

SUPREME COURT OF THE STATE OF NEW YORK COUNTY
OF QUEENS

In the Matter of the Application of

**SIERRA CLUB and HUDSON RIVER FISHERMEN'S
ASSOCIATION, NEW JERSEY CHAPTER INC.,**

VERIFIED ANSWER

Petitioners,

INDEX NO. 2402/19

-against-

**NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, BASIL SEGGOS,
COMMISSIONER, and HELIX RAVENSWOOD LLC,**

Respondents.

Respondent Helix Ravenswood LLC ("Helix") by their attorneys, Barclay Damon LLP,
for their Answer with Objections in Point of Law, respond as follows:

INTRODUCTION

1. States that no response is required for the allegations contained in Paragraph 1 and refers the Court to the Verified Petition as best evidence of the claims brought in this action by Petitioners.

2. Denies the allegations contained in Paragraph 2.

3. States that no response is required for the allegations contained in Paragraph 3, refers the Court to the Verified Petition as best evidence of the relief sought in this action and denies that such relief is warranted.

PARTIES

4. Denies the allegation that the Ravenswood Generation Station's ("Ravenswood") water usage for its cooling intake structures causes injury to the

conservation, aesthetic and recreational interests of Petitioner Sierra Club's members and denies knowledge or information sufficient to form a belief as to the remaining allegations in Paragraph 4.

5. Denies the allegation that the Ravenswood Generation Station's ("Ravenswood") water usage for its cooling intake structures causes injury to the conservation, aesthetic and recreational interests of Petitioner Hudson River Fishermen Association's ("HRFA") members and denies knowledge or information sufficient to form a belief as to the remaining allegations in Paragraph 4.

6. Admits the allegations contained in Paragraph 6.

7. Admits the allegations contained in Paragraph 7.

STATUTORY AND REGULATORY FRAMEWORK

8. Admits the allegations contained in Paragraph 8.

9. States that no response is required for the allegations contained in Paragraph 9 and refers all legal questions regarding the Water Resources Protection Act of 2011 to the Court.

10. States that no response is required for the allegations contained in Paragraph 10 and refers all legal questions regarding the Water Resources Protection Act of 2011 to the Court.

11. States that no response is required for the allegations contained in Paragraph 11 and refers all legal questions regarding the Water Resources Protection Act of 2011 to the Court.

12. States that no response is required for the allegations contained in Paragraph 12 and refers all legal questions regarding the Water Resources Protection Act of 2011 to the Court.

13. Admits the allegations contained in Paragraph 13.

14. Admits the allegations contained in Paragraph 14 and affirmatively states that existing users, like Ravenswood, were entitled to a permit.

THE RAVENSWOOD PERMITS

A. 2013 Ravenswood Water Withdrawal Permit

15. Admits the allegations contained in Paragraph 15.
16. With respect to the allegations contained in Paragraph 16, refers the Court to the Environmental Notice Bulletin as best evidence of its terms.
17. With respect to the allegations contained in Paragraph 17, refers the Court to the referenced comments as best evidence of its terms.
18. Admits the allegations contained in Paragraph 18.
19. Denies the allegations contained in Paragraph 19.
20. Admits the allegations contained in Paragraph 20, except notes that the case was refiled February 18, 2014, not February 18, 2019 as stated in Paragraph 20.
21. Admits the allegations contained in Paragraph 21 and affirmatively states that the 2013 Ravenswood permit was modified by the Department on March 7, 2014 to accurately reflect the correct capacity of the Ravenswood facility's water withdrawal system.
22. Admits the allegations contained in Paragraph 22 and affirmatively states that the referenced decisions also favored Ravenswood.

B. 2018 Appeals Court Decision Invalidating Ravenswood Permit

23. With respect to the allegations contained in Paragraph 23, refers the Court to the Second Department's decision as best evidence of its terms
24. With respect to the allegations contained in Paragraph 24, refers the Court to the Second Department's decision as best evidence of its terms.

C. 2019 Ravenswood Water Withdrawal Permit

25. Denies the allegations contained in Paragraph 25 and affirmatively states that the Appellate Division, Second Department did not invalidate the permit but rather remanded the

matter back to the New York State Department of Environmental Conservation (the “Department”) for further proceedings under the State Environmental Quality Review Act (“SEQRA”).

26. With respect to the allegations contained in Paragraph 26, refers the Court to the Department’s April 28, 2018 letter as best evidence of its terms.

27. With respect to the allegations contained in Paragraph 27, refers the Court to the Department’s April 28, 2018 letter as best evidence of its terms, and affirmatively states that Ravenswood submitted a full “Project Justification” with its initial permit application even though it was not required to do so as an existing facility.

28. Refers the Court to the Administrative Return as best evidence of the nature and extent of Ravenswood’s application materials.

29. Admits that the Department accepted the transfer application as complete and issued a negative declaration on September 25, 2018, affirmatively states that a revised Negative Declaration was issued on February 14, 2019 and refers the Court to the February 14, 2019 Negative Declaration as best evidence of its contents.

30. Refers the Court to the Environmental Notice Bulletin, dated October 3, 2018 (Administrative Return 394-398), as best evidence of what the Department announced on October 3, 2018.

31. Denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 31.

32. Denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 32 and affirmatively states that the Court did not invalidate the prior initial water withdrawal permit issued for Ravenswood but merely annulled it and remitted it back to the Department for further proceedings in accordance with SEQRA.

33. Admits the allegations contained in Paragraph 33.

34. With respect to the allegations contained in Paragraph 34, refers the Court to Ravenswood's water withdrawal permit as best evidence of its terms.

35. With respect to the allegations contained in Paragraph 35, refers the Court to Ravenswood's water withdrawal permit as best evidence of its terms and affirmatively states that the Court did not invalidate the prior initial water withdrawal permit issued for Ravenswood but merely annulled it and remitted it back to the Department for further proceedings in accordance with SEQRA.

36. With respect to the allegations contained in Paragraph 36, refers the Court to Ravenswood's water withdrawal and SPDES permits as best evidence of their terms.

FIRST CAUSE OF ACTION

37. Repeats and realleges its respective responses to Paragraphs 1 through 36 of the Verified Petition as if set forth in full in response to Paragraph 37 of the Verified Petition.

38. Denies the allegations contained in Paragraph 38.

39. Denies the allegations contained in Paragraph 39.

40. Denies the allegations contained in Paragraph 40.

41. Denies the allegations contained in Paragraph 41.

42. Denies the allegations contained in Paragraph 42.

43. Denies the allegations contained in Paragraph 43.

44. Denies the allegations contained in Paragraph 44.

45. Denies the allegations contained in Paragraph 45 and affirmatively states that the Court did not invalidate the prior initial water withdrawal permit issued for Ravenswood, the Department did not concede that it had not made appropriate determinations as required by New York's Water Resources Protection Act ("Act") and appropriate terms and conditions were set

by the Department for Ravenswood's water withdrawal permit.

46. States that no response is required for the allegations contained in Paragraph 46 and refers all legal questions to the Court. To the extent a response is required, denies the allegations contained in Paragraph 46.

47. States that no response is required for the allegations contained in Paragraph 47 and refers all legal questions to the Court.

48. With respect to the allegations contained in Paragraph 48, refers the Court to the cited statute and legislative history as best evidence of the legislative purpose and denies knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 48.

49. Denies the allegations contained in Paragraph 49.

SECOND CAUSE OF ACTION

50. Repeats and realleges its respective responses to Paragraphs 1 through 49 of the Verified Petition as if set forth in full in response to Paragraph 50 of the Verified Petition.

51. Denies the allegations contained in Paragraph 51.

52. With respect to the allegations contained in Paragraph 52, refers the Court to the cited regulation as best evidence of its terms.

53. Denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 53.

54. Denies the allegations contained in Paragraph 54.

55. Denies the allegations contained in Paragraph 55.

56. With respect to the allegations contained in Paragraph 56, affirmatively states that the 2018 Negative Declaration was amended and refers the Court to the Department's February 14, 2019 Negative Declaration as best evidence of its terms.

57. With respect to the allegations contained in Paragraph 57, refers the Court to the cited statutes and their legislative history as best evidence of their terms and legislative purpose and affirmatively states that the legislative history made it clear that existing operators such as Ravenswood would be *entitled* to a permit.

58. With respect to the allegations contained in Paragraph 58, affirmatively states that the 2018 Negative Declaration was amended and refers the Court to the Department's February 14, 2019 Negative Declaration as best evidence of its terms.

59. With respect to the allegations contained in Paragraph 59, affirmatively states that the 2018 Negative Declaration was amended and refers the Court to the Department's Negative Declaration as best evidence of its terms.

60. With respect to the allegations contained in Paragraph 60, affirmatively states that the 2018 Negative Declaration was amended and refers the Court to the Department's Negative Declaration as best evidence of its terms.

61. With respect to the allegations contained in Paragraph 61, affirmatively states that the 2018 Negative Declaration was amended and refers the Court to the Department's Negative Declaration as best evidence of its terms.

62. Denies the allegations contained in Paragraph 62.

63. Denies the allegations contained in Paragraph 63 and affirmatively states that the 2018 Negative Declaration was amended.

RELIEF REQUESTED

64. States that no response is required for Petitioners' prayer for relief in the Verified Petition. To the extent a response is required, Helix denies that Petitioners are entitled to the relief requested.

65. Helix denies every allegation in the Verified Petition not otherwise addressed

herein.

**FIRST AFFIRMATIVE DEFENSE
AND OBJECTION IN POINT OF LAW**

66. Petitioners lack standing to bring their claims. Not one Petitioner has provided any evidence that one of its members has standing.

**SECOND AFFIRMATIVE DEFENSE
AND OBJECTION IN POINT OF LAW**

67. Petitioners failed to administratively exhaust their claims, including but not limited to their failure to challenge Ravenswood's SPDES permit, or its BTA determination, at the time the Department issued the SPDES permit.

**THIRD AFFIRMATIVE DEFENSE
AND OBJECTION IN POINT OF LAW**

68. The Department's interpretation of the relevant provisions of the Environmental Conservation Law as they relate to SEQRA and the initial water withdrawal permits issued for Ravenswood, is lawful and entitled to judicial deference as the Department is the administrative agency charged with administration and implementation of the Environmental Conservation Law and also vested with the appropriate technical expertise.

**FOURTH AFFIRMATIVE DEFENSE
AND OBJECTION IN POINT OF LAW**

69. The record of proceedings before the Department, submitted as the Administrative Return and incorporated by reference herein, establishes that the Department's findings and determinations were supported by substantial evidence in the record, were not affected by any error of law, were not arbitrary and capricious, and do not constitute an abuse of discretion.

**FIFTH AFFIRMATIVE DEFENSE
AND OBJECTION IN POINT OF LAW**

70. The review conducted by the Department as summarized within its February 14, 2019 Negative Declaration demonstrates that the Department conducted a careful, thorough, and complete review of the relevant areas of environmental concern, took the required “hard look” at all relevant areas, and provided a written, reasoned elaboration for its determination.

**SIXTH AFFIRMATIVE DEFENSE
AND OBJECTION IN POINT OF LAW**

71. Because the Department’s thorough and well-reasoned SEQRA findings supported issuance of the February 14, 2019 Negative Declaration, Petitioners’ claims should be rejected.

**SEVENTH AFFIRMATIVE DEFENSE
AND OBJECTION IN POINT OF LAW**

72. Due to Ravenswood’s long-standing non-consumptive water withdrawals from the East River, the Department appropriately exercised its discretion and established the baseline for purposes of SEQRA.

**EIGHTH AFFIRMATIVE DEFENSE
AND OBJECTION IN POINT OF LAW**

73. The Act was not intended to supplant the Department’s review of facilities like Ravenswood that are required to employ the Best Technology Available in accordance with Section 704.5 of 6 NYCRR and Section 316(b) of the federal Clean Water Act. Furthermore, the Act was not meant to provide a proverbial “second bite at the apple” regarding the volume of water needed by these facilities or the technology by which they withdraw water. To the contrary, the Legislature expressly intended these facilities to be *entitled* to an initial water withdrawal permit and to continue withdrawing water at the *maximum* capacity previously

reported to the Department.

**NINTH AFFIRMATIVE DEFENSE
AND OBJECTION IN POINT OF LAW**

74. Neither Section 704.5 of 6 NYCRR or Section 316(b) of the federal Clean Water Act require the installation of closed-cycle cooling on an existing cooling water intake structure. As such, the Department's July 10, 2011 Commissioner's Policy – 52 Best Technology Available ("BTA") For Cooling Water Intake Structures ("CP-52"), identifies closed-cycle cooling or the "equivalent" as the performance goal for BTA to minimize adverse environmental impacts pursuant to Section 704.5 of 6 NYCRR and Section 316(b) of the federal Clean Water Act in a State Pollutant Discharge Elimination System ("SPDES") permit for an existing cooling water intake structure. CP-52 defines "equivalent" as the reductions, obtainable by a suite of technologies that are not closed-cycle cooling, in impingement mortality and entrainment that are 90 percent or greater of that which would be achieved by a wet closed-cycle cooling system.

**TENTH AFFIRMATIVE DEFENSE
AND OBJECTION IN POINT OF LAW**

75. Petitioners' claims are barred by the statute of limitations to the extent that their second cause of action seeks to challenge the Department's 2018 Negative Declaration which was issued on September 25, 2018, more than four (4) months prior to Petitioners' commencement of this action in April 2019.

**ELEVENTH AFFIRMATIVE DEFENSE
AND OBJECTION IN POINT OF LAW**

76. Petitioners' claims are moot to the extent that their second cause of action seeks to challenge the Department's September 25, 2018 Negative Declaration. The operative determination of significance, which supported the Department's issuance of the initial water

withdrawal permit to Ravenswood was issued by the Department on February 14, 2019.

**TWELFTH AFFIRMATIVE DEFENSE
AND OBJECTION IN POINT OF LAW**

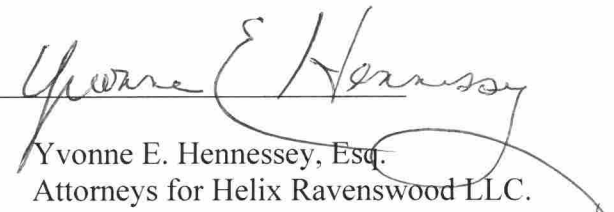
77. The Verified Petition was improperly verified by their counsel, particularly with respect to Paragraphs 4 through 5 concerning Petitioners' alleged interests and injury.

78. Helix reserves the right to assert additional affirmative defenses in the event discovery indicates such defenses may be appropriate.

WHEREFORE, Respondent respectfully requests that the relief requested in the Petition be denied, that the Petition and this action be dismissed, and that Respondent be awarded costs and disbursements or, in the event the Court grants the Petition, that the Court remand the matter for a rehearing at which the technical matters complained of by the Petitioner may be remedied, together with such other relief as may be right and just.

DATED: August 12, 2019

BARCLAY DAMON LLP

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ATTORNEY AFFIRMATION/VERIFICATION

The undersigned, an attorney admitted to practice in the courts of the State of New York, hereby affirms under the penalties of perjury that deponent is a partner with the firm of Barclay Damon LLP, attorneys for Respondent Helix Ravenswood, LLC, that deponent has read the foregoing Verified Answer and Objections in Point of Law and knows the contents thereof, that the same is true upon information and belief, and that deponent believes it to be true. Deponent further states that the reason that this affirmation is made by deponent and not by Respondent is because Respondent does not have an office in the County of Albany where the undersigned has an office.

The grounds of deponent's belief as to all matters stated herein include deponent's representation of Respondent in the permitting of the original initial water withdrawal permit and the prior litigation referenced in the Verified Petition, communications with officers, employees, and agents of Respondent, business records of Respondent and relevant administrative documents and permits.

DATED: August 12, 2019


YVONNE E. HENNESSEY