April 15, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S ANSWER TO APPLICANT'S MOTION AND MEMORANDUM FOR DECLARATORY ORDER THAT IT HAS ALREADY OBTAINED THE REQUIRED NEW YORK STATE COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW OF INDIAN POINT 2 AND 3 FOR RENEWAL OF THE OPERATING LICENSES

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("Staff" or "NRC Staff") hereby files its answer to the "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 2 and 3 for Renewal of the Operating Licenses" ("Motion"), filed on July 30, 2012.[1]

In its Motion, Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") seeks the entry of a Declaratory Order by the Atomic Safety and Licensing Board ("Board"), declaring that Entergy need not provide any further certification by the State of New York ("New York") that license renewal of Indian Point Units 2 and 3 ("IP2" and "IP3") is consistent with the New York State Coastal Management Program ("NYCMP" or "CMP"), as required by the Coastal Zone Management Act ("CZMA") of 1972, 16 U.S.C. § 1451, *et seq.* In support of this request, Entergy cites, *inter alia*, regulations promulgated by the National Oceanic & Atmospheric

[1] This response is filed in accordance with the Board's scheduling Orders in this proceeding. *See* "Order (Granting NRC Staff's Motion for an Extension of Time)" (Apr. 5, 2013); "Order (Granting Parties Joint Motion for Alteration of Filing Schedule)" (Feb. 28, 2013), slip op. at 2.

Administration ("NOAA") in 15 C.F.R. § 930.51(b)(3), which provide that when a State has previously reviewed the federally licensed action for consistency with the CZMA, and the Federal agency determines that license renewal will not have any "substantially different effects" on the environment than were previously considered, no further CZMA review is required.

For the reasons set forth below, the Staff respectfully submits that Entergy has not demonstrated it is entitled to the entry of a Declaratory Order on these issues. Accordingly, the Staff recommends that Entergy's Motion be denied.[2]

II. BACKGROUND

Entergy filed its license renewal application ("LRA") on April 23, 2007, seeking to renew the operating licenses for IP2 and IP3 for an additional period of 20 years.[3] On May 11, 2007, the NRC published a notice of receipt of the LRA, and on August 1, 2007, the NRC published a notice of acceptance for docketing and notice of opportunity for hearing on the LRA. No contentions have been filed regarding compliance with the CZMA.

In Section 9.3 ("Coastal Zone Management Program Compliance") of Entergy's Environmental Report, submitted as part of its LRA, Entergy stated as follows:

> The Federal Coastal Zone Management Act (16 USC 1451 et seq.) imposes requirements on applicants for a federal license to conduct an activity that could affect a state's coastal zone. The Act requires the applicant to certify to the licensing agency that the proposed activity would be consistent with the state's federally approved coastal zone management program (16 USC

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[2] Responses in opposition to Entergy's Motion have been filed by New York and Riverkeeper, Inc. *See* (1) "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" (Apr. 5, 2013) ("New York's Response"); and (2) "Riverkeeper Answer in Opposition to 'Motion and Memorandum by Applicant Entergy Nuclear Operations, Inc. for Declaratory Order . . . '" (Apr. 5, 2013). New York included in its filing a cross-motion seeking a declaratory order that a CZMA consistency review for license renewal is required (New York Response, at 22-30); the Staff is filing a separate response to that cross-motion.

[3] Letter from Fred Dacimo (Entergy) to NRC Document Control Desk (April 23, 2007) (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML071210108), as supplemented by letters dated May 3 and June 21, 2007 (ADAMS Accession Nos. ML071280700 and ML071800318, respectively).

> 1456(c)(3)(A)). The National Oceanic and Atmospheric Administration has promulgated implementing regulations that indicate that the requirement is applicable to renewal of federal licenses for activities not previously reviewed by the state (15 CFR 930.51(b)(1)). The regulation requires that the license applicant provide its certification to the federal licensing agency and a copy to the applicable state agency (15 CFR 930.57(a)).
>
> The NRC's Office of Nuclear Reactor Regulation has issued guidance to its staff regarding compliance with the Act. This guidance acknowledges that New York has an approved coastal zone management program [NRC 2004]. The IP2 and IP3 site, located in Westchester County, is within the New York coastal zone.
>
> The NRC is expected to issue the draft SEIS for IP2 and IP3 in early 2008. At that time, Entergy will submit an application for a Coastal Zone Consistency Certification (see Attachment D) to the NYSDOS which will include a copy of the [LRA] for IP2 and IP3 and a copy of the draft SEIS in fulfillment of the regulatory requirement for submitting a copy of the coastal zone consistency certification to the appropriate state agency.

LRA (Ex. ENT00015B), at 9-1; emphasis added. In addition, in Attachment D ("Coastal Management Program Consistency Determination") to its Environmental Report, Entergy stated:

> **Federal Consistency Certification for Federal Permit and License Applicants**[1]
> This is the Entergy Nuclear Indian Point 2, LLC (IP2) and Entergy Nuclear Indian Point 3, LLC (IP3) . . . certification to the [NRC] that the renewal of the IP2 and IP3 Operating Licenses will be consistent with enforceable policies of the federally approved state coastal zone management program. The certification describes background requirements, the proposed action (i.e. license renewal), anticipated environmental impacts, New York State Coastal Management Program (NYSCMP) policies, IP2 and IP3 compliance status, and summary findings.
>
> **CONSISTENCY CERTIFICATION**
> Entergy certifies to the NRC that renewal of the IP2 and IP3 Operating Licenses comply with the enforceable policies of New York State's approved Coastal Management Program (NYSCMP) and will be conducted in a manner consistent with such program. Entergy expects IP2 and IP3 operations during the renewed license terms to be a continuation of current operations as described below, with no physical or operational station alterations that would affect New York State's coastal zone.

[1] This certification is patterned after the example certification included as Appendix E of NRC LIC-203, 2004.

Thus, in its April 2007 LRA, Entergy certified that license renewal of IP2 and IP3 is consistent with the NYCMP, and stated that it would submit a CZMA consistency certification to the New York Department of State ("NYSDOS"), the agency that is responsible for conducting New York's CZMA consistency reviews. On July 24, 2012, however, Entergy submitted an updated LRA to the Staff, in which it stated that Entergy does not need a further CZMA certification for license renewal.[4] On July 30, 2012, Entergy filed the instant Motion.

On August 13, 2012, the Staff issued a Request for Additional Information ("RAI") to Entergy, regarding its decision not to provide a CZMA certification to New York.[5] On September 11, 2012, Entergy submitted its response to that RAI, further detailing its position.[6]

In addition, Entergy has initiated three separate actions in New York State proceedings relating to CZMA issues since filing its Motion: On October 1, 2012, Entergy filed a petition in the New York Supreme Court, challenging New York's recent amendment of its coastal habitat designations to include portions of the Hudson River adjacent to Indian Point; on November 7, 2012, Entergy filed a petition with NYSDOS asserting that Indian Point is exempt from a consistency review under NYCMP grandfathering provisions; and on December 17, 2012, Entergy submitted a consistency certification to NYSDOS (and the NRC) regarding license

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[4] *See* Letter from Fred R. Dacimo (Entergy) to NRC Document Control Desk, "Supplement to License Renewal Application – Compliance with the Coastal Zone Management Act, Indian Point Nuclear Generating Unit Nos. 2 & 3, Docket Nos. 50-247 and 50-286, License Nos. DPR-26 and DPR-64," at 1 (Jul. 24, 2012) (ADAMS Accession No. ML12207A122).

[5] Letter from Michael Wentzel (NRC), to Vice President, Operations (Entergy), "Subject: Request for Additional Information for the Review of the Indian Point Nuclear Generating Unit Nos. 2 and 3, License Renewal Application Environmental Review (TAC Nos. MD5411 and MD5412)" (Aug. 13, 2012) ("RAI") (Attachment 2 to New York's Response).

[6] Letter from Fred R. Dacimo (Entergy) to NRC Document Control Desk, "Subject: Response to Request for Additional Information for Review of the Indian Point Nuclear Generating Unit Nos. 2 and 3, License Renewal Application Environmental Review - Compliance with Coastal Zone Management Act" (NL-12-125) (Sept. 11, 2012) ("RAI Response") (Attachment 3 to New York's Response).

renewal of IP2 and IP3[7] – although it expressly reserved its right to argue that IP2/IP3 license renewal is exempt from review under the terms of the NYCMP. [8]

III. DISCUSSION

A. Applicable Legal Standards

1. Issuance of a Declaratory Order

Under the Administrative Procedure Act, 5 U.S.C. § 554(e), an agency, in its sound discretion, may issue a declaratory order to terminate a controversy or to remove uncertainty." This principle has been applied in NRC adjudicatory proceedings. Thus, the Commission has held that its presiding officers have been delegated the authority to issue declaratory relief under 10 C.F.R. § 2.718, which gives them "all powers necessary" to carry out their duties "to take appropriate action to avoid delay." Such relief may be granted, "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." *Kansas Gas & Elec. Co.* (Wolf Creek Nuclear Generating Station, Unit 1), CLI-77-1, 5 NRC 1, 5 (1977).[9] Further, the Commission has held that "[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." *Id.* at 4, *citing Abbot Laboratories v. Gardner*, 387 U.S. 136 (1967).

In determining whether to grant declaratory relief, another board has held that two questions must be answered in the affirmative:

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[7] Entergy's CZMA consistency certification for license renewal of IP2 and IP3, dated December 17, 2012, was provided as Attachment 4 to New York's Response.

[8] *See* Letter from Kathryn M. Sutton, Esq. and Paul M. Bessette, Esq. to the Board (Dec. 21, 2012) at 1-2. *See also,* Letter from Kathryn M. Sutton, Esq. and Paul M. Bessette, Esq. to the Board (Dec. 17, 2012) at 1-2 and n.2; and letter from John J. Sipos, Esq. to the Board (Dec. 21, 2012) at 1-2.

[9] *Accord, Advanced Medical Systems, Inc.* (One Factory Row Geneva, Ohio 44041), LBP-89-11, 29 NRC 306, 314 (1989); *Washington Public Power Supply System* (WPPSS Nuclear Project Nos. 3 and 5), LBP-77-15, 5 NRC 643, 645 (1977).

> First, does a genuine and live controversy exist between the Licensee and the Staff sufficient to support a declaratory order. Second, is the issuance of declaratory relief appropriate in this proceeding. The former is necessary to ensure that a board has jurisdiction over the matter to be decided, without which it cannot issue any relief, declaratory or otherwise. The latter is necessary because declaratory relief is discretionary and is to be granted only to terminate a controversy or eliminate uncertainty and avoid unnecessary delay.

AMS, 29 NRC at 314.[10] Thus, whether or not a Declaratory Order should be issued is a matter within the sound discretion of the Board.

2. Jurisdiction and Procedural Requirements

The Board has jurisdiction to rule upon the Applicant's Motion, pursuant to the Commission's delegation of authority to resolve matters placed into controversy by the parties pertaining to issuance of renewed licenses for IP2 and IP3. In this regard, the Board has jurisdiction to resolve those issues that fall within the delegation of authority contained in the Commission's Notice of Opportunity for Hearing for the proceeding.[11] *Public Service Co. of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976). Inasmuch as issuance of a renewed license may require that the Commission consider the Applicant's consistency certification in accordance with Section 307 of the CZMA,[12] this issue appears to fall within the scope of this proceeding and the Board's general jurisdiction.

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[10] *See Yale Broadcasting Corp. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973) (FCC was not required to issue a declaratory order "merely because a radio broadcaster asks for one. . . . An administrative agency should not be compelled to issue a clarifying statement unless its failure to do so can be shown to be a clear abuse of discretion.").

[11] *See* "Establishment of Atomic Safety and Licensing Board," 72 Fed. Reg. 60,394 (Oct. 24, 2007) (establishing a Board to preside over the IP2/IP3 license renewal proceeding). *See generally*, "Final Rule, "Part 2—Rules of Practice; Authority of Atomic Safety and Licensing Board to Rule on Certain Petitions," 37 Fed. Reg. 28,710 (Dec. 29, 1972); NRC Management Directive 9.5, Chap. 0106 ("Organization and Functions/ Atomic Safety and Licensing Board Panel"), §§ 022 (Functions), 023 (Authority), and 033 (Delegation to Atomic Safety and Licensing Boards).

[12] Section 307 of the CZMA states that "[n]o license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, . . . " *See* discussion *infra* at 8-10.

Finally, as a matter of procedure, it must be noted that Entergy's Motion pertains to an issue that is not the subject of any contention in this proceeding. In this regard, the Board's authority to rule upon issues in a license renewal proceeding is limited to the matters placed in controversy by the parties – which the Commission's regulations generally require be in the form of a contention;[13] in contrast, issues that are not the subject of admitted contentions are to be resolved by the Staff under its delegated authority from the Commission.[14] Accordingly, Entergy's Motion may be denied in that it does not relate to a contention in the proceeding.[15]

3. The Coastal Zone Management Act

The Coastal Zone Management Act recognizes a national interest in "the effective management, beneficial use, protection and development of the coastal zone." 16 U.S.C. § 1451(a). The CZMA seeks to balance "increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development" with the need to protect "important ecological, cultural, historic, and esthetic values" in such areas. 16 U.S.C. § 1451(c) and (e). Accordingly, Congress declared it is the national policy, *inter alia*, to encourage and assist the states in developing and implementing "management programs to achieve wise use of the land and water resources of the coastal zone, giving full

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[13] *See* 10 C.F.R. § 2.309(f) (contentions); 10 C.F.R. §2.340(a)(1) (in OL, OL amendment and license renewal proceedings, the Board is to make findings of fact and conclusions of law on (a) "the matters put into controversy by the parties," (b) any matter designated by the Commission, and (c) any matter that was not placed in controversy by the parties, "but only to the extent that the presiding officer determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves of an examination of and decision on the matter upon its referral by the presiding officer"; *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998) ("[t]he scope of a particular proceeding is limited to the scope of the admitted contentions and any issues the Commission authorizes the Board to raise sua sponte.").

[14] *See, e.g.,* 10 C.F.R. §§ 1.32(c), 1.43, and 2.103; *cf. Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 35-36 (2005) (in a proceeding with a mandatory hearing, the Staff has "prime responsibility for technical fact-finding on uncontested matters").

[15] The issue of whether an applicant is required to file contentions in a licensing proceeding does not appear to have been squarely addressed in NRC case law; in one proceeding, however, the Board approved an applicant's filing of contentions and applied the Commission's contention filing requirements to those contentions. *See Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), LBP-84-42, 20 NRC 1296, 1306-07 (1984).

consideration to ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development," to encourage coordination and cooperation among Federal, State and local agencies, and to support State and Federal regulation of land use practices affecting coastal resources, among other stated objectives. 16 U.S.C. § 1452(2) & (5).

In particular, the CZMA requires that "any coastal state which has completed the development of its management program" shall submit that program to the U.S. Secretary of Commerce for review and approval. 16 U.S.C. § 1454.[16] Under Section 306 of the Act, before approving such program, the Secretary must find that the state or program has satisfied 16 specified criteria regarding, *inter alia*, required program elements, coordination with other authorities, organization, administrative processes, and approval by the State Governor. 16 U.S.C. § 1455.[17] Once a state's CMP has been approved by the Secretary, Section 307 of the Act requires that any applicant for a required Federal license or permit to conduct an activity, affecting any land or water use or natural resource of the coastal zone of that state, "shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program"; in addition, the applicant is required to provide the state or its designated agency a copy of that certification. 16 U.S.C. § 1456(c)(3)(A). Section 307 of the Act further provides as follows:

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[16] The term "coastal state" includes, *inter alia*, states that border on the Atlantic Ocean or Long Island Sound. 16 U.S.C. § 1453(4). The term "coastal waters" includes, *inter alia*, "those waters, adjacent to the shorelines, which contain a measurable quantity or percentage of sea water, including, but not limited to, sounds, bays, . . . and estuaries." 16 U.S.C. § 1453(3). The term "estuary" means "that part of a river or stream . . . having unimpaired connection with the open sea, where the sea water is measurably diluted with fresh water derived from land drainage." 16 U.S.C. § 1453(7).

[17] Included among these is a requirement that the CMP "provides for adequate consideration of the national interest involved in planning for, and managing the coastal zone, including the siting of facilities such as energy facilities which are of greater than local significance. In the case of energy facilities, the Secretary shall find that the State has given consideration to any applicable national or interstate energy plan or program." 16 U.S.C. § 1455(d)(8).

> Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state [or] its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this title or is otherwise necessary in the interest of national security.

Id., emphasis added.

The U.S. Department of Commerce, National Oceanic and Atmospheric Administration ("NOAA"), has adopted regulations under Sections 306 and 307 of the Act, establishing (a) requirements for a state's CMP to be approved, as set forth in 15 C.F.R. Part 923,[18] and (b) requirements governing implementation of the federal consistency requirement of the CZMA, as set forth in 15 C.F.R. Part 930.[19] Subpart D of Part 930 pertains to "Consistency for Activities Requiring a Federal License or Permit." Section 930.51 provides, in pertinent part, as follows:

> **§ 930.51 Federal license or permit.**
> (a) The term "federal license or permit" means any authorization that an applicant is required by law to obtain in order to conduct activities affecting any land or water use or natural resource of the coastal zone and that any Federal agency is empowered to issue to an applicant. . . .
> (b) The term also includes the following types of renewals and major amendments which affect any coastal use or resource:
> (1) Renewals and major amendments of federal license or permit activities not previously reviewed by the State agency;

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[18] *See* 15 C.F.R. § 923.1(a)-(b).

[19] *See* 15 C.F.R. § 930.1(b).

> (2) Renewals and major amendments of federal license or permit activities previously reviewed by the State agency which are filed after and are subject to management program changes not in existence at the time of original State agency review; and
>
> (3) Renewals and major amendments of federal license or permit activities previously reviewed by the State agency which will cause an effect on any coastal use or resource substantially different than those originally reviewed by the State agency.
>
> * * * *
>
> (e) The determination of substantially different coastal effects under paragraphs (b)(3), and (c) of this section is made on a case-by-case basis by the Federal agency after consulting with the State agency, and applicant. The Federal agency shall give considerable weight to the opinion of the State agency. The terms "major amendment," "renewals" 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. . . .

Id., emphasis added. *See California v. Norton*, 311 F.3d 1162, 1174 n.8 (9th Cir. 2002). Entergy relies upon these provisions, and in particular § 930.51(b)(3), in support of its Motion.

B. Entergy Has Not Established A Sufficient Factual Basis for the Motion.

In accordance with 10 C.F.R. § 2.325, "[u]nless the presiding officer otherwise orders, the applicant or the proponent of an order has the burden of proof."[20] Thus, Entergy must demonstrate that it is entitled to the entry of a declaratory order that no further CZMA consistency review is required for license renewal of IP2 and IP3.

In its Motion, Entergy relies upon 15 C.F.R. § 930.51(b)(3) in support of its argument that no further CZMA consistency review is required, on the grounds that (a) the activities authorized by its current operating license were previously reviewed by the relevant state agency for CZMA compliance, Motion at 15-21; and (b) the renewal of that license will not "cause an effect on any coastal use or resource substantially different than those originally reviewed by the State

[20] On evidentiary matters, that burden must be met by a showing that the motion is supported by a preponderance of the evidence. *See, e.g., Amergen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 263 (2009).

agency." *Id.* at 21-24. Two determinations are therefore central to Entergy's Motion: (1) whether the federal license or activity was previously reviewed by the relevant state agency for CZMA compliance, and (2) whether license renewal will cause an effect on any coastal use or resource substantially different than those originally reviewed by the State agency. While Entergy may be entirely correct in its assertions regarding these matters, it is not clear to the Staff from the documents provided in support of Entergy's Motion that Entergy is entitled to the entry of a Declaratory Order in its favor on these issues.

1. Consultation Between the NRC and the State.

In accordance with 15 C.F.R. § 930.51(e), recited *supra* at 10. a determination as to whether license renewal would cause substantially different coastal effects than those previously reviewed is to be made by the Federal licensing agency after consulting with the State agency and the applicant; the opinion of the cognizant State agency is to be given "considerable weight." *Id.* Here, there has been no consultation between the NRC and the New York Department of State ("NYSDOS"), the State agency whose opinion is to be given considerable weight in the NRC's decision.[21] Thus, a sufficient basis has not been established to support issuance of a Declaratory Order that license renewal will not cause substantially different effects on coastal resources than those which were reviewed previously.

2. Prior Review of Activities to Be Authorized by License Renewal.

A finding under 15 C.F.R. § 930.51(b)(3) that license renewal will not have substantially different effects on the coastal environment than the effects that were reviewed previously necessarily requires that a prior review has been conducted of the effects of plant operation. Thus, the Statement of Consideration for § 930.51(b)(3) observed that the rule sought to avoid "unnecessary State agency review":

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[21] While actual consultation has not occurred, New York's opposition to Entergy's Motion may be construed to demonstrate that the State does not concur in Entergy's view that the effects of license renewal are not substantially different than the effects that the State reviewed previously.

> Paragraph [930.51](b) is founded on the principle that an applicant does not have a vested right to receive approval of a renewal or a major amendment without first complying with the law existing at the time approval is sought. However, this principle must operate in the context of avoiding unnecessary State agency review. Therefore subparagraph (1) assures the State agency of an opportunity to review licenses and permits which were originally approved by the Federal government prior to management program approval and are subject to major amendment or renewal following management program approval. In the event the State agency has previously reviewed a license or permit activity, further review is limited to cases where changes in management program provisions necessitate reevaluation of the activity (subparagraph (2)), or the activity will be modified substantially causing new coastal zone effects (subparagraph (3)).[22]

Entergy asserts that New York has previously conducted several reviews of Indian Point's effects on the coastal zone for consistency with its CMP that satisfy NOAA's regulations, such that further consistency review is not required.[23] In particular, Entergy asserts that the New York State Public Service Commission ("NYSPSC") and the New York Power Authority ("NYPA"), which previously owned Indian Point Units 2 and 3, have conducted consistency reviews – NYPA, when it transferred the IP3 license to Entergy in 2000, and NYSPSC, when it transferred the IP2 license to Entergy in 2001.[24] Further, Entergy asserts that the State Pollution Discharge Elimination System ("SPDES") permits that were issued by New York under

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[22] Final Rule, "Part 930 – Federal Consistency with Approved Coastal Management Programs," 43 Fed. Reg. 10,510, 10,523 (Mar. 13, 1978) ("1978 Rule") (emphasis added). For example, in a recent decision, the Under Secretary of Commerce determined that a further CZMA consistency review was not required under 15 C.F.R. § 930.51(b)(3), in connection with a company's request for a U.S. Army Corps. of Engineers ("USACE") permit to make minor modifications to the design of its port facilities, where (a) the Commonwealth of Puerto Rico had twice reviewed the project's design and determined that it was consistent with the Commonwealth's CMP, and (b) the proposed modifications would "not result in coastal effects substantially different from what Puerto Rico previously reviewed and approved." Letter from Jane Lubchenco, Under Secretary of Commerce for Oceans and Atmosphere, to Thomas C. Jensen, Esq. and Luis O. Cintron (Dec. 1, 2010), "*Decision in the Consistency Appeal of Pan American Grain Co.,*" at 2 & 4 ("*Pan American*") ("Attachment 1" hereto).

[23] Motion at 14-21.

[24] *Id.* at 15-19; see id., Attachments 6 & 7; *cf.* id., Attachments 8 & 21.

the Clean Water Act,[25] and various other permits issued by the State,[26] either explicitly or implicitly determined that Indian Point's continuing operations are consistent with the NYCMP. These assertions are supported by the Declaration of Marc J. Lawlor, based on his review and interpretation of various State documents.[27]

As stated *supra* at 11, while Entergy may be entirely correct in its assertions regarding these matters, it is not clear to the Staff from the documents provided in support of Entergy's Motion that Entergy is entitled to the entry of a Declaratory Order in its favor on these issues. Unlike the situation in *Pan American Grain Co.* (*see* n. 22, *supra)*, it is not clear to the Staff that New York has reviewed the effects on coastal resources that may be occasioned by operation of IP2 and IP3. In the Staff's view, additional documentation and/or consultation with the State would assist in understanding the meaning and effect of the documents submitted in support of Entergy's Motion and would help to resolve this issue.

3. The Effects of License Renewal.

Entergy asserts that because Indian Point Units 2 and 3 will continue to operate in the same manner as they have until now, license renewal will not cause any substantially different effects on the coastal environment than those caused by current operations.[28] Entergy also states that its recent construction of an Independent Spent Fuel Storage Installation ("ISFSI") and a Generation Support Building ("GSB") will not have any additional effects on the coastal zone;[29] and that its anticipated replacement of reactor vessel heads and control rod drive mechanisms during the license renewal period will have negligible coastal zone impacts.[30]

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[25] *Id.* at 19-21; *see id.*, Attachments 8 and 22-25.

[26] *Id.* at 19-21; *see id.*, Attachment 8.

[27] *See* Attachment 8 to Entergy's Motion, at 2.

[28] Motion at 21-24.

[29] *Id.* at 23-24.

[30] *Id.* at 24.

Entergy therefore asserts that under 15 C.F.R. § 930.51(b)(3), no additional CZMA consistency review is required.[31]

The Staff agrees with Entergy that Indian Point's operations are not expected to change during the license renewal period, and that the ISFSI, GSB, and other projects listed above will have no additional coastal effects beyond those of currently-licensed operations. Nonetheless, in addition to considering whether "the activity will be modified substantially causing new coastal zone effects,"[32] NOAA's regulations in 15 C.F.R. § 930.51(b)(2) indicate that a state may consider whether "changes in management program provisions necessitate reevaluation of the activity." In its RAI Response, Entergy stated that there were routine changes to the CMP in 2001 and 2006, none of which are material to CMP provisions that concern Indian Point's license renewal.[33] The Staff believes that this assertion raises an issue that is properly within the State's expertise to decide and should be considered, in the first instance, by New York. In the absence of consultations with New York, the Staff is unable to conclude that there have been no changes in CMP policies that need to be considered in determining whether license renewal would have substantially different effects than effects considered previously.[34]

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[31] *Id.* at 14, 24.

[32] *Id.* at 22, *citing* Final Rule: Consistency for Department of the Interior Outer Continental Shelf (OCS) Prelease Sale Activities and for Other Federal Activities Directly Affecting the Coastal Zone, 44 Fed. Reg. 37,142, 37,150 (June 25, 1979). The Staff notes that this language appeared, as well, in the previous Statement of Consideration for the Final Rule. *See* 1978 Rule, 43 Fed. Reg. at 10,523.

[33] RAI Response (Attachment 3 to New York's Response) at 15.

[34] Inasmuch as NOAA's regulations in § 930.51(e) instruct that "[t]he Federal agency shall give considerable weight to the opinion of the State agency," and "[t]he term[ ] . . . "substantially different" shall be construed broadly to ensure that the State agency has the opportunity to review activities and coastal effects not previously reviewed," the Staff believes that consultation with New York could assist the agency, in general, in determining whether the effects of license renewal on coastal zone resources are substantially different than the effects considered in a previous consistency review.

C. Entergy Has Not Established that Issuance of A Declaratory Order Is Appropriate.

As discussed *supra* at 5-6, the Board may issue a declaratory order "only to terminate a controversy or eliminate uncertainty and avoid unnecessary delay." *AMS*, 29 NRC at 314. The issuance of a Declaratory Order here would not appear to accomplish these purposes.

First, issuance of a Declaratory Order would not terminate a controversy. Under the CZMA, New York is responsible for conducting a review to determine whether the activities to be authorized by a federal permit or license (including license renewal) are consistent with the State's CMP. Since filing its Motion with the Board, Entergy filed a consistency certification with the State – and New York is presumably now engaged in a review of that certification. As part of its review, New York can determine whether the effects of IP2/IP3 operation license renewal are consistent with the NYCMP – including whether previous consistency reviews were conducted and, if so, whether the effects of license renewal are substantially different than the effects previously considered. The outcome of New York's consistency review can be appealed to the Secretary of Commerce, whose decision, in turn, can be reviewed in federal court.[35] Rather than terminating controversy, issuance of a Declaratory Order by the Board could lead to conflicting results and may, in fact, only add to the controversy.

Second, issuance of a Declaratory Order would not eliminate uncertainty. While Entergy asserts that a Declaratory Order is required because it "confronts grave uncertainty as to its legal obligations,"[36] that uncertainty can be resolved by New York's conduct of a consistency review to determine whether the effects of license renewal on coastal resources is consistent

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[35] *See Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council*, 589 F.3d 458, 463 (1st Cir. 2009) ("the CZMA also limits state authority to delay or prohibit projects subject to consistency review, by providing for federal review of state agency determinations. If the state agency objects to consistency certification, the applicant may appeal the decision to the Secretary of Commerce, who can override the objection on a finding 'that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.' 16 U.S.C. 1456(c)(3)(a). The Secretary's decision, in turn, may be reviewed in federal district court."). On appeal, NOAA could reverse New York's findings on the grounds, *inter alia*, that the previous reviews exempted Entergy from obtaining a new consistency determination for license renewal. *See, e.g., Pan American Grain Co.*, at 4.

[36] Motion at 3 (internal quotation marks omitted).

with the NYCMP, and/or a determination whether a consistency review was previously conducted and whether the effects of license renewal are substantially different than the effects considered in the previous review. Unlike the situation in *Wolf Creek*, where the applicant needed to know whether certain construction activities would run afoul of this agency's own requirements, here the Board is not "uniquely positioned" to avoid delay by resolving the "legal uncertainty."[37] Rather, the issues raised by Entergy's Motion pertain to the NYCMP and New York's administrative process, and any legal uncertainty can be resolved by the State, subject to review by the Secretary of Commerce and the federal courts.

Further, the applicants in *Wolf Creek* faced a substantially more serious uncertainty than Entergy does here. Whereas the *Wolf Creek* applicants may have been subject to civil liability or criminal prosecution; here, the worst-case scenario for Entergy is that New York could disagree with Entergy's position – a decision which Entergy could then appeal to the Secretary of Commerce, whose decision would then be subject to review in federal court.

Third, resolution of this issue by the Board would not avoid unnecessary delay. Under 15 C.F.R. § 930.51(e), a "determination of substantially different coastal effects" is to be made "by the Federal agency after consulting with the State agency, and applicant." That consultation should be conducted before the issues raised by Entergy's Motion are resolved, particularly since the State's views are to be given "considerable weight." *Id.* Moreover, that consultation would require the State to consider the effects of license renewal on coastal zone resources and whether those effects are different than any effects previously considered – which the State is presumably doing now, as a result of Entergy's recent filing of a consistency certification with the State. Thus, a ruling on Entergy's motion would not "avoid unnecessary delay."

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[37] *See Wolf Creek*, CLI-77-1, 5 NRC at 4-5. In *Wolf Creek*, the applicant's only alternative to a declaratory order would have been to seek an opinion from the General Counsel; the Commission dismissed that alternative due to the Board's greater "familiarity with possible crucial factual issues." *Id.*

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that Entergy has not established that it is entitled to a Declaratory Order that no further CZMA consistency review is required for license renewal of IP2 and IP3. Entergy's Motion should, therefore, be denied.

Respectfully submitted,

Signed (electronically) by

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Dated at Rockville, Maryland
this 15th day of April 2013

ATTACHMENT 1

(Letter from Jane Lubchenco, Under Secretary of Commerce for Oceans and Atmosphere, to Thomas C. Jensen, Esq. and Luis O. Cintron (Dec. 1, 2010), "Decision in the Consistency Appeal of Pan American Grain Company")

TO

NRC STAFF'S ANSWER TO APPLICANT'S MOTION AND MEMORANDUM FOR DECLARATORY ORDER THAT IT HAS ALREADY OBTAINED THE REQUIRED NEW YORK STATE COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW OF INDIAN POINT 2 AND 3 FOR RENEWAL OF THE OPERATING LICENSES

UNITED STATES DEPARTMENT OF COMMERCE
The Under Secretary of Commerce
for Oceans and Atmosphere
Washington, D.C. 20230

DEC - 1 2010

VIA CERTIFIED MAIL — RETURN RECEIPT REQUESTED

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Luis O. Cintron
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Re: Decision in the Consistency Appeal of Pan American Grain Company

Dear Messrs. Jensen and Cintron:

On January 27, 2010, Pan American Grain Company (Pan American) filed a consistency appeal with the Secretary of Commerce (Secretary), pursuant to section 307(c)(3)(A) of the Coastal Zone Management Act (CZMA). See 16 U.S.C. § 1456(c)(3)(A) (2000). Pan American challenges an objection by the Puerto Rico Planning Board (Puerto Rico) to proposed amendments to an ongoing and federally-permitted port improvement project at Pan American's facilities along San Juan Bay, Puerto Rico. For reasons set forth below, I override the objection because Puerto Rico was not entitled to review the proposed amendments to the project.[1] Accordingly, necessary federal permits may issue.

I. Statutory and Regulatory Background

The CZMA provides states with federally-approved coastal management programs the opportunity to review proposed activities requiring federal licenses or permits if the activity would affect any land or water use or natural resource of the state's coastal zone. 16 U.S.C. § 1456(c)(3)(A).[2] A properly raised objection by a state precludes federal agencies from issuing licenses or permits for the activity, unless the Secretary overrides the state's objection. 16 U.S.C. § 1456(c)(3)(A). A state's objection is subject to an override for procedural reasons, as a threshold matter, if the state failed to comply with the CZMA and its procedural regulations. 15 C.F.R. § 930.129(b).

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[1] Authority to make this determination as a threshold matter pursuant to 15 C.F.R. § 930.129(b) has been delegated to NOAA. *See* Department Organization Order 10-15 at 3.01(i)(u) (May 28, 2004), available at http://www.osec.doc.gov/omo/dmp/doos/doo10_15.html (last visited Oct. 14, 2010).

[2] Under the CZMA, the term "state" includes the Commonwealth of Puerto Rico. *See* 16 U.S.C. § 1453(5).

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II. Factual Background

Pan American is a privately-held company, engaged in importing, exporting, and processing grain, grain by-products, and fertilizer. The company owns and maintains port and milling facilities in an industrial section of San Juan Bay. Since 2002, Pan American has been making substantial improvements to its facilities: expanding an existing warehouse; constructing additional grain silos, a mill, and two warehouses; repairing an existing pier damaged by a 1998 hurricane (Hurricane Georges); and constructing a new marine leg and platform.[3] Except for construction of the marine leg and platform, the project is substantially complete.

Prior to the objection that is the subject of this appeal, Puerto Rico twice reviewed the project for consistency with the Commonwealth's coastal management program. In February 2002, Puerto Rico concurred with Pan American's original permit application,[4] thereby allowing the Corps to issue a permit necessary for construction of the project.[5] In 2008, Puerto Rico concurred with a Pan American request to extend its original permit.[6] In both instances, the project reviewed by Puerto Rico included a marine leg and platform. Following Puerto Rico's second concurrence, the Corps issued Pan American an extension to its permit, which remains in force until 2013.[7]

In 2009, Pan American sought to amend its existing Corps permit to authorize minor design improvements to its proposed marine leg and platform. Specifically, Pan American proposes to: (a) modify the dimensions of the platform, slightly enlarging its overall size; (b) construct a service walkway that would provide access to the platform; and (c) alter the piles supporting the platform, using twenty-four smaller piles instead of the six larger support piles conceived in the original design.[8] In the view of the Corps, the design changes proposed by Pan American would result in no coastal effects beyond those previously identified and reviewed. Given its permitting

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[3] A "marine leg" is a conveyer belt affixed to the pier and is designed to unload grain from a cargo ship. The marine leg at issue is comprised of two concrete platforms oriented in an "L" shape measuring, respectively, 90' x 30' and 33' x 30,' and a breasting dolphin against which vessels may be moored.

[4] Letter from Wanda I. Capó Rivera, Acting Chairperson, Common Wealth of Puerto Rico, Office of the Governor, Planning Board, to Mr. Jordi Bofil, CMA Architects and Engineers LLP, re: Federal Consistency Determination CZ-2002-0927-041, Sol. Cong. 0246, Pan American Grain Company, Feb. 21, 2002 (Puerto Rico Federal Consistency Determination CZ-2002-0927-041).

[5] Corps Permit Number 200105368(IP-CGR), issued Mar. 2002.

[6] Puerto Rico Planning Board Resolution CZ-2008-0213-047, Jun. 2, 2008.

[7] Pan American Principal Brief, at 6-9; Letter from Sindulfo Castillo, Chief, Antilles Regulatory Section, Department of the Army, Jacksonville District Corps of Engineers to NOAA Office of General Counsel, Apr. 12, 2010 (Corps Comments).

[8] Letter from Sindulfo Castillo, Chief, Antilles Regulatory Section, Department of the Army, Jacksonville District Corps of Engineers to NOAA Office of General Counsel, August 17, 2010 (Corps Supplemental Comments). Though not identified by either the parties or the Corps, Pan American's 2009 application also includes the construction of a service walkway that would be located alongside the platform and used to provide access to the platform. Joint Permit Application, June 2009, at 4. As such, I will consider it a part of Pan American's proposal for purposes of this review.

requirements, however, the Corps required Pan American to submit a new application. The Corps permit application form includes a CZMA consistency certification section the applicant must sign, potentially initiating a new CZMA consistency review process.

Following its third review of the project, Puerto Rico objected. Puerto Rico did not object to changes to the marine leg and platform, but rather objected to Pan American's continued use of a dead-end public road providing access to the facility, the lack of certain permits for an already constructed warehouse, and the lack of certain permits for an access control booth to Pan American's facility.[9] The dead-end road has been used by Pan American and its predecessor since 1957, and provides access to the Pan American facility and other industrial tenants. In support of its objection, Puerto Rico states that this public road is an integral part of the Guaynabo Municipal Government's local redevelopment and revitalization plan, and that the proposed project would violate two enforceable policies of the Commonwealth's federally approved coastal management program that relate principally to beach access.[10]

DISCUSSION

A threshold issue in this appeal is whether Puerto Rico was entitled to review Pan American's project a third time, based upon proposed changes to the marine leg and platform. As noted above, the CZMA provides states with federally-approved coastal management programs the opportunity to review proposed activities requiring federal licenses or permits if the activity would affect any land or water use or natural resource of the state's coastal zone. 16 U.S.C. § 1456(c)(3)(A).

State review under the CZMA of federal license and permit activities, however, is not without limit. Under NOAA regulations implementing section 1456(c)(3)(A), once a proposed license or permit activity has been reviewed and approved by a state as consistent with its coastal program, and assuming no intervening changes to the coastal program, further state review under the CZMA is limited to major amendments of the federal license or permit activity that "will cause

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[9] Letter from Héctor O'Neill García, Mayor, Commonwealth of Puerto Rico, Autonomous Municipal Government of Guaynabo, to Héctor Morales Vargas, President, Puerto Rico Planning Board, re: Federal Certificate of Compatibility CZ 2010-0703-001, Joint Application: 983, Nov. 2, 2009; Letter from Héctor O'Neill García, Mayor, Commonwealth of Puerto Rico, Autonomous Municipal Government of Guaynabo, to Héctor Morales Vargas, President, Puerto Rico Planning Board, re: Federal Certificate of Compatibility CZ 2010-0703-001, Joint Application: 983, Dec. 28, 2009.

[10] Puerto Rico cited the following two enforceable policies as the basis for its objection:

- The Objectives and Public Policies of the Land Use Plan of Puerto Rico establishing the following: Avoid building structures in beach areas, discourage activities in adjacent areas where they may impede or hinder free access to beaches and encourage free enjoyment of panoramic views, free access to the sun and enjoyment of these areas by all people.

- Planning Regulation Number 17: "Zoning Regulation for the Coastal Zones and the Access to Beaches and Coasts of Puerto Rico."

an effect on any coastal use or resource substantially different than those originally reviewed by the State agency." 15 C.F.R. § 930.51(b)(3).[11]

At this juncture, Pan American seeks approval from the Corps to modify its proposed marine leg and platform – a proposal that was twice reviewed and approved by Puerto Rico as consistent with its coastal management program. The design changes proposed by Pan American, however, would not result in coastal effects substantially different from those previously reviewed by Puerto Rico. This is evident from the nature of the proposed changes – a slightly larger marine platform, a modest walkway servicing the platform, and a reconfiguration of the pilings supporting the platform. It is reinforced by the views of the Corps, which confirms that the coastal effects of the amendment are not substantially different from those previously reviewed.[12] Finally, while Puerto Rico alleges new adverse effects, it has failed to identify a single change in coastal effects associated with the proposed modification. Because Pan American's proposed changes do not result in coastal effects substantially different from what Puerto Rico previously reviewed and approved, Puerto Rico was not entitled to a third federal consistency review.[13]

Given the above, I override Puerto Rico's objection pursuant to 15 C.F.R. § 930.129(b), because Puerto Rico did not have the right to review Pan American's proposed amendments to the project. Accordingly, necessary federal permits may issue.

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[11] This limitation on subsequent review is reinforced in 15 C.F.R. § 930.51(e), which defines the term "major amendment" as follows:

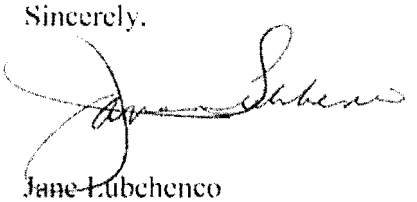
> The term "major amendment" of a federal license or permit activity means any subsequent federal approval that the applicant is required to obtain for modification to the previously reviewed and approved activity and where the activity permitted by issuance of the subsequent approval will . . . in the case of a major amendment subject to § 930.51(b)(3), affect any coastal use or resource in a way that is substantially different than the description or understanding of effects at the time of the original activity.

[12] Corps Supplemental Comments, at 2.

[13] I note that the permit application at issue in this appeal differs from how new permit applications are typically treated under NOAA's federal consistency regulations. As a general rule, new permit applications that seek authorization to conduct a federally-approved license or permit activity trigger state review for federal consistency. That said, where a state has previously reviewed and approved an activity, state reexamination of a project is guided by the whether the proposal constitutes a "major amendment" with coastal affects substantially different from what had been previously reviewed, as set forth in NOAA's regulation at 15 C.F.R. § 930.51(b)(3), not the procedural requirements of the licensing federal agency, which may require a new license application for reasons unique to the licensing statute and completely unrelated to the CZMA and to any change in anticipated coastal effects.

In this instance, the Corps' regulations required a new permit application, even though the Corps has stated that consideration of coastal effects was "not applicable" to the decision to require a new permit application. *See* Corps Supplemental Response, at 2. Because Pan American's proposal is really a request to make minor changes to an ongoing activity that has already been reviewed by Puerto Rico and licensed by the Corps, Pan American's proposal – for purposes of CZMA review – is considered as an amendment rather than a new license or permit activity.

Sincerely,



Jane Lubchenco
Under Secretary of Commerce
for Oceans and Atmosphere

cc: Puerto Rico Planning Board, P.O. Box 41119, San Juan, Puerto Rico 00940-1119, E-mail address: ortiz_R@jp.gobierno.pr

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305 (as revised), I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO APPLICANT'S MOTION AND MEMORANDUM FOR DECLARATORY ORDER THAT IT HAS ALREADY OBTAINED THE REQUIRED NEW YORK STATE COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW OF INDIAN POINT 2 AND 3 FOR RENEWAL OF THE OPERATING LICENSES," dated April 15, 2013, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above- captioned proceeding, this 15th day of April, 2013.

/Signed (electronically) by/

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