McDermott
Will & Emery

Boston Brussels Chicago Düsseldorf Frankfurt Houston London Los Angeles Miami
Milan Munich New York Orange County Paris Rome Seoul Silicon Valley Washington, D.C.

Strategic alliance with MWE China Law Offices (Shanghai)

Bobby R. Burchfield
Attorney at Law
bburchfield@mwe.com
+1 202 756 8003

July 15, 2014

VIA FEDERAL EXPRESS

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

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

Dear Mr. Wrona:

Entergy Nuclear Operations, Inc., respectfully submits this letter as part of the Coastal Zone Management Act (CZMA) consultation process contemplated by 15 C.F.R. § 930.51(e) for the license renewal applications for Indian Point Nuclear Generating Units Nos. 2 and 3 ("IP2" and "IP3").

In its request for information dated December 6, 2013, the NRC Staff asked the New York State Department of State (NYSDOS) to respond to six questions regarding New York's Coastal Management Program (CMP). The NRC Staff also asked NYSDOS to address Entergy's position that Entergy has already obtained the CZMA consistency determinations that are necessary for license renewal pursuant to 15 C.F.R. § 930.51(b)(3).[1] NYSDOS responded by letter dated May 30, 2014.[2] In anticipation of further questions from the NRC Staff, and in an effort to assist the Staff in formulating those questions, Entergy sets forth in this letter its response to NYSDOS's letter.

NYSDOS now makes the critical concession that other state agencies have, in fact, conducted consistency reviews of IP2 and IP3,[3] but then repeatedly asserts that only a consistency review denominated as a "federal consistency review" and conducted by NYSDOS itself can ever be

---

[1] *See* Letter from David J. Wrona, Chief, Envtl. Review & Guidance Update Branch, NRC, to George Stafford, NYSDOS (Dec. 6, 2013).

[2] Letter from Linda M. Baldwin, General Counsel, NYSDOS, to David J. Wrona, Chief, Envtl. Review & Guidance Update Branch, NRC (May 30, 2014) (hereafter "NYSDOS Cover Letter to NRC") (enclosing separate document titled "NYSDOS Responses to NRC's Six Inquiries").

[3] NYSDOS Cover Letter to NRC 8-9, 11-12; NYSDOS Responses to NRC's Six Inquiries 7-13, 17-19.

sufficient to fulfill the CZMA requirements for a federal project. Putting to the side for the moment NYSDOS's involvement in those prior consistency reviews by other state agencies, the implications of NYSDOS's position are severe. For example, in NYSDOS's view, consistency reviews conducted for projects undertaken by state agencies or subject to state approval can be much more lenient than consistency reviews conducted for projects undertaken by federal agencies or subject to federal approval. In other words, a project undertaken in the Hudson River that requires a permit from NYSDEC is subject to much less rigorous consistency review than a project undertaken in the same place that requires a permit from the Army Corps of Engineers. This position is contrary to the requirements of the CZMA, the regulations promulgated under it, and New York's own CMP, and would undermine the federal-state relationship implicit in the CZMA by allowing states to discriminate against federally-licensed projects.

Further, NYSDOS's position misreads the pertinent regulations. According to NYSDOS, only a *federal* consistency review conducted *by NYSDOS* for the *original* federal license is sufficient to preclude further, duplicative reviews upon an application to renew that federal license.[4] But the plain language of 15 C.F.R. § 930.51(b)(3) imposes no such limitations. Instead, it exempts from further consistency review any federal license renewal so long as the licensed "activities"—here, IP2 and IP3's operations—have been "previously reviewed by the State agency,"[5] if the renewal will not cause substantially different coastal effects from "those originally reviewed by the State agency." The regulation does not distinguish federal from state reviews, nor does it distinguish among reviews of the same "activities" based on the types of licenses or other approvals that were at issue.

Moreover, 15 C.F.R. § 930.11(o) recognizes that the term "the State agency" includes not only the agency "designated" under the CZMA—here NYSDOS—but also any other state agency to which the designated agency delegates its authority.

Finally, 15 C.F.R. § 930.6(c) explicitly recognizes that another New York state agency's issuance of a state permit or approval—which requires that agency to conduct a consistency review—can "constitute the State agency's consistency concurrence or objection" for purposes of a *federal* permit or approval. Thus, when read together and in context, the regulations deem the prior *state* consistency reviews sufficient for a federal permit on the same activities.

---

[4] *See* NYSDOS Cover Letter to NRC 2, 4, 8, 11-13; NYSDOS Responses to NRC's Six Inquiries 17-21. NYSDOS goes so far as to suggest that *renewal* of an existing license or permit will always be subject to the CMP, even if NYSDOS reviewed the project when the original permit was issued. *See id.* at 22-23. This position would negate 15 C.F.R. § 930.51(b)(3); *see also* Decision in Consistency Appeal of Pan Am Grain Company, U.S. Dep't of Commerce, Dec. 1, 2000 (overriding objection by State because it had no right to review permit renewal), *available at* http://coastalmanagement.noaa.gov/consistency/mediadecisions/panamerican.pdf.

[5] *See also* 44 Fed. Reg. 37,142, 37,150 (June 25, 1979) (explaining that § 930.51(b)(3) limits "further [consistency] review to cases where . . . *the activity* will be modified substantially causing new coastal zone effects" (emphasis added)).

I. NYSDOS's Role in Consistency Determinations by Other State Agencies

A. Significance of state consistency reviews

NYSDOS repeatedly asserts that it is the only agency authorized under the CMP to conduct *federal consistency* reviews, meaning a consistency review related to a federal agency's approval of a federal license or permit.[6] Even if the distinction between "federal" and "state" reviews were valid and relevant, there is no provision of the CMP making such an unequivocal declaration. Indeed the CMP expressly qualifies NYSDOS's authority to conduct federal consistency reviews: "*Generally*, the Department will evaluate major actions proposed in the Coastal Area of the State by Federal agencies or by entities requiring Federal permits and determine the consistency of those actions with the Program's policies."[7]

More to the point, the regulations do not require a separate *federal* consistency review if, as NYSDOS finally admits,[8] the *state* has conducted prior state consistency reviews. *First*, as shown above, the exemption under § 930.51(b)(3) does not require a previous *federal* consistency review. Rather, the plain language of the regulation requires only a "previous[ ] review[ ] by the State agency" of the "activities" that are the subject of the federal license renewal—here, the operations of IP2 and IP3. While a previous federal consistency review of the activities would certainly qualify, it is not required. A review of the activities by "the State agency" is sufficient. As shown below and in Entergy's previous submissions, "the State agency" has previously reviewed the operations of IP2 and IP3 on several occasions.

Second, NYSDOS is mistaken in its contention that only consistency reviews by NYSDOS, as the designated "State agency," count.[9] Under 15 C.F.R. § 930.11(o), "the State agency" designated under the CZMA—here, NYSDOS—may delegate its authority to another state agency, and if so that other agency becomes "the State agency" for purposes of the federal regulations.[10] NYSDOS does not dispute that, in the CMP itself, NYSDOS delegated the authority to conduct consistency reviews for *state* permits and other approvals to the state agencies that have authority to issue them, such as NYSDEC, NYPA, and NYPSC.[11] Thus, a state consistency review conducted by an authorized New York agency is a review "by the State agency" for purposes of § 930.51(b)(3), even though it is not conducted by NYSDOS.

---

[6] NYSDOS Cover Letter to NRC 2, 4-8, 13; NYSDOS Responses to NRC's Six Inquiries 9, 11-12, 17-19, 21.

[7] CMP pt. II, § 4, at 3 (emphasis added).

[8] NYSDOS Cover Letter to NRC 8-9, 11-12; NYSDOS Responses to NRC's Six Inquiries 7-13, 17-19.

[9] NYSDOS Cover Letter to NRC 2, 4-8, 11-13; NYSDOS Responses to NRC's Six Inquiries 20-21.

[10] *See* 15 C.F.R. § 930.11(o) ("The term 'State agency' means the agency of the State government designated pursuant to section 306(d)(6) of the [CZMA] . . . *or a single designee State agency appointed by the 306(d)(6) State agency*." (emphasis added)). NYSDOS is the New York agency "designated pursuant to section 306(d)(6)."

[11] *See* CMP pt. II, § 4, at 2-4, 7-9.

Third, § 930.6(c) describes circumstances in which a *state* review qualifies as a *federal* review. The regulation provides:

> 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 [i.e., the federal consistency determination] 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.

(emphasis added). Indeed, "if all management program enforceable policies are contained in State permit standards, *then usually the issuance of the relevant State permit(s) will be sufficient for determining consistency*."[12] This approach makes perfect sense in light of § 930.6(a), which requires the State agency "to uniformly and comprehensively apply the enforceable policies of the State's management program." As the preamble to § 930.6(a) explains, "[u]niformity is required to ensure that States are not applying policies differently, *or in a discriminatory way*, among various entities for the same type of project for similar purposes, *e.g.*, *holding a Federal agency to a higher standard than a local government or private citizen*."[13]

Here, the CMP and its implementing regulations require state agencies to review state permit activities for consistency with the CMP policies, and require NYSDOS to monitor and supervise those consistency reviews.[14] In the words of the pertinent federal regulation, NYSDOS "ensures that the State permitting agencies or the State agency review individual projects to ensure consistency with all applicable State management program policies."[15] Accordingly, to the extent a federal consistency determination is required for the renewal of the IP2 and IP3 operating licenses, New York's issuance of state permits related to IP2 and IP3's operations satisfies that requirement.

In short, under the federal CZMA regulations, there is no rigid requirement that a previous review must have been conducted by NYSDOS for a federal license rather than by another authorized New York agency for a state license. When a New York agency with authority delegated by the CMP has previously reviewed "the activities" for which a federal license renewal is sought, the renewal requires no further consistency review unless the renewal "will cause . . . substantially different coastal effects."[16]

---

[12] 65 Fed. Reg. 77,124, 77,129 (Dec. 8, 2000) (elaborating on 15 C.F.R. § 930.6(c)) (emphasis added).

[13] *Id.* at 77,128 (emphasis added).

[14] *See* CMP pt. II, § 4, at 2-4, 7-9.

[15] 15 C.F.R. § 930.6(c).

[16] *Id.* § 930.51(b)(3), (e).

B. NYSDOS's role in state consistency reviews

NYSDOS's response understates its role in the consistency reviews conducted by other state agencies. In conducting consistency reviews as part of State Environmental Quality Review Act (SEQRA) procedures, state agencies must "complet[e] a coastal assessment form (CAF) in a form prescribed by [NYSDOS]," and "[w]here any question on the CAF is answered yes, a brief and precise description of the nature and extent of the action shall be provided on the CAF, and a copy of the CAF forwarded to [NYSDOS] . . . ."[17] Although NYSDOS "is not authorized to override the [consistency] decisions of its sister agencies," the CMP requires NYSDOS to "work with the agencies and assist them in fulfilling" their obligation to ensure consistency for state permits and approvals.[18] NYSDOS is also required to "[m]onitor[ ]," "track," and "evaluate the consistency determinations made by State agencies," and "[w]hen appropriate, . . . advise the agencies on the consistency of [proposed] actions with the coastal policies.[19] Thus, NYSDOS serves as a "check" on other agencies to ensure they are reviewing state license and permit activities and determining they are consistent with the enforceable policies of the CMP.

NYSDOS also has the obligation or, at minimum, the right to participate in other agencies' SEQRA environmental reviews, including the attendant state consistency reviews, as an "involved" or "interested" agency. Under the SEQRA regulations, the "lead" agency is the state agency with principal responsibility for approving a proposed action and conducting the environmental review, including the state consistency review.[20] But other agencies with relevant jurisdiction are required to participate in the review as "involved" agencies. An "involved" agency "has the responsibility to provide the lead agency with information it may have that may assist the lead agency in [its review]."[21] Moreover, any state agency may "participate in the review process" as an "interested" agency "because of its specific expertise or concern about the proposed action."[22] "Interested agencies are strongly encouraged to make known their views on the action, particularly with respect to their areas of expertise and jurisdiction."[23] As explained in more detail below, NYSDOS was designated as an "involved" agency in at least one previous review of IP3 and was, at minimum, encouraged to participate as an "interested" agency in the other previous reviews of IP2 and IP3.

---

[17] 19 NYCRR § 600.4. Examples of CAFs regarding IP2 and/or IP3 are attached to Entergy's Reply to NRC Request for Additional Information Regarding Supplement to Environmental Report (Sept. 11, 2012) (hereafter "Entergy's RAI Response") as Exhibit 1 at ETR000027-28, Exhibit 2 at 1-2, and Exhibit 7 at ETR000212-14.

[18] CMP pt. II, § 4, at 9.

[19] *Id.* at 3.

[20] *See* 6 NYCRR § 617.2(u); *see also id.* §§ 617.9(b)(5)(vi), 617.9(b)(8), 617.11(e); 19 NYCRR § 600.4(a)-(b).

[21] 6 NYCRR §§ 617.2(s), 617.3(e).

[22] *Id.* § 617.2(t).

[23] *Id.* § 617.3(e).

II. Previous Reviews of IP2 and IP3

NYSDOS misses the mark by asserting the "NRC's approval of the transfer of the licenses [to Entergy] did not involve any inquiry into the operations of the nuclear power facilities," and that "[n]o federal consistency [review] of the operating licenses for IP2 or IP3 has ever taken place."[24] The record undermines these claims. Indeed, multiple New York agencies reviewed the operations of IP2 and IP3 for license transfers and permit applications. For reasons explained above, these qualify as previous reviews under CZMA regulations. In any event, NYPA did use the *federal* consistency assessment form for the transfer of IP3.[25]

A. Previous reviews of the operations of IP2 and IP3

NYSDOS is incorrect in its assertion that previous reviews of IP2 and IP3 did not encompass their operations.[26] The documentation prepared for those reviews demonstrates that they examined the plants' operations in depth.

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

In March 2000, NYPA recorded the results of its consistency review of the transfer of IP3 to Entergy as part of the agency's SEQRA environmental review. The documents make clear that NYPA reviewed not only the transfer itself, but also the existing and future operations of IP3 for consistency with the CMP. In addressing individual CMP policies, NYPA repeatedly recited that, at the time of the transfer, IP3 "operate[d] in compliance with all applicable environmental laws and regulations" and would be "required to continue to do so under any new ownership."[27]

---

[24] NYSDOS Cover Letter to NRC 10.

[25] Entergy's RAI Response, Exhibit 1 at ETR000212-14

[26] NYSDOS Cover Letter to NRC 11-13.

[27] Entergy's RAI Response, Ex. 1 at ETR000025 (re CMP Policy 30); *see also* ETR000024 (re CMP Policy 44: "The prospective buyer will purchase the sites in compliance with all applicable environmental permits and licenses [and] would then be required by law to maintain the sites in compliance with the terms and conditions [thereof]."); *id.* (re CMP Policy 11: "Existing site buildings and structures have been sited and constructed in accordance with all applicable laws and regulations."); ETR000025 (re CMP Policy 30: "The prospective buyer will purchase the sites in compliance with existing environmental permits and licenses [and] would then be required to maintain these sites in compliance with the terms and conditions [thereof]."); *id.* (re CMP Policy 38: "The plants are in compliance with all applicable environmental regulations [and] will be required to remain in compliance under any new ownership."); ETR000026 (re CMP Policy 38: "The plants are in environmental compliance, and will be required to remain so under new ownership."); *id.* (re CMP Policy 40: "The plants comply with all applicable environmental regulations [and] will be required to continue to do so under any new ownership, pursuant to applicable environmental regulations."); *id.* (re CMP Policy 40: "IP3 and JAF operate in compliance with all applicable environmental regulations [and] will be required to continue to do so under any new ownership."); *id.* (re CMP Policy 41: "The sites currently operate in compliance with all applicable air quality regulations [and] will be required to continue to do so under any new ownership."); ETR000029 (re CMP Policy 18: "The prospective buyer will acquire the sites in compliance with all applicable environmental laws and regulations. The plants, once under new ownership, will be required to continue to comply with these laws and regulations.").

Moreover, as required by the CMP and state regulations,[28] NYPA's consistency review was part of its environmental assessment under SEQRA, which likewise evaluated IP3's operations. For example, NYPA's summary of the "Reasons Supporting This Determination" (i.e., that the transfer would not have a significant effect on the environment) includes the following:

> The sale, when completed, will involve the transfer to and assumption by Entergy of the ownership and *operation of IP3 . . . in the same manner* as provided for in the state & federal licenses, permits, & approvals currently in effect for these facilities. . . . Entergy can draw upon its extensive operational experience and sound financial resources, and is committed to the continuation of *current operations* without substantial change.[29]

Indeed, NYPA's environmental assessment is replete with analysis of the existing environment at the IP3 site,[30] NYPA's then-existing operation of IP3,[31] and the future operation of IP3 under new ownership.[32]

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

In August 2001, the NYPSC issued an FSEIS in which it determined that "the proposed transfer of IP2 and IP3 to Entergy" is "consistent with applicable coastal zone policies set forth in 19 NYCRR § 600.5 [i.e., the New York coastal policies],"[33] as required by the CMP and SEQRA regulations. The NYPSC later issued an order containing a further written finding of consistency.[34] Like NYPA's consistency review for IP3, the NYPSC's consistency review for IP2 was part of its environmental assessment, as required by the CMP and state regulations.[35]

The NYPSC reviewed not only the transfer of IP2 to Entergy, but also the operations of IP2.[36] And like NYPA's environmental assessment, the NYPSC's environmental assessment for the

---

[28] *See* CMP, pt. II, § 4, at 2-4, 7-9; 19 NYCRR § 600.4(b).

[29] Entergy's RAI Response, Ex. 1 at ETR000003 (emphasis added); *see also id.* at ETR000045 ("The agreement *to operate* the facilities under the terms of all existing regulatory permits *assures continued operation in an environmentally sound and safe manner.*" (emphasis added)).

[30] *See id.* at ETR000006-09, 17-21, 31.

[31] *See id.* at ETR000031-33, 35, 38-40.

[32] *See id.* at ETR000035-40.

[33] *See* Entergy's RAI Response, Ex. 4 at ETR000054.

[34] *See* Entergy's RAI Response, Ex. 5 at 11 ("The Commission's action is consistent with the applicable policies set forth in Article 42 of the Executive Law, as implemented by 19 NYCRR § 600.5 . . . .").

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

[36] *See, e.g.*, Entergy's RAI Response, Ex. 4 at ETR000088 ("[I]t can be reasonably concluded that the IP2 will be *operated* in a superior manner . . . [T]he anticipated changes are likely to have either no or positive environmental

transfer of IP2 contains comprehensive analysis of the existing environment at the site,[37] ConEd's then-existing operation of IP2,[38] and the future operation of IP2 under Entergy's ownership.[39] For example, the NYPSC's review of IP2's operations at the time of the transfer included analysis of (a) the effects of IP2's operations on air resources, water resources, and endangered species;[40] (b) IP2's waste generation, storage, and disposal, its petroleum storage, and its chemical bulk storage;[41] and (c) ConEd's "comprehensive environmental management systems" and environmental permits for IP2.[42]

Likewise, the NYPSC thoroughly reviewed the potential impacts on "New York State's coastal zone" of IP2's future operations under Entergy's ownership,[43] including potential impacts on air quality,[44] water quality,[45] visual aesthetics,[46] land,[47] plants and animals,[48] agricultural land resources,[49] historical and archaeological resources,[50] open space and recreation,[51] transportation,[52] energy,[53] noise and odor emissions,[54] community growth and character,[55] local property taxes,[56] and health and safety.[57]

---

impacts as a result of the sale." (emphasis added)); *id.* at ETR000088 ("While improved *operations* could lead to increased water usage, [IP2] must remain within the bounds of its SPDES and other water permits. Accordingly . . . the Proposed Action [i.e., sale] will not result in any additional potentially significant or likely adverse impacts to the coastal zone in the area surrounding IP2." (emphasis added)).

[37] *See id.* at ETR000057-59.

[38] *See id.* at ETR000059-67 ("highlighting specific environmental regulatory aspects of IP2's [then-existing] operations").

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

[40] *Id.* at ETR000059-63.

[41] *Id.* at ETR000063-65.

[42] *Id.* at ETR000065-67.

[43] *Id.* at ETR000088-89.

[44] *Id.* at ETR000085-86.

[45] *Id.* at ETR000086.

[46] *Id.* at ETR000086-87.

[47] *Id.* at ETR000087-88.

[48] *Id.* at ETR000089.

[49] *Id.* at ETR000089.

[50] *Id.* at ETR000089-90.

[51] *Id.* at ETR000090.

[52] *Id.* at ETR000090-91.

[53] *Id.* at ETR000091.

The declaration of John H. Smolinsky confirms that the NYPSC's review focused on the operation of IP2.[58] Mr. Smolinsky was a leading member of the NYSPSC team that conducted the environmental analysis of the license transfer to Entergy and prepared the FSEIS.[59] Among other details about the review, Mr. Smolinsky states that the NYPSC "specifically determined that *IP2's operation* was consistent with New York's coastal policies."[60]

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

In February 2000, NYSDEC completed a CAF that reflected its determination that renewal of the plants' SPDES permit will not "affect the achievement of [New York's] coastal policies."[61] Because thermal discharges from IP2 and IP3 would necessarily result from use of the Hudson River for cooling operations, NYSDEC's consistency review considered whether the operations of IP2 and IP3 were consistent with the policies of the CMP. This inference from NYSDEC's 2000 consistency review is borne out by its 2003 consistency review, discussed below.

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

In the June 2003 FEIS for the renewal of IP2 and IP3's SPDES permit, NYSDEC recorded the results of another consistency review that reaffirmed its earlier consistency determination from February 2000. Like NYPA and NYPSC's consistency reviews, NYSDEC's consistency review for IP2 and IP3 was part of its SEQRA environmental assessment and encompassed the plant's operations. Indeed, NYSDEC "assessed the resources likely to be impacted by the facilities; evaluated alternative technologies and management strategies to mitigate impacts from each facility's *operations*; and proposed a preferred action intended to reduce the respective impacts."[62] Accordingly, NYSDEC's review evaluated, among other things, "the significance of

---

[54] *Id.* at ETR000091-92.

[55] *Id.* at ETR000092-94.

[56] *Id.* at ETR000094-95.

[57] *Id.* at ETR000095-96.

[58] *See* Entergy's Motion for Leave to Supplement Its Motion for Declaratory Order, Att. 30 ¶¶ 7-8 (May 20, 2013).

[59] *Id.* ¶ 6.

[60] *Id.* ¶ 8.

[61] *See* Entergy's RAI Response, Ex. 2.

[62] Entergy's RAI Response, Ex. 6 at 1 (emphasis added) (describing the Draft EIS ("DEIS")—the FEIS "consists of the original DEIS," plus "comments received on the DEIS; [NYSDEC]'s responses to those comments, [and] expanded discussions of the regulatory setting and alternatives for mitigation of impacts from the operation of [IP2 and IP3]").

entrainment mortality [and] other impacts of *continued operation of [IP2 and IP3]*, including thermal impacts."[63]

B. NYSDOS's participation in previous reviews of IP2 and IP3

According to NYPA, NYSDOS was an "involved" agency in the SEQRA environmental review (including the CMP consistency review) for the transfer of IP3 to Entergy.[64] SEQRA required NYSDOS, as an involved agency, to help determine if the activity fell within the coastal zone and, if so, to ensure that the provisions of 19 NYCRR 600 (including New York's coastal policies) were considered when evaluating the activity.[65] These regulations state that "[n]o State agency *involved* in an action shall carry out, fund or approve the action until it has complied with the provisions of article 42 of the Executive Law."[66] Article 42 of the Executive Law requires that actions "be consistent with the applicable coastal policies."[67] Thus, NYSDOS, as an involved agency, was required to have a meaningful role in NYPA's consistency determination.

NYSDOS's status as an involved agency further required it "to provide the lead agency [i.e., NYPA] with information it may have that may assist the lead agency in making its determination of significance."[68] NYSDOS was also entitled "to impose substantive conditions" on the transfer "following [NYPA's] filing of a final EIS and written findings statement."[69]

At the very least, NYSDOS deferred to NYPA on its consistency determination. Before NYPA conducted its review, it sent letters stating its intention to serve as the lead agency for the review to all involved and interested agencies. In response, "[t]he Department of State [i.e., NYSDOS] had no objection to [NYPA] assuming the role of Lead Agency" for the review process.[70] Thus, NYSDOS was aware of, and did not object to, NYPA's exercise of authority to determine whether the transfer was consistent with the policies in the CMP.

The available written record[71] does not reveal whether NYSDOS was an "involved" agency in connection with the additional previous reviews of IP2 and IP3, but even if it was not, the

---

[63] *Id.* at 4 (emphasis added).

[64] *See* Entergy's RAI Response, Ex. 1 at ETR000003 (listing NYSDOS and NYSDEC under "Other involved agencies (if any)" on SEQRA Negative Declaration form).

[65] 6 NYCRR § 617.6(a)(5).

[66] 19 NYCRR § 600.3(a) (emphasis added).

[67] *Id.* § 600.3(b).

[68] 6 NYCRR § 617.3(e).

[69] *Id.* § 617.3(b).

[70] *See* Entergy's RAI Response, Ex. 1 at ETR000030.

[71] NYSDOS indicates that it has no "documents" describing its involvement in the previous reviews of IP2 and IP3, but also notes that its typical interaction with sister state agencies with respect to consistency reviews is oral.

SEQRA regulations gave NYSDOS the opportunity to participate in those reviews as an "interested" agency. "Interested agencies are *strongly encouraged* to make known their views on the action, particularly with respect to their *areas of expertise and jurisdiction.*"[72] Thus, the regulations undoubtedly gave NYSDOS the opportunity to participate. Entergy lacks clear documentation showing that NYSDOS availed itself of that opportunity. NYSDOS's response does not say, but it concedes that most of its inter-agency exchanges are oral.[73]

NYSDOS likewise approved NYSDEC's review of both IP2 and IP3 when NYSDOS reviewed and concurred with NYSDEC's CAF, indicating on a State Consistency Project Review Sheet that "No Comments [were] Necessary."[74] NYSDOS's approval of NYSDEC's consistency determination, without comment, indicates that NYSDOS was fully aware of, and approved, NYSDEC's determination that the SPDES permit renewal was consistent with the CMP policies.

III. Uniformity of State and Federal Consistency Reviews

As shown (p. 4), the federal regulations require "uniformity" in a state's application of its coastal policies, and expressly prohibit states from holding federal projects to a higher standard than state projects.[75] Consistent with this principle, NYSDOS concedes that "[b]oth federal and state agencies taking action in the coastal area must act consistently with New York's 44 enforceable coastal policies."[76] Although the regulations applicable to state consistency reviews list only 29 of the 44 policies, NYSDOS acknowledges that this is because the remaining 15 policies are contained in other state laws that are binding on the other state agencies.[77] Thus, even according to NYSDOS, consistency reviews conducted by New York state agencies for purposes of state

---

[72] 6 NYCRR § 617.3(e) (emphasis added).

[73] *See supra* note 71.

[74] *See* Entergy's RAI Response, Ex. 3.

[75] *See* 65 Fed. Reg.at 77,128 (explaining that the CZMA principle of "uniformity" prohibits states from "holding a Federal agency to a higher standard than a local government or private citizen," or from otherwise "applying [coastal] policies differently, or in a discriminatory way, among various entities for the same type of project for similar purposes"); *see also* 15 C.F.R. § 930.6(a) (requiring the State agency "to uniformly and comprehensively apply the enforceable policies of the State's management program").

[76] NYSDOS Responses to NRC's Six Inquiries 15 (citing 16 U.S.C. § 1455(d)(15)). The cover letter to NYSDOS's response is less candid, asserting that the consistency reviews conducted by New York state agencies for purposes of state permits and approvals are "fundamentally different" and more "limited" than the consistency reviews conducted by NYSDOS for purposes of federal permits and approvals. NYSDOS Cover Letter to NRC 8. As shown herein, that is simply untrue.

[77] *See* NYSDOS Responses to NRC's Six Inquiries 16; *cf.* CMP, pt. I, at 2 ("Forty-four coastal management policies will apply to State agency decisions . . . . Twenty-nine of these policies are new or have significantly increased enforceability as a result of the State's Waterfront Revitalization and Coastal Resources Act. Fifteen of the policies are from such existing State laws as the Tidal and Freshwater Wetlands Acts.").

approvals and those conducted by NYSDOS for purposes of federal approvals must both review the proposed activities for consistency with the 44 coastal policies of the CMP.[78]

But NYSDOS then contravenes the federal uniformity requirement by arguing that there is a single substantive *difference* between state and federal consistency reviews—namely, that federal consistency requires that the proposed activity be consistent with *all* 44 coastal policies, whereas state consistency can, in certain circumstances, be satisfied even if the activity is *not* consistent with one or more policies.[79] Since NYSDOS makes no claim that the previous state reviews *of IP2 and IP3* found *any* such inconsistency, NYSDOS's argument is, at best, academic.

In any event, NYSDOS's position is inconsistent with the CZMA uniformity principle, which prohibits "*holding a Federal agency to a higher standard than a local government or private citizen.*"[80] If NYSDOS were correct that federal consistency requires full consistency with *all* of the 44 CMP policies, then New York's use of a more flexible standard for state consistency would violate the uniformity principle.

Tellingly, NYSDOS identifies no authority for its assertion that federal consistency requires federal projects to be consistent with every single policy.[81] Indeed, NYSDOS's actual practice *contradicts* its assertion. First, the form consistency certification contained in the Federal Consistency Assessment Form—which *NYSDOS* created and which *NYSDOS* requires applicants seeking federal approvals to complete—certifies only that "[t]he proposed activity complies with New York State's approved Coastal Management Program . . . and will be conducted in a manner consistent with such program."[82] Thus, NYSDOS does *not* require federal applicants to certify compliance with *all* of the 44 CMP policies.

Nor has NYSDOS in fact required perfect consistency. NYSDOS's consistency determinations in connection with the license renewals for three other nuclear generating facilities operating in New York belie its argument that federal consistency forbids "the balancing of the competing policies."[83] In their federal consistency certifications, the owners of both the Nine Mile Point and FitzPatrick facilities expressly acknowledged that the continued operation of those plants under

---

[78] NYPA completed both state *and* federal CAFs in its consistency review for IP3. Because this joint federal-state review required no change in NYPA's analysis, much less in its ultimate conclusion of consistency with the CMP policies, the joint review highlights the lack of any substantive difference between state and federal consistency reviews. *See* Att. 6 to Entergy Mot. at ETR000022-29.

[79] *See* NYSDOS Responses to NRC's Six Inquiries 16-17 (citing 19 NYCRR § 600.4(b) with respect to state consistency).

[80] 65 Fed. Reg.at 77,128 (emphasis added).

[81] *See* NYSDOS Responses to NRC's Six Inquiries 17.

[82] *See* New York State Department of State, Coastal Management Program, *Federal Consistency Assessment Form* 3, *available at* http://www.dos.ny.gov/opd/programs/pdfs/Consistency/FCAF_fillable.pdf.

[83] *See* NYSDOS Responses to NRC's Six Inquiries 17.

renewed licenses *would not* be consistent with several CMP policies.[84] And for *more than 30* of the 44 policies, they and the owners of the R.E. Ginna facility made no claim or showing that renewal *would* be consistent, concluding instead that those policies were inapplicable in the circumstances.[85] In other words, Nine Mile Point, FitzPatrick, and R.E. Ginna certified that license renewal would be consistent with *less than 30%* of the CMP's 44 coastal policies, and two of the three expressly certified that it would be *inconsistent* with one or more policies.

NYSDOS nonetheless concurred with all three certifications, without even mentioning their failure to show consistency with *all* CMP policies.[86] In short, NYSDOS's assertion in its response that federal consistency requires a proposed activity to be consistent with *every* CMP policy is invented from whole cloth. To the extent NYSDOS intends to apply that approach to IP2 and IP3, it would cut against years of precedent and would violate the federal prohibition against "applying [coastal] policies differently, or in a discriminatory way, among various entities for the same type of project for similar purposes."[87]

More importantly for present purposes, NYSDOS's assertion provides no basis for distinguishing federal consistency from state consistency—*neither* of which requires consistency with each and every policy. NYSDOS's reliance on this non-existent requirement as the *only* substantive difference between state and federal consistency reviews violates the uniformity requirement of the federal regulations, is unsupported by the CMP, and is contradicted by the empirical evidence from other nuclear power plant consistency reviews.

IV. Substantial Changes to the Coastal Environment and the CMP

Like New York's Answer to Entergy's motion for a declaratory order, NYSDOS's response to the Staff's request for information fails to identify *any* substantial change in the coastal environment since the previous reviews of IP2 and IP3.[88] Here, the Staff specifically asked NYSDOS to "state

---

[84] *See* Att. 10 to Entergy Motion for Declaratory Order (July 30, 2012) ("Entergy Mot.") at ETR000155 (Nine Mile Point Nuclear Station, Federal Consistency Certification) (explaining that heightened security concerns will preclude the public recreational use of coastal resources mandated by policies 21 and 22); Att. 11 to Entergy Mot. at ETR000194 (James A. FitzPatrick Nuclear Power Plant, Federal Consistency Certification) (same as to policy 9). An affiliate of Entergy is the licensed operator of the FitzPatrick plant.

[85] *See* Chart attached hereto as Ex. A; *see also* Att. 9 to Entergy Mot. at ETR000129-31 (R.E. Ginna Nuclear Power Plant, Federal Consistency Certification); Att. 10 to Entergy Mot. at ETR000153-56 (Nine Mile Point Nuclear Station, Federal Consistency Certification); Att. 11 to Entergy Mot. at ETR000193-99 (James A. FitzPatrick Nuclear Power Plant, Federal Consistency Certification).

[86] *See* Att. 12 to Entergy Mot. (Letter from Sally Ball, NYSDOS, to Jim Costedio, Entergy Nuclear, concurring with the FitzPatrick certification); Att. 13 to Entergy Mot. (Letter from Sam Messina, NYSDOS, to Robert C. Mecredy, Rochester Gas and Electric Corporation, concurring with the Ginna certification); Att. 14 to Entergy Mot. (Letter from Jeff Zappieri, NYSDOS, to Timothy J. O'Connor, Constellation Energy, concurring with the Nine Mile Point certification).

[87] 65 Fed. Reg.at 77,128 (elaborating on 15 C.F.R. § 930.6(a)).

[88] *See* NYSDOS Responses to NRC's Six Inquiries 21-22.

if you believe there were any substantial changes in the coastal environment."[89] NYSDOS identified none.

NYSDOS likewise fails to identify any substantial change to the CMP or modification to the CMP's policies. Although NYSDOS identifies several "routine program changes" to the CMP, it makes no attempt to argue that any of those changes is "substantial" or relevant to IP2 and IP3.[90]

NYSDOS does note, however, that many laws have changed since IP2 and IP3 began operations. Those changes in law are not responsive, however, to the Staff's questions about changes in *the coastal environment*. Further, those changes occurred before the previous consistency reviews cited by Entergy.

V. The CMP Exempts IP2 and IP3 From Further Consistency Review

Although asked by the NRC Staff, NYSDOS failed to offer any reasons why the CMP's grandfathering provisions do not exempt IP2 and IP3 from consistency review. Under the heading "Section 9 – Special Federal Program Requirements," the New York CMP states that "projects for which a substantial amount of time, money and effort have been expended . . . 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 CZMA.[91] To carry out this requirement, the CMP grandfathering provision exempts from consistency review projects meeting either of two criteria. First, the CMP exempts a project if it was identified as grandfathered under SEQRA at the time of SEQRA's enactment in 1976.[92] Second, the CMP exempts a project if a "final Environmental Impact Statement" has been prepared prior to the "effective date" of the DOS regulations at 19 NYCRR Part 600; that is, September 28, 1982.[93]

IP2 and IP3 are not subject to the consistency review provisions of the CMP because both actions were "grandfathered" under SEQRA at the time of its enactment. By the time SEQRA became effective on September 1, 1976, IP2 and IP3 had long since received their NRC construction permits, completed construction, and obtained their final NRC operating licenses, which were issued on September 28, 1973, and December 12, 1975, respectively. All relevant NRC, state, and municipal authorizations necessary for the operation of IP2 and IP3 were complete before September 1, 1976. Thus, the plants are grandfathered under SEQRA and consequently under the CMP.

---

[89] Letter from David J. Wrona, Chief, Envtl. Review & Guidance Update Branch, NRC, to George Stafford, NYSDOS, at Question No. 4(b) (Dec. 6, 2013).

[90] *See* NYSDOS Responses to NRC's Six Inquiries 21-22.

[91] CMP pt. II, § 9, at 1.

[92] *Id.*

[93] *Id.*

The EIS exemption also applies to IP2 and IP3. IP2 and IP3 were fully evaluated in final EISs issued by the NRC in 1972 and 1975, respectively, both well before the "grandfathering date" of September 28, 1982. Although both were federal EISs, New York considers a state and federal EIS to be equivalent as a matter of law.[94]

Entergy petitioned NYSDOS for a Declaratory Ruling that IP2 and IP3 met both of the CMP's grandfathering provisions and, therefore, are exempt from federal consistency review. On January 9, 2013, NYSDOS issued an "advisory" response that the facilities are not grandfathered, and on December 13, 2013, the New York Supreme Court, Albany County, affirmed NYSDOS's determination. Entergy has appealed to the New York Supreme Court, Appellate Division, Third Department. Briefing is complete, but no argument date has been set. Entergy does not expect a decision before early 2015.

VI. Conclusion

As shown, NYSDOS's unqualified position that only a federal consistency review by NYSDOS is a sufficient previous review for purposes of 15 C.F.R. § 930.51(b)(3), is inconsistent with the federal regulations, the CMP drafted by NYSDOS, NYSDOS's consistency review of three other nuclear plant license renewals, and principles of federalism. Entergy would welcome the opportunity, either in person or in writing, to answer any additional questions by NRC Staff about the consistency review process relating to IP2 and IP3.

Sincerely,

Bobby R. Burchfield

Attachments

cc: Linda M. Baldwin, General Counsel, NYSDOS
Sherwin E. Turk, Office of the General Counsel, NRC

[94] *See* 6 NYCRR 617.15(a) ("[W]hen a draft and final EIS for an action has been duly prepared under the National Environmental Policy Act of 1969, an agency has no obligation to prepare an additional EIS under [SEQRA], provided the Federal EIS is sufficient to make findings under [SEQRA]."); *see also* Letter to the Hon. Maria E. Villa and Daniel P. O'Connell from NYSDEC Asst. Counsel Mark D. Sanza (Mar. 25, 2011) (advising that NRC's final supplemental EIS is sufficient for findings under SEQRA) (attached hereto as Ex. B).

Consistency Certifications for License Renewals of New York Nuclear Facilities

Policy	Ginna	Nine Mile Point	FitzPatrick	Indian Point
1. Restore deteriorated and underutilized waterfront areas.	Inapplicable	Inapplicable	Inapplicable	Consistent*
2. Facilitate the siting of water-dependent uses and facilities on or adjacent to coastal waters.	Inapplicable	Inapplicable	Inapplicable	Consistent*
3. Further develop the state's major ports and encourage siting that supports waterborne transportation.	Inapplicable	Inapplicable	Inapplicable	Inapplicable
4. Encourage traditional uses and activities that provide smaller harbor areas with their unique maritime identity.	Inapplicable	Inapplicable	Inapplicable	Inapplicable
5. Encourage the location of development in areas where public services and essential facilities are adequate.	Inapplicable	Inapplicable	Inapplicable	Consistent*
6. Expedite permit procedures to facilitate the siting of development at suitable locations.	Inapplicable	Inapplicable	Inapplicable	Inapplicable
7. Protect significant coastal fish and wildlife habitats.	Inapplicable	Consistent	Consistent	Consistent*
8. Protect fish and wildlife resources in the coastal area from hazardous wastes and other pollutants.	Consistent	Consistent	Consistent	Consistent*
9. Expand recreational access to fish and wildlife resources in the coastal area.	Inapplicable	Inapplicable	Not Consistent	Consistent*
10. Further develop commercial finfish, shellfish, and crustacean resources in the coastal area.	Inapplicable	Inapplicable	Inapplicable	Consistent*
11. Structures will be sited in the coastal area so as to minimize flooding and erosion.	Inapplicable	Inapplicable	Inapplicable	Consistent*
12. Activities in the coastal area will minimize flooding and erosion by protecting natural protective features.	Consistent	Consistent	Inapplicable	Consistent*
13. Erosion protection structures shall be constructed or reconstructed only if they have a reasonable probability of controlling erosion for at least thirty years.	Inapplicable	Inapplicable	Inapplicable	Consistent*
14. Activities shall not increase erosion or flooding.	Inapplicable	Inapplicable	Inapplicable	Consistent*
15. Mining, excavation or dredging in coastal waters shall not increase erosion of adjacent land or interfere with natural processes which supply beach materials.	Inapplicable	Inapplicable	Inapplicable	Inapplicable

Policy	Ginna	Nine Mile Point	FitzPatrick	Indian Point
16. Public funds shall only be used for necessary erosion protective structures where the public benefits outweigh the long term costs.	Inapplicable	Inapplicable	Inapplicable	Inapplicable
17. Non-structural measures to minimize flooding and erosion shall be used whenever possible.	Consistent	Consistent	Consistent	Consistent*
18. Proposed major actions in the coastal area must give full consideration to the interests of the state and its citizens.	Inapplicable	Inapplicable	Inapplicable	Consistent*
19. Protect access to public water-related recreation resources.	Inapplicable	Inapplicable	Inapplicable	Consistent*
20. Access to publicly-owned shore lands shall be provided in a manner compatible with adjoining uses.	Inapplicable	Inapplicable	Inapplicable	Consistent*
21. Water-dependent and water-enhanced recreation will be encouraged and facilitated.	Inapplicable	Not Consistent	Inapplicable	Consistent*
22. Development will provide for water-related recreation if compatible with the development's primary purpose.	Inapplicable	Not Consistent	Inapplicable	Consistent*
23. Protect sites of historical, architectural, archaeological or cultural significance.	Inapplicable	Inapplicable	Inapplicable	Consistent*
24. Prevent impairment of scenic resources of statewide significance.	Inapplicable	Inapplicable	Inapplicable	Consistent*
25. Protect resources that contribute to the overall scenic quality of the coastal area.	Inapplicable	Inapplicable	Inapplicable	Consistent*
26. Protect agricultural lands in the coastal area.	Inapplicable	Inapplicable	Inapplicable	Inapplicable
27. Siting of major energy facilities in the coastal area will be based on public energy needs, environmental compatibility, and the need for a shorefront location.	Inapplicable	Inapplicable	Inapplicable	Inapplicable
28. Ice management practices shall not interfere with the production of hydroelectric power, damage significant fish and wildlife habitats, or increase erosion or flooding.	Inapplicable	Inapplicable	Inapplicable	Inapplicable
29. Encourage and ensure the environmental safety of the development of energy resources on the outer continental shelf.	Inapplicable	Inapplicable	Inapplicable	Inapplicable
30. Discharge of pollutants into coastal waters will conform to state and national water quality standards.	Consistent	Consistent	Consistent	Consistent*

Policy	Ginna	Nine Mile Point	FitzPatrick	Indian Point
31. State coastal area policies will be considered in reviewing coastal water classifications and modifying water quality standards.	Inapplicable	Inapplicable	Inapplicable	Inapplicable
32. Encourage the use of alternative or innovative sanitary waste systems in small communities.	Inapplicable	Inapplicable	Inapplicable	Inapplicable
33. Best management practices will be used to control of stormwater runoff and sewer overflows draining into coastal waters.	Consistent	Consistent	Consistent	Consistent*
34. Discharge of waste materials into coastal waters from vessels will be limited to protect the coastal environment.	Inapplicable	Inapplicable	Inapplicable	Inapplicable
35. Dredging and filling in coastal waters will be undertaken in a manner that meets existing State permit requirements, and protects the coastal environment.	Inapplicable	Inapplicable	Inapplicable	Consistent*
36. Activities related to the shipment and storage of hazardous materials will be conducted in a manner that will minimize spills into coastal waters.	Consistent	Consistent	Consistent	Consistent*
37. Best management practices will be used to minimize non-point discharges of excess nutrients, organics and eroded soils into coastal waters.	Inapplicable	Inapplicable	Inapplicable	Consistent*
38. Surface water and groundwater supplies will be protected.	Consistent	Consistent	Inapplicable	Consistent*
39. The transport, storage, treatment and disposal of solid wastes within coastal areas will be conducted in a manner that protects the coastal environment.	Consistent	Consistent	Consistent	Consistent*
40. Effluent discharged into coastal waters will not be unduly injurious to fish and wildlife and shall conform to state water quality standards.	Consistent	Consistent	Consistent	Consistent*
41. Land use or development in the coastal area will not cause a violation of national or state air quality standards.	Inapplicable	Inapplicable	Consistent	Consistent*
42. Coastal management policies will be considered in reclassifying land areas pursuant to the prevention of significant deterioration regulations of the federal CAA.	Inapplicable	Inapplicable	Inapplicable	Inapplicable

New York State Department of Environmental Conservation
Office of General Counsel, 14th Floor
625 Broadway, Albany, New York 12233-1500
Fax: (518) 402-9018 or (518) 402-9019
Website: www.dec.ny.gov

Joe Martens
Commissioner

March 25, 2011

VIA ELECTRONIC MAIL
AND HAND DELILVERY

Hon. Maria E. Villa
Hon. Daniel P. O'Connell
Administrative Law Judges
New York State Department of
Environmental Conservation
Office of Hearings and Mediation Services
625 Broadway, 1st Floor
Albany, New York 12233-1550

Re: ***Entergy Nuclear Indian Point Units 2 and 3***
CWA Section 401 WQC Application Proceeding
NRC – Atomic Safety and Licensing Board's Dec. 3, 2010 FSEIS

Dear ALJs Villa and O'Connell:

This constitutes Department staff's filing in compliance with the *Ruling on Proposed Issues for adjudication and Petitions for Party Status* dated December 13, 2010, issued in the Entergy Indian Point §401 WQC proceeding ("Issues Ruling"), and with item 3 of the Scheduling Order attached to the Issues Ruling. Specifically, page 9 of the Issues Ruling and item "3" of the Scheduling Order directed Department staff to:

> ". . . advise the ALJs and the parties as to whether the Nuclear Regulatory Commission, Atomic Safety and Licensing Board's December 3, 2010 Final Supplemental Environmental Impact Statement ('FSEIS') is sufficient for Department Staff to make the findings required by Section 617.11 of 6 NYCRR."[1]

Thereafter, with a submission dated January 28, 2011, Department staff complied with this directive. Subsequently, and also pursuant to the Issues Ruling, five (5) parties to this proceeding responded to Department staff's January 28, 2011 filing: (1) New York City Department of Environmental Protection; (2) Entergy; (3) Riverkeeper; (4) Central Hudson Gas & Electric Corporation; and (5) the Town of Cortlandt. In accordance with the Issues Ruling, Department staff submits this letter in reply to those responses.

[1] Department staff notes that the December 3, 2010 FSEIS was prepared by staff of the NRC, not by the Atomic Safety and Licensing Board itself, and that such FSEIS is not yet actually "final."

As commentators on this topic have stated, "SEQRA provides that no state EIS is required as long as an EIS has been prepared under NEPA. This holds true regardless of whether the New York agency participates in preparing the federal EIS or not. If it does, SEQRA compliance is 'coordinated with and made in conjunction with federal requirements in a single environmental reporting procedure.'" Gerrard, Ruzow and Weinberg, *Environmental Impact Review in New York*, Vol. 2, 8-21 to 8-26, § 8.04 (2009); see also *Hudson River Sloop Clearwater, Inc. v. Dept. of the Navy*, 836 F.2d 760 (2d Cir. 1988).

Contrary to statements by petitioners New York City Department of Environmental Protection and Central Hudson Gas & Electric Corporation, the Department is not required under 6 NYCRR 617.15 to make an evidentiary type submission that the NRC's EIS is sufficient. Rather, a presumption is contained in ECL §8-0111, as implemented by 6 NYCRR §617.15, that the Federal EIS will indeed serve as the environmental impact statement for the State SEQRA proceeding. See McKinney's Consolidated Laws of New York Annotated, Book 17.5, Practice Commentaries to ECL §8-0111 (Thomson/West 2006); see also, *Environmental Impact Review in New York, supra*. At the same time, and as permitted by 6 NYCRR §617.15, the lead agency may supplement the NEPA EIS so it can make whatever SEQRA findings that would not be supported by an EIS prepared pursuant to NEPA.[2] Moreover, a federal agency's final decision "shall not be controlling on any state . . . agency decision on the action, but may be considered by the agency." 6 NYCRR §617.15(e).

Accordingly, Department staff's letter dated January 28, 2011, adequately responded to the ALJ's question set out in the December 13, 2010 Issues Ruling that the NRC FSEIS would be sufficient as supplemented by documents and materials recited in Department staff's letter, including the supplement to be prepared in connection with the SPDES permit proceeding which will cover SEQRA-related issues previously identified by the Assistant Commissioner including, among others, potential impacts of implementing BTA and alternatives. See *In the Matter of a Renewal and Modification of a State Pollutant Discharge Elimination System ("SPDES") Permit Pursuant to Environmental Conservation Law ("ECL") Article 17 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") Parts 704 and 750 et seq. by Entergy Nuclear Indian Point*, Interim Decision of the Assistant Commissioner (Aug. 13, 2008), at 15 and 22.

With regard to the actual contents of the NRC's FSEIS, the abstract to the document states as follows: "This SEIS includes the NRC staff's analysis which considers and weighs the environmental impacts of the proposed action, the environmental impacts of alternatives to the proposed action, and mitigation measures available for reducing or avoiding adverse impacts. It also includes the NRC staff's recommendation regarding the proposed action." Notably, the NRC deferred to the Department on entrainment and impingement BTA issues (which have

[2] Section 617.15 of 6 NYCRR follows from the general rule set out in the Department's SEQRA regulations that "[a]gencies must carry out the terms and requirements of this Part with minimum procedural and administrative delay, must avoid unnecessary duplication of reporting and review requirements by providing, where feasible, for combined or consolidated proceedings, and must expedite all SEQR proceedings in the interest of prompt review." 6 NYCRR §617.3(h); see also *Jackson v. New York State Urban Development Corporation*, 67 NY2d 400, 419 (1986).

been identified for analysis and adjudication in the Department's §401 WQC and SPDES permit proceedings). While Department staff and the various parties to this proceeding may take issue with certain other analyses and conclusions presented in the NRC staff's FSEIS, Department staff believes that the FSEIS is adequate with supplementation through the hearing record on the issues reserved by the NRC to the Department, i.e., those related to water quality.

Thus, one should not lose sight of the fact that the §401 WQC application and denial – which is the subject matter of this proceeding – was made in connection with, and is only one part of, NRC's overall re-licensing process for Entergy Indian Point Units 2 and 3. Within the context of that process, the limited question put to the Department on Entergy's §401 WQC application was whether the proposed re-licensing and continued operation of Indian Point Units 2 and 3 for an additional 20 years would contravene State water quality standards.[3]

Aside from Entergy's argument that SEQRA does not apply to a §401 WQC application, the parties, with the exception of Riverkeeper, argue that Department staff's January 28, 2011 list of supplemental materials is too open ended and that NRC staff's FSEIS is, therefore, insufficient for the Department to make findings required by 6 NYCRR §617.11. This, of course, begs the question since Department staff is not arguing against having the NRC's FSEIS supplemented. The only issue here is with what materials the NRC FSEIS should be supplemented for purposes of this proceeding. In this regard, the issues that the respective parties claim need additional treatment consist of impacts associated with the construction and operation of a closed-cycle cooling system at Indian Point. Yet, the NRC specifically deferred to the Department on that issue and it has already been determined that the impacts from such a system will be assessed in the supplemental EIS prepared in the Department's SPDES permit administrative proceeding. See *In the Matter of a Renewal and Modification of a State Pollutant Discharge Elimination System ("SPDES") Permit Pursuant to Environmental Conservation Law ("ECL") Article 17 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") Parts 704 and 750 et seq. by Entergy Nuclear Indian Point*, Interim Decision of the Assistant Commissioner (Aug. 13, 2008). In the context of this proceeding, the supplement would thus focus on the assessment of potential impacts associated with answering the question of whether Entergy was appropriately denied a WQC for the continued operation of Indian Point Units 2 and 3 based on applicable water quality standards pursuant to CWA §401 and 6 NYCRR §608.9.

With respect to the other materials cited in Department staff's January 28, 2011 submission, the Department has historically used administrative hearing records to supplement the SEQRA record. See Ruzow and Marsh, *Hearing Reports Under the Environmental Conservation Law: Their Function, Preparation, and Importance*, 2 Pace Env'tl. Law Review, Vol. 2, Issue 2, at 200 (1985); see also 6 NYCRR §624.13(c).

---

[3] Riverkeeper and Entergy both raise a threshold question, namely the applicability of SEQRA to CWA §401 WQC proceedings, citing *Rahm v. Diamond* (32 NY2d 34), *Power Authority of the State of New York v. Williams* (60 NY2d 315), and *Fourth Branch Association v. Dept. of Envtl. Conservation* (146 Misc.2d 334). These decisions refer to the Federal Energy Regulatory Commission's jurisdiction in hydropower cases under the Federal Power Act which specifically sets limits on the Department's scope of inquiry on a CWA §401 WQC application rather than on the certification itself. As a result, these cases are not uniformly dispositive here as they do not answer the preemption question with respect to the Nuclear Regulatory Commission's jurisdiction.

We trust this satisfies the inquiry raised in the Issues Ruling. Thank you for your courtesies and attention to this matter.

Very truly yours,

Mark D. Sanza
Assistant Counsel

Via U.S. Mail and E-Mail:

Elise N. Zoli, Esq. — ezoli@goodwinprocter.com
John C. Englander, Esq. — jenglander@goodwinprocter.com
Goodwin Procter, LLP — rfitzgerald@goodwinprocter.com
Exchange Place
Boston, Massachusetts 02109

Rebecca Troutman, Esq. — rtroutman@riverkeeper.org
Riverkeeper, Inc.
20 Secor Road
Ossining, New York 10562

Melissa-Jean Rotini, Esq. — mjr1@westchestergov.com
Assistant County Attorney
County of Westchester
Room 600, 148 Martine Avenue
White Plains, New York 10601

Richard L. Brodsky, Esq. — richardbrodsky@gmail.com
2121 Saw Mill River Road
White Plains, New York 10607

Daniel Riesel, Esq. — driesel@sprlaw.com
Sive, Paget & Riesel, P.C. — vshiah@sprlaw.com
460 Park Avenue, 10th Floor
New York, New York 10022

Sam M. Laniado, Esq. — sml@readlaniado.com
David B. Johnson, Esq. — dbj@readlaniado.com
Read and Laniado, LLP
25 Eagle Street
Albany, New York 12207-1901

Michael J. Delaney, Esq.
Director, Energy Regulatory Affairs
New York City Department of
Environmental Protection
59-17 Junction Boulevard, 19th Floor
Flushing, New York 11373-5108
mdelaney@dep.nyc.gov

Robert J. Glasser, Esq.
Robert J. Glasser, P.C.
284 South Avenue
Poughkeepsie, New York 12601
Bob.glasser@robertjglasserpc.com

Via E-Mail Only:

Ned Sullivan, President
Hayley Mauskapf, Esq.
Paul Schwartzberg
Scenic Hudson, Inc.
nsullivan@scenichudson.org
hmauskapf@scenichudson.org
Schwartzberg@scenichudson.org

Steven Blow, Esq.
New York State Department of Public Service
steven_blow@dps.state.ny.us

Karl S. Coplan, Esq.
Daniel E. Estrin, Esq.
Pace Environmental Litigation Clinic, Inc.
kcoplan@law.pace.edu
destrin@law.pace.edu

Deborah Brancato, Esq.
Phillip H. Musegaas
Nicholas Goldstein
Katherine Leisch
Scott Troia
Riverkeeper, Inc.
dbrancato@riverkeeper.org
phillip@riverkeeper.org
ngoldstein@law.pace.edu
kleisch@law.pace.edu
stroia@law.pace.edu

Geoffrey H. Fettus, Esq.
Natural Resources Defense Council
gfettus@nrdc.org

Frank V. Bifera, Esq.
Hiscock & Barclay, LLP
fbifera@hblaw.com

Kelli M. Dowell, Esq.
Entergy Services, Inc.
kdowell@entergy.com

FDMS#394320v1