STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

December 23, 2013

Lawrence G. McDade, Chair
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Michael F. Kennedy
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop - T-3 F23
Two White Flint North
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Rockville, MD 20852-2738

Re: Indian Point Nuclear Generating Station, Unit 2 and Unit 3
Docket Nos. 50-247-LR/50-286-LR; ASLBP No. 07-858-03-LR-BD01

Dear Administrative Judges:

From time to time, Entergy has informed the Atomic Safety Licensing Board about Entergy's position concerning certain coastal zone management issues.

The State provides the Board and the parties with copies of two recent decisions by the New York State Supreme Court for Albany County wherein the court denied two petitions that Entergy filed pursuant to New York State Civil Practice Law and Rules Article 78 against the New York State Department of State concerning coastal zone issues. The two rulings are:

1. Entergy Nuclear Indian Point 2, LLC, et al. v. New York State Department of State, et al., Index No. 5450-12 (Albany County), Decision Order and Judgment dated November 20, 2012;

2. Entergy Nuclear Operations, Inc., et al v. New York State Department of State, et al, Index No. 1535-13 (Albany County), Decision Order and Judgment dated December 13, 2013.

Respectfully submitted,

Signed (electronically) by

John J. Sipos
Assistant Attorney General

cc: All individuals, parties, or NRC offices on the Service List

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Attachment 1

Decision and Order/Judgment with Notice of Entry
November 20, 2013

In the Matter of the Application of Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC v. New York State Department of State, et al.

Supreme Court, Albany County
Index No. 5450-12
RJI No. 01-12-ST4009
(Justice Michael C. Lynch, Presiding)

SUPREME COURT STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
ENTERGY NUCLEAR INDIAN POINT 2, LLC, and
ENTERGY NUCLEAR INDIAN POINT 3, LLC, as
respective owners of Indian Point 2 and Indian Point 3,
and joint applicants for the Indian Point SPDES
permit renewal,

Petitioners-Plaintiffs,

NOTICE OF ENTRY
Index No. 5450-12
RJI No. 01-12-ST4009

For a Judgment pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

THE NEW YORK STATE DEPARTMENT OF STATE,
CESAR A. PERALES, Secretary of the New York State
Department of State, THE NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL
CONSERVATION, and JOSEPH MARTENS,
Commissioner, New York State Department of
Environmental Conservation,

Respondents-Defendants.

PLEASE TAKE NOTICE that a Decision and Order/Judgment a copy of which is attached, was signed on November 20, 2012, by the Hon. Michael C. Lynch, J.S.C., and filed and entered in the Office of the Clerk of Albany County on November 26, 2013.

Dated: November 26, 2013
Albany, New York

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

ENTERGY NUCLEAR INDIAN POINT 2, LLC,
ENTERGY NUCLEAR INDIAN POINT 3, LLC, and
ENTERGY NUCLEAR OPERATIONS, INC.,

Petitioners-Plaintiffs,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION
AND
ORDER/JUDGMENT

- against -

THE NEW YORK STATE DEPARTMENT OF
STATE, CESAR A. PERALES, Secretary of the
New York State Department of State, THE NEW YORK
STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION, and JOSEPH MARTENS,
Commissioner of the New York State Department of
Environmental Conservation,

Respondents-Defendants.

Supreme Court, Albany County
Index No. 5450-12
RJI No. 01-12-ST4009
(Justice Michael C. Lynch, Presiding)

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LYNCH, J:

Petitioners Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3 LLC are the owners of nuclear power generating units operating as part of a nuclear power facility located on the Eastern shore of the Hudson River in Westchester County, New York (hereinafter, "Indian Point"). Petitioner Entergy Nuclear Operations, Inc. is the federally-licensed operator of the units. Hereinafter, the Court will refer to these entities as "petitioners".

In June 2012, the respondent New York State Department of State designated a stretch of the Hudson River adjacent to Indian Point as a "Significant Coastal Fish and Wildlife Habitat" (SCFWH) pursuant to State regulations. Now, petitioners challenge the designation and request that it be annulled. This case derives from the application of New York State's coastal policies developed pursuant to the Federal Coastal Zone Management Act (16 USC §1451 et. seq.) New York State's "Waterfront Revitalization and Coastal Resources Act" (hereinafter, Waterways Act) and the regulations governing New York State's coastal areas.

The CZMA was enacted in 1972, "to establish a national policy and develop a national program for the management, beneficial use, protection, and development of the land and water resources of the Nation's coastal zones..." (92 PL 583;86 Stat. 1280). The CZMA allows "coastal states", like New York State (16 USC §1453(4)), to develop "management programs" for submission to the Secretary of Commerce for approval (16 USC §1454). A "management program"

> " includes ...a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adopted by the state in accordance with [the CZMA] the provisions of this title, setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone

(16 USC §1453 (m)). Once the Federal government approves a State's management program, the State

may obtain federal funds to administer its coastal management program (16 USC §1455). Moreover, the State is allowed to participate in the "consistency" review of applications for federal permit and license applications. Accordingly, with limited exceptions, an applicant may not obtain a license or permit unless the State agrees that the proposed activity "complies with enforceable policies of the state's approved program" (16 USC § 1456 (3)[A]).

New York State began to develop its coastal management plan in 1975 when the Legislature designated the respondent New York State Department of State (hereinafter DOS) to serve as the "single state agency for the receipt and administration of federal grants pursuant to the [CZMA]" (Chapter 464 of Laws of 1975, §47). The Legislature enacted the Waterways Act in 1981 "to provide for the establishment of the New York Coastal Management Program pursuant to the [CZMA]" (Ch. 840 of Laws of 1981; Bill Jacket Senate Memorandum in Support). By the Waterways Act, the DOS was authorized to administer the Act and to promulgate rules and regulations in furtherance of the statute (Executive Law §913). The rules and regulations administering the Waterways Act are set forth at 19 NYCRR Part 600 et. seq.

In 1982, the DOS issued a document titled, "New York's Coastal Management Program and Final Environmental Impact Statement" (hereinafter, CMP; Record at 38). The CMP was and remains the "framework for government decision-making which affects New York's coastal area" (Id, CMP I.1). The CMP outlines New York State's forty-four coastal policies that are intended to "either [promote] the beneficial use of coastal resources, [prevent] their impairment, or [deal] with major activities that substantially affect numerous resources" (CMP at II-6, 1-2). Pursuant to the regulations promulgated under the Waterways Act, "State agencies are strongly encouraged to consider the coastal policy explanations and guidelines contained in the [CMP]" when evaluating proposed actions that affect New York State's coastal areas (19 NYCRR

§600.5).

As relevant to this proceeding, a policy established by both the regulations and the CMP is that, "Significant coastal fish and wildlife habitats ... will be protected, preserved, and, where practical, restored so as to maintain their viability as habitats" (19 NYCRR §600.5(b)[1]; CMP "Policy 7" Section II-6, p. 20). Pursuant to the regulations, a SCFWH is a habitat area that:

"(1) exhibit to a substantial degree one or more of the following characteristics:

> (i) [is] essential to the survival of a large portion of a particular fish or wildlife population (e.g. feeding grounds, nursery areas);
> (ii)...supports a species that is either endangered, threatened or of spcial concern as those terms are defined at 6 NYCRR Part 182;
> (iii)...supports fish or wildlife populations having significant commercial, recreational or educational value; or
> (iv)...is of the type which is not commonly found in the State or a coastal region of the State; and

(2) are to varying degrees difficult or even impossible to replace in kind.

(19 NYCRR §602.5 (a); see also, CMP Section II-6, p. 20 Record at 38). New York State's CMP was approved by the Federal Secretary of Commerce on September 30, 1982 (47 Fed Reg 47056; Return at 35).

In 1975, when the State enacted Chapter 464 in compliance with the CZMA (Supra), the Legislature authorized DOS to prepare "coastal area boundaries" (Executive Law §911(2)). Relevant to this proceeding, the DOS was also authorized to designate on the coastal area map "those significant coastal fish and wildlife habitat areas ... which the [DOS] finds satisf[ies] the criteria of [19 NYCRR 602.5]" (Executive Law §914; 19 NYCRR §602.4[a]). In 1987, pursuant to this authority, the Department of State first designated 39 SCFWH areas on the Hudson River between Albany and Manhattan. At that time, the SCFWH areas included the "Haverstraw Bay" area at Hudson River Miles 35-41 (Lusic Affirmation Exhibit A) and an area named, "Hudson River Mile 44-56" (Lusic Affirmation Exhibit B). Notably, the Department

of State did not designate Hudson River Miles 41-44 as a SCFWH area in 1987. Indian Point is located along that stretch of the Hudson River at River Miles 41-44.

On May 25, 2011, DOS issued a "Notice of Review" to announce that the agency, with the New York State Department of Environmental Conservation (DEC) was

> revising the [SCFWH] documentation for habitat areas located along the Hudson River in the Counties of Albany, Rensselaer, Columbia, Green, Ulster, Dutchess, Orange, Rockland, and Westchester. A total of 35 previously designated SCFWH areas along the Hudson River have been revised to 33 SCFWH [areas] and 7 new Habitat areas have been recommended for designation by the DEC under the State's Coastal Management Program as administered by the DOS.

(See Record at 23 at p. 79). On June 8, 2011, the DOS retracted the May 25, 2011 Notice and announced that the public review and comment period for the proposed SCFWH revisions would begin on June 15, 2011. (see Record at 22 p. 95). On June 22, 2011, the DOS announced that two public information meetings were scheduled (Record 20). Further, by the June 22, 2011 Notice, the DOS specifically advised that it was considering draft revisions to 17 designated SCFWH areas; revisions and boundary modifications for 14 designated SCFWH areas, including, as relevant here, Hudson River Mile 40-60; and the designation of 7 new SCFWH areas (Id.). The proposed SCFWH at Hudson River Mile 40-60 was and remains known as the "Hudson Highlands".

On August 15, 2011, the petitioners submitted timely comments in response to the proposed revisions. In sum, petitioners' submission set forth the basis for its' belief that the DOS failed to establish, "a reasonable legal or factual basis for the proposed modifications" (Lusic Affirmation, Exhibit P). By correspondence dated May 15, 2012, the New York State Department of Environmental Conservation issued its recommendation that the DOS adopt the proposed revisions, "modifying current habitat boundaries and revising language narratives for 17 existing habitats..." including the Hudson Highlands area at issue in this proceeding (Record

6).

On July 19, 2012, "based upon recommendations of the New York State Department of Environmental Conservation..." the Department of State issued its modifications to the 1987 SCFWH designations. Consequently, nearly 8,471 acres of the Hudson River, including the previously un-designated stretch of the River adjacent to Indian Point, were designated as significant coastal fish and wildlife habitat areas. Challenged herein is the determination to modify the 1987 SCFWH area designations at Haverstraw Bay and Hudson River Miles 44-56 "by expanding the habitat boundary three and one-half miles to the north and south for a total of seven additional seven miles (sic) of deepwater and adjacent shallows and shoals" to designate the Hudson Highlands SCFWH area (Lusic Exhibit V).

By this hybrid CPLR Article 78 proceeding and declaratory judgment action, petitioners now assert eight causes of action against the respondents DOS and DEC. Procedurally, petitioners contend that the DOS violated certain provisions of the State Administrative Procedure Act and New York State Constitution related to rulemaking (First and Third Causes of Action); that the DEC and DOS failed to follow the regulations governing the designation of SCFWH areas (second and fourth causes of action); and that the DOS violated SEQRA (sixth cause of action). Petitioners also contend that the DEC's recommendation and DOS's designation of the Hudson Highlands SCFWH were substantively flawed (seventh cause of action). Finally, petitioners argue that the DOS exceeded its authority when it designated the SCFWH areas (Eighth Cause of Action).

As relevant to the issue presented, SAPA defines a rule as "'the whole or part of each agency statement, regulation or code of general applicability that implements or applies law,' but excluding 'interpretive statements and statements of general policy which in themselves have no

legal effect but are merely explanatory' (Cubas v. Martinez, 8 N.Y.3d 611, 621 [2007] [quoting SAPA 102 [2] (a) [i]; (b) [iv]). Accordingly, "a 'rule or regulation' is 'a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers'" (Id., [quoting Matter of Roman Catholic Diocese of Albany v New York State Dept. of Health, 66 NY2d 948, 951 [1985]). In contrast, an administrative determination is an "interpretive statement" when it "reli[es] on and constitute[s] [a] reasonable interpretation [ ] of existing regulations or statutes" Matter of Board of Educ. of the Kiryas Joel Vil. Union Free Sch. Dist. v State of New York, ___ AD3d ___, 2013 NY Slip Op 6770 [3rd Dept. October 17, 2013]).

Both the State Administrative Procedure Act (SAPA §201 et. seq.) and the New York State Constitution provide that certain procedures must be followed when an agency undertakes rulemaking activities (SAPA §202; New York State Constitution Article IV §8). The petitioners argue that because the SCFWH designations are "generally applicable to all entities seeking to conduct covered activities within the areas affected..." (Petition ¶101), it was rulemaking activity. Indisputably, the respondents did not comply with the rulemaking procedures set forth in SAPA and the New York State Constitution.

In this Court's view, the challenged designation is not a "rule" as defined by SAPA. Rather, the DOS relied on and interpreted the existing regulatory criteria set forth in 19 NYCRR §602.5 when it designated the Hudson Highlands as a SCFWH area. Accordingly, even if the designation can be characterized as "generally applicable", the respondent's interpretation of the regulations was an activity exempt from the definition of the rule set forth in SAPA (Elcor Health Servs. v. Novello, 100 N.Y.2d 273, 279 [2003]; Lewis v New York State Dept. of Civ. Serv., 60 AD3d 216, 224 [2009], affd 13 NY3d 358 [2009]; Matter of HMI Mech. Sys. v

McGowan, 277 A.D.2d 657 [2000] app. den. 96 N.Y.2d 705 [2001]). The Court thus finds that the petitioners' first and third causes of action are without merit.

Next, the petitioners contend that the DOS's actions were arbitrary and capricious because the agency failed to follow its own procedures prior to designating the SCFWH areas on July 19, 2012. It is well-settled that a State agency is bound to follow its own rules and regulations (Frick v. Bahou, 56 N.Y.2d 777; thus, "[a]n agency acts arbitrarily and capriciously when it fails to conform to its own regulations (see, Matter of Law Enforcement Officers Union v State of New York, 229 AD2d 286, 291, lv denied 90 NY2d 807).

The procedures for identifying, mapping, and designating SCFWH areas are set forth in 19 NYCRR §602.4. As relevant to this proceeding, the regulations require the DOS to identify and designate SCFWH areas "[a]fter consultation with appropriate State agencies", if the DOS finds that the area complies with the regulatory criteria set forth at 19 NYCRR §602.5 (19 NYCRR §602.4 (a)). A SCFWH area is "eligible for designation only if it has been identified and recommended for designation by the [DEC]"; and, the DOS "shall designate all areas identified and recommended by the DEC, unless the [DOS] finds, after the public review process: : (1) that there was an error in the evaluation [pursuant to 19 NYCRR §602.5]...; or (2) that designation would not lead to the achievement of the purposes of the [SCFWH policy (see 19 NYCRR §600.5(b)[1])]" (19 NYCRR §602.4(c)).

In this proceeding, petitioners contend that the DOS failed to comply with the regulations because the DEC did not identify and recommend the area prior to the designation as required by 19 NYCRR §602.4(c). In support of this argument, petitioners rely on the record evidence that the DOS announced its intent to modify the 1987 SCFWH area designations on May 25, 2011 (albeit retracted on June 8, 2011) but the DEC did not issue its recommendation until May 25,

2012 (see Record at 6).

In response to the petition, the DOS submits an affidavit by Ms. Wojtowicz, the employee who managed the review process for the agency. She avers that in 2003, the agency met with representatives from the DEC to discuss the revisions (Wojtowicz ¶30). In 2005, the agencies singed an interagency agreement wherein they agreed to share staff and resources on the project. According to Ms. Wojtowicz, the agencies engaged in a "collaborative and deliberative process" from mid 2007, when the DEC provided draft SCFWH narratives, until the drafts were ready for public notice in May 2011 (Id.).

The respondent DEC submits an affidavit by their employee Ms. Blair, a biologist who supervised the DEC staff that prepared the recommendations. She avers that the recommendations "were the result of years of work by [DEC] collecting fish and wildlife information that began in 2005, and subsequent collaboration between [DEC and DOS] staff to refine and craft the final narratives and maps of the changes (Blair, ¶ 7). The practice, she explains, was, "to work closely with [DOS] staff in a collaborative process to identify and evaluate significant coastal habitats (Blair ¶15).

Contrary to petitioners' argument, the Court finds that the respondents' determination to coordinate its efforts here was not an irrational interpretation of its procedural obligations. The regulation clearly provides that an area is not eligible for designation as a SCFWH area unless it is recommended by the DEC (19 NYCRR § 602.4 (c)). The regulation does not otherwise direct how the agencies are to comply with their procedural obligations. The DOS is permitted to "consult[ ] with appropriate State agencies" prior to making its designation (19 NYCRR §602.4(a)) and the DOS may reject the DEC's recommendation only if it is erroneous or inconsistent with the State's fish and wildlife policies (19 NYCRR 602.4 (c) [1]-[2]). In this

Court's view, given the task, its importance to both agencies, and the DOS's obligation to oversee the State's Coastal Management Program, it was entirely rational for the two agencies to work together to ensure that the review was comprehensive and that the DOS's designation was informed and not a mere "rubberstamp" of the DEC's recommendation.

Petitioners also contend that the respondents failed to comply with the regulation's public notice requirements. Relevant to this issue, the regulation provides that, "before any [SCFWH] area...is designated, timely public notice shall be provided and one or more public hearings held" (19 NYCRR §602.4(b)). Further, as set forth above, the regulations allow DOS to reject DEC's recommendation if it makes certain findings "after the public review process" (19 NYCRR 602.4(c)). As to its content, the regulations provide that the notice, "shall ... identify the areas proposed for designation, facilitate public comment by announcing the availability for inspection of the documentation supporting the nomination of any site proposed for designation, and by requesting public comment and participation at the hearing" (19 NYCRR 602.4(b)).

Here, petitioners argue that the DOS failed to comply with the regulations because it allowed public comment and review prior to the DEC's recommendation and failed to allow public comment and review after the DEC's recommendation. As set forth above, the regulations require that there be notice and opportunity for public comment "[b]efore any SCFWH area ... is designated" (19 NYCRR §602.4(b)); that the DOS shall designate the recommended areas absent certain findings "after the public review process" (19 NYCRR §602.4 (c)); and that the determination to designate an area must follow "public notice, hearing and comment" (19 NYCRR §602.4(d)). While the regulation anticipates that "one or more public hearings" may be held (19 NYCRR §602.4(b)), it does not obligate the DOS to hold more than one hearing.

The submissions before the Court indicate that the DOS issued public notice of the proposed designations, held two informational meetings in July 2011, and a public hearing on July 27, 2011. The record confirms that the proposed designations offered for public review on June 8, 2011 did not differ from those that were formally recommended on May 15, 2012, except to the extent they were modified in response to the petitioners' comments submitted on August 15, 2011 (Lusic Affirmation, Exhibit P). The practical effect of the collaboration between the two agencies was that petitioners did comment on the recommended areas and thus were permitted to challenge the DEC's findings with specific reference to the values that DEC assigned to the regulatory criteria (Barnthouse Exhibit B). The Court finds therefore, that the respondents provided public notice as required by the regulation.

Petitioners also contend that the respondents failed to "make publicly available adequate documentation supporting the proposed modifications" (Petition Para 63, 110). On this, the regulation provides that the public notice must, "...identify the areas proposed for designation, facilitate public comment by announcing the availability for inspection of the documentation supporting the nomination of any site proposed for designation" (19 NYCRR §602.4(b)). Here, both the May 25, 2011 and June 8, 2011 Notices advised as to the Counties where the habitats were located along the Hudson River and specifically advised that

> The purpose of this notice is to obtain comments relevant to the accuracy of the information contained in the proposed draft habitat documentation. Copies of the narratives and maps describing and depicting boundaries for the habitat will be available for download at http://nyswaterfronts.com

Here, the petitioners were able to review the narratives and maps and to submit a comprehensive response to the proposed designations (Lusic Affirmation Exhibit P). In this Court's view, the record demonstrates that the public notice complied with the substantive

requirements of the regulation and was sufficient to "facilitate public comment" (see e.g. Powerline Coalition v. New York State PSC, 244 A.D.2d 98, 103 [1998] [description was "sufficiently detailed so as to inform the public" with regard to a proposal to reconstruct power lines and substations; copies of the detailed application at issue were available for review]).

Petitioners also contend that the DOS failed to comply with 19 NYCRR §602.4(f) which provides:

> (f) After consultation with appropriate State agencies, the Secretary may repeal or modify an existing significant area designation, but only after repeating the notice procedure for designation found in subdivision (b) of this section, and only upon a finding that repeal or modification is justified by changes to the characteristics of the area which were the basis for the original or subsequent designation

The crux of petitioner's argument is that the 2012 Husdon Highlands designation is a modification of the 1987 designation that excluded the River Miles 41-44 and that the DOS failed to demonstrate that the modification is "justified by changes to the characteristics of the area which were the basis for the original or subsequent designation" (Id.). The term, "characteristics of the area" refers to the regulatory criteria that must be present "to a substantial degree" to be considered a SCFWH area (19 NYCRR §602.5 (1)[1]).

The Court rejects the respondents apparent argument that the May 2012 designation was a "new" habitat, presumably with reference to River Miles 41-44, the cited regulation did not apply (Wojtowicz, ¶ 44). Contrary to this claim, the record confirms that the DOS characterized the proposal to include River Miles 41-44 within the "Hudson Highlands" SCFWH to be a modification of the boundaries of existing habitats (Record 22 - June 2011 Public Notice). Similarly, by the May 15, 2012 recommendation, the DEC described the action as "modifying current habitat boundaries and revising language narratives for 17 existing habitats based on newly acquired information, data, and impact assessment supplied by DEC staff (Record 6). By

the July 19, 2012 designation of the Hudson Highlands, the DOS explicitly, "modif[ied] the November 15, 1987 designation ... by expanding the habitat boundary..." (Lusic Exhibit V)[1]. The July 25, 2012 Public Notice of the designation also characterizes the "Hudson Highlands" as a modification to existing habitat boundary (Record 2).

While this Court agrees with petitioners that the cited regulation applies where, as here, an existing habitat boundary is modified, it does not agree that the respondents failed to comply with the regulation. On this point, Ms. Wojtowicz explains that the recommended boundary modifications were issued "using the latest and best available scientific information" and that the narratives were "reviewed and revised based on recent data, information, updated technological advances that provided a current professional scientific understanding of the ecosystems and physical dynamics of the Hudson River" (¶ 34). Further, she explains, "[t]he analysis of previously unavailable data and information supports a finding that both [River Miles 40-44 and 56-60] easily meet the ... criteria [for SCFWH designation]" (¶ 47).

Like Ms. Wojtowicz, Ms. Blair explains that:

> In the more than two decades following the 1987 designation of the original 35 Hudson River SCRWHs, the state of knowledge about the Hudson River estuary ecosystem changed enough to warrant revisiting of the original designations. The acquisition of information was dramatic: we acquired the most in-depth river bottom and habitat maps of any large ecosystem *** . Major investments were also made in furthering our understanding of the estuary's physical and chemical environment, productivity, food webs, fisheries and wildlife communities ***. New computing, sampling and analytical technologies transformed our ability to ask and answer questions. Over that 25-year period, we also witnessed major changes in the ecosystem and its fish populations *** and wildlife ***. Together these factors made it clear that it was necessary and appropriate to revisit the original 1987 SCFWH designations; indeed, it was the only responsible course of action"

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[1]By comparison, the "Black Creek" "Catskill Deepwater", "Coeymans/Hannacroix Creek Complex", "Kingston-Poughkeepsie Deepwater "Brandow Point Marsh and Flats", "Manitou Marsh", "Smith's Landing", "South Bay Creek and Marsh", and "Stuyvestant Marsh" were newly designated as SCFWH areas in July 2012.

(Blair ¶ 17 [internal citations to reports and data omitted]).

In this Court's view, DOS complied with the regulatory requirement that SCFWH areas be justified "by changes to the characteristics of the area". In 1987, the DOS designated Peekskill Bay and Haverstraw Bay as SCFWH areas and excluded the area between the boundaries of those habitats, River Miles 41-44. Here, the record demonstrates that the DEC and DOS gathered new information with regard to the River and the 1987 SCFWH areas, and modified the boundaries after finding that the new information revealed a change in the characteristics of the existing area sufficient to warrant an extension of the existing habitat boundaries. While the Court is mindful that the petitioners do not agree with the agencies' findings with regard to the characteristics of the Hudson Highlands SCFWH area, its' claim that the agencies failed to demonstrate compliance with the regulation is without merit.

By their sixth cause of action, petitioners claim that the respondents issued a negative declaration in violation of SEQRA (Petition¶¶ 133 - 143). It is well-settled that in this proceeding, this Court's review "is limited to whether the lead agency ... 'identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination'" (<u>Matter of Mombaccus Excavating, Inc. v Town of Rochester</u>, N.Y., 89 A.D.3d 1209, 1210 [2011] <u>lv. den.</u> 18 N.Y.3d 808 [2012] [<u>cit. om.</u>]). Further, "[i]f the agency has failed to take the required hard look or set forth a reasoned elaboration for its determination, its action will be annulled as arbitrary and capricious (<u>Matter of Troy Sand & Gravel Co., Inc. v. Town of Nassau</u>, 82 A.D.3d 1377, 1378 [2011]). Here, the crux of petitioner's argument is that the respondents failed to provide a proper, comprehensive review of the significance of the environmental impact of the designations.

Where, as here, an action involves a coastal area, the reviewing agency must coordinate its SEQRA review with the review required by the Waterways Act regulations (6 NYCRR §617.6(a)[5]; 19 NYCRR §600.1[d]). The regulations governing the review of actions located in a coastal area require the reviewing agency to complete a "Coastal Assessment Form" (CAF) "prior to the agency's determination of significance pursuant to SEQRA so that it can then supplement other information used by State agencies in making determinations of significance pursuant to [the SEQRA regulations]" (19 NYCRR §600.4).

Petitioners do not challenge the DOS's determination after its initial review that the designation of SCFWH areas was an "unlisted" action pursuant to SEQRA (6 NYCRR 617.6(a)). Accordingly, DOS properly completed a short environmental assessment form "to assist it in determining the environmental significance or non-significance of actions" (Matter of Ellsworth v. Town of Malta, 16 A.D.3d 948, 949 [2006] [citing 6 NYCRR 617.2 [m]; see 6 NYCRR 617.6 [a] [3]]). As the action affected a Coastal Area, the DOS also completed a Coastal Assessment Form (see 6 NYCRR §617.2(f); 6 NYCRR §617.6; 19 NYCRR §600.1(d); 19 NYCRR §600.4; Record at 7). Review of the CAF reveals that the DOS assessed the identified criteria and concluded that the modifications and designations would have a "significant effect" upon (1) significant fish or wildlife habitats; (2) commercial or recreational use of fish and wildlife resources; (3) scenic quality of the coastal environment; (4) development of future or existing water dependent uses; and (4) land and water uses within the State's small harbors; and existing or potential public recreation opportunities (Record at 7).

In an appendix to the CAF, the DOS explained in more detail that the proposed action would impact significant fish or wildlife habitats because it would advance the policies of the Waterways Act as the "...habitat designations serve to protect and enhance the SCFWH [areas]

by ensuring federal and State agencies take into account their natural resources values before making decisions which could affect them" (Record at 7, Attachment B; C1.a). As to the effect of the action on commercial or recreational use of fish and wildlife resources, the DOS explained that the action would advance the State's coastal policies because the designations considered the value of habitats as feeding, spawning and nursery areas in order to protect, maintain, and, hopefully expand the species for continued commercial and recreational use (Id., at C.2.a). The DOS concluded that the designations would prevent the impairment of "areas...prized for their natural beauty and scenic quality" or contribute to the scenic quality of the area (Id. at C.2.b).

The DOS also acknowledged within the CAF that the action would impact "development of future or existing water dependent uses". Specifically, the DOS recognized the need "to achieve a balance between economic development and preservation that will permit the beneficial use of coastal and inland waterway resources while preventing the loss of living marine resource and wildlife..." (Id. C.2.c). Further, as relevant to the petitioners, the agency explained that the action would "advance ... Coastal Policy 2 - Facilitate the siting of water dependent use and facilities on or adjacent to coastal waters": because:

> New development, as well as alteration of existing uses, if poorly sited can despoil and destroy aquatic resources. The impact assessments and habitat narratives which accompany each designated habitat considers the adverse impacts of proposed development which could undermine or diminish their sustainability or impair the functioning of the ecosystem. Conversely, certain types of appropriate water dependent development may enhance habitat values. Any diminution of the habitat ecosystem ... is of concern. The proposed designation of new and amendment of existing habitats, with the updating of their narrative information, helps ensure that a balance is struck between economic development and preservation.

Here, pursuant to the EAF, the DOS concluded that with respect to the listed criteria "considered [to be] indicators of significant adverse impacts on the environment" (6 NYCRR §617.7), there would be no adverse environmental impact. Further, with respect to each

criterion, the DOS responded simply, "NYS coastal and Coastal Management program will be advanced" (see Record at 9, ¶C 1-7). The DOS further explained the "Reasons Supporting [its] Determination" as follows:

> Modifying existing habitat documentation and designating new Significant Coastal Fish and Wildlife Habitats in accordance with New York's federally approved CMP, [The Waterways Act and Regulations] will more fully implement and advance the State's coastal policies relating to protection, preservation, and where practical, restoration of [SCRWH areas] so as to maintain their viability as habitats. This action will also advance other policies [the Waterways Act and Regulations], which reflect objectives of the [CZMA] and the CMP....
>
> The [DOS] has determined that the proposed action would be undertaken in a manner consistent with and would advance applicable State coastal policies and, therefore, would have beneficial, not adverse effects on the coastal environment by advancing relevant state policies relating to the protection of natural resources and appropriate development and uses of the coastal area. This action furthers and advances the findings contained in the Department of State's written SEQR findings and analysis of the effects of the action on, and its consistency with, applicable State coastal policies in the original 1982 CMP Program and Final Environmental Impact Statement.

(EAF Part III). On June 6, 2012, the DOS issued its public "Notice of Negative Declaration" in the State Register. Therein, it announced:

> the proposed modifications and designations will not have a significant adverse environmental impact. The current availability of advanced technologies have allowed for an improved and more detailed understanding of the ecological and natural resource importance and significance of designated habitat areas in the Hudson River Estuary and this has allowed for new scientific information ... to become available since the original habitat designations in 1987. Moreover, since the original designation of 35 SCFWH [areas] in 1987, the physical conditions of a number of previously designated habitats have changed, given the dynamic natural environment of the Hudson River. Based on those changes and new habitat data and information collected since that time, the Department of State is proposing to modify the written content of the 35 previously designated SCFWH narratives, ...for a total of 40 proposed habitats

(Record 8).

Now, petitioners claim is that the DOS gave the same "rote" response to each of the questions on the EAF and failed to sufficiently identify or analyze potentially adverse

environmental effects which "can reasonably be anticipated to result" from the designations and modifications (Petition ¶¶ 69, 139); and, that the negative declaration, "rested on an unlawfully narrow view of a significant effect on the environment, did not correctly identify the relevant areas of environmental concern, did not reflect a hard look at those issues, and failed to support the negative determination with a reasoned written elaboration" (Petition ¶140).

In support of their claims, petitioners submit an affidavit by David Harrison, an economist who specializes in the economics of energy and environmental policies. In March 2012, Harrison prepared a document titled, "Potential Energy and Environmental Impacts of Denying Indian Point's License Renewal Applications" as part of Indian Point's license renewal application before the Nuclear Regulatory Commission (Harrison, Exhibit B). Relying upon Harrison's report, petitioners contend that if Indian Point ceases operation, the power generated by Indian Point will necessarily be replaced by alternative sources of power with attendant negative environmental and economic impacts. For example, petitioner claims that an increase in the use of fossil fired units will result in an increase harmful air emissions with serious health consequences; increased use of wind energy will kill birds and bats and result in increased noise pollution; and an increased use of hydro power will increase carbon dioxide and methane emissions, increase local humidity, damage aquatic habitats, and impact biodiversity and fish populations.

Notably, here, petitioners focus on the potential impact of the action on Indian Point, followed by the consequent, potential adverse impacts on the environment if Indian Point may one day either cease or reduce its operations as a result of the action. Without dismissing these concerns, under SEQRA, it is not necessary to, "investigate every conceivable environmental problem; [the reviewing agency] may, within reasonable limits, use its discretion

in selecting which ones are relevant" (Matter of Save the Pine Bush, Inc. v Common Council of the City of Albany, 13 N.Y.3d 297, 307 [2009]). Further, "[a] 'rule of reason' *** is applicable not only to an agency's judgments about the environmental concerns it investigates, but to its decisions about which matters require investigation" (Id. [citing Jackson, Supra]).

In this Court's view, the petitioners may be correct that "[r]eplacing power from IP with power from fossil fired, pollutant emitting plants, which may be necessary if the SCFWH modifications result in operations being impacted at IP is indisputably a significant environmental impact". Nonetheless, as the DEC confirms in this proceeding, the designation of the Hudson Highlands as a SCFWH area is not a "predetermination on federal or state consistency for any particular use, including energy facilities" (Wojtowicz ¶ 9). The potential impacts petitioners have identified are not a direct consequence of the action at issue in this case. Rather, petitioners speculate that they may occur as a result of the designation at some point in the future. As "[i]t is neither arbitrary and capricious nor a violation of environmental laws for a lead agency 'to ignore speculative environmental consequences which might arise'" (Matter of Chinese Staff & Workers' Assn. v. Burden, 88 A.D.3d 425, 433 [2011] [cit. om.] aff'd. 19 N.Y.3d 922 [2012]), the Court perceives no error in the DOS's failure to consider the potentially adverse environmental consequences that petitioners have identified here.

The Court recognizes that strict compliance with SEQRA's procedures is necessary (N.Y. City Coalition to End Lead Poisoning, Inc. v. Vallone, 100 N.Y.2d 337, 350 [2003]). While petitioners focus solely on the EAF, as set forth above, the respondent's SEQRA review included completion and consideration of both the EAF and the CAF. In this Court's view, review of the record confirms that the the DOS gave the requisite "hard look" and reasoned elaboration for its determination. In context, the action at issue has only beneficial

environmental effects and the finding that the designation would advance the State's coastal policy is supported by the record and not arbitrary and capricious (Gernatt Asphalt Prods. v. Town of Sardinia, 87 N.Y.2d 668, 690 [1996]). Petitioner's sixth cause of action is thus dismissed.

By their fifth cause of action and seventh causes of action, the petitioners challenge the validity of the DEC's recommendation and the DOS's designation. The petitioners argue that the DEC failed to comply with the Waterways Act because its recommendation was based on a formula that resulted in an "inappropriately low threshold" for determining significance (¶130). Similarly, petitioners argue that because the recommendation was "riddled with errors" (¶146) the DOS should not have designated the Hudson Highlands as a SCFWH area but should have determined "that there was an error in the evaluation of the area" pursuant to the regulatory criteria (see 19 NYCRR §602.4(c)[1]) (Seventh Cause of Action).

In response to the petition, the DEC's biologist, Ms. Blair explains that in 1984, the DEC developed a document titled, "Technical Memorandum: Procedures used to identify and recommend areas for designation as [SCFWH areas]" (hereinafter, "Technical Memorandum" (Blair ¶11; Record at 34). The Technical Memorandum was used to identify and designate the Hudson Highlands SCFWH area at issue in this proceeding. By the Memorandum, an area's significance is determined by assigning a numerical value or "score" to the regulatory criteria, to wit: (1) ecosystem rarity; (2) species vulnerability; (3) Human use; (4) population level; and (5) replaceability (19 NYCRR §602.5 (a) [1]-[2]).

Review of the Technical Memorandum reveals the rationale for the DEC's assignment of a uniform value to each of the criteria. For example, with respect to "Ecosystem Rarity", the fixed score may range from as high as 100, if the ecosystem is "one of a kind"; to as low as 0,

where the ecosystem is not rare. An area's Species Vulnerability score may range from 36 if endangered species are present; to 0 if there are no vulnerable species. Based on the geographic scope of an area's importance, the score for "Human Use" may range from as high as 49 if the area has significant commercial or recreational uses important to residents of the world; to 0 if the area has no significant human use. The "Population Level" criteria may be assigned a score from as high as 49 if the concentration of a given species is unusual in the world; to 0, where there is no unusual concentration of species. Finally, as to the "Replaceability" criteria, an area may be scored as high as 1.2 if it is "irreplaceable" to as low as .4 if it "will be replaced through independent processes, without active management within two years" (Return at 34, p. 12-13).

In order to determine whether a habitat should be designated as a SCFWH, DEC calculates a "Habitat Index" by adding together the scores assigned to the "ecosystem rarity", "species vulnerability", "human use", and "population level" criteria. The "Habitat Index" is then multiplied by the score for the area's "replaceability". If this formula yields a result of 15.5 or greater, or if the score assigned to "ecosystem rarity", "species vulnerability", "human use", or "population level" criteria, individually, is above 15.5, the habitat qualifies for designation as a SCFWH (Record 34 at p. 9-11). In each category, the intermediate fixed score is "16".

In this proceeding, petitioners contend that the DEC did not make a finding that the habitat designations were critical to the maintenance or re-establishment of the species, nor did it identify any evidence to support such a finding when recommending the modifications. Rather, petitioners argue, pursuant to the Technical Memorandum, DEC can determine that an area is a significant coastal fish and wildlife habitat so long as it scores above a 15.5 which, based on the criteria, does not require that an area be "critical to the maintenance or re-establishment of

species of fish or wildlife" (Petition ¶ 130).

As a general rule, this Court should "'...defer to the governmental agency charged with the responsibility for administration of [a] statute in those cases where interpretation or application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, and the agency's interpretation is not irrational or unreasonable' ***" Matter of County of Albany v. Hudson River-Black Riv. Regulating Dist., 97 A.D.3d 61, 66-67 [2012]; see, Campion v. New York State Adirondack Park Agency, 188 AD2d 877, 878 [1992]). An agency's interpretation of a statute or regulation should be, "consistent with the spirit, purpose and objects of said [regulation]" (Brown v. Glennon, 203 AD2d 846, 849 [1994]).

Here, the regulations direct the DEC to identify and recommend areas for designation as SCFWH areas. In furtherance of this authority, the Technical Memorandum establishes a threshold of 15.5 "to correspond with the DOS's definition of "significant coastal fish and wildlife habitats" set forth in the regulations [at 9 NYCRR 602.5 (a)[1]]. The threshold value of 15.5 ensures that when an area is assigned the mid-line score of "16" because it exhibits a characteristic of significance pursuant to the regulations; and is assigned the multiplier score of "1" because it is at least "difficult to replace", it will qualify for designation as a SCFWH (Record at 34, page 15).

The effect of the DEC's methodology is that an area may be deemed to exhibit a regulatory characteristic to "a substantial degree" if the area is at least difficult to replace and (1) exhibits a concentration of species of fish or wildlife that is unusual as compared to the rest of New York State; (2) supports a species that is, at least, of "special concern" (see 6 NYCRR Part 182); (3) supports a species that has significant commercial, recreational, or educational value to

New York State residents; or (4) is "of a type" that is rare in a coastal region of New York State. (Record at 34, page 12-13).

The Waterways Act declares that the "public policy of the state of New York within the coastal areas and inland waterways" includes the need "[t]o conserve, protect and where appropriate promote commercial and recreational use of fish and wildlife resources and to conserve and protect fish and wildlife habitats identified by the department of environmental conservation as critical to the maintenance or re-establishment of species of fish or wildlife" (Executive Law §912). In this proceeding, while petitioners focus on the word, "critical", the Court perceives no error in DEC's determination to apply the challenged threshold as a means to achieve the stated policies of the Act. Rather, by establishing the threshold and applying the formula, the agency complied with its statutory and regulatory obligation to determine whether a coastal habitat has "significant" characteristics as compared to other coastal areas within New York State. Accordingly, this Court finds that the DEC's interpretation of the regulations as requiring the threshold was not "inappropriately low" and is entitled to deference (Matter of Gracie Point Community Council v. New York State Dept. of Envtl. Conservation, 92 A.D.3d 123, 129 [2011]).

In addition to the foregoing challenge to the DEC's methodology, petitioners also challenge the specific scores that the agency assigned to the Hudson Highlands SCFWH area. Pursuant to the "Coastal Fish and Wildlife Rating Form", which was incorporated within and made a part of the DOS's determination to designate the Hudson Highlands as a SCFWH area, the DEC calculated the area's significance value to be 151.25, well above the general threshold for significance.

As set forth above, the DEC calculated the significance value of the Hudson Highlands by

assigning fixed scores to each of the regulatory criteria pursuant to the Technical Memorandum. In this proceeding, petitioners challenge the substantive basis for the score assigned to each characteristic. For example, the DEC assigned the score of 25 to the Hudson Highland's "Ecosystem Rarity" (19 NYCRR §602.5(a)[1](i). By the Rating Form, the DEC advised that the area was notable because it is "[a]n extensive area of deep, turbulent river channel with strong currents and rocky substrates; unusual in the Hudson River Estuary" (Rating Form).

In support of the petition, Entergy submits an affidavit by Lawrence Barnthouse, PhD., a biologist who cites extensive experience assessing Hudson River ecosystems. Dr Barnthouse opines that the ecosystem rarity score was excessive because the ecosystem is not "rare in a major ecological region of New York". Rather, according to Dr. Barnthouse, "the entire Hudson River to the Troy dam, arguably satisfies [the] ... depth, turbulence, currents and substrate quality of the River (Barnthouse ¶ 32). In Barnthouse's opinion,

> the ecosystem characteristics in and around Indian Point - an area of deep, turbulent river channel with a strong current and rock substrates - are shared by a 150 mile stretch of the Hudson River and not unusual in the HR estuary and therefore not rare

(Barthhouse ¶¶28-52, ¶84). Dr. Barnthouse further contends that the designation was "overly inclusive" because it extends beyond the deep channel areas of the Hudson River.

Petitioners also challenge the score assigned to the "Human Use" characteristic (19 NYCRR §602.5 (a)[1](iii)). By the Rating Form, the DEC advises that it assigned the score 16 because the "striped bass production in [the Hudson Highlands] contributes to commercial and recreational fisheries in the State of New York". According to Dr. Barnthouse, this stated basis is without merit because his review of the research indicates that the area is "no more critical to striped bass production than any other area of the Hudson River" (Barnthouse ¶39).

Dr. Barnthouse also opines that the score assigned to the "Population Level"

characteristic (19 NYCRR §602.5(a)[1](iv)) was erroneous. This characteristic "refers to the concentration of a species on an area during its normal period of occurrence" (Technical Memorandum p. 9, Coastal Fish and Wildlife Rating Form). According to the DEC, the score was warranted because it determined the Hudson Highlands was "a major spawning area for Hudson River striped bass; Major nursery and summering area for Atlantic sturgeon" and that the concentration of these species was "unusual in [a] major ecological region of the United States" (Technical Memorandum at 12-13; Rating Form).

As stated above, Dr. Barnthouse avers that his review of the relevant research conducted in 2002-2007 does not support the DEC's conclusion that the area is "major spawning area for striped bass" (Barnthouse ¶39). Further, he opines that the DEC's conclusion that the area is a "major nursery and summering area for Atlantic sturgeon" is not supported by the literature or data generated by the Hudson River Biological Program (BMP)[2] , or that the concentration of Atlantic sturgeon is the area is unusual as compared to the rest of the State or the United States. More specifically, he explains that the score is not warranted because based on samples taken from 1979 to 2009 there is effectively no evidence of either Atlantic sturgeon larvae or eggs at River Miles 39-46; that "juvenile Atlantic sturgeon are rarely present in the near shore areas of the Indian Point region"; and that only "some post spawning [sturgeon] have been found in the deep water channel" (Barnthouse ¶45).

Finally, the petitioners challenge the score assigned to the "Replaceability" characteristic (19 NYCRR 602.5(a)[2]). This factor is defined as "the ability to replace the area, either on or off site, with an equivalent replacement for the same fish and wildlife and uses of those same fish

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[2]Barnthouse explains in his affidavit that the BMP includes data collected from various sampling programs conducted at various times during the year (¶5).

and wildlife, for the same users of those fish and wildlife" (See Technical Memorandum; Coastal Fish and Wildlife Rating Form). DEC assigned the score 1.2 because it determined that the Hudson Highlands habitat area was "Irreplaceable".

Dr. Barnthouse contends that this score was not "fully explained or supported" by the Rating Form (Barnthouse ¶49). Further, according to Dr. Barnthouse, the DEC was required to "discuss which portions of the area are irreplaceable and the rationale for the rating" (Barnthouse ¶51). With reference to the Technical Memorandum, Barnthouse contends that the DEC should have honored the stated objective, to "maximize inclusion of the fish and wildlife values contributing to the habitat's importance and minimize inclusion of adjacent land and water not pertinent to those values" (Barnthouse ¶51, citing Record 34 at p. 2).

When reviewing an administrative determination, this Court's role "is not to determine if the agency action was correct or to substitute its judgment for that of the agency, but rather to determine if the action taken by the agency was reasonable" (Chemical Specialties Mfrs. Ass'n v. Jorling, 85 NY2d 382, 396 [1995]). Accordingly, the "[t]he court must defer to the factual determinations made by an agency within its area of expertise so long as there is a rational basis for those determinations" (Hassig v. N.Y. State Dep't of Envtl. Conservation, 6 A.D.3d 1007, 1009 [2004]). Judicial deference is required, "even where conflicting inferences can be drawn from the scientific evidence adduced" (Matter of Riverkeeper, Inc. v. Johnson, 52 A.D.3d 1072, 1074 [2008]).

Here, the record presented confirms that as to the "Species Vulnerability" characteristic, 19 NYCRR §602.5(a)[1](ii)), the DEC assigned a score in excess of the minimum threshold based upon the presence of bald eagles, a threatened species; and Atlantic sturgeon and shortnose sturgeon, both endangered species, in the Hudson Highlands area (Rating Form). The DEC

further explained that the area has a "significant concentration of wintering bald eagles" because the water rarely freezes (Id.; Blair ¶ 40). Petitioners do not dispute this assessment. Accordingly, inasmuch as the Court has found that the threshold scores established by the DEC were rational, and the presence of these species resulted in scores that exceeded the threshold, this finding alone supports the agency's determination that the Hudson Highlands was a SCFWH area.

Notwithstanding, in this Court's view, respondents have demonstrated a rational basis for the score it assigned to the area's "Ecosystem Rarity" characteristic. Here, in response to the petitioners' challenge to the Ecosystem Rarity Score, the DEC's biologist, Ms. Blair explains that the data that the agency relied upon indicates that the Hudson Highlands is the deepest segment of the Hudson River, and at River Miles 40-44, the majority of the area is deeper than 32 feet[3] and there are three sections that are more than 90 feet deep. Although Dr. Barnthouse focuses on the physical characteristics of the area, the definition "ecosystem rarity" is not so limited. Rather, the category "ecosystem rarity" "is defined as the 'uniqueness of the plant and animal community and the physical, structural and chemical features which support this community" (Technical Memorandum at p. 7; Rating Form). Here, by the narrative appended to the Rating Form, the DEC explained that the physical characteristics of the area, i.e. the currents and deep water, support different life stages of migratory fish such as striped bass, shortnose sturgeon, and Atlantic sturgeon, the latter two species being endangered species; and, because the area rarely freezes, provides a winter habitat for bald eagles, a threatened species. While petitioners may dispute the extent to which these species can be found in the area, it is not disputed that the

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[3]Ms. Blair explains that the shipping channel on the Hudson River is 32 feet deep (para 31).

species are present, unique, and dependent on the physical characteristics of the area for their survival (Blair ¶¶ 36-40).

Respondents have also provided a rational basis for the score assigned to the "Human Use" characteristic. This characteristic "refers to significant (i.e. demonstrable) commercial, recreational, or educational wildlife uses" (Technical Memorandum at p. 8; Rating Form). By the Technical Memorandum, the DEC explains that there is not often "direct evidence" available to measure human use (Technical Memorandum, p. 8). Here, the DEC notes in the Rating Form that "based on egg abundance data, Hudson Highlands is one of two areas of high striped bass egg deposition in the esutary"; that striped bass spawn in the area in May and June; and, although commercial striped bass fishing on the Hudson is no longer permitted, the Hudson Highlands still "contributes to coastal commercial and recreational fisheries". The DEC also concluded that the "concentrations of anadromous[4] and marine fishes" in the area support recreation fishing for visitors from throughout the lower Hudson Valley. Further, the DEC noted that the Hudson Highlands is a "critical habitat" for "esturarine-dependent" fisheries because it "contributes directly to the production of in-river and ocean populations of food, game, and forage fish species" and fisheries along the Atlantic coast therefore benefit from the species that originate in the Hudson Highlands (Id.).

In response to the petition, and with reference to the scientific report the agency relied upon, Ms. Blair explains that the DEC determined that the striped bass production in the area contributes to the "vibrant striped bass recreational sport fishery from New York Harbor to the federal dam at Troy" (Blair ¶41). Notably, petitioners do not dispute that such fishery exists.

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[4]Anadromous fish travel from the ocean to fresh water to spawn (http://www.merriam-webster.com/dictionary/anadromous))

Further, Ms. Blair cites a 2010 report that concluded that the striped bass do not necessarily remain in the Hudson River but will instead leave to become part of larger schools on the Atlantic Ocean before returning to the River to spawn (Id.). Although Ms. Blair concedes that the data indicates some evidence of spawning throughout most of the Hudson River, the data evinces a higher density of eggs, larvae, and young of the year within the Hudson Highlands which indicates that the area is, relatively, a "vital habitat" for striped bass (¶42).

The Court also finds that respondents have demonstrated a rational basis for its determination to assign a score to the "Population Level" characteristic based on its finding that the area was a "major spawning area" for striped bass and "major nursery and summering area for Atlantic sturgeon" that is unusual in a "major ecological region of the United States"[5]. While Dr. Barnthouse may dispute the abundance, he acknowledges that striped bass and Atlantic sturgeon are present in the area, even if they are not often found in areas close to shore. Ms. Blair explains that the data the DEC relied upon established that striped bass and both juvenile and adult Atlantic sturgeon rely on the Hudson Highlands during different stages of their lives (¶45).

Finally, the Court finds that record provides a rational basis for respondents' determination that the SCFWH area was "irreplaceable". Based on the Technical Memorandum, this is the highest score that could be assigned. The other options were a finding that the habitat, fish, wildlife and users (1) would be difficult or too expensive to replace or that the ability to replace was "uncertain"; (2) could be replaced through available replacement techniques which could reasonably be successful or that the area would replace itself within ten years; (3) could be

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[5]The ecological regions of the United States are defined in the Appendix to the Technical Memorandum.

replaced by "well-understood" techniques at an "immediately available" site or would replace itself within five years; or (4) would be replaced, independently, within two years (Technical Memorandum).

In response to the petition, Ms. Blair explains that "[t]here are very few examples of in-river habitat restoration or replacement in the Hudson River, and the success of these has not been demonstrated over the long-term" (Blair ¶49). Further, citing the research before the DEC, she explains, "[s]cientists believe that restored or created habitat will not achieve equivalent habitat function for decades, if ever" (Id.). She explains that habitat restoration in estuaries is a "young science" and cites research that concludes that "habitat restoration does not result in habitat that is functionally equivalent to that which it seeks to replace" (¶50). While petitioners contend that the respondents did not "fully explain" their findings, they do not provide any alternatives nor do they suggest that the habitat or any purported segment thereof is replaceable. As Ms. Blair explains, at this time, the technology to recreate the conditions necessary to sustain the species present in the Hudson Highland SCFWH area has not been developed.

The Court is cognizant that the scientists in this proceeding have cited ample data with reference to available scientific literature in support of their respective conclusions. Importantly, however, this Court has no authority to determine whether petitioners' data is more relevant or valid than that relied upon by the respondents. Clearly, petitioners believe that there is evidence that conflicts with the DEC's findings. In this proceeding, the existence of contrary evidence makes no difference, as this Court's role is not to consider and resolve disputed facts (Save Our Forest Action Coalition, Inc. v. City of Kingston, 246 A.D.2d 217, 220-221 [1998]).

The DEC has provided a reasonable basis for the scores that it assigned to each of the regulatory characteristics and this Court may not substitute its judgment for that which was exercised by the respondents here. Accordingly, the petitioner's seventh cause of action is without merit.

Finally, the Court rejects petitioners claim that the DOS lacked authority to adopt the SCFWH area modifications at issue in this proceeding. To the extent the petition can be read as a challenge to the DOS's promulgation of the regulations set forth at 19 NYCRR Part 602, the Court agrees with respondents that the claims are untimely (Matter of Entergy Nuclear Indian Point 2, LLC v New York State Dept. of Envtl. Conservation, 23 A.D.3d 811, [2005] lv. dismissed, lv. den. 6 NY3d 802 [2006]). Moreover, the Court finds that in view of authority granted to the Department of State by the Legislature in 1975 (Chapter 464 of the Laws of 1975, Supra) and expanded in 1981 (Chapter 840 of the Laws of 1981) to include the authority

> ...to adopt, amend or rescind such rules and regulations as may be necessary or convenient to the performance of the functions, powers and duties of the secretary; and [ ] [t]o do all other things necessary or convenient to carry out the functions, powers and duties expressly set forth in this article or as may from time to time be confined upon the secretary by the legislature of the state

(Executive Law §913 (6), (7)), the DOS was authorized to designate the SCFWH areas at issue in this proceeding.

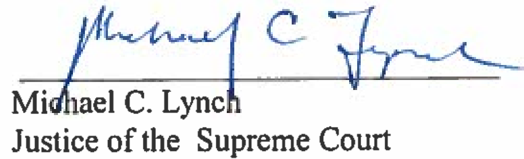
Accordingly, based on the foregoing, it is

ORDERED AND ADJUDGED that the petition is dismissed.

This represents the Decision and Order/Judgment of this Court. All papers are being returned to the Attorney General. The signing of this Decision and Order/Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provisions of that

rule regarding filing, entry, or notice of entry.

SO ORDERED!
Dated: Albany, New York
November 20, 2013



Michael C. Lynch
Justice of the Supreme Court

Papers Considered:

(1.) Notice of Verified Petition/Complaint dated October 1, 2012; Verified Petition and Complaint dated October 1, 2012; Affidavit sworn September 28, 2012 (Lusic), with Exhibits thereto; Affidavit of Patric W. Conroy sworn September 27, 2012, with Exhibits thereto; Affidavit of David Harrison Jr. PhD., sworn September 27, 2012, with Exhibits thereto; Affidavit of Lawrence W. Barnthouse, PhD., sworn September 27, 2012, with Exhibits thereto, Memorandum of Law;

(2) Answer and Return dated December 20, 2012, with Affidavit in Support sworn December 20, 2012 (Stephanie Wojtowicz) and Exhibits thereto; Affidavit in Support sworn December 18, 2012 (Elizabeth A. Blair) and Exhibits thereto; Affidavit in Support sworn December 18, 2012 (William C. Nieder) and Exhibit thereto, Memorandum of Law;

(3) Affidavit sworn June 6, 2013 (Lawrence W. Barnthouse, PhD.), Reply Memorandum of Law;

(4) Amicus Curiae Brief filed August 5, 2013 (Riverkeeper, Inc. and Scenic Hudson, Inc.) (Daniel E. Estrin, Esq.).

Oral Argument was held on September 27, 2013.

Attachment 2

Decision and Order/Judgment with Notice of Entry
December 13, 2013

In the Matter of the Application of Entergy Nuclear Operations, Inc., et al. v. New York State Department of State, et al.

Supreme Court, Albany County
Index No. 1535-13
RJI No. 01-12-ST4421
(Justice Michael C. Lynch, Presiding)

SUPREME COURT STATE OF NEW YORK
COUNTY OF ALBANY

ENTERGY NUCLEAR OPERATIONS, INC.,
ENTERGY NUCLEAR INDIAN POINT 2, LLC, and
ENTERGY NUCLEAR INDIAN POINT 3, LLC,

Petitioners-Plaintiffs,

NOTICE OF ENTRY
Index No. 1535-13
RJI No. 01-12-ST4421

For a Judgment pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

THE NEW YORK STATE DEPARTMENT OF STATE,
CESAR A. PERALES, Secretary of the New York State
Department of State,

Respondents-Defendants.

PLEASE TAKE NOTICE that a Decision and Order/Judgment a copy of which is attached, was signed on December 13, 2013, by the Hon. Michael C. Lynch, J.S.C., and filed and entered in the Office of the Clerk of Albany County on December 19, 2013.

Dated: December 19, 2013
Albany, New York

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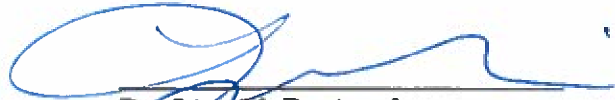

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

ENTERGY NUCLEAR OPERATIONS, INC.,
ENTERGY NUCLEAR INDIAN POINT 2, LLC,
and ENTERGY NUCLEAR INDIAN POINT 3 LLC,

Petitioners-Plaintiffs,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

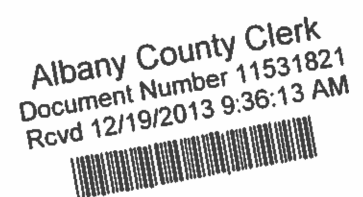
- against -

THE NEW YORK STATE DEPARTMENT OF
STATE, CESAR A. PERALES, Secretary of the
New York State Department of State

Respondents-Defendants.

DECISION AND ORDER/JUDGMENT

Supreme Court, Albany County
Index No. 1535-13
RJI No. 01-12-ST4421
(Justice Michael C. Lynch, Presiding)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APPEARANCES:

For Petitioners/Plaintiffs:

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LYNCH, J:

Petitioners Entergy Nuclear Indian Point 2 LLC and Entergy Nuclear Indian Point 3 LLC

are the entities that own nuclear power generating units known as Indian Point Generating Units 2 and 3 (IP2 and IP3) (hereinafter, "Entergy" or "Petitioners"). On or about November 5, 2012, Petitioners filed an application with the respondent New York State Department of State (hereinafter, DOS) for a declaratory ruling that IP2 and IP3 are not subject to review pursuant to a certain provision set forth in a document titled, "New York State Coastal Management Program and Final Environmental Impact Statement" (hereinafter, CMP). In response, the DOS advised that because the CMP is not a "rule or statute enforceable by the [DOS]", the petitioners were not entitled to a declaratory ruling pursuant to the New York State Administrative Procedure Act. The DOS instead issued an "advisory" response that IP2 and IP3 were subject to the State's Coastal Management Program. This hybrid CPLR Article 78 and declaratory judgment action followed.

In 1959, the State of New York conveyed property located in Buchanon, New York and situate along the Hudson River to Consolidated Edison, Inc. (ConEd) so that it could construct the Indian Point nuclear power generating facility. In 1966, the United States Atomic Energy Commission (AEC) issued a construction permit to ConEd to allow it to build IP2; in 1968, ConEd applied for an operating license. In 1972, the AEC issued its Environmental Impact Statement, the Nuclear Regulatory Commission (NRC, the successor to the AEC), issued an operating license in 1973, and IP2 began generating electricity in 1974 (Petition ¶37). Entergy purchased IP2 from ConEd in 2001.

In October 1968, ConEd applied for an operating license for IP3 and thereafter, began to construct the Unit. In 1974, the New York State Legislature authorized the State's Power Authority (NYPA) to acquire IP3. The NRC completed the EIS for IP3 in February 1975 and issued the operating license in December 1975. IP3 began generating electricity in 1976.

Entergy purchased IP3 from NYPA in 2000.

On April 30, 2007 Entergy submitted a license renewal application (LRA) to the NRC requesting a twenty year extension of the existing operating licenses for IP2 and IP3. The IP3 license expires in 2015; the IP2 license expired this year but has been extended pending review.

As the Hudson River is within the "coastal zone" (see 16 USCS §1453(1)), Entergy's license application is subject to the provisions of the Federal Coastal Zone Management Act (CZMA) and its regulations (16 USCS §1451 et. seq.). In relevant part, the CZMA provides that a "coastal state", like New York State (16 USCS §1453(4)), may develop a "management program" that

> " includes ...a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adopted by the state in accordance with [the CZMA] the provisions of this title, setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone

(16 USCS §1453 (m)).

In 1981, the New York State Legislature enacted the "Waterfront Revitalization and Coastal Resources Act" (hereinafter, Waterfront Act) "to provide for the establishment of the New York Coastal Management Program pursuant to the [CZMA]" (Ch. 840 of Laws of 1981; see Executive Law Article 42). Therein, the DOS was authorized to administer the State's Waterfront Act and to promulgate rules and regulations as required in furtherance of the statute (Executive Law §913). In 1982, pursuant to authority set forth in the Waterfront Act, the DOS issued the CMP which is the focus of the instant dispute. The CMP describes "the forty-four coastal policies with which all State agency actions must be consistent" and provides the "framework for government decision-making which affects New York's coastal area" (CMP I.1). These coastal policies are implemented through, among other authorities, the Waterfront Act

and its regulations (19 NYCRR §600.1 et. seq.) and the State Environmental Quality Review Act (Environmental Conservation Law §8-0101 et. seq., hereinafter, SEQRA) and its regulations (6 NYCRR Part 617) (See CMP Appendix A, E, F).

The National Oceanic and Atmospheric Administration (NOAA) on behalf of the United States Secretary Commerce, approved New York State's Coastal Management Program in September 1982 (Petition ¶47; see 16 USCS §§1454, 1455). Accordingly, the CZMA provides that New York State is entitled to participate in "consistency" review (16 USCS §1456) and the renewal applications pending before the NRC are subject to Federal regulations governing "Consistency for Activities Requiring a Federal License or Permit" (see Title 15 CFR Part 930 Subpart D). The regulations obligate the applicant to provide to both the Federal reviewing agency and the DOS, as New York State's reviewing agency, "a certification that the proposed activity complies with and will be conducted in a manner consistent with the [CMP]" (15 CFR 930.57; 15 CFR 930.58). Notably, the applicant must include with its submissions to the State:

> An evaluation that includes a set of findings relating the coastal effects of the proposal and its associated facilities to the relevant enforceable policies of the [State's] management program. Applicants shall demonstrate that the activity will be consistent with the enforceable policies of the management program.

(Id.).

Upon receipt of a complete application, the DOS has six months to review the consistency certification (15 CFR §930.59) during which time it must provide public notice and allow an opportunity for public comment (15 CFR §930.61). Thereafter, the State may either concur with or object to the certification (15 CFR §930.62; 15 CFR §930.63). If the State objects to the certification, the Federal agency may not issue the license unless, after an appeal, the

Federal Secretary of Commerce overrides the State's objection upon a finding that "the activity is consistent with the objectives or purposes of the Coastal Zone Management Act, or is necessary in the interest of national security" (15 CFR §930.63; 15 CFR §930.64; 15 CFR Part 930, Subpart H). Here, petitioners' consistency certification for the IP2 and IP3 license renewals is pending. Petitioners advise that the DOS's response to the certification is due on March 22, 2014 (correspondence dated October 15, 2013).

Citing the need for "special discussion" with regard to Federal program requirements "pertaining to national interest, uses of regional benefit, Federal consistency and public participation", New York State's CMP includes a section that reviews "Special Federal Program Requirements" (CMP II-9). Relevant to this dispute, the CMP provides:

> The projects which meet one of the following two criteria have been determined to be projects for which a substantial amount of time, money and effort have been expended, and will not be subject to New York State's Coastal Management Program and therefore will not be subject to review pursuant to the Federal consistency procedures of the Federal Coastal Zone Management Act of 1972, as amended: (1) those projects identified as grandfathered pursuant to the SEQRA at the time of its enactment in 1976; and (2) those projects for which a final Environmental Impact Statement has been prepared prior to the effective date of the Department of State Part 600 regulations [see Appendix A, DOS Consistency Regulations NYCRR Title 19, Part 600, 6600.3(4)].

On November 5, 2012, the petitioners filed a Petition for Declaratory Relief pursuant to the New York State Administrative Procedure Act (SAPA) (see SAPA §204) seeking, "a declaratory ruling that IP2 and IP3 are not subject to review for consistency with the enforceable policies of the New York State Coastal Management Plan". In sum, the petitioners argued that because the IP2 and IP3 units were grandfathered under SEQRA and the Environmental Impact Statements were adopted before the effective date of the regulations administering the Waterfront Act 19 NYCRR Part 600 et. seq , IP2 and IP3 are exempt from consistency review pursuant to the policies set forth in the CMP. Consequently, petitioners argue, the pending applications to

renew the operating licenses of IP2 and IP3 are exempt from the CMP's consistency certification process (Memorandum of Law at ¶1).

On January 9, 2013, after seeking and obtaining an extension of time for its response, the DOS issued its determination. First, the DOS ruled that the CMP is "not an appropriate subject for a declaratory ruling" because it is "not a 'rule or statute enforceable by [the DOS]' as it has neither been enacted by the State Legislature nor promulgated as a rule pursuant to SAPA" (Return at 11). Notwithstanding that, in recognition of its obligation to offer "assistance" to applicants with regard to whether a proposed action may be exempt under the CMP criteria, the DOS included a substantive response, albeit characterized as "advisory only", that the IP2 and IP3 were subject to the CMP.

Petitioners commenced this hybrid CPLR Article 78 proceeding and declaratory judgment action to challenge the respondents ruling. First, petitioners contend that the DOS's "denial" of the petition was "arbitrary and capricious, an abuse of discretion, and contrary to law" (First Cause of Action). Second, petitioners seek a declaration that IP2 and IP3 qualify as "grandfathered" under the CMP and thus, are not subject to federal consistency review (Second Cause of Action).

Preliminarily, the Court rejects the respondent's apparent claims that the CZMA preempts the CMP and that the State lacks jurisdiction to review the issues presented. Respondents correctly contend that the CZMA specifically mandates that Federal agency activities must be "consistent to the maximum extent practicable with the enforceable policies of approved State management programs" (16 USCS §1456(c)[1]). In addition, however, the CZMA also explicitly states that the CZMA should not be construed "to diminish ...state jurisdiction, responsibility, or rights in the field of planning development, or control of water resources,

submerged lands, or navigable waters'... (16 USCS §1456(e); see Cal. Coastal Com v. Granite Rock Co., 480 U.S. 572, 592 [1987]). In this Court's view, the State's authority under the CZMA includes the discretion to decline to review certain activities for consistency with its management program (See, e.g. 15 CFR §930.53(a) [the State must identify those activities that it wishes to review for Federal consistency]; 15 CFR §930.62 [the State's concurrence with an applicant's consistency certification will be presumed if State does not respond within requisite time]).

The New York State Administrative Procedure Act permits agencies to issue, upon request, declaratory rulings "with respect to (i) the applicability to any person, property, or state of facts of any rule or statute enforceable by it, or (ii) whether any action by it should be taken pursuant to a rule" (SAPA §204(1)). Similarly, regulations promulgated by the DOS provide:

> Generally, a declaratory ruling is a binding advisory opinion as to the applicability of a rule or statute to a particular state of facts, the purpose of which is to give guidance before rather than after the conduct in question occurs. Most often, it addresses a set of operable facts which the petitioner poses as a future plan of action and can give binding assurance to the petitioner that certain consequences will flow from future conduct unless the declaratory ruling is set aside or modified by a court of competent jurisdiction or the law is changed by act of the Legislature. A declaratory ruling, however, will not extend or limit a rule or statute beyond that which might be reasonably educed from the language of the rule or the statute in question. Where a declaratory ruling would be, in effect, a regulation then regulations will be published and properly promulgated.

(19 NYCRR § 264.1 (b)).

The agency is not obligated to issue a ruling upon a request; rather, it may exercise its discretionary authority to decline a request for a ruling (SAPA 204 (2) [a]; see Matter of Humane Soc'y of United States v. Brennan, 63 A.D.3d 1419, 1420 [2009]). Indeed,

> "the only limitations upon the authority of the agency to issue a declaratory ruling are the discretion of the agency to withhold a ruling, the power of the agency to regulate the procedure governing petitions seeking a ruling, the power of a court to alter a ruling or set

it aside and the power of the agency to change the ruling prospectively.

(Power Authority of New York v. New York State Dep't of Environmental Conservation, 58 N.Y.2d 427 [1983]). A party may seek review of an agency's ruling or its refusal to issue a ruling by commencing a proceeding pursuant to CPLR Article 78 (Dairy Barn Stores, Inc. v. State Liquor Authority, 67 A.D.2d 692 [1979]). Where, as here, an agency has refused to issue a ruling, the Court's authority in a CPLR Article 78 is limited; while it may remand the proceeding to the agency for a ruling, it may not issue a declaratory ruling in the agency's stead (Id.).

Here, in response to the petitioner's request "for a declaratory ruling that IP2 and IP3 are not subject to review for consistency with the enforceable policies of New York's Coastal Management Plan", the DOS responded:

> The CMP text is not a "rule or statute enforceable by [DOS]" as it has neither been enacted by the State Legislature nor promulgated as a rule pursuant to SAPA. ..Thus the interpretation of the CMP is not an appropriate subject for a declaratory ruling"

(Return 19).

As relevant to the issue presented, SAPA defines a rule as "'the whole or part of each agency statement, regulation or code of general applicability that implements or applies law,' but excluding 'interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory' (Cubas v. Martinez, 8 N.Y.3d 611, 621 [2007] [quoting SAPA 102 [2] (a) [i]; (b) [iv]). Accordingly, "a 'rule or regulation' is 'a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers'" (Id., [quoting Matter of Roman Catholic Diocese of Albany v New York State Dept. of Health, 66 NY2d 948, 951 [1985]).

Here, in context of the State and Federal statutory and regulatory scheme, the Court

agrees with petitioners that the DOS had the authority to issue the requested declaratory ruling. The CMP is the document that provides the "framework" for decisions affecting coastal areas in New York State, and is the heart of the State's Coastal Management Program that was approved by NOAA Pursuant to the CZMA, a State's "management program" is

> a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adopted by the state in accordance with the provisions of this title, setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone.

16 USCS §1453(12). New York State's "Management Program" includes the CMP, but the CMP incorporates and is implemented by statutory and regulatory authorities, including the Waterfont Act and SEQRA (CMP Part I.1.; Executive Law Article 42; 19 NYCRR Part 600; Environmental Conservation Law Article 8; 6 NYCRR Part 617). By approving the State's Management Program, the Secretary of Commerce necessarily determined that the State's Program, which includes the CMP and the statutes and regulations referenced therein, was consistent with and would further the policies and purposes of the CZMA (16 USCS § 1455 [d](1)). Moreover, by such approval, it is apparent that the State had demonstrated that the Program, "taken together" allows for implementation of the stated coastal policies; that it requires the State and its authorized personnel to conform to the enforceable policies of the Management Program; and that such the Program includes provisions to ensure its enforcement (15 CFR §923.43). Here, the question presented, whether the IP2 and IP3 are subject to review under the CMP, is one that could have been addressed pursuant to SAPA 204 with reference to the State's Coastal Management Program, which incorporates the CZMA and its regulations, the Waterfront Act and its regulations, and the CMP and is administered by the Department of State.

In this Court's view, the DOS too narrowly framed the issue as addressing simply the interpretation of the CMP with respect to IP2 and IP3. Rather, in context, the question presented was whether, based on the referenced "grandfather" policy stated in the CMP, the State planned to subject IP2 and IP3 to consistency review pursuant to the State's approved Coastal Management Program. Accordingly, the Court finds that the DOS's refusal to issue the declaratory ruling was arbitrary and capricious (Dairy Barn Stores, Inc. v. State Liquor Authority, 67 AD2d 692; see also, Dairy Barn Stores, Inc. v. State Liquor Authority, 67 A.D.2d 691 [where it was arbitrary and capricious to refuse to issue a declaratory ruling with regard to the agency's objections based, in part, on certain policy statements")

While the DOS refused to characterize its ruling as a declaratory ruling pursuant to SAPA 204, it did issue a ruling that it deemed to be "advisory" only. Here, it is apparent that the advisory opinion is the Department's "definitive position" with regard to whether it considers IP2 and IP3 to be subject to consistency review under the State's Coastal Management Program (see e.g. Compass Adjusters & Investigators v. Comm'r of Taxation & Fin., 197 A.D.2d 38 [1994]). Accordingly, and in the interest of judicial economy, the Court declines to remand the matter to the DOS to issue a formal ruling (see Dairy Barn Stores, Inc., Supra, 67 AD2d 692) and will instead review the merits of the purported "advisory" response pursuant to SAPA 204(1).

Where, as here, the Court must review an agency's response to a ruling pursuant to SAPA 204,

> "It is settled that 'the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld' *** Deference to such construction is appropriate where the language used in the statute is special or technical and does not consist of common words of clear import *** In addition, deference to an agency's construction of a statute is warranted '[w]here the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices'"

New York State Ass'n of Life Underwriters v. New York State Banking Dep't, 83 N.Y.2d 353, 359-360 [1994]).

In 1975, the New York State Legislature designated the New York State Department of State as the agency responsible for the administration of the CZMA in New York State (Chapter 464 of the Laws of 1975, §47). When the Waterfront Act was enacted it 1981 (L. 1981, ch. 840), the DOS was given the authority to, inter alia, "to evaluate and make recommendations on federal, state and local programs and legislation relating to coastal and inland waterway resources issues" (Executive Law §913(2)). The DOS's interpretation of the CMP is thus entitled to deference so long as it is not unreasonable or irrational (Id.).

As set forth above, the CMP provides in the "Introduction" to the Section titled, "Special Federal Program Requirements" that certain projects "have been determined to be projects for which a substantial amount of time, money and effort have been expended" because they meet one of two identified criteria. This Court finds that the respondent's conclusion that the criteria did not apply to the license renewal applications submitted by IP2 and IP3 was rational.

The "activity" at issue here is, of course, the renewal of each unit's federal license and it is not disputed that neither unit has been subject to review pursuant to the CZMA. The Federal regulations distinguish license activity and "development projects" (15 CFR 930 Subpart C; 15 CFR 930 subpart D). Moreover, as relevant here, the CZMA regulations specifically provide that license renewals not previously reviewed by the State are subject to federal consistency (15 CFR §930.51 (b)). Similarly, in furtherance of the regulatory requirement that the State list those activities that it wishes to review for federal consistency (see 15 CFR §930.53), the State specifically identifies "[l]icensing and certification of the siting, construction, and operation of

nuclear power plants" as an activity that is subject to the federal consistency provisions (CMP II-9 at p. 20).

Petitioners now contend that the first criterion, "those projects identified as grandfathered pursuant to the SEQRA at the time of its enactment in 1976", applies because IP2 and IP3 are grandfathered pursuant to the State Environmental Quality Review Act. In response to the request for a declaratory ruling, the DOS advised that while certain construction, modification, and acquisition activities and projects at IP3 were "identified" as grandfathered under SEQRA, the operation of IP2 and IP3 were never "identified" at the time that SEQRA was enacted. Accordingly, the DOS advised that the criterion did not apply IP2 and IP3.

In this Court's view, deference to the DOS ruling is appropriate. Review of the legislative history reveals that in order to implement the provisions of the State Environmental Quality Review Act, each state agency was directed to provide a list of agency actions which the agency "deem[ed] to [be] approved" (see L. 1976, ch. 228 §5; L. 1977, ch. 252). Upon receipt of such list, the State's budget director was directed to review, and if appropriate, certify that "substantial time, work and money have been expended on such projects" and, thereafter, "submit ... an official list of projects which shall be deemed approved and therefore not subject to the provisions of [SEQRA]" (Id.).

The listing requirement was not codified at Article 8 of the Environmental Conservation Law. Instead, and in addition to the foregoing, the statute provides that in general, its provisions do not apply to "actions undertaken or approved prior to the effective date of [SEQRA]" (ECL 8-0111 (5) [added L. 612 of 1975). This "grandfathering" provision in SEQRA is separate and distinct from those actions that were specifically identified and "deem[ed] to [be]

approved" in furtherance of the phased implementation legislation in 1976 and 1977.

Here, the question presented is not, as petitioners suggest, whether the IP2 and IP3 are grandfathered pursuant to ECL 8-0111 (5) (see, e.g. Salmon v. Flacke, 91 A.D.2d 867 aff'd 61 N.Y.2d 798; Northeast Solite Corp. v. Flacke, 91 A.D.2d 57) but whether the criteria identified in the CMP applies to the licensing of IP2 and IP3. As stated, the CZMA expressly provides that license renewals are subject to consistency review and the CMP clearly announces that the State intends to participate in the review of license applications. In context therefore, the Court finds that the respondent's conclusion that the first criterion is not applicable because neither facility was certified as a "project" "deemed to [be] approved" during SEQRA's phased implementation was not irrational.

The Court also finds that the DOS's determination that the second criterion, "those projects for which a final Envioronmental Impact Statement has been prepared prior to the effective date of the Department of State Part 600 regulations [see Appendix A, DOS Consistency Regulations, NYCRR Title 19, Part 600, 6600.3(4)]", is inapplicable to the license renewal applications is entitled to deference. Indisputably, the United States Atomic Energy Commission issued its final Environmental Impact Statement (EIS) related to the licensure of IP2 in September 1972 and it issued the EIS for the IP2 license in February 1975. Petitioners contend that this criterion must be applied literally, that is, because an EIS for each unit was prepared prior to the effective date of New York State's Waterfront Regulations, the petitioners need not certify that its operations are consistent with the coastal policies set forth in the CMP.

The Court declines to construe the CMP so literally. Indisputably, the operations at IP2 and IP3 have never been subject to review pursuant to the CZMA. In view of the statutory and regulatory provisions governing license renewals, the second critereon set forth in the CMP may

have applied during the implementation of New York State's Coastal Management Program when the IP2 and IP3 licenses were in effect. The pending license renewal applications, however, are not exempt from consistency review. The respondent's conclusion that the second criterion is not applicable was therefore rational.

The parties' remaining contentions have been considered and are either without merit or not necessary to resolve in light of the foregoing.

Accordingly, based on the foregoing it is

ORDERED AND ADJUDGED that the petition is dismissed; and it is further

ORDERED AND ADJUDGED that the request for a declaratory judgment is denied.

This represents the Decision and Order/Judgment of this Court. All papers are being returned to the Attorney General. The signing of this Decision and Order/Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provisions of that rule regarding filing, entry, or notice of entry.

SO ORDERED!
Dated: Albany, New York
December 13, 2013

Michael C. Lynch
Justice of the Supreme Court

Papers Considered:

(1.) Notice of Verified Petition-Complaint dated March 13, 2013, Summons dated March 13, 2013, Verified Petition-Complaint dated March 13, 2013, Exhibits A-M thereto, Affidavit in Support sworn March 11, 2013 (Donald M. Mayer) and Exhibits thereto, Affidavit in Support sworn March 11, 2013 (Fred R. Dacimo) and Exhibits thereto, Memorandum of Law in Support;
(2) Objection and Certified Return filed May 10, 2013, Memorandum of Law;
(3) Reply Memorandum of Law filed June 7, 2013
(4) Correspondence dated October 4, 2013 (Bobby R. Burchfield, Esq.), correspondence dated October 15, 2013 (Bobby R. Burchfield, Esq.).

Oral Argument was held on September 27, 2013.

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