

CLEAN OCEAN ACTION, THE AMERICAN LITTORAL SOCIETY,
SAVE BARNEGAT BAY

December 6, 2007

By E-mail and Facsimile

N.J. Department of Environmental Protection
Division of Land Use Regulation
P.O. Box 439
Trenton, NJ 08625-0439
Attn: Mr. Mark Godfrey

**Re: Renewal Application of AmerGen for Federal Consistency Certification for
Oyster Creek Nuclear Generation Station, Docket No. 1500-02-0005.5**

Dear Mr. Mark Godfrey:

Clean Ocean Action (“COA”), the American Littoral Society (“ALS”), and Save Barnegat Bay (“SBB”) (collectively “we”) submit the following comments in response to the New Jersey Department of Environmental Protection’s (“DEP”) posting in the November 21, 2007 DEP Bulletin regarding the renewal application (“the Application”) of AmerGen (“the Applicant”) for Federal Consistency Certification for the Oyster Creek Nuclear Generating Station (“OCNGS”) in Lacey Township, New Jersey (Program File No. 1500-02-0004.4 CDT 06001). Clean Ocean Action is a regional, broad-based coalition of 125 conservation, environmental, fishing, boating, diving, student, surfing, women’s, business, service, and community groups with a mission to improve the degraded water quality of the marine waters off the New Jersey/New York coast. The American Littoral Society is a national, non-profit organization whose mission is to promote the study and conservation of coastal areas and marine ecosystems. The American Littoral Society’s work involves a combination of law, policy, and educational activities that introduce citizens to their marine environment, the effects of human activities taking place in the water and on the land, and to approaches for its conservation. Save Barnegat Bay is a not-for-profit environmental group, founded in 1971, working to conserve undeveloped natural land and clean water throughout the Barnegat Bay watershed.

Since the DEP is obligated to and has already committed to reviewing comments submitted prior to the DEP’s last Coastal Zone Management Act (CZMA) consistency determination on May 31, 2007, we refrain from introductory discussions of the merits and importance of this consistency review. Instead, we present new comments in the following sections and attach our previous comments, which are hereby incorporated as if set forth at length herein. However, our conclusion remains the same. We reject the Applicant’s contention that continued operation of the OCNGS would be consistent with the State’s enforceable policies on coastal management, and believe that the Applicant has failed to demonstrate the required consistency through its submissions. Therefore,

we respectfully submit that DEP cannot find the Applicant's application consistent with the rules.

These comments are submitted under protest for the inadequate and unreasonable period for public comment provided by DEP for the Application, for the reasons set forth in the December 5th letter of our counsel, the law firm of Ansell Zaro Grimm & Aaron, to Commissioner Lisa Jackson, and as otherwise set forth below. We specifically reserve the right to raise any additional information, issues, concerns, or arguments regarding the Application at any future point in time, including in the context of litigation, due to the prejudicial and inadequate public process employed by DEP.

A. A Third Consistency Review vs. the Appeal Process

We first object to DEP's consideration of the Applicant's September 13, 2007 request for consistency review. Apparently DEP is performing a consistency review in response to this letter. The Applicant is not entitled to a new review and an appeal is the appropriate action for the Applicant to undertake if it disagrees with DEP's May 31, 2007 letter.

In DEP's May 31 letter, DEP found that it could not make a positive consistency determination. DEP's decision was made pursuant to 15 CFR 930.63. Pursuant to that Rule, DEP's "objection *may* describe alternative measures (if they exist) which, if adopted by the applicant, may permit the proposed activity to be conducted in a manner consistent with the enforceable policies of the management program."¹ DEP chose not to provide alternative measures that would, if adopted, allow the proposed activity to be conducted with consistency. This decision not to provide alternative measures was legally appropriate, and it is legally significant. Because DEP did not provide alternative measures, the Applicant's September 13 letter is without basis. The Applicant acts in their letter as if conditions were set forth for them to adopt. This is clearly not the case. DEP set forth reasons why "the applicant . . . failed . . . to supply the information required."² DEP went no further.

The proper legal remedy for the Applicant was explained in the May 31 letter, as required by 15 CFR 930.63(e), which provides:

Pursuant to 15 CFR part 930, subpart H, and within 30 days from receipt of this letter, you may request that the Secretary of Commerce override this objection. In order to grant an override request, the Secretary must find that the activity is consistent with the objectives or purposes of the Coastal Zone Management Act, or is necessary in the interest of national security. A copy of the request and supporting information must be sent to the [Name of State] management program and the federal permitting or licensing agency. The Secretary may collect fees from you for administering and processing your request.

¹ Emphasis added.

² 15 CFR 930.63(e).

Therefore, the Applicant's sole legal right was to appeal the May 31 letter.

DEP clearly did not provide "alternative measures," which would have entitled the Applicant to the following rights: "adopt an alternative; abandon the project; or file an appeal under subpart H."³ Those rights are only provided "*if* a State agency proposes an alternative(s) in its objection letter."⁴ Since DEP chose not to propose alternatives, the Applicant was left with two options: abandon the project or file an appeal under subpart H. The Applicant's September 13 letter does not constitute one of those two options and therefore must not be considered. DEP has no legal basis for continuing to consider federal consistency.

B. Due Process: Improper Notice

Even if DEP believes it is entitled to review the Applicant's September 13 letter, DEP must suspend consideration until it allows for a proper comment period. In this instance, DEP has failed to afford COA, ALS, SBB, and other interested members of the public a "reasonable opportunity to submit data, views or arguments" regarding the Application, as required by the New Jersey Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and the federal consistency rules, 15 CFR 930.61. The 15-day comment period was far shorter than the time "necessary to reasonably inform the public, obtain sufficient comment, and develop a decision on the matter."⁵ Moreover, DEP violated the federal consistency regulations by starting the public comment period prior to the receipt of all "necessary data" and "any other information relied upon by the applicant to make its certification."⁶ Similarly, DEP's denials of our requests for extensions were arbitrary, capricious, and unreasonable.

DEP provided notice of its consistency review in the November 21, 2007 DEP Bulletin. The DEP states that written comments should be submitted within 15 days of publication date. However, the DEP provided notice at a point in time when the record for consideration of consistency was not complete. As acknowledged by DEP in several communications between DEP and our and other organizations, the Applicant had not submitted all information that would be considered by November 21, 2007. DEP's acknowledgement was made at a point when it was unclear when the final submission from the Applicant would become available. The final submission became available on the late afternoon of Friday, November 30, 2007. In other words, nine (9) days of the 15 day comment period had passed before the full application for consistency review was even submitted to DEP from the applicant.

Our organizations requested a rescission of the notice or, in the alternative, an extension of the comment period based on this and other facts. At least one other organization made a similar request. Such requests were denied by DEP. DEP's denial letter does not address the full merits of our letter. Instead, DEP's denial states that the current

³ 15 CFR 930.63(d).

⁴ 15 CFR 930.63(d) (emphasis added).

⁵ 15 CFR 930.61(a).

⁶ 15 CFR 930.58-930.61.

consistency review is similar to the previous consistency review with two (2) exceptions, “the scope of the fisheries data” and “various mitigation activities.” In fact, the current consistency review, to the extent that it is appropriate, must address five (5), not two (2), deficiencies in the previous consistency request. Further, the new materials addressing these five (5) issues constitute over 400 pages of materials plus several Excel spreadsheets. In other words, the time necessary to draft comments for this consistency determination is not small as suggested by DEP.

Further, claiming the “pending request is essentially the same” is not an appropriate basis for rejecting a rescission or extension request when part of the basis of the request is that the record was not complete for over half the comment period. At no point were our organizations informed of the nature and extent of the final submission that the Applicant would provide. Nor were our organizations notified of when the Applicant would provide its final submission. This drastically reduced our capability of being able to draft our comments, leaving us with six (6) days to address this serious issue. In reality, by receiving the new submission less than one and a half hours before the end of business on the day before the weekend (i.e., at 3:35 p.m. on Friday, November 30, 2007), our organization were left with four (4) business days. While we have done our best to provide comments in this unreasonably short time period, our review was truncated both in scope and our ability to confer with other interested parties and persons.

DEP acted inappropriately in denying our request for a rescission or extension. Therefore, DEP should suspend consideration of this consistency request and allow for a full comment period. As noted above, we further reserve the right to raise any additional information, issues, concerns, or arguments regarding the Application at any future point in time, including in the context of litigation, due to the prejudicial and inadequate public process employed by DEP.

C. Scope of DEP’s Review

Notwithstanding the above objections to the lack of any apparent basis and the inadequate public process for the Application, we provide the following comments for consideration. First, however, we address the context in which our comments are made.

DEP did not make any findings based on the merits of the application in its May 31, 2007 determination that it could not agree with the Applicant’s assertion of consistency.⁷ If DEP had, then it would have issued its May 31 decision under 15 CFR 930.63(b). DEP did not do this. Instead, DEP’s objection was based “upon a determination that the applicant has failed, following a written State agency request, to supply the information required pursuant to Sec. 930.58 or other information necessary for the State agency to determine consistency.”⁸ Therefore, DEP must not only consider and issue its opinion

⁷ In its May 31, 2007 letter, the Division concluded on page 9: “The Division cannot make a positive consistency determination, as the Division has determined the applicant has failed, following a written State agency request, to supply the information required pursuant to Sec. 930.58 or other information necessary for the State agency to determine consistency.”

⁸ 15 CFR 930.63(c).

based on the five issues addressed in its May 31 letter, but also all issues raised in the Applicant's consistency request materials as they address the substantive enforceable policies within New Jersey's federally approved coastal management program. That is, DEP's review is not limited to the universe of materials submitted after May 31, 2007, as DEP did not consider and rule on previously submitted materials. In the same vein, DEP must now consider all comments currently and previously submitted from interested parties. Accordingly, we resubmit our previous comments for review (attached hereto), the substance, validity, and relevance of which are unchanged by any materials subsequently furnished by the Applicant. Moreover, DEP must consider all previous comments, even if not resubmitted by other organizations and individuals, as they address materials previously submitted by the Applicant that DEP has yet to rule upon.

We note that DEP correctly concurs with this analysis as it stated in its December 3, 2007 letter rejecting our request for a rescission or extension of the comment period. In that letter DEP stated: "Be assured that the file record for this application, *including all comments on the prior application*, will be carefully reviewed by DEP staff prior to any decision on this request."⁹ We resubmit our previous comments for ease of reference.

D. Comments on Issues in DEP's May 31, 2007 Letter

In its May 31, 2007 letter denying consistency, DEP addressed five (5) issues. The Applicant addressed each of these five (5) issues in its September 13 letter. Below, we address each issue separately.

D.1 Aquatic Biota

The Applicant contends that the provided data from Impingement and Entrainment Studies conducted from September 2005 through September 2006 ("Year 1 data") and October 2006 through September 2007 ("Year 2 data") "*suffice to support a positive finding that the proposed license renewal meets the requirements of N.J.A.C 7.7E-8.0 and applicable Basic Coastal Policies.*"¹⁰ The USFWS does not agree and, in addition to several other concerns about plant impacts, the agency recommended an "*expansion of the current biological sampling study to a **minimum of 3 years.***"¹¹ The expansion of the study to a minimum of 3 years was "wholly" supported by the USEPA¹² and specifically cited by the DEP¹³ as one of the many pieces of information needed to make a positive finding of consistency.

⁹ Emphasis added.

¹⁰ Letter of September 13, 2007 from T. Rausch, AmerGen to T. Micai, NJDEP.

¹¹ Department of Interior, USFWS, New Jersey Field Office, Letter to USNCR regarding their review the Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) and to conduct a scoping process for the license renewal of the AmerGen Energy Company, LLC (AmerGen) (applicant) Oyster Creek Nuclear Generating Station. Nov. 23, 2005

¹² USEPA Region 2, Letter to the US NRC, Review of the Draft Generic Environmental Impact Statement for License Renewal of Nuclear Plant, Supplement 28 (draft SEIS): Oyster Creek Nuclear Generating Station (CEQ #20060246), Sept. 7, 2006

¹³ Letter of May 31, 2007 from T. Micai, NJDEP. to T. Rausch, AmerGen

The DEP also found they could “*not arrive at a definitive conclusion concerning the current impacts of impingement associated with OCNGS because recent population data are not available.*”¹⁴ The USFWS also requested this information. Yet, the Applicant chose to ignore the recommendation of these agencies and only conduct a two-year impingement and entrainment study with no population data. Once again, the Applicant failed to provide DEP with the minimum amount of requested data. Therefore, their third attempt to obtain consistency must be denied.

The Applicant also submitted a report entitled “Oyster Creek Generating Station Fishery Data Report” “*as additional support for the Applicant’s conclusion that OCGS does not adversely impact the natural functioning of marine fish in Barnegat Bay...*”¹⁵ The Fishery Data Report reaches this conclusion without providing any new data on actual fish populations in the bay or surrounding habitats, or any analyses (such as population and ecosystem modeling) utilizing the Year 1 and Year 2 data that are necessary to determine the environmental consequences of impingement and entrainment or evaluate the combined losses associated with both impingement and entrainment. The Fishery Data Report does include a regression analysis that was used to extrapolate abundances of certain organisms in Barnegat Bay using historic data and recent impingement and entrainment data (Year 1 and Year 2), “*OCGS impingement monitoring provides reasonable indices of the far-field abundance of many of the most commercially and ecologically important organisms impacted by plant operations,*”¹⁶ and acknowledges the “*relationships are species-specific and may depend upon several uncontrolled environmental factors.*”¹⁷ These perceived relationships rely on historical data and analysis from a 1980-1981 study by Ecological Analysts, Inc. (“EAI”), even though the Fisheries Data Report cites problems with comparing current data to historic data because the raw data and methods used are not available. In a different section of the Fisheries Data Report pertaining to entrainment, the Applicant lists some of the additional environmental factors that impact entrainment rates and are independent of population size including “*changes in weather or water quality in the Bay, a change in the distribution of spawning females or a ‘pulse’ of larvae drifting into the intake area.*”¹⁸ We have already provided substantial comments (which we incorporate by reference) that both refute the scientific validity of extrapolating bay-wide abundance from impingement and entrainment monitoring data and question the scientific quality of the historical data from EAI (please see Section D.6 in our comments originally submitted on March 23, 2007). Serious issues with the analyses used in the EAI studies, as well as a lack of

¹⁴ Letter of May 31, 2007 from T. Micai, NJDEP. to T. Rausch, AmerGen

¹⁵ Letter of November 20, 2007 from M. Gallagher, AmerGen to T. Micai, NJDEP.

¹⁶ Oyster Creek Generating Station Fishery Data Report, November 2007, AmerGen Energy Company, LLC.

¹⁷ Oyster Creek Generating Station Fishery Data Report, November 2007, AmerGen Energy Company, LLC.

¹⁸ Oyster Creek Generating Station Fishery Data Report, November 2007, AmerGen Energy Company, LLC., Sec. 4.1.2

information on how data were collected, have been cited by several scientific organizations, including the NRC¹⁹ and Summers, et al. (1989).²⁰

In addition to these previous concerns, recent documents reveal the Applicant failed to collect current data to quantify several important environmental factors, so they are unable to determine the relative importance of these factors to the rates of Year 1 and 2 impingement/entrainment, resulting in a linear regression is incomplete and inaccurate.

In addition, we question several statements made by the Applicant as part of their recent package of materials to support a finding of consistency with New Jersey's CZMA in regards to aquatic biota.

No Compliance Demonstrated. The Applicant's contends that "[t]he Year 1 and Year 2 data are sufficient for the purpose of demonstrating compliance with the CZMA,"²¹ when in fact, for the third time, the Applicant has failed to provide all the data necessary to determine whether 20 more years of OCNCS operations will be compliant with CZMA including a showing of "minimum interference to the natural functioning of marine fish and fisheries, including the reproductive and migratory patterns of estuarine and marine dependent species of fish and shellfish."

The use of Year 1 and Year 2 impingement and entrainment data are limited to determining compliance with 2004 EPA Phase II 316(b) regulations, but are not adequate to support a positive finding that license renewal meets the requirements of N.J.A.C. 7.7E-8.0 and applicable Basic Coastal Policies. The Year 1 and Year 2 data presented by the Applicant was developed and approved specifically to meet compliance with the 2004 EPA Phase II 316(b) regulations.²² With the promulgation of the 2004 rule, compliance is now based **only** on showing a reduction in impingement and entrainment and no longer requires any additional biological data that would be necessary to assess plant operation's affects to bay-wide fish and shellfish populations. The new Phase II section 316(b) regulations represent a fundamental shift in how the EPA determines compliance, by assuming that achieving a quantifiable reduction in impingement and entrainment will consequently reduce the plant's impacts on the fish and shellfish resources in the affected waterbody, without the need to prove the extent of these changes through the collection of bay-wide population data. In other words, the USEPA is no longer looking at whether the plant is impacting populations, only if the plant is meeting their required reductions in impingement and entrainment. The approved 2005-2007

¹⁹ Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 28 for Oyster Creek Nuclear Generating Station, NUREG-1437, Final Report—Main Report (Jan. 2007), Pages 4-11 through 4-27.

²⁰ Summers, J.K., et al. (1989) Technical Review and Evaluation of Thermal Effects Studies and Cooling Water Intake Structure Demonstration of Impact for the Oyster Creek Nuclear Generating Station. Revised Final Report. Prepared by Versar Inc. for NJ Department of Environmental Protection.

²¹ Oyster Creek Generating Station Fishery Data Report, November 2007, AmerGen Energy Company, LLC

²² EPA 40 CFR, Parts 9, 122 et al. Part II, Pollution Discharge Elimination System – Final Regulation to establish requirements for cooling water intake structures at Phase II existing facilities. Final Rule.

impingement and entrainment study conducted at OCNGS reflects these new compliance requirements and the parameters of the collection efforts and analyses were limited to quantifying the number of organisms impinged and entrained and did not include additional biological sampling of the bay.

In order to develop the population or ecosystem models necessary to analyze the impacts of OCNGS impingement and entrainment (Year 1 and 2 data) on the natural functioning of marine fish in Barnegat Bay (including the reproductive, spawning, and migratory patterns), the Applicant must collect additional data on bay-wide population sizes. These additional data were requested by both the DEP and the USFWS.

In the Final GEIS for OCNGS, the NRC clearly stated population data, not impingement and entrainment data, were necessary to reach a conclusion on impacts of plant operations when they determined:

Because recent population data are not available, the NRC staff cannot arrive at a definitive conclusion concerning the current impact of entrainment associated with OCNGS.²³ [A similar statement was made regarding impingement.²⁴]

Clearly, the Applicant has failed to provide sufficient impingement and entrainment data for the purpose of demonstrating compliance with the CZMA.

Continuing Adverse Impacts. The Applicant contends that “*operation of OCGS continues to not adversely impact the natural function of marine fish in Barnegat Bay, including the reproductive, spawning and migratory patterns or species abundance or diversity*”²⁵.

We have already provided substantive comments that refute this contention as well (please see our comments originally submitted on March 23, 2007). This contention is also in direct conflict with the findings of the USEPA, the USFWS, and NOAA/NMFS.

USEPA – “Nonetheless, this facility's impacts to aquatic ecosystems over the course of its operation have been significant, contrary to the statements in the draft EIS.”²⁶

²³ Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 28 for Oyster Creek Nuclear Generating Station, NUREG-1437, Final Report—Main Report (Jan. 2007), pages 4-16.

²⁴ Id. at 4-23.

²⁵ Letter of September 13, 2007 from T. Rausch, AmerGen to T. Micai, NJDEP.

²⁶ USEPA Region 2, Letter to the US NRC, Review of the Draft Generic Environmental Impact Statement for License Renewal of Nuclear Plant, Supplement 28 (draft SEIS): Oyster Creek Nuclear Generating Station (CEQ #20060246), Sept. 7, 2006.

USFWS - *“The continued operation of the Oyster Creek Nuclear Generating Station poses individual and cumulative impacts on the human environment. The continued use of 1.25 billion gallons of water per day from Barnegat Bay represents an adverse impact to the bay's aquatic biota.”*²⁷

NOAA/NMFS – *“The history of the plant operation, as documented throughout the GEIS, shows that thermal, entrainment, and impingement impacts are directly impacting EFH species and their prey species. These impacts have been well documented and the OCNGS operation continues to have direct and cumulative effects.”*²⁸

Although these federal agencies had to base their conclusions on the available historical data for OCNGS, their conclusions are not likely to change if they had Year 1 and Year 2 impingement and entrainment study results, as the Applicant concluded *“the comparisons in this report of Year 1 and Year 2 data with the historical data also indicate that the previously observed trends are continuing”*²⁹

Assertions Regarding Past and Future Impacts. In reference to the newly released Year 1 and Year 2 data, the Applicant also reported *“consistency with respect to range of data variability, species diversity, and OCGS operational characteristics between historic impingement mortality and entrainment data and the Year 1 [and Year 2 data]”* and the Applicant believes that recent impingement and entrainment data further support the conclusion that *“OCGS’ operation continues to not adversely impact the natural functioning of marine fish in Barnegat Bay.”*³⁰ The two basic components of this conclusion are that OCNGS operations did not cause adverse impacts in the past and will continue to cause no adverse impacts into the future. The support for this conclusion is based on the concept that OCNGS operations have not changed since it began operating in 1969, nor have the number or the species distribution of impinged/entrained organisms changed.

This argument has two fundamental flaws. The first is the conclusion that past OCNGS’ operations have had no adverse impacts on fisheries resources in the bay. Not only is the conclusion wholly unsupported by available data and information, but it is also another example of the Applicant’s failure to accurately identify and analyze the impacts of

²⁷ Department of Interior, USFWS, New Jersey Field Office, Letter to USNCR regarding their review the Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) and to conduct a scoping process for the license renewal of the AmerGen Energy Company, LLC (AmerGen) (applicant) Oyster Creek Nuclear Generating Station. Nov. 23, 2005.

²⁸ NOAA/NMFS, Letter to USNRC, Review of Essential Fish Habitat Consultation within the draft Supplement 28 to NUREG-1437, "Generic Environmental Impact Statement for License.Renewal. of Nuclear Plants" regarding License Renewal of Oyster Creek Nuclear Generating Station (TAC NO. MC7625), Sept. 28, 2006

²⁹ Oyster Creek Generating Station Fishery Data Report, November 2007, AmerGen Energy Company, LLC

³⁰ Oyster Creek Generating Station Fishery Data Report, November 2007, AmerGen Energy Company, LLC

OCNGS' operations for the purpose of determining consistency. As was stated in the above section, several federal agencies do not concur with the Applicant's conclusion that past operations have caused NO adverse impacts. Even the NRC, an agency that continuously sides with the nuclear generating industry, acknowledges some impacts of plant operations are "small." Some of the documented and apparent impacts of past OCNGS operations that have been reported include:

*"Start-up and operation of OCNGS reversed the flow of the South Branch of the Forked River away from Barnegat Bay, changed the salinity of the water and destroyed all of the brackish and fresh water habitat in the lower reach of the Forked River and Oyster Creek. Given these and other significant changes to the aquatic environment and the representative species, the facility's impacts cannot be appropriately described as small."*³¹ These comments were written by the USEPA to challenge the NRC's claim that impacts of OCNGS' operations are "small." The Applicant goes even further than the NRC in concluding OCNGS' operations have NO impact.

*"Oyster Creek, just south of the Forked River drainage area, may have also lost a herring spawning run after a dam was build on the creek in the 1960s for the purpose of storing water for fire fighting capability at the nuclear plant. The proximity of the Forked River to the plant cooling intake structures makes it likely that any egg larvae or young-of-the-year herring originating from Forked River will pass through the plant's cooling system and be killed before entering Barnegat Bay."*³²

*"The GEIS notes that the densities of three benthic invertebrate species studied decreased from 9,000 to 17,000 individuals per square meter in 1969 to less than 500 individuals per square meter in 1973 (a decline of 94.1 to 97.1%). Coincidentally, the OCNGS began operation in December of 1969. It's not inconceivable that the entrainment losses reported for hard clams (112.3 billion annually) occurred for numerous larval organisms (both invertebrates and vertebrates), thereby having significant, albeit undocumented impacts on the bay ecosystem."*³³

The USEPA's recognition of the adverse impact of once-through cooling systems such as the one utilized by OCNGS is the reason for promulgating new Phase II 316(b) regulations in 2004 *"With the implementation of today's final rule, EPA*

³¹ USEPA Region 2, Letter to the US NRC, Review of the Draft Generic Environmental Impact Statement for License Renewal of Nuclear Plant, Supplement 28 (draft SEIS): Oyster Creek Nuclear Generating Station (CEQ #20060246), Sept. 7, 2006.

³² Department of Interior, USFWS, New Jersey Field Office, Letter to USNCR regarding their review the Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) and to conduct a scoping process for the license renewal of the AmerGen Energy Company, LLC (AmerGen) (applicant) Oyster Creek Nuclear Generating Station. Nov. 23, 2005.

³³ NJDEP letter to USNRC reviewing the Oyster Creek Nuclear Generating Station Generic EIS for License Renewal of Nuclear Plants Section written by the Division of Fish and Wildlife, pg 5-10, Sept. 11, 2006.

intends to minimize the adverse environmental impact of cooling water intake structures by reducing the number of aquatic organisms lost as a result of water withdrawals associated with these structures.”³⁴

The second fundamental flaw is the fact that even as OCNGS’ operations and rates/species distributions of impinged/entrained organisms have not changed since 1969, there have been significant, documented changes to the Barnegat Bay system and the fisheries species that utilize it. We have already provided substantial comments outlining these changes as they relate to OCNGS’ operations (please see Sections B.3, C.2, D.2, D.3, D.4, and D.6 in our comments originally submitted on March 23, 2007). In addition, several federal agencies have also recognized the significance of these changes and their importance in determining impacts of OCNGS’ operations on Barnegat Bay’s fisheries resources including:

*USFWS – “Significant population changes have also occurred to several commercial and recreationally important finfish and shellfish species found in Barnegat Bay since the conclusion of the 12-year biological sampling study in 1977. The population of the hard clam (*Merceneria mercenaria*) and winter flounder (*Pseudopleuronectes americanus*) have dropped precipitously and the localized effects of the intake of over 1 billion gallons of water per day on these two species are unknown. In addition, the Atlantic Coast population of the striped bass (*Marone saxatilis*) has risen sharply from the mid-1980s. Striped bass and other marine species are known to utilize the intake and discharge areas of the project, but the extent of their use is unknown.*”³⁵

NOAA/NMFS – “winter flounder mortalities through impingement and entrainment are of greatest concern as the mortalities are relatively high in relation to the population. NMFS is particularly concerned about the OCNGS’s cooling system’s impact on winter flounder because recruitment of winter flounder has been below average since 1989; and the 2001 year class appears to be the smallest in 22 years.”³⁶

NRC - “Because recent population level monitoring data from the estuary are not available, it is not possible for the NRC staff to determine whether the conclusions of Summers et al. (1989) are still valid, though comments received

³⁴ EPA 40 CFR, Parts 9, 122 et al. Part II, Pollution Discharge Elimination System – Final Regulation to establish requirements for cooling water intake structures at Phase II existing facilities. Final Rule.

³⁵ Department of Interior, USFWS, New Jersey Field Office, Letter to USNCR regarding their review the Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) and to conduct a scoping process for the license renewal of the AmerGen Energy Company, LLC (AmerGen) (applicant) Oyster Creek Nuclear Generating Station. Nov. 23, 2005.

³⁶ NOAA/NMFS, Letter to USNRC, Review of Essential Fish Habitat Consultation within the draft Supplement 28 to NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" regarding License Renewal of Oyster Creek Nuclear Generating Station (TAC NO. MC7625), Sept. 28, 2006.

on the draft SEIS contend that the current condition of Barnegat Bay does not resemble the past.”³⁷

It must be noted that despite clear evidence of the decline of the hard clam population in Barnegat Bay and OCNGS’ role in same, the Applicant also failed to count hard clam larvae in their recent entrainment study. Thus, there are no Year 1 and Year 2 data to update the 32-year old data that showed an annual rate of 112.3 billion hard clam larvae entrained.³⁸ This omission is outrageous as the hard clam is critically important to the ecology and economy of the region.

Moreover, the serious concerns outlined above by NMFS and USFWS about the continued high mortality of winter flounder in OCNGS’ once-through cooling system are further justified by Year 2 entrainment data, that estimated 118,820,000 winter flounder were entrained over a 49-week period. In fact, winter flounder were the second most common species entrained in Year 2, comprising 17.34% of the total organisms entrained.³⁹ This consistent, excessive, and ongoing “taking” of winter flounder as a result of OCNGS’ operations is in stark contrast to the experience of the fishing community. Under current regulations, New Jersey’s recreational anglers are now limited to ten fish of 12 inch minimum length and the Atlantic States Marine Fisheries Commission has continually lowered commercial and recreational fishing quotas, citing a precipitous decline in population size and a need to rebuild winter flounder stocks in the Mid-Atlantic and New England region.⁴⁰ The current threat of OCNGS’ operations to the continued success of the region’s winter flounder population is accurately described by the USEPA:

“ The EPA believes that an aquatic population’s potential compensatory ability (the capacity for a species to increase its survival, growth, or reproduction in response to reductions sustained to its overall population size) may be compromised by impingement and entrainment losses in conjunction with all the other stressors encountered within a population’s natural range, as well as impingement and entrainment losses occurring consistently over extended periods of time.”⁴¹

The impacts of such a continuous, and seemingly disproportionate rate of entrainment at OCNGS on the winter flounder population is not fully known at this time and the

³⁷ Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 28 for Oyster Creek Nuclear Generating Station, NUREG-1437, Final Report – Main Report (Jan. 2007), 4.0 Environmental Impacts of Operation, pg. 4-55.

³⁸ Summers, J.K., et al (1989) Technical Review and Evaluation of Thermal Effects Studies and Cooling Water Intake Structure Demonstration of Impact for the Oyster Creek Nuclear Generating Station. Revised Final Report. Prepared by Versar Inc. for NJ Department of Environmental Protection.

³⁹ Oyster Creek Generating Station Fishery Data Report, November 2007, AmerGen Energy Company, LLC, Table 3 and Sec. 4.1.2.

⁴⁰ Atlantic States Marine Fisheries Commission (2005) Amendment 1 to the Interstate Management Plan for Inshore Stocks for Winter Flounder. Fisheries Management Report # 43, available at www.asmf.org

⁴¹ EPA 40 CFR, Parts 9, 122 et al. Part II, Pollution Discharge Elimination System – Final Regulation to establish requirements for cooling water intake structures at Phase II existing facilities. Final Rule.

Applicant has made no attempt to identify or evaluate these potential impacts. In fact, the Applicant has failed to acknowledge any potential role in the decline of the winter flounder population or the crash of the hard clam population in Barnegat Bay. The NRC did recognize the potential impact of entrainment on declining populations in the Final GEIS for OCNCS:

“Recently, the status of winter flounder stocks has been a concern of fisheries management agencies along the eastern seaboard. The southern New England mid-Atlantic stock abundance of winter flounder has continued to decline despite fishery management efforts intended to reverse this trend (ASMFC 2005). If future monitoring efforts demonstrate a similar decline in Barnegat Bay, the ongoing entrainment losses at OCNCS will need to be considered as part of an integrated management program to address this issue.”⁴²

The Year 1 and Year 2 data continue to support our ongoing concerns regarding the substantial number of fish and shellfish eggs, larvae, and adults that become impinged and entrained during OCNCS’ operations. These newly released data reveal a total estimate of 1,370,930,000 organisms entrained and 2,866,373 organisms impinged in Year 1 and 685,300,000 organisms entrained and 2,921,831 organisms impinged in Year 2.⁴³ It is highly unlikely that the already stressed food-web in Barnegat Bay can continue to absorb such astronomical losses. In fact, the most commonly impinged/entrained organisms, including sand shrimp, grass shrimp, blue crab, bay anchovy, Atlantic menhaden, and silversides, make up the base of the Barnegat Bay food web and substantial, annual losses have far-reaching implications on the stability and success of fish populations at higher trophic levels. The USEPA presents extensive information regarding this phenomena in the 2004 Phase II section 316(b) regulations. Below is a small excerpt of a much larger discussion. We have included a direct link to EPA rulemaking document below in footnote 44 and urge the DEP to review this section in its entirety as the as part of their consistency determination process:

“Decreased numbers of aquatic organisms can disrupt aquatic food webs and alter species composition and overall levels of biodiversity. For example, a model that examined the effect of large entrainment losses of forage fish, such as bay anchovy, predicted subsequent reductions in predator populations (including commercially and recreationally important species such as striped bass, weakfish, and blue fish) as high as 25%. This is because forage species, which comprise a majority of entrainment losses at many facilities, are often a primary food source for predator species.”⁴⁴

⁴² Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 28 for Oyster Creek Nuclear Generating Station, NUREG-1437, Final Report – Main Report (Jan. 2007), 4.0 Environmental Impacts of Operation, Pg. 4-16

⁴³ Oyster Creek Generating Station Fishery Data Report, November 2007, AmerGen Energy Company, LLC, Table 3 and 4.

⁴⁴ EPA 40 CFR, Parts 9, 122 et al. Part II, Pollution Discharge Elimination System – Final Regulation to establish requirements for cooling water intake structures at Phase II existing facilities. Final Rule. (<http://www.epa.gov/fedrgstr/EPA-WATER/2004/July/Day-09/w4130a.pdf>)

Underestimation of Substantial Impacts. In reaching the conclusion that Year 1 and Year 2 data support their findings that OCNGS' operation do not adversely impact the functioning of the natural marine fish community in Barnegat Bay, the Applicant completely disregards the importance of the millions of individuals that are most commonly impinged and entrained by OCNGS to the Barnegat Bay food-web. Thus, the Applicant incorrectly and dramatically underestimates the substantial impacts of impingement and entrainment on marine fisheries resources.

The Applicant's failure to accurately analyze the effects of impingement/entrainment on the populations of important commercial fish and shellfish in the Barnegat Bay, or to respond to the criticisms raised by federal resource agencies as noted above, represents another data gap in the material provided to the DEP for determining compliance with the state's enforceable policies on coastal zone management, which makes it impossible for the Applicant to legitimately demonstrate consistency or for DEP to concur.

Finally, there are several important impacts of OCNGS' operations that the Applicant has failed to address or even acknowledge for the third time. Namely, the Applicant fails to address the effects of heat shock/thermal plume and the cumulative impacts of ongoing plant operations on the resources of Barnegat Bay. These impacts have been identified by a number of state and federal agencies, and must be addressed by the Applicant as part of this consistency determination. In fact, the Applicant's decision to ignore these agencies' requests for updated information on these important impacts is inexcusable, as both the USEPA and USFWS letters, cited by the DEP⁴⁵ and provided to the Applicant, include extensive comments and concerns of these two impacts.

Heat Shock/Thermal Plume

In addition to the substantive comments we have already provided and incorporate by reference on the impacts of Heat Shock/Thermal Plume from OCNGS' operations (please see Sections D.2, D.3.1, D.4, and D.7 in our comments originally submitted on March 23, 2007), several state and federal agencies have also raised concerns about the drastic increase in temperature caused by the discharge of heated effluent from OCNGS resulting in significant impacts to water quality and fisheries resources, including reduced spawning and recruitment success, and interference with the movement of fish along migratory finfish pathways in the vicinity of the plant.

USEPA – "Since OCNGS began operation there have been a number of significant fish kills in Oyster Creek and Barnegat Bay due to heat shock. We strongly recommend that new and current studies should be done for representative species. The studies should address the less conspicuous ability of heat to preclude the use of affected areas by temperature sensitive species, attract and expose organisms to areas of elevated temperature during spawning periods, and expose eggs and larvae to water temperatures far exceeding naturally ambient levels."

⁴⁵ Letter of May 31, 2007 from T. Micai, NJDEP. to T. Rausch, AmerGen

USFWS – “*The effect of the discharge of hot water is unknown on recreational sport fish and other aquatic species. In addition, there have been several confirmed large fish kills due to cold water shock from winter plant closings. document these fish kills and discuss the cumulative impacts of these kills in view of the data and available information concerning the aquatic biota that is entrapped on the cooling water intake structures or entrained in the heat dissipation chamber.*”⁴⁶

Although these comments were a response to information in the GEIS for OCNGS re-licensing, they were directed at the Applicant and represent legitimate concerns about the thermal plume’s impacts on New Jersey’s aquatic resources and therefore, must be a part of the DEP’s evaluation of OCNGS consistency with state policy.

Cumulative Impacts

Cumulative impacts have been defined as “*the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions*”⁴⁷ (40 CFR Part 1508.7). The Applicant’s failure to provide any evaluation of the cumulative impacts of past, present, or future OCNGS’ operations has once again undermined the DEP’s ability to evaluate their consistency with New Jersey’s enforceable policies. These critical analyses of cumulative impacts must form the foundation of the DEP’s determination of consistency that would allow the plant to continue operations on the Barnegat Bay for an additional 20-years. We have already provided substantial comments on the importance of identifying and evaluating cumulative impacts of OCNGS’ operations (please see Sections B.3, C.2 in our comments originally submitted on March 23, 2007). The numerous insults to Barnegat Bay have been well documented (please see Section B in our comments originally submitted on March 23, 2007) and continue to threaten water quality and fisheries resources and cause significant impairments. The Applicant claims that they have NO impact on the bay’s water quality and aquatic resources because: a) OCNGS’ operations have continued, unchanged for 38 years, b) the impairments were recognized only recently, and c) some of the other insults are relatively new and substantial. This argument is inaccurate, uninformed, and not supported by many of the federal agencies responsible for protecting water quality and natural resources.

In fact, it is widely held that the opposite is true and that as water quality and fisheries resources of the Bay continue to decline due to the addition of new and increased insults, the capacity of the resources to absorb the continued level of impacts of plant operations is diminished, and the overall effects due to the plant are increased. The

⁴⁶ Department of Interior, USFWS, New Jersey Field Office, Letter to USNCR regarding their review the Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) and to conduct a scoping process for the license renewal of the AmerGen Energy Company, LLC (AmerGen) (applicant) Oyster Creek Nuclear Generating Station. Nov. 23, 2005

⁴⁷ Definition is provided by the Council on Environmental Quality (CEQ)

EPA presents extensive information regarding these phenomena in the 2004 Phase II section 316(b) regulations. Below is a small excerpt of a much larger discussion. We have included a direct link to EPA rulemaking document below in footnote 48 and urge the DEP to review this section in its entirety as part of their consistency determination process:

“[T]he Agency is concerned that to the extent that many of the aquatic organisms subject to the effects of cooling water withdrawals reside in impaired waterbodies, they are potentially more vulnerable to cumulative impacts from an array of physical and chemical anthropogenic stressors.”⁴⁸

The concept was further developed specific to OCNGS’ operations in NRC’s Final GEIS for the plant:

“For two Category 2 issues (entrainment of fish and shellfish in early life stages and impingement of fish and shellfish), the NRC staff determined that the existing once-through cooling system could have a MODERATE impact if species composition and abundance of aquatic organisms in Barnegat Bay have changed substantially from the 1970s and 1980s during which the last studies of the effects of OCNGS operations on bay-wide populations were conducted.” (A similar statement was made regarding impingement).⁴⁹

In order to adequately assess OCNGS’ contribution to the decline in water quality and aquatic resources, the effects of OCNGS’ operations should have been periodically evaluated in the context of all the current environmental conditions that influence the Barnegat Bay. There is no better time to undertake such an exercise than in conjunction with this process of determining consistency with New Jersey’s environmental policy, which may result in continued operation of OCNGS for an additional 20 years. This recommendation is also supported by the USFWS:

“...document the adverse cumulative impacts that are occurring to the bay's aquatic biota from thermal impacts (cold-water shock and heated water, as discussed below) and from entrapment or entrainment from passing through the circulation and dissipation pumps. Without more relevant biological data on species use of the project area, the Service must conclude that cumulative impacts to the environment are more than minimal.” These comments were a response to information in the GEIS for OCNGS relicensing. In fact, in applying for a consistency determination, the Applicant has failed to acknowledge even the NRC’s conservative finding of a minimal cumulative impact and completely disregarded the issue of cumulative impacts.

⁴⁸ EPA 40 CFR, Parts 9, 122 et al. Part II, Pollution Discharge Elimination System – Final Regulation to establish requirements for cooling water intake structures at Phase II existing facilities. Final Rule. (<http://www.epa.gov/fedrgstr/EPA-WATER/2004/July/Day-09/w4130a.pdf>)

⁴⁹ Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 28 for Oyster Creek Nuclear Generating Station, NUREG-1437, Final Report – Main Report, (Jan. 2007) Executive Summary, pg. 21 and 4.23

The Applicant's failure to address or even acknowledge OCNGS's thermal plume and the cumulative impacts of OCNGS's operation to the water quality and fisheries resources of Barnegat Bay represents a substantial data gap in the material provided to the DEP for determining compliance with the CZMA, which makes it impossible for the Applicant to legitimately demonstrate consistency or for DEP to concur.

For all of these reasons and those in our previous comments, DEP must find the proposed activity inconsistent.

D.2 Protection of Endangered and Threatened Sea Turtles

DEP found that it could not make a positive finding of compliance with the Rule on Endangered or Threatened Wildlife or Plant Species Habitats (N.J.A.C. 7:7E-3.38) or Basic Coastal Policy 1 "as the applicant is not in compliance with the federal requirements." It is first worth noting that under this part of the letter, DEP's decision was made pursuant to 15 CFR 930.63(b), as opposed to § 930.63(c). This, however, does not change any of the analysis above that details why an appeal or abandonment of the project are the only remedies available to the Applicant. Section 930.63(b) also provides that DEP "may describe alternative measures." This section is identical to § 930.63(c) and therefore is treated the same. DEP chose not to provide alternative measures, thereby not providing the Applicant with the third possible option under § 930.63(d) of adopting alternative(s). Therefore, the Applicant is only left with the two options of appealing or abandoning the project.

Our discussion under Section C above is also not changed by DEP's treatment of the sea turtles issue. This is the only topic area where DEP indicated that it provided any review on the merits of the Applicant's consistency certification. It is apparent in the May 31 letter that DEP did not address any other issues on the merits, including the many topic areas beyond the five topics addressed in that letter. Further, DEP's previous review of the sea turtle issue was limited in scope, necessitating a complete review of this issue on the merits as well. We again note that these statements are merely written in over precaution as DEP already confirmed in its December 3, 2007 letter to us that it would consider the entire file record, "including all comments on the prior application." Our previous comments address the issue of endangered and threatened sea turtles in greater detail. The comments below address the issues on this topic as they relate to DEP's May 31 letter and the Applicant's response.

In its May 31 letter, DEP denied consistency because "the applicant is not in compliance with the federal requirements." This conclusion was based on the determination in the National Marine Fisheries Service's ("NMFS") September 22, 2005 Biological Opinion ("BO") that the continued operation of the OCNGS "may adversely affect" endangered Kemp's ridley, green, or threatened loggerhead sea turtles. DEP noted that "the continued operation of OCNGS will result in continued 'taking' of endangered and threatened species." These were the sole reasons provided for a finding of inconsistency.

In its September 13 letter, the Applicant responded by citing NMFS's November 21, 2006 BO and agreeing to comply with "**mandatory**" conditions.⁵⁰ The Applicant's limited response is utterly inadequate for several reasons and fails to cure its non-compliance.

First, there are no differences in the conclusions between the September 25, 2005 BO and the November 21, 2006 BO. In both, the NMFS found that the proposed action is not likely to adversely affect endangered leatherback or hawksbill sea turtles. In both, the NMFS found that the continued operation of OCNGS is not likely to jeopardize the continued existence of endangered Kemp's ridley, green, or threatened loggerhead sea turtles. And in both, the NMFS found that the proposed action "may adversely affect" endangered Kemp's ridley, green, or threatened loggerhead sea turtles. DEP's finding of inconsistency was based on this last NMFS conclusion. Nothing changed between the 2005 BO and the 2006 BO. Therefore, there is not a single new basis for DEP to change its conclusion of inconsistency.

Second, even if there was a difference in the BO's, the 2006 BO is explicitly not in effect. In that BO, the NMFS states that "[a]t the time NRC renews the license for OCNGS, NMFS will consider the September 22, 2005 Biological Opinion and ITS withdrawn and this Biological Opinion and ITS will become effective."⁵¹ Therefore, DEP properly relied on the 2005 BO in its May 31 letter. The 2006 BO was available for DEP to rely on, but DEP did not. The Applicant inappropriately relied on the 2006 BO in its September 13 letter. It is not apparent why the Applicant took this action as the 2006 BO changes nothing, as already noted.

Finally, the Applicant's commitment to comply with mandatory conditions does not remedy the failed consistency determination on this issue. Those are mandatory conditions. Both the 2005 and 2006 BO contain the mandatory terms and conditions. DEP denied consistency even with the existence of the mandatory conditions in the 2005 BO. Therefore, the Applicant's commitment to follow the mandatory conditions in the 2006 BO does not change anything.

When DEP denied consistency this year, the Applicant was already complying with mandatory conditions. So, by agreeing on September 13, 2007 to follow mandatory conditions, the Applicant was committing to the status quo. The status quo was insufficient on May 31, 2007 and remains insufficient today. By now explicitly agreeing to follow the law, the Applicant has not cured any previous deficiency. The Applicant has failed to note a single change that justifies a reversal of DEP's conclusion.

DEP found it could not make a finding of consistency because there may be adverse affects even with the mandatory conditions. Language in the BO's themselves reflect the conclusion that the mandatory conditions will not eliminate the potential for adverse

⁵⁰ Emphasis added.

⁵¹ Letter from Patricia Kurkul, Regional Administrator, Northeast Region, National Marine Fisheries Service, to Frank Gillespie, Director, Division of License Renewal, Office of Nuclear Regulatory Program, U.S. Nuclear Regulatory Commission at 2 (Nov. 21, 2006) (on file with Clean Ocean Action).

affects.⁵² Instead, the Applicant's opportunity to cure its non-compliance is to undertake additional measures. Both BO's specifically provide non-mandatory "conservation measures." "Conservation Recommendations are discretionary agency activities to minimize or *avoid adverse effects* of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information."⁵³ The Applicant was provided with these written measures that could help it achieve compliance. The Applicant could also have suggested other measures that would help it achieve compliance. The Applicant did neither. Instead, the Applicant committed to following mandatory conditions, committing to the status quo. The Applicant has provided nothing new for DEP to consider. Therefore, DEP must uphold its finding of inconsistency for non-compliance.

D.3 NJPDES Permit

In its May 31 letter, DEP stated that "[s]hould the applicant submit a future determination request, the applicant will need to demonstrate compliance with any current or reissued NJPDES permit" (NJPDES Permit No. NJ0005550). The applicant has submitted a future determination request. Therefore, the Applicant must demonstrate compliance with any current or reissued NJPDES permit. Other than quoting DEP's letter, the Applicant's sole response on this issue is: "As noted above, we understand that DEP will consider the IM&E studies in its future NJPDES permit decisions." This does not satisfy the Applicant's obligation to demonstrate compliance. Furthermore, our attached comments from the previous review (which we incorporate by reference) specifically address why the status of the Applicant's NJPDES permit makes the Applicant fail consistency review at this point in time.

D.4 Public Access

DEP could not make a consistency finding under the Waterfront Rule (N.J.A.C. 7:7E-8.11) or Basic Coastal Policy 5 because the Applicant did not submit any Public Access plans. The Applicant responded by submitting a plan to donate to Lacey Township approximately 220 acres of the Finninger Farm property and improve an undeveloped section of the Finninger Farm. The description of the proposed donation makes no mention of securing the project with a conservation easement, as required to provide public open space and public access in perpetuity. If the public isn't given a conservation easement, the public has no rights as open space and public access is subject to the

⁵² "NMFS has determined that the proposed action of renewing the operating license for the OCGNS and the measuring, holding and transfer of sea turtles as required by the Incidental Take Statement and the two actions together are not likely to jeopardize the continued existence of any threatened or endangered species." Endangered Species Act Section 7 Consultation, Biological Opinion, NOAA's National Marine Fisheries Service Northeast Regional Office, 49 (Nov. 22, 2006). Taking these steps, which would include AmerGen complying with the mandatory terms and conditions, would result in no likely jeopardy to the continued existence of any threatened or endangered species. However, the NMFS does not state that complying with the mandatory terms and conditions will eliminate the remaining threat of adverse affects. Adverse affects, not jeopardizing existence, was the basis of the Division's conclusion of inconsistency.

⁵³ Endangered Species Act Section 7 Consultation, Biological Opinion, NOAA's National Marine Fisheries Service Northeast Regional Office, 54 (Nov. 22, 2006) (emphasis added).

development interests of the town. Further, the Applicant proposes to retain rights to utilize the property for commercial uses in association with the OCNGS (e.g. overflow parking), diminishing the public use and nature of the donation. Finally, the Applicant has not committed to certifying that the donated land will be clean and free of contamination. For these reasons, the Applicant's submission is inadequate for establishing consistency.

D.5 Maintenance and Upgrade of Facility

DEP also found that the Applicant did not provide sufficient information to demonstrate compliance with Basic Coastal Policy 5, which states: "Maintain and upgrade existing facilities, and site additional energy facilities in a manner consistent with the rules of this Coastal Management Program." DEP concluded in its May 31 letter that the Applicant "failed to discuss upgrades to the plant to ameliorate its impacts since its construction, except for the Ristroph traveling screens."

The Applicant's September 13 letter listed several additional improvements made to the facility such as replacing its fire water pump diesel and replacing the emergency service water/underground piping. The improvements listed are more reflective of maintenance improvements as opposed to upgrades, which is what DEP found lacking. Basic Coastal Policy 5, especially when read in the context of the other Policies, reflects a goal of achieving advancements and progress. Engaging in bare minimum maintenance does not reflect achievement of Policy 5. For example, constructing a closed-loop cooling system would reflect an upgrade that advances OCNGS towards being a modern facility that greatly reduces its impact to the coastal environment. The Basic Coastal Policies are meant to improve the coastal environment, not make sure facilities such as OCNGS don't fall apart. The Applicant's responses to this section still do not constitute sufficient information to demonstrate compliance.

E. Mitigation Measures

The Applicant's November 30, 2007 letter to Commissioner Lisa P. Jackson states, "In connection with the above referenced matters pending before the New Jersey Department of Environmental Protection, the Applicant commits to the following environmental projects." Descriptions of projects then follow. However, nowhere in the letter is there any description or submittal that the "commitments" are responsive to any regulatory requirements or requirement of law governing DEP's consideration of the Applicant's Federal Consistency Request or the pending NJPDES Permit for OCNGS. The Applicant does state that its commitment to undertaking the described "environmental projects" are contingent on OCNGS receiving a positive consistency determination, on the US Nuclear Regulatory Commission (NRC) granting OCNGS a renewed license, and on OCNGS' continued operation.

The correspondence in no way communicates to the public the genesis of the proposed environmental projects, what harms created by the past, current, or continued operation of OCNGS during the proposed 20 year license period they are intended to address or be

responsive to, or any demonstration, assertion, or conclusion as to how they are sufficient in any intended response to any harm or regulatory compliance requirements. There is absolutely no assertion that these projects are intended to make the re-licensing either consistent with the May 31, 2007 Federal Consistency Determination by DEP or the requirements of the NJPDES program, despite the letter's assertion that the project "commitments" are made in "connection" with those matters. Absent such information there is no way either DEP or the public can reasonably determine the adequacy, appropriateness, or necessity of the "environmental projects" particularly as regards any outstanding regulatory obligations carried by the Applicant or obligations on the part of DEP to protect the public trust and public trust resources under their jurisdiction.

The exception to these infirmities is with the reference to the proposed donation of property within Lacey Township in the closing paragraph, which we addressed in Section D4 above.

If it is the Applicant's position, or that of DEP, that these projects are intended to be responsive to some currently unidentified regulatory requirement or current, past, or future harm caused by OCNGS, then the specifics of such should be clearly articulated for the public, and allow public comment on the sufficiency and appropriateness of the measures

While we object to the review of these projects for the reasons just listed, it is worth noting specific deficiencies of these projects. First, the projects are unaccompanied by any thorough analysis that can demonstrate consistency, as discussed in Section E3 below. Additionally, there are other issues associated with the projects, as discussed in Sections E1-E2 below, that undermine the implicit suggestion that these projects will correct the environmental impacts created by OCNGS.

E.1 Tidal Wetlands Restoration

Comments by the United States Fish and Wildlife Service on the NRC GEIS in 2005 in discussing potential mitigation projects associated with OCNGS stated, "The proximity of the Forked River to the plant cooling intake structures makes it likely that any egg larvae or young-of-the-year herring originating from Forked River will pass through the plant's cooling system and be killed before entering Barnegat Bay." To the extent that the tidal marsh restoration projects described in the November 30, 2007 letter are intended to address fisheries impacts related to OCNGS (as was DEP's position on other nuclear plant relicensing decisions), these would appear to be severely compromised by the location of the projects – even leaving aside the question of potential fish productivity of the "establishment of desirable marsh species."

E.2 Hard-Clam Bed Restoration

The area identified for establishment of the hard-clam restoration project contains one of the highest remaining concentrations of submerged aquatic vegetation ("SAV"), which would be potentially negatively affected by large-scale placement of material.

E.3 Mitigation, Compensation, and Restoration

It is our belief that the only manner in which OCNGS may begin to demonstrate consistency with New Jersey's enforceable coastal zone management policies, particularly those regarding marine fisheries resources and habitats, is through the construction of a closed-loop cooling system. Even with the use of this best available technology, there may be residual environmental harm, and there clearly has been tremendous cumulative damage to the ecosystem of Barnegat Bay throughout the overly long operating history of OCNGS. Given this, demonstrating consistency with the Federal Coastal Zone Management Regulations and Enforceable Rules under New Jersey's Coastal Management Program, particularly *Policy 1: To Protect and Enhance the coastal ecosystem*, may require some form of estuarine enhancement in addition to the closed-loop cooling system. As discussed in DEP's May 31 letter, "Basic coastal polices 1 and 4 require consideration of the need to protect and enhance all of the coastal ecosystem components . . . and consideration of the need by the general public, as recreational fishermen, to maintain harvestable marine and estuarine fish and invertebrate populations." The Applicant has not demonstrated consistency with this policy.

Demonstrating consistency with this policy must be supported by empirical data and quantification of impacts and injury, identification of the components of the Barnegat Bay ecosystem that produce the species loss, identification of the suitable habitat restoration alternatives related to the species loss, quantification of the productive capacity of Barnegat Bay habitats, scaling of the restoration alternatives to be considered to insure that they are adequate to address the level harm created by OCNGS, and the development of directly related costs for undertaking restoration sufficient to offset losses as well as historic degradation. The result of such an analysis must guide the selection of any appropriate mitigation, enhancement, or restoration projects: the remedy must equal or exceed the harm. To fail to do so would violate the fundamental tenants of Policy 1 and 4: if the harm created by OCNGS continues to exceed the practical, real contribution of any compensatory project, it will fail to "protect . . . all of the coastal ecosystem components" because continuing degradation will persist. If the historic and cumulative harm created by OCNGS is not remedied, there can be no "enhancement . . . of the coastal ecosystem" because the estuary will continue to exist in a diminished state as a result of the harms created by OCNGS.

F. Conclusion

As originally discussed, DEP should not even undertake a consistency review. The only appropriate actions after DEP's May 31, 2007 letter were for the Applicant to file an appeal or abandon the project. If DEP does undertake consistency review, it should first re-open the comment period to allow for a full 15 days with a complete record, at a minimum. Finally, if DEP does undertake review at this point in time, it must deny federal consistency for the reasons both above and in our previous comments.

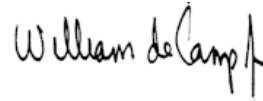
Sincerely,



Cindy Zipf
Clean Ocean Action
Executive Director



Tim Dillingham
American Littoral Society
Executive Director



William deCamp, Jr.
Save Barnegat Bay
President



Jennifer Samson, Ph.D.
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