2-1; and II-2-6 and 7.[12] Since that time, NYSDOS and the federal Office of Coastal Resource Management

---

[11] NYSDEC, in accordance with Section 401 of the Clean Water Act, must certify that a facility meets state water quality standards *prior to* a federal agency issuing a federal license or permit in conjunction with its proposed operation. NYSDEC issued a combined § 401 water quality certification for Unit 1 (now closed) and Unit 2 on December 7, 1970, with limited conditions. In 1973, NYSDEC issued a revised § 401 water quality certification that encompassed only Unit 2; on May 2, 1975, NYSDEC issued a revised § 401 water quality certification to also encompass Unit 3 and incorporated the NPDES permit requirement to retrofit the facilities with a closed-cycle cooling system. In conjunction with its 1982 SPDES permit, NYSDEC issued a modified § 401 water quality certification that incorporated by reference the SPDES permit, noting that the Hudson River Settlement Agreement had postponed closed cycle cooling and did not contain any determination that the facilities complied with certain applicable State water quality standards and criteria at that time, particularly a "best technology available" determination required by section 316(b) of the Clean Water Act and 6 NYCRR § 704.5. The 1982 § 401 water quality certification is the last water quality certification that was issued by NYSDEC for Units 2 and 3. *See also* http://www.dec.ny.gov/permits/63150.html (last visited Apr. 5, 2013).

[12] *See* http://www.dos.ny.gov/communitieswaterfronts/atlas/index.html (last visited Apr. 5, 2013).

(OCRM) have made a number of routine program changes to New York's Coastal Management Program, including but not limited to the designation of Significant Coastal Fish and Wildlife Habitats ("Significant Habitats") in the Hudson River coastal zone in 1987; those designations were updated in 2012 to include a revised designation that included River Mile 43 adjacent to Indian Point in the Hudson Highlands Significant Habitats, River Miles 40-60.[13] Atts. 18, 19. The updated 2012 Hudson River Significant Habitats designations reflect the National Marine Fisheries Service's February 6, 2012 listing of the Atlantic sturgeon as "endangered," joining the previously listed endangered Shortnose sturgeon.[14] Att.18; *see also* Atts. 20, 21.

Entergy submitted a Federal Consistency Assessment Form and supporting information to NYSDOS on December 17, 2012, to certify consistency with the New York Coastal Management Program for its April 23, 2007 LRA. Att. 4. NYSDOS did not commence the 6-month federal consistency review period because Entergy's submission was incomplete. Att. 5. Entergy notified NYSDOS that SFEIS Volume 4 is anticipated to be available on or about April 30, 2013 and stated it would provide that document to NYSDOS when issued by NRC Staff. Att. 6. NYSDOS's receipt of the aquatic impacts section of the SFEIS will start the agency's six-month federal consistency review timeframe. 15 C.F.R. § 930.60.

[13] This updated designation is currently subject to litigation in state court. *Energy Nuclear Indian Point Unit 2, et al v. NYSDOS and* NYSDEC, Index No. 5450-12 (Sup. Ct. Albany Co.).

[14] On March 26, 2013, NYSDEC informed NRC that it objected to the proposed National Marine Fisheries Service "incidental take" permit limitations in the January 30, 2013 Biological Opinion. *See* Att. 20, 21.

ARGUMENT

POINT I

ENTERGY'S MOTION FOR DECLARATORY RULING IS MOOT

Entergy's July 30, 2012 motion seeks a determination from the Board that it is not subject to federal consistency review by NYSDOS. However, Entergy's December 17, 2012 submission of coastal federal consistency materials to NYSDOS started the federal consistency process, rendering moot its motion to the Board for declaratory order. Although NYSDOS determined that the submission was not complete, Entergy responded that it will provide the missing report to NYSDOS when it is issued by the NRC Staff. Atts. 5, 6. Because Entergy initiated federal consistency review with NYSDOS – albeit more than 5 years after Entergy's April 2007 license renewal application – there is no issue for the Board or NRC to resolve. Accordingly, Entergy's motion should be denied on mootness grounds.

Under the doctrine of mootness, a tribunal is divested of subject matter jurisdiction when "the parties lack a legally cognizable interest in the outcome" of the case. *Fox v. Bd. of Trustees of State Univ.*, 42 F.3d 135, 140 (2d Cir. 1994) (quoting C*ounty of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Mootness "occurs 'when interim relief or events have eradicated the effects of the defendant's act or omission, and there is no reasonable expectation that the alleged violation will recur.'" *Adams v. Zarnel*, 619 F.3d 156, 162 (2d Cir. 2010) (quoting *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 647 (2d Cir. 1998)); *see also Mitskovski v. Buffalo & Fort Erie Pub. Bridge Auth.*, 415 Fed. Appx. 264, 267-268 (2d Cir. 2011). Without a "live" controversy, a court lacks authority to offer advisory opinions. *NML Capital, Ltd. v. Republic of Arg*., 2012 U.S. App. LEXIS 19740, 1-3 (2d Cir. 2012) (*citing Church of Scientology v. United States*, 506 U.S. 9, 12 (1992). The NRC's administrative consideration of the mootness doctrine

reflects these principles, but it has noted that it is not strictly bound by the "case or controversy" requirement. *See In the Matter of Texas Utilities Electric Company* (Comanche Peak Steam Electric Station, Unit 2), 37 N.R.C. 192 (1993) (*citing Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 N.R.C. 41, 54 (1978), *remanded on other grounds sub nom. Minnesota by Minnesota Pollution Control Agency v. United States,* 602 F.2d 412 (D.C. Cir. 1979). The NRC has recognized that pragmatic concerns may warrant flexibility in its consideration of questions that may recur in an administrative proceeding, "unless it seems sufficient to await the event or better to defer to another court." *In the Matter of Calvert Cliffs 3 Nuclear Project LLC and Unistar Nuclear Operating Svcs., LLC,* ASLBP No 09-874-02-COL-BD01, 70 N.R.C. 198 (2009).

Regardless of Entergy's attempt to hedge its bets by claiming a full reservation of rights in the letter to NYSDOS that accompanied Entergy's December 17, 2012 submission of materials (Att. 4 at 1, n.2), its submission initiated the federal consistency review. Any issues that Entergy may have regarding the federal consistency requirements and ultimate determination can and should be handled in the ordinary course under the federal consistency appeals provisions. *See* 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. Part 930 and § 930.130(c). Therefore, the Board should deny Entergy's motion for declaratory order on mootness grounds.

POINT II

THE BOARD LACKS JURISDICTION TO CONSTRUE THE COASTAL ZONE MANAGEMENT ACT AND IMPLEMENTING REGULATIONS

The State of New York respectfully submits that the Board lacks jurisdiction and the regulatory expertise to construe the CZMA, 16 U.S.C. § 1451, *et seq.* and its implementing regulations, which are administered by the Office of Coastal Resource Management within the

National Oceanic and Atmospheric Administration (OCRM/NOAA), an agency of the U.S. Department of Commerce. Entergy seeks a determination from the Board that aggregated state agency coastal consistency reviews under New York statutes are the legal equivalent of federal consistency determinations by the designated State agency. *See* 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.51(e); *see also* Entergy July 30, 2012 Motion at 15-21. Entergy cites the Administrative Procedure Act, 5 U.S.C. § 554(e), 10 C.F.R. § 2.319(r) and NRC precedent as grounds for its motion, "to terminate a controversy or remove uncertainty." *See* Entergy's July 30, 2012 Motion at 5, n.16. Here the particular "controversy" to be addressed is a fundamental issue of interpretation of OCRM/NOAA regulations, not an incidental or discretionary matter within the scope of the Board's adjudicatory authority.[15] Unlike the applicants in the NRC administrative decisions cited, Entergy is seeking to avoid a legal obligation, not to comply with the law in a reasonable way. Thus, the Board should deny Entergy's motion for declaratory order.[16]

Entergy seeks interpretation of the CZMA and its regulations by relying on decisions from the mid-1970s that concern incidental decision-making on construction and timing matters squarely within the NRC's jurisdiction. *See, e.g., Wash. Pub. Power Supply Sys.* (WPPSS Nuclear Projects No. 3 & 5), LBP-77-15, 5 N.R.C. 643 (ASLB, 1977) (implicit in the motion is

---

[15] Of course, this is not to suggest that the Board does not have a responsibility to ensure that the FSEIS is in compliance with 10 C.F.R. § 51.71(d).

[16] If the Board does not deny Entergy's motion outright, the State of New York respectfully calls the Board's attention to 15 C.F.R. § 930.55, which provides for review, advice or mediation of "significant disagreements" by OCRM or the Secretary of Commerce. Rather than expend further Board resources, referral to the administering agency presents a viable option because the underlying issues involve the construction and application of the CZMA and its implementing regulations. The State respectfully submits that resolution of the dispute by OCRM is a better legal "fit" and engenders a more efficient review process that relates to matters squarely within the Commission's jurisdiction and discretion.

applicant's concession that the NRC and Board have jurisdiction over the "limited 'offsite' matters" at issue). None involves a legal interpretation of statues or regulations administered by another federal agency. Rather, they are examples of a Board's case-by-case determination of whether it and/or NRC has authority over the subject of the applicant's motion, and whether the APA provides it the practical authority to fill the administrative interstices of nuclear facility regulation.

> The 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, by agency rule, to empower presiding officers to exercise this power. 5 U.S.C. 556(c)(9). General commentary on administrative practice supports the use of this authority as an efficient tool of administrative justice. The relevant delegation to presiding officers of this Commission is contained in 10 CFR 2.718, giving them 'all powers necessary' to carry out their duties 'to take appropriate action to avoid delay.' Among the powers enumerated in this rule is the authority to 'take any other action consistent with the (Atomic Energy) Act,' the Commission's other regulations and the Administrative Procedure Act. Thus, the licensing boards have the power to issue declaratory relief provided there is the requisite connection between the rendering of a declaratory order and fulfillment of the board's duty to take appropriate steps to avoid delay in a proceeding otherwise before it. The applicants' motion, made to a licensing board already constituted to hear their application, has such a connection.

Kan. Gas & Elec. Co. (Wolf Creek Nuclear Generating Station), CLI-77-1, 5 N.R.C. 1, 4-5 (1977), *aff'g* ALAB-321, 3 N.R.C. 293, 298 (1976) (Board jurisdiction to authorize pre-permit transportation work to mitigate hearing delays avoids applicants placing themselves in "legal jeopardy").

In *Wash. Pub. Power Supply Sys.* (WPPSS Nuclear Projects No. 3 & 5), relying on the Wolf Creek decision, the Board exercised its discretion to grant pre-licensing authorization to commence limited work because it was a practical result within its jurisdiction.

> The 'uncertainty' to which the Commission referred in *Wolf Creek* involved, in part, the jurisdiction of the Commission to evaluate environmental impacts occurring 'offsite' and to impose license conditions concerning such impacts. As

> the Commission noted (*Id.*, 5 NRC at 7), this jurisdictional question was not raised for the first time in *Wolf Creek*. *See, e.g., Detroit Edison Company* (Greenwood Energy Center) 8 AEC 936 (1974). *Implicit in the filing of the instant motion is a concession by the Applicant that the Commission (and hence this Board) has jurisdiction over those limited 'offsite' matters which are the subject of the motion.*

Wash. Pub. Power Supply Sys. (WPPSS Nuclear Projects No. 3 & 5), LBP-77-15, 5 N.R.C. 643 (ASLB, 1977) (emphasis added).

The question of regulatory construction raised by Entergy's motion for declaratory ruling is not the type of "uncertainty" considered in *Kansas Gas Power & Elec. Co. (Wolf Creek)* or *Wash Pub. Power Supply Sys.* (WPPSS Nuclear Projects No. 3 & 5). Here, rather than asking the Board to allow an access road or to store construction equipment in anticipation of obtaining NRC authorization, Entergy is asking the Board to resolve important legal and programmatic issues under the CZMA and the federally-approved New York State Coastal Management Program, and such a decision would have implications to federal agencies and state coastal programs that would extend far beyond NRC relicensing. Plainly, the nature and legal requirements for federal consistency review are outside the scope of license renewal and, therefore, the jurisdiction of the Board.[17] Moreover, Entergy's invocation of the generalized

[17] Were the Board to construe the CZMA statute and NOAA's regulations, neither interpretation would be entitled to deference by the federal courts. The issue raised in Entergy's request to the Board for declaratory ruling presents an important legal question of regulatory construction and interpretation of another federal agency's statute and rules. Any interpretation of those provisions by NRC would not be entitled to deference under the *Chevron* test. *See, e.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 682-683 (2007) (EPA not entitled to deference regarding construction of the Endangered Species Act, administered by the Departments of Interior and Commerce) (citing *Chevron, U.S.A., Inc. v. Natural Resource Defense Council*, 467 U.S. 837 (1984)("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"); *Department of Treasury v. Federal Labor Relations Auth.*, 837 F.2d 1163, 1167 (D.C. Cir. 1988) ("[W]hen an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is not entitled to deference"); *Sherley v. Sebelius*, 689 F.3d 776, 785 (D.C. Cir. 2012)(*Chevron* deference is appropriate only when reviewing an agency's "construction of a statutory scheme it is entrusted to administer") (*citing United States v. Mead Corp*., 533 U.S. 218, 226-27 (2001)).

declaratory ruling tool under the APA is inappropriate and unnecessary here because the CZMA and its implementing regulations expressly provide a means of resolving questions of applicability and interpretation. *See* 15 C.F.R. § 930.55.

CONCLUSION

For the reasons stated above, the State of New York respectfully requests that the Board deny Entergy's motion on grounds that it is moot, and/or on grounds that the Board is without jurisdiction to construe the Coastal Zone Management Act and affiliated State laws and regulations. In the event that the Board does not deny Entergy's motion on mootness or jurisdictional grounds outright, the State respectfully submits the attached cross-motion seeking a declaration that Entergy's license renewal *is* subject to federal consistency review by the New York State Department of State.

CROSS-MOTION FOR A DECLARATION THAT ENTERGY'S LICENSE RENEWAL APPLICATION IS SUBJECT TO FEDERAL CONSISTENCY REVIEW BY THE NEW YORK STATE DEPARTMENT OF STATE

As discussed above, the State submits that Entergy's motion should be denied on grounds that it is moot, and that the Board lacks the jurisdiction and regulatory expertise to adjudicate matters of State and federal Coastal Zone Management law. In the event that the Board does not deny Entergy's motion on mootness or jurisdictional grounds outright, the State of New York respectfully cross-moves for a declaratory ruling pursuant to Section 5(e) of the Administrative Procedures Act, 5 U.S.C. § 554(e), for a declaration that the LRA sought by applicant Entergy Nuclear Indian Point Units 2 and 3 is subject to federal consistency review by NYSDOS under 15 C.F.R. § 930.51, Subpart D of the Department of Commerce regulations.

PRELIMINARY STATEMENT

Entergy's Indian Point facilities have never been subjected to federal consistency review by the designated "State agency" for purposes of the CZMA, as that term is defined by 15 C.F.R. § 930.11(o) and 16 U.S.C. § 1455(d)(6) – here the NYSDOS. *See* Atts. 1, 7. Entergy's motion is an artful sleight of hand that ignores this basic and inconvenient fact. Contrary to Entergy's argument, no amount of aggregated state consistency review or certification by other New York agencies can substitute for the requisite federal consistency review by the NYSDOS. NYSDOS retains sole authority under the New York State Coastal Management Program, which has not been delegated to any other New York State agencies.

FEDERAL CONSISTENCY REVIEW BY NYSDOS IS REQUIRED BECAUSE THE "STATE AGENCY" HAS NEVER CONDUCTED CONSISTENCY REVIEW FOR INDIAN POINT

NYSDOS is the single "State agency" designated by Secretary of Commerce and defined by 15 C.F.R. § 930.11(o), and holds sole authority for federal consistency review under the New York State Coastal Management Program. 1975 N.Y. Laws, ch. 464, § 47; Att. 7; *see also* http://coastalmanagement.noaa.gov/ mystate/ny.html (last visited Apr. 5, 2013). NYSDOS has never conducted a coastal consistency review for Indian Point. Att. 1. Moreover, the applicable laws and regulatory landscape have changed substantially since Indian Point's original licenses were issued in 1973 and 1975, respectively, including the NRC's authorizing legislation and its environmental and relicensing regulations. *See* 10 C.F.R. Parts 51 and 54. Any review that occurred in the context of original licensing did not, and could not, consider the impacts of an additional 20 years of operation beyond the original license period. Accordingly, the Commission's 1995 license renewal regulations recognize that facilities and circumstances may have changed over time, and require facility-specific and comprehensive review, as is occurring in this proceeding. Even if NYSDOS had previously reviewed Indian Point for federal consistency, which it has not, the NRC's recognition of the need for comprehensive environmental review for license renewal underscores the need for federal consistency review here. In order to ensure that NYSDOS has the opportunity to review the Indian Point license renewal and its coastal effects, and to effectuate coastal management regulations, the State respectfully submits that the Board must "give considerable weight to the opinion of the State agency," and find that NYSDOS has never reviewed Indian Point for federal consistency purposes. *See* 15 C.F.R. § 930.51(e) (emphasis added).

Contrary to Entergy's claim, there has been no State agency review of Indian Point for federal consistency purposes. Att. 1; *see also* 15 C.F.R. § 930.51(b)(1). Entergy's motion for declaratory order misconstrues a plainly-worded definition of "State agency" in the NOAA regulations. *See* 15 C.F.R. §§ 930.11(o); 16 U.S.C. § 1456(c)(3)(A). Entergy argues that the requirement for federal consistency review by the "State agency" has been satisfied by prior reviews under State law by New York governmental entities other than NYSDOS in matters not related to the renewal of Indian Point's operating licenses. However, "State agency review" pursuant to 15 C.F.R. § 930.51(b)(1) does not include reviews by state agencies for state consistency purposes. Nor is the "State agency review" requirement satisfied by cumulative state permitting or license transfer reviews and approvals, as the New York State Coastal Management Program makes no such provision. Thus, unless and until the NYSDOS conducts a federal consistency review of Entergy's Indian Point LRA, the CZMA and implementing regulations prohibit the NRC's renewal of the operating licenses. *See* 16 U.S.C. 1456(c)(3)(A); 15 C.F.R. § 930.53(d); 10 C.F.R. § 51.71(d).

Entergy's Theory of "Previous Review" is Flawed

Entergy argues that its facility is exempt from federal consistency review because New York State agencies and a public authority conducted state consistency on the largely ministerial transfer of ownership of Indian Point Units 2 and 3 in 2001 and 2000, respectively, and in conjunction with state environmental review for purposes of the Indian Point SPDES permit in 2000 and 2003 -- all state administrative actions legally unrelated to the pending license renewal

proceeding.[18] *See* Atts. 22, 23. More particularly, Entergy claims this collection of previous state consistency reviews conducted by the Public Service Commission (PSC), the NYSDEC, and the Power Authority of the State of New York (PASNY) pursuant to various State laws and regulations (the State Environmental Quality Review Act, Executive Law Article 42 and 19 NYCRR part 600) obviate its statutory obligation to demonstrate federal consistency in conjunction with its license renewal application. Whatever the coastal management program scheme and design may be in other states, under the New York State Coastal Management Program, only NYSDOS is authorized to conduct the consistency review of federal agency actions pursuant to the CZMA. *See* 16 U.S.C. § 1456(c)(3)(A); 1975 N.Y. Laws, ch. 464, § 47; Att. 7. State consistency determinations, made pursuant to the Waterfront Act and its implementing regulations, cannot bind federal agencies.[19]

In order to make its argument, Entergy conflates a "state agency" for state consistency purposes under the Waterfront Act (New York Executive Law Article 42) with the single "State agency" designated under the CZMA and implementing regulations. They are not interchangeable terms, nor do they have the same obligations or legal authority. The State's Waterfront Act defines "state agency" to mean "any department, bureau, commission, board,

---

[18] The NRC's own regulations recognize the distinctions between the ministerial act of transferring a current license to a new operator and the complete multi-year administrative process and environmental review that accompanies a renewal for an operating license. A license transfer constitutes a "categorical exclusion" from NEPA under the NRC regulations. 10 C.F.R. § 51.22(a) ("The action belongs to a category of actions which the Commission, by rule or regulation, has declared to be a categorical exclusion, after first finding that the category of actions does not individually or cumulatively have a significant effect on the human environment."); 10 C.F.R. § 51.22(c)(21) (exemption of direct or indirect NRC license transfers from NRC's NEPA regulations, 10 C.F.R. Part 51)). *See In the Consistency Appeal of Long Island Lighting Company from an Objection by the New York Department of State (LILCO)*, 1988 NOAA LEXIS 32 (Feb. 26, 1988) (License transfers are ministerial in nature, and review may not capture the operating licenses of nuclear facilities).

[19] State consistency applies only to Waterfront Act § 911(9) State agency actions. *See* Att. 7 at II-4-4.

public authority or other agency of the state, including any public benefit corporation any member of which is appointed by the governor" (New York Executive Law § 911(5)); thus, the PSC, the NYSDEC and the PASNY are all "state agencies" under Executive Law § 911(5) for state consistency purposes. Again, however, no agency but NYSDOS is authorized as the single "State agency" designated pursuant to 16 U.S.C. § 1456(c)(3)(A) to make federal consistency determinations. 15 C.F.R. §§ 930.11(o); 923.47; 1975 N.Y. Laws, ch. 464, § 47.[20] NYSDOS has not delegated this designated State agency authority to any other Executive Law § 911(5) State agency, nor does the Coastal Management Plan provide for delegation.

Entergy mistakenly reads 15 C.F.R. § 930.6(c) to provide that a New York state agency permit can constitute or substitute for NYSDOS for a federal consistency review. Section 930.6(c) does not apply to the New York State Coastal Management Program and is not relevant here. That regulation reads:

> "*If described in a State's management program*, 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 or the State agency review individual projects to ensure consistency with all applicable State management program policies and that applicable public participation requirements are met. The State agency shall monitor such permits issued by another State agency."

15 C.F.R. § 930.6(c) (emphasis added). The New York State Coastal Management Program does not contain any description or programmatic reference allowing for the substitution of a state permit for NYSDOS federal consistency review. Nor is NYSDOS required to monitor the

[20] The Executive Law § 911(5) "State agency" is not the legal equivalent to "State agency" pursuant to CZMA implementing regulations, which define a "State agency" to "mean the agency of the State government designated pursuant to section 306(d)(6) of the Act to receive and administer grants for an approved management program, or a single designee State agency appointed by the 306(d)(6) State agency." 15 C.F.R. § 930.11(o).

issuance of Executive Law § 911(5) State agency permits. The "substitute" process that Entergy attempts to invoke does not exist in New York.

Entergy further compounds its fundamental errors by asserting that NRC, as the federal licensing agency, "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." Entergy's July 30, 2012 Motion at 4. This statement is not accurate. NRC does not have "exclusive responsibility" regarding any aspect of coastal management. NOAA's coastal regulations require the federal licensing agency to consult with the State agency responsible for federal consistency review to determine (1) whether the single State agency ever conducted federal consistency review for the activity and (2) if so, whether the new license is substantially different from that previously reviewed. *See* 15 C.F.R. § 930.51(b)(2), (3). NYSDOS has been very clear: Indian Point has never been the subject of federal consistency review. Att. 1. The correct result here – indeed the only result – is for the Board to determine that the mandatory federal consistency review by NYSDOS has not yet occurred. There can be no "further" review where the facility and its operations have never been the subject of federal consistency review, much less reviewed for cumulative coastal resource impacts proposed to occur twenty years hence. Entergy's argument that Indian Point should not be subject to "further consistency review by New York State" is wholly without merit.

The Changed Regulatory Landscape Compels Federal Consistency Review of the LRA

Even if Indian Point had been previously subject to consistency review by the NYSDOS – which it has not – the regulatory landscape that includes NRC authority, the federal coastal program and the New York State Coastal Management Program, as well as other important environmental requirements, has changed dramatically since the facilities were originally

licensed 40 years ago, as have aspects of the facility and its environmental circumstances. These important changes compel NYSDOS's federal consistency review of Indian Point's LRA.

15 C.F.R. § 930.51(b)(2), referenced by Entergy, directs federal consistency review for renewals of federal licenses where activities were previously reviewed by the State agency, but where coastal management program changes occurred after the original review. As indicated, the original operating license was never subjected to federal consistency review by NYSDOS (or any other state agency). Att. 1. Clearly, the scope and requirements of federal coastal consistency review have changed since the CZMA was enacted in 1972. *See, e.g.*, 16 U.S.C. § 1451, Pub. L. 92-583 (5 amendments between 1976 and 1996); Att. 7 (New York Coastal Management Program approved by NOAA in 1982). NOAA regulatory requirements have changed, as has the scope of New York State jurisdiction in relation to federal agency license and permit requirements, particularly the State's lead status for purposes of coastal management and permitting under the Clean Water Act. The New York State Coastal Management Program has undergone numerous routine program changes, including the addition of Local Waterfront Revitalization Programs, significant habitat designations, the addition of interstate consistency, and the addition of updated and new state statutes and regulations to enforce the 44 coastal policies. Att. 7; *see also,* 15 C.F.R. Part 930 subpart I (addressing consistency of federal activities having interstate coastal effects); 15 C.F.R. § 923.84 (providing the procedure for routine program changes). Listing of protected endangered Shortnose sturgeon and Atlantic sturgeon was incorporated in the July 2012 Hudson River significant habitat designations. Att. 19; *see also,* Atts. 20, 21. Federal consistency review is designed to encompass "program changes" such as these, even where review has occurred before. 15 C.F.R. § 930.51(b)(2).

Disregarding the "not previously reviewed" impediment to its argument, Entergy attempts to further bolster its argument by asserting that Indian Point will not "cause an effect on any coastal use or resource substantially different than those originally reviewed by the State agency." *See* Entergy's July 30, 2012 Motion at 22, 24, citing 15 C.F.R. § 930.51(b)(3). Understanding that Indian Point never has been reviewed by NYSDOS for federal consistency, common sense dictates that the twenty-year license renewal sought by Entergy for its Indian Point facilities is likely to cause effects on coastal uses and resources that are "substantially different" than those which were or may have been known at the time of the original licenses, forty years ago.

Entergy's claim that nothing has changed or will change during the 20-year license extension period is, at best, simply wrong. The most glaring example involves Indian Point's obsolete once-through cooling water intake system, which *must* change during the proposed 20-year license renewal period in order to comply with the "best technology available" requirements of the Clean Water Act and New York State law. *See* Att. 24; *see also* Atts. 11, 14, 15. These same requirements formed the basis for NYSDEC's April 2, 2010 denial of Entergy's application for a water quality certification under Section 401 of the Clean Water Act which, like the federal coastal certification, is required for NRC renewal of Indian Point's operating licenses. *See* 10 C.F.R. §§ 51.45(d), 51.71(d); Att. 17. In February 2010, Entergy proposed an alternative to closed-cycle cooling, namely, installation of an array of 144 72-inch wedge wire screens in approximately five acres of the bed of the Hudson River. Att. 25. Entergy supplemented these submissions on March 29, 2013, which materials included an updated environmental review for the wedge wire screen system and a certification of coastal consistency among other analyses.

See Att. 26. Upon information and belief, none of this information has been provided to the NRC.

Either of the operational changes to Indian Point's cooling water intake system discussed above would compel federal consistency review, simply by virtue of the facility's location in the Hudson River coastal zone. *See* Atts. 7, 19. Whether the NYSDEC's regulatory compliance choice is the closed-cycle system described in the draft SPDES permits or another compliance method such as Entergy's proposed 5-acre wedge wire screen system in the Hudson River, there will be facility changes during the 20-year license renewal period that will impact coastal resources in ways that are "substantially different" than the existing and obsolete once-through cooling water intake system. In much the same way, and as Entergy acknowledged in its 2007 ER, Indian Point's spent fuel pools continue to impact the environment through leaks of radiological material into the Hudson River environment since at least 1994. Accordingly, even if review had occurred previously, these "substantially different" impacts and changed facility conditions would further support NYSDOS federal consistency review under 15 C.F.R. § 930.51(b)(3).

Because Indian Point has never been subject to federal consistency review by the designated State agency, the Board should grant the State's cross-motion for declaratory order and direct Entergy to seek a federal consistency determination from NYSDOS.

CONCLUSION

The State of New York respectfully requests that the Board grant its cross-motion for declaratory ruling, find that (1) the New York State Department of State, as the designated "State agency" under the Coastal Zone Management Act, has never conducted a federal consistency

review of Indian Point and (2) that Entergy's license renewal application is subject to mandatory federal consistency review by the New York State Department of State, and direct Entergy to proceed with that mandatory process.

Respectfully submitted,

Signed (electronically) by
Lisa M. Burianek
Assistant Attorney General
Office of the Attorney General
for the State of New York
The Capitol
Albany, New York 12224
(518) 473-3105

Signed (electronically) by
Janice A. Dean
Assistant Attorney General
Office of the Attorney General
for the State of New York
120 Broadway
New York, New York 10271
(212) 416-8459

April 5, 2013

10 C.F.R. § 2.323 Certification

Pursuant to 10 C.F.R. § 2.323(b) and the Board's July 1, 2010 Scheduling Order (at 8-9), I certify that I have made a sincere effort to contact counsel for NRC Staff and Entergy 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.

Entergy opposes the motion, and Staff does not oppose the motion but reserves its rights to respond to the State's arguments. Riverkeeper and Clearwater support the State's motion.

Signed (electronically) by

_____

Janice A. Dean
Assistant Attorney General
State of New York

dated: April 5, 2013