NRR-PMDAPEm Resource

From: Gathen, Kari (DOS) [Kari.Gathen@dos.ny.gov]
Sent: Friday, May 30, 2014 6:33 PM
To: Moser, Michelle
Cc: Wrona, David; Baldwin, Linda (DOS)
Subject: NYS DOS Response to NRC Inquiries
Attachments: NYSDOS Letter response to NRC 5 30 2014.pdf; NYSDOS responses to NRC's six inquiries 5 30 2014.pdf; Attachment 1.pdf; Attachment 2.pdf; Attachment 3.pdf; Attachment 4.pdf; Attachment 5.pdf; Attachment 6.pdf; Attachment 7.pdf; Attachment 8.pdf; 2013 12 12 NRC letter to DOS.pdf

This email is being sent on behalf of Ms. Linda Baldwin.

Dear Ms. Moser,

Please accept the attached letter and other attachments as the New York State Department of State's complete response to Mr. Wrona's December 6, 2013, letter to George Stafford, a copy of which is also attached to this email.

Sincerely,

Linda M. Baldwin
General Counsel
New York State Department of State
Albany - 518-474-6740
NYC - 212-417-5803

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Recipients:
"Wrona, David" <David.Wrona@nrc.gov>
Tracking Status: None
"Baldwin, Linda (DOS)" <Linda.Baldwin@dos.ny.gov>
Tracking Status: None
"Moser, Michelle" <Michelle.Moser@nrc.gov>
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99 WASHINGTON AVENUE
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ANDREW M. CUOMO
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CESAR A. PERALES
SECRETARY OF STATE

May 30, 2014

Mr. David J. Wrona, Chief
United States Nuclear Regulatory Commission
Environmental Review and Guidance Update Branch
Division of License Renewal
Washington, D.C. 20555-0001

Re: Consistency of the Indian Point Nuclear Generating Units Nos. 2 and 3 (IP2, LLC and IP 3, LLC), License Renewal Application with New York State Coastal Management Program

Dear Mr. Wrona,

This letter responds to your correspondence dated December 6, 2013 to George Stafford, New York State Deputy Secretary of State, requesting consultation pursuant to 15 C.F.R. § 930.51 regarding the federal consistency review of the license renewal application for Indian Point Nuclear Generating Unit Nos. 2 and 3 (IP2 and IP3 respectively). These facilities are owned and operated by Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc. (Entergy). You have asked the New York State Department of State (NYSDOS) to answer six (6) questions about the federal consistency process as it relates to the IP2 and IP3 License Renewal Application, which is pending before your agency.

NRC's questions are premised on the applicability of a federal-state consultation envisioned in a federal regulation, 15 C.F.R. § 930.51(e). The consultation process only arises in the context of a federal license renewal when the original license was previously reviewed for federal consistency by the State agency and the renewal will cause an effect on any coastal use or resource "substantially different" than that originally reviewed by the State agency. 15 C.F.R. § 930.51(b)(3) and (e). In her August 8, 2102 letter to NRC's Eric Leeds, then NYSDOS General Counsel Susan L. Watson indicated that NYSDOS is the sole designated State agency[1] authorized to conduct consistency reviews of federal agency activities pursuant to the federal Coastal Zone Management Act (CZMA). Because IP2 and IP3 have never been reviewed for consistency by this agency, NYSDOS takes the position that 15 C.F.R. § 930.51(e) is

[1] L.1975, c. 464, § 47. The State Legislature appointed NYSDOS the "single State agency" to accept federal funding to prepare and administer the NYS CMP. The "State agency" is defined at 15 C.F.R. § 930.11(o). NYSDOS is the only designated "State agency" to review federal agency applications for federal consistency.

inapplicable and that interagency consultation is not warranted. Nonetheless, as a matter of courtesy, NYSDOS will answer NRC's questions.

In accordance with the CZMA and the regulations promulgated by National Oceanic and Atmospheric Administration (NOAA), no New York State agency, except NYSDOS, has the authority to review the federal consistency of IP2 and IP3's operating license or operating license renewal applications under the CZMA. As the pointed out in NOAA's commentary when it revised the federal consistency regulations in 2000:

> Section 930.6(c) is added to clarify the role of the single State agency for coordinating federal actions and the State agency's responsibility to apply all relevant enforceable policies when conducting consistency reviews.
>
> Further, NOAA's program approval regulations require a single State agency charged with implementing federal consistency, section 923.53(a)(1), as does the existing federal consistency regulation, section 930.18. The need for a designated State consistency agency is to ensure: uniform application of a State's management program policies, efficient coordination of all management program requirements, comprehensive coastal management review, that all relevant enforceable policies are considered for a federal consistency review, that public participation requirements are met, and that there is a single point of contact for Federal agencies and the public to discuss consistency issues. The State agency coordinates consistency reviews, issues concurrences and objections, coordinates with Federal agencies, provides guidance on complying with the consistency requirement, handles appeals to the Secretary and mediation requests, etc. **The State agency may rely on the expertise of other State agencies, but other State agencies may not be the designated State agency for consistency reviews, decisions, etc.**[2]

Federal consistency reviews were not conducted for the original IP operating licenses, which predated the approval of New York's CMP in 1982. Here, the consistency review obligation applies to Entergy's IP license renewal applications. Thus, Entergy's federal consistency certification is being reviewed in accordance with 15 C.F.R. § 930.51(b)(1), which requires that "[r]enewals and major amendments of federal license or permit activities not previously review by the State agency" are to be reviewed for federal consistency review in accordance with 15 C.F.R Part 930 subpart D. In commenting on revised federal consistency regulations in 1979, NOAA commented:

> Paragraph (b) [of 15 C.F.R. 930.51] is founded on the principle that an applicant does not have a vested right to receive approval of a renewal or a major amendment without first complying with the law existing at the time approval is sought. However, this principle must operate in the context of avoiding unnecessary State agency review. **There, subparagraph (1) [of 15 C.F.R. 930.51(b)] assures the State agency of an opportunity to review licenses and permits which were originally approved by the Federal government prior to [coastal] management program and are subject to major amendment or renewal following the [coastal] management program approval.** In the event the State agency has previously reviewed a license or permit activity, further review is limited to cases where changes in [the coastal] management program provisions necessitate reevaluation of the activity (subparagraph [15 C.F.R.

[2] 65 Fed. Reg. 77124-01, 77128 - 77129 (Dec. 8, 2000) (emphasis added).

930.51(b)](2)), or the activity will be modified substantially causing new coastal zone effects (subparagraph [15 C.F.R. 930.51(b)](3)).[3]

The letter is organized to provide the necessary background and context for NYSDOS's responses to NRC's inquiries.

Chronology of Indian Point Licensing

Indian Point Unit 2 was licensed for commercial operation by the Atomic Energy Commission (AEC), the predecessor to the NRC, for forty (40) years on September 28, 1973 with an expiration date of September 28, 2013. Unit 2 was originally licensed to the Consolidated Edison Company (ConEd), which later sold that facility to Entergy in September 2001.

IP3 was licensed on December 12, 1975, for a 40-year period that will expire on December 12, 2015. While ConEd originally owned IP3, it was conveyed to the Power Authority of the State of New York (NYPA) during construction. NYPA operated IP3 until November 2000 when it was sold to Entergy.

Entergy purchased IP2 and IP3 in 2001 and 2000 respectively, and NRC approved the transfer of the operating licenses for these units. NYSDOS did not perform a federal consistency review of that property and license transfer.

On April 23, 2007, Entergy filed an application with the NRC to extend the commercial operating licenses for IP2 and IP3 for an additional twenty (20) years beyond the current expiration dates. Although not included with the license renewal submission, the application "indicated that Entergy would submit a Coastal Management Program Consistency Certification to the New York State Department of State."[4]

More than 5 years later, Entergy sent a letter declaring that it had already met its federal consistency review requirement for the IP2 and IP3 license renewals.[5] On July 30, 2012, Entergy filed a motion and memorandum with the NRC for a declaratory order asserting that it has already met its CZMA federal consistency requirements (15 C.F.R. Part 930 subpart D) and amending its Environmental Report (10 C.F.R. Part 53) to reflect its position that it was not obligated to take further action on the issue.[6] In that correspondence, Entergy contended that the relicensing of IP2 and IP3 are exempt from federal consistency review by NYSDOS because several New York State agencies and public authorities conducted State agency consistency review in connection with State actions and/or approvals.

[3] 44 Fed. Reg. 37,142, 37,150 (June 25, 1979) (emphasis added).

[4] See Indian Point Nuclear Generating Unit Nos. 2 and 3 – License Renewal Application (April 23, 2007) at Environmental Report Attachment D.

[5] See Letter from Entergy's Fred Damico to the Nuclear Regulatory Commission dated July 24, 2012 at p. 1. "Entergy reassessed the Act's requirements and has determined that IP2 and IP3 already have obtained the necessary consistency reviews from the State of New York and that license renewal will not result in coastal effects that are substantially different than the effects previously reviewed by NYSDOS and other state agencies with jurisdiction under state law to make those determinations. 15 CFR 930.51 (b)(3). From this determination flows the conclusion that IP2 and IP3 require no further consistency review in connection with this proceeding

[6] Motion and Memorandum from Entergy to the NRC dated July 30, 2012. In the motion, Entergy asserts purporting to amend its 2007 environmental report pursuant to 10 C.F.R. 51.45(d) and assert "that IP2 and IP3 have already obtained the necessary consistency reviews from the State of New York and that no further review is required, pursuant to regulations promulgated by the U.S. Department of Commerce, National Oceanic and Atmospheric Administration in 15 C.F.R. 930.51."

By letter dated August 8, 2012, NYSDOS's then General Counsel Susan Watson responded to NRC indicating that Entergy's contentions were without legal merit.[7] Under the CMP, NYSDOS has been designated as the single State agency authorized to receive and administer grants and thereby to make consistency determinations pursuant to the CZMA and its regulations.[8] Only NYSDOS can make the federal consistency determination mandated by the CZMA. It has never conducted a federal consistency review for the Indian Point Unit 2 or Indian Point Unit 3 operating license.

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

On April 5, 2013, New York filed a cross-motion seeking leave to file additional exhibits and supplemental proposed findings of fact and conclusions of law. On May 20, 2013, Entergy filed a motion to supplement its July 30, 2012 motion for declaratory order.[9]

On June 12, 2013, the NRC's Atomic Safety and Licensing Board issued an order, granting New York's motion to file additional exhibits and supplemental proposed findings of fact and conclusions of law and denied the cross motions of the parties for declaratory orders on the issue of consistency review.[10] It ruled:

> "Given that no consultation has occurred between the NRC Staff, the New York State Department of State, and Entergy pursuant to 15 C.F.R. § 930.51(e), we conclude that Entergy's and New York's motions are premature. Accordingly, Entergy's and New York's motions are DENIED without prejudice."

In a letter dated December 6, 2013, you wrote to Deputy Secretary of State George Stafford seeking to initiate the consultation process between federal and state agencies concerning whether renewal applications for federal activities previously reviewed and found consistent are would have "substantially different coastal effects" under paragraphs (b)(3), and (c) of 15 C.F.R. 930.51.[11]

Background: Consistency Review in New York State

The New York State Coastal Management Program (NYS CMP) was approved by U.S. Secretary of Commerce Malcolm Baldridge and became effective on September 30, 1982. It identifies NYSDOS as the single New York State agency empowered to conduct federal consistency on behalf of the State of New York and to be eligible to receive CZMA grants to administer the State's Coastal

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[7] See letter dated August 8, 2012 from Susan L. Watson, General Counsel, New York Department of State (NYSDOS) to Eric Leeds, Director of Nuclear Reactor Regulation, Nuclear Regulatory Commission.
[8] L.1975, c. 464, § 47; 16 U.S.C. § 1456 (c) and 15 C.F.R. §§ 923.53, 930.6 and 930.10.
[9] See Entergy's Motion for Leave to Supplement its Motion For Declaratory Order That it Has Already Obtained the Required New York State Coastal Management Program Consistency Review of Indian Point Unit 2 and 3 for Renewal of the Operating Licenses (May 20, 2013).
[10] See Atomic Safety and Licensing Board Order dated June 12, 2013. Docket Nos. 50-247-LR and 50-286-LR ASLBP No. 07-858-03-LR-BD01 at p. 4. (Emphasis in original).
[11] See 15 C.F.R. 930.51(e). "The determination of substantially different coastal effects under paragraphs (b)(3), and (c) of this section is made on a case-by-case basis by the Federal agency after consulting with the State agency, and applicant. **The Federal agency shall give considerable weight to the opinion of the State agency. The terms "major amendment," "renewals" and "substantially different" shall be construed broadly to ensure that the State agency has the opportunity to review activities and coastal effects not previously reviewed.**" (Emphasis added).

Management Program.[12] IP2 and IP3 were licensed before the federal approval of the NYS CMP in 1982.

In New York, there are two kinds of consistency decisions: federal and state. The NYSDOS reviews federal agency actions for consistency under the CZMA; the state agencies review their own individual actions for State agency consistency under New York Executive Law Article 42 ("Waterfront Act"). Although similar, the State and federal reviews are neither identical nor substitutes for each other. This distinction between state and federal consistency reviews is well recognized by state agencies themselves. (See NYSPSC Order in Case 70363, Iroquois Gas Transmission System; and ALJ Ruling on NYSDEC Project No. 3-5510-161-1-0 Xanadu Properties Associates).

Federal Consistency

The CZMA provides coastal states and territories with the option to develop a coastal management program consisting of enforceable policies. Under the CZMA, state coastal management programs become effective upon approval of the U.S. Secretary of Commerce.[13] Prior to approving a state management program, the Secretary of the U.S. Department of Commerce must find that the Governor of the State has designated a single State agency to receive grants and administer the management program.

New York's CMP was approved by the U.S. Secretary of Commerce, and became effective, on September 30, 1982.[14] To effectuate the Program's development, the New York State Legislature appointed NYSDOS the "single State agency" to accept federal funding to prepare and administer the New York State Coastal Management Program ("NYS CMP").[15] During the 1981 legislative session, New York Governor Hugh L. Carey codified NYSDOS's responsibilities to administer the coastal program by signing the Waterfront Act, now NY Executive Law Article 42. The federally approved CMP identifies NYSDOS as the single State agency with authority to conduct federal consistency review of federal agency activities affecting New York's coastal area. The license renewal applications pending before the NRC (15 C.F.R. Part 54) are being reviewed by NYSDOS pursuant to 15 C.F.R. Part 930, subpart D and in accordance with 15 C.F.R. § 930.51(b)(1).[16]

Proposed federal actions, including permit applications, are reviewed by NYSDOS for consistency with the State's 44 enforceable coastal policies. NYSDOS reviews all federal actions affecting land or water uses or natural resources of the coastal zone. If NYSDOS objects to a proposed permit activity as being inconsistent with the State's coastal policies, the federal agency is barred from issuing the permit, unless the Department's decision is overridden by the US Secretary of Commerce.[17] While the federal CZMA regulations provide that a State agency may designate other state agencies to conduct federal consistency reviews in particular circumstances,[18]the NYS CMP provides this authority

[12] See NYS CMP at II-4-2 and 3; see also http://coastalmanagement.noaa.gov/mystate/ny.html.
[13] See 16 U.S.C. § 1455(d); 15 C.F.R. § 923.1.
[14] 16 U.S.C. § 1455(d); 15 C.F.R. § 923.1. The CMP is described in a document entitled "State of New York Coastal Management Program and Final Environmental Impact Statement."
[15] L.1975, c. 464, § 47.
[16] "Renewals and major amendments of federal license or permit activities not previously reviewed [the original operating licenses] by the State agency [DOS]." 15 C.F.R. § 930.51(b)(1).
[17] 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.63; and 15 C.F.R. Part 930, subpart H.
[18] See 15 C.F.R. § 930.6(c).

solely to NYSDOS. In New York, federal consistency review is conducted by a single State agency, NYSDOS.[19]

In terms of State agency responsibilities to conduct consistency of federal agency actions, the NOAA has clarified the role of the single State agency for coordinating federal actions and the State agency's responsibility to apply all relevant enforceable policies when conducting consistency reviews. The regulations provide:

> (a) This section describes the responsibilities of the "State agency" described in § 930.11(o).[20] A designated State agency is required to uniformly and comprehensively apply the enforceable policies of the State's management program, efficiently coordinate all State coastal management requirements, and to provide a single point of contact for Federal agencies and the public to discuss consistency issues. **Any appointment by the State agency of the State's consistency responsibilities to a designee agency must be described in the State's management program. In the absence of such description, all consistency determinations, consistency certifications and federal assistance proposals shall be sent to and reviewed by the State agency.** A State may have two State agencies designated pursuant to § 306(d)(6) of the Act where the State has two geographically separate federally-approved management programs.
>
> (b) The State agency is responsible for commenting on and concurring with or objecting to Federal agency consistency determinations and negative determinations (see subpart C of this Part), consistency certifications for federal licenses, permits, and Outer Continental Shelf plans (see subparts D, E and I of this Part), and reviewing the consistency of federal assistance activities proposed by applicant agencies (see subpart F of this part). The State agency shall be responsible for securing necessary review and comment from other State, regional, or local government agencies, and, where applicable, the public. **Thereafter, only the State agency is authorized to comment officially on or concur with or object to a federal consistency determination or negative determination, a consistency certification, or determine the consistency of a proposed federal assistance activity.**
>
> (c) **If described in a State's management program,** the issuance or denial of relevant State permits can constitute the State agency's consistency concurrence or objection if the State agency ensures that the State permitting agencies or the State agency review individual projects to ensure consistency with all applicable State management program policies and that applicable public participation requirements are met. The State agency shall monitor such permits issued by another State agency. (Emphasis added.)[21]

The NYS CMP does not describe or otherwise provide for the delegation of federal consistency review to any other State agency. In fact, it states the opposite. "New York State must ensure that the above federal activities are consistent with its CMP. To that end, the Department of State (DOS) has

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[19] "The CZMA requires that a State have a single State agency for grant administration and management program implementation (including federal consistency). CZMA §§ 306(d)(6) and 307(c)(1)(C). Further, NOAA's program approval regulations require a single State agency charged with implementing federal consistency, section 923.53(a)(1), as does the existing federal consistency regulation, section 930.18." NOAA Commentary on Final Rule revising the federal consistency provisions in 15 C.F.R. Part 930 and discussing "State Responsibility". 65 Fed. Reg. 77124-01,77129-77129 (December 8, 2000).

[20] 15 C.F.R. § 930.11(o): "The term 'State agency' means the agency of the State government designated pursuant to section 306(d)(6) of the Act to receive and administer grants for an approved management program, or a single designee State agency appointed by the 306(d)(6) State agency.'"

[21] 15 CFR § 930.6. Section 930.6(c) is added to clarify the role of the single State agency for coordinating federal actions and the State agency's responsibility to apply all relevant enforceable policies when conducting consistency reviews.

been designated as the State's agency responsible for reviewing federal activities as to their consistency with the CMP."[22] NYSDOS has never delegated that federal consistency review function to another State agency. Cobbling together disparate State agency reviews does not approximate the federal review required by the CZMA.

Entergy's insertion of the phrase "or its designee" into the federal consistency portion of its flowchart is therefore patently misleading. NYSDOS's federal consistency's authority has never been delegated to any other State agency at any time. Further, Entergy's conclusion in its "flowchart" that federal and State consistency in New York State are equivalent or interchangeable reflects a gross misunderstanding of New York State law, the NYS CMP, and federal consistency.[23]

State Agency Consistency

The CZMA requires that each federally-approved Coastal Management Program "provide a mechanism to ensure that all State agencies will adhere to the program."[24] This requires the coastal state to identify or adopt state legislation which binds state agencies so that State agency actions in the coastal area will be consistent with the program's enforceable coastal policies. State agency "means any department, bureau, commission, board, public authority or other agency of the state, including any public benefit corporation any member of which is appointed by the governor."[25] These agencies are not to be confused with NYSDOS, the single State agency for federal consistency as defined at 15 C.F.R. § 930.11(o).[26] Thus the New York State Department of Environmental Conservation (NYSDEC), the New York State Public Service Commission (NYSPSC), and NYPA are all "State agencies" *for the purpose of fulfilling the State consistency requirements of the NYS CMP*.

In 1981, the Waterfront Act[27] was enacted to implement and enforce the CMP at the state level. The Waterfront Act and its regulations[28] require that State agency actions within the coastal area be undertaken in a manner that is consistent with the State's coastal policies: "No State agency involved in an action may carry out, fund or approve an action until it has complied with the provisions of Article 42 of the Executive Law."[29] Development activities in New York's coastal area which involve direct State agency action or funding, which require state permits for actions involving an environmental impact statement under the State Environmental Quality Review Act (SEQRA), or which are located within a local waterfront revitalization program, must be determined by the State agency undertaking the action to be consistent with the coastal policies in the Waterfront Act or in the local program.

New York State agencies, as defined in Executive Law § 911 (5), must comply with the State consistency review obligation in the New York's coastal areas and inland waterways. NYSDEC,

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[22] NYS CMP at II-9-8.
[23] See Letter dated September 11, 2012 from Fred R. Dacimo, VP License Renewal, Entergy Northeast Nuclear to the U.S. Nuclear Regulatory Commission Response to Request for Additional Information for Review of the Indian Point Nuclear Generating Unit Nos. 2 and 3, License Renewal Application Environmental Review – Compliance with Coastal Zone Management Act Indian Point Nuclear Generating Unit Nos. 2 & 3 Docket Nos. 50-247 and 50-286 License Nos. DPR-26 and DPR-64 at p. 271 of 282. ("Entergy RAI Response").
[24] 16 U.S.C. § 1455(d)(15); 15 C.F.R. §§ 923.1(c)(8) and 923.40.
[25] See Executive Law § 911(5).
[26] 15 C.F.R. § 930.11(o) defines the terms "State agency" to means "the agency of the State government designated pursuant to section 306(d)(6) of the Act to receive and administer grants for an approved management program, or a single designee State agency appointed by the 306(d)(6) State agency."
[27] Executive Law Article 42, added by Chapters 840 and 841 Laws of 1981.
[28] 19 NYCRR Part 600 and § 600.4.
[29] 19 NYCRR §600.3.

NYSPSC and NYPA are among the state agencies which must comply with the consistency requirement of Executive Law Article 42 when their actions occur within the coastal area.[30]

State consistency procedures require that a State agency determine that its own direct action or a permit or license issuance is consistent to the maximum extent practicable with the 29 state coastal policies.[31] State agency consistency review pursuant to Executive Law only reflects 29 of the 44 enforceable policies of the federally approved NYS CMP. The remaining 15 coastal policies are made enforceable through a large compilation of New York State statutes with which state agencies must comply; these statutes are listed following the policy explanations in the NYS CMP. If a State agency is able to make determination of consistency as it relates to its own State agency action, that finding constitutes the State agency's determination of consistency as required by Article 42 of the Executive Law. NYSDOS does not review that State agency consistency determination.

Differences between Federal and State Consistency Reviews

Review by New York State agencies for consistency is fundamentally different from NYSDOS's federal consistency review under the federal CZMA. In New York, each State agency is responsible for determining the consistency of its own actions with the coastal policies according to the regulations set forth in 19 NYCRR Part 600. The State agencies acting under NY Executive Law Article 42 are self-policing when conducting their consistency reviews.

State consistency is a limited, self-contained review of the State agency's own action. Except for NYSDOS, State agencies cannot review for consistency the actions of any other New York State agency, let alone actions of federal agencies. In instances where two or more State agencies share jurisdiction over a proposed action, each agency must render its own consistency determination. Moreover, under federalism principles, NY Executive Law Article 42 cannot give state agencies authority to review for consistency federal agency activities where federal law does not. Only pursuant to the congressionally enacted CZMA can States attain the authority to review federal agency actions. The CZMA confers that review authority on a single State agency. In New York, the single State agency for federal consistency review is NYSDOS.

State and federal agencies often have different regulatory responsibilities regarding a particular project when issuing licenses or authorizations but they do not overlap.[32] NYSDOS is the designated "single State agency" empowered to review federal agency actions for federal consistency. New York State did not have a federally-approved CMP at the time the original operating licenses for IP2 and IP3 were issued. This license renewal requires NYSDOS to conduct federal consistency review -- for the first time.

NYSDEC, NYSPSC and NYPA conducted separate State agency consistency reviews when the Indian Point Generating Stations were transferred to Entergy or when decisions on state permit applications were made. However, neither the NYSPSC, nor NYSDEC nor the State authority NYPA is or was authorized to make or issue consistency determinations under the CZMA that are binding on federal agencies.

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[30] NYSDOS is also an Executive Law § 911(5) State agency for the purposes of conducting State consistency review of its own State agency actions, such as the designation of a Significant Coastal Fish and Wildlife Habitat as part of a Routine Program Change to the NYS CMP.

[31] Executive Law Article 42; 19 NYCRR § 600.5

[32] The laws and regulations of the United States are the law of the land under the Supremacy Clause, and conflicting state laws are either preempted or ineffective.

Consistency Review of Entergy's Application to Renew the IP Operating Licenses

On December 17, 2012, Entergy submitted to NYSDOS a Consistency Certification for the renewal of the operating licenses for IP2 and IP3. [33] The certification and supporting information comprise 11 volumes. NYSDOS deemed the certification incomplete because the Supplemental Environmental Impact Statement (SEIS) for Aquatic Impacts of the plant had not yet been issued by NRC. [34] On June 20, 2013, the SEIS was received and NYSDOS's consistency review of the application for renewal of the commercial operating licenses for the nuclear facilities commenced. [35] NYSDOS is reviewing Entergy's federal consistency certification in accordance with 15 C.F.R. § 930.51(b)(1), which requires that "[r]enewals and major amendments of federal license or permit activities not previously reviewed by the State agency" are to be reviewed for federal consistency review in accordance with 15 C.F.R Part 930 subpart D.

NYSDOS and Entergy have entered into stay agreements with respect to federal consistency review to allow for consideration of new information.[36] A second stay agreement was executed on January 9, 2014 that expires on October 20, 2014; NYSDOS's federal consistency decision is due on or before December 31, 2014.[37]

License Transfers Pursuant to Atomic Energy Act

Licensed by the Atomic Energy Commission on September 28, 1973, IP2[38] was sold by ConEd to Entergy in September 2001. IP3[39] was licensed by the NRC on December 12, 1975, to ConEd which later conveyed it to the Power Authority of the State of New York (PASNY – the predecessor to the New York Power Authority (NYPA)). NYPA operated IP3 until November 21, 2000, when it transferred its ownership interest in, and operating/maintenance responsibility for, the IP3 plant to Entergy.

Unlike operating license and license renewal, NRC's consent to permit the transfer of an existing licenses and property transfers pursuant to 10 C.F.R. Part 2 and 50[40] is not a listed federal agency activity in the NYS CMP. State agencies involved in State approvals – NYPA, NYSDES and NYSPSC – conducted SEQRA and State agency consistency reviews. for the facility transfers to Entergy. NYSDOS did not review for federal consistency the transfer of ownership of Units 2 and 3; this should be borne out by the NRC's records.

Transfers of title to property have already been previously determined by the federal court to not be subject to federal consistency review.[41] As a federal court stated: "Mere transfer of title cannot directly affect the coastal zone, so no CZMA consistency determination is required."[42] License and

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[33] See Letter from Fred Dacimo, Vice President, License Renewal, Entergy to NYSDOS Secretary of State Cesar A. Perales dated December 17, 2012. (Attachment 1).
[34] See Letter from Fred Anders, Chief, NYSDOS Natural Resources Management Bureau to Fred Dacimo, Vice President, License Renewal, Entergy dated January 16, 2013. (Attachment 2).
[35] See Letter from Jeffrey Herter, Assistant Chief, NYSDOS Natural Resources Management Bureau to Fred Dacimo, Vice President, License Renewal, dated June 28, 2013. (Attachment 3).
[36] See Stay Agreement between NYSDOS and Entergy beginning on October 9, 2013 and ending on January 9, 2014. (Attachment 4).
[37] See Stay Agreement between NYSDOS and Entergy beginning on January 9, 2014 and ending on October 20, 2104 with a federal consistency decision due on or before December 31, 2014. (Attachment 5).
[38] Facility Operating License No. DPR-26.
[39] Facility Operating License No. DPR-64.
[40] 10 C.F.R. §§ 50.80 and 50.90. See 42 U.S.C. §§ 2201(b), 2201(i), 2201(o), and 2234.
[41] See Ono v. Harper, 592 F.Supp. 698 (D.Haw.1983)
[42] Id. 592 F. Supp. at 700.

property transfers of nuclear facilities to a responsible entity are not usually expected have an appreciable effect on the coastal area. Notably, the NRC has determined that operating license transfers are a categorically exempt action pursuant to the National Environmental Policy Act (NEPA); the operating license transfers are considered a ministerial act that do not have an effect on the environment.[43]

> "In general, license transfers do not involve any technical changes to plant operations. Rather, they involve changes in ownership or partial ownership of facilities at a corporate level. Section 184 of the Atomic Energy Act of 1954, as amended (AEA), specifies, however, that:
>
> > '[N]o license granted hereunder * * * shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of this Act, and shall give its consent in writing. (42 U.S.C. 2234; 10 C.F.R. 30.34 (b), 40.46, 50.80, 72.50)'"[44]

In fact, the NRC distinguishes between a license transfer (10 C.F.R. Part 2 subpart M) and a license renewal (10 C.F.R. Part 54) by relegating the two distinct processes to different regulatory sections and by exempting license transfers from NEPA review. The NRC does not subject a license transfer (10 C.F.R. Part 2 subpart M) to the same kind of comprehensive review as that associated with the issuance of an operating license (10 C.F.R. Parts 50 and 51) or a license renewal (10 C.F.R. Part 54). This view is buttressed by the fact that the NRC requires all license renewal applications to undergo the 10 C.F.R. Part 54 evaluative process prior to obtaining a renewal license. A license transfer, unlike an application for a license renewal,[45] does not require the completion of an Environmental Report. The NRC remarked:

> "Further, under its procedures for implementing NEPA, the Commission may exclude from preparation of an environmental impact statement, or an environmental assessment, a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in NRC proceedings. In this rulemaking, the Commission finds that the approval of a direct or indirect license transfer, as well as any required administrative license amendments to reflect the approved transfer, comprises a category of actions which do not individually or cumulatively have a significant effect on the human environment. **Actions in this category are similar in that, under the AEA and Commission regulations, transfers of licenses (and associated administrative amendments to licenses) will not in and of themselves permit the licensee to operate the facility in any manner different from that which has previously been permitted under the existing license.** Thus, the transfer will usually not raise issues of environmental impact that differ from those considered in initial licensing of a facility. In addition, the denial of a transfer would also have in and of itself no impact on the environment, since the licensee would still be authorized to operate the facility in accordance with the existing license."[46]

Contrary to Entergy's contentions, NRC's approval of the transfer of the licenses did not involve any inquiry into the operations of the nuclear power facilities, the key element in issuing and renewing

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[43] See 10 C.F.R. § 51.22(c)(21).
[44] Final Rule, "Streamlined Hearing Process for NRC Approval of License Transfers," 63 Fed. Reg. 66721, 66722-66723 (Dec. 3, 1998).
[45] 10 C.F.R. Part 51.
[46] Id, 63 Fed. Reg. at 66728.

operating licenses. No federal consistency of the operating licenses for IP2 or IP3 has ever taken place. *As a consistency determination was not conducted prior to issuance of the operating licenses in 1973 and 1975[47], and no intervening consistency review of those operating licenses has occurred, IP has not been "previously reviewed" for purposes of 15 C.F.R. § 930.51 (b). That review is required now.*

State Consistency Reviews of the Transfer of IP Facilities

NYSPSC and NYPA conducted separate State agency consistency reviews on their individual actions, detailed below, when the Indian Point Generating Stations were transferred to Entergy. Later, NYSDEC conducted a State agency consistency review under the Waterfront Act prior to its approval of the SPDES application. These are discussed below.

NYSPSC –PSL § 70 review - IP2

IP2 was originally licensed to ConEd. In 2001, in accordance with NY Public Service Law § 70, the NYSPSC reviewed ConEd's proposed transfer of the retired IP1 unit and active IP2 assets and franchise to Entergy. That statute ensures that no "electric corporation shall transfer or lease its franchise, works or system ...to any other person or corporation or contract for the operation of its works and system, without the written consent of the [NY Public Service] commission." The statute only addresses the transfer of stock, works and system. Nothing in the implementing regulations refers to the operations of the facility generating the electricity.[48]

In accordance with its obligations under SEQRA and the Waterfront Act, NYSPSC reviewed for State agency consistency the proposed transfer of the stock, works and systems associated with IP1 and IP2 from Con Ed to Entergy. On August 17, 2001, the NYSPSC issued an order adopting and approving a Final Supplemental Environmental Impact Statement ("FSEIS") which included a State agency consistency of the transfer of ConEd's interests in IP1 and IP2 to Entergy. NYSPSC's State agency consistency review concerned the matter at hand -- the transfer of stock, works and system -- and concluded that the simple transfer of these interests from a utility to a merchant plant owner, which did not review, change or extend the operations or underlying license of the nuclear facilities, did not implicate the coastal policies of 19 NYCRR § 600.5. The internal operations of IP1 and IP2 and their operating licenses were not addressed in that review.

NYPA – PSL § 70 review - IP3

NRC originally licensed IP3 to ConEd on December 12, 1975, which subsequently conveyed it to the Power Authority of the State of New York (PASNY – the predecessor to the New York Power Authority (NYPA)). PASNY/NYPA, a public authority, operated IP3 until November 2000 when it was sold to Entergy.

As then-owner of IP3, NYPA prepared a consistency certification in connection with its State Environmental Quality Review Act (SEQRA)[49] negative declaration for the proposed sale and transfer of its license and the physical facilities comprising IP3 to the buyer, Entergy. NYPA concluded that its sale was in accordance with State coastal policies. NYPA submitted a federal consistency assessment form (FCAF) to NYSDOS for the sale and license transfer.[50] As discussed later, NYSDOS did not conduct a federal consistency review of the sale and transfer of the license of IP3 to Entergy since NRC

[47] New York did not have an approved CMP until 1982. Prior to that approval, consistency review of federal agency actions could not be conducted.
[48] 16 NYCRR Article 3, Part 31.
[49] NY Environmental Conservation Law Article 8.
[50] See FCAF for IP3, LLC and James A. FitzPatrick as prepared by William Slade dated January 6, 2000.

nuclear license transfers are unlisted actions in the NS CMP[51] and are not expected to have reasonably foreseeable effects on coastal uses or resources.[52]

NYPA did not conduct, nor did it have the authority to conduct, a federal consistency review of the operating license for the IP3 nuclear facility. NYPA simply reviewed its own transfer of the facility to Entergy in accordance with the Waterfront Act. This State consistency review does not, as Entergy contends, serve as a "previous" federal consistency review for purposes of 15 C.F.R. §930.51(b)(2) or (3).

NYSDEC – ECL Article 17 - State Pollutant Discharge Elimination System (SPDES) Permit Review

Because SPDES permits are issued pursuant to state law,[53] SPDES permits are subject to State consistency review. In April 1982, NYSDEC issued a 5 year SPDES permit for the Indian Point nuclear power plants and the Roseton and Bowline Point fossil fuel power facilities. On October 1, 1987, NYSDEC renewed the 5 year SPDES permit for the generating stations. NYSDEC completed State agency consistency reviews in connection with the SPDES permits as part of its Waterfront Act obligations. Prior to the expiration date in 1992, however, the owners of the facilities at that time, Consolidated Edison and NYPA, submitted timely SPDES permit renewal applications to NYSDEC and, by operation of State Administrative Procedure Act (SAPA) §401, the 1987 SPDES permit for IP2 and IP 3 is remains in effect. On May 20, 1992, NYSDEC required the utilities to prepare an environmental impact statement regarding the 1992 applications for SPDES permit renewals. In December 1999, the utilities submitted a revised Draft Environmental Impact Statement ("DEIS"). The DEIS was accepted by NYSDEC staff on February 28, 2000 as being adequate for public review.

When Entergy purchased IP2 and IP3 in 2001 and 2000, respectively, the 1987 (SAPA extended) SPDES permit for the facilities was subsequently transferred to Entergy. NYSDEC completed State consistency review required by19 NYCRR 600.4 in 2000 as a component of the review of the transfer of the IP SPDES permit from NYPA and ConEd to Entergy.

The final environmental impact statement was prepared by NYSDEC and adopted on June 25, 2003. NYSDEC completed State agency consistency reviews pursuant to the Waterfront Act during its 2000 and 2003 environmental review. Neither involved a federal consistency determination as the actions did not involve a federal agency action. NYSDEC's State agency consistency reviews do not serve as a previous federal consistency review for purposes of 15 C.F.R. 930.51(b)(2) or (3).

Conclusion

Since and including the time the IP2 and IP3 operating licenses were issued in the 1970s, no federal consistency review has been conducted. Moreover, there has been no federal or State consistency review that has inquired into the terms of the operating license. The ministerial license transfer process conducted in 2000 and 2001 pursuant to 10 C.F.R. Part 2 subpart M is separate and distinct from the comprehensive review required under the NRC's relicensing regulation in 10 C.F.R. Part 54. The

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[51] See 15 C.F.R. 930.54(a). NYPA's completion of a FCAF for federal consistency was indicative of its role as an applicant pursuant to 15 C.F.R. 930.57. NYPA did not conduct and had no authority to conduct a federal consistency review of sale and transfer of IP3 under the CZMA.

[52] The procedures for a coastal state to review for federal consistency an "unlisted" activity "are provided to ensure that State agencies are afforded an opportunity to review federal license or permit activities with reasonably foreseeable coastal effects." 15 C.F.R. 930.54(f). A designated State agency may opt not to review an unlisted federal license or permit activity if it determines that the activity will not have reasonably foreseeable coastal effects. The license transfer for IP3 was an unlisted action in the NYS CMP.

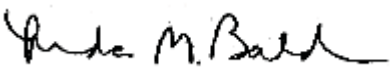
[53] Environmental Conservation Law (ECL) Article 17, Title 8.

operating licenses and the operations of the nuclear facilities were certainly not reviewed by any State agency in 2000 nor 2001. The State consistency review conducted by NYPA involved solely the sale of its license and nuclear assets to IP3. NYSPSC's review of the transfer of the "franchise, works or system" of IP2 did not involve a review of the operating license. Nor did NYSDEC's State consistency review of the transfer of the SPDES permit from NYPA and Consolidated Edison to Entergy pertain to the IP operating licenses.

In conclusion, NYSDOS is the sole designated State agency[54] authorized to conduct consistency reviews of federal agency activities pursuant to the CZMA. As IP2 and IP3 have never previously been reviewed by NYSDOS for consistency by this agency, 15 C.F.R. § 930.51(e) is inapplicable and interagency consultation is not applicable here.

NYSDOS's responses to the NRC's six inquiries are submitted as an enclosure along with this letter.

Sincerely,



Linda M. Baldwin
General Counsel

Enc.

Attachment 1: See Letter from Fred Dacimo, Vice President, License Renewal, Entergy to NYSDOS Secretary of State Cesar A. Perales dated December 17, 2012

Attachment 2: Letter from Fred Anders, Chief, NYSDOS Natural Resources Management Bureau to Fred Dacimo, Vice President, License Renewal, Entergy dated January 16, 2013

Attachment 3: Letter from Jeffrey Herter, Assistant Chief, NYSDOS Natural Resources Management Bureau to Fred Dacimo, Vice President, License Renewal, dated June 28, 2013

Attachment 4: Stay Agreement between NYSDOS and Entergy beginning on October 9, 2013 and ending on January 9, 2014

Attachment 5: Stay Agreement between NYSDOS and Entergy beginning on January 9, 2014 and ending on October 20, 2104 with a federal consistency decision due on or before December 31, 2014

Attachment 6: 2001 NYS CMP Routine Program Change

Attachment 7: 2006 NYS CMP Routine Program Change

Attachment 8: Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3 LLC v. New York State Dept. of State, 42 Misc. 3d 896 (Supreme Ct. [Albany Cty.]) Dec. 13, 2013.

[54] L.1975, c. 464, § 47. The State Legislature appointed NYSDOS the "single State agency" to accept federal funding to prepare and administer the NYS CMP. The "State agency" is defined at 15 C.F.R.§ 930.11(o). NYSDOS is the only designated "State agency" to review federal agency applications for federal consistency.

STATE OF NEW YORK
DEPARTMENT OF STATE
ONE COMMERCE PLAZA
99 WASHINGTON AVENUE
ALBANY, NY 12231-0001

ANDREW M. CUOMO
GOVERNOR

CESAR A. PERALES
SECRETARY OF STATE

NYSDOS Responses to NRC's Six Inquiries

NRC INQUIRY # 1

Further, the CMP states that NYSDOS will evaluate the consistency determinations made by State agencies and, when appropriate, advise the State agencies on the consistency of such actions with the coastal policies (CMP Part II, § 11-4 at 3 (1982)).

Please describe the process by which NYSDOS evaluates the consistency determinations made by State agencies. Specifically, please describe how a consistency determination is made, NYSDOS's role in making a determination, and how NYSDOS advises State agencies on the consistency of actions with the New York State CMP. Please describe how NYSDOS documents such coordination with State agencies.

1. How does DOS evaluate the consistency determinations made by other state agencies?

NYSDOS has no authority to correct or override the decisions of state agencies undertaken in accordance with Executive Law Article 42 and the 19 NYCRR Part 600 regulations. On its own initiative, or when requested by a State agency, NYSDOS may provide comments or guidance to state agencies on the consistency of actions pending before them.

NYSDOS does not as a routine procedure consult with other state agencies when they are conducting State consistency reviews. If requested to consult or provide assistance to another State agency, NYSDOS readily does so. Such requests are infrequent.

Each State agency is required to conduct its own review and file the certification of consistency with the Secretary of State at the time of making its decision on the action. 19 NYCRR § 600.4. Also, if the review was subject to a final environmental impact statement pursuant to SEQRA, the State agency must make a written finding that the action is consistent with applicable state coastal policies set forth in 19 NYCRR 600.5.[1] The final environmental impact statement must be filed with the Secretary of State's office. [2] NYSDOS monitors the

[1] 6 NYCRR § 617.11 (e).
[2] 6 NYCRR § 617.12 (b)(7).

consistency certifications and environmental impact statements filed by state agencies in the office. A formal evaluation is not conducted.

Executive Law § 913 sets forth the NY Secretary of State's responsibilities with respect to advising the Governor and the various state agencies about coastal matters. It provides in pertinent part:

> § 913. Functions; powers and duties. The secretary shall have the following functions, powers and duties:
>
> 1. To advise the governor and agencies of state government concerning planning, programs and policies for the achievement of wise use of the land and water resources of coastal areas and inland waterways, giving full consideration to ecological, cultural, historic, aesthetic values and the needs for economic development and to encourage public and private institutions to preserve, protect, enhance, develop and use coastal and inland waterway resources in a manner consistent with the purposes and policies of this article.
>
> ***
>
> 4. To review, evaluate and issue recommendations and opinions concerning programs and actions of state agencies which may have the potential to affect the policies and purposes of this article, including but not limited to, programs within the jurisdiction of the departments of state, agriculture and markets, environmental conservation, public service, commerce and transportation, the offices of energy and parks and recreation and the office of general services.

In accordance with the Waterfront Act, each State agency is responsible for determining the consistency of its own actions with coastal policy according to the procedures set forth in the regulations promulgated by the Department of State at 19 NYCRR Part 600. State agencies are self-policing when conducting their consistency reviews. There is no process comparable to NYSDOS federal consistency review for State consistency.

2. How is a consistency determination made?

The Waterfront Act and its regulations require that State agency actions within the coastal area be undertaken in a manner that is consistent with the State's coastal area policies. The regulations declare: "No State agency involved in an action may carry out, fund or approve an action until it has complied with the provisions of Article 42 of the Executive Law."[3] State agencies, as defined in Executive Law § 911 (5), must comply with the State consistency review obligation. According to this definition, "State agency" includes any department, bureau, commission, board, public authority or other agency of the state, including any public benefit corporation any member of which is appointed by the Governor. Development activities in New York's coastal area which involve direct State agency action or funding, which require state permits for actions involving an environmental impact statement under SEQRA, or which are located within a local waterfront revitalization program, must be determined by the State agency undertaking the action to be consistent with the coastal policies in the Waterfront Act regulations

[3] 19 NYCRR § 600.3.

or in the local program. As discussed above, NYSDOS does not make the state consistency determination for other State agencies or review them.

State Agency Direct Actions

Executive Law Section 919 provides that "actions directly undertaken by State agencies within the coastal area including grants, loans or other funding assistance, land use and development, or planning, and land transactions, shall be consistent with the coastal area policies of this article." This provision of law effectively ties together the programs of state agencies by binding their actions to the coastal policies. Only those direct State agency actions which are considered to Type I or unlisted in accordance with SEQRA must comply with the consistency review obligation. 19 NYCRR §§ 600.3 and 600.4. The State agency action is measured against the statements of policy set forth in the regulations implementing the Waterfront Act. 19 NYCRR § 600.5. If a direct State agency action is conducted in a municipality on either a coastal or inland waterway with a local waterfront revitalization program which has been approved by the Secretary of State, the state action must be consistent "to the maximum extent practicable" with the local program. Executive Law § 915 (8).[4] Direct State agency actions can include funding or construction of structures, highways or other capital projects, conveyance of state lands including underwater lands, and acquisition of open space areas and other interests in land and state planning activities.

State Permitting Actions

State agency actions in the coastal area which involve the issuance of permits or other approvals are required to go through a consistency review if the action is the subject of a final Environmental Impact Statement (FEIS) pursuant to SEQRA. (19 NYCRR § 600.4(a); 6 NYCRR § 617.5(d), 617.9(e)). The SEQRA regulations provide that no State agency shall make a final decision on the action until it has made a written finding that it is consistent with the coastal policies set forth in 19 NYCRR § 600.5. (6 NYCRR § 617.9(e)).

State agency actions, including permit actions, which are likely to affect the policies and purposes of a community's approved LWRP, are required to be conducted in a manner which is consistent to the maximum extent practicable with the local program. Executive Law §§ 915(8) and 916(1)(a). The consistency requirement is also applicable to State agency actions in municipalities on inland waterways with an approved local program.

State Consistency Procedures

Both the Waterfront Act and SEQRA impose separate but interrelated responsibilities on state agencies to act in a manner which is consistent with the state coastal policies or with those of an approved local waterfront revitalization program.

1. Waterfront Act

[4] See 19 NYCRR § 600.4(c).

Each State agency is responsible for determining the consistency of its actions with coastal policy according to the procedures set forth in the regulations promulgated by the Department of State at 19 NYCRR Part 600.

Initially, the State agency must determine if the action is located within the coastal area. If the action is within the coastal area, and the action is either a Type I or unlisted action as defined in SEQRA, the agency must prepare a State Coastal Assessment Form (SCAF) prior to the determination of environmental significance. A CAF is a form used by a State agency to assist it in determining the consistency of an action. Information requested on the CAF generally pertains to whether a proposed action may have a significant effect on use of coastal shorelands or underwater lands, recreational opportunities, coastal flooding or erosion, public access or visual quality, commercial or recreational fishing, historic or archeological features, existing water dependent uses or special management areas. Reference should be made to the CMP when completing the form. If any question on the SCAF is answered "yes", a brief and concise description of the nature and extent of the action must be provided. In some instances, a copy of the SCAF must be filed with the Secretary of State for actions that do not require preparation of a final environmental impact statement.[5]

The completion of a SCAF is required to evaluate the consistency of State agency actions in the coastal area. The CAF also supplements other information used by that agency in making the determination of the environmental significance of the action. Where a positive declaration is made pursuant to SEQRA, the State agency is required to comply with the applicable consistency requirements of the SEQRA regulations. Where a negative declaration is made, the SCAF aids in the preparation of the consistency certification. The agency, at the time of its decision on the action, must file a certification with the Secretary of State that the action will not hinder the achievement of any state coastal policies and whenever practicable, will advance one or more of those policies.[6] In instances where more than one State agency is involved in an action, each agency must make its own separate consistency determination.

Under Executive Law Article 42, there is a balancing approach to State agency consistency with coastal policies. When it becomes clear that a proposal will substantially hinder one or more coastal policies, the agency may only undertake the activity if it certifies that:

> (1) no reasonable alternatives exist which would permit the action to be taken in a manner which would not substantially hinder the achievement of such policy;
>
> (2) the action taken will minimize all adverse effects on such policies to the maximum extent practicable;
>
> (3) the action will advance one or more of the other coastal policies; and
>
> (4) the action will result in an overriding regional or statewide public benefit.

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[5] 19 NYCRR § 600.4.
[6] 19 NYCRR § 600.4(b), (c).

A separate but similar procedure has been established in the regulations for the review of a State agency action within the boundary of a community with an approved local waterfront revitalization program, where the action is one which has been identified by the Secretary pursuant to Executive Law § 916(1) and a negative declaration has been issued.[7] Where a finding of a potentially significant impact has been issued, the action will be reviewed under SEQRA procedures. If the action would substantially hinder the achievement of the policies or purposes of an approved local waterfront revitalization program, the State agency may not undertake the action until it certifies that no reasonable alternatives exist, the action will to the maximum extent practicable minimize all adverse effects on the local policy and the action will result in an overriding regional or statewide benefit.[8] Such certification constitutes a determination that the action is consistent to the maximum extent practicable with the approved local program.

Each State agency is required to file the certification of consistency with the Secretary of State at the time of making its decision on the action.[9] Filing of the certification completes the consistency review process.

2. SEQRA

The Coastal Management Program relies upon SEQRA as a means for implementing the consistency requirements of Article 42 of the Executive Law. In the Waterfront Act, the State Legislature directed the Commissioner of Environmental Conservation to amend the SEQRA regulations "to assure adequate consideration of impacts on the use and conservation of coastal resources."[10] Various amendments were made to the SEQRA regulations to assure that state agencies actions in the coastal area comply with the State's coastal policies or those of an approved local program.

3. What is NYSDOS's role in a State agency determination?

As discussed above, NYSDOS does not have a formal role in the State agency consistency reviews conducted by other state agencies. On an informal basis, NYSDOS may offer advice when requested by a State agency. NYSDOS does not review, approve or override a State agency's determination of State consistency.

NYSDOS itself is also an Executive Law § 911(5) State agency for the purposes of conducting State consistency review of its own State agency actions, such as the designation of a Significant Coastal Fish and Wildlife Habitat as part of a Routine Program Change to the NYS CMP. As a State agency, NYSDOS conducts State agency consistency review of its own action should it potentially affect the coastal area. NYSDOS follows the same procedures for state agencies described above.

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[7] 19 NYCRR § 600.4(c).
[8] Id.
[9] 19 NYCRR § 600.4 (c) and (d).
[10] Executive Law § 919(3).

4. How does NYSDOS advise State agencies on the consistency of their actions with the CMP?

As explained previously, upon request, the consistency staff at NYSDOS will speak with the staff at another State agency about the application of the coastal policies to proposed actions in the coastal area or in municipalities with LWRPs located on coastal and inland waterways.

Due to statutory time constraints, NYSDOS's federal consistency determination frequently precedes the State consistency review conducted by state agencies, which take guidance and advice from NYSDOS's evaluation of the coastal effects of a proposed action. The CZMA requires that NYSDOS usually concur with or object to a proposed federal activity within six (6) months from receipt of the certification unless a stay has been entered.[11]

5. How does NYSDOS document such coordination?

When solicited, NYSDOS staff typically provide informal guidance to another State agency about a particular consistency review over the telephone. NYSDOS does not require that such calls be documented.

NRC INQUIRY # 2

On July 24, 2012, Entergy submitted a supplement to its application for renewal of the IP2 and IP3 operating licenses. In its supplement, Entergy reevaluated the status of its compliance with the CZMA. In its reevaluation, Entergy concluded that IP2 and IP3 have already obtained the necessary consistency reviews from the State of New York and that license renewal will not result in coastal effects that are substantially different than the effects previously reviewed by NYSDOS and/or other State agencies with jurisdiction under State law to make those determinations. Entergy based this conclusion, in part, on the assessment of coastal effects evaluated in the following four New York State documents:

• New York Power Authority's (NYPA) environmental review (including the State Environmental Quality Review Act (SEQRA) negative declaration, Federal consistency certification, and State coastal assessment, if any) on the proposed sale of NYPA's IP3 to Entergy (March 31, 2000).

• New York State Department of Environmental Conservation's (NYSDEC) Coastal Assessment (February 11, 2000) completed as a part of the State Pollutant Discharge Elimination System (SPDES) permit renewal application for IP2 and IP3 (March 2, 2000).

• New York Public Service Commission's (NYSPSC) Final Supplemental Environmental Impact Statement (FSEIS), on the transfer of IP1 and IP2 from Consolidated Edison to Entergy (August 17, 2001).

[11] 16 U.S.C. § 1456

• NYSDEC's Final Environmental Impact Statement (FEIS) concerning applications to renew the SPDES permits for Hudson River power plants, including IP2 and IP3 (June 25, 2003).

For each of the four environmental reviews listed above, please indicate, separately, whether NYSDOS considers a consistency review to have been conducted by NYSDOS and/or another NYS office or agency. For each review, please state (a) which office or agency conducted that review, (b) whether that office or agency was authorized to conduct such review (including the statutory or regulatory bases for such authority), (c) the scope of the review (including both the activities reviewed and the resources affected by those activities), (d) whether NYSDOS evaluated the consistency determination made by the other State office or agency, and (e) whether NYSDOS provided comments or advice (or declined to provide comments or advice) to that office or agency on the consistency of such actions with the State's CMP. If NYSDOS considers that a consistency review was not conducted for any of the four matters listed above, please describe why a consistency review was not necessary or was not conducted for that particular action.

NYSDOS RESPONSE:

In each of the four matters listed in the question, a State agency consistency review was completed by the respective State agency. No federal consistency review was conducted in any of the four matters. NYSDOS did not conduct any of the State agency consistency reviews. None of the four reviews referenced were conducted pursuant to the CZMA or the implementing federal regulations governing federal consistency substantive and procedural requirements.[12] A State agency consistency review is not a substitute for a federal consistency review of federal agency actions conducted by NYSDOS under the federally approved NYS CMP.

For each State consistency review noted in NRC's question, NYSDOS responds as follows:

• New York Power Authority's (NYPA) environmental review (including the State Environmental Quality Review Act (SEQRA) negative declaration, Federal consistency certification, and State coastal assessment, if any) on the proposed sale of NYPA's IP3 to Entergy (March 31, 2000).

(a) which office or agency conducted that review.

NYPA is the State public authority that conducted the State consistency review of its own actions pursuant to Executive Law § 919(1) and 19 NYCRR § 600.4. NYPA's review also included the transfer of its James A. FitzPatrick Nuclear Power Plant in Scriba, New York to Entergy. Prior to its 2008 license renewal, Entergy complied with its federal consistency obligations by filing a certification with NYSDOS for its license renewal application for

[12] See 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. Part 930 subpart D.

FitzPatrick.[13] As discussed previously nuclear license transfer is an unlisted federal license or permit activity under the NYS CMP. NYSDOS did not request authorization from the NOAA Administrator to conduct a federal consistency review for the license transfer of IP3 from NYPA to Entergy pursuant to 15 C.F.R. Part 930 subpart D, and such a review is considered ministerial under NRC regulations. Moreover, the simple transfer of ownership of IP3 did not have reasonably foreseeable effects on any coastal use or resource.[14]

As required pursuant to Executive Law § 919(1) and 19 NYCRR § 600.4, NYPA completed a SCAF for the license transfers of IP3 and FitzPatrick to Entergy, a Type I SEQRA action, to inform its decision-making regarding a determination of significance.[15] NYPA completed Part 1 of the SEQRA Full Environmental Assessment Form, and concluded that "[t]he project will not result in any large and important impact(s) and. therefore, is one which will not have a significant impact on the environment, therefore a negative declaration will be prepared accompanied by an explanatory addendum."[16] In reaching its negative declaration, NYPA concluded: "Physically, there will be no difference in facility operation before and after the sale. No operational or physical changes will be made. Virtually the only change will be a substitution of upper management. The staff, the operating procedures and the legal requirements for operation will not change."[17] Therefore, NYPA "determined that the proposed action described below will not have a significant effect on the environment and a Draft Environmental Impact Statement will not be prepared."[18]

NYPA conducted the environmental reviews for the sale of IP3 and its other nuclear facilities and submitted a federal consistency assessment form (FCAF) to NYSDOS for the

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[13] The James A. FitzPatrick Nuclear Power Plant is located in Scriba, NY. The NRC license transfer joint application process included both FitzPatrick and IP3, LLC from NYPA to Entergy. NYSDOS issued a federal consistency concurrence for FitzPatrick on July 24, 2008.

[14] See 15 C.F.R. 930.54(a). On December 3, 1998, the NRC "In general, license transfers do not involve any technical changes to plant operations. Rather, they involve changes in ownership or partial ownership of facilities at a corporate level." 63 Fed. Reg. 66,721; Negative Declaration, Notice of Determination of Non-Significance for IP3, LLC and FitzPatrick, as prepared by William Slade for NYPA, Lead Agency, March 31, 2000, p. 2. "The sale, when completed, will involve the transfer to and assumption by Entergy of the ownership and operation of IP3 & JAF in the same manner as provided for in the state & federal licenses, permits, & approvals currently in effect for these facilities."

[15] The State CAF, which is a State agency completes pursuant to 19 NYCRR § 600.4, is not to be confused with the FCAF, which an applicant for a federal agency authorization completes and submits to the federal agency and NYSDOS pursuant to 15 C.F.R. § 930.57.

[16] See 6 NYCRR § 617.6(a). State Environmental Quality Review Full Environmental Assessment Form for the Sale of Indian Point 3 and James A. FitzPatrick Nuclear Power Plants, completed by William Slade, NYPA (Lead Agency), January 6, 2000; see also Addendum to Environmental Assessment, Proposed Action; The Sale of the Indian Point 3 and the James A. FitzPatrick Nuclear Power Plants at p. 2.

[17] Addendum To Environmental Assessment - Proposed Action: The sale of the Indian Point 3 and The James A. Fitzpatrick Nuclear Power Plants

[18] Negative Declaration, Notice of Determination of Non-Significance for IP3, LLC and FitzPatrick, as prepared by William Slade for NYPA, Lead Agency, March 31, 2000, p. 1. Further, NYPA's statement in the Attachment to the SEQRA Full Environmental Assessment Form, at p. 1, that "[t]he Department of State had no objection to the Authority assuming the role of Lead Agency" relates to the choice of State agency conducting the SEQRA review; it has nothing to do with State consistency. (15 C.F.R. §§ 930.62 or 930.63).

license transfer.[19] As such transfers are not listed activities in the NYS CMP,[20] federal consistency review was not automatically required. NYSDOS determined not to seek review OCRM's permission to conduct a federal consistency review of the sale and transfer of the license of IP3 to Entergy. As NYPA noted in the FCAF: "Physically, there will be no difference in facility operation before and after the sale. No operational or physical changes will be made. Virtually the only change will be a substitution of upper management. The staff, the operating procedures and the legal requirements for operation will not change." The NRC nuclear license transfer was not expected to have reasonably foreseeable effects on coastal uses or resources.[21]

(b) whether that office or agency was authorized to conduct such review (including the statutory or regulatory bases for such authority).

NYPA, as a State public authority, is required by NY Executive Law § 919(1) and the regulations at 19 NYCRR § 600.4, to complete a *State agency consistency review* for either a Type I or Unlisted action if the action will be undertaken in the coastal area. NYPA is not authorized to, and did not, conduct a *federal consistency* review. NYSDOS is the only designated State agency (15 C.F.R. §§ 930.6 and 930.11(o)) authorized to conduct such federal consistency reviews.

(c) the scope of the review (including both the activities reviewed and the resources affected by those activities)

The State coastal policies used for State consistency review are set forth in regulation[22] and are used to fulfill the State agency's 19 NYCRR § 600.4 consistency obligations. State agencies taking action in the State coastal area required to follow the State consistency procedures,[23] except in the event that the proposed action is a SEQRA listed Type II action.

The scope of NYPA's State consistency review was not focused on IP3 operations but was limited to the transfer of its assets and the IP3 operating license to Entergy (10 C.F.R. Part 2 subpart M) for the remainder of its license permit, from 2000 to December 12, 2015.[24] According to NYPA: "The proposed action is the sale of NYPA's IP3 & JAF NPPs. The sale includes the land, structures, equipment, personnel & agreements on ancillary services & power supply. Entergy will purchase the NPPs subject to all existing permits & approvals…. **The sale will not result in any physical change to either site."[25]** In explaining its reasons supporting its negative

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[19] See FCAF for IP3, LLC and James A. FitzPatrick as prepared by William Slade dated January 6, 2000.
[20] See 15 C.F.R. § 930.54(a). NYPA's completion of a FCAF for federal consistency was indicative of its role as an applicant pursuant to 15 C.F.R. 930.57. NYPA did not conduct and had no authority to conduct a federal consistency review of sale and transfer of IP3 under the CZMA.
[21] The procedures for a coastal state to review for federal consistency an "unlisted" activity "are provided to ensure that State agencies are afforded an opportunity to review federal license or permit activities with reasonably foreseeable coastal effects." 15 C.F.R. § 930.54(f). A designated State agency may opt not to review an unlisted federal license or permit activity if it determines that the activity will not have reasonably foreseeable coastal effects. The license transfer for IP3 was an unlisted action in the NYS CMP.
[22] 19 NYCRR §§ 600.5 and 600.6.
[23] 19 NYCRR §§ 600.3 and 600.4.
[24] See NYPA Negative Declaration, Notice of Determination of Non-Significance, prepared by William Slader, January 6, 2000 at p. 1. "Name of Action: The proposed action is the sale of NYPA's Indian Point 3 (IP3) & James A. FitzPatrick (JAF) Nuclear Power Plants (NPPs) to indirectly wholly-owned subsidiaries of the Entergy Corporation of New Orleans."
[25] NYPA Negative Declaration, Notice of Determination of Non-Significance, at p. 1. Bolding added.

environmental determination, NYPA wrote: "[t]he sale, when completed, will involve the transfer to and assumption by Entergy of the ownership and operation of IP3 [and] [James A. FitzPatrick] in the same manner as provided for in the state [and] federal licenses, permits, [and] approvals currently in effect for these facilities."[26]

NYPA completed a State consistency review as required by Executive Law Article 42, 19 NYCRR § 600.4 to inform its SEQRA decision-making of "significance" of the license transfer of IP3 and FitzPatrick, which NYPA determined to have "no significant impact." The scope of NYPA's consistency review was limited to the IP3 license and asset transfer to Entergy.[27]

(d) whether NYSDOS evaluated the consistency determination made by the other State office or agency.

No documents at NYSDOS indicate that NYSDOS evaluated NYPA's State agency consistency determination.

(e) whether NYSDOS provided comments or advice (or declined to provide comments or advice) to that office or agency on the consistency of such actions with the State's CMP.

No documents at NYSDOS indicate that NYSDOS commented or declined to comment or give advice to NYPA regarding its 2000 State agency consistency review.

• New York State Department of Environmental Conservation's (NYSDEC) Coastal Assessment (February 11, 2000) completed as a part of the State Pollutant Discharge Elimination System (SPDES) permit renewal application for IP2 and IP3 (March 2, 2000).

(a) which office or agency conducted that review.

NYSDEC conducted the State consistency review of its own permitting actions pursuant to SEQRA and the Waterfront Act regulations. NYSDEC prepared a SCAF as part of the pending Indian Point SPDES permit renewal application. No federal agency action was involved in this State agency review. NYSDOS did not conduct a federal consistency review of the matter. As noted above, NYSDEC has no federal consistency review authority.

(b) whether that office or agency was authorized to conduct such review (including the statutory or regulatory bases for such authority).

NYSDEC, as a State agency, is required by the Executive Law § 919(1) and 19 NYCRR § 600.4, to complete a State agency consistency review for either a Type I or Unlisted action if the action will be undertaken in the coastal area. NYSDEC is not authorized to conduct a federal

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[26] NYPA Negative Declaration, Notice of Determination of Non-Significance, at p. 2. NYPA was required to make a determination of significance (6 NYCRR 617.7) and concluded the its role as a State agency in transferring the IP3 license to Entergy "[would] not result in any large and important impact(s) and. therefore, is one which will not have a significant impact on the environment, therefore a negative declaration will be prepared." Negative Declaration, Notice of Determination of Non-Significance, prepared by William V. Slade, Director, Environmental Division, NYPA, January 6, 2000, Full Environmental Assessment Form, p. 1.

[27] See State CAF for IP3, LLC and FitzPatrick completed by William Slade, January 6, 2000.

consistency review. Only NYSDOS is authorized to conduct federal consistency in New York pursuant to 15 C.F.R. Part 930.

(c) the scope of the review (including both the activities reviewed and the resources affected by those activities).

The scope of the State consistency review was limited to the pending SPDES permit renewal application for IP2 and IP 3, as defined in NY Executive Law Article 42. This review did not involve a 15 C.F.R. Part 930 federal agency action, federal authorization for a license or permit, or federal financial assistance.

(d) whether NYSDOS evaluated the consistency determination made by the other State office or agency.

NYSDOS reviewed NYSDEC's State agency consistency assessment form (SCAF) but provided no comments on it or the pending SPDES permit renewal.

(e) whether NYSDOS provided comments or advice (or declined to provide comments or advice) to that office or agency on the consistency of such actions with the State's CMP.

No documents at NYSDOS indicate that NYSDOS commented or declined to comment or give advice to NYSDEC regarding its State consistency review.

• New York Public Service Commission's (NYSPSC) Final Supplemental Environmental Impact Statement (FSEIS), on the transfer of IP1 and IP2 from Consolidated Edison to Entergy (August 17, 2001).

(a) which office or agency conducted that review.

NYSPSC conducted the State consistency review of its own actions pursuant to Public Service Law § 70 and the Waterfront Act regulations.

(b) whether that office or agency was authorized to conduct such review (including the statutory or regulatory bases for such authority).

NYSPSC, as a State agency, is required and authorized by the Executive Law § 919(1) and 19 NYCRR § 600.4, to complete a State agency consistency review for either a Type I or Unlisted action if the action will be undertaken in the coastal area. In accordance with NY Public Service Law § 70, the NYSPSC reviewed ConEd's transfer of the retired IP1 unit and active IP2 assets and franchise to Entergy. NYSPSC is not authorized to conduct a federal consistency review. NYSDOS is the only designated State agency to conduct such reviews.

(c) the scope of the review (including both the activities reviewed and the resources affected by those activities).

In 2001, NYSPSC authorized ConEd to transfer the assets of the retired IP1 and active IP2 to Entergy, finding that the proposed transfer is "consistent with applicable coastal zone policies set forth in 19 NYCRR § 600.5 [*i.e.*, the New York coastal policies]."[28] Like the 2000

[28] NYSPSC, FSEIS Order, at ETR00054 (Aug. 17, 2001) see also Final Order of NYSPSC Authorizing Asset Transfer 11 (Aug. 31, 2001).

NYPA transfer discussed above, NYSPSC's State consistency review focused solely on the transfer of stock, works and system for IP1 and IP2 from ConEd to Entergy pursuant to NY Public Service Law § 70 and did not involve a review, change or extension of the operations of the facilities. No federal agency action was involved in this State agency review.

(d) whether NYSDOS evaluated the consistency determination made by the other State office or agency.

No documents at NYSDOS indicate that NYSDOS evaluated NYSPSC's State agency consistency determination.

(e) whether NYSDOS provided comments or advice (or declined to provide comments or advice) to that office or agency on the consistency of such actions with the State's CMP.

No documents at NYSDOS indicate that NYSDOS commented or declined to comment or give advice to NYSPSC regarding its State consistency review.

• NYSDEC's Final Environmental Impact Statement (FEIS) concerning applications to renew the SPDES permits for Hudson River power plants, including IP2 and IP3 (June 25, 2003).

(a) which office or agency conducted that review.

NYSDEC conducted the environmental review and State consistency review of its own permitting actions pursuant to the SEQRA and Waterfront Act regulations. Upon information and belief that review is still on-going.

(b) whether that office or agency was authorized to conduct such review (including the statutory or regulatory bases for such authority).

In its FEIS, NYSDEC analyzed the SPDES permit renewals for the three Hudson River power generation facilities -- Roseton 1 & 2, Bowline 1 & 2, and Indian Point 2 & 3 Steam Electric Generating Stations -- under the policies in Executive Law Article 42. That document stated that: "The SPDES permit renewals [for these electric generating facilities] that are the subject of this DEIS will not result in any new effects on coastal zone policies."[29] However this was not a site specific alternatives review. See, Entergy v. NYSDEC, et als., 3 Misc. 3d 1070, ***8 (Sup.Ct. Albany Co. 2004), *aff'd,* 23 A.D. 3d 811 (3d Dep't 2005), *appeal dismissed and denied,* 6 N.Y.3d 802 (2006). Because the SPDES permit was a State action, NYSDEC reviewed the SPDES permit renewals as a matter of State consistency. NYSDEC is not authorized to conduct a federal consistency review; NYSDOS is the only designated State agency to conduct such reviews.

In 2008, NYSDEC's Interim Decision directed the parties to the SPDES proceeding to evaluate alternatives under SEQRA in the context of an administrative hearing.[30] Depending

[29] See Final Environmental Impact Statement, New York State Pollutant Discharge Elimination System Permits for the Roseton 1 & 2, Bowline 1 & 2, and Indian Point 2 & 3 Steam Electric Generating Stations.
[30] See www.dec.ny.gov/hearings/45956.html

upon the alternatives chosen as complying with the federal Clean Water Act, State consistency will necessarily be addressed in that context for the selected technology.[31]

(c) the scope of the review (including both the activities reviewed and the resources affected by those activities).

The scope of the NYSDEC's State consistency review is limited to the renewal of the SAPA-extended SPDES permits for IP2 and IP 3.

(d) whether NYSDOS evaluated the consistency determination made by the other State office or agency.

No documents at NYSDOS indicate that NYSDOS evaluated NYSDEC's FEIS concerning SPDES permit renewal applications for Hudson River power plants.

(e) whether NYSDOS provided comments or advice (or declined to provide comments or advice) to that office or agency on the consistency of such actions with the State's CMP.

No documents at NYSDOS indicate that NYSDOS commented or declined to comment or give advice to NYSPSC regarding its State consistency review.

NRC INQUIRY # 3. Part I:

The State of New York's CMP states that, "Generally, [NYSDOS] will evaluate major actions proposed in the Coastal Area of the State by Federal agencies or by entities requiring Federal permits and determine the consistency of those actions with the Program's policies" (CMP Part II, § 11-4 at 3 (1982)). Please describe the circumstances, if any, in which NYSDOS would not perform a consistency evaluation for a Federal action that may affect New York State's coastal zone.

The federal CZMA requires a State with a federally approved CMP to develop a list of federal agency activities which will be reviewed for federal consistency. This list appears in Table 2 of the NYS CMP,[32] which details the federal agency activities that NYSDOS has already determined will have coastal effects on New York's coastal resources and uses[33] and whenever proposed, will be reviewed for federal consistency. The NYS CMP also provides for the issuance of general concurrences for minor actions.[34]

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[31] See www.dec.ny.gov/enb/97047.html

[32] See NYS CMP Table 2 at p. II-9-17 to II-9-23.

[33] See 15 C.F.R. 930.53(a); see also NYS CMP Table 2 at p. II-9-17 to II-9-23. "The specific federal regulatory activities subject to consistency review by DOS, including those that may occur outside of the State's coastal zone and have reasonably foreseeable coastal effects, are listed in Part II of Table I. DOS will review these activities for their consistency with New York's CMP in accordance with the procedural requirements of 15 C.F.R. Part 930, subpart D (or subpart I for federal regulatory activities having interstate coastal effects)." NYS CMP at p. II-9-12.

[34] See 15 C.F.R. § 930.62(a). "…The State agency may issue a general concurrence for minor activities (see § 930.53(b))…." see also NYS CMP p. II-9-13 – II-9-14. Criteria for General Concurrence.

> Activities will not require further DOS review and separate concurrences with consistency certifications if all of the following relevant criteria are met:
> •The activity involves a use that is the same as, or similar to, adjacent or nearby uses;

If a federal agency activity is not "listed"[35]in the NYS CMP, NYSDOS has the option of seeking permission from NOAA's Office of Coastal Resources Management (OCRM) Director to conduct a consistency evaluation.[36] If NYSDOS wants to review the unlisted action, NYSDOS will follow the procedures in 15 C.F.R. § 930.54 to review the activity for federal consistency. There are no categorical exemptions of federal agency activities from federal consistency review. Further, the federal consistency concurrence or objection must be issued by NYSDOS, the designated State agency (15 C.F.R. § 930.11(o)), as there are no provisions in the NYS CMP for other State agencies to "stand in the shoes" of NYSDOS.[37]

The circumstances in which NYSDOS would not perform a consistency evaluation for a federal action that may affect New York State's coastal zone are limited. One such instance is if NYSDOS has previously entered into an agreement with a federal agency to establish preset conditions for issuance of a general concurrence with conditions for select Regional and Nationwide activities. For example, NYSDOS and the U.S. Army Corps of Engineers (Corps)

•The activity is compatible with community character in design, size, and materials;
•If the activity would be in an area covered by an approved LWRP, the community advises that it is consistent with the community's land and water use controls for the area;
•The activity is identified in an approved LWRP as one that should be undertaken to advance the policies and purposes of the approved LWRP and the community so advises;
•The activity involves reconstruction, replacement, maintenance or repair of lawful structures, in-kind and in-place, and where applicable a community advises that it complies with an approved LWRP and DOS determines it complies with any applicable Special Management Area Plan;
•Other than for the exercise of riparian or littoral rights (see below), the activity is entirely on property owned or otherwise authorized by the owner for use by the proponent of the activity;
•The activity involves the exercise of riparian or littoral rights that is typical of lawful riparian or littoral access traditionally exercised in the area; complies with any applicable local standards; and avoids any unnecessary interference with navigation and other public uses of the water;
•The activity would not significantly impair the rights and interests of the public regarding the use of public lands or waters;
•The activity does not disrupt existing lawful water-dependent uses;
•Other than for the exercise of riparian or littoral rights or the reconstruction, replacement, maintenance or repair of lawful structures (see above), the activity would not be undertaken in a vegetated wetland or natural protective feature;
•The activity would not generate or discharge non-point source pollution to coastal waters, or would provide a means of adequately treating non-point sources of pollution using accepted best management practices.

[35] See 15 C.F.R. § 930.54; "DOS will also monitor activities requiring federal regulatory approval that are not listed in Part II of Table I to determine if the activities may affect land and water uses and natural resources in the State's coastal zone. If DOS determines that an unlisted activity will affect coastal uses or resources, then DOS will advise the applicant, federal agency and OCRM that a consistency review of the activity will be required. As part of this notification, DOS will request OCRM's approval to review the unlisted activity." NYS CMP at II-9-12.

[36] 15 C.F.R. § 930.54 (a)(1): "With the assistance of Federal agencies, State [coastal] agencies should monitor unlisted federal license or permit activities (e.g., by use of intergovernmental review process established pursuant to E.O. 12372, review of NEPA documents, Federal Register notices). State agencies shall notify Federal agencies, applicants, and the Director of unlisted activities affecting any coastal use or resource which require State agency review within 30 days from notice of the license or permit application, that has been submitted to the approving Federal agency, otherwise the State agency waives its right to review the unlisted activity. The waiver does not apply in cases where the State agency does not receive notice of the federal license or permit application."

[37] See 15 C.F.R. § 930.62(a), in part, "At the earliest practicable time, the **State agency** [DOS] shall notify the Federal agency and the applicant whether the State agency concurs with or objects to a consistency certification…." (Emphasis added).

have engaged in a 15 C.F.R. Part 930 subpart D federal consistency review process that has resulted in the identification of Corps identified Regional and Nationwide federal activities subject to a Corps permit. In that context, after NYSDOS has conducted a thorough federal consistency review of the identified Regional and Nationwide Corps activities, NYSDOS issues a federal consistency determination that included a coastal policy analysis and conditions for each of the activities that, if adhered to, would not have adverse coastal effects. [38] The federal consistency decision has an expiration date of five years from the date of issuance, is periodically updated with through mutual consent from NYSDOS and the Corps and provides for the determination that there would not be coastal effects from the activity if the conditions are met.

If an applicant or agency is not able to meet the conditions for issuance of a Regional and Nationwide permit, it must submit a consistency certification to NYSDOS seeking an individualized federal consistency review. NYSDOS does not have such an agreement with NRC for the licensing of nuclear facilities. Accordingly all NRC required licenses, certification, or approvals, including renewal applications, must be submitted to NYSDOS for federal consistency review prior to NRC approval.

NRC INQUIRY # 3 PART II:

> **Additionally, please describe how a consistency evaluation for a Federal action would differ from an evaluation performed for a State action. For the four reviews cited by Entergy, please describe whether each review would be sufficient for a consistency review for a Federal action and, if deficient, how that review is deficient. Please cite any applicable regulations, guidance, or other relevant documents.**

There are similarities as well as differences in the manner in which federal and State agency consistency is conducted and projects are evaluated. A federal consistency review by NYSDOS is subject to the 15 CFR 930 regulations, state consistency review is not. Others are discussed below.

Both federal and state agencies taking action in the coastal area must act consistently with New York's 44 enforceable coastal policies. Though the policies are phrased different in the NYS CMP and in the Waterfront Act and its regulations (Executive Law § 912 and 19 NYCRR §§ 600.5 and 600.6), the obligation to abide by them is a common responsibility. Central to the enactment of waterfront legislation in New York was satisfying the CZMA requirement that each coastal state enact a state law with authority to bind state agencies to comply with the same coastal policies to which federal agency must comply.[39] Enforceability of the coastal policies at the state level was a base minimum requirement for program approvability. The Waterfront Act

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[38] When NYSDOS conducts a federal consistency of the Corps' Nationwide and Regional activities and sets forth in the federal consistency decision, the identified activities will not be required to undergo individual federal consistency review if the activity is conducted pursuant to the condition listed in DOS's federal consistency decision for those actions. See 15 C.F.R. § 930.1(c).

[39] 16 U.S.C. § 1455(d)(15).

became the linchpin for requiring State agency consistency and ensuring that the coastal policies were implemented and enforced at the state level.

The NYS CMP is a networked coastal program that draws upon a network of state statutes, regulations and other legal authorities to enforce the state coastal policies[40]and does *not* incorporate the 44 enforceable coastal policies in a single State consistency permit. The Waterfront Act regulations contain 29 coastal policies which are applicable to State agency consistency. The other 15 policies, which together with the 29 enforce the 44 coastal policies, are contained in State laws and programs administered by State agencies other than NYSDOS. The policy language and format differs between the NYS CMP and the Waterfront Act regulations. The State Legislature empowered NYSDOS to adopt rules and regulations ensure that those state policies codified in Executive Law § 912 were given effect.

Each State agency is responsible for reviewing its direct or permitting actions to ensure that they are undertaken in a manner that is consistent with the State's 29 coastal area policies in 19 NYCRR § 600.5 or § 600.6, depending upon the geographical location of the project and in accordance with the procedures set forth in 19 NYCRR Part 600, the Waterfront Act regulations.[41] Potentially, several state agencies may have separate regulatory reviews in connection with a given project; each must render a separate consistency determination before it issues or denies a permit. The State agencies acting under NY Executive Law Article 42 are self-policing when conducting their consistency reviews. By comparison, NYSDOS is the only State agency which is empowered to conduct federal consistency review in New York State and only one federal consistency determination of a federal action is possible. Its authority is not transferable to another New York State agency nor can a federal consistency review be artificially manufactured through a State agency consistency review for a separate action.

Following federal approval of New York's CMP in 1982, proposed federal actions or approvals affecting land or water uses or the natural resources of the coastal zone are reviewed by NYSDOS for consistency with the State's 44 coastal policies. The federal consistency process centers on the interaction between the NYSDOS, the federal agency, and the applicant; this important dynamic is not present when state agencies conduct a consistency review under the Waterfront Act.

A distinguishing feature of State agency consistency review which differs from federal consistency review is the concept of balancing. Under Executive Law Article 42, there is a balancing approach to State agency consistency with coastal policies. When it becomes clear that a proposal will substantially hinder one or more coastal policies, the State agency may only undertake or approve the activity if it certifies: 1) that no reasonable alternatives exist; 2) the action taken will minimize all adverse impacts on such policies to the maximum extent

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[40] For networked programs see C.F.R. § 923.43(b)(2). Rather than enact comprehensive legislation, New York's legislature elected to utilize a networked approach for coordinating and implementing the goals of the program, with provision for adoption of local programs. See Executive Law Article 42 and the NYS CMP, § II-4, at 1-2, 8. There are currently 81 New York state statutes which enforce the coastal policies; they are listed after each policy in the NYS CMP and are kept current through periodic routine program changes. (15 C.F.R. § 923.84).

[41] 19 N.Y.C.R.R. § 600.3.

practicable; 3) the action will advance one or more of the other coastal policies; and 4) the action will result in an overriding regional or statewide benefit.[42]

By contrast, federal consistency does not permit the balancing of the competing policies. When the federal consistency certification is submitted, NYSDOS is required to issue an objection, concurrence or conditional concurrence within six months of receiving all necessary data and information. Unlike in State consistency, there is no provision for the "balancing" of coastal policies in a federal consistency review and the federal agency activity must not be inconsistent with any of the 44 enforceable coastal policies. If NYSDOS objects to a federal consistency certification, then an applicant may initiate an appeal process in accordance with the procedures in 15 C.F.R. Part 930 subpart H. There is no administrative appeal process for State consistency reviews.

State consistency is a limited, isolated review of the State agency's own action. State agencies cannot review for consistency the actions of any other New York State agency, let alone those of federal agencies. In instances where two or more state agencies may have jurisdiction over a proposed action, each agency must render its own consistency determination and can potentially reach contrary determinations about the consistency of the activity. Moreover, under federalism principles, no state law, including NY Executive Law Article 42, can give to state agencies authority to review federal agency activities. Only pursuant to the congressionally enacted CZMA can States attain the authority to conduct reviews of federal agency actions. The CZMA confers that review authority on a single State agency. In New York, the single State agency for federal consistency review is NYSDOS.

For the four reviews cited by Entergy, please describe whether each review would be sufficient for a consistency review for a Federal action and, if deficient, how that review is deficient. Please cite any applicable regulations, guidance, or other relevant documents.

• New York Power Authority's (NYPA) environmental review (including the State Environmental Quality Review Act (SEQRA) negative declaration, Federal consistency certification, and State coastal assessment, if any) on the proposed sale of NYPA's IP3 to Entergy (March 31, 2000).

NYPA's consistency review is not sufficient for purposes of federal consistency review, nor a substitute for it. NYPA owned IP3 until November 21, 2000, when it transferred its ownership interest in, and operating/maintenance responsibility for, the IP3 plant to Entergy. NYPA conducted a State agency consistency review of the sale of the facility and its operating license to Entergy. The NYPA State consistency determination was limited to the transfer of IP3 to Entergy and did not review the operating license for the IP3 facility. As the seller of IP3, NYPA's state consistency review was limited to its own property transfer. Under no construct would that state review be sufficient for federal consistency review of IP3's operating license.

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[42] 19 NYCRR § 600.4(b). A separate but similar procedure has been established in the regulations for the review of a State agency action within the boundary of a community with an approved local waterfront revitalization program, where the action is one which has been identified by the Secretary pursuant to Executive § 916(1) and a negative declaration has been issued. 19 NYCRR § 600.4(c) Where a positive declaration has been issued, the action will be reviewed under SEQRA procedures.

The NRC's federal agency action treats such transfer as a ministerial act (10 C.F.R. §§ 50.80 and 50.90). The review accorded transfer of a nuclear facility to a responsible buyer does not approximated the comprehensive multi-level of review involved with a NRC license renewal (10 C.F.R. Part 54). In any event, NYPA would not have been authorized to conduct a federal consistency of NRC's action, as it has not been delegated authority to conduct federal consistency reviews by the NYS CMP.

• New York State Department of Environmental Conservation's (NYSDEC) Coastal Assessment (February 11, 2000) completed as a part of the State Pollutant Discharge Elimination System (SPDES) permit renewal application for IP2 and IP3 (March 2, 2000).

NYSDEC's consistency review is not sufficient for purposes of federal consistency review, nor a substitute for it. The February 11, 2000 NYSDEC prepared a SCAF. The SPDES permit reviews is a NYSDEC action and does not involve a federal agency action, which is a basic requirement for the completion of a federal consistency review.[43] The NYSDEC State CAF is a preparatory step in a State consistency review in the State agency SEQRA process.[44]It is not a substantive review of the IP2 and IP3 operational licenses; and it does not involve the federal consistency review of the NRC license renewal. (15 C.F.R. Part 930 subpart D) Therefore, the NYSDEC State consistency action cannot be recognized as a federal consistency review.

• New York Public Service Commission's (NYSPSC) Final Supplemental Environmental Impact Statement (FSEIS), on the transfer of IP1 and IP2 from Consolidated Edison to Entergy (August 17, 2001).

NYSPSC's consistency review is not sufficient for purposes of federal consistency review, nor a substitute for it. NYSPSC's State consistency review of the transfer of the assets and franchise of retired IP1 unit and active IP2 did not involve a federal action, nor is NYSPSC the designated State agency to conduct federal consistency reviews. The NYSPSC approval of the transfer involved NY Public Service Law § 70 and related State law requirements and did not involve a review, change or extension of the operations or underlying license of the nuclear facilities. Moreover, the NYSPSC determination does not purport to review the NRC's approval of the license transfer from ConEd to Entergy (which NRC considers ministerial act). Finally, NYSPSC is not authorized to conduct a federal consistency review and its State consistency review was focused only on its approval of the transfer as a responsible State agency.

• NYSDEC's Final Environmental Impact Statement (FEIS) concerning applications to renew the SPDES permits for Hudson River power plants, including IP2 and IP3 (June 25, 2003).

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[43] See e.g. 15 C.F.R. § 930.51(a). "The term "federal license or permit" means any authorization that an applicant is required by law to obtain in order to conduct activities affecting any land or water use or natural resource of the coastal zone and that any Federal agency is empowered to issue to an applicant." See 16 U.S.C. § 1456. The basic premise of the federal CZMA is that it involves the designated State agency's review of federal agency activities for federal consistency with the enforceable State coastal policies.

[44] 19 NYCRR § 600.4.

NYSDEC's consistency review is not sufficient for purposes of federal consistency review, nor a substitute for it. The NYSDEC June 25, 2003 FEIS is not a review of the IP2 and IP3 operational licenses, nor does it involve the federal consistency (15 C.F.R. Part 930 subpart D) review of the NRC license renewal. The ongoing NYSDEC SEQRA and SPDES/Best Technology Available (BTA) administrative hearing, which is expected to result in an alternative specific State consistency determination, is not the equivalent of a federal consistency review conducted under the CZMA and its implementing regulations at 15 C.F.R. Part 930.

NRC INQUIRY # 4.

CZMA regulations in 15 CFR 930.51 describe situations whereby the renewal of a Federal license or permit for an activity that has previously been reviewed for consistency with the State's coastal management program does not require a subsequent consistency determination unless the proposed action will cause an effect on any coastal use or resource substantially different than those previously reviewed by the State agency.

a. Please describe your understanding of the applicability of 15 CFR 930.51(b), (c) and (e) to the license renewal application for IP2 and IP3.

b. Please state if you believe there were any substantial changes in the coastal environment or substantial changes to the New York CMP since 2000. If so, please describe those changes.

a. Please describe your understanding of the applicability of 15 CFR 930.51 (b), (c) and (e) to the license renewal application for IP2 and IP3.

The regulations implementing the CZMA state:

"(a) The term "Federal license or permit" means any authorization, certification, approval, or other form of permission which any Federal agency is empowered to issue to an applicant."[45]

Entergy's license renewal application for IP2 and IP3 fall within that definition of a "federal license or permit." NYSDOS is currently reviewing the IP2 and IP3 applications for federal consistency pursuant to the substantive and procedural requirements of 15 CFR Part 930 Subpart D as "[l]icensing and certification of the siting, construction, and operation of nuclear power plants, pursuant to Atomic Energy Act of 1954, Title II of the Energy Reorganization Act of 1974 and the National Environmental Policy Act of 1969." They are each listed activities in NYS CMP Table 2 requiring federal consistency review to be conducted by NYSDOS, the only 15 C.F.R. § 930.11(o) designated State agency in New York State to conduct federal consistency reviews.[46]

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[45] 15 C.F.R. § 930.51(a).
[46] NYS CMP at p. II-9-20.

15 C.F.R. §§ 930.51(b)(2) and (3) and (c) address consistency review of a major amendment or renewal of an activity previously reviewed for federal consistency and subsequently permitted.[47] That provision is not applicable here. Since IP2 and IP3 were never reviewed for consistency by NYSDOS, 15 C.F.R. §§ 930.51 (b)(2) and (3), (c) and (e) are inapplicable to the current situation. The consultation process between federal and state agencies arises only in the context of a federal license renewal when the original license was previously reviewed for federal consistency by the State agency and the renewal will either be subject to new program requirements or cause an effect on any coastal use or resource "substantially different" than those originally reviewed by the State agency. 15 C.F.R. §§ 930.51(b)(3) and (e).

In order for 15 C.F.R. §§ 930.51(b)(2) or (3) to apply, the original "federal license or permit activities" must have undergone a previous federal consistency review.[48] The NRC approved the original operating licenses for IP2 and IP3 in 1973 and 1975, respectively. Both original licenses pre-date the September 30, 1982 federal approval of the NYS CMP and thus neither original operating permit was or could have been subject to federal consistency review.

While federal consistency reviews were not conducted for the original IP operating licenses, a separate and distinct review obligation applies to license renewal applications where the facilities have not been previously reviewed. Here, Entergy's federal consistency certification is being reviewed in accordance with 15 C.F.R. § 930.51(b)(1), which requires that "[r]enewals

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[47] 15 C.F.R. § 930.51 reads, in pertinent part:

(a) The term "federal license or permit" means any authorization that an applicant is required by law to obtain in order to conduct activities affecting any land or water use or natural resource of the coastal zone and that any Federal agency is empowered to issue to an applicant….

(b) The term also includes the following types of renewals and major amendments which affect any coastal use or resource:

(1) Renewals and major amendments of federal license or permit activities not previously reviewed by the State agency;

(2) Renewals and major amendments of federal license or permit activities previously reviewed by the State agency which are filed after and are subject to management program changes not in existence at the time of original State agency review; and

(3) Renewals and major amendments of federal license or permit activities previously reviewed by the State agency which will cause an effect on any coastal use or resource substantially different than those originally reviewed by the State agency.

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

(d) The term "renewals" of a federal license or permit activity means any subsequent re-issuance, re-approval or extension of an existing license or permit that the applicant is required to obtain for an activity described under paragraph (b) of this section.

(e) The determination of substantially different coastal effects under paragraphs (b)(3), and (c) of this section is made on a case-by-case basis by the Federal agency after consulting with the State agency, and applicant. The Federal agency shall give considerable weight to the opinion of the State agency. The terms "major amendment," "renewals" and "substantially different" shall be construed broadly to ensure that the State agency has the opportunity to review activities and coastal effects not previously reviewed. .

[48] 15 C.F.R. §§ 930.51(b)(2) and (3).

and major amendments of federal license or permit activities not previously reviewed by the State agency" are to be reviewed for federal consistency review in accordance with 15 C.F.R Part 930 subpart D.[49] In order for 15 C.F.R. § 930.51(b)(2) or (3) to apply, NYSDOS would have to have previously completed a federal consistency certification. Subsection 15 C.F.R. § 930.51(b)(2) and (3) contain a condition precedent requiring that "the federal license or permit activities previously reviewed **by the State agency**". NYSDOS, as the only designated "State agency", has never reviewed the original operating licenses for IP2 and IP 3 and so 15 C.F.R. § 930.51(b)(2) or (3) does not apply to the current license renewal applications (10 C.F.R. Part 54).

Applicable here, 15 C.F.R. § 930.51(b)(1) describes a situation where federal consistency is required when the renewal of the federal license or permit "was not previously reviewed by the State agency." As discussed previously, NYSDOS is the sole designated State agency with the authority to review NRC operating licenses and license renewals. While federal consistency review was conducted for the other New York nuclear power stations in New York in conjunction with their license renewal applications (including Entergy's FitzPatrick plant), NYSDOS has never conducted a federal consistency review for IP2 and IP3.[50]

NRC INQUIRY # 4 subpart b.

> **Please state if you believe there were any substantial changes in the coastal environment or substantial changes to the New York CMP since 2000. If so, please describe those changes.**

Yes, the NYS CMP has changed since 2000. NRC's inquiry asks NYSDOS whether there were "any substantial changes in the coastal environment" since the year 2000. Pursuant to 15 C.F.R. § 930.51(b)(3), deference would be provided to NYSDOS in "[t]he determination of substantially different coastal effects under paragraphs (b)(3), and (c) of this section is made on a case-by-case basis by the Federal agency after consulting with the State agency, and applicant. The Federal agency shall give considerable weight to the opinion of the State agency."[51]

The NYS CMP underwent two Routine Program Changes (RPCs) in 2001 (Appendix 6) and 2006 (Appendix 7), and the changes to the program provided the addition of material required for federal consistency review. These changes were not considered to be amendments to the NYS CMP but rather routine changes in a decision rendered by the US Department of Commerce. The 2001 RPC expanded the "necessary data and information list"[52] to include, among other things, the submission of a FEIS if required by the federal agency, as is the case with the IP2 and IP3 license renewals (10 C.F.R. Part 54).[53] The 2006 RPC contained interstate consistency provisions (15 C.F.R. Part 930 subpart I) that provided for NYSDOS, as the

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[49] See NYS CMP at p. II-9-11: "Activities in or outside of New York's coastal zone, which require federal permits, licenses and other regulatory authorizations and affect land and water uses and natural resources in the coastal zone, are subject to review by DOS for their consistency with the State's CMP. This requirement also applies to renewals and major amendments to such regulatory approvals."
[50] See L. 1975, C. 464, 947.
[51] 15 C.F.R. § 930.51(e).
[52] 15 C.F.R. § 930.58(a).
[53] 2001 NYS CMP RPC at p. 25-26. (Attachment 6)

designated State agency, to review applications for federal license and permits for federal consistency that were located in Connecticut State waters in Long Island Sound.

In 2012, the NYS CMP has also been updated for the addition of federally-approved Local Waterfront Revitalization Programs and the update of the Significant Coastal Fish and Wildlife Habitats.[54]

NRC INQUIRY # 5.

Is the Department aware of any other examples where a consistency review by a State agency was not required, or not conducted, because a review had been conducted previously and the proposed activity would not affect any coastal use or resource in a way that was substantially different than the description or understanding of effects at the time of the original review, as described 15 CFR 930.51? If so, please describe the circumstances of that (those) situation(s).

NYSDOS is not aware of any other examples where a federal consistency review by a State agency [NYSDOS] was not required, or not conducted, because a review had been conducted previously and the proposed activity would not affect any coastal use or resource in a way that was substantially different than the description or understanding of effects at the time of the original review. When federal permits or licenses expire, NYSDOS conducts a new consistency review.

Changes that occur between an original license and a renewal application provide additional information for review. For instance, NYSDOS receives applications for federal agency maintenance dredging permits that are generally issued for standard time intervals, and are usually valid for 5 or 10 year terms. At the conclusion of the maintenance dredging permit, applicants generally submit an application for a federal consistency review for a "renewal" of the first permit. Although called a renewal, this second permit for a set term number of years for maintenance dredging is classified by both the federal agency and DOS as an entirely new review, which entails NYSDOS's completion of a federal consistency review for the new permit term.

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[54] Since 2000, the following RPCs were approved by the Office of Coastal Resource Management (OCRM) for Significant Coastal Fish and Wildlife Habitats (SCFWHs). June 6, 2002: OCRM concurred with NYSDOS's RPC to add 5 and to modify 41 SCFWHs in Suffolk County; August 31, 2006: OCRM concurred with NYSDOS's July 13, 2006 RPC to add 8 SCFWHs in Suffolk County and to modify in 25 SCFWHs in Suffolk and Nassau Counties; February 20, 2009 and May 13, 2009: OCRM concurred with NYSDOS's December 2, 2008 RPC to add 2 SCFWHs to the South Shore of Long Island, to modify 9 SCFWHs including the combination of 4 of the previously designated habitats into two habitats and the deletion of three habitats; and November 30, 2012, OCRM concurred with NYSDOS's July 31, 2012 RPC to update the Hudson River SCFWHs. The RPC includes modifications to the narratives for the existing 35 habitats, the extension of 13 habitat boundaries, the consolidation of 4 habitats into 2, and the designation of 7 new habitats.

Significantly, three nuclear power plant facilities submitted certifications to NYSDOS for federal consistency review for the 10 C.F.R. Part 54 operating license renewals applications. These were:

F-2002-0707 **R.E. Ginna Nuclear Power Plant** (Rochester Gas & Electric)
F-2004-0194 **Nine Mile Point Nuclear Station Units 1 & 2** (Constellation)
F-2007 1155 **James A. FitzPatrick Nuclear Power Plant** (Entergy)

As with Indian Point, NYSDOS never reviewed the original operating licenses for the three facilities but reviewed the renewal applications in accordance with 15 C.F.R. 930.51(b)(1). All three applications were classified as new federal consistency reviews by NYSDOS. In addition, each review resulted in a determination that the activities were consistent with the enforceable policies of the NYS CMP, and the facility licenses were renewed by NRC.

NRC INQUIRY # 6.

Please describe whether NYSDOS concurs with Section 9.3 of Entergy's Environmental Report, as revised (Enclosure 1 to NL-12-107), in which Entergy states it "now believes that the New York Coastal Zone Management Plan also exempts both plants from further consistency review."

Entergy focused its response to R.A.I. No. 3 on so-called "grandfathering" provisions in the NYS CMP.[55] Entergy filed suit in New York Supreme Court, Albany County seeking a declaratory order that it is "exempt" from federal consistency review. On December 13, 2013, in Entergy Nuclear Operations, Inc. v. New York State Dept. of State, 42 Misc.3d 896 (Sup. Ct. Albany Co. 2013), Supreme Court Justice Michael Lynch issued a favorable decision to NYSDOS and finding that the "exemption" provisions do not apply to Entergy's application for the license renewal.[56] The court upheld the NYSDOS's conclusion that Entergy's Indian Point facility was subject to federal consistency review by virtue of Entergy's 2007 application to renew its operating licenses for its Indian Point facilities. On January 22, 2014, Entergy filed a notice of appeal with the N.Y. Supreme Court, Appellate Division, Third Department. The appeals process is still ongoing.

[55] See NYS CMP at pt. II, § 9, at 1.
[56] See Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3 LLC v. New York State Dept. of State, 42 Misc. 3d 896 (Supreme Ct. [Albany Cty.]) Dec. 13, 2013. (Attachment 8).

Entergy

Indian Point Energy Center
450 Broadway, GSB
P.O. Box 249
Buchanan, N.Y. 10511-0249
Tel (914) 254-2055

Fred Dacimo
Vice President
License Renewal

December 17, 2012

BY HAND DELIVERY

Secretary Cesar A. Perales
New York State Department of State
Division of Coastal Resources
1 Commerce Plaza
99 Washington Avenue—Suite 1010
Albany, New York 12231

New York State Department of State
Office of Coastal, Local Government and Community Sustainability
Attn: Consistency Review Unit
1 Commerce Plaza
99 Washington Avenue—Suite 1010
Albany, New York 12231

Re: Consistency Certification for Entergy Nuclear Indian Point 2 and Entergy Nuclear Indian Point 3 License Renewal Application

Dear Secretary Perales:

This submittal is being made by Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc. (collectively, "**Entergy**"). The purpose of the submittal is to inform the New York State Department of State ("**NYSDOS**") of Entergy's certification that issuance by the United States Nuclear Regulatory Commission ("**USNRC**") of 20-year renewed operating licenses ("**License Renewal**") for Indian Point Energy Center Unit 2 and Unit 3 (collectively, "**IPEC**") is consistent with all applicable and enforceable policies of the document published by NYSDOS as the New York State Coastal Management Program (the "**NYCMP**")[1] as approved by the National Oceanic and Atmospheric Administration ("**NOAA**") in accordance with the federal Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.* (the "**CZMA**"). This consistency certification ("**Consistency Certification**") is respectfully submitted under a full reservation of rights.[2]

[1] The NYCMP is set forth in a document entitled "New York State Coastal Management Program and CZM Program Final Environmental Impact Statement," with changes from 1982 to 2006, published by NYSDOS.

[2] The issue of whether License Renewal requires any further review under the CZMA is a federal question pending before and to be resolved by the Atomic Safety and Licensing Board ("**ASLB**"). *See, "Motion and Memorandum By Applicant Entergy Nuclear Operations, Inc. for Declaratory Order That It Has Already Obtained the Required New York State Coastal Management Program Consistency Review of IPEC Units 2 and 3 for Renewal of the Operating Licenses,"* dated July 30, 2012, USNRC Atomic Safety and Licensing Board Docket Nos. 50-247 and 50-286. In addition, for the reasons presented to NYSDOS by Entergy's petition filed on November 7, 2012, License Renewal is exempt from review under the terms of the NYCMP itself. *See, "In the Matter of the Petition of: Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC, for a Declaratory Ruling, PETITION FOR DECLARATORY RULING,"* dated November 5, 2012, filed with the State of New York,

I. The NYCMP Lists IPEC Among the Existing Energy Facilities That Demonstrate The State's Recognition of the National Interest in the Coastal Zone

In seeking federal approval of the NYCMP, NYSDOS specifically described the existing nuclear energy facilities, including IPEC, already located in the State's coastal zone:

> The State has demonstrated its recognition of the national interest in energy facilities ***by the number and scope of facilities already located in or planned for New York's coastal area . . .[including] nuclear – 5 units . . .*** [and] 2 nuclear – under construction . . .

NYCMP at Chapter II-9, at 3 (emphasis added).

The NYCMP then acknowledged that "major electric and gas facilities are beneficial, for they supply the energy necessary for the operation of industries, transportation vehicles and services, and home heating," and that "some major electric generation and transmission facilities are provided by the Power Authority of the State of New York [which owned and/or operated Indian Point Energy Center Unit 3 from 1976 to 2000.]" *Id.* Chapter II-9 at 8. On the basis of the existing energy production facilities already located in the State's coastal zone, NYSDOS predicted that the NYCMP would have "no negative effects" on energy use and development. In fact, the NYCMP embraces as one of its foundational elements "the importance of adequate energy supplies for the economic development of the State." *Id.* Chapter V at 7. Because IPEC's consistency with the NYCMP is explicitly described by the NYCMP, NYSDOS should concur that IPEC License Renewal is consistent with the NYCMP.

II. IPEC License Renewal Is Consistent With All Applicable and Enforceable Policies of the NYCMP

IPEC is fully consistent with the NYCMP. Entergy's April 23, 2007, license renewal application to USNRC (the "**USNRC Application**"), Attachment 1, seeks only to continue operating the existing facilities for an additional 20 years. Specifically, the USNRC Application neither requests permission to site a new energy facility, nor to construct new facilities. Entergy is not seeking authorization to physically alter IPEC's facilities, or to materially change IPEC's operating parameters, as part of the USNRC Application. There will be no change to the environment, or to IPEC's physical facilities, as a result of License Renewal that could be viewed as being inconsistent with the NYCMP. Consequently, the 44 policies of the NYCMP do not apply to the facts and circumstances of License Renewal.

If and to the extent one or more of the 44 policies of the NYCMP might nevertheless be deemed applicable to IPEC, this Consistency Certification explains why IPEC is consistent with those policies. Importantly, as is demonstrated by this Consistency Certification, even with respect to the handful of NYCMP polices that would be relevant under different circumstances, the consistency of IPEC License Renewal is manifest. Continued operation of IPEC is a vitally important water-dependent use of New York's coastal zone which substantially advances the goals of key NYCMP policies, including, among others: Policy 18—which seeks to protect New York's economic security; Policy 41—which seeks to prevent global warming and preserve air quality; and Policy 43—which seeks to prevent acid rain. IPEC furthers the goals of these NYCMP policies because IPEC: (a) helps to keep metropolitan New York safe, secure and prosperous by providing reliable[3] and affordable[4] energy in proximity to

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Department of State (Attachment 57). Entergy reserves its right to seek judicial review in the event NYSDOS should fail to recognize IPEC as grandfathered under the NYCMP. Entergy also expressly reserves all rights to contest the validity and enforceability of the NYCMP, and the authority of NYSDOS to conduct federal consistency review, under both federal and state law.

[3] This issue of IPEC's relationship to electrical system reliability is addressed in the report prepared by Charles River Associates for the New York City Department of Environmental Protection ("**NYCDEP**") entitled "Indian Point Retirement Economic Analysis," dated August 2, 2011 (the "**2011 NYCDEP Analysis**"), Attachment 48, at 32 and 33 ("In addition to providing active power generation, the reactive power and reserves provided by IPEC support the voltage necessary to keep the transmission system secure...IPEC is physically located in Westchester County...at a particularly important location.") and at 12 ("There are proprietary analyses from some Group members which strongly suggest that [without IPEC] there are other factors which will result in local (i.e., in-City) and broader system reliability issues.") The significant and immediate reliability implications, if IPEC's baseload generation were lost, were identified in the New York Independent System Operator, Inc. ("**NYISO**") 2012 Reliability Needs Assessment—NYISO's most recent reliability

the metropolitan area, (b) advances New York State's important climate change and air quality goals,[5] and (c) preserves tax revenue and economic activity that sustains all levels of governmental services for the citizens of New York State.[6] IPEC's contributions are summarized below, as well as in the "Overview of IPEC's Consistency with the NYCMP" accompanying this Consistency Certification.

III. IPEC Plays an Essential Role in Addressing New York's Energy and Air Quality Needs

The New York metropolitan area is affected by transmission grid constraints and higher electricity costs that result from a number of factors.[7] "IPEC's retirement without new generation or transmission additions will compromise the reliability of the electricity grid."[8]

New York's ability to respond to future economic growth depends in part upon adequate supplies of affordable energy.[9] In the near term, New York State will be required to grapple with the implications of new environmental regulatory requirements which potentially may impact the ongoing operations of a substantial portion of the installed generating capacity of New York State.[10] Within this context, IPEC's strategically-placed 2,158

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assessment of the New York bulk power system. *See*, NYISO's *2012 Reliability Needs Assessment* (NYISO, September 18, 2012) ("**2012 NYISO RNA**"), Attachment 71.

[4] 2011 NYCDEP Analysis at 11 ($1.5 billion dollar annual increase in energy costs without IPEC).

[5] 2011 NYCDEP Analysis at 13 (approximately 15% increase in carbon emissions, and roughly 7-8% increase in NO_x, in New York City and New York State, without IPEC).

[6] *See, e.g.*, 2011 NYCDEP Analysis at 11 ("IPEC's retirement may have far-reaching ancillary economic impacts. IPEC is a major employer in the region, employing approximately 1,100 people, with additional jobs created through indirect and induced economic activity… [T]he ancillary economic impacts [of retiring IPEC] may be substantial."); *"The Economic Impacts of Closing and Replacing the Indian Point Energy Center,"* (Manhattan Institute, Center for Energy Policy and the Environment, September, 2012), ("**2012 Manhattan Institute**"), Attachment 68, at Executive Summary ("closing IPEC would increase average annual electric expenditures in New York State by $1.5 billion—$2.2 billion over the 15-year period of 2016-30. … The effects of these higher electricity costs absorbed by customers would ripple through the New York economy, leading to estimated reductions in output of $1.8 billion--$2.7 billion per year over the 15-year period 2016-30. *The resulting loss of jobs in the state could range from 26,000 to 40,000 per year, depending on the alternative chosen to replace IPEC.*") (emphasis added).

[7] National Economic Research Associates, Inc. ("**NERA**") letter dated April 29, 2010, to the New York State Department of Environmental Conservation ("**NYSDEC**") regarding "*Effects of the Loss of Indian Point Nuclear Generating Units 2 and 3 Capacity and Generation on New York State Environmental, Economic and Energy Needs*" ("**NERA 2010**"), Attachment 35, at 11 ("In 2008, average electricity prices in New York were more than *70 percent higher* than average electricity prices in the country as a whole. On average, New York prices were about 60 percent higher than U.S. prices over the 19-year period [1990-2008].") (emphasis added) Higher energy costs will be particularly harmful to the residents and businesses of New York City and Long Island where the range of energy costs is already about 30% higher than in upstate New York. "*Alternatives to the Indian Point Energy Center for Meeting New York Electric Power Needs*," National Research Council of the National Academies (Washington, DC, 2006)(the "**2006 National Academy Report**"), Attachment 46, at 46 ("the annual average prices in 2005 were $83 per megawatt hour (MWh) and $98/MWh, [in New York City and Long Island], respectively, compared to prices ranging from $65/MWh to $72/MWh in Zones A through F upstate").

[8] 2011 NYCDEP Analysis, at 12. *See also,* NYISO 2012 RNA at 42-43. The New York Energy Highway Task Force has recently pointed out New York's lack of, and need for, a "Replacement Contingency Plan" before New York even can plan to begin to address the serious reliability, public and private costs, environmental consequences, and other major system effects that would accompany any attempt to replace IPEC. *See, New York Energy Highway Blueprint*, issued by the New York Energy Highway Task Force (October, 2012) ("**2012 NY Energy Highway Blueprint**"), Attachment 69, at 42, 48-49.

[9] 2012 NY Energy Highway Blueprint at 3 (Quoting Governor Cuomo's 2012 State of the State Address: "Key to powering our economic growth is expanding our energy infrastructure.")

[10] *See, Power Trends 2012, State of the Grid* ("**2012 NYISO Power Trends**"), Attachment 67, at 43 ("The array of proposed regulations is estimated to potentially impact more than half of the installed generating capacity in New York State, with effects ranging from retrofitting pollution controls to reduced use or retirement."); *Power Trends 2011* (NYISO, May 2011) ("**2011 NYISO Power Trends**") Attachment 49, at 41 ("The array of proposed regulations is estimated to impact 23,957 megawatts of capacity, more than half the installed generating capacity in New York State."); 2012 NY Energy Highway Blueprint, Attachment 69, at 42 ("More than 40 percent of New York's existing power generating capacity is over 40 years old and more than 20 percent is over 50 years old. Recent and pending

megawatt baseload generating capacity,[11] and annual generation of more than 17,000,000 megawatt hours of electricity,[12] constitute an important asset in New York's existing energy supply system that should continue to operate in furtherance of the objectives of NYCMP Policy 18.

Additionally, and consistent with the goals of NYCMP Policies 41 and 43, IPEC substantially reduces air pollution and acid rain impacts within the New York City metropolitan area and New York State generally that would otherwise result from the burning of some combination of fossil-fuel fired facilities that would be needed to meet the electricity requirements of Southeastern New York.[13] In "*plaNYC—A Greener, Greater New York*" (City of New York, April 2011) (the "**2011 NYC Plan**"), Attachment 47, New York City's position is clearly and succinctly stated:

1. IPEC is the "cornerstone" of New York City's electricity system, "that supplies up to 30% of our power virtually carbon free," and its removal could "threaten the reliability, increase prices, and jeopardize our greenhouse gas reduction efforts." *Id.* at 105.

2. "Closing Indian Point without a viable and relatively clean replacement option would jeopardize reliability, significantly increase prices, worsen local air quality, and make it very challenging to achieve our goal of reducing greenhouse gas emissions 30% by 2030. For these reasons we will support the continued safe operation of IPEC." *Id.* at 112.

3. "Retiring Indian Point without replacing at least a portion of its capacity could lead to power system instability. Replacement costs would exceed $2 billion and New Yorkers would also pay at least $1.5 billion in higher energy costs over the next decade, and electricity consumers could see their bills increase by 15%. Local air pollution would increase and our efforts to reduce greenhouse gas emissions 30% by 2030 would be unachievable because we would most likely shift to electricity generated by more carbon-intensive sources." *Id.* at 117.

Importantly, the 2011 NYCDEP Analysis confirms that:

> The [New York State] market would see cost increases of approximately $1.5 billion per year, or roughly a 10% increase under our base case scenarios. . . . These price increases do not include financial support which would be necessary to construct projects which would otherwise be uneconomic, nor does it include other costs which would be necessary to reinforce the grid to support new generation. *Id.* at 11 (footnotes omitted).[14]

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environmental regulations...coupled with lower natural gas prices could lead to accelerated retirements of some of these older facilities. The potential retirement of power plants creates uncertainties for the future of the State's power supply." (citations omitted)).

[11] 2158 megawatts is the combined gross generating capacity of IPEC, Attachment 22, at 8-27.

[12] See, "2012 Load & Capacity Data" (NYISO, April, 2012) ("**NYISO 2012 Gold Book**") at 33. (IPEC generated 17,016,900 megawatt hours of electricity in 2011).

[13] 2011 NYCDEP Analysis, at 13 ("[B]oth [New York] City and [New York] State would see approximately a 15% increase in carbon emissions under most conventional replacement scenarios, with roughly a 7-8% increase in NOx emissions."). *See also,* "*Potential Energy and Environmental Impacts of Denying Indian Point's License Renewal Applications,*" (NERA Economic Consulting, March, 2012) (**NERA 2012**), Attachment 63, at 40 (projecting that, without IPEC, national CO_2 emissions would increase by 13,500,000 metric tons annually on average over the period 2016-2025, national SO_2 emissions would increase by 6,400 tons annually on average over this period, and national NOx emissions would increase by 3,300 tons annually on average over this period.)

[14] Even if IPEC is taken off-line temporarily:

> the wholesale price [of energy] would increase substantially. Without Indian Point and without new capacity, more inefficient units with higher costs would have to be used to meet load. These expensive units would set higher wholesale prices.

2006 National Academy Report, at 45.

Accordingly, if IPEC's baseload generation were lost:

- there is a threat that New York's energy system will become unreliable and vulnerable to disruption;
- the residents of New York will be unnecessarily exposed to the harmful effects of increased air pollution; and
- the increased cost of energy production will be imposed on New York's residents and businesses—a functional new $1.5 billion dollar annual tax.[15]

IV. Conclusion

The energy, security, economic, and public health needs of consumers in New York City and Southeastern New York, and the basic economic needs of New York residents, provide overwhelming support for concurrence with IPEC's NYCMP consistency.

In compliance with 15 C.F.R. § 930.57(b), if and to the extent the policies of the NYCMP are deemed applicable, Entergy certifies that IPEC License Renewal complies with the applicable and enforceable policies of the State of New York approved management program and will be conducted in a manner consistent with such program. Accompanying this letter is a Federal Consistency Assessment Form signed on behalf of Entergy, and an "Overview of IPEC's Consistency with the NYCMP" explaining why, on its merits, IPEC is consistent with the NYCMP.

Please promptly provide written notice of any determinations or decisions reached by NYSDOS with respect to this filing to: (a) Entergy's counsel in this matter, Goodwin Procter, LLP, Exchange Place, 53 State Street, Boston, MA 02109, Attention: Martin R. Healy, Esq; telephone - (617) 570-1371; e-mail - mhealy@goodwinprocter.com; and (b) Ms. Lois M. James, Division of License Renewal, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone - (301) 415-6459; e-mail – Lois.James@nrc.gov.

Thank you for your cooperation in this matter.

Respectfully submitted,

Fred Dacimo
Vice President License Renewal
Indian Point Energy Center

Enclosures: (list)

cc: Lois M. James, Division of License Renewal, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission
Sherwin E. Turk, Esq., Office of General Counsel, U.S. Nuclear Regulatory Commission
Kelli Dowell, Assistant General Counsel, Environmental, Entergy

1783491

[15] 2012 Manhattan Institute, Attachment 68, at Executive Summary and at 19 ("Closing IPEC . . . would impose the equivalent of a tax on consumers and producers that would, as tax increases do, reduce economic growth.").

STATE OF NEW YORK
DEPARTMENT OF STATE
ONE COMMERCE PLAZA
99 WASHINGTON AVENUE
ALBANY, NY 12231-0001

ANDREW M. CUOMO
GOVERNOR

CESAR A. PERALES
SECRETARY OF STATE

January 16, 2013

CORRECTED VERSION

Mr. Fred Dacimo
Entergy
450 Broadway
Buchanan, NY 10511

Re: F-2012-1028 – Entergy Nuclear Indian Point 2, LLC: Entergy Nuclear Indian Point 3, LLC: Entergy Nuclear Operations, Inc. (Collectively Entergy)
U.S. NRC Docket Nos. 50-247-LR and 50-286-LR
Hudson River, Town of Buchanan, Westchester County
Request for Necessary Data and Information

Dear Mr. Dacimo:

The Department of State (Department) received the Federal Consistency Assessment Form and supporting information regarding the above matter on December 17, 2012. Pursuant to 15 CFR Section 930.60(a)(2), the Department is notifying Entergy and the Nuclear Regulatory Commission (NRC), within 30 days of receipt of the incomplete submission, that necessary data and information was not received allowing the Department to initiate review of this proposal in accordance with 15 CFR Part 930, Subpart D. The Department's review period will commence on the date of receipt of the missing necessary data and information.

Necessary Data and Information

Pursuant to 15 CFR Section 930.60 and the State of New York's federally approved Coastal Management Program (CMP), initiation of review of activities requiring authorizations from federal agencies does not begin until the Department receives all of the necessary data and information enabling it to assess and undertake its review of the coastal effects of activities. The regulations at 15 CFR Section 930.58 and the CMP describe the necessary data and information to be included with a consistency certification and provided to the Department. The following is a list of necessary data and information that has not yet been received by the Department:

"A copy of the Final Environmental Impact Statement, if required by the federal agency or by a state agency having jurisdiction over the proposed activity." (NYS CMP, 2001 Routine Program Change)

In particular, the Department requests copies of the Final Supplemental Environmental Impact Statement (FSEIS) related to license renewal of Indian Point Nuclear Generating Units 2 and 3, Volume

4, which pertains to aquatic impacts (including impacts to endangered species) to coastal resources, as well as any other EIS supplements prepared for this license renewal application.

If Entergy submits new or proposes substantial modifications to pending permit applications, a new consistency review may be commenced.

Please provide this information as soon as possible. If you have any questions regarding this matter, please contact Jeffrey Zappieri at (518) 474-6000. When communicating with us regarding this matter, please refer to our file # F-2012-1028

Sincerely,

Fred J. Anders
Chief, Natural Resources Management Bureau

c: US NRC – Ms. Lois M. James
NYS DEC Central Office – Christopher Hogan
NYS AG – John Sipos
Goodwin Proctor LLC – Martin R. Healy, Esq

STATE OF NEW YORK
DEPARTMENT OF STATE
ONE COMMERCE PLAZA
99 WASHINGTON AVENUE
ALBANY, NY 12231-0001

ANDREW M. CUOMO
GOVERNOR

CESAR A. PERALES
SECRETARY OF STATE

June 28, 2013

Mr. Fred Dacimo
450 Broadway
Buchanan, NY 10511

Re: F-2012-1028 – Entergy Nuclear Indian Point 2, LLC: Entergy Nuclear Indian Point 3, LLC: Entergy Nuclear Operations, Inc. (Collectively Entergy)
U.S. NRC Docket Nos. 50-247-LR and 50-286-LR
Renewal of the operating licenses of Indian Point Unit 2 and Unit 3 for an additional 20 years of plant operation with no proposed change of existing facilities
Hudson River, Town of Buchanan, Westchester County
Received Federal Consistency Assessment Form – Began Review

Dear Mr. Dacimo:

The Department of State (Department) received your Federal Consistency Assessment Form and various supporting information regarding the above matter on December 17, 2012. By letter dated January 16, 2013, the Department notified you that your submittal was deficient of certain necessary data and information (Volume 4 of the Final Supplemental Environmental Impact Statement (FSEIS)) and that review would commence upon receipt of the said information. (See 15 C.F.R. §§ 930.58(a) and 930.60(a)(2)).

On June 20, 2013, the Department was notified by the federal Nuclear Regulatory Commission that the aforementioned Volume 4 of the FSEIS had been completed and was received by the Department on June 20, 2013. Accordingly, the Department began its review of your consistency certification on June 20, 2013. (15 C.F.R. § 930.60(a)(3)).

Further, pursuant to 15 CFR § 930.63(c), the Department may request, in writing, additional information and data it feels is necessary to allow the Department to complete its review of your consistency certification.

Sincerely,

Jeffrey Herter
Assistant Chief
Natural Resources Management Bureau

c: US NRC – Ms. Lois M. James
NYS DEC Central Office – Christopher Hogan
NYS AG – John Sipos
Goodwin Proctor LLC – Martin R. Healy, Esq

STAY AGREEMENT

The Coastal Zone Management Act provides the state coastal management agency six (6) months to review a complete consistency certification and issue a decision. 16 USC § 1456(c)(3)(A). The regulations for consistency review provide an opportunity to stay the coastal state's review with the applicant's agreement. 15 CFR § 930.60(b).

Since June 20, 2013, the New York Department of State ("DOS") has been reviewing, for federal consistency, the License Renewal Application for Entergy Nuclear Indian Point 2 and Entergy Nuclear Indian Point 3 submitted by Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc. ("Entergy") (DOS Filing # F-2012-1028). A consistency determination is due on or before December 20, 2013.

Pursuant to 15 CFR § 930.60(b), DOS and Entergy agree to a stay period beginning on October 9, 2013 and ending on January 9, 2014 to provide adequate time for DOS to review public comments and any additional information Entergy timely submits to DOS within the review period. The expiration of the stay leaves 72 days in the coastal consistency review period.

Unless the stay period is shortened or extended by subsequent mutual agreement of the undersigned, the consistency decision is due on or before March 22, 2014.

Linda M. Baldwin
General Counsel
New York Department of State

Date: 10/9/2013

Elise N. Zoli
Goodwin Proctor, LLP
for Entergy

Date: 10/9/2013

SECOND STAY AGREEMENT

The Coastal Zone Management Act provides the state coastal management agency six (6) months to review a complete consistency certification and issue a decision. 16 USC § 1456(c)(3)(A). The regulations for consistency review provide an opportunity to stay the coastal state's review with the applicant's agreement. 15 CFR § 930.60(b).

Since June 20, 2013, the New York Department of State ("DOS") has been reviewing, for federal consistency, the License Renewal Application for Entergy Nuclear Indian Point 2 and Entergy Nuclear Indian Point 3 submitted by Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc. ("Entergy") (DOS Filing# F-2012-1028).

By an agreement dated October 9, 2013, acting pursuant to 15 CFR § 930.60(b), DOS and Entergy agreed to a stay period beginning on October 9, 2013 and ending on January 9, 2014 to provide adequate time for DOS to review public comments and any additional information Entergy timely submits to DOS within the review period. The expiration of the stay left 72 days in the coastal consistency review period.

In this second stay agreement, acting pursuant to 15 CFR § 930.60(b), DOS and Entergy agree to an additional stay period beginning on January 9, 2014, and ending on October 20, 2014, to provide adequate time for DOS to evaluate the additional information that Entergy timely submits to DOS within the review period. The expiration of this second stay period also leaves 72 days in the coastal consistency review period.

Unless the stay period is shortened or extended by subsequent mutual agreement of the undersigned, the consistency decision is due on or before December 31, 2014.

Linda M. Baldwin
General Counsel
New York Department of State

Dated: January 9, 2014

Martin R. Healy
Goodwin Procter LLP
for Entergy

Date: January 8, 2014

(c)

New York State Coastal Management Program Routine Program Change

Table of Contents

I. Introduction

The following changes to the New York State Coastal Management Program are considered by the Department of State to be Routine Program Changes. Changes are made to 7 of the State's 44 coastal policies, additional or revised authorities that implement most of the 44 policies are listed, and the sections on Special Management Areas and federal consistency are revised. A copy of revised regulations implementing the State Environmental Quality Review Act (SEQR) is also submitted; the changes to these implementing regulations do not result in any change to the Coastal Management Program.

The changes to the policies and the means for implementing the policies are primarily the result of the following list of legislative acts that have been enacted over the last few years.

- Chapter 791 of the Laws of 1992
- Long Island South Shore Estuary Reserve - Article 46 of the Executive Law
- Environmental Protection Act - Article 54 of the Environmental Conservation Law
- Clean Water/Clean Air Bond Act of 1996 -Article 56 of the Environmental Conservation Law
- Siting of Major Electric Generating Facilities - Article X of the Public Service Law
- New York State Scenic Byways Program - Article XII-C of the Highway Law
- Sections 33-c and 33-e of the Navigation Law
- Long Island Sound Coastal Advisory Commission, Article 42 of the Executive Law

A summary of the relevant provisions of each of the laws is included along with their full text at the end of this submission.

II. The Text of the Program Changes.

(Page numbers are those found in the State of New York Coastal Management Program and Final Environmental Impact Statement, dated August 1982).

Policy #1 Changes to Policies and their Means for Implementation

Under State Means for Implementing the Policy (B), page II-6-8, add the following:

5. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

6. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

7. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

8. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

9. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy #2 Changes

Under Explanation of Policy (A), page II-6-9, add a new paragraph after the 2nd paragraph:

Water dependent activities shall not be considered a private nuisance, provided such activities were commenced prior to the surrounding activities and have not been determined to be the cause of conditions dangerous to life or health and any disturbance to enjoyment of land and water has not materially increased.

Under Explanation of Policy (A), page II-6-9, insert at the beginning of the 3rd paragraph:

A water dependent use is an activity which can only be conducted on, in, over or adjacent to a water body because such activity requires direct access to that water body, and which involves, as an integral part of such activity, the use of the water.

Under Explanation of Policy (A), page II-6-10, replace the 2nd paragraph from the bottom with the following:

In addition to water dependent uses, those uses which are enhanced by a waterfront location should be encouraged to locate along the shore, though not at the expense of water dependent uses. A water-enhanced use is defined as a use or activity which does not require a location adjacent to or over coastal waters, but whose location on land adjacent to the shore adds to the public use and enjoyment of the water's edge. Water-enhanced uses are primarily recreational, cultural, retail, or entertainment uses. A restaurant which uses good site design to take advantage of a waterfront view is an example of a water-enhanced use.

Under State Means for Implementing the Policy (B), page II-6-15, add the following:

5. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

6. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

7. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

8. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

9. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 3 changes

Under Explanation of Policy (A) on page II-6-18, add a 10th guideline:

In applying the above guidelines the information in harbor management plans being developed by local governments pursuant to Article 42 of the Executive Law and local laws that would implement them shall be considered.

Under State Means for Implementing the Policy (B), page II-6-20, add the following:

6. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

7. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

8. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

Policy # 4 changes

Under Explanation of Policy (A) on page II-6-22, add a 7th guideline:

In applying the above guidelines the information in harbor management plans being developed by local governments pursuant to Article 42 of the Executive Law and local laws that would implement them shall be considered..

Under State Means for Implementing the Policy (B), page II-6-23, add the following:

4. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

5. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

6. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

7. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

8. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 5 changes

Under State Means for Implementing the Policy (B), page II-6- 29, add the following:

4. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

5. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

6. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

7. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

8. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 7 changes

Under State Means for Implementing the Policy (B), page II-6-41, add the following:

11. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

12. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

13. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

14. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

15. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 8 changes

Under State Means for Implementing the Policy (B), page II-6-46, add the following:

12. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

13. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

14. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

15. Article X Siting of Major Electric Generating Facilities (Article X of the Public Service Law)

Policy # 9 changes

Under State Means for Implementing the Policy (B), page II-6-50, add the following:

9. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

10. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

11. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

12. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

13. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 10 changes

Under State Means for Implementing the Policy (B), page II-6-53, add the following:

3. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

4. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

5. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

6. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

7. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 11 Changes

Under Explanation of Policy on page II-6-55, first paragraph, 6th line from bottom: replace ".....Section 505.3(u) of the regulations for ECL, Article 34." with "..... 6NYCRR Part 505.2(x)".

Under State Means for Implementing the Policy (B), page II-6-57, add the following:

6. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

7. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

8. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

9. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 12 changes

Under State Means for Implementing the Policy (B), page II-6-61, add the following:

6. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

7. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

8. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

9. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 13 changes

Under State Means for Implementing the Policy (B), page II-6-64, add the following:

4. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

5. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

6. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

7. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 14 changes

Under State Means for Implementing the Policy (B), page II-6-67, add the following:

6. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

7. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

8. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

9. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 15 changes

Under State Means for Implementing the Policy (B), page II-6-71, add the following:

8. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

9. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

10. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

11. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 16 changes

Under State Means for Implementing the Policy (B), page II-6-74, add the following:

4. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

5. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

6. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

7. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 17 changes

Under State Means for Implementing the Policy (B), page II-6-77, add the following:

4. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

5. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

6. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

7. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

8. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 18 changes

Under State Means for Implementing the Policy (B), page II-6-87, add the following:

34. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

35. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

36. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

37. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

38. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 19 changes

Under State Means for Implementing the Policy (B), Page II-6-97, revise the lead paragraph of #6 to read:

Siting of Energy Facilities, Public Service Law (Article VII and X) and Commission Opinion 72-3, case #26108

Under State Means for Implementing the Policy (B), page II-6-98, add the following:

10. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

11. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

12. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

13. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

14. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 20 changes

Under Explanation of Policy (A) on page II-6-99, place new paragraph after the third paragraph:

The regulation of projects and structures, proposed to be constructed in or over lands underwater, is necessary to responsibly manage such lands, to protect vital assets held in the name of the people of the State, to guarantee common law and sovereign rights, and to ensure that waterfront owners' reasonable exercise of riparian rights and access to navigable waters shall be consistent with the public interest in reasonable use and responsible management of waterways and such public lands for the purposes of navigation, commerce, fishing, bathing, recreation, environmental and aesthetic protection, and access to the navigable waters and lands underwater of the State.

A 7th guideline for use in determining consistency is added to page II-6-102:

7. In making any grant, lease, permit, or other conveyance of land now or formerly underwater, there shall be reserved such interests or attached such conditions to preserve the public interest in the use of state-owned lands underwater and waterways for navigation, commerce, fishing, bathing, recreation, environmental protection, and access to the navigable waters of the state. In particular, the granting of publicly owned underwater or formerly underwater lands to private entities will be limited to exceptional circumstances only.

Under State Means for Implementing the Policy (B), page II-6-105, revise #7 to read:

7. Siting of Major Electric Generating Facilities (Article X of the Public Service Law)

Under State Means for Implementing the Policy (B), page II-6-106, add the following:

12. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

13. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 21 changes

Under State Means for Implementing the Policy (B), page II-6-113, add the following:

12. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

13. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

14. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

15. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

16. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 22 changes

Under State Means for Implementing the Policy (B), page II-6-118, revise #4 with the following:

4. Siting of Major Electric Generating Facilities (Article X of the Public Service Law)

Under State Means for Implementing the Policy (B), page II-6-119, add the following:

8. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

9. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

10. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

11. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

12. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 23 changes

Under State Means for Implementing the Policy (B), page II-6-126, add the following:

5. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

6. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

7. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

8. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

9. New York State Scenic Byways Program - Article XII-C of the Highway Law

Policy # 24 changes

Under State Means for Implementing the Policy (B), page II-6-131, revise the first paragraph of #5 to read:

Utility Transmission Facility Siting Act, Public Service Law, (Article VII and Article X), revise the last line of #5. To read "...into Article VII and Article X deliberations."

Under State Means for Implementing the Policy (B), page II-6-131, add the following:

9. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

10. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

11. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

12. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

13. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

14. New York State Scenic Byways Program - Article XII-C of the Highway Law

Policy # 25 changes

Under State Means for Implementing the Policy (B), page II-6-134, add the following:

6. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

7. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

8. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

9. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

9. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

10. New York State Scenic Byways Program - Article XII-C of the Highway Law

Policy # 26 changes

Under State Means for Implementing the Policy (B), page II-6-144, add the following:

5. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

6. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

7. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

8. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 27 changes

Under Explanation of Policy (A), page II-6-145,In the second sentence of the second paragraph replace "Article 5" with "Article 6".

Replace the fourth sentence of the second paragraph with the following: With respect to transmission lines and the siting of major electric generating facilities, Articles VII and X of the State's Public Service Law require additional forecasts and establish the basis for determining the compatibility of these facilities with the environment and the necessity for providing additional electric capacity.

Under Explanation of Policy (A), page II-6-145, replace the third paragraph with the following:

The Department of State will present testimony for the record during relevant certification proceedings under Articles VII and X of the Public Service Law when appropriate; and use the State SEQR and DOS regulations to ensure that decisions regarding other proposed energy facilities (not subject to Articles VII and X of the Public Service Law) that would affect the coastal area are consistent with coastal policies.

Under State Means for Implementing the Policy (B), page II-6-146, replace item #1 Energy Law (Article 5 with Energy Law (Article 6). Replace item # 2 with:
Siting of Major Electric Generating Facilities (Public Service Law [Article X])

Before preparation of a site or the construction of major electric generation facility can commence, a Certificate of Environmental Compatibility and Public Need must be issued by the New York State Board on Electric Generation Siting and the Environment. This process is described in detail in Section 7. In granting this certificate, the Board must determine that the facility:

- minimizes adverse environmental impacts, considering the state of available technology; the nature and economics of reasonable alternatives; and the interest of the state with respect to aesthetics,

preservation of historic sites, forest and parks, fish and wildlife, viable agricultural lands, and other pertinent considerations;

- is compatible with public health and safety;
- will not be in contravention of water quality standards or be inconsistent with applicable regulations of the Department of Environmental Conservation, or in case no classification has been made of the receiving waters associated with the facility, will not discharge any effluent that will be unduly injurious to the propagation and protection of fish and wildlife, the industrial development of the state, and public health and public enjoyment of the receiving waters;
- will not emit any pollutants to the air that will be in contravention of applicable air emission control requirements or air quality standards;
- will control the runoff and leachate from any solid waste disposal facility;
- will control the disposal of any hazardous waste;
- serves the public interest, convenience and necessity.

The regulations which implement Article X assure that the Board's decision will be compatible with the policies articulated in this document, both those relating to environmental protection and to economic development.

To further ensure compatibility, the Department of State will review applications and may present testimony during proceedings involving facilities proposed to be sited in the coastal areas. When reviewing applications, the Department will examine the alternate locations proposed by the applicant as well as the rationale for the preferred site, particularly with respect to potential land uses on or near the proposed site, and the justification for the amount of shorefront land to be used. Proposed uses which are likely to be regarded by the Department as requiring a shorefront location include:

- Uses involved in water/land transfer of goods (docks, pipelines, and short term storage facilities);
- Uses requiring large quantities of water (hydroelectric power plants, pumped storage power plants);
- Uses that rely heavily on waterborne transportation of raw materials or products which are difficult to transport on land.

Article X also provides that the Department of Environmental Conservation may issue permits pursuant to federally delegated authority under the federal Clean Water Act, the federal Clean Air Act, and the federal Resource Conservation and Recovery Act. Any permits issued under these authorities shall be provided to the Board of Electric Generation and Siting prior to the issuance of a certificate.

Under State Means for Implementing the Policy (B), page II-6-151, add the following:

13. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

Policy # 29 changes

Under State Means of Implementing the Policy (B), page II-6-157, add the following:

10. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

11. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

12. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

13. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 30 changes

Under State Means of Implementing the Policy (B), page II-6-159, add the following:

5. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

6. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

7. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

8. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 31 changes

Under State Means of Implementing the Policy (B), page II-6-161, add the following:

3. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

Policy # 32 changes

Under State Means of Implementing the Policy (B), page II-6-163, add the following:

4. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

5. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

6. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

7. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 33 changes

Under State Means of Implementing the Policy (B), page II-6-165, add the following:

4. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

5. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

6. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

7. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 34 changes

Replace Explanation of Policy (A), page II-6-167, with the following:

All untreated sanitary waste from vessels is prohibited from being discharged into the State's coastal waters. Where coastal resources or activities require greater protection than afforded by this requirement the State may designate vessel waste no discharge zones. Within these no discharge zones the discharge of all vessel waste whether treated or not is prohibited. A determination from EPA that an adequate number of vessel waste pump out stations exists is necessary before the State can designate a no discharge zone. The State prepared a Clean Vessel Act Plan which identifies the coastal waters for which no discharge zones are needed and the number of vessel waste pump outs required to obtain the determination from EPA. The discharge of other wastes from vessels is limited by State law.

Under State means of Implementing the Policy (B), page II-6-167, add the following:

Replace item 1. with the following:

1. Sections 33-c and 33-e of the Navigation Law

2. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

3. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

4. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

5. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

6. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 35 changes

Replace the policy statement (page II-6-169) with this revised statement: "Dredging and filling in coastal waters and disposal of dredged material will be undertaken in a manner that meets existing State permit requirements, and protects significant fish and wildlife habitats, scenic resources, natural protective features, important agricultural lands, and wetlands".

Replace the Explanation of Policy with this revised wording:

Dredging, filling, and dredge material disposal are activities that are needed for waterfront revitalization and development, such as maintaining navigation channels at sufficient depths, pollutant removal, and other coastal management needs. Such projects, however, may adversely affect water quality, fish and wildlife habitats, wetlands, and other important coastal resources. Often these adverse effects can be minimized through careful design and timing of the dredging or filling activities, proper siting of dredged material disposal sites, and the beneficial use of dredged material. Such projects shall only be permitted if they satisfactorily demonstrate that these anticipated adverse effects have been reduced to levels which satisfy State permit standards set forth in regulations developed pursuant to Environmental Conservation Law, (Articles 15, 24, 25, and 34), and are consistent with policies

pertaining to the protection and use of coastal resources (State Coastal Management policies 7, 15,19, 20, 24, 26, and 44).

Under State Means for Implementing the Policy (B), page II-6-170, add the following:

6. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

7. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

8. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

9. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 36 changes

Under State Means for Implementing the Policy (B), page II-6-171, add the following:

4. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

5. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

6. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

7. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

8. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 37 changes

Under State Means for Implementing the Policy (B), page II-6-173, add the following:

8. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

9. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

10. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

11. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

12. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas

Policy # 38 changes

Under State Means for Implementing the Policy (B), page II-6-175, add the following:

10. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

11. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

12. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

13. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

14. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 39 changes

Under State Means for Implementing the Policy (B), page II-6-178, add the following:

8. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

9. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

10. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

11. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 40 changes

Under State Means for Implementing the Policy(B), page II-6-179, #1. Change Article VIII to Article X.

Under State Means for Implementing the Policy (B), page II-6-179, add the following:

3. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

4. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

5. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

6. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

7. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 41 changes

Under State Means for Implementing the Policy (B), page II-6-181, add the following:

2. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

Policy # 42 changes

Under State Means for Implementing the Policy (B), page II-6-183, add the following:

5. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 43 changes

Under State Means for Implementing the Policy (B), page II-6-185, add the following:

3. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

4. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

5. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Policy # 44 changes

Under State Means for Implementing the Policy (B), page II-6-190, add the following:

4. Environmental Protection Act (Article 54 of the Environmental Conservation Law)

5. Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

6. Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

7. Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

8. Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

Revisions to Section 8 - Special Management Areas

The Department of State is making a routine program change to the New York State Coastal Management Program that will better define as well as broaden the definition of special management areas, compatible with the Coastal Zone Management Act of 1972 and its regulations. The proposed revised definition for special management areas includes those areas that possess distinctive and cohesive natural, recreational, industrial, commercial, ecological, scenic or historic resources; areas or regions with urban characteristics where shoreline and surface water uses are competitive, in conflict, or where concentrated uses are appropriate; and areas or regions that are subject to issues which require attention beyond that which can be addressed by the statewide Coastal Management Program.

Insert the following following d. on page II-8-9

Beyond the LWRP special management areas described above, special management areas may be identified where ntermunicipal issues require a concerted and cooperative effort of the affected local governments and the State. Also

certain issues affecting discreet areas within a coastal municipality may require focused and detailed management. Therefore, several other types of special management areas may be identified; these are described below.

Centers of Maritime Activity

Maritime centers are a discrete portion or area of a harbor or bay that is developed with, and contains concentrations of, water-dependent commercial and industrial uses or essential support facilities. The harbor or bay area is a center for waterborne commerce, recreation, or other water-dependent business activity, and may be an important component of the regional transportation system.

These areas generally exhibit the following characteristics:

- Concentrations of water-dependent commercial or industrial uses.
- Sheltered locations and suitable hydrologic conditions, such as sufficient water depth and good flushing.
- Adequate existing navigation channels, anchorage and turning basins, piers and docks, and land-based infrastructure, e.g., highway or rail connections, essential for the operation of water-dependent commercial and industrial uses; if needed, new infrastructure could be provided.
- Physical conditions meet the unique siting and operational requirements of most water-dependent commercial and industrial uses to ensure the efficient and effective operation of water-dependent uses.
- The center is in close proximity to central business districts where commercial uses can be located that complement or support water-dependent uses, but which are inappropriate for a waterfront location.
- Lack of conflict with high value natural resources, such as beaches, dunes, or bluffs; wetlands; shellfish beds, bird habitat or other fish and wildlife habitat; or exceptional surface water quality.

The priority uses to be encouraged in these areas include water-dependent commercial, industrial, and recreational uses and compatible water-enhanced uses. Lowest priority uses are those that are incompatible with water-dependent uses and the functioning of the maritime center.

Waterfront Redevelopment Areas

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A waterfront redevelopment area is part of, or near, a business district and contains blighted or underutilized properties which are adequate in size to accommodate significant redevelopment. These areas may contain brownfields which are abandoned, vacant, or unused sites where redevelopment and productive reuse has been delayed indefinitely by real or perceived contamination. In their geographic scope, waterfront redevelopment areas are generally a discrete area of a community, not the entire community.

The characteristics of waterfront redevelopment areas include: (l) urban waterfront areas; (2) locations where redevelopment serves as a catalyst for the reclamation of a blighted or underutilized area or improves a deteriorated condition; (3) areas where infrastructure and transportation facilities exist; and (4) locations where redevelopment can advance regional objectives by improving public access, retaining and expanding water-dependent uses, or facilitating new economic activities appropriate to the region.

Within waterfront redevelopment areas, redevelopment actions should result in a majority of the following: a restored and revitalized waterfront or adjacent inland area; a strengthened local and regional economy through the development of commercial, industrial, and residential uses; improved waterfront recreation opportunities, public

access, or dockage; improved views to the waterfront; restored and preserved historic sites; improved environmental quality; enhanced community character and sense of place; and enhanced visiting pleasure.

The following circumstances are indicative of what is required for successful and appropriate development:

- COMMUNITY INITIATIVE AND COMMITMENT
  The community demonstrates initiative and commitment to undertake and follow through on major redevelopment projects to improve the area. The local government demonstrates an interest in, and commitment to, significantly improving the community's waterfront or business district through an expression of one or more of the following: citizen support and consensus; plans which demonstrate sound economic development and land/water use objectives; or preparation of preliminary waterfront inventories and design plans.

- LOCAL PLANNING
  The community has an approved Local Waterfront Revitalization Program or is actively preparing a Local Waterfront Revitalization Program. A Local Waterfront Revitalization Program can provide the local comprehensive land use planning context for redevelopment.

- ADEQUATE LAND AND WATER USE CONTROLS
  The community has, or will have in place, adequate land and water use controls to manage the use, density, and location of development. These controls are necessary to ensure that the size, scale, and intensity of uses generated by redevelopment are appropriate and compatible with the landside and waterside character of the community.

- LAND AND WATER USE OPTIMIZATION
  New development will generally improve the environmental quality of the area. New development will make optimal use of the area's land and water resources which include the built and natural environments, land and water uses, community character, and infrastructure, with particular attention to providing water-dependent and water-enhanced uses.

- INFRASTRUCTURE
  Infrastructure and transportation systems exist which are adequate to service the proposed redevelopment. If the existing systems are inadequate, they can be repaired or upgraded to satisfactorily service the intended redevelopment.

- ECONOMIC GROWTH
  Opportunities exist to stabilize or improve the local and regional economy through redevelopment projects. The area can accommodate a significant increment in growth and development.

- OPPORTUNITIES TO RESTORE AND REDEVELOP
  Sufficient development demand exists which can be channeled to areas for redevelopment. These development pressures can be used as opportunities to restore and redevelop significant blighted or underutilized areas, buildings, land, waterfronts, or neighborhoods, and to remediate environmental problems through appropriate redevelopment.

- PUBLIC ACCESS
  Public access can be improved by enhancing existing public access or by establishing new public access. Opportunities exist to establish: public open spaces on the waterfront which allow a wide range of

recreational uses, waterfront recreation facilities and features to attract people to the waterfront, or an access circulation system that links waterfront areas and the business district to the waterfront.

- COMMUNITY NEEDS
  The area to be redeveloped will serve community needs as an activity center for a range of cultural, living, employment, recreational, and educational opportunities. The redeveloped waterfront can be established or improved as a place for people to gather, socialize, recreate, or work. Redevelopment will result in the addition of new public or semi-public facilities or improvements to existing facilities.

- REGIONAL SIGNIFICANCE
  The area can accommodate a significant level of new development and is, or has the potential to be, a waterfront area of regional or statewide significance. Redevelopment in the area will make major contributions to the region for retention or expansion of water-dependent uses or expansion of economic activities appropriate to the region.

- ENVIRONMENTAL IMPROVEMENT
  Redevelopment will result in environmental improvement by remediating brownfields, improving stormwater management, and improving visual quality.

The priority uses for waterfront redevelopment areas are those that are identified in a redevelopment plan, and will improve the area economically, visually, and environmentally. Lowest priority uses are those that are not identified in the plan as permitted or desirable.

Regionally Important Natural Areas

Certain areas of the state's coast are characterized by an array of smaller, natural ecological communities that together form a significant landscape of environmental, social, and economic value to the people of New York.

These regionally important areas may warrant special management attention if they exhibit the following characteristics:

- The area contains significant natural resources.
  The natural resources of the area are significant to the coastal region if they contain assemblages or outstanding examples of natural ecological communities; fish or wildlife habitat; endangered, threatened, or rare plants or plant communities; or significant coastal geologic features. Significance is further determined by the cultural value or the historic or present-day human use made of the natural resources. Although development may exist in an area that is a regionally important natural area, it would have a preponderance of significant natural resources.

- The resources are at risk.
  Risk is determined by the degree to which the area's natural and related cultural resources have been subject to, or are likely to be subject to, primary, secondary, and cumulative negative impacts associated with existing and new development or people's activities that place ecosystem viability and, consequently, people's quality of life, at risk.
- Additional management measures are needed to preserve or improve the significant resources, or sustain their use.

  Finally, an area with significant resources that are found to be at risk must require additional management measures beyond those currently available to maintain or improve those resources and the viability of the ecological complex within which they function.

Priority uses for regionally important natural areas are those that are compatible with sustaining and improving ecosystem viability and natural resources. Lowest priority uses are those that would have a significant adverse impact on ecosystem viability and natural resources.

Small Watersheds

Small watersheds may also warrant special management attention to improve water quality through a comprehensive program to reduce non-point pollution. These programs would include a significant embayment or reach of a river reduced by non-point pollution and where the municipalities that comprise the watershed wish to work cooperatively to reduce non-point pollution.

Priority uses are those that will not impact or have minimal impact on the upland drainage basin including sub-basins, tributaries, and wetlands of the small watershed. Lowest priority uses are those that would have a significant adverse impact on the upland drainage basin including sub-basins, tributaries, and wetlands of the small watershed.

Insert on page III-8-12 following the third paragraph.

Significant Coastal Fish and Wildlife Habitats

Significant Coastal Fish and Wildlife Habitats are discrete areas that are most valued for their wildlife habitat value as they support important fish and wildlife populations and merit special protection (see Policy 7).

The following criteria are used to identify Significant Coastal Fish and Wildlife Habitats. The significance of a habitat increases to the extent the habitat could not be replaced if destroyed. One or more of the following criteria must be met:

- The habitat is essential to the survival of a large portion of a particular fish or wildlife population.
- The habitat supports populations of species which are endangered, threatened or of special concern.
- The habitat supports populations having significant commercial, recreational, or educational value.
- The habitat exemplifies a habitat type which is not commonly found in the state or in a coastal region.

Priority uses are those that will not impact or have minimal impact on habitat values and natural resources. Lowest priority uses are those that would have a significant adverse impact on habitat values and natural resources.

Scenic Areas of Statewide Significance (SASS)

A Scenic Area of Statewide Significance is defined as:

An area that encompasses unique, highly scenic landscapes that are comprised of geological features, water bodies, vegetation, historical and cultural features, and views and which are accessible to the public and recognized for their scenic quality.

The following criteria are used to identify Scenic Areas of Statewide Significance. One or more of the following criteria must be met:

- The area exhibits, alone or in combination, the following characteristics:
  (i) unusual variety of major components;
  (ii) unusual unity of major components
  (iii) striking contrasts between lines, forms, textures, and colors or

(iv) an area generally free of discordant features which due to siting form, scale, or materials, visually interrupt the overall scenic quality of the resource

- The area is unique in the region or the State's coastal area.
- The area is visually and physically accessible to the general public.
- The area is widely recognized by the general public for its visual quality.

Priority uses are those that are, or can be designed and sited to be, compatible with protecting the integrity of the scenic area. Lowest priority uses are those that are incompatible with protecting the integrity of the scenic area.

Criteria for the Preparation of Special Management Area Plans for Developed Areas

The following criteria have been established to assist in determining when a special area such as maritime centers, and waterfront redevelopment areas requires the development of a special management area plan. Special management plans will only be developed and approved after consultation with potentially affected local, state, and federal agencies.

- **Resource Availability** — Adequate program staff and funding must be available to undertake the preparation of the plan.
- **Local Commitment** — Local leadership must be committed to undertake and implement the plan and there is strong public support for the planning project. Commitment can be demonstrated through local resolution, cooperative municipal arrangements, and the provision of local resources to help with preparation and implementation of the plan.
- **Partnerships** — The community has demonstrated a positive record of establishing public/private partnerships to carry out and implement planning and redevelopment projects.
- **Issues and Opportunities** — An assessment of the planning area indicates that certain economic or land use issues and opportunities exist that warrant the preparation of a special management area plan to ensure the issue is adequately addressed or to take full advantage of the opportunity.

Criteria for the Preparation of Special Management Area Plans for Natural Resources

The following criteria have been established to assist in determining when a regionally important natural area, significant coastal fish and wildlife habitats, or small watersheds requires the development of a special management area plan. Special management area plans will only be developed and approved after consultation with potentially affected local, state, and federal agencies.

- **Resource Availability** — Adequate program staff and funding must be available to undertake the preparation of a natural resource management plan.
- **Local Commitment** — There must be local commitment to cooperate in preparation and implementation of a natural resource management plan. Commitment can be demonstrated through local resolution, cooperative municipal arrangements, and the provision of local resources to help with preparation and implementation of the plan.

- **Resources at Risk** — Habitat function and viability or water quality is at risk from immediate or imminent development or poor land use practices. Habitat function and viability is in a condition of ongoing or chronic degradation due to human influenced factors, such as continued or increased stormwater loadings, continued or increased rate of buffer encroachment or loss, and continued or increased decline of key indicator species including species or guilds of species important to the economy of an area or district.

- **Technical Feasibility** — Adverse impacts, degradation, and other impediments to a habitat's ability to function and remain viable must be well documented and successful methodologies must exist to address or correct the problem(s).

Criteria for the Preparation of Special Management Area Plans for Scenic Areas

The following criteria have been established to assist in determining when a scenic areas of statewide significance requires the development of a special management area plan. Special management area plans will only be developed and approved after consultation with potentially affected local, state, and federal agencies and their policies.

- **Resource Availability** — Adequate program staff and funding must be available to undertake the preparation of the plan.

- **Local Commitment** — Local leadership must be committed to undertake and implement the plan and there is strong public support for the planning project. Commitment can be demonstrated through local resolution, cooperative municipal arrangements, and the provision of local resources to help with preparation and implementation of the plan.

- **Resources at Risk** — Scenic resources are at risk from immediate or imminent development or poor land use practices that are likely to cause a significant adverse impact that, once undertaken, cannot be mitigated or reversed.

Federal Consistency Procedures

The section on federal consistency beginning on the bottom of page II-9-11 and ending on page II-9-25 is replaced with the following:

Federal agencies are responsible for many activities which can affect the policies and overall intent of New York State's Coastal Management Program (CMP). In recognition of their potential effect, Congress in passing the Coastal Zone Management Act of 1972, as amended, required that the activities of federal agencies occurring within or outside the State's coastal zone and which affect land and water uses and natural resources in that zone must be consistent with New York's federally approved coastal management program. The federal activities that must comply with this requirement are:

- Federal agency activities (i.e. performed by or on behalf of a federal agency);
- Activities requiring federal licenses, permits and other regulatory approvals;
- Federal financial assistance to state and local governments; and,
- Outer Continental Shelf exploration, development and production activities.

New York State must ensure that the above federal activities are consistent with its CMP. To that end, the Department of State (DOS) has been designated as the State's agency responsible for reviewing federal activities as to their consistency with the CMP. The bases for the consistency reviews conducted by DOS are: the enforceable

policies in Part II, Section 6 of the CMP document; the guidelines found in the explanations of those policies; and the management programs for Special Management Areas, such as local waterfront revitalization programs, which have been approved and incorporated into the State's CMP. If an activity, other than one performed by or on behalf of a federal agency*, is found by DOS to be inconsistent with New York's CMP, the federal agency cannot proceed to authorize or financially assist that activity. DOS' consistency decision may be appealed to the U.S. Secretary of Commerce. If DOS' decision is appealed, the federal agency may only approve the activity after the Secretary determines that the activity is consistent with the objectives and purposes of the Coastal Zone Management Act or necessary in the interest of national security.

DOS will carry out its federal consistency review responsibilities in full compliance with the requirements of the Coastal Zone Management Act and 15 CFR Part 930. The Department will also strive to expeditiously review all federal activities that affect uses and resources in the State's coastal zone. To help DOS meet that objective, the following procedures supplement those contained in 15 CFR Part 930 and will apply to the federal activities reviewed by the Department.

General Elements of the Procedures

The following describes general elements of the federal consistency process. Specific procedures for each type of federal activity are described following this section and at 15 CFR Part 930.

1. *Early Consultation.* Federal agencies and applicants should consult with DOS early in the planning stages of a proposed activity. This consultation should be considered as a necessary first step for all major, unique or potentially controversial activities. The purpose of this early consultation is to provide DOS the opportunity to advise federal agencies and applicants of: (a) general and, where possible, specific coastal management concerns raised by the proposed activities; (b) the coastal policies and other components of the State's CMP that are relevant to the proposed activities; (c) how to assess the consistency of the activities with the applicable policies; and, (d) the types of information and data that are essential for review purposes. This step will allow federal agencies and applicants the time to adequately address DOS' CMP concerns and/or obtain necessary information, before the proposed activities are reviewed for consistency with the CMP. All federal agencies and applicants should consult with DOS to: determine if their activities would be subject to consistency review requirements; obtain information on the review process; and receive general guidance on how to proceed with their planned activities.

2. *Information Needs.* Whenever possible, the Department of State will base its consistency determination on documents normally required for compliance with federal regulations or approval.. Generally, this documentation includes environmental assessments, environmental impact statements, permit and license applications, financial assistance applications and supporting information, as well as, the documentation required by 15 CFR Part 930.

DOS may request a federal agency or applicant to submit additional information for consistency review purposes. When this information is necessary, DOS will promptly notify the agency or applicant of this need, specify the type of information required, and state the reason(s) for the additional information. Request of this information does not alter the time period for DOS review.

3. *Coordinated Review.* When an activity is subject to both federal and state consistency review requirements, DOS and the other involved state agency will strive to concurrently conduct their respective reviews. This objective is possible only if the federal agency or applicant provides the required documentation submitted to another state agency to DOS as well.

DOS will coordinate its review of federal activities for consistency with New York's CMP with other state agencies and local governments with approved Local Waterfront Revitalization Programs.

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*These activities must also be consistent but the procedures differ.

4. *Public Notice.* DOS is required by 15 CFR Part 930 to issue public notice for federal agency activities and federal permits, licenses and other regulatory approvals that are subject to consistency review. To comply with that requirement, DOS will issue such notice in the State Register and may, at its discretion, also publish notice in newspapers having general circulation in the geographic areas of the proposed activities. All public notices issued by DOS will also be placed on the Department's website. DOS may, at its discretion, issue public notice for proposed federal financial assistance activities. The public review comment period will normally be 30 days, but no less than 15 days.

5. *Interagency Agreements.* DOS may, consistent with the requirements of 15 CFR Part 930, enter into formal and informal agreements with federal agencies to further define the types of activities that would require consistency review, the timing of that review, joint public notification of proposed activities and other procedures that would expedite the review process and reduce regulatory burdens upon federal agencies and applicants.

Procedures for Federal Agency Activities

All federal agency activities affecting any coastal use or resource are to be undertaken in a manner that is consistent to the maximum extent practicable with the enforceable policies of the New York State Coastal Management Program. The enforceable policies of the New York Coastal Management Program include the policies and purposes of approved Local Waterfront Revitalization Program's. The specific procedures to assure this consistency are spelled out in 15 CFR Part 930.30 through 930.46.

The consistency determination must contain the following:

- a statement indicating whether the proposed activity will be undertaken in a manner consistent to the maximum extent practicable with enforceable policies of the New York State Coastal Management Program;
- a description of the evaluation of the effects of the activity on the relevant enforceable policies of the state's coastal management program;
- a detailed description of the proposed activity (including, as appropriate, maps, site plans, photographs and the timing of the activity), its associated facilities and their coastal effects; and
- comprehensive data and information sufficient to support the federal agency's consistency statement.

The amount of detail in the evaluation of enforceable policies, activity description and supporting documentation shall be commensurate with the expected coastal effects of the activity. This information must be available to the DOS in order for the review time period specified in the regulations to commence.

In order to help the DOS understand the proposed federal agency activity and its effects and thus facilitate and expedite the DOS review, DOS recommends that the following information be included , as appropriate, with the federal agency's consistency determination.

- the purpose and need for the activity
- alternatives to the activity considered by the federal agency
- identification of other approvals and funding needs from federal and state agencies (including copies of documentation submitted to those other agencies), e.g., water quality certifications,

correspondence with the State Historic Preservation Officer, and US Army Corps of Engineers permit applications).

- required NEPA documentation (Environmental Assessment or Environmental Impact Statement, Finding of No Significant Impact, draft Record of Decision)

A federal agency should consult with DOS at an early stage in the planning of a proposed activity. This consultation should occur at the time the agency begins to identify alternatives for the proposed activity. DOS involvement at this juncture in the federal agency's planning process will ensure that all applicable coastal policies are factored into the identification and analysis of alternatives, and thereby increase the likelihood that the selected or preferred alternative will be found consistent with New York's CMP.

DOS will issue public notice on all federal agency activities that are subject to consistency review. This notice will be given in the *State Register* and may also be published in a newspaper having general circulation in the area(s) where a proposed activity will occur. The public review period will normally be for 30 but not less than 15 days. DOS will either concur, concur with conditions or object after public review and within the 60 day or extended time period allowable under 15 CFR Part 930, Subpart C.

If a federal agency determines that a proposed activity will not affect any coastal use or resource in the State's coastal zone, the agency may have to submit a negative determination to DOS. If a negative determination is required pursuant to15 CFR Section 930.35, this determination must describe the activity, its location and the basis for this finding, which is to include an evaluation of the activity and the enforceable policies of the CMP. DOS will object to a negative determination, within the 60 day or extended time period allowable under 15 CFR Part 930, Subpart C, if the coastal effects of the proposed activity are reasonably foreseeable.

DOS will also monitor federal agency activities that are not listed in Part I of Table 1. DOS will notify a federal agency and request the submission of a consistency determination, if the agency's proposed activity will have reasonably foreseeable effects on the State's coastal zone.

Federal agencies, which are proposing activities which meet the Criteria for General Concurrence listed on page II-9-27 may request concurrence from DOS that certain activities, other than development projects as defined in 930.31b, should not be subject to further DOS review because the activities will have de minimis effects.

Procedures for Activities Requiring Federal Permits, Licenses and Other Regulatory Approvals

Activities in or outside of New York's coastal zone, which require federal permits, licenses and other regulatory authorizations and affect land and water uses and natural resources in the coastal zone, are subject to review by DOS for their consistency with the State's CMP. This requirement also applies to renewals and major amendments to such regulatory approvals.

A federal agency may not issue a permit, license or other authorization for an activity occurring in or outside and affecting the coastal zone unless: (a) DOS concurs or concurs with conditions with the applicant's consistency certification; (b) DOS' concurrence is conclusively presumed; or (c) the U.S. Secretary of Commerce overrides DOS' objection to the applicant's consistency certification.

An applicant seeking a federal permit, license or other authorization is responsible for submitting all of the documentation needed by DOS for its review of the proposed activity. This documentation is to be submitted at the time that an application for a permit, license, etc. is filed with the federal agency. DOS will commence its consistency review of a proposed activity upon receipt of all necessary data and information, which consists of the following items:

1. Copy of the federal permit, license, etc. application.

2. Copy of the completed Federal Consistency Assessment Form, which includes a signed consistency certification and written analysis of the proposed activity's consistency with the policies of the State's CMP.

3. Copy of all supporting documentation submitted with the federal application, including a detailed description of the proposed activity, its associated facilities and coastal effects, map(s) showing the geographic location of the proposed activity, site map(s) and diagram(s) drawn to scale showing all components of the activity and their location on the site, recent color photographs of the site, written statement on the purpose and need for the activity, identification of the owners of the abutting upland properties and underwater lands, and written analysis of alternatives to the proposed activity considered by the applicant.

4. Copy of the final Environmental Impact Statement, if required by the federal agency or by a state agency having jurisdiction over the proposed activity.

5. Copies of permit, license, etc. applications and related correspondence submitted to involved state agencies (eg. DEC, OGS , SHPO, NYPA, PSC).

6. For energy facilities subject to Articles VII or X of the New York State Public Service Law all documentation submitted to the Siting Board for its consideration through to the conclusion of its public hearing process. Energy facilities undergo an extensive review by the State's Siting Board. DOS will participate in the review process when appropriate and advise the Siting Board of coastal policy concerns applicable to the proposed energy facility. DOS will coordinate its federal consistency review of major energy facilities with the Siting Board and other agencies involved in the Article VII or X processes.

The specific federal regulatory activities subject to consistency review by DOS, including those that may occur outside of the State's coastal zone and have reasonably foreseeable coastal effects, are listed in Part II of Table 1. DOS will review these activities for their consistency with New York's CMP in accordance with the procedural requirements of 15 CFR Part 930, Subpart D (or Subpart I for federal regulatory activities having interstate coastal effects). DOS will also monitor activities requiring federal regulatory approval that are not listed in Part II of Table 1 to determine if the activities may affect land and water uses and natural resources in the State's coastal zone. If DOS determines that an unlisted activity will affect coastal uses or resources, then DOS will advise the applicant , federal agency and OCRM that a consistency review of the activity will be required. As part of this notification, DOS will request OCRM's approval to review the unlisted activity.

DOS will issue public notice on those activities requiring federal regulatory approvals that are subject to consistency review. This notice will be given in the *State Register*. Notice may also be published in a newspaper having general circulation in the area(s) where a proposed activity will occur. The public review period will normally be 30 but no less than 15 days. If DOS decides to hold a public hearing on a proposed activity, notice will be given and indicate the purpose, date, time and place of the hearing. When acceptable to the federal agency and DOS, a joint public notice procedure may be established to meet both agencies' public review obligations.

Following public review and within the six month time period allowable under 15 CFR Part 930, Subpart D, DOS will either concur, concur with conditions or object to an applicant's consistency certification. If the conditions in a DOS conditional concurrence are not acceptable to the applicant or the involved federal agency, then the Department's decision must be treated as an objection to the applicant's consistency certification.

The Corps of Engineers may authorize activities by nationwide and general (regional and statewide) permits or by Letters of Permission. Whenever the U.S. Army Corps of Engineers proposes to issue or revise a nationwide or general permit, the DOS will review the proposed nationwide or general permit. For nationwide or general permits to which DOS objects to the consistency determination or concurs with conditions, activities which would otherwise

have been eligible for one of these permits will be reviewed as follows. When the Corps of Engineers notifies DOS of an activity which would have been authorized by a nationwide or general permit but for DOS's objection or concurrence with conditions to that permit, DOS will advise the applicant and the Corps within 30 days whether a consistency review is necessary. If a consistency review is necessary, the activity will be reviewed by DOS for consistency with the New York's Coastal Management Program. Activities that may be authorized by Letter of Permission will be subject to consistency review by DOS regardless of their location in the State's coastal zone. If a proposed activity may be authorized by a Letter of Permission and is determined by DOS that it does not significantly affect coastal uses or resources, DOS' concurrence with the applicant's consistency certification will not be necessary. DOS will advise the applicant and the federal agency of its determination within 30 days of the receipt of notification from the Corps of Engineers that the activity may be authorized by a nationwide or general permit or Letter of Permission. Under this variance, the applicant is still responsible for submitting all of the above identified necessary data and information to DOS at the time it is filed with the federal agency.

In addition to the above variances to procedures in 15 CFR Part 930 Subpart D, DOS is providing a general concurrence to minor activities whose characteristics are such that they would not affect the achievement of the coastal policies or special management area plans either individually or when cumulative effects are considered. This general concurrence will apply to activities which meet the following criteria.

Criteria for General Concurrence

Activities will not require further DOS review and separate concurrences with consistency certifications if all of the following relevant criteria are met:

- The activity involves a use that is the same as, or similar to, adjacent or nearby uses;
- The activity is compatible with community character in design, size ,and materials;
- If the activity would be in an area covered by an approved LWRP, the community advises that it is consistent with the community's land and water use controls for the area;
- The activity is identified in an approved LWRP as one that should be undertaken to advance the policies and purposes of the approved LWRP and the community so advises;
- The activity involves reconstruction, replacement, maintenance or repair of lawful structures, in-kind and in-place, and where applicable a community advises that it complies with an approved LWRP and DOS determines it complies with any applicable Special Management Area Plan;
- Other than for the exercise of riparian or littoral rights (see below), the activity is entirely on property owned or otherwise authorized by the owner for use by the proponent of the activity;
- The activity involves the exercise of riparian or littoral rights that

  is typical of lawful riparian or littoral access traditionally exercised in the area;

  complies with any applicable local standards; and

  avoids any unnecessary interference with navigation and other public uses of the water;
- The activity would not significantly impair the rights and interests of the public regarding the use of public lands or waters;
- The activity does not disrupt existing lawful water-dependent uses;

- Other than for the exercise of riparian or littoral rights or the reconstruction, replacement, maintenance or repair of lawful structures (see above), the activity would not be undertaken in a vegetated wetland or natural protective feature;

- The activity would not generate or discharge non-point source pollution to coastal waters, or would provide a means of adequately treating non-point sources of pollution using accepted best management practices.

In order to monitor adherence to the criteria required for this general concurrence, applicants must submit all required necessary data and information listed above to DOS. If DOS determines that the activity meets the criteria for general concurrence, the applicant and federal agency will be notified within 30 days of receipt of the requisite data and information that the activity does not require a consistency review by DOS. If DOS determines that the activity does not meet the criteria, then the activity will be reviewed for consistency with New York's Coastal Management Program. The time period for this review would begin when the proposal was initially submitted assuming all the necessary information and data was also submitted at that time.

Procedures for Federal Financial Assistance to State and Local Governments

Applications for federal financial assistance (eg. grants, loans, subsidies, guarantees, insurance, etc.) submitted by New York State agencies, local governments and related public entities (eg. special purpose districts, authorities, etc.) to federal agencies for activities that occur within or outside the State's coastal zone and affect land and water uses and natural resources in the zone will be reviewed by DOS for consistency with the CMP. These activities include, but are not limited to, the planning, design and construction of new structures and facilities, alteration or demolition of existing structures and facilities, and the development of land and water use and resource management plans. The specific federal financial assistance activities subject to consistency review by DOS are listed in Part III of Table 1.

In accordance with the provisions of 15 CFR Part 930, Subpart F(or Subpart I in the case of a financial assistance activity having interstate coastal effects), an applicant for a listed federal financial activity should submit to DOS, at the time of filing an application with a federal agency, the following documentation to commence consistency review of the proposed activity:

1. Copy of the federal financial assistance application.

2. Detailed written description of the proposed activity.

3. Written evaluation on the relationship of the proposed activity and its reasonably foreseeable coastal effects to the applicable CMP policies.

4. Copy of all supporting documentation submitted with the federal application, including map(s) showing the geographic location of the proposed activity, and site map(s) and diagram(s) drawn to scale showing all components of the proposed activity and their location on the site.

5. Copy of the final EIS, if required by the federal agency or by the state or local agency having jurisdiction over the proposed activity.

6. Copies of state permit applications, if required, and related correspondence submitted to the involved state agencies.

New York State does not have a state clearinghouse established pursuant to Executive Order 12372. Therefore, DOS will monitor federal financial assistance activities not listed in Table 1 that occur within and all activities occurring outside of the State's coastal zone through notices published in the Federal Register, individual public notices issued by the federal agencies, and NEPA documents. If an unlisted activity or one occurring outside of the State's coastal

zone is determined by DOS to have reasonably foreseeable effects upon the coastal zone, DOS will, within 15 days of the receipt of notification, inform the applicant, the involved federal agency and OCRM that the proposed activity will be reviewed for consistency with the State's CMP.

DOS will, after the receipt of all of the above listed information, review minor federal financial assistance activities in 45 days or less. Major activities which involve NEPA or SEQRA documentation will be reviewed within 90 days of the receipt of all required documentation. This review period may be extended up to 45 days to provide additional time to evaluate a complex activity or to permit DOS the opportunity seek public comment on a proposed activity. DOS is not required by 15 CFR Part 930, Subparts F or I to issue public notice for federal financial assistance activities that are reviewed by the Department for consistency with the CMP. DOS may, however, determine that public review of a federal financial assistance activity is warranted. If so determined, notice will be given in the *State Register* and may be published in a newspaper having general circulation in the area(s) where a proposed activity will occur. The public review period will normally be 30 but no less than 15 days.

During its review, DOS may consult with an applicant on conditions that would allow the Department to concur with the proposed activity. Upon completion of its consistency review, DOS will either concur , concur with conditions or object to the proposed activity. If the conditions in a DOS conditional concurrence are not acceptable to the applicant or the federal agency, then the Department's decision must be treated as an objection to the proposed activity.

Applicants for federal financial assistance which DOS determines meet the Criteria for General Concurrence listed above will be notified within 30 days that DOS does not object to the proposed activity.

Procedures for Outer Continental Shelf Exploration, Development and Production Activities

Activities, which are described in Outer Continental Shelf (OCS) plans as requiring federal permits and licenses and affect land and water uses and natural resources in New York's coastal zone, are subject to review by DOS for consistency with the State's CMP. This requirement also applies to the activities described in amended OCS plans.

An involved federal agency may not issue the requested permit or license for an activity affecting the coastal zone unless: (a) DOS concurs or concurs with conditions with the person's consistency certification; (b) DOS' concurrence is conclusively presumed; or (c) the U.S. Secretary of Commerce overrides DOS' objection to a person's consistency certification.

A person (eg. individual, corporation, partnership, government agency) seeking U.S. Department of Interior approval of a proposed OCS plan is responsible for submitting all of the documentation needed by DOS for its review of the federal permit and license activities described in the plan. This documentation is to be provided to DOS by the U.S. Department of Interior. DOS will commence its consistency review of the proposed federal permit and license activities upon receipt of all necessary data and information, which consists of the following items:

1. Copy of the proposed OCS plan, which identifies and describes the activities requiring federal permits and licenses and the reasonably foreseeable effects that those activities will have on land and water uses and natural resources of the State's coastal zone. The description of the proposed activities must include an evaluation of the activities' coastal effects and demonstrate how those effects would be consistent with the enforceable policies of the CMP, map(s) showing the geographic location of the proposed activities, site map(s) and diagram(s) drawn to scale showing all components of the proposed activities and their location on the site, and map(s) showing the location of commercial shipping lanes, existing oil and gas exploration, development and production activities and potential land bases for the proposed oil and gas activity.

2. Copy of required NEPA documentation (EA or final EIS).

3. Copy of the person's consistency certification.

DOS will commence its consistency review of the federal permit and license activities described in the OCS plan upon receipt of the above listed necessary data and information. During the course of its review, DOS may request the submission of additional information on the proposed permit and license activities. The Department will also coordinate its review with the Department of Environmental Conversation.

DOS will issue public notice on the federal permit and license activities described in the OCS plan that are subject to consistency review. This notice will be given in the State Register. Notice may also be published in a newspaper having general circulation in the coastal region(s) which may be affected by the proposed activities. The public review period will be at least 30 days. If DOS decides to hold a public hearing on the proposed activities, notice will be given and indicate the purpose, date, time and place of the hearing.

DOS will review federal permit and license activities described in the OCS plan as expeditiously as possible and strive to issue its concurrence, conditional concurrence or objection to a person's consistency certification within three months of commencing its review. If DOS cannot complete its consistency review in the three month period, the Department will notify the person, U.S. Department of Interior and OCRM of the reason(s) for the delay. This notification will be given prior to the end of the three month period. DOS must conclude its review of the proposed activities within six months from the receipt of all necessary data and information or its concurrence may be presumed.

III. Routine Program Change Analysis

Introduction

The following analysis describes why the proposed program changes are not amendments as defined by section 923.80(d). The analysis is organized by the five coastal management areas, a substantial change to which would constitute a program amendment. For each of these coastal management areas the proposed changes that relate to that management area are presented in the following order: changes in policy; changes in authorities; and changes in procedures.

1. Uses Subject to Management

A. Coastal Policy Changes

The following program changes to policies are not changes in uses subject to management. They are minor changes in the management of uses already subject to the program, and minor changes to the laws governing the siting of major energy facilities.

Policy # 2

- The new paragraph after the 2nd paragraph, page II-6-9 was added to reflect the addition to the Executive Law of a stipulation that water dependent activities not be considered to be private nuisances The purpose of adding this legislation was to protect water dependent activities from the pressures associated with the subsequent development of nearby non-water dependent activities. This addition results in a minor change in the management of uses subject to the coastal management program. It advances the existing policy of facilitating water dependent uses.

- The addition to the 3rd paragraph, page II-6-9 incorporates a definition of water dependent uses as that term is defined in the amendment to Section 911 of the Executive Law (Chapter 791 of the Laws of 1992). The term "water dependent" wasn't defined in the CMP, rather, examples of uses and facilities determined to be water dependent were enumerated. The addition of this definition results in a minor change to the management of uses subject to the program in that it clarifies the meaning of the term, water dependent uses, consistent with the program's interpretation of the term over the last 20 years.

- The replacement of the 2nd paragraph from the bottom of page II-6-10 contains a revised definition of "water-enhanced uses" which clarifies the original CMP definition, stressing the public benefits of such uses and providing general categories of these uses.

  This revised definition of "water-enhanced uses" represents a minor change to the CMP's management of uses subject to the program because it merely clarifies this category of uses.

  The revised definition more accurately states the intent of the CMP as reflected in the examples given and the manner in which the program has interpreted the term over the past 20 years based on the examples.

Policy # 3

The additional guideline, II-6-22, does not change the uses subject to management or their management but merely requires consideration of local or harbor specific information or standards in applying the existing guidelines. State supported port planning generates useful information that should guide decision making.

Policy # 4

The additional guideline, page II-6-18, does not change the uses subject to management or their management but merely requires consideration of local or harbor specific information or standards in applying the existing guidelines. As a result of the Coastal Management Program and additional local government authority local governments have taken a more active role in the management of their harbors. This is generating useful information that should guide decision making.

Policy # 20

- The paragraph added following the third paragraph under Explanation of Policy, page II-6-99:

  reflects changes resulting from Chapter 791 of the Laws of 1992 in regard to the construction or reconstruction of structures in, on, or above lands underwater. This change which lists criteria to be used in managing such structures is not a change to the management of uses subject to the program because it merely reflects the language used in the the State's codification of the Public Trust Doctrine which doctrine has been the basis for regulation of these structures.

- Add a 7th guideline under Explanation of Policy, page II-6-102: This guideline follows the legislation set out in Subdivision 7 of Section 75 of the Public Lands Law within which it is specified that State-owned underwater lands may be conveyed, but only in a manner that is consistent with the preservation of such public interests as navigation, commerce, fishing, and access to navigable waters. This change is not substantial in that it also reflects the implications of the Public Trust Doctrine.

Policy # 27

- Replace the 4th sentence of the second paragraph under Explanation of Policy, page II-6-145: This revised sentence updates the policy explanation by replacing Article VIII with Article X. The new article expands and improves on the previous statute in several ways. It broadens the definition of electric generating facility by including any electric generating facility (rather than steam electric only) with a generation capacity of at least 80,000 kilowatts including interconnection electric transmission lines and fuel gas transmission lines that are not subject to review under Article VII of the Public Service Law.

  Section 163 of Article X institutes a new pre-application procedure whereby potential applicants for a certificate of environmental compatibility and need submit a preliminary scoping document; this preliminary step expands and improves the review of a proposal by various parties and provides advance information about the potential environmental impacts of a major electric generating facility and any measures proposed to minimize environmental impacts.

  Section 165 of the article mandates that a final decision of the board of electric generation siting and the environment be rendered within 12 months from the date of a determination by the board chairman that an application complies with the requirements of a complete application. This change helps the permitting process to run more smoothly and efficiently; the expired Article VIII process did not include a definite time frame for a decision to be made.

  These revisions result in a minor change to energy facility siting procedures in that they improve and streamline reviews and evaluations of proposed electric generating facilities in the coastal area

Replace the third paragraph under Explanation of Policy, page II-6-145: Section 166 of this article removes the Secretary of State from the list of parties to a certification hearing, where the Secretary was included on the parties list in Article VIII (now expired). However, the Department of State maintains full review powers when an application for a certificate of environmental compatibility and public need involves a federal approval and concerns the siting of a major electric generating facility in, or which may significantly affect, the coastal area. This revision to the coastal program is a minor change to uses subject to management; the Department of State retains full review power to review the siting of major electric generating facilities in or which significantly affect the coastal area through the federal consistency process. DOS can also request to be a party to a proceeding under Article X. The change in references to the Energy Master Plan is not a substantial change to the program because this provision of the Energy Law was terminated in accordance with the original terms of that legislation. It was replaced by a new Article 6 with similar provisions.

Policy # 34

- The revision of the Explanation of Policy , page II-6-167 is not a substantial change to the management of uses subject to the program. The revision is made to more accurately reflect provisions of the Clean Water Act.

Policy # 35

- Replace the policy statement with a revised statement, page II-6-169: The original Policy # 35, which covers dredging and dredge spoil disposal, did not include the filling of coastal waters with materials other than dredge spoil. This policy is a minor change in the management of uses subject to the management program because it incorporates an activity that the State has been regulating since before its coastal management program was approved, which regulations are identified as authorities for enforcing this policy, viz., ECL Articles 15, 24, and 25; and because it merely makes explicit, in the context of this policy, the effect of the application of the other 43 policies on the activity of filling on coastal waters. The replacement of the term "spoil" with "material" is not a change but merely the use of the more current term of art.

- Replace the Explanation of Policy, page II-6- 169: The revised explanation incorporates the addition of filling coastal waters with materials other than dredge spoil, which is a detailing of what is already regulated by a number of existing statutes within the Environmental Conservation Law. The policy explanation also expands the statement "proper siting of dredge spoil disposal sites" to include the "beneficial use of dredged material."

B. New or Revised Authorities

The following new or revised authorities have not resulted in changes to the uses subject to the management program but in minor changes to the management of uses already subject to management, or to minor changes in authorities for regulating the siting of energy facilities.

Amendment to the Executive Law to include a new Section, 922, Comprehensive Harbor Management Plans (Chapter 791 of the Laws of 1992)

Section 922 of the NYS Executive Law authorizes local governments to development comprehensive harbor management plans. It does not represent a change to the uses subject to the management program It is a minor change to the management of those uses because it delegates to local government the State's authority to regulate certain activities in water whenever the local government incorporates a harbor management plan in its Local Waterfront Revitalization Program.

Specifically subdivision 922.1 allows local governments to adopt, amend and enforce local laws or ordinances to regulate the construction, size and location of wharves, docks, moorings, piers, jetties, platforms, breakwaters or other structures in, on, or above surface waters and underwater lands within a municipality or bounding the municipality to a distance of 1500 feet from the shore . Before this legislation became law, there had been no clear State enabling legislation which authorized all municipalities to regulate all uses and activities occurring in harbor and nearshore areas. The lack of clear legislation hampered the ability of the State and local governments to comprehensively manage activities in harbor and nearshore areas, and to resolve conflicts and issues in these important areas. The changes resulting from this amendment are not substantial in regard to uses subject to the NYSCMP. The amendment will allow more coordinated management of harbor uses by including their regulation in Local Waterfront Revitalization Programs.

Subdivision 922.4 specifies that Section 922 shall not diminish the authority of any municipality pertaining to the regulation of harbors, surface waters and underwater lands granted by other laws, charters, or other instruments. Prior to the enactment of this section some local governments had all the authority granted by this Section and all local governments had some of the authority granted. To protect existing water dependent businesses this subdivision provides that local harbor management plans may not displace conforming water-dependent businesses existing prior to the effective date of this section.

Subdivision 922.5 provides that conveyance of interests pursuant to subdivision seven of Section 75 of the Public Lands Law regarding lands underwater and permits issued pursuant to subdivision one of Section 15-0503 of the Environmental Conservation Law must be consistent to the extent practicable with approved comprehensive harbor management plans. This provision is not a substantial change since this specific requirement of consistency would be included in the general requirement that State actions be consistent with approved LWRPs.

Amendment to Section 8 of the Public Lands Law (Chapter 791 of the Laws of 1992)

This amendment provides for the bringing of trespass charges by the State's attorney general against trespassers over State-owned underwater lands following reports of this activity by the Commissioner of the Office of General Services. Such prosecution will better protect the public's right to use public lands. This represents the further detailing of the State's ability to protect these rights and is not a substantial change to uses subject to management.

Amendment to Section 75 of the Public Lands Law (Chapter 791 of the Laws of 1992)

Several revisions and additions to Section 75 have been made that have an effect on uses subject to management in the coastal area, but these amendments serve to further refine the NYS Coastal Management Program and are not of a substantial nature. For instance, the amendment provides a new, clearer definition of water-dependent uses(see above) Additionally, the amendments provide for the transfer of jurisdiction over State-owned underwater lands from the Commissioner of the Office of General Services to other State agencies, allows for the protection of the public's interests in State-owned underwater lands when these lands are conveyed by grant, lease, etc., allows the Commissioner of the Office of General Services to collect fees when State-owned lands underwater are conveyed, and provides for the attachment of necessary rules with respect to grants, leases, and other conveyances of State-owned underwater lands. These amendments limit grants of public trust lands and specify the public's interest that is to be protected in any conveyance of underwater or formerly underwater land. They have the general effect of codifying the Public Trust Doctrine.

Interagency Memorandum of Understanding (implementing Chapter 791 of the Laws of 1992)

In order to facilitate the implementation of this amendment and its requirements, a memorandum of understanding (MOU) providing for a consultation process among various State agencies in regard to the administration of State-owned underwater lands has been established. This MOU has resulted in the development of procedures with respect to leases and other conveyances for use of State-owned underwater lands to protect the public interest. This

agreement is related to uses subject to management within the coastal zone, but is primarily procedural and is not a substantial change to the management of those uses.

Amendment to Section 15-0503 of the Environmental Conservation Law (Chapter 791 of the Laws of 1992)

This amendment represents a change in the management of uses subject to the management program, but is not a substantial change. It provides that the Department of Environmental Conservation will require the issuance of a permit for the construction of structures in, on, or above waters of the State except for cases where a lease or other conveyance of an interest authorizing use of State-owned underwater lands has been issued by the State. In that instance essentially the same standards apply to the issuance of the lease or other conveyance as would apply to the issuance of the permit. This amendment is also not a substantial change to the management of uses subject to the program because these structures in the coastal zone are regulated by other provisions of the ECL identified in the CMP as implementing the program, particularly Articles 15, 24 and 25 of the ECL..

Section 915-b of the Executive Law (Chapter 791 of the Laws of 1992)

This amendment further refines the CMP in that it specifies that water dependent use activities shall not be considered a private nuisance with the condition that such activities were well-established prior to surrounding activities and that they are neither hazardous nor has disturbance to the enjoyment of surrounding lands been increased. This is a change in the management of uses subject to management, but it is not a substantial change because it further details the existing legislative policy of facilitating water dependent uses.

Article 54 of the Environmental Conservation Law (Environmental Protection Act)

Through the enactment of Article 54 of the Environmental Conservation Law, the State Legislature established a permanent fund to protect the environment and public health, safety and welfare via the provision of assistance to state agencies, public benefit corporations, public authorities, municipalities and not-for-profit corporations. This financial assistance in the form of grants would help to fund projects such as landfill closure, recycling, parks and protected areas, coastal rehabilitation projects, open space conservation projects, and local waterfront revitalization plans. The funding of such projects within the coastal zone is not a substantial change to the management of uses subject to the management program. It does significantly increase the State's ability to advance plans and projects that implement the State's Coastal Management Program.

Enactment of Article 56 of the Environmental Conservation Law (Implementation of the Clean Water/Clean Air Bond Act of 1996

Article 56 of the ECL established a means to implement the Clean Water/Clean Air Bond Act of 1996, which provides funds for clean water, solid waste, clean drinking water, brownfields, air quality, and aquatic habitat restoration projects. Through the Bond Act, several State agencies, including the Department of State, have been authorized to fund water quality improvement projects that implement management programs, plans, or projects for certain water bodies in New York State, including coastal zone waters. The funding of such projects within the coastal zone is not a substantial change to the management of uses subject to the management program. It does significantly increase the State's ability to advance projects that implement the State's Coastal Management Program. There is a specification in the Act that eligible water quality improvement projects include those that involve waters identified in plans in accordance with Section 1455b of the federal Coastal Zone Management Act.

Sections 33-c and 33-e of the Navigation Law (Regulating Disposal)

These changes to the State Navigation Law bring State law into greater conformity with the Clean Water Act provisions regarding vessel waste no discharge zones. They establish the process by which the State will designate vessel waste no discharge zones following EPA's assent. They also provide for enforcement of no discharge zones

and authorize local governments to establish and enforce a no discharge zone whenever one has been established by the State. While these amendments are a significant advance in enabling the State and local governments to avail themselves of the benefits of improved water quality that can result from a vessel waste no discharge zone, this additional authority is not a substantial change in uses subject to the management program or in their management because it merely establishes the procedures for vessel waste no discharge zones as provided for in the Clean water Act, the provisions of which must be included in the State's Coastal Management Program pursuant to CZMA section 307(f).

Article XII-C of the Highway Law (New York State Scenic Byways Program)

Added to the NYS Highway Law in 1992, this Article allows the creation of a comprehensive scenic byways program to guide and coordinate State agency, local government, and not-for-profit organization activities to better serve the public interest. An important emphasis of the program is to create a system of scenic byways within the State (especially within the coastal zone), and to recommend actions by the State legislature necessary to implement a coordinated program that will serve the goals of preserving and protecting the State's scenic, historic, recreational, cultural and archeological resources. The scenic byways so designated are essentially special management areas of particular concern within the coastal zone. This is a change, although not a substantial one, in that it charges the Scenic Byways Advisory Board (established through this Article) with the task of recommending standards such as those for operation and management of designated scenic byways to protect and enhance landscape and view corridors; for scenic byway-related signs; and for highway safety along scenic byways. This represents a detailing of existing state standards for highways in New York State.

2. Special Management Areas

The Special Management Areas Section (Part II section 8) of the Coastal Management Program is revised by adding four new special management areas. This, however, is not a substantial change to the program. Central to New York's program has been the development of Local Waterfront Revitalization Programs. These were identified as one of three special management areas in the original NYSCMP. The four special management areas to be added are a variation of LWRPs. LWRPs are comprehensive coastal management programs for the entire coastal area of a particular political subdivision of the State. The issues addressed in LWRPs are often intermunicipal in nature or are of a greater priority within a particular geographic area of a municipality. These additional special management areas allow the cooperative and concerted effort of local governments and the State evidenced in the LWRP to be applied to intermunicpal issues and discreet areas within a municipality that may require focused and detailed management.

Other than small watershed plans, the additional special management areas meet the criteria presented in the 1979 Draft NYS CMP Appendix F pp. 1-6 and referenced in the NYS CMP on page II- 8-1. Specifically, "Areas where development and facilities are dependent on the revitalization of, or access to, coastal waters" is the basis for centers for maritime activity special management areas. "Areas of urban concentration where shoreline utilization and water uses are highly competitive ... such areas are characterized among other factors by: ... structural obsolescence ... governmental concern as evidenced by plans, proposal, etc. prepared over the years" is the basis for the waterfront redevelopment areas special management area. "Areas of high natural productivity or essential species habitat for living resources, including fish, wildlife and the various trophic levels in the food web critical to their well being" is the basis for regionally important natural areas special management area. Other criteria on pages F1-6 are also relevant and fill out the principal criteria referenced above. Although these criteria area not restated in the NYS CMP, in the aggregate they were the basis for the LWRP special management area. This revision as described above partially disaggregates that special management area identified in the NYS CMP. The small watershed special management area furthers an important management measure of the Coastal Non-point Pollution Control Program.

In addition to identifying the types of special management areas, viz., Centers of Maritime Activity, Waterfront Redevelopment Areas, Regionally Important Natural Areas, and Small Watersheds, to be added, criteria are included to help determine when and where a special management area should be identified and a plan prepared. Plans

prepared for these areas would, subsequent to their completion, be submitted as routine program changes or amendments to the NYCMP, either as part of a LWRP, as part of a regional coastal program, or as a stand alone Special Management Area Plan or Special Area Management Plan.

Scenic Areas of Statewide Significance and Significant Coastal Fish and Wildlife Habitats, already provided for in the NYCMP, are now included under the rubric of special management areas. This is not a substantial change to the program.

3. Boundaries

There are no boundary changes to the NYS Coastal Management Program include in this Routine Program Change.

4. Authorities and Organizations

Most of the program changes included in this submission relate to enforceable policies or the state's organization or authorities to implement the CMP.

Minor changes to policy statements or guidelines are made to policies 2, 3, 4, 20, 27, 34 and 35. The reasons why each of these changes are not substantial are described in this analysis under 1.A. above Uses Subject to Management.

Changes in authorities are the result of several legislative enactments subsequent to program approval and regulations implementing them. The following legislative acts are submitted as new authorities.

1. Chapter 791 of the Laws of 1992* (codification of the Public Trust Doctrine, harbor management plans, and dock regulation)

2. Article 54 of the ECL
(Environmental Protection Fund)

3. Article 56 of the ECL
(Clean Water/Clean Air Bond Act)

4. Article X of the PSL
(Energy Facility Siting)

5. New York State Scenic Byways Program - Article III -C of the Highway Law

6. Sections 33c and 33e of the Navigation Law
(vessel waste no discharge zones)

7. Article 46 of the Executive Law
(Long Island South Shore Estuary Reserve)

8. Section 923 of the Executive Law
(Long Island Sound Coastal Advisory Commission)

The reasons why the new authorities numbered 1-5 are not substantial changes to the NYS CMP are presented in 1.B above, Uses Subject to Management, New or Revised Authorities. The reasons why new authorities 6 and 7 are not substantial are presented in 5., below, Coordination, Public Involvement and National Interest.

In addition to the above changes, the regulations implementing the SEQRA, a key means of implementing New York's program, have been revised. The revised regulations are included with this submission. The changes are not substantial. One change inserts the word 'adverse' before environmental impacts to describe what must be assessed in an EIS. This change avoids the need to complete an EIS for projects whose only significant effects are positive for the environment. Another change modifies the list of Type II actions, these are the minor or ministerial actions which by their nature are not likely to have a significant effect on the environment. Any of these actions which are within the coastal area are still subject to regulatory review under various environmental regulations, such as, the wetland and erosion hazard regulations. Other amendments to the State Environmental Review Act regulations include additional guidance on scoping the environmental impacts of projects, changes in critical environmental area designation and review requirements, changes to the existing environmental impact statement format, and amendments related to the contents of findings statements.

The change to Policy 11 explanation of policy is merely correcting a wrong reference.

There are no changes to the state's organization to implement the NYSCMP submitted as part of this program change.

5. Coordination, Public Involvement, and the National Interest

Of the program changes included in this submission, three are related to this program approval area.

The creation of the Long Island South Shore Estuary Council and the Long Island Sound Coastal Advisory Commission establish regional coastal bodies to assist and advise the Division of Coastal Resources in implementing the NYS CMP in their respective regions. These bodies also provide a mechanism for coordination among the members of the Council or the Commission (see list of members in the legislation). When the regional plans that these bodies adopt or advise on are completed and enforceable those plans will be submitted as separate program changes. These two program changes are not substantial because they add to the array of consultation and coordination between the lead coastal agency and other state agencies, local governments, regional agencies, and not for profit organizations that is provided for in the NYSCMP. Both bodies provide the opportunity for greater public involvement through numerous public meetings.

The NYS CMP federal consistency procedures are completely revised. Although program changes to the federal consistency section is a complete substitution, there are essentially only three changes being made. These are: 1) an update of the list of "Federal Activities and Development Projects Likely to Directly (sic) Affect New York State's Coastal Area;" 2) a further detailing and clarification of the information required for the Department of State to assess the consistency of an activity; and 3) provision of a means to expedite the review of minor projects whose characteristics are such that they could not adversely affect the achievement of the coastal policies or would advance the policies. These changes are not substantial.

The third change is not substantial since over the past eighteen years, the activities or projects that have the characteristics or meet the criteria set forth in the revised federal consistency procedures have been routinely found consistent with the CMP. This change would reduce the time spent by applicants for federal permits, federal agencies, and the DOS without any adverse effects on the ability to carry out the NYS CMP policies. Under this change, proponents of activities which are determined to meet the established criteria would be notified within 10 days that their activity is an activity that has been determined to be consistent with the NYS CMP and no further review by the DOS is necessary.

IV. State Authority Summaries

Chapter 791

- Construction of Projects Over State-owned Land Under Water (Chapter 791 of the Laws of 1992)

This act amends the Public Lands Law, the Environmental Conservation Law, and the Executive Law, in relation to requiring a lease, easement or other interest, or permit, for the erection of certain structures or placement of fill on lands underwater and to authorize establishment of comprehensive harbor management plans. The NYS Legislature found that regulation of projects and structures which are proposed to be constructed in or over State-owned lands underwater is necessary to responsibly manage the State's interest in these lands to protect vital public assets, to guarantee common law and sovereign rights, to ensure reasonable exercise of riparian rights, and to allow for reasonable use of waterways for various public activities.

The Act defines water dependent activities to mean those activities which can only be conducted on, in, over, or adjacent to a water body because such activity requires direct access to that water body, and which involves, as an integral part of such activity, the use of the water.

Section 75 of the Public Lands Law authorizes grants, leases, easements, and other conveyances for the use of state-owned underwater lands and the ceding of the jurisdiction of these lands in a manner consistent with the public interest in the use of State-owned underwater lands for navigation, public access, and other uses, with due regard for the need of affected owners of private property to safeguard their property. Additionally, transfers of jurisdiction over State-owned lands underwater to the NYS Department of Environmental Conservation (DEC) for the purpose of protecting environmentally sensitive lands underwater are authorized via this amendment to the Public Lands Law. This transfer may take place even if the State agency is not the proprietor of the adjacent upland. The NYS Office of General Services (OGS) and DEC are also given the power to promulgate any needed rules and to charge fees with respect to grants, leases, easements and lesser interests for the use of State-owned lands underwater. The OGS has since adopted regulations regarding conveyances of these publicly-owned lands.

A memorandum of understanding providing for a consultation process regarding the administration of state-owned underwater lands (including formerly underwater lands) has been established involving the Secretary of State and commissioners of the Office of General Services (OGS), Department of Environmental Conservation (DEC), and Office of Parks, Recreation & Historic Preservation as well as other interested state agencies. Using this consultation process, the State has established rules with respect to grants, leases, easements, and lesser interests for the use of state-owned land underwater that are reasonable and necessary to protect the interests of the people in such lands underwater. Specifically, the OGS regulates docks and other structures placed on or in State-owned underwater lands; and DEC regulates docks and other structures placed in waters above underwater lands not owned by the State.

Section 15-0503 of the Environmental Conservation Law includes a water body protection amendment to the Environmental Conservation Law whereby the construction, reconstruction, or expansion of docks, platforms, breakwaters and other such structures in, on, or above waters will require the issuance of a permit except where a lease or conveyance of an interest authorizing the use and occupancy of state-owned lands underwater has been obtained from the State. The dock, pier, wharf or other structure subject to regulations (adopted by the Department of Environmental Conservation) would provide dockage for five or fewer boats and encompass within its outer perimeter an area less than four thousand square feet. In addition, the regulations apply to mooring facilities that provide mooring for fewer than ten boats.

A new Section 915-b was added to the Executive Law that specifies that water dependent use activities shall not be considered a private nuisance, provided such activities were commenced prior to the surrounding activities and have not been determined to be the cause of conditions dangerous to human life or health, and any disturbance to enjoyment of land has not been increased materially.

In addition, the Executive Law was amended to include a new Section 922 that authorizes the development of comprehensive harbor management plans, which provide local governments with the authority to comprehensively manage activities in harbor and nearshore areas. Section 922 of Chapter 791 allows local legislative bodies to adopt, amend and enforce local laws or ordinances to regulate wharves, docks, moorings, piers, breakwaters or other structures in, on, or above surface waters and underwater lands to a distance of 1500 feet from the shore within or bounding a municipality in order to implement comprehensive harbor management plans. This section specifies that

the Secretary of State must approve any local law or ordinance locally adopted that establishes a harbor management plan developed under this section of the Executive Law. Examples of issues of regional or local importance that should be addressed by the plans include limits on public access to the harbor or public use of the harbor area, adverse impacts on scenic quality and visual access to the harbor, interference with navigation channels by structures such as docks, floats, or anchored or moored vessels, and the need to protect important water-dependent uses in appropriate areas within the harbor. Regulations have been promulgated that specify the participation of the public and federal, State, and local governments and agencies in the development of harbor management plans. These harbor management plans serve to direct the restoration, revitalization, and redevelopment of both deteriorated and underutilized waterfronts for various compatible uses.

SSER

- Long Island South Shore Estuary Reserve (Article 46 of the Executive Law)

In 1993, in response to concerns about the condition and future of the South Shore estuary, the New York State Legislature adopted the Long Island South Shore Estuary Reserve Act. The Act declared the estuary to be a resource of unparalleled biological, economic, and social value which must be protected and managed. It defined the Reserve to include the South Shore bays and adjacent drainage areas. The Act provides a means for public and private interests to: work collectively and to pool resources and expertise to integrate and coordinate existing programs and studies, make recommendations to mitigate pollution sources in order to maintain or enhance water quality, maximize natural productivity and improve management of shellfish harvest areas to insure economic viability and minimize health risk, make recommendations on policies designed to balance the preservation of natural resources while providing adequate access and use of resources for the public as well as stability for water dependent businesses and tourism, make recommendations on methods to protect the value of existing public and private investment that has already been made in the region, and provide direction for state and local governments to protect, preserve and manage the unique natural resources of the South Shore estuary. To oversee preparation of a Comprehensive Management Plan for the Reserve, the Act created the South Shore Estuary Reserve Council. The Council is comprised of representatives from the South Shore towns and villages, Nassau and Suffolk counties, and other entities, including recreation, estuary-based business, environment, and academic interests. The Act designated the New York State Secretary of State as Chair of the Council and gave the Department of State responsibility for providing administrative and technical support to the Council. The Act also created several committees to assist the Council, including a Technical Advisory Committee and a Citizens Advisory Committee.

EPF

- Environmental Protection Act (Article 54 of the Environmental Conservation Law)

The Environmental Protection Act of 1993 provides a permanent funding structure for open space land conservation projects; non-hazardous municipal landfill closure projects; municipal waste reduction or recycling projects; park, recreation, and historic preservation projects; local waterfront revitalization plans; coastal rehabilitation projects, Long Island central pine barrens area planning; and south shore estuary reserve planning Title 11 of Article 54 authorizes the Secretary of State to provide, on a competitive basis, State assistance payments to municipalities within the designated coastal area toward the cost of any local waterfront revitalization program. Eligible costs for local waterfront revitalization program activities include planning, various studies, preparation of relevant local laws, and construction projects.

CW/CA BA

- Implementation of the Clean Water/Clean Air Bond Act of 1996 (Article 56 of the Environmental Conservation Law)

The Clean Water/Clean Air Bond Act of 1996 provides monies for the preservation, enhancement, restoration, and improvement of the State's environment, including funds for clean water, solid waste, clean drinking water, brownfields, and air quality projects. The Bond Act proposal was approved by the voters of New York State in

November of 1996. Under Title 3 of the Act, funds were allocated to state agencies (in some instances), municipalities, and soil and water conservation districts for water quality improvement projects that implement management programs, plans, or projects for particular water bodies in New York State. In particular, the Department of State was given the ability to administer water quality improvement projects that involved non-agricultural non-point source abatement and control programs and aquatic habitat restoration. The Act (Section 56-0303) specifies that eligible water quality improvement projects include those that involve waters identified in plans in accordance with Section 1455b of the federal Coastal Zone Management Act.

The commissioners of the state Office of Parks, Recreation & Historic Preservation (OPRHP) and the Department of Environmental Conservation (DEC) were authorized to undertake projects which develop, expand, or enhance water quality protection of or public access to coastlines, watersheds, lakes, and rivers. Projects which are not identified in the State land acquisition plan (Open Space Plan) cannot be proposed for acquisition by the State under this section if any town, village or city where the project is located notifies the State of its objection to such acquisition. Projects funded by either OPRHP or DEC shall develop, expand or enhance water quality protection or public access to water bodies, including but not limited to coastlines, aquifers, watersheds, lakes, rivers and streams.

Article X

- Siting of Major Electric Generating Facilities (Article X of the Public Service Law)

This statute, enacted in 1992, replaced Article VIII of the Public Service Law. The new statute is an important means of implementing Policy 27 regarding the siting and construction of major energy facilities in the coastal area. Additionally, the process established under Article X fully addresses other coastal management policies that include this statute as a means of implementation.

The New York State Board of Electric Generation and Siting will issue a certificate of environmental compatibility and public need when it has determined: 1) that the electrical generating facility will satisfy additional electrical capacity needs or other electric system needs; 2) the nature of the probable environmental impacts; 3) that the facility minimizes adverse environmental impacts and protects public safety; 4) that the facility is designed to operate in compliance with all applicable state and local laws and regulations and: 5) that the construction and operation of the facility is in the public interest. Article X also provides that the Department of Environmental Conservation may issue permits pursuant to federally delegated authority under the federal Clean Water Act, the federal Clean Air Act, and the federal Resource Conservation and Recovery Act. Any permits issued under these authorities shall be provided to the Board of Electric Generation and Siting prior to the issuance of a certificate.

Regulating Vessel Waste Disposal

- Sections 33-c and 33-e of the Navigation Law

Section 33-c was amended and Section 33-e was added to the Navigation Law in 1995 as a means of curbing the incremental decline in water quality, natural resource values and public enjoyment of coastal waters in New York State through the designation of vessel waste no-discharge zones. These additions follow requirements of the federal Clean Water Act, which prohibits the discharge of treated vessel wastes within no-discharge zones. The Clean Water Act further states that a state may not designate a no-discharge zone without EPA approval, and that this approval will occur when a state certifies there is a need for greater resource protection and there are sufficient pumpout facilities within a no-discharge zone.

Specifically, Section 33-c mandates that each marine toilet on watercraft used or operated upon the waters of the State shall be equipped with a pollution control device. It further states that any municipality within which a vessel waste no-discharge zone has been designated or adjacent to such a zone may adopt and enforce local laws prohibiting the discharge of vessel wastes in waters within such municipality, or in waters adjacent to such municipality to distance of 1500 feet from shore.

Section 33-e provides for the designation of vessel waste no-discharge zones in waters of the State for which adequate availability of marine sanitation device pump-out or dump station facilities has been demonstrated. This section also states that the discharging of materials for marine sanitation devices within designated no-discharge zones is prohibited and that these devices must be rendered unuseable while vessels are operated within a no-discharge zone. Furthermore, this section provides for the boarding and inspecting of vessels operating in a no-discharge zone by any lawfully designated agent to determine whether or not the vessel is operating in compliance with this statute.

Long Island Sound Coastal Advisory Commission

- Section 923 of Article 42 of the Executive Law (Waterfront Revitalization of Coastal Areas and Inland Waterways)

This section was added to Article 42 in 1995, establishing a coastal advisory commission to implement the Long Island Sound Coastal Management Program. The Program was developed to enrich the Long Island Sound coastal area by enhancing community character, reclaiming the quality of natural resources, reinvigorating the working waterfront and connecting people to the sound. The program document recommended the creation of a Long Island Sound coastal advisory commission to facilitate cooperation and coordination among all levels of government and citizenry. The Commission is comprised of 17 members appointed from the Long Island Sound area. The legislation directs that every state agency and public corporation having jurisdiction over land or water on or in the Sound, or over programs relating to the purposes and goals of this article shall offer full cooperation and assistance to the commission in carrying out its duties.

Scenic Byways (New York State Scenic Byways Program - Article XII-C of the Highway Law

This article, which was a 1992 addition to the State's Highway Law, was established within the NYS Department of Transportation to create a comprehensive scenic byways program to guide and coordinate the activities of State agencies, local governments and not-for-profit organizations in order to better serve the public interest. The purpose of the program is to "....encourage and coordinate state actions and the activities of others which relate to the development, protection, promotion and management of scenic byways". Section 349-cc. of this article specifies that an advisory board of state agencies with responsibilities related to the designation and management of scenic byways and not-for-profit organizations related to the promotion and development of scenic byways would be formed to advise and assist the Department of Transportation in the operation of the scenic byways program. An emphasis of the program is to create a system of scenic byways in the State, particularly along major water bodies, and to recommend actions by the State legislature that may be necessary to implement a coordinated program that will serve the goals of preserving and protecting the State's scenic, historic, recreational, cultural and archeological resources. Recommendations would serve to enhance recreational and economic development through tourism and education in the history and culture of New York State.

V. The Public Notice

The following Public Notice water published on April 3, 2001 in New York State Register. It was also posted on the New York State Department of State web site on that date.

PUBLIC NOTICE

New York State Department of State

Routine Program Change Notice

Pursuant to 15 CFR 923.84(b), the New York State Department of State (DOS) has submitted to the federal Office of Ocean and Coastal Resource Management (OCRM) a routine program change. The DOS considers this change to be routine [according to 15 CFR 923.84] and requests OCRM's concurrence in this determination. The change to the New York State Coastal Management Program covered by this request are the rewording of a coastal policy,

the incorporation of updated explanations for several of the State's coastal policies, an expansion based on recent state legislation of the listing of authorities by which the Coastal Management Program is implemented, additional categories of special management areas, and changes to federal consistency procedures.

The State coastal policies, together with explanations and an accounting of the means to implement the policies, were originally established in 1982 and are set forth in the New York State Coastal Management Program and Final Environmental Impact Statement. One revised coastal policy statement,7 revised policy explanations, and an updated listing of the authorities that implement 43 of the State's 44 coastal policies are necessary to accurately reflect the recent changes to New York's authorities to implement the Coastal Management Program.

A. Laws and/or regulations adopted or amended which provide additional authorities to implement the Coastal Management Program and are the basis for changes to New York's costal policies 2, 3, 4, 20, 27 34.
1. **Chapter 791 of the Laws of 1992, involving amendments to the Public Lands Law, Environmental Conservation Law, and Executive Law** (Construction of Projects Over State-owned Land Under Water). Additionally, existing regulations were amended to implement the laws and an interagency MOU established between the agencies involved in carrying out Chapter 791.

2. **Article 46 of the Executive Law** (Long Island South Shore Estuary Reserve).

3. **Article 54 of the Environmental Conservation Law** (Environmental Protection Act).

4. **Article 56 of the Environmental Conservation Law** (Clean Water/Clean Air Bond Act of 1996).

5. **Navigation Law** sections 33-c and 33-e (Vessel Waste No Discharge).

6. **Article XII-C of the Highway Law** (Scenic Byways Program).

7. **Article 42, Section 923 of the Executive Law** (Long Island Sound Coastal Advisory Commission).

8. **Article X of Public Services Law**, Siting of Major Electric Generating Facilities.
B. Other authorities which provide additional means to implement the Coastal Management Program.

1. **Special Management Area revision** . Four new categories of special management areas are added. These are centers of maritime activity, waterfront redevelopment areas regionally important natural areas, and small watersheds.

2. **Federal Consistency Procedures**. Three changes are made to federal consistency procedures. These are an updated list of Federal Activities and Development Projects likely to affect New York's Coastal Area; a further detailing of the information required for DOS to assess the consistency of an action; and provisions to expedite the review of minor activities.

Federal regulations mandate that New York State provide public notice of its routine program change of the State's Coastal Management Program to the general public, local governments, other state agencies, and regional offices of relevant federal agencies.

The Department of State has requested concurrence of the Office of Ocean and Coastal Resource Management in the National Oceanic and Atmospheric Administration in the determination that these actions constitute a routine program change. Copies of the routine program change document are available for review in Albany at the NYS Department of State Coastal Management Program offices at 41 State Street, Albany, NY 12231.

Any comments on whether or not the action constitutes a routine program change should be submitted by April 24, 2001 to:

Helen Farr, Coastal Management Specialist
Office of Ocean and Coastal Resource Management
Coastal Programs Division, 11th floor
1305 East-West Highway
Silver Spring, MD 20910.

Further information on this action may be obtained by contacting:

Charles McCaffrey
Division of Coastal Resources
New York State Department of State
41 State Street
Albany, NY 12231
Phone (518) 473-3368

VI. Text of Additional or Revised State Authorities

The full text of the new or revised statutes, new or revised regulations, and an Memorandum of Understanding referred to in the proposed program changes follows in the following order:

1. Chapter 791 of the Laws of 1992
2. Long Island South Shore Estuary Reserve Act
3. Environmental Protection Act
4. Clean Water/Clean Air Bond Act
5. Electric Generating Facilities
6. Scenic Byways Program
7. Navigable Waters
8. Inland Waterways
9. 19 NYCRR Part 603, Harbor Management
10. 6 NYCRR Part 617, SEQR
11. 9NYCRR Parts 270 & 271, Lands Underwater
12. Memorandum of Understanding on Underwater Lands

INTERSTATE CONSISTENCY RPC - FILE COPY - DO NOT DISCARD

PUBLIC NOTICE
Department of State
Notice of Routine Program Change Implementation
of the
New York Coastal Management Program

STATEWIDE - In accordance with Federal regulations in 15 CFR Part 923.84.(b)(4), the New York State Department of State (DOS) hereby provides notice that on March 28, 2006, the federal Office of Ocean and Coastal Resources Management (OCRM), in the National Oceanic and Atmospheric Administration of the U.S. Department of Commerce, concurred with a DOS determination that changes to the list of federal agency activities in Table 2 of the New York Coastal Management Program, that are subject to review by DOS in accordance with 15 CFR Part 930, and the addition of a new Table 2A list of interstate activities subject to DOS review, are Routine Program Changes to Uses Subject to Management and Coordination, Public Involvement and the National Interest, and approved these changes.

Federal consistency provisions in 15 CFR Part 930 apply with the approved change effective on the date of publication of this notice.

For further information contact: Steven C. Resler, Deputy Bureau Chief, Division of Coastal Resources, at (518) 474-5290 (e-mail sresler@dos.state.ny.us).

From: Carleigh Trappe <Carleigh.Trappe@noaa.gov>
To: Steven Resler <SRESLER@dos.state.ny.us>
Date: 3/28/2006 2:57:42 PM
Subject: Interstate RPC approval

Steve,
I tried to fax the approval letter to you this morning, but I don't think it went through. A scanned copy is attached and the original is in the mail.
-Carleigh

--
Carleigh Trappe
Coastal Management Specialist
NOAA/NOS/OCRM
1305 East-West Highway, SSMC4, N/ORM3
Silver Spring, MD 20910
Phone: 301-563-1165
Fax: 301-713-4367
E-mail: carleigh.trappe@noaa.gov

Interstate Consistency
RPC approval

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL OCEAN SERVICE
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
Silver Spring, Maryland 20910

MAR 28 2006

Mr. George R. Stafford
Director, Division of Coastal Resources
New York Department of State
41 State Street
Albany, New York 12231

Dear Mr. Stafford,

Thank you for your letter dated February 6, 2006, requesting that the Office of Ocean and Coastal Resource Management (OCRM) approve the incorporation of the changes to the text of Table 2 and the addition of Table 2A into the New York State Coastal Management Program (NYSCMP) as a Routine Program Change (RPC) pursuant to Coastal Zone Management Act (CZMA) regulations at 15 C.F.R. part 923, subpart H and OCRM Program Change Guidance (July 1996). We did not receive any comments on your request.

A change to a state's federal consistency list, including interstate activities, is, generally, a change to Uses Subject to Management since a state is either adding new federal license or permit activities to review, or expanding its review of existing uses/federal license or permit activities to new geographic areas. The federal consistency lists are also part of a state's Coordination, Public Involvement and National Interest component.

Based on our review of your submission, we concur that the changes to Table 2 and the addition of Table 2A are RPCs to Uses Subject to Management and Coordination, Public Involvement and the National Interest, and OCRM approves the incorporation of these tables into the NYSCMP. Table 2A, Interstate Activities, was developed in accordance with 15 C.F.R. part 930, subpart I, as described below.

The NYCMP's list of interstate activities in Table 2A includes three activities that require permits, licenses, or other forms of approval by the U.S. Army Corps of Engineers. The activities are pursuant to sections 9 and 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, and section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (permits for ocean disposal of dredged material). These three activities are currently part of New York's list of federal license or permit activities and subject to federal consistency review by New York. This RPC does not add new activities, but includes an expanded geographic area in Connecticut, as authorized by 15 C.F.R. part 930, subpart I.

The geographic location for these activities includes clearly defined areas in the state of Connecticut. The geographic areas were coordinated with Connecticut and are similar to those proposed by Connecticut, encompassing the Bryam River to the Route 1 Bridge, and Long Island Sound and Fishers Island Sound to the 20-foot contour closest to the opposing state.

New York described effects from activities occurring within these areas of Connecticut as follows. Activities pursuant to sections 9 and 10 of the Rivers and Harbors Act of 1899 affect

the use of New York waters by potentially interfering with navigation. Activities pursuant to section 404 of the Clean Water Act and section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 affect New York resources by potentially increasing the load of sediments, which may also include contaminants. The sediments and the possible pollutants have various negative effects on habitats and species, including commercial fisheries. The effects are described in greater detail in New York's RPC submission. OCRM concurs with New York's description of effects since: (1) location of resources and uses in Long Island Sound and circulation of water in the Sound is well known; and 2) New York is limiting its interstate description to those activities that present the most common source of federal permits that would impact New York coastal uses or resources. If New York, or other states, propose reviewing interstate activities farther removed from a state's coastal zone or for areas or activities not as widely understood, the state's effects analysis may need further information.

During the development of the interstate activities list, the NYCMP consulted with Connecticut and relevant Federal agencies. Connecticut indicated in writing that it has no objections to the list.

Federal consistency shall apply to the approved changes once you publish notice of the approval, pursuant to 15 C.F.R. § 923.84(b)(4). Please provide this office with a copy of the public notice.

Once you publish notice of OCRM's approval, only the listed federal license or permit activities located within the described geographic areas in Connecticut will be routinely subject to New York's interstate federal consistency review. If New York wants to review other interstate activities, or the listed interstate activities in areas outside of the described geographic areas, New York must either amend its list or seek case-by-case review as an unlisted activity under 15 C.F.R. § 930.54.

In addition, consistent with recent OCRM advice provided to states seeking interstate review, states do not need to describe geographic areas within other states for the review of Federal agency activities under 15 C.F.R. part 930, subpart C in their coastal management programs. This is because, whether listed or whether a geographic location is described, a Federal agency is obligated to determine whether its activity, regardless of location (including within the boundaries of another state) will have reasonably foreseeable effects on a state's coastal uses or resources. NOAA included 15 C.F.R. § 930.155(a) to specifically address this matter; that, while NOAA encourages states to consult with Federal agencies for interstate Federal agency activities, NOAA's interstate regulations do not affect the obligation for Federal agencies to provide consistency determinations to states for activities with coastal effects.

Should you have any questions, please call Carleigh Trappe at (301)-713-3155, extension 165.

Sincerely,

for John King, Chief
Coastal Programs Division

Any interested parties and/or agencies desiring to express their views regarding this proposed activity may do so by filing their comments, in writing, no later than 4:30 p.m., **30 days from the date of publication of this notice, or March 8, 2006.**

PUBLIC NOTICE
Department of State
Notice of Proposed Routine Program Change
to the New York Coastal Management Program

Federal regulations require New York State to provide public notice of its routine program change of the State's Coastal Management Program (CMP) to the general public, local governments, other state agencies and regional offices of relevant federal agencies.

Pursuant to 15 CFR 923.84(b), the New York State Department of State (DOS), which administers the CMP, has submitted to the federal Office of Ocean and Coastal Resource Management a routine program change to the CMP. The DOS considers this change to be routine, in accordance with 15 CFR 923.84, and requests OCRM's concurrence with this determination. The change is being made because the list of activities in the CMP, subject to consistency with the CMP and routine review by the DOS, has remained unchanged since initial approval of the CMP more than twenty years ago. The change covered by this request are updated references to the list of: 1) activities undertaken directly by or on behalf of Federal agencies (see 15 CFR Part 930, Subpart C); 2) requiring permits or other forms of authorization from Federal agencies (see 15 CFR Part 930, Subpart D); and 3) activities involving financial assistance from Federal agencies. These activities are subject to and require review by the Department of State in accordance with the consistency provisions of the Federal Coastal Zone Management Act (CZMA), its implementing regulations in 15 CFR Part 930, and the CMP. The updates to the existing list of activities does not change the types of activities subject to review by the Department, nor does it affect procedural or other elements of the CMP.

This program change also includes, in accordance with 15 CFR Part 930, Subpart I, a new listing of interstate activities (activities in states other than New York) that would have reasonably foreseeable effects on coastal resources and uses in New York. The review by DOS of these interstate activities, for consistency with the CMP, would be required.

The DOS has requested concurrence of the Office of Ocean and Coastal Resource Management, in the National Oceanic and Atmospheric Administration, that these actions constitute a routine program change in accordance with 15 CFR Part 923. Copies of the routine program change are available for review in Albany at the NYS Department of State Coastal Management Program offices at 41 State Street, Albany, NY 12231. Any comments on whether the action does or does not constitute a routine program change should be submitted by February 28, 2006 to: John King, Chief, Coastal Programs Division, Office of Ocean and Coastal Resource Management, National Ocean Service, U.S. Department of Commerce, 1305 East West Highway, Silver Spring, MD 20910

Further information regarding this action may be obtained by contacting: Steven C. Resler, Division of Coastal Resources, Department of State, 41 State St., Albany, NY 12231-0001, (518) 474-5290, e-mail: sresler@dos.state.ny.us

PUBLIC NOTICE
Department of State

A meeting of the New York State Security or Fire Alarm Installer Advisory Committee will be held on Friday, February 17, 2006 at 10:00 a.m. at the Department of State, Division of Licensing Services, 84 Holland Avenue, First Floor Conference Room, Albany, NY.

Should you require further information, please contact: Carol Fansler (cfansler@dos.state.ny.us) at (518) 486-3857

Please always consult the Department of State website (www.dos.state.ny.us) on the day before the meeting to make sure the meeting has not been canceled.

PUBLIC NOTICE
Uniform Code Regional Boards of Review

Pursuant to 19 NYCRR 1205, the petitions below have been received by the Department of State for action by the Uniform Code Regional Boards of Review. Unless otherwise indicated, they involve requests for relief from provisions of the New York State Uniform Fire Prevention and Building Code. Persons wishing to review any petitions, provide comments, or receive actual notices of any subsequent proceeding may contact Roy Scott, Codes Division, Department of State, 41 State Street, Albany, NY 12231, (518) 474-4073 to make appropriate arrangements.

2006-0009 Matter of Akiba Cohen, 959 Westwood Road, Woodmere, NY, for an appeal and/or variances concerning fire-safety requirements, including the need to sprinkle a three-story building.

Involved is the alteration of a one-family dwelling of frame construction, located at 959 Westwood Road, Town of Hempstead, County of Nassau, State of New York.

2006-0053 Matter of Nokia Corp., 102 Corporate Park Drive, Harrison, NY, for a variance concerning egress requirements.
Involved is a proposed new building, located at 102 Corporate Park Drive, Town of Harrison, County of Westchester, State of New York.

STATE OF NEW YORK
DEPARTMENT OF STATE
41 STATE STREET
ALBANY, NY 12231-0001

GEORGE E. PATAKI
GOVERNOR

Mr. John King
Chief, Coastal Programs Division
U.S. Department of Commerce
National Ocean Service
Office of Ocean and Coastal Resource Management
Silver Spring, Maryland, 20910

February 6, 2006

Dear Mr. King:

In response to the August 24, 2005 and November 22, 2005 letters to us from the Office of Ocean and Coastal Resources Management (OCRM) regarding proposed routine program changes to the New York Coastal Management Program (NYCMP), we are resubmitting our proposed routine program change. The materials for that resubmission are enclosed.

This routine program change is significantly different than that provided to OCRM last July. It does not involve changes to any of the existing listed activities in the NYCMP that had been and are now subject to routine review by New York in accordance with 15 CFR Part 930. This routine program change instead involves the rewording of descriptions of three categories of activities currently subject to review by New York in accordance with 15 CFR Part 930, Subparts C, D, and F, and the addition of text to identify which of the 15 CFR Part 930 Subparts apply to those categories of activities. These minor explanations involve no substantive change to the NYCMP.

This routine program change also includes a new list of interstate activities. This list is significantly different than that submitted in July 2005, and is limited to those activities in Connecticut likely to have coastal effects of significant concern in New York. Connecticut has indicated in writing that it has no objection to this listing in the NYCMP, and no Federal agency has objected to these activities.

As our Routine Program Change Analysis indicates, New York considers this a routine program change, and we respectfully request OCRM's concurrence with that determination.

If OCRM has any questions or needs any other information or assistance regarding this matter, I may be contacted at OCRM's convenience at (518) 474-5290 (e-mail sresler@dos.state.ny.us).

Sincerely,

Steven C. Resler
Deputy Bureau Chief, Resources Management Bureau
Division of Coastal Resources

SCR/bms
c: Carleigh Trappe - OCRM (w/out enclosure)
David Kaiser - OCRM (w/out enclosure)

New York State Coastal Management Program

Routine Program Change

Request for OCRM Concurrence
February 2006

Text Changes to Table 2 Listing of Activities Subject to Review
in Accordance with 15 CFR Part 930

New Table 2A Listing of Interstate Activities Subject to Routine Review
in Accordance with 15 CFR Part 930

Submitted by:

New York State Department of State
Division of Coastal Resources
41 State Street - 8th Floor
Albany, New York 12231-0001

New York State Coastal Management Program
Routine Program Change
February 2006

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I. Introduction

New York's Coastal Management Program (NYCMP) has been implemented successfully for more than two decades. It is and has been implemented successfully in large part through consistency provisions of the Federal Coastal Zone Management Act (CZMA), and implementing regulations in 15 CFR Part 930. These consistency provisions apply to: 1) activities undertaken directly by or on behalf of Federal agencies; 2) activities requiring permits, licenses, or other forms of approval or authorization from Federal agencies; 3) Outer Continental Shelf exploration, development and production activities; and 4) federal assistance to state and local governments.

Since its approval in 1982, the NYCMP has included in it a listing of activities routinely subject to review by New York in accordance with the consistency provisions of the CZMA and 15 CFR Part 930. That listing is Table 2 of the NYCMP document. The activities listed in that Table 2 had always been subject to consistency reviews by New York when they would be undertaken within New York's coastal area, and outside of New York's coastal area and having any reasonably foreseeable effects on any coastal resources or uses of New York's coastal area. When those listed activities were being contemplated in New York's coastal area, Federal agencies, applicants for Federal agency permits or other forms of authorization or approval, and applicants for financial assistance from Federal agencies routinely submitted consistency determinations (for Federal agency activities) or certifications (for activities requiring Federal agency approvals or other forms of authorizations) to New York so that New York could review those activities for consistency with the enforceable policies of the NYCMP. Federal agencies and applicants also submitted consistency determinations and certifications to New York for activities listed in Table 2 of the NYCMP, but in other states, when Federal agencies, applicants, or New York determined that the activities would have reasonably foreseeable effects on coastal resources or uses of New York's coastal area. In accordance with the CZMA and amendments to it in 1991 (Coastal Zone Act Reauthorization Amendments), which strengthened and made clear that its consistency provisions apply to activities outside of a state's coastal area and having any effect in a state's coastal area, and providing clear authority to a state with an approved CMP to review those activities for consistency with the state's approved coastal management program, certain unlisted Federal agency activities, and activities requiring Federal agency authorizations or approvals, were also subjected to review by New York, whether undertaken within New York's coastal area, or outside of New York's coastal area in another state and having reasonably foreseeable effects on coastal resources or uses of New York's coastal area.

The consistency regulations in 15 CFR Part 930 were amended and became effective in January 2001. Amendments to the regulations included new interstate consistency provisions that became effective in 2002. These new interstate consistency provisions require states to include in their coastal management programs a listing of interstate activities, having reasonably foreseeable coastal effects in the state listing the interstate activity, that are routinely subject to review for consistency with the enforceable policies of a state's coastal management program. For example, an applicant for Federal agency authorization would be required to submit a consistency certification to a state listing, in its coastal management program, the activity for which authorization is requested.

On behalf of the New York Secretary of State, the New York Department of State's Division of Coastal Resources is responsible for the overall administration of the NYCMP. In that capacity the Division is responsible for reviewing activities subject to consistency with the NYCMP in accordance with the CZMA and 15 CFR Part 930. In that capacity the Division has also responded to thousands of inquiries regarding activities subject to the 15 CFR Part 930 regulations. Those inquiries include requests for clarification

regarding which Subparts of the 15 CFR Part 930 regulations apply to the categories of activities listed in the NYCMP.

In 2001 the Division submitted a routine program change to OCRM that included several changes to the NYCMP, including a proposed updated listing of activities in Table 2. OCRM concurred with that routine program change, except for the updated Table 2 listing of activities. OCRM did not concur with that proposed change involving the Table 2 listing because the Division had not consulted directly with Federal agencies regarding those proposed changes. The updated Table 2 listing did not include a listing of interstate activities that would be subject to review by New York.

To remedy these shortcomings, the Division initiated direct consultations with Federal agencies and neighboring in early 2002 regarding New York's proposed updating of Table 2, including a proposed new listing of interstate activities in New Jersey, Connecticut, Rhode Island and Pennsylvania, that would be subject to routine review in accordance with 15 CFR Part 930 by New York (see coordination letters and other communications in Sections VIII and IX of this routine program change submission). The Division revised the new proposed listing in response to those consultations with Federal and State agencies, and in July 2005 resubmitted the new listing to OCRM for routine program change concurrence. In August 2005 OCRM indicated that New York's request for OCRM's concurrence was denied because other notice requirements had not been provided to Federal and other State agencies, the general public, and affected parties. The OCRM denial letter indicated OCRM would subsequently provide detailed comments for the Division's consideration, and provided those comments in November 2005.

After consideration of OCRM's comments, New York has decided not to amend its existing listing of Table 2 activities subject to routine review by New York. This decision is in large part to avoid overburdening Federally regulated entities, Federal agency regulatory programs, and the Division with unnecessary burdens involving consistency reviews of the wide range of activities that might not be of or result in effects of great significance in New York's coastal area, or otherwise significantly affecting resources or uses of New York's coastal area. This NYCMP routine program change instead involves two revisions to the NYCMP. They are:

1. changes to the text of Table 2 of the NYCMP. The changes are minor changes to text clarifying three general types of activities that are routinely subject to consistency reviews by New York. No changes are made to the existing listing of activities; and

2. a new Table 2A, containing a listing interstate activities having reasonably foreseeable effects on coastal resources or uses in New York's coastal area. These newly listed interstate activities will be subject to routine review by New York in accordance with the consistency provisions of the CZMA and 15 CFR Part 930. Applicants requesting permits, licenses, or other forms of Federal agency approval or authorization for these activities must submit consistency certifications to New York for these activities in accordance with 15 CFR Part 930.

The new Table 2A interstate listing is limited to certain activities in Connecticut, in much of the Long Island Sound and the Byram River. These activities were included with several others in the proposed interstate listing originally provided to the Connecticut coastal management program. Connecticut and New York had carefully coordinated respective interstate listings, and both states indicated in writing that they had no objections to either state's interstate listings. This routine program change does not include interstate listings for other states.

II. The Text of the Program Change

There are two changes included with this submission:

1) The changes to the text of Table 2 are changes to the descriptions of three categories of activities subject to review by New York in accordance with 15 CFR Part 930. Those changes are (~~strikeout~~ deleted, and underline added):

FEDERAL ACTIVITIES ~~AND DEVELOPMENT PROJECTS LIKELY TO DIRECTLY~~ AFFECTING ~~NEW YORK STATE'S COASTAL AREA~~ LAND AND WATER USES AND NATURAL RESOURCES IN THE COASTAL ZONE OF NEW YORK STATE

This list has been prepared in accordance with the consistency provisions of the federal Coastal Zone Management Act and implementing regulations in 15 CFR Part 930. It is not exhaustive of all activities subject to the consistency provisions of the federal Coastal Zone Management Act, implementing regulations in 15 CFR Part 930, and the New York Coastal Management Program. It includes activities requiring: 1) the submission of consistency determinations by federal agencies; 2) the submission of consistency certifications by entities other than federal agencies; and 3) the submission of necessary data and information to the New York State Department of State, in accordance with 15 CFR Part 930, Subparts C, D, E, F and I, and the New York Coastal Management Program.

I. ~~Direct Federal Activities and Development Projects~~ Activities Undertaken Directly By or On Behalf of Federal Agencies

The following activities, undertaken directly by or on behalf of the identified federal agencies, are subject to the consistency provisions of the Coastal Zone Management Act, its implementing regulations in 15 CFR Part 930, Subpart C, and the New York Coastal Management Program.

II. Federal Licenses, ~~and~~ Permits and Other Forms of Approval or Authorization

The following activities, requiring permits, licenses, or other forms of authorization or approval from Federal agencies, are subject to the consistency provisions of the Coastal Zone Management Act, its implementing regulations in 15 CFR Part 930, Subpart D, and the New York Coastal Management Program.

III. Federal Financial Assistance to State and Local Governments

The following activities, involving financial assistance from federal agencies to state and local governments, are subject to the consistency provisions of the Coastal Zone Management Act, its implementing regulations in 15 CFR Part 930, Subpart F, and the New York Coastal Management Program. When these activities involve financial assistance for entities other

than State and local governments, the activities are subject to the consistency provisions of 15 CFR Part 930, Subpart C.

2) A new Table 2A lists interstate activities (activities in another state) routinely subject to review by New York in accordance with 15 CFR Part 930. The change is:

Table 2A

Interstate Activities

The following activities in coastal areas of another state are listed and are routinely subject to review for consistency with applicable enforceable policies of the New York CMP in accordance with 15 CFR Part 930, Subpart I and other applicable Parts of 15 CFR Part 930.

1. In the State of Connecticut:

Department of Defense, Army Corps of Engineers

-- Construction of structures (e.g. bulkheads, revetments, groins, jetties, piers, docks, islands, etc.) or conduct of activities such as the mooring of vessels in navigable waters, or obstruction or alteration of navigable waters pursuant to Sections 9 and 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401, et. seq.), in the Byram River within 50' of the Federal navigation channel in the Byram River or, where there is no Federal navigation channel in the Byram River, within the Byram River within 50' of the border of New York and Connecticut upstream to the US Route 1 bridge.

-- Discharge of dredged and fill materials and other activities in the waters of the United States pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344) in Long Island Sound and Fishers Island Sound waterward of the 20' bathymetric contour closest to the Connecticut shoreline.

-- Activities subject to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1401 et seq.) In Long Island Sound and Fishers Island Sound waterward of the 20' bathymetric contour closest to the Connecticut shoreline.

III. Routine Program Change Analysis

1. Text Changes to Table 2 Listing of Activities Subject to Review

Federal agencies and others often do not submit applicable and relevant consistency determinations, certifications, and other information in accordance with 15 CFR Part 930 and the NYCMP. In many instances Federal agencies submit to New York consistency certifications, rather than consistency statements and determinations, often in the form of a Federal Consistency Assessment Form intended for applicants rather than Federal agencies. This is often and in part because staff in Federal agencies or their consultants do not or are not aware of the differences between the types of activities subject to CZMA consistency provisions and applicable Subparts of the 15 CFR Part 930 regulations. These changes to text help provide relevant information to Federal agencies and others attempting to comply with relevant regulation and processes.

The changes to the text in Table 2 do not effect a change in uses subject to management of the NYCMP, do not involve special management areas or amend the coastal area boundaries or authorities and organization, and effect no change in any other element of the NYCMP other than providing language clarifying which Subparts of the 15 CFR Part 930 regulations are applicable to the categories of activities listed in the NYCMP and subject to review for consistency with the NYCMP.

2. New Table 2A Listing of Interstate Activities

Prior to amendments to 15 CFR Part 930 limiting a state e's review of interstate activities unless the state includes an approved list of interstate activities in its coastal management program, New York reviewed activities in other states, having reasonably foreseeable effects on resources and uses of New York's coastal area, for their consistency with the enforceable policies of the NYCMP. New York's review of certain interstate activities was subsequently limited when new 15 CFR Part 930 interstate activity regulations became effective in 2002. Specifically, interstate consistency regulations in 15 CFR Part 930 precluded New York's review of activities requiring permits, licenses or other forms of authorization or approval from Federal agencies, in another state, without New York having an approved list of interstate activities, subject to routine review by New York, in the NYCMP.

The new Table 2A is a listing of activities in another state, having reasonably foreseeable effects on resources and uses of New York's coastal area, is a listing of activities that New York once reviewed in accordance with the CZMA and 15 CFR Part 930 until amendments to the 15 CFR Part 930 regulations precluded New York's review of those activities. Since the new listing of activities is comprised of activities that had previously been subject to Federal coastal consistency provisions and review by New York, listing those activities in the new Table 2A interstate listing reestablishes New York's ability to review those activities in accordance with the CZMA and 15 CFR Part 930. This does not effect a change in uses originally subject to management in or by the NYCMP, does not establish or otherwise create new special management areas or effect any changes in boundaries, authorities, or organization of the NYCMP, and does not involve any other substantial changes to the NYCMP.

Based on the foregoing, New York considers these two changes routine program changes in accordance with 15 CFR Part 923.

IV. Table 2 with Text Changes and Explanations

PROPOSED ROUTINE PROGRAM CHANGE
NEW YORK COASTAL MANAGEMENT PROGRAM

The following text changes are made to New York's existing approved Coastal Management Program (CMP). New text is in underline, except underlines below the names of Federal agencies. Underlines below the names of Federal agencies is existing underlined text of the existing approved CMP, for example, Department of Commerce, except where noted or explained otherwise by text in [brackets]. Deletions are in ~~strikeout~~, and will not be included in the final document. Text in [brackets] is for explanations or notes regarding changes, and will not be included in the final document.

TABLE 2

[Text changes to the following heading describing this Table 2, the paragraph following it, and to the headers for I, II, and III and paragraphs immediately following those headers are made to: 1) better reflect language in and purposes of the Federal Coastal Zone Management Act (CZMA) and its implementing regulations; 2) distinguish between the types of activities subject to the consistency provisions of the CZMA; and 3) refer agencies and the public to applicable Federal consistency regulations.

These changes are made in response to thousands of written and verbal communications, over a period of more than two decades, involving inquiries regarding applicable sections of the 15 CFR Part 930 consistency regulations and the major types of activities in and affecting New York's coastal area that are routinely subject to those regulations. Except for a new Table 2A listing entitled Interstate Activities at the end of this Table 2, these changes to text have no substantive effect on any enforceable policy of the CMP nor any change in its implementation other than providing better and more accurate information regarding activities subject to specific Subparts of the 15 CFR Part 930 regulations.

In addition, except for new Table 2A entitled Interstate Activities, the following list of activities is the same as the list currently included in New York's existing approved CMP. No changes are made to this current list of activities.]

FEDERAL ACTIVITIES ~~AND DEVELOPMENT PROJECTS LIKELY TO DIRECTLY~~ AFFECTING ~~NEW YORK STATE'S COASTAL AREA~~ LAND AND WATER USES AND NATURAL RESOURCES IN THE COASTAL ZONE OF NEW YORK STATE

This list has been prepared in accordance with the consistency provisions of the federal Coastal Zone Management Act and implementing regulations in 15 CFR Part 930. It is not exhaustive of all activities subject to the consistency provisions of the federal Coastal Zone Management Act, implementing regulations in 15 CFR Part 930, and the New York Coastal Management Program. It includes activities requiring: 1) the submission of consistency determinations by federal agencies; 2) the submission of consistency certifications by entities other than federal agencies; and 3) the

submission of necessary data and information to the New York State Department of State, in accordance with 15 CFR Part 930, Subparts C, D, E, F and I, and the New York Coastal Management Program.

I. ~~Direct Federal Activities and Development Projects~~ Activities Undertaken Directly By or On Behalf of Federal Agencies

The following activities, undertaken directly by or on behalf of the identified federal agencies, are subject to the consistency provisions of the Coastal Zone Management Act, its implementing regulations in 15 CFR Part 930, Subpart C, and the New York Coastal Management Program.

Department of Commerce, National Marine Fisheries Service:

- Fisheries Management Plans

Department of Defense, Army Corps of Engineers:

- Proposed authorizations for dredging, channel improvement, breakwaters, other navigational works, erosion control structures, beach replenishment, dams or flood control works, ice management practices and activities, and other projects wit the potential to impact coastal lands and waters.
- Land acquisition for spoil disposal or other purposes.
- Selection of open water disposal sites.

Department of Defense, Air Force, Army and Navy:

- Location, design, and acquisition of new or expanded defense installations (active or reserve status, including associated housing, transportation or other facilities).
- Plans, procedures and facilities for handling or storage use zones.
- Establishment of impact, compatibility or restricted use zones.

Department of Energy:

- Prohibition orders.

General Services Administration:

- Acquisition, location and design of proposed Federal government property or

buildings, whether leased or owned by the Federal government.

Department of Interior, Fish and Wildlife Service:

-- Management of National Wildlife refuges and proposed acquisitions.

Department of Interior, National Park Service:

-- National Park and Seashore management and proposed acquisitions.

Department of Interior, Minerals Management Service:

-- OCS lease sale activities including tract selection, lease sale stipulations, etc.

Department of Transportation, Coast Guard:

-- Location and design, construction or enlargement of Coast Guard stations, bases, and lighthouses.

-- Location, placement or removal of navigation devices which are not part of the routine operations under the Aids to Navigation Program (ATON).

-- Expansion, abandonment, designation orf anchorages, lightering areas or shipping lanes and ice management practices and activities.

Department of Transportation, Federal Aviation Administration

-- Location and design, construction, maintenance, and demolition of Federal aids to air navigation.

Department of Transportation, St. Lawrence Seaway Development Corporation:

-- Acquisition, location, design, improvement, and construction of new and existing facilities for the operation of the Seaway, including traffic safety, traffic control and length of navigation season.

Department of Transportation, Federal Highway Administration:

-- Highway construction

II. **Federal Licenses, and Permits and Other Forms of Approval or Authorization**

The following activities, requiring permits, licenses, or other forms of authorization or

approval from Federal agencies, are subject to the consistency provisions of the Coastal Zone Management Act, its implementing regulations in 15 CFR Part 930, Subpart D, and the New York Coastal Management Program.

Department of Defense, Army Corps of Engineers:

- Construction of dams, dikes or ditches across navigable waters, or obstruction or alteration of navigable waters required under Sections 9 and 10 of he Rivers and Harbors Act of 1899 (33 U.S.C. 401, 403).

- Establishment of harbor lines pursuant to Section 11 of the Rivers and Harbors Act of 1899 (33 U.S.C. 404, 405).

- Occupation of seawall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the U.S. pursuant to Section 14 of the Rivers and Harbors Act of 1899 (33 U.S.C. 408).

- Approval of plans for improvements made at private expense under USACE supervision pursuant to the Rivers and Harbors Act of 1902 (33 U.S.C. 565).

- Disposal of dredged materials into the waters of the U.S>, pursuant to the Clean Water Act, Section 404 (33 U.S.C. 1344).

- All actions for which permits are required pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413).

- Construction of artificial islands and fixed structures in Long Island Sound pursuant to Section 4 (f) of the Rivers and Harbors Act of 1912 (33 U.S.C.).

Department of Energy, Federal Energy Regulatory Commission:

- Licenses for non-Federal hydroelectric projects and primary transmission lines under Sections 3 (11), 4 (e) and 15 of the Federal Power Act (16 U.S.C. 796 (11), 797 (11) and 808).

- Orders for interconnection of electric transmission facilities under Section 202 (b) of the Federal Power Act (15 U.S.C. 824 a (b)).

- Certificates for the construction and operation of interstate natural gas pipeline facilities, including both pipelines and terminal facilities under Section 7 (c) of the Natural Gas Act (15 U.S.C. 717 f (c)).

-- Permission and approval for the abandonment of natural gas pipelines and Section 7 (b) of the Natural Gas Act (15 U.S.C. 717 f (b).

Department of Energy, Economic Regulatory Commission:

-- Regulation of gas pipelines, and licensing of import or export of natural gas pursuant to the Natural Gas Act (15 U.S.C. 717) and the Energy Reorganization Act of 1974.

-- Exemptions from prohibition orders.

Environmental Protection Agency:

-- NPDES permits and other permits for Federal installations, discharges in contiguous zones and ocean waters, sludge runoff and aquaculture permits pursuant to Sections 401, 402, 403, 405, and 318 of the Federal Water Pollution Control Act of 1972 (33 U.S.C. 1341, 1342, 1343, and 1328).

-- Permits pursuant to the Resources Recovery and Conservation Act of 1976.

-- Permits pursuant to the underground injection Control Program uner Section 1424 of the Safe Water Drinking Water Act (42 U.S.C. 300 h-c).

-- Permits pursuant to the Clean Air Act of 1976 (42 U.S.C. 1857).

Department of Interior, Fish and Wildlife Service:

-- Endangered species permits pursuant to the Endangered Species Act (16 U.S.C. 153 (a)).

Department of Interior, Minerals Management Service:

-- Permits to drill, rights of use and easements for construction and maintenance of pipelines, gathering and flow lines and associated structures pursuant to 43 U.S.C. 1334, explorations and development plans, and any other permits or authorizations granted for activities described in detail in OCS exploration, development, and production plans.

-- Permits required for pipelines crossing federal lands, including OCS lands, and associated activities pursuant to the OCS Lands Act (43 U.S.C. 1334) and 43 U.S.C. 931 (c) and 20 U.S.C. 185.

Interstate Commerce Commission:

-- Authority to abandon railway lines (to the extent that the abandonment involves removal of trackage and disposition of right-of-way); authority to construct railroads; authority to construct coal slurry pipelines.

Nuclear Regulatory Commission:

-- Licensing and certification of the siting, construction and operation of nuclear power plants pursuant to Atomic Energy Act of 1954, Title II of the Energy Reorganization Act of 1974 and the National Environmental Policy Act of 1969.

Department of Transportation:

-- Construction or modification of bridges, causeways or pipelines over navigable waters pursuant to 49 U.S.C. 1455.

-- Permits for Deepwater Ports pursuant to the Deepwater Ports Act of 1974 (33 U.S.C. 1501).

Department of Transportation, Federal Aviation Administration:

-- Permits and licenses for construction, operation or alteration of airports.

III. Federal Financial Assistance to State and Local Governments

The following activities, involving financial assistance from federal agencies to state and local governments, are subject to the consistency provisions of the Coastal Zone Management Act, its implementing regulations in 15 CFR Part 930, Subpart F, and the New York Coastal Management Program. When these activities involve financial assistance for entities other than State and local governments, the activities are subject to the consistency provisions of 15 CFR Part 930, Subpart C.

Department of Agriculture

10.068	Rural Clean Water Program
10.409	Irrigation, Drainage, and Other Soil and Water Conservation Loans
10.410	Low to Moderate Income Housing Loans
10.411	Rural Housing Site Loans
10.413	Recreation Facility Loans
10.414	Resource Conservation and Development Loans
10.415	Rural Rental Housing Loans
10.416	Soil and Water Loans
10.418	Water and Waste Disposal Systems for Rural Communities
10.419	Watershed Protection and Flood Prevention Loans

10.422	Business and Industrial Loans
10.423	Community Facilities Loans
10.424	Industrial Development Grants
10.426	Area Development Assistance Planning Grants
10.429	Above Moderate Income Housing Loans
10.430	Energy Impacted Area Development Assistance Program
10.901	Resource Conservation and Development
10.902	Soil and Water Conservation
10.904	Watershed Protection and Flood Prevention
10.906	River Basin Surveys and Investigations

Department of Commerce

11.300	Economic Development - Grants and Loans for Public Works and Development Facilities
11.301	Economic Development - Business Development Assistance
11.302	Economic Development - Support for Planing Organizations
11.304	Economic Development - State and Local Economic Development Planning
11.305	Economic Devlopement - State and Local Economic Development Planning
11.307	Special Economic Development and Adjustment Assistance Program - Long Term Economic Deterioration
11.308	Grants to States for Supplemental and Basic Funding of Titles I, II, III, IV, and V Activities
11.405	Anadromous and Great Lakes Fisheries Conservation
11.407	Commercial Fisheries Research and Development
11.417	Sea Grant Support
11.427	Fisheries Development and Utilization - Research and Demonstration Grants and Cooperative Agreements Program
11.501	Development and Promotion of Ports and Intermodal Transportation
11.509	Development and Promotion of Domestic Waterborne Transport Systems

Department of Housing and Urban Development

14.112	Mortgage Insurance - Construction or Substantial Rehabilitation of Condominium Projects
14.115	Mortgage Insurance - Development of Sales Types Cooperative Agreements
14.117	Mortgage Insurance - Homes
14.124	Mortgage Insurance - Investor Sponsored Cooperative Housing
14.125	Mortgage Insurance - Land Development and New Communities

14.126	Mortgage Insurance - Management Type Cooperative Projects
14. 127	Mortgage Insurance - Mobile Home Parks
14.218	Community Development Block Grants/Entitlement Grants
14.219	Community Development Block Grants/Small Cities Program
14.221	Urban Development Action Grants
14.223	Indian Community Development Block Grant Program

Department of the Interior

15.400	Outdoor Recreation - Acquisition, Development and Planning
15.402	Outdoor Recreation - Technical Assistance
15.403	Disposal of Federal Surplus Real Property for Parks, Recreation, and Historic Monuments
15.411	Historic Preservation Grants-In-Aid
15.417	Urban Park and Recreation Recovery Program
15.600	Anadromous Fish Conservation
15.605	Fish Restoration
15.611	Wildlife restoration
15.613	Marine Mammal Grant Program
15.802	Mineral Discovery Loan Program
15.950	National Water Research and Development Program
15.951	Water Resources Research and Technology - Assistance to State Institutes
15.592	Water Research and Technology-Matching Funds to State Institutes

Department of Transportation

20.102	Airport Development Aid Program
20.103	Airport Planning Grant Program
20.205	Highway Research, Planning, and Construction
20.309	Railroad Rehabilitation and Improvement - Guarantee of Obligations
20.310	Railroad Rehabilitation and Improvement - Redeemable Preference Shares
20.506	Urban Mass Transportation Demonstration Grants
20.509	Public Transportation for Rural and Small Urban Areas

General Services Administration

39.002	Disposal of Federal Surplus Real Property

Community Services Administration

49.002	Community Action

49.011	Community Economic Development
49.013	State Economic Opportunity Offices
49.017	Rural Development Loan Fund
49.018	Housing and Community Development (Rural Housing)

Small Business Administration

59.012	Small Business Loans
59.013	State and Local Development Company Loans
59.024	Water Pollution Control Loans
59.025	Air Pollution Control Loans
59.031	Small Business Pollution Control Financing Guarantee

Environmental Protection Agency

66.0001	Air Pollution Control Program Grants
66.418	Construction Grants for Wastewater Treatment Works
66.426	Water Pollution Control - State and Areawide Water Quality Management Planning Agency
66.451	Solid and Hazardous Waste Management Program Support Grants
66.542	Solid Waste Management Demonstration Grants
66.600	Environmental Protection Consolidated Grants Program Support: Comprehensive Environmental Response, Compensation and Liability (Super fund)

Note: Numbers refer to the Catalog of Federal Domestic Assistance Programs, 1980 and its two subsequent updates.

V. New Table 2A with Summaries of Reasonably Foreseeable Effects

PROPOSED ROUTINE PROGRAM CHANGE
NEW YORK COASTAL MANAGEMENT PROGRAM

[All of the underlined text in following item IV entitled Interstate Activities is new, added to the end of Table 2 of the NYCMP]

Table 2A

Interstate Activities

The following activities in coastal areas of another state are listed and are routinely subject to review for consistency with applicable enforceable policies of the New York CMP in accordance with 15 CFR Part 930, Subpart I and other applicable Parts of 15 CFR Part 930.

1. In the State of Connecticut:

Department of Defense, Army Corps of Engineers

- Construction of structures (e.g. bulkheads, revetments, groins, jetties, piers, docks, islands, etc.) or conduct of activities such as the mooring of vessels in navigable waters, or obstruction or alteration of navigable waters pursuant to Sections 9 and 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401, et. seq.), in the Byram River within 50' of the Federal navigation channel in the Byram River or, where there is no Federal navigation channel in the Byram River, within the Byram River within 50' of the border of New York and Connecticut upstream to the US Route 1 bridge.

[*Reasonably foreseeable direct and indirect effects, based on characteristics of the area* - Regarding the construction of structures and mooring of vessels in the narrow Byram River water body, the in-water areas adjacent to the shoreline are intensely developed with a wide range of marine structures such as docks, piers, pilings, floats, and bulkheads of varying sizes and configurations. A wide range of types and sizes of commercial and recreational vessels are tied, fixed, or otherwise moored to these structures or other mooring devices, both near and directly abutting the existing navigation channel in the river. There have been instances where it was discovered, through New York's consistency review of these federally regulated activities, that several existing structures and moored vessels were in and others were proposed in the federal channel in both New York and Connecticut. The presence of structures and moored vessels in the channel physically interfered with important water-dependent commercial and recreational navigation in the channel and adjacent areas by other commercial and recreational vessels transiting between facilities in the river in both New York and Connecticut, and to and from facilities in the river and elsewhere. New York notified applicants for the newly proposed structures and the federal government of these circumstances, resulting in administrative and judicial actions culminating in the removal of the structures and vessels from the channel. It is these types of interference with publicly owned resources and appropriate uses of a

designated navigation accessway and other areas that need to be avoided. In the narrow confines of the Byram River, structures or moored vessels within 50' of the existing navigation channel, or the center line of the river which is also the border between New York and Connecticut, are likely to affect navigation in this constricted area, including areas in New York, limiting available space for navigation in areas outside of the federal channel, necessitating greater use of the channel and areas adjacent to it for navigation throughout the area. Available space for a wide range of important uses of the river would be reduced as new structures are constructed and used, and conflicts between uses will intensify as more structures are constructed and more vessels are moored in the area.]

= Discharge of dredged and fill materials and other activities in the waters of the United States pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344) in Long Island Sound and Fishers Island Sound from the New York and Connecticut state line to the 20' bathymetric contour closest to the Connecticut shoreline.

= Activities subject to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1401 et seq.) In Long Island Sound and Fishers Island Sound from the New York and Connecticut state line to the 20' bathymetric contour closest to the Connecticut shoreline.

[Reasonably foreseeable direct and indirect effects, based on characteristics of the area - The two types of activities preceding this summary of effects involve the introduction of sediments, often including contaminants with them, in the open waters of Long Island Sound. Long Island Sound is a semi-enclosed body of water that has been studied and designated an estuary of national significance in accordance with the National Estuaries Program. Its unique and important characteristics and values and issues necessitating attention on the part of government agencies and others, including the need to comprehensively manage the disposal of dredged materials in Long Island Sound based in part on understandings of site specific and regional and interstate effects of the disposal of dredged materials on the Long Island Sound's overall ecosystem, are included in comprehensive and special purpose studies, reports and management plans for the area over several decades. These include the Long Island Sound Study by the New England River Basins Commission in the 1970's, an Interim Dredged Materials Management Plan developed jointly by federal agencies and the states of Connecticut and New York in the 1980's, a Long Island Sound Study and Comprehensive Conservation and Management Plan developed and approved in accordance with the National Estuary Program, and the Long Island Sound Coastal Management Program developed and approved as an amendment to and element of New York's federally approved Coastal Management Program in accordance with the federal Coastal Zone Management Act. These comprehensive plans and various studies and reports regarding the characteristics of Long Island Sound recognize the strong influences of flood and ebb tides in the Sound, and a generally counterclockwise movement of waters in the Sound as they enter its easternmost end, move westward primarily in its northern half in Connecticut until reaching the more narrow western portions of the Sound, thence moving generally south into New York and eastward off the north shore of Long Island in New York, exiting the Sound to the Atlantic Ocean and Block Island Sound off Long Island's east end. This is visually depicted in models of the movement of currents in Long

Island Sound, including a sloshing effect resulting in the general overall movement of currents and very fine sediments southward toward Long Island. It is generally understood that sediments are carried throughout the Sound's water column by these currents (see general descriptions of currents and sediment transportation and distribution in Signell, R.P., List, J.H., and Farris, A.S., 2000. Bottom Currents and Sediment Transport in Long Island Sound: A Modeling Study. *Journal of Coastal Research*, 16(3), 551-556).

With regard to the general distribution of sediments in Long Island Sound, the United States Geological Survey publication entitled Regional Distribution of Sea-Floor Sedimentary Environments in Long Island Sound by Harley J. Knebel, Lawrence J. Poppe, and Vee Ann Cross includes the following summary description of the movement of sediments in Long Island Sound:

> "From the distribution of sedimentary environments we can draw two major inferences regarding the accumulation of fine-grained sediments. First, the regional east-to-west succession of sedimentary environments indicates that the Sound is highly efficient in trapping fine-grained sediments. Bottom sediments derived from...the erosion and winnowing of the sea floor in the eastern Sound are transported westward ... and are sequestered in the central and western parts of the basin."

The disposal of dredged and fill material in open waters clearly results in the suspension of sediments of various types in the water column upon their release at the surface. While most of those sediments drop rapidly toward the benthos, especially larger grained sediments as opposed to fine sediments, finer sediments are carried varying distances downcurrent or downdrift of disposal sites, carrying with them various pollutants, such as heavy metals and organic compounds attached to and otherwise associated with fine sediments (see for example U.S. Army Corps of Engineers Data Submittal for Water Quality Monitoring Event #8 on 14 July 2003 - Providence River and Harbor Maintenance Dredging Project, Data Summary Submission - July 21, 2003). The suspension of sediments discharged in the water column, and immediate and longer term releases of contaminants associated with suspended sediments as well as sediments settling in benthic areas, have varying types and degrees of physical effects on water quality in the immediate area where they are undertaken, for varying distances downdrift of the area where sediments are initially suspended and settle, released over short time, and subsequently carried afield, whether by currents or to varying degrees by organisms occupying disposal sites, having direct physical effects on the water column and immediate, adjacent, and nearby benthic areas, and lesser understood indirect effects both at disposal sites and farther afield. Direct physical effects also have varying types and degrees of direct and indirect effects on species that are elements of, rely upon, or otherwise use disposal sites and adjacent and nearby areas. All of the varying types and degrees of effects on biological resources, and the spatial areas affected, differ depending on the manner in which sediments and other materials are released or otherwise suspended in the water column, the types of sediments or other materials suspended, the types of pollutants associated with sediments, depths of water, and surface and other currents in the areas. Some species, including those supporting or constituting important fisheries, spend parts of their lives in and readily transit and use benthic areas and waters throughout Long Island Sound in both Connecticut and New York. The various and varying degrees

of direct effects of suspended sediments, and any pollutants associated with them, especially when carried into New York waters by currents, and any effects on species using waters in both states, would likely result in varying types and degrees of effects in the water column, in benthic areas, and of species using the water column and of species using the water column and benthic areas of Connecticut and New York. Depending on the circumstances, effects on those resources would likely result in various types and degrees of effects on human uses of those resources in New York, including commercial and recreational fisheries and markets. Given the complexities and wide range of circumstances involving any particular types and means of disposing of or managing the disposal of dredged materials, specific types and degrees of those effects and their effects on and consistency with the enforceable policies of the New York CMP can not be predetermined. Therefore, the specific circumstances involving the disposal of dredged and fill materials in the Sound and specific types and degrees of effects on coastal resources and uses must be fully assessed in order to assess the overall effects of the activities on coastal resources and uses, and based on those effects, on and the consistency of the activities with applicable coastal policies of the New York CMP.]

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VI. Public Notice

PUBLIC NOTICE

Department of State
Notice of Proposed Routine Program Change
to the New York Coastal Management Program

Federal regulations require New York State to provide public notice of its routine program change of the State's Coastal Management Program (CMP) to the general public, local governments, other state agencies and regional offices of relevant federal agencies.

Pursuant to 15 CFR 923.84(b), the New York State Department of State (DOS), which administers the CMP, has submitted to the federal Office of Ocean and Coastal Resource Management a routine program change to the CMP. The DOS considers this change to be routine, in accordance with 15 CFR 923.84, and requests OCRM's concurrence with this determination. The change is being made because the list of activities in the CMP, subject to consistency with the CMP and routine review by the DOS, has remained unchanged since initial approval of the CMP more than twenty years ago. The change covered by this request are updated references to the list of: 1) activities undertaken directly by or on behalf of Federal agencies (see 15 CFR Part 930, Subpart C); 2) requiring permits or other forms of authorization from Federal agencies (see 15 CFR Part 930, Subpart D); and 3) activities involving financial assistance from Federal agencies. These activities are subject to and require review by the Department of State in accordance with the consistency provisions of the Federal Coastal Zone Management Act (CZMA), its implementing regulations in 15 CFR Part 930, and the CMP. The updates to the existing list of activities does not change the types of activities subject to review by the Department, nor does it affect procedural or other elements of the CMP.

This program change also includes, in accordance with 15 CFR Part 930, Subpart I, a new listing of interstate activities (activities in states other than New York) that would have reasonably foreseeable effects on coastal resources and uses in New York. The review by DOS of these interstate activities, for consistency with the CMP, would be required.

The DOS has requested concurrence of the Office of Ocean and Coastal Resource Management, in the National Oceanic and Atmospheric Administration, that these actions constitute a routine program change in accordance with 15 CFR Part 923. Copies of the routine program change are available for review in Albany at the NYS Department of State Coastal Management Program offices at 41 State Street, Albany, NY 12231. Any comments on whether the action does or does not constitute a routine program change should be submitted by February 28, 2006 to:

John King, Chief
Coastal Programs Division
Office of Ocean and Coastal Resource Management
National Ocean Service
U.S. Department of Commerce
1305 East West Highway
Silver Spring, MD 20910

Further information regarding this action may be obtained by contacting:

Steven C. Resler
Division of Coastal Resources
New York State Department of State
41 State Street
Albany, NY 12231-0001
Phone: (518) 474-5290
E-mail: sresler@dos.state.ny.us

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.

1535-13

SUPREME COURT OF NEW YORK, ALBANY COUNTY

42 Misc. 3d 896; 976 N.Y.S.2d 650; 2013 N.Y. Misc. LEXIS 5755; 2013 NY Slip Op 23425

December 13, 2013, Decided

NOTICE:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE PRINTED OFFICIAL REPORTS.

PRIOR HISTORY: *Entergy Nuclear Indian Point 2, LLC v. New York State Dept. of State, 2012 N.Y. Misc. LEXIS 6247 (N.Y. Sup. Ct., Nov. 20, 2012)*

COUNSEL: [***1] For Petitioners/Plaintiffs: Andrew C. Rose, Esq., Nixon Peabody LLP, Albany, New York; Bobby R. Burchfield, Esq., Matthew M. Leland, Esq. and Thomas J. Tynan, Esq., McDemott Will & Emery LLP, Washington, D.C.

For Respondents/Defendants: Lisa M. Burianek, Esq. The Capitol, Attorney General of the State of New York, Albany, New York.

JUDGES: Michael C. Lynch, Justice of the Supreme Court.

OPINION BY: Michael C. Lynch

OPINION

[**653] [*897] Michael C. 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 [*898] 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 [***2] 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 P37). 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 [***3] 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, [*899] 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 [**654] Coastal Resources Act" (hereinafter, [***4] 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 [***5] (Petition P47; 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 [*900] 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 [***6] 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" [**655] (CMP II-9). Relevant to this dispute, the CMP provides:

> The projects which meet one of the [***7] 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 [*901] 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 [***8] 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 P1).

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. [***9] 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 [**656] lands, or navigable waters'... (*16 USCS § 1456(e)*; see *Cal. Coastal Com v. Granite Rock Co., 480 U.S. 572, 592, 107 S. Ct. 1419, 94 L. Ed. 2d 577 [1987]*).In this [*902] Court's view, the State's authority under the CZMA includes the discretion to decline [***10] 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 [***11] 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 AD3d 1419, 1420, 881 N.Y.S.2d 533 [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* [*903] *Environmental Conservation, 58 NY2d 427, 448 N.E.2d 436, 461 N.Y.S.2d 769 [1983]*). A party may seek review of an agency's ruling or its refusal to [***12] issue a ruling by commencing a proceeding pursuant to *CPLR Article 78* (*Dairy Barn Stores, Inc. v. State Liquor Authority, 67 AD2d 692, 412 N.Y.S.2d 396 [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 [**657] 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 NY3d 611, 621, 870 N.E.2d 133, 838 N.Y.S.2d 815 [2007]* [***13] [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 *Roman Catholic Diocese v. New York State Dep't of Health, 66 NY2d 948, 951, 489 N.E.2d 749, 498 N.Y.S.2d 780 [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" [*904] includes the CMP, but the CMP incorporates [***14] 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 [***15] 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, 412* [**658] *N.Y.S.2d 396; see also, Dairy Barn Stores, Inc. v. State Liquor Authority, 67 AD2d 691, 412 N.Y.S.2d 395* [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 [***16] Management Program (see e.g. *Compass Adjusters & Investigators v. Comm'r of Taxation & Fin.*, [*905] *197 AD2d 38, 610 N.Y.S.2d 625 [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 NY2d 353, 359-360, 632 N.E.2d 876, 610 N.Y.S.2d 470 [1994]).

In 1975, the New York State Legislature designated the New York [***17] 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.

[*906] 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 [***18] 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 [**659] 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" [***19] 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 [*907] separate and distinct from those actions [***20] 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 AD2d 867, 458 N.Y.S.2d 755* aff'd *61 NY2d 798, 462 N.E.2d 123, 473 N.Y.S.2d 946; Northeast Solite Corp. v. Flacke, 91 AD2d 57, 458 N.Y.S.2d 291*) 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 [***21] 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 [**660] 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 [***22] was therefore rational.

[*908] 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

Michael C. Lynch

Justice of the Supreme Court

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

December 6, 2013

Mr. George Stafford
New York State Department of State
Counsel's Office
One Commerce Plaza
99 Washington Avenue
Albany, NY 12231-0001

SUBJECT: CONSISTENCY OF THE INDIAN POINT NUCLEAR GENERATING UNIT NOS. 2 AND 3, LICENSE RENEWAL APPLICATION, WITH NEW YORK STATE COASTAL MANAGEMENT PROGRAM

Dear Mr. Stafford,

By letter dated April 23, 2007, Entergy Nuclear Operations, Inc. (Entergy) submitted, pursuant to Title 10 of the *Code of Federal Regulations,* Parts 51 and 54, an application and associated environmental report for review by the U.S. Nuclear Regulatory Commission (NRC), to renew the operating licenses for Indian Point Units 2 and 3 (IP2 and IP3, respectively). The NRC staff documented its findings related to the environmental review of Entergy's license renewal application (LRA) in Supplement 38 to NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," which was issued in December 2010. In addition, the NRC staff issued a supplement to the Final Supplemental Environmental Impact Statement in June 2013.

By letter dated July 24, 2012, Entergy submitted a supplement to its environmental report providing an updated status of its compliance with the Coastal Zone Management Act (CZMA). In its supplement to its environmental report, Entergy stated that IP2 and IP3 have already obtained the necessary consistency reviews from the State of New York and that no further review is required, pursuant to regulations promulgated by the U.S. Department of Commerce, National Oceanic and Atmospheric Administration in 15 CFR 930.51. The regulations in 15 CFR 930.51 require, for the renewal or major amendment of a federal license or permit, that a review be conducted of the consistency of the proposed action with the State's coastal management program (CMP). The regulations further describe situations whereby the renewal of a Federal license or permit for an activity that has previously been reviewed for consistency with the State's CMP does not require a subsequent consistency determination unless the proposed action will cause an effect on any coastal use or resource substantially different than those previously reviewed by the State agency. The regulations in 15 CFR 930.51(b)-(c) require a CMP consistency review in the following circumstances:

> (b)(1) Renewals and major amendments of federal license or permit activities not previously reviewed by the State agency;
>
> (b)(2) Renewals and major amendments of federal license or permit activities previously reviewed by the State agency which are filed after and are subject to management program changes not in existence at the time of original State agency review; and

(b)(3) Renewals and major amendments of federal license or permit activities previously reviewed by the State agency which will cause an effect on any coastal use or resource substantially different than those originally reviewed by the State agency.

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

Paragraph 930.51(e) states as follows:

(e) The determination of substantially different coastal effects under paragraphs (b)(3) and (c) of this section is made on a case-by-case basis by the Federal agency after consulting with the State agency, and applicant. The Federal agency shall give considerable weight to the opinion of the State agency. The terms "major amendment," "renewals" and "substantially different" shall be construed broadly to ensure that the State agency has the opportunity to review activities and coastal effects not previously reviewed.

In accordance with its responsibilities under the National Environmental Policy Act of 1969 (NEPA) and the CZMA, the NRC staff is reviewing the information contained in Entergy's LRA and environmental report supplement. In addition, the NRC staff is seeking input from the State of New York Department of State (NYSDOS) pertaining to the State of New York's Coastal Zone Management Plan, in accordance with 15 CFR 930.51. Enclosed are several questions related to these topics. Responses by NYSDOS will be helpful to the NRC staff in our review of Entergy's supplement to its environmental report. We would be pleased to discuss the enclosed request with you, and suggest that a telephone conference call be arranged at your earliest convenience to facilitate our consultations regarding this matter.

If you have any questions, please contact Michelle Moser, Environmental Scientist, at 301-415-6509, or via e-mail at michelle.moser@nrc.gov.

Sincerely,

David J. Wrona, Chief
Environmental Review and Guidance
Update Branch
Division of License Renewal

Docket Nos. 50-247 and 50-286

Enclosure:
As stated

cc w/encl: Listserv

(b)(3) Renewals and major amendments of federal license or permit activities previously reviewed by the State agency which will cause an effect on any coastal use or resource substantially different than those originally reviewed by the State agency.

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

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Sincerely,
/RA/
David J. Wrona, Chief
Environmental Review and Guidance
Update Branch
Division of License Renewal

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Enclosure: As stated

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NAME	RChazell	YEdmonds	MMoser	LJames	STurk	DWrona
DATE	10/09/13	11/26/2013	10/9/2013	10/24/2013	11/12/13	11/5/2013

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INDIAN POINT NUCLEAR GENERATING UNIT NOS. 2 AND 3,
LICENSE RENEWAL APPLICATION

REQUEST FOR RESPONSES BY THE NEW YORK STATE DEPARTMENT OF STATE REGARDING THE STATE OF NEW YORK'S COASTAL ZONE MANAGEMENT PROGRAM

In accordance with the Coastal Zone Management Act (CZMA) and regulations promulgated by the U.S. Department of Commerce, National Oceanic and Atmospheric Administration in 15 CFR 930.51, the U.S. Nuclear Regulatory Commission (NRC) staff requests that the New York State Department of State (NYSDOS) provide its responses to the following questions pertaining to the application by Entergy Nuclear Operations, Inc. (Entergy) to the NRC for license renewal of Indian Point Nuclear Generating Units 2 and 3 (IP2 and IP3). Responses by the NYSDOS will assist the NRC in fulfilling its statutory responsibilities under the CZMA and the National Environmental Policy Act of 1969 (NEPA).

1. The State of New York's Coastal Zone Management Program (CMP) indicates that NYSDOS is the designated coastal management agency of New York State (CMP Part II, § II-4 at 2 (1982)) and, as such, is responsible for administering the New York CMP, as well as coordinating activities essential to its implementation. Further, the CMP states that NYSDOS will evaluate the consistency determinations made by State agencies and, when appropriate, advise the State agencies on the consistency of such actions with the coastal policies (CMP Part II, § II-4 at 3 (1982)). Please describe the process by which NYSDOS evaluates the consistency determinations made by State agencies. Specifically, please describe how a consistency determination is made, NYSDOS's role in making a determination, and how NYSDOS advises State agencies on the consistency of actions with the New York State CMP. Please describe how NYSDOS documents such coordination with State agencies.

2. On July 24, 2012, Entergy submitted a supplement to its application for renewal of the IP2 and IP3 operating licenses. In its supplement, Entergy reevaluated the status of its compliance with the CZMA. In its reevaluation, Entergy concluded that IP2 and IP3 have already obtained the necessary consistency reviews from the State of New York and that license renewal will not result in coastal effects that are substantially different than the effects previously reviewed by NYSDOS and/or other State agencies with jurisdiction under State law to make those determinations. Entergy based this conclusion, in part, on the assessment of coastal effects evaluated in the following four New York State documents:

    - New York Power Authority's (NYPA) environmental review (including the State Environmental Quality Review Act (SEQRA) negative declaration, Federal consistency certification, and State coastal assessment, if any) on the proposed sale of NYPA's IP3 to Entergy (March 31, 2000).

    - New York State Department of Environmental Conservation's (NYSDEC) Coastal Assessment (February 11, 2000) completed as a part of the State Pollutant Discharge Elimination System (SPDES) permit renewal application for IP2 and IP3 (March 2, 2000).

ENCLOSURE

- New York Public Service Commission's (NYPSC) Final Supplemental Environmental Impact Statement (FSEIS), on the transfer of IP1 and IP2 from Consolidated Edison to Entergy (August 17, 2001).

- NYSDEC's Final Environmental Impact Statement (FEIS) concerning applications to renew the SPDES permits for Hudson River power plants, including IP2 and IP3 (June 25, 2003).

For each of the four environmental reviews listed above, please indicate, separately, whether NYSDOS considers a consistency review to have been conducted by NYSDOS and/or another NYS office or agency. For each review, please state (a) which office or agency conducted that review, (b) whether that office or agency was authorized to conduct such review (including the statutory or regulatory bases for such authority), (c) the scope of the review (including both the activities reviewed and the resources affected by those activities), (d) whether NYSDOS evaluated the consistency determination made by the other State office or agency, and (e) whether NYSDOS provided comments or advice (or declined to provide comments or advice) to that office or agency on the consistency of such actions with the State's CMP. If NYSDOS considers that a consistency review was not conducted for any of the four matters listed above, please describe why a consistency review was not necessary or was not conducted for that particular action.

3. The State of New York's CMP states that, "Generally, [NYSDOS] will evaluate major actions proposed in the Coastal Area of the State by Federal agencies or by entities requiring Federal permits and determine the consistency of those actions with the Program's policies" (CMP Part II, § II-4 at 3 (1982)). Please describe the circumstances, if any, in which NYSDOS would not perform a consistency evaluation for a Federal action that may affect New York State's coastal zone. Additionally, please describe how a consistency evaluation for a Federal action would differ from an evaluation performed for a State action. For the four reviews cited by Entergy, please describe whether each review would be sufficient for a consistency review for a Federal action and, if deficient, how that review is deficient. Please cite any applicable regulations, guidance, or other relevant documents.

4. CZMA regulations in 15 CFR 930.51 describe situations whereby the renewal of a Federal license or permit for an activity that has previously been reviewed for consistency with the State's coastal management program does not require a subsequent consistency determination unless the proposed action will cause an effect on any coastal use or resource substantially different than those previously reviewed by the State agency.

    a. Please describe your understanding of the applicability of 15 CFR 930.51(b), (c) and (e) to the license renewal application for IP2 and IP3.

    b. Please state if you believe there were any substantial changes in the coastal environment or substantial changes to the New York CMP since 2000. If so, please describe those changes.

5. Is the Department aware of any other examples where a consistency review by a State agency was not required, or not conducted, because a review had been conducted previously and the proposed activity would not affect any coastal use or resource in a way that was substantially different than the description or understanding of effects at the time of the original review, as described 15 CFR 930.51? If so, please describe the circumstances of that (those) situation(s).

6. Please describe whether NYSDOS concurs with Section 9.3 of Entergy's Environmental Report, as revised (Enclosure 1 to NL-12-107), in which Entergy states it "now believes that the New York Coastal Zone Management Plan also exempts both plants from further consistency review."