SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF YATES

In the Matter of the Application of

SIERRA CLUB, COMMITTEE TO PRESERVE THE FINGER LAKES by and in the name of PETER GAMBA, its President; and COALITION TO PROTECT NEW YORK by and in the name of KATHRYN BARTHOLOMEW, its Treasurer; and SENECA LAKE GUARDIAN, A WATERKEEPER AFFILIATE by and in the name of YVONNE TAYLOR, its Vice President,

Petitioners,

Index No. 2017-0232

Hon. William F. Kocher

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

–against–

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, BASIL SEGGOS, COMMISSIONER, GREENIDGE GENERATION, LLC and LOCKWOOD HILLS, LLC,

Respondents.

PETITIONERS' REPLY MEMORANDUM OF LAW

RICHARD J. LIPPES, ESQ.
Lippes & Lippes
1109 Delaware Avenue
Buffalo, NY 14209-1601
Telephone: (716) 884-4800
Email: rlippes@lippeslaw.com

RACHEL TREICHLER, ESQ.
7988 Van Amburg Road
Hammondsport, New York 14840
Telephone: (607) 569-2114
Email: treichlerlaw@frontiernet.net

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

This reply memorandum of law for the Petitioners is submitted in reply to issues raised by the Respondents in their objections in point of law and memoranda of law. This reply memorandum of law will also clarify and support the arguments made in Petitioners' initial memorandum of law, as they relate to the arguments made by Respondents in their responses. Therefore, as will be seen, their arguments regarding procedural issues are not applicable to the facts of this case, and Respondents' arguments regarding the merits of Petitioners' claims do not affect the failure of Respondent New York State Department of Environmental Conservation ("DEC") in fulfilling its legal obligations under the New York State Water Supply Law, Environmental Conservation Law, Article 15, Title 15 (the "WSL"); the New York State Pollutant Discharge Elimination System Law, Environmental Conservation Law, Article 17, Title 8 (the "SPDES Law"); and the New York State Environmental Quality Review Act, Environmental Conservation Law, Article 8 ("SEQRA").

ARGUMENT IN REPLY

POINT I

PETITIONERS' HAVE STANDING

Based on the criteria for organizational standing set forth in *Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297 (2009); *Society of the Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761 (1991); *Matter of Dental Society. V. Carey*, 61 N.Y.2d 330 (1984) and *Douglaston Civic Ass'n, Inc. v. Galvin,* 36 N.Y.2d 1 (1974). Petitioners each demonstrate organizational standing in this proceeding.

In support of their claims to standing, Petitioners provide herewith the affidavits of eight individuals who are members of Petitioners Sierra Club and Committee to Preserve the Finger Lakes ("CPFL") demonstrating injury-in-fact from the proposed operations of the Greenidge Generating Station ("Greenidge Station"). Three of the individuals, Linda Downs, Carolyn McAllister, and Jane Crumlish, are members of both Sierra Club and CPFL. Eileen and John Moreland, Linda Bracht and Abi and Winton Buddington are members of CPFL only. Each of these individuals resides on the shore of Seneca Lake just north of the location where the discharges from Greenidge Station flow into the Keuka Outlet. Ms. Downs, Ms. Crumlish, Ms. Bracht and Mr. and Mrs. Moreland and their families use water they pipe from the lake for showering, washing dishes, and washing clothes. Several of the affiants use water piped from the lake for brushing teeth and sometimes for cooking. All the affiants swim in the lake and use the lake for other recreational activities such as fishing and boating.

Each affiant alleges that he or she will be exposed to harms that are greater than other residents of the region because they reside on the shores of Seneca Lake and make more use of the lake than other residents. Their proximity and use of the lake exposes them to the harms that are likely to result now that Greenidge Station has resumed operations and has begun to pump hot water into the lake in their vicinity. The modified State Pollution Discharge Elimination System ("SPDES") permit issued to the owner of Greenidge Station by DEC allows huge discharges of water from the plant's cooling system, up to 134,000,000 gallons per day of water up to 108 degrees in temperature during the summer. Higher water temperatures in the area of the lake on which Petitioners' members live are likely to result from these discharges. Higher water temperatures in their area of the lake increases the likelihood of outbreaks of toxic algae blooms next to their shore lines and docks that will injure their health and impair their ability to

use water from the lake for swimming, boating or fishing. Therefore, their injury-in-fact is different than other members of the community who live farther away from the high temperatures created by the Greenidge water discharges and are not exposed to the same risks of toxic algae blooms. Ms. Downs, Ms. Crumlish, Ms. Bracht and Mr. and Mrs. Moreland allege an additional and compelling special injury because they pipe water from the lake for most of their water needs, including brushing teeth, cooking, showering, washing dishes, and washing clothes. Their use of water from the lake for household purposes is significantly different than the use most residents in their area make of the lake. Most residents use water piped from the Village of Penn Yan or the City of Geneva for household purposes. Because of their use of lake water for household purposes, Ms. Downs, Ms. Crumlish, Ms. Bracht and Mr. and Mrs. Moreland and their families will be exposed to significantly higher levels of toxic algae than other residents in the area if blooms occur on their shorefronts near the discharge outfall of Greenidge Station.

This past September, Ms. Downs and Ms. Moreland discovered a harmful algae bloom on their shoreline that ran along the shoreline all the way from Ms. Downs' house to Ms. McAllister's house. This bloom tested at 30x the threshold level of 25 micrograms of alpha-chlorophyll New York is using to classify algae blooms and a level of microcystin that was 3x the threshold value used by New York to classify an algae bloom sample as high toxin. L. Downs Aff. ¶ 34.

Petitioners also submit the affidavit of Mary Anne Kowalski. Ms. Kowalski is a member of Petitioners Seneca Lake Guardian, Sierra Club and CPFL. She lives across the lake from Greenidge Station in the Town of Romulus. She lives in a homeowners association that has a beach, boat launch and pavilions on Seneca Lake. She alleges that she and others who live on

the shore of the lake near Greenidge Station will be harmed by huge discharges of warmed water from Greenidge Station that may raise the surface temperature of the lake and increase the likelihood of harmful algae blooms and result their exposure to the risks of breathing droplets of water with toxic algae into their lungs or absorbing toxic algae through their skin.

In support of Petitioners' member affidavits alleging special and specific harms from the Greenidge discharges, Petitioners' submit the affidavit of Dr. Gregory Boyer, an expert on harmful algae blooms ("HABs"). Dr. Boyer provides his expert opinion that increasing water temperatures in the lake near the outflow of the Greenidge Generating Station will increase the likelihood of HABs in that area of the lake.

These affidavits show that Sierra Club, CPFL and Seneca Lake Guardian have members who meet the zone of interest test of *Society of Plastics* as well as the broader standing rules set forth in *Save the Pine Bush, Sierra Club v. Village of Painted Post,* 26 N.Y.3d 301 (2015) and *Association for a Better Long Island v. DEC*, 23 N.Y.3d 1, (2014).

Because CPFL has organizational standing, it follows that the coalition of which it is a member, the Coalition to Preserve New York ("CPNY") also has standing to join as a petitioner in this case.

For these reasons, Petitioner organizations have standing to challenge Respondent DEC's actions in issuing a water withdrawal permit and a modified SPDES permit to Respondent Greenidge Generation LLC ("GGLLC") for operation of its Greenidge Generating Station.

POINT II

PETITIONERS' CLAIMS ARE NOT MOOT

Petitioners' claims are not moot. The environmental harms sought to be prevented by this proceeding have only begun to occur. These environmental harms are cumulative and occur

each day Greenidge Station operates. Although the plant allegedly began operations last spring, as far as Petitioners have been able to ascertain, Greenidge Station has not yet generated any electricity. The generation figures for Greenidge Station on the electricity data browser (EDB) of the US Energy Information Agency ("EIA") show that no electricity has been generated at Greenidge from 2011 to January 2018. See https://tinyurl.com/y772zujg [last accessed April 26, 2018]. If the plant is not actually generating electricity at this time, the plant's water withdrawals and water discharges have so far been minimal. When and if water withdrawals and water discharges begin at the levels authorized in GGLLC's water withdrawal and modified SPDES permit, up to 139,248,000 gallons per day and 134,000,000 gallons per day respectively, these withdrawals and discharges are likely to have a significant effect on Seneca Lake and these impacts need to be reviewed in a full Environmental Impact Statement.

For these reasons, Petitioners' claims are not moot.

POINT III

PETITIONERS' CLAIMS ARE NOT TIME-BARRED

The verified petition challenges the issuance of a water withdrawal permit and a modified SPDES permit to GGLLC on September 11, 2017. Petitioners' also challenge DEC's SEQRA review that accompanied these two permits, both its determination that issuance of the water withdrawal permit was a Type II action not subject to SEQRA review, issued August 12, 2015, and its amended negative declaration that there would be no significant environmental impact from issuing a modified SPDES permit, issued June 28, 2016. Petitioners' claims are not time-barred because DEC's SEQRA determinations did not become ripe for review until the permits were issued. *Matter of Eadie v. North Greenbush Town Board* 7 N.Y.3d 306 (2006).

The verified petition does not challenge the transfers of the SPDES permits issued to previous owners of Greenidge Station that took place in 2013 and 2014.

POINT IV

PETITIONERS' CLAIMS ARE NOT BARRED BY RES JUDICATA OR CLAIM PRECLUSION

Petitioners' claims are not barred by the doctrine of *res judicata* or claim preclusion. There has been no prior decision involving the claims Petitioners raise in this proceeding. Petitioners' claims regarding the water withdrawal permit and the modified SPDES permit issued to GGLLC on September 11, 2017 were not addressed in the earlier case between Petitioners and Respondents, *Matter of Sierra Club v. DEC* ("*Greenidge I*"), Yates County Supreme Court, Index No. 2016-0165, currently on appeal to the Fourth Department. *Greenidge I* involves Petitioners' claims regarding the Title IV and Title V air emission permits issued to GGLLC on September 8, 2016. Because the claims in the earlier proceeding involved different permits, and because Petitioners could not have raised their claims regarding the water withdrawal permit and the modified SPDES permit in the earlier proceeding, the doctrine of *res judicata* does not apply. "Under the doctrine of *res judicata*, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation." *Matter of Hunter*, 4 N.Y.3d 260, 269 (2005). Accord *City of New York v. Welsbach Electric*, 9 N.Y.3d 124 (2007); *Parker v. Blauvelt Fire Co*., 93 N.Y.2d 343 (1999); *Plumley v. Erie Boulevard Hydropower*, 114 A.D.3d 1249, (4th Dept. 2014). If for no other reason, *res judicata* does not apply in this case because there is an additional party. Petitioner Seneca Lake Guardian was not a party to *Greenidge I*. Also, Petitioners could not have raised their claims regarding DEC's issuance of GGLLC's water withdrawal and modified SPDES

permits in *Greenidge I* because these permits were not issued until September 11, 2017, five months after this court rendered its decision in *Greenidge I* on April 21, 2017. In order to raise their claims regarding these permits, Petitioners have been forced to bring this second proceeding.

Petitioners' challenge to the second set of GGLLC permits is similar to an example given in the *Hunter* case involving challenges to Trust A and Trust B. The court stated that a party's opportunity to raise objections regarding Trust A do not bar that party from continuing to litigate their claims with regard to Trust B. "Pamela's opportunities to raise objections regarding the estate and Trust A accounts do not bar objectants from continuing to litigate their claims with respect to the Bank's management of Trust B." 4 N.Y.3d at 271. Similarly, Petitioners' claims regarding GGLLC's water withdrawal permit and modified SPDES permit were not previously litigated and decided against Petitioners in a prior action.

For these reasons, Petitioners are not barred from bringing this proceeding by the doctrine of *res judicata* or claim preclusion.

POINT V

PETITIONERS' HAVE EXHAUSTED THEIR ADMINISTRATIVE REMEDIES

Petitioners have exhausted their administrative remedies. Petitioner Committee to Preserve the Finger Lakes ("CPFL") presented its concerns regarding the conditions set forth in water withdrawal and modified SPDES permits proposed to be issued to GGLLC and the adequacy of DEC's SEQRA review of the Greenidge permits in two comment letters on the permits, one filed September 11, 2015, A.R. 1196-1204, and one filed August 5, 2016, A.R. 1271-1280. The first letter objected to DEC's failure to include appropriate terms and conditions in the water withdrawal permit, to DEC's Type II classification for the water withdrawal permit

and to DEC's Best Technology Available ("BTA") determination for the cooling water intake structures at Greenidge Station. The second letter expressed concern that "the amended negative declaration issued by DEC on June 28, 2016 . . . fails to comply with SEQRA in many respects," a number of which were itemized in the letter. A.R. 1271. No further specificity is required for CPFL to have exhausted its administrative remedies. As the Court of Appeals stated in *Walton v. New York State Department of Correctional Services*, 8 N.Y.3d 186 (2007), "The focus of the 'exhaustion' requirement . . . is not on the challenged action itself, but on whether administrative procedures are available to review that action and whether those procedures have been exhausted. [citations omitted]." *Id*. at 195. In this proceeding CPFL's comment letters objected to DEC's water withdrawal permit conditions and Type II determination and to DEC's BTA determination and the adequacy of DEC's amended negative declaration and asserted that DEC should have conducted a full Environmental Impact Review of GGLLC's project to repower Greenidge Station. These comments were sufficient to exhaust CPFL's administrative remedies. DEC held no other administrative proceedings on the GGLLC permits in which CPFL could have participated. DEC did not hold a public hearing on the permits and DEC did not hold an issues conference to identify issues with the permits.

Because Petitioner CPFL filed comments on the GGLLC permits with DEC raising the issues that are raised in this proceeding and because the other Petitioners alleged direct harm and injury to their members that is different from that of the public at large and provided affidavits from their members to support those allegations, all the Petitioners should be deemed to have exhausted their administrative remedies under the rule established in *Matter of Shepherd v. Maddaloni*, 103 A.D.3d 901 (2nd Dept. 2013). In the *Shepherd* case, the court held that the petitioners were not precluded from challenging a site plan approval on the ground that they did

not actively participate in the administrative proceeding where others had advanced their objections in the proceeding and where they alleged direct harm and injury that is in some way different from that of the public at large in their petition.

For these reasons, Petitioners have established that they exhausted their administrative remedies.

POINT VI

PETITIONERS ESTABLISH THAT DEC FAILED TO COMPLY WITH THE WSL IN ISSUING GGLLC's WATER WITHDRAWAL PERMIT

A. Appropriate Conditions Were Not Imposed in GGLLC's Water Withdrawal Permit

Respondents' assertions that the conditions contained in GGLLC's water withdrawal permit comply with the requirements of the water withdrawal permitting provisions of the WSL are demonstrably incorrect. ECL 15-1503(2) requires that DEC assess the impacts of a proposed permit and ECL 15-1503(4) requires that DEC set appropriate conditions in the permit to address the impacts identified. ECL 15-1503(2) mandates eight factors to be determined by the DEC in making a decision whether to grant or deny a water withdrawal permit. These factors include:

- the proposed water withdrawal takes proper consideration of other sources of supply that are or may become available;
- the quantity of supply will be adequate for the proposed use; . . .
- the need for all or part of the proposed water withdrawal cannot be reasonably avoided through the efficient use and conservation of existing water supplies;
- the proposed water withdrawal is limited to quantities that are considered reasonable for the purposes for which the water use is proposed;
- the proposed water withdrawal will be implemented in a manner to ensure it will result in no significant individual or cumulative adverse impacts on the quantity or quality of the water source and water dependent natural resources;

- the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures; . . .

Nothing in the administrative record shows that DEC made these determinations for GGLLC's water withdrawal permit application. As the Second Department stated in its recent decision interpreting the water withdrawal permit issued to the Ravenswood Generating Station in Queens County to take over 1.5 billion gallons per day from the East River in New York Harbor, *Matter of Sierra Club v. Martens*, 2018 NY Slip Op 153 (2nd Dept. January 10, 2018), a copy of which is attached hereto for the court's convenience, these determinations must be made individually for each operator and each water source:

> The statutory factors that the DEC is required to consider when reviewing an application and imposing conditions on the permittee do not lend themselves to mechanical application. For instance, whether "the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures" (ECL 15-1503[2][g]) will almost certainly vary from operator to operator, or from water source to water source. The DEC's own regulations state that an "initial permit" must include "environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies" (6 N.Y.C.R.R. 601.7[e]). Whether a condition is "appropriate" for a given operator is a matter that falls within the DEC's expertise and involves the exercise of judgment, and, therefore, implicates matters of discretion [citations omitted].

Id. There is absolutely no indication in the conditions contained in GGLLC's water withdrawal permit or in the administrative record that the conditions in GGLLC's permit were tailored to the circumstances of the Greenidge facility or to the unique circumstances of Seneca Lake. The only conditions included in GGLLC's permit are generic conditions that DEC is including in all water withdrawal permits.

One factor that should have been evaluated in determining whether GGLLC's proposed water withdrawal "will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures" as required by ECL 15-1503(2)(g) was the

open-cycle cooling system at Greenidge Station. The alternative of closed-cycle cooling is an obvious water conservation measure and should have been evaluated for a facility seeking a permit to use the massive volumes of water GGLLC was seeking permission to take from Seneca Lake. A comparison of the water use of Greenidge Station with the water use of the Athens Generating Station in Greene County provides a stunning illustration of the water conservation benefits of closed cycle cooling. GGLLC applied for a withdrawal permit in the amount of 159,897,000 gallons per day to provide once-through cooling of its 107 MW generating station. A.R. 836. For reasons that are not explained in the administrative record, DEC reduced the amount of 159,897,000 gallons per day requested in GGLLC's application to 139,248,000 gallons per day in the issued permit. A.R. 1412. In contrast, the Athens Station is permitted to take 1,500,000 gallons of water per day from the Hudson River for the facility's air-cooled condensers (according to DEC's Permit Applications database, https://www.dec.ny.gov/cfmx/extapps/envapps/). These air-cooled closed-cycle condensers provide cooling for the operations of the 1,080 MW Athens Station. Thus closed-cycle cooling at the Athens Station requires only 1% of the 139,248,000 gallons per day Greenidge Station is permitted to take from Seneca Lake. Yet the generating capacity of Athens Station is 10 times greater than the generating capacity of Greenidge Station! Given the tremendous water conservation benefits of closed-cycle cooling, DEC's failure to evaluate whether closed-cycle cooling for Greenidge Station was an environmentally sound and economically feasible water conservation measure violated the WSL.

The fact that DEC included a condition in GGLLC's water withdrawal permit incorporating the biological monitoring requirements of GGLLC's SPDES permit is not a substitute for DEC making the determinations required by ECL 15-1503(2). Although

6 N.Y.C.R.R. 601.7(f) provides that DEC will review an initial water withdrawal permit application "in coordination with the SPDES or other permit program, particularly with respect to any pending permit renewals," neither this section nor any other section of the WRL or the regulations authorize incorporating provisions from a SPDES permit as a way of fulfilling DEC's duties to make the determinations required in ECL 15-1503(2) and to incorporate appropriate conditions to implement those determinations in the water withdrawal permit as required by in ECL 15-1503(4). Whatever determinations DEC has made regarding the adequacy of GGLLC's once-through cooling system under the SPDES law and regulations, those determinations do not substitute for the necessity of determining whether GGLLC's once-through cooling system represents an "environmentally sound and economically feasible water conservation measure" under the WSL. The standards to be applied is issuing a SPDES permit under the SPDES law and regulations are not the same as the standards that apply under the WSL and water permitting regulations, and a separate *de novo* determination needs to be made pursuant to the requirements of the WSL.

In *Sierra Club v. Martens*, cited above, the court gave a detailed description of the cooling water intake system of Ravenswood Station and the impacts this system has on fish in the East River:

> In connection with electrical generation by three of the station's four steam generators, Ravenswood Station withdraws large amounts of water from the East River to cool the station's boiler equipment, turbines, and auxiliary equipment. The water is used only once and then discharged back into the East River. This "once-through cooling" system is the original cooling system that has been used by Ravenswood Station since it began operating in 1963. The station's fourth generator uses a multi-celled air-cooled condenser system that does not require the withdrawal of water from the river. When operating at full load, the station has a maximum withdrawal capacity of 1.5 billion gallons of water per day, although the actual amount of water used to operate the station is typically less, and varies depending upon the station's operating needs. This sizable water

> withdrawal has environmental consequences, most notably to fish and other local aquatic life. When the cooling water is drawn in, larger fish are killed when they become "impinged" on the screens that cover the intake structures to prevent debris in the water from entering. Juvenile fish, larvae, and eggs that are small enough to pass through the intake screens are killed when they become "entrained" in the cooling system. Additionally, the discharge of heated water back into the East River also has an impact on the aquatic environment. In the early 1990s, studies by ConEdison, the station's prior owner, demonstrated that, each year, approximately 83,000 fish became impinged and an average of 220 million eggs, larvae, and juvenile fish became entrained by the station's cooling system. Technology installed at the station in 2005 reduced annual impingement to approximately 25,000 fish and entrainment to 150 million organisms and eggs. Additional measures implemented in 2012 resulted in further reductions in impingement and entrainment.

Id. No equivalent discussion of the impact of the cooling water intake structure at Greenidge Station on fish impingement and entrainment is contained in the administrative record. The engineer's report attached to GGLLC's application makes no reference to fish impingement and entrainment, A.R. 846-861, and there is no indication in the administrative record that fish impingement and entrainment or any other potential impacts on Seneca Lake were considered by DEC as GGLLC's water withdrawal application was processed.

For these reasons, DEC's review of GGLLC water withdrawal permit application did not meet the standard for review set forth in ECL 15-1503(2).

B. The Phrase "Shall Issue" in ECL 15–1501(9) Does Not Preclude DEC from Exercising Discretion in Setting Appropriate Permit Conditions

The interpretation of the phrase "shall issue" in ECL 15–1501(9) was addressed at length in *Sierra Club v. Martens*, cited above. In that case, the Second Department determined that while it was mandatory under ECL 15–1501(9) that "an operator receiving an initial permit is authorized to withdraw, i.e., its pre-[WSL] maximum withdrawal capacity" the statutory factors DEC is required to consider in issuing a permit pursuant to ECL 15–1503(2) "do not lend themselves to mechanical application" and therefore determined that "the statute clearly

authorizes the DEC to act in a discretionary manner with respect to the imposition of appropriate terms and conditions." *Id*. p. 8. The court concluded that the clarity with which DEC's obligation to impose appropriate terms and conditions is set forth in ECL 15–1501(9) and 15–1503(2) outweighs any implication that the phrase "shall issue" implies a nondiscretionary act. The court's full reasoning is as follows:

> Here, while ECL 15–1501(9) states that the DEC "shall issue" an initial permit to an existing operator for its self-reported maximum water withdrawal capacity, the statute provides that such initial permit is "subject to appropriate terms and conditions as required under this article." Notably, the WRPA specifically provides the DEC with the power "to grant or deny a permit or to grant a permit *with conditions*" (ECL 15–1503[2] [emphasis added]). The statutory factors that the DEC is required to consider when reviewing an application and imposing conditions on the permittee do not lend themselves to mechanical application. For instance, whether "the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures" (ECL 15–1503[2][g]) will almost certainly vary from operator to operator, or from water source to water source. The DEC's own regulations state that an "initial permit" must include "environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies" (6 N.Y.C.R.R. 601.7[e]). Whether a condition is "appropriate" for a given operator is a matter that falls within the DEC's expertise and involves the exercise of judgment, and, therefore, implicates matters of discretion (see *New York Civ. Liberties Union v. State of New York*, 4 NY3d at 184; *Tango v. Tulevech*, 61 N.Y.2d at 41; see also *Tarter v. State of New York*, 68 N.Y.2d at 518–519).
>
> While ECL 15–1501(9) may be mandatory with respect to the maximum volume of water an operator receiving an initial permit is authorized to withdraw, i.e., its pre-WRPA maximum withdrawal capacity, the statute clearly authorizes the DEC to act in a discretionary manner with respect to the imposition of "appropriate terms and conditions as required under [ECL article 15]." Thus, while the phrase "shall issue" implies a nondiscretionary act, "[s]tatutory language, however strong, must yield to what appears to be intention and that is to be found not in the words of a particular section alone but by comparing it with other parts or provisions of the general scheme of which it is part" (McKinney's Cons Laws of NY, Book 1, Statutes § 97, Comment at 213 [1971 ed]).

Id.

Furthermore, an interpretation of the "shall issue" wording in ECL 15-1501(9) as mandating that no other conditions may be imposed in the permit is contrary to DEC's well-established interpretations of similar "shall issue" wording under the permitting provisions of ECL Article 17, the Water Pollution Control Law governing SPDES permits and ECL Article 23, the Oil, Gas and Solution Mining Law. ECL 17-0701(5) provides that "[a] SPDES permit shall be issued to the applicant upon such conditions as the commissioner may direct," yet DEC interprets that provision as giving them sufficient discretion to require numerous terms and conditions in SPDES permits and to subject SPDES permit applications to review under SEQRA. ECL 23-0503(2) provides that DEC "shall issue a permit to drill, deepen, plug back or convert a well, if the proposed spacing unit [conforms to ECL requirements]," yet DEC interprets that provision as giving them sufficient discretion to require numerous terms and conditions in oil and gas well drilling permits and to subject oil and gas well drilling permit applications to review under SEQRA. There is no basis for interpreting the "shall issue" language in ECL 15-1501(9) any differently.

C. Deference to DEC's Interpretation of ECL 15-1501(9) Is Not Appropriate when the Question Is One of Pure Legal Interpretation of Statutory Terms

Petitioners discussed the case law applicable to the issue of when a court should defer to an agency interpretation of its statutory powers in their initial memorandum of law. Pet. MOL, pp. 8-10. As explained in that memorandum, the rules for evaluating when a court should defer to an agency interpretation of a statute are explained in the decision of the Court of Appeals in *Raritan Development Corp. v. Silva,* 91 N.Y.2d 98 (1997):

> Where "the question is one of pure legal interpretation of statutory terms, deference to the [agency] is not required" . . . . On the other hand, when applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference. [Citations omitted.] Even in those situations,

> however, a determination by the agency that "runs counter to the clear wording of a statutory provision" is given little weight. [Citations omitted.]

Id. 102-103. The cases cited by Respondent GGLLC in its memorandum of law are cases in which the agencies' determinations did not run counter to the statutory language. In the present case, DEC's interpretation of its powers to exercise discretion in setting the terms of an initial water withdrawal permit issued pursuant to ECL 15-1501(9), as set forth in its response to comments on GGLLC's water withdrawal application, A.R. 1167, does run counter to the statutory language and deference is not appropriate.

Petitioners note that DEC appears to have recently altered its interpretation of its powers to exercise discretion in setting terms and conditions in water withdrawal permits. In the most recent announcements of water withdrawal permit applications in DEC's Environmental Notice Bulletin ("ENB"), starting with the ENB issued February 21, 2018, DEC no longer claims that issuance of a water withdrawal permit to an existing non-public user is a Type II action under SEQRA, but instead categorizes them as unlisted. See e.g., the notice of the completed application of the Woods Valley Ski Area in Oneida County in the April 11, 2017 ENB, http://www.dec.ny.gov/enb/20180411_reg6.html#630660000800001 ["Project is an Unlisted Action and will not have a significant impact on the environment. A Negative Declaration is on file. A coordinated review was not performed."].

For these reasons, deference to the interpretation of DEC's discretion in issuing water withdrawal permits pursuant to ECL 15-1501(9) set forth in DEC's response to comments on GGLLC's water withdrawal permit application is not appropriate.

POINT VII

PETITIONERS ESTABLISH THAT DEC FAILED TO COMPLY WITH SEQRA IN ISSUING GGLLC's WATER WITHDRAWAL PERMIT

Based on its interpretation of DEC's obligations under WSL to exercise discretion in setting appropriate terms and conditions for water withdrawal permits issued pursuant to ECL 15-1501(9), the court in *Sierra Club v. Martens*, cited above, held that "the issuance of an 'initial permit' for making water withdrawals pursuant to Environmental Conservation Law § 15-1501(9) is not a ministerial act that is excluded from the definition of 'action' under the State Environmental Quality Review Act (hereinafter SEQRA; see ECL 8-0105[5][ii])." *Id*. at 2. For this reason, the court held that the initial water withdrawal permit issued to TC Ravenswood for operation of the Ravenswood Generating Station "must be annulled, and the matter remitted to the DEC for further proceedings on TC Ravenswood's permit application in accordance with SEQRA." *Id*. at 9. This court should do likewise and annul GGLLC's water withdrawal permit.

Respondents' claim that it does not matter that GGLLC's water withdrawal permit was classified as a Type II action under SEQRA because consideration of the water withdrawal permit was included in DEC's SEQRA review of the air permits and the SPDES permit ignores the fact that DEC's amended negative declaration was invalid. See discussion below at Point IX.

POINT VIII

PETITIONERS ESTABLISH THAT DEC FAILED TO COMPLY WITH THE SPDES LAW IN NOT REQUIRING CLOSED-CYCLE COOLING

A. Review of GGLLC's SPDES Permit Application as a New Application under 6 N.Y.C.R.R. 621.11(b)(3) Means that Closed-Cycle Cooling Must Be Required

Respondents acknowledge that the SPDES regulations require that applications for renewal of a SPDES permit for a facility that has not operated during the term of the permit, such as GGLLC's application for the renewal of the AEE2 SPDES permit for operation of Greenidge

Station, are to be treated as a new application and be subject to a full technical review. 6 N.Y.C.R.R. 621.11 (b)(3). Respondents assert that GGLLC's renewal application was treated as a new application and was subject to a full technical review. DEC's failure to require the implementation of closed-cycle cooling at Greenidge Station, however, demonstrates that GGLLC's renewal application was not treated as a new application. DEC's policy document CP-#52 / Best Technology Available (BTA) for Cooling Water Intake Structures ("BTA Policy"), A.R. 724-731, requires closed-cycle cooling for new facilities and repowered facilities, and this policy should have been implemented if GGLLC's renewal application was treated as a new application in compliance with 6 N.Y.C.R.R. 621.11 (b)(3).

B. DEC's Best Available Technology Policy for a Repowered Facility Requires Closed-Cycle Cooling

Respondents assert that DEC's BTA Policy allows DEC to establish "closed-cycle cooling or the equivalent" as the best available technology for Greenidge Station. The BTA Policy, however, requires closed-cycle cooling at a repowered facility such Greenidge Station. Equivalent technology is only allowed at an existing facility. The policy states:

> One of the most efficient and effective ways to minimize or eliminate the number of and mortality to aquatic organisms impinged and entrained during industrial cooling is to minimize or eliminate the use of once-through, non-contact cooling water from the surface waters of New York. The demonstrated technology that achieves the greatest reduction in non-contact cooling water use is closed-cycle cooling. Under the U.S. EPA CWA 316(b) Phase I Rule (40 C.F.R. Part 125, subpart I), wet closed-cycle cooling was identified as the best technology available for new facilities to minimize impingement and entrainment and New York has already required closed-cycle cooling technology to be employed on new facilities and for electric generating facilities being repowered. *Given the effectiveness of closed-cycle cooling at reducing adverse environmental impact caused by a CWIS, the biological significance of New York's surface waterbodies and their importance for commercial and recreational uses, particularly in* the marine and coastal district, the tidal reach of the Hudson River and *the Great Lakes, this policy establishes closed-cycle cooling as the performance goal for all new and repowered*

> *industrial facilities in New York*. The performance goal for all existing industrial facilities in New York is closed-cycle cooling or the equivalent. [Emphasis added].

A.R. 727-728. In her affidavit dated February 28, 2018, Colleen Kimble, Energy Unit Leader at DEC's Division of Fish and Wildlife, states that she participated in DEC's BTA determination for Greenidge Station and that the review given to Greenidge Station was as an existing facility and not as a repowered facility. Kimble Aff. ¶ 12. She states, "Greenidge Station has been in operation for many years and is defined as an existing facility with a cooling water intake structure design capacity greater than 20 MGD." *Id*. Her affidavit makes clear that the wrong standard was applied in evaluating BTA for Greenidge Station. Because Greenidge Station was permanently retired in 2012, Pet. ¶ 39, it should have been evaluated as a repowered facility under the BTA Policy and closed-cycle cooling should have been required.

POINT IX

PETITIONERS ESTABLISH THAT DEC FAILED TO COMPLY WITH SEQRA IN ISSUING GGLLC's SPDES PERMIT

A. The Amended Negative Declaration Is a Conditioned Negative Declaration

Respondent DEC acknowledges that conditioned negative declarations may not be issued for Type I actions, but asserts in its memorandum of law that "DEC did not violate the prohibition against issuing a conditioned negative declaration for a Type I action because DEC imposed no conditions in its amended negative declaration. Instead, DEC issued an amended negative declaration for a project that involved modifying a SPDES permit to impose more stringent conditions." DEC MOL at 32. Respondent GGLLC makes a similar argument. Greenidge MOL at 19. These assertions, however, rely on a distinction that does not exist between conditions in the negative declaration itself and distinctions in the underlying permit

covered by the negative declaration. As the Court of Appeals stated in *Matter of Merson v. McNally*, 90 N.Y.2d 742 (1997):

> [A] lead agency clearly may not issue a negative declaration on the basis of conditions contained in the declaration itself. *Nor could the lead agency achieve the same end by other means, such as supporting the negative declaration with a statement that conditions would be imposed only on an underlying special use permit to reduce environmental impacts;* extracting concessions from the developer as necessary prerequisites to the issuance of the negative declaration [citation omitted]; or requiring specific mitigation measures, and then approving a proposal that has been revised in compliance with the mandate of the lead agency [emphasis added].

Id. at 753. In the present case, DEC's decision to require conditions in the underlying SPDES permit is attempting to "achieve the same ends by other means," and is not permitted for Type I actions. As Petitioners noted in their initial memorandum of law, "Inherent in these conditions is the recognition by DEC that significant environmental impacts are posed by the Greenidge Project without imposition of the conditions." Pet. Initial MOL at 19.

For these reasons, Petitioners have demonstrated that DEC's amended negative declaration is invalid because it is a conditioned negative declaration of a Type I action.

It is of great concern to Petitioners that, notwithstanding the conditions set forth in DEC's amended negative declaration and in GGLLC's modified SPDES permit requiring new equipment to protect against fish impingement and entrainment, DEC is allowing Greenidge Station to operate without having installed that equipment, despite the fact the plant's current "cooling water intake structure *lacks any fish protection technology*, therefore the facility does not meet either the requirements of 6 N.Y.C.R.R. § 704.5 nor the requirements of the CWA § 316(b) Phase II Rule (40 CFR Parts 122 and 125). [emphasis added.]" Biological Fact Sheet - Cooling Water Intake Structure, prepared by William C. Nieder and last revised on 17 March 2017. A.R. 1475. Petitioners note with dismay that no specific date is provided in GGLLC's modified SPDES permit for when technology to prevent fish impingement and entrainment must

be installed at Greenidge Station. The time requirements in the permit related to the installation of cylindrical wedge wire screening are complicated and subject to numerous DEC approvals. First is a requirement that "[w]ithin six months of the effective date of the permit (EDP +6 months), the permittee must submit an approvable Cylindrical Wedge-Wire Screen (CWWS) Pilot Study Plan." A.R. 1429. Second is a requirement that "[w]ithin 3 months of receiving Department approval of the final CWWS Study Report, the permittee must submit an approvable Technology Installation and Operation Plan (TIOP) to meet the best technology available requirements under 6 N.Y.C.R.R. Part 704.5 and Section 316(b) of the Clean Water Act (CWA). This plan must include: . . . Complete installation of CWWS by the Effective Date of the Permit (EDP) + 5 years." A.R. 1430. Third is the requirement that "[w]ithin 3 months of Department approval of the Technology Installation and Operation Plan, the permittee must submit an approvable Verification Monitoring Plan. This plan must include details of procedures to confirm that the necessary reductions in impingement and entrainment required by this permit are being achieved, and must include the following: a. At a minimum, two years of in-plant entrainment monitoring over a five-year averaging period to verify the full-scale performance of BTA measures; . . . c. A schedule of implementation; . . . ." *Id.* The completion of these requirements could take many years.

B. It is Clear that DEC Did Segment Its Review of the Greenidge Project

Respondent DEC claims that DEC did not segment its review of impacts of waste disposal at the Lockwood coal ash landfill from its review of the impacts of new operations at Greenidge Station. The grounds for DEC's assertion are: 1. "[t]he Landfill holds a SPDES permit that is not at issue in this proceeding;" and 2, "[b]oth the Landfill and Greenidge Station already exist; neither is proposed, and neither is a component of the other." Neither of these

grounds, however, supports a finding the DEC did not segment its review of reopening the landfill and reopening Greenidge Station. The landfill was placed in protective layup at the same time as Greenidge Station. The lay-up plan for the landfill prepared by Daigler Engineering and submitted to DEC in May 2011 makes clear the close connection in operations between Greenidge Station and the landfill. The layup plan states:

> AES Greenidge, L.L.C. (AES) owns a coal fired electrical generating plant on the west shore of Seneca Lake near the Village of Dresden in the Town in the Town of Torrey, Yates County, New York. In support of the power plant operation, AES also owns the Lockwood Ash Disposal Site located on Swarthout Road, across NYS Route 14 from the power plant. . . .
>
> The Greenidge Power Generating Station is in the process of entering a protective layup status. . . . As an integral element of power station operations, the Lockwood Ash Disposal Site is also being prepared for protective layup.

Affidavit of Mary Anne Kowalski dated April 25, 2018 (Kowal. Aff."), Ex. A, p. 1-1. Greenidge Station and the landfill remain under common ownership. Pet. ¶ 12.

Segmentation has occurred because problems at the Lockwood landfill were under investigation by DEC at the same time the GGLLC's permit applications for new operations at Greenidge Station were being considered. On February 18, 2015, DEC and the owner of the landfill executed a consent order. The consent order states that DEC "has determined that groundwater at the site contains substances in excess of the duly promulgated water quality standards for, inter alia, total dissolved solids, boron, manganese, magnesium, iron, sodium and sulfate," and that DEC "believes that the Leachate Pond is a source of the substances and has contributed and continues to contribute to a contravention of duly promulgated water quality standards in violation of ECL § 17-0501 and 6 N.Y.C.R.R. § 360-1.14(b)(2)." Kowal. Aff., Ex. B. p. 3. Thus the problems at the landfill were well known to DEC before DEC issued its initial negative declaration under SEQRA for the GGLLC permit applications on July 30, 2015.

The fact that there are two separate SPDES permits for two facilities is irrelevant to the issue of segmentation. The cumulative impacts of operations under both permits must be considered under SEQRA. 6 N.Y.C.R.R. 617.3(g)(1); 6 N.Y.C.R.R. 617.2(ag).

At the time the consent order was entered into the landfill was being brought out of protective lay-up status and was being prepared to accept new wastes coming from operations at Greenidge Station. Reopening the landfill was an integral component of the overall project to restart Greenidge Station.

The Court of Appeals made clear in *Matter of Village of Westbury v. Dept. of Transp.*, 75 N.Y.2d 62 (1989) that the impacts of two closely related projects must be considered together:

> We conclude that the widening of Northern State Parkway is the type of subsequent action contemplated by the regulations and that the environmental effects of the two projects should be considered together. The interchange construction is one part of a plan to alleviate the traffic congestion and capacity deficiencies of the Northern State Parkway at its interchange with Meadowbrook State Parkway and east of it. The other part of that plan is the widening project. The two are complementary components of the remedy for the Northern State Parkway's traffic flow problems, sharing a common purpose, integrated and scheduled for consecutive construction. Thus, design of each is dependent on the other in that lane construction which will be undertaken as part of the interchange project has no independent utility without the subsequent widening of Northern State Parkway to the east. That being so, the regulations require the consideration of their combined effects even though they are not part of a single formalized plan [citations omitted].
>
> DOT's reliance on the future widening of the Northern State Parkway in planning the interchange project establishes that the widening is, in the words of the regulations, a "subsequent action" "included in any long-range plan", "likely to be undertaken as a result" of the interchange construction or "dependent" on it (see, 6 N.Y.C.R.R. 617.11 [b]; 17 N.Y.C.R.R. 15.11 [b]).

75 N.Y.2d at 71. Unlike the two projects under consideration in *Westbury*, the reopening of the Lockwood landfill was undertaken at the same time as GGLLC prepared for the reopening of Greenidge Station, so the arguments in the present case are even stronger that these two projects

constituted impermissible segmentation under the SEQRA regulations. 6 N.Y.C.R.R. 617.3(g)(1); 6 N.Y.C.R.R. 617.2(ag). Accord *Matter of Sierra Club v. Village of Painted Post*, 134 A.D.3d 1475 (4th Dept. 2015); *Sun Co. v. Syracuse Industrial Development Agency*, 209 A.D.2d 34 (4th Dept. 1995), app. dis'd, 86 N.Y.2d 776 (1995),

For these reasons, Petitioners establish that DEC's amended negative declaration is invalid because it segments review of the impacts of reopening the Lockwood landfill from its review of the impacts of repowering Greenidge Station.

C. Because Greenidge Station Did Not Operate during the Term of the SPDES Permit GGLLC Sought to Renew, DEC's SEQRA Review Must Use a Baseline of No Operations

As noted above, Respondents acknowledge that the SPDES regulations require that applications for renewal of a SPDES permit for a facility that has not operated during the term of the permit, such as GGLLC's application for the renewal of the AEE2 SPDES permit for operation of Greenidge Station, are to be treated as a new application and to be subject to a full technical review. 6 N.Y.C.R.R. 621.11 (b)(3). A consequence of this requirement is that the accompanying SEQRA review of the permit application must also treat the application as a new permit. This means that the review of impacts conducted under SEQRA must be compared to a baseline of no operations. The need to use a baseline of no operations in evaluating the impacts of a repowered facility under SEQRA is supported by DEC's BTA policy, which requires that closed-cycle cooling is required for new and repowered facilities. See discussion above at Point VIII. The fact that the standard that applies to repowered facilities under the BTA policy is the standard that applies to new facilities is a further indication repowered facilities are to be treated as new facilities for purposes of SEQRA review.

The necessity for requiring that the SEQRA review of new operations at a repowered facility be conducted against a baseline of no operations is shown by the slight-of-hand that is taking place with DEC's conditioned negative declaration for GGLLC's modified SPDES permit. DEC used the statement of conditions for new technology to protect against fish impingement and entrainment in the amended negative declaration as a basis for concluding that there would be no significant environmental impacts from new operations at Greenidge Station despite the fact that the plant had absolutely no technology in place to prevent fish impingement and entrainment. DEC used these conditions to circumvent SEQRA requirements for a full Environmental Impact Statement. The various studies required in GGLLC's modified SPDES permit should have been conducted prior to issuance of the permit as part of an EIS process.

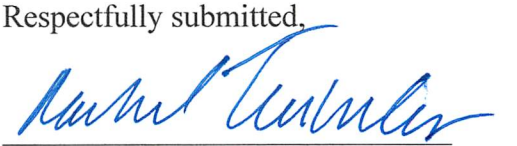
For these reasons, Petitioners have demonstrated that the SEQRA review of the impacts of a repowered facility must be compared to a baseline of no operations.

CONCLUSION

For each of the reasons discussed above, Petitioners respectfully request that the water withdrawal permit and the modified SPDES permit issued by DEC to GGLLC for operations at Greenidge Generating Station and DEC's accompanying negative declaration be annulled.

DATED: Hammondsport, New York
April 27, 2018

Respectfully submitted,



RICHARD J. LIPPES, ESQ.
Lippes & Lippes
1109 Delaware Avenue
Buffalo, NY 14209-1601
Telephone: (716) 884-4800

RACHEL TREICHLER, ESQ.
7988 Van Amburg Road
Hammondsport, New York 14840
Telephone: (607) 569-2114

Attorneys for Petitioners-Appellants

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D53268
C/htr

_____AD3d_____ Argued - February 6, 2017

L. PRISCILLA HALL, J.P.
LEONARD B. AUSTIN
SANDRA L. SGROI
FRANCESCA E. CONNOLLY, JJ.

2015-02317 OPINION & ORDER

In the Matter of Sierra Club, et al.,
appellants, v Joseph Martens, Commissioner, New
York State Department of Environmental Conservation,
et al., respondents.

(Index No. 2949/14)

APPEAL by the petitioners, in a proceeding pursuant to CPLR article 78 to review a determination of the New York State Department of Environmental Conservation dated November 15, 2013, as amended March 7, 2014, which granted the application of the respondent Trans Canada Ravenswood, LLC, for a water withdrawal permit pursuant to Environmental Conservation Law § 15-1501(9), from a judgment of the Supreme Court (Robert J. McDonald, J.), entered December 10, 2014, in Queens County, which, upon decisions of the same court dated October 1, 2014, and October 2, 2014, respectively, denied the petition and dismissed the proceeding

Lippes & Lippes, Buffalo, NY (Richard J. Lippes of counsel), Rachel Treichler, Hammondsport, NY, Gary Abraham, Allegany, NY, and Jonathan L. Geballe, New York, NY, for appellants (one brief filed).

Eric T. Schneiderman, Attorney General, New York, NY (Anisha S. Dasgupta and Bethany A. Davis Noll of counsel), for respondent Joseph Martens, Commissioner, New York State Department of Environmental Conservation.

Barclay Damon, LLP, Albany, NY (Yvonne E. Hennessey, Danielle E. Mettler-LaFeir, and Laura L. Mona of counsel), for respondent Trans Canada Ravenswood,

LLC.

CONNOLLY, J.

We hold that the issuance of an "initial permit" for making water withdrawals pursuant to Environmental Conservation Law § 15-1501(9) is not a ministerial act that is excluded from the definition of "action" under the State Environmental Quality Review Act (hereinafter SEQRA; *see* ECL 8-0105[5][ii]).

I

The respondent Trans Canada Ravenswood, LLC (hereinafter TC Ravenswood), operates the Ravenswood thermoelectric generating station (hereinafter Ravenswood Station or the station) in Long Island City, Queens, which produces energy for the City of New York. In connection with electrical generation by three of the station's four steam generators, Ravenswood Station withdraws large amounts of water from the East River to cool the station's boiler equipment, turbines, and auxiliary equipment. The water is used only once and then discharged back into the East River. This "once-through cooling" system is the original cooling system that has been used by Ravenswood Station since it began operating in 1963. The station's fourth generator uses a multi-celled air-cooled condenser system that does not require the withdrawal of water from the river. When operating at full load, the station has a maximum withdrawal capacity of 1.5 billion gallons of water per day, although the actual amount of water used to operate the station is typically less, and varies depending upon the station's operating needs. This sizable water withdrawal has environmental consequences, most notably to fish and other local aquatic life. When the cooling water is drawn in, larger fish are killed when they become "impinged" on the screens that cover the intake structures to prevent debris in the water from entering. Juvenile fish, larvae, and eggs that are small enough to pass through the intake screens are killed when they become "entrained" in the cooling system. Additionally, the discharge of heated water back into the East River also has an impact on the aquatic environment. In the early 1990s, studies by ConEdison, the station's prior owner, demonstrated that, each year, approximately 83,000 fish became impinged and an average of 220 million eggs, larvae, and juvenile fish became entrained by the station's cooling system. Technology installed at the station in 2005 reduced annual impingement to approximately 25,000 fish and entrainment to 150 million organisms and eggs. Additional measures implemented in 2012

resulted in further reductions in impingement and entrainment.

II

Since the 1970s, Ravenswood Station has been regulated by the Federal Clean Water Act (*see* 33 USC § 1251 *et seq.*), and required to maintain a State Pollutant Discharge Elimination System (hereinafter SPDES) discharge permit (*see* ECL 17-0801 *et seq.*; *see also* 33 USC § 1342[b]). The SPDES permitting system, which the New York State Department of Environmental Conservation (hereinafter the DEC) administers at the state level, regulates the discharge of pollutants from point sources (*see* 33 USC § 1311[a]). With respect to cooling water intake structures, the Clean Water Act provides that effluent standards for discharges "shall require that the location, design, construction, and capacity of cooling water intake structures reflect the *best technology available* for minimizing adverse environmental impact" (33 USC § 1326[b] [emphasis added]). "Best technology available," or "BTA," is a standard of performance established through detailed regulations promulgated by the United States Environmental Protection Agency (40 CFR 125.94[a]; *see Entergy Corp. v Riverkeeper, Inc*., 556 US 208). The Clean Water Act expressly provides that states may adopt and enforce more stringent effluent limitations or standards of performance than required by federal law (*see* 33 USC § 1370; *Islander E. Pipeline Co., LLC v Connecticut Dept. of Envtl. Protection*, 482 F3d 79, 90 n 9 [2d Cir]).

While the SPDES permitting system generally authorized the DEC to regulate entities that *discharge* into water, under prior law (*see* former ECL 15-1501), the DEC also had separate authority to regulate *withdrawals* of water, i.e., the removal or taking of water from the waters of the state, but only with respect to withdrawals made by public water suppliers (*see* Assembly Sponsor's Mem in Support, Bill Jacket, L 2011, ch 401; *see also* ECL 15-1502[16]). However, the "*consumptive* uses of water for agricultural, commercial, and industrial purposes remain[ed] largely unregulated" (Assembly Sponsor's Mem in Support, Bill Jacket, L 2011, ch 401 [emphasis added]). Neighboring states, including "Connecticut, New Jersey, Rhode Island, and Massachusetts all ha[d] programs that regulate[d] industrial, commercial and agricultural water withdrawals" (*id*.; *see* Conn Gen Stat §§ 22a-365 to 22a-379; NJ Stat § 58:1A-1 *et seq.*; RI Gen Laws tit 46, ch 15.7; Mass Gen Laws ch 21G).

Accordingly, in 2011, the State Legislature amended ECL article 15 by enacting the Water Resources Protection Act (*see* ECL 15-1501 *et seq.* [hereinafter the WRPA]), which directed

the DEC to implement a water withdrawal permitting program to regulate the use of the state's water resources. Pursuant to the WRPA, all commercial and industrial operators of water withdrawal systems with a capacity to withdraw more than 100,000 gallons per day are required to obtain a water withdrawal permit (*see* ECL 15-1501[1]; 15-1502[14]). Applicants for water withdrawal permits are required to submit a "proposed near term and long range water conservation program that incorporates environmentally sound and economically feasible water conservation measures" (ECL 15-1503[1][f]). The DEC has the power to grant or deny a permit, or to grant a permit with conditions, and in doing so, must consider a number of statutory factors, including whether "the proposed water withdrawal will be implemented in a manner to ensure it will result in no significant individual or cumulative adverse impacts on the quantity or quality of the water source and water dependent natural resources," and whether "the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures" (ECL 15-1503[2][f], [g]).

As pertinent to this appeal, with respect to existing operators of water withdrawal systems, the WRPA provides for the issuance of an "initial permit" based upon an operator's self-reported "maximum water withdrawal capacity" prior to the statute's effective date (ECL 15-1501[9]). Specifically, the statute states: "[the DEC] *shall issue* an initial permit, *subject to appropriate terms and conditions as required under this article*, to any person not exempt from the permitting requirements of this section, for the maximum water withdrawal capacity reported to [the DEC] . . . on or before February [15, 2012]" (ECL 15-1501[9] [emphasis added]; *see* 6 NYCRR 601.7[d]). The DEC's regulations implementing the WRPA state that an "initial permit . . . includes all terms and conditions of a water withdrawal permit, including environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies, and is subject to modification, suspension and revocation" (6 NYCRR 601.7[e]).

III

In order to comply with the WRPA, in 2013, TC Ravenswood applied for an initial permit. The DEC determined that the permit application was not subject to SEQRA. In response to public comments that the application should be reclassified as a Type I action under SEQRA, the DEC asserted that the issuance of the permit was ministerial, because it "has no discretion but to issue 'initial permits' for the amount of the water withdrawals for users that were in operation and

properly reported their withdrawals to [the DEC] as of February 15, 2012." On November 15, 2013, the DEC issued TC Ravenswood an initial permit authorizing the withdrawal of 1.39 billion gallons of water per day. The initial permit incorporated monitoring requirements from TC Ravenswood's SPDES permit, and imposed several additional conditions related to the installation of meters and the collection of data regarding water withdrawals. Subsequent to the issuance of the initial permit, the DEC amended the initial permit to authorize the withdrawal of just over 1.5 billion gallons of water per day.

The petitioners, who are nonprofit organizations dedicated to the protection of the environment and conservation of water resources, commenced this proceeding pursuant to CPLR article 78, arguing that the DEC erroneously classified the issuance of the permit as a ministerial action not subject to SEQRA. The Supreme Court denied the petition and dismissed the proceeding, concluding that the WRPA and its implementing regulations did not leave the DEC with any discretion to deny TC Ravenswood an initial permit, and that it was thus required to issue the initial permit regardless of environmental concerns. The petitioners appeal, and we reverse.

IV

"In a CPLR article 78 proceeding to review a determination of an administrative agency, the standard of judicial review is whether the determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion" (*Matter of Wilson v New York City Dept. of Hous. Preserv. & Dev.*, 145 AD3d 905, 907; *see* CPLR 7803[3]). For the reasons that follow, we find that the issuance of an initial permit pursuant to ECL 15-1501(9) is not a ministerial act and, therefore, the DEC's determination was affected by an error of law (*see* CPLR 7803[3]; *Matter of 149 Glen St. Corp. v Jefferson*, 140 AD3d 742, 743; *cf. Matter of Long Is. Pine Barrens Socy., Inc. v Central Pine Barrens Joint Planning & Policy Commn.*, 138 AD3d 996, 998).

"SEQRA's fundamental policy is to inject environmental considerations directly into governmental decision making; thus the statute mandates that '[social], economic, and environmental factors shall be considered together in reaching decisions on proposed activities'" (*Matter of Coca-Cola Bottling Co. of N.Y. v Board of Estimate of City of N.Y.*, 72 NY2d 674, 679, quoting ECL 8-0103[7]). "The procedures necessary to fulfill SEQRA review are carefully detailed

in the statute and its implementing regulations, and [courts] have recognized the need for strict compliance with SEQRA requirements" (*Matter of City Council of City of Watervliet v Town Bd. of Town of Colonie*, 3 NY3d 508, 515 [citations omitted]; *see Matter of King v Saratoga County Bd. of Supervisors*, 89 NY2d 341, 347).

"To promote the Legislature's goals, and to provide an informational tool to aid in the decision-making process, SEQRA requires agencies to prepare an [environmental impact statement] 'on any *action* they propose or approve which may have a significant effect on the environment'" (*Incorporated Vil. of Atl. Beach v Gavalas*, 81 NY2d 322, 325, quoting ECL 8-0109[2]). "[SEQRA] broadly defines the term 'action' to include projects or activities that the agency either directly undertakes or funds, policy and procedure-making and *the issuance of permits*, licenses or leases" (*Incorporated Vil. of Atl. Beach v Gavalas*, 81 NY2d at 325 [emphasis added]; *see* ECL 8-0105[4]). When undertaking an action, a governmental agency (or designated "lead agency" where more than one agency is involved in the decision-making process) must initially determine whether a proposed action "may have a significant effect on the environment" (*Matter of Coca-Cola Bottling Co. of N.Y. v Board of Estimate of City of N.Y.*, 72 NY2d at 680; *see* ECL 8-0109[2]; *see also* ECL 8-0111[6]). "If no significant effect is found, the lead agency may issue a 'negative declaration,' identifying areas of environmental concern, and providing a reasoned elaboration explaining why the proposed action will not significantly affect the environment" (*Matter of Coca-Cola Bottling Co. of N.Y. v Board of Estimate of City of N.Y.*, 72 NY2d at 680; *see* 6 NYCRR former 617.6[g]). However, "[i]f the lead agency determines that there may be significant environmental impact, it must see to it that an environmental impact statement [hereinafter EIS] is prepared, which fully evaluates the potential environmental effects, assesses mitigation measures, and considers alternatives to the proposed action" (*Matter of Coca-Cola Bottling Co. of N.Y. v Board of Estimate of City of N.Y.*, 72 NY2d at 680; *see* ECL 8-0109[2], [4]).

To assist agencies in determining whether a proposed action may have a significant effect on the environment, SEQRA directs the DEC to promulgate regulations identifying, inter alia, "[a]ctions or classes of actions that are likely to require preparation of environmental impact statements," and "[a]ctions or classes of actions which have been determined not to have a significant effect on the environment and which do not require environmental impact statements" (ECL 8-0113[2][c]). In furtherance of this mandate, the DEC classifies actions as Type I, Type II,

or Unlisted (*see Matter of South Bronx Unite! v New York City Indus. Dev. Agency*, 115 AD3d 607, 609 n 4). "[A] Type I action carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS" (6 NYCRR 617.4[a][1]). Type II "actions have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under [SEQRA]" (6 NYCRR 617.5[a]). "[A]ll remaining actions are classified as 'unlisted' actions" (*Matter of City Council of City of Watervliet v Town Bd. of Town of Colonie*, 3 NY3d at 518 n 8). "Type I and unlisted actions are subject to SEQRA review, and Type I actions 'are more likely to require the preparation of an EIS than Unlisted actions'" (*id*., quoting 6 NYCRR 617.4[a]).

As relevant to the case at bar, the DEC classifies "a project or action that would use ground or surface water in excess of 2,000,000 gallons per day" as a Type I action (6 NYCRR 617.4[b][6][ii]). Ravenswood Station has the capacity to withdraw over 1.5 billion gallons of water per day, an amount approximately 750 times greater than the DEC's Type I threshold.

However, SEQRA also expressly excludes from the definition of "action," "official acts of a ministerial nature, involving no exercise of discretion" (ECL 8-0105[5][ii]). The DEC construes the words "shall issue" in ECL 15-1501(9) to mean that the issuance of an initial permit to an existing operator is mandatory and involves no agency discretion, and is, therefore, a ministerial act. The petitioners argue that the words "subject to appropriate terms and conditions as required under this article" in ECL 15-1501(9) give the DEC the discretion to impose conditions on the initial permit and, therefore, the issuance of an initial permit is not excluded from the definition of "action" under SEQRA. We agree with the petitioners' interpretation of the statute.

Whether a particular action is ministerial or discretionary depends upon the underlying statute or regulatory scheme (*see Incorporated Vil. of Atl. Beach v Gavalas*, 81 NY2d at 325; *Matter of Ziemba v City of Troy*, 37 AD3d 68, 73). "Discretionary or quasi-judicial acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" (*Tango v Tulevech*, 61 NY2d 34, 41; *see Matter of Filmways Communications of Syracuse v Douglas*, 106 AD2d 185, 186, *affd* 65 NY2d 878). Generally, determinations that involve an agency's expertise, the application of law, and exercise of judgment are nonministerial (*see New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184; *Tango v Tulevech*, 61

NY2d 34, 41; *see also Tarter v State of New York*, 68 NY2d 511, 518-519). "[W]hen an agency has some discretion, but that discretion is circumscribed by a narrow set of criteria which do not bear any relationship to the environmental concerns that may be raised in an EIS, its decisions will not be considered 'actions' for purposes of SEQRA's EIS requirements" (*Incorporated Vil. of Atlantic Beach v Gavalas*, 81 NY2d at 326).

Here, while ECL 15-1501(9) states that the DEC "shall issue" an initial permit to an existing operator for its self-reported maximum water withdrawal capacity, the statute provides that such initial permit is "subject to appropriate terms and conditions as required under this article." Notably, the WRPA specifically provides the DEC with the power "to grant or deny a permit or to grant a permit *with conditions*" (ECL 15-1503[2] [emphasis added]). The statutory factors that the DEC is required to consider when reviewing an application and imposing conditions on the permittee do not lend themselves to mechanical application. For instance, whether "the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures" (ECL 15-1503[2][g]) will almost certainly vary from operator to operator, or from water source to water source. The DEC's own regulations state that an "initial permit" must include "environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies" (6 NYCRR 601.7[e]). Whether a condition is "appropriate" for a given operator is a matter that falls within the DEC's expertise and involves the exercise of judgment, and, therefore, implicates matters of discretion (*see New York Civ. Liberties Union v State of New York*, 4 NY3d at 184; *Tango v Tulevech*, 61 NY2d at 41*; see also Tarter v State of New York*, 68 NY2d at 518-519).

While ECL 15-1501(9) may be mandatory with respect to the maximum volume of water an operator receiving an initial permit is authorized to withdraw, i.e., its pre-WRPA maximum withdrawal capacity, the statute clearly authorizes the DEC to act in a discretionary manner with respect to the imposition of "appropriate terms and conditions as required under [ECL article 15]." Thus, while the phrase "shall issue" implies a nondiscretionary act, "[s]tatutory language, however strong, must yield to what appears to be intention and that is to be found not in the words of a particular section alone but by comparing it with other parts or provisions of the general scheme of which it is part" (McKinney's Cons Laws of NY, Book 1, Statutes § 97, Comment at 213 [1971 ed]).

In light of our determination, the parties' remaining contentions have been rendered

academic.

Accordingly, the initial permit, as amended, must be annulled, and the matter remitted to the DEC for further proceedings on TC Ravenswood's permit application in accordance with SEQRA. Therefore, the judgment is reversed, on the law, that branch of the petition which was to annul the determination dated November 15, 2013, as amended March 7, 2014, is granted, the petition is otherwise denied as academic, and the matter is remitted to the DEC for further proceedings in accordance herewith.

HALL, J.P., AUSTIN and SGROI, JJ., concur.

ORDERED that the judgment is reversed, on the law, with one bill of costs, that branch of the petition which was to annul the determination dated November 15, 2013, as amended March 7, 2014, is granted, the petition is otherwise denied as academic, and the matter is remitted to the New York State Department of Environmental Conservation for further proceedings in accordance herewith.

ENTER:

Aprilanne Agostino
Clerk of the Court