

BY HAND AND E-MAIL

July 31, 2013

Fred J. Anders, Chief
National Resources Management Bureau
One Commerce Plaza
New York State Department of State
99 Washington Street
Albany, New York 12231-0001

**Re: New York State Department of State File #F-2012-1028
Consistency Certification for Entergy Nuclear Indian Point 2 and
Entergy Nuclear Indian Point 3 License Renewal Application**

Dear Mr. Anders:

For reasons previously provided to the New York State Department of State (“the Department”),¹ and also presented to the Atomic Safety and Licensing Board,² the renewal by Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc. (“Entergy”) of the operating licenses for Indian Point Energy Center Unit 2 and Unit 3 (“IPEC”) is not subject to the requirement for additional federal consistency review under 16 U.S.C. § 1456(c)(3)(A).

Nonetheless, if the Department rejects Entergy’s positions and continues to maintain that additional federal consistency review is required for the renewal of IPEC’s operating licenses (“License Renewal”), Entergy requests the right to fully participate in the review process (without waiving its full reservation of rights).³ In particular, Entergy requests

¹ See, *Petition For Declaratory Ruling, In the Matter of the Petition of: Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC, for a Declaratory Ruling*, (State of New York, Department of State, Nov. 5, 2012).

² See *Motion and Memorandum By Applicant Entergy Nuclear Operations, Inc. for Declaratory Order That It Has Already Obtained the Required New York State Coastal Management Program Consistency Review of Indian Point Units 2 and 3 for Renewal of the Operating Licenses*, Docket Nos. 50-247-LR and 50-286-LR (NRC Atomic Safety and Licensing Board, July 30, 2012) (ADAMS Accession No. ML12212A383).

³ See Letter of Fred Dacimo to the Department dated December 17, 2012 (transmitting Entergy’s certification that License Renewal is consistent with the New York Coastal Management Program (“NYCMP”)) at 1, n.2. In addition to asserting that IPEC is grandfathered under the NYCMP, and that

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that, prior to issuing a final objection (if any) to Entergy's certification that License Renewal is consistent with all enforceable and applicable policies of the New York State Coastal Management Program (the "Consistency Certification"), the Department provide Entergy with an adjudicatory hearing.⁴

Entergy believes that there is overwhelming evidence to support the conclusion that License Renewal is consistent with the NYCMP. Entergy is confident that, with the Department's use of fair and open procedures in its review of the Consistency Certification, any reasons advanced to the contrary can be shown to be without factual or legal basis. Yet, the Department's review of Entergy's Consistency Certification, if resulting in an "objection," could profoundly and negatively affect the rights and interests of many. Those rights and interests include, among others:

- the rights and interests of Entergy's shareholders;
- the rights and interests of Entergy's approximately 1,100 employees to continue gainful employment;
- the rights and interests of people who rely on IPEC for their livelihoods;⁵
- the rights and interests of people who rely on IPEC for energy needs;⁶

IPEC has been previously reviewed for consistency with the NYCMP, Entergy expressly reserved all rights to contest the validity and enforceability of the NYCMP, and the authority of the Department to conduct federal consistency review, under both federal and state law.

⁴ Entergy also respectfully requests transparency from the Department concerning who, at the Department, is going to make the decision for the Department, and on what basis. *Ex parte* communications with the Department decision-maker should be prohibited. If evidence or information is being presented to the Department decision-maker by Department staff, or through other sources, which will be considered by the Department decision-maker in connection with its review of the License Renewal Consistency Certification, Entergy should be provided with that evidence or information at the same time it is presented to the Department decision-maker, and all such evidence or information should simultaneously be made part of the public record.

⁵ See Jonathan A. Lesser, *The Economic Impacts of Closing and Replacing the Indian Point Energy Center*, Executive Summary (Center for Energy Policy and the Environment at The Manhattan Institute, September 2012) (the "2012 Manhattan Institute Report") (the resulting loss of jobs in New York if IPEC were closed "could range from 26,000 to 40,000 per year, depending on the alternative chosen to replace IPEC").

⁶ See The City of New York and Mayor Michael R. Bloomberg, *PlaNYC Update April 2011. A Greener, Greater New York* (the "2011 NYC Plan"), at 105 (IPEC is the "cornerstone" of New York City's

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- the rights and interests of New York citizens in a strong economy;⁷
- the rights and interests of New York citizens to a clean environment;⁸ and
- Entergy's rights and interests in preserving its capital investments.⁹

The facts underlying Entergy's request for an adjudicatory hearing, should the Department intend to object to the Consistency Certification, are unprecedented. Federal consistency review under 16 U.S.C. §1456(c)(3)(A) of the Coastal Zone Management Act ("CZMA") was never intended by Congress to apply to existing activities and facilities such as IPEC.¹⁰ As far as Entergy is able to ascertain, New York State federal

electricity system "that supplies up to 30% of our power virtually carbon free," and its removal could "threaten the reliability, increase prices, and jeopardize our greenhouse gas reduction efforts").

⁷ See 2012 Manhattan Institute Report, at Executive Summary ("closing IPEC would increase average annual electric expenditures in New York State by \$1.5 billion--\$2.2 billion over the 15-year period 2016-30 . . . The effects of these higher electricity costs absorbed by customers would ripple through the New York economy, leading to estimated reductions in output of \$1.8 billion--\$2.7 billion per year over the 15-year period 2016-30").

⁸ See Charles River Associates, *Indian Point Energy Center Retirement Analysis*, 13 (New York City Department of Environmental Protection, August 2, 2011), (estimating that a 15% increase in carbon emissions and a roughly 7-8% increase in NOx emissions, in New York City and New York State, will occur without IPEC).

⁹ The United States Energy Information Administration estimates that the cost to construct IPEC was more than \$2,400,000,000.00, adjusted for inflation through 2007. A study prepared for the County of Westchester estimated that "just compensation" for the taking of IPEC in 2016 would be \$4,199,000,000.00. (Levitan & Associates, Inc., June 9, 2005) at 83.

¹⁰ The Senate Committee on Commerce report on the then-proposed CZMA became the operative legislative history for the CZMA since the Senate bill was adopted as law. The report underscores in unambiguous terms that Congress never intended the CZMA to be applied retroactively to existing facilities or activities begun prior to enactment of the bill:

[The CZMA] provides that after final approval by the Secretary of a State's management program, any applicant for a Federal license or permit to conduct any *new activity* in the coastal zone shall provide in the license or permit application a certification that the proposed activities comply with the State's approved management program . . . Thus, [the CZMA] assures that before a federal license or permit is issued to conduct any *new activity* in the coastal zone, directly, significantly and adversely affecting the coastal waters, it will be reviewed by an appropriate State agency and a certification of compliance supplied. . . . *Emphasis is placed upon "new" activity. This activity is after the date of enactment of the legislation. It will thus be appropriate to distinguish between new activities, such as the building of a new marina, or the dredging of a new*

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consistency review has never been used to shut down an existing operating business. Nor has federal consistency review been used by any coastal state to preclude Nuclear Regulatory Commission (“NRC”) license renewal. The Department itself repeatedly has determined that NRC license renewal for nuclear facilities within its coastal zone is consistent with the NYCMP.¹¹ Accordingly, a Department objection to IPEC License Renewal would be utterly without precedent.

If Entergy is ultimately prevented from using IPEC for power production, IPEC’s economic value and power production benefits will be squandered, along with the jobs of many.

It is inconceivable that the New York legislature intended to vest the Department with unbridled discretion to deprive license renewal rights for an existing business without providing any form of hearing.¹² The Federal Due Process clause protects against deprivation of property without due process of law. Likewise, the New York counterpart to the Federal Due Process clause, set forth in Article I, Section 1, of the New York Constitution Bill of Rights, specifies that “[n]o member of this state shall be . . . deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the

channel, as opposed to the maintenance of existing facilities or activities begun prior to the enactment of the bill.

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

¹¹The Department determined that NRC license renewal for three other nuclear power plants located in New York State’s coastal zone—Ginna, Fitzpatrick, and Nine Mile Point (a multi-unit installation)—was consistent with the NYCMP. See Entergy Consistency Certification, Attachments 31, 32, and 33. The Department even went so far as deciding that the Nine Mile Point Nuclear Power Stations did not require “individual consistency certification” because Nine Mile Point had the benefit of “general consistency concurrence.” See Correspondence from Jeff Zappieri, New York Department of State, to Timothy J. O’Connor, Constellation Energy (July 18, 2006).

¹² Importantly, the provision of a hearing with respect to NYCMP consistency determinations for federally-licensed projects would be consistent with the Department of Environmental Conservation’s (“DEC”) practice with respect to NYCMP consistency determinations for state-licensed projects. As the DEC has explained, adjudicatory hearings are appropriate because, “[a]s with a determination of nonsignificance under SEQRA, sound public policy and administrative efficiency justify early review and correction in the event it is concluded that the Department’s consistency certification will not survive judicial review.” *In the Matter of the Application for a Solid Waste Management Facility Permit Pursuant to Article 27 of the Environmental Conservation Law for Construction and Operation of a Yard Waste Composting Facility in Spring Creek Park, Brooklyn, New York* (Interim Decision June 14, 2006). The principles of “sound public policy and administrative efficiency” referenced by the DEC apply no less to federal consistency determinations made by the Department, and there is no principled basis upon which the Department should deny at least the same level of adjudicatory review to its own consistency determinations.

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land . . .”¹³ If the Department has federal consistency review authority in connection with License Renewal, then, subject to Entergy’s appellate rights, a Department “objection” to Entergy’s Consistency Certification could effectively deprive Entergy of its right and privilege to seek License Renewal on terms and conditions under which NRC is otherwise authorized to issue such License Renewal. Within the context of IPEC License Renewal—which will affect the fate of a multi-billion dollar special purpose facility with hundreds of employees serving the energy needs of New York State—Entergy’s right and privilege to seek License Renewal from NRC warrants some form of an adjudicatory hearing.

Moreover, the State Administrative Procedure Act (“SAPA”) establishes uniform procedures intended to protect the rights and privileges of New York citizens, such as Entergy, when state agencies, such as the Department, are engaged in an “activity . . . in which a determination of the legal rights, duties or privileges of named parties” will be made.¹⁴ Even the Department’s own regulations—which the Department routinely applies in cases with far less potential to harm the citizens of New York—call for adjudicatory hearing rights in this case.¹⁵ Given the stakes, if the Department’s decision-

¹³ The Constitution of the State of New York, Article I, Section 1.

¹⁴ SAPA § 102(3).

¹⁵ The Department adopted regulations under SAPA for the purpose of affording “due process of law and an opportunity to be heard.” 19 NYCRR Part 400 (setting forth NSYDOS procedures on adjudicatory hearings and appeals pursuant to SAPA). Assuming that the Department has adjudicatory authority with respect to federal consistency determinations, there can be no question that the Department’s regulations require an adjudicatory hearing before a final objection to the Consistency Certification may be lodged. 19 NYCRR § 400.4(b) provides that:

The Department of State shall, *before making a final determination to deny an application for a license*, notify the applicant in writing of the reasons for such proposed denial and shall afford the applicant an opportunity to be heard in person or by counsel prior to denial of the application. Such notification shall be served personally or by certified mail or in any manner authorized by the Civil Practice Law and Rules. * * * Upon receipt of such demand, an adjudicatory proceeding will be commenced in the manner set forth in subdivision (a) of this section, except that the reasons for denial will be set forth in the stead of charges.

19 NYCRR § 400.4(b) (emphasis added). Under SAPA, “license” includes “the whole or part of any agency permit, certificate, approval, registration, charter, or *similar form of permission required by law*.” SAPA, § 102(4). Apart from certain rights of appeal, if additional federal consistency review is required for IPEC, a Department “objection” to the Consistency Certification could be fatal to Entergy’s ability to obtain and operate under a renewal operating license. “[The] CZMA gives states a *conditional veto* over

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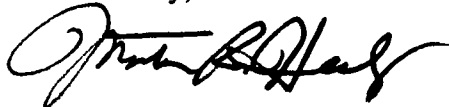
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maker should reach a tentative conclusion that an objection to the consistency of License Renewal with the NYCMP is warranted, then Entergy claims its right to an adjudicatory hearing under SAPA and 19 NYCRR Part 400 to test the merits of that tentative decision before a final decision is made.

We look forward to discussing these process requirements with you, and to participating in an open and fair review by the Department of the Consistency Certification based upon a complete, readily-available, and transparent public record.

Thank you for your cooperation in this matter.

Sincerely,



Martin R. Healy
Attorney for Entergy

cc: Cesar A. Perales, Secretary, New York State Department of State, (By Hand and E-Mail)
New York State Department of State, Office of Coastal, Local Government and Community Sustainability, Attn: Consistency Review Unit, (By Hand and E-Mail)
Lois M. James, Division of License Renewal, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, (By Federal Express and E-Mail)
Sherwin E. Turk, Esq., Office of General Counsel, U.S. Nuclear Regulatory Commission, (By Federal Express and E-Mail)
Fred Dacimo, Vice President License Renewal, Indian Point Energy Center. (By Regular Mail and E-Mail)
Kelli Dowell, Assistant General Counsel, Environmental, Entergy, (By Regular Mail and E-Mail)

federally licensed or permitted projects.” *Weaver’s Cove Energy, LLC, v. Rhode Island Coastal Resources Management Council*, 583 F. Supp. 2d 259, 267 (D.R.I, 2008) , *aff’d* 589 F.3d 458 (1st Cir. 2009)(emphasis added); *AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120, 123 (4th Cir. 2008). Therefore, federal consistency review by the Department is manifestly a “license” – an “approval” or other “form of permission required by law” for License Renewal.

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Christopher Hogan, Project Manager, NYSDEC Central Office, Division of
Environmental Permits, (By Federal Express and E-Mail)
John Sipos, Assistant Attorney General, State of New York, (By Federal Express
and E-Mail)
William B. Glew, Jr., Associate General Counsel, Entergy Services, Inc., (By
Regular Mail and E-Mail)