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To be Argued by:
KATHLEEN M. SULLIVAN
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Court of Appeals

STATE OF NEW YORK

In the Matter of ENTERGY NUCLEAR OPERATIONS, INC.,
ENTERGY NUCLEAR INDIAN POINT 2, LLC, and
ENTERGY NUCLEAR INDIAN POINT 3, LLC,

Petitioners-Respondents,

-against-

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

Respondents-Appellants.

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Dated: January 19, 2016

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals for the State of New York, Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC state as follows:

Entergy Nuclear Operations, Inc. is a wholly owned subsidiary of Entergy Nuclear Holding Company #2, which is a wholly owned subsidiary of Entergy Corporation.

Entergy Nuclear Indian Point 2, LLC is a wholly owned subsidiary of Entergy Nuclear Holding Company #3, LLC, which is a wholly owned subsidiary of Entergy Nuclear Holding Company, LLC. Entergy Nuclear Holding Company, LLC is a wholly owned subsidiary of Entergy Corporation.

Entergy Nuclear Indian Point 3, LLC is a wholly owned subsidiary of Entergy Nuclear New York Investment Company I, which is a wholly owned subsidiary of Entergy Nuclear Holding Company #1. Entergy Corporation owns 75% of Entergy Nuclear Holding Company #1 and Entergy Global, LLC owns the other 25%. Entergy Global, LLC is a wholly owned subsidiary of Entergy International Holdings, LLC, which is a wholly owned subsidiary of Entergy Corporation.

Entergy Corporation is a publicly traded company. It has no parent corporation.

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Respondents Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC (together, "Entergy") respectfully submit this brief in support of affirmance of the Appellate Division's unanimous judgment dated December 11, 2014.

INTRODUCTION

In asserting supposed authority under the New York Coastal Management Program ("CMP") to second-guess the federal license renewal process for the Indian Point nuclear power plants, appellants New York Department of State and Secretary of State Cesar A. Perales (together, "NYSDOS") omit to note the elaborate system of state and federal regulation that governs Indian Point and ensures its safe and environmentally appropriate operation in producing electricity for residents of the New York City region. The U.S. Nuclear Regulatory Commission ("NRC") comprehensively and exclusively regulates Indian Point for nuclear safety under the Atomic Energy Act. NRC's license renewal process exhaustively considers compliance with federal environmental laws. And the New York Department of Environmental Conservation ("DEC") also regulates Indian Point's environmental compliance, including its compliance with a State Pollutant Discharge Elimination System ("SPDES") permit in its Hudson River water withdrawals and discharges.

If NYSDOS seeks to layer CMP review on top of these existing comprehensive regulatory requirements governing Indian Point, NYSDOS's remedy is to apply for the U.S. Secretary of Commerce's approval to amend the CMP, not to distort the current CMP's plain text, which exempts Indian Point from review. All six judges to have considered this case have recognized that the text of CMP's exemption provision covers Indian Point.[1] The specific exemption those judges considered covers "projects for which a final Environmental Impact Statement ['EIS'] has been prepared prior to the effective date of the Department of State Part 600 regulations . . . ." (R.276.) Indian Point is clearly such a project, as the effective date of the Department of State Part 600 regulations was September 28, 1982, and final EISs were prepared for Indian Point before that date, in 1972 and 1975, under the federal National Environmental Protection Act ("NEPA").

The Appellate Division's conclusion that Indian Point is grandfathered from CMP review is thus straightforward and correct, and that should be the end of the matter. Under well-settled law, the plain language of a regulation controls, and an

[1] (R.4605 (Appellate Division; reported at 125 A.D.3d 21 (3d Dep't 2014)) ("[A]pplying the plain meaning of the language in the CMP, Indian Point 2 and Indian Point 3 are exempt . . . ."); R.4 (Supreme Court; reported at 42 Misc. 3d 896 (Sup. Ct. Albany Cnty. 2013)) (acknowledging that the CMP exemption "literally" applies, but deferring to NYSDOS's contrary interpretation); *see infra*, at 21 (explaining that Supreme Court applied an erroneous standard of review).

agency's "regulatory construction that conflicts with the plain meaning of the promulgated language" must be rejected. *Matter of Visiting Nurse Serv. of N.Y. Home Care v. N.Y. State Dep't of Health*, 5 N.Y.3d 499, 506 (2004).

While NYSDOS argues (Br. 41-44) that only an EIS prepared pursuant to the State Environmental Quality Review Act ("SEQRA")—not the federal NEPA statute—qualifies for the exemption, the CMP's drafters used the words "final EIS," not "state EIS," and in any event, SEQRA itself permits the use of final EISs prepared under NEPA in place of final EISs prepared under SEQRA. NYSDOS is also wrong to contend (Br. 31-39) that the exemption applied to Indian Point only at original licensing and not at license renewal, for the exemption uses the terms "project" and "facility" as synonyms, meaning that the Indian Point *facility* is covered for its lifetime.

Were there any doubt as to the correctness of the ruling below regarding the CMP's above-described EIS exemption (there is not), Indian Point is also covered by a separate CMP exemption for "projects identified as grandfathered pursuant to [SEQRA] at the time of its enactment in 1976." (R.276.) This SEQRA exemption also applies by its plain terms because Indian Point was identified as grandfathered by that version of SEQRA as of May 28, 1976, as Indian Point was "undertaken or approved" before that date. E.C.L. § 8-0111(5)(a) (1976).

In a variation on the adage that no good deed goes unpunished, NYSDOS asserts (Br. 23-24, 37) that Entergy cannot argue for a CMP exemption for Indian Point when it did not do so as to license renewal for Entergy's FitzPatrick plant in Oswego, New York in 2008. But Entergy should not be faulted for cooperating with NYSDOS by submitting FitzPatrick to CMP review. New York made no attempt to shut down FitzPatrick in 2008. In contrast, New York intervened in the NRC's Indian Point license renewal proceeding with that very goal, giving rise to Entergy's justifiable concern that NYSDOS would, if able to do so, use the CMP as an additional tool to block Indian Point's relicensing. In any event, NYSDOS cites no authority supporting estoppel based on Entergy's past position as to a different nuclear plant.

The unanimous judgment of the Appellate Division that the CMP exempts Indian Point from review should be affirmed.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether Indian Point is exempt from CMP review by the plain language of the CMP's EIS exemption for "projects for which a final Environmental Impact Statement has been prepared prior to the effective date of the Department of State Part 600 regulations . . . ."
2. Whether Indian Point is exempt from CMP review by the plain meaning of the CMP's SEQRA exemption for "projects identified as grandfathered

pursuant to [the] State Environmental [Q]uality Review Act at the time of its enactment in 1976."

3. Whether Indian Point's CMP-exempt status can be forfeited by (a) increases in stringency of non-CMP regulations; (b) improvements made to mitigate a facility's environmental impact; or (c) changes that are incidental to a facility's operation and are exclusively and comprehensively regulated by the federal government.

COUNTERSTATEMENT OF THE CASE

A. Background On Indian Point

1. Construction And Operation Of Indian Point

In 1959, the State of New York conveyed land on the Hudson River in the Village of Buchanan to Consolidated Edison ("ConEd"). (R.501-05.) NRC's predecessor (the Atomic Energy Commission) issued construction permits for Indian Point 2 in 1966 and Indian Point 3 in 1969. (R.540, R.1484.)

ConEd constructed the plants at a cost of $2.45 billion (in 2007 dollars). (R.3130.) From construction through initial operation, Indian Point 2 and 3 received the full range of approvals from federal, state, and local agencies required for an infrastructure project of the magnitude and complexity of Indian Point. These authorizations included permits from the New York State Water Resources Commission for dredging and the construction of discharge canals (R.1489); approvals from the New York Department of Health for a sewage disposal system

and for the construction of service boilers and cooling water discharge channels (R.1489); and water quality certifications from DEC (R.2603-08, R.2645-60).

A final EIS was prepared for Indian Point 2 in 1972 by the Atomic Energy Commission for Indian Point 2, and a final EIS was prepared for Indian Point 3 in 1975 by NRC. (R.506, R.1412.) The Atomic Energy Commission issued Indian Point 2 a 40-year license on September 28, 1973. (R.47.) NRC issued Indian Point 3 a 40-year license on December 12, 1975. (*Id.*) Indian Point 2 began operating at full power on August 1, 1974, and Indian Point 3 began operating at full power on August 30, 1976. (R.3135.)

The NRC may grant a nuclear plant an initial license valid up to 40 years, and then may renew the license for up to 20 additional years if the plant meets NRC's stringent, comprehensive, codified renewal standards—standards premised on ensuring that the plant will remain safe through the renewal period. *See, e.g.*, 42 U.S.C. § 2133(c); 10 C.F.R. § 54.31(b); *N.J. Envtl. Fed'n v. U.S. NRC*, 645 F.3d 220, 224 (3d Cir. 2011) ("The NRC has codified comprehensive regulations governing nuclear power plant license renewal proceedings.") (citing 10 C.F.R. pt. 54). The original license term was limited to 40 years, *see* 42 U.S.C. § 2133(c); 10 C.F.R. § 54.31(b), "for antitrust and financial reasons rather than safety or common defense and security reasons," *Am. Pub. Power Ass'n v. U.S. NRC*, 990 F.2d 1309, 1313 (D.C. Cir. 1993) (internal quotation marks and citation omitted).

More than 75 nuclear reactors in the United States have been granted renewed licenses for the additional 20-year period, *see* NRC, *Status of License Renewal Applications and Industry Activities*, http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html. Contrary to NYSDOS's assertion (Br. 17-18), it was established well before the CMP's adoption in 1982 that nuclear plants were eligible for license renewal. *See* 42 U.S.C. § 2133(c) (1958) ("Each . . . license shall be issued for a specified period, as determined by the Commission, depending on the type of activity to be licensed, but not exceeding forty years, and may be renewed upon the expiration of such period.").

In 2001, ConEd sold Indian Point 2 to Entergy. (R.34.) In 2000, the New York Power Authority (which had purchased Indian Point 3 in 1974 from ConEd, (R.31)), sold Indian Point 3 to Entergy (R.34).

On April 30, 2007, more than six years before the September 28, 2013 end date of Indian Point 2's original 40-year license and the December 12, 2015 end date of Indian Point 3's original 40-year license, Entergy filed a joint application with the NRC for renewal of the licenses for Indian Point 2 and 3. (R.47.)[2]

[2] A nuclear plant that has timely filed an application for a renewed license may continue to operate under its original license, even after the end date of the original license, until the application for license renewal is finally determined. 5 U.S.C. § 558; 10 C.F.R. § 2.109(b).

2. Indian Point's Benefits

Reduced emissions. Nuclear plants emit negligible amounts of carbon as compared to fossil-fueled plants. (R.3433.) Nuclear power thus "may play an integral role in the State's efforts to address climate change." (R.2754.) Indian Point, unlike fossil-fueled plants, also produces electricity with *de minimis* emissions of non-carbon air pollutants (such as NO_x) that are "directly related to respiratory diseases." (R.3433.) For this reason, in approving the sale of Indian Point 2 to Entergy, the New York Department of Public Service concluded that "early retirement of New York's nuclear units, including [Indian Point 2], would have a significant negative environmental impact on air resources." (R.3434.)

Ensuring reliability of the electricity grid. Indian Point is critical to New York's electricity needs, providing approximately 17% of the energy demanded by southeastern New York. (R.2668.) "[T]he electricity supply available in New York currently relies heavily on Indian Point as a major baseload contributor to the power supply needed in the New York metropolitan area," and "[r]eplacement of this capacity would require major efforts in new generation, transmission, and demand management." (R.2743.) Additionally, because Indian Point generates electricity using nuclear power, it provides a fuel-diversity benefit because "[e]xcessive dependence on one fuel source [such as natural gas] threatens system reliability if that fuel supply encounters shortages." (R.2738.)

Economic impact. Indian Point also provides important economic benefits to the New York City metropolitan area. Electricity prices to homeowners and businesses in the region would rise significantly if Indian Point were shut down. (*See, e.g.*, R.2754 (explaining the "State's nuclear capacity will benefit the State by lowering . . . wholesale prices").) And Indian Point employs more than 1,000 people, in relatively high-paying positions. (R.3016.)

3. Indian Point's Alleged Costs, And Non-CMP Regulation Of Those Alleged Costs

Aquatic impact. Indian Point withdraws water from the Hudson River for use in certain cooling systems at the facility, and during this withdrawal fish eggs and larvae are sometimes drawn into the plant ("entrainment") and fish are sometimes stuck against the intake structure ("impingement"). DEC, through the SPDES permitting program, regulates the conditions under which Indian Point is allowed to withdraw, and then discharge, this Hudson River water. *See* 6 NYCRR 750-1.1 *et seq.*; 6 NYCRR 704.5; (R.3138, R.3142, R.4566). As explained below, substantial improvements and modifications to Indian Point have been made over the years to mitigate the effects of Indian Point's water withdrawal on aquatic species.

NYSDOS misstates (Br. 16) that Indian Point's original operating licenses required that Indian Point be modified to employ cooling towers that would reduce or obviate the need to withdraw Hudson River water. In fact, the original licenses

approved the plants' use of a "once-through" cooling system that relied on Hudson River withdrawals, and it was only later that NRC proposed to amend the licenses to require construction and use of cooling towers. (R.3139-40.) But NRC's authority to impose this requirement was superseded by the enactment of the Clean Water Act and the creation of the National Pollutant Discharge Elimination System program, which provided for science-based consideration of cooling water use. (R.3140.)

Given these developments, the parties entered into the Hudson River Settlement Agreement ("HRSA") (acknowledged by NYSDOS only in a footnote, *see* Br. 16 n.2), which required Indian Point to install state-of-the-art fish-protection technologies, and authorized extensive study of the Hudson River fish populations by a consortium of power plant owners (including the then-owners of Indian Point), postponing consideration and selection of additional (or supplemental) technology to redress identified impacts, if any, until at least a decade's worth of data had been compiled. (R.3141; *see also* R.3141-42 (DEC's statement that "[t]he intent of the HRSA was that, based upon the data and analyses provided by the facilities, the [DEC] could determine, and the parties could agree upon, the best technology available (BTA) to minimize adverse environmental impact on aquatic organisms in the Hudson River from these facilities in accordance with 6 NYCRR § 704.5").)

Since the HRSA (which is now expired) was signed, Indian Point has employed significant measures to minimize impingement and entrainment, including installation of variable speed pumps, specially designed "Ristroph" screens, and fish handling and return systems. (R.498, R.4566.) These measures have succeeded. "[D]EC noted that the current design, along with seasonable flow reductions and generation outages . . . , attains an estimated 77% reduction in impingement mortality." (R.4567.) And the population of the endangered shortnose sturgeon fish in the Hudson River *increased*. (R.3436; *see also* R.4567-68 ("[National Marine Fisheries Service] has previously stated in biological assessments involving the shortnose sturgeon that, overall, the intakes and discharges of Hudson River power plants are unlikely to jeopardize the recovery of the Hudson River shortnose sturgeon population.").)[3]

Regulatory schemes other than CMP may yet require additional measures. In connection with Indian Point's SPDES permit, DEC is considering whether Indian Point should be subjected to different or additional conditions. (R.3150, R.4574-75.) NRC too is reviewing potential aquatic impacts, having retained an outside expert to prepare two reports in the last five years, and a third that is in

[3] While the federal government has given Atlantic sturgeon—a distinct species from shortnose sturgeon—protected status, New York has not. (R.4587.)

progress currently.[4] If NRC determines that the impacts are moderate or greater, it must consider mitigating measures, *see Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989), and must "determine whether or not the adverse environmental impacts of license renewal are so great that preserving the option of license renewal . . . would be unreasonable," 10 C.F.R. § 51.95(c)(4).

Spent nuclear fuel. A necessary incident to nuclear plant operations is the creation of spent nuclear fuel, which must be safely stored. 42 U.S.C. § 10131. NRC comprehensively regulates such storage at plants across the country. *See, e.g.*, 10 C.F.R. § 50.51(b)(1) (operating licenses continue even after their expiration date as to "the storage, control and maintenance of the spent fuel, in a safe condition"); *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 409 (2d Cir. 2013) (NRC has "jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials"). In August 2014, NRC published a new final rule on continued storage, concluding that "spent fuel can be stored safely for at least 60 years beyond the licensed life for operation."

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[4] Environmental Impact Statement for License Renewal of Nuclear Power Plants: Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3 ("Supplemental EIS"), Vol. 1 (Dec. 2010), http://pbadupws.nrc.gov/docs/ML1033/ML103350405.pdf; Supplemental EIS, Vol. 4 (June 2013), http://pbadupws.nrc.gov/docs/ML1316/ML13162A616.pdf; Draft Supplemental EIS, Vol. 5 (Dec. 2015), https://cdxnodengn.epa.gov/cdx-enepa-II/public/action/eis/details?eisId=185041.

Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238, 56,241 (Aug. 26, 2014). New York and several other States filed a petition in the U.S. Court of Appeals for the D.C. Circuit challenging the generic rule; that petition remains pending and underscores that this issue is squarely before NRC and will receive searching agency and judicial review in a manner that affords States adequate input. *See State of New York v. NRC*, No. 14-1210 (D.C. Cir.).[5]

Spent nuclear fuel is first moved from the reactor into a specially designed and constructed, NRC-managed, and site-monitored spent fuel pool for cooling, before subsequent transfer into dry casks. Some such pools have leaked, and NRC's regulations require nuclear plants constantly to monitor for and prevent such leaks and to respond as appropriate, consistent with NRC regulations focused on protection of nuclear safety, human health, and the environment. NRC Reg. Guide 1.13, at 13.2-13.3 (Mar. 10, 1971). A decade ago, Entergy discovered a pre-existing leak from the spent fuel pool of Indian Point 2. (R.2810.) NRC initiated a thorough investigation and concluded that the "public health and safety has not been, nor is likely to be, adversely affected, and the dose consequence to the public

[5] NRC's Atomic Safety and Licensing Board has ruled that the generic Continued Storage Rule applies to Indian Point. *See In the Matter of Entergy Nuclear Operations, Inc.*, Dkt. Nos. 50-247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01, Order Dismissing Contentions NYS-39/RK-EC-9/CW-EC-10 and CW-SC-46-7, at 6-7 (Nov. 10, 2014), http://pbadupws.nrc.gov/docs/ML1431/ML14314A350.pdf.

that can be attributed to current on-site conditions associated with groundwater contamination is negligible." (R.2911-12; *see also* R.2809.)[6] Entergy has undertaken various measures to monitor for and to identify leaks, including underwater camera inspections of the fuel pool (R.2824-25) and a groundwater monitoring array (from which water samples from dozens of locations on site are tested) that ensures Entergy's ability to detect any future releases (R.2942-43).[7]

B. The Federal Coastal Zone Management Act And New York's Coastal Management Program

The federal Coastal Zone Management Act ("CZMA") and its implementing regulations provide for state participation in a federal agency's review of a license application, at a State's option. A State may elect to participate in the regime by preparing a CMP, which the U.S. Secretary of Commerce reviews and may

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[6] Additionally, although a leak was detected from the Indian Point 1 spent fuel pool during ConEd's ownership of that unit (in the early 1990s) (R.2953), upon acquisition, Entergy fast-tracked that pool's closure and NRC concluded that the ConEd leak had no residual effect on safety or the environment. (R.2934-35.) Indian Point 1 was permanently shut down in 1974 (R.2953), and is not at issue in Entergy's application for license renewal for Indian Point 2 and 3.

[7] Any existing spent nuclear fuel from Indian Point will remain on site indefinitely, regardless whether Indian Point receives renewed licenses from NRC. Despite the fact that Indian Point and other nuclear operators entered into contracts with the U.S. Department of Energy for removal of spent nuclear fuel from the plant sites to a federal government storage repository, that repository was never built. *See Entergy Nuclear FitzPatrick, LLC v. United States*, 711 F.3d 1382, 1383-86 (Fed. Cir. 2013). This led NRC to study the safety and feasibility of longer term storage at plant sites, as described in text.

approve if compliant with certain statutory criteria. 16 U.S.C. §§ 1454, 1455(d).[8] A State must list in its CMP the matters that it "wishes to review for consistency." 15 C.F.R. § 930.53(a).

A CMP may also contain exemptions. For example, as explained in more detail below, New York's CMP exempts from review "projects for which a final [EIS] has been prepared prior to the effective date of the Department of State Part 600 regulations . . . " and "projects identified as grandfathered pursuant to [SEQRA] at the time of its enactment in 1976." (R.276.) Similarly, Massachusetts' CMP exempts from one of its prohibitions facilities meeting several conditions including that "construction is commenced . . . or the municipality has been awarded a . . . grant for construction of the facility prior to January 1, 1978." Mass. Coastal Program Policies 77 (Oct. 4, 2011), http://www.mass.gov/eea/docs/czm/fcr-regs/czm-policy-guide-policies.pdf; *see also, e.g.*, Fla. Coastal Mgmt. Program Guide 18 (Sept. 16, 2015), http://www.dep.state.fl.us/cmp/publications/FCMP_Program_ Guide_2015.pdf ("A

[8] Underscoring the voluntary nature of this opt-in regime, not all eligible States opted in immediately upon enactment of the CZMA in 1972. For example, Illinois did so only in 2012, and one eligible State, Alaska, does not currently have a CMP. *See* Coastal Zone Management Plans, http://coast.noaa.gov/czm/mystate.

proposed federal license or permit activity is not reviewed for consistency if the activity is vested, exempted, or accepted under its own regulatory authority.").[9]

If a State obtains federal approval of its CMP, *and* if the CMP applies to the project or facility at issue, then a federal agency reviewing an application for a federal license or permit must deny the application if the relevant state agency objects to the applicant's certification that the project complies with the state's CMP. Specifically:

> No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification [that the project is consistent with the state's CMP] or until, by the state's failure to act, the concurrence is conclusively presumed, unless the [U.S.] Secretary [of Commerce], on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.

16 U.S.C. § 1456(c)(3)(A).

As pertains to New York, in 1981, the State Legislature passed the Waterfront Revitalization and Coastal Resources Act, Exec. L., ch. 18, art. 42 (1981), which permitted NYSDOS to implement a CMP for New York. NYSDOS did so, and on September 30, 1982, the U.S. Secretary of Commerce, through the

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[9] Variations in the language of exemption provisions of different States' CMPs make the comparisons NYSDOS relies upon (Br. 36) inapposite. At issue in this case is the plain meaning of New York's CMP.

National Oceanic and Atmospheric Administration ("NOAA"), approved New York's CMP. Approval of the N.Y. Coastal Zone Mgmt. Program, 47 Fed. Reg. 47,056-02 (Oct. 22, 1982) (publishing the September 30, 1982 determination).

The CMP's drafters exempted from review those facilities already in existence as of 1982 for which substantial time, money, and effort had already been invested before the CMP was adopted. The exemption provision, set forth at the outset of the CMP chapter titled "Special Federal Program Requirements," states:

> The projects which meet one of the following two criteria have been determined to [b]e projects for which a substantial amount of time, money and effort have been expended, and will not be subject to New York State's [CMP] and therefore will not be subject to review pursuant to the Federal consistency procedures of the Federal [CZMA], as amended: (1) those projects identified as grandfathered pursuant to [SEQRA] at the time of its enactment in 1976; and (2) those projects for which a final [EIS] has been prepared prior to the effective date of the Department of State Part 600 regulations [see Appendix A, DOS Consistency Regulations, NYCRR Title 19, Part 600, []600.3(4)].

(R.276 (all brackets except before "see" and after "600.3(4)" added).)[10]

Consistent with the CMP's exemption provisions for Indian Point, the CMP expressly labels as "existing facilities" the five then-extant nuclear plants in New

[10] Since 1990, the CMP has been amended five times, but the exemption provisions were never revised except for the introduction of a typographical error that changed the citation from "§ 600.3" to "6600.3." (R.145 n.37, R.260 n.89, R.265 nn.91, 92, R.283 n.105); Notice of Routine Program Change, 34 N.Y. Reg. 63 (Dec. 19, 2012).

York (which included Indian Point 2 and 3) (R.278), as distinguished from the "new" or "proposed" facilities described elsewhere in the CMP (R.167, R.254). The CMP also notes that "[n]o negative effects on energy use and development are expected as a result of implementing the [CMP]." (R.331.) The CMP provides that New York will regulate aquatic impacts of energy facilities through SPDES and other applicable laws. (R.165-67.) Specifically, the CMP recognizes that, under a series of laws including the SPDES program, "Federal projects," including specifically "nuclear . . . energy generating facilities," "which may affect the State's coastal fish and wildlife resources, can be regulated." (R.165-66.)

C. The Federal License Renewal Application For Indian Point

On April 30, 2007, Entergy filed with the NRC a license renewal application for Indian Point 2 and 3. (*See* R.47.) On July 24, 2012, in a submission to NRC, Entergy sought to satisfy the CZMA by invoking two exemptions from the need to submit to CMP review. While Entergy had previously submited to CMP review for its Upstate FitzPatrick plant in 2008, Entergy pursued these exemptions for Indian Point because New York had already indicated its strong oppposition to Indian Point's license renewal by intervening in Indian Point's NRC license renewal proceeding, *New York State Notice of Intention to Participate and Petition to Intervene*, Dkts. 50-247-LR and 50-286-LR (NRC Nov. 30, 2007),

http://pbadupws.nrc.gov/docs/ML0734/ML073400187.pdf, creating justifiable concern that it was necessary to invoke exemptions.[11]

First, Entergy explained that, under a federal CZMA regulation, New York agencies had previously reviewed Indian Point for consistency with the CMP, and therefore that another review was not required. *See* Letter from Entergy to NRC at 1-2 (July 24, 2012) ("Entergy 2012 Letter"), http://pbadupws.nrc.gov/docs/ML1220/ML12207A122.pdf (citing 15 C.F.R. § 930.51(b)(3)). This "previous review" argument was briefed by both parties to NRC Staff, and a decision by NRC Staff is pending, as NYSDOS recognizes (Br. 21).

Second, Entergy argued that Indian Point is exempt from review under the CMP exemption provisions at issue in this appeal. *See* Entergy 2012 Letter, Enclosure 1 to NL-12-107.

Subsequently, Entergy filed with NRC and NYSDOS a certification that, should either of these exemption arguments be rejected (such that Entergy would be required to submit to CMP review), Indian Point is in fact consistent with the

[11] New York law in any event plainly holds that submitting to review in a prior licensing proceeding does not estop a party from taking a different position in a subsequent renewal proceeding. *See, e.g.*, *Matter of Atl. Cement Co. v. Williams*, 129 A.D.2d 84, 92 (3d Dep't 1987); *E. Fifties Neighborhood Coal. ex rel. Saputelli v. Lloyd*, 13 Misc. 3d 1243(A), at *5 n.2 (Sup. Ct. N.Y. Cnty. 2006).

CMP. Letter from Entergy to NRC and N.Y. State Dep't of State (Dec. 17, 2012), http://pbadupws.nrc.gov/docs/ML1235/ML12352A340.html.

D. Proceedings Below

1. NYSDOS's Decision

On November 7, 2012, Entergy requested from NYSDOS a declaratory ruling that the EIS and SEQRA exemptions in the CMP apply to Indian Point. (R.44-48.) NYSDOS issued a decision adverse to Entergy on January 9, 2013. (R.486-500.)

2. Supreme Court's Decision

Entergy petitioned for review by the Supreme Court, Albany County, under CPLR Article 78. (R.24-43.) At the threshold, the court correctly described the interplay between the CMP and the CZMA, recognizing that the CZMA is a voluntary opt-in regime for the States, and thus that the CZMA's applicability turns on the scope of a State's CMP. As the court explained, "the State's authority . . . includes the discretion to *decline to review* certain activities for consistency with its management program." (R.10 (citations omitted; emphasis added).)

The court nonetheless denied the petition, holding that the CMP's exemption provisions do not apply to Indian Point. As to the EIS exemption (for "projects for which a final Environmental Impact Statement has been prepared prior to the effective date of the Department of State Part 600 regulations . . . " (R.276)), Supreme Court acknowledged that, construed "literally," the exemption applies to

Indian Point 2 and 3 because it is undisputed that "an EIS for each unit was prepared prior to [September 28, 1982]." (R.16.) The court, however, "decline[d] to construe the CMP so literally," reasoning instead that it was "rational" for NYSDOS to depart from that plain language for the policy reason that Indian Point has never been reviewed by NYSDOS for consistency with the CMP. (R.16-17.) The court did not discuss this Court's precedent that, regardless of an agency's policy preferences, "a regulatory construction that conflicts with the plain meaning of the promulgated language" must be rejected. *Matter of Visiting Nurse Serv. of N.Y. Home Care*, 5 N.Y.3d at 506.

As to the CMP's SEQRA exemption (for "projects identified as grandfathered pursuant to [SEQRA] at the time of its enactment in 1976" (R.276)), Supreme Court did not address the plain meaning of the words "at the time of its enactment in 1976," and instead looked to subsequent events, namely whether a New York agency had included Indian Point on a post-1976 list of grandfathered projects. (R.15.)

3. The Appellate Division's Decision

A unanimous five-Justice panel of the Appellate Division for the Third Department reversed, holding that Indian Point is covered by the CMP's EIS Exemption. (R.4605-11.) Having held that the EIS exemption applies, the Appellate Division did not reach the SEQRA exemption.

The Appellate Division began by observing that an agency interpretation of a regulation that "'conflicts with'" that "plain meaning" must be overturned. (R.4609 (quoting *Matter of Visiting Nurse Serv. of N.Y. Home Care*, 5 N.Y.3d at 506).) Given this principle, the Appellate Division rejected NYSDOS's interpretation because "[f]inal [EISs] were . . . completed for Indian Point 2 and Indian Point 3 in 1972 and 1975, respectively. Accordingly, applying the plain meaning of the language in the CMP, Indian Point 2 and Indian Point 3 are exempt from consistency review." (R.4609.)

The Appellate Division found that NYSDOS's argument that a final EIS qualifies for the exemption only if it was prepared pursuant to the New York SEQRA statute (as opposed to the federal NEPA statute) has "simply no basis in law," (*id.*), especially because the "SEQRA regulatory regime . . . permits the use of final [EISs] prepared under NEPA." (*Id.* (citing 6 NYCRR 617.2(n), 617.15(a); Philip Weinberg, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 17 ½ , E.C.L. § 8-0111).)

The Appellate Division then addressed NYSDOS's argument that purported changes at Indian Point caused a forfeiture of its CMP-exempt status. The Appellate Division rejected the argument on the ground that the New York SEQRA provision—which *explicitly* embraces a material-changes exception, *see* E.C.L. § 8-0111(5) (deeming certain actions grandfathered "except . . . where . . .

[a] modification may result in a significant adverse effect on the environment")—"is not pertinent to the applicability of the CMP." (R.4610.) Unlike the SEQRA provision, the CMP does not mention a material-changes exception and instead rules it out by cross-referencing SEQRA only for purposes of one of the two CMP exemption provisions, and then only for SEQRA "at the time of its enactment in 1976" as opposed to post-1976 events that could potentially forfeit grandfathered status under SEQRA. (R.276.)

Finally, the Appellate Division emphasized the narrow scope of its decision, explaining that "[n]othing in our decision should be read as precluding the Department from amending the CMP to require consistency review in cases such as the one presently before us." (R.4610 n.3 (citing 16 U.S.C. § 1455(e); 15 C.F.R. § 930.51(b)).)[12]

Notwithstanding the Appellate Division's unanimous decision holding Indian Point exempt from CMP consistency review, NYSDOS on November 6, 2015 issued an objection to Entergy's (alternative) certification that Indian Point is consistent with the CMP, and so informed this Court by letters dated November 10

[12] Any future amendment of the CMP would not apply retroactively to Entergy's pending license renewal application for Indian Point 2 and 3, which was filed in 2007. NOAA has made clear that any revisions to the CMP "shall only be applied to applications for federal authorizations filed after [NOAA's] approval" of those revisions. Letter from NOAA's Acting Chief of Coastal Programs Division to NYSDOS (Nov. 30, 2012).

and 30, 2015. On November 25, 2015, NOAA sent a "Letter Order" to NYSDOS and Entergy, which ruled that "the date upon which Entergy would be required to file its Notice of Appeal [before the Secretary of Commerce] to New York's November 6, 2015, objection is extended until 60 days after the final order of the New York Court of Appeals" in the instant appeal. On January 14, 2016, Entergy filed a federal complaint regarding the objection. *See Entergy Nuclear Indian Point 2, LLC v. Perales*, No. 1:16-cv-00051-LEK-DJS (N.D.N.Y.).

ARGUMENT

"Grandfathering" provisions like the two CMP exemptions at issue here are commonplace regulatory devices to protect existing projects from new regulatory schemes in order to "mitigate[] the disruption of settled arrangements caused by the change in the law." *In re Megan-Racine Assocs., Inc.*, 102 F.3d 671, 676 (2d Cir. 1996) (applying plain language of grandfathering provision in New York Public Service Law § 66-c). As another court explained: "Governments enact laws which invite citizens to invest their money and time and to arrange their affairs in reliance upon those laws," and "the purpose of protecting those who relied on prior laws . . . is a matter of simple fairness." *Sklar v. Byrne*, 727 F.2d 633, 641-42 (7th Cir. 1984); *see also*, *e.g.*, *E. Fifties Neighborhood Coal. ex rel. Saputelli v. Lloyd*, 13 Misc. 3d 1243(A), at *10 (Sup. Ct. N.Y. Cnty. 2006) (exemption provision in the New York SEQRA statute "rationally and

appropriately provided for an orderly phase-in of its provisions, including . . . providing for grandfathering of projects underway").[13]

There is no doubt that Indian Point 2 and 3, which were constructed before the CMP's adoption at a cost of $2.45 billion (in 2007 dollars), fit within this policy and the preamble to the CMP's exemption provision as "projects for which a substantial amount of time, money and effort have been expended." (R.276.) It is similarly clear that Indian Point 2 and 3 are covered by the plain text of the EIS exemption, upon which the Appellate Division relied (*see* Point I), and by the CMP's separate SEQRA exemption, which the Appellate Division did not need to reach (*see* Point II). Moreover, the Appellate Division correctly rejected NYSDOS's argument that Indian Point's exempt status has been forfeited (*see* Point III).

At the threshold, it bears restating that the CMP, not the CZMA, is the starting and ending point for analysis of whether the CMP's exemption applies to

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[13] Contrary to NYSDOS's assertion (Br. 4), the CMP's exemption provisions do not concern only whether a state agency—as opposed to the private license applicant—has invested time, effort, and resources into the project. As recognized by the cases cited in text, the usual concern of grandfathering clauses is to protect private investment, not government resources. *See also, e.g.*, *Matter of Radio Common Carriers of N.Y., Inc. v. N.Y. State Pub. Serv. Comm'n*, 79 Misc. 2d 600, 606 (Sup. Ct. Albany Cnty. Special Term 1974) ("The statutory employment of grandfathering clauses is a well-recognized principle used to protect vested interests and property rights.").

Indian Point. As the Appellate Division correctly concluded, the CZMA is a voluntary, opt-in regime for States that depends on whether the relevant State's CMP applies to the facility at issue. (R.4606-07.) In other words, the CZMA requires nothing unless the relevant State opts in by preparing its own CMP, and even then the scope of the State's review depends upon which projects it identifies for review and which projects it exempts from review. *See, e.g.*, 15 C.F.R. § 930.53(a) (a State's authority reaches only those activities identified by its CMP as ones the State "wishes to review"); *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 590 (1987) ("[F]or an activity to be subject to CZMA consistency review, the activity must be on a list that the State provides . . . .").

This disposes of NYSDOS's repeated and misdirected reliance (*e.g.*, Br. 10, 32-33, 46-47) on CZMA provisions that apply only when a State's CMP includes (and does not exempt) a particular project or activity for review. Similarly, it is irrelevant to this case whether the *CZMA* itself exempts Indian Point (*see* NYSDOS Br. 42), because New York's *CMP* exempts Indian Point. As the preamble to the CMP's exemption provisions makes clear, "projects" covered by the CMP's exemption language "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]*." (R.276 (emphasis added).)

I. THE PLAIN LANGUAGE OF THE EIS EXEMPTION COVERS INDIAN POINT

The EIS exemption expressly applies to "those projects for which a final [EIS] has been prepared prior to the effective date of the Department of State Part 600 regulations [see Appendix A, DOS Consistency Regulations, NYCRR Title 19, Part 600, 600.3(4)]." (R.276.) Every judge—*i.e.*, five Justices of the Appellate Division (R.4609), and one Justice of Supreme Court (R.16)—to have reviewed the plain language of the EIS exemption agreed that it applies literally to Indian Point because "final [EISs]" for Indian Point were prepared before the "effective date of the Department of State Part 600 regulations," which was September 28, 1982.

NYSDOS barely addresses the text and instead asks this Court (Br. 39-40) to "defer[]" to NYSDOS's supposedly "rational" interpretation that the exemption was intended to "solv[e] a transition problem" that is mentioned nowhere in the CMP. NYSDOS's approach should be rejected because it contravenes the well-established rule that an agency's interpretation of a regulation must be overturned if it "conflicts with the plain meaning of the promulgated language." *Matter of Visiting Nurse Serv.*, 5 N.Y.3d at 506. NYSDOS's case citations (Br. 39) are not to the contrary. Several recognize that a court should *not* defer to an agency interpretation that is "unreasonable." *See, e.g.*, *Matter of Natural Res. Defense Council, Inc. v. N.Y. State Dep't of Envtl. Conservation*, 25 N.Y.3d 373, 397

(2015) (quoting *Matter of Howard v. Wyman*, 28 N.Y.2d 434, 438 (1971)); *N.Y. State Ass'n of Life Underwriters v. N.Y. State Banking Dep't*, 83 N.Y.2d 353, 359-60 (1994) (same). As this Court explained in *Matter of Visiting Nurse Services*, one example of an unreasonable agency interpretation is where, as here, it "conflicts with the plain meaning of the promulgated language." 5 N.Y.3d at 506.

For the reasons that follow, the EIS exemption applies to Indian Point because final EISs were prepared for Indian Point *before* the 1982 effective date of the Department of State Part 600 regulations (*see* Point I.A), and the exemption's use of the word "projects" clearly indicates that the exemption applies to a facility for its lifetime, not merely for one particular license application during that lifetime (*see* Point I.B).

A. Final Environmental Impact Statements Were Prepared For Indian Point 2 And 3 Before 1982

Again, the EIS exemption applies to "projects for which a final [EIS] has been prepared prior to the effective date of the Department of State Part 600 regulations [see Appendix A, DOS Consistency Regulations, NYCRR Title 19, Part 600, 600.3(4)]." (R.276.) The effective date of the Department of State Part 600 regulations was "September 28, 1982." 19 NYCRR 600.3. And "final [EISs]" for Indian Point 2 and 3 were prepared well before that date: In September 1972, NRC's predecessor prepared a final EIS for Indian Point 2 (R.506-1404), and in

February 1975, NRC prepared a final EIS for Indian Point 3 (R.1412-2602), both times pursuant to the federal NEPA statute.

NYSDOS attempts (Br. 41-43) to inject into the exemption's plain language a requirement that the final EIS had been prepared pursuant to the state SEQRA statute rather than the federal NEPA statute. This argument is irreconcilable with the CMP drafters' choice to require a "*final* EIS," without any further limitation or qualification that such "final EIS" be prepared under state rather than federal law.

Unable to locate any requirement of a state EIS in those words, NYSDOS looks instead (Br. 41) to the bracketed language at the end of the EIS exemption: "[see Appendix A, DOS Consistency Regulations, NYCRR Title 19, Part 600, 600.3(4)]." (R.276.) According to NYSDOS, this cross-reference indicates that the CMP's drafters intended the CMP's EIS exemption to track the exemption set forth in the cross-referenced regulations. That is incorrect. Where the CMP's drafters wanted a CMP exemption to track another statute's or regulation's exemption provision, they said so explicitly. A clear example is the CMP's SEQRA exemption, which applies to "projects identified as *grandfathered pursuant to [SEQRA]* at the time of its enactment in 1976." (R.276 (emphasis added).) The CMP did *not* use this formulation in the CMP's EIS exemption, and this Court must presume such different approaches in two parts of the CMP to be intentional. *Cf. INS v. Cardozo-Fonseca*, 480 U.S. 421, 432 (1987) ("[W]here

Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted); *see Rivers v. Birnbaum*, 102 A.D.3d 26, 36 (2d Dep't 2012) (applying same principle in interpreting New York statute).

In other words, had the CMP's drafters intended to make the EIS exemption track the grandfathering exemption in the Department of State Part 600 regulations, the drafters would have phrased it as "those projects identified as grandfathered by the Department of State Part 600 regulations [see Appendix A, DOS Consistency Regulations, NYCRR Title 19, Part 600, 600.3(4)]." Instead, the CMP's drafters stated: "those projects for which a final [EIS] has been prepared prior to the effective date of the Department of State Part 600 regulations [see Appendix A, DOS Consistency Regulations, NYCRR Title 19, Part 600, 600.3(4)]." (R.276.) Thus, the bracketed language at the end of the EIS exemption does not make the EIS exemption track the exemption in the cross-referenced regulation, but rather borrows only "the effective date of the Department of State Part 600 regulations" (*id.*); the regulation cited within the brackets, 19 NYCRR 600.3(4), indeed provides that effective date, September 28, 1982.

Finding no support in the CMP's plain text, NYSDOS hypothesizes (Br. 40) that the CMP's drafters intended merely to "solv[e] a transition problem" by

creating a "transition exemption [that] saves from [CMP] consistency review only projects that had been subject to review under SEQRA but had not been subject to review for consistency with the state's coastal policies because they were reviewed before New York's CMP became effective in 1982." In other words, according to NYSDOS, the CMP's SEQRA exemption was to apply to pre-1976 projects, and the CMP's EIS exemption was to apply to certain 1976-82 projects. But NYSDOS cites no evidence that this was the CMP drafters' purpose, and there is no irrationality in the interpretation that follows from the plain text of the CMP: that the drafters provided two separate exemptions that might *both* apply (as here) to a particular facility based on events that occurred before 1976.

Even if NYSDOS were correct that the CMP's EIS exemption tracks the grandfathering provision in 19 NYCRR 600.3(4) (rather than merely borrowing its effective date from that section), the exemption would still plainly cover Indian Point because final EISs prepared under NEPA satisfy *SEQRA* by SEQRA's own terms. As the Appellate Division correctly explained, the SEQRA regulations themselves "permi[t] the use of final [EISs] prepared under [the federal] NEPA" in place of state EISs prepared under SEQRA. (R.4609 (citing 6 NYCRR 617.2(n), 617.15(a); Philip Weinberg, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 17½, ECL § 8-0111)); *see also* 6 NYCRR 617.15(a) (no EIS under SEQRA is needed "[w]hen a draft and final EIS for an action has been duly

prepared under [NEPA]"); *id.* 617.2(n) (defining "EIS" to include "a 'federal' document in accordance with section 617.15 of this Part").

Finally, NYSDOS's interpretation would impermissibly render the EIS exemption "mere surplusage." *Scott v. Mass. Mut. Life Ins. Co.*, 86 N.Y.2d 429, 435 (1995). If the EIS exemption tracked the grandfathering provision in 19 NYCRR 600.3(4) but a federal EIS did not qualify as a state EIS under the SEQRA regulations, then the EIS exemption would apply to a null set. The CMP's exemptions appear in the CMP's Section entitled "Special *Federal* Program Requirements" (R.276 (emphasis added)), and thus are concerned only with *federal projects*.[14] And federally-approved projects after 1976 need have only a federal EIS under NEPA, *see* 42 U.S.C. § 4332(c), not a state EIS under SEQRA, because (as explained in the previous paragraph) no EIS under SEQRA is needed "[w]hen a draft and final EIS for an action has been duly prepared under [NEPA]." 6 NYCRR 617.15(a); *see also* E.C.L. § 8-0111(2) (a "federal [EIS], duly prepared, shall suffice for the purpose of" SEQRA and "no further report under [SEQRA] is required"). Thus, on NYSDOS's reading, *no* federal project between 1976 and 1982 would qualify for the EIS exemption because no such project would have a state EIS—an impermissible result.

[14] NYSDOS's argument (Br. 41) that the EIS exemption is "state-focused" disregards that fact.

B. The Exemption Applies To A "Project," Meaning A "Facility," Not Merely To A Discrete Application Made By A Facility

NYSDOS argues (Br. 31-39) that the EIS exemption applied only at original licensing and does not apply at license renewal. But NYSDOS never acknowledges that the CMP's EIS exemption (and the SEQRA exemption discussed in Point II as well) applies to "projects," meaning "facilities," not to a particular license application made by the facility. Instead, NYSDOS relies almost entirely on federal CZMA provisions that, as explained *supra*, at 26, are irrelevant unless the state's CMP applies.

The CMP frames the EIS exemption (and also the SEQRA exemption) as applying to a "project." (R.276.) "[P]roject" is a synonym for "facility," as indicated by the CMP's interchangeable use of those terms on the very page that contains the exemption provision:

> A State's management program must identify uses and *facilities* of regional benefit and demonstrate how they would not be unreasonably restricted or excluded (15 CFR 923.12). It should be noted that these uses and *facilities* may be considered of national interest. . . . The *projects* which meet one of the following two criteria have been determined to [b]e projects for which a substantial amount of time, money and effort have been expended, and will not be subject to New York State's Coastal Management Program . . . .

(R.276 (emphasis added); *see also, e.g.*, R.227 ("During the review of proposed *projects*, consideration is given to: the location of the proposed *facility* . . . .") (emphasis added); R.224 ("[M]easures to preserve farmland . . . traversed by

transportation *facilities* are included in all stages of such *projects*.") (emphasis added); R.252 ("The procedures for assessing the suitability of a site for other *facilities* likely to locate in the coastal zone are essentially the same as for assessing the suitability of any other type of *project* in the coastal zone.") (emphasis added).)[15]

The CMP is not unique in this regard: it is typical for a grandfathering exemption to apply to a facility for its lifetime, and not to be lost when the time comes for the facility to apply for license renewal. *See, e.g.*, *Matter of Atl. Cement Co. v. Williams*, 129 A.D.2d 84, 88, 92 (3d Dep't 1987) (involving "the renewal of a permit [for a mine], not an initial application for a permit," and holding that the mine was exempt from review); *E.T.O., Inc. v. Town of Marion*, 375 N.W.2d 815, 818 (Minn. 1985) ("[Because] the rationale behind the [grandfathering] clause is to prevent licensees from being deprived of their licenses for reasons over which they have no notice or control, [denial of] the same protection [upon license renewal] would . . . be arbitrary and capricious.").

[15] To the extent the CMP's exemption provisions describe "project" as a synonym not just for "facility" but also for "uses" (R.276), the latter term similarly encompasses a category of activities and is not time-limited. (*See, e.g.*, R.146-47 ("[u]ses requiring large quantities of water for processing and cooling purposes (for example: hydroelectric power plants, fish processing plants, pumped storage power plants) . . . .").)

To be sure, the CMP lists licensing of "nuclear power plants" (R.295), including license "renewals" (R.286), as matters NYSDOS reserves the right to review. But those references appear *after* and must be read in light of the CMP's exemption provision. (R.276.) In other words, an exempt facility is exempt both when applying for an initial federal license and a renewal of that license.

II. THE PLAIN LANGUAGE OF THE SEQRA EXEMPTION COVERS INDIAN POINT

The Appellate Division, having held that the CMP's EIS exemption applies to Indian Point, did not need to reach the CMP's SEQRA exemption, which covers "projects identified as grandfathered pursuant to [SEQRA] at the time of its enactment in 1976." (R.276.) This Court likewise need not address the SEQRA exemption if it affirms the Appellate Division's holding that the EIS exemption applies. But if this Court disagrees regarding the reach of the EIS exemption, it should proceed to examine the SEQRA exemption and to conclude that it encompasses Indian Point. *See, e.g.*, *Parochial Bus Sys., Inc. v. Bd. of Educ. of City of N.Y.*, 60 N.Y.2d 539, 545-46 (1983) ("[T]he successful party . . . is entitled to raise an error made below . . . as long as that error has been properly preserved and would, if corrected, support a judgment in his favor.").

A. Indian Point Was Identified As Grandfathered By SEQRA As Of May 28, 1976 Because Indian Point Had Been "Undertaken Or Approved" Before That Date

The CMP's SEQRA exemption applies to "those projects identified as grandfathered pursuant to [SEQRA] at the time of its enactment in 1976." (R.276.) The only "SEQRA . . . enactment in 1976" was Chapter 228 of the Laws of 1976, which was approved by Governor Carey on May 28, 1976.[16] At that time, SEQRA's grandfathering provision stated in relevant part: "The requirements of subdivision two of section 8-0109 of this article shall not apply to . . . [a]ctions undertaken or approved prior to the effective date of this article." E.C.L. § 8-0111(5)(a) (1976).[17]

Thus, the plain text of the SEQRA exemption (and the SEQRA grandfathering provision it incorporates by reference) asks simply whether Indian Point was "undertaken or approved" before May 28, 1976. The answer is yes. *First*, the "approved" element is satisfied. From construction through initial

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[16] This 1976 enactment amended the original SEQRA, L. 1975, ch. 612, which had been approved by Governor Carey on August 1, 1975.

[17] The "effective date of this article" was initially June 1, 1976, L. 1975, ch. 612, § 2, and was later amended to September 1, 1976, L. 1976, ch. 228, § 4. However, as explained in text, the CMP calls for a test of SEQRA grandfathered status as of the date of SEQRA's 1976 *enactment* (not effective date), which was May 28, 1976. In any event, because Indian Point was grandfathered under SEQRA as of the May 28, 1976 enactment date since it was "undertaken or approved" before that date, it *a fortiori* was "undertaken or approved" before the later dates of June 1, 1976 and September 1, 1976.

operation, Indian Point 2 and 3 received numerous approvals from federal, state, and local agencies, culminating in NRC's issuance of operating licenses for both plants, and all of these approvals were granted before May 28, 1976. *See supra*, at 5-6. *Second*, actions concerning both Indian Point 2 and 3 were "undertaken" before May 28, 1976, in the sense that planning, design, and construction on both plants commenced and was substantially (or entirely) completed before that date. *See id*.

B. There Is No Textual Basis to Consider Developments After May 28, 1976

In the courts below, NYSDOS did not dispute either of the foregoing points. Instead, it argued that a project can fall within the CMP's SEQRA exemption only if the project was included on a list of grandfathered activities prepared by a New York agency *after May 28, 1976*. (*See* NYSDOS App. Div. Br. 25.)

NYSDOS's interpretation is contrary to the plain text of the CMP. The CMP, adopted in 1982, expressly pinned the applicability of the SEQRA exemption to SEQRA at the time of its enactment in 1976 (*i.e.*, as of May 28, 1976). Again, the CMP's SEQRA exemption applied to "projects *identified* as grandfathered pursuant to [SEQRA] *at the time of its enactment in 1976*." (R.276 (emphasis added).) As of that time, SEQRA's grandfathering provision *itself* "identified as grandfathered" (R.276) those projects—such as Indian Point—that had already been "undertaken or approved," E.C.L. § 8-0111(5)(a) (1976).

To be sure, the May 28, 1976 SEQRA enactment imposed a new requirement that each state agency prepare a list by August 1, 1976 of those "state agency actions" (as opposed to private party actions) that it "deems to have been approved" in accordance with the "undertaken or approved" standard of SEQRA's grandfathering provision; the director of budget was then instructed to review the lists to "certify that substantial time, work and money have been expended on such projects . . . ." L. 1976, ch. 228, § 5.[18] But since this requirement was new as of May 28, 1976, the agencies could not practicably have had lists of their projects and activities prepared as of that date. Rather, they were given until August 1, 1976 to compile the lists. *Id.* Accordingly, any such lists, and the subsequent certification of such lists by the director of the budget, cannot inform whether a particular project was grandfathered "at the time of [SEQRA's] enactment in [May 1976]." In other words, if (as NYSDOS's interpretation would require) a project had to be listed by an agency to qualify for the CMP's SEQRA exemption, no project would qualify, thereby rendering the SEQRA exemption a nullity, which

[18] The listing/certification requirement is uncodified and is not determinative of grandfathered status in any event. Instead, projects are "identified" as grandfathered *by SEQRA itself* if they meet the test in the substantive, codified provision, *i.e.*, that they were "undertaken or approved" before SEQRA's enactment. *See* Gerrard *et al.*, *Environmental Impact Review in New York* § 2.01 (2013) ("If an agency failed to include a direct agency project on its list, the project might nevertheless" be grandfathered.).

the CMP's drafters surely did not intend. *See, e.g.*, *Branford House, Inc. v. Michetti*, 81 N.Y.2d 681, 688 (1993) ("A construction rendering statutory language superfluous is to be avoided.") (citations omitted). The SEQRA exemption instead requires an application of the "undertaken or approved" standard as of May 28, 1976, without regard to any subsequent agency listing or director of budget certification, which here occurred on April 11, 1978—almost two years after the May 28, 1976 SEQRA enactment. (R.2663, 2665.)

Accordingly, the presence of Indian Point 2 or 3 on a subsequent agency list that was then certified by the director of budget is irrelevant and not a prerequisite to qualifying for the SEQRA Exemption. Nor does the presence or absence of the plants on such a list—here, NYPA's list mentioned only certain activities at Indian Point 3, and none at Indian Point 2, as grandfathered (R.2665)—provide even indirect evidence on whether Indian Point 2 or 3 had been "undertaken or approved" as of May 28, 1976. NYPA's failure to list any activities at Indian Point 2 is explained by the fact that Indian Point 2 was then privately owned by ConEd (R.30), and SEQRA's listing requirement applied only to "state agency actions" as distinguished from actions "involving the issuance to a [private] person of a . . . license." *Compare* L. 1976, ch. 228, § 5 (uncodified), *with id.* § 1 (codified at E.C.L. § 8-0105(4)); *see also* L. 1977, ch. 252, §§ 11, 14 (confirming that listing requirement did not apply to agencies' review or approval of licenses to private

persons). As to Indian Point 3, NYPA's listing of numerous construction activities at the plant, but not the overall activity of operation, is explained by the facts that the prior owner, ConEd, had applied for the operating license from NRC in 1968, six years before NYPA acquired Indian Point 3, and that ConEd was a private entity not subject to the listing/certification requirement.[19] In any event, even if NYPA had owned Indian Point 3 throughout the entire period, its listing of specific activities that comprise the broader project of nuclear plant operation necessarily includes the broader project because regulations under SEQRA define "projects" as "a set of activities." 6 NYCRR 617.2(b) (1978).

III. INDIAN POINT'S EXEMPT STATUS UNDER THE CMP HAS NOT BEEN FORFEITED

NYSDOS argues (Br. 46-51) that material changes in Indian Point's operations and in the regulatory landscape have triggered a forfeiture of Indian Point's CMP-exempt status. The argument should fail for two reasons. *First*, the CMP's exemption provisions do not contemplate a material-changes doctrine. *Second*, even if they did contemplate such a doctrine, it is not implicated by

[19] In the case of a permit granted to a private entity, the permit itself (if issued prior to the relevant date for determining grandfathered status) provides notice to the public of the project's grandfathered status. By contrast, in the case of an activity conducted by a state agency that may not be the subject of a permit, there is arguably a need for some public notice of the project's grandfathered status, and the listing/certification requirement satisfies that concern. *See* Gerrard, *supra*, § 2.01 ("[e]ach agency's 'certified' list . . . was required to be available for public inspection") (citing L. 1977, ch. 252, §§ 9, 10, 12, 13).

(a) increases in stringency of non-CMP regulations; (b) changes that mitigate Indian Point's environmental impact; or (c) changes that are exclusively within the federal government's authority to regulate.

A. The Coastal Management Program Does Not Include A Material-Changes Doctrine

At the threshold, the text of the CMP's exemption provisions does not contain a material-changes doctrine, and such a doctrine cannot be imported into the CMP from SEQRA or from CZMA regulations.

The Appellate Division correctly distinguished SEQRA's material-changes doctrine, *see* E.C.L. § 8-0111(5); *Matter of Salmon v. Flacke*, 61 N.Y.2d 798 (1984), as "not pertinent to the applicability of the CMP." (R.4610.)[20] As discussed in Point II, *supra*, the CMP made only one of its two exemptions (*i.e.*, the CMP's SEQRA exemption) turn on SEQRA's grandfathering provision, and even as to that exemption, the CMP referenced SEQRA's grandfathering provision only as of May 28, 1976. The CMP's drafters could have, but did not, include an "except[ion]" to the exemption, E.C.L. § 8-0111(5), for a *post-May 28, 1976* "substantial" "*change* in the level of operation," *Salmon v. Flacke*, 61 N.Y.2d at 800 (emphasis added).

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[20] Contrary to NYSDOS's description (Br. 5), the Appellate Division did not reject the Department's argument "without discussion."

NYSDOS's opening brief in this Court does not challenge that conclusion.[21] Instead, NYSDOS now relies exclusively upon federal CZMA regulations as authority for a material-changes doctrine in the CMP context. (*See* NYSDOS Br. 47 (citing 15 C.F.R. § 930.51(b)(3), and (f)).) But as explained *supra*, at 26, the CZMA does not independently impose any requirements; its applicability turns, at the threshold, on the scope of New York's CMP.[22]

B. Even If The Coastal Management Program Incorporated A Material-Changes Doctrine, It Has Not Been Triggered

Even if the material-changes doctrine applied here (it does not), NYSDOS fails to show that it has been triggered by (a) measures that have been undertaken or may yet be undertaken to mitigate Indian Point's environmental impact; (b) spent nuclear fuel storage, which is an incident of nuclear plant operation and is comprehensively and exclusively regulated by the federal government; or (c) increases in the stringency of non-CMP regulations applicable to Indian Point.

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[21] In proceedings below, NYSDOS did rely on SEQRA. (*See* NYSDOS App. Div. Br. 34 ("When an application to renew a license involves a project or activity that has undergone material changes, it is again subject to review, whether under SEQRA or the CZMA.") (citing E.C.L. § 8-0111(5)(a)); R.497 (NYSDOS's own underlying decision) (citing *Salmon*, 61 N.Y.2d at 800).)

[22] Moreover, the CZMA regulation upon which NYSDOS relies (Br. 46 (citing 15 C.F.R. § 930.51)), assigns to "the Federal agency," not the state agency (such as NYSDOS here), "[t]he determination of substantially different coastal effects . . . after consulting with the State agency, and applicant." 15 C.F.R. § 930.51(e).

Reduction in impact on aquatic life. NYSDOS argues that Indian Point has lost its CMP-exempt status because it has since 1982 installed equipment to *reduce* or to *mitigate* Indian Point's impact on aquatic life in the Hudson River ("traveling screens, fish handling and return systems, and low pressure screenwash systems," NYSDOS Br. 49), and it may yet undertake additional such measures in the future (such as "cylindrical wedge-wire screens," *id.*).[23] But it would be perverse for measures that mitigate, rather than exacerbate, a facility's environmental impact to trigger a loss of exempt or grandfathered status. Not surprisingly, no New York court has ever so held. To the contrary, *Salmon*'s focus on whether there will be a "modification . . . which may have a significant impact on the environment," *Atl. Cement*, 129 A.D.2d at 92 (discussing *Salmon*, 61 N.Y.2d at 800), clearly implies that the "significant impact" must be a negative one.

On-site storage of spent nuclear fuel. NYSDOS also asserts that the on-site storage of spent nuclear fuel qualifies as a material change that forfeits Indian Point's CMP-exempt status. As an initial matter, creation of spent nuclear fuel is an inevitable part of a nuclear power plant's operations and, hence, is not the type

[23] As explained *supra*, at 9, NYSDOS incorrectly claims (Br. 49) that Indian Point's original licenses required that cooling towers be constructed in the future. In any event, if such cooling towers were to be required, it could only be on the basis that they would reduce Indian Point's environmental impact, not worsen that impact.

of change that New York courts have deemed to forfeit a facility's grandfathered status. *See, e.g.*, *Atl. Cement*, 129 A.D.2d at 92 ("Although petitioner's [mining] activities are approaching abutting properties in some places, the expansion underlying this encroachment was previously reviewed by DEC and is consistent with the nature of mining, i.e., that mining operations progress into different areas.") (citation omitted).

In any event, regulation of spent nuclear fuel storage is comprehensively and exclusively regulated by the federal NRC. *See, e.g.*, *Pac. Gas & Electric Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 207 (1983) (NRC has "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials"); *Bullcreek v. NRC*, 359 F.3d 536, 538 (D.C. Cir. 2004) ("[T]he AEA confers on the NRC authority to license and regulate the storage and disposal of [spent nuclear] fuel."). As explained *supra*, at 12-13, NRC has analyzed this issue and found that on-site storage of spent nuclear fuel is safe both during and after the operating life of the plant. New York State can challenge (and is challenging) NRC's determination in the U.S. Court of Appeals for the D.C. Circuit. What New York State cannot do, given the NRC's exclusive authority, is undertake its own regulatory action (such as CMP review by NYSDOS) based on spent nuclear fuel storage concerns.

Moreover, to the extent NYSDOS relies (Br. 48) on a prior leak from Indian Point 2's spent fuel pool, NYSDOS ignores that the leak was repaired and remediated well before the federal license renewal application for Indian Point was filed in 2007. (R.2810.)[24] NRC found no adverse impact on public health from the leak, and no federal or state authority has found an adverse impact on the natural environment. (R.2809, R.2911-12.) Thus, to the extent such a leak could be considered to be a change in Indian Point's operations, it was an immaterial change, not a "substantial" change as required under *Salmon v. Flacke* to cause a loss of exempt status.

Regulatory changes. NYSDOS also invokes "regulatory changes" (Br. 47), but those changes involve *additional* regulation from other state and federal sources. Accordingly, they provide less, not more, reason to deem Indian Point's CMP-exempt status forfeited. For example, DEC, through its SPDES program, is evaluating whether to impose additional measures to deal with aquatic impact, *see supra*, at 11, and NRC is likewise studying that issue, *see supra*, at 11-12.[25] And

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[24] As discussed *supra*, at 14 n.6, a leak at Indian Point 1 was also remediated with no residual effect on safety or the environment, and in any event Indian Point 1 was permanently shut down in 1974 and is not at issue in Entergy's application for license renewal for Indian Point 2 and 3.

[25] NYSDOS's reliance (Br. 50) on the fact that NRC's original studies evaluated Indian Point's environmental impact for the original license period offers no support for its "material changes" argument. NRC more recently has prepared

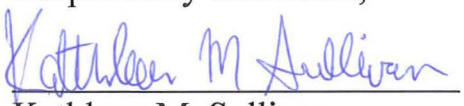
NRC, both on an ongoing basis and in connection with the license renewal application, is comprehensively regulating the safety of Indian Point for the surrounding population. *See supra*, at 6, 12. Those non-CMP sources of regulation do not exempt Indian Point from review, but the CMP does.

CONCLUSION

The Appellate Division's order and judgment should be affirmed.

Dated: January 19, 2016
New York, New York

Respectfully submitted,



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EISs for the 20-year renewal term. *See supra*, at 12 n.4. But *New York* exempted Indian Point as a facility from review under the CMP, applying the exemption to a "project" and not a particular timeframe or license. *See* Point I.B, *supra*.

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