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.,

Petitioners,

-against-

Index No. 2402/19

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

Respondents,

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

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RESPONDENT'S MEMORANDUM OF LAW

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PRELIMINARY STATEMENT

Respondent Helix Ravenswood, LLC ("Helix Ravenswood") respectfully submits this Memorandum of Law and accompanying Answer and Objections in Point of Law, Affidavit of James Scullin, dated August 9, 2019, and Affirmation of Yvonne E. Hennessey, dated August 12, 2019, in opposition to the Sierra Club and Hudson River Fisherman's Association, New Jersey Chapter, Inc.'s ("HRFA") (collectively referred to as "Petitioners") attempt to annul the New York State Department of Environmental Conservation's ("NYSDEC") well-reasoned and rationally-based determinations to issue an initial water withdrawal permit for the Ravenswood Generating Station ("Ravenswood Facility" or "Facility"). Petitioners' claims fail on multiple, independent grounds.

At the outset, Petitioners lack standing. Petitioners have each failed to establish that at least one member of their organization has suffered an injury-in-fact sufficient to confer standing to sue individually. Indeed, they could not – the Ravenswood Facility has withdrawn water from the East River since the 1960s such that the challenged permit did not authorize any new activity that could cause an injury-in-fact. Moreover, Petitioners' attempts at establishing a sufficient injury-in-fact are vague, conclusory, and overly generalized.

Petitioners fare no better with respect to the substance of their claims. The Ravenswood Facility has been in operation for decades, during which time it has been authorized to withdraw water from the East River. The Ravenswood Facility's initial water withdrawal permit ("2019 Initial Permit"), which Petitioners are challenging in this proceeding, did not authorize any new activity. Moreover, despite Petitioners' claims, the Ravenswood Facility's water withdrawals have been thoroughly reviewed by the New York State Department of Environmental Conservation ("NYSDEC"). In particular, the Ravenswood Facility's State Pollution Discharge Elimination System ("SPDES") permit requires Best Technology Available ("BTA") in order to

minimize the environmental impacts associated with the Facility's cooling water intake structures and associated water withdrawals.

The Ravenswood Facility's water withdrawals were also the subject to a thorough and appropriate review under the New York Water Resources Protection Act ("WRPA"), N.Y. Envtl. Conserv. Law §§ 15-1501 *et seq*. ("WRPA"). Notwithstanding, despite Petitioners' self-serving and unsupported assertions to the contrary, the WRPA was not intended to supplant NYSDEC's review of facilities like the Ravenswood Facility that are required to employ BTA, or provide a proverbial "second bite at the apple" regarding the volume of water needed by the Ravenswood Facility or similarly-situated 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 NYSDEC.

Petitioners claim that NYSDEC violated the State Environmental Quality Review Act ("SEQRA") fares no better. Not surprisingly, Petitioners fail to cite any case law for their improper baseline argument and suggestion that NYSDEC should have ignored the Ravenswood Facility's long-standing, existing water withdrawals and related permitting. This is because NYSDEC's exercise of its technical expertise appropriately resulted in a baseline that recognized the Facility's long-standing and existing operations and attendant impacts, which is wholly consistent with SEQRA and past agency decisions as well as the WRPA and its legislative history.

Given the foregoing, there is no merit to Petitioners' claims that NYSDEC improperly processed the 2019 Initial Permit. Indeed, the WRPA, the implementing regulations promulgated by NYSDEC, and the legislative history, not to mention the Appellative Division,

Second Department, all confirm that NYSDEC lacked discretion to reduce the amount of water that the Ravenswood Faculty could withdraw from the East River.

Accordingly, the Petition must be dismissed in its entirety with prejudice.

STATEMENT OF FACTS

A. The Water Resources Protection Act

Prior to 2011, Environmental Conservation Law ("ECL") Article 15, Title 15 required permits only for certain public water supplies without regard to the size of the water withdrawal. The WRPA expanded the statutory coverage to include commercial, manufacturing, industrial, oil and gas development, and other purposes for withdrawals that exceeded a threshold volume of 100,000 gallons per day. The purpose of the WRPA was to expand NYSDEC's permitting because "***consumptive*** uses of water . . . remain largely unregulated." *See* Affirmation of Yvonne E. Hennessey, Esq., dated August 12, 2019 ("Hennessey Aff."), Exh. A, p. 16 (Bill Sponsor's Memorandum in Support) (emphasis added); *see also Sierra Club v. Martens et al.*, Dkt. 2015-02317, slip. op., p. 3 (2d Dep't Jan. 10, 2018) (*Ravenswood I*).

Pertinent legislative history explains that the WRPA "provide[s] that existing water withdrawals would be ***entitled*** to an initial permit based on their maximum water withdrawal capacity reported to [NYS]DEC on or before February 15, 2012 pursuant to existing law." (Bill Sponsor's Memorandum in Support) (emphasis added). *See* Hennessey Aff., Exh. A, p. 8.

Accordingly, the WRPA authorized NYSDEC to implement a permitting program for water withdrawals from (1) an existing source; (2) a new source; or (3) an increased water withdrawal from an existing permitted source. ECL § 15-1501(1)(a). Two separate types of permits were established: "Initial" permits for existing withdrawals and "New" permits for proposed withdrawals.

Specific to existing withdrawals, the WRPA mandated that "the department 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 the section, for the maximum water withdrawal capacity reported to the department . . . on or before February fifteenth, two thousand twelve." ECL § 15-1501(9).

The WRPA also directed NYSDEC to promulgate regulations to implement the new permitting program for water withdrawals. ECL § 15-1501(4). As part of its rulemaking process, NYSDEC published a notice of proposed rulemaking and notice of adoption in the New York State Register. Hennessey Aff., Exhs. B & C. In both notices, NYSDEC reiterated the Legislature's mandate that "existing water withdrawals above the size threshold are entitled to an initial permit." Hennessey Aff., Exh. B, p. 9 & Exh. C, p. 3. NYSDEC explained that "the amended legislation includes provisions allowing existing systems to utilize the more efficient and less costly initial permit process" to address concerns from industry groups that it would be burdensome for existing operators to apply for permits for withdrawals that have already existed and are already permitted. Hennessey Aff., Exh. B, p. 11 & Exh. C, p. 5.

In its rulemaking, NYSDEC confirmed that an initial permit would be issued for the withdrawal volume equal to the maximum withdrawal capacity reported to NYSDEC by February 15, 2012. 6 N.Y.C.R.R. § 601.7(d). It also determined that initial permits would include both generic conditions as well as site-specific conditions necessary to ensure that the water withdrawal system employs "environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies." 6 N.Y.C.R.R. § 601.7(e).

B. The Ravenswood Facility's Cooling Water Intake / Water Withdrawal System

The Ravenswood Facility is an electric generating facility located on the East River in Long Island City, Queens, New York. A.R. at 11[1]. It produces electricity for use throughout New York City. *See* Affidavit of James Scullin, dated August 9, 2019 ("Scullin Aff."), ¶ 8. With a combined capacity of 2,480 megawatts ("MW"), the Ravenswood Facility has the ability to, and has, produced up to 21% of the total electricity used by New York City. *Id.* ¶¶ 10-1.

The Ravenswood Facility consists of three steam boiler turbine/generators, known as Units 10, 20, and 30; a combined cycle unit, known as Unit 40 and; several simple cycle combustion turbines. *Id.* ¶ 9; A.R. at 169, 258, 366. Units 10, 20, and 30 were constructed in the early to mid-1960s, while Unit 40 went into service in 2004. Scullin Aff., ¶¶ 7, 12.

For over 50 years, the Ravenswood Facility has used a once-through cooling water system, which withdraws water from the East River that is circulated through the cooling system to cool the Unit 10, 20, and 30 boiler equipment, turbines, and auxiliary equipment. This water is not consumed by the Facility. Instead, all of it is discharged back into the East River. Scullin Aff., ¶ 13; A.R. at 11.

Cooling water from the East River is a critical component of the production of electricity at the Ravenswood Facility, as it is necessary for proper operation and to prevent overheating. Scullin Aff., ¶ 15; A.R. at 11. The maximum capacity of the Facility's cooling water system, which has not changed since the Facility was initially installed in the 1960s, is 1527.84 million gallons per day. Scullin Aff., ¶ 16. This ensures that there is sufficient water to keep the units properly cooled and to prevent overheating even when all of the units are operating on a very hot day. *Id.* ¶ 17. The actual amount of cooling water needed per day to keep the boilers and

[1] "A.R." refers to the Administrative Record, dated June 19, 2019. The citations in this Memorandum of Law use the numbering of the Administrative Record dated June 19, 2019, but do not include the "0000" pretext.

equipment at the Facility from overheating varies based on which units are operating and the amount of time that the units are operating (*i.e.*, load). *Id.* ¶ 18.

C. The Ravenswood Facility's SPDES Permit

The Ravenswood Facility's cooling water intake system, which withdraws water from the East River, has been regulated under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, ("CWA") since the 1970s. NYSDEC's SPDES permitting system administers the CWA through its own SPDES water permitting program. *Ravenswood I,* p. 3. The Ravenswood Facility, therefore, is subject to the BTA requirements for cooling water intake structures under CWA § 316(b) and 6 N.Y.C.R.R. § 704.5. The purpose of BTA is to minimize environmental impacts associated with cooling water intake structures. CWA § 316(b); 6 N.Y.C.R.R. § 704.5.

The requirements applicable to the Ravenswood Facility are contained in its SPDES permit issued by the NYSDEC in 2007, and renewed on November 1, 2012.[2] A.R. at 70, 120. The Facility's SPDES permit, including the BTA determination contain therein, underwent a full SEQRA review before it was originally issued in 2007. A.R. at 62.

While NYSDEC evaluated closed-cycle cooling, it determined that it was not feasible at the Ravenswood Facility due to, among other reasons, the limited space available for cooling towers on the site. A.R. at 109. As such, the following actions, in combination, were determined by NYSDEC to represent BTA for the Facility: use of variable speed pumps, strategic timing of scheduled outages, upgrading traveling screens, and continued use of low-stress fish returns. A.R. at 64.

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[2] Petitioners failed to comment on the draft 2007 SPDES permit or the BTA requirements set forth therein. They also failed to comment on the draft 2012 SPDES permit, or the BTA requirements applicable to the Ravenswood Facility's cooling water intake contained therein, or otherwise challenge the Ravenswood Facility's SPDES permit or BTA requirements. *See* Scullin Aff., ¶ 31 & Exh. C.

D. Ravenswood 2013 Initial Water Withdrawal Permit

Following promulgation of the NYSDEC's regulations implementing the WRPA, the Ravenswood Facility submitted an application for an initial permit to the NYSDEC on May 31, 2013. A.R. at 163. The Ravenswood Facility's application for an initial permit sought authorization to withdraw water in an amount and kind similar to what had been previously occurred at the Ravenswood Facility as part of its cooling water intake system for approximately 50 years. A.R. at 5-39, Scullin Aff., ¶ 13.

NYSDEC issued an initial permit for the Ravenswood Facility on November 15, 2013, as amended March 7, 2014 ("2013 Initial Permit"), which permitted the withdrawal of the maximum capacity of the Ravenswood Facility's cooling water intake system. A.R. at 55, 198. The 2013 Initial Permit included five general permit conditions applicable to all water withdrawal permits and eight site-specific permit conditions. A.R. at 155-158.

E. Petitioners' Prior Article 78 Challenge of the 2013 Initial Permit

Petitioners commenced their first Article 78 challenge of NYSDEC's issuance of the Facility's 2013 Initial Permit on February 18, 2014 in Supreme Court, Queens County.

In Decisions, dated October 1 and 2, 2014, the Supreme Court denied the Petition and dismissed the proceeding. *See Sierra Club v. Martens et al*, Index No. 2949/14 (N.Y. Sup. Ct. Queens County Oct. 1, 2014); *Sierra Club v. Martens et al*, Index No. 2949/14 (N.Y. Sup. Ct. Queens County Oct. 2, 2014). *See* Hennessey Aff., Exhs. D & E. In its October 1, 2014 Decision, the Supreme Court held that "[t]he issuance of an initial permit is a ministerial act not subject to review under either SEQRA or the Waterfront Act." *See id*., Exh. D, p. 10. The Supreme Court agreed with NYSDEC that because the Ravenswood Facility was entitled to an initial permit under the WRPA, the issuance of the initial permit was a ministerial act for which

NYSDEC had no discretion under the WRPA and, therefore, was a Type II action not subject to SEQRA review. *See id.*, pp. 8-9.

Thereafter, the Supreme Court issued a Judgment, as proposed by Petitioners, in which it adjudged that the "verified petition is denied and further the proceeding is dismissed on the merits according to the decision dated October 1, 2014 and the decision dated October 2, 2014." *See* Hennessey Aff., Exh. F. Petitioners filed and served a Notice of Appeal on January 7, 2015 before the New York Supreme Court Appellate Division, Second Department.

Following oral argument on February 6, 2017, the Second Department entered an Opinion and Order dated January 10, 2018. *See Ravenswood I.* The Second Department's Opinion and Order reversing the Supreme Court was limited in scope – it never reached the validity of the 2013 Initial Permit or its conditions. Indeed, the Second Department's Opinion and Order succinctly summarized the narrow basis of its Decision in the first sentence of the Opinion: "We hold that the issuance of an 'initial permit' for making water withdrawals . . . is not a ministerial act that is excluded from [SEQRA]." *See id.*, p. 2. The remainder of the Petition, including the validity of the underlying permit, was "denied as academic." *See id.*, p. 9.

The Court reasoned that the application of Section 1501(9) of the WRPA, the applicable section for the issuance of initial permits, was not ministerial because it authorized NYSDEC to grant or deny an initial permit with conditions. *See id.*, p. 8. The Court, however, added that "[w]hether a condition is 'appropriate' for a given operator ***is a matter that falls within the [NYS]DEC's expertise*** and involves the exercise of judgment, and, therefore, implicates matters of discretion." *See id.* (emphasis added). Based on this reasoning, the Court remitted the matter back to NYSDEC to apply SEQRA without opining on the 2013 Initial Permit or its conditions, which the Court held were squarely within NYSDEC's discretion.

F. Ravenswood 2019 Initial Water Withdrawal Permit

On April 12, 2017, Ravenswood submitted a modified application for an Initial Permit to NYSDEC, including a Short Environmental Assessment form. A.R. at 203. Based on NYSDEC's request, on March 4, 2018, Ravenswood submitted a Full Environmental Assessment form. A.R. at 340.

On October 3, 2018, NYSDEC published a Notice of Complete Application in the Environmental Notice Bulletin ("ENB"), a Notice of Negative Declaration, and opened a public comment period until October 18, 2018. A.R. at 401. The ENB stated that the issuance of the 2019 Initial Permit is a Type I SEQRA action, that a coordinate review with other agencies was performed, and that the issuance of the 2019 Initial Permit would not have a significant effect on the environment. A.R. at 402. The ENB also noted that the SEQRA Negative Declaration was on file with the Department. A.R. at 402. The comment period was subsequently extended by NYSDEC until November 19, 2018. A.R. at 471. Petitioners filed comments during the public comment period. A.R. at 474-499.

On February 20, 2019, NYSDEC issued the 2019 Initial Permit, an Amended Negative Declaration dated February 14, 2019, and a Response to Public Comments. A.R. at 541, 540 & 542.

The 2019 Initial Permit includes five general permit conditions applicable to all water withdrawal permits, and ten permit conditions specific to the Ravenswood Facility, including the eight permit conditions included in the 2013 Initial Permit and two new permit conditions that were not included in the 2013 Initial Permit. A.R. at 541-546.

ARGUMENT

POINT I

SIERRA CLUB AND HRFA LACK ORGANIZATIONAL STANDING

Standing requirements are an indispensable part of any challenge to a governmental action, and each element of standing must be proved in order for the challenge to survive. *New York State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004). As Petitioners have not alleged sufficient facts to satisfy even the most basic elements of individual or organizational standing, the entire Petition must be dismissed.

An organization or association that challenges an environmental permit and/or SEQRA review must show that (1) at least one of its members would have standing to sue individually; (2) the interests in the matter are germane to its purpose to show that it is the appropriate representative of those interests; and (3) neither the asserted claim nor the relief requires an individual member's participation. *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 774 (1991); *see also Dental Soc'y of State v. Carey*, 61 N.Y.2d 330, 333 (1984) (stating that "[t]he standing of an organization such as respondent to maintain an action on behalf of its members requires that some or all of the members themselves have standing to sue, for standing which does not otherwise exist cannot be supplied by the mere multiplication of potential plaintiffs"). "These requirements ensure that the requisite injury is established and that the organization is the proper party to seek redress." *Niagara Preserv. Coal. v. New York Power Auth.*, 121 A.D.3d 1507, 1510 (4th Dep't 2014) (quoting *Society of Plastics Indus.*, 77 N.Y.2d at 775 (internal quotes omitted)).

Petitioners bear the burden to establish that at least one individual member of each organization has suffered an "injury-in-fact" that is separate from the public at large, and that the

member's injury is within SEQRA's "zone of interests," otherwise no standing exists. *See Save the Pine Bush, Inc. v. City of Albany*, 13 N.Y.3d 297, 306 (2009) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)); *Society of Plastics Indus.*, 77 N.Y.2d at 769.

Here, Petitioners have failed to meet their burden. First, for an individual member to establish standing, Petitioners must prove an environmental "injury-in-fact" that is different than the public at large in degree and kind. *Lujan*, 504 U.S. at 560; *New York State Ass'n of Nurse Anesthetists*, 2 N.Y.3d at 211. To prove injury-in-fact, the individual must show there has been an invasion of a legally-protected interest that is (i) concrete and particularized, and (ii) actual or imminent – not conjectural or hypothetical. *Lujan*, 504 U.S. at 560. "A general – or even special – interest in the subject matter is insufficient to confer standing" as "interest and injury are not synonymous." *Niagara Preserv. Coal.*, 121 A.D.3d at 1510 (citing *Citizens Emergency Comm. to Preserv. v. Tierney*, 70 A.D.3d 576, 576 (1st Dep't 2010), *lv. denied*, 15 N.Y.3d 710 (2010)). It is not enough that the concern or injury is of wide public concern. *Brown v. County of Erie*, 60 A.D.3d 1442, 1444 (4th Dep't 2009).

This injury-in-fact requirement cannot be met by conclusory allegations of harm or speculation of potential harm from future events. *New York State Ass'n of Nurse Anesthetists*, 2 N.Y.3d at 214 (noting that "tenuous and ephemeral harm is insufficient to trigger judicial intervention."); *Kindred v. Monroe County*, 119 A.D.3d 1347, 1348 (4th Dep't 2014) (concluding that the alleged environmentally-related injuries were too speculative and conjectural to prove an actual and specific injury-in-fact). Petitioners must offer probative evidence, as allegations without evidentiary support are patently insufficient. *Society of Plastics Indus.*, 77 N.Y.2d at 778.

Second, the alleged injury must fall within the "zone of interests protected by the statute invoked," thus tying the injury-in-fact to the governmental act that is being challenged. *Society of Plastics*, 77 N.Y.2d at 773. This requires Petitioners to show that the alleged injury is the kind and type of concern sought to be promoted or protected. *Kindred*, 119 A.D.3d at 1348 (quoting *Society of Plastics*, 77 N.Y.2d at 773); *see also Colella v. Board of Assessors*, 95 N.Y.2d 401, 409-10 (2000).

In addition to proving that at least one member of an organization has standing to sue, the organization must join those member(s) that it claims would be harmed by the respondent's actions as petitioners to the proceeding. *Citizens Organized to Protect the Env't v. Planning Bd. of Town of Irondequoit*, 50 A.D.3d 1460, 1461 (4th Dep't 2008) (finding that non-participation by the individual members was fatal); *see also Wind Power Ethics Group v. Planning Bd. of Town of Cape Vincent*, No. 2010-2882, slip op. at 5 (Sup. Ct. Jefferson County Jan. 26, 2011).

Here, the Petition does not present sufficient facts to establish a single element of standing to support Petitioners' challenge. *See Niagara Preserv. Coal.*, 121 A.D.3d at 1509. Furthermore, neither Petitioner has joined let along even identified any member of its organization, and there is not even a single affidavit attempting to establish either Petitioner's standing.

Tellingly, Petitioners have not asserted or even inferred a direct injury, only that some unidentified members "are injured by the environmental damage caused to the East River, the Hudson River, Long Island Sound, the New York Harbor and the New York Bight by Ravenswood's water usage for its cooling water intake structures." Petition ¶¶ 4, 5. Such general un-particularized statements offered in the Petition alleging that Petitioners will be injured, but not how, are woefully insufficient. Verified Petition ¶¶ 4, 5.

Both Petitioners state that their general purpose is to protect the environment. Petition ¶ 4 (alleging that Sierra Club's "purposes include practicing and promoting the responsible use of [the] earth's ecosystems and resources, and protecting and restoring the quality of the natural and human environment"), ¶ 5 (alleging that HFRA's "mission is to encourage the responsible use of aquatic resources and protection of habitat"). These general interests in the beauty and health of the environment do not establish an injury that is based on NYSDEC's issuance of the February 14, 2019 Negative Declaration or the subsequent issuance of the 2019 Initial Permit.

Similarly, Petitioners' generalized concerns about cooling water intake structures that are not specific in any way to the Ravenswood Facility are insufficient to establish standing. *See Long Island Pine Barrens Soc'y v. Planning Bd.*, 213 A.D.2d 484, 485-86 (2d Dep't 1995) (noting that generalized allegations that a project will have a deleterious impact upon the petitioner or its members are insufficient to establish standing; further stating that where an allegation of injury does not demonstrate that the individual petitioners will suffer an environmental injury which is in any way "different in kind and degree from the community generally," such allegations fail to satisfy the petitioner's burden of establishing an injury-in-fact); *see also Sun-Brite Car Wash, Inc. v. Board of Zoning & Appeals*, 69 N.Y.2d 406, 413 (1987).

Moreover, there can be no injury-in-fact here. As detailed above, the Ravenswood Facility has been in operation for more than 50 years. During this time, it has withdrawn water from the East River through its cooling water intake structures. It was merely a change in law that required the Facility to secure a water withdrawal permit – not a change in environmental impacts. Indeed, the water withdrawals permitted by the challenged water withdrawal permit are

no different in kind or amount than those previously authorized by NYSDEC for this facility pursuant to the Ravenswood Facility's SPDES permit.

In sum, Petitioners have failed to meet their burden of establishing standing to challenge the 2019 Initial Permit or NYSDEC's Amended Negative Declaration. Their claims, therefore, fail and must be dismissed.[3]

POINT II

NYSDEC IS ENTITLED TO SUBSTANTIAL DEFERENCE

NYSDEC's interpretation of the relevant provisions of the ECL as they relate to SEQRA, the WRPA, and the 2019 Initial Permit is lawful and entitled to judicial deference as NYSDEC is the administrative agency charged with administration and implementation of the ECL and also vested with the appropriate technical expertise.

It is well settled that an agency's interpretation of a statute or regulation should be granted substantial deference if that agency is responsible for administering the statutory program and its decision is rationally based. *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842-43 (1984); *Andryeyeva v. New York Health Care, Inc.*, 33 N.Y.3d 152, 174 (2019); *Matter of Chesterfield Assoc. v. New York State Dep't of Labor*, 4 N.Y.3d 597, 604 (2005); *Carver v. State of New York*, 87 A.D.3d 25, 33 (2d Dep't 2011).

As a general rule, "courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise." *Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009). An agency's construction of its regulations "if not irrational or unreasonable, should be upheld." *Howard v. Wyman*, 28 N.Y.2d 434, 438 (1971). "Judicial deference to an agency's

[3] The prior court's holding that Petitioners had standing is of no moment here, as that decision was based on affidavits (noticeably absent here) of members of each Petitioner, who may or may not still be members of Petitioners. *See Sierra Club v. Martens et al.*, Index No. 2949/14 (N.Y. Sup. Ct. Queens County Oct. 2, 2014). Petitioners, therefore, were required to establish their standing anew for this action, which they have failed to do.

interpretation of its rules and regulations is warranted because, having authored the promulgated text and exercised its legislatively delegated authority in interpreting it, the agency is best positioned to accurately describe the intent and construction of its chosen language." *Andryeyeva*, 33 N.Y.3d at 174 (citing *Peckham*, 12 N.Y.3d at 431).

"While judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives'" *Riverkeeper v. Town of Southeast*, 9 N.Y.3d 219, 232 (2007) (citing *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990); *see also Village of Chestnut Ridge v. Town of Ramapo*, 99 A.D.3d 918, 925 (2d Dep't 2012). Therefore, even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of NYSDEC. *Consolidated Edison Co. v. New York State Div. of Human Rights*, 77 N.Y.2d 411, 417 (1991); *Trump on the Ocean, LLC v. Cortes-Vasquez*, 76 A.D.3d 1080, 1092 (2d Dep't 2010). Moreover, if an agency's interpretation of a statute is reasonable, it must be upheld even if the statute is reasonably subject to a different construction. *Wyman*, 28 N.Y.2d at 438 (finding that an agency's construction of a statute or regulation should be upheld if not irrational or unreasonable); *Trump on the Ocean*, 76 A.D.3d at 1093.

Petitioners have not shown any reason why NYSDEC should not be granted substantial deference in its application of the WRPA and SEQRA. As such, NYSDEC's decisions challenged in this action are entitled to substantial deference.

POINT III

THERE HAS BEEN NO VIOLATION OF THE WRPA

Petitioners claim that NYSDEC violated the WRPA due to their assertion that NYSDEC failed to make the required determinations or impose adequate conditions. Such second-guessing, in what can only be described as an attempt to revisit NYSDEC's prior and well-

reasoned BTA determination for the Ravenswood Facility, must fail. As the record amply demonstrates, NYSDEC used its technical expertise as well as its historic knowledge and prior permitting of the Facility to make the appropriate determinations required by the WRPA and imposed adequate conditions. Any disagreement or second-guessing by Petitioners should be rejected. *See* Point II, *supra*.

A. NYSDEC Made the Determinations Required by the WRPA

Petitioners argue that NYSDEC did not make the required determinations under the WRPA because (1) NYSDEC's administrative record "makes it apparent" that NYSDEC did not have sufficient information to do so; (2) existing operations are irrelevant; and (3) the 2019 Initial Permit is virtually identical to the 2013 Initial Permit remanded to NYSDEC by the Appellate Division, Second Department. *See* Petitioners' Memorandum of Law ("MOL"), Point 1(B). Petitioners' arguments improperly ignore the WRPA and legislative history, overlook key documents in NYSDEC's administrative record, and wholly ignore NYSDEC's technical expertise as the agency charged with implementing the WRPA and, thus, the substantial deference owed to NYSDEC, relative to issuance of the 2019 Initial Permit based on the "***maximum water withdrawal capacity reported to the department . . . on or before February fifteenth, two thousand twelve***." ECL § 15-1501(9) (emphasis added). They also overstate the Appellate Division's holding.

1. NYSDEC's Had Sufficient Information

Section 15-1503(2) sets forth the eight determinations required of NYSDEC "in making its decision to grant or deny a permit or to grant a permit with conditions." ECL § 15-1503(2). To assist NYSDEC in making these determinations, an application for a water

withdrawal permit must be on forms provided by NYSDEC and include exhibits that are "applicable to the withdrawal." 6 N.Y.C.R.R. § 601.10.[4]

Here, the initial water withdrawal permit application submitted by the Ravenswood Facility, which incorporated all of the materials previously provided to NYSDEC in 2013, was on the forms provided by NYSDEC and included all of the exhibits listed in Part 601.10 applicable to the Ravenswood Facility's water withdrawal. *See* A.R. at 5-40. Where one of the listed exhibits did not apply to the Facility's water withdrawal, it was noted as such in the application. *Id.*

In addition to the Ravenswood Facility's application, NYSDEC also had before it an extensive amount of information, including historical knowledge of the Facility as well as studies and evaluations concerning the Ravenswood Facility's cooling water withdrawal system from the Facility's SPDES permitting. This included NYSDEC's 2006 BTA analysis and supporting data related to the environmental impacts from the Ravenswood Facility's cooling water intake structure. A.R. at 62-65.

Based on this application, and as demonstrated by NYSDEC's administrative record, not only did NYSDEC have sufficient information to make the required determinations, it did so even though, arguably, all of these determinations were not applicable to existing facilities entitled to an initial permit. *See* A.R. at 532-539.

2. NYSDEC's Cumulative Impact Determination Was Rationally Based and Reasonable

Petitioners' argument that NYSDEC did not make the required cumulative impact determination fails. At the outset, the information Petitioners urge should have been considered

[4] All of the listed exhibits are not necessarily applicable to every water withdrawal application. As can be seen by looking at the exhaustive list of exhibits, many specifically apply only to public water supply systems, withdrawals from canals, withdrawals from the Great Lakes, renewals, etc. 6 N.Y.C.R.R. § 601.10 (a)-(o).

is a report they authored, which is not part of the administrative record. Petitioners' MOL, pp. 10-11. Offering it here is therefore misplaced, as Article 78 proceedings are limited to the administrative record before the agency ***at the time*** it made the determination being challenged. *See Kam Hampton I Realty Corp. v. Board of Zoning Appeals*, 273 A.D.2d 387, 388 (2d Dep't 2000) (noting judicial review "is limited to the record before the agency, and proof outside the administrative record should not be considered") (internal citations omitted); *see also Levine v. New York State Liquor Auth.*, 23 N.Y.2d 863, 864 (1969).

Furthermore, there is no evidence that NYSDEC ignored existing conditions in the Hudson River estuary. To the contrary, NYSDEC considered existing conditions as well as its 2006 analysis of the impacts associated with the Facility's water withdrawals. In doing so, NYSDEC aptly determined that there was "no factual change or basis for now considering those same impacts to be significant either individually or cumulatively[.]" A.R. at 528-529, 533-534. This is due, in part, because the water withdrawals made by the power plants on the East River, including the Ravenswood Facility, are existing, unchanged water withdrawals that are non-consumptive – meaning all of the water withdrawn is returned back to the East River. A.R. at 533. NYSDEC also properly considered the reduction in the impacts it considered in 2006 based on the Facility's implementation of BTA per the requirements of its SPDES permit and the Facility's "relatively small" contribution to the overall impacts to the river. A.R. 533-534. Petitioners' focus on the absence of a specific "document" evidencing NYSDEC's determination is simply beside the point. So is their unsupported assertion that NYSDEC's 2006 analysis is no longer valid.

In short, NYSDEC considered cumulative impacts as part of its determination to issue the 2019 Initial Permit. Such consideration was both rational and reasonable. *See* Point II, *supra*.

3. NYSDEC's Determination as to Environmentally Sound and Economically Feasible Water Conservation Measures Was Rationally Based and Reasonable

Similarly, Petitioners' assertion that NYSDEC failed to determine whether the Ravenswood Facility's water withdrawals "will be implemented in a manner that incorporates sound and economically feasible water conservation measures" lacks merit.

The WRPA requires that water withdrawals be "implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures." ECL § 15-1503(2)(g); 6 N.Y.C.R.R. § 601.7(e) (requiring that an initial permit include "terms and conditions, including environmentally sound and economically feasible water conservation measures to promote efficient use of supplies"). Included in the WRPA definition of "environmentally sound and economically feasible water conservation measures" is the provision that measures be "technically feasible and available," as well as "economically feasible and cost effective based on an analysis that considers direct and avoided economic and environmental costs." ECL §§ 15-1502(9)(ii), (iii).

Simply put, Petitioners' argument relative to ECL § 15-1503(2)(g) is nothing more than an improper attempt to get a proverbial "second bite at the apple" regarding the volume of water needed by the Ravenswood Facility and the technology by which it withdraws water from the East River. *See* Petitioners' MOL, p. 14 (arguing that NYSDEC was required to demand information and evaluate closed-cycle cooling).

This, however, it not what the WRPA requires. Indeed, despite Petitioners' urgings to the contrary, the Legislature did not intend to supplant NYSDEC's substantial review under the CWA of facilities like the Ravenswood Facility that are required to employ BTA. It also did not intend to require such facilities to revisit, as part of the water withdrawal permitting, their BTA. It would belie common sense, particularly because NYSDEC's CWA BTA cooling water intake

requirements are more stringent than those requirements included in the WRPA for water withdrawals, for New York to require something more stringent than BTA for a given facility, and it would arguably be preempted by federal law.

Rather, the Legislature expressly intended that facilities like the Ravenswood Facility would be ***entitled*** to an initial water withdrawal permit and would continue withdrawing water at the ***maximum*** capacity previously reported to the NYSDEC. Hennessey Aff., Exh. A, p. 7. As such, any insinuation that existing operations are irrelevant or were improperly considered by NYSDEC misses the mark.

Furthermore, there can be no doubt that closed-cycle cooling is not an "environmentally sound and economically feasible water conservation measure[]" for the Ravenswood Facility as it is neither "technically feasible and available" nor "economically feasible and cost effective based on an analysis that considers direct and avoided economic and environmental costs." ECL §§ 15-1502(9)(ii), (iii), 15-1503(2)(g).

During the facility's SPDES permitting in 2006, NYSDEC determined that closed-cycle cooling was not "available" at the Ravenswood Facility because it is not "technically and administratively feasible" due to site-specific space constraints – namely, the generation of water vapor plumes and salt solids falling to the ground in the most densely-populated city in the State. A.R. at 65-69, 535.[5] NYSDEC also determined that the costs of closed-cycle cooling would be "wholly disproportionate" to the gains that could be achieved at the Ravenswood Facility from

[5] In order for a specific cooling water intake structure technology, such as closed-cycle cooling, to be determined as BTA, it first must be considered to be "available" for a particular facility. *See* NYSDEC CP-52 Policy (A.R. at 681-88). NYSDEC's Policy governing BTA terminations (CP-52) defines "available" as "technologies and operational measures that are technically and administratively feasible for a particular facility, . . . , with costs not wholly disproportionate to the benefits." It in turn describes the "wholly disproportionate test" as "neither a traditional cost-benefit analysis nor an economic analysis but simply a comparison of the proportional reduction in impact (benefit) as compared to the proportional reduction in revenue (cost) of installing and operating BTA technology to mitigate adverse environmental impact" and that which "does not monetize the resource and gives presumptive weight to the value of the environmental benefits to be gained."

alternative operational controls and technologies that reduce the environmental impact of the Facility's cooling water intake. *Id*. These factors, which led to NYSDEC's 2006 determination that closed-cycle cooling is not "available" at the Ravenswood Facility, have not changed. *Id*. As such, NYSDEC properly determined that closed-cycle cooling is not "technically feasible and available" and is not "economically feasible and cost effective" as required by the WRPA.

4. The 2019 Initial Permit Comports with the Appellate Division's Decision

Finally, the Appellate Division never addressed Petitioners' claims that the 2013 Initial Permit violated the WRPA. Rather, that Court merely addressed Petitioners' SEQRA claim. In doing so, the Court noted that "[w]hether a condition is 'appropriate' for a given operator ***is a matter that falls within the [NYS]DEC's expertise*** and involves the exercise of judgment, and, therefore, implicates matters of discretion." *See* Hennessey Aff., Exh. G, p. 8 (emphasis added). Based on this reasoning, the Court remitted the matter back to NYSDEC to apply SEQRA without opining on the 2013 Initial Permit or its conditions, which the Court held were squarely within NYSDEC's discretion.

In sum, relying on the totality of the information before it and utilizing its technical expertise, NYSDEC made the determinations required by the WRPA.

B. NYSDEC Imposed Appropriate Conditions in the Ravenswood Facility's Permit

Petitioners take issue with NYSDEC's condition in the 2019 Initial Permit incorporating the biological monitoring requirements from the Facility's SPDES permit. Their assertion rests on the unsupported contentions that the Legislature perceived a lack of authority under the SPDES program and that the Ravenswood Facility's intake structures do not comport with NYSDEC guidance on BTA for cooling water intake structures. Petitioners' MOL, Point I(C). Petitioners are wrong on the facts and the law.

First, Petitioners overlook the actual legislative history underlying the WRPA. That history establishes that the Legislature was concerned with the consumptive use of waters, and that existing users would be entitled to a water withdrawal permit – not that there was an overarching concern that existing users, specifically those regulated under the SPDES program, were not sufficiently regulated. *See* Hennessey Aff., Exh. A, p. 8 (noting that "existing water withdrawals would be *entitled* to an initial permit based on their maximum water withdrawal capacity reported to DEC on or before February 15, 2012 pursuant to existing law."); Hennessey Aff., Exh. B, p. 11; Hennessey Aff., Exh. C, p. 3 (noting that "the amended legislation includes provisions allowing existing systems to utilize the more efficient and 'less costly' initial permit process" to address concerns from industry groups that it would be burdensome for existing operators to apply for permits for withdrawals that have already existed and are already permitted). Had the Legislature perceived a problem with the existing facilities with non-consumptive cooling water withdrawals regulated by the SPDES program, it would not have determined that such facilities would be entitled to an initial permit.

Moreover, as Petitioners acknowledge, when a water withdrawal system is subject to a SPDES permit, as is the Ravenswood Facility, NYSDEC will review the initial permit application in coordination with the SPDES permit. *See* 6 N.Y.C.R.R. § 601.7(f). This is clear evidence that a facility's SPDES permit is indeed pertinent to the analysis NYSDEC is required to make for purposes of the WRPA. Petitioners' assertion that this provision does not explicitly allow NYSDEC to rely on a facility's SPDES permit, or the extensive review and permitting undertaken by NYSDEC to issue and appropriately condition a SPDES permit, is nonsensical.

Second, the Ravenswood Facility's BTA is not in conflict with the NYSDEC's BTA Policy. Petitioners' unsupported claim to the contrary is wholly without any basis in law and

evidences a fundamental misunderstanding of BTA and the requirements of NYSDEC's CP-52 Policy. *See* NYSDEC CP-52 Policy (A.R. at 681-88). It also overlooks the fact that the Ravenswood Facility has timely applied for a SPDES renewal permit for which NYSDEC is currently revisiting the Facility's BTA. Scullin Aff., n. 2.

As part of a SPDES permit, NYSDEC biologists make facility-specific BTA determinations for each facility that is subject to BTA, which is a statistical and technical analysis based on several factors. CWA § 316(b); 6 N.Y.C.R.R. § 601.5, A.R. at 681 – 688. The CP-52 Policy is used to determine a facility's BTA and includes four performance goals, and which of the four goals apply to a particular facility depends on whether the facility is new or existing, and its location. *See* NYSDEC CP-52 Policy (A.R. at 681-688).

With regard to an existing facility, NYSDEC's CP-52 requires BTA performance goals that are ***equivalent*** to closed-cycle cooling, which is defined as a reduction in impingement mortality and entrainment by 90% of what a closed-cycle cooling system would achieve. *See* NYSDEC CP-52 Policy, p. 3. It does not require closed-cycle cooling as Petitioners assert.

Finally, there can be no doubt that NYSDEC properly conditioned the 2019 Initial Permit. As the administrative record establishes, independent of the SPDES permitting analysis that NYSDEC conducted in 2006, NYSDEC evaluated the application before it and appropriately conditioned the 2019 Initial Permit. A.R. at 532.

NYSDEC included five general permit conditions and ten site-specific conditions in the 2019 Initial Permit. A.R. at 544-545. One of these site-specific conditions, Condition 5, incorporates the BTA requirements included in the Ravenswood Facility's SPDES permit, which have resulted in a 26% decrease in the amount of cooling water the Facility actually uses to operate, as one of these measures. A.R. at 544.

Thus, taken as a whole, the conditions in the 2019 Initial Permit are consistent with the purpose and mandates of the WRPA and ensure that the Ravenswood Facility's water withdrawals are conducted in a manner that is "environmentally sound and economically feasible." *See Ravenswood I*, slip. op. at 8 (Hennessey Aff., Exh. G) (stating that "[w]hether a condition is 'appropriate' for a given operator is a matter that falls within [NYS]DEC's expertise and involves the exercise of judgment, and therefore implicates matters of discretion"); Point II, *supra* (explaining deference owed to NYSDEC on substantive matters). Accordingly, Petitioners' claims should be rejected.

POINT IV

NYSDEC TOOK THE NECESSARY HARD LOOK AND APPROPRIATELY UTILIZED ITS DISCRETION IN ESTABLISHING THE APPROPRIATE BASELINE UNDER SEQRA

Petitioners assert that the NYSDEC failed to take a hard look at the impacts of issuing the 2019 Initial Permit for the Ravenswood Facility because, according to Petitioners, NYSDEC used the wrong baseline when it completed its environmental review and issued its Amended Negative Declaration. *See* Verified Petition, Second Cause of Action; Petitioners' MOL, p. 25.[6] Petitioners' argument fails and should be rejected by the Court.

[6] To the extent that Petitioners assert that the Type I designation mandated a positive declaration and preparation of a full environmental impact statement, such claims are similarly baseless. As found in a substantially-similar case challenging a negative declaration for an Initial Permit brought by Petitioner Sierra Club:

> DEC "complied with the requirements of SEQRA in issuing the negative declaration and, . . . the 'designation as a type I action does not, per se, necessitate the filing of an environmental impact statement . . . , nor was one required here'[.]"

Sierra Club v. New York State Dep't of Envtl. Conserv., Index No. 2017-0232, slip. op. at 11 (N.Y. Sup. Ct. Yates County Nov. 2, 2018) (quoting *Wooster v. Queen City Landing, LLC*, 150 A.D.3d 1689, 1692, *rearg. denied*, 151 A.D.3d 1970 (4th Dep't 2017); *see Incorporated Village of Poquott v. Cahill*, 11 A.D.3d 536, 540 (2d Dep't 2004) "[W]here the lead agency, after taking a 'hard look' at relevant environmental concerns, determines that the project will have no significant adverse environmental impacts, and issues a negative declaration to that effect, the EIS may be dispensed with as unnecessary, even for a Type I action.") (internal citations omitted).

Notably, Petitioners fail to cite any case law for their improper baseline argument and suggestion that NYSDEC should have ignored the Ravenswood Facility's long-standing, existing water withdrawals and attendant impacts and related permitting. This is because they cannot and their claim really boils down to revisionist history and disagreement with NYSDEC's SEQRA expertise.

A. SEQRA "Hard Look" Standard

The standard of review uniformly applied by New York courts to assess whether an agency's determination of significance and negative declaration complies with SEQRA is the "H.O.M.E.S. test." *H.O.M.E.S. v. New York State Urban Dev. Corp.*, 69 A.D.2d 222, 232 (4th Dep't 1979); 6 N.Y.C.R.R. § 617.7(b)(1); *Chinese Staff & Workers' Ass'n v. Burden*, 19 N.Y.3d 922, 924 (2012); *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986). Under the H.O.M.E.S. three-part test, courts evaluate whether the agency: (1) identified the relevant areas of environmental concern; (2) took a "hard look" at the identified areas of environmental concern; and (3) made a "reasoned elaboration" of the basis for the determination of significance. 6 N.Y.C.R.R. § 617.7(b); *Chinese Staff*, 19 N.Y.3d at 924; *Jackson*, 67 N.Y.2d at 417; *H.O.M.E.S.*, 69 A.D.2d at 232. "When a reasonable determination is made in accordance with these criteria, it should be upheld." *Soule v. Colonie*, 95 A.D.2d 979, 982 (3d Dep't 1983).

Under the first prong of the test, not every conceivable environmental impact must be identified and addressed, and "the degree of detail with which each environmental factor must be discussed will necessarily vary and depend on the nature of the action under consideration." *Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 688 (1996); 6 N.Y.C.R.R. § 617.7(b)(2); *Chinese Staff*, 19 N.Y.3d at 924.

The agency must then "thoroughly analyze the identified areas of environmental concern" to ensure it has taken a "hard look" at the environmental issues. 6 N.Y.C.R.R.

§ 617.7(b)(3); *Chinese Staff*, 19 N.Y.3d at 924. A record that includes a complete Environmental Assessment Form ("EAF") satisfies the "hard look" requirement. *See Gernatt Asphalt*, 87 N.Y.2d at 689-90; *Coursen v. Town of Pompey*, 37 A.D.3d 1159, 1160 (4th Dep't 2007).

If no significant adverse environmental impacts are found, the lead agency prepares a written "negative declaration," which must be supported by a reasoned elaboration. 6 N.Y.C.R.R. § 617.7(b)(4). A complete and well-documented record, as is presented here, is all that is necessary to show that the action is supported by substantial evidence in the record and complies with SEQRA. *Matter of Brooklyn Bridge Park Legal Defense Fund, Inc. v. New York State Urban Dev. Corp.*, 50 A.D.3d 1029, 1031 (2d Dep't 2008) ("SEQRA does not require that the FEIS contain all of the raw data supporting its analysis as long as that analysis is sufficient to allow informed consideration and comment on the issues raised."); *Ellsworth v. Town of Malta*, 16 A.D.3d 948, 950 (3d Dep't 2005). The reasoned elaboration does not have to be included in the negative declaration itself, particularly when it calls-out the underlying record, including the EAF, as support. *Gabrielli v. Town of New Paltz*, 93 A.D.3d 923, 925 (3d Dep't 2012). Where the EAF and supporting record contains more than just "checked boxes" and includes a lengthy and detailed rationale, it will be found to constitute a "reasoned elaboration" for purposes of compliance with SEQRA. *Id*. at 925. Also, it is well settled that a short explanation in a negative declaration meets the standards required for SEQRA. *Prospect Park E. Network v. New York State Homes & Cmty. Renewal*, Docket No. 101695/13, 2014 N.Y. Misc. LEXIS 2815, *14-16 (Sup. Ct. New York County June 18, 2014) ("While the negative declaration is terse, it does sift the potential environmental impacts of the Project."); *see also Har Enterprises v. Brookhaven*, 74 N.Y. 524, 530 (2d Dep't 1989) (quoting *Jackson*, 67 N.Y.2d at 417 ("The degree of detail [of the declaration] will obviously vary with the nature of the proposal and the agency's

determination will be annulled 'only if arbitrary, capricious or unsupported by substantial evidence.'")).

B. Use of Existing Conditions as the Baseline Is Both Rationale and Reasonable

NYSDEC formulated the baseline as "the magnitude of the impact is measured by the difference between existing conditions and that proposed change that would be brought about by a proposed permit" and subsequently found that "there is no difference between the amount of water withdrawn under the SPDES permit and the amount that may be withdrawn under the water withdrawal permit." *See* February 14, 2019 Negative Declaration (A.R. 528-529). This use of existing conditions as the baseline is consistent with the goals of SEQRA and the prevailing practice of agency environmental assessments.

In a Type I action, SEQRA requires the lead agency to determine the significance of a proposed project on the areas of environmental concern. 6 N.Y.C.R.R. § 617.7(b). SEQRA sets out a non-exhaustive list of possible criteria to determine significance which focus on the ***existing*** conditions of the environmental setting. *See* 6 N.Y.C.R.R. § 617.7(c)(1)(i-xii) ("A substantial adverse change in *existing* air quality . . . the impairment of the character or quality of . . . *existing* community or neighborhood character . . . a substantial change in the use, or intensity of use, of land . . . or in its capacity to support *existing* uses.") (emphasis added)).

The use of existing conditions as the baseline is also entirely consistent with agency environmental assessments in New York and across the nation. *See, e.g., Lazard Realty, Inc. v. New York State Urban Dev. Corp.*, 1989 N.Y. Misc. LEXIS 35, at *21 (Sup. Ct. New York County Jan. 18, 1989) (agency's use of the existing conditions as the baseline for "environmental review was procedurally proper and clearly not in violation of law."); *see also Center for Biological Diversity v. United States Dep't of Interior*, 623 F.3d 633, 642 (9th Cir. 2010); *Town of Winthrop v. Federal Aviation Admin.*, 535 F.3d 1, 4 (1st Cir. 2008); *Conservation Law Found.*

v. FERC, 216 F.3d 41, 46 (D.C. Cir. 2000); *American Rivers v. FERC*, 201 F.3d 1186, 1195-96 (9th Cir. 1999) (affirming FERC's existing conditions baseline); *Defenders of Wildlife v. North Carolina DOT*, 971 F. Supp. 2d 510, 527 (E.D.N.C. 2013) (noting that the baseline "facilitates the comparison of the environmental consequences of the status quo to the proposed action"); *Lazard Realty, Inc. v. Loup River Pub. Power Dist.*, 161 F.E.R.C. ¶¶ 61,292, 62,597 (2017); *City of Tacoma, Washington*, 71 F.E.R.C. ¶¶ 61,381, 62,492 (1995) (finding that the use of existing conditions as the baseline for environmental analysis is reasonable.).

Indeed, "SEQRA must be construed reasonably" with the facts of the proposed action. *Id.*; *Jackson*, 67 N.Y.2d at 417 ("An agency's substantive obligations under SEQRA must be viewed in light of a rule of reason."). Here, the "action" under SEQRA was the issuance of an initial water withdrawal permit as required by the WRPA, which required NYSDEC to issue a permit at the ***maximum*** capacity previously reported to the NYSDEC, for a facility that has been in operation for decades, during which time it has consistently withdrawn water from the East River and been subject to NYSDEC permitting and environmental reviews under SEQRA.

Contrary to Petitioners' claim, SEQRA does not require consideration of "previous impacts" in an agency-established baseline. Petitioners' MOL, p. 26; *E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359, 373 (1988) ("[T]he [Agency] cannot use its powers to review the environmental impact of the entire project as a pretext for the correction of perceived problems which existed and should have been addressed earlier in the environmental review process."); *see also American Rivers*, 201 F.3d at 1191-92 (finding it appropriate for agency to characterize the baseline as the continued operation of facilities under the terms of their original license rather than a license-denial baseline entailing dam removal); *Lazard Realty*, 1989 N.Y. Misc. LEXIS 35, at *21.

As such, NYSDEC's decision to use the existing conditions as the baseline for the continued and unchanged operation of the Ravenswood Facility is both pragmatic and furnishes a reasonable interpretation of SEQRA and is consistent with prior precedent. It also comports with the legislative intent and statutory provisions. NYSDEC's decision to use the existing conditions as the baseline is therefore reasonable, rationale, and entitled to substantial deference. *See* Point II, *supra*.

In contrast, using a baseline dependent on a hypothetical pre-project or no-project marker dating back over 50 years, as Petitioners contend is the correct baseline, is the definition of arbitrary and capricious. *See American Rivers*, 201 F.3d at 1197 ("[T]o the extent a hypothetical pre-project or no-project environment can be recreated, evaluation of such an environment against current conditions at best serves to describe the current cumulative effect on natural resources of these historical changes.").

CONCLUSION

For all of the reasons set forth herein, Respondent Helix Ravenswood respectfully submits that the Petition should be denied *in toto* with prejudice.

Dated: August 12, 2019
Albany, New York

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