

To be Argued by:
RICHARD J. LIPPES

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New York Supreme Court
Appellate Division – First Department

In the Matter of the Application of

SIERRA CLUB and HUDSON RIVER FISHERMEN'S ASSOCIATION,

Petitioners-Appellants,

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

– against –

JOSEPH MARTENS, Commissioner, New York State Department of
Environmental Conservation, and CONSOLIDATED EDISON COMPANY
OF NEW YORK INC.,

Respondents-Respondents.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

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PRELIMINARY STATEMENT

This reply brief for the Petitioners-Appellants (hereinafter cited as “Petitioners”) is submitted in reply to issues raised by the Respondents-Respondents (hereinafter cited as “Respondents”) in their briefs in response. This reply brief will also clarify and support the arguments made in Petitioners’ initial brief, as they relate to the arguments made by Respondents in their briefs in response. Therefore, as will be seen, neither timeliness or laches are applicable to the facts of this case, and Respondents’ arguments regarding the interpretation of the legal obligations of Respondent New York State Department of Environmental Conservation (“DEC”) under the Water Supply Law (“WSL”), Environmental Conservation Law (“ECL”) Article 15, Title 15 and the State Environmental Quality Review Act (“SEQRA”), ECL Article 8 are unavailing.

It is respectfully submitted that this Court lacks jurisdiction to consider the assertion of Respondent Consolidated Edison East River LLC (“CEER”) that the lower court erred on standing because CEER did not cross appeal the lower court’s decision.

ARGUMENT

POINT I

ECL 15-1501(9) MANDATES THAT DEC USE DISCRETION IN SETTING THE TERMS AND CONDITIONS OF AN INITIAL WATER WITHDRAWAL PERMIT

All parties appear to be in agreement that the interpretation of ECL 15-1501(9) is dispositive on the issue of whether or not DEC has discretion in setting terms and conditions in water withdrawal permits granted to existing users, i.e., “initial” permits. For the reasons explained below, the arguments set forth in Respondents’ briefs do not refute Petitioners’ claim that ECL 15-1501(9) mandates that DEC exercise discretion in setting the terms and conditions of an “initial” water withdrawal permit.

A. The Wording of ECL 15-1501(9) Is Clear

ECL 15-1501(9) provides that Respondent 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 department . . . as of February 15, 2012 [emphasis added].” ECL 15-1501(9) specifies the size of the permit to be issued, but in other respects, leaves the terms and conditions to be imposed to be determined by DEC “subject to appropriate terms and conditions as required by this article [Article 15, WSL].” What types of conditions constitute “appropriate

terms and conditions” are specified in ECL 15-1503(4) and ECL 15-1503(2). ECL 15-1503(4) provides that DEC has the power “to grant or deny a permit or grant a permit *with such conditions as may be necessary to provide satisfactory compliance* by the applicant with the matters subject to department determination pursuant to subdivision 2 of this section [emphasis added].” The required determinations are listed in ECL 15-1503(2).

None of the arguments advanced by Respondents’ contradict this clear wording.

1. Issuing a Permit for a Specified Limit Does Not Preclude Setting Permit Conditions

Respondent DEC’s assertion that, “[a]ny conditions limiting ConEd’s water withdrawals—including by reducing its water withdrawal capacity—would conflict with ConEd’s statutory entitlement to an initial permit for a volume of water equal to its ‘maximum water withdrawal capacity,’” DEC Br. 30, is simply not logical.

Of course conditions may be added to a permit that specify conditions on how the maximum limit is to be utilized. If DEC’s assertion that setting a permit limit precludes setting any conditions in the permit, this would be true of permits issued to new users as well as permits issued to existing users.

2. *Future Withdrawals by an Existing User Are the Withdrawals Proposed for Permitting*

Respondent DEC claims that “[t]he eight factors in ECL § 15-1503(2), by their plain terms, apply only to “proposed” or “future” withdrawals, not initial permits.” DEC Br. 30. CEER makes a similar assertion. CEER Br. 31. It is true that the phrase “proposed withdrawals” is used in describing the determinations required by ECL 15-1503(2), but this phraseology is perfectly consistent with making these determinations for continuing withdrawals by existing water users.

The purpose of any water withdrawal permit is to regulate future water uses by the permit holder. This is true whether a permit is issued to an existing user to permit the continuation of withdrawals that have previously taken place or is issued to a new user to permit beginning a sequence of entirely new withdrawals. In either circumstance, evaluation of the potential impacts of the future withdrawals to be allowed by the permit is required.

3. *The Phrase “Shall Issue” Does Not Preclude the Exercise of Discretion in Setting Permit Conditions*

In support of its contentions regarding the mandatory nature of initial permits, Respondent CEER points to the phrase “shall issue” in ECL 15-1501(9). CEER Br. 44. CEER asserts that DEC did not make a discretionary decision to issue it a permit “because the statute mandated that the initial permit be issued. . . . As the trial court properly observed, the “word ‘shall’ is non-negotiable; it is a

command. Further the legislative history explains this term as a referring to an ‘entitlement.’” *Id.*¹

This argument makes far too much of the word “shall,” a word used in many of the permitting provisions of the ECL. For example, almost every subsection of ECL 15-1501 uses the word “shall.” 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 requirements 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 DEC 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 DEC sufficient discretion to require numerous terms and conditions in oil and gas well drilling

¹ The significance of the word “entitled” in the legislative history of the 2011 amendments to WSL is discussed below at 11.

permits and to subject oil and gas well drilling permit applications to review under SEQRA.

4. 6 NYCRR 601.7(e) Is Consistent with the Requirements of ECL 15-1501(9)

Notwithstanding DEC's assertions to the contrary,² the wording of 6 NYCRR 601.7(e) is fully consistent with Petitioners' interpretation of ECL 15-1501(9), and is equally clear that the setting of appropriate terms and conditions in an initial permit requires making the determinations mandated by ECL 15-1503(2) and 6 NYCRR 601.11.

6 NYCRR 601.7(e) provides that, "An initial permit is for a fixed term not to exceed ten years. It 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, pursuant to the requirements of this Part." The statement in 6 NYCRR 601.7(e) 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

² DEC asserts that "petitioners are mistaken in claiming . . . that their position finds support in DEC regulations providing for an initial permit to include water conservation and efficiency measures," citing 6 N.Y.C.R.R. § 601.7(e). DEC Br. 30. DEC also states: "Petitioners also misread the regulations . . . in stating that 6 N.Y.C.R.R. § 601.11—which governs applications for new permits and reiterates the statutory factors from ECL 15-1503(2)—applies to initial permits. A separate section, 6 N.Y.C.R.R. § 601.7, sets the standards for initial permits. Where the same rules apply to both types of permit, the requirements appear in both sections. Compare 6 N.Y.C.R.R. § 601.7(e), (f), with 6 N.Y.C.R.R. § 601.11(b), (h)." *Id.* 31 n. 9.

supplies,” makes clear that the appropriate terms and conditions to be included in an initial permit include conditions that address the determinations required by ECL 15-1503(2) and 6 NYCRR 601.11. This is because 6 NYCRR 601.7(e) contains the phrase “including environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies,” which is a reference to ECL 15-1503(2)(g) and 6 NYCRR 601.11(c)(7), thus making unequivocally clear that these determinations are required for initial permits.

As seen from this comparison, there is no factual basis for DEC’s implication that there is an inconsistency between Petitioners’ interpretation of ECL 15-1501(9) and Petitioners’ interpretation of 6 NYCRR 601.7(e). In fact, the congruence between these two provisions provides strong support for Petitioners’ interpretation of the requirements of both sections.

DEC says Petitioners’ interpretation of the requirements applicable to initial permits would “eliminate the distinction between initial and new permits.” DEC Br. 22. Although Petitioners do not claim that there are no distinctions between initial and new permits, Petitioners do claim that DEC is mandated to set appropriate terms and conditions in both types of permits. In fact, as Petitioners point out in their initial brief, DEC itself made this claim in 2012 in its response to comments on the draft water withdrawal permitting regulations when DEC stated “ECL 15-1503 establishes permit application requirements and standards for

permit issuance. This Section applies to all permits. *The statute does not authorize the Department to apply different standards for the issuance of initial permits.*

[emphasis added].” R.396 cited in P. Initial Br. 24.

5. *The Legislative History of the 2011 Amendments Shows Initial Permits Are to Be Subject to Appropriate Terms and Conditions*

Respondent DEC asserts that failure to recognize a distinction between initial and new permits would be “at odds with the Legislature’s purpose in creating the initial permit scheme,” DEC Br. 31, but offers no illustrations from the legislative history to show that the legislature intended that permits issued to existing users be exempt from the statutory requirements for appropriate terms and conditions. The reference to the “the more efficient and less costly ‘initial permit’ process” DEC cites in its brief, comes from the summary of the revised regulatory impact statement contained in the notice published in the New York Register of the promulgation of the water withdrawal regulations.³ The summary explains that the reason why the initial permit process is less costly is “because it usually avoids the need for a permit hearing (as described in the RIS). While public notice and comment on the ‘initial permit’ application must occur, a permit hearing on top of that would generally not be necessary.” *Id.* The summary does not attribute the efficient and less costly initial permit process to an elimination of requirements

³ N.Y. St. Reg., Vol. 34, Issue 48, ENV-47-11-00012-A (November 28, 2012), <https://govt.westlaw.com/nyreg/Document/I5a1947a034b411e2ae2f0000845b8d3e?> [last accessed 09/22/17].

that DEC impose appropriate terms and conditions in initial permits. In fact, at the same time the regulations were promulgated, DEC published its response to comments on the draft water withdrawal permitting regulations referenced above stating that “[t]he statute does not authorize the Department to apply different standards for the issuance of initial permits.” R.396.

DEC’s other references include a letter from an industry lawyer in March 2011 requesting that an “automatic” initial permit process be included in the 2011 bill,⁴ and a newspaper article published in April 2011 reporting that the Business Council “reversed course to support the water withdrawal permit scheme after Legislature added the provision for initial permits.”⁵ DEC Br. 31-32. Neither of these references provide any support for the proposition for which they are cited, DEC’s assertion that “Requiring those users to submit to conditions that would limit their ability to withdraw water at existing volumes, as petitioners seek, is inconsistent with the legislative intent underlying the statute.” *Id.* at 32.

Similarly, the statement that “existing water withdrawals would be entitled to an initial permit” in the Assembly Memorandum in support of the legislation cited by Respondent CEER, R.986, CEER Br. 30, does not support an inference of

⁴ Letter from Thomas M. West to Sen. Mark Grisanti, reprinted in Bill Jacket for ch. 401 (2011).

⁵ Peter Mantius, “Local N.Y. Environmentalists Fight Fast Tracking of Water Bill,” *Natural Resources News Service* (April 18, 2011).

any legislative intent that permits issued to existing users not be subject to conditions.

While recognizing that news articles normally constitute hearsay, since Respondent DEC cited a newspaper article in support of its arguments on the legislative history of the 2011 amendments to WSL, DEC Br. 32 n. 10, Petitioners reference interviews with two legislators published in the *Poughkeepsie Journal* which show that at least some members of the legislature did not intend for existing users to be exempt from requirements that water withdrawal permits contain appropriate terms and conditions contained in the 2011 amendments.⁶ In an interview published in March 2016, the assembly sponsor of the 2011 amendments, former assembly environmental conservation committee chair, Robert Sweeney of Long Island, who retired in 2014, told reporter John Ferro that DEC's handling of water withdrawal permit applications is not "in keeping with the letter and spirit of the legislation."⁷ Sweeney told Ferro the legislation was meant to provide information to help guide future decisions and legislation. "But you certainly can't determine what the impacts of water usage and water withdrawals are without having information," he is quoted as saying. *Id.*

⁶ John Ferro, "Molinaro questions DEC's execution of water law," *Poughkeepsie Journal*, December 8, 2015, <http://www.poughkeepsiejournal.com/story/tech/science/environment/2015/12/08/molinaro-questions-decs-execution-water-law/76922800/> [last accessed 9/22/17]; John Ferro, "DEC's handling off water regs criticized," *Poughkeepsie Journal*, March 2, 2016, <http://www.poughkeepsiejournal.com/story/tech/science/environment/2016/03/02/sweeney-dec-water-withdrawal-regulations/80986584/> [last accessed 9/22/17].

⁷ "DEC's handling off water regs criticized," op. cit.

Ferro's interview with Dutchess County Executive and former state Assemblyman Marc Molinaro published in December 2015⁸ reports that Molinaro disputes DEC's recent claims that the legislation exempts water withdrawal permits issued to existing users from review under SEQRA. The article states that Molinaro served as the third-ranking member of the Assembly's Republican Conference in 2011. "My job," Molinaro is quoted as saying, "was to read these things and then advise, with counsel, other members in the Assembly Republican Conference what is in the bill." *Id.* The article reports that Molinaro told Ferro that the Assembly Republican Conference expected there would be some evaluation of the impacts by DEC and stated that the legislation was meant to ensure that large, existing withdrawals would require permits for the first time, and that "through rules promulgated by the DEC, there would be a degree of oversight with consideration of impact." *Id.* According to the article, Molinaro said the Republican Conference's bill memo specifically states there would be criteria the DEC would use in issuing the permit. "What, you just have to make sure you spell your name right?" Molinaro is quoted as asking. *Id.* The state, Molinaro says, requires even the smallest of developments, through zoning laws and SEQRA, "to consider and prove their impact is not going to negatively affect the health and well-being of someone else." *Id.* The same, he told Ferro, should be expected of

⁸ "Molinaro questions DEC's execution of water law," *op. cit.*

the largest water withdrawals. “We have a very sensitive ecosystem,” he is quoted as saying in the article. “We have a limited supply of potable and usable water. Any withdrawal of any kind has an impact on the environment and human considerations. In my estimation, the law is — and was — intended to ensure there was some agency overseeing withdrawals and, at the end of the day, some consideration of impact.” *Id.*

B. DEC’s Issuance of a Water Withdrawal Permit to CEER was a Discretionary Act Subject to SEQRA Review

Respondents’ only basis for asserting that DEC’s issuance of a water withdrawal permit to CEER was not subject to SEQRA review is their claim that DEC’s act in issuing the permit was not discretionary and thus was a purely ministerial act. Based on this claim, they assert that, as a ministerial act, the issuance of an initial water withdrawal permit is not within the definition of an “action” subject to regulation under SEQRA and that it falls within scope of the Type II exemption listed in 6 NYCRR 617.5(c)(19) of the SEQRA regulations.

If in fact DEC’s actions in issuing initial water withdrawal permits to existing users were purely ministerial, these exemptions would apply. However, as shown above and in Petitioners’ initial brief, this claim ignores the clear mandates of WSL that DEC exercise discretion in setting the terms and conditions of a water withdrawal permit issued to an existing user. Because issuance of an initial permit is not a ministerial act, issuance of the CEER permit was subject to review under

SEQRA. As described in Petitioners' initial brief, CEER's permit application met two different standards for Type I actions. 6 NYCRR 617.4(a) and 6 NYCRR 617.4(b)(6)(ii).

DEC misstates Petitioners' claims regarding the application of Type I standards. DEC Br. 35. Petitioners do not claim that the Type I standards "trigger SEQRA review regardless of the ministerial act exemption." *Id.* Rather, Petitioners claim that because the ministerial act exemption does not apply, the Type I standards must be evaluated when DEC is evaluating an initial permit application, and if the Type I standards apply, as they do in this case, the action must be reviewed as a Type I action.

Respondents misinterpret the relevant case law when they suggest that the case law supports categorizing DEC's obligations to set appropriate terms and conditions in initial water withdrawal permits as ministerial. *Matter of Citizens for an Orderly Energy Policy*, 78 N.Y.2d 398 (1991) involved an entirely different set of circumstances than the issuance of an initial water withdrawal permit to an existing user. The *Citizens* case determined that an act of the Legislature act directing the Long Island Power Authority ("LIPA") to close a nuclear power plant was not subject to SEQRA because LIPA had "no choice" but to follow the Legislature's commands. The circumstances of the present case are entirely different. In this case, the Legislature enacted a new permitting program and

specifically directed DEC to issue initial permits to existing users subject to appropriate terms and conditions. The legislature has adopted many permitting programs in the past, all of which have been subject to SEQRA and there is not any evidence that the Legislature intended the water withdrawal permitting program to be different in respect to environmental review.

So too, in *Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preserv. Commn.*, 306 A.D.2d 113, 114 (1st Dep't 2003), the circumstances in which this court found that approval of a proposal to raise building's height was ministerial act because commission's authority was limited to examining whether statutory criteria were met are entirely different than the circumstances at issue in the present case in which DEC is required by WSL to make a series of complex determinations and use those determinations to set appropriate terms and conditions.

As Petitioners point out in their initial brief, the "pivotal inquiry" in determining whether an agency decision is ministerial or discretionary for purposes of determining the applicability of SEQRA is "whether the information contained in an EIS may 'form the basis for a decision whether or not to undertake or approve such action,'" *Atlantic Beach v Gavalas*, 81 N.Y.2d 322, 326 (1993). Furthermore, it is not just the decision whether to grant or deny a permit that is informed by an EIS. The SEQRA law and regulations require that the SEQRA

review process certify that “the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.” 6 NYCRR 617.11(d)(5). See also ECL 8-0109, 6 NYCRR 617.9(b)(5), Daniel R. Mandelker et al., *NEPA Law and Litig.* § 12:4 (2017). In this case, the DEC determinations required by ECL 15-1503(2) have to do with environmental concerns that are central to SEQRA and the information contained in an EIS would be critical to the process of setting terms and conditions in the CEER permit.

For all these reasons, DEC’s issuance of the CEER water withdrawal permit is not properly categorized as a ministerial action under SEQRA.

C. Because DEC’s Issuance of a Water Withdrawal Permit to CEER Was Subject to Review under SEQRA It Was Also Subject to Coastal Zone Review

The parties appear to be in agreement that, if issuance of CEER’s water withdrawal permit is determined to have been subject to review under SEQRA, it would also be subject to review under state and city coastal zone laws.

POINT II

DEFERENCE TO DEC'S INTERPRETATION OF THE WATER RESOURCES LAW IS NOT APPROPRIATE

Respondent DEC cites the case of *Natural Resources Defense Council v. New York State Dept. of Env'tl. Conservation*, 25 N.Y.3d 373 (2015) in support of its contention that, “[a]s long as DEC’s construction of the ECL, SEQRA, and DEC’s own regulations is “not irrational or unreasonable,” that construction must be upheld.” DEC Br. 37. This contention overlooks the fact that the statutory construction issues considered in the *NRDC v. DEC* case are different than the statutory construction issues presented in this case and the rule of deference applied in *NRDC v. DEC* is not appropriate in this case because the statutory wording is clear and DEC has no special expertise that is applicable in interpreting the statute. *Raritan Development Corp. v. Silva*, 91 N.Y.2d 98, 102-103 (1997).

In *NRDC v. DEC* the court had before it a complicated and contradictory set of federal and state statutes, regulations and court cases to construe. The court resolved the conflicting provisions by determining that DEC’s practice was adequate to comply with the statutory requirements, stating “[t]hese are reasonable judgments that DEC possesses the discretion and expertise to make in furtherance of its responsibilities under the Environmental Conservation Law to regulate stormwater discharges from small MS4s.” 25 N.Y.3d at 397. The court cited

Matter of Howard v Wyman, 28 N.Y.2d 434 (1971) and *Matter of Davis v Mills*, 98 N.Y.2d 120 (2002).

The rule stated in these cases, however, is only a portion of the fuller rule regarding judicial deference to agency determinations. The full rule for evaluating when a court should defer to an agency interpretation of a statute is explained in the *Raritan* case:

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.]

Raritan v. Silva, 91 N.Y.2d at 102-103.⁹ Under this fuller rule, the fact that DEC’s interpretation of its discretion in issuing initial water withdrawal permits runs counter to the clear wording of ECL 15-1501(9) means that judicial deference to DEC’s interpretation of the law is not appropriate.

The relationship between the two sets of rules is described in *Kurland v. New York City Campaign Finance Board*, 23 Misc.3d 567 (New York Cty 2009)

The starting point for the court's discussion is the well settled principle that an agency's interpretation of the statutes and regulations it is responsible for administering is

⁹ The *Raritan* case and other cases following this rule are described more fully in Petitioners’ initial brief at 25-27.

entitled to great deference, and must be upheld if not irrational or unreasonable [citations omitted]. Juxtaposed against this principle is the equally well established principle that where the question is one of pure statutory construction “dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight.” [citations omitted]. In such cases, judicial review is less restrictive and the courts are “free to ascertain the proper interpretation from the statutory language and legislative intent” (*Seittelman v Sabol*, 91 NY2d at 625). Agency determinations which completely conflict with the clear wording of a statutory provision are not to be upheld (see *Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 103 [1997]). Stated differently, an agency, however laudable its intentions, is not permitted to legislate by interpreting a statute in a manner which is at variance or inconsistent with the express language of the statute.

Id. 572-573.

The contradiction between DEC’s previous interpretation of the standards to be applied under WSL published in its response to comments on the draft regulations, R. 396, and its current interpretation provides additional support for the argument that DEC’s current interpretation is not entitled to deference

POINT III

THE PETITION WAS TIMELY FILED

A. The Four-Month Statute of Limitations in CPLR 217 Should Be Applied in this Proceeding

Respondents do not offer convincing arguments why the reasoning applied by the court in *Niagara Mohawk Power Corp. v. State*, 300 A.D.2d 949 (3rd Dep’t

2002) should not be followed in the present case and the four month statute of limitations in CPLR 217 applied. The grounds for distinguishing the Third Department's decision in *Niagara Mohawk* do not hold up to analysis.

Although the court in *Niagara Mohawk* distinguished that court's earlier decision in *Spinnenweber v. Department of Environmental Conservation*, 120 A.D.2d 172 (3rd Dep't 1986), on the ground that *Niagara Mohawk* involved a decision by a river regulating district and *Spinnenweber* involved a DEC determination, as Philip Weinberg states in his Practice Commentaries on ECL 15-0515, "exactly why that led to a differing result is unclear."¹⁰

After all, determinations by river regulating districts are governed by ECL Article 15, Title 21 and the application of a 60-day limitation period in *Spinnenweber* was based on a determination that all proceedings under Article 15 are intended by the legislature to have the same statutes of limitation. In *Spinnenweber*, the court declined to give effect to a provision in Article 15, Title 5 that stated that proceedings under Title 5 should be brought under Article 78, applying instead the 60-day period provided by ECL 15-0905(2). Under the reasoning applied in *Spinnenweber*, it should not matter whether a decision is made by a river regulating district or DEC if the decision is made on a determination subject to ECL Article 15.

¹⁰ Philip Weinberg, Practice Commentaries to ECL § 15-0515, 17½ McKinneys Cons. Laws of N.Y. 225 (2006).

Because the decision in *Niagara Mohawk* applied a different analysis to the issue of whether the statute of limitations in ECL 15-0905(2) applies in a particular case, that decision can be read as effectively overturning the analysis applied in *Spinnenweber*.

Respondents argue that, although ECL 15-0903(1) is broadly worded to exempt actions involving Title 5, Title 15 and Title 27 of Article 15 from the requirements of Title 9 of Article 15, that section should be read more narrowly to only provide an exemption from the hearing procedures provided by ECL 15-0903(2) and should not be interpreted to provide an exemption from ECL 15-0905(2), one of the other provisions of Title 9.

Respondents provide detailed descriptions of the legislative history of ECL 15-0905(2) and ECL 15-0903(1) in support of their analysis that the ruling in *Spinnenweber* should be applied in the present case. They assert that this legislative history supports the argument that all proceedings under Article 15 are to come under the 60-day limitation period in ECL 15-0905(2) and that the exemption from ECL 15-0905(2) provided by ECL 15-0903(1) for actions involving Title 5, Title 15 and Title 27 of Article 15 should be ignored. They assert that ECL 15-0903(1) was added to ECL 15-0903 in order to negate the hearing procedures set forth in that section which conflicted with the uniform hearing procedures provided in ECL Article 70. They fail to consider the

possibility that at the same time the legislature sought to make hearing procedures consistent, the legislature also decided to make the statutes of limitations governing hearing procedures more consistent by removing conflicts with CPLR 217 and that is why ECL 15-0903(1) is more broadly worded.

Petitioners contend that the considerations applied in *Niagara Mohawk* regarding fair notice are equally applicable in the present case, and that, as in *Niagara Mohawk*, the statute of limitations in CPLR 217 should be applied.

B. The Statutory Limitation Period Runs from the Date DEC Issued CEER's Water Withdrawal Permit

CEER's assertion that Petitioners' goal in bringing this proceeding is to reopen the BTA determination DEC made under CEER's SPDES permit in 2010, CEER Br. 22, is manifestly incorrect. A review of the Petition demonstrates that this case is a challenge to DEC's practices in administering the issuance of water withdrawal permits to existing users under the WSL and SEQRA for one of the first and largest permits issued under the 2011 amendments to the law.

Nor is there any basis for CEER's assertion that Petitioners' claims have "nothing to do with the legislative purpose of the WRPA – water conservation – as the facility returns the salt water it withdraws back to the East River." *Id.* 28. In fact WSL, or WRPA as CEER refers to the law in its brief, applies to withdrawals

from an estuary,¹¹ and water conservation measures are required under WSL, not just to protect drinking water, but also to protect aquatic life in the water source. ECL 15-1503(2)(f) requires a determination whether the withdrawals to be permitted “will be implemented in a manner to ensure [they] will result in no significant individual or cumulative adverse impacts on the quantity or quality of the water source *and water dependent natural resources* [emphasis added].” The biological richness of the Hudson River estuary is described in the Petition,” More than two hundred species of fish are found in the Hudson and its tributaries, which make up one of the most biodiverse temperate estuaries on the planet.” R. 12-14. In recognition of the importance of the Hudson River estuary, the legislature enacted the Hudson River Estuary Management Act “in order to protect, preserve and, where possible, restore and enhance the Hudson River estuarine district.” ECL 11-0306(2). As Gilbert Hawkins observes in his affidavit, “The East River plays a critical role in the Hudson River estuary and the New York Bight. It is one of the main fish migration routes between the Atlantic Ocean and both the Hudson River and Long Island Sound.” R. 494.

¹¹ As noted in Petitioners’ initial brief, the lower court applied a distinction between freshwater and non-fresh water withdrawals that does not exist in WSL and it implementing regulations. The regulations exempt withdrawals from the Atlantic Ocean and Long Island Sound, but do not exempt withdrawals from the Hudson River estuary or the East River. 6 NYCRR 601.9(i). P. Initial Br. 28-29.

CEER's argues that the time period for challenging CEER's water withdrawal permit should be calculated from the date DEC issued its SEQRA determination on its BTA determination in the 2010 SPDES permit renewal, but its argument is not supported by the cases it cites. CEER Br. 22-24. Each of the cited cases relates to the time periods for challenging the SEQRA determination regarding the environmental impacts of the permit at issue in the case. None of the cited cases provide any basis for finding that a SEQRA determination issued for one permit sets the limitation period for the time to challenge a different permit issued under a different permitting law—a permit issued under a law not even enacted at the time the SEQRA determination on the first permit was issued. The current proceeding was filed within four months of the issuance of CEER's water withdrawal permit, and thus was timely under Article 78.

C. The Doctrine of Laches Is Not Applicable to this Proceeding

CEER contends that Petitioners' "inaction" through its failure to participate in CEER's 2010 SPDES permit proceedings caused CEER an injury, but as Petitioners' point out in their initial brief, Petitioners' participation in CEER's SPDES proceedings would not have reduced CEER's expenses in installing the improvements to its water intake system required by DEC's 2010 BTA determination. P. Initial Br. 50. Those expenses were incurred as a result of requirements imposed by DEC and Petitioners' participation in the proceedings

would not have resulted in fewer expenditures. In fact, because DEC does not conduct hearings on SPDES permit renewals and because DEC issued a declaration of no substantial environmental impacts for issuance of CEER's 2010 SPDES permit renewal, thereby precluding any SEQRA hearing procedures, there would have been very little opportunity for Petitioners to have participated in those proceedings had it chosen to do so.

But in any event, it was not necessary for Petitioners' to have participated in CEER's 2010 SPDES proceedings in order to bring this challenge to DEC's interpretation of its obligations in issuing water withdrawal permits under the 2011 amendments to WSL. CEER's SPDES permit proceedings were conducted separate and apart from the requirements of WSL, indeed were conducted before the amendments to WSL at issue in this case were even enacted, and CEER's SPDES proceedings did not involve the interpretation of the provisions of WSL. None of the cases cited by CEER in support of its claim of laches find prejudicial delay resulting from a party's failure to become involved in previous proceedings that did not involve the permit being challenged by that party. None of these cases are relevant to the circumstances of the present case in which Petitioners filed their challenge to the permit at issue in this case, CEER's water withdrawal permit, within the four-months of the issuance of the permit.

Although CEER frames its assertions regarding DEC's 2010 BTA determination in terms of laches, the substance of CEER's assertions appears to be grounded in collateral estoppel. Essentially, CEER appears to be claiming that consideration of the environmental impacts of CEER's water withdrawal technology in this proceeding is precluded by DEC's BTA determination with regard to CEER's SPDES permit in 2010. CEER has not asserted collateral estoppel in this proceeding with regard to the BTA determination, however, so that issue is not before the court on this appeal. Perhaps CEER did not make a collateral estoppel claim because DEC's BTA determination regarding CEER's SPDES permit is not entitled to collateral estoppel effect in this proceeding. The BTA determination was made under an entirely different statute than the statute at issue in this proceeding, and the standards that apply to BTA determinations under the SPDES law are not the same as the standards that apply under WSL. Furthermore, Petitioners were not a party to the earlier proceeding, which would be essential for collateral estoppel to apply in this proceeding. *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500-502 (1984), *Allstate Ins. Co. v. Zuk*, 160 A.D.2d 971, 972 (2nd Dep't 1990).

POINT IV

THE LOWER COURT PROPERLY DETERMINED THAT PETITIONERS HAVE STANDING

Respondent CEER asserts in its brief that “[t]he trial court erred in holding that Petitioners-Appellants have standing to bring this suit.” CEER Brief 52.

However, because CEER failed to cross appeal on this issue, this issue is beyond this Court’s review. *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002) (“These issues are beyond this Court’s review because plaintiffs failed to cross-move for leave to appeal.”) Accord *Hecht v. City of New York*, 60 N.Y.2d 57 (1983).

But even if this court decides to address the standing issue, the lower court properly determined that Petitioners have standing. As the lower court stated, “Here, petitioners’ concerns pertain to the quality and quantity of Con Edison’s massive water withdrawals, as well as the use and observation of fish,” citing *Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297 (2009). R. 29. The court said that “Petitioners have submitted the affidavit of Gilbert Hawkins (a member of both the Sierra Club and HRFA), who has alleged sufficient harm on behalf of himself and petitioners based on issuance of the Initial Permit to establish standing.” R. 29-30.

CEER misstates the applicable law on standing. CEER asserts that “no admissible proof was submitted” by Petitioners that they would suffer a

“cognizable, concrete injury” from the actions at issue in this proceeding. CEER Br. 52. CEER states that neither of the two affidavits submitted by Petitioners “mentions the facility’s technology to meet the 90% impingement and 75% entrainment reductions required by the 2010 SPDES permit,” or testifies that “a further reduction in impingement or entrainment would benefit recreational fishing, which is the only activity cited as the basis for standing.” *Id.* 52-53. Such statements, however, are not necessary to establish standing in this proceeding.

In fact, Petitioners Sierra Club and Hudson River Fishermen’s Association (“HRFA”) meet the criteria for organizational standing set forth in *Association for a Better Long Island v. New York State Department of Environmental Conservation*, 23 N.Y.3d 1 (2014); *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); *Dental Society v Carey*, 61 N.Y.2d 330 (1984) and *Douglaston Civic Ass’n, Inc. v. Galvin*, 36 N.Y.2d 1 (1974).

In *Save the Pine Bush*, the court specifically adopted the standing rule established in the United States Supreme Court case of *Sierra Club v Morton*, 45 U.S. 727 (1972) which recognized that an injury to a particular plaintiff’s “[a]esthetic and environmental well-being” are enough to confer standing. 13 N.Y.3d at 305, citing 45 U.S. at 734. *Save the Pine Bush* cited with approval the United States Supreme Court case of *Lujan v Defenders of Wildlife*, 504 U.S. 555,

562-563 (1992) in which the *Lujan* court said that “the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.” 13 N.Y.3d at 305, citing 504 US at 562-563.

Petitioners also establish that they have at least one member who meets the zone-of-interest test of *Society of Plastics*. In support of their claims to standing in this case, Petitioners have provided the affidavit of Gilbert Hawkins, a member of both Sierra Club and HRFA. R. 492-513. Hawkins’ affidavit is sufficient to establish that both Sierra Club and HRFA have a member who meets the zone-of-interest test of *Society of Plastics* as well as the broader standing rules set forth in *Save the Pine Bush* and *Better Long Island*.

Hawkins states in his affidavit that he is an active member of both HRFA and Sierra Club. R. 494. Besides being an active member of the two organizations, Hawkins is an active fisherman who fishes “whenever I can. Lately, that has been about once a month.” *Id.*

Hawkins says that he attends each general membership meeting of HRFA, where the members give reports on the fishing conditions in New York Harbor and the East River. *Id.* Therefore, he is personally familiar with the activities of the members of HRFA concerning their fishing habits, and states that during the spring and fall fish migration seasons, HRFA members fish in the New York harbor estuary every day. *Id.*

Concerning fish kills, Hawkins states that he is concerned that the fish kills caused by the once through cooling system at the CEER generating stations are having a negative impact on his and other HRFA members' ability to catch fish and on the health of the fish population in the river. He states that he sees declines of some type of fish in the river, and he describes presentations made to HRFA asserting this. *Id.* ¶¶ 21-25.

The affidavit submitted by Hawkins clearly shows that he complies with the in-fact-injury requirement for standing, and that his injury as a fisherman is different than the public at large. Hawkins "use" or observation of an animal species, in this case fish, also meets the *Save the Pine Bush* standard for standing.

CONCLUSION

For the reasons set forth herein and in Petitioners' initial brief, Sierra Club and Hudson River Fishermen's Association respectfully submit that the judgment of the lower court should be reversed and the water withdrawal permit issued by DEC to CEER for its East River Generating Station annulled.

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Respectfully submitted,



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