

**ANALYSIS OF MUNICIPAL AND COUNTY
PERMITTING AND OFFICE OF GENERAL
SERVICES APPROVAL FOR CWW SCREENS
PROJECT AT INDIAN POINT**

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INTRODUCTION

As part of the administrative proceeding regarding the New York State Department of Environmental Conservation's ("DEC") proposed modification of the Indian Point State Pollutant Discharge Elimination System ("SPDES") permit, Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC (collectively, "Entergy") is proposing an array of cylindrical wedgewire ("CWW") screens as the "best technology available" to satisfy 6 NYCRR § 704.5. The CWW array would be installed on the bed of the Hudson River. This memorandum identifies the local permits and approvals potentially required to complete this installation, addressing activities both in the Hudson River and on the adjoining shoreline. This memorandum also summarizes the procedures/standards for obtaining a grant of an easement from the State of New York through the New York State Office of General Services ("OGS"), which has asserted ownership of certain underwater lands on which the CWW screens and related equipment would be constructed.

BACKGROUND

The CWW screens project will be constructed in the Hudson River on underwater lands adjoining the Indian Point facility in the Village of Buchanan (the “Village”), which is located within the Town of Cortlandt (the “Town”) in Westchester County. The project will not affect lands of the Town located outside the Village. As set forth in greater detail below, lands located under the Hudson River typically are owned by the State of New York, unless specifically deeded to another landowner. Maps, deeds and other documents provided by Entergy,¹ indicate that Consolidated Edison Company of New York, Inc. (“Con Edison”), the prior owner of Unit 2, received letters patent from New York State for underwater lands adjoining the facility in 1959 to enable it to construct intake tunnels and other structures. A small portion of the land deeded to Con Edison was then deeded to the New York State Atomic and Space Development Authority (now known as the New York State Energy Research and Development Authority or “NYSERDA”) in 1971.² Accordingly, and without resolving ownership, it is assumed that the CWW screens project would be constructed on underwater lands owned by the state and Entergy. The Indian Point property itself consists of two separate parcels which are owned by separate entities – Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC. However, the property is depicted as a single tax parcel on Westchester County’s online tax parcel viewer.³

The project calls for installing 144 CWW screens on the bed of the Hudson River.⁴ The screens are approximately 72 inches in diameter and approximately 257 inches long, with a 2 mm slot size and maximum through-screen velocity of 0.25 feet per second. Groups of CWW screens will be installed using plenum boxes as a foundation. The plenum boxes supporting the CWW screens will be located on the Hudson River bottom approximately 300 to 500 feet from the existing Unit 2 and Unit 3 intake structures. The centerlines of the CWW screens will be approximately 10 feet above the existing river bottom elevation. These groups of CWW screens will feed into a cooling water intake bay through header pipes, resulting in six CWW screen intake trains each for Units 2 and 3. The header pipes will be buried below the river bottom and

¹ These documents include: (1) Report of Attorney General, Report of Standing Committee, meeting minutes and related documents authorizing grant of lands under the waters of the Hudson River to Con Edison; (2) Deed, Liber 597, Page 289, conveying underwater lands adjacent to lands owned by Con Edison from the State of New York to Con Edison (Dec. 14, 1959); (3) Certificate issued by the Commissioner of General Services declaring that conditions respecting improvement in the letters patent issued to Con Edison had been substantially complied with, Liber 6589, Page 309 (Jan 18, 1966); and (4) Deed, Liber 7006, Page 298, conveying portion of underwater lands from Con Edison to the New York State Atomic and Space Development Authority (July 26, 1971).

² Based on available information, it is our understanding that the project will not directly impact the small portion of land owned by NYSERDA.

³ See Westchester County Geographical Information Systems Municipal Tax Parcel viewer at: <http://giswww.westchestergov.com/taxmaps/default.aspx?sMun=Buchanan#> for depiction of tax parcel.

⁴ The description of the project was derived from the following documents: Enercon Services, Inc., *Technical Design Report for Indian Point Units 2 and 3, Implementation of Cylindrical Wedge Wire Screens*, ENTGIP152-PR-CWW-06 (Apr. 2012) (hereinafter “Enercon Report”) (Entergy Exh.165); and TRC Environmental Corporation, *Environmental Report, New York State Environmental Quality Review Act, In Support of the Draft SEIS for a State Pollutant Discharge Elimination System (SPDES) Permit (No. NY-0004472) Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC* (March 29, 2013) (the “CWW SEQRA Report”).

follow approximately the slope of the river bed. Each CWW train will feed into a concrete transition box. The transition boxes will be located just off-shore, approximately 30 feet from the existing intake structures. Three rectangular intake ducts will span from each of the transition boxes to the existing intake structures (12 intake ducts total).

To keep the screens clear of debris, an airburst system (“ABS”) may be installed that requires a dedicated pipe routed from the ABS equipment to each individual CWW screen under water (for a total of 144 ABS pipes). The ABS pipes will be routed as six bundles of 24 pipes each from the new ABS building support platform to the screen arrays. The pipes will be buried below the river bottom and follow approximately the slope of the river bed. Above-water components of the ABS system are expected to be housed in a newly constructed building, referred to as the ABS Building. The ABS Building will be located approximately 9 feet offshore of the Unit 1 Wharf on an in-river support structure and will be connected to the existing wharf via two ramps. If installed, the ABS Building will be constructed of prefabricated concrete panels and is expected to be approximately 170 feet long, by 40 feet wide, by 37-38 feet high (when measured from the top of the in-water support structure). The top of the support structure will be approximately 14 feet above mean water height, making the total structure approximately 51 feet high relative to the mean water elevation in the river. The ABS Building is the only structure associated with the CWW screens project that will be visible from land; all of the remaining components will be installed underwater.⁵

For various reasons, the project has been designed and will be optimized to minimize construction activities on land. Delivery of equipment and materials and installation of the CWW screens and related equipment will be completed from barges whenever possible. Construction of the ABS Building may be completed from the existing Unit 1 Wharf with materials delivered by barge or from the barges themselves. The only on-land construction anticipated is the installation of certain utility conduits to service the ABS Building. To the extent on-land access is necessary, the activity is likely to be limited to the delivery and staging of materials. No on-land construction beyond the installation of utility conduits is planned.

⁵ An existing, off-site industrial area with river access will be required for staging assembly and miscellaneous support activities. See CWWS SEQRA Report, § 2.5.5. This memorandum assumes that the existing off-site area will hold all necessary authorizations for operation.

LOCAL PERMITS AND APPROVALS

I. Ownership of Lands under the Hudson River

As a general rule, lands under the tidal portion of the Hudson River, including the area offshore of Indian Point, are owned by the State of New York in keeping with the long-standing common law rule that title to tidal rivers rests in the sovereign with an easement in favor of navigation. *Fulton Light, Heat & Power Co. v. State*, 200 N.Y. 400, 94 N.E. 199 (1911); *Town of North Elba v. Grimditch*, 98 A.D.3d 183, 948 N.Y.S.2d 137 (3d Dept. 2012).⁶ Accordingly, as noted above, this memorandum assumes that the state owns title to the lands under the Hudson River in the project area, except as noted in the Background section.

The property potentially affected by the proposed installation of the CWW screens can be divided into three categories:

1. **On-shore:** As noted in the Background section, the project will not require the construction of on-shore structures. However, electrical connections between the plant proper and the ABS Building will be required. Any on-land construction activities are potentially subject to the Village of Buchanan's zoning code and any other applicable Village laws (hereinafter "Village Code").
2. **Near shore lands underwater:** The portion of the lands underwater immediately adjacent to the shore, which was deeded to Con Edison, is now owned by Entergy. See Sections II-IV below for a discussion of the status of these lands under local zoning and other laws.
3. **Far shore lands underwater:** The remaining underwater lands potentially affected by the project are located outside the portion deeded to Con Edison and are assumed to be owned by the State. Permission to construct the CWW screens in this portion of the River will be obtained from OGS, which is responsible for issuing easements and other permissions for the use of state-owned underwater lands.

II. Local Zoning Authority over Underwater Lands Generally

In general, local zoning codes do not apply to lands of the state. *See, e.g., Washington County Cease, Inc. v. Persico*, 99 A.D.2d 321, 473 N.Y.S.2d 610 (3d Dept. 1984), *order aff'd*, 64 N.Y.2d 923, 488 N.Y.S.2d 630 (1985). Over the years, the Appellate Division, Second Department has addressed this basic principle as applied to navigable waters on several occasions. In *Erbstrand v. Vecchiolla*, 35 A.D.2d 564, 313 N.Y.S.2d 576 (2d Dept. 1970), the court concluded that the City of Rye erred in attempting to enforce violations of its zoning code arising from construction of a float in Milton Harbor, instead determining that the zoning power of the city did not extend into the navigable waters of the harbor. According to the court, "[n]avigable waters are within the sole jurisdiction and control of the State of New York," subject to various exceptions. *Id.* at 564. In reaching its decision, the court distinguished cases cited by the city on the ground that they involved land structures and uses that pertain to

⁶ In the case of the Hudson River, the state also owns the underwater lands in the non-tidal (i.e., freshwater) portion of the river. According to the *Fulton Light* court, grants made to settlers along the non-tidal portion of the Hudson River under the Dutch government excluded lands underwater; because title to the underwater lands was never conveyed to the adjoining landowners, upon the succession of the English, title in the non-tidal portion of the river also vested in the crown.

navigation such as piers and wharfs “and not to the area beyond the foreshore where appellants’ floats are located.” *Id.* The Second Department clarified the status of zoning in relation to state-owned underwater lands in *Town of Carmel v. Melchner*, 2013 WL 693002 (2d Dept. 2013) when it found that the Town of Carmel had no authority to regulate the construction or placement of docks in state-owned underwater lands.⁷ *See also Town of North Elba v. Grimditch*, 98 A.D.2d 183, 187, 948 N.Y.S.2d 137 (3d Dept. 2012) (where State owns title to land in its sovereign capacity it has exclusive jurisdiction, preempting local land use laws). Local zoning laws may, however, apply where jurisdiction over navigable underwater lands has been transferred from the State to the municipality. *See, e.g., Rottenberg v. Edwards*, 103 A.D.2d 138, 478 N.Y.S.2d 675 (2d Dept. 1984) (citations omitted) (towns in Nassau and Suffolk Counties may apply local zoning codes to tidal underwater lands and waterways based on land grants that conferred proprietary rights to certain tidal waters to the towns).

In deciding whether local governments have authority over construction activities in navigable waters, a key factor in some cases is the proximity and “attachment” of the structure at issue to the shore. As noted in *S.D. Office Equipment Co. v. Philbrick*, “municipal zoning power extends to restriction on the use of the shoreline, such as the construction of docks and marinas.” 247 A.D.2d 838, 840, 668 N.Y.S.2d 426 (4th Dept. 1998) (quoting 1 Anderson, *New York Zoning Law & Practice*, § 9.07, at 402). Courts appear to be more reluctant to find zoning jurisdiction over structures located off shore, particularly structures that do not pertain to navigation. *See Erbsland v. Vecchiolla*, 35 A.D.2d 564, 565, 313 N.Y.S.2d 576 (2d Dept. 1970) (“zoning jurisdiction extends only to control of land structures and uses that pertain to navigation, such as piers and wharves, and not to the area beyond the foreshore where appellants’ floats are located”).

Reviewing these cases together, the following conclusions can be drawn:

1. The Village of Buchanan cannot regulate lands under the Hudson River to the extent they are owned by New York State in its sovereign capacity. Thus, the “far shore” portion of the underwater lands potentially affected by the project is not subject to local zoning codes and other regulations.
2. The “near shore” portion of the affected underwater lands (i.e., those deeded to Con Edison in 1959) *may* be subject to local regulation. As part of its approval of the CWW screens project, OGS may require that the existing letters patent be surrendered pursuant to Public Lands Law § 76 and replaced with an easement for the entire area affected by the project, in which case the “near shore” would be exempt from zoning regulation in the same manner as the “far shore,” i.e., would not be subject to municipal zoning laws, including the construction of any ABS Building in the “near shore” area. As further discussed below, even if the uncertainty as to the extent of the Village’s jurisdiction is resolved so as to include the near shore areas affected by the project, it is our opinion that the project would be approved consistent with local zoning regulations.

⁷ In reaching its conclusion, the court quoted *Town of North Elba v. Grimditch*, 98 A.D.3d 183, 188, 948 N.Y.S.2d 137 (3d Dept. 2012) (citations omitted), for the proposition that where “the State holds title to the land under navigable water in its sovereign capacity, its paramount authority ‘is not limited to regulation in the interest of navigation but extends to every form of regulation in the public interest.’”

III. Identifying the Boundaries/Jurisdiction of the Village over the Underwater Lands Owned by Entergy

Assuming the Village of Buchanan has the authority to regulate the near shore underwater lands owned by Entergy, the next question is whether they have, in fact, exercised that authority. A review of the zoning map for the Village does not clearly indicate whether its jurisdiction extends into the Hudson River. The Village of Buchanan map, which is not particularly detailed, appears to show that the boundary of the M-2 zoning district (which contains the Indian Point plant) extends just to the Hudson River but not beyond to the underwater lands owned by Entergy. However, the underwater parcel subject to the letters patent is depicted as part of the Village of Buchanan's Indian Point tax parcel on Westchester County's GIS Municipal Tax Parcel Viewer service.⁸

Under § 211-8.A of the "Interpretation of Boundaries" section of the Village Zoning code, "[d]istrict boundary lines are intended to follow center lines of streets, rights-of-way, water courses or lot lines or be parallel or perpendicular thereto, unless such boundary lines are fixed by dimensions as shown on the Zoning Map." The boundary lines shown on the Zoning Map depict the M-2 zone extending just to the water's edge but not beyond and, therefore, consistent with § 211-8.A, the district boundary is the water's edge. This conclusion is consistent with the fact that the state generally owns the land beneath the Hudson River.

In addition to resolving the specific question of where the boundaries of the Village's zoning districts lie in relation to the Hudson River, the broader question arises whether the boundaries of the Village extend into the Hudson River for purposes of exercising authority under Village laws other than zoning laws. The Zoning Map for the Town of Cortlandt identifies the Village boundary as the center of the Hudson River. Moreover, the description of the corporation limits of the Village of Buchanan, Westchester County, New York, as extended, dated May 7, 1931, identifies the Village boundary as the center line of the Hudson River. In light of this evidence, it is assumed for purposes of this memorandum that the Village boundaries extend to the center of the Hudson River parallel to the shoreline.

Whether or not the Village has exercised zoning authority over the near shore lands ultimately is not material to the basic question of whether construction of the CWW screens is authorized in the Village. As discussed in Section IV below, we conclude that the CWW screens fall within the uses authorized in the zoning district in which the Indian Point plant is located. Accordingly, even if the Village's zoning authority extends to the "near shore," in our opinion, the use at issue – cooling water intake as part of the peaceful use of atomic energy – is already authorized. As a result, no use variance would be needed.

The portion of the project that has the greatest potential to trigger the need for local approvals is the ABS Building. The ABS Building is a conventional building that will be located near the shoreline on a wharf-like structure. Unlike the rest of the CWW screens project, the ABS Building will be located above rather than below the water and will be visible. Given the

⁸ The Westchester County GIS map service showing the Village of Buchanan tax parcels can be found at: <http://giswww.westchestergov.com/taxmaps/default.aspx?sMun=Buchanan>.

type of structure and its proximity/connection to the shore, the Village may seek jurisdiction over the ABS Building and agree to limit its local review and approvals to that structure.⁹

IV. Authorized Uses under the Village Zoning Code

The plant is located in an M-2 Zoning District under the Village Zoning Code. This zone allows as of right the **“peaceful use of atomic energy.”** Village Zoning Code § 211-10, Schedule of Use Regulations (emphasis added). Although the Zoning Code does not spell out precisely what types of activities fall within the scope of the “peaceful use of atomic energy,” the production of nuclear energy is impossible without some type of cooling water intake structure. It is, therefore, our opinion that the permitted use contemplates construction of water intakes. The CWW screens are properly characterized as an extension of the existing cooling water intake structure and so would be allowed without the need for a use variance from the Village.¹⁰

V. Applicability of Building/Fire Codes to Construction of CWW Screens

This memorandum assumes that the ABS Building is a structure governed by the State Building Code, as reflected in the Village Code. *See* N.Y. Building Code §§ 101.2 and 202 (applying code to buildings and structures of all types); Village Code § 67-5 (defining “building” to include all structures). The Village requires a building permit prior to erecting, constructing, enlarging, structurally altering or moving any building or structure. Village Code § 67-10.B. Village Code Chapter 67, Building Construction, is designed to ensure that structures meet certain minimum standards and adopts and recognizes the New York State Uniform Fire Prevention and Building Code in effect on January 1, 1984, as amended, as the Official Building Construction Code of the Village of Buchanan. Village Code § 67-7. Any other permits issued by the Village must comply with the Building Code. Village Code § 67-8.B.

Building permits are issued by the Code Enforcement Officer and/or Building Inspector (referred to in the Village Code as the “building inspector”). Under § 67-10.A of the Village Code, building permits “shall be granted only in conformance with the regulations. No building permit shall be issued unless the proposed construction or use is in conformance with all of the provisions of this Article and other applicable laws, rules and regulations.” Under § 67-10.C(5), the building inspector “shall examine or cause to be examined all applications for permits and the plans, specifications and documents filed therewith” and “shall approve or disapprove of the application within 1 (one) month from the receipt of the completed application accompanied by all appropriate documents and fees.” The permit will expire one year from the date of issuance, although it may be extended an additional six months if construction has been commenced but not completed. Village Code § 67-10.D. A denial of a building permit is appealable to the Village Trustees. Village Code § 67-13.

As a general rule, if the applicant submits the required information and satisfies the applicable provisions of the building code and other relevant standards, the inspector must issue

⁹ As stated previously, if the State replaces the existing letters patent with an easement for the impacted area under water, the State would have exclusive jurisdiction on or above the riverbed, including the construction of the ABS Building, and the provisions of the Village Zoning Code would not apply to the ABS Building.

¹⁰ As previously stated in Section III, the boundary lines shown on the zoning map extend to the water’s edge. Thus, the zoning map creates another obstacle to the Village extending its zoning code beyond the water’s edge.

the building permit. Where a proposed use is clearly not authorized by the applicable zoning ordinance, the building inspector must deny the permit. *See, e.g., Bockis v. Kayser*, 112 A.D.2d 222, 491 N.Y.S.2d 438 (2d Dept. 1985). In deciding whether to issue the permit, the inspector may not consider matters outside the scope of his/her authority. *See, e.g., Plander v. Koehler*, 150 N.Y.S.2d 879 (Nassau Co. Sup. Ct. 1956). If the building inspector fails to issue a required permit, he/she can be compelled to act via a writ of mandamus.

As previously noted, the Village's Building and Construction Code applies to "structures," a broad term that appears to encompass all types of things that are constructed on land and over water. Given this broad definition, if the Village determines that it has jurisdiction over the near shore structures, local authorities will likely conclude, at minimum, that the ABS Building requires a building permit. To the extent the Village (1) determines that the CWW screens and other components constitute "structures" rather than equipment and (2) attempts to extend its jurisdiction into the Hudson River, the Village also could seek to require a building permit for the other parts of the CWW screens project. As a practical matter, however, the unique nature of the CWW screens limits the value of the building code as a guide for construction. As a result, administration of the building permit requirement for the more unconventional portions of the project will likely be more "ministerial" than usual, particularly where, as here, the construction of the project will require prior review and approval from other state and federal agencies (e.g., the Army Corps of Engineers) with extensive experience in underwater construction.

VI. Dimensional (i.e., Bulk) Regulations

The dimensional limitations applicable to uses in the M-2 zoning district are set forth at Village Zoning Code § 211-15, Table of Bulk Regulations. These bulk regulations establish standards regarding acceptable lots under the Village Zoning Code, addressing minimum lot area, minimum lot width, minimum lot frontage at street line, minimum lot depth, minimum front yard, minimum side yard, minimum rear yard, maximum building height, and maximum lot coverage. Each of the key terms is defined in Village Zoning Code § 211-5. The Village Zoning Code § 211-5 defines "lot" as:

A piece or parcel of land occupied or intended to be occupied by a principal building or a group of such buildings and accessory buildings or utilized for a principal use and uses accessory or incidental to the operation thereof, together with such open spaces as required by this chapter, and having required lot frontage on a street. A lot may be composed of one or more tax lots, but it may not be subdivided unless each new lot conforms to all the requirements of the district in which it is located.

The phrase "lot line" meanwhile, is defined as the "property lines bounding the lot."

Where a parcel cannot satisfy the bulk requirements, the owner must obtain a variance from the municipality. Under Village Zoning Code § 211-39.B, the Zoning Board of Appeals may grant a variance from the requirements because of "practical difficulty". In making its determination, the Board must make each and every one of the following findings under Zoning Code § 211-39.B:

- (1) That the variation requested is not substantial in relation to the requirement.
- (2) That the effect of any increased population density which may thus be produced upon the available services and facilities is not significant.
- (3) That a substantial change in the character of the neighborhood or a substantial detriment to adjoining properties will not be created.
- (4) That the difficulty cannot be alleviated by some method feasible for the applicant to pursue other than a variance.
- (5) That the variation would not cause adverse aesthetic, environmental or ecological impacts on the property or on surrounding areas.
- (6) That the requested variance is the minimum variance necessary to afford relief.
- (7) That, in view of the manner in which the difficulty arose and considering all of the above factors, the interests of justice will be served by allowing the variance.

As noted above, the Indian Point property consists of two parcels which are owned by separate entities – Entergy Nuclear Indian Point 2, LLC and Energy Nuclear Indian Point 3, LLC. However, Westchester County’s online tax parcel viewer depicts Indian Point as a single parcel. Consistent with § 211-5, the Indian Point property is a parcel of land occupied by “a group of such buildings and accessory buildings or utilized for a principal use and uses accessory or incidental to the operation thereof, together with such open spaces as required by this chapter, and having required lot frontage on a street.” With respect to this analysis, we have assumed that two parcels are a single lot for zoning purposes.¹¹

The Village Zoning Map does not extend into the Hudson River which evinces an intent not to extend zoning jurisdiction to the structures above and below the Hudson River. If the Village concludes that its zoning authority extends to the shoreline and not beyond, the bulk restrictions will not apply to the project and no variance would be required. As previously noted, however, the ABS Building is a comparatively conventional structure; moreover, it will be attached, albeit indirectly, to the visible portion of the shoreline. As a result, the Village may attempt to impose its M-2 bulk requirements on the project.

Based upon the proposed dimensions of the ABS Building, if the M-2 bulk requirements apply, the project may require a variance from the Village’s bulk regulations as they relate to height. Under the Code, the term “building height” is defined as the “vertical distance measured from the mean level of the ground surrounding the building to the highest point of a flat or mansard roof or to a point equidistant between the highest and lowest points of a pitched, gabled, hip or gambrel roof.” Village Zoning Code § 211-5. As noted above, virtually all of the structures associated with the CWW screens project will be installed below the water. The only major structure to be visible is the ABS Building, which will be located on an in-river support structure immediately seaward of the Unit 1 wharf. According to the CWW SEQRA Report, the planned height of the ABS Building is 37-38 feet from the top of the slab of the in-water support structure to the top of the building. By comparison, the height limit for buildings in an M-2 district is 2½ stories or 35 feet, whichever is less. In this instance, however, there will be no

¹¹ Whether the parcels are one or two lots will not make a difference to the bulk requirements analysis because the project is being constructed almost exclusively off-shore. As a result, most of the bulk requirements are either irrelevant or readily satisfied regardless of whether the parcel is considered one or two lots. The only bulk requirement potentially triggered by the project – maximum building height – is unaffected by whether the parcel is one lot or two.

“ground surrounding” the ABS Building because it will be constructed over water. Given that the Code does not directly address this circumstance, we believe it is reasonable to conclude that the height of the ABS Building will be measured from the top of its supporting pier and/or the adjacent elevation of the Unit 1 Wharf. Thus, as presently designed, the ABS Building height exceeds the maximum allowable height allowed under the Village Zoning Code by 2 to 3 feet. In all other respects, the ABS Building will meet the bulk requirements in the zoning code relating to minimum lot area, minimum lot width, minimum lot frontage at street line, minimum front yard, minimum side yard and maximum lot coverage.¹²

If the Village Code Enforcement Officer requires a building permit and denies the building permit due to a failure to comply with the height requirement applicable to uses in the M-2 district, Entergy will have the following options:

- (1) Reduce the height of the structure to equal to or less than 35 feet.
- (2) Appeal the denial to the Village Trustees seeking a determination that the “bulk requirements” do not apply to the ABS building for one or more of the following reasons:
 - (i) the M-2 zoning district does not extend into the River; and/or
 - (ii) under the Navigation Law, the State has exclusive jurisdiction over structures on lands under navigable waters owned by the state in its sovereign capacity.
- (3) If not successful in Steps 1 or 2, apply to the Village Zoning Board of Appeals (ZBA) for an area variance.

If an area variance is required at all, it is our opinion that the Village ZBA will grant a variance. Entergy should have no difficulty meeting each of the seven criteria spelled out in Village Zoning Code § 211-39.B that must be satisfied to obtain a variance. The ABS Building will be small both in absolute terms and relative to the numerous other structures already on the Indian Point property. Moreover, assuming the height of the building is measured from the top of the in-river structure, the building only exceeds the height limit by a few feet. Finally, the operation of the ABS Building and the CWW screens will have no impact on adjacent properties or the character of the surrounding neighborhood.

VII. Performance Standards; Nuisances

Under Village Zoning Code § 211-23.A, any application for a building permit is subject to specific performance standards and must be accompanied by a sworn statement by the owner of the property that it will be operated in accordance with the performance standards. The general provision relating to the regulation of nuisance elements states:

No land or building in any district, used or occupied for any purposes, shall be operated in such a manner as to create any

¹² The bulk restrictions also include rear yard requirements. The Village Zoning Code defines rear yard as “a yard extending the full width of the lot and lying between the rear lot line *and the nearest line of the principal building*. Village Zoning Code § 211-5 (emphasis added). Because the ABS Building would not be the principal building on the site, its placement does not impact existing rear yard dimensions. Moreover, given that the project is located in the Hudson River and that there is nothing that could be constructed behind project, we assert that the rear yard requirements do not apply.

dangerous, injurious, noxious or otherwise objectionable fire, explosive or other hazard; noise or vibration, smoke, dust, dirt or other form of air pollution; electrical or other disturbance; glare; or other substance, condition or element in such amount as to adversely affect the surrounding area or premises (referred to herein as “dangerous or objectionable elements”), provided that any use permitted by this chapter may be undertaken and maintained if it conforms to the regulations of this subsection limiting dangerous and objectionable elements at the specified point or points of the determination of their existence.

Village Zoning Code § 211-23.B.

Of particular note, all non-residential uses are subject to the standards for noise spelled out in Village Zoning Code § 211-23.C(3). Under this section,

At the points of measurement specified, the maximum sound pressure level radiated in each standard or octave band by any use or facility, other than transportation facilities or temporary construction work, shall not exceed the values for octave bands lying within the several frequency limits given in Table 1 after applying the corrections shown in Table II.

The corrections must be applied if the noise is not smooth and continuous and is not radiated between the hours of 10:00 p.m. and 7:00 a.m.

The ABS system may require a land-based air compressor/accumulator. According to CWW SEQRA Report, the unit would have a total sound power level of 96 dBA based on representative vendor data; however, the unit would be housed within the ABS Building. The CWW SEQRA Report indicates that sound levels from operation of the CWW screens with ABS would result in no predicted increases over existing conditions and would be below the Village of Buchanan noise ordinance limits in Village Zoning Code § 211-23.C(3). CWW SEQRA Report § 4.10.2.

In addition, the operation of the CWW screens will not result in any increase in air pollution as no additional emission sources are required for their operation. *See* CWW SEQRA Report § 4.3.2.

VIII. Site Plan Review and Approval

Under § 211-25 of the Village Zoning Code, the building inspector may not issue a building permit for the construction or alteration of any structure or for the use of any land in the Village until the Planning Board has approved a final site development plan, with certain limited exceptions.¹³ In considering approval of the plan, the Planning Board shall “take into

¹³ In particular, no site development plan is required for projects identified as a special permit use in Village Code § 211-10. Since “peaceful use of atomic energy” is identified as a use permitted by right in that section (and no special use permit is required), this exception does not apply to the CWW screens project.

consideration the public health, safety, and general welfare and the comfort and convenience of the public in general and the residents of the immediate neighborhood in particular and shall make appropriate conditions and safeguards in harmony with the general purpose and intent of this chapter and, particularly, in regard to achieving” general standards relating to design, access, utilities, environment, and conformance. *Id.* § 211-26. Among other things, the Planning Board will consider “[h]armonious relationships of principal and accessory uses with the site, with each other and with adjacent properties and streets.” The Board also will take into consideration the “avoidance or minimization of disturbance to wetlands and floodplains, air and water pollution and other potential environmental, engineering or aesthetic impacts” and “[c]onformance of the proposed site development plan with the Master Plan and Official Map of the village, with all applicable provisions of this chapter [i.e., the Village Zoning Code] and with all other regulations and statutes governing the development of the proposed site.” *Id.* The contents of the plan are spelled out in Village Zoning Code § 211-27.

The following steps must be followed to obtain site plan approval: (1) applicant submits a preliminary site development plan and other required information to the Secretary of the Planning Board at least 14 days in advance of the Planning Board meeting; (2) Planning Board calls a public hearing within 60 days of receipt of the preliminary application; (3) Planning Board issues decision on preliminary application within 60 days after close of public hearing; (4) applicant submits application for final site development plan and Board approves final plan in accordance with the schedule for the draft plan. The final application must include proof of application to all federal, state and county agencies for any required approvals. The building permit must be obtained within one year of the date of the Board’s decision; the project must be completed within three years unless the conditions of approval specify a longer period. Village Zoning Code § 211-29. Any adverse decisions may be appealed to the Zoning Board of Appeals. *Id.* § 211-31.

If the Building Code Enforcement Officer requires a building permit and denies the building permit due to a lack of an approved site development plan, Entergy will have the following options:

- (1) Appeal the denial to the Village Board of Trustees for a determination that final site plan development approval is not required for structures above navigable waters; or
- (2) Apply to the Planning Board for site plan approval.

As discussed above, the site development plan review process is largely intended to ensure that projects are consistent with the surrounding community. Village Code § 211-26 specifically requires the planning board to “take into consideration the public health, safety, and general welfare and the comfort and convenience of the public in general and the residents of the immediate neighborhood in particular.” At the time of planning board review, the CWW screens project will have been through a full SEQRA process and DEC, as the lead agency, would have issued SEQRA findings that the adverse impacts to the environment from both construction and operation have been mitigated to the extent practicable. Thus, the requisite balancing will already have been performed and a decision reached. Absent more acute local impacts to the neighborhood or community, the site plan review process is unlikely to contribute anything new to the review process beyond those items covered in the SEQRA findings. *See Troy Sand & Gravel Co. v. Nassau*, 101 A.D.3d 1505, 957 N.Y.S.2d 444 (3d Dept. 2012).

Moreover, the screens and underwater piping are not visible from the shoreline and will tie in directly to the existing plant equipment. The only change in the physical appearance of the property will be the relatively small structure needed to house the ABS equipment. Given these relatively minor changes to the site itself, it is our opinion that site plan approval will be granted by the Village Planning Board. If the Planning Board were to deny the application for site plan approval, Entergy could appeal the denial to the ZBA and thereafter to the state supreme court via an Article 78 proceeding. Courts will invalidate a ZBA's decision regarding site plan approval as arbitrary and capricious whenever substantial evidence does not exist to support it.

IX. Other Village Laws/Approvals

A. Soil and Excavation Permit

Under Chapter 159 of the Village Code, prior to commencing any non-exempt excavation, the owner or his/her duly constituted agent, must obtain a soil and excavation permit from the Village building inspector. The application must include detailed information about the project, a certificate from the applicant's engineer that the proposed operation will not interfere with drainage, and a certificate of insurance from the owner and/or contractor establishing the extent of liability of the applicant or contractor. The applicant also must specify how long the work will take to complete; per the Village Code, the completion time for the excavation authorized under the permit cannot exceed two years. The building inspector must issue a decision within 30 days after filing (subject to review and approval by the Planning Board) based on specified standards. Among other things, the applicant must show that the project: will not interfere with surface drainage or endanger streets or highways; "will not cause substantial traffic hazards, vibrations, noise, dust or sand;" and operations in connection with any use "will not be more objectionable to nearby properties by reason of noises, fumes, vibration or lights than would be the operations of any use permitted by right." The applicant also must show that the period of time and the methods for completion of the work are reasonable. Permits granted by the Village Code Enforcement Officer may contain various conditions relating to the conduct of the excavation, including execution of a payment and performance bond or cash deposit to secure site rehabilitation and/or guarantee faithful performance of work. Village Code § 159-8. Village Code § 159-6.A exempts from the permit requirements excavations where a building permit has been issued and the excavation is limited in area to that needed to complete the construction activity authorized by the permit.

According to the CWW SEQRA Report, no soil excavation is proposed on land other than that associated with installation of utilities needed for the ABS Building. These utility-related excavation activities are exempt from the permit requirements per Village Code § 159-6.A. Although the CWW screens project also entails excavation in the Hudson River, the Village Code requirements speak in terms of the excavation of "soil" rather than sediment. *Compare* Village Code Chapter 203 (regulating draining, dredging, excavation and removal activities in wetlands water bodies or watercourses). Moreover, the factors listed for assessing projects under the law are relevant primarily to excavation activities on land. In addition, the in-river excavation activities will be extensively regulated by the U.S. Army Corps of Engineers, an agency with acknowledged expertise in the review and approval of dredging projects. As a result, the Village should conclude that a local excavation permit is unnecessary. *See Town of Carmel v. Melchner*, 2013 WL 693022 (2d Dept. 2013) (indicating that towns lacks the authority to regulate dredging

activity in the Hudson River). Accordingly, it is our opinion that an excavation permit is not required for the project and, even if such a permit were required, it would be issued.

B. Wetlands Permit

The Village of Buchanan regulates construction activity in wetlands under Village Code Chapter 203, Wetlands. Section 203-3 states that “[i]t is the intent of this chapter to implement the Freshwater Wetlands Act of the State of New York as presently contained in Article 24 of the Environmental Conservation Law” (“ECL”). The regulation repeatedly cites ECL Article 24, indicating that its scope is limited to freshwater wetlands. Under the ECL, authority to implement the state freshwater wetlands law can be delegated to local governments. *See* ECL § 24-0501.

The Village Code defines “wetland” as encompassing all lands and waters, including but not limited to, lands designated on the State Wetlands Map, which have a contiguous area of at least 1/10 of an acre and which contain specific types of lands, vegetation or soils spelled out in Village Code § 203-3. The Code prohibits specific activities in any wetland, water body or watercourse or within 100 feet of the boundary of any wetland, water body or watercourse, without a permit issued under Chapter 203. Regulated activities including draining, dredging, excavation or removal, depositing of any material such as soil, rock or debris, “[e]recting any building or structure of any kind, roads, the driving of pilings or placing of any other obstructions, whether or not they change the ebb and flow of the water,” or other activities that could impair the functions served by the wetlands, water bodies or watercourses. Village Code § 203-4.

Persons proposing to conduct an activity that requires a wetland permit must file an application with the Planning Board that includes information and documents spelled out in Village Code § 203-6.A(1)-(3) and satisfy public hearing and neighbor notification requirements. Village Code § 203-6. The applicant has the burden of showing that the proposed activity will be in accord with the policies and provisions of Chapter 203. The Planning Board must consider the effect of the proposed activity in relation to various factors, including public health and welfare, fishing, flood, hurricane and storm dangers, and the protection or enhancement of the functions of wetlands. The Planning Board may impose permit conditions/limitations or require a bond. Village Code § 203-7.

The CWW screens will be installed on lands immediately adjoining and underneath the Hudson River, which are considered tidal wetlands by DEC.¹⁴ In addition, the project calls for construction of an in-water structure to house the ABS equipment. A review of the map of the Village of Buchanan found on DEC’s online Environmental Resource Mapper showed no state-mapped freshwater wetlands on the Indian Point property.¹⁵ In conjunction with an earlier security upgrade project at the facility, a village-designated wetland was identified in the northeast corner of the property. However, the CWW screen project is not anticipated to disturb areas within 100 feet of this wetland. As a result, no freshwater wetland permit will be required from the Village for the project.

¹⁴ *See* <http://www.dec.ny.gov/lands/4940.html> for a general description of the state’s tidal wetlands.

¹⁵ The Environmental Resource Mapper can be accessed at: <http://www.dec.ny.gov/imsmaps/ERM/checkZone.htm>.

C. Steep Slopes Permit

Under Village Code Chapter 165, the Village of Buchanan requires a permit to disturb steep slopes, which is defined as: “[g]round areas with a slope greater than 15%, with a minimum area of 500 square feet which possesses one dimension of a minimum of 10 feet. Measurements shall be made along a horizontal plane.” Village Code § 165-3.¹⁶ The approval authority differs depending on what other approvals are required. The most “senior” village entity responsible for issuing approvals to a project is also responsible for issuing the steep slope permit. Accordingly, if an approval is required by the Village Board under another ordinance, then the Village Board also is responsible for issuing the steep slope permit, even if permits/approvals also must be obtained from the Planning Board or Zoning Board of Appeals. All regulated activities that do not require approval from the Village Board, Planning Board or Zoning Board of Appeals can be approved by the building inspector. Village Code § 165-6. The requirements for a steep slope permit application are spelled out in Village Code § 165-7, which addresses both the content of the permit application and the procedure and timeframes for obtaining approval. Steep slope permits are valid for two years from the date of approval (or for the period of any other permit issued by the approval authority); they may be renewed for an additional two years. In granting the permit, the Village can require security “in an amount and with surety and conditions satisfactory to it” to ensure compliance with the permit. The Village also can require the applicant to submit a detailed monitoring program as well as periodic written status reports. Village Code §§ 165-8 to -10.

The Westchester County GIS map service indicates the presence of steep slopes at various locations on the Indian Point property, including along or near the shore of the Hudson River.¹⁷ If the CWW screens project will disturb one or more steep slopes, Entergy will be required to obtain a permit from the Village in accordance with the procedures and standards outlined above. As a practical matter, however, we believe such a permit will not be needed. As noted above, the CWW screens project is being installed almost exclusively in the water; the only structures being installed on land are utility conduits. Moreover, construction is being staged from barges on the water to the maximum extent possible, minimizing possible construction impacts on land. Under these circumstances, it seems unlikely that the project will disturb 500 feet of steep slopes necessitating a permit.

D. Flood Damage Prevention

The Village of Buchanan has adopted laws addressing construction in areas prone to flooding and erosion. Chapter 97 of the Village Code, Flood Damage Prevention, requires a permit for all construction and other development to be undertaken in “areas of a special flood hazard,” defined as:

¹⁶ The only exemption is for “customary landscaping not involving regrading”. A permit also is required to cut any tree with a diameter greater than four inches when measured 1½ feet from ground level on any steep slope other than an exempt activity. Village Code § 165-4.

¹⁷ The Westchester County GIS map service showing the presence of steep slopes can be accessed at: <http://giswww.westchestergov.com/gismap/default.aspx?> The map depicts in different colors slopes of between 15% and 25% (pink) and those over 25% (red).

The land in the floodplain within a community subject to a one-percent or greater chance of flooding in any given year. This area may be designated as Zone A, AE, AH, AO, A1-A30, A99, V, VO, VE, or V1-V30. It is also commonly referred to as the “base floodplain” or one-hundred-year floodplain.” For purposes of this chapter, the term “special flood hazard area (SFHA)” is synonymous in meaning with the phrase “area of special flood hazard.” Village Code § 97-4.

The areas of special flood hazard in the Village (Community No. 360168) are identified in specific documents prepared by the Federal Emergency Management Agency (FEMA) and in a report entitled *Flood Insurance Study, Westchester County, New York, All Jurisdictions* (Sept. 28, 2007). Village Code § 97-6.

The permit application must be submitted to the “local administrator”¹⁸ on forms supplied by the administrator. The information required to be included in the permit application is spelled out in Village Code § 97-12. The local administrator must review the application for completeness and for compliance with the requirements of Chapter 97 and other requirements, including confirming that all necessary federal and state permits have been obtained. In addition, the applicant cannot occupy or use the structure until the local administrator issues a certificate of compliance stating that the building or land conforms to the requirements of the Chapter. Village Code § 97-13. The relevant construction standards are spelled out in Village Code §§ 97-14 (General Standards), 97-15 (Standards for All Structures), and 97-17 (Nonresidential Structures). Allegations that the local administrator made an error in implementing the permit program and/or requests for variances must be directed to the ZBA, which will consider factors spelled out in Village Code §§ 97-19 (appeals) and 97-20 (variances).

The Westchester County GIS map service indicates that the entire shoreline of the Indian Point plant is part of a 100-year floodplain and so is potentially subject to the flood damage prevention permit requirements.¹⁹ We have been advised that the ABS Building will be constructed above the 100-year flood level, consistent with the nearby buildings on land. In addition, the structures supporting the ABS will be designed to withstand normal loads required for their specific applications. In particular, the ABS platform will be designed to withstand dynamic loads from the river including the forces from the current and tides, debris accumulation, ice, and impacts from trees and boats.²⁰ The only structures proposed to be

¹⁸ “Local administrator” is defined as the “person appointed by the community to administer and implement this chapter [i.e., Chapter 97] by granting or denying development permits in accordance with its provisions. This person is often the Building Inspector, Code Enforcement Officer, or employee of an engineering department.” Village Code § 97-4. The Village of Buchanan’s website indicates that the Village has a building inspector but not a code enforcement officer or engineering department. As a result, it seems likely that the local administrator under Chapter 97 is the building inspector. However, this conclusion must be confirmed.

¹⁹ The map service can be accessed at: <http://giswww.westchestergov.com/gismap/default.aspx?> In addition, we have downloaded a hard copy of the relevant FEMA map showing the location of floodplains on the Indian Point property.

²⁰ Enercon Services, Inc. *Phase I Technical Report, Air Burst System Design – Indian Point Units 2 & 3*, §2.1.2 (Apr. 2012) (Entergy Exh. 165C).

installed on land are utility conduits, which will be located underground. These utility conduits are not “structures” subject to the Flood Damage Prevention Law. To the extent a permit is required for the ABS Building under Village Code § 97-2, the building will have to be designed to meet the elevation and flood-proofing requirements of Village Code §§ 97-14, 97-15, and 97-17. In our opinion, this approval, if required, will require an assessment of the facility in relation to the applicable design standards and will be issued in accordance with standards and procedures similar to those governing the issuance of building permits under the State Building Code and the Village Code.

E. Stormwater Management and Erosion and Sediment Control

The Village has included in its Zoning Code a law addressing stormwater management activities associated with “land development activities,” which is defined as “[c]onstruction activity, including clearing, grading, excavating, soil disturbance or placement of fill that results in land disturbance of greater than one acre, or activities disturbing less than one acre of total land area that is part of a larger common plan of development or sale.” Village Zoning Code § 211-87. Under this law, all land development activities that require site plan review are subject to stormwater review under Article XIV of the Village Zoning Code. Pursuant to Village Zoning Code § 211-91, “[n]o application for approval of a land development activity shall be reviewed until the appropriate board has received a stormwater pollution prevention plan (“SWPPP”) prepared in accordance with the specifications of this article.” The contents of the SWPPP are spelled out in Village Zoning Code § 211-92. The law also contains provisions relating to contractor certification, performance and design criteria, maintenance and repair of stormwater management facilities, among other requirements.

As previously noted, the CWW screens project has been designed to limit the amount of construction activity occurring on land. Based on the CWW SEQRA Report, the project is not expected to disturb more than one acre of land. As a result, the project will not implicate the stormwater management and sediment control requirements of the Village Zoning Code.²¹

F. Miscellaneous Village Requirements

The following local laws require brief mention.

- **Blasting.** Quarrying and blasting activities are regulated under Village Code Chapter 143. It is our understanding that the CWW screens project is unlikely to require any blasting. If blasting is required, the activity must comply with the ground and air blast standards established to minimize noise and vibrations as well as monitoring and recordkeeping requirements.
- **Stormwater management.** Chapter 166 of the Village Code regulates discharges to the Village’s municipal separate storm sewer system (“MS4”) for purposes of achieving compliance with the SPDES general permit for stormwater discharges to

²¹ If completing the project requires disturbing more than one acre of land, Entergy will be required to comply with Article XIV of the Village Zoning Code. However, these requirements essentially parallel New York State’s general permit requirements for stormwater discharges associated with construction activity. Complying with the state requirements should satisfy Entergy’s local obligations.

- MS4s. The law is targeted at preventing the discharge of non-stormwater flows to the Village's MS4. The only provision which is arguably relevant to the CWW screens project is Village Code § 166-11, which requires persons subject to the construction activity SPDES permit to comply with the provisions of that permit. It goes on to provide that: "Proof of compliance with said permit may be required in a form acceptable to the municipality prior to the allowing of discharges to the MS4." However, we understand that no discharges to the MS4 will result from the project.
- **Noise.** Village Code § 119-5 prohibits construction noise between the hours of 7:00 p.m. and 8:00 a.m. except in the event of an emergency requiring immediate construction or demolition.²²

²² Under Section 132 of the New York Town Law, assuming all of the activity associated with constructing and operating the CWW screens occurs within the boundaries of the Village of Buchanan, the Town of Cortlandt lacks authority to directly regulate the activity. However, if any activity occurs outside the Village's boundaries but within the Town, the Town can directly regulate those activities under the Town Code. We have not uncovered any state laws that would give the Town authority to regulate construction of the CWW screens in the Village. The state has adopted provisions under the Navigation Law authorizing certain local governments to adopt and enforce local laws restricting and regulating the manner of construction and location of boathouses, moorings and docks in any waters within or bounding the respective municipality up to 1500 feet from the shoreline. *See* N.Y. Nav. Law § 46-a.2 (applicable to specifically listed municipalities, including the Town of Cortlandt); N.Y. Nav. Law § 46-a.5 (applicable to "participating communities" in the Hudson Valley Greenway, a group that includes the Town of Cortlandt). In the present case, however, the CWW screens and related equipment are not "boathouses, moorings or docks" and so are not subject to local laws under these provisions.

WESTCHESTER COUNTY PERMITS AND APPROVALS

I. Introduction

The Village of Buchanan is located in Westchester County. New York's General Municipal Law authorizes county planning boards to review certain local zoning actions; in addition, certain building permits must be reviewed by county public works officials. Finally, Westchester County has adopted various county laws addressing construction and other similar activities. As discussed below, none of these county requirements should significantly impact the CWW screens project.²³

II. Consultation with County Planning Board Regarding Zoning Actions

Section 239-c of the New York General Municipal Law ("GML") allows county legislatures to authorize county planning boards to review certain types of planning and zoning actions by cities, towns or villages within the county. In particular, GML § 239-m requires various zoning actions to be referred to the county planning agency or regional planning council (if there is no county agency). Actions subject to referral include, among others, issuance of special use permits, approval of site plans, and granting of use or area variances. GML § 239-m.3(a). However, such referrals are necessary only if the action involves real property within 500 feet of the boundary of any city, village or town or the right-of-way of any existing or proposed county or state road, among other criteria. GML § 239-m.3(b). The county planning board must review the proposed action to assess its inter-community or county-wide impacts as spelled out in GML § 239-l. These impacts include compatibility of land uses with one another, traffic, impact on county uses, protection of community character, drainage, community facilities, official municipal/county development policies as expressed in comprehensive plans and other similar documents, and other matters relating to public convenience, governmental efficiency, and community environment. The county must review the action referred within 30 days of receipt (longer if agreed upon by the county and local government) and report its recommendations to the referring body, together with a statement of the reasons for those recommendations. If the county fails to report within such period, the local government can take action without the report. If the county recommends modification or disapproval, the referring local planning board may approve its original proposal by a vote of a majority plus one of all its members.²⁴ Within 30 days of the vote, the referring local government must file a report of its final action with the county planning agency; if the referring local government acts contrary to a recommendation of modification or disapproval, the reasons for that decision must be set out in the report.

²³ The State's paramount authority over lands underwater owned by the State in its sovereign capacity applies to the County government as well as the local government except where otherwise authorized by the Legislature.

²⁴ In addition, "any county planning agency or regional planning council report received after thirty days or such longer period as may have been agreed upon, but two or more days prior to final action by the referring body, shall be subject to the provisions of subdivision five of this section" (i.e., the extraordinary vote upon recommendation of modification or disapproval). GML § 239-m.4(b).

As noted in Sections VI and VIII of the Local Permits and Approval section, the CWW screens project may require site plan approval and/or an area variance (based on the height of the ABS Building). Moreover, the Indian Point facility shares a border with the Town of Cortlandt. As a result, any application for site plan approval or an area variance may need to be referred to the Westchester County Department of Planning for approval in accordance with GML § 239-m above.²⁵ Given that (1) the actual construction will be located some distance from municipal boundaries or county roads (other than the center of the Hudson River); (2) the actual construction will not have significant regional impacts; and (3) the project, once constructed, will not have significant regional impacts (beyond that associated with the plant generally), we believe that the county lacks a rational basis for modifying or disapproving the project. To the extent objections are raised, the Village Planning Board may uphold its original decision by the vote of a majority of its members plus one. Since the Village Planning Board and the ZBA consist of five members, they will need four out of five members to approve a site plan and/or area variance, respectively, if those approvals are rejected by the County Planning Board.

III. Consultation with County Department of Public Works Regarding Buildings and Structures

GML § 239-f (formerly § 239-k) requires the county superintendent of highways or the commissioner of public works to adopt regulations requiring the approval of certain building permits by the county. The law applies to proposed structures, proposed new streets, or proposed buildings which may have frontage on, access to or be otherwise directly related to any existing or proposed right of way or site shown on the official county map. Upon receipt of an application for a building permit subject to the law, the municipal building inspector must notify the county superintendent of highways or commissioner of public works who, in turn, notifies affected federal or state agencies. The county superintendent of highways or commissioner of public works must review the building permit within 10 working days and report to the municipality his/her approval, disapproval or approval subject to conditions. The county forfeits its right to suspend action if it fails to act within 10 days. Federal/state agencies have 10 working days to file their objections. In making its report, the county superintendent/commissioner must take into account various factors relating to the prospective character of the development and its impacts on access, traffic, and drainage. The building permit must be issued consistent with the report; however, the local board of appeals or other authorized board may vary the requirements of the report by a two-thirds vote of all the members. As discussed in Section IV.C below, no consultation with the County Department of Public Works is required for this project.

IV. Potentially Applicable County Regulations

Westchester County has adopted various laws that are potentially applicable to the CWW screens project. Below is a brief summary of these provisions, together with an assessment of their impact on the project. Unless otherwise noted, all citations in this section refer to the Westchester County Administrative Code, hereinafter referred to as the “WCAC”, or Westchester County Regulations, referenced as “WCR”.

²⁵ Details about zoning and planning referrals, including applicable forms and instructions, can be found on the Westchester County Department of Planning’s website at: <http://planning.westchestergov.com/land-use-&-development/zoning-referrals>.

A. Stream Control Law

Westchester County has adopted a stream control law, set forth at WCAC Art. III, § 241.121 to .151. The law is implemented via County Public Works Stream Control Ordinance No. 1, which is codified at WCR Chap. 842. The law is designed to alleviate recurrent floods by authorizing the County Commissioner of Public Works and Transportation to establish channel lines and issue/withhold permits for channel obstructions. In particular, activities involving the construction/maintenance of channel obstructions, changes to the location of any established channel lines or the construction/maintenance of structures within 100 feet from any established channel line require a permit from the Commissioner. WCR § 842.31. The procedures for obtaining permits are spelled out in WCR §§ 842.41 to .101.

The County Stream Control Law does not apply to the Hudson River itself. WCAC Art. III, § 241.141. As a result, the law is relevant to the CWW screens project only if activity on land will disturb any established channels (i.e., designated streams or watercourses). The Westchester County GIS map service indicates the presence of streams that discharge to the Hudson River at various locations on the Indian Point property, including along or near the shore of the Hudson River.²⁶ However, none of these streams are identified on the County Department of Public Works website as requiring a permit prior to construction.²⁷ Accordingly, work in or near these minor streams would not require a permit under the county's Stream Control Law.

B. Critical Environmental Areas

Consistent with 6 NYCRR § 617.4(h) of New York's State Environmental Quality Review Act ("SEQRA") regulations, Westchester County has adopted an ordinance designating specific parts of the county as critical environmental areas ("CEAs") to ensure that actions taking place in or adjacent to those areas are considered Type I environmental actions that are subject to full SEQRA review. WCR Ch. 694. The list of CEAs covered by the law includes "[t]he Hudson River, its islands and underwater land and all shore lands within the cultural boundaries of its shoreline as depicted in the September 1989 report of the Westchester County Department of Planning." WCR § 694.11.L. However, because the CWW screens project is already subject to a full SEQRA review in the SPDES proceeding, the River's designation as a CEA is irrelevant for purposes of this review.

C. Construction of Buildings and Structures

Chapter 803 of the WCR establishes special procedures for issuing building permits for buildings that have frontage on, access to, or are otherwise directly related to any existing or proposed county road. These procedures implement General Municipal Law § 239-k (currently § 239-f discussed above). Although the regulation refers solely to county roads, the state statute being implemented applies to any "existing or proposed right-of-way or site shown on the

²⁶ The Westchester County GIS map service showing the presence of streams can be accessed at: <http://giswww.westchestergov.com/gismap/default.aspx?>. The map depicts streams as thin blue lines.

²⁷ See the County Department of Public Works Stream/Stormwater Connection web page for a list of established channel lines that require permits: <http://publicworks.westchestergov.com/permits-and-programs/stream-permits>.

official county map.” GML § 239-f. This broader scope is reflected on the County Department of Public Works website, which provides: “The county requires building permits prior to any construction project on or adjacent to county property.”²⁸

Based on our review of Westchester County Department of Planning maps, it appears that the Indian Point plant is not located on any county roads nor is it adjacent to any county property.²⁹ However, a county road (County Route 156) may dead end at the northeast corner of the plant site. Even if County Route 156 dead-ends at the plant boundary, the structures associated with the project do not have frontage on, access to or otherwise directly relate to the county road. As a result, no consultation with the County Department of Public Works is required under WCR Chapter 803.

²⁸ Information about the county’s building and road permit program can be accessed at: <http://publicworks.westchestergov.com/building-and-road-permits>.

²⁹ See map located at: <http://planning.westchestergov.com/images/stories/MapPDFS/CountyStateRoadsParks.pdf>.

OGS EASEMENT TO USE STATE-OWNED LANDS UNDER WATER

I. Introduction

For purposes of the analysis which follows, we have assumed that the majority of the underwater lands on which the CWW screens and related equipment will be installed is owned by New York State. As a result, Entergy will be required to obtain an easement from OGS, which manages State-owned underwater lands. The remainder of this memorandum discusses the standards/criteria for issuing such easements and explains why the necessary easement is expected to be granted in this case.

II. Procedure for Obtaining OGS Grant, Easement or Other Interest

Under New York's Public Lands Law § 75.7(a), the commissioner of OGS "may grant in perpetuity or otherwise, to owners of the land adjacent to the land underwater . . . to promote the commerce of this state or for the purpose of beneficial enjoyment thereof by such owners . . . so much of said land underwater as the commissioner deems necessary for that purpose." The procedure for obtaining grants, easements or other interests in lands underwater are spelled out in the Public Lands Law and OGS's implementing regulations, which are set forth at 9 NYCRR Part 270. The precise procedure to be followed differs depending on whether the applicant is seeking a grant in fee simple of lands underwater or an easement, lease, permit or other lesser interest.³⁰

The procedure for obtaining an easement, lease, permit or other lesser interest in lands underwater is contained in 9 NYCRR subpart 270-5. Applications for an easement require submission of a petition to OGS, accompanied by the following documents:

- certified copy of deed(s) of applicant's adjacent upland;
- a duplicate copy of any permit issued by the U.S. Army Corps of Engineers or any pending application;
- a completed environmental assessment form together with marine project information and/or other SEQRA documentation;
- a plan or sketch showing the project;
- a reproducible map made by a licensed land surveyor showing the location of the structure(s), the upland property of the applicant and those of adjoining properties along the waterfront; and
- a metes and bounds description of the lands applied for.

9 NYCRR § 270-5.2(a)-(f). OGS may require tax maps, photographs, or other information when necessary. 9 NYCRR § 270-5.2(h).

The applicant may submit the application to OGS prior to submission of a notice of application (and post-date the application at least 20 days in the future) or wait until 20 days after

³⁰ A separate part applies to easements in lands underwater for cables, conduits, pipelines, and hydroelectric power. 9 NYCRR Part 271. Upon information and belief, the CWW screens project is not eligible for easements under this section.

the notice of application has been served on the city, town or village where the land is situated and the owner(s) of adjoining property along the shorefront. The notice must state the date on which the application will be made to OGS and contain a description of the underwater land applied for, the use of the land underwater applied for, and directions to file any objections by the date of the application. Unlike notices for grants in fee, notices for easements and other lesser uses need not be published or posted. After the 20-day notice period has expired, the applicant must submit affidavits of service, together with copies of the notices, to verify that the municipality and adjacent landowners have been notified of the application. If the applicant waited to submit the petition until after the 20-day period expired, the entire package (application plus affidavits of service) can be submitted to OGS at once. The municipality and adjoining landowners must submit any objections within the 20-day notice period. 9 NYCRR § 270-5.4(a). The Commissioner will then decide whether to provide an additional opportunity for public notice and comment and/or hold a public hearing. 9 NYCRR §§ 270-5.4(b), 270-5.5.

III. Criteria/Standards for Issuing an OGS Easement Over Underwater Lands

In reviewing an application for an easement, the OGS Commissioner will assess the “probable effect of the use, structure or facility on the public interest in State-owned lands underwater” based on the following factors set out in 9 NYCRR § 270-3.2:

- the environmental impact of the project,
- values for natural resource management, public recreation and commerce,
- the size, character and effects of the project in relation to neighboring uses,
- the potential for interference with navigation, public uses of waterway and riparian/littoral rights,
- any adverse economic impact on existing commercial enterprises,
- the effect of the project on the natural resource interests of the State in the lands, and
- consistency with the public interest for purposes of fishing, bathing, and access to navigable waters and the need of the owners of private property to safeguard their property.

OGS may also require the applicant to submit an environmental assessment form indicating the purpose, scope, and potential impacts of the project. As part of its review, OGS must consult with other state agencies and give “due regard” to incorporating those comments in the review of the application. With respect to DEC, OGS:

shall incorporate into any grant, lease, easement, permit or lesser interest those conditions deemed necessary by [DEC] to adequately protect the affected environment or natural resource. If the environment or resources cannot be protected as determined by the findings of the Commissioner of Environmental Conservation, the proposed application shall be denied.

If an agency fails to respond to the request for comments within 45 days of receipt of the solicitation, any objections are deemed waived. 9 NYCRR § 270-3.2(b).

As a practical matter, for large projects, most if not all of these factors will have been suitably addressed prior to submission of the application for an OGS easement by the permit

application process. For example, projects that already have undergone SEQRA review will have fully evaluated the environmental impact of the project and its impacts on natural resources of the State. Projects requiring approval from the Army Corps of Engineers (“ACOE”) will already have evaluated and managed impacts to navigation as part of the ACOE permit process. Thus, OGS typically relies on the numerous other approvals required for a project when evaluating compliance with the above criteria. To the extent these factors are satisfied by the prior approvals of other state, federal or municipal agencies, OGS grants these easements as a matter of course.

IV. Implications for CWW Screens Project

Prior to issuing an easement, OGS must review the project in accordance with the factors spelled out in 9 NYCRR § 270-3.2, which requires a review of the environmental, navigation, socio-economic, natural resource and other impacts of the project. This OGS review is, in essence, a less comprehensive version of the environmental review required by DEC in support of the Draft Supplemental Environmental Impact Statement (SEIS) for the facility’s SPDES permit. Accordingly, by the time the application for an easement is submitted to OGS, DEC will already have completed its comprehensive review of the project under SEQRA and will have issued its SEQRA findings that the project (and this alternative) will mitigate adverse impacts to the environment to the extent practicable. Moreover, the OGS application will not be submitted until: (1) the ACOE has completed its review of the project under 33 CFR Part 325 and related provisions and issued the required individual permit needed to install and operate the CWW screens; and (2) all other key environmental permits/approvals have been obtained. Thus, by the time the application for the easement is submitted to OGS, the project will already have undergone a thorough review by DEC and other expert agencies with regard to its environmental, navigational, and other impacts. In our opinion, if the CWW screens project is approved by these agencies, it would be arbitrary and capricious for OGS to deny the requested easement. OGS is extremely unlikely to conduct its own independent analysis of the environmental and other impacts of the project and, notwithstanding the comprehensive record and the reasoned elaboration by the expert agencies, issue a conclusion based on the same record that significantly contradicts the findings of the other agencies.³¹

The conclusion that issuance of OGS easements is largely a routine action is borne out by the judicial history of the OGS easement program. Our research has uncovered only two reported proceedings under Article 78 of the Civil Practice Law and Rules involving challenges to OGS decisions regarding applications for grants or other interests in lands underwater. *See Castaways Motel v. C.V.R. Schuyler*, 24 N.Y.2d 120, 299 N.Y.S.2d 148 (1969) (addressing whether letter relating to OGS determination was final agency action); *Fahnestock v. Office of General Services*, 24 A.D.2d 98, 263 N.Y.S.2d 811 (3d Dept. 1965) (upholding OGS grant of letters patent in conjunction with construction of municipal incinerator plant). The absence of challenges to OGS lands underwater determinations shows that such determinations are issued routinely and without controversy.

³¹ Also, in the present case, New York State previously issued letters patent to Con Edison, Entergy’s predecessor at the site, authorizing construction of the original cooling water intake structures. Thus, New York State already has determined that the installation of structures on the underwater lands of the Hudson River in support of the Indian Point plant meets the criteria of the statute.