APL-2015-00152

To be Argued by:
BARBARA D. UNDERWOOD
(Time Requested: 20 Minutes)

App. Div. Third Dept. No. 518510; Albany Co. Index No. 1535-13

Court of Appeals of the 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.

BRIEF FOR RESPONDENTS-APPELLANTS

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MISCELLANEOUS

PRELIMINARY STATEMENT

This case presents the question of whether a pending application to renew, for 20 more years, the federal operating licenses for the Indian Point nuclear power facilities on the Hudson River is subject to review by the New York State Department of State (NYSDOS) under a joint federal-state regulatory program designed to protect coastal resources. The Appellate Division ruled, incorrectly, that Indian Point was exempt from review by New York State to determine consistency with the policies of New York's Coastal Management Program (CMP) because, when the reactors were built 40 years ago, they were the subject of federal environmental impact statements (EISs) issued under the federal National Environmental Policy Act of 1969 (NEPA).

New York's CMP, adopted in 1982 pursuant to the federal Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 (CZMA), identifies 44 statewide policies applicable to development and natural resource management along New York's coastline. The CZMA, along with New York's CMP, authorizes NYSDOS to review proposed actions requiring federal licenses for consistency with the state coastal policies.

Petitioners Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point, LLC, and Entergy Nuclear Indian Point 3 LLC (together, "Entergy") in 2007 applied to the Nuclear Regulatory Commission (NRC) for the renewal of federal licenses to operate the two 40-year-old nuclear reactors at Indian Point, located on the Hudson River 24 miles from New York City, for an additional 20 years. That renewal application is currently pending.

Entergy sought an opinion from NYSDOS on whether its relicensing application to the NRC was exempt from review by NYSDOS for consistency with the CMP's policies. Entergy claimed that the New York CMP does not require review of its application for consistency with New York's coastal management policies, because the CMP exempts from such review "those projects for which a final Environmental Impact Statement has been prepared prior to the [September 1982] effective date of the Department of State Part 600 regulations," regulations which govern review of state actions for consistency with the CMP. Entergy contended that the federal EISs filed for the Indian Point power plants in 1972 and 1975 qualify it for that exemption.

NYSDOS issued an advisory opinion concluding that Entergy's application to the NRC to renew its operating licenses for another 20 years is not exempt from review by NYSDOS for consistency with New York's CMP. Interpreting the CMP exemption it had authored, NYSDOS explained that the exemption was a time-limited transitional provision governing actions undertaken during the period between the effective date of the State Environmental Quality Review Act (SEQRA) on September 1, 1976 and the state coastal consistency regulations' effective date of September 28, 1982. (Record on Appeal (R.) at 495.) That exemption, NYSDOS opined, had no relevance to Entergy's pending application for license renewal. Supreme Court upheld NYSDOS's determination, but the Appellate Division reversed, rejecting the agency's construction of the exemption and substituting its own interpretation.

The Appellate Division erred. The exemption does not cover Entergy's present request to the NRC, a federal agency, to renew the plants' federal licenses for an additional 20 years. It makes no sense to say that, because environmental impact statements for the reactors' original siting and operation were prepared in 1972 and 1975, the

20-year relicensing sought today—a new and distinct federal agency decision—cannot be reviewed separately for consistency with New York's coastal policies. The relicensing of nuclear plants is a new and separate regulatory action under federal law, and review by NYSDOS for consistency with New York's coastal policies is required under the CZMA and New York's CMP.

NYSDOS reasonably interpreted its exemption as a time-limited pass for projects that were subject to an EIS prepared under state SEQRA during the limited time period when SEQRA was in effect but the CMP's implementing regulations had not yet been adopted (1976-82). As we explain below, NYSDOS chose an exemption period between the effective date of SEQRA and the effective date of the consistency regulations as the exemption's beginning and end points. This exemption ensured that projects for which state agencies had invested time and effort in the preparation of an EIS would not thereafter also be required to undergo a review by NYSDOS for consistency with the CMP's coastal policies. NYSDOS's interpretation of this transitional exemption, and its view that Entergy did not qualify for it, are entitled to deference.

The Third Department likewise erred in rejecting without discussion NYSDOS's alternative determination that consistency review of the federal license renewal applications is warranted by material changes in Indian Point's operation and applicable law that have occurred since the 1970s.

This Court should therefore reverse. The Appellate Division's decision undermines New York's important role in the joint federal-state program established by the CZMA to protect coastal resources. It would allow Entergy to operate the aging Indian Point nuclear reactors for another 20 years beyond the original licenses' expiration without any review of whether that extended operation would be consistent with the policies in New York's CMP.

QUESTIONS PRESENTED

1. Is Entergy's current application for a 20-year renewal of its federal licenses for the aging nuclear reactors at Indian Point subject to review by NYSDOS for consistency with New York's coastal policies, as contemplated by the federal CZMA?

2. Did NYSDOS act rationally in construing the exemption language in its CMP and in determining that the exemption applied

only to actions reviewed under state law within a specified time period, and not to the current federal action of renewing operating licenses for the nuclear reactors at Indian Point, which was initiated decades after that transitional period ended?

3. Do material changes to the Indian Point nuclear reactors' operations since their original licensing independently support NYSDOS's consistency review of Entergy's application to the NRC to renew the Indian Point facilities' operating licenses?

JURISDICTIONAL STATEMENT

This Court has subject matter jurisdiction over this appeal under C.P.L.R. § 5602(a)(1)(i). The action originated in New York State Supreme Court, Albany County, Index No. 1535-13. (R.22, 24.) The action was finally determined by the Appellate Division in an Opinion and Order entered December 11, 2014. (R.4605-4611.) This Court granted respondents-appellants' motion for leave to appeal by Order entered June 4, 2015. (R.4601-4602.) The grounds for this appeal were preserved, among other things, in NYSDOS's initial ruling (R.494-500), in NYSDOS's submissions and arguments to Supreme Court

(R.3161-3182, 3190-3192, 3210-3214, 4458-4473, 4476-4477), and in NYSDOS's brief to the Appellate Division, Third Department.

STATEMENT OF THE CASE

A. Statutory and Regulatory Context

This case involves the CZMA's unique federal-state statutory and regulatory scheme aimed at protecting the coastal areas in New York and other coastal states. The CZMA authorizes coastal states to conduct consistency reviews of federal actions that affect their respective coastal uses and resources. This case deals with NYSDOS's interpretation of certain provisions of its own CMP, described below.

1. The Federal Coastal Zone Management Act

Declaring "a national interest in the effective management, beneficial use, protection, and development of the coastal zone," 16 U.S.C. § 1451(a), Congress enacted the CZMA in 1972 to encourage states to protect their coastal resources by developing CMPs. *See* 16 U.S.C. §§ 1451-1452. (*See also* R.66-67.) The CZMA posits that "[t]he key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full

authority" over coastal lands and waters by adopting CMPs. 16 U.S.C. § 1451(i).

The CZMA invites each coastal state to develop a CMP for approval by the U.S. Secretary of Commerce. 16 U.S.C. §§ 1451(a), 1454. The CMPs are "comprehensive statement[s] . . . setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone." 16 U.S.C. § 1453(12).

Under the CZMA, "any applicant for a required Federal license" to conduct an activity "affecting any land or water use or natural resource of the coastal zone" of a state must provide a certification that the proposed activity complies with the enforceable policies of the state's federally-approved CMP, "and that such activity will be conducted in a manner consistent with the program." 16 U.S.C. § 1456(c)(3)(A). (*See also* R.3176.) "No license . . . shall be granted by the Federal agency" until the state or its designated agency has concurred with the certification, is deemed to have done so, or the U.S. Secretary of Commerce overrides the state's objection. 16 U.S.C. § 1456(c)(3)(A). In New York, the designated agency is NYSDOS. (R.94.)

In determining whether to concur with the applicant's certification, the designated state agency conducts a "federal consistency review" of a proposed federal license application. The term "federal" in this context refers not to the reviewing entity, but to the action—a federal license, permit, or activity—reviewed by the designated state agency pursuant to the federally-approved CMP. *See* 15 C.F.R. § 930.11(g). State actions too are subject to review for consistency with the CMP, but that review—known as "state consistency review"—is conducted not by NYSDOS but by the state agency proposing to take the action, in accordance with regulations promulgated by NYSDOS. *See* 19 N.Y.C.R.R. §§ 600.2(l), 600.3, 600.4; Exec. L. § 919.

Federal consistency review has aptly been explained, in discussion on the House floor, as a "bargain" between the federal government and the states: "If [the states] developed [coastal management] programs which met Federal standards and received Federal approval, we promised that Federal agencies would adhere to these programs." (R.3600.) The purpose of federal consistency review is to ensure that proposed federal-level activities are consistent with the affected state's

CMP. *See* 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.50. It "can be a powerful management tool for the states to make certain that federal activities are coordinated with their coastal management programs." (R.3604; *accord* R.3611 (noting that federal consistency requirements have grown in significance as a management tool).)

Federal regulations under the CZMA require consistency review of renewal applications for federal licenses that affect any coastal use or resource where the activities were not previously reviewed by the designated state agency, where the activities are subject to new management program changes, or where the renewal will cause an effect substantially different from those the state agency originally reviewed. 15 C.F.R. §§ 930.51(b)(1)-(3). NYSDOS has never reviewed Entergy's Indian Point facilities for federal consistency with New York's CMP.

Reinforcing the underlying statute, the CZMA regulations provide that if the designated state agency determines that a proposed federal activity is inconsistent with its approved CMP and issues an objection, the federal agency is precluded from permitting or licensing the activity. 15 C.F.R. §§ 930.63, 930.64. The U.S. Secretary of Commerce

may override a state's consistency objection by finding that the proposed activity is consistent with the national objectives or purposes of the CZMA or is necessary for national security. 15 C.F.R. § 930.130(e)(1); *see also* 15 C.F.R. §§ 930.121, 930.122. The federal courts have jurisdiction over appeals of the Commerce Department's decisions. 15 C.F.R. § 930.130(c); 5 U.S.C. § 702.

2. New York's Coastal Management Program

In 1982, with input gathered from more than 1,000 meetings and hearings (R.52), New York adopted a CMP. (R.49-485.) *See* 16 U.S.C. § 1453(12). NYSDOS took the lead in preparing the CMP and also administers it. (R.70, 3175-3176.) *See* 1975 N.Y. Laws ch. 464, § 47(1). The U.S. Secretary of Commerce approved New York's CMP on September 30, 1982, and the CMP became effective on that date. *See* 47 Fed. Reg. 47,056 (Oct. 22, 1982). (*See also* R.52.)

The CMP recognizes that New York's coast is "one of the State's greatest assets" and is "unique, for it contains a variety of natural, recreational, industrial, commercial, cultural, aesthetic, and energy resources of local, statewide and national significance"—resources that are "severely threatened by competing demands." (R.70.) The CMP

guides government decision-making in the coastal zone on matters such as waterfront development, fish and wildlife habitat, public access, recreation, historic and scenic resources, wetlands, water and air resources, and energy production. (R.64-65, 141-245.)

New York's CMP sets forth 44 enforceable statewide policies relating to coastal activities, against which license renewals and other federal actions affecting coastal resources must be assessed. (R.64, 141-245; *see also* R.3178-3179.) These policies include protecting fish and wildlife resources (R.165-167), developing recreational and commercial fishing (R.168-172), preventing or minimizing damage from flooding and erosion (R.172-184), promoting public water-related recreation (R.190-196, 202-209), preserving and protecting the coastal area's scenic resources (R.213-218), meeting public energy needs in an environmentally safe manner (R.225-232), and controlling air and water pollution (R.232-243).

For proposed federally-licensed activities that may affect a coastal use or resource, New York State has designated NYSDOS to review federal agency actions to ensure their consistency with the 44 enforceable coastal policies set forth in the CMP. (R.94-95, 283, 286,

3176.) *See* 15 C.F.R. § 930.11(o); 1975 N.Y. Laws ch. 464, § 47(1). Review of federal actions for consistency with the CMP is distinct from any state agency review of environmental impacts required by SEQRA, which was enacted in 1976 and is codified at New York Environmental Conservation Law, art. 8.

Since its effective date on September 30, 1982, New York's CMP has listed the issuance of an operating license for a nuclear facility as a reviewable activity that requires the applicant to submit a federal consistency certification to NYSDOS. (R.292, 295.) Further, the CMP's requirement of federal consistency review "applies to renewals" of federal licenses (R.286), and thus likewise requires the license renewal applicant to submit a consistency certification to NYSDOS.

B. The Hudson River Valley and the Indian Point Reactors

New York's coastal zones include the Hudson River Valley. A tidal estuary, the Hudson River is surrounded by an ecologically and historically significant area that extends 150 miles upriver from New York City to the federal dam at Troy. (R.78-79, 4377-4378.) It is home to two endangered species of fish, the shortnosed sturgeon and the

Atlantic sturgeon. (R.78, 1541, 4392.) *See* 77 Fed. Reg. 5880, 5912 (Feb. 6, 2012) (listing Atlantic sturgeon as endangered). It also supports other threatened and endangered species, including the bog turtle, the Indiana bat, and the bald eagle. (R.4587.)

Entergy's Indian Point nuclear generating facilities are located on the east bank of the Hudson River in Westchester County, New York, about 24 miles north of New York City. (R.4372, 4562.) The site has two active nuclear reactors, Indian Point Unit 2 and Unit 3 (R.30-32),[1] along with storage pools for spent nuclear fuel. The federal government issued 40-year operating licenses for Unit 2 and Unit 3 in the early 1970s, when Consolidated Edison owned all three Indian Point reactors. (R.3139.) The agency now known as the New York Power Authority acquired the licensed and partially-completed Indian Point Unit 3 from Consolidated Edison in 1975. (R.31, 3139.) Entergy bought Unit 3 from the Power Authority in 2000 and acquired Unit 2 from Consolidated Edison in 2001. (R.34, 3139.)

Entergy has continued to operate Unit 2 and Unit 3 under the original 40-year licenses. Both reactors use a "once-through" cooling

[1] Unit 1 ceased generating electricity in 1974. (R.4372 n.1, 4562.)

water intake system, which draws water from the Hudson River, passes the water once through a steam condenser, and then discharges it back into the river at a higher temperature. (R.3138.) The cooling water intake systems for Units 2 and 3 withdraw nearly 2.5 billion gallons of water per day from the Hudson River, "constituting the greatest single industrial use of water in New York State, and far exceed[ing] the amount of water withdrawn by any other industrial facility located on the Hudson River." (R.3149.)

The massive water intakes at Units 2 and 3 destroy nearly one billion fish, fish eggs, fish larvae, and other aquatic organisms every year. (R.3147, 3149.) Many of those smaller fish and aquatic organisms are injured or killed when the cooling system sucks them through the intake screens (entrainment). Those fish too large to be drawn through the screens may be forcibly sucked against the screens, pinned there, and killed by the power of Indian Point's intake pipes (impingement). (*See* R.3139 n.2-3.)

The original federal EISs for Units 2 and 3, issued by the NRC's predecessor, the Atomic Energy Commission (AEC) in 1972 and by the NRC in 1975, respectively, reviewed the once-through cooling systems

and recommended that they be replaced by a closed-cycle cooling system (*i.e.,* cooling towers) to prevent the destruction of fish and other aquatic life from entrainment and impingement. (R.513, 2055; *see also* R.3140, 3153.) Indian Point's original operating licenses and National Pollution Discharge Elimination System permit required that the Indian Point facilities be retrofitted to employ closed-cycle cooling to mitigate the once-through cooling systems' impact on the Hudson River and its ecology. (*See* R.3139-3140.) Yet, the Indian Point reactors' once-through cooling systems, previously expected to be an interim measure, have never been replaced.[2] (R.3142-3143.) The cooling water intake structures have been retrofitted with screens and other technologies

[2] The retrofitting requirement was postponed by litigation resulting in the Hudson River Settlement Agreement (HRSA) among Indian Point's then-owners and operators, three other Hudson River power generation facilities, and federal and state regulators. The HRSA established a process that postponed the implementation of closed-cycle cooling at Indian Point and the other Hudson River power plants for ten years, provided for comprehensive study of facility impacts to the Hudson River and its ecosystem, and provided interim mitigation measures to reduce fish, larval and egg mortalities from impingement and entrainment. At Indian Point, the interim measures included seasonal "outages" and the installation of variable speed pumps. The HRSA was extended four times and expired on February 1, 1998. Pursuant to the HRSA, the Department of Environmental Conservation (DEC) issued State Pollutant Discharge Elimination System (SPDES) permit renewals to Indian Point. Those permits have been extended by operation of the State Administrative Procedure Act during the adjudication of the agency's 2003 draft SPDES permit, which requires closed-cycle cooling or its equivalent. (*See* R.3139-3143.)

since their original installation in an attempt to mitigate some of the impacts on aquatic life (R.3139, 4562-4563, 4565-4567), but massive numbers of fish and other organisms continue to be killed at Indian Point (R.3146-3147).

In addition, although not contemplated by the original licenses, the Indian Point facilities store decades worth of spent nuclear fuel on-site because the federal government has been unable to establish a permanent repository for nuclear waste. (R.4396.) Radioactive waste from the spent fuel pools at Indian Point has leached into the groundwater and migrated to the Hudson River. (R.499; *see* R.2810, 2812, 2817, 2833, 2920, 2926-2927, 2935, 3014, 3019, 3126, 3147.)

C. License Renewal under the Federal Atomic Energy Act

The NRC licenses the nation's nuclear power facilities. 42 U.S.C. §§ 2132-2134. The federal Atomic Energy Act (AEA) limits the term of an initial operating license to a maximum period of 40 years. 42 U.S.C. § 2133(c). Thus, when the AEC and NRC issued the Indian Point operating licenses in the early 1970s, the licenses were for a 40-year term and the attendant environmental review contemplated operations

during that term only. (R.3182.) Until 1991, the NRC had no regulatory framework or procedures for relicensing nuclear power plants. The agency developed those procedures as the nuclear power fleet began to approach the end of the original 40-year licenses. (R.3181-3182; *see* R.497 n.23.)

In 1995, the NRC adopted its current "Part 54" regulations authorizing the relicensing of nuclear reactors for up to 20 years beyond the original term. 10 C.F.R. § 54.31(b). A renewed operating license "supersed[es]" the original license. 10 C.F.R. § 54.31(c). The Part 54 regulations focus on technical issues such as aging nuclear equipment. In 1996, the NRC amended its "Part 51" regulations to implement a framework for assessing various environmental issues under NEPA in the context of 20 years of additional operation. *See, e.g.,* 10 C.F.R. §§ 51.53(c)(3)(ii); 51.95(c).

An application for an extended license requires the NRC to supplement its generic EIS for relicensing a nuclear facility with a site-specific EIS to support the application for a 20-year extended license term,[3] a process that began for the Indian Point reactors in

[3] *See* http://www.nrc.gov/reactors/operating/licensing/renewal/process.html

2007. (R.3181; *see* R.3005-3011.) To facilitate that site-specific review, the applicant must submit an environmental report to the NRC and must identify other necessary environmental permits and approvals. *See* 10 C.F.R. §§ 51.45, 51.53(c).

D. Entergy's License Renewal Applications

The 40-year license for Indian Point Unit 2 expired in September 2013. (R.3135, 3139.) The NRC has allowed that facility to continue to operate while its administrative license renewal proceeding is pending. *See* http://www.nrc.gov/info-finder/reactor/ip2.html. The 40-year license for Unit 3 expires in December 2015. (R.3135, 3139.)

In 2007, Entergy applied to the NRC for a 20-year renewal of both operating licenses. (R.47.) *See* 72 Fed. Reg. 26,850 (May 11, 2007). In a supporting environmental report, Entergy stated that its application was subject to NYSDOS's federal consistency review under the CZMA (R.4559, 4561-4562), and indicated that materials would be "submitted at [a] later date" after the NRC completed its draft supplemental EIS (R.4561-4593). *See* 10 C.F.R. § 51.45(d) (requiring applicant's environmental report to list all permits, licenses, and approvals that must be obtained for the proposed action).

On December 17, 2012, Entergy submitted a letter to NYSDOS certifying consistency with the New York CMP's policies (R.4168-4170.) *See* 35 N.Y. St. Register at 70 (Aug. 28, 2013). On January 16, 2013, NYSDOS advised that Entergy's certification materials lacked the necessary data and information to commence the six-month consistency review period, *see* 15 C.F.R. § 930.60(a)(2), since the NRC's site-specific supplemental EIS for aquatic impacts had not been received. (R.4172.) On June 20, 2013, NYSDOS received the supplemental EIS and commenced consistency review of the application for renewal of the commercial operating licenses for the nuclear facilities.

E. Entergy's First Attempt to Avoid Federal Consistency Review: Motion to the NRC

In an about-face from the statements in its 2007 application, Entergy in July 2012 sought a ruling from the NRC that its relicensing application for Indian Point was not subject to NYSDOS's review for consistency with the CMP. (R.4299, 4305.) New York opposed Entergy's request and cross-moved for a declaratory ruling that consistency review was required.[4]

[4] *See* http://pbadupws.nrc.gov/docs/ML1309/ML13095A481.pdf.

The NRC staff recommended that Entergy's motion be denied (R.4222) because consistency review issues should be resolved by NYSDOS in the first instance. "As part of its review," the NRC staff explained, "New York can determine whether the effects of [Indian Point Units 2 and 3] operation license renewal are consistent with the NYCMP." (R.4235.)

On June 12, 2013, the NRC's Atomic Safety and Licensing Board ruled that Entergy's motion and New York's cross-motion were premature because NYSDOS and the NRC staff had not yet consulted, which the NRC staff viewed as a requirement under 15 C.F.R. § 930.51(e). *In re Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3*), Order at 4 (June 12, 2013) (ML13163A233).[5]

F. Entergy's Second Attempt to Avoid Federal Consistency Review: Request to NYSDOS for a Declaratory Ruling

In a second bid to avoid federal consistency review, on November 7, 2012, Entergy petitioned NYSDOS for a declaratory ruling

[5] *See* http://pbadupws.nrc.gov/docs/ML1316/ML13163A233.pdf.

that the Indian Point facilities were exempt from consistency review under the CMP. (R.44-48; *see also* R.3176.)

The New York CMP included two time-limited exemptions from consistency review of certain projects approved prior to the CMP's 1982 adoption. (R.276.) The exemptions covered: (1) "those projects identified as grandfathered pursuant to State Environmental [Q]uality Review Act at the time of its enactment in 1976"; and (2) "those projects for which a final Environmental Impact Statement has been prepared prior to the effective date of the Department of State Part 600 regulations [see Appendix A, DOS Consistency Regulations, N.Y.C.R.R. Title 19, Part 600, 6600.3(4)]."[6] (R.276; brackets in original.) The second exemption is at issue here.

The regulation referenced in the second exemption, 19 N.Y.C.R.R. § 600.3(d), stated that it shall not apply to any "action for which a final environmental impact statement has been prepared . . . pursuant to 6 N.Y.C.R.R. Part 617 [SEQRA] prior to the effective date of this Part." 19 N.Y.C.R.R. Part 600.3(d). Part 617 contains SEQRA's implementing

[6] "6600.3(4)" was a typographical error; it was intended to reference 19 N.Y.C.R.R. § 600.3(4), which is now codified at 19 N.Y.C.R.R. § 600.3(d). (*See* R.4608 n.1.)

regulations regarding environmental impact review of state actions and approvals for the limited purpose of "state consistency review." *See* Exec. Law § 919(3). The Part 600 regulations define "actions" as "actions as defined in SEQR[A] . . . which are undertaken by State agencies." 19 N.Y.C.R.R. § 600.2(b).

Entergy argued that Indian Point Unit 2 and Unit 3 were the subject of final federal EISs issued in 1972 and 1975, respectively, and therefore were exempt in perpetuity from consistency review under the CMP's second exemption. (R.46.) The EISs for Indian Point had been issued under NEPA, not SEQRA. (*See* R.536, 1480.) The Indian Point reactors were already constructed, licensed, and operating before either SEQRA or the CMP took effect.

Entergy's claim regarding the purported exemption for Indian Point Units 2 and 3 contrasts starkly with its participation in NYSDOS's 2008 federal consistency review of the license renewal application for Entergy's James A. FitzPatrick Nuclear Power Plant on Lake Ontario in Scriba, New York, which—like the Indian Point facilities—commenced operation in the mid-1970s, pre-SEQRA and pre-CMP. (R.492-493, 3134.) NYSDOS conducted a federal consistency

review of the FitzPatrick operating license renewal and found it to be consistent with the enforceable coastal policies. (R.492, 4314.) The NRC subsequently renewed the FitzPatrick reactor's operating license. (*See* R.3134.)

G. NYSDOS's Response to Entergy's Request for a Declaratory Ruling

NYSDOS responded to Entergy's request for declaratory ruling as to the claimed exemptions' effect on Indian Point on January 9, 2013. (R.486-500; *see also* R.3176-3177.) NYSDOS concluded that Entergy's application to extend Indian Point's operating licenses by 20 years was not exempt from federal consistency review under the CMP, and NYSDOS so advised Entergy.[7] (R.487-497)

NYSDOS determined that the relicensing applications did not qualify for the first exemption because operation and maintenance of the nuclear reactors were not specifically "identified as grandfathered"

[7] Although NYSDOS did not view the Coastal Management Program as an appropriate subject for a declaratory ruling, it issued an advisory opinion because the Coastal Management Program "directs [NYSDOS] to assist applicants in determining whether their application meets one of the exemption criteria." (R.488.)

by any state agency when SEQRA was enacted in 1976. (R.488-494; *see also* R.3179-3180.)

NYSDOS construed the second exemption as covering only projects for which an EIS had been prepared pursuant to SEQRA, a state law, and not facilities for which a federal EIS had been prepared pursuant to NEPA. (R.494-497; *see also* R.3180-3181.) Because SEQRA was not yet enacted when the federal EISs were completed for Indian Point's initial licensing, the second exemption was not relevant to Indian Point. (R.496-497.)

Explaining the second exemption's limited reach, NYSDOS noted the CMP's express reference to 19 N.Y.C.R.R. § 600.3(4): "By this reference, the [transitional] exemption adopts the same exemption provided in § 600.3(4), which exempts actions for which [final state EISs] were prepared pursuant to 6 N.Y.C.R.R. Part 617 during the six-year interval between SEQRA's September 1, 1976 effective date and the effective date of 19 N.Y.C.R.R. Part 600 on September 28, 1982." (R.495.) The Part 600 regulations referenced in the second exemption applied only to actions "undertaken by State agencies." 19 N.Y.C.R.R. § 600.2(b). In other words, projects were exempt from consistency

review under New York's CMP if they had already undergone a SEQRA EIS review during the period from 1976 to 1982. (R.495-496.) NYSDOS accordingly concluded that "[t]he NEPA-based environmental reviews prepared for Indian Point 2 and 3" prior to SEQRA's enactment "do not qualify to exempt the Indian Point facilities from consistency review under the Clause (2) language." (R.497.)

Additionally, NYSDOS advised that federal consistency review was "warranted and required" by changes in the operations of the Indian Point facilities and in the regulatory landscape since the original licenses were issued 40 years ago. (R.497-500.) In particular, NYSDOS noted that, due to federal delay in providing sites for nuclear waste disposal, Indian Point retained 40 years of spent nuclear fuel on-site. (R.499.) Over time, the Indian Point storage pools had leaked radioactive material, which reached the Hudson River. (R.499.) These "substantial and significant changes in . . . waste storage practices" at the Indian Point reactors (R.499) have not been the subject of consistency review. NYSDOS also pointed to modifications of the reactors' once-through cooling water intake systems, some already

installed (R.498) and others under consideration in connection with the renewal of Indian Point's SPDES permits (R.500).

H. Entergy's Petition and Supreme Court's Decision

Entergy filed the underlying petition on March 13, 2013. (R.24.) Pursuant to C.P.L.R. Article 78 or, alternatively, C.P.L.R. § 3001, Entergy sought to annul NYSDOS's determination and requested a declaration that Entergy's Indian Point nuclear reactors were not subject to New York's CMP. (R.24, 42.)

In December 2013, Albany County Supreme Court (Lynch, J.) dismissed Entergy's petition and denied its request for declaratory relief. (R.4-17.) Because administration of the CZMA in New York fell within NYSDOS's designated agency responsibilities, Supreme Court held that NYSDOS's interpretation of the CMP should receive deference unless it is unreasonable or irrational. (R.13-14.) Supreme Court concluded that NYSDOS's determination was rational and therefore upheld it. (R.14-16.)

Observing that "the CZMA expressly provides that license renewals are subject to consistency review and the CMP clearly announces that the State intends to participate in the review of license

applications," the court held that it was rational for NYSDOS to conclude that the first exemption did not apply to Entergy's reactors where neither facility had been certified during SEQRA's phased implementation as a project that was deemed approved. (R.16.)

The court likewise held that it was rational for NYSDOS to conclude that the CMP's second exemption did not apply to the relicensing of Entergy's Indian Point reactors; "[t]he pending license renewal applications" were a new proceeding that was "not exempt from consistency review." (R.16-17.)

I. The Appellate Division's Decision

Entergy appealed Supreme Court's decision to the Appellate Division, Third Department. The appellate court reversed, finding that the Indian Point facilities fell within the CMP's second exemption as a matter of law. (R.4609-4610.) The Third Department did not analyze the first exemption, which NYSDOS and Supreme Court had both concluded was inapplicable.

While agreeing that NYSDOS's interpretation of its regulations must be upheld unless it is irrational and unreasonable (R.4609), the Third Department viewed NYSDOS's reading of the second exemption

as conflicting with the "plain meaning" of the CMP's exemption language. (R.4609-4610.) Specifically, the Third Department saw "no basis in law" for limiting the second exemption to state EISs prepared under SEQRA. (R.4609.) It therefore held that the Indian Point nuclear reactors were "exempt from review under the CMP because final environmental impact statements were filed for both prior to 1982" under the federal NEPA. (R.4610-4611.)

The Third Department did not address NYSDOS's additional argument that material changes to the operations of Indian Point Unit 2 and Unit 3 warranted federal consistency review regardless of any exemption. In the Appellate Division's view, therefore, the CMP's second exemption foreclosed NYSDOS from ever conducting a consistency review of those aged nuclear facilities, regardless of how long they operate and how their operations and effects on coastal resources may change over the years.

This Court granted NYSDOS and Secretary Perales leave to appeal on June 4, 2015. (R.4601-4602.)

ARGUMENT

ENTERGY'S CURRENT APPLICATION FOR A 20-YEAR RENEWAL OF ITS FEDERAL LICENSES FOR THE AGING NUCLEAR REACTORS AT INDIAN POINT IS SUBJECT TO REVIEW BY NYSDOS FOR CONSISTENCY WITH NEW YORK'S COASTAL MANAGEMENT POLICIES

The Third Department incorrectly determined that the CMP's second exemption applied to Indian Point's relicensing because "[f]inal environmental impact statements were prepared pursuant to [NEPA] . . . for Indian Point 2 and Indian Point 3 in 1972 and 1974, respectively." (R.4609.)

In Point A, we demonstrate that the relicensing of a nuclear reactor is a new proceeding requiring new EISs and federal consistency review before the NRC can act on Entergy's applications. The second exemption should not be read to permit an applicant to escape consistency review of the current application for relicensing. The EISs prepared in 1972 and 1975 do not qualify the relicensing for the CMP's second exemption because they are not final EISs *as to* the current relicensing of the Indian Point facilities for an additional 20 years.

In Point B, we demonstrate that the federal EISs prepared under NEPA in 1972 and 1975 do not qualify for the CMP's second exemption.

The provision was designed to exempt from consistency review those projects that were subject to a state EIS prepared under SEQRA during the brief transitional period (1976-1982) between SEQRA's enactment and the issuance of the state consistency regulations in 1982. The exemption does not relate to federal EISs prepared under NEPA, which have no relationship with the Part 600 regulations.

Finally, in Point C, we demonstrate that material changes to Indian Point's operation over the past 40 years, including the facilities' spent fuel storage practices and the reactors' cooling water intake system, independently support a consistency review of Indian Point's relicensing.

A. Because License Renewal is a Separate Federal Action, the Transitional Exemption for a Project with a Pre-1982 Environmental Impact Statement Does Not Apply to the Current Relicensing of Indian Point.

Entergy's current application for a license to operate the Indian Point reactors for an additional 20 years is a new federal action separate and independent from the original licensing decisions made during the 1970s. Entergy's license renewal application is subject to federal consistency review. If the Appellate Division were correct in

holding that Entergy's relicensing application is exempt from federal consistency review because of the EISs issued in 1972 and 1975, then virtually all decisions to relicense aging nuclear reactors—and other federally-licensed or permitted facilities—would be exempt, because EISs ordinarily would have been issued for the original licensing. That cannot be, and is not, the law.

An application to the NRC to extend a nuclear power plant's license for 20 years beyond its original 40-year term requires federal consistency review. A "[f]ederal license" is subject to consistency review under the CZMA. *See* 16 U.S.C. §1456(c)(3)(A). A "federal license or permit" includes "any authorization that an applicant is required by law to obtain in order to conduct activities affecting any land or water use or natural resource of the coastal zone." 15 C.F.R. § 930.51(a).

"Renewals . . . of federal license or permit activities not previously reviewed by the State agency" are expressly treated as federal licenses or permits. 15 C.F.R. § 930.51(b)(1). "Renewals" include "any subsequent . . . extension of an existing license," 15 C.F.R. § 930.51(d), and the term must be "construed broadly to ensure that the State

agency has the opportunity to review activities and coastal effects not previously reviewed," 15 C.F.R. § 930.51(e).

New York's CMP specifically identifies the "[l]icensing . . . of nuclear power plants" as requiring review by NYSDOS for their consistency with the CMP. (R.295; *see also* R.129.) It further provides that "renewals and major amendments to such regulatory approvals" are equally subject to consistency review. (R.286.)

NYSDOS has concluded that the CZMA requires it to review for consistency Entergy's current application to the NRC for renewal of the Indian Point licenses. That conclusion makes sense for at least three reasons.

First, the renewal of a nuclear power plant's operating license is a "major Federal action" under the NRC's NEPA implementation regulations, which triggers the need for a new environmental impact review separate and apart from the original licensing decision. *See Commonwealth of Mass. v. United States*, 522 F.3d 115, 119 (1st Cir. 2008); 10 C.F.R. §§ 51.20(a)(1), (b)(2). Moreover, the NRC's regulations governing license renewal differ markedly from those NRC regulations applicable to the original nuclear operating licensing permit

procedures; consequently, the NRC's review of license renewal applications under those regulations differs from a first-time licensing. *Compare* 10 C.F.R. Part 54 *with* 10 C.F.R. § 50.57.

Because an applicant seeks to extend the operation of a reactor that has already operated 40 years, the NRC requires the applicant to provide a detailed review of the existing nuclear facility and its aging components to ensure that the plant can perform its intended functions safely during the subsequent 20-year license renewal period. *See generally* 10 C.F.R. Part 54. An application for relicensing must contain technical assessments of aging equipment, 10 C.F.R. §§ 54.21-54.22, as well as a supplemental environmental report, 10 C.F.R. § 54.23.

Thus, when dealing with Indian Point's relicensing, the NRC's review goes well beyond the federal EISs prepared under NEPA filed in the 1970s. (R.3181.) Relicensing involves a new, distinct, and separately-documented environmental and regulatory analysis, focusing on a new, 20-year time-frame for extended operations. A site-specific

supplemental EIS prepared under NEPA is required to augment the NRC's generic EIS for relicensing. 10 C.F.R. § 51.95(c).[8]

Second, NYSDOS's federal consistency review of nuclear license renewals accords with the intent of the CZMA's drafters. In enacting the law, Congress identified "a national interest in the effective management, beneficial use, protection, and development of the coastal zone" in the face of "[n]ew and expanding demands" for resources, including energy. 16 U.S.C. §§ 1451(a), (f). Congress therefore declared that "[t]he key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority" over coastal lands and waters. 16 U.S.C. § 1451(i). NYSDOS seeks to exercise New York's authority in this case.

Third, NYSDOS's consistency review of nuclear license renewals under the CMP conforms with regulatory precedent and industry practice under the CZMA. In 23 other instances, parties applying to the

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[8] In connection with Entergy's application for 20-year renewals of Indian Point's operating licenses, the NRC issued its first supplemental EIS in December 2010, *see* 75 Fed. Reg. 77,920 (Dec. 14, 2010), and revised it in June 2013, *see* 78 Fed. Reg. 39,018 (June 28, 2013). The NRC is presently working on a second supplemental EIS for the Indian Point license renewals, *see* 79 Fed. Reg. 52,058 (Sept. 2, 2014), which it expects to issue in 2016. *See* http://www.nrc.gov/reactors/operating/licensing/renewal//applications/indian-point.html#schedule.

NRC to relicense coastal-zone nuclear plants after 40 years have had their applications reviewed for consistency with CMPs by the designated state coastal agencies. (R.3312.) As the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, explained in 1979, renewal of a license would be subject to review for consistency with the host state's CMP notwithstanding the original licensing: "an applicant does not have a vested right to receive approval of a renewal . . . without first complying with the law existing at the time approval is sought." 44 Fed. Reg. 37,150 (June 25, 1979).

In New York, NYSDOS has previously conducted federal consistency reviews of NRC license renewal applications for three other aged nuclear power plants. As Entergy has acknowledged, each of those applicants for an NRC license renewal sought and obtained NYSDOS's concurrence with their consistency certifications, permitting the plant to operate under a renewed license. (R.4313-4314.) Just like Indian Point, those three other New York nuclear power stations—the James A. FitzPatrick nuclear facility, the R.E. Ginna nuclear power station, and Nine Mile Point Unit 1—received their original 40-year federal

operating licenses before SEQRA and the CMP became effective in 1976 and 1982, respectively. (R.3134-3136.)

Notably, the FitzPatrick plant is owned by Entergy. NYSDOS reviewed Entergy's consistency certification for the license renewal of the FitzPatrick facilities and found the 20-year license renewal to be consistent with the enforceable coastal policies. (R.492, 4313-4314 & n.30; Statement of Facts § F.)[9] As with FitzPatrick, Entergy here originally acknowledged that federal consistency review by NYSDOS was required for its applications to the NRC to renew the Indian Point licenses for another 20 years. (*See* R.4559; Statement of Facts § D.)

Against the background of federal consistency reviews for NRC license renewals, the Third Department erred in ruling that a license renewal extending the Indian Point reactors' license terms for 20 more years is exempt from NYSDOS's federal consistency review because "[f]inal environmental impact statements [were] . . . completed . . . in 1972 and 1975" (R.4609). While "final" as to Indian Point's original operating license, the 1970s-era federal EISs have no relation to the license renewal contemplated today because they looked at the original

[9] *See also* http://www.entergy.com/News_Room/newsrelease.aspx?NR_ID=1225.

40-year license term only. As argued below in Point C, the NRC must address new and different issues in the relicensing. The old environmental reviews will be supplanted by contemporary environmental reviews, just as Indian Point's original licenses will be superseded by the renewed licenses. *See* 10 C.F.R. § 54.31(c).

Moreover, the relicensing is a separate federal action for which environmental analysis and review is ongoing. *See* 10 C.F.R. Part 54. Thus, Indian Point's relicensing does not meet the second exemption's requirement that a "final Environmental Impact Statement has been prepared" for it prior to 1982.

NYSDOS does not seek to rewrite history by launching a consistency review of Indian Point's original 40-year operating licenses; the CMP received federal approval in 1982, after those reactors were licensed for operation and running. Rather, NYSDOS must now exercise its federal consistency authority to determine whether Entergy's current application to the NRC to extend the operating licenses for an additional 20 years is consistent—or can be made consistent—with the 44 enforceable policies set forth in the CMP. The Third Department's decision is therefore mistaken in treating the federal EISs from 1972

and 1975 as final statements with respect to Indian Point's relicensing that would exempt it from review by NYSDOS for consistency with the CMP.

B. NYSDOS Acted Rationally in Determining that the CMP's Second Exemption Applied Only to Actions Reviewed Under State Law Within a Specific Time Period, and not to the Current Federal Action to Renew Operating Licenses for the Nuclear Reactors.

NYSDOS's interpretation of the CMP and its provisions, including the exemptions, should be accorded deference so long as it is rational. *See Matter of Natural Res. Defense Council, Inc. v. N.Y. State Dep't of Environmental Conservation*, 25 N.Y.3d 373, 397 (2015); *Matter of Terrace Court, LLC v. New York State Div. of Housing & Community Renewal,* 18 N.Y.3d 446, 454 (2012); *Matter of Davis v. Mills*, 98 N.Y.2d 120, 125 (2002); *N.Y. State Ass'n of Life Underwriters v. N.Y. State Banking Dep't*, 83 N.Y.2d 353, 359-60 (1994).

NYSDOS's opinion is entitled to deference. NYSDOS authored the New York CMP and submitted it for federal approval in 1982. (R.51.) NYSDOS is the New York agency designated to review federal agency actions to ensure their consistency with the 44 enforceable coastal policies set forth in the CMP. (R.94-95, 283, 286, 3176.) *See* 1975 N.Y.

Laws ch. 464, § 47(1). It commands the organizational structure and legal capacity to carry out that mission. (*See* R.3178.) If an applicant needs assistance in determining whether a proposed action is exempt from consistency review under the CMP, the applicant is directed to consult with NYSDOS. (R.276.)

When NYSDOS created the exemption, it was solving a transition problem**.** The transition exemption saves from 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.

Accordingly, as NYSDOS made clear in its advisory opinion, the transition exemption applies only to a project that was the subject of a New York state EIS issued between the enactment of SEQRA and the promulgation of the Part 600 regulations governing consistency review of state agency actions. It did not provide an exemption for projects subject to a federal EIS. The exemption ensured that projects on which state agencies had invested time, effort, and resources in the preparation of an EIS would not thereafter be required to undergo a consistency review. (*See* R.276.)

NYSDOS's interpretation of its own regulation is not merely rational, but is compelled both by a careful reading of the second exemption's text and by an analysis of its purpose.

To begin with, the second exemption excuses from consistency review "those projects for which a final Environmental Impact Statement has been prepared prior to the effective date of the Department of State Part 600 regulations [see Appendix A, DOS Consistency Regulations, N.Y.C.R.R. Title 19, Part 600, 6600.3(4)]." (R.276; brackets in original.) That language on its face implies that the reason for the second exemption is that the Part 600 regulations are not yet available for use. The Part 600 regulations relate only to state agencies' consistency review of their own actions, 19 N.Y.C.R.R. § 600.1(b), and apply only to actions "undertaken by State agencies," 19 N.Y.C.R.R. § 600.2(b). The state-focused nature of this exemption is underscored by its reference to the DOS's state consistency regulations, which make clear that an action is exempt when it is the subject of "a final environmental impact statement . . . prepared . . . *pursuant to 6 N.Y.C.R.R. Part 617* [the state SEQRA regulations] prior to the

effective date of this Part [the state consistency regulations]." 19 N.Y.C.R.R. § 600.3(d) (emphasis added).

A federal EIS issued under NEPA before 1976 is not within the purpose of the second exemption because the exemption addresses a specific category of cases: where state consistency review was required but not yet possible and where a state EIS had been prepared under SEQRA. The exemption relied upon state review under SEQRA as a benchmark because the existence of such review demonstrated that significant state resources were already invested in the project.

Focusing on that limitation, NYSDOS explained that the second exemption "does not relate to EISs prepared under [NEPA]," and that "[i]t makes no sense to broadly exempt from federal consistency review all pre-existing projects for which a [federal] NEPA EIS has been prepared when the CZMA allows no such exemptions or exclusions." (R.495.) Instead, the second exemption was "reserved for those EISs prepared pursuant to [New York State] SEQRA before the 1982 effective date of the Part 600 regulations and state consistency requirements." (R.497.) In other words, the time-limited exemption window opened with SEQRA's enactment in 1976, and closed for state

agency actions undertaken after 19 N.Y.C.R.R. Part 600 was adopted in 1982.

The Third Department was simply mistaken in holding that NYSDOS's interpretation "conflict[ed] with the plain meaning" of the second exemption (R.4609). Instead, it was the Third Department that interpreted the exemption in conflict with its plain meaning. The Third Department read the citation to 19 N.Y.C.R.R. § 600.3(d) out of the CMP, leaving the cross-reference with no effect. That was impermissible. *See Matter of Albany Law School v. N.Y. State Office of Mental Retardation & Developmental Disabilities,* 19 N.Y.3d 106, 125 (2012) (rejecting interpretation of regulation that would have rendered one sentence unnecessary); *People ex rel. Brown v. N.Y. State Div. of Parole,* 70 N.Y.2d 391, 402 (1987) (rejecting interpretation of regulation that would have rendered words meaningless).

When NYSDOS drafted the CMP, it could have included a more expansive exemption that cited NEPA as well as SEQRA—but it did not.

NYSDOS's interpretation accords with the second exemption's function. The second exemption was a special, time-limited exception

intended to cover reviews ongoing between SEQRA's effective date of September 1, 1976 and the effective date of the Part 600 regulations, September 28, 1982. (*See* R.3180-3181.)

By using the second exemption to preclude consistency review of license renewals sought decades later, the Third Department wrenched the exemption's language from all reasonable context. Indian Point's original federal licenses were granted in the mid-1970s, years before the CMP became effective in 1982. Because federal consistency review was not authorized in New York State prior to the CMP's approval in 1982, there was no occasion to conduct such a review of Indian Point's original federal licenses. (R.3180-3181.) That, and not the exemptions, is the reason why Indian Point's original licensing was not subject to federal consistency review.

Adopting the Third Department's interpretation would yield an indefensible result: federal actions and decisions regarding Indian Point could never be the subject of consistency review. No policy supports granting Indian Point an exemption from federal consistency review in perpetuity, no matter what changes may be proposed. (*See* R.495.)

The CZMA expresses a strong federal policy in favor of designated state agencies reviewing federal actions for consistency with enforceable state coastal policies. Congress regarded states' exercising their "full authority" over coastal zones as "[t]he key to more effective protection and use" of coastal resources. 16 U.S.C. § 1451(i). NYSDOS seeks to exercise that authority now.

In short, the Third Department missed the point when it stated that "neither SEQRA nor NEPA would have required a coordinated review of projects affecting coastal areas completed prior to 1982" (R.4610). The CZMA and New York's federally-approved CMP require NYSDOS to undertake such a review today.

No federal consistency review was conducted for Indian Point's original operating licenses in 1972 and 1975, nor could it have been. Forty years later, as the facilities are considered for an additional 20 years of operation, such a review is timely, relevant, and legally mandated.

C. Material Changes Since Indian Point's Original Licenses were Issued Independently Necessitate Review of Entergy's License Renewal Application for Consistency with New York's Coastal Management Program.

Without discussion, the Appellate Division rejected NYSDOS's independent alternative conclusion that federal consistency review is authorized and required because of material changes to Indian Point's operations since the original 40-year licenses were issued. (*See* R.497-500.) Instead, the Third Department apparently took the position that, under the second exemption, federal EISs "completed for Indian Point 2 and Indian Point 3 in 1972 and 1975" were a substitute for federal consistency review of the current license renewal applications. (R.4609.)

The Third Department was mistaken. The 40-year-old federal EISs are not a substitute for, or even the equivalent of, a consistency determination by NYSDOS on the reactors' relicensing. Even the NRC will premise its relicensing decision on more than the outdated federal EISs prepared under NEPA for the original licenses. (R.3181.) Indian Point's contemplated use of the Hudson River during the next 20 years will have effects "substantially different" from the facilities reviewed in the federal EISs prepared during the 1970s, *see* 15 C.F.R. § 930.51(b)(3),

and regulatory changes that have affected Indian Point's operation were "not in existence at the time" the reactors were originally licensed, *see* 15 CF.R. §930.51(b)(2).[10] Based on these changes, NYSDOS properly determined that a federal consistency review of the relicensing applications is authorized and necessary. (R.497-500.)

An activity that materially changes a previously exempted activity can revive the applicability of regulatory review. *See Salmon v. Flacke,* 61 N.Y.2d 798, 798 (1984) (applying SEQRA). This principle is embodied in the CZMA, which provides for review of license renewals that will cause coastal effects "substantially different than those originally reviewed by the State agency." 15 C.F.R. § 930.51(b)(3). The terms of the regulations, including "substantially different," must be "construed broadly to ensure that the State agency has the opportunity to review activities and coastal effects not previously reviewed." 15 C.F.R. § 930.51(f).

[10] The Hudson River's resources have changed as well. *See Entergy Nuclear Indian Point 2, LLC v. New York State Dep't of State,* 130 A.D.3d 1190 (3d Dep't 2015) (upholding revisions to Hudson River Significant Coastal Fish and Wildlife Habitat designations).

In its advisory opinion, NYSDOS identified two main areas of change that support federal consistency review of Entergy's application to extend Indian Point's licenses by 20 years.

First, the 1970s-era federal EISs assumed that spent nuclear fuel from the Indian Point reactors would be shipped offsite to a federally-approved long-term storage facility. (R.803, 1892.) That has not happened. *See State of New York v. Nuclear Regulatory Comm'n,* 681 F.3d 471 (D.C. Cir. 2012) (reproduced at R.4394-4405). Instead, "[d]ue to the government's failure to establish a final resting place for spent fuel, [spent nuclear fuel] is currently stored on site at nuclear plants," including Indian Point. (R.4396.)

As a result, Indian Point is now the long-term and seemingly permanent home of 40 years of spent nuclear fuel (*see* R.499-500, 3228; *see also* 3299-3300), and the pending license renewals, if granted, would authorize the on-site storage of spent fuel generated by two reactors during an additional 20 years of operation. Radioactive material leaking from the reactors' on-site spent fuel pools has already contaminated the groundwater and migrated to the Hudson River. (R.499; *see* R.2810, 2812, 2817, 2833, 2920, 2926-2927, 2935, 3014, 3019, 3126, 3147.) This

use of New York's coastal resources—and the contemplated storage of 20 additional years of spent nuclear fuel—has never been reviewed for consistency with the enforceable policies set forth in the Coastal Management Program.

Second, the reactors' once-through cooling systems reviewed in the original federal EISs were never remedied as intended. Those reviews had concluded that the original cooling systems at Indian Point Units 2 and 3 should be replaced with closed-cycle cooling systems. (R.513, 2055.) That did not happen either. (R.3142-3143.) Instead, the cooling water intake systems were modified with much less expensive (and dramatically less effective) traveling screens, fish handling and return systems, and low pressure screenwash systems. (R.3139.) Those devices resulted in only a small reduction in the destruction of aquatic organisms and fail to meet federal and state standards requiring use of the best technology available. (R.3139, 3147, 3150.) Other alternatives, including "cylindrical wedge-wire screens" (R.3153-3157, 500), are under consideration in proceedings before the DEC, but neither the existing system nor any potential change has been the subject of a federal consistency evaluation under the CMP.

These material changes, which occurred after the issuance of Indian Point's federal EISs in 1972 and 1975 and the CMP's adoption in 1982, independently support federal consistency review of Entergy's relicensing application. The facilities' 1970s-era federal EISs, upon which the Third Department based its exemption ruling, no longer reflect accurately the operation of Indian Point's cooling system or waste storage facilities. Indeed, the NRC is required to complete a new facility-specific supplemental EIS as part of its review of Entergy's application. *See* 10 C.F.R. § 51.53(c); *see also* 10 C.F.R. §§ 51.45, 54.23.

Even if the reactors' operation and the regulatory landscape had not changed during the ensuing 40 years, the issues raised by relicensing still would differ materially from those considered when the plants were originally commissioned. The 1972 and 1975 federal EISs each assumed that the reactors would have an operating life of no more than 40 years. (R.676, 783, 846, 1881, 1891, 2018, 3182; *see also* R.3182.) Those federal EISs further assumed that the reactors would be decommissioned and dismantled after their operating life ended. (R.767-768, 1881-1882.) Now that Entergy seeks to keep both plants operating for an additional 20 years beyond the expiration of their

original license terms, the analyses based on outdated 40-year projections no longer can be relied upon.[11]

[11] The point is reinforced when one examines the federal EISs from 1972 and 1975 on which the Third Department and Entergy relied. Although denominated "final" for purposes of the original licenses, the EISs cautioned that their analysis was not complete. Both federal EISs required further study, monitoring, assessment, and evaluation of multiple issues. (*See, e.g.,* R.637, 683, 695, 747-749, 805, 911, 920, 1597, 1600, 1606, 1778, 1866, 2056-2057.)

CONCLUSION

The Appellate Division's order should be reversed. The license renewals for Indian Point Units 2 and 3 are reviewable by the New York Department of State for consistency with the Coastal Management Program, and do not qualify for the program's second exemption.

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