UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	May 6, 2013

ENTERGY'S COMBINED ANSWER AND REPLIES REGARDING COASTAL ZONE MANAGEMENT ACT ISSUES

Richard A. Meserve
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-6000
(202) 662-6291 fax

Bobby R. Burchfield
Matthew M. Leland
Clint A. Carpenter
MCDERMOTT WILL & EMERY LLP
500 North Capitol Street, NW
Washington, DC 20001-1531
(202) 756-8000
(202) 756-8087 fax

Kathryn M. Sutton
Paul M. Bessette
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004-2541
(202) 739-3000
(202) 739-3001 fax

William B. Glew, Jr.
William Dennis
ENTERGY SERVICES, INC.
440 Hamilton Avenue
White Plains, NY 10601
(914) 272-3360

Counsel for Entergy Nuclear Operations, Inc.

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PRELIMINARY STATEMENT

In its Motion for Declaratory Order filed on July 30, 2012, Entergy demonstrated that this Atomic Safety and Licensing Board ("Board") has authority under the Administrative Procedure Act and Nuclear Regulatory Commission ("NRC") precedents to issue declaratory orders in appropriate circumstances. (Entergy Mot. at 1-2, 4-5.) In addition, Entergy demonstrated that for federal license renewals, the federal regulations implementing the Coastal Zone Management Act ("CZMA") obviate further consistency review if the interested state has previously reviewed the pertinent activity, and if the license renewal will not cause 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). (Entergy Mot. at 6-7, 14, 21-22.) We further demonstrated that it is the federal licensing agency (here, this Board), rather than the state agency, that must determine whether any coastal zone effects are substantially different. 15 C.F.R. § 930.51(e) . (Entergy Mot. at 4.) Finally, Entergy demonstrated that New York State has repeatedly reviewed Indian Point Nuclear Generating Units 2 and 3 ("IP2" and "IP3") for consistency with the New York Coastal Management Program ("CMP"), and that license renewal will not produce any substantially different coastal zone effects. (Entergy Mot. at 14-24.)

The arguments made by New York and Riverkeeper in opposition are not persuasive. First, contrary to New York's assertion, the motion is not moot. Even though Entergy has submitted a consistency certification to the State of New York, it did so with a full reservation of rights to seek this Board's resolution of the issues raised in Entergy's motion.[1] Moreover, New York may very well object to Entergy's certification, and thus—in the absence of the declaratory

[1] *See* Notification of Entergy's Consistency Certification Pursuant to the Coastal Zone Management Act (Dec. 17, 2012), Att. 1 at 1-2, Att. 2 at 1 & n.2.

order sought by Entergy—preclude renewal of the IP2 and IP3 operating licenses. Further, their attack on the Board's jurisdiction to decide this dispute flies in the face of federal coastal zone management regulations, which plainly vest jurisdiction in the federal licensing agency to determine whether license renewal would produce coastal zone effects substantially different from those previously reviewed by New York. 15 C.F.R. § 930.51(e). And finally, the assertions by New York and Riverkeeper of different coastal zone effects are unfounded, and in any event raise issues vested by Congress in the exclusive jurisdiction of the NRC, not in the state CZMA process.

New York's cross-motion for a declaratory order fares no better. Even if everything New York argues were accurate—and it is not—this Board still could *not* properly issue a declaration that Entergy must comply with the state's CMP process. Among other reasons, Entergy has pending a separate action under New York State law for a declaration that the New York CMP grandfathers IP2 and IP3, obviating consistency review.[2] Further, New York simply cannot explain away the documentary record demonstrating that the New York Power Administration ("NYPA") and the New York Public Service Commission ("NYPSC") did, in fact, conduct consistency reviews of the plants' operations when they were transferred to Entergy in 2000 and 2001, and that the New York Department of Environmental Conservation ("NYSDEC") conducted a consistency review in 2003 in connection with a state pollutant discharge elimination system ("SPDES") process. Nor can New York deny that federal regulations require consideration of *any* previous consistency review, not just prior consistency reviews for *federal* projects. Finally, because federal regulations prohibit differential treatment of activities subject

[2] *See* Notification of Entergy's Verified Petition-Complaint Filed with the New York State Supreme Court for Albany County, New York (Mar. 15, 2013).

to both federal and state review, an activity deemed consistent with the CMP policies for purposes of a state permit or license cannot be deemed *inconsistent* with those very same policies in connection with a federal permit.

ENTERGY'S LIMITED REPLIES TO THE OPPOSITIONS OF NEW YORK STATE AND RIVERKEEPER

I. ENTERGY'S MOTION IS NOT MOOT.

When Entergy filed its consistency certification with the NRC and the New York State Department of State ("NYSDOS") on December 17, 2012, it did so with a full and explicit reservation of its rights to pursue the current motion, as well as to pursue state court litigation to enforce its rights under the "grandfathering" provisions of the CMP.

New York contends, however, that the mere filing by Entergy of a consistency certification has "eradicated" this dispute. (NYS Resp./Cross-Mot. at 16). But "mootness" would occur only if, because of intervening events, this Board's issuance of the requested declaratory order could not possibly affect the renewal of the IP2 and IP3 operating licenses. *See, e.g.*, *DeFunis v. Odegaard*, 416 U.S. 312, 316-20 (1974) (challenge to law school's admission policies was moot only because petitioner, who had been admitted to school pursuant to trial court injunction, had recently registered for his final term, which parties agreed entitled him to complete term and receive law degree "regardless of any decision th[e] Court might reach on the merits"). Entergy's filing of the consistency certification can have no such effect.

Mere submission of the consistency certification does not fulfill the requisite for CZMA compliance as a condition to license renewal. Nor does such a filing by itself guarantee a favorable consistency determination by NYSDOS. Indeed, New York's posture throughout these proceedings, and its repeated opposition to the continued operation of IP2 and IP3 (*see* Entergy Mot. at 13 n.36), suggest a significant risk that it will object to Entergy's consistency

certification. An objection by New York, if upheld on appeal by the Secretary of Commerce and in any subsequent litigation, would preclude license renewal *unless* this Board determines that a further consistency review is *not required* for license renewal. Issuance of the declaratory order requested by Entergy would deem the consistency requirement *already satisfied*, and thus clear the way for renewal of the license regardless of NYSDOS's action on the pending consistency certification. Accordingly, unless and until NYSDOS issues a concurrence with Entergy's consistency certification (or fails to issue a timely objection), *see* 16 U.S.C. § 1456(c)(3)(A), the dispute about whether a concurrence with Entergy's consistency certification is or is not necessary for license renewal will remain a live and critically important dispute. The motion is not moot.

II. FEDERAL CZMA REGULATIONS VEST JURISDICTION OVER ENTERGY'S MOTION IN THE NRC AS THE FEDERAL LICENSING AGENCY.

In its Motion, Entergy demonstrated that regulations implementing the CZMA vest jurisdiction in the NRC, as the federal licensing agency, to decide whether New York has conducted a previous consistency review of IP2 and IP3, and if so whether the coastal zone effects from license renewal are "substantially different than those originally reviewed." (Entergy Mot. at 4.) According to 15 C.F.R. § 930.51(e), "[t]he determination of substantially different coastal effects under paragraph[ ] (b)(3) . . . of this section is made on a case-by-case basis *by the Federal agency* after consulting with the State agency, and applicant." *Id*. (emphasis added). Notwithstanding this clear regulation, New York contends that the Board is not competent to interpret and apply the CZMA regulations.

New York's position is untenable. Not only is § 930.51(e) clear on its face, but the *Federal Register* notice accompanying it confirms the intention to vest authority to decide these very issues in the federal licensing agency: "NOAA did not intend . . . to have the State agency

make the decision on whether coastal effects are substantially different. Thus to provide clarification, NOAA has amended the section [15 C.F.R. § 930.51(e)] so that *the Federal permitting agency makes this determination* after consulting with the state and applicant." 71 Fed. Reg. 788, 795 (Jan. 5, 2006) (emphasis added).

New York cannot dispute this. Rather, its argument boils down to an assertion that simply because the NRC did not promulgate the CZMA regulations, it cannot interpret those regulations or exercise jurisdiction to resolve disputes arising under them. There is no support or logic to New York's position, and adopting it would be directly contrary to the CZMA regulations. Indeed, both the NRC Staff and this Board are frequently confronted with the need to interpret regulations issued by other agencies to address issues arising, for example, under the National Environmental Policy Act. *See, e.g.*, *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), 70 N.R.C. 227, 260 n.104 (2009) ("The Council on Environmental Quality, an agency created by NEPA, has promulgated regulations concerning compliance with NEPA," which "provide useful guidance in interpreting the scope of the environmental considerations enumerated in [the NRC's NEPA regulations].")

Moreover, little if any interpretation of the CZMA regulations will be necessary. The primary issues here are whether New York has previously reviewed IP2 and IP3 for consistency with its CMP, and if so whether the coastal zone effects from license renewal are "substantially different" than those previously reviewed. These are fact-laded issues, well within the NRC's competence.

III. LICENSE RENEWAL WILL NOT CAUSE SUBSTANTIALLY DIFFERENT COASTAL ZONE EFFECTS.

Both Riverkeeper, in opposing Entergy's Motion, and New York, in support of its Cross-Motion, argue that the coastal zone effects that will result from license renewal are "substantially

different" from any coastal effects previously reviewed. These arguments are flawed in three independent ways. First, they misconstrue the analysis required by the regulations in evaluating whether coastal zone effects from the proposed license activity (here, the continued operation of IP2 and IP3) are substantially different from those previously reviewed. Second, New York and Riverkeeper have not shown that the coastal zone effects alleged in their briefs are "substantially different" from those previously reviewed. And third, the effects they tout go to the core of the NRC's exclusive jurisdiction, and are barred from consideration by any state agency in the context of its CZMA review.

A. The Regulatory History Makes Clear That "Substantially Different" Coastal Zone Effects Result When "the Activity Will Be Modified Substantially Causing New Coastal Zone Effects."

As shown in Entergy's Motion (at 21-22), both the Senate Report accompanying the CZMA when passed in 1972 and the *Federal Register* Notice accompanying 15 C.F.R. § 930.51(b) make clear that CZMA review focuses on new or substantially modified *activity* in the coastal zone. The Senate Report explained that the CZMA "assures that . . . any *new activity* in the coastal zone, directly, significantly and adversely affecting coastal waters . . . will be reviewed by an appropriate State agency . . . . *Emphasis is placed upon 'new' activity.*" S. Rep. No. 92-753 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4793-94 (emphasis added). When NOAA issued the regulations at issue here, it reiterated this key principle by limiting "further [consistency] review to cases where . . . *the **activity** will be modified substantially* causing *new* coastal zone effects." 44 Fed. Reg. 37,142, 37,150 (June 25, 1979) (emphasis added).

This focus on an "activity" that is "new" or "modified substantially" is both logical and clear: it would make no sense to subject an existing facility to a redundant consistency review for purposes of license renewal if its operations were materially identical to the operations previously reviewed. For example, in any federal license renewal proceeding, a state could

always assert that the coastal impacts evaluated previously are now "substantially different" simply because the surrounding coastal environment has changed. Instead of protecting applicants from redundant consistency reviews, a focus on whether the *coastal environment* has changed, rather than on whether the *proposed activity* has changed, would encourage such redundant reviews through no fault of the applicant. Indeed, states might feel obligated to determine whether the coastal environment has changed in the years or decades between the time of a previous consistency review to the license renewal, thus engaging in duplicative consistency review. Any protection from "duplicative effort and unnecessary delays," 15 C.F.R. § 930.1(c), would be lost.[3] Moreover, NOAA's delegation of authority to federal licensing agencies to decide the question of "substantially different coastal effects," § 930.51(e), further underscores that the focus of the § 930.51(b)(3) inquiry is on changes to the *activity*, not the coastal environment. While most federal agencies have little involvement in coastal issues, *every* federal licensing agency necessarily has the expertise to determine whether the activities that it licenses have been, or will be, substantially modified.

Although ultimately the Staff recommends denial of the cross-motions, 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 [by Entergy] will have no additional coastal zone effects beyond those of currently-licensed operations." (Staff Ans. to Entergy Mot. at 14). The Staff also notes the existence of routine program changes to the CMP between 2001 and 2006 and believes consideration of the effect of those changes on the consistency certification is "an issue properly within the State's expertise to decide." (*Id.*). But neither the

[3] It is true, as the Staff's Answer to Entergy's motion notes, that changes in regulations may be considered, but only those changes made *before* the application at issue was filed. *See* 15 C.F.R. § 930.51(b)(2).

State nor the Staff has identified any pertinent change in the CMP between the time Entergy acquired IP2 and IP3 in 2000 and 2001, and the time it filed its license renewal application in 2007, nor has Entergy found any such change. (*See* Entergy RAI Resp. (Att. 3 to NYS Resp./Cross-Mot.) at 15 & n.66.)

Indeed, it is noteworthy that the only change to the CMP *cited by New York* is the "July 2012 Hudson River significant habitat designations." (NYS Resp./Cross-Mot. at 28). The July 2012 habitat designations were approved in November 2012 by the Office of Coastal Resource Management, however, to operate *prospectively* only, that is, in consistency reviews for license applications filed *after* November 2012. (*See* OCRM Approval Letter to NYSDOS (Att. 19 to NYS Resp./Cross-Mot.) (approving the incorporation of the July 2012 habitat designations "as enforceable policies of the New York CMP" that "shall only be applied [for federal consistency purposes] to applications for federal authorizations filed *after* OCRM's approval" (emphasis added)); *see also* 15 C.F.R. § 930.51(b)(2) (allowing further consistency review for "[r]enewals . . . of federal license or permit activities previously reviewed by the State agency which are filed *after* . . . management program changes not in existence at the time of original State agency review" (emphasis added)). Thus, the 2012 habitat designations cited by New York are legally inapplicable to Entergy's application for license renewal here.

B. The Purported Effects Asserted by Riverkeeper Are Not Substantially Different Coastal Effects Justifying Further Consistency Review.

Riverkeeper asserts that Entergy's more efficient operation of the two facilities, increasing power output by 3.26% at IP2 and by 4.85% at IP3, may cause different coastal zone effects. (RK Ans. at 19-20.) To the contrary, this greater efficiency does not come close to proving a *substantial modification* to plant operations of the sort envisioned by the regulation. An increase of 5% simply is not substantial in any respect.

But even if a less than 5% increase in power output were substantial, the effects hypothesized by Riverkeeper that might result from the increased power output are issues within the exclusive jurisdiction of the NRC, not the CZMA consistency review process. Riverkeeper hypothesizes that the increased power output "increases the likelihood of *plant components succumbing to various aging mechanisms,* posing an *increased risk of accidents* that could indisputably result in *radiological releases* and associated impacts to the . . . coastal resources of New York State." (*Id.* (emphasis added).) It cannot be gainsaid that this Board has exclusive jurisdiction to consider, and is delving deeply into, the aging of plant components and the consequences and mitigation of radiological accidents. Riverkeeper's suggestion that New York may conduct an independent review of those issues, and perhaps cause denial of the license on those grounds, is wholly unfounded.

Nor does Riverkeeper's assertion of effects due to "long-term onsite nuclear waste storage" demonstrate substantially different coastal zone effects. (*Id.* at 23-25.) To begin, these asserted effects purportedly result from ongoing plant operations, not from any substantial modification of plant operations. Like every other nuclear power plant in the United States, IP2 and IP3 have for many years stored spent nuclear fuel onsite in accordance with NRC regulations. Riverkeeper gives no reason to believe—much less any proof—that the coastal effects, if any, will increase merely because the amount of spent fuel stored onsite may increase as a result of license renewal. Moreover, Riverkeeper's speculation that there will be "significant impacts" is premised on further speculation that the "*future*" onsite storage of spent fuel might be "long-term, perhaps permanent." (*Id.* at 24.) Riverkeeper's supposition about the possible effects of future, yet-to-be-determined NRC actions on the issue of spent fuel storage fails entirely to demonstrate that license renewal "*will* cause" substantially different coastal effects.

15 C.F.R. § 930.51(b)(3) (emphasis added); *see also* Luxton Decl. (Att. 15 to Entergy Mot.) at 6 (noting that § 930.51(b)(3) "use[s] the standard 'will cause,' which represents a significantly higher evidentiary threshold than a more speculative requirement such as 'may cause'").

In any event, the possibility that onsite storage could be "long-term" was not, as Riverkeeper claims, "previously unforeseen" by New York. (RK Ans. at 24.) The amount of time that spent fuel will have to be stored at nuclear power plants has *always* been indefinite. Indeed, when New York conducted consistency reviews of IP2 and IP3's operations in 2001 and 2000, respectively, spent nuclear fuel had already been stored onsite for approximately 25 years. Moreover, New York expressly noted in those reviews that plans for a permanent, nationwide storage solution might not come to fruition.[4]

Finally, but most important, this issue is again in the exclusive domain of this agency, not the state consistency review process. By way of the Atomic Energy Act, the NRC has exclusive authority to regulate public health and safety of nuclear power activities. *See Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 207 (1983) (explaining that the federal government has exclusive jurisdiction over regulation of nuclear materials and that "no role was left for the states"); *see also Consol. Edison Co. of N.Y., Inc. v. Pataki*, 292 F.3d 338, 352-53 (2d Cir. 2002) ("The field of public health and safety regulation of nuclear power generation has been occupied by Congress through the Atomic Energy Act, 42 U.S.C. §§ 2011 *et*

[4] *See* Att. 6 to Entergy Mot. at ETR000032-33 (stating that Department of Energy "expects" that construction of a "centralized repository . . . to provide permanent storage for SNF" will "be completed by approximately 2010," and that "if this date is extended, planning for on site dry cask storage at IP3 may be necessary"); *id.* at ETR000039-40 (describing dry cask storage technologies and their successful use at other facilities, and stating that "[p]resent planning provides for the additional storage through the use of dry cask storage"); Att. 7 to Entergy Mot. at ETR000098 (describing expected need for additional onsite storage at IP2, and stating that construction of ISFSI on IP2 site "will eliminate the need for an off-Site storage facility prior to decommissioning"); *id.* at ETR000099 ("Decommissioning is expected to occur at the end of the existing or extended [i.e., renewed] NRC-issued license life of IP2. . . . It can be expected that [Entergy] . . . would seek a license extension . . . .").

seq., and therefore any regulation in that area by the states is preempted."). Among the nuclear activities within the NRC's exclusive regulatory authority is the long-term storage of radioactive materials. *See Jersey Cent. Power & Light Co. v. Lacey Tp.*, 772 F.2d 1103, 1109 (3d Cir. 1985) (citing the Atomic Energy Act, 42 U.S.C. §§ 2014, 2061-64, 2071, 2078, 2091-99, 2111-14) (holding that ordinance prohibiting the importation of spent nuclear fuel was preempted). Releases of radiological materials—resulting, for example, from "SFP fires," "radiological leaks," or "dry casks" (RK Ans. at 24)—are similarly within the exclusive domain of the NRC. *See Train v. Colo. Pub. Interest Research Group, Inc.*, 426 U.S. 1, 16 n.12 (1976). For these reasons, New York is precluded from reviewing or imposing standards on IP2 and IP3's storage of radioactive materials.

In an attempt to bolster its argument that the long-term storage of spent nuclear fuel is a "substantially different coastal effect" that triggers a consistency review, Riverkeeper relies on the recent court ruling on the NRC's Waste Confidence Decision in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012). (RK Ans. 23-24.) The Waste Confidence Decision represents the *NRC's* generic determination that spent nuclear fuel can be stored safely and without significant environmental impacts for 60 years after the end of the licensed life of a nuclear power plant. *See* 77 Fed. Reg. 65,137 (Oct. 25, 2012). In *New York v. NRC*, New York and three other states challenged the NRC's Waste Confidence Decision on the basis that it required additional NRC discussion of the bases for its findings that long-term spent fuel storage will have no significant impacts to the environment. Although the court ruled in favor of New York and vacated the NRC's Waste Confidence Decision, the court remanded the issue to the NRC for further review. By no means does *New York v. NRC* diminish the NRC's exclusive authority over this field or

imply that such matters may fall within the scope of state CZMA regulation—indeed, the NRC is presently exercising that exclusive authority in its pending generic rulemaking on this very issue.

Moreover, New York has previously acknowledged that its environmental review authority over this issue is preempted. On August 17, 2001, the New York Public Service Commission issued its Final Supplemental Environmental Impact Statement ("FSEIS") for the transfer of IP2 from Consolidated Edison to Entergy. Parties commenting on the draft EIS had raised concerns about the implications of spent fuel storage on the environment. (*See* Att. 7 to Entergy Mot. at ETR000069.) The NYPSC noted in response, however, that the NRC is responsible for setting and enforcing standards for health and safety concerns relating to radiation exposure. (*See id.* at ETR000095.) The NYPSC continued by explaining that "[p]ermanent disposal of commercial spent fuel is the responsibility of the federal government" and temporary on-site spent fuel storage is "authorized, controlled, and subject to NRC inspection, under the same NRC-issued licenses that authorize reactor operation." (*Id.* at ETR000098.) Acknowledging that it had no authority over these radiological safety issues, New York nonetheless found the operation of IP2 consistent with the enforceable policies of the CMP. (*See id.* at ETR000054.)

Riverkeeper's other arguments that license renewal will cause substantially different coastal effects, while equally unavailing, are duplicative of arguments asserted in New York's Cross-Motion. Entergy responds to New York's arguments below at pp. 24-26.

Accordingly, Entergy urges the Board to grant its Motion and issue a Declaratory Order stating that license renewal will not cause coastal zone effects substantially different from those previously reviewed by New York, and that no further consistency review is necessary for license renewal.

ENTERGY'S OPPOSITION TO NEW YORK'S CROSS-MOTION

I. THE CONSISTENCY REVIEWS IDENTIFIED BY ENTERGY ESTABLISH THAT NEW YORK HAS "PREVIOUSLY REVIEWED" THE OPERATIONS OF IP2 AND IP3 WITHIN THE MEANING OF 15 C.F.R. § 930.51(B)(3).

In Entergy's opening papers, we demonstrated that agencies of New York State have repeatedly reviewed IP2 and IP3 for consistency with the CMP in the context of approving the transfers of those plants to Entergy in 2000 and 2001, in the context of the SPDES water quality proceedings in 2003, and in the context of numerous state permits and licenses. (Entergy Mot. at 10-11, 15-21 & Exs. 6-8, 21-25). Ignoring almost all of this, New York responds adamantly and repeatedly that (a) only NYSDOS may conduct consistency reviews for federal licenses, (b) NYSDOS has never done a consistency review of IP2 and IP3, and (c) any reviews by other state agencies cannot count as "previous reviews" for purposes of 15 C.F.R. § 930.51(b)(3). As the Staff correctly points out, New York "fails to provide any meaningful discussion of the legal effect of the reviews that were conducted by other State agencies, or of the potential effect of NYSDOS's tacit or implicit acceptance of those reviews. In the Staff's view, New York has not provided sufficient information to support a conclusive finding that the State has not previously conducted a review of the effects on coastal zone resources that may be occasioned by operation of IP2 or IP3." (Staff Ans. to NYS Cross-Mot. at 10).

A. New York Agencies Have Repeatedly Reviewed the Operations of IP2 and IP3 for Consistency with the CMP.

The operations of the Indian Point plants have been found consistent with the policies of the New York CMP several times in the past – including at least in the following four instances.

1. NYPA's consistency review of IP3's operations.

In March 2000, as part of its SEQRA environmental review of the transfer of IP3 and the James A. FitzPatrick ("JAF") plant to Entergy, NYPA completed a "*Federal Consistency*

Assessment Form" that "constitute[s] a determination of consistency" with CMP policies. *See* 19 NYCRR § 600.4(b).[5] That transfer also required NRC approval. *See* 10 C.F.R. § 30.34(b) (requiring NRC approval for transfer of any NRC-issued license to a new owner). Prior to making its consistency determination, NYPA sent letters to all interested agencies, including NYSDOS, stating NYPA's intention to serve as the "lead agency" for the review of the transfer in accordance with SEQRA regulations and the CMP. NYSDOS "had no objection to [NYPA] assuming the role of Lead Agency" for the review process.[6] Thus, NYSDOS was aware of, and did not object to, NYPA's exercise of authority to determine whether the transfer was consistent with the policies in the CMP.

The documents make clear that NYPA reviewed not only the transfer itself, but also the existing and future operations of IP3 for consistency with the CMP. In addressing individual CMP policies, NYPA repeatedly recited that, at the time of the transfer, IP3 "operate[d] in compliance with all applicable environmental laws and regulations" and would be "required to continue to do so under any new ownership."[7] Moreover, as required by the CMP and state

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[5] See Att. 6 to Entergy Mot. at ETR000023.

[6] *See* Att. 6 to Entergy Mot. at ETR000030.

[7] Att. 6 to Entergy Mot. at ETR000025 (re CMP Policy 30); *see also* ETR000024 (re CMP Policy 44: "The prospective buyer will purchase the sites in compliance with all applicable environmental permits and licenses [and] would then be required by law to maintain the sites in compliance with the terms and conditions [thereof]."); *id.* (re CMP Policy 11: "Existing site buildings and structures have been sited and constructed in accordance with all applicable laws and regulations."); ETR000025 (re CMP Policy 30: "The prospective buyer will purchase the sites in compliance with existing environmental permits and licenses [and] would then be required to maintain these sites in compliance with the terms and conditions [thereof]."); *id.* (re CMP Policy 38: "The plants are in compliance with all applicable environmental regulations [and] will be required to remain in compliance under any new ownership."); ETR000026 (re CMP Policy 38: "The plants are in environmental compliance, and will be required to remain so under new ownership."); *id.* (re CMP Policy 40: "The plants comply with all applicable environmental regulations [and] will be required to continue to do so under any new ownership, pursuant to applicable environmental regulations."); *id.* (re CMP Policy 40: "IP3 and JAF operate in compliance with all applicable environmental regulations [and] will be required to continue to do so under any new ownership."); *id.* (re CMP Policy 41: "The sites currently operate in compliance with all applicable air quality regulations [and] will be required to continue to do so under any new ownership."); ETR000029 (re CMP Policy 18: "The prospective buyer

regulations, *see* CMP, pt. II, § 4, at 2-4, 7-9; 19 NYCRR § 600.4(b), NYPA's consistency review was part of its environmental assessment under SEQRA, which also evaluated IP3's operations. For example, NYPA's summary of the "Reasons Supporting This Determination" (i.e., that the transfer would not have a significant effect on the environment) includes the following:

> The sale, when completed, will involve the transfer to and assumption by Entergy of the ownership and *operation of IP3* & JAF *in the same manner* as provided for in the state & federal licenses, permits, & approvals currently in effect for these facilities. . . . Entergy can draw upon its extensive *operational* experience and sound financial resources, and is committed to the continuation of *current operations* without substantial change.[8]

Indeed, NYPA's environmental assessment is replete with analysis of the existing environment at the IP3 site,[9] NYPA's then-existing operation of IP3,[10] and the future operation of IP3 under new ownership.[11]

2. NYPSC's consistency review of IP2's operations.

In August 2001, NYPSC issued an FSEIS in which it determined that "the proposed transfer of IP2 and IP3 to Entergy" is "consistent with applicable coastal zone policies set forth in 19 NYCRR § 600.5 [i.e., the New York coastal policies],"[12] as required by the CMP and SEQRA regulations. NYPSC later issued an order containing a further written finding of

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will acquire the sites in compliance with all applicable environmental laws and regulations. The plants, once under new ownership, will be required to continue to comply with these laws and regulations.").

[8] Att. 6 to Entergy Mot. at ETR000003 (emphasis added); *see also* Entergy Mot. at 18 (discussing other examples).

[9] *See* Att. 6 to Entergy Mot. at ETR000006-09, 17-21, 31.

[10] *See* Att. 6 to Entergy Mot. at ETR000031-33, 35, 38-40.

[11] *See* Att. 6 to Entergy Mot. at ETR000035-40.

[12] *See* Att. 7 to Entergy Mot. at ETR000054.

consistency.[13] These statements by NYPSC, acting as the "lead agency" for the environmental review of the transfer,[14] "constitute[ ] a determination of consistency" for purposes of New York State's authorization of the transfer. 19 NYCRR § 600.4(a). The transfer also required NRC approval. *See* 10 C.F.R. § 30.34(b).

Like NYPA's consistency review for IP3, NYPSC's consistency review for IP2 was part of its environmental assessment, as required by the CMP and state regulations. *See* CMP, pt. II, § 4, at 2-4, 7-9; 19 NYCRR § 600.4(a); 6 NYCRR § 617.9(b)(5)(vi), (b)(8); 6 NYCRR § 617.11(e). NYPSC reviewed not only the transfer of IP2 to Entergy, but also the operations of IP2.[15] And like NYPA's environmental assessment, NYPSC's environmental assessment for the transfer of IP2 is replete with analysis of the existing environment at the site,[16] ConEd's then-existing operation of IP2,[17] and the future operation of IP2 under Entergy's ownership.[18]

For example, NYPSC's review of IP2's operations at the time of the transfer included (a) the effects of IP2's operations on air resources, water resources, and endangered species (Att. 7 to Entergy Mot. at ETR000059-63); (b) IP2's waste generation, storage, and disposal, its petroleum storage, and its chemical bulk storage (ETR000063-65); and (c) ConEd's

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[13] *See* Att. 21 to Entergy Mot. at 11 ("The Commission's action is consistent with the applicable policies set forth in Article 42 of the Executive Law, as implemented by 19 NYCRR § 600.5 . . . .").

[14] *See* Att. 7 to Entergy Mot. at ETR000051 (identifying the New York State Department of Public Service as the lead agency).

[15] *See, e.g.*, Entergy Mot. at 18-19 (discussing statements by NYPSC demonstrating that its consistency review encompassed IP2's operations).

[16] *See* Att. 7 to Entergy Mot. at ETR000057-59.

[17] *See* Att. 7 to Entergy Mot. at ETR000059-67 ("highlighting specific environmental regulatory aspects of IP2's [then-existing] operations").

[18] *See* Att. 7 to Entergy Mot. at ETR000084-101 (addressing potential environmental impacts of post-transfer operation of IP2 by Entergy and, in many cases, comparing it with ConEd's operation of IP2).

"comprehensive environmental management systems" and environmental permits for IP2 (ETR000065-67).

Likewise, NYPSC thoroughly reviewed the potential impacts on "New York State's coastal zone" of IP2's future operations under Entergy's ownership (Att. 7 to Entergy Mot. at ETR000088-89), including potential impacts on air quality (ETR000085-86), water quality (ETR000086), visual aesthetics (ETR000086-87), land (ETR000087-88), plants and animals (ETR000089), agricultural land resources (ETR000089), historical and archaeological resources (ETR000089-90), open space and recreation (ETR000090), transportation (ETR000090-91), energy (ETR000091), noise and odor emissions (ETR000091-92), community growth and character (ETR000092-94), local property taxes (ETR000094-95), and health and safety (ETR000095-96).

3. NYSDEC's first consistency review of IP2 and IP3's operations.

In February 2000, NYSDEC completed a Coastal Assessment Form ("CAF") that reflects its determination that renewal of the plants' SPDES permit will not "affect the achievement of [New York's] coastal policies."[19] NYSDOS, as the agency having oversight over other state agencies' consistency determinations, reviewed and concurred with NYSDEC's CAF, indicating on a State Consistency Project Review Sheet that "No Comments [were] Necessary."[20] NYSDOS' approval of NYSDEC's consistency determination, without comment, indicates that NYSDOS was fully aware of, and approved, NYSDEC's determination that the SPDES permit renewal was consistent with the policies of the CMP.

[19] *See* Att. 24 to Entergy Mot.

[20] *See* Att. 25 to Entergy Mot.

Moreover, because thermal discharges from IP2 and IP3 would necessarily result from their operations, NYSDEC's consistency review necessarily considered whether the operations of IP2 and IP3 were consistent with the policies of the CMP. This inference from NYSDEC's 2000 consistency review is borne out by its 2003 consistency review, discussed below.

4. NYSDEC's second consistency review of IP2 and IP3's operations.

In the June 2003 FEIS for the renewal of IP2 and IP3's SPDES permit, NYSDEC reaffirmed its earlier consistency determination from February 2000. After acknowledging its obligations under SEQRA and the CMP to "find that . . . permitting actions . . . are consistent with the Coastal Management Program" and to include in the EIS "an identification of the applicable coastal . . . policies and a discussion of the effects of the proposed action on such policies," NYSDEC concluded that "[t]he SPDES permit renewal[ ] . . . will not result in any new effects on coastal zone policies" and incorporated by reference the "[c]oastal zone consistency forms . . . contained in DEIS appendix IV-5."[21] One of those consistency forms is a CAF prepared by NYPA on behalf of itself and ConEd, which were the original applicants for IP2 and IP3's SPDES permit renewal. That CAF states NYPA's determination that renewal of the plants' SPDES permit will not "affect the achievement of [New York's] coastal policies."[22]

Like NYPA and NYPSC's consistency reviews, NYSDEC's consistency review for IP2 and IP3 was part of its SEQRA environmental assessment and encompassed the plant's operations. Indeed, as summarized in the FEIS for the renewal of the SPDES permit for IP2 and IP3, NYSDEC "assessed the resources likely to be impacted by the facilities; evaluated alternative technologies and management strategies to mitigate impacts from each facility's

[21] Att. 22 to Entergy Mot. at 23-24 (citing 6 NYCRR §§ 617.9(e), 617.14(d)(10); 19 NYCRR § 600.4(a)).

[22] Att. 23 to Entergy Mot. at ETR000212.

operations; and proposed a preferred action intended to reduce the respective impacts."[23] Thus, NYSDEC's review evaluated, among other things, "the significance of entrainment mortality [and] other impacts of *continued operation of [IP2 and IP3]*, including thermal impacts."[24]

* * *

For each of these four consistency reviews, the reviewing state agencies had authority under the CMP and state regulations to conduct their reviews as part of the SEQRA environmental assessment process.[25] The CMP likewise gave NYSDOS the authority in every instance to advise the reviewing agency regarding the consistency of the proposed action, and the obligation to monitor, review, and evaluate the agency's consistency determination.[26]

B. Consistency Reviews for State Permits or Licenses Constitute "Previous Reviews" If They Reviewed the Same "Activity."

New York does not deny that these consistency reviews occurred, that the agencies that conducted the reviews—NYPA, NYPSC, and NYSDEC—were authorized by New York law and the CMP to do so, or that each review found the operations of IP2 and IP3 consistent with the very same CMP policies that would be applied if NYSDOS conducts another consistency review of IP2 and IP3. Rather, New York's primary argument is that NYSDOS is the State agency designated by New York to conduct consistency reviews for federal licenses and projects, and that NYSDOS has never conducted its own consistency review of IP2 or IP3.

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[23] Att. 22 to Entergy Mot. at 1 (emphasis added) (describing the Draft EIS ("DEIS")—the FEIS "consists of the original DEIS," plus "comments received on the DEIS; [NYSDEC]'s responses to those comments, [and] expanded discussions of the regulatory setting and alternatives for mitigation of impacts from the operation of [IP2 and IP3]").

[24] Att. 22 to Entergy Mot. at 4 (emphasis added).

[25] *See* CMP, pt. II, § 4, at 2-4, 7-9; 19 NYCRR §§ 600.1(d), 600.4; 6 NYCRR § 617.9(b)(5)(vi), (8); 6 NYCRR § 617.11(e).

[26] *See* CMP, pt. II, § 4, at 3.

New York's argument fails for two reasons. First, and more important, the regulation upon which Entergy relies does not limit the term "previously reviewed" to consistency reviews done in connection with federal licenses or permits. Rather, 15 C.F.R. § 930.51(b)(3) asks whether the renewal of "activities" which were "previously reviewed" will "cause an effect on any coastal use or resource substantially different than those originally reviewed by the State agency." Thus, properly read, section 930.51(b)(3) encompasses *any* consistency review by *any* state agency of the "*activities*" subject to license renewal. *See* § 930.51(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 . . . ." (emphasis added)); 44 Fed. Reg. at 37,150 (explaining that § 930.51(b)(3) limits "further [consistency] review to cases where . . . *the activity* will be modified substantially causing new coastal zone effects." (emphasis added)). Thus, the "previous review" requirement looks to the *activity*, not the type of license or permit. It does not matter whether the previous review was for a state license or a federal license, so long as the state agency reviewed the same *activity* that is at issue in the federal license renewal—here, the operation of IP2 and IP3.

Moreover, New York does not dispute that NYSDOS, in the CMP, has delegated the authority to conduct consistency reviews for state licenses and other authorizations to the authorizing state agencies, such as NYSDEC, NYPA, and NYPSC, retaining for itself a monitoring and supervision role. *See* CMP pt. II, § 4, at 2-4, 7-9; *see also* 15 C.F.R. § 930.11(o) ("The term 'State agency' means the agency of the State government designated pursuant to section 306(d)(6) of the [CZMA] . . . *or a single designee State agency appointed by the 306(d)(6) State agency.*" (emphasis added)). Nor does New York dispute that, notwithstanding

minor procedural differences, the consistency reviews conducted by New York agencies for state authorizations are, in substance, the same as the consistency reviews conducted by NYSDOS for federal authorizations—both require the reviewing agency to determine whether the proposed activity is consistent with the policies of the CMP. *Compare* 15 C.F.R. §§ 930.57(a), .62(a), .63(b) (requiring State agency to either concur with or object to federal license applicant's certification that "[t]he proposed activity complies with the enforceable policies of [the State's CMP] and will be conducted in a manner consistent with such [CMP]"), *with* CMP pt. I, at 2 (providing that the CMP's "[f]orty-four coastal management policies will apply to State agency decisions," and that "[a]ll activities involving a State permit, funding, or other action will be undertaken in a manner consistent with the coastal policies"); *id.* pt. II, § 4, at 4 ("The State agency having jurisdiction over a proposed action is responsible for determining the consistency of that action with the coastal policies.").[27] Indeed, the fact that NYPA's completion of both state *and* federal CAFs in its consistency review for IP3 required no apparent change in its analysis, much less in its ultimate conclusion of consistency with the CMP policies, highlights the lack of any substantive difference between state and federal consistency reviews. (*See* Att. 6 to Entergy Mot. at ETR000022-29.)

Federal regulations state that "the issuance or denial of relevant State permits can constitute the State agency's consistency concurrence or objection *if* the State agency ensures that the State permitting agencies . . . review individual projects to ensure consistency with all

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[27] *See also* 15 C.F.R. § 930.6(a) (requiring states "to uniformly and comprehensively apply the enforceable policies of the State's management program"); 65 Fed. Reg. 77,124, 77,128 (Dec. 8, 2000) ("Uniformity is required to ensure that States are not applying policies differently, or in a discriminatory way, among various entities for the same type of project for similar purposes, *e.g.*, holding a Federal agency to a higher standard than a local government or private citizen."); Entergy RAI Response (Att. 3 to NYS Resp./Cross-Mot.) at 6-9 (explaining in greater detail the consistency review processes for federal and state authorizations).

applicable State management program policies." 15 C.F.R. § 930.6(c) (emphasis added). Indeed, "if all management program enforceable policies are contained in State permit standards, then *usually the issuance of the relevant State permit(s) will be sufficient for determining consistency*." 65 Fed. Reg. 77,124, 77,129 (Dec. 8, 2000) (elaborating on 15 C.F.R. § 930.6(c)) (emphasis added). As shown, New York's program meets this condition.

Accordingly, where, as here, a New York agency with authority delegated by the CMP has previously reviewed the same *activity* for which the federal license renewal is sought—whether for a *federal* activity or a *state* activity—the renewal requires no further consistency review unless the renewal activity "will cause . . . substantially different coastal effects." § 930.51(b)(3), (e). Under the federal CZMA regulations, it simply does not matter whether the previous review was conducted by NYSDOS for a federal license or by another authorized New York agency for a state license.

C. NYSDOS May Delegate Consistency Reviews of Federal Activities to Other State Agencies.

In any event, and alternatively, the federal CZMA regulations recognize that a "State agency" appointed to conduct federal consistency reviews may delegate that authority to other state agencies. *See* 15 C.F.R. § 930.11(o); (*see also* Entergy Mot. at 7). The delegation of authority is permissible so long as it is "described" in the State's management program. *See* 15 C.F.R. § 930.6(a). In each of the four consistency reviews discussed above, NYSDOS was aware of the review and approved of another agency's review.

Although New York argues that NYSDOS, and only NYSDOS, may conduct a federal consistency review, it is noteworthy that it cites no provision making such an unequivocal declaration, and our review has disclosed no such provision. New York's CMP states that NYSDOS "will also be responsible for conducting the Federal consistency review process at the

State level. *Generally*, the Department will evaluate major actions proposed in the Coastal Area of the State by Federal agencies or by entities requiring Federal permits and determine the consistency of those actions with the Program's policies." CMP pt. II, § 4, at 3 (emphasis added). But the CMP also states:

> Chapter 464 of the Laws of 1973 authorizes [NYSDOS] to apply for, receive and administer any Federal funds which are made available to the State under the Coastal Zone Management Act of 1972, as amended. *These Laws also permit [NYSDOS] to enter into agreements with other State, regional, county and local agencies which could assist the Department of State in the administration and/or implementation of the Coastal Management Program.*

Id. at 2 (emphasis added). Of particular relevance here, NYSDOS is to "coordinate its review of federal activities for consistency with New York's CMP with other state agencies" when an activity, such as nuclear power plant operation, is subject to federal and state consistency reviews. *See id.* § 9, at 10.

New York ignores the CMP's multiple delegations of consistency review authority that bear upon nuclear power plant operations. For example, the CMP provides that the New York State Department of Environmental Conservation ("NYSDEC" or "DEC")

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

Id. § 4, at 3. The CMP also vests the New York Power Authority ("NYPA") and New York State Public Service Commission ("NYSPSC") with responsibility for assuring activities within their jurisdiction are consistent with the policies in New York's CMP. *Id*. at 3-4. NYSDOS maintains

a monitoring and advisory role, *id*. at 3, 9, but agencies other than NYSDOS may conduct these consistency reviews.

Nevertheless, even if New York is correct that no state agency other than NYSDOS may conduct a consistency review for a federal license, and that other state agencies may conduct consistency reviews only for state permits, federal CZMA regulations make clear that a *state* consistency review may be a sufficient previous review to obviate a subsequent federal consistency review. *See* 15 C.F.R. § 930.6(c) ("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 . . . .").

II. LICENSE RENEWAL WILL NOT PRODUCE NEW OR DIFFERENT COASTAL ZONE EFFECTS.

New York also seeks a declaratory ruling that a consistency review is required on the purported basis that the license renewal will produce significantly different coastal zone effects than those previously reviewed. New York's assertions, echoed by Riverkeeper (*see* RK Ans. at 20-25), are not persuasive.

First, there is no merit to the argument that a potential modification to the existing cooling water system at IP2 and IP3 mandates further consistency review. (NYS Resp./Cross-Mot. at 29-30.) This issue is the subject of ongoing proceedings before NYSDEC concerning renewal of IP2 and IP3's SPDES permit. Whatever ultimate modification of the cooling system, if any, will be required or implemented is currently unknown. While it may or may not be appropriate for NYSDOS or NYSDEC to conduct a consistency review of any cooling system modification that is eventually implemented, any such consistency review will occur in the context of issuing the SPDES permit, *not* the operating license renewal at issue before this Board. Presumably even New York would concede that a consistency review in the context of

the SPDES permit would be under the auspices of the NYSDEC, not NYSDOS. CMP pt. II, § 4, at 3.

Equally unavailing is New York's argument that "leaks of radiological material into the Hudson River environment" from spent fuel pools at IP2 and IP3 demonstrate a substantially different coastal zone effect. (NYS Resp./Cross-Mot. at 30.) To begin, this asserted effect purportedly results from *prior and ongoing* plant operations, not from any substantial *modification* of plant operations. *See* 44 Fed. Reg. at 37,150 (explaining that 15 C.F.R. § 930.51(b)(3) limits "further [consistency] review to cases where . . . the activity will be modified substantially causing new coastal zone effects."). Further, the NRC and NYSDEC have conducted multiple independent assessments of these discharges.[28] Both agencies concluded that there are no measurable impacts on human health, groundwater quality, and ecological resources from the discharges.[29] Moreover, the NRC determined that the releases are well below (<0.1%) the NRC limits for plant effluents and associated calculated offsite doses.[30] Because these releases are considered *de minimis* for nuclear power plant operations by the agency with exclusive regulatory authority over them, spent fuel pool discharges cannot qualify as "coastal effects" for CZMA purposes or "substantially different" from previous plant operations. In any event, New York gives no reason to believe—much less any proof—that these effects will *increase* as a result of license renewal.

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[28] Testimony of Entergy Witnesses Donald M. Mayer, Alan B. Cox, Thomas C. Esselman, Matthew J. Barvenik, Carl J. Paperiello, and F. Owen Hoffman Concerning Consolidated Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks), at ¶¶ A108-A117, Mar. 29, 2012 (ENT000301).

[29] *See id*.

[30] *See id*. ¶¶ A112, A118.

Finally, but most important, this issue is in the exclusive domain of the NRC, not the state consistency review process, for the same reasons, discussed above at pp. 10-11, as the issue of "long-term onsite nuclear waste storage" raised by Riverkeeper. *See, e.g.*, *Train v. Colo. Pub. Interest Research Group, Inc.*, 426 U.S. 1, 16 n.12 (1976) ("States are precluded [under the Atomic Energy Act] from playing any role in several significant areas of regulation including the setting of limitations on radioactive discharges from nuclear power plants."). Because state regulation of radiological discharges is preempted by federal law, such discharges cannot constitute a "substantially different coastal effect" subject to state consistency review.

REQUEST FOR ORAL ARGUMENT

Because of the "novel and complex" issues raised by Entergy's Motion and New York's Cross-Motion (Order Granting Entergy's Motion for an Extension of Time and for Leave to File Replies 2 (Apr. 11, 2013)), Entergy respectfully submits that oral argument would be helpful to the Board. Accordingly, Entergy requests oral argument on the Motion and Cross-Motion.

CONCLUSION

For the reasons set forth above and in Entergy's Motion, Entergy urges the Board to issue a Declaratory Order that IP2 and IP3 have been previously reviewed for consistency with the New York Coastal Management Program, that license renewal will produce no coastal zone effects substantially different from those previously reviewed, and accordingly that no further consistency review is necessary for purposes of Entergy's License Renewal Applications for IP2 and IP3. For these same reasons, Entergy also urges the Board to deny New York's Cross-Motion for a Declaratory Order.

Dated: May 6, 2013

Respectfully submitted,

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

Richard A. Meserve
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-6000
(202) 662-6291 fax

Kathryn M. Sutton
Paul M. Bessette
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004-2541
(202) 739-3000
(202) 739-3001 fax

Bobby R. Burchfield
Matthew M. Leland
Clint A. Carpenter
MCDERMOTT WILL & EMERY LLP
500 North Capitol Street, NW
Washington, DC 20001-1531
(202) 756-8000
(202) 756-8087 fax

William B. Glew, Jr.
William Dennis
ENTERGY SERVICES, INC.
440 Hamilton Avenue
White Plains, NY 10601
(914) 272-3360

Counsel for Entergy Nuclear Operations, Inc.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	May 6, 2013

CERTIFICATE OF SERVICE

I certify that on May 6, 2013 copies of the foregoing Combined Answer and Replies were served electronically via the Electronic Information Exchange on the following recipients:

Administrative Judge
Lawrence G. McDade, Chair
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: Lawrence.McDade@nrc.gov)

Administrative Judge
Dr. Michael F. Kennedy
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: Michael.Kennedy@nrc.gov)

Administrative Judge
Dr. Richard E. Wardwell
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: Richard.Wardwell@nrc.gov)

Office of the Secretary
Attn: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: hearingdocket@nrc.gov)

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-7H4M
Washington, DC 20555-0001
(E-mail: ocaamail.resource@nrc.gov)

Shelby Lewman, Law Clerk
Anne Siarnacki, Law Clerk
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: shelbie.lewman@nrc.gov)
(E-mail: Anne.Siarnacki@nrc.gov)

Sherwin E. Turk, Esq.
Edward L. Williamson, Esq.
Beth N. Mizuno, Esq.
David E. Roth, Esq.
Brian G. Harris, Esq.
Mary B. Spencer, Esq.
Anita Ghosh, Esq.
Brian Newell, Paralegal
Office of the General Counsel
Mail Stop: O-15D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: Sherwin.Turk@nrc.gov)
(E-mail: Edward.Williamson@nrc.gov)
(E-mail: Beth.Mizuno@nrc.gov)
(E-mail: David.Roth@nrc.gov)
(E-mail: Brian.Harris@nrc.gov)
(E-mail: Mary.Spencer@nrc.gov)
(E-mail: Anita.Ghosh@nrc.gov)
(E-mail: Brian.Newell@nrc.gov)

Melissa-Jean Rotini, Esq.
Assistant County Attorney
Office of Robert F. Meehan, Esq.
Westchester County Attorney
148 Martine Avenue, 6th Floor
White Plains, NY 10601
(E-mail: MJR1@westchestergov.com)

Manna Jo Greene
Karla Raimundi
Hudson River Sloop Clearwater, Inc.
724 Wolcott Ave.
Beacon, NY 12508
(E-mail: mannajo@clearwater.org)
(E-mail: karla@clearwater.org)
(E-mail: stephenfiller@gmail.com)

Daniel Riesel, Esq.
Victoria Shiah Treanor, Esq.
Sive, Paget & Riesel, P.C.
460 Park Avenue
New York, NY 10022
(E-mail: driesel@sprlaw.com)
(E-mail: vshiah@sprlaw.com)

John Louis Parker, Esq.
Office of General Counsel, Region 3
NYS Dept. of Environmental Conservation
21 S. Putt Corners Road
New Paltz, New York 12561-1620
(E-mail: jlparker@gw.dec.state.ny.us)

John J. Sipos, Esq.
Charlie Donaldson Esq.
Assistant Attorneys General
Office of the Attorney General
of the State of New York
The Capitol
Albany, NY 12224-0341
(E-mail: John.Sipos@ag.ny.gov)
(E-mail: Charlie.Donaldson@ag.ny.gov)

Michael J. Delaney, Esq.
Vice President -Energy Department
New York City Economic Development
Corporation (NYCDEC)
110 William Street New York, NY 10038
mdelaney@nycedc.com

Phillip Musegaas, Esq.
Deborah Brancato, Esq.
Riverkeeper, Inc.
20 Secor Road
Ossining, NY 10562
(E-mail: phillip@riverkeeper.org)
(E-mail: dbrancato@riverkeeper.org)

Sean Murray, Mayor
Kevin Hay, Village Administrator
Village of Buchanan
Municipal Building
236 Tate Avenue
Buchanan, NY 10511-1298
(E-mail: smurray@villageofbuchanan.com)
(E-mail: Administrator@villageofbuchanan.com)

Robert D. Snook, Esq.
Assistant Attorney General
Office of the Attorney General
State of Connecticut
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
(E-mail: Robert.Snook@po.state.ct.us)

Janice A. Dean, Esq.
Teresa Manzi
Assistant Attorney General
Office of the Attorney General
of the State of New York
120 Broadway, 26th Floor
New York, New York 10271
(E-mail: Janice.Dean@ag.ny.gov)
(E-mail: Teresa.Manzi@ag.ny.gov)

Signed (electronically) by Clint A. Carpenter

Clint A. Carpenter
McDermott Will & Emery LLP
500 North Capitol Street, NW
Washington, DC 20001-1531
(202) 756-8000
(202) 756-8087 fax