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July 25, 2014

Mr. David J. Wrona, Chief
United State 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 License
Renewal Application with New York State Coastal Management Program – Request to Strike and
Disregard July 15, 2014 Letter from Entergy to NRC Staff

Dear Mr. Wrona:

On May 30, 2014, the New York Department of State (NYSDOS) sent a letter to you containing its responses to six questions posed to it by NRC staff. By letter dated July 15, 2014, McDermott, Will and Emery, attorneys for Entergy, gratuitously wrote to you in an attempt to “assist [NRC] staff” by anticipating that NRC staff would seek their opinion. As the applicant for the license renewal for Indian Point 2 and 3, Entergy is not a participant to any part or portion of a 15 C.F.R. § 930.51(e) consultation, which is limited to “[t]he determination of substantially different coastal effects under paragraphs (b)(3), and (c) of [15 C.F.R. § 930.51] [a]s made on a case-by-case basis by the Federal agency after consulting with the State agency, and applicant . . . [and] [t]he Federal agency shall give considerable weight to the opinion of the State agency.” Accordingly, we respectfully request that NRC staff strike Entergy’s letter from its consideration of this matter, and that the contents of said letter be given no weight in the 15 C.F.R. § 930.51(e) consultation process. However, in the event that NRC staff does not strike the submission, the Department requests that the following brief response be considered.

Issuance of State Consistency Determinations or State Permits Cannot Constitute Federal Consistency Concurrence in New York State

New York’s Coastal Management Program does not recognize any state permits or State agency consistency decisions as constituting federal consistency concurrence.¹ The Coastal Management Program authorizes NYSDOS to conduct federal consistency review and has never delegated federal consistency review authority to other state agencies. Entergy’s letter misconstrues the law, particularly regarding whether consultation pursuant to 15 CFR 930.51 is appropriate or warranted. Importantly, Entergy misapprehends the requirements of the Coastal Zone Management Act (CZMA). All coastal states participating in the CZMA are required to ensure their state agencies abide by the enforceable

¹ See 15 C.F.R. § 923.43(b)(1); compare 15 C.F.R. § 923.43(b)(2).

policies² of their respective Coastal Management Program, before federal agencies can be required to abide by those same policies.³ State agencies must either conduct consistency review of their own actions or apply for a centralized state coastal permit to make the coastal policies enforceable at the state level. New York's program uses a networked approach, codified in NY Executive Law Article 42 and other statutes and regulations, to provide a "mechanism to ensure that all state agency actions will adhere to the program."⁴ New York also "integrates" municipally-prepared local waterfront revitalizations into the State's program. Entergy distorts this state level review by equating it with NYSDOS's specific and singular responsibility for federal consistency review.

As we have explained on several occasions, state agency consistency certification regarding state agency actions pursuant to New York Executive Law, Article 42 and a NYSDOS federal consistency review of a federal agency action are not equivalent or interchangeable. Entergy overstates NYSDOS's role in the state agency consistency process. NYSDOS offers assistance to other state agencies on consistency matters when requested. NYSDOS does not have the power to interfere in or override any other state agency's consistency reviews. Moreover, NYSDOS is not an involved or interested agency under SEQRA when other agencies conduct their reviews.

NYSDOS is the only New York State agency with statutory and programmatic authority to carry out federal consistency review.⁵ Contrary to Entergy's assertions, NYSDOS is the only state agency authorized by the Department of Commerce to conduct federal consistency review of federal agency actions under the CZMA. While the law provides an option to have a state permit constitute a federal consistency or the possibility of delegating the designated State agency authorities,⁶ New York did not choose that option when developing and adopting its Coastal Management Program. Rather, New York has one 15 C.F.R. § 930.11(o) "designated State agency" to carry out the federal consistency reviews of federal agency actions and activities, and that agency is NYSDOS.

Consultation Pursuant to 15 CFR 930.51 Is Not Warranted

As we explained in our May 30, 2014 response to NRC's inquiry, a previous federal consistency review of a federally licensed activity is necessary to invoke the consultation process under 15 CFR § 930.51 when the federal permit or license is being considered for renewal. No previous consistency review of the operating licenses took place in the original Indian Point licensing proceedings. Indeed, New York did not even have a federally approved Coastal Management Program until 1982, well after the operating licenses were issued in the 1970s. For this reason, 15 CFR 930.51 does not apply and, as we explained previously, consultation is not warranted for the consistency review of Entergy's Indian Point license renewal applications pending before the NRC.

²An "enforceable policy" is a state policy that is legally binding under state law (e.g., through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions), and by which a state exerts control over private and public coastal uses and resources, and which are incorporated in a state's federally approved Coastal Management Program. 16 U.S.C. §304(6a) and 15 C.F.R. § 930.11(h).

³ See 15 C.F.R. Part 923 for Coastal Management Program requirements.

⁴ 15 C.F.R. § 923.1(c)(8); *see* Article 42, New York Executive Law § 919; 19 N.Y.C.R.R. §§ 600.3 and 600.4.

⁵ In 1975, the New York State Legislature appointed NYSDOS as the "single state agency" to accept federal funding to prepare and administer the State's Coastal Management Program. L. 1975, c. 464, § 47. Governor Hugh L. Carey codified NYSDOS's administration of the Coastal Management Program by signing the Waterfront Revitalization and Coastal Resources Act (Waterfront Act) in 1981. Executive Law Article 42, added by L. 1982 c. 849 and c. 841; *see also*, 15 C.F.R. § 923.47. The NYS CMP identifies NYSDOS as the only New York State agency empowered to conduct federal consistency on behalf of New York State and to be eligible to receive CZMA grants to administer the NYS CMP. *See*, NYS CMP at pp. II-4-2 and 3.

⁶ *See* 15 C.F.R. § 930.6.

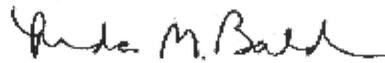
NRC Staff Lack Jurisdiction to Decide This Matter

Moreover, the NRC Staff are without jurisdiction to decide whether various State consistency determinations issued over a number of years on unrelated matters, cobbled together, satisfy the requirement for a federal consistency certification by the designated "State agency" under the CZMA, 16 U.S.C. § 1456(c)(3)(A). Not even NRC would accede to Entergy's argument that the sale of nuclear facilities and transfer of operating licenses approximates the comprehensive multi-year review involved in issuing or re-issuing an operating license for a nuclear facility.⁷

Entergy's articulated concern regarding balancing in New York's application of its enforceable policies during a federal consistency review is unwarranted. New York's coastal policies incorporate balance through federal approval of the State's Coastal Management Program. When state policies are incorporated into a Coastal Management Program, the Coastal Management Program is evaluated by the Secretary of Commerce to ensure the policies balance the objectives of the CZMA and give priority consideration to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation. See 16 USC §303(2)(D). To the extent that Entergy's concerns are not addressed by New York's eventual coastal consistency determination, currently expected on or before December 31, 2014; Entergy may seek review of that determination by the U.S. Secretary of Commerce.⁸

New York has been clear in its communications with the NRC and Entergy: Indian Point has never been subject to federal coastal consistency review, and that review is required by law in conjunction with Entergy's license renewal application to the NRC. If you have further questions, please do not hesitate to contact us.

Sincerely,



Linda M. Baldwin
General Counsel

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cc: McDermott, Will and Emery

⁷ Compare the NRC regulations pertaining to a license transfer (10 C.F.R. part 2 subpart M) with the comprehensive regulations addressing operating license renewal (10 C.F.R. part 54).

⁸ 16 USC § 1456 (c)(3)(A) and 15 C.F.R. Part 930 Subpart H.