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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF ENTERGY NUCLEAR OPERATIONS,
INC.,

Respondent,

-against-

No. 179

NEW YORK STATE DEPARTMENT OF STATE,

Appellant.

20 Eagle Street
Albany, New York 12207
October 19, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Number 179, Matter of
2 Entergy Operations, Inc. v. New York State Department
3 of State.

4 Good afternoon.

5 MS. UNDERWOOD: Good afternoon. Barbara
6 Underwood for the Department of State.

7 The court below - - -

8 CHIEF JUDGE DIFIORE: Ms. Underwood, do you
9 care to reserve for rebuttal?

10 MS. UNDERWOOD: Yes. I would like to
11 reserve five minutes for rebuttal.

12 CHIEF JUDGE DIFIORE: Five minutes?

13 MS. UNDERWOOD: Thank you.

14 CHIEF JUDGE DIFIORE: You may.

15 MS. UNDERWOOD: The court below held that
16 New York's Coastal Management Program gave Entergy's
17 forty-year-old nuclear reactors at Indian Point, a
18 permanent, perpetual exemption from any review ever
19 for consistency with New York's coastal policies,
20 even though Entergy now seeks relicensing of the
21 reactors for another twenty years.

22 It is utterly implausible that New York's
23 coastal program did any such thing. That ruling is
24 inconsistent with the clear intent of the Coastal
25 Management Program as reflected elsewhere in the document,

1 it's intention with the federal regulations that govern
2 the state's program, this program was adopted to implement
3 a federal law, and it - - -

4 JUDGE RIVERA: Well, given the exceptions,
5 I know your position is they don't fit under the
6 exceptions, but given the exceptions, isn't it
7 possible that there actually would be someone or - -
8 - or - - - or an entity, perhaps not Entergy, that
9 would fit under those exceptions that would have the
10 similar characteristics you're describing?

11 MS. UNDERWOOD: Well, it's conceivable, I
12 suppose. Although - - - I mean, that is, there's
13 nothing about the regulations - - - the things that
14 I've stated, that says on its face they couldn't
15 create such an exception. But because those
16 exceptions, as read by the Appellate Division, are in
17 such tension with the federal law, the federal
18 Regulations, and the rest of the document, they
19 shouldn't be read that way.

20 We are essentially construing a document here,
21 construing a text. And it should be construed in light of
22 the statute it's implementing. We don't even know that
23 the - - - this document had to be approved by the Federal
24 Commerce Department.

25 JUDGE GARCIA: Counsel - - -

1 MS. UNDERWOOD: And the Federal Commerce
2 Department - - - yes?

3 JUDGE GARCIA: I'm sorry. To get - - -
4 just to stop you for a second. I understand it was
5 approved, but I just want to make sure I'm
6 understanding your argument in interpreting this
7 grandfather clause. And there's two parts to the - -
8 - to this rule, right. The first one, your position
9 is, those - - - that exemption, the grandfather
10 language there, refers to a specific list of projects
11 that was in existence.

12 As to the second part of it, that those projects
13 for which a final EIS had been prepared prior to the
14 effective date, right, and this cross site. It's my
15 understanding, and help me here, that the argument is that
16 that applies to State agencies who are looking to get this
17 type of approval only. And therefore, Indian Point would
18 not fit within Section 2; is that accurate or not?

19 MS. UNDERWOOD: Well, what it - - - the
20 argument is - - - there are two pieces to this
21 argument, but the one you're - - - you're talking
22 about is that the exemption we are talking now about
23 exemption two - - -

24 JUDGE GARCIA: Right.

25 MS. UNDERWOOD: - - - the one about to - -

1 - about having an environmental impact statement,
2 that it cross references the State Regulation that
3 was for State agencies.

4 JUDGE GARCIA: Right. So a state actor
5 seeking this type of approval.

6 MS. UNDERWOOD: Well, no, it's - - - yes.
7 But the Coastal Management Program applies to federal
8 agencies. So that is the - - - the enforcement we're
9 talking about here - - -

10 JUDGE GARCIA: Um-hum.

11 MS. UNDERWOOD: - - - of the Coastal
12 Management Program, is as against federal agencies.
13 The way this statute works, just to step back - - -

14 JUDGE GARCIA: Right.

15 MS. UNDERWOOD: - - - a minute, is that the
16 Department of State was put in charge of enforcement
17 of developing the Coastal Management Program, and
18 making the rules for having it enforced against both
19 federal agencies and state agencies.

20 The state agencies, it said, would - - - would
21 themselves do the coastal review - - -

22 JUDGE GARCIA: Right.

23 MS. UNDERWOOD: - - - under regulations
24 written by the Department of State. But for federal
25 agencies, the Department of State would do the

1 review. That was the - - - the new thing. The
2 federal law gave the State the authority to review
3 federal actions on condition that it also develop a
4 mechanism for applying those same rules to state
5 agencies.

6 JUDGE STEIN: But would a federal agency
7 ever have a state FEIS before 1982?

8 MS. UNDERWOOD: Bef - - - well, before 19 -
9 - -

10 JUDGE STEIN: Would there ever be a reason
11 for a federal - - -

12 MS. UNDERWOOD: Yes.

13 JUDGE STEIN: - - - project to have a state
14 - - -

15 MS. UNDERWOOD: Yes. There are projects
16 that - - - Westway was one. Westway was very much in
17 the mind of the drafters when they wrote these
18 exemptions. You could have a project that needed
19 both federal permits and state permits that might
20 need a federal and a state environment - - -

21 JUDGE STEIN: But isn't it true that under
22 SEQRA, a Federal FEIS may be sufficient if it meets
23 the requirements of SEQRA, of the state SEQRA? Is
24 that a correct statement?

25 MS. UNDERWOOD: Yes, that is a correct - -

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JUDGE STEIN: Okay. So do we know, does the record tell us here whether the federal FEIS that was - - - that was prepared here, met those qualifications?

MS. UNDERWOOD: Well, we know that it didn't, for several reasons. One is that when these federal statements were done, SEQRA hadn't been enacted yet. These are old - - - these are - - -

JUDGE STEIN: Right. But that doesn't mean that - - - that they didn't comply with SEQRA as - - -

-

MS. UNDERWOOD: Well, if - - -

JUDGE STEIN: - - - as it was subsequently enacted.

MS. UNDERWOOD: It does for the following reasons. The big difference between state SEQRA and federal NEPA, which is what the federal EISs are done under, is that the state law has what is commonly called an action forcing component, or a substantive component, so that under state - - - under state law, and environmental impact statement has to, not only disclose environmental impacts, it has to find that environmental impact - - - adverse environmental impacts have been minimized as much as possible, and

1 that mitigation measures have been found for the ones
2 that couldn't be avoided.

3 So it has a whole component that isn't required
4 under federal law, there is no reason why a federal
5 environmental impact statement written before that law was
6 passed.

7 JUDGE RIVERA: All right. So just to
8 clarify that, you're saying under the federal, you
9 just identify what the problem is, but under the
10 state, you identify it and say, and this is the
11 action that's been taken to address that problem?

12 MS. UNDERWOOD: Yes. More so even, that
13 you have minimized your - - - you have minimized - -
14 - yes, you've minimize the environmental impact, and
15 you failed mitigation measures where you couldn't
16 avoid them all together.

17 JUDGE FAHEY: Can I - - -

18 MS. UNDERWOOD: That is - - -

19 JUDGE FAHEY: Can I - - -

20 MS. UNDERWOOD: - - - a key difference
21 between the federal law and the state law. And
22 because of that difference, there are a series of
23 provisions that are designed to try to minimize the
24 burden of complying with both, to get coordinated
25 activity were possible, but that don't make a federal

1 document just automatically substitutable. For
2 instance - - -

3 JUDGE FAHEY: Can I - - - can I - - - can
4 I just move you off to a different topic a little bit
5 - - -

6 MS. UNDERWOOD: Yes.

7 JUDGE FAHEY: - - - because you only have a
8 limited amount of time here - - -

9 MS. UNDERWOOD: Yes.

10 JUDGE FAHEY: - - - for a complicated
11 issue.

12 It seems that the core of the issue is the
13 meaning of the word projects. They prefer the facilities,
14 you don't. What - - - I want to know two things. First,
15 what does "projects" mean to you, if you could just
16 address that - - -

17 MS. UNDERWOOD: Yes.

18 JUDGE FAHEY: - - - please, Ms. Underwood,
19 and the second thing is, is under your definition of
20 what a project is, would the second exemption ever
21 apply? Give me an example of when it would apply
22 when - - - under your definition of what a project
23 is. Go ahead.

24 MS. UNDERWOOD: Okay.

25 JUDGE FAHEY: So two things. What do you

1 mean by "project", and secondly, if that's the case,
2 then when would it ever apply.

3 MS. UNDERWOOD: Okay. Apart - - -

4 JUDGE FAHEY: Because I was hard pressed to
5 find that.

6 MS. UNDERWOOD: Okay. A project is not a
7 facility, as they suggest. The exemptions were never
8 meant to give a facility a permanent exemption from
9 coastal review; it refers to an undertaking. The
10 original license and the operation of the plants
11 under that original forty-year license was a project.

12 The renewal of it - - -

13 JUDGE PIGOTT: Could you have shut them
14 down at any time? Could you - - - I know they
15 applied for an extension, but could you and this
16 Coastal Management Program say, we just don't like
17 nuclear power on our riverbank, close it down?

18 MS. UNDERWOOD: Not pursuant to the - - - I
19 mean, I'm not speaking about all law, but the coastal
20 zone management review occurs only when an action is
21 sought; and an action would be seeking the license or
22 seeking the renewal of it.

23 JUDGE FAHEY: So - - - so the project - - -

24 MS. UNDERWOOD: So no.

25 JUDGE FAHEY: So the project then would

1 only apply to the original forty-year operating
2 license - - -

3 MS. UNDERWOOD: That's correct.

4 JUDGE FAHEY: - - - is what you're saying.
5 So when would the second exemption ever apply?

6 MS. UNDERWOOD: The second exemption,
7 meaning the exemption of getting a state EIS would
8 apply if, in connection, for example - - - I mean, it
9 wouldn't apply now. It's much too late for any of
10 these to have any application, but - - - but if - - -
11 if in connection with the - - - with a renewal
12 application, which wasn't needed during that time
13 here, but for some - - - some project, they needed
14 both state and federal permits, or state and federal
15 actions, and they sought and obtained a state EIS.

16 JUDGE STEIN: So your position is that both
17 of these exemptions only applied in that initial
18 hearing.

19 MS. UNDERWOOD: Yes, yes. These exceptions
20 were designed - - -

21 JUDGE STEIN: They - - - they have no
22 application here.

23 MS. UNDERWOOD: - - - to solve like - - -
24 well, I won't say like what. They were designed to
25 deal with projects that were in process that might on

1 the face of things, seem to need a review under the
2 coastal zone management law, but were being exempted.
3 Forty years later or thirty-five years later, that
4 has no room - - - no room left to operate.

5 And to read these exemptions as if they
6 were written to give permanent exemptions to plants,
7 as distinguished from transitional exemptions to
8 permit applications, is just to - - - is just to
9 misunderstand them. And - - - and if I could just
10 say, the federal regulations under which these - - -
11 this plan was created, and which govern Commerce's
12 view of how this should work, specifically say that
13 relicensing has to be subjected to coastal review, if
14 the original license never was, as in this case.

15 There are other circumstances. Relicensing
16 under the federal regs also has to be subjected to coastal
17 review if the impacts have changed. I mean, there are a
18 series of circumstances under which relicensing has to be
19 subject to coastal review. So if the State had written
20 the exception to mean what Entergy and the Appellate
21 Division think it means, it's not at all clear that
22 treasury - - - that Commerce and NOAA, which is the agency
23 in Commerce that has this, would have - - - would have
24 approved it.

25 The Appellate Division misread the plan. I see

1 my time is up, but I'll just say, it created a permanent
2 exemption that the Department of State never intended, and
3 the Federal Commerce Department never approved, and this
4 Court should reverse that decision and hold that the
5 requirement of coastal review applies to the relicensing
6 application for these nuclear reactors, which have never
7 been evaluated for consistency with New York's Coastal
8 Management Plan - - -

9 CHIEF JUDGE DIFIORE: Thank you, Ms.
10 Underwood.

11 MS. UNDERWOOD: - - - Program.

12 CHIEF JUDGE DIFIORE: Ms. Sullivan.

13 What about this concept of the permanent
14 perpetual exemption?

15 MS. SULLIVAN: Thank you, Your Honor, and
16 may it please the court. Kathleen Sullivan for the
17 respondent, Entergy.

18 The State seeks to use the Coastal Management
19 Plan to shut down Indian Point, even though the plain
20 language of the grandfather clause of the plan - - -

21 JUDGE STEIN: Well, is there - - -

22 MS. SULLIVAN: - - - bars that result.

23 JUDGE STEIN: Is their alleged intent
24 really relevant here? I mean, isn't it really a
25 question of statutory interpretation?

1 MS. SULLIVAN: It's absolutely, purely a
2 question of regulatory interpretation, Your Honor.
3 And I'd like to begin with the language of the
4 statute - - -

5 JUDGE STEIN: And does it - - -

6 MS. SULLIVAN: - - - of the regulation.

7 JUDGE STEIN: Let me just ask you, doesn't
8 the fed - - - doesn't federal law require you to file
9 an environmental impact statement when you seek
10 renewal of a license?

11 MS. SULLIVAN: Yes, Your Honor, we do and
12 have - - - the NRC, the Nuclear Regulatory Commission
13 has filed one final EIS and two supplements in our
14 renewal proceeding.

15 JUDGE STEIN: They don't require a new - -
16 - oh, in the renewal - - -

17 MS. SULLIVAN: In the renewal proceeding,
18 Your Honor.

19 JUDGE STEIN: The new one, right?

20 MS. SULLIVAN: Yes. That's where the F - -
21 -

22 JUDGE STEIN: Okay. So here's my question.
23 Okay. So the original one wasn't good enough for
24 them.

25 MS. SULLIVAN: No, no, Your Honor. The

1 original one is - - - let's separate two things.

2 Yes, we need a federal final EIS for a renewal - - -

3 JUDGE STEIN: I know, but my question is -

4 - -

5 MS. SULLIVAN: - - - under federal law.

6 JUDGE STEIN: - - - is that if under

7 federal law the renewal is considered a new event,

8 let's not call it a project or whatever, let's just

9 call it an event for now. If it - - - if under

10 federal law it's a new event requiring a new

11 environmental impact statement, why shouldn't it

12 trigger some review as well by the State?

13 MS. SULLIVAN: Because, Your Honor, the

14 State grandfathered Entergy. The State Coastal

15 Management Plan grandfathered Entergy in an exception

16 that the federal government approved when it accepted

17 the CMP with the exceptions.

18 JUDGE STEIN: And with that interpretation

19 - - -

20 JUDGE ABDUS-SALAAM: And what exactly is

21 that, Ms. Sullivan? What exactly is - - -

22 MS. SULLIVAN: The exception.

23 JUDGE ABDUS-SALAAM: Yes.

24 MS. SULLIVAN: I'd like to read it, if I

25 could, Your Honor. And the easiest place to find it

1 in the record is on record 276.

2 And, respectfully, this is, Judge Garcia, about
3 federal projects. Not state projects. The title of the
4 page is - - -

5 JUDGE GARCIA: After reading it, one thing
6 I'm interested in the explanation for is why is it
7 cross referencing the effective date of Part 600? It
8 could have just listed - - -

9 MS. SULLIVAN: I'd love to get to that.

10 JUDGE GARCIA: - - - a date.

11 MS. SULLIVAN: I'd love to get - - - let me
12 - - -

13 JUDGE GARCIA: But we've read the statute.

14 MS. SULLIVAN: I'd love - - -

15 JUDGE GARCIA: It could just list the date.

16 MS. SULLIVAN: It could have just listed
17 this date - - - the date. Your Honor, what I want to
18 be clear on is that I answered Judge Stein's
19 question. Your Honor, the reason why the federal - -
20 - the need for a new federal EIS is irrelevant here,
21 is that the State grandfather clause referred to
22 projects, and let's just read it, "for which a final
23 environmental impact statement has been prepared
24 prior to the effective date of the Part 600
25 regulation."

1 So let's just be clear. The answer to Judge
2 Stein's question is, the new federal EIS is irrelevant to
3 the EIS that's referenced in the grandfather clause. That
4 is something that happened prior to September 28th, 1982.

5 Now, Judge Garcia, you asked, why have the
6 bracketed reference to the Part 600 regulations, Part
7 600.3(4)?

8 JUDGE GARCIA: Right. Why not just have a
9 date?

10 MS. SULLIVAN: Well, Your Honor, I think
11 the way this is written, it means, and to answer your
12 - - - your question, Your Honor, what it is saying
13 is, if you had a final EIS prior to September 28th,
14 1982, you're grandfathered. And yes, you're
15 grandfathered for the life of the facility.

16 And I want to get to Judge Fahey's question
17 about how projects are the same as facilities, and I'll
18 show you - - - I'll be happy to show you that.

19 But to answer Judge Garcia's question, the
20 reference is simply to incorporate the effective date.
21 Now, how do we know it was not incorporating the whole
22 Part 600 regulations?

23 JUDGE GARCIA: What couldn't you just - - -
24 but my question is, why do you need it as a date? If
25 you wanted a date of 1982, you could have put a date

1 of 1982, and without cross-referencing Part 600. So
2 what's the reason they had for cross-referencing Part
3 600 that's relevant to this reg?

4 MS. SULLIVAN: Because, Your Honor, they
5 were announced around the same time, and they didn't
6 know exactly what the effective date would be. So it
7 turns - - - the CMP is - - -

8 JUDGE RIVERA: Okay. But then why pinpoint
9 it to that?

10 MS. SULLIVAN: Well, you - - -

11 JUDGE RIVERA: I think that's really the
12 theme.

13 JUDGE GARCIA: Right.

14 MS. SULLIVAN: So, Your Honor - - -

15 JUDGE RIVERA: But the question is, why
16 pinpoint it to that and not something else?

17 MS. SULLIVAN: So let's - - - what we're -
18 - - let's not mind read; let's look at the language.
19 The language, clearly, and I want to answer Judge
20 Abdus-Salaam's question. What is the exception? The
21 exception is a grandfather clause for anyone, any
22 project that had a final EIS before the effective
23 date of the regulation.

24 I think the plain reading of that is, find
25 the effective date of the regulation, and if you had

1 an EIS before then - - -

2 JUDGE GARCIA: That regulation covers what

3 - - -

4 MS. SULLIVAN: - - - you're grandfathered.

5 JUDGE GARCIA: - - - that they're cross-
6 referencing; Part 600 covers what?

7 MS. SULLIVAN: Part 600 is waterfront
8 regulations that were adopted around - - - under the
9 same statute that authorized the creation of the
10 Coastal Management Plan.

11 Part 600.3(d) is a waterfront grandfather
12 clause. It's a waterfront grandfather clause, and
13 let me answer. There are three reasons we win even
14 if - - - let me - - - let me back up and give them in
15 order, because this is complicated.

16 We win because we had final federal EISs prior
17 to 1982. And the statute says final - - -

18 JUDGE STEIN: But let me just stop you - -

19 -

20 MS. SULLIVAN: - - - it doesn't say state.

21 JUDGE STEIN: Let me just stop you there.

22 Okay. You say that a renewal isn't subject to - - -

23 hold on. A renewal - - -

24 MS. SULLIVAN: But - - -

25 JUDGE STEIN: - - - isn't subject to review

1 because forty years ago you were grandfathered in.

2 MS. SULLIVAN: That is right.

3 JUDGE STEIN: But isn't that - - - isn't
4 that circular? Doesn't that - - - that doesn't
5 answer the question of whether renewal is a new
6 project requiring you to fulfill the requirement.

7 MS. SULLIVAN: Your Honor, Atlantic Cement,
8 out of the great Third Department, Atlantic Cement
9 holds that, for purposes of SEQRA grandfathering, a
10 renew - - - when you're grandfathered prior to SEQRA
11 by the SEQRA grandfather clause, you're still
12 grandfathered when you apply for renewal.

13 And the same principle applies here. It
14 would upset New York grandfather clause law for a
15 variety of statutes. If you were to now say,
16 renewals vitiate grandfathering - - -

17 JUDGE FAHEY: But I - - -

18 JUDGE RIVERA: But isn't your position - -
19 - isn't your position much more troubling than what
20 you're suggesting?

21 MS. SULLIVAN: No - - -

22 JUDGE RIVERA: Because your position - - -

23 MS. SULLIVAN: - - - it's not troubling at
24 all.

25 JUDGE RIVERA: Your position is exactly

1 what the Solicitor General has argued, which is that
2 you can have this facility that has been around for
3 forty years, you're seeking this twenty year, another
4 two decades, without any of this review, and that
5 that is not at all what the State ever intended with
6 these exceptions - - -

7 MS. SULLIVAN: Your Honor - - -

8 JUDGE RIVERA: - - - and - - - and, if I
9 may finish, it undermines - - - yeah, I thought you'd
10 say that - - - it undermines, if not the language,
11 the spirit of what the federal government intended by
12 setting up this state check on the coastal
13 management.

14 MS. SULLIVAN: Not at all, Your Honor. And
15 let me - - - first, I want to be sure I address why -
16 - -

17 JUDGE RIVERA: Um-hum.

18 MS. SULLIVAN: - - - you may think it
19 sounds illogical to have grandfathering for the life
20 of the plant, but that is commonplace for
21 grandfathering clauses throughout New York, for
22 zoning variances, for the Mining Reclamation Act,
23 that issue in Atlantic Cement.

24 And to get to Judge Stein's question and
25 Judge Fahey's question, I want to be sure I answer

1 the question, why is a project a facility? And the
2 answer is that the CMP itself uses the terms
3 interchangeably.

4 Look at page 224, and you find the sentence that
5 says, "Measures to preserve farmland and the natural
6 characteristics of the land traversed by transportation
7 facilities are included in all stages of such projects."
8 Facilities, such projects, interchangeably.

9 Look at 227, and you'll see another sentence
10 that uses projects and facilities as a synonym. 22 - - -
11 record 227, middle of the page. "During the review of
12 proposed projects, consideration is given to the location
13 of the proposed facility."

14 So, Judge Fahey, project means - - -

15 JUDGE RIVERA: A project could be - - -

16 MS. SULLIVAN: - - - facility.

17 JUDGE RIVERA: But a project could be taken
18 place at a facility. I don't know if that second
19 example meets your point at all.

20 MS. SULLIVAN: Project means - - - but
21 project means facility here; there is no indication
22 otherwise. There is no indication that project for
23 purposes of the grandfather clause did not mean
24 facility. And Your Honor, if you have any doubt,
25 turn - - -

1 JUDGE STEIN: But isn't the - - - isn't the
2 word project also accompanied throughout the document
3 by words such as preconstruction, or perspective, or
4 implementation, or proposed; wouldn't that go the
5 other way? So in other words, maybe there are
6 instances in which it's used interchangeably, but
7 still, isn't that inconsistent with the intent?

8 MS. SULLIVAN: Your Honor, why are we
9 looking at intent? The purpose of a grandfather
10 clause is to give reliance - - - to allow reliance on
11 well-settled expectations given by the language.

12 If the legislature had - - - sorry, if the
13 secretary - - - if Secretary Patterson had wanted to write
14 this - - -

15 JUDGE RIVERA: Well, is your position that
16 it's not ambiguous? Even though it's - - -

17 MS. SULLIVAN: Unambiguous.

18 JUDGE RIVERA: - - - even though it's
19 interchangeable and perhaps undermines, in certain
20 places you're arguing.

21 MS. SULLIVAN: Utterly unambiguous. And
22 Your Honor, here is the canon of construction that
23 tells you why. As Judge Fahey pointed out, if
24 Section 2 does not - - - if exception two does not
25 apply to a renewal, it applies to nothing.

1 The Solicitor General has told us in her brief
2 that the retroactivity principle means you couldn't apply
3 the 1982 or the 1976 SEQRA requirements to pre-'76, and
4 you couldn't apply the 1982 CMP requirements
5 retroactively, it would apply - - - then the exception
6 would apply to nothing. And it must apply to something.

7 And we think the logical meaning is it applies
8 to renewals of licenses for projects that obtained their
9 final EIS prior to September 28th, 1982.

10 That's the logical - - - it's the only one that
11 doesn't render the - - - the second exception a nullity,
12 and you can't read it to match with the second exception
13 of nullity.

14 JUDGE RIVERA: If you have a single
15 facility, might you have several projects and several
16 projects requiring separate EISs, or am I wrong?

17 MS. SULLIVAN: Your Honor, I'd like to
18 spend a little time on what EIS do you need.
19 Generally, and I want to respectfully disagree - - -

20 JUDGE RIVERA: Well, was I wrong about
21 that, before you go on?

22 MS. SULLIVAN: You - - - generally, you get
23 one EIS - - -

24 JUDGE RIVERA: Um-hum.

25 MS. SULLIVAN: - - - for a project or a

1 facility, you get one EIS for an event required under
2 state or federal law.

3 JUDGE RIVERA: So a facility may be running
4 more than one project, and may have more than one
5 EIS?

6 MS. SULLIVAN: That's correct, Your Honor,
7 but I want to disagree strenuously with my friend,
8 the Solicitor General's, point.

9 And this goes back to the colloquy with
10 you, Judge Garcia. The exemption here does not
11 require that the Pre-1982 EIS be a state EIS; it
12 doesn't require that. It requires - - - any fia - -
13 - any final EIS can suffice, and it uses Part 600.3
14 only for the date.

15 How do we know that? And - - - and I want to be
16 very clear on how we know it doesn't incorporate the
17 substance of Part 600.3. The reason we know that is, in
18 the exception one, it uses the - - - the CMP uses the term
19 "pursuant to the SEQRA grandfather clause". So exception
20 one says, projects are grandfathered by CMP if they were
21 grandfathered pursuant to SEQRA at the time of its
22 enactment.

23 We say recovered under that too, but let's just
24 go back. If the second clause had wanted to incorporate
25 the Part 600 grandfather clause by reference, it would

1 have said grandfathered pursuant to Part 600.3, but it
2 didn't. It just said, prior to the effective date.

3 Those two different wordings must mean something
4 different. And so we would respectfully urge you can't
5 read the second exception as incorporating the waterfront
6 regulation grandfather clause in Part 600. But even if
7 you did, we would win.

8 And why would we win? Because if you go to
9 600.3(4)(d), it says that you're grandfathered under the
10 waterfront regulations if you had a final environmental
11 impact statement prepared pursuant to 6 NYCRR Part 617.
12 If we go to Part 617, and Your Honor, this is referenced
13 in the final paragraph of the Third Department's decision,
14 the final page of the Third Department's decision. Part
15 617 says, a federal EIS counts as a state EIS. It does so
16 in two places. SEQRA says in the definition section,
17 that's a Part 617.2(n), that environmental impact
18 statement means or a federal document in accordance with
19 Section 6 - - -

20 JUDGE RIVERA: He says there is a
21 significant substantive difference. Why is she not
22 correct about that?

23 MS. SULLIVAN: She's incorrect, Your Honor,
24 because first of all, NEPA has action forcing
25 provisions too. And second, because the - - - as we

1 say in page 12 of our brief.

2 But I also want to refute the idea that you get
3 two EISs. You know, a lot of us passed by the Tappan Zee
4 Bridge today, and in reply brief at page - - - the reply
5 brief at page 30, the government says, oh, well, Tappan
6 Zee, you needed two - - - you needed federal and state
7 approval; you didn't.

8 We actually looked in the federal - - - the
9 Tappan Zee EIS is prepared pursuant to NEPA. It's
10 submitted pursuant to NEPA, and the State participated in
11 it. So I want to refute this idea that you need two EISs
12 - - -

13 JUDGE FAHEY: All right. Let me just - - -

14 MS. SULLIVAN: - - - or that a federal EIS
15 - - -

16 JUDGE FAHEY: Can I just stop - - - you had
17 said - - - it was a good point, a good argument, we
18 win for three reasons. First, it was a - - - you got
19 a final EIS, it was before '82. Is your second point
20 grandfathering? What are you three reasons?

21 MS. SULLIVAN: Three reasons, Your Honor -
22 - -

23 JUDGE FAHEY: I just don't want you to get
24 down and me not hearing all three.

25 MS. SULLIVAN: Thank you, Your Honor, for

1 giving me the second chance of the three reasons.

2 JUDGE FAHEY: Go ahead.

3 MS. SULLIVAN: The first is, the exception
4 one is a final EIS; it doesn't have to be a state
5 EIS. Okay.

6 The second reason is that if - - - if you do - -
7 - the second reason is, it incorporates only the date of
8 Part 600, not the substance. And therefore - - - and we
9 had EISS prior to the date. So we had a final federal EIS
10 for Indian Points 2 and 3 by 1973 and 1975. So the second
11 point - - - it says final not state. Second point is it
12 uses the date, not the substance of Part 600. And the
13 third point, which I know it took me a long time to
14 explain, is if you go to Part 600, we still win because
15 Part 600.3 incorporates the SEQRA definitions of EISS, and
16 SEQRA, in 617.15(a), that's 6 NYCRR 617.15(a) says, "When
17 a draft and final EIS for an action has been duly prepared
18 under NEPA, an agency, a state agency has no obligation to
19 prepare an additional EIS under this part."

20 So even if the State were right, or even if,
21 Judge Garcia, you wondered why did they reference the
22 waterfront regs grandfathering clause in Part 600.3, we
23 still win because Part 600.3 says a federal EIS counts as
24 a state EIS.

25 JUDGE ABDUS-SALAAM: Did you have to be on

1 some sort of list? Because there - - -

2 MS. SULLIVAN: We do not, Your Honor.

3 JUDGE ABDUS-SALAAM: You don't. Why?

4 MS. SULLIVAN: We do not, Your Honor.

5 JUDGE ABDUS-SALAAM: Why do you have to not
6 be on a list?

7 MS. SULLIVAN: Your Honor, now we are
8 returning to exception one.

9 JUDGE ABDUS-SALAAM: Right.

10 MS. SULLIVAN: So we think we win because
11 we had a final EISs prepared prior to September 28th,
12 1982. Federal ones are good enough, and we win,
13 you're done with exception two.

14 If you get to exception one, the SEQRA
15 exception, again, it's a plain language argument; it's a
16 pure regulatory construction argument. It's unambiguous
17 language; we don't need to look to intent.

18 Exception one says those projects - - - also
19 exempting, those projects identified as grandfathered - -
20 - may I answer, Your Honor - - -

21 JUDGE STEIN: But what is the meaning - - -

22 MS. SULLIVAN: - - - I see I'm out of time.

23 CHIEF JUDGE DIFIORE: Yes, you may, of
24 course.

25 JUDGE STEIN: What is the meaning of the

1 word "identified"?

2 JUDGE ABDUS-SALAAM: Yes.

3 JUDGE STEIN: When you - - -

4 MS. SULLIVAN: Identified as grandfathered
5 pursuant to SEQRA. We think it means that if SEQRA
6 grandfathered you at its enactment in 1976, SEQRA has
7 identified you as grandfathered. And we know what
8 SEQRA did in 1976. SEQRA did in 19 - - -

9 JUDGE STEIN: Can it also be - - - can it
10 also be interpreted as the State interprets it, and
11 doesn't that make it ambiguous?

12 MS. SULLIVAN: I don't think so, Your
13 Honor, because what - - - what the reference is - - -

14 And Your Honor, may I continue past my time?

15 CHIEF JUDGE DIFIORE: Please.

16 MS. SULLIVAN: The reference is to what
17 SEQRA did in 1976. And that, you can look for
18 yourself. It's ECL 8-01115(a), and that says,
19 "Actions undertaken or approved prior to the
20 effective date of that article." There's your
21 identification clause.

22 What SEQRA identified at the time of its
23 enactment is still in SEQRA today. It's that clause,
24 it's 8-01115(a); that's what was identified.

25 So Your Honor, Justice Abdus-Salaam, there is no

1 need to look to 1978 what the budget director might list.
2 And besides, the budget director only lists state
3 projects, and ConEd owned half of Indian Point at that
4 time, and New York - - - and NYPA just bought it. So we
5 wouldn't be on that list because we were a private
6 project.

7 So just to summarize, Your Honor, I - - - I know
8 this is a lot of complex regulatory discussion, but our
9 point is, plain language of grandfather clauses must have
10 meaning in New York State.

11 And your ruling in this case does not just
12 effect Indian Point, which just yesterday the New York ISO
13 said there would be significant problems of resource
14 adequacy on the electric grid, because Indian Point
15 supplies 25 percent of the electricity in South Eastern
16 New York.

17 But this isn't just about the State's effort to
18 shut down Indian Point with the intended spikes in our
19 electric bills, and brownouts, and blackouts. It isn't
20 just about Indian Point; it's about whether grandfather
21 clauses have plain meaning.

22 New York might have - - - now, we should have
23 them grandfathered Indian Point 2 and 3 in 1982, but it
24 did so. And don't take it for me, Your Honor. If you
25 have any doubt, turn two pages after the exemption in the

1 record, and go to page 278, and you're going to see on
2 page 278, two pages after the grandfather clause, the
3 State, Secretary Patterson on behalf of the State lists
4 the power plants in the state.

5 He says, the State has - - - this is 278, middle
6 of the page. "The State has demonstrated its recognition
7 of the national interest in energy facilities by the
8 number and scope of facilities already located in our plan
9 for New York's coastal area, and it identifies five
10 nuclear units."

11 JUDGE STEIN: So does it matter at all
12 whether in the last forty years, and I'm not saying
13 that this has happened, that there is - - - there is
14 nuclear waste seeping into the ground, and going into
15 the river, and endangering the lives and the health
16 of numerous New Yorkers. That doesn't matter because
17 you were grandfathered - - -

18 MS. SULLIVAN: Your Honor - - -

19 JUDGE STEIN: - - - forty years ago.

20 MS. SULLIVAN: - - - we dispute that
21 description.

22 JUDGE STEIN: I know - - - I know you do.
23 I know you do.

24 MS. SULLIVAN: NRC has found none of those
25 - - -

1 JUDGE STEIN: I'm not saying it's true.

2 MS. SULLIVAN: - - - effects.

3 JUDGE STEIN: I'm not saying it's true.

4 MS. SULLIVAN: And the answer is, yes, it
5 matters, but not for the Coastal Zone Management Act,
6 Coastal Management Plan. Of course it matters, Your
7 Honor. We are involved in some of the most heavy
8 layers of regulation known to any industry in
9 America. We are regulated by the Nuclear Regulatory
10 Commission. It has produced, not just the 2,000
11 pages of EISs in your record, it's produced three
12 EISs - - -

13 JUDGE RIVERA: But you are exercising the
14 state review, right? You say, we should only be
15 subject to this federal review - - -

16 MS. SULLIVAN: Not at all, Your Honor.

17 JUDGE RIVERA: -- the state review doesn't
18 apply at all.

19 MS. SULLIVAN: Not at all, Your Honor.

20 JUDGE RIVERA: So what state review applies
21 to you?

22 MS. SULLIVAN: The SPDES, SPDES process.

23 JUDGE RIVERA: SPDES.

24 MS. SULLIVAN: Environmental - - - the
25 Department of Environmental Conservation has

1 tremendous amount of control over our non-
2 radiological activities, including non-radiological
3 hazardous waste, including effects on aquatic life.

4 We are in con - - - we are in - - - we are
5 in - - - we're in a process right now to decide with
6 the Department of Environmental Conservation whether
7 we should put new kinds of mesh - - - mesh wiring in
8 to protect aquatic life. We were just fined for an
9 oil spill for 575,000 dollars by DEC. We are
10 regulated at the state level.

11 And let me give you one more thing, Your
12 Honor. The State participates in the NRC
13 proceedings. The State intervened in our federal
14 renewal in November of 2007. The State intervened;
15 it didn't just show up and comment on the EISs. It
16 did that too, but it showed up and intervened.

17 JUDGE RIVERA: Do you recognize in your
18 application to the feds, that you were subject to the
19 CMP?

20 MS. SULLIVAN: We didn't - - - in our
21 initial application, we did, Your Honor, and we later
22 submitted a protest. We later said that we are
23 grandfathered and we need not comply with C - - -

24 But, Your Honor, with respect, same thing was
25 true in Atlantic Cement; we shouldn't be penalized because

1 we voluntarily complied at time one. You know, if I don't
2 file for all my exemptions on my tax return one year, and
3 the next year I realize, oh, I could have filed for some
4 more exceptions, I'm allowed to do that, same here. The
5 fact that we initially complied voluntarily should not
6 refute our ability to claim the grandfathering now.

7 But Your Honor, I just want to be clear, Judge
8 Stein, we are very regulated by the feds and by the State.
9 All we ask here is that this extremely narrow regulatory
10 question about compliance with the Coastal Management
11 Plan, we were grandfathered in 1982. Project means
12 facilities, it was in perpetuity, and there is plenty of
13 opportunities for the State to intervene if it's concerned
14 about the next twenty years, and it has done so.

15 The State has vigorously represented through its
16 intervention in the federal renewal, through its
17 participation in the adjudicated hearings about the EISs
18 for the Federal approval, it's - - - the State regulates
19 us through DEC, we are in constant dealings with DEC with
20 respect to the SPDES, the pollutant discharge program, and
21 we are very responsive to that dual set of regulation.

22 All we are suggesting here is that we are
23 grandfathered as to this one plan. And just remember, CMP
24 is not comprehensive environmental regulation; it's done
25 essentially by the Department of State without

1 adjudicatory hearings, without any requirement of public
2 participation. The federal process and the DEC processes
3 are much more open to public participation.

4 So please read New York grandfather clauses the
5 way they were written, even if the State regrets how they
6 were written now.

7 Thank you.

8 JUDGE RIVERA: Even if - - -

9 CHIEF JUDGE DIFIORE: Thank you.

10 JUDGE RIVERA: I'm sorry, if I could just
11 say - - -

12 CHIEF JUDGE DIFIORE: Yes.

13 JUDGE RIVERA: So even if the State takes
14 the position, with respect to this review, that you
15 shouldn't get this renewal, do the feds have to
16 follow that - - -

17 MS. SULLIVAN: No, Your Hon - - -

18 JUDGE RIVERA: - - - recommendation. So
19 you still have an opportunity regardless of - - -

20 MS. SULLIVAN: We do, Your Honor.

21 JUDGE RIVERA: - - - where DOS stands on
22 this, right?

23 MS. SULLIVAN: We do, Your Honor. We have
24 the opportunity to argue to the Secretary of Commerce
25 that they should disapprove the State's objection.

1 State objected November 5th, 2015; they said, shut
2 down Indian Point.

3 JUDGE RIVERA: Um-hum.

4 MS. SULLIVAN: We can go to the Secretary
5 of Commerce, whoever he or she may be - - -

6 JUDGE RIVERA: Um-hum.

7 MS. SULLIVAN: - - - and say, please
8 override the State. And that will become a decision
9 for the Secretary of Commerce.

10 We also have - - - there are other
11 challenges we could bring; we could bring an Article
12 78 challenge, for example, to this.

13 But what I would respectfully ask the court to
14 do is not just postpone the issue to those other forms of
15 review, because what you hold in this case is going to
16 have an effect on what people think about New York law,
17 and whether grandfather clauses that plainly exempt people
18 mean what they say.

19 So I think for purposes of New York statutory
20 construction or your regulatory construction, the plain
21 lang - - - you should read the plain language the way we
22 urge you to and the way five judges of the Appellate
23 Division unanimously found; they said clear and
24 unambiguous plain language.

25 You should rule that way - - - even if we could

1 resolve Indian Point some other way down the line, it's
2 very important for you to send a strong message about
3 plain language meaning what it says for the sake of New
4 York rule of law.

5 Thank you very much, Your Honor.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 Ms. Underwood.

8 MS. UNDERWOOD: I want to call your
9 attention to the last sentence of the exemption
10 paragraph, which isn't much quoted in the briefs,
11 although it's refer to.

12 It says, if you turn to the page in the
13 Coastal Management Plan that contains it. "If an
14 applicant needs assistance to determine if its
15 proposed action meets one of these two criteria, the
16 applicant should contact the Department of State."

17 That's the last sentence after the two
18 exceptions. And that's important for two reasons.
19 It shows you that a project in the exemption context
20 is an action. It's not a facility forever; it's an
21 action. The granting of a license, the activities of
22 the plant - - -

23 JUDGE PIGOTT: This is a - - - this is - -

24 -

25 MS. UNDERWOOD: - - - under that license.

1 JUDGE PIGOTT: What Ms. Sullivan said
2 toward the end, you know, there's no regs for this
3 thing; it's just a program. It's sort of, the two
4 got together and said, let's - - - let's make sure
5 our - - - our shores are well taken care of. And it
6 does seem odd that in doing so, you can say, and by
7 the way, now that we have this, we're shutting down
8 every nuclear power plant in the State of New York
9 and affecting everyone because of a program. Not
10 because of a reg, not because of a law, but because
11 of a program.

12 What - - - what can you tell me - - -

13 MS. UNDERWOOD: Well, I'd like to address
14 that - - -

15 JUDGE PIGOTT: Later? Okay.

16 MS. UNDERWOOD: - - - if I could just
17 finish. In one seconds. I don't usually do this,
18 but that sentence that I quoted has two reasons for
19 being important. It tells you that it's actions that
20 are being regulated, not facilities, and it tells
21 you, it reserves an interpretive role to the
22 Department of State.

23 JUDGE PIGOTT: That's what I meant when I
24 said it's a program, because there's no regs. And to
25 say well, an action means this, I don't know who

1 wrote this, and, you know, and it could've been - - -

2 MS. UNDERWOOD: The Department of State

3 wrote this.

4 JUDGE PIGOTT: Of course they did. But

5 what I'm saying is, you know, if I'm doing a program,

6 I can sit around with five people and develop a

7 program. Are we sitting here saying, but wait a

8 minute, you know, action is a - - - is a legal term

9 that means this, program is a legal term that means

10 that, and we should put that in the definitional

11 sections before we get into big fights later on about

12 what's a program and what's an action?

13 MS. UNDERWOOD: Yes. Well, this functions

14 a lot like a regulation. It isn't a regulation in

15 the sense - - - but there was actually notice and

16 comment on this - - - on this coastal program.

17 JUDGE FAHEY: But wouldn't that have

18 solved what Judge Pigott is saying; wouldn't that

19 have solved the problem with the meaning of the word

20 projects?

21 MS. UNDERWOOD: Yeah, well, there never was

22 a problem. No one else has ever claimed this

23 exemption in the - - - in the many decades that it's

24 been in existence.

25 JUDGE PIGOTT: No. You know what I

1 pictured, and I know you're going to correct me that
2 I'm wrong, but can you shut down West Point because,
3 you know, you're saying it's right on the - - - it's
4 right on the Hudson, it's uglier than hell, it's been
5 there for over 200 years, we don't need this thing
6 anymore; we're shutting down West Point?

7 MS. UNDERWOOD: This also doesn't shut
8 things down. It makes an objection to a violation of
9 the coastal policies, and just like environmental
10 impact statements and many other things, if there's
11 an objection, there can be room for modifications
12 that would comply with that objection before you even
13 ever get to, or simultaneous with, appealing to the
14 Secretary of Commerce.

15 CHIEF JUDGE DIFIORE: And the State - - -

16 MS. UNDERWOOD: The State doesn't have the
17 power to shut it down; it has the power to make an
18 objection to the certification that this is
19 consistent with the coastal policies.

20 CHIEF JUDGE DIFIORE: And can the State
21 satisfy that responsibility or obligation that they
22 have by participating in the federal proceedings?

23 MS. UNDERWOOD: Not its responsibility for
24 the coastal policies. Congress thought it was
25 important to layer on top of all the other regulatory

1 environmental statutes, this Coastal Zone Management
2 Act. And while it is true that the State can
3 register its concerns in these other processes, it
4 doesn't do a review for consistency with the coastal
5 policies.

6 JUDGE PIGOTT: Right. But aren't we saying
7 the same thing? In other words, you can go to - - -
8 you can go to the feds and say, they want a new
9 license and this is our opinion with respect to it,
10 it's not consistent with the CMP.

11 MS. UNDERWOOD: That's right.

12 JUDGE PIGOTT: Or you can write a letter,
13 or do whatever the State does, saying, we've now
14 issued a decision saying it doesn't comply with the
15 CMP. And in your view, they're the same.

16 They don't have to - - - they can ignore
17 the CMP, they can say - - - because you just said it
18 doesn't - - -

19 MS. UNDERWOOD: They can - - - the federal
20 government actually cannot find that New York was
21 wrong; what it finds is that its review authority is
22 that there are national interests that outweigh the
23 violation of the - - - or the inconsistency with the
24 coastal policies. That's what it might find for West
25 Point; for all we know, that's what it might find for

1 any project.

2 It doesn't actually review the State's
3 analysis; it just can conclude that there are
4 national concerns.

5 JUDGE ABDUS-SALAAM: Ms. Underwood, could
6 you address what Ms. Sullivan said about the
7 grandfathering law that we are - - - the - - - she's
8 sort of put in the context of what we decide here is
9 going to be looked at for how we determine what is
10 grandfathered or grandparented; I kind of like that
11 word better.

12 MS. UNDERWOOD: I think that's not correct.
13 We are interpreting a very particular provision. New
14 York did not adopt the entire SEQRA grandfathering
15 process, so all of these cases about SEQRA
16 grandfathering are really somewhat beside the point.
17 New York did two things. It bothered two lists from
18 SEQRA to deal with its gra - - - it didn't borrow the
19 whole process, it didn't say, if you're exempt under
20 SEQRA, you are exempt from the Coastal Management
21 Program.

22 Exemption one, which we've barely talked
23 about here but has been referred to, exempts matters
24 that have - - - projects that have been identified as
25 grandfathered, and that doesn't mean the same thing

1 as grandfathered, and we know that because of the
2 particular history that exists here.

3 When SEQRA was enacted, it had an exemption
4 for actions undertaken or approved prior to the
5 effective date. There was an issue about what
6 actions would qualify, and the legislature enacted a
7 provision telling state agencies to submit a list.

8 And there was another law a year later,
9 asking for more lists. And those lists had recently
10 been gathered and were in place. They were made in
11 '76 or so. In '82, when the coastal program was
12 created, they were readily available to invoke. The
13 - - - the coastal program doesn't exempt everything
14 that is - - - it could be found to be exempt under
15 SEQRA.

16 JUDGE RIVERA: So was counsel wrong when
17 she said they wouldn't have been on the list?

18 MS. UNDERWOOD: They - - - they probably
19 wouldn't have been on the list. It's conceivable - -
20 - actually, Indian - - - some construction at Indian
21 Point was on the - - - the list, the power
22 authority's list. Not the operation of the nuclear
23 plants, but the construction of a building. That's
24 an action that was undertaken by an agency and was on
25 the list.

1 So they might or might not have been on the
2 list, depending on what they were, but that's what
3 the coastal program adopted with some existing
4 documentary records. It was - - - it was designed to
5 avoid adjudicating what projects had had enough
6 investment of energy and money and so forth to be
7 exempt, and to just take some lists to deal with the
8 transitional problem of who would be grandfathered.

9 Exemption one is the lists of projects
10 exempted from SEQRA in response to a legislative
11 mandate, and exemption two is the projects that have
12 filed a document, a state - - - a state environmental
13 impact statement, and that was what the drafters of
14 the Coastal Management Program did, that's what the
15 Department of Commerce approved.

16 And by the way, to the extent there is a
17 notion of some kind of expectation interest that's
18 being defeated here, the initial license, which was
19 for forty years, is what rewarded that investment of
20 energy, money, and - - -

21 JUDGE PIGOTT: Yeah, but could you say that
22 to a restaurant, you know, who was overlooking the
23 Hudson, and they are applying for, you know, another
24 - - - another license, and the CMP comes in and says,
25 we think you're ugly so we're not going to let you,

1 you know - - - you made your money the first ten
2 years you were here; you're gone.

3 MS. UNDERWOOD: Perhaps not. Here, that is
4 something where the - - -

5 JUDGE PIGOTT: That's what I worry about.

6 MS. UNDERWOOD: Well, where the renewals
7 were expected. That's what all those cases about
8 mining, Atlantic Cement and so forth, are. Those are
9 short permits that everybody expects will be renewed
10 regularly unless there is a problem. And that's what
11 all those cases that Entergy has cited are. This is
12 a very different thing. A forty-year license at the
13 time it was issued, it wasn't even clear whether it
14 would be renewable later. There was a determination
15 that it could be renewed.

16 It's just not - - - not the same thing, and
17 if you look to the Commerce Department's regulations
18 about license renewals, you see that. They say - - -
19 some license renewals might not be - - - require
20 coastal review, probably your restaurant. But a
21 license renewal for something that was never reviewed
22 before, or that has new and different impacts, or
23 there is a list, three or four things of reasons why
24 a license renewal needs coastal review. The salient
25 one here is that this one never was reviewed.

1 And yes, my colleague is right in saying
2 that now, when state and federal reviews are both
3 required, there is collaboration. And the State
4 participates, and there's an effort to produce one
5 document, one reporting document that will cover
6 everything. But the whole point here is that when
7 these plants got their federal environmental review,
8 there was no occasion for the State to participate;
9 there was no state SEQRA, much less a state Coastal
10 Management Program.

11 So it is not the case that the State failed
12 to collaborate as expected or missed its opportunity;
13 there's a new law that came into place requiring a
14 new kind of review, and Congress and the State
15 Department of State, and the State Legislature all
16 contemplated that that review would happen here.

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Entergy Nuclear Operations, Inc. v. New York State Department of State, No. 179 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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