NIXON PEABODY LLP
ATTORNEYS AT LAW

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ANDREW C. ROSE, ESQ.
acrose@nixonpeabody.com

March 13, 2013

Albany County Clerk
Albany County Clerk's Office
Albany County Courthouse
16 Eagle Street
Albany New York 12207-1077

Re: Entergy Nuclear Operations, Inc., *et al. v.* NYSDOS, *et al.*
Index no. 1535-13

Dear Sir/Madam:

Enclosed, for filing with the **SUPREME COURT**, please find an original and 1 copy of Petitioners-Plaintiffs' Notice of Petition, Verified Petition-Complaint, Memorandum of Law and supporting Affidavits of Fred R. Dacimo and Donald M. Mayer. Also enclosed is an Application for Index Number and RJI along with our check in the amount of $305 to cover the filing fee.

If you would process the check and forward these papers to the SUPREME COURT CLERK along with this letter, it would be appreciated.

Thank you for your attention to this matter.

Very truly yours,

NIXON PEABODY LLP

By: Andrew C. Rose

ACR/ema
Enclosures
cc: NYS Department of State (Susan L. Watson, Esq.)
NYS Attorney General

Albany County Clerk
16 Eagle St. Rm 128
Albany, NY 12207

Receipt

Issued to: ENTERGY NUCLEAR OPERTIONS VS NYS DEPT OF STATE

For: 1535-13

Receipt #753960

Issued: 03/13/2013 at 3:44 PM

Operator: SP

Document# 11352776 - Civil Index Number		
Cultural Ed		14.25
Index Co		26.00
Index State		165.00
Record Mgt		4.75
Sub-total:		210.00
Document# 11352778 - Civil Filing		
County Portion		.00
Discontinuances		.00
Note of Issue		.00
Notice of Appeal		.00
RJI		95.00
Subpoena		.00
Trial DeNovo		.00
Trial Jury		.00
Sub-total:		95.00
Motions		135.00
Check 101004034(NIXON PEABODY L)		440.00
Total:	**$**	**440.00**

Thomas G. Clingan, County Clerk

bc: William B. Glew, Jr., Esq. (Entergy) *via e-mail:* wglew@entergy.com
Kelli Dowell, Esq. (Entergy) *via e-mail:* kdowell@entergy.com
Bobby R. Burchfield, Esq. (McDermott Will & Emery) *via e-mail:* bburchfield@mwe.com
Matthew M. Leland, Esq. (McDermott Will & Emery) *via e-mail:* mleland@mwe.com

APPLICATION FOR INDEX NUMBER

ALBANY COUNTY CLERK
Application for INDEX NUMBER
pursuant to CPLR §8018(a).

FEE $210.00

Spaces below to be TYPED OR PRINTED by applicant.

INDEX NUMBER

DO NOT WRITE IN THIS SPACE

Title of Action or Proceeding

ENTERGY NUCLEAR OPERATIONS, INC.,
ENTERGY NUCLEAR INDIAN POINT 2, LLC,
and ENTERGY NUCLEAR INDIAN POINT 3, LLC,

against

NEW YORK STATE DEPARTMENT OF STATE, *et al*

TYPE BELOW NAME AND ADDRESS OF ATTORNEY(S) FOR PLAINTIFF(S)

NIXON PEABODY LLP
Andrew C. Rose, Esq.
677 Broadway, 10th Floor
Albany, NY 12207

TYPE BELOW NAME AND ADDRESS OF ATTORNEY(S) FOR DEFENDANT(S)

_____

_____

_____

INDEXED AND ENTERED
(CLOCK DATE)

Indexed and Entered _____
DO NOT WRITE ON LINE

DO NOT DETACH

Title of Action or Proceeding to be TYPED or PRINTED by applicant.

STATE OF NEW YORK
SUPREME COURT **ALBANY COUNTY**

INDEX NUMBER
FEE $210.00

ENTERGY NUCLEAR OPERATIONS, INC.,
ENTERGY NUCLEAR INDIAN POINT 2, LLC,
and ENTERGY NUCLEAR INDIAN POINT 3, LLC,

against

NEW YORK STATE DEPARTMENT OF STATE, *et al.*

Endorse This INDEX NUMBER
On All Papers and advise your adversary
of the number assigned

INDEXED AND ENTERED
(CLOCK DATE)

REQUEST FOR JUDICIAL INTERVENTION

UCS-840 (7/2012)

For Court Clerk Use Only:
IAS Entry Date
Judge Assigned
RJI Date

Supreme COURT, COUNTY OF Albany

Index No: _____ Date Index Issued: _____

CAPTION: Enter the complete case caption. Do not use et al or et ano. If more space is required, attach a caption rider sheet.

ENTERGY NUCLEAR OPERATIONS, INC.,
ENTERGY NUCLEAR INDIAN POINT 2, LLC,
and ENTERGY NUCLEAR INDIAN POINT 3, LLC,

For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules

Plaintiff(s)/Petitioner(s)

-against-

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

Defendant(s)/Respondent(s)

NATURE OF ACTION OR PROCEEDING: Check ONE box only and specify where indicated.

MATRIMONIAL

- ○ Contested

NOTE: For all Matrimonial actions where the parties have children under the age of 18, complete and attach the **MATRIMONIAL RJI Addendum.**

For Uncontested Matrimonial actions, use RJI form UD-13.

TORTS

- ○ Asbestos
- ○ Breast Implant
- ○ Environmental: _____ (specify)
- ○ Medical, Dental, or Podiatric Malpractice
- ○ Motor Vehicle
- ○ Products Liability: _____ (specify)
- ○ Other Negligence: _____ (specify)
- ○ Other Professional Malpractice: _____ (specify)
- ○ Other Tort: _____ (specify)

OTHER MATTERS

- ○ Certificate of Incorporation/Dissolution [see **NOTE** under Commercial]
- ○ Emergency Medical Treatment
- ○ Habeas Corpus
- ○ Local Court Appeal
- ○ Mechanic's Lien
- ○ Name Change
- ○ Pistol Permit Revocation Hearing
- ○ Sale or Finance of Religious/Not-for-Profit Property
- ○ Other: _____ (specify)

COMMERCIAL

- ○ Business Entity (including corporations, partnerships, LLCs, etc.)
- ○ Contract
- ○ Insurance (where insurer is a party, except arbitration)
- ○ UCC (including sales, negotiable instruments)
- ○ Other Commercial: _____ (specify)

NOTE: For Commercial Division assignment requests [22 NYCRR § 202.70(d)], complete and attach the **COMMERCIAL DIV RJI Addendum.**

REAL PROPERTY: How many properties does the application include? _____

- ○ Condemnation
- ○ Mortgage Foreclosure (specify): ○ Residential ○ Commercial

Property Address: _____ (Street Address, City, State, Zip)

NOTE: For Mortgage Foreclosure actions involving a one- to four-family, owner-occupied, residential property, or an owner-occupied condominium, complete and attach the **FORECLOSURE RJI Addendum.**

- ○ Tax Certiorari - Section: _____ Block: _____ Lot: _____
- ○ Tax Foreclosure
- ○ Other Real Property: _____ (specify)

SPECIAL PROCEEDINGS

- ○ CPLR Article 75 (Arbitration) [see **NOTE** under Commercial]
- ◉ CPLR Article 78 (Body or Officer)
- ○ Election Law
- ○ MHL Article 9.60 (Kendra's Law)
- ○ MHL Article 10 (Sex Offender Confinement-Initial)
- ○ MHL Article 10 (Sex Offender Confinement-Review)
- ○ MHL Article 81 (Guardianship)
- ○ Other Mental Hygiene: _____ (specify)
- ○ Other Special Proceeding: _____ (specify)

STATUS OF ACTION OR PROCEEDING: Answer YES or NO for EVERY question AND enter additional information where indicated.

	YES	NO	
Has a summons and complaint or summons w/notice been filed?	◉	○	If yes, date filed: 03/13/2013
Has a summons and complaint or summons w/notice been served?	◉	○	If yes, date served: 03/13/2013
Is this action/proceeding being filed post-judgment?	○	◉	If yes, judgment date: _____

NATURE OF JUDICIAL INTERVENTION:

Check ONE box only AND enter additional information where indicated.

- ○ Infant's Compromise
- ○ Note of Issue and/or Certificate of Readiness
- ○ Notice of Medical, Dental, or Podiatric Malpractice — Date Issue Joined: _____
- ○ Notice of Motion — Relief Sought: _____ — Return Date: _____
- ◉ Notice of Petition — Relief Sought: Annul Declaratory Ruling — Return Date: _____
- ○ Order to Show Cause — Relief Sought: _____ — Return Date: _____
- ○ Other Ex Parte Application — Relief Sought: _____
- ○ Poor Person Application
- ○ Request for Preliminary Conference
- ○ Residential Mortgage Foreclosure Settlement Conference
- ○ Writ of Habeas Corpus
- ○ Other (specify): _____

RELATED CASES:

List any related actions. For Matrimonial actions, include any related criminal and/or Family Court cases. If additional space is required, complete and attach the **RJI Addendum**. If none, leave blank.

Case Title	Index/Case No.	Court	Judge (if assigned)	Relationship to Instant Case
Entergy Nuclear Indian Point 2 LLC, et al. vs NYSDOS, et	Index #: 5450-12 RJI #: 01-12-ST4009	Albany County Supreme Court	Hon. Michael C. Lynch	Similar Parties

PARTIES:

For parties without an attorney, check "Un-Rep" box AND enter party address, phone number and e-mail address in space provided. If additional space is required, complete and attach the **RJI Addendum**.

Un-Rep	Parties: List parties in caption order and indicate party role(s) (e.g. defendant; 3rd-party plaintiff).	Attorneys and/or Unrepresented Litigants: Provide attorney name, firm name, business address, phone number and e-mail address of all attorneys that have appeared in the case. For unrepresented litigants, provide address, phone number and e-mail address.	Issue Joined (Y/N):	Insurance Carrier(s):
☐	ENTERGY NUCLEAR OPERATIONS, I (Last Name) (First Name) Primary Role: Petitioner Secondary Role (if any):	ROSE (Last Name) ANDREW (First Name) NIXON PEABODY LLP (Firm Name) 677 Broadway, 10th Floor (Street Address) Albany (City) New York (State) 12207 (Zip) +1 (518) 427-2650 (Phone) +1 (518) 427-2666 (Fax) acrose@nixonpeabody.com (e-mail)	○ YES ○ NO	
☐	ENTERGY NUCLEAR INDIAN POINT 2 (Last Name) (First Name) Primary Role: Petitioner Secondary Role (if any):	ROSE (Last Name) ANDREW (First Name) NIXON PEABODY LLP (Firm Name) 677 Broadway, 10th Floor (Street Address) Albany (City) New York (State) 12207 (Zip) +1 (518) 427-2650 (Phone) +1 (518) 427-2666 (Fax) acrose@nixonpeabody.com (e-mail)	○ YES ○ NO	
☐	ENTERGY NUCLEAR INDIAN POINT 3 (Last Name) (First Name) Primary Role: Petitioner Secondary Role (if any):	ROSE (Last Name) ANDREW (First Name) NIXON PEAPBODY LL P (Firm Name) 677 Broadway, 10th Floor (Street Address) Albany (City) New York (State) 12207 (Zip) +1 (518) 427-2650 (Phone) +1 (518) 427-2666 (Fax) acrose@nixonpeabody.com (e-mail)	○ YES ○ NO	
☐	NYS DEPARTMENT OF STATE (Last Name) (First Name) Primary Role: Respondent Secondary Role (if any):	(Last Name) (First Name) (Firm Name) (Street Address) (City) (State) (Zip) (Phone) (Fax) (e-mail)	○ YES ○ NO	

I AFFIRM UNDER THE PENALTY OF PERJURY THAT, TO MY KNOWLEDGE, OTHER THAN AS NOTED ABOVE, THERE ARE AND HAVE BEEN NO RELATED ACTIONS OR PROCEEDINGS, NOR HAS A REQUEST FOR JUDICIAL INTERVENTION PREVIOUSLY BEEN FILED IN THIS ACTION OR PROCEEDING.

Dated: 03/13/2013

Andrew C. Rose
SIGNATURE

1977370
ATTORNEY REGISTRATION NUMBER

Andrew C. Rose
PRINT OR TYPE NAME

Print Form

Print Form

Request for Judicial Intervention Addendum

UCS-840A (7/2012)

Supreme COURT, COUNTY OF Albany Index No:

For use when additional space is needed to provide party or related case information.

PARTIES: For parties without an attorney, check "Un-Rep" box AND enter party address, phone number and e-mail address in "Attorneys" space.

Un-Rep	Parties: List parties in caption order and indicate party role(s) (e.g. defendant; 3rd-party plaintiff).	Attorneys and/or Unrepresented Litigants: Provide attorney name, firm name, business address, phone number and e-mail address of all attorneys that have appeared in the case. For unrepresented litigants, provide address, phone number and e-mail address.	Issue Joined (Y/N):	Insurance Carrier(s):
☐	PERALES, Secretary of the New York Last Name CESAR First Name Primary Role: Secondary Role (if any): Respondent	Last Name First Name Firm Name Street Address City State Zip Phone Fax e-mail	◯ YES ◯ NO	
☐	Last Name First Name Primary Role: Secondary Role (if any):	Last Name First Name Firm Name Street Address City State Zip Phone Fax e-mail	◯ YES ◯ NO	
☐	Last Name First Name Primary Role: Secondary Role (if any):	Last Name First Name Firm Name Street Address City State Zip Phone Fax e-mail	◯ YES ◯ NO	
☐	Last Name First Name Primary Role: Secondary Role (if any):	Last Name First Name Firm Name Street Address City State Zip Phone Fax e-mail	◯ YES ◯ NO	
☐	Last Name First Name Primary Role: Secondary Role (if any):	Last Name First Name Firm Name Street Address City State Zip Phone Fax e-mail	◯ YES ◯ NO	
☐	Last Name First Name Primary Role: Secondary Role (if any):	Last Name First Name Firm Name Street Address City State Zip Phone Fax e-mail	◯ YES ◯ NO	

RELATED CASES: List any related actions. For Matrimonial actions, include any related criminal and/or Family Court cases.

Case Title	Index/Case No.	Court	Judge (if assigned)	Relationship to Instant Case

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

ENTERGY NUCLEAR OPERATIONS, INC., ENTERGY NUCLEAR INDIAN POINT 2, LLC, and ENTERGY NUCLEAR INDIAN POINT 3, LLC, *Petitioners-Plaintiffs*, For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules -against- NEW YORK STATE DEPARTMENT OF STATE, CESAR A. PERALES, Secretary of the New York State Department of State, *Respondents-Defendants.*	Index No.: 1535-13 **NOTICE OF VERIFIED PETITION-COMPLAINT** **ORAL ARGUMENT REQUESTED**

PLEASE TAKE NOTICE that, Petitioners-Plaintiffs, Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC, (collectively, "Entergy") will hereby apply to this Court at the Albany County Courthouse, 16 Eagle Street, Albany, New York, on the 5th day of April, 2013, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an Order pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") or, in the alternative, pursuant to CPLR section 3001, against Respondents-Defendants New York State Department of State and Cesar A. Perales, the New York State Secretary of State (collectively "DOS"):

(a) reversing, annulling, and setting aside, as arbitrary and capricious and contrary to law, the New York State Department of State's Response to Request for Declaratory Ruling, dated January 9, 2013, denying Entergy's petition for a declaratory ruling that Indian Point

Nuclear Generating Units 2 and 3 are not subject to review for consistency with the enforceable policies of New York's Coastal Management Program;

(b) declaring that Indian Point Nuclear Generating Units 2 and 3 are not subject to New York's Coastal Management Program; and

(c) granting Entergy such other and further relief as this Court finds just and proper.

Entergy's request for relief is supported by the accompanying (i) Verified Petition-Complaint, duly verified on the 13th day of March, 2013, (ii) Memorandum of Law in Support of the Verified Petition-Complaint, (iii) supporting affidavits, and (iv) official records of proceedings before and actions taken by DOS.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR section 7804(c), an Answer to the Verified Petition-Complaint and opposing affidavits and memoranda, if any, must be served on the undersigned attorneys for Entergy no later than five (5) days prior to the April 5, 2013 return date.

Dated: Albany, New York
March 13, 2013

Respectfully submitted,

William B. Glew, Jr.
ENTERGY SERVICES, INC.
440 Hamilton Avenue
White Plains, N.Y. 10601
(914) 272-3360

Andrew C. Rose (N.Y. Bar No. 096551)
NIXON PEABODY LLP
677 Broadway, 10th Floor
Albany, NY 12207
Tel: (518) 427-2650 / Fax: (866) 947-0449

Bobby R. Burchfield (pro hac vice pending)
Matthew M. Leland (pro hac vice pending)
Thomas J. Tynan (pro hac vice pending)
MCDERMOTT WILL & EMERY LLP
500 North Capitol Street, N.W.
Washington, D.C. 20001
Tel: (202) 756-8000 / Fax: (202) 756-8087

Counsel for Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

ENTERGY NUCLEAR OPERATIONS, INC., ENTERGY NUCLEAR INDIAN POINT 2, LLC, and ENTERGY NUCLEAR INDIAN POINT 3, LLC, *Petitioners-Plaintiffs*, For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules -against- NEW YORK STATE DEPARTMENT OF STATE, CESAR A. PERALES, Secretary of the New York State Department of State, *Respondents-Defendants.*	Index No.: 1535-13 Petitioners designate Albany County as venue for this proceeding pursuant to §§ 7804(b) and 506(b). **SUMMONS** Respondents-Defendants' principal place of business is One Commerce Plaza, 99 Washington Avenue, Albany, New York 12231.

TO THE ABOVE-NAMED RESPONDENTS-DEFENDANTS:

YOU ARE HEREBY SUMMONED to answer the Verified Petition-Complaint of the Petitioners-Plaintiffs in this action, and serve a copy of your answer upon the undersigned attorneys for the Petitioners-Plaintiffs within twenty (20) days after service of the above, exclusive of the date of service or within thirty (30) days after service is complete if services is made by any method other than personal delivery to you within the State of New York.

In the case of your failure to answer the Verified Petition-Complaint of the Petitioners-Plaintiffs, judgment will be taken against you on default for the relief sought in the Petition-Complaint.

Dated: March 13, 2013

Respectfully submitted,

William B. Glew, Jr.
ENTERGY SERVICES, INC.
440 Hamilton Avenue
White Plains, N.Y. 10601
Tel: (914) 272-3360

Andrew C. Rose
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Counsel for Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

ENTERGY NUCLEAR OPERATIONS, INC., ENTERGY NUCLEAR INDIAN POINT 2, LLC, and ENTERGY NUCLEAR INDIAN POINT 3, LLC, *Petitioners-Plaintiffs*, For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules -against- NEW YORK STATE DEPARTMENT OF STATE, CESAR A. PERALES, Secretary of the New York State Department of State, *Respondents-Defendants.*	Index No.: 1535-13 **VERIFIED PETITION-COMPLAINT** **ORAL ARGUMENT REQUESTED**

Petitioners-Plaintiffs, Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC (collectively, "Entergy"), for their Verified Petition-Complaint, pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR") or, in the alternative, pursuant to CPLR section 3001, state and allege as follows:

PRELIMINARY STATEMENT

1. On November 7, 2012, Entergy submitted a Petition for Declaratory Ruling to Respondents-Defendants New York State Department of State and Cesar A. Perales, the New York State Secretary of State (collectively "DOS"), pursuant to Section 204 of the New York State Administrative Procedure Act ("SAPA"). (A copy of Entergy's Petition for a Declaratory

Ruling ("Entergy Pet.") is attached hereto as Ex. A.)[1] Entergy's Petition requested a Declaratory Ruling that Indian Point Nuclear Generating Units 2 and 3 ("IP2" and "IP3," respectively) are not subject to review under the State of New York's Coastal Management Program ("CMP") pursuant to the CMP's grandfathering provisions. (A copy of the CMP is attached hereto as Ex. B.)

2. The grandfathered status of IP2 and IP3 arises from official actions by the State of New York several decades ago in support of the construction and operation of the plants.

3. For nearly half a century, the State of New York was a proponent and facilitator of the Indian Point plants that operate along the Hudson River in Westchester County, New York. Indeed, from 1959 to 1976, New York conveyed property, issued permits, and extended leasehold interests to the plants. New York also *owned and operated* IP3 from 1974 through 2000.

4. Both plants began operation after thorough analysis of their environmental impacts by the relevant federal licensing agency.

5. On September 30, 1982, nearly a decade after IP2 and IP3 (under New York's ownership) began supplying electricity to consumers in New York City and southeast New York, the National Oceanic and Atmospheric Administration ("NOAA") approved New York's CMP.

6. The CMP was developed by DOS to qualify for federal grants provided under the Coastal Zone Management Act, 16 U.S.C. §§ 1451-65, that would help New York manage its coastal resources. *See* Ex. B, CMP § I, at 3-4.

7. The Coastal Zone Management Act and its implementing regulations state that there is a national interest "involved in planning for, and managing the coastal zone, including

[1] Documents submitted to DOS with Entergy's Petition for a Declaratory Ruling bear the Bates label prefix "ENTERGY_NYSDOS."

the siting of facilities such as energy facilities which are of greater than local significance." 15 C.F.R. § 923.52(a); *see also* Ex. B, CMP § II-9, at 1 ("'facilities which are necessary to meet requirements which are other than local in nature.'") (quoting 16 U.S.C. § 1455(d)(8)).

8. In order to ensure that "adequate consideration was given to various types of facilities . . . of interstate or national concern," DOS incorporated two grandfathering provisions into its CMP that exempt from review under the CMP "projects for which a substantial amount of time, money and effort have been expended." Ex. B, CMP § II-9, at 1.

9. When it drafted the CMP, DOS recognized that the CMP could not and should not be applied retroactively to operating energy facilities like IP2 and IP3.

10. Accordingly, Entergy filed its Petition with DOS seeking a Declaratory Ruling that IP2 and IP3 are grandfathered under the CMP and, therefore, exempt from procedures requiring review of federal licensing activities for consistency with the CMP's enforceable policies. Ex. A, Entergy Pet. ¶ 2.

11. On January 9, 2012, DOS denied Entergy's Petition in its Response to Request for Declaratory Ruling and contended that IP2 and IP3 failed to meet requirements of the CMP's grandfathering clause exemptions. (A copy of DOS's Response ("DOS Response") is attached hereto as Ex. C.)

12. In light of the numerous official actions by the State of New York in support of IP2 and IP3 and the comprehensive environmental impact statements analyzing those plants, Entergy asks this Court to grant relief pursuant to Article 78 of the CPLR in the form of an Order and Judgment setting aside the determination of DOS as arbitrary, capricious, and contrary to law, or, in the alternative, in the form of a declaratory judgment of Entergy's rights pursuant to CPLR section 3001.

PARTIES

13. At all times relevant hereto, Entergy Nuclear Operations, Inc. is and has been a Delaware corporation with its principal place of business at 1340 Echelon Parkway, Jackson, Mississippi, 39213.

14. Entergy Nuclear Indian Point 2, LLC is a Delaware limited liability company that owns IP2.

15. Entergy Nuclear Indian Point 3, LLC is a Delaware limited liability company that owns IP3.

16. At all times relevant hereto, DOS is a governmental body and Secretary Perales is an officer within the meaning of CPLR section 7802 and took certain actions that are the subject of this action.

JURISDICTION AND VENUE

17. This Court has jurisdiction to review DOS's response denying Entergy's petition under Section 205 of SAPA because "the petitioner has first requested the agency to pass upon the validity or applicability of the rule in question."

18. In the alternative, this court has jurisdiction to maintain this proceeding as one for a declaratory judgment pursuant to CPLR section 3001.

19. This proceeding is timely because Entergy commenced it within four months of January 9, 2013, when DOS denied Entergy's petition for a declaratory ruling. CPLR § 217(1); SAPA § 202(8).

20. DOS's review of Entergy's Petition occurred in Albany County, New York. Therefore, venue is proper in Albany County because the "material events" of this proceeding took place there. CPLR § 506(b).

FACTS

Construction of the Indian Point Plants

21. IP2 and IP3 are nuclear power plants located along the Hudson River that safely generate electricity for homes, businesses, and public facilities in New York City and Westchester County.

22. Development of the Indian Point nuclear power plants began as early as 1959 when the State of New York conveyed a portion of the Indian Point site to Consolidated Edison New York, Inc. ("ConEd") for construction of Indian Point Unit 1 ("IP1") and later IP2 and IP3. *See* Department of State, Letters Patent, *recorded in* Book of Patents No. 75 at p. 289 (Recorded Dec. 14, 1959) (attached hereto as Ex. D).

23. ConEd received a construction permit for IP2 from the U.S. Atomic Energy Commission ("AEC") on October 14, 1966, which triggered a series of state agency authorizations and the expenditure of resources to further expand the nuclear generating capacity at Indian Point. *See* AEC, *Final Environmental Statement: Indian Point Nuclear Generating Plant Unit No. 2* (1972) ("IP2 EIS"), Vol. I, at I-1, I-4 (attached hereto as Exs. E-1 and E-2).

24. For example, from 1967 to 1969, the Village of Buchanan issued several permits necessary for the development of IP2 and IP3, including those for dredging activities and construction of containment buildings, turbine rooms and heater bays, fuel storage facilities, auxiliary buildings, waste facilities, services facilities, and other activities. *See* Village of Buchanan Building Permits (attached hereto as Ex. F).

25. The New York State Water Resources Commission also issued several permits for dredging and the construction of discharge canals. Nuclear Regulatory Commission, *Final Environmental Statement: Indian Point Nuclear Generating Plant Unit No. 3* (1975) ("IP3 EIS"), Vol. I, at I-6 (attached hereto as Exs. G-1 and G-2).

26. On December 7, 1970, the Department of Environmental Conservation ("DEC") issued a water quality certification for IP2 pursuant to the Water Quality Improvement Act of 1970, and issued another on September 24, 1973 pursuant to the Federal Water Pollution Control Act of 1972. *See* Letter from T.P. Curran, Department of Environmental Conservation, to Harry G. Woodbury, Senior Vice President, Consolidated Edison Company (Dec. 7, 1970); James L. Biggane, Executive Deputy Commissioner, New York State Department of Environmental Conservation to Carl L. Newman, Vice President, Consolidated Edison Company (Sept. 24, 1973) (attached hereto as Ex. H).

27. The New York State Department of Health also authorized a sewage disposal system for the plants, as well as the construction of service boilers and cooling water discharge channels. *See* Ex. G-1, IP3 EIS, Vol. I, at I-6.

28. In 1971, New York conveyed to ConEd a leasehold interest authorizing IP1, IP2, and IP3 to use Hudson River submerged lands, a lease that continues in effect today. *See* Lease between New York State Energy and Research Development Authority ("NYSERDA") and ConEd (July 1, 1971) (attached hereto as Ex. I).

29. On May 2, 1975, DEC granted a water quality certification for operation of IP3 pursuant to "Section 401 of the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500." *See* Letter from Ogden Reid, Commissioner, State of New York

Department of Environmental Conservation to Carl L. Newman, Vice President, Consolidated Edison Company (May 2, 1975) (attached hereto as Ex. J).

30. New York recognized that significant resources were required for the facilities at Indian Point.

31. On April 11, 1978, the New York State Budget Director explicitly certified projects that the New York Power Authority ("NYPA") approved in order to complete IP3 after the Authority purchased the unit from ConEd in 1974. *See* Certification of Acting Director of the Budget Howard F. Miller (Apr. 11, 1978) (attached hereto as Ex. K). This certification represents a determination by the Budget Director that these NYPA-approved projects qualified as projects for which "substantial time, work and money have been expended." *Id.*

Environmental Impact Statement for IP2

32. While construction of IP2 progressed, ConEd applied for an operating license for the plant on October 15, 1968. *See* Ex. E-1, IP2 EIS, Vol. I, at I-1.

33. As part of the process of meeting requirements for the issuance of the license, the AEC completed a final Environmental Impact Statement ("EIS") pursuant to the National Environmental Policy Act that analyzed the impacts of IP2's operations on the surrounding environment. *See id.* at xxviii.

34. The EIS was published in September 1972 after 24 months of analysis, review, and comment by federal and state agencies on IP2's environmental effects, extensive testimony from ConEd at hearings, and visits by AEC personnel to the Indian Point location and its surroundings. *See id.* at xxx-xxxi. The DEC and the New York State Office of the Attorney General were among the government entities participating in the review. *See id.* at vi.

35. The EIS analyzed numerous aspects of IP2, including its: (a) location, facilities, and external appearance; (b) operational impacts on land, water, and air resources; and (c) ability to provide additional baseload capacity in order to meet the demand for electricity. *See id.* at II-IV, X.

36. After considering the environmental, economic, and technical benefits of the plant, the AEC concluded that it was appropriate to issue an operating license for IP2. *See id.* at vii.

37. IP2 began providing electricity to the citizens of New York in 1974, pursuant to an operating license issued by the Nuclear Regulatory Commission ("NRC"), successor to the AEC, on September 28, 1973.

Environmental Impact Statement for IP3

38. ConEd applied for an operating license for IP3 on October 15, 1968 and began construction of the facility shortly thereafter. *See* Ex. G-1, IP3 EIS, Vol. I, at I-1.

39. In 1974, however, the New York legislature authorized NYPA to acquire IP3. *See, e.g.*, Emergency Provisions for the Metropolitan Area of the City of New York, N.Y. Pub. Auth. Law § 1001-a (1974); 1974 N.Y. Sess. Law 1216.

40. As with IP2, the NRC completed the IP3 EIS in February 1975. The IP3 EIS reviewed and analyzed IP3's facilities, the impacts of the plant's operations on the surrounding environment and fisheries habitats, and its ability to generate electricity for New York City and Westchester County, New York. *See* Ex. G-1, IP3 EIS, Vol. I, at III-V, X.

41. Several federal and state agencies commented on the IP3 EIS, including DEC and the New York State Attorney General's office. *See id.* at viii-ix, XII-69.

42. After a thorough evaluation and analysis, the NRC concluded that it should issue an operating license for IP3. *See id.* at xiii.

43. IP3 began providing electricity to the citizens of New York in 1976 pursuant to an operating license issued by the NRC on December 12, 1975.

44. By the time IP2 and IP3 started to generate electricity, the costs to construct the Indian Point facilities were substantial. The estimated construction costs of the facilities, adjusted for inflation, exceeded $2.4 billion. *See* Aff. of Fred R. Dacimo ¶ 9 (citing United States Energy Information Administration, New York Nuclear Profile, *available at* http://www.eia.gov/nuclear/state/newyork/ (last visited, Feb. 12, 2013) (expense adjusted to 2007 Dollars using Bureau of Labor Statistics' Consumer Price Index)).

The CMP

45. In 1972, Congress passed the Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.*, which authorized a federal grant-in-aid program to help participating states develop programs that focus on sound management of coastal resources. *See* Ex. B, CMP § I, at 3-4.

46. Acting on this federal support, DOS developed its CMP with substantial public input and in consultation with numerous federal agencies, including the NRC, U.S. Department of Energy, and the Federal Energy Regulatory Commission. *Id.* § VI, at 1-2.

47. On behalf of the Secretary of Commerce, NOAA approved the CMP on September 30, 1982.

48. The CMP sets forth 44 policies that are intended to promote the beneficial use of coastal resources, prevent impairments to those resources, and manage activities that affect them. *See id.* § I, at 1.

49. Pursuant to the Coastal Zone Management Act, New York may, in certain circumstances, review federal activities within the coastal zone for consistency with the CMP's policies. *See id.* § II-9, at 8; *see also* 16 U.S.C. § 1456(c)(3)(a). This review may include activities within the coastal zone that require a federal license or permit. *See* Ex. B, CMP § II-9, at 8; 16 U.S.C. § 1456(c)(3)(a).

The CMP's Grandfathering Provision

50. Not all federal licenses and permits are subject to CMP review.

51. The CMP specifically considered the role of energy facilities located within the coastal zone in order to meet the national energy objectives of reducing dependence on foreign oil and ensuring "renewable and essentially inexhaustible sources of energy for sustained economic growth." Ex. B, CMP § II-9, at 3.

52. As stated in the CMP, New York "demonstrated its recognition of the national interest in energy facilities by the number and scope of facilities *already located in* or planned for New York's coastal area." *Id.* (emphasis added). IP2 and IP3 were among those facilities in 1982.

53. In recognition of existing facilities that are important to these and other national interests, the CMP incorporated a grandfathering provision, which remains part of the CMP today. *Id.* § II-9, at 1. The provision states that "projects for which a substantial amount of time, money and effort have been expended . . . will not be subject to New York State's Coastal Management Program and therefore will not be subject to review pursuant to the Federal consistency procedures" of the CZMA. *Id.*

54. The CMP grandfathering provision exempts from consistency review projects meeting either of two criteria.

55. First, a "project" is exempt if it was "identified as grandfathered" under the State Environmental Quality Review Act ("SEQRA") at the time of SEQRA's enactment in 1976. *Id.*

56. SEQRA grandfathered "[a]ctions undertaken or approved prior to the effective date" of the Act, *i.e.*, September 1, 1976. ECL § 8-0111(5)(a). "Actions" include "projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies." ECL § 8-0105(4)(i). The term "agencies" includes both state and local agencies, ECL § 8-105(3), and any local "board, district, commission, or governing body, including any city, county, and other political subdivision of the state." ECL § 8-0105(2).

57. Second, a project is exempt if a "final Environmental Impact Statement" has been prepared prior to the "effective date" of the DOS regulations at 19 NYCRR Part 600, *i.e.*, September 30, 1982. Ex. B, CMP § II-9, at 1.

Entergy's License Renewal Application

58. In 2000, Entergy purchased IP3 from NYPA, and in 2001 it purchased IP2 from ConEd.

59. Under Entergy's ownership, IP2 and IP3 currently meet the electric power needs of millions of consumers in New York City and Westchester County.

60. As recently as 2010, IP2 and IP3 provided 10 percent of all electricity consumed in New York State and approximately 17 percent of all electricity consumed in southeastern New York State (including New York City, the Long Island area, and the lower Hudson Valley). *See* NERA Economic Consulting, *Potential Energy and Environmental Impacts of Denying Indian Point's License Renewal Applications*, U.S. NRC Dkt. Nos. 50-247-LR and 50-286-LR, March 30 2012, at 1 (attached hereto as Ex. L).

61. To continue providing electricity to consumers in these regions, Entergy submitted a license renewal application ("LRA") to the NRC on April 30, 2007, requesting a 20-year extension of the existing operating licenses for IP2 and IP3, which run through 2013 and 2015, respectively.

62. On July 24, 2012, Entergy supplemented its LRA after determining that IP2 and IP3 had already satisfied the requirements of the CZMA. *See* Letter from F. Dacimo, Entergy, to NRC Document Control Desk, Supplement to License Renewal Application–Compliance with Coastal Zone Management Act (July 24, 2012) ("LRA Supplement"). Entergy's supplement explains that IP2 and IP3 are not subject to further consistency review because both units have been previously reviewed by New York for consistency with the CMP, and the renewal of their licenses will not result in coastal effects that are substantially different than those New York previously reviewed. *Id.* at 1; *see also* 15 C.F.R. § 930.51(b)(3). Pursuant to federal regulations, Entergy submitted this question to the Atomic Safety and Licensing Board for review, where it is pending. This question of previous review is not the subject of this Article 78 Petition-Complaint.

63. In reference to the grandfathering provisions in the CMP, Entergy's supplement also states that the company "believes that the New York Coastal Management Plan also exempts both [IP2 and IP3] from further consistency review." LRA Supplement, Enclosure 1 at 1.

DOS's Response to Entergy's Petition for a Declaratory Order

64. On November 7, 2012, Entergy petitioned the Secretary of State for a declaratory ruling that IP2 and IP3 comply with both of the grandfathering provisions of the CMP and, therefore, are not subject to the CMP.

65. DOS requested, and Entergy consented to, an additional thirty days—from early December 2012 to January 9, 2013—for DOS to address the petition. *See* Letter from DOS General Counsel Susan Watson to Bobby R. Burchfield (Dec. 4, 2012) (attached hereto as Ex. M).

66. On January 9, 2013, DOS denied Entergy's petition, contending that the CMP is not "a statute or rule" and thus is not a proper subject for a petition for a declaratory ruling. Nevertheless, although deeming its response "advisory," DOS contends that IP2 and IP3 do not meet either of the CMP's grandfathering provisions. Ex. C, DOS Response 3.

67. DOS asserts that the first clause of the CMP's grandfathering provision applies only to projects "identified" as grandfathered pursuant to SEQRA. Although IP2 and IP3 were licensed to operate before the effective date of SEQRA, DOS nevertheless states that no New York agency had expressly identified the operation and maintenance of IP2 or IP3 on an "exempt list." *See* Ex. C, DOS Response 4. Therefore, DOS concludes, IP2 and IP3 are "subject to SEQRA and, in turn, federal consistency." *Id.*

68. DOS also asserts that even if IP2 and IP3 qualify for grandfathering pursuant to SEQRA, substantial changes to IP2 and IP3, as well as changes to the "the regulatory landscape" defeat any SEQRA grandfathering status applicable to the facilities. *Id.* at 12.

69. The changes to IP2 and IP3 identified by DOS were anticipated at the time of initial licensure and were not substantial. They also are consistent with nuclear power plant operations. For example, the changes identified by DOS include Entergy's application to extend the operation of IP2 and IP3 by 20 years and the federal regulation of Indian Point's spent fuel pools, *see id.* at 12-15, but these are not the types of changes that would defeat grandfathering.

70. Finally, DOS maintains that the second clause of the CMP's grandfathering provision exempts only projects for which final environmental impact statements have been prepared *pursuant to SEQRA*. According to DOS, the final environmental impact statements for IP2 and IP3 that were issued pursuant to the National Environmental Policy Act and before the effective date of SEQRA do not trigger the grandfathering clause exemption, *see id.* at 10-12, even though New York law states that a federal FEIS may be sufficient under SEQRA, *see* 6 NYCRR 617.15(a).

FIRST CAUSE OF ACTION
Article 78
(CPLR § 7803(3))

71. Entergy re-alleges paragraphs 1 through 70 as if fully set forth herein.

72. DOS's denial of Entergy's petition is arbitrary and capricious, an abuse of discretion, and contrary to law. *See* CPLR § 7803(3).

73. DOS's ruling that Entergy's petition is improper because the CMP is not a statute or rule is erroneous as a matter of law, as well as arbitrary and capricious and an abuse of discretion. The CMP comprises a network of binding statutes and rules, it functions as a legally binding regulatory construct, and DOS's response to Entergy's petition construes numerous statutes and rules.

74. Contrary to DOS's response, IP2 and IP3 qualify for grandfathering under the first clause of the CMP's grandfathering provision based on SEQRA. First, both facilities meet SEQRA's requirements for grandfathering because relevant NRC, state, and municipal "actions" and "activities" associated with the operation of IP2 and IP3 were underway and, in most circumstances, complete before September 1, 1976.

75. New York agencies facilitated the construction and operation of IP2 and IP3 by supplying property for the Indian Point site and providing access to Hudson River water.

76. New York also passed a law that authorized NYPA's acquisition of IP3, which also was consummated prior to SEQRA's effective date. *See, e.g.*, Emergency Provisions for the Metropolitan Area of the City of New York, N.Y. Pub. Auth. Law § 1001-a (1974); 1974 N.Y. Sess. Law 1216.

77. After its acquisition of IP3, NYPA approved several projects necessary to complete IP3 and related transmission facilities, including, among others, an administration building, drainage facilities, sewage treatment facilities, and enlargement of a spent fuel storage tank. The Director of the New York State Division of the Budget later certified to the Commissioner of Environmental Conservation that these were projects for which "substantial time, work and money have been expended" prior to the effective date of SEQRA. Ex. K, Certification of Acting Director of the Budget Howard F. Miller (Apr. 11, 1978).

78. New York, its agencies, and localities also issued certifications and permits vital to the operation of IP2 and IP3 before September 1, 1976.

79. Thus, IP2 and IP3 are "actions" that were undertaken and approved prior to SEQRA's effective date. Accordingly, both "actions" are "grandfathered" under SEQRA.

80. Second, DOS misinterprets the CMP's first grandfathering provision by asserting that the exemption applies only to projects or activities undertaken before SEQRA's effective date *and* that are listed by an agency on an exemption list that is certified by New York's Director of the Budget and maintained by New York's Commissioner of Environmental Conservation.

81. SEQRA, on which the CMP's first grandfathering clause turns, does not require listing procedures for actions involving the grant of a license or permit. *See* 1977 N.Y. Laws c. 252, §§ 11, 14.

82. The state issued numerous final permits for IP2 and IP3 before SEQRA's effective date of September 1, 1976. Those permits qualify the facilities for grandfathering pursuant to the CMP.

83. Moreover, as DOS recognized in its response, an applicant can qualify for grandfathering for an unlisted project even when listing applies by demonstrating that "'substantial time, work and money have been expended'" on the project prior to the SEQRA effective date. Ex. C, DOS Response 5 (quoting Gerrard et al., *Environmental Impact Review in New York*, § 2.01(5)(a)(2012)).

84. IP2 and IP3 plainly qualify under this test, having cost $2.4 billion and taken many years to construct.

85. Third, the facilities and operations of IP2 and IP3 have not undergone material changes since operating licenses were issued in 1973 and 1975, respectively.

86. DOS acted contrary to law, and arbitrarily and capriciously, by concluding that activities related to Indian Point's spent fuel pools, which are regulated exclusively by the NRC pursuant to federal law, and license extensions for IP2 and IP3 qualify as material changes that negate SEQRA grandfathering. *See* Aff. of Donald M. Mayer.

87. Accordingly, there have not been any circumstances that would negate SEQRA grandfathering for IP2 and IP3.

88. Moreover, with respect to the second clause of the grandfathering provision, IP2 and IP3 are exempt from further consistency review under the CMP because final federal EISs

were prepared for each facility before the "effective date" of DOS regulations at 19 NYCRR Part 600, *i.e.*, September 28, 1982.

89. IP2 was fully evaluated in a final federal EIS completed by the NRC in 1972, and IP3 was similarly evaluated in a final federal EIS issued in 1975.

90. DOS acted contrary to law, and acted arbitrarily and capriciously, by construing the second clause of the CMP's grandfathering clause provision as applying only to projects for which a final EIS was completed pursuant to SEQRA.

91. A final federal EIS may be sufficient for findings under SEQRA. *See* 6 NYCRR § 617.15(a).

92. DOS's construction of the CMP's grandfathering clause provision is contrary to state and federal law, and arbitrarily and capriciously ignores the facts supporting the grandfathering status of IP2 and IP3.

93. Entergy is harmed by this construction, which requires IP2 and IP3 to undergo a redundant, burdensome, and uncertain consistency review pursuant to the CMP.

94. To protect its interests, and with express reservation of its position that the license renewal application is not subject to further consistency review, Entergy filed a voluminous consistency certification with DOS on December 17, 2012.

95. On January 16, 2013, DOS notified Entergy that it viewed the certification as incomplete, and requested submission of the yet-to-be published final supplement of the EIS. Once the certification is complete, DOS has six months to complete its review, the successful outcome of which is by no means assured.

96. An actual and justiciable controversy exists regarding whether IP2 and IP3 are grandfathered and judicial review of DOS's response to Entergy's petition for a declaratory ruling is appropriate.

97. Thus, Entergy seeks an order and judgment pursuant to CPLR Article 78, CPLR section 3001, and SAPA section 205 that DOS's refusal to grant Entergy's petition for declaratory ruling was contrary to state and federal law and arbitrary and capricious.

98. Entergy also seeks a declaration that IP2 and IP3 are grandfathered under one or both clauses of the CMP's grandfathering provisions.

SECOND CAUSE OF ACTION
Declaratory Judgment
(CPLR § 3001)

99. Entergy re-alleges paragraphs 1 through 98 as if fully set forth herein.

100. In the alternative, in the event DOS's action is not reviewable pursuant to CPLR § 7803(3), Entergy seeks a declaratory judgment, pursuant to CPLR § 3001, that IP2 and IP3 qualify under one or both clauses of the grandfathering provision.

101. DOS's action threatens imminent harm to Entergy by subjecting it to a burdensome and time-consuming regulatory process with an uncertain outcome. An adverse determination by DOS on Entergy's consistency certification would inflict devastating and irreparable injury on Entergy, its shareholders, and the millions of individuals and businesses that rely on power generated by IP2 and IP3.

102. Accordingly, this dispute presents an appropriate controversy for resolution by declaratory judgment.

PRAYER FOR RELIEF

WHEREFORE, Entergy respectfully requests an order and judgment:

(i) annulling, reversing, and setting aside the Secretary of State's determination rejecting Entergy's claim for a declaratory ruling;

(ii) declaring that IP2 and IP3 are not subject to the CMP;

(iii) for such other relief as the Court may find just and proper including the costs and disbursements of this proceeding.

Dated: Albany, New York
March 13, 2013

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

ENTERGY NUCLEAR OPERATIONS, INC., ENTERGY NUCLEAR INDIAN POINT 2, LLC, and ENTERGY NUCLEAR INDIAN POINT 3, LLC, *Petitioners-Plaintiffs*,	Index No.: _____
For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules	**VERIFICATION**
-against-	
NEW YORK STATE DEPARTMENT OF STATE, CESAR A. PERALES, Secretary of the New York State Department of State, *Respondents-Defendants.*	

ANDREW C. ROSE, ESQ., affirms under penalties of perjury that:

He is an attorney admitted to practice in the State of New York, and is attorney for Petitioners-Plaintiffs, Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC. He makes this Verification because said Petitioners-Plaintiffs are not located in the county wherein he maintains his office. He has read the annexed Petition, knows the content thereof, and states that the content is true to his knowledge and, as to those matters stated upon information and belief, he believes it to be true.

Dated: March 13, 2013

Andrew C. Rose

ANDREW C. ROSE, ESQ.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

ENTERGY NUCLEAR OPERATIONS, INC., ENTERGY NUCLEAR INDIAN POINT 2, LLC, and ENTERGY NUCLEAR INDIAN POINT 3 LLC,	)	
Petitioners-Plaintiffs,	)	
For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules	)	
-against-	)	Index No.: 1535-13
NEW YORK STATE DEPARTMENT OF STATE, CESAR A. PERALES, Secretary of the New York State Department of State,	)	
Respondents-Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION-COMPLAINT

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GLOSSARY OF ABBREVIATED TERMS

AEC	Atomic Entergy Commission
ConEd	Consolidated Edison New York, Inc.
CMP	New York State Coastal Management Program
CZMA	Coastal Zone Management Act
DEC	New York State Department of Environmental Conservation
DOS	New York State Department of State or New York State Secretary of State
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
Entergy	Entergy Nuclear Operations, Inc. Entergy Nuclear Indian Point 2, LLC Entergy Nuclear Indian Point 3, LLC
FEIS	Final Environmental Impact Statement
FSEIS	Final Supplemental Environmental Impact Statement
IP1	Indian Point Nuclear Generating Unit 1
IP2	Indian Point Nuclear Generating Unit 2
IP3	Indian Point Nuclear Generating Unit 3
IPEC	Indian Point Energy Center
NEPA	National Environmental Policy Act
NOAA	National Oceanic and Atmospheric Administration
NRC	Nuclear Regulatory Commission
NYPA	New York Power Authority
NYSERDA	New York State Energy and Research Development Authority
SAPA	State Administrative Procedure Act

SCFWH	Significant Coastal Fish and Wildlife Habitat
SEQRA	State Environmental Quality Review Act
SPDES	State Pollutant Discharge Elimination System

INTRODUCTION

When then-Secretary of State Basil A. Paterson, on behalf of the New York State Department of State (collectively "DOS"), delivered the New York Coastal Management Program ("CMP") to the National Oceanic and Atmospheric Administration ("NOAA") for federal approval in 1982, DOS explicitly exempted from the program those projects for which a substantial amount of time, money, and effort had already been expended. To that end, DOS created objective criteria for determining whether a project is exempt from the CMP. First, DOS exempted projects that were grandfathered under the State Environmental Quality Review Act ("SEQRA") at the time of its enactment in 1976. Second, DOS exempted projects that were the subject of a final Environmental Impact Statement ("EIS") prior to the effective date of the regulations at 19 NYCRR Part 600 (*i.e.*, September 28, 1982).

On November 7, 2012, Petitioner-Plaintiff Entergy[1] submitted a petition to DOS requesting a declaratory ruling that Entergy's Indian Point Nuclear Generating Units 2 and 3 ("IP2" and "IP3," respectively) qualify for the grandfathering exemption. As a consequence, Entergy contends that its application to the Nuclear Regulatory Commission ("NRC") to renew the operating licenses of the two units is exempt from the CMP's consistency certification process.

On January 9, 2013, DOS issued an "advisory" response to Entergy's petition, stating that neither clause of the grandfathering exemption applies to the Indian Point plants. DOS contends that IP2 and IP3 are subject to the CMP because: (1) the operations of IP2 and IP3 were not "listed" by a New York agency as exempt under SEQRA; (2) IP2 and IP3 have undergone

[1] Plaintiff-Petitioners, collectively referred to as "Entergy," are Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.

material modifications since they were licensed to operate in the 1970s; and (3) although a comprehensive *federal* Environmental Impact Statement was completed for each plant before it began operating, the projects were not the subject of a final Environmental Impact Statement completed *pursuant to SEQRA* before September 28, 1982.

DOS's ruling is erroneous as a matter of law because it deems inappropriate Entergy's request for interpretation of the CMP's grandfathering provision, misconstrues the criteria for exemption from the CMP, and conflicts with controlling federal law. It also is arbitrary and capricious and an abuse of discretion because it ignores substantial and compelling evidence that IP2 and IP3 qualify under the grandfathering provisions. Accordingly, Entergy brings this action to remedy the DOS's erroneous and improper construction of the CMP. For the reasons set forth below and in the accompanying Verified Petition-Complaint ("Verified Pet."), Entergy is entitled to judgment as a matter of law and respectfully requests that this Court reverse, annul, and set aside DOS's determination as arbitrary and capricious, an abuse of discretion, and contrary to law. Moreover, Entergy respectfully requests that this Court declare that, as a matter of law, IP2 and IP3 are exempt from the CMP.

STATEMENT OF FACTS

New York's Approval of the Construction and Operation of IP2 and IP3

Entergy owns and operates the Indian Point Energy Center ("IPEC"), which is a nuclear power facility located on the eastern shore of the Hudson River in the Village of Buchanan, Westchester County. Verified Pet. ¶¶ 14-15, 21. At that site, Entergy currently operates two units, IP2 and IP3, which since the 1970s have safely generated electricity for homes, businesses, and public facilities in New York City and Westchester County. *Id.* ¶¶ 37, 43.

The state of New York has a long history of supporting and facilitating the operation of these facilities. In 1959, the state conveyed a portion of land alongside the Hudson River to Consolidated Edison New York, Inc. ("ConEd") for construction of Indian Point Nuclear Generating Unit 1 ("IP1"). Verified Pet. ¶ 22.[2] IP2 and IP3 were later constructed on the same site. *Id.*[3] Between 1968 and 1969, the Village of Buchanan issued several construction permits allowing ConEd to build various components of the IP2 and IP3 sites, including containment buildings, turbine rooms, fuel storage facilities, and waste facilities. *Id.* ¶ 24.[4] In 1970, and again in 1975, ConEd secured water quality permits allowing appropriate discharges from the plants into the Hudson River. *Id.* ¶¶ 26, 29.[5] In 1971, New York conveyed to ConEd a leasehold interest authorizing the plants to use Hudson River submerged lands, a lease that continues in effect today. *Id.* ¶ 28.[6]

As construction of IP2 and IP3 ensued, ConEd applied to the NRC (f/k/a Atomic Energy Commission) for operating licenses for the units. In evaluating ConEd's application, the NRC completed an EIS pursuant to the National Environmental Policy Act for each plant, analyzing the potential environmental impact of their operations. The NRC issued the final EIS for IP2 in September 1972, and the final EIS for IP3 in February 1975. *Id.* ¶¶ 34, 40.[7] The NRC

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[2] *See* Department of State, Letters Patent, *recorded in* Book of Patents No. 75 at p. 289 (Recorded Dec. 14, 1959) (Verified Pet. Ex. D).
[3] *See id.*
[4] *See* Village of Buchanan Building Permits (Verified Pet. Ex. F).
[5] *See* Letter from T.P. Curran, Department of Environmental Conservation, to Harry G. Woodbury, Senior Vice President, Consolidated Edison Company (Dec. 7, 1970) (Verified Pet. Ex. H) and Letter from Ogden Reid, Commissioner, State of New York Department of Environmental Conservation to Carl L. Newman, Vice President, Consolidated Edison Company (May 2, 1975) (Verified Pet. Ex. J).
[6] *See* Lease between New York State Energy and Research Development Authority ("NYSERDA") and ConEd (July 1, 1971) (Verified Pet. Ex. I).
[7] *See* U.S. Atomic Energy Commission ("AEC"), *Final Environmental Statement: Indian Point Nuclear Generating Plant Unit No. 2* (1972) ("IP2 EIS") (Verified Pet. Exs. E-1 and E-2); Nuclear Regulatory Commission

(continued...)

subsequently issued operating licenses for IP2 and IP3 on September 28, 1973, and December 12, 1975, respectively. Verified Pet. ¶¶ 37, 43. Meanwhile, in 1974, the New York legislature authorized the New York Power Authority ("NYPA") to acquire IP3 to "help assure continuity of electric power for the people" of New York. Emergency Provisions for the Metropolitan Area of the City of New York, N.Y. Pub. Auth. Law § 1001-a (1974); 1974 N.Y. Sess. Law 1216; *see also* Verified Pet. ¶ 39.[8]

When IP2 and IP3 began generating electricity in 1974 and 1976, respectively, the substantial costs associated with construction of IP2 and IP3 placed the two units among the most expensive energy facilities in the state. *See* Verified Pet. ¶ 44. The United States Energy Information Administration estimates their combined construction costs, adjusted for inflation, are more than $2.4 billion. *See id.*[9]

The New York Coastal Management Program

In 1972, Congress passed the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451 *et seq.*, a federal grant-in-aid program with the goal to "preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone." *See* 16 U.S.C. § 1452(1). The CZMA establishes a framework by which participating coastal states can review certain activities within their respective coastal zones that require a federal license or permit for consistency "with the enforceable policies of the state's approved program." 16 U.S.C. § 1456(c)(3)(A). The New York CMP, which was approved by the National Oceanic and

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("U.S.NRC"), *Final Environmental Statement: Indian Point Nuclear Generating Plant Unit No. 3* (1975) ("IP3 EIS") (Verified Pet. Exs.G-1 and G-2).

[8] NYPA owned and operated IP3 from 1974 until selling it to Entergy in 2000.

[9] Aff. of Fred L. Dacimo ¶ 9 (citing United States Energy Information Administration, New York Nuclear Profile, *available at* http://www.eia.gov/nuclear/state/newyork/ (last visited, Feb. 12, 2013) (expense adjusted to 2007 Dollars using Bureau of Labor Statistics' Consumer Price Index)).

Atmospheric Administration ("NOAA") on behalf of the Secretary of Commerce in September 1982, sets forth 44 coastal policies focused on the sound management of New York's coastal resources.

As a condition for approval of a state coastal management program, the CZMA requires the Secretary of Commerce to determine, among other things, that the program provides for "adequate consideration of the national interest involved in . . . the siting of facilities such as energy facilities which are of greater than local significance." 16 U.S.C. § 1455(d)(8). State plans must have as one "required program element[]" a "planning process for energy facilities likely to be located in . . . the coastal zone . . . ." § 1455(d)(2)(H).

In compliance with these requirements, the CMP recognizes that "New York's coast plays an important role in satisfying the energy needs of the state." Verified Pet. Ex. B, CMP § II-5, at 23. Although acknowledging that "energy facilities have certain positive and negative aspects," *id.*, such as environmental impacts arising from use of coastal resources, the CMP gives a directly relevant example of how New York accommodates energy production facilities in the coastal zone:

> [The CMP demonstrates] its recognition of the national interest in energy facilities by the number and scope of facilities already located in or planned for New York's coastal area. The total 1981 capacity for New York State utilities was 30,331 megawatts. This was produced by the following types of existing facilities[:] . . . (5) nuclear - 5 units.

Id. § II-9, at 3. Thus, to obtain approval of its program, DOS emphasized to the federal government that IP2 and IP3, which were two of the five nuclear plants operating in New York in 1982, generated a meaningful percentage of New York's electricity while using coastal resources to support their operations. Based on its review of existing energy production facilities in the New York coastal zone, including IP2 and IP3, DOS concluded that its CMP would have

"no negative effects" on energy production. *Id.* § V, at 7. Instead, DOS noted that the CMP "recognizes the importance of adequate energy supplies for the economic development of the State." *Id.*

In recognition of the importance of energy production, national defense, and transportation facilities that existed before its adoption, the CMP contains a grandfathering provision. *See id.* § II-9, at 1-6. The CMP states that "projects for which a substantial amount of time, money and effort have been expended . . . *will not be subject to New York State's Coastal Management Program* and therefore *will not be subject to review pursuant to the* ***Federal consistency procedures***" of the CZMA. *Id.* § II-9, at 1 (emphasis added). Specifically, the CMP grandfathering provision exempts from consistency review projects meeting either of two criteria. First, the CMP exempts a "project" if it was "identified as grandfathered" under SEQRA at the time of its enactment in 1976. *Id.* Second, the CMP exempts a project if a "final Environmental Impact Statement" has been prepared prior to the "effective date" of the DOS regulations at 19 NYCRR Part 600; that is, September 28, 1982. *Id.* Although DOS has incorporated routine program changes to the CMP since its adoption in 1982, the CMP has retained its grandfathering provision for facilities and activities that meet either of these criteria.

The Current Dispute

Entergy purchased IP3 from NYPA in 2000, and subsequently purchased IP1 and IP2 from Consolidated Edison New York, Inc. ("ConEd") in 2001. Verified Pet. ¶ 58. Both sales required the approval of New York State. Under Entergy's ownership during the past decade,

IP2 and IP3 have achieved high levels of safety, operational reliability, and efficiency.[10] As recently as 2010, IP2 and IP3 supplied 10 percent of total electricity consumed in New York State and approximately 17 percent of total electricity consumed in southeastern New York State (which includes New York City, the Long Island area, and the lower Hudson River Valley). Verified Pet. ¶ 60.[11]

On April 30, 2007, Entergy submitted a license renewal application to the NRC to renew the operating licenses for IP2 and IP3 for an additional 20 year term. *Id.* ¶ 61.[12] On November 7, 2012, Entergy petitioned DOS to confirm in a declaratory ruling that IP2 and IP3 are grandfathered by the CMP and thus are not subject to the CMP's consistency review procedures as part of the license renewal process. *Id.* ¶ 64.

On January 9, 2013, DOS denied Entergy's petition. At the outset, DOS contends that Entergy's petition is procedurally improper because the CMP is not a "rule or statute" as to which a petition for a declaratory ruling will lie. *Id.* ¶ 66. Nonetheless, DOS rejected Entergy's petition in a comprehensive fifteen page "advisory" response. *Id.*

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[10] *See* Nat'l Research Council of the Nat'l Academies, *Alternatives to the Indian Point Energy Center for Meeting New York Electric Power Needs*, 14 (2006) (citations omitted) ("Since Entergy took over Indian Point, it has operated the plants extremely well. From 2003 to 2005, Unit 2 operated at a capacity factor of 96.6 percent and Unit 3 at 93.7 percent. The industry average is 89.6 percent. The two Indian Point reactors are among the lowest-cost generators in New York, and they operate whenever possible supplying base load power to the system. Together, they account for 5.3 percent of the total installed generating capacity in New York State, but they produce 10.1 percent of the electricity.") (App. 32).

[11] *See* NERA Economic Consulting, *Potential Energy and Environmental Impacts of Denying Indian Point's License Renewal Applications*, U.S. NRC Dkt. Nos. 50-247-LR and 50-286-LR, March 30, 2012, at 1 (Verified Pet. Ex. L).

[12] On July 24, 2012, Entergy supplemented its license renewal application based on its determination that IP2 and IP3 had already satisfied the consistency requirements of the CZMA. (Verified Pet. ¶ 62.) Both IP2 and IP3 have been subject to previous consistency reviews and their operations do not cause substantially different coastal effects. *See* 15 C.F.R. § 930.51(b)(3). Pursuant to federal regulations, Entergy submitted this question in a motion for a declaratory order to the Atomic Safety and Licensing Board for review, where it is pending. Responses to the motion are due on March 22, 2013, and a decision does not appear imminent. This question is not the subject of this Article 78 Petition-Complaint.

DOS contends that IP2 and IP3 do not qualify for grandfathering for three reasons. First, DOS asserted that the first clause of the CMP's grandfathering provision applies only to projects explicitly "identified" as grandfathered pursuant to SEQRA. *See* Verified Pet. Ex. C, DOS Response 4-7. Although IP2 and IP3 were licensed to operate and began operating before the effective date of SEQRA, DOS asserts that they do not qualify under this first clause because no New York agency had expressly identified the operation and maintenance of IP2 or IP3 on an "exempt list." *Id.* at 4. Second, DOS argues that there have been material changes to IP2 and IP3 and to "the regulatory landscape," and that these changes negate the SEQRA grandfathering status that might be applicable to the facilities. *Id.* at 12. Finally, DOS claims that the second clause of the CMP's grandfathering provision exempts only projects for which a final EIS had been prepared pursuant to SEQRA. *See id.* 10-12. Because the final EISs for IP2 and IP3 were issued pursuant to the National Environmental Policy Act before the effective date of SEQRA, DOS contends that they do not trigger the grandfathering clause exemption, *see id.* 10-12, even though New York law states that a federal FEIS is sufficient to make findings under SEQRA, *see* 6 NYCRR § 617.15(a).

ARGUMENT

By its plain language, the CMP exempts projects such as IP2 and IP3 from its provisions. The CMP provides an exemption for two types of projects: "(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 [September 28, 1982]." Ex. B, CMP, § II-9, at 1. Although *either* clause would provide a full exemption from the CMP, Entergy respectfully submits that IP2 and IP3 qualify under *both*.

I. THIS COURT HAS JURISDICTION TO REVIEW THE SECRETARY'S DECISION.

Entergy requested a declaratory ruling from DOS that the CMP's grandfathering clause applies to Entergy's pending application for license renewal. In its fifteen-page response, DOS set forth its view that the grandfathering clause does not apply to Entergy's license renewal application for IP2 and IP3. Although DOS contends that "the interpretation of the CMP is not an appropriate subject for a declaratory ruling," and deemed its response "advisory only," the response plainly sets forth DOS's definitive position on this matter. Verified Pet. Ex. C, DOS Response 3. DOS's position is that Entergy must commit IP2 and IP3 to a burdensome, time consuming, and redundant consistency review process with an uncertain outcome. *Id.* at 15. Thus, this case presents a ripe dispute over which the court has jurisdiction.

A. DOS's Response Sets Forth Its Definitive Position on the Applicability of the Grandfathering Clause to Entergy's License Renewal Application.

Acknowledging that the regulation governing declaratory rulings imposes a thirty-day deadline for DOS to address Entergy's petition,[13] DOS requested, and Entergy consented to, an additional thirty days—from early December 2012 to January 9, 2013—for DOS to address the petition. *See* Verified Pet. ¶ 65 (citing Letter from DOS General Counsel Susan Watson to Bobby R. Burchfield (Dec. 4, 2012) (requesting agreement for extension pursuant to 19 NYCRR § 264.2(i)) (Verified Pet. Ex. M)). In reliance on that agreement, DOS delivered a response to Entergy on January 9, 2013. Verified Pet. Ex. C, DOS Response 1. Even though DOS now deems its response "advisory only," the agency took pains to comply with the procedural timing

[13] *See* SAPA § 204 (2)(a); 19 NYCRR § 264.1 (2012) ("[I]f the Secretary fails to act within 30 days, the petition or request is deemed denied . . . .").

constraints applicable to declaratory rulings. Moreover, DOS has stated its "definitive position on the issue." *Gordon v. Rush*, 100 N.Y.2d 236, 242 (2003). Accordingly, Entergy's Verified Petition-Complaint is ripe for review by the court.

In *Compass Adjusters & Investigators, Inc. v. Comm'r of Taxation and Fin.*, 197 A.D.2d 38 (3d Dept. 1994), the plaintiff sought a legal opinion addressing whether plaintiff was subject to a sales tax on private investigative services. The Tax Commissioner concluded that plaintiff was subject to the tax, deeming its decision "a nonbinding advisory letter." 197 A.D.2d at 41. Before the Appellate Division, the Commissioner contended that the controversy was not ripe because its opinion was merely "advisory," but the court rejected that argument:

> Defendant claims that it issued a nonbinding advisory letter, but there is nothing in the record to suggest that the letter, which was issued in response to plaintiffs' request for a legal opinion, was not defendant's definitive position on the question of whether the services rendered by plaintiffs as licensed independent adjusters are subject to the sales tax . . . .

Id. Similarly here, DOS's comprehensive response sets forth numerous grounds purportedly supporting its position, and gives no indication that DOS either is still evaluating its position, or is open to reconsidering its position.

Moreover, the response imposes "actual, concrete injury" on Entergy. *Id.* In it, DOS concludes that the CMP's grandfathering clause "does not apply to Entergy's re-licensing application filed with the NRC for Indian Point." Verified Pet. Ex. C, DOS Response 15. If so, Entergy must show DOS that renewal of the IP2 and IP3 licenses are consistent with the enforceable policies of the CMP. Due to the exigencies of time, Entergy has already has submitted a consistency certification; DOS has deemed that certification incomplete, and

requested additional materials before the 180-day review process can even begin.[14] Although Entergy has certified that license renewal complies with the CMP in all respects, DOS's concurrence with the certification is by no means assured.[15] Thus, the DOS response inflicts actual, concrete injury—through administrative burden and ongoing legal risk—on Entergy.

B. This Court Has Jurisdiction To Review DOS's Determination Under Article 78.

On November 7, 2012, Entergy submitted a request for declaratory ruling pursuant to the State Administrative Procedure Act ("SAPA") section 204. Section 204(1) allows any person to petition a state agency, such as DOS, for a declaratory ruling "with respect to (i) the applicability to any person, property, or state of facts of any rule or statute enforceable by it, or (ii) whether any action by it should be taken pursuant to a rule." DOS denied Entergy's request on January 9, 2013. Under section 204(1) of SAPA, "[a] declaratory ruling shall be subject to review in the manner provided for in article seventy-eight of the civil practice law and rules." Entergy's Article 78 request for judicial review has been brought within the four month limit set by CPLR § 217(1).[16]

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[14] Entergy submitted its consistency certification for purposes of license renewal to DOS on December 17, 2012. On January 16, 2013, DOS deemed Entergy's certification incomplete because it is missing the yet-to-be published Volume IV of the Environmental Impact Statement. *See* Letter to Fred Dacimo from Natural Resources Management Bureau Chief Fred J. Anders (Jan. 16, 2013) (App. 36-37). That volume is currently being prepared by the NRC, and is not yet available. Once DOS receives the necessary data and information required for its review, DOS will have 180 days to complete it. *See* 15 C.F.R. § 930.60(a).

[15] *See* Matthew Wald, *As Reactors Age, the Money to Close Them Lags*, N.Y. TIMES, Mar. 21, 2012, at A11 ("In New York, Gov. Andrew M. Cuomo has vowed to force the two operating reactors at another Entergy plant, Indian Point, 35 miles north of Midtown Manhattan, to shut down when their licenses expire in 2013 and 2015 by denying them state environmental permits.") (App. 38); New York State Energy Planning Board, 2009 State Energy Plan 64 (2009) ("New York is opposing the license renewals for Indian Point Units 2 and 3 . . . due to significant safety and environmental impacts associated with their operation. . . . includ[ing] the adequacy of the evacuation plan . . . ; the risk of a terrorist attack on the spent fuel pools . . . ; the impact of earthquakes on the integrity of the facility . . . ; and the impact on aquatic life from the use of 2.5 billion gallons of Hudson River water each day . . . .") (App. 45).

[16] SAPA section 202(8) also sets forth a four month limit for challenging the improper promulgation of rules.

Now, DOS contends that Entergy's petition for a declaratory ruling was unfounded. It reasons that the CMP is not a "rule or statute" because "it has neither been enacted by the State Legislature nor promulgated as a rule pursuant to SAPA." Verified Pet. Ex. C, DOS Response 3. Thus, DOS contends, the CMP is not a proper subject of a request for declaratory ruling, and its decision is, it says, merely "advisory." *Id.*

DOS is incorrect for at least four reasons. First, the CMP appears to carry the force of law. SAPA defines a "rule" in part as "the whole or part of each agency statement, regulation or code of general applicability that implements or applies law." SAPA § 102(2)(a)(i). The CMP clearly imposes obligations on entities conducting activities in the New York coastal zone, and enables New York agencies to restrict or preclude such activities. Further, DOS complied with rigorous federal procedures to obtain federal approval of the CMP. To obtain federal government approval under the CZMA, a state coastal management program must be adopted either by "comprehensive legislation" or by "networking," which means that the program's policies must be derived from and enforceable through state statutes or regulations already in effect. 15 C.F.R. § 923.43(b). New York employed the "networking" approach, which requires public "notice, and the opportunity for full participation by relevant Federal and State agencies, local governments, regional organizations, port authorities, and other interested parties and persons, and [must] be adequate to carry out the purposes of the Act and be consistent with the national policy set forth in section 303 of the [CZMA]." 15 C.F.R § 923.3(a).

To develop the CMP, New York passed the Waterfront Revitalization and Coastal Resources Act of 1981, which required the New York Secretary of State "to prepare and implement a coastal management program." Verified Pet. Ex. B, CMP, Submittal Letter from

New York Secretary of State Basil A. Peterson to Assistant Administrator for NOAA's Office of Coastal Zone Management (Aug. 13, 1982)). The Secretary of State carried out these responsibilities by developing the CMP with public input from more than 1,000 public meetings and hearings. *See id.* The CMP was also subject to comprehensive environmental review pursuant to SEQRA. New York then submitted the plan resulting from this federally-mandated process to the Secretary of Commerce for approval, which was necessary before the plan could become effective under the CZMA. *See* 15 C.F.R. § 923.1.[17] Thus, by any common understanding of the term, the CMP is a "rule."

If the CMP is *not* a statute or rule, what exactly is it? And how can it carry the force of law if it is not a statute or rule? In short, DOS's position that the CMP is not a rule because DOS did not comply with SAPA in promulgating it is illogical and raises many more questions than it answers.

Second, even if it is not a "rule or statute," the CMP is a networked plan that purports to incorporate and summarize requirements and policies *derived from* numerous rules and statutes. *See* Verified Pet. Ex. B, CMP § II-6, at 2. As explained in the CMP, "the main instruments for implementing the [CMP's] forty-four policies are a number of regulatory and management State authorities" including the Waterfront Revitalization and Coastal Resources Act and SEQRA. *Id.* § I, at 1. Indeed, the CMP repeatedly relies on SEQRA for its implementation, including in the first clause of the grandfathering provision at issue here. *See id.* §§ II-9, at 1 (grandfathering under SEQRA); II-4, at 3 (using SEQRA to track consistency determinations by other agencies), II-4, at 8 (relying on SEQRA to ensure consistency with CMP policies).

[17] Entergy takes no position at this time on whether the New York CMP should have complied with *both* these federal requirements *and* the procedural requirements of SAPA.

Third, the extensive incorporation of rules and statutes into the CMP means that any interpretation of the CMP necessarily represents an interpretation of one or more "rules and statutes." DOS's response to Entergy's request for declaratory ruling confirms this point. In it, DOS construed the first clause of the grandfathering provision by repeatedly analyzing SEQRA and the rules pertaining to SEQRA. *See* Verified Pet. Ex. C, DOS Response 3-9. Likewise, in construing the second clause of the grandfathering provision, DOS construed other statutory and regulatory provisions, including 19 NYCRR § 600.3(4) (now codified at 19 NYCRR § 600.3(d)); 6 NYCRR § 617.6(a)(5); 6 NYCRR § 617.9(b)(5)(vi); and 6 NYCRR § 617.11(e). *See id.* at 9-15. Thus, DOS's contention that the CMP is something other than a rule or statute, and thus not subject to a declaratory ruling request, ignores both the essence of the CMP *and* the reality of what DOS did here: DOS *in fact* interpreted not just the CMP, but the rules and statutes underlying the CMP.

Finally, the grandfathering provision at issue here invites the very sort of request submitted by Entergy. After setting forth the two independent bases for a grandfathered exemption from the CMP, the provision concludes: "If an applicant needs assistance to determine if its proposed action meets one of these two criteria, the applicant should contact the Department of State." Verified Pet. Ex. B, CMP § II-9, at 1. Entergy sought an interpretation of the two criteria, and DOS gave it. That interpretation is not immune from judicial review merely because DOS labels it "advisory."

C. This Court Also Has Jurisdiction To Issue a Declaratory Judgment.

Even if DOS was not required to issue a declaratory order pursuant to Section 204 of SAPA, the fact is that it has nonetheless issued an interpretation of the CMP grandfathering provision, which creates a live and ripe dispute that threatens actual and imminent injury on

Entergy. In these circumstances, this Court has jurisdiction to issue a declaratory judgment to address the respective rights and obligations of the parties. Entergy has properly pleaded this alternative basis for jurisdiction pursuant to CPLR section 3001. Verified Pet. ¶¶ 99-102. Even if an Article 78 challenge to the DOS response is unavailable, this Court can and should still address this case as one for declaratory judgment. *See Lamar Cent. Outdoor, LLC v. State of New York*, 64 A.D. 3d 944, 949 (3d Dept. 2009) (treating case originally filed as an Article 78 special proceeding as a declaratory judgment action).

II. THE CMP'S GRANDFATHERING PROVISION MUST BE APPLIED UNIFORMLY TO FEDERAL AND STATE CONSISTENCY REVIEWS.

DOS asserts in its Response that the CMP's grandfathering provisions do not apply to *federal* consistency reviews because the federal Coastal Zone Management Act ("CZMA") "does not provide exceptions or exclusions from federal consistency review."[18] Verified Pet. Ex. C, DOS Response 3. But Entergy's application is grandfathered under the terms of the *CMP*, not under the terms of the CZMA. DOS cannot explain why the CMP grandfathering provision appears under the heading "Section 9 – Special *Federal* Program Requirements," *and* explicitly states that grandfathered actions "will not be subject to review pursuant to the *Federal* consistency procedures" of the CZMA. Verified Pet. Ex. B, CMP § II-9, at 1. On this basis alone, DOS's response is arbitrary and capricious.

Further, DOS's interpretation is contrary to federal law. According to DOS, an applicant for a *federal* license or permit *must always* certify consistency with the enforceable policies of New York's CMP, but the same entity seeking a *state* license or permit could receive an

[18] Nevertheless, DOS also states in its Response that, "By its terms, the CMP exemption from federal consistency narrowly applies to projects '*identified* as grandfathered pursuant to State Environmental Quality Review Act at the time of its enactment in 1976.'" Verified Pet. Ex. C, DOS Response 3.

exemption from consistency review under the CMP's grandfathering clause. Federal CZMA regulations require a state "to *uniformly* and comprehensively apply the enforceable policies of the State's management program." 15 C.F.R. § 930.6(a) (emphasis added). "Uniformity is required to ensure that States are not applying policies differently, or in a discriminatory way, among various entities for the same type of project for similar purposes, *e.g.*, *holding a Federal agency to a higher standard than a local government or private citizen.*" 65 Fed. Reg. 77,124, 77,128 (Dec. 8, 2000) (emphasis added).

DOS's interpretation of the CMP's grandfathering clause runs afoul of this regulation. Because each consistency review conducted by New York—whether for a federal or state permit—must conform to the same standards, the CMP grandfathering exemptions must apply to a federal consistency review exactly as they apply to a state consistency review. Accordingly, DOS's interpretation of the grandfathering clause is contrary to federal law, and is arbitrary and capricious.

III. SUBSTANTIAL TIME, MONEY, AND EFFORT WERE DEVOTED TO THE CONSTRUCTION AND LICENSING OF IP2 AND IP3.

As one of its "Special Federal Program Requirements," the CMP includes a grandfathering provision addressing projects "for which a substantial amount of time, money and effort have been expended." Verified Pet. Ex. B, CMP § II-9, at 1. Specific examples of projects highlighted in this section of the CMP include national defense facilities, public parks and lands, transportation facilities, and *energy production and transmission facilities*. *See id.* § II-9, at 1-6. Each facility or project on this list routinely requires major planning and public input, compliance with multiple regulations and permitting standards, and substantial expenditures of private or public funds.

Nuclear power plants, such as IP2 and IP3, are facilities highlighted by the CMP "in recognition of the national interest in energy facilities," and are precisely the sort of projects contemplated by the CMP's grandfathering provision. *See id.* § II-9, at 1, 3-4. At the time of their completion, IP2 and IP3 were among the most expensive electric power projects ever completed in New York State, with an inflation-adjusted cost of $2.4 billion. (*See* p. 4, n. 9 above). Construction, from groundbreaking to operations, took place over the course of many years. *See* Verified Pet. Ex. E-1, IP2 EIS, Vol. I, at I-1 (identifying construction permits issued to IP2 in 1966); Verified Pet. Ex. G-1, IP3 EIS, Vol. I, at I-1 (identifying construction permits issued to IP3 in 1969). IP2 and IP3 also received numerous state and local construction, discharge, and other permits, as well as the federal operating permits during this period. *See* Verified Pet. ¶¶ 23-27, 29, 37, 43. Accordingly, they are projects for which substantial time, money, and effort were expended, and are grandfathered from the CMP.

IV. IN REFUSING TO EXEMPT IP2 AND IP3 FROM FURTHER CONSISTENCY REVIEW UNDER THE SEQRA GRANDFATHERING PROVISION, DOS IGNORES THE PLAIN LANGUAGE OF THE CMP.

The CMP *does not apply* to projects "identified as grandfathered pursuant to [the] State Environmental [Q]uality Review Act at the time of its enactment in 1976." Verified Pet. Ex. B, CMP § II-9, at 1. SEQRA excludes "[a]ctions undertaken or approved prior to the effective date" of that Act, which was September 1, 1976. *See* ECL § 8-0111(5)(a) and n.2. SEQRA "actions" include "projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies." §

8-0105(4)(i).[19] "Actions" also encompass state "policy, regulations, and procedure-making." § 8-0105(4)(ii). The term "agencies" includes both state *and* local agencies, § 8-105(3), and any local "board, district, commission, or governing body, including any city, county, and other political subdivision of the state." § 8-0105(2). Further, as shown below (Part III.C), at least two appellate courts have applied SEQRA's grandfathering provision to overrule efforts by the New York State Department of Environmental Conservation ("DEC") to impose SEQRA review on permit renewals for projects that were approved or commenced prior to SEQRA's effective date.[20] Accordingly, if an existing project or ongoing activity that involved the issuance of a lease, permit, license, certificate, or other entitlement was approved prior to SEQRA's effective date of September 1, 1976, *or* if the project or activity was commenced before that date, then the project or activity is exempt from SEQRA and, in turn, from the consistency review provisions of the CMP.

A. IP2 and IP3 Meet SEQRA's Requirements for Grandfathering

IP2 and IP3 constitute "actions" that were undertaken and approved prior to SEQRA's effective date. IP2 received its operating license on September 28, 1973 and IP3 received its operating license on December 12, 1975. Both facilities were therefore licensed to begin operating prior to September 1, 1976, the effective date of SEQRA.

Without question, New York State and its various agencies entered into contracts and leases in support of both facilities' operations. As mentioned, the State of New York conveyed

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[19] IP2 and IP3 constitute "actions" for the purposes of SEQRA because, as shown below, the plants' operations involved "the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies." ECL § 8-0105(4)(i).

[20] *See Fletcher Gravel Co. v. Jorling*, 179 A.D.2d 286, 290-91 (4th Dept. 1992); *Atl. Cement Co. v. Williams*, 129 A.D.2d 84, 92 (3d Dept. 1987).

land for the facilities to ConEd and facilitated the construction of IP2 and IP3. Verified Pet. ¶ 22.[21] The New York State Atomic and Space Development Authority (now, "NYSERDA") also conveyed to ConEd a leasehold interest authorizing use by IP2 and IP3 of Hudson River submerged lands. *Id.* ¶ 28. Thus, New York agencies facilitated the construction and operation of IP2 and IP3 by supplying two essential resources: land and access to a large water source through a bottomlands conveyance.

Moreover, in 1974, also prior to SEQRA's effective date, the state of New York passed a law that recognized the critical role of IP3 in serving New York City's energy needs and, based on that recognition, authorized NYPA to acquire IP3. *Id.* ¶ 39.[22] The NRC issued an operating license for IP3 to NYPA in 1975 and the plant commenced commercial operations on August 30, 1976, again prior to SEQRA's effective date. *Id.* ¶ 43.

The Village of Buchanan also issued several construction permits to the Indian Point site from 1967 to 1969, years before the effective date of SEQRA. For example, the Village issued permits to the plants for dredging activities and construction of containment buildings, turbine rooms and heater bays, fuel storage facilities, service facilities, auxiliary buildings, and other activities. *Id.* ¶ 24 (Village of Buchanan Building Permit No. 427, July 11, 1967; No. 459, May 28, 1968; No. 460, May 28, 1968; No. 463, July 15, 1968; No. 473, Feb. 24, 1969; No. 491, Aug. 25, 1969; No. 492, Aug. 26, 1969; and No. 458, May 28, 1968.) Because the Village of Buchanan is an "agency" recognized under SEQRA, *see* ECL § 8-0105(2) and (3), permits issued by the Village also are sufficient to invoke SEQRA's grandfathering exemption.

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[21] *See* Department of State, Letters Patent (Verified Pet. Ex. D).
[22] *See, e.g.*, Emergency Provisions for the Metropolitan Area of the City of New York, N.Y. Pub. Auth. Law § 1001-a (1974); 1974 N.Y. Sess. Law 1216.

Other New York agencies also issued various operational permits and licenses to IP2 and IP3 well in advance of SEQRA's effective date. For example, on December 7, 1970, DEC issued a water quality certification for IP2. Verified Pet. ¶ 26.[23] DEC issued the certification pursuant to the Water Quality Improvement Act of 1970, which stated in pertinent part:

> Any applicant for a Federal license or permit to conduct any activity including . . . the construction or operation of facilities, which may result in any discharge into the navigable waters of the United States, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that there is reasonable assurance . . . that such activity will be conducted in a manner which will not violate applicable water quality standards.

See Pub. L. No. 91-224, § 21(b)(1), 84 Stat. 91, 108 (1970) (App. 47-71). IP2 could not have obtained a federal license to operate without first obtaining a certification of water quality from the State of New York or otherwise fulfilling the requirements of Section 401 of the Clean Water Act.[24] Verified Pet. ¶ 26.

On May 2, 1975, DEC also issued a water quality certification for operation of IP3. *Id.* ¶ 29.[25] DEC issued the certification pursuant to "Section 401 of the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500." Section 401 requires applicants for federal permits to obtain certification from the State or interstate water control agencies that a proposed water resources project is in compliance with established effluent limitations and water quality standards. As was the case for IP2, IP3 could not have obtained a federal operating license without first obtaining a Section 401 certification from the State of New York or otherwise fulfilling the requirements of Section 401 of the Clean Water Act. These authorizations reflect DEC's reviews of potential environmental impacts of IP2 and IP3,

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[23] *See* Letter from T.P. Curran, Department of Environmental Conservation (Verified Pet. Ex. H).
[24] On September 24, 1973, DEC issued another water quality certification for IP2 (Verified Pet. Ex. H).
[25] *See* Letter from Ogden Reid, Commissioner, Department of Environmental Conservation (Verified Pet. Ex. J).

particularly the impact of the facilities' operations on aquatic organisms, chemical discharges, and the temperature of their discharges.

By the time SEQRA became effective on September 1, 1976, IP2 and IP3 had long since received their NRC construction permits, completed construction, and obtained their NRC operating licenses, which were issued in 1973 and 1975, respectively. Inasmuch as all relevant NRC, state, and municipal authorizations necessary for the operation of IP2 and IP3 were complete before September 1, 1976,[26] all "actions" and "activities" were also complete. Thus, both IP2 and IP3 are grandfathered under SEQRA and, consequently, the CMP.

B. The CMP and SEQRA Do Not Require "Listing" as a Prerequisite for Grandfathering.

DOS asserts that IP2 and IP3 are not grandfathered under the CMP because neither facility's operations were identified as grandfathered pursuant to SEQRA before September 1, 1976. *See* Verified Pet. Ex. C, DOS Response 4. Interpreting amendments to the SEQRA statute from 1976, DOS contends that projects are "identified" only through listing procedures applicable to "state agency actions." *Id.* Such statutory procedures called upon state agencies to submit to the Director of the New York State Division of the Budget a list of state agency actions deemed "approved" before the SEQRA cutoff date. *See* 1976 N.Y. Laws Chapter 228, § 5. After reviewing the list, the Budget Director could certify the projects as grandfathered under SEQRA and submit the list to the Commissioner of Environmental Conservation. DOS notes

[26] IP2 and IP3 had not yet received a State Pollutant Discharge Elimination System ("SPDES") permit from DEC prior to September 1, 1976, but DEC did not have the authority to issue one. Pursuant to a Memorandum of Understanding with DEC, the Environmental Protection Agency ("EPA") had retained jurisdiction over the National Pollutant Discharge Elimination System permit proceedings that, at the time, were pending before the EPA. DEC eventually issued SPDES permits for IP2 and IP3 in 1986. *See* DEC, *Notice of Complete Application for State Pollution Discharge Elimination System (SPDES) Permit*, THE STAR (Westchester, New York) (Sept. 9, 1986) (providing public notice of DEC's negative SEQRA determination for Indian Point and noting it is either "exempt, excluded or a Type II action").

that the operations of IP2 and IP3 are not on any list, and therefore concludes that they do not qualify for the SEQRA grandfathering exemption. Significantly, DOS's interpretation of SEQRA, which is implemented by DEC, not DOS, *see* ECL § 3-301, is entitled to minimal if any deference. *See Atl. Cement Co. v. Williams*, 129 A.D.2d 84, 89 (3d Dept. 1987) (agency interpretation entitled to little weight if it does not involve "matters within the expertise of the agency" and is "merely one of statutory reading and analysis").

DOS's conclusion based on the "listing" requirement is flawed for two reasons. First, there is no "listing" requirement for grandfathered projects arising from the issuance of a permit or authorization. As explained in the treatise relied on by DOS in its response, the New York legislature amended SEQRA again in 1977 to help clarify how specific actions would be regulated under, or exempt from, SEQRA.[27] *See* Verified Pet. Ex. C, DOS Response 4. The SEQRA amendments established listing procedures for exempt "actions directly undertaken by a *local agency*." 1977 N.Y. Laws Chapter 252, §§ 9, 12 (emphasis added) (App. 72-78). They also set forth procedures for identifying exempt "actions supported in whole or in part by a form of *funding assistance* from one or more state or local agencies." *See id.* §§ 10, 13 (emphasis added). They do *not*, however, require an agency to submit to the Budget Director a list of actions "requiring the issuance of a *permit or authorization* for use or permission to act." *See id.* §§ 11, 14 (emphasis added). Under SEQRA, these actions are grandfathered so long as they received "all final approvals" before September 1, 1978. *See id.* It makes perfect sense that

[27] As defined by SEQRA in 1976, "Actions" included projects or activities: (1) directly undertaken by an agency; (2) supported in whole or part through contracts, grants, subsidies, loans or other forms of funding assistance; or (3) involving the issuance of a permit or license by an agency. *See* 1976 N.Y. Laws Chapter 228, § 1 (App. 79-81).

projects receiving permits before SEQRA's effective date, like IP2 and IP3, would not require listing. The permits are publicly available evidence of prior state approvals.

Second, even if IP2 and IP3 were subject to the listing requirement, that requirement is not conclusive. As the treatise quoted by DOS makes clear, even if an activity is not listed by an agency, "the project might nevertheless qualify as an excluded action if it could be demonstrated that 'substantial time, work or money had been expended on the project' prior to the SEQRA effective date." Verified Pet. Ex. C, DOS Response 4-5 (citing Gerrard et al., *Environmental Impact Review in New York*, § 2.01(5)(a) (2012)). As noted above (pp. 2-4 and n.9), IP2 and IP3 took several years to construct, were among the most expensive electric power projects ever completed in New York State, and were subject to numerous final approvals before they began operations.

DOS's response acknowledges that certain aspects of IP3 are, in fact, "listed." Verified Pet. Ex. C, DOS Response 5. After acquiring IP3 in 1974, NYPA approved projects necessary for its completion. On April 11, 1978, the Budget Director certified that those projects qualified as ones for which "substantial time, work and money had been expended," and thus "listed" them. *See* Certification of Acting Director of the Budget Howard F. Miller (Apr. 11, 1978) (Verified Pet. Ex. K). But the projects approved by NYPA after 1974 represent only a portion of the work involved in constructing a nuclear power plant. It is therefore arbitrary for DOS to conclude that the projects completed *before* NYPA's acquisition of IP3 do not qualify as projects for which "substantial time, work and money had been expended." It also is arbitrary to suggest that similar projects for IP2 did not require "substantial time, work and money." For these

reasons, DOS's interpretation of the SEQRA grandfather provision is arbitrary, capricious, and contrary to law.

C. New York Courts Have Not Hesitated To Overrule Agencies When They Ignore SEQRA's Grandfathering Provision.

New York courts have applied the SEQRA exemption for nearly three decades to permit renewals of projects subject to considerably less regulatory review than that imposed upon IP2 and IP3. Indeed, courts enforce the SEQRA grandfathering provision even when DEC, the agency charged (unlike DOS) with implementing SEQRA, denies grandfathering. For example, in *Northeast Solite Corp. v. Flacke*, 91 A.D.2d 57 (3d Dept. 1983), DEC asserted that a mining company's permit applications were subject to SEQRA review, thus requiring the company to prepare an environmental impact statement analyzing the effects of its ongoing operations. The company sought judicial review of DEC's determination, arguing that the "operation of [its mining] facility commenced long before SEQRA was enacted," and the facility therefore qualified for grandfathering under SEQRA. *Id.* at 59. The Third Department agreed with the company, holding that SEQRA's "grandfathering" clause specifically applied to facilities that had obtained permits and authorizations necessary to commence operations prior to SEQRA's effective date. *See id.* at 60.

Further, reasonable and anticipated evolutions in grandfathered activities do not alter grandfathering status. A Fourth Department ruling supports this point. *See Fletcher Gravel Co., Inc. v. Jorling*, 179 A.D.2d 286 (4th Dept. 1992). In *Fletcher*, the Appellate Division again overruled DEC by determining that an approved and permitted quarry operated by Fletcher Gravel Company since 1965 fell within SEQRA's grandfathering clause. DEC asserted that there had been a material change in the company's operation of the quarry and, consequently, the

company's application to renew its mining permit was subject to SEQRA's review requirements. *Id.* at 288. The court rejected DEC's argument, reasoning that "adding machinery and equipment, changing the placement of its equipment, and expanding quarrying activities on the site . . . is *consistent with the nature of mining*," which "requires some flexibility in the use and placement of equipment, as well as the height and breadth of stockpiles and the configuration of haulageways." *Id.* at 289 (emphasis added). Accordingly, the court determined that the changes occurring as a result of permit renewal did not "constitute a significant change in permit conditions." *Id.* Based on that determination, the court held that "[p]etitioner's quarry is an action 'undertaken or approved prior to the effective date' of SEQRA; *consequently, it falls within the grandfather clause.*" *Id.* at 290 (emphasis added).

These precedents confirm the broad scope of the SEQRA grandfathering clause and assure that grandfathered status is preserved *even if* the facility's operations or activities change over time. Facilities like IP2 and IP3 fall within this broad scope because they began operations pursuant to state leases, permits, and licenses before SEQRA became effective and their ongoing activities are entirely "consistent with the nature" of the activities approved originally for the facilities.

D. DOS Inaccurately Claims There Have Been and Will Be "Material Changes" to IP2 and IP3.

In its response, DOS nevertheless challenges Entergy's representation that it anticipates no material changes in the footprint or facilities of the two units, or their designs or operations. It reasoned that significant modifications may occur that "can revive the applicability of SEQRA" and defeat any grandfathering protections that IP2 and IP3 might have achieved. Verified Pet. Ex. C, DOS Response 12.

In particular, DOS first suggests that mere *renewal* of operating licenses for IP2 and IP3 is a material change. *See id.* at 13. This position is contrary to *Atl. Cement Co.*, 129 A.D.2d at 92 and *Fletcher Gravel Co., Inc.*, 179 A.D.2d at 291, which enforced the SEQRA grandfathering exemption in the context of permit renewals. Further, DOS's apparent position about the aggregate effects of ongoing plant operations is contrary to the fundamental purpose of the SEQRA grandfathering provision, which is to protect activities that have remained unchanged since the SEQRA trigger date. *See Atl. Cement Co.*, 129 A.D.2d at 92. Indeed, SEQRA grandfathering might be negated only if there is a "*substantial increase* in the level of operations." *See Salmon v. Flacke*, 61 N.Y.2d 798, 800 (1984) (in *dicta*, suggesting that "*proof* of change in the level of operation so substantial" might remove an activity from the SEQRA grandfathering provision) (emphasis added). As shown in Entergy's petition, however, there are no material increases in output, water use, or otherwise anticipated during the license renewal period (*see* Verified Pet. Ex. B, Entergy Pet. 3), and DOS has identified no basis to rebut Entergy's showing.

Second, DOS points to Entergy's retrofitting of cooling water intake structures for IP2 and IP3 as evidence of a substantial change to the facilities. *See* Verified Pet. Ex. C, DOS Response 13-14. The mere installation of new equipment is not sufficient to defeat SEQRA grandfathering. *See Fletcher Gravel*, 179 A.D.2d at 289 (rejecting DEC's argument that the installation and new placement of machinery qualified as a change in operation that negated SEQRA grandfathering). Moreover, as shown in DOS's response, DEC acknowledged that the Ristroph screen technology and occasional decreases in cooling water intake structure flows have *reduced*, rather than maintained or increased, the effects on aquatic organisms in the Hudson

River. *See* Verified Pet. Ex. C, DOS Response 13.[28] Thus, the Ristroph screens and flow decreases cause *fewer* environmental impacts, and are not significant changes that would defeat grandfathering.

Third, DOS suggests that certain spent fuel pool leaks qualify as "material changes." *See* Verified Pet. Ex. C, DOS Response 14. As a threshold matter, radiological safety lies in the exclusive domain of the NRC. *See Pac. Gas & Electric Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 207 (1983) (explaining Atomic Energy Act gave federal government exclusive jurisdiction over regulation of nuclear materials and that "no role was left for the states"). Moreover, Congress expressly limited the ability of states to regulate, pursuant to their Clean Water Act authority, releases of radiological materials from NRC-regulated facilities. *See Train v. Colo. Pub. Interest Research Group, Inc.*, 426 U.S. 1, 16 n.12 (1976). Accordingly, federal law preempts an effort by DOS or DEC to regulate spent nuclear fuel pool releases, either directly through regulation or indirectly through the consistency review process.

Even if that were not so, the NRC and DEC conducted independent assessments of the discharges. *See* Aff. of Donald M. Mayer. Both agencies concluded that there are no measurable impacts on human health, groundwater quality, and ecological resources, and the releases are *well below pertinent NRC standards*. *See id.* ¶¶ 6-18.[29] Thus, the discharges are not material changes in operation that negate SEQRA grandfathering for IP2 or IP3.

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[28] Application of the CMP grandfathering provisions to exempt IP2 and IP3 from further review under the CZMA will not affect the ongoing State Pollution Discharge Elimination System proceeding.

[29] *See* NUREG-1437, Supp. 38, Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Vol. 1, at 2-104 to 2-114, 4-41 to 4-42, 4-56, 4-61, 4-67 to 4-69 (Dec. 2010); Entergy's Statement of Position on Consolidated Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks), *In the Matter of Entergy Nuclear Operations, Inc.*, Docket Nos. 50-247-LR and 50-286-LR, at 23-24, 33-36 (Mar. 29, 2012).

Fourth, DOS argues that court proceedings concerning NRC policies on storage of spent nuclear fuel also affect IP2 and IP3 relicensing and, therefore, are substantial changes to their operations. *See* Verified Pet. Ex. C, DOS Response 14-15. According to DOS, the potential "change in the regulatory landscape" regarding the 40 year old spent fuel pools qualifies as a substantial modification. *Id.* at 14. Again, DOS has ventured into an area preempted by federal law. Moreover, DOS's interpretation is contrary to SEQRA. Even if legal proceedings relating to the NRC's waste confidence rule result in further restrictions on spent fuel storage, an agency's "determination to require permits for items that did not previously require permits, many of which were already in use . . . does not constitute a material change in permit conditions." *Fletcher Gravel Co., Inc.*, 179 A.D.2d at 290.

Finally, DOS asserts that IP2 and IP3 "*may*" someday, as a condition for obtaining a water quality permit, be required to replace their existing cooling systems with cooling towers, and if so, that *might* constitute a substantial change. *See* Verified Pet. Ex. C, DOS Response 14-15. This chain of speculation is simply too attenuated, unsupported, and unreliable to create a rational basis upon which to defeat grandfathering. If it should come to pass, and depending on a host of factors not currently known, then such a requirement for cooling towers might trigger separate review under the CMP outside the scope of license renewal.

Accordingly, because none of the changes alleged by DOS are material modifications to the operations of IP2 and IP3, SEQRA grandfathering still applies to the facilities.

V. DOS ERRONEOUSLY DETERMINES THAT ONLY A STATE EIS TRIGGERS THE SECOND GRANDFATHERING PROVISION UNDER THE CMP

Under the CMP's second grandfathering provision, a project is exempt from the CMP if a final EIS was prepared for the project prior to September 28, 1982. Verified Pet. Ex. B, CMP §

II-9, at 1. This exemption plainly applies to IP2 and IP3, and DOS's determination otherwise was contrary to settled law and was arbitrary and capricious. DOS cannot deny that IP2 and IP3 were fully evaluated in final EISs issued by the NRC in 1972 and 1975, respectively, well before the "grandfathering date" of September 28, 1982.

The IP2 and IP3 EISs satisfy both the letter and the spirit of the CMP grandfathering clause. The grandfathering clause explicitly states that covered activities "will not be subject to review pursuant to the Federal consistency procedures of the Federal Coastal Zone Management Act." *Id.* § II-9, at 1. Because only activities requiring a federal license or permit require review under the "Federal consistency procedures," it is all but inevitable that the environmental impact statements for qualifying activities will be prepared under federal rather than state law. DOS's reading of the clause as applicable only EISs prepared under state law is nonsensical and certainly arbitrary, capricious, and contrary to law.

Further, in promulgating the CMP, DOS did not limit the term "final Environmental Impact Statement" to reports issued by the state. Rather, as shown elsewhere in the CMP, the term encompasses both state *and* federal EISs. *See id.* § II-9, at 12 (referring to a "final Environmental Impact Statement" regardless of whether it was "required by the federal agency or by a state agency having jurisdiction over the proposed activity"). Thus, the DOS's determination that a state EIS is a prerequisite for exemption under the CMP's grandfathering provision is entirely inconsistent with the language of the CMP. Under the more plausible reading of the CMP, the grandfathering clause is triggered by *either* a final EIS document prepared under SEQRA *or* a final EIS document prepared under the National Environmental Policy Act of 1969 ("NEPA") and deemed sufficient under SEQRA.

Finally, New York considers a state and federal EIS to be equivalent as a matter of law. *See* 6 NYCRR § 617.15(a) ("When a draft and final EIS for an action has been duly prepared under the National Environmental Policy Act of 1969, an agency has no obligation to prepare an additional EIS under [SEQRA], provided the Federal EIS is sufficient to make findings under [SEQRA]."). Indeed, in state proceedings on Entergy's application for a Section 401 Water Quality Certification pursuant to the Clean Water Act, DEC has relied on the NRC's Final Supplemental Environmental Impact Statement for IP2 and IP3 to meet SEQRA requirements. On March 25, 2011, DEC Assistant Counsel Mark D. Sanza wrote to DEC Administrative Law Judges Maria E. Villa and Daniel P. O'Connell to explain that there is a presumption in New York's Environmental Conservation Law, ECL § 8-0111, that a federal EIS will serve as the EIS for a state SEQRA proceeding, and to advise them of DEC's determination that the FSEIS regarding IP2 and IP3 would be sufficient for findings under SEQRA, even if it required minimal supplementation with additional documents. *See* Letter to the Hon. Maria E. Villa and Daniel P. O'Connell from Mark D. Sanza (Mar. 25, 2011) (App. 82-86).

Consisting of approximately 898 pages of analysis and 697 pages of appendices, the EISs for IP2 and IP3 prepared in 1972 and 1975 respectively are more than sufficient to invoke the CMP grandfathering provision. The EISs embody comments, criticisms, and perspectives from a number of different federal, state, and local agencies. For example, in drafting the EIS for IP3, the NRC held "several meetings with the applicant, its consultants, the *State of New York*, and intervenors in order to exchange information about current ecological research results." Verified Pet. Ex. G-1, IP3 EIS, Vol. I, at i (emphasis added). The EIS for IP2 evaluates the environmental impacts of both IP1 and IP2, and given "the proximity of Units Nos. 1, 2, and 3

and the similarity in design," concludes that it was "reasonable to expect that any and all requirements placed on Unit 2 as a consequence of [the] Statement [would] apply as well to Units Nos. 1 and 3." Verified Pet. Ex. E-1, IP2 EIS, Vol. I, at i. The IP3 EIS goes even further. It considers not only "the environmental impacts of all three Units," but also "the cumulative environmental benefits and impacts of the plants within a 30-mile reach of the [Hudson] river." Verified Pet. Ex. G-1, IP3 EIS, Vol. I, at i.

Both EISs consider a comprehensive array of environmental concerns, including those relating to the coastal zone. The EISs analyze the impact on air and water use and identify sources of potential and probable biological effects, including chemical discharges, thermal discharges, entrainment, and impingement. With respect to land use, the EISs discuss the impact of the plants on aesthetics, access, noise, historical landmarks, and climate. *See* Verified Pet. Ex. E-1, IP2 EIS Vol. I., Part V ("Environmental Impacts of Indian Point Unit No. 2 Operation with Unit No. 1 Operation"); Verified Pet. Ex. G-1, IP3 EIS Vol. I, Part V ("Environmental Impacts of Station Operation").

In addition, the EISs incorporate comments from at least 23 different federal, state, and local agencies and interested parties, including DEC and the New York State Attorney General. *See* Verified Pet. Ex. E-2, IP2 EIS, Vol. II., Appx. XII-1-24; *see* Verified Pet. Ex. G-2, IP3 EIS, Vol. II., Appx. I-1-104. For example, DEC critiqued the IP2 EIS draft report page by page, and—in over 30 pages of comments—incorporated "the views of all appropriate State agencies including the New York State Atomic Energy Council." Verified Pet. Ex. E-2, IP2 EIS, Vol. II, Appx. XII-55. And while some of the comments were critical, others were complimentary. *Compare id.* at XII-81, Comment 50 *with id.* at XII-60, Comment 7. Similarly, the DEC

commented on the draft IP3 EIS and concluded that the draft statement was "an exceptionally well prepared document." *Id.* at I-19. To address these comments and others, the AEC and NRC revised the text of the draft EISs. *See id.* at XII-1-129; Verified Pet. Ex. E-1, IP2 EIS, Vol. I, at XII-1-51. Thus, the final EISs for IP2 and IP3 were the products of a truly collaborative process between the federal nuclear agencies and the interested New York state agencies.

In many respects, the EISs reached the same conclusion for both units on certain issues. *Compare* Verified Pet. Ex. E-1, IP2 EIS, Vol. I., at i. (finding 3.b. regarding enhanced value of the site to the general public) *with* Verified Pet. Ex. G-1, IP3 EIS, Vol. I., at ii. (finding 3.c. regarding the same); Verified Pet. Ex. E-1, IP2 EIS, Vol. I., at iii. (finding 3.g. regarding oxygen concentration) *with* Verified Pet. Ex. G-1, IP3 EIS, Vol. I., at iv. (finding 3.h. regarding the same); Verified Pet. Ex. E-1, IP2 EIS, Vol. I., at iii. (finding 3.i. regarding chlorination) *with* Verified Pet. Ex. G-1, IP3 EIS, Vol. I., at iv. (finding 3.j. regarding the same); Verified Pet. Ex. E-1, IP2 EIS, Vol. I., at iii.-iv (finding 3.j. regarding striped bass population) *with* Verified Pet. Ex. G-1, IP3 EIS, Vol. I., at iv-vii (finding 3.k. regarding the same). Indeed, any differences were minor. *Compare* Verified Pet. Ex. E-1, IP2 EIS, Vol. I., at iv. (finding that the discharge of radioactive gases would "result in an insignificant radiological impact on man and natural populations of terrestrial and aquatic life") *with* Verified Pet. Ex. G-1, IP3 EIS, Vol. I., at vii. (same finding but only with respect to the impact on man).

Since issuance of the EISs, IP2 and IP3 have operated safely and reliably for almost four decades. The EISs were sufficient to permit their nuclear power operations, and they are no less sufficient to satisfy the CMP's second grandfathering exemption. Accordingly, DOS's refusal to declare IP2 and IP3 exempt from the CMP is arbitrary, capricious, and contrary to law.

CONCLUSION

As shown above, IP2 and IP3 are facilities for which substantial time, money, and effort were expended before New York adopted and NOAA approved the CMP. Both units were undertaken and received final permit approvals before the effective date of SEQRA. IP2 and IP3 also were the subject of final EISs before the effective date of the CMP and its coastal policies. Accordingly, Entergy respectfully urges this Court to annul DOS's determination and declare that IP2 and IP3 meet the grandfathering provisions of the CMP and, accordingly, are not subject to the CMP or consistency review.

Dated: March 13, 2013

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

ENTERGY NUCLEAR OPERATIONS, INC., ENTERGY NUCLEAR INDIAN POINT 2, LLC, and ENTERGY NUCLEAR INDIAN POINT 3, LLC.,	
Petitioners-Plaintiffs,	Index No.: 1535-13
For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules	**AFFIDAVIT OF FRED R. DACIMO**
-against-	
NEW YORK STATE DEPARTMENT OF STATE, CESAR A. PERALES, Secretary of the New York State Department of State,	
Respondents-Defendants.	

STATE OF NEW YORK)
) ss:
COUNTY OF WESTCHESTER)

I, Fred R. Dacimo, being duly sworn, depose and say based on my personal knowledge that:

1. I am the Vice President of License Renewal for Entergy Wholesale Commodities ("EWC"). Including my current employment at EWC, I have worked in the nuclear industry for nearly forty years at various nuclear power facilities throughout the United States.

2. I have served as EWC's Vice President of License Renewal since December 3, 2007. I am responsible for the overall management and direction of the license renewal program for Indian Point Energy Center ("IPEC"). From January 2003 through 2007, I served as the Site Vice President of IPEC, and was responsible for the overall operation of Indian Point Nuclear Generating Units 2 and 3 ("IP2" and "IP3"), as well as the maintenance of Unit 1, which is permanently shutdown and in a safe storage ("SAFSTOR") condition.

3. I have been closely involved in the operation of IPEC since 1999. At that time, I was employed by the New York Power Authority and served as the Plant Manager of IP3. I continued to serve as Plant Manager after Entergy acquired IP3 in 2000 and, in addition to my responsibilities at IP3, was appointed Vice President of IP2 on September 1, 2001.

4. For two years before I joined IPEC, I was employed by Commonwealth Edison as the Site Vice President of its LaSalle Station. I was responsible for overseeing the plant's startup operations, and served as the plant's primary liaison with regulatory authorities. For years before that, I served as Northeast Utilities' Vice President of Nuclear Operations, responsible for Connecticut Yankee, Millstone 1, 2, and 3, and Seabrook Nuclear Power Stations. I have also held positions involving nuclear power plant operations at Boston Edison's Pilgrim Station and Oyster Creek Nuclear Power Station.

5. I earned a bachelor's degree in nuclear science from SUNY Maritime College and currently serve on its Engineering Advisory Board. I have held Senior Reactor Operator licenses for both Boiling Water Reactors and Pressurized Water Reactors, and have also participated in and mentored at the Institute of Nuclear Power Operations' Senior Plant Managers Program. I currently sit on the Nuclear Oversight Board for Southern California Edison for its San Onofre Nuclear Generating Station.

IP2 and IP3 Statistics

6. I am familiar with the United States Energy Information Administration ("EIA"), which is an agency within the United States Department of Energy.

7. As explained on its website, the "EIA collects, analyzes, and disseminates independent and impartial energy information to promote sound policymaking, efficient markets, and public understanding of energy and its interaction with the economy and the environment. EIA is the

nation's premier source of energy information . . . ." EIA Website (available at http://www.eia.gov/about/mission_overview.cfm). A complete and accurate copy of a relevant excerpt of the EIA's Internet website, last visited on February 15, 2013, is attached hereto as Exhibit A.

8. I am aware that the EIA reports on the nuclear industry, including information about nuclear power plants, their construction, and power production capabilities. Moreover, I am familiar with statistics on Indian Point Nuclear Power Plant that are published by the EIA.

9. According to the EIA's data, IP2 and IP3 were constructed at a substantial cost of $2.45 billion (adjusted for inflation to 2007 dollars). *See* EIA Profile for New York (available at http://www.eia.gov/nuclear/state/newyork/). A complete and accurate copy of a relevant excerpt of the EIA's Internet website, last visited on February 12, 2013, is attached hereto as Exhibit B. The IP2 and IP3 costs exceed the cost of construction for almost every other nuclear power plant in the State of New York. *See id.*

Ristroph Screens

10. I have reviewed the New York Department of Environmental Conservation's Notice of Denial of Entergy's application for a Clean Water Act § 401 Water Quality Certification for IP2 and IP3. *See* DEC Notice of Denial, Apr. 2, 2010. A complete and accurate copy of the Notice of Denial is attached hereto as Exhibit C. This denial is the subject of ongoing litigation.

11. DEC's Notice mentions Entergy's use of certain technologies, such as Ristroph screens. *See id.* at 3.

12. Although, in DEC's assessment, the reduction of entrainment is not sufficient for approval of the WQC application, DEC acknowledges that the technologies and occasional

decreases in cooling water intake structure flows have *reduced* entrainment of the Hudson River's aquatic species. *See id.*

13. DEC does not claim that Ristroph screens or other technologies maintain or *increase* entrainment of the aquatic species. *See id.*

14. In addition, DEC states that the Ristroph screens are "technological measures to reduce impingement mortality" of aquatic species. *See id.* at 13.

15. Finally, DEC has not suggested that entrainment or impingement have increased since the early years of IPEC's operation.

Fred R. Dacimo

Sworn to before me this 14 day
of March 2013.

Notary Public

CHRISTINA LEITMANN
Notary Public, State of New York
Registration #01LE5070946
Qualified In Putnam County
Commission Expires January 6, 2015

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

ENTERGY NUCLEAR OPERATIONS, INC., ENTERGY NUCLEAR INDIAN POINT 2, LLC, and ENTERGY NUCLEAR INDIAN POINT 3, LLC.,	
Petitioners-Plaintiffs,	Index No.: 1535-13
For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules	**AFFIDAVIT OF DONALD M. MAYER**
-against-	
NEW YORK STATE DEPARTMENT OF STATE, CESAR A. PERALES, Secretary of the New York State Department of State,	
Respondents-Defendants.	

STATE OF NEW YORK)
) ss:
COUNTY OF WESTCHESTER)

I, Donald M. Mayer, being duly sworn, depose and say based on my personal knowledge that:

1. I am employed by Entergy Nuclear Operations Inc. as the Director of Indian Point Nuclear Generating Station Unit 1 ("IP1"). As Director, I am responsible for overall project direction and management of the retired IP1 plant. I also provide senior management oversight for a variety of strategic projects for Entergy at Indian Point Energy Center ("IPEC"). I am specifically responsible for all programs related to IP1 safe storage, which included the removal of the spent fuel from the facility's storage pools in 2008.

2. From 2005 to 2009, I was responsible for management of the overall site investigation of groundwater resources as they relate to IP1, as well as Indian Point Nuclear Generating Units 2 and 3 ("IP2" and "IP3," respectively). This included responsibility for the hydrological,

remedial, and radiological aspects of the effort. Since that time, I have maintained an oversight and advisory role of the groundwater program.

3. Based on this experience, I am familiar with the IP1 and IP2 spent fuel pool leaks and the inspections conducted by the United States Nuclear Regulatory Commission ("NRC"). I am also familiar with independent assessments of spent fuel pool leaks at IP1 and IP2 by the New York State Department of Environmental Conservation ("DEC").

4. The studies identified below confirm that the spent fuel leaks at IPEC have had and continue to have no measurable impact on public or environmental health and safety. In fact, the studies demonstrate that the releases are well below (<0.1%) the NRC limits for plant effluents and associated calculated offsite doses.

NRC's Independent Assessment of Spent Fuel Pools at IP2 and IP3

5. NRC Staff initiated a special inspection of certain leaks from IPEC on September 20, 2005. The purpose of the inspection was to determine if the groundwater near the leaks affected, or could affect, public health and safety.

6. In March 2006, NRC Staff issued a Special Inspection Report with findings on the leaks. *See* NRC Special Inspection Report No. 05000247/2005011 (Mar. 16, 2006) ("2006 NRC Special Inspection Report") (RIV000069). A complete and accurate copy of the 2006 Special Inspection Report is attached hereto as Exhibit A. As stated in the report, the NRC Staff found that the groundwater contamination did not and was not likely to adversely affect public health and safety. *See id.* at iv-viii.

7. The NRC Staff subsequently performed more independent inspections and testing at IPEC, and evaluated radiological and hydrological conditions affecting groundwater onsite. *See* Indian Point Nuclear Generating Unit 3 – NRC Integrated Inspection Report 05000286/2007003

at 20-22 (Aug. 8, 2007) ("2007 NRC Inspection Report") (ENT000347). A complete and accurate copy of the 2007 NRC Inspection Report is attached hereto as Exhibit B. The NRC Staff also continued to verify groundwater sample results by conducting split monitoring well sampling with Entergy and DEC. *See* May 13, 2008 NRC Inspection Report at 4-5 (RIV000067) ("2008 NRC Inspection Report"). A complete and accurate copy of the 2008 NRC Inspection Report is attached hereto as Exhibit C.

8. Following these reviews, the NRC Staff found:

- There are no drinking water sources that can be impacted by the groundwater conditions. *See* 2008 NRC Inspection Report at vii, ¶ 6.
- If an individual is exposed to the maximum amount of the leaks relative to the liquid effluent aquatic food exposure pathway, that maximum exposure would still be less than 0.1 percent of NRC guidelines (As Low As Is Reasonably Achievable ["ALARA"] guidelines in Appendix I of 10 C.F.R. Part 50). NRC Staff found that the leaks would have a negligible effect on public health, safety, and the environment. *See id.* at vii, ¶ 7.
- There was no evidence of any significant leak or loss of radioactive water inventory from the site that was discernible in the offsite environment. *See id.* at viii, ¶ 9.

9. For these findings, the NRC Staff relied, in part, on an independent analysis of groundwater transport through fractured bedrock (utilizing geophysical well logging data) conducted by the U.S. Geological Survey. *See id.* at vii; *see also* USGS, Flow-Log Analysis for Hydraulic Characterization of Selected Test Wells at the Indian Point Energy Center, Buchanan, New York (2008) (ENT000341) ("2008 USGS Analysis"). A complete and accurate copy of the 2008 USGS Analysis is attached hereto as Exhibit D.

10. The findings in the 2008 NRC Inspection Report are also summarized and incorporated by reference in the NRC's Final Supplemental Environmental Impact Statement ("FSEIS") for the license renewals for IP2 and IP3. *See* FSEIS at 2-111 (NYS00133A). Relevant, authentic, and accurate excerpts from the FSEIS are attached hereto as Exhibit E.

11. Based on the NRC Staff's reviews and associated analyses, the FSEIS concludes that "the abnormal liquid releases . . . are within the NRC's radiation safety standards contained in 10 CFR Part 20 and are not considered to have a significant impact on plant workers, the public, or the environment (i.e., while the information related to [spent fuel pool] leakage is new, it is not significant)." FSEIS at 4-61 (NYS00133B). Relevant, authentic, and accurate excerpts from the FSEIS are attached hereto as Exhibit F.

DEC's Independent Assessment of Spent Fuel Pool Leaks

12. DEC, with assistance from the New York State Department of Health, performed assessments of public health and environmental impacts of the leaks. *See* FSEIS at 2-112 (NYS00133A); 2007 DEC Community Fact Sheet (ENT000325). A complete and accurate copy of the DEC 2007 Community Fact Sheet is attached hereto as Exhibit G. *See also* 2009 DEC Strontium Study (ENT000321). A complete and accurate copy of the 2009 DEC Strontium Study is attached hereto as Exhibit H.

13. DEC's conclusions were consistent with Entergy's own assessment of the hydrogeologic implications and extent of radiological groundwater contamination. *See* "Hydrogeologic Site Investigation Report" (Jan. 7, 2008) ("2008 Site Investigation Report") (ENT00331A). A complete and accurate copy of the 2008 Site Investigation Report is attached hereto as Exhibit I.

14. As to any strontium contamination, DEC concluded that removal of the spent fuel and water from the IP1 spent fuel pools would and did eliminate the active source of contamination from the Unit 1 pool and that the use of ongoing monitored natural attenuation is an acceptable approach to ongoing management of the plume arising from that source. *See* DEC Community Fact Sheet (May 2008) ("2008 DEC Community Fact Sheet") (ENT000345). A complete and accurate copy of the 2008 DEC Community Fact Sheet is attached hereto as Exhibit J.

15. The DEC also determined that strontium levels in fish near the site were no higher than those collected from other statewide locations. *See* 2007 DEC Community Fact Sheet at 1 (Ex. G).

16. In 2007, DEC conducted an enhanced, independent radiological surveillance of several aquatic species in the lower Hudson River. It published the results of this assessment in 2009. *See* 2009 DEC Strontium Study (Ex. H).

17. DEC concluded that there were no significant differences in the concentrations of strontium in fish and shellfish samples near Indian Point as compared to those sampled upriver at control locations. *See id.* at 8 (Ex. H).

18. DEC also concluded that the levels of all radionuclides (including strontium) in fish and shellfish at all of the sampling locations were two to five orders of magnitude lower than established criteria for protection of freshwater ecosystems. *See id.* at 8 (Ex. H).

Donald M. Mayer

Sworn to before me this March
day of 11, 2013.

Notary Public

CHRISTINA LEITMANN
Notary Public, State of New York
Registration #01LE5070946
Qualified in Putnam County
Commission Expires January 6, 2015

STATE OF NEW YORK
SUPREME COURT **ALBANY COUNTY**

ENTERGY NUCLEAR OPERATIONS, INC.,
ENTERGY NUCLEAR INDIAN POINT 2, LLC,
and ENTERGY NUCLEAR INDIAN POINT 3, LLC,

Petitioners-Plaintiffs,

For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules

-against-

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

Respondents-Defendants.

AFFIDAVIT OF SERVICE

Index No.: 15-35-13

STATE OF NEW YORK)
)SS.:
COUNTY OF ALBANY)

Kristen Galarneau, being duly sworn, deposes and says:

1. I am over the age of eighteen, not a party to this action, and reside in the State of New York.

2. On March 13, 2013, I served the Petitioners-Plaintiffs'

- Notice of Verified Petition-Complaint;
- Summons;
- Verified Petition-Complaint, with accompanying volumes of exhibits;
- Memorandum of Law in Support of Verified Petition-Complaint, with appendix annexed there to;
- Affidavit of Fred R. Dacimo, with exhibits annexed there to;
- Affidavit of Donald M. Mayer, with exhibits annexed there to;
- Application for Admission, *pro hac vice*, of Bobby R. Burchfield;
- Application for Admission, *pro hac vice*, of Matthew M. Leland; and
- Application for Admission, *pro hac vice*, of Thomas J. Tynan;

by personally delivering and leaving a copy of said papers with Ronald House, Clerk II, a person authorized to accept service on behalf of the Attorney General of the State of New York, The Justice Building, Albany, New York.

3. On the same date I additionally served the above-referenced documents, in the above action, upon the **NEW YORK DEPARTMENT OF STATE and CESAR PERALES, SECRETARY OF STATE OF NEW YORK STATE,** by personally delivering and leaving a copy of said papers with William Sharpe, Esq., Principal Attorney, a person authorized to accept service on behalf of the New York Department of State, 99 Washington Avenue, Albany, New York.

KRISTEN GALARNEAU

Sworn to before me this 13th
day of March, 2013

Notary Public – State of New York

KEVIN R. DAYER
Notary Public, State of New York
Qualified in Albany County
No. 4970210
Commission Expires August 6, 20 14