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VIA ELECTRONIC MAIL AND FEDERAL EXPRESS OVERNIGHT DELIVERY

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 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 ongoing consultation process required by 15 C.F.R. § 930.51(e). This letter responds as appropriate to the letter from the Hon. Linda M. Baldwin, General Counsel of the New York State Department of State ("NYSDOS") dated July 25, 2014 ("Baldwin 7/25/14 Letter"), and summarizes the large and complex record before the Staff on whether further consistency review of Indian Point Nuclear Generating Units Nos. 2 and 3 ("IP2" and "IP3") is necessary.[1]

The issue before the Staff is of utmost importance to this license renewal proceeding. An applicant for a federal license (or license renewal) to conduct in a state's coastal zone an activity listed in the state's coastal management program must show compliance with the Coastal Zone Management Act ("CZMA"). Unless within an exception, the applicant must obtain actual or presumed concurrence by the state with the applicant's certification that the proposed activity is consistent with the state's Coastal Management Plan ("CMP"), or obtain a ruling from the Secretary of Commerce or a court overriding the state's objection. The matter before the Staff involves the *exception* to the requirement of state concurrence found in 15 C.F.R. § 930.51(b)(3).

The Staff's authority to address this issue and Entergy's entitlement to participate are, we respectfully submit, unassailable. Under 15 C.F.R. § 930.51(e), "[t]he determination of

[1] On November 5, 2014, Entergy sent notice to the Nuclear Regulatory Commission and NYSDOS of its withdrawal of its December 17, 2012, consistency certification. By letter of November 21, 2014, NYSDOS objected to the withdrawal. Entergy remains of the view that it has a unilateral right to withdraw the consistency certification. Should it be necessary, Entergy reserves the right to submit a revised consistency certification that includes new information, including at least the Supplemental Final Environmental Impact Statement currently expected in March 2016.

substantially different coastal effects . . . is made on a case-by-case basis by the *Federal agency*"—here, the Nuclear Regulatory Commission—"after consulting with the State agency, and *applicant*." (emphasis added). Further, the Atomic Safety and Licensing Board denied Entergy's motion and NYSDOS's cross motion as premature "[g]iven 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)."[2]

The primary dispute between Entergy and NYSDOS concerns whether any of the consistency reviews on IP2 and IP3 by State agencies other than NYSDOS constitute "previous[] review[s]" as that term is used in 15 C.F.R. § 930.51(b)(3).[3] This issue is governed by National Oceanic and Atmospheric Administration ("NOAA") regulations, which NYSDOS concedes supersede any inconsistent terms of New York law, practice, or understanding.[4]

NYSDOS is correct that the New York CMP designates NYSDOS as the primary agency to conduct federal consistency reviews. NYSDOS may also be correct that "NYSDOS has never conducted a coastal consistency review for Indian Point."[5] But NYSDOS is not correct, as a matter of controlling federal law, that "no amount of aggregated state consistency review or certification by other New York agencies can substitute for the requisite federal consistency review by the NYSDOS."[6] As shown below, this statement is at odds with controlling federal regulations and would undercut important federal policies of avoiding redundant and inconsistent state reviews.

Importance of Reviews by Other State Agencies. The controlling regulation is 15 C.F.R. § 930.51(b)(3), which requires a consistency review for:

> [r]enewals and major amendments of federal license or permit *activities* previously reviewed by the State agency which *will*

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[2] Licensing Board Order, at 4 (June 12, 2013) (emphasis added).

[3] NYSDOS insists that no other State agency is authorized under any circumstances to do a consistency review of an application for a federal permit or license for a project in the New York coastal zone. The CMP does not prescribe such an absolute rule, however, stating that "*[g]enerally*, the Department [of State] 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." New York State Coastal Management Program and Final Environmental Impact Statement ("NY CMP"), at Section II-4, p. 3 (emphasis added), http://www.dos.ny.gov/opd/programs/pdfs/NY_CMP.pdf. In this case, however, the more important question is whether the consistency reviews conducted by other State agencies qualify as "previous[ ] review[s]" for purposes of 15 C.F.R. § 930.51(b)(3), even if conducted for purposes of State licenses or permits. As shown in the text, those other reviews plainly do qualify.

[4] *See* May 30, 2014, Letter from Hon. Linda M. Baldwin to David J. Wrona, at 8 n.32 ("Baldwin 5/30/14 Letter") ("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.").

[5] State of NY Response to Entergy's Request to the Atomic Safety and Licensing Board for A Declaratory Order Concerning Coastal Zone Management Act Issues, at 23 (April 5, 2013) ("NYSDOS ASLB Br.").

[6] *Id.* at 22. *See also* Baldwin 7/25/14 letter at 1 ("New York's Coastal Management Program does not recognize any state permits or State agency consistency decision as constituting federal consistency concurrence.").

> *cause* an *effect* on any coastal use or resource *substantially different* than those originally reviewed by the State agency.

Id. (emphasis added). Notably, this regulation, by its plain language, focuses on "activities previously reviewed." *See id.* The legislative history of the CZMA confirms that Congress placed "[e]mphasis" upon the review of "'*new' activity*."[7] When NOAA promulgated § 930.51(b)(3), it explained that "further review is limited to cases where . . . the *activity* will be *modified substantially* causing *new* coastal zone effects."[8] NOAA continued: "In the event the State agency has previously reviewed a license or permit *activity*, further review is limited to cases where . . . *the activity will be modified substantially* causing new coastal zone effects . . . ."[9] One important purpose of the regulation is to "avoid[ ] unnecessary State agency review."[10]

On the central question whether reviews by State agencies other than NYSDOS can ever be sufficient for issuance of a later federal permit, 15 C.F.R. § 930.6(c) controls and is quite clear:

> *If described in a State's management program*, the issuance . . . of relevant State permits *can constitute the State agency's consistency concurrence* or objection *if* the State agency ensures that the State permitting agencies . . . 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.[11]

When it issued section 930.6(c), NOAA explained: "[i]f 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 regulation would make no sense if every *federal* permit nevertheless required a separate *federal* consistency determination merely because the earlier review was done for a state, not federal, permit. By its terms, section 930.6(c) addresses precisely the situation here of prior reviews by *other state* agencies for *state*, rather than *federal*, permits and projects.

Section 930.6(c) sets forth three conditions which, if each is met, allow state permit issuances to "constitute the State agency's consistency concurrence." Each of those conditions is met.

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[7] S. Rep. No. 92-753 (1972), reprinted in 1972 U.S.C.C.A.N. 4776, 4793-94 (emphasis added).
[8] 44 Fed. Reg. 37,142, 37,150 (June 25, 1979) (emphasis added).
[9] *Id.*
[10] *Id.*
[11] 15 C.F.R. § 930.6(c) (emphasis added).
[12] 65 Fed. Reg. 77,124, 77,129 (Dec. 8, 2000) (emphasis added) (explaining 15 C.F.R. § 930.6(c)).

The first condition of section 930.6(c) is that the process for issuing *state permits* be "described in [the] State's management program." Here, the New York CMP plainly assigns consistency review responsibilities to other New York State agencies in addition to NYSDOS. With respect to the New York State Department of Environmental Conservation ("DEC") the CMP states:

> In its permitting role, DEC reviews most activities that have the potential to impact coastal resources. Those with the potential for significant impact are thoroughly reviewed in connection with the SEQRA process and *can be approved only after DEC has found that the activity will be consistent with the policies of the coastal management program.*[13]

But DEC is not the only State agency required to perform consistency review. The CMP requires *every* New York State agency to assure consistency of its actions and permit determinations with the CMP:

> State agencies, including State created authorities, commissions and boards, operate a number of programs which are critical to and may affect the proper management of New York's coastal resources. In addition to the Departments of State and Environmental Conservation, some of the other agencies include . . . the Public Service Commission; the Power Authority of the State of New York. . . . Some of the land and water activities affected by the agencies' programs include . . . siting of energy facilities. . . . *Thus, agencies of New York State are equipped and are expected to perform a vital role in the implementation of the Coastal Management Program.*
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> Section 919(1) of the Waterfront Revitalization and Coastal Resources Act requires that '. . . actions directly undertaken by State agencies within the coastal area . . . 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 decision-making actions to the coastal policies. . . . *The State agency having jurisdiction over a proposed action is responsible for determining the consistency of that action with the coastal policies.*[14]

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[13] NY CMP, at Section II-4, p. 3 (emphasis added).
[14] *Id.* at 3-4 (emphasis added).

Importantly, 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."[15]

In an effort to distinguish state consistency reviews from federal consistency reviews, NYSDOS asserts that "the concept of balancing" is a "distinguishing feature of State agency consistency review which differs from federal consistency review."[16] By this, NYSDOS appears to mean that applicants for federal licenses must show consistency with every one of the 44 coastal zone policies, whereas state consistency reviews are more lenient, allowing "balancing" of need versus coastal effect. This argument fails on both the facts and the law.

One of the key principles of the CZMA is that a state may not discriminate in its review of federal, state, or local activities within the coastal zone. All applicants to conduct such activities in a state's coastal zone must receive equal treatment. Thus, 15 C.F.R § 930.6(a) requires the State agency "to uniformly and comprehensively apply the enforceable policies of the State's management program."[17] As NOAA explained when it issued section 930.6(a), that provision prohibits a state 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."[18] Indeed, NYSDOS admits that "[c]entral 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 agenc[ies] must comply.*"[19]

Further, Entergy showed—and NYSDOS does not deny—that NYSDOS concurred with the consistency certifications of the three other nuclear facilities operating in the New York coastal zone (Nine Mile Point, FitzPatrick, and R.E. Ginna) even though none of them certified consistency with every one of the 44 policies.[20] Only by ignoring this federal requirement for uniformity, as well as its own actions with regard to Nine Mile Point, FitzPatrick, and R.E. Ginna, can NYSDOS contend that reviews for state permits are less rigorous than reviews for federal permits. All 44 enforceable coastal policies must be considered whether the consistency review is undertaken for a federal license or for a state license, and in neither circumstance must the applicant certify absolute compliance with each one of the 44 policies. If, as the record shows, balancing is appropriate for both state and federal permits, need for the project or strong satisfaction of some policies can excuse the failure to satisfy a small number of other policies.

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[15] NYSDOS May 30, 2014, Responses to NRC Staff's December 6, 2013, Requests for Additional Information ("NYSDOS 5/30/14 RAI Responses"), at unnumbered page 15. *See also* Baldwin 5/30/14 Letter, at 8 ("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. . . .").
[16] NYSDOS 5/30/14 RAI Responses, at unnumbered page 16.
[17] 15 C.F.R. § 930.6(a).
[18] 65 Fed. Reg. at 77,128.
[19] NYSDOS 5/30/14 RAI Responses, at unnumbered page 15.
[20] Entergy's July 15, 2014, Letter to David J. Wrona, at 11-13 and Exhibit A.

The second condition set forth in section 930.6(c) is that "the State agency [here, NYSDOS] ensures that the State permitting agencies . . . review individual projects to ensure consistency with all applicable state management program policies." As NYSDOS concedes,[21] Executive Law § 913 imposes on NYSDOS the responsibility "[t]o *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 the New York coastal zone regime.[22] Thus, NYSDOS is charged with "ensur[ing]" that other state agencies comply with the coastal policies.[23]

Moreover, regulations issued under New York's State Environmental Quality Review Act ("SEQRA") state that, even when NYSDOS is not the "lead agency" for conducting the consistency review on a project, it has authority to become an "involved agency" with respect to activities affecting the coastal zone.[24] If an involved agency receives written notice from the lead agency, "[t]he determination of significance issued by the lead agency following coordinated review is *binding on all other involved agencies*."[25] As shown below, NYSDOS was expressly identified as an "involved agency" in one of the four primary previous reviews at issue here—the transfer of IP3 from NYPA to Entergy—and was informed of all four of the reviews.[26] Even if not an "involved agency," NYSDOS has authority to participate as an "interested agency," defined as an agency "that lacks the jurisdiction to fund, approve or directly undertake an action but wishes to participate in the review process because of its specific expertise or concern about the proposed action."[27] SEQRA regulations "strongly encourage[ ]" interested agencies "to make known their views on the action, particularly with respect to their areas of expertise and jurisdiction."[28] Again, NYSDOS does not deny that it had the opportunity to comment on each of these consistency reviews. Indeed, the evidence shows that for at least two of these reviews—the first (relating to IP3) and the third (relating to both IP2 and IP3)—NYSDOS explicitly commented.

Finally, **the third condition** set forth in section 930.6(c) is that "[t]he State agency shall *monitor* such permits issued by another State agency." (emphasis added). This condition is also

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[21] NYSDOS 5/30/14 RAI Responses, at unnumbered page 2.
[22] New York Executive Law § 913(4) (emphasis added).
[23] *See* 15 C.F.R. § 930.6(c).
[24] N.Y. Comp. Codes R. & Regs. Tit. 6, § 617.2(s).
[25] *Id.* § 617.6(b)(3)(iii) (emphasis added).
[26] In the May 30, 2014, responses to the Staff's December 6, 2013, Requests for Additional Information, NYSDOS admits that it "reviewed NYSDEC's State agency consistency assessment form" dated March 2, 2000, prepared in connection with the State Pollutant Discharge Elimination System ("SPDES") permit renewal proceeding. NYSDOS 5/30/14 RAI Responses, at unnumbered page 11. NYSDOS does not deny reviewing the other three consistency reviews, but states "*No documents at NYSDOS indicate that NYSDOS evaluated*" the consistency determinations by the Power Authority of the State of New York ("NYPA") in 2000, by the New York Public Service Commission ("NYPSC") in 2001, or by the New York State Department of Environmental Conservation ("NYSDEC") in 2003. *See id.*, at unnumbered pages 10, 12, 13 (emphasis added).
[27] N.Y. Comp. Codes R. & Regs. Tit. 6, § 617.2(t).
[28] *Id.* § 617.3(e).

met. As the CMP puts it, "[*m*]*onitoring* the decisions of State agencies as to the consistency of their proposed actions with coastal policies *will be an important administrative activity*" of NYSDOS.[29]

Thus, the CMP authorizes—indeed requires—other New York State agencies to determine whether applicants for state permits are in compliance, taking into account the same 44 policies that NYSDOS reviews for federal consistency. The CMP and state law impose on NYSDOS an important role to "review" and "monitor" as well as issue recommendations regarding those actions by other State agencies. Section 930.6(c) says that, under these circumstances, the consistency determinations by other State agencies "constitute" concurrence by "the State agency" (here, NYSDOS). Those consistency reviews by other state agencies for state permits and licenses should "usually" be sufficient for a later federal permit.[30] Accordingly, these consistency determinations by other State agencies are "previous reviews" for the purpose of section 930.51(b)(3).[31]

The Previous Reviews. Since Entergy acquired IP3 in 2000, NYSDEC and other state agencies have issued at least 39 permits to IP2 and IP3.[32] At least 21 of these permits are for IP2, 10 are for IP3, and the rest are applicable to the Indian Point facilities generally.[33] Of these, four stand as especially compelling evidence that New York has previously reviewed the Indian Point facilities for consistency with the 44 coastal policies of New York.

First, in 2000, NYPA reviewed IP3's operations for consistency with the coastal policies as part of its SEQRA review of its proposed transfer of IP3 to Entergy. NYSDOS "had no objection to [NYPA's] assumption of Lead Agency status" for the review process.[34] NYPA prepared a "Federal Consistency Assessment Form" and certified that "the proposed activity complies with New York State's approved Coastal Management Program, or with the applicable approved local waterfront revitalization program, and will be conducted in a manner consistent with such program."[35] Notably, the Federal Consistency Assessment Form signed by William

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[29] NY CMP, at Section II-4, p. 3 (emphasis added).
[30] *See* 15 C.F.R. § 930.6(c); 65 Fed. Reg. at 77,129 (Dec. 8, 2000) ("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.").
[31] Although NYSDOS refers repeatedly to its authority to conduct "federal consistency review of federal agency actions," *e.g.*, NYSDOS 5/30/14 RAI Responses, at unnumbered page 7, the CZMA regulations distinguish "Consistency for Federal Agency Activities," governed by Subpart C of 15 C.F.R. Part 930, from "Consistency for Activities Requiring a Federal License or Permit," governed by Subpart D of 15 C.F.R. Part 930. Subpart D governs the consistency review at issue here. Subpart C applies to the actions by federal agencies themselves in the State's coastal zone, and is a different process.
[32] *E.g.*, Entergy's July 30, 2012, Motion for Declaratory Order ("Entergy's Opening Br."), at 21. Although federal CZMA regulations prohibit duplicative consistency reviews for federal license renewals, *see* 15 C.F.R. § 930.51(b)(3), New York law does *not* prohibit duplicative review for State permits and licenses.
[33] *Id.* Since Entergy's Opening Brief was filed, as but one recent example, a SPDES discharge permit was issued to IP2 by NYSDEC on October 7, 2014.
[34] NYPA, Negative Declaration (March 31, 2000), at ETR000030 (Att. 6 to Entergy's Opening Br.).
[35] *See id.*, at ETR000023.

Slade on behalf of NYPA on January 6, 2000 is *precisely the same form* (with immaterial, if any, changes) that NYSDOS contends must be signed today for the IP3 license renewal.[36] Further, emails obtained by Entergy pursuant to New York's Freedom of Information Law demonstrate that NYPA "chose the [Federal Consistency Assessment Form] figuring the transfer of the NRC license was the primary transfer."[37]

NYPA's consistency review considered not only the transfer itself, but also the "long term future operation" of the plant.[38] Of the 44 policies in the CMP, NYPA determined that IP3's operations affected only eight of them, regarding coastal erosion, water quality, and air quality, but nonetheless concluded that the plant's operations were consistent with the coastal policies of New York.[39]

In the Negative Declaration for IP3, NYPA explained that "Entergy will acquire IP3 . . . in compliance with all applicable laws & regulations. [IP3], once under new ownership, will be required to continue to comply with these & any other applicable laws & regulations."[40] NYPA explained further:

> The transaction has been structured to minimize or eliminate any adverse environmental, safety, social or economic impacts that could be associated with the sale of the facilities. The agreement to operate the facilities under the terms of all existing regulatory permits *assures continued operation in an environmentally sound and safe manner.*[41]

Thus, whether explicitly required or not, NYPA did, in fact, perform a consistency review of IP3 in 2000, and found not just the transfer, but the ongoing operations, to be consistent with the coastal policies of the state of New York. As a result, NYPA's consistency determination is "binding on" NYSDOS.[42] NYSDOS does not deny that it fulfilled its statutory role to review and monitor NYPA's consistency certification process.[43] Critically, NYPA expressly identified NYSDOS as an "involved agency.[44]

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[36] *Compare* Att. 6 to Entergy's Opening Br., at ETR0000022-23 *with* NYSDOS Coastal Management Program "Federal Consistency Assessment Form" at http://www.dos.ny.gov/opd/programs/pdfs/fcaf2.pdf.
[37] Att. 31 to Entergy's May 20, 2013 Motion for Leave to Supplement its Motion for Declaratory Order.
[38] Att. 6 to Entergy's Opening Br., at ETR0000044.
[39] *See* Att. 6 to Entergy's Opening Br. Contrary to NYSDOS's suggestion that the review examined the mere act of transferring IP3 to a new owner (NYSDOS 5/30/14 RAI Responses, at unnumbered pages 8-10), the mere act of transferring the plant would have had no effect on coastal erosion, water quality, or air quality.
[40] Att. 6 to Entergy's Opening Br., at ETR000002.
[41] *Id.* at ETR000045 (emphasis added).
[42] N.Y. Comp. Codes R. & Regs. Tit. 6, § 617.6(b)(iii).
[43] *See supra* at n.26.
[44] *Id.* at ETR000003.

Second, the following year, the NYPSC approved the transfer of IP2 from Consolidated Edison to Entergy. On August 17, 2001, the NYPSC adopted and approved a Final Supplemental Environmental Impact Statement ("FSEIS") addressing the potential site-specific impacts of the sale.[45] After public notice of the environmental review,[46] numerous entities commented, including the New York State Attorney General's Office, the Department of Public Service Staff, Westchester County, the City of New York, the Town of Cortlandt, and the Hendrick Hudson School District.[47] NYSDOS does not deny that it was aware of the FSEIS and could have participated in the process (and indeed was required to participate had it seen any need to do so, as explained above).

The FSEIS included NYPSC's determination that the proposed transfer of IP1 and IP2 to Entergy was "consistent with applicable coastal zone policies set forth in 19 NYCRR § 600.5 [*i.e.*, the New York coastal policies]."[48] Two weeks later, NYPSC issued an order authorizing the transfer, including a further "written finding" of consistency pursuant to CMP regulations, 6 NYCRR § 617.11(e):

> [T]he approval of the sale and transfer of Indian Point and related assets [to Entergy] . . . is consistent with the applicable policies set forth in Article 42 of the Executive Law as implemented by 19 NYCRR 600.5, and will achieve a balance between the protection of the environment and the need to accommodate social and economic considerations.[49]

NYPSC also reviewed the operations as part of its analysis of impacts to coastal areas:

> While improved operations could lead to increased water usage, [IP2] must remain within the bounds of its SPDES [State Pollutant Discharge Elimination System] and other water permits. Accordingly, it can reasonably be concluded that the Proposed Action *will not result in any additional potentially significant or likely adverse impacts to the coastal zone in the areas surrounding IP2.*[50]

NYPSC also stated that "it can reasonably be concluded that the IP2 *will be operated in a superior manner* . . . [T]he anticipated changes are likely to have either no or positive

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[45] NYPSC, Order Adopting and Approving Issuance of FSEIS (Aug. 17, 2001) ("NYPSC 8/17/01 FSEIS Order") (Att. 7 to Entergy's Opening Br.).
[46] *See* NYPSC 8/17/01 FSEIS Order, at ETR000056 (Att. 7 to Entergy's Opening Br.).
[47] NYPSC, Order Authorizing Asset Transfer (Aug. 31, 2001) ("NYPSC 8/31/01 Order"), at 1-2 (Att. 21 to Entergy's Opening Br.).
[48] NYPSC 8/17/01 FSEIS Order, at ETR000054 (Att. 7 to Entergy's Opening Br.).
[49] NYPSC 8/31/01 Order, at 11 (Att. 21 to Entergy's Opening Br.).
[50] NYPSC 8/17/ 01 FSEIS Order, at ETR0000088 (emphasis added) (Att. 7 to Entergy's Opening Br.).

environmental impacts as a result of the sale."[51] John Smolinsky, the retired Chief of the Environmental Certification and Operations Section of NYPSC was part of the team that evaluated the IP2 transfer. Mr. Smolinsky confirms in his declaration that "we specifically determined that IP2's operation was consistent with New York's coastal policies."[52]

Importantly, both the 2000 NYPA and 2001 NYPSC reviews expressly contemplated that the operating licenses for IP2 and IP3 might be renewed and thus considered operation of these units well into the future.[53]

Third, in 2000, when NYPA and ConEd sought renewals of the SPDES permit for IP2 and IP3, NYPA submitted a State Consistency Assessment Form ("CAF") concluding that renewal of the SPDES permits would not "affect the achievement of [New York's] coastal policies."[54] In addition, NYSDEC prepared its own CAF evaluating the coastal effects of renewing the permits.[55] Consistent with its oversight role, NYSDOS reviewed NYSDEC's coastal assessment form and concluded "No Comments Necessary."[56]

Fourth, in 2003, NYSDEC prepared an FEIS for IP2, IP3, and two other facilities on the Hudson River. Even though it recognized that further environmental review would occur with regard to the SPDES permit renewal, NYSDEC concluded that "[t]he SPDES permit renewals that are the subject of this FEIS *will not result in any new effects on coastal zone policies*" and incorporated by reference the "[c]oastal zone consistency form . . . contained in DEIS Appendix IV-5," which is discussed above.[57] Again, NYSDOS does not deny that it had notice and an opportunity to review the FEIS, nor does it deny fulfilling its review and monitoring obligations described above.[58]

"Substantially different" coastal zone effect. In light of these, and other, previous reviews of IP2 and IP3 for consistency with the New York CMP, the next question is whether license renewal "*will cause* an effect on any coastal use or resource *substantially different than those originally reviewed* by the State agency."[59] As former NOAA General Counsel Jane

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[51] *Id.* at ETR0000085 (emphasis added).
[52] Declaration of John H. Smolinsky, ¶ 8 (Att. 30 to Entergy's May 20, 2013 Motion for Leave to Supplement its Motion for Declaratory Order) (citing ETR000054).
[53] *See* NYPA, Negative Declaration, at ETR0000035 (Jan. 6, 2000) (Att. 6 to Entergy's Opening Br.) (noting that "the permits [that will be transferred to the purchaser] are renewed periodically"); *see also* NYPSC 8/17/2001 FSEIS Order, at ETR0000075 (Att. 7 to Entergy's Opening Br.) (referring to "the ability of the owner of IP2 . . . to extend its license . . . subject to the NRC's review and approval.").
[54] NYPA, Coastal Assessment Form, at ETR000212-14 (date illegible), in DEIS Appendix IV-5 (Att. 23 to Entergy's Opening Br.).
[55] NYSDEC, State CAF (Feb. 11, 2000) (Att. 24 to Entergy's Opening Br.). *See also* Declaration of Marc J. Lawlor, at ¶¶ 17-20 (Att. 8 to Entergy's Opening Br.).
[56] State Consistency Project Review Sheet (Mar. 9, 2000) (Att. 25 to Entergy's Opening Br.).
[57] NYSDEC, Final Environmental Impact Statement, at 24 (June 25, 2003) (Att. 22 to Entergy's Opening Br.) (emphasis added).
[58] *See supra* at n.26.
[59] 15 C.F.R. § 930.51(b)(3) (emphasis added).

Luxton explained in her declaration, the use of the term "*will cause*," rather than "*may cause*," was plainly a conscious choice by NOAA to avoid speculation about uncertain future effects.[60]

Moreover, when NOAA issued section 930.51(b)(3) it limited "further [consistency] review . . . to cases where . . . the *activity* will be modified substantially causing new coastal zone effects."[61] The evidence before the Staff shows that "renewal of the operating licenses for IP2 and IP3 will not result in any change in the operation of the plants."[62] During briefing before the ASLB, "[t]he Staff agree[d] with Entergy that Indian Point's operations are not expected to change during the license renewal period, and that the [Independent Spent Fuel Storage Installation], [Generation Support Building], and other projects listed [by Entergy] will have no additional coastal effects beyond those of currently-licensed operations."[63]

With no change in operations ("the activity") at IP2 or IP3, no "substantially different" effects on the coastal zone are feasible. And NYSDOS has identified none. In briefing to the ASLB, NYSDOS identified no "effect on any coastal use or resource" that license renewal "*will cause*," much less such an effect that is "substantially different" from those previously reviewed.[64] Likewise, in its response to the December 6, 2013, RAIs, NYSDOS also failed to identify any adverse coastal effect that license renewal "will cause."[65]

Also in the RAIs, the Staff asked NYSDOS whether any routine program changes to the CMP might necessitate a further review, and asked New York to describe "any substantial changes in the coastal environment or substantial changes to the New York CMP since 2000."[66] In its response, NYSDOS reported that "routine changes" were made in 2001 to require submission of an FEIS if required by the federal agency, and in 2006 to give NYSDOS authority to review applications for federal licenses and permits "in Connecticut State waters in Long Island Sound."[67] These "routine changes" to the CMP, which do not require approval by NOAA, are not "management program changes" of the sort referred to in section 930.51(b)(2), which do

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[60] Declaration of Jane C. Luxton, at ¶ 18 (Att. 15 to Entergy's Opening Br.).
[61] 44 Fed. Reg. at 37,150 (emphasis added).
[62] Declaration of Fred R. Dacimo, at ¶ 17 (Att. 16 to Entergy's Opening Br.).
[63] NRC Staff's Answer to Entergy's Opening Br., at 14 (April 15, 2013).
[64] *See* 15 C.F.R. § 930.51(b)(3). In briefing before the ASLB, NYSDOS referred to *potential* changes in the cooling intake system, but those effects are speculative. NYSDOS ASLB Br., at 29-30; Riverkeeper's Answer in Opposition to Entergy's Opening Br., at 20-22 (April 5, 2013). Riverkeeper referred to increased power output that has already occurred, but provided no documentation of any "new" coastal effects that "will" occur due to that increased output. *Id.*, at 19-20. Finally, Riverkeeper asserted radiological leaks and the effects of long-term onsite nuclear storage, *id.* at 22-25, but those issues are within the exclusive province of the NRC, and not within the scope of a state CZM consistency review. *See* Entergy's Combined Answer and Replies, at 9 (May 6, 2013).
[65] *See* NYSDOS 5/30/14 RAI Responses.
[66] NRC Inquiry No. 4 subpart b., December 6, 2013.
[67] NYSDOS 5/30/14 RAI Responses, at unnumbered pages 21-22.

require approval by NOAA.[68] Further, these particular routine changes are not relevant to IP2 or IP3, and do not negate the relevance of the four previous reviews discussed above.[69]

Next, NYSDOS invokes the language of section 930.51(e) stating that "the federal agency shall give considerable weight to the opinion of the state agency," and suggests that this phrase requires the Staff to defer and accede to the position of NYSDOS.[70] As NOAA explained when it issued section 930.51(e), this reading is incorrect:

> NOAA did not intend to use the phrase to have the state agency make the decision on whether coastal effects are substantially different. Thus, to provide clarification, NOAA has amended the section so that *the Federal permitting agency makes this determination after consulting with the State and applicant*. If a State disagrees with a Federal agency's determination concerning substantially different coastal effects, then the State could either request NOAA mediation or seek judicial review to resolve the factual dispute.[71]

Thus, while the Staff must certainly consider the comments of NYSDOS on their merits, the decision of whether substantially different coastal zone effects "will" result is left to the expert determination of this agency. Here, NYSDOS has not rebutted Entergy's evidence that the "activity"—the ongoing operation of IP2 and IP3—will not change, and NYSDOS certainly has not identified any "new" coastal zone effects that "will" be "substantially different" from those previously considered.[72]

Accordingly, Entergy respectfully submits that no further consistency review is necessary for renewal of the IP2 and IP3 licenses. Even though performed by agencies other than NYSDOS and even if for purposes other than renewal of the federal license, the consistency

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[68] *See* 15 C.F.R. § 923.84 (distinguishing routine program changes, of which OCRM must simply be notified, from amendments, which must be reviewed and approved by OCRM pursuant to 15 C.F.R. §§ 923.81-.82).

[69] Environmental Impact Statements were prepared for three of the four reviews at issue, and due to the negative declaration issued under SEQRA, none was required for the 2000 transfer of IP3 to Entergy. *See* NYPA, Negative Declaration (March 31, 2000), Att. 6 to Entergy's Opening Br.; *see also* N.Y. Comp. Codes R. & Regs. tit. 6, § 617.9(a)(5)(i)([b]) ("No final EIS need be prepared if . . . the lead agency has determined that the action will not have a significant adverse impact on the environment."). Indian Point is not "in Connecticut State waters in Long Island Sound." *See* NYSDOS 5/30/14 RAI Responses, at unnumbered page 22. Other changes listed by NYSDOS are also not relevant. NYSDOS 5/30/14 RAI Responses, at unnumbered pages 21-22; *see also* NYSDOS ASLB Br., at 27-30 (April 5, 2013). NYSDOS notes that "the scope and requirements of federal coastal consistency review have changed since CZMA was acted in 1972." *Id.* at 28. It does not, however, identify any such changes since the reviews at issue here (from 2000 to 2003) were conducted. NYSDOS also mentions changes to the CMP in 2012, NYSDOS 5/30/14 RAI Responses, at unnumbered page 22, but NOAA approved those changes as prospective only, and thus inapplicable to the License Renewal Application here, which was submitted in April 2007. *See* Nov. 20, 2012 Letter from J. Gore, NOAA to G. Stafford, NYSDOS, at 6.

[70] NYSDOS 5/30/14 RAI Responses, at unnumbered page 21.

[71] 71 Fed. Reg. 788, 795 (Jan. 5, 2006) (emphasis added).

[72] *See supra* at n.64.

reviews previously performed on IP2 and IP3, are sufficient "previous[ ] review[s]" under federal law to obviate further consistency review in this license renewal proceeding. This is especially true because the operations of the facilities will not change, and thus will produce no "new" effects, much less "substantially different" effects, on the coastal zone.

Entergy remains available to answer questions or to meet in person if the Staff would find that helpful.

Sincerely,

Bobby R. Burchfield

cc: Sherwyn Turk, Esq.
Hon. Linda M. Baldwin