VIA EMAIL

August 23, 2023

Governor Kathy Hochul
Attorney General Letitia James
Chair and CEO Director Rory Christian, Public Service Commission
Commissioner Basil Seggos, Department of Environmental Conservation
Commissioner James V. McDonald, M.D., Department of Health
Thomas Congdon, Department of Public Service, Chair, Indian Point Decommissioning Oversight Board

Dear Governor Hochul, Attorney General James, Chair Christian, Commissioner Seggos, Commissioner McDonald, and Chair Congdon:

We commend Governor Hochul for her environmental leadership in signing into law a ban on any radioactive wastewater discharges into the Hudson River from the Indian Point (IP) nuclear reactors. While this law is an important step, more needs to be done to prevent the degradation of the Hudson River, address any pollution from past releases and meaningfully involve the public in the decision-making process.

The undersigned write to inform you of new information that supports the State's right to ban these discharges under the federal Clean Water Act and to urge you to use this existing authority to establish an environmentally responsible waste management process. A State plan is needed to determine the best on-site storage method for the IP polluted wastewater from the reactors and spent fuel rod pools to isolate it from the environment. Of equal importance, a full investigation is needed to explore whether there is any past pollution of the Hudson River ecosystem from over 60 years of nuclear power plant operations; and to compare the test results with a newly discovered Department of Health (DOH) 1958 baseline ecosystem study. It is critical that there be meaningful public involvement throughout these procedures.

We represent elected officials; national, state and regional organizations; health, environmental justice, legal, civic, faith and community leaders. This letter describes many important environmental, health, jurisdictional, legal, good government practices, and "Right to Know" reasons for our requests. For each issue, we have included extremely important requests for action on this public health and environmental hazard to establish a judicious and environmentally sound process.

1) Meetings Critically Needed to Develop a Fair, Judicious and Environmentally Sound Process, with Public Input and Independent Experts

Since Hudson River communities and the river's ecosystem are at substantial risk from the proposed discharge of radioactive wastewater, and since over 440,000 people, 35 municipalities and over 200 organizations are strongly opposed to the discharge, it is incumbent on the state to hold a series of meetings to discuss all the recommendations embodied in this letter. We request that the meetings be held between a core of representative organizations and elected officials from among the letter signatories and representatives from the Governor, Attorney General and the Departments of Environment Conservation, Health and Public Service (DEC, DOH, DPS). We request the meetings include full public input on the meeting agendas, and presentations by select members of our groups and elected officials. These meetings are critical from a good government and public participation perspective. The Decommissioning Oversight Board (DOB) meetings have not provided meaningful public participation on the wastewater and off-site testing.

2) Comprehensive Testing is Needed to Ascertain Toxic & Radioactive Components of the Wastewater

There is a high level of public distrust due to past "self-regulation" practices whereby former owner Entergy and Holtec have conducted their own testing. The impacted and concerned public has also had substantial problems with obtaining past test results in a format and style that is easy to understand and compares such results with existing state and federal standards, in the same measurement units.

At the last DOB meeting—before the Governor signed the ban discharge bill into law—a DOH official stated that the agency would conduct tests of the wastewater a few weeks before the first proposed discharge and the results would take around two weeks. Then they stated that the results will not include strontium-90 since it takes approximately 3 months for test results to be received. It was an outrageous statement as the amount of this radionuclide would not be known until 3 months *after* it was supposed to be dumped into the Hudson River. Clearly, this proposal is unacceptable and the antithesis of the DOH's mission and state and federal water policies.

Moreover, the June 2023 Memorandum of Understanding on wastewater testing between Holtec and the state was finalized without any input from the public, including community and environmental organizations and independent experts. A responsible and comprehensive wastewater investigative testing plan needs to be conducted, starting with the release of a draft testing work plan for the IP wastewater. It should include testing for all possible radionuclides and toxic chemicals, including those found in the Pilgrim nuclear facility's wastewater test results in May 2023. Holtec should be responsible for funding the sampling, however, it is critical that the testing be done independently by the DEC and DOH, with full public input and oversight. The draft plan should have a 30-day public comment period, a public meeting to discuss the submitted comments, and a responsiveness summary detailing a response to each public comment, before the issuance of the final plan. Please see *Appendix A* for detailed recommendations.

3) Comprehensive Ecosystem Testing Needed to Investigate Impact of Past Discharges to the Hudson River and to Compare with the 1958 Department of Health Baseline Survey

After over sixty years of discharges from Indian Point's three reactors, it is incumbent on the state and federal agencies to require comprehensive off-site ecosystem testing for both radionuclides and toxic chemicals. These federal and state procedures, known as the "remedial investigation" phase under the State and Federal Superfund and Brownfield Cleanup Programs, are standard practices, as well as for proposed storage facility permits of toxic or radiologically contaminated waste. This type of testing is also based on the "Right-to-Know" principle embodied in federal and state policy.

A) Newly Uncovered 1958 Hudson River Baseline Survey Conducted by DOH Bureau of Radiological Health Services & Subsequent Annual Reports of Ecosystem Test Results

A 1962 *Journal of Public Health* article by DOH officials describe a baseline survey conducted that the DOH initiated before the reactor started operating, which was done in cooperation with "federal agencies, local health departments, and Consolidated Edison." This "comprehensive preoperational survey of natural background radiation surrounding the site" covered a 20-mile radius.

"The results provide a baseline which can be used to determine how much radioactivity, if any, is added by the reactor plant. Samples of water, vegetation, soil, rabbit thyroid, fish, plankton and bottom mud were routinely collected and analyzed. Fallout bucket stations were maintained. A background gamma survey was made by helicopter. By 1959, the survey report was published." In addition, at this time, a survey of milk, water, and food processing points was made within a 20-mile radius of the reactor site. The article reported that "After discussions, a monitoring program was agreed upon. In August, 1961, Consolidated Edison received its permit. Soon, plans were set to begin a continuing radiological sampling program."

B) Comprehensive Testing Needed for the Hudson River Ecosystem Today

It is our understanding that over the years, the DOH passed on the testing responsibility to the companies that owned the reactors, who clearly have a financial conflict of interest. Therefore, it is incumbent on the DOH and DEC to conduct a comprehensive off-site ecosystem monitoring investigation as soon as possible to compare it with the 1958 baseline survey report.

The investigative process should begin with the release of a draft Investigation Work Plan on testing the river sediment at the discharge points and outwards, and the baseline survey testing of water, vegetation including private, school and community vegetable and fruit gardens, soil, rabbit thyroid, fish, plankton and bottom mud, other biota, such as deer, otter and other wildlife, and the milk of cows at all the dairy farms within a 20-mile radius. The testing should include

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analysis of all possible radionuclides and toxic chemicals. It is also important that the Work Plan is based on the goal of conducting analyses that are of high quality, comprehensive and transparent. For instance, fish sampling should not be "averaged" and test results for each fish in each category should be listed separately. Historical reports from the companies operating the reactors, the NRC, DOH and DEC should be reviewed to inform the Work Plan, including the DOH's annual ecosystem monitoring reports of testing conducted in reactor communities. The draft Work Plan should have a 30-day public comment period, a public meeting to discuss the submitted comments, and a responsiveness summary detailing a response to each public comment.

The final draft report of the ecosystem monitoring test results should include a full environmental and health hazard assessment of each of the pollutants found, including any possible synergistic impacts and any studies finding emerging hazards. For instance, science tells us that tritium poses a significant health and environmental hazard due to its radiological properties, as it is a carcinogen, mutagen, and teratogen, and when organically bound it can bioaccumulate in fish, wildlife, biota and humans.² Science also tells us that an exposure to a carcinogen increases the risk of developing cancer, or as stated by the DOH, "every exposure, no matter how low, to a cancer-causing compound is assumed to be associated with some increased risk. As the dose of a carcinogen decreases, the chance of developing cancer decreases, but each exposure is accompanied by some increased risk."³There are many radioactive isotopes that need to be tested, one of which is Krypton-85 is a radioactive isotope which may cause cancer, thyroid disease, liver or kidney disorder.⁴ A scientific study found krypton-85 from nuclear fission interferes with the atmospheric-electrical system ... "There may be a krypton-specific greenhouse effect and a collapse of the natural atmospheric-electrical field ... human well-being may be expected to be impaired ..." Other toxic chemicals must be included in testing, such as per- and polyfluoroalkyl substances (PFAS), PFOA (perfluorooctanoic acid) and PFOS (perfluorooctane sulfonic acid) which are toxic, highly persistent and bioaccumulative. The Environmental Protection Agency (EPA) released a health advisory stating that there is no safe level of exposure to PFAS, known as "forever chemicals."

The final draft report should have a 90-day public comment period, public meetings to discuss the submitted comments, and a responsiveness summary detailing a response to each public comment.

4) New York State Can Ban Discharges Under the Clean Water Act Antidegradation Part 131 Provision; Supported by Federal & State Designation of Hudson River as a Precious Waterway and President Biden's Executive Order

The NRC acceptance of Holtec's proposal to discharge polluted wastewater was irresponsible and an insult to the residents of the Hudson River, the State, and federal and state environmental protection laws. The time is long overdue for the state to lead a wastewater management process with full public input and the assistance of independent experts to review on-site storage options in a responsible, judicious, and prudent way.

A) State Rights Under the Clean Water Act Part 131 on Antidegradation

Charles Openchowski, former senior attorney in the EPA's Office of General Counsel, wrote a seminal article this year, *The Oak Ridge Cleanup: Protecting the Public or the Polluter?* The article revealed that states are not preempted by the Atomic Energy Act in relation to two key provisions of the Clean Water Act.

"...the carve-out in the definition of "pollutant" in 40 C.F.R. §122.2 for certain Atomic Energy Act-regulated radionuclides is explicitly limited in application to only 40 C.F.R. Parts 122, 123, and 124. The plain language of EPA's regulations does not extend this carve-out to other CWA regulations, such as 40 C.F.R. Part

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² Dr. Gordon Edwards, *Health Dangers of Tritium Emissions*, https://ccnr.org/tritium_1.html; Alan Williams, University of Plymouth, Scientists call for coordinated global effort to assess the full environmental impacts of tritium. 4/4/2023, https://phys.org/news/2023-04-scientists-global-effort-full-environmental.html; Dr. Ian Fairlie, The Hazards of Tritium, 3/13/2020, https://mail.google.com/mail/u/0/#search/valeria%40dtesq.com/WhctKKXwxrWnWgjDdjGskgkhSrJCmcVmHdSwSlKTKMXCHXwwtdHSCNdFlTmnJVfnMjKXskQ?projector=1&messagePartId=0.1; and Makhijani, Arjun, "Exploring Tritium Dangers: Health and Ecosystem Risks of Internally Incorporated Radionuclides", IIER Resource Books, 2023. Exploring-Tritum-Dangers.pdf (ieer.org).

³ Hopewell Precision Area Contamination, Appendix C - NYS DOH Procedure for Evaluating Potential Health Risks for Contaminants of Concern, Hopewell Precision Area Contamination (ny.gov)

⁴ https://www.environmentalpollutioncenters.org/krypton-85/

⁵ Climate risks by radioactive krypton-85 from nuclear fission Atmospheric-electrical and air-chemical effects of ionizing radiation in the atmosphere. (1994). <a href="http://inis.iaea.org/search

⁶ EPA 2022, <u>2022 EPA Health Advisory Levels for Four PFAS (wa.gov)</u>

125 (which addresses TBELs) [Technology-based effluent limitations] and Part 131 (which includes water quality standards, use designation, and antidegradation provisions)."⁷

Part 131 of the CWA states:

- "§ 131.12 Antidegradation policy and implementation methods.
 - (a) The State shall develop and adopt a statewide antidegradation policy.
- ... (3) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected."

The Hudson River has been recognized by both Congress and New York State as an outstanding national resource and waterway of exceptional ecological and recreational significance. The **Hudson River Valley National Heritage Area** was designated by Congress to recognize the importance of the history and the natural resources of the Hudson River Valley to the nation. The area includes 250 communities in ten counties bordering the Hudson River for 154 miles of tidal estuary. One of the goals of the Hudson River Valley National Heritage Area Management Plan is to "safeguard and enhance the Hudson River Valley's natural and cultural heritage through conservation of its nationally significant resources."

To protect this exceptional waterway, the **Hudson River Estuary Management Act** was established by state law in 1987. The Hudson River estuary incorporates over 2,000 acres of tidal freshwater wetlands and many more acres of brackish tidal wetlands. The Hudson River Estuary Management Advisory Committee has issued a 2021-2025 Action Agenda which includes the following goals: a vital river ecosystem with sustainable estuarine fisheries, robust river habitats and clean Hudson River water; and a thriving and resilient watershed with healthy tributaries, climate-adaptive communities, and conserved natural areas for wildlife, source water, climate resilience, and scenery. In addition, DEC's designated uses for the Hudson River generally range from **Class AA to Class C** for use as a source of water supply for drinking, culinary or food processing purposes; primary and secondary contact recreation; and suitable for fish, shellfish and wildlife propagation and survival.

Furthermore, Attorney Openchowski goes on to cite the intent of the CWA according to two Congressional legislative history reports. The CWA citations clearly support the actions of New York State, an EPA-delegated CWA state, to ban the wastewater discharge from Indian Point into the Hudson River since Holtec would be specifically using the river as a waste treatment system, not only by the discharge but also by using the river water to dilute the wastewater.

..."The RA Decision also pointed out that "[t]he CWA Legislative History at 1425 (Senate Report) states: '(t)he use of any river, lake, stream or ocean as a waste treatment system is unacceptable' regardless of the measurable impact of the waste on the body of water in question," and the CWA Conference Report states that the Act "specifically bans pollution dilution as an alternative to waste treatment." Id. 16

For more information on this important article, the DEC's Antidegradation policy, Hudson River designated uses and the Hudson River federal and state laws, please see *Appendix B*.

¹² Section 11-0306 of the Environmental Conservation Law.

⁷ The Oak Ridge Cleanup: Protecting the Public or the Polluter? Pg. 9, Charles Openchowski, a retired senior attorney in the Office of General Counsel of the U.S. Environmental Protection Agency. Copyright © 2023 Environmental Law Institute®, Washington, DC. Reprinted with permission from ELR®, http://www.eli.org

⁸ https://www.ecfr.gov/current/title-40/chapter-I/subchapter-D/part-131/subpart-B/section-131.12#p-131.12(a)(2)

⁹ Congress designated the Hudson River Valley National Heritage Area in Title IX of Public Law 104-333 (1996), as amended by Section 324 of Public Law 105-83 (1997).

¹⁰ Hudson River Valley National Heritage Area | Hudson River Valley Greenway (ny.gov)

¹¹ Ibid.

¹³ Hudson River Valley National Heritage Area | Hudson River Valley Greenway (ny.gov)

¹⁴ https://www.dec.ny.gov/lands/5104.html

¹⁵ Part 701 Classifications--Surface Waters and Groundwaters

¹⁶ The Oak Ridge Cleanup: Protecting the Public or the Polluter? Pg. 3, Charles Openchowski, a retired senior attorney in the Office of General Counsel of the U.S. Environmental Protection Agency. Copyright © 2023 Environmental Law Institute®, Washington, DC. Reprinted with permission from ELR®, http://www.eli.org

B) New York State is an NRC Agreement State and EPA delegated state. It has the authority to ban the discharge under the CWA antidegradation provision. These federal agencies delegated their regulatory authority to DEC. An agreement between the U.S. Atomic Energy Commission (precursor to the NRC) and the State of New York was signed in 1962. According to federal regulations, the NRC is authorized to enter into such agreements with the Governor of any State providing for the discontinuance of the NRC's regulatory authority and the delegation of that authority to a State to regulate materials "for the protection of the public health and safety from radiation hazards." The DEC has also been delegated by the EPA to implement the CWA National Pollutant Discharge Elimination System. DEC implements the NPDES program through Article 17, Title 8 of the Environmental Conservation Law, with the SPDES program, and through its antidegradation policy and many other policies and programs. State law specifically empowers the DEC with the authority to regulate "pollutants" and the definition includes "radioactive materials" (Article 17, Title 1-0105).

Additionally, the NRC acceptance of Holtec's plan to discharge the polluted water can be reopened, and New York State can assert its authority to rescind the approval and ban the discharge, in accordance with **President Biden's 2021 Executive Order** (EO). ¹⁹ For more information, please see *Appendix C*. The EO requires all executive departments and federal agencies to advance environmental justice by specifically reviewing all their decisions during the last 4 years under the Trump administration and take action to remedy any such decisions if they conflict with the following national objectives.

"It is, therefore, the policy of my Administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals."

Such actions would also be in accordance with the State's recent **Disadvantaged Community designation of the communities surrounding Indian Point**, including Peekskill, Buchanan and Montrose in Westchester County; Haverstraw and West Haverstraw in Rockland County; and Esopus in Ulster County.²¹ These areas have unfair environmental burdens and socioeconomic factors. For instance, Courtney Williams resides in a Peekskill census tract with an environmental burden that is higher than 98% of the census tracts in the state.

5) Establish a State-Led Wastewater On-Site Storage Management Process, with Public Input

The process to determine the management of the radioactive and toxic wastewater from a closed non-operating, private nuclear power reactor is precedent setting, not only for New York State but for the nation. Future generations will have to live with the decisions that will be made. It is incumbent on the State to establish a judicious and fair process to store the wastewater on-site so that it is isolated from the environment and best protects the river's ecosystem, communities, and the economic, societal, health and environment of the Hudson River region. Public participation is a cornerstone of any government remediation or waste management program. Concerned citizens, policymakers and organizations have complaints, questions, and requests for information that have not been adequately addressed, nor have they been an integral part of the so-called wastewater management process to date. Good government practices require meaningful public involvement, comprehensive public information that is readily available, and regular opportunities to have two-way communications with government decision-makers. (See DEC Part 375 public participation requirements for Brownfield sites).

¹⁷ Memorandum of Agreement between the U.S. Atomic Energy Commission and the State of New York, 10/15/1962, https://www.nrc.gov/cdn/nmss/pdf/nyagreements.pdf

¹⁸ 42 U.S. Code § 2021 - Cooperation with States, https://www.law.cornell.edu/uscode/text/42/2021

¹⁹ Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, White House (Jan. 20, 2021)

 $[\]underline{\text{https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/}$

²⁰ Ibid.

²¹ DEC, March 2023, https://climate.ny.gov/resources/disadvantaged-communities-criteria/

The State of New York can and should establish a responsible state-led administrative process to develop an on-site waste management plan with full public input, based on state standards. There are many outstanding issues surrounding the storage of polluted wastewater, and a critical need for a contemplative government and public process. The following are just a few of the important issues that should be addressed.

- ➤ Work with the EPA to assess the impact on the Federal Superfund Hudson River ongoing five-year permanent remedy review process, and its ongoing lower Hudson River PCB investigation.
- Design a protective and effective on-site storage facility. Many organizations that have worked on nuclear waste pollution for decades have determined that above ground monitored, and retrievable storage is the best way to isolate the waste from the environment. The design of such a facility should be engineered to immediately repair any container leakage. Thus, the facility must be above ground with monitoring and retrievability components. Each container would have several monitoring sensors attached to it, so the operators can be immediately alerted if it starts to leak. When this occurs, a robotic device would be used to pull out the leaking container, repackage it, and place it back in the container.
- ▶ Review facilities with ongoing nuclear waste storage facilities and studies. For instance, Dr. Gordon Edwards is an expert on Canadian nuclear waste storage and treatment and recommends tritium wastewater should be stored in sealed drums to prevent evaporation and placed in a storage building. For instance, a 2008 state-funded independent scientific study recommended the following storage and management plan for the high-level nuclear wastewater at the West Valley site, located 30 miles south of Buffalo.

"The most significant contamination in the HLW [high level waste] tanks is expected to be in the residual liquid in the bottom of tanks 8D-1 and 8D-2, holding 14,000 and 5,000 gallons of high level waste, respectively, and in filters designed to capture radionuclides and remove excess liquid from wastes. The filters, estimated to hold 94,000 curies of cesium-137,115 would be flushed out; the flushing liquid would be mixed into cement to form a Class C radioactive solid waste. The tank contents would be flushed and solidified with grout. These solids, as well as the demolished tank shells, would be transferred into 55-gallon drums ..."²²

We urge the State to enforce the ban on the discharge, conduct wastewater testing, complete a comprehensive ecosystem investigation, and implement a wastewater management process to safeguard the Hudson River, the public health, and the economics and environment of the surrounding affected communities. The State's wastewater management plan and a remediation plan to clean up any pollution discovered during the investigation, should be conducted with full public input, and fully explore various storage facility designs. The State must utilize the Commissioner's Policy 29²³ which provides environmental justice communities with an enhanced public participation plan. The Plan should include the creation of a *Hudson River Advisory Group* composed of residents, elected officials, and environmental, environmental justice, health, and civic group representatives. The Plan should also include an *Expert Advisory Group* composed of an interdisciplinary team of specialists put forth by the public, including independent scientists, medical doctors, geologists, hydrogeologists, statisticians, and nuclear energy engineers without any conflicts of interest.

6) Follow State Standards on Air, Water, Soil, Sediment & Wildlife Pollution

The wastewater final management decision, and any needed remediation, should follow state statutory and regulatory standards that are fully protective of human health, and the ecosystem, including biota, fish and wildlife. According to EPA and many organizations and experts, the NRC's standards are extremely unprotective and in direct conflict with the state's statutory and regulatory policies on toxic waste remediation and air pollution. The NRC standard is 2,000 times higher than New York State's statutory 1 in a million-cancer risk for toxic chemical soil cleanup standards. Please see *Appendix D* for important details on this issue.

²² Alice Napoleon, Jeremy Fisher, PhD, William Steinhurst, PhD, Synapse Energy Economics; Professor Michael Wilson, PhD, SUNY Fredonia; Frank Ackerman, PhD, Tufts University; and Marvin Resnikoff, PhD, Emily Brown, Radioactive Waste Management Associates. Pg. 53. *The Real Costs of Cleaning Up Nuclear Waste: A*

Full Cost Accounting of Cleanup Options for the West Valley Nuclear Waste Site, 2008, https://www.nirs.org/wp-content/uploads/radwaste/decommissioning/wvfcareport1108.pdf/.

²³ https://www.dec.ny.gov/regulations/36951.html.

7) State Championed Responsible Management of Nuclear Waste Utilizing Above Ground Storage through State Funded Study and Legislation

New York State has twice championed an environmentally responsible nuclear waste storage proposal with a landmark study and legislation proposing that "low-level" radioactive waste be stored in an above ground (ABG) storage building that would isolate the waste from the environment and be designed to ensure comprehensive monitoring, retrievability and repackaging. When a tank or barrel of waste starts to leak, once again a sensor would alert the operators and the leaking barrel would be mechanically retrieved, repackaged, and put back into the ABG storage building. In both instances, the State sought an alternative approach to an irresponsible federal agency plan or a federal law which was later partially overturned by the U.S. Supreme Court. Please see *Appendix E* for more information.

Thank you for considering our urgent requests. We look forward to receiving a response from each of you and we request a joint meeting be scheduled soon. On behalf of the signatories, please contact us by emailing or calling Anne Rabe, NYPIRG, arabe@nypirg.org and 518-560-1849 to arrange the meeting.

Sincerely,

National & Statewide Groups

George Povall Executive Director **All Our Energy** Point Lookout, NY

Andra Leimanis Program Director **Alliance for a Green Economy** Syracuse, NY

Hoksila Banks **American Indian Movement** Woodstock, NY

Mary Smith Communications Director **Church Women United in NYS** Rochester, NY

Bob Cohen Policy & Research Director Citizen Action of New York Albany, NY

Deb Katz Executive Director Citizens Awareness Network Rowe, MA

Barbara Warren
Executive Director
Citizens' Environmental Coalition
Cuddebackville, NY

Harriet Shugarman

Executive Director

ClimateMama

New York, NY

Sally Courtright

Climate Reality Project

Colonie, NY

Michael J Keegan

Chairperson

Coalition for Nuclear Free Great Lakes

Monroe, MI

Joni Arends

Executive Director

Concerned Citizens for Nuclear Safety

Santa Fe, NM

Michel Lee, Esq.

Chair

Council Intelligent Energy & Cons. Policy

Scarsdale, NY

Alice Hirt

Co-Chair

Don't Waste Michigan

Holland, MI

Amy Rosmarin

Executive Director

Earthkeeper Health Resources

North Salem, NY

Raya Salter

Executive Director

Energy Justice Law & Policy Center

New Rochelle, NY

Santosh Nandabalan

Senior Organizer

Food & Water Watch

Brooklyn, NY

Brahvan Ranga

Political Director

For the Many

Beacon, NY

Renee Vogelsang

New York Director

Frack Action

Ithaca, NY

Patricia Wood

Executive Director

Ellen Weininger

Director of Educational Outreach

Grassroots Environmental Education

White Plains, Port Washington, NY

David H. Toman

Executive Director

Hudson River Sloop Clearwater

New Paltz, NY

Sister Sheila Stone

Susan Wood, Sue Tannehill

Judy Fitzgerald

Interfaith Climate Justice Community

Buffalo, Cheektowaga, Clarence Center, NY

Laura Myerson

Jewish Voice for Peace

WESPAC

Brooklyn, NY

Judy Treichel

Executive Director

Nevada Nuclear Waste Task Force

Las Vegas, NV

JK Canepa

Co-Founder

New York Climate Action Group

New York, NY

Ruth Foster

Director

NY Climate Advocacy Project

East Greenbush, NY

Donna O'Malley

Leader

NY Mothers Out Front

Croton On Hudson, NY

Ann Finneran

NY Water Action

Fallsburg, NY

Betta Broad

Campaign Director

New Yorkers for Clean Power

Kingston, NY

Anne Rabe

Environmental Policy Director

NYPIRG

Albany, NY

Rashida Tyler

Deputy Executive Director

NYS State Council of Churches

Albany, NY

Jerry Rivers

Environmental Scientist

N. American Climate, Cons. & Environment

Roosevelt, NY

Dave Kraft

Director

Nuclear Energy Information Service

Chicago, IL

Tim Judson

Executive Director

Nuclear Information and Resource Service

Takoma Park, MD

Laurel Tumarkin

Peoples Climate Movement - NY

Brooklyn, NY

Doug Couchon

President

People for a Healthy Environment

Elmira, NY

Kathleen Nolan, MD

President

Physicians for Social Responsibility - NY

Woodstock NY

Kate Bartholomew

Chair

Sierra Club Atlantic Chapter

Albany, NY

Carol De Angelo

Director

Peace, Justice & Integrity Creation

Sisters of Charity of New York

Bronx, NY

Alice Slater

World Beyond War

New York, NY

Elected Officials

Vincent Rossillo Mayor Village of Dobbs Ferry Dobbs Ferry, NY

Shari Rosen Ascher Trustee Dobbs Ferry Board Dobbs Ferry, NY

Paul Feiner Town Supervisor Greenburgh, NY

Kathie Talbot City Councilmember Peekskill, NY

Brian Fassett City Councilmember City of Peekskill Peekskill, NY

Patricia Riley Deputy Mayor City of Peekskill Peekskill, NY

Bruce Tucker Mayor Village of Piermont Piermont, NY

Karen Brown Mayor Village of Tarrytown Tarrytown, NY

Laura Petit Legislator Ulster County Legislator Esopus, NY

Regional Groups

Jackie Weisberg 350Brooklyn Brooklyn, NY

Dorian Fulvio Steering Committee **350NYC** New York, NY Karen Harris

Art Students League

New York, NY

Diane Perea

Beacon Democrats

Beacon, NY

Vicki Fox

Beacon Sloop Club

Beacon, NY

Paula Wittlin

Bet AM Shalom Synagogue

Mamaroneck, NY

Rebekah Creshkoff

Communications Officer

Beyond Plastics Sullivan County

Callicoon, NY

Debby Lee Cohen

Executive Director

Cafeteria Culture

New York, NY

Brian Eden

Policy Coordinator

Campaign for Renewable Energy

Ithaca, NY

Monica Ferguson

Co-Chair

Clarkstown Democratic Com.

Clarkstown, NY

Tracy Frisch

Chair

Clean Air Action Network of Glens Falls

Argyle, NY

Ashley Redfield

Clean Air Coalition of Greater Ravena-Coeymans

Coeymans, NY

Judith Canepa

Coordinator

Coalition Against Rockaway Pipeline

New York, NY

Joe Wilson

Coordinator

Coalition Outreach, Policy & Education

Dryden, NY

Dr. Jill Berman

Co-Founder

Columbia County Reduce Waste/BYO

Ghent, NY

Frank Brodhead

Linda Snider, Jay Gilbert

Kirsten Andersen

Concerned Families of Westchester

Hastngs-on-Hudson, NY

Louise Levesque

Dominican Sisters of Hope

Ossining, NY

B. Arrindell, Bernard Handler, Jane Cyphers

Damascus Citizens for Sustainability

Narrowsburg, NY

Natalia Prakhina

Owner

Earth Nurture Farm

Paramus, NY

Pete Elder

President

Elder Development Group

Kent, NY

Doug Couchon

Co-Founder

Elmirans & Friends Agst. Fracking

Elmira, NY

Tracy Stora

Program Director

Federated Conservationists Westchester Co.

Rye, NY

Reverend John Long

Pastoral Associate

First Presbyterian Church

Buffalo, NY

Irene Weiser

Coordinator

Fossil Free Tompkins

Caroline, NY

Mary Finneran

Co-Founder

FrackBustersNY

Cairo, NY

Susan Hillary

Goshen Green Farm

Goshen. NY

Dustin Malatesta

Good Night Restaurant

Woodstock, NY

Penelope Karageorge

Director

Greek-American Writers Ass.

New York, NY

Rev. Gary McCaslin

Homo Sapiens for Inhabitable Planet

Cortland, NY

Manna Jo Greene

Hudson Valley Climate

Science & Solutions Network

Ulster County Legislator Dist. 19

Rosendale, NY

Marilyn Elie, Co-Founder

Judy Allen

Indian Point Safe Energy Coalition

Cortlandt Manor, NY

Putnam Valley, NY

Margaret Reilly

Co-Leader

Climate Crisis Working Group

Indivisible Mohawk Valley

New Hartford, NY

Deborah Porder

Lead Organizer

Indivisible Scarsdale

Scarsdale, NY

Marcia Stone

Co-Chair

Indivisible Yorktown

Yorktown, NY

Edward Jaramillo

Kalpulli Huehuetlahtolli

Edison, NJ

Catherine W Guthrie

Executive Director

Keaton's Kids

Garrison, NY

Stephen Kent

President

KentCom LLC

Garrison NY

Dawn Powell

Lake Peekskill Civic Ass.

Putnam Valley, NY

Susana Hitorangi

Director

LEAF of Hudson Valley

Nanuet, NY

Victoria Oltarsh

Learning Expanded Arts Program

Nyack, NY

Lisa Tyson

Executive Director

Long Island Progressive Coalition

Bellmore, NY

Mari Inoue

Co-Founder

Manhattan Project Nuclear-Free World

New York, NY

Katherine Bini

Steering Committee

Metro N.Y. Catholic Climate Movement

New York, NY

Nivo Rovedo

Executive Committee

Mid-Hudson Sierra Club

LaGrangeville, NY

Caroline Fenner

Communications & Outreach

Mothers Out Front Dutchess County

Poughkeepsie, NY

Natalia Gianella

Director

Munay Wasi LLC

Ellenville, NY

Carol Marsh Compliance Officer **Nyack Boat Club** Spring Valley, NY

Lloyd Trufelman

Northern Westchester Indivisible

Katonah, NY

Annie Wilson

NY Env. Law & Justice Project Environmental Justice Initiative

New York, NY

Haym Gross, Chair **NYC 2030 District**

Brooklyn, NY

Iris Hiskey Arno

Co-Chair

Environment Committee

NYCD16 Indivisible

Hastings on Hudson, NY

Ray Evans Harrell

Priest

Nuyagi Keetoowah Society

Manhattan, NY

Sylvia Rodriguez Case

Co-Chair

Peace Action Fund NYS

Gallatin, NY

Janine Melillo

Secretary

Peekskill Conservation Advisory Council

Peekskill Progressives

Peekskill, NY

Marthe Schulwolf, Ph.D.

Founder

Piermont Marsh Alliance

Piermont, NY

Pascal Akesson

President

Piermont Rowing Club

Nyack, NY

Eleanor Joyce

Presentation Sisters

Kingston, NY

Rebekah Sale

Director

Property Rights & Pipeline Cen.

Stone Ridge, NY

Julie Ruben

Commissioner

Putnam Valley Commission

for Conservation of Environment

Putnam Valley, NY

Karen Freede

Putnam Valley Democratic Com.

Putnam Valley, NY

Susan & Philip Likes

Putnam Progressives

Putnam Valley, NY

Steven Smith

Legal Advisor

Ramapough Munsee Nation

Stony Point NY

Robert Welton, Christine Kielb

Board Member

Rensselaer Env. Coalition

Rensselaer, NY

Susan Shapiro

Attorney

Rockland Environmental Group

Rockland, NY

Jacquelyn Drechsler

Rockland Coalition To End

The New Jim Crow

Environmental Committee

Valley Cottage, NY

Tina Rose

Steering Committee

Rockland United

Clarkstown, NY

Nancy Vann

President

Safe Energy Rights Group

Peekskill, NY

Rabbi Juliet Elkind-Cruz

Save the Hudson

New York, NY

Marvin Baum

Save West Hook Mountain

Clarkstown, NY

Mary Eagleson

Scarsdale Friends Meeting

White Plains, NY

Yvonne Taylor

Vice President

Seneca Lake Guardian

Watkins Glen, NY

Lalita Malik

Chair

Sierra Club Mid-Hudson Group

Union Vale, NY

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Chair

Sierra Club Lower Hudson Group

Mount Kisco, NY

Sr. Joan Agro, OP

Congregational Secretary

Sisters of St. Dominic Blauvelt

Blauvelt, NY

Claudia Levy

SoHo Alliance

Manhattan, NY

Kevin Spath

Director

Spath Counseling

Garrison, NY

Andrew E Stein

Andy Stein Music

Cortlandt, NY

Anthony Costantino

Stop Holtec

Peekskill, NY

Suzannah Glidden

Co-Founder

Stop Algonquin Pipeline Expansion

North Salem, NY

Carole Resnick

Organizer

Syracuse Peace Council

Syracuse, NY

Lee Gough, Leah Krauss

Nina Nichols

The Ecoassembly

Pt. Ewen/Hudson River

Water District

Esopus, NY

Al Hemberger

The Loft Recording Studios

Garrison, NY

Peter Bardaglio

Coordinator

Tompkins Co. Climate Prot. Initiative

Trumansberg, NY

Amy Kletter

Chair

Environment Comm.

Ulster Activists

New Paltz, NY

Phil Rose

Steering Committee

United Climate Action Network

Cazenovia, NY

Ling Tsou

Co-Founder

United for Action

New York, NY

Tina Volz-Bongar

Co-Organizer

Vince Scafaria

United For Clean Energy

Peekskill, NY

Croton on Hudson, NY

Sr. Alice Msrie Giordano

JPIC Coordinator

Ursulines of Roman Union Eastern Provence

Eastchester, NY

Jacob King

Unitarian Universalist Ministry

Albany NY

Bettina Mayer

Unitarian Univ. Cong. Hudson Valley

Croton on Hudson, NY

Bob Elmendorf

Treasurer

Upper Hudson Peace Action

Chatham, NY

Harry Vetter

Chair

Upper Nyack Green Committee

Upper Nyack, NY

Terri Thal

Board Member

West Branch Conservation Assoc.

Clarkstown, NY

Nada Khader

Executive Director

WESPAC Foundation

White Plains, NY

Susan Van Dolsen

Co-Organizer

Westchester for Change

Rye, NY

Andres San Millan

President

Wheaton Park Bridge

Poughkeepsie, NY

Amy Harlib

Artistic Director

Yoga For Peace

New York, NY

Vitalah Simon

Director

YogaShine

Armonk, NY

Kurt Krumperman

Public Policy Comm. Chair

Zero Waste Capital Dist.

Bethlehem, NY

Yayoi Koizumi, Founder

Cheryl Botts

Zero Waste Ithaca

Ithaca, Danby, NY

Individuals

Harriett Abernathy New York, NY

Phoebe Banks Woodstock, NY

Royce Battleman West Harrison, NY

Kristin Bergstrom Woodstock, NY

Karen Biesanz Horseheads, NY

Christine Blossy Carmel, NY

Harry Bolick Hopewell Junction, NY

Flo Brodley Somers, NY

Anne Carter Peekskill, NY

Linda Conte Croton-on-Hudson, NY

Susan & Ian Cummings Putnam Valley, NY

Alicia Cummings Warwick, NY

Jocelyn DeCrescenzo Valley Cottage, NY

Lisa Derrickson Painted Post, NY

Jacquelyn Drechsler Clarkstown, NY

Lisa Elkind New York, NY

Rachel Evans Garrison, NY

Lisa Feldman

Cortlandt, NY

James Fleishman Poughkeepsie, NY

Laura Forman Poughkeepsie, NY

Nora Freeman Port Chester, NY

Sven Furberg Accord, NY

Isca Greenfield-Sanders Putnam Valley, NY

Donna Gury Patterson, NY

Connie Haack White Plains, NY

Christine Harlan Accord, NY

Linda Harris Kent, NY

Joshua J. Herz Rochester, NY

Lois Intravio Cold Spring, NY

Carla Rae Johnson Peekskill, NY

Theresa Kardos Cortlandt Manor, NY

Claudia Kavenagh Petersburgh, NY

Emmelia Klubnick Cold Spring, NY

Sheila Krstevski Yorktown, NY

Doris Jean Kolarek Putnam, NY Steven Laifer Cold Spring, NY

Jennifer Lahey South Salem, NY

Michael Lammers New York, NY

June Levier Topeka, NY

Lalita Malik Union Vale, NY

Denise Manos Huntington, NY

Rob May Garrison, NY

Beth McCormick Croton-on-Hudson, NY

John McGee Elmira, NY

Professor Branda Miller RPI Averill Park, NY

Lisa Moir Croton on Hudson, NY

Jenny Monroe Caton, NY

Susanne Moss Beacon, NY

Roberto Muller Cold Spring, NY

Laura Nathanson Cold Spring, NY

Melissa Ortquist Esopus, NY

Amina Mohamed Ithaca, NY

Lori Moir

Orangetown, NY

Thomas Pendleton Putnam Valley, NY

Maggie Ploener Putnam Valley, NY

Alan Preucil Barbara Preucil Elmira, NY

John Rath Poughkeepsie, NY

Carol Reingold High Falls, NY

Cynthia Roberts Scarsdale, NY

Chris Rosen Putnam Valley, NY

Irwin Rosenthal Woodstock, NY

Lillian Rosengarten Cold Spring, NY

Susan Rutman Yonkers, NY

Andrea Sadler Cold Springs, NY

Dale Saltzman South Salem, NY

Lloyd Schloss White Plains, NY

Jorg-Michael Schwarz Peekskill, NY

Elizabeth Schutt White Plains, NY

Judi Seidman Elmira, NY

Tinya Seeger Fishkill, NY Elizabeth C. Segal Ossining, NY

Jane Shumsky Croton-on-Hudson, NY

Virginia Stillman Ossining, NY

Cindy Shapiro Thompsonville, NY

Laurie M Smyla Sloatsburg, NY

Melanie Steinberg Milo, NY

Jean Sweezey Putnam Valley, NY

Suprina Troche Poughkeepsie, NY

Donna Yannazzone Haverstraw, NY

Terri Udolf Cortlandt Manor, NY

Glenna Wright Kent Lakes, NY

Lou Zimet Cortlandt Manor, NY

cc: Lisa Garcia, Environmental Protection Agency Region 2 Administrator

Ray Lorson, Deputy Regional Administrator, Nuclear Regulatory Commission

U.S. Senator Chuck Schumer

U.S. Senator Kirsten Gillibrand

Congressman Michael Lawler

Mike Mastroianni, Assistant Secretary for Education

Senator Peter Harckham

Senator Shelley Mayer

Assemblywoman Dana Levenberg

Assemblyman Jonathan Jacobson

Rachel Adler, Department of Labor

Mark Pattison, Department of State

Mark Massaroni, Department of Taxation and Finance

Jennifer Wacha, Division of Homeland Security and Emergency Services

Tom Scaglione, Empire State Development

Joe Leary, New York Power Authority

Alyse Peterson, New York State Energy Research and Development Authority

David Lochbaum, Nuclear Engineer (ret.)

Richard Webster, Riverkeeper

Dr. Richard Becker, Supervisor, Town of Cortlandt

Theresa Knickerbocker, Mayor, Village of Buchanan

Susan Spear, Deputy Commissioner of Emergency Services, Westchester County

Catherine Borgia, Westchester Co. Board of Legislators

Colin Smith, Westchester Co. Board of Legislators

Dr. Dennis Lauro, Hendrick Hudson School District

Lou Picani, President, Teamsters Local 456

Bill Smith, Vice President, Utility Workers Union of America Local 1-2

Thomas Carey, President, Westchester Putnam Central Labor Council

John O'Leary, Deputy Secretary, Office of the Governor

Jeshica Patel, Assistant Counsel, Office of the Governor

Daniel Schroeder, Chief, NRC Division of Reactor Projects

Brett Klukan, NRC Regional Counsel

Richard Guzman, NRC Project Manager

Lem Srolovic, Chief, AG Environmental Protection Bureau

Kelly Turturro, DEC

John Sipos, DPS Counsel

Tom Kaczmarek, DPS Executive Director