To be Argued by:
RICHARD J. LIPPES

New York County Clerk's Index No. 100524/15

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.

BRIEF FOR PETITIONERS-APPELLANTS

RICHARD J. LIPPES
LIPPES & LIPPES
1109 Delaware Avenue
Buffalo, New York 14209
(716) 884-4800
rlippes@lippeslaw.com

– and –

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

Attorneys for Petitioners-Appellants Sierra Club and Hudson River Fishermen's Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

QUESTIONS PRESENTED

1. Does the Water Supply Law, Environmental Conservation Law Article 15, Title 15 (WSL), require initial water withdrawal permits issued to existing water users to comply with the same standards that apply to water withdrawal permits issued to new users?

Answer: The lower court erred in ruling that WSL does not require initial water withdrawal permits issued to existing water users to comply with the same standards that apply to water withdrawal permits issued to new users. The clear wording of the provisions of WSL shows that the same standards do apply.

2. Is issuance of an initial water withdrawal permit to an existing user properly categorized as an exempt Type II action not subject to review under the State Environmental Quality Review Act (SEQRA)?

Answer: The lower court erred in ruling that the issuance of an initial water withdrawal permit to an existing user is a ministerial action and thus an exempt Type II action not subject to review under the SEQRA. The withdrawals at issue in this proceeding should have been categorized as a Type I action. In addition, under the requirements of the WSL, the issuance of an initial permit to an existing user is not a ministerial action, but requires the exercise of discretion. Therefore issuance of an initial permit does not qualify as a Type II action.

4. Does the laches doctrine require a person challenging the issuance of a water withdrawal permit to have participated in the proceedings related to the renewal of the permit holder's State Pollution Discharge Elimination System (SPDES) permits?

Answer: The lower court erred in ruling that Petitioners were barred from bringing their claims for violation of WSL and SEQRA because they had not sought to participate in the permit holder's SPDES permit renewal proceedings. Petitioners have performed no actions, however, that have caused the permit holder any injury to its operations. Petitioners' participation in the permit holder's SPDES proceedings would not have reduced the permit holder's expenses in installing improvements to its water intake system.

5. What is the correct statute of limitations to apply in a proceeding to challenge water withdrawal permits issued under Article 15, Title 15 of the ECL?

Answer: The lower court erred in ruling that the applicable limitation period 60-days pursuant to a provision in ECL Article 15, Title 9, instead of the standard four month period under CPLR Article 78. The ambiguities of two conflicting provisions in Title 9 and several conflicting court decisions did not give Petitioners fair notice that the 60-day limitation period would be applied to this proceeding.

PRELIMINARY STATEMENT

The fundamental issue presented by this case is whether the decision of the New York State Department of Environmental Conservation (DEC) to exempt existing water users from the substantive requirements of New York's new water withdrawal permitting law, the Water Resources Protection Act of 2011,[1] is consistent with the express provisions of the law and the legislature's intent in enacting the new water withdrawal permitting program.

The new permitting law is the first law in New York to require non-public water users to obtain water withdrawal permits. Public water supplies have been required to obtain permits since 1905.[2] Because almost all persons subject to the new law are existing users, DEC's refusal to apply the requirements of the law to existing users turns a law designed to protect our state's rich water resources into a give-away of these resources to the very persons targeted for permitting.[3]

DEC's claim that it has no authority under the new law to make environmental determinations or to impose water conservation conditions on existing withdrawals is ironic, given that a major justification for the new amendments was the need to increase DEC's authority to regulate large water

[1] Chapters 400-402, Laws of 2011, codified at ECL Article 15, Title 15, 15-1501 *et seq.*

[2] The Water Supply Act of 1905 (Chapter 724, Laws of 1905).

[3] It is a giveaway because no fees are being charged for water usage or for issuance of a permit.

withdrawals in order to enable DEC to comply with the requirements of the Great Lakes-St. Lawrence River Basin Water Resources Compact.[4]

DEC's interpretation turns the law's lack of an exemption for existing users into a benefit even greater than an exemption would provide. It gives large existing users the best of all possible worlds—a permit that is a privilege to take water and may subsequently be interpreted to give permit holders priority water rights over users below the permitting threshold or exempt from permitting without the scrutiny or conditions the law requires for receiving the privilege of a permit.

The harms that result from DEC's interpretation of the new law are compounded because DEC claims that the issuance of water withdrawal permits to existing users is exempt from review under the State Environmental Quality Review Act, ECL Article 8, ("SEQRA"). DEC claims this exemption on the spurious ground that DEC has no discretion to deny water withdrawal permits to existing users or to set conditions in permits issued to existing users.

In addition, DEC claims that because permits issued to existing users are exempt from review under SEQRA, they are also exempt from review under the New York State Waterfront Revitalization of Coastal Areas and Inland Waterway

[4] ECL 21-1001.

Act,[5] and local waterfront revitalization laws such as the New York City Waterfront Revitalization Program.[6]

In an attempt to halt DEC's flawed implementation of the new water withdrawal permitting program, Petitioners have challenged two of the earliest and largest water withdrawal permits issued under the new law. In December 2013, Petitioners filed a challenge to the first permit issued to a non-public user under the new law, the permit issued to TransCanada Ravenswood LLC for its Ravenswood Generating Station in Queens to take over 1.5 billion gallons per day from the East River.[7] Petitioners' received an adverse ruling in that case from the Queens County Supreme Court in October 2014.[8] Petitioners appealed that judgment to the Second Department in July 2015. Oral arguments were heard by the Second Department on February 6, 2017. The parties are awaiting the Second Department's ruling in the case.

The present case involves Petitioners' challenge to the first water withdrawal permit issued in New York County to a non-public user, the permit issued to Consolidated Edison East River LLC ("CEER") for its East River Generating

---

5 Executive Law, Art. 42.

6 New York City Waterfront Revitalization Program (June 2016), http://www1.nyc.gov/assets/planning/download/pdf/applicants/wrp/wrp-2016/nyc-wrp-full.pdf.

7 Pursuant to an agreement among the parties, Petitioners filed a new petition in February 2014, *Sierra Club v. Martens*, Queens County Supreme Court, Index No. 2949/14 ("*Sierra Club v. Martens I*"). The two decisions issued by the court are reproduced at R. 539 and 1004.

8 R. 539, 1004.

Station to take up to 373.4 million gallons per day from the East River. Petitioners' filed their verified petition on March 23, 2015, R. 45 and received an adverse ruling from the New York County Supreme Court on September 29, 2016.[9] R. 12.

STATEMENT OF FACTS

The Water Resources Protection Act of 2011 (WRPA), Chapters 400-402, Laws of 2011, was signed into law by Governor Cuomo on August 15, 2011 , with the support of many of New York's largest environmental and conservation organizations, including Petitioner Sierra Club. WRPA amended the Water Supply Law, ECL Article 15, Title 15, 15-1501 *et seq.* (WSL).to require that any person taking 100,000 gallons or more per day from any of the state's waters obtain a water withdrawal permit (with certain exemptions not relevant here). ECL 15-1501. The new law is the first statutory provision in New York law to require that users other than public water supply systems obtain water withdrawal permits. As noted above, water withdrawal permits have been required for public water supply systems since 1905.[10]

The purpose of the legislation as outlined in the Assembly sponsor's memorandum in support of the bill was to update New York's water withdrawal laws in light of increased demands on the state's water resources and to increase

[9] *Sierra Club v. Martens*, 53 Misc.3d 1204(A), 2016 WL 5719815 (New York Cty 2016) (*Sierra Club v. Martens II*).

[10] The Water Supply Act of 1905 (Chapter 724, Laws of 1905).

DEC's authority to regulate water withdrawals. R. 380. The legislation aimed to strengthen the water conservation elements of the previous permitting program and encourage water reuse, as required for compliance with New York's obligations under the Great Lakes, St. Lawrence River Basin Water Resources Compact ("Compact"), ECL 21-1001 and sound resource management. The memorandum in support states:

> Pursuant to the ECL, DEC has been entrusted with the responsibility to conserve and control New York State's water resources for the benefit of all the inhabitants of the State.
>
> However, the water supply provisions of Title 15 derive primarily from statutes written in the first half of last century, and therefore are outdated. Under the provisions of Title 15, DEC generally only has authority to regulate public water supplies to ensure adequate quantities of potable water. As a result, consumptive uses of water for agricultural, commercial and industrial consumptive uses remain largely unregulated.
>
> Moreover, since the provisions of Article 15 were enacted, population growth, pressures to keep water instream for fisheries and the environment, and increased use of water for commercial, industrial and other purposes have resulted in substantially increased demands on the State's water resources. In addition, potential impacts from climate change, and proposals to export vast amounts of water from New York to other states and abroad could pose new threats to the State's water supply. These issues have served to highlight the limitations on the State's water resources program and DEC's limited .ability to regulate water withdrawals for many purposes. In contrast, neighboring states of Connecticut, New Jersey, Rhode Island and

> Massachusetts all have programs that regulate industrial, commercial and agricultural water withdrawals.
>
> Another important recent development is enactment of the Great Lakes, St. Lawrence River Basin Water Resources Compact . . . .
>
> These developments, and the potential adverse effects of climate change, support the need to implement more effective measures proposed by this bill to protect and conserve New York's water resources.
>
> In addition, this bill, by authorizing DEC to implement a statewide permitting program for all water withdrawals of equal or greater than 100,000 gpd, would allow New York to meet one if its significant responsibilities under the Compact: implementation of a regulatory program for water withdrawals in the Great Lakes Basin. Further, this bill would result in a strengthening of the water conservation elements of the current permitting program and encourage water reuse, consistent with the Compact and sound resource management.[11]

At the time he signed WRPA into law, Governor Cuomo emphasized the protections offered by the new law and the benefits of increasing DEC's authority to regulate all significant water withdrawals in the Great Lakes Basin."The preservation and protection of New York's water resources is vital to the state's residents, farmers and businesses," the Governor said."[T]his law will enable DEC to comply with commitments under the Great Lakes-St. Lawrence River Basin

[11] Assembly Sponsor's Memorandum in Support of Bill Number A5318A, pp. 5-10 of the Bill Jacket. R. 380. Identical statements are made in a DEC Memorandum to Mylan L. Denerstein, Esq., Counsel to the Governor, by Maureen A. Coleman, DEC Legislative Counsel, dated August 3, 2011, recommending approval for the legislation, pp. 15-16 of the Bill Jacket. R. 386.

Water Resources Compact (Compact) by regulating all significant water withdrawals occurring in the New York portion of the Great Lakes Basin."[12]

The legislation applied key elements of the Compact's decision-making standards to water withdrawal permits issued throughout the state; including the Compact requirements that water withdrawals must "incorporate environmentally sound and economically feasible water conservation measures" and "result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources and the applicable Source Watershed." ECL 21-1001, Section 4.11.2.

These Compact requirements are incorporated in ECL 15-1503(2), which mandates eight factors to be determined by the DEC in making a decision whether to grant or deny a water withdrawal permit. These factors include:

> (d) the need for all or part of the proposed water withdrawal cannot be reasonably avoided through the efficient use and conservation of existing water supplies;
>
> (e) the proposed water withdrawal is limited to quantities that are considered reasonable for the purposes for which the water use is proposed;
>
> (f) the proposed water withdrawal will be implemented in a manner to ensure it will result in no significant individual or cumulative adverse impacts on the quantity or quality of the water source and water dependent natural resources;

[12] *Governor Cuomo to Sign Law to Protect New York's Waters*, Press Release Governor's Press Office, August 15, 2011. R. 389.

> (g) the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures.

The basic permitting requirements of WSL are set out in ECL 15-1501 and ECL 15-1503. ECL 15-1501(1) requires that any person withdrawing more than 100,000 gallons per day from the waters of New York obtain a permit. ECL 15-1501(2) continues in full force and effect the permits previously issued by DEC to public water suppliers. ECL 15-1501(3) incorporates the requirements of the State Sanitary Code for drinking water supplies. ECL 15-1501(4) instructs DEC to promulgate regulations to implement a permitting program and authorizes DEC to create additional exemptions. ECL 15-1501(5) authorizes DEC to consolidate existing permits held by a public water supply. ECL 15-1501(6) requires permit holders to make annual reports of water usage and water conservation measures. ECL 15-1501(7) lists categories of users that are exempt from permitting requirements. ECL 15-1501(8) instructs DEC to establish "a water conservation and efficiency program with the goals of (a) ensuring improvement of the waters and water dependent natural resources, (b) protecting and restoring the hydrologic and ecosystem integrity of watersheds throughout the state, (c) retaining the quantity of surface water and groundwater in the state, (d) ensuring sustainable use of state waters, and (e) promoting the efficiency of use and reducing losses and waste of water." ECL 15-1501(9) provides that existing users who registered their

use with the DEC as of February 2012 are eligible to receive a permit for their maximum reported capacity.

ECL 15-1503(1) specifies what must be contained in a permit application. ECL 15-1503(2) specifies the determinations that must be made by DEC in deciding whether to grant or deny a permit. These are the factors listed above, which include the requirements for compliance with the Great Lakes Compact. ECL 15-1503(3) requires DEC to publish a water conservation manual. 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." ECL 15-1503(5) gives DEC authority to adopt regulations to implement the title. And ECL 15-1503(6) provides that a new permit shall be valid for a period not to exceed 10 years.

DEC promulgated new regulations implementing the 2011 amendments in November 2012. 6 NYCRR Part 601. The regulations became effective April 1, 2013. 6 NYCRR 601.11(c) reinforces the mandates of ECL 15-1503(2) by requiring the same eight determinations. These mandates are further reinforced by requirements in the regulations that the information necessary to make these determinations be included in the application materials for a water withdrawal permit. 6 NYCRR 601.10(k).

6 NYCRR 601.7(e) pertaining to "Initial Permits" specifies that initial permits are subject to all the terms and conditions of a water withdrawal permit. 6 NYCRR 601.7(f) provides that DEC will review an initial permit application "in coordination with SPDES or other permit program."

6 NYCRR 601.7(b) specifies a schedule by which existing users are required to submit permit applications. Under the schedule, the largest users go first. Users that are designed to withdraw a volume of 100 million gallons per day or more were required to submit their applications by June 1, 2013.

Almost 1,600 existing users registered with DEC in 2012 and 2013 (R. 357, 398). Approximately 1000 of these users are existing private users not previously permitted by DEC. *Id*.

On May 30, 2013, CEER submitted an application to DEC for a permit to withdraw up to 373.4 million gallons of water per day from the East River in the Hudson River estuary for cooling operations at its East River Generating Station. R. 257.

DEC determined that the CEER application was complete on June 3, 2014, R. 201, notwithstanding a number of deficiencies in the application. Among the deficiencies observed by Petitioners are that the application failed to include Section 2 of the Water Withdrawal Reporting Form (WWRF) that shows consumptive use on a monthly basis and failed to include Section 4 of the WWRF

that summarizes "Water Conservation and Efficiency" measures. The application also failed to contain a project justification. These items are among the items required to be included in a water withdrawal permit application by ECL 15-1503(1) and 6 NYCRR 601.10.

Petitioners learned of CEER's application when notice of the application was published in DEC's Environmental Notice Bulletin (ENB) on June 11, 2014. R. 291. The notice, which was a joint notice for CEER's water withdrawal permit application and its SPDES permit renewal application, stated under the caption "State Environmental Quality Review (SEQR) Determination" that "Project is not subject to SEQR because it is a Type II action." R. 292. In addition, the project description stated that, "The Department has determined that permit renewals, and the issuance of 'initial permits' under ECL section 15-1501.9 as implemented by 6 NYCRR 601.7, are Type II actions, and not subject to SEQR." *Id.* The notice also stated that "This project is not located in a Coastal Management area and is not subject to the Waterfront Revitalization and Coastal Resources Act." *Id.* In fact the East River Generating Station is located in a Coastal Zone, as shown in the Coastal Zone map for the area of the plant. R. 484.

Petitioner Sierra Club joined with the Natural Resources Defense Council, Riverkeeper and Citizen's Campaign for the Environment in submitting comments to DEC on the CEER application on August 11, 2014 (Sierra-NRDC Comments).

R. 303. The comments raised a number of the issues regarding DEC's handing of CEER's permit application under three general headings:

> 1. Issuance of the proposed permit is not a "ministerial action" and is, therefore, subject to SEQRA review.
>
> 2. The permit must specify and require implementation of all "environmentally sound and economically feasible" water conservation measures.
>
> 3. DEC must ensure that there has been sufficient analysis of the potential adverse impacts of the proposed water withdrawal and impose any necessary permit conditions to avoid those impacts.

Id. DEC's response dated September 27, 2014, to the Sierra-NRDC Comments, DEC disagreed with each point. R. 310. Without explaining its reasoning in detail, DEC asserted that "the Department's authority to impose water conservation measures is incidental to the requirement of the statute that the Department issues permits for the maximum capacity reported by the applicant;" that "the selection of BTA and closed-cycle cooling is the purview of the SPDES permit application," and that "Initial permits, . . . , are not subject to Part 601.11." *Id*.

Without modifying the draft permit to address any of the objections raised in the Sierra-NRDC Comments, DEC issued a water withdrawal permit to CEER on November 21, 2014, with an effective date of December 1, 2014. R. 325. The activity authorized by the permit is "the withdrawal of a supply of water up to 373,400,000 gallons per day (GPD) from the East River for once through cooling

and other processes related to electrical generation." *Id*. The permit was issued for a five year term.

A separate SPDES permit was issued at the same time as the water withdrawal permit with the same effective date for the same term. R. 330. The water withdrawal permit is very short, only five pages in length. AR 238. The SPDES permit has more terms and conditions and is 24 pages in length. It is not apparent that there are any conditions related to water conservation in CEER's SPDES permit.

Notwithstanding the apparent absence of water conservation requirements in the SPDES permit, the water withdrawal permit states that "*[r]equired measures for water conservation* and the reduction of impacts to the fisheries resource contained in the Biological Monitoring Requirement Section of the facilities [sic] SPDES permit are hereby incorporated by reference into this permit [emphasis added]." R. 326. The only requirements in the water withdrawal permit relating to water conservation measures are conditions 7 and 8, which require that all sources of supply be metered and that all meters be calibrated. R. 327. Other practices identified as "Best Management Practices" in the WWCF are not required in the CEER permit, such as annual water audits, regular surveys for leakage, regular surveys of underground piping for water leakage, the recycling of water (such as closed-cycle cooling) or the use of reclaimed water. CEER's responses on its

permit application showed that none of these practices were in effect at the East River station. R. 262-267.

The biological monitoring conditions in the SPDES permit are terse. Most are just short headings accompanied by statements that the condition has been met. The condition requiring an "Impingement Mortality and Entrainment Characterization Study," states "condition has been met." R. 341. The condition requiring a "Design and Construction Technology Plan" states "condition has been met." *Id*. The condition requiring a "Technology Installation and Operation Plan" states "[t]he Technology Installation and Operation Plan was submitted and approved by the department." *Id*. The condition requiring a "Verification Monitoring Study" states "[t]he Verification and Monitoring Plan has been submitted and approved by the Department." *Id*. The only detail in the biological monitoring conditions is provided in the requirement for "Complete installation of BTA." *Id.* This condition specifies the installation of certain types of intake screens and requires the establishment of a dedicated fish return in order to reduce entrainment "by at least 75% from the calculation baseline," and to reduce impingement mortality "by at least 90% from the calculation baseline." *Id*. As noted above, it is not apparent that any of the conditions in the SPDES permit require measures to reduce water use.

DEC issued a negative declaration for the SPDES permit on June 1, 2014. R. 284. The "Impact Analysis" in the Negative Declaration states that the SPDES and Clean Water Act regulations "require that [the] facility minimize impacts from impingement and entrainment on aquatic organisms from the cooling water intake. SEQR has similar requirements in that a project sponsor must minimize impacts to the maximum extent practicable. However, Best Available Technology has already been determined and these changes [are] unrelated to BAT. The changes represent a tightening of effluent monitoring and waste minimization." R. 287.

The Negative Declaration does not address the cumulative impacts on the Hudson River Estuary of the water withdrawals by all the power plants operating in the estuary. Five months after DEC issued the CEER water withdrawal permit and SPDES permit renewal, DEC released its Draft Hudson River Estuary Action Agenda 2015-2020 on April 1, 2015.[13] Target 4 for Benefit 3 of the Agenda, "Vital Estuary Ecosystem Vision," calls for the reduction of fish kills in at the four remaining steam electric power plants in the estuary that that use once-through cooling systems by "imposing the 'best technology available' standard pursuant to 6 NYCRR§704.5 and §316(b) of the Clean Water Act, which both call for minimizing adverse environmental impacts."[14] CEER's East River station is one of

13 Draft Hudson River Estuary Action Agenda 2015-2020, dated April 1, 2015, http://www.dec.ny.gov/docs/remediation_hudson_pdf/dhreaa15.pdf [accessed 7/20/17].

[14] *Id*. at 30.

these four plants. The wording of Target 4 implies that greater protections remain to be imposed under the "best technology available" standards of the SPDES regulations and the Clean Water Act than were imposed in the CEER SPDES permit.

Affidavits filed by CEER in this proceeding describe in considerable detail various steps DEC and CEER have taken over the years in connection with CEER's SPDES permit renewals to put in place technology for reducing impingement and entrainment by the East River station. Petitioners note that such efforts are sorely needed because the impingement and entrainment figures contained in DEC's 2014 Biological Monitoring Report for the SPDES permit are shocking. As stated in the affidavit of Gilbert Hawkins, 2014 President of HRFA, "Impingement and entrainment studies show that impingement and entrainment by the CEER power plant is much higher than at the Ravenswood plant, even though, judging by their permitted capacities, the CEER plant is withdrawing only *one/seventh* the volume of water." R. 497. Citing the data contained in DEC's biological monitoring reports for the two plants, Mr. Hawkins states that:

> 35. Comparing the entrainment data for the two plants, we find that the Con Ed plant entrained 1.34 billion fish eggs and larvae during the study year and the Ravenswood plant entrained 149.7 million eggs, larvae and juveniles. This means that the Con Ed plant entrained almost nine times as many eggs and larvae as the Ravenswood plant.

> 36. If the permitted water withdrawal capacities of the two plants are taken into account and entrainment per gallon of water withdrawn is calculated, the Con Ed plant entrained eggs and larvae at a rate 36 times the rate for the Ravenswood plant.
>
> 37. Comparing the impingement data for the two plants, we find that the Con Ed plant impinged an estimated 1.5 million fish during the study year compared to only 25,850 fish impinged by the Ravenswood plant. This means that the Con Ed plant entrained 58 times as many eggs and larvae as the Ravenswood plant!
>
> 38. If the permitted water withdrawal capacities of the two plants are taken into account and impingement per gallon of water withdrawn is calculated, the Con Ed plant impinged fish at a rate an astronomical 237 times greater than the rate at the Ravenswood plant!

R. 498-499.

PROCEDURAL HISTORY

The verified petition of Sierra Club and Hudson River Fishermen's Association was filed March 23, 2015. R. 45. The petition alleged four causes of actions with respect to DEC's issuance of CEER's water withdrawal permit: violations of SEQRA, violations of the Water Supply Law, violations of the coastal zone laws and violations of the public trust. Respondent DEC served the administrative record on June 5, 2015. R. 84. Petitioners served their initial memorandum of law and supporting affidavits on July 5, 2015. R. 354. Respondent DEC served its verified answer and supporting affidavits on August 7, 2015. R. 514. Respondent CEER filed a motion to dismiss and supporting affidavits on

August 7, 2015. R. 576. A hearing was held on August 30, 2016. On September 29, 2016, the lower court issued a decision and order finding that Petitioners had standing and granting CEER's motion to dismiss. R. 12. Petitioners served their notice of appeal of the judgment on November 3, 2016. R. 6.

ARGUMENT

POINT I

DEC VIOLATED WSL IN ISSUING AN INITIAL WATER WITHDRAWAL PERMIT TO CEER WITHOUT COMPLYING WITH THE STATUTORY REQUIREMENTS

The key legal issue presented by this case is the proper interpretation of Environmental Conservation Law ("ECL") 15-1501(9), the section of New York's new water withdrawal permitting law that specifies that existing users are to be entitled to initial permits. Petitioners contend that the lower court erred when it determined that WSL effectively exempts initial permits issued to existing users from the substantive requirements of the new water permitting law, and ruled that DEC did not violate WSL and that DEC's issuance of a water withdrawal permit to CEER was not arbitrary and capricious under the statutory scheme. Petitioners assert that the statutory language is clear that the same standards apply to initial permits issued to existing users as apply to permits issued to new users.

Pursuant to Section 7803(3) of the Civil Practice Law and Rules (CPLR), the relevant inquiry in this Article 78 proceeding challenging DEC's interpretation of

the provisions of WSL is whether DEC's determinations as to the meaning of the law were affected by an error of law and whether its actions in issuing the CEER permit were made in violation of lawful procedure or were arbitrary and capricious or an abuse of discretion. *Nestle Waters v. City of New York*, 121 A.D.3d 124 (1st Dep't 2014).

For the reasons set forth below, DEC's actions were affected by an error of law, were made in violation of lawful procedure and were arbitrary and capricious.

A. ECL §15-1501(9) Requires that initial Permits Issued to Existing Users Be Subject to the Same Standards that Apply to Permits Issued to New Users

There is no distinction in WSL's permitting requirement between existing withdrawals and new withdrawals. ECL 15-1501(1) provides that "no person shall have the power "to make a water withdrawal from *an existing* or new source [emphasis added]" until that person shall have obtained a water withdrawal permit. Existing users are not one of the exempt categories of water users listed in ECL 15-1501(7).

ECL 15-1501(9) provides that 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]," i.e., an existing user. ECL 15-1501(9) specifies the size of the

permit to be issued to an existing user, 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]." ECL 15-1503(2) specifies a number of determinations that must be made by DEC in deciding whether to grant or deny a permit. 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."

There is no basis for concluding, as the lower court did, that the provisions of ECL 15-1501(9) are inconsistent with the requirements of ECL 15-1503(2). ECL 15-1501(9) incorporates the requirements of ECL 15-1503(2) through the requirement that a permit issued to an existing user be "subject to appropriate terms and conditions as required by this article." The incorporation results because ECL 15-1503(4) provides that the conditions to be imposed in a water withdrawal permit are to be "such conditions as may be necessary to provide satisfactory compliance" with the determinations made by DEC pursuant to ECL 15-1503(2). The statutory scheme requires that the determinations mandated by ECL 15-1503(2) be made as a basis for DEC to set adequate permit conditions. If the required determinations are not made, adequate conditions cannot be imposed.

The lower court was incorrect in stating that "Section 15-1501(6) defines the "appropriate terms and conditions" referenced in Section 15-1501 (9)." No conditions are specified in ECL §15-1501(6). The water withdrawal reporting requirements set forth in ECL 15-1501(6) are not permit terms and conditions, but are reporting requirements imposed on each user who is eligible for a permit. These requirements apply whether or not a permit has been issued.

The water permitting regulations DEC adopted in 2012, 6 NYCRR Part 601, are fully compatible with the statutory requirements of WSL. The provisions of 6 NYCRR 601.7(e) pertaining to initial permits are fully in accordance with the requirements of ECL 15-1501(9) and ECL 15-1503(2). 6 NYCRR 601.11(c) requires the same determinations as ECL 15-1503(2). 6 NYCRR 601.7(e) elaborates on the requirements of ECL 15-1501(9). 6 NYCRR 601.7(e) provides that an initial permit "includes all terms and conditions of a water withdrawal permit, including environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies, and is subject to modification, suspension and revocation, pursuant to the requirements of this Part." In stating that an initial permit "includes all terms and conditions of a water withdrawal permit," 6 NYCRR 601.7(e) makes it clear that initial permits issued to existing users are subject to the same standards as permits issued to new users. The reference to "environmentally sound and economically feasible water

conservation measures to promote the efficient use of supplies" in 6 NYCRR 601.7(e) is a reference to ECL 15-1503(2)(g) and 6 NYCRR 601.11(c)(7), which require that DEC determine whether "the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures."

Thus it is apparent that the clear wording of WSL and the accompanying regulations require that the same standards be applied to the issuance of initial permits to existing users as to permits issued to new users.

When DEC was questioned during the comment period on the draft water withdrawal regulations regarding whether there were any distinctions in the standards that applied to initial permits issued to existing users compared to the standards that apply to permits issued to new users arose, DEC responded that the standards are the same. R.396. Most notably, in response to a comment by Entergy Nuclear Operations, Inc. requesting clarification as to "whether the standards for issuance of initial permits for existing facilities are subject to the same issuance standards as new permits," 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]." *Id*.

It was not until the ENB notice for the first non-public water withdrawal permit application that DEC publicly stated that it was applying a distinction between the standards that applies to initial permits issued to existing users and permits issued to new users.

B. Deference to DEC's Current Interpretation of ECL 15-1501(9) Is Not Appropriate

Because DEC's current interpretation of its discretion in issuing initial water withdrawal permits runs counter to the clear wording of ECL 15-1501(9), judicial deference to DEC's interpretation of the law is not appropriate. Under the applicable case law, "a determination by the agency that 'runs counter to the clear wording of a statutory provision' is given little weight." *Raritan Development Corp. v. Silva,* 91 N.Y.2d 98 (1997). The rules for evaluating when a court should defer to an agency interpretation of a statute are 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.]

Id. 102-103. In *Raritan,* the Court declined to defer to the interpretation of a section of New York City's Zoning Resolution put forth by the Board of Standards and Appeals of the City of New York (BSA). The Court said, "The statutory

language could not be clearer. . . . BSA's interpretation conflicts with the plain statutory language and may not be sustained." *Id*. at 103.

Similarly, in *Matter of Brown v. NYS Racing and Wagering Board*, 60 A.D.3d 107 (2nd Dep't 2009), the court stated: "when a 'question is one of pure legal interpretation of statutory terms, deference to the [agency] is not required. . . . In such instances, courts should construe clear and unambiguous statutory language as to give effect to the plain meaning of the words used." *Id*. at 115, citations omitted. The *Brown* court found, "There being no ambiguity in the operative statutory terms, we must necessarily deem the pertinent provisions of the Education Law as subject to pure legal interpretation and give effect to their plain meaning, without necessarily deferring to the interpretation advanced by NYSED." *Id*. at 116. *HLP Properties, LLC, v. Department of Environmental Conservation*, 21 Misc.3d 658 (New York Cty 2008), addressed DEC's interpretation of eligibility to participate in the Brownfield Cleanup Program under ECL 27-1401. The *HLP* court found that DEC's interpretation of the statute was unreasonable. The court stated:

> [W]hile the implementation of a statute may place an agency in a position where they are forced to deal with competing interests, striking a balance between those interests is exclusively a legislative function. . . . Stated differently, an agency, by law, is not allowed to "legislate" by adding "guidance requirements" not expressly authorized by statute. . . .

Id. at 669, citations omitted. Accord *East River Realty Company, LLC v. Department of Environmental Conservation*, 68 A.D.3d 564 (1st Dep't 2009) (rejecting DEC's reliance on extrastatutory factors in determining who could participate in DEC's brownfield cleanup program).

The contradiction between DEC's contemporaneous interpretation of the standards to be applied under WSL and its current interpretation further mitigates against giving deference to DEC's current interpretation.

C. In Issuing the CEER Permit, DEC Failed to Make the Required Determinations and Impose Adequate Conditions

As shown above, DEC was required under the provisions of ECL 15-1501(9) to make the determinations set forth in ECL 15-1503(2) and to use those determinations to set appropriate terms and conditions in the CEER permit. The administrative record shows that DEC did not make these determinations for the CEER water permit. DEC did not even require CEER to provide the necessary data and analysis in its application materials to enable DEC to make the determinations required by the ECL 15-1503(2). The application failed to provide much of the information required by 6 NYCRR 601.10, including information on consumptive use, a water conservation plan or a project justification that explains why the proposed water conservation measures are environmentally sound and economically feasible. As noted above, CEER's application proposed no water conservation measures.

Two determinations that DEC failed to make regarding the CEER application were the determinations required by ECL 15-1503(2)(f) and (g) whether "the proposed water withdrawal will be implemented in a manner to ensure it will result in no significant individual or cumulative adverse impacts on the quantity or quality of the water source and water dependent natural resources, including aquatic life" and whether "the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures." To comply with these requirements, DEC should have determined whether CEER's once through cooling system "will result in no significant individual or cumulative adverse impacts on the quantity or quality of the water source and water dependent natural resources, including aquatic life" and represents an "environmentally sound and economically feasible water conservation measure," and it did not do so.

The lower court's determination that because the withdrawals at issue in this proceeding are not withdrawals of freshwater, the court "declines to consider water conservation themes underlying WSL as a basis to require further consideration of closed-cycle methods leading to vacatur of the Initial Permit," R. 40, creates 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.[15] It might be appropriate for DEC to take water quality into account in evaluating the impacts of CEER's withdrawals, even though none of the determinations required by ECL 15-1503(2) and 6 NYCRR 601.11(c) require an evaluation of water quality, but there is no basis in WSL for a ruling that consideration of water conservation issues is not required for non-freshwater withdrawals.

D. SPDES Permit Conditions Are Not a Substitute for Compliance with WSL

The fact that DEC included a condition in CEER's water withdrawal permit incorporating the biological monitoring requirements of CEER's SPDES permit is not a substitute for DEC making the determinations required by ECL 15-1503(2) and 6 NYCRR 601.11(c). Although 6 NYCRR 601.7(f) provides that DEC will review an initial permit application "in coordination with the SPDES or other permit program, particularly with respect to any pending permit renewals," neither this section nor any other section of the WRL or the regulations authorize incorporating provisions from a SPDES permit as a way of fulfilling DEC's duties to make the determinations required in ECL 15-1503(2) and 6 NYCRR 601.11(c).

Whatever determinations DEC has made regarding the adequacy of CEER's once-through cooling system under the State Pollutant Discharge Elimination System (SPDES) law and regulations, ECL Article 17, 17-0101 et seq. and 6

[15] 6 NYCRR 601.9(i).

NYCRR Part 750, DEC's determinations under the SPDES law do not substitute for the necessity of an independent determination that the cooling system is in compliance with the requirements of WSL.

An evaluation of the work that has been done on CEER's cooling water intake system pursuant to its SPDES permit and its effectiveness would likely be part of such an evaluation under WSL. But that fact that certain actions have been taken pursuant to CEER's SPDES permitting proceedings is not dispositive of the determinations required by WSL because WSL and the SPDES law have different objectives and different requirements. The standards to be applied is issuing a SPDES permit are not the same as the standards that apply under WSL and water permitting regulations, and a separate *de novo* determination needs to be made pursuant to the requirements of WSL.

The New York Legislature established the SPDES program in 1973 to comply with new Federal requirements. Congress enacted the federal Water Pollution Control Act of 1972, [16] commonly referred to as the Clean Water Act (CWA), the first comprehensive national clean water legislation to try and prevent pollution from reaching levels damaging to the environment and human health. The CWA authorized development of a National Pollutant Discharge Elimination System (NPDES) to regulate discharges to surface waters of the United States.

[16] 33 U.S.C. 1251 et seq. (1972).

Section 301 of the CWA declares a prohibition against any discharge of any pollutant into waters of the United States except in compliance with a NPDES permit. The CWA authorizes the United States Environmental Protection Agency (EPA) to delegate the NPDES permit program to state governments, enabling states to perform many of the permitting, administrative and enforcement aspects of the NPDES Program.

The SPDES law allowed New York to become eligible to receive delegated authority to regulate discharge activities covered by the federal program. [17] In 1975, the SPDES program was approved by the EPA.[18] In order to take advantage of this federal delegation, New York State adopted its own SPDES permitting system, which is codified in Titles 7 and 8 of the Water Pollution Control Law, ECL Article 17. Under the ECL provisions, the DEC is charged with issuing and enforcing SPDES permits within New York State.[19]

The provisions of ECL 17-0701 and ECL 17-0703 setting the requirements for issuance of SPDES permits are comparable to the WSL provisions authorizing the issuance of water withdrawal permits. These provisions make clear that the SPDES program is focused on water pollution, not water conservation. ECL 17-

[17] Office of the State Comptroller, Clean Water Permit Process, 2001-S-18, March 13, 2003, http://osc.state.ny.us/audits/allaudits/093003/093003-h/01s18.pdf.

[18] *Id*.

[19] DEC, *SPDES Compliance and Enforcement, State Fiscal Year 2015/2016 Annual Report*, October 1, 2016, http://www.dec.ny.gov/docs/water_pdf/2015annualrpt.pdf [last accessed 07/25/17].

0701(1) provides, in pertinent part, "[i]t shall be unlawful for any person, until a written SPDES permit therefor has been granted by the commissioner, or by his designated representative, and unless such permit remains in full force and effect, to: a. Make or cause to make or use any outlet or point source for the discharge of sewage, industrial waste or other wastes or the effluent therefrom, into the waters of this state, or . . . ." ECL 17-1701(5) provides that "[a] SPDES permit shall be issued to the applicant upon such conditions as the commissioner may direct." ECL 17-0703(1) provides that "[t]he permit provided in section 17-0701 and title 8 hereof shall be issued by the commissioner or by his designated representative, pursuant to regulations of the department adopted in accordance with subdivision 3 of section 17-030(3) and title 8 hereof." Unlike the water withdrawal law, the SPDES law has no threshold to the permitting requirements. Any discharge of wastes into the waters of New York State must be permitted.

DEC reports that the number of active SPDES permits in fiscal year 2015/16 was 20,504, which included 1,423 SPDES permits issued to industrial facilities.[20]

Discharges from power plant cooling systems are subject to special rules under the CWA. Pursuant to Section 402 of the CWA discharges from power plant cooling systems must be authorized by a NPDES permit or by a state permit program. Section 316(b) of the CWA requires EPA to issue regulations for cooling

[20] *Id*.

water intake structures to ensure "that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact."[21] Whether the EPA regulations should require closed-cycle cooling at existing facilities is an issue that has been debated since 1976 and is still being debated. As stated in a recent article, "[t]he U.S. Environmental Protection Agency's thus-far unsuccessful attempt to regulate how existing power plants and factories suck in water to cool their machinery is one of the longest-running environmental rulemakings, dating back to 1976 and leading to a U.S. Supreme Court ruling in 2009. Now that the legal battle is flaring up again at the Second Circuit."[22]

The EPA finalized its latest attempt to regulate cooling water intake systems at existing structures in a new rule published on May 19, 2014. [23] The rule does not require that all existing plants use closed-loop systems. However, the rule does include provisions that may require existing facilities to install closed-loop systems where there is a demonstrated environmental need for their use.[24]

[21] 33 U.S.C. 1316(b).

[22] "EPA's 40-Year Battle For Water Cooling Regs," Juan Carlos Rodriguez, *Law360*, June 21, 2016, https://www.law360.com/articles/807361/epa-s-40-year-battle-for-water-cooling-regs-a-cheat-sheet [last accessed 07/27/17].

[23] 40 CFR Parts 122 & 125 (Subparts I, J, & N).

[24] EPA Releases Final Standards for Cooling Water Intake Structures at Power Plants and Other Facilities, Stephen Fotis, Erin Bartlett, and Avi Zevin, Van Ness Feldman LLP, May 22, 2014, http://www.vnf.com/2895 [last accessed 07/27/17].

The EPA's earlier standards for existing facilities, which did not require closed-loop cooling, had been challenged in court by both environmental organizations and industry in a long series of court cases. EPA's first attempt at issuing section 316(b) regulations was reversed by the United States Court of Appeals for the Fourth Circuit in 1977 on procedural grounds in *Appalachian Power Corp. v. EPA*, 566 F.2d 451 (4th Cir. 1977). For almost twenty years thereafter, state authorities implemented the requirements of section 316(b) on a case-by-case basis for individual plants through CWA‐ permit proceedings.[25] In 1995, however, EPA entered into a consent decree with environmental groups that ultimately led to the issuance of three sequential section 316(b) rules."Phase I," finalized in 2001, established standards for new electric generating units (EGUs) and certain other facilities using large amounts of cooling water; "Phase II," finalized in 2004, covered most existing EGUs; and "Phase III," finalized in 2006, covered all other facilities using cooling water that are subject to section 316(b) of the CWA.[26] These standards were challenged by both environmental organizations and industry. The United States Court of Appeals for the Second Circuit held in 2004 and 2007 that certain aspects of the Phase I and II regulations were

[25] *Id.*
[26] *Id.*

inconsistent with the CWA, and remanded the rules to EPA.[27] In the summer of 2010, the Fifth Circuit remanded a portion of the Phase III standard that addressed requirements for additional existing facilities not covered in Phase II.[28] In 2011, the Second Circuit's 2007 decision was overturned by the U.S. Supreme Court after the Court found that Congress did not speak directly to whether or not a cost-benefit analysis could be used in environmental standards under the "best technology available" standard and upheld EPA's interpretation of the regulations as reasonable.[29]

The Second Circuit is now examining EPA's 2014 rule, deciding whether to send the rule back to the EPA for further revision based on the arguments of Petitioner Sierra Club and more than 20 other environmental organizations that the rule needs to require closed-cycle cooling, or to remove from the rule what industry groups, including the American Petroleum Institute, Entergy Corp. and an ad-hoc group of manufacturing trade associations called the Cooling Water Intake Structure Coalition, argue are overreaching requirements.[30] The case is scheduled for argument on September 14, 2017.

---

[27] *Riverkeeper, Inc. v. EPA*, 358 F.3d 174 (2nd Cir.2004), and *Riverkeeper, Inc. v. EPA*, 475 F. 3d 83 (2nd Cir. 2007), rev'd *Entergy Corp. v. Riverkeeper Inc.*, 556 U.S. 208 (2009).

[28] *ConocoPhillips Co. v. EPA*, 612 F.3d 822 (5th Cir. 2010).

[29] Entergy Corp. v. Riverkeeper Inc., 556 U.S. 208 (2009).

[30] The case is Cooling Water Intake Structure Coalition et al. v. U.S. Environmental Protection Agency et al., Index Number 14-4645, U.S. Court of Appeals for the Second Circuit.

DEC issued a guidance on Best Available Technology ("BTA") for Cooling Water Intake Structures in 2011. [31] The guidance states that cooling water intake structures will be subject to one of four "performance goals" when selecting BTA. Each of the four goals requires "closed-cycle cooling." *Id*. The guidance also states, "This policy will be implemented when: (i) an applicant seeks a new SPDES permit; (ii) a permittee seeks to renew an existing SPDES permit; or (iii) a SPDES permit is modified either by the Department or by the permittee, for a facility that operates a CWIS in connection with a point source thermal discharge." *Id*. Under the guidance document, the policy requiring closed-cycle cooling should have been implemented when CEER's SPDES permit was renewed in 2014, but it was not.

The lower court's statement that "closed-cycle methods, as noted throughout this decision, have already been considered at length and rejected," R. 40, ignores the long and complicated history of the applicable EPA rules and fails to acknowledge that new water withdrawal permitting legislation establishes a new set of standards and requirements that requires a new set of determinations. Previous determinations under the CWA and the SPDES law would be relevant facts to consider, but cannot be dispositive if the requirements of WSL are to be given effect.

[31]"BTA for Cooling Water Intake Structures," July 10, 2011, http://www.dec.ny.gov/docs/fish_marine_pdf/btapolicyfinal.pdf, Hawkins Aff. Ex. C.

The legislature enacted a new permitting law requiring extensive water conservation measures because it perceived that DEC did not have adequate authority under existing laws, such as the SPDES law, to protect New York's water resources. Almost every major water user in the state already has a SPDES permit. If water withdrawals could be adequately regulated under the SPDES program, the legislature would not have seen a need for a new permitting program imposing significant water conservation requirements.

Furthermore, the SPDES regulations themselves provide that the provisions of a SPDES permit should not be used to assert compliance with other laws. 6 CRR-NY 750-2.1 (j) provides that "nothing in a SPDES permit relieves the permittee from a requirement to obtain any other permits required by law."

For each of these reasons, the lower court erred in ruling that DEC did not violate WSL and that DEC's issuance of a water withdrawal permit to CEER was not arbitrary and capricious under the statutory scheme.

POINT II

DEC VIOLATED SEQRA IN DETERMINING THAT ISSUANCE OF THE CEER PERMIT WAS A TYPE II ACTION EXEMPT FROM REVIEW UNDER SEQRA

DEC violated SEQRA when it determined that issuance of an initial water withdrawal permit to CEER was a Type II action not subject to review under SEQRA and the lower court erred in holding that it did not.

The heart of SEQRA lies in its provision regarding Environmental Impact Statements. *Williamsburg Around the Bridge Block Association v. Giuliani*, 223 A.D.2d 64 (1st Dep't 1996). The law provides that whenever an action *may* have a significant impact on the environment, an Environmental Impact Statement ("EIS") shall be prepared. ECL 8-0109(2). An EIS is required to contain all the information necessary to assure that the decision-making body, called the "lead agency," can ultimately determine to go forward or not with a project in a manner that will create the least negative impact to the environment. The agency having principle responsibility for carrying out or approving the project or activity, in this case DEC, is charged with the responsibility of determining whether the project under consideration may have significant adverse environmental effects, and if so, must prepare an EIS. *Id*. The EIS is made available to the public so that they are apprised of possible adverse environmental consequences and may comment and propose mitigating measures. *Id*. The "lead agency" is the entity charged with carrying out the procedures mandated by SEQRA. Therefore, the lead agency must "act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid environmental effects." ECL 8-0109(1).

Since the early landmark cases of *Town of Henrietta v Department of Environmental Conservation*, 76 A.D.2d 215 (4th Dep't 1980), and *H.O.M.E.S. v*

New York State Urban Development Corporation, 69 A.D.2d 222 (4th Dep't 1979), New York courts have addressed the requirements and responsibilities of agencies pursuant to SEQRA on numerous occasions. Early on in these cases, courts recognized that because of the importance placed upon SEQRA responsibilities by the Legislature, substantial compliance with SEQRA will not suffice; rather the statute must be strictly and literally construed, and compliance with the procedural requirements must be enforced. *Matter of Rye Town/King Civic Association v Town of Rye*, 82 A.D.2d 474 (2nd Dep't 1981), *lv. app. dism.* 56 N.Y.2d 985 (1982); *Schenectady Chemicals v Flack*, 83 A.D.2d 460 (3rd Dep't 1991); *Williamsburg Around the Bridge Block Association v. Giuliani*, 223 A.D.2d 64 (1st Dep't 1996).

In addition, the courts have recognized that to assure that both the spirit and letter of SEQRA are followed, courts cannot allow a lead agency the rubric of "substantial compliance" to escape the environmental goals of the Act. See, *e.g., Stony Brook Village v Reilly*, 299 A.D.2d 481 (2d Dep't 2002), *Matter of Rye Town*, 82 A.D.2d 474.

While SEQRA requires a strict standard of compliance, the lead agency is allowed to fulfill substantive duties in making its final decision and choosing from appropriate alternatives is within their discretion. However, the broader discretion that resides with an agency concerning its substantive duties does not insulate the

agency from judicial review. Indeed, in the case of *Akpan v Koch*, 75 N.Y.2d 561 (1990), the court elucidated the standard of review concerning substantive matters:

> Nevertheless, an agency, acting as a rationale decision-maker, must have conducted an investigation and reasonably exercised its discretion so as to make a reasoned elaboration as to the affect of a proposed action on a particular environmental concern. Thus, while a court is not free to substitute its judgment for that of the agency on substantive matters, the court must insure that, in light of the circumstances of a particular case, the agency has given due consideration to pertinent environmental factors.

75 N.Y.2d at 571, citations omitted.

The universally applied standard in determining whether or not a lead agency has fulfilled its SEQRA obligations was first espoused in the *H.O.M.E.S.* case, *supra*, and eventually incorporated in the SEQRA regulations at 6 NYCRR 617.7(b). The standard is commonly called the "hard look standard." It requires that the agency:

> Identify all areas of relevant environmental concern;
>
> Thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and
>
> Present a reasoned elaboration for why these identified environmental impacts will not adversely affect the environment, in the event that it is determined that an EIS need not be drafted.[32]

[32] 6 NYCRR 617.7(b).

In determining whether an EIS needs to be prepared, the SEQRA regulations provide a detailed road map concerning the obligations of the lead agency. The lead agency must first determine whether or not the proposed action falls within the categories of "Type I", "Unlisted", or "Type II." Type I actions are those actions that because of their size, scope or type, are determined to be more likely to have adverse environmental consequences, and therefore require the drafting of an EIS. As explained in the SEQRA regulations:

> The purpose of the list of type I actions in this section is to identify, for agencies, project sponsors and the public, those actions and projects that are more likely to require the preparation of an EIS than unlisted actions. All agencies are subject to this type I list. . . . . [T]he fact that an action or project has been listed as a type I action, carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS.

6 NYCRR 617.4(a). In contrast, Type II actions do not require environmental review under SEQRA. Type II actions are identified in Section 617.5 of the regulations. They have already been determined not to have an adverse effect on the environment, and therefore no further SEQRA review is required. Type II actions include minor actions such as painting yellow lines on a highway or maintaining a public building. *Branch v Riverside Park Community LLC*, 74 A.D.3d 634 (1st Dept), *lv denied* 15 N.Y.3d 710 (2010). 6 NYCRR 617.5(a) provides:

> Actions or classes of actions identified in subdivision (c) of this section are not subject to review under this Part. These actions have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under Environmental Conservation Law, article 8. The actions identified in subdivision (c) of this section apply to all agencies.

6 NYCRR 617.5(a). Unlisted actions are those actions that are neither Type I nor Type II. 6 NYCRR 617.2(ak).

An environmental impact statement must be prepared if a proposed action "may include the potential for at least one significant adverse environmental impact." 6 NYCRR 617.7(a)(1). Conversely, to determine that an EIS will not be required for an action, "the lead agency must determine either that there will be no adverse environmental impacts or the identified adverse environmental impacts will not be significant." 6 NYCRR 617.7(a)(2).

In the present case, the trial court erred in finding that DEC's determination that issuance of the CEER water withdrawal permit constituted a Type II action.

A. Issuance of the CEER Water Withdrawal Permit is a Type I Action under SEQRA

Section 617.4(a)(1) of the SEQRA regulations identifies as Type I actions "those actions that an agency determines may have a significant adverse impact on the environment and require the preparation of an EIS." 6 NYCRR 617.4(a)(1).

The criteria for determining whether an action has a significant adverse impact on the environment are set forth in Section 617.7(c). These criteria include:

> (ii) the removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat area; substantial adverse impacts on a threatened or endangered species of animal or plant, or the habitat of such a species; or other significant adverse impacts to natural resources; . . . .

6 NYCRR 617.7(c)(ii). Under this standard, the destruction of aquatic life by the cooling water intake structures of CEER's East River plant outlined above clearly has a significant adverse impact. As documented in the plant's own impingement and entrainment studies, the plant's massive water withdrawals through its cooling water intake structures remove and destroy large quantities of fish and other aquatic life from the East River. R. 285. These massive withdrawals substantially interfere with the movement of resident and migratory fish in the Hudson River estuary. R.495. For this reason, it is apparent that CEER's water withdrawals meet the test for Type I actions set forth in the SEQRA regulations.

The amount of water withdrawn pursuant to the CEER permit means that the CEER withdrawals fall within one of the categories of actions listed as Type I actions in the SEQRA regulations. The regulations list "a project or action that would use ground or surface water in excess of 2,000,000 gallons per day," as a category of Type I actions. 6 NYCRR 617.4(b)(6)(ii). Such a listing "carries with

it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS." 6 NYCRR 617.4(a). The water withdrawal permit issued to CEER to take up to of 373,400,000 gallons per day, involves withdrawals that are *186 times* the Type I threshold provided in Section 617.4(b)(6)(ii), and are likely to have an equally large adverse impact.

In view of the significant adverse environmental impacts of the CEER water withdrawals and the explicit categorization of water withdrawals over 2,000,000 GPD as Type I actions in the SEQRA regulations, DEC's failure to make that determination was arbitrary and capricious and a violation of SEQRA.

B. Issuance of the CEER Water Withdrawal Permit Does Not Qualify as a Type II Action under SEQRA

The issuance of the CEER water withdrawal permit does not meet any of the Type II exemptions listed in the SEQRA regulations at 6 NYCRR 617.5(c). DEC's claim that issuance of an initial water withdrawal permit is a purely ministerial act within scope of 6 NYCRR 617.5(c)(19) of the SEQRA regulations is simply incorrect. [33] This claim is completely contrary to the statutorily-mandated

[33] DEC stated in the Negative Declaration DEC issued on CEER's SPPDES permit that "[a]s provided by ECL §15-1501.9 the Department has no discretion but to issue "initial permits" for the amount of the water withdrawals for users that were in operation and properly reported their withdrawals to the Department as of February 15, 2012. Under these circumstances, the issuance of the water withdrawal permit here is covered by the Type II category for ministerial actions set out in section 617.5(c)(19) of the Department's SEQR regulations. "Ministerial action" is defined [under the SEQR regulations] as "an action performed upon a given state of facts in a prescribed manner imposed by law without the exercise of any judgment or discretion as to the propriety of the act… ." Here, above and beyond the amount of the permitted withdrawal (which

approval process in WSL for issuance of an initial water withdrawal permit to an existing user discussed above, which requires the exercise of extensive discretion by DEC in making the determinations required by ECL 15-1503(2) and in setting appropriate terms and conditions to address those determinations as required by ECL 15-1503(4). DEC's failure to comply with the requirements of WSL in making these determinations and setting appropriate conditions does not make issuance of an initial water withdrawal permit to an existing user a ministerial action. The relevant issue in determining the application of 6 NYCRR 617.5(c)(19) is the whether the statutory requirements for issuance of a water withdrawal permit meet the definition of a ministerial action so as to fall within that exemption. It is clear that of initial water withdrawal permit to an existing user in accordance with the requirements of WSL cannot be said to be "official acts of a ministerial nature involving no exercise of discretion."

The Court of Appeals interpreted the scope of the ministerial exemption in Section 617.5(c)(19) of the SEQRA regulations in *Atlantic Beach v Gavalas,* 81 N.Y.2d 322 (1993). The ruling in this case supports a determination in the present case that DEC's issuance of an initial water withdrawal permit is not within the Type II exemption in Section 617.5(c)(19). In *Gavalas*, the Court stated that the

---

is prescribed by statute), the Legislature has restricted the Department's discretion to the standard form permit and the imposition of sound water conservation measures. Generally, an action may be deemed ministerial, if it could not have been approved or denied on the basis of SEQR's broader environmental concerns. R. 287.

"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,'" *Id*. at 326. The court noted that an agency evaluating an EIS is required to "assess the potential impact on land, water, plants and animals, growth and character of the community and other environmental concerns." The court determined that the village ordinance at issue in that case did not give the village building inspector the type of discretion that would allow a permit grant or denial to be based on the environmental concerns detailed in an EIS. Therefore the court determined that issuance of the building permit at issue in that case did not constitute an agency "action" within the purview of SEQRA. *Id*. at 328.

The present case presents very different factual circumstance from the circumstances before the court in *Gavalas*. In this case, DEC's evaluation of the determinations required by ECL 15-1503(2) clearly would be informed by an EIS. For example, Section 15-1503(2)(g) requires that DEC "shall determine whether . . . the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures." This determination would be informed by an EIS. Section 15-1503(2)(d) mandates that, before issuing a water withdrawal permit, DEC determine whether "the need

for all or part of the proposed water withdrawal cannot be reasonably avoided through the efficient use and conservation of existing water supplies." Again, this determination would be informed by an EIS. Unlike the circumstances before the court in *Gavalas*, the statutes and regulations at issue in this case require DEC to make determinations and set conditions that have to do with environmental concerns that are central to SEQRA.

The court in *Sierra Club v. Martens I*,[34] reached a contrary conclusion because it did not examine the clear wording of WSL, but improperly deferred to DEC's interpretation of its discretion.

For each of these reasons, the lower court erred in determining that issuance of the CEER permit was not properly subject to environmental review under SEQRA.

C. Because Issuance of an Initial Water Withdrawal Permit Is Properly Subject to Review under SEQRA, It Is Subject to Review under State and City Coastal Zone Laws

Because the lower court erred in holding that issuance of an initial water withdrawal permit to CEER is not properly subject to environmental review under SEQRA, the court also erred in ruling that environmental review under the state Waterfront Revitalization and Coastal Resources Act, Executive Law, Art. 42 (the

[34] Op. cit., note 7.

"Act") and New York City Waterfront Revitalization Program ("NYC WRP") was not required.

The Act requires that actions undertaken by State agencies within the coastal area shall be consistent with the Act's coastal area policies. Exec. L. §919(1). The Act allows for the creation of optional local government waterfront revitalization programs. Once a local waterfront revitalization program is approved by the State as consistent with the state's coastal policies, the local coastal area management policies become incorporated into the state's Coastal Management Program.

New York City was the first municipality in the state to adopt a local program. The NYC WRP was approved by New York State for inclusion in the New York State Coastal Management Program and then approved by the U. S. Secretary of Commerce on September 30, 1982. Consequently, state agency actions identified by the New York Secretary of State are required to be undertaken in a manner that is consistent "to the maximum extent practicable" with the NYC WRP. Executive Law 916.1(b), 19 NYCRR 600.3(c), 600.4. Permits issued by DEC under Article 15, Title 15 (Water Supply) are listed in the current list of state agency actions that are to be undertaken in a manner consistent with the NYC WRP.[35]

[35] See Appendix A to the NYC WRP, June 2016, http://www1.nyc.gov/assets/planning/download/pdf/applicants/wrp/wrp-2016/nyc-wrp-full.pdf, p. 131 [accessed 07/30/17].

Under the CMP, consistency determinations are coordinated with the SEQRA process. The regulations specify that a coastal assessment form (CAF) is required to be completed prior to an agency's determination of significance pursuant to SEQRA. 19 NYCRR 600.4.

Had DEC properly determined that issuance of the CEER water permit was a Type I action under SEQRA, DEC would have been required to submit the forms necessary to allow New York City to conduct a consistency review under the NYC WRP. Because the court erred in determining that DEC properly classified its action in issuing the CEER water permit as a Type II action, it also erred in determining that no coastal consistency review was required under the NYC WMP.

POINT III
THE LACHES DOCTRINE DOES NOT REQUIRE PETITIONERS TO HAVE PARTICIPATED IN CEER'S SPDES PERMIT PROCEEDINGS

The lower court erred in ruling that the petition was barred by the doctrine of laches on the ground Petitioners did not get involved in DEC's renewal of CEER's SPDES permit in previous years. The court stated that the essential element of laches is "delay prejudicial to the opposing party" and that prejudice can be established by a "showing of injury, change of position . . . or some other disadvantage resulting from the delay." R. 40. Petitioners have performed no actions, however, that have caused CEER any injury to its operations. Petitioners'

participation in the permit holder's SPDES proceedings would not have reduced CEER's expenses in installing improvements to its water intake system. CEER's expenditures on its water intake system were made as a result of negotiations between CEER and DEC under the SPDES law in order to receive renewals of CEER's SPDES permit. Petitioners' involvement in CEER's SPDES proceedings would not have resulted in fewer expenditures. The water withdrawals at CEER's East River station have not been impeded in any way by this proceeding.

The cases cited by the lower court do not support its ruling. None of the cases cited by the court and none of the laches cases Petitioners have reviewed find prejudicial delay resulting from a complainant's failure to become involved in previous proceedings that did not involve the complainant. The case relied upon most heavily by the court is the Third Department's decision in *Save The Pine Bush v. Department of Environmental Conservation*, 289 A.D.2d 636 (3d Dep't 2001). In that case, the petitioners brought an Article 78 challenging DEC's decision to grant the City of Albany a variance permitting the expansion of a landfill. The harms the court found to the City of Albany resulted from expenditures the City of Albany made to expand the landfill during the proceeding. There was no claim or finding that the petitioners in that case should have gotten involved in earlier proceedings to permit the landfill.

The lower court failed to consider the broader policy implications of its laches determination. If the court's ruling that failure to challenge previously issued SPDES permits serves as a bar to bringing an action under WSL is affirmed, it will set a precedent that no water withdrawal permit issued to a user that already has a SPDES permit can be challenged. As noted above, most large water users subject to permitting under WSL already have SPDES permits. Such a precedent therefore would effectively nullify the new water permitting law.

For these reasons, the lower court erred in ruling that the petition was barred by the doctrine of laches on the ground Petitioners did not get involved in DEC's renewal of CEER's SPDES permit proceedings in previous years.

POINT IV

THE PETITION WAS TIMELY FILED

The lower court erred in ruling that the petition was untimely because it was not filed within 60 days of DECs issuance of the CEER water withdrawal permit. Petitioners' contend that the 60 day statute of limitations provided in ECL 15-0905(2), the limitation applied by the court, should not be made applicable to Petitioners' challenge because another section of ECL Article 15, Title 9, excludes actions involving Article 15, Title 15 (WSL) from the 60-day limitation in ECL 15-0905(2). ECL 15-0903(1) provides that "[t]he provisions of this title shall not apply to applications for permits, . . . , or to permit modification, suspension or

revocation proceedings initiated by the department where any of such actions involve title 5, 15 [i.e., WSL], or 27 of this article."

The lower court determined that the exclusion provided by ECL 15-0903(1) only applies to hearing procedures, and does not provide an exemption from the 60-limitation period in ECL 15-0905(2) if a hearing is not involved. While it is a fact that the section in which ECL 15-0903(1) is contained is captioned "Hearing procedure," that caption does not alter the fact that the exclusion contained in Subsection 1 is not limited to ECL 15-0903 on hearing procedures but extends to all the provisions of Title 9, including ECL 15-0905(2).

The lower court cited the decisions in *Spinnenweber v. Department of Environmental Conservation*, 120 A.D.2d 172 (3rd Dep't 1986) and *Rochester Canoe Club v. Jorling*, 150 Misc.2d 321 (Monroe Cty 1991), *appeal dismissed* 179 A.D.2d 1040 (4th Dep't 1992) in support of its decision not to apply the exemption in ECL 15-0903(1). However, the *Spinnenweber* case did not consider ECL 15-0903(1). Rather, *Spinnenweber* interpreted a provision that is not applicable in the present case, ECL 15-0515. ECL 15-0515 provides that determinations under sections 15-0501, 15-0503, and 15-0505 of Title 5 of Article 15 shall be reviewable in a proceeding pursuant to Article 78. *Spinnenweber* acknowledged that an ambiguity existed as to whether the 60-day limitation period in ECL 15-0905(2) applied or the standard four month statute for Article 78 proceedings

under ECL 15-0515. In order to resolve this ambiguity, the court looked to the legislative history of the provisions. On the basis of the court's interpretation of the legislative history, the court decided to apply the 60-day limitation period in ECL 15-0905(2). In the *Rochester Canoe* case, the court applied the analysis in *Spinnenweber* to the issue of whether the exemption contained in ECL 15-0903(1) applied. *Rochester Canoe* resolved the conflict between in ECL 15-0903(1) and ECL 15-0905(2) in favor of applying the 60-day limitation period in ECL 15-0905(2). Both cases involved the determination of the appropriate period of limitations under Title 5 of Article 15, not Title 15 as in the present case.

Petitioners contend that, rather than following *Spinnenweber* and *Rochester Canoe*, a fairer way to resolve the conflict between ECL 15-0903(1) and ECL 15-0905(2) is offered by the most recent case interpreting the applicability of ECL 15-0905(2), *Niagara Mohawk Power Corp. v. State*, 300 A.D.2d 949 (3rd Dep't 2002). In *Niagara Mohawk*, the Third Department decided not to follow its decision in *Spinnenweber*. Instead, the *Niagara Mohawk* court held that the 60-day limitation period in ECL 15-0905(2) does not apply to the review of a determination of a river regulating district under ECL Article 15, Title 21. The court applied the four-month statute of limitations applicable to Article 78 proceedings instead. The court reached this determination even though there is no exemption for actions under Article 15, Title 21 from the application of the 60-day

limitation period in ECL 15-0905(2).[36] The court determined that a "liberal interpretation of the statute in favor of [petitioners] which reason and authority compel us to employ" warranted a more generous limit, and concluded that "that the statutory language, on its face, is too narrow to give a petitioners fair notice that the 60-day limitations period applies to determinations of river regulating districts." *Id*. Although the lower court declined to follow *Niagara Mohawk* on the ground that it involved a decision by a river regulating district, not DEC, Petitioners contend that the considerations applied in *Niagara Mohawk* are equally applicable in the present case. Due to the conflict in wording between ECL 15-0903(1) and ECL 15-0905(2), Petitioners did not have fair notice that they were not exempt from the 60 day limitation period of ECL 15-0905(2). In view of the ambiguities arising from the conflict in the statutory wording and the conflicting court decisions, fairness requires application of the four-month statute of limitations provided for Article 78 proceedings in this case.

For these reasons, the filing of the petition was within the four month statute of limitations on actions provided for Article 78 was timely and the lower court erred in ruling that the petition was untimely. In any event, Petitioners' causes of action under SEQRA and the coastal zone laws are timely because the four month

[36] Actions under Title 21 are not included in ECL 15-0903(1).

statute of limitations on actions provided for Article 78 applies to these causes of action.

CONCLUSION

For these reasons, 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.

DATED: Buffalo, New York
August 1, 2017

Respectfully submitted,

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

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

Attorneys for Petitioners-Appellants

PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 600.10(d)(1)(v)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules and regulations, etc. is 12,835 words.

SUPREME COURT OF THE STATE OF NEW YORK
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, AS COMMISSIONER NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and CONSOLIDATED EDISON COMPANY OF NEW YORK INC. Respondents-Respondents.	X : : : : : : : : : : : : : X	New York County Index No. 100524/2015 **PRE-ARGUMENT STATEMENT**

Petitioners-Appellants Sierra Club and Hudson River Fishermen's Association submit this Pre-Argument Statement pursuant to Section 600.17 of the Rules of the Appellate Division, First Department.

1. FULL TITLE OF THE ACTION:

   The title of the action is as appears above.

2. FULL NAMES OF THE PARTIES:

   The full names of the original parties are as appear above.

3. NAMES, ADDRESSES AND TELEPHONE NUMBERS OF COUNSEL FOR APPELLANTS:

   Richard J. Lippes, Esq.
   LIPPES & LIPPES
   1109 Delaware Avenue
   Buffalo, New York 14209-1601
   Telephone: (716) 884-4800
   Email: rlippes@lippeslaw.com

Rachel Treichler, Esq.
LAW OFFICE OF RACHEL TREICHLER
7988 Van Amburg Road
Hammondsport, New York 14840
Telephone: (607) 569-2114
Email: treichlerlaw@frontiernet.net

4. NAMES, ADDRESSES AND TELEPHONE NUMBERS OF COUNSEL FOR RESPONDENTS:

Eric Schneiderman
ATTORNEY GENERAL OF NEW YORK STATE
The Capitol
Albany, New York 1224-0381
c/o Laura Heslin, Esq.
Assistant Attorney General
Office of the New York State Attorney General
120 Broadway, 26th Floor
New York, New York 10271
Telephone: (212) 416-6091
Email: Laura.Heslin@ag.ny.gov

Philip E. Karmel, Esq.
BRYAN CAVE LLP
1290 Avenue of the Americas
New York, NY 10104-3300
Telephone: (212) 541-2311
Email: pekarmel@bryancave.com

5. COURT AND COUNTY FROM WHICH APPEAL IS TAKEN:

Supreme Court of the State of New York, County of New York

6. NATURE AND OBJECT OF THE PROCEEDING:

Petitioners-Appellants Sierra Club and Hudson River Fishermen's Association commenced this proceeding pursuant to Article 78 of the CPLR seeking judicial review of the decision of Respondent Commissioner of the New York State Department of Environmental Conservation ("DEC") to exempt the application of Respondent Consolidated Edison ("Con Ed") for an initial water withdrawal permit under New York's newly-enacted water withdrawal permitting law, Environmental Conservation Law ("ECL") §§ 15-1501 *et seq*., from review

under the State Environmental Quality Review Act ("SEQRA") and the New York City Waterfront Revitalization Program. The proceeding seeks to establish that applications for water withdrawal permits by existing users are subject to review under SEQRA and state and local coastal zone laws.

7. RESULT REACHED BELOW:

The court below issued a decision and order on September 28, 2016 granting Con Ed's motion for dismissal of the petition, denying the petition and dismissing it with prejudice.

8. GROUNDS FOR SEEKING REVERSAL:

The lower court's decision and order is erroneous as a matter of fact and law on the following grounds.

First, the lower court erred in ruling that the petition was untimely because it was not filed within 60 days of DECs issuance of a water withdrawal permit to Con Ed. ECL § 15-0903(1) explicitly excludes "applications for permits" under ECL §§ 15-1501 *et seq*. (the water withdrawal permitting sections of the ECL) from the 60-day limitation in ECL § 15-0905(2), the limitation applied by the court. The court's determination that the exclusion provided by ECL § 15-0903(1) only applies to hearing procedures, not to permit decisions is inconsistent with the clear wording of that section, which provides that "[t]he provisions of this title shall not apply to applications for permits, . . . , or to permit modification, suspension or revocation proceedings initiated by the department where any of such actions involve title 5, 15 [i.e., ECL §§ 15-1501 *et seq*.] or 27 of this article."

Second, the lower court erred in ruling that the petition was without merit on the ground that DEC's issuance of a water withdrawal permit to Con Ed was not arbitrary and capricious under the statutory scheme. The court's determination is not supported by the evidence regarding DEC's actions in issuing the Con Ed permit, which shows that DEC did act

in an arbitrary and capricious manner is issuing the Con Ed permit.

Third, the lower court erred in ruling that DEC's issuance of a water withdrawal permit to Con Ed was ministerial and thus an exempt Type II action not subject to environmental review under SEQRA. The court's determination is not supported by the wording of Con Ed permit which shows that DEC in fact exercised discretion in issuing the permit or by the statutory provisions of the water withdrawal permitting law which require that DEC exercise discretion in setting the terms and conditions of a water withdrawal permit.

Fourth, because the lower court erred in ruling that DEC's issuance of a water withdrawal permit to Con Ed was exempt from review under the SEQRA, the court erred in ruling that environmental review under the New York City Waterfront Revitalization Program was not warranted.

Fifth, the lower court erred in ruling that DEC did not violate the water withdrawal permitting law in issuing the Con Ed water withdrawal permit. The court's determination that issuance of a permit to an existing user was mandated by the law did not support the court's conclusion that DEC had no discretion under the law to conduct reviews and impose permit conditions to meet the requirements of the law.

Finally, the lower court erred in ruling that the petition was barred by the doctrine of *laches* on the ground Petitioners did not get involved in DEC's renewal of Con Ed's State Pollution Discharge Elimination System (SPDES) permit in 2010. Participation in the renewal process for Con Ed's SPDES permit would not have enabled Petitioners to raise their concerns with DEC's administration of the water withdrawal permitting law, which was not enacted until 2011. Consequently, no unreasonable delay in bringing Petitioners' claims regarding DEC's issuance of Con Ed's water withdrawal permit resulted from Petitioners' failure to get involved

in DEC's renewal of Con Ed's SPDES permit in 2010.

DATED: Hammondsport, New York
November 3, 2016

Respectfully submitted,

Counsel for Petitioners-Appellants

By: 

Rachel Treichler, Esq.
Law Office of Rachel Treichler
7988 Van Amburg Road
Hammondsport, New York 14840
Telephone: (607) 569-2114
Email: treichlerlaw@frontiernet.net

Richard J. Lippes, Esq.
Lippes & Lippes
1109 Delaware Avenue
Buffalo, New York 14209-1601
Telephone: (716) 884-4800
Email: rlippes@lippeslaw.com

To:

Laura Heslin, Esq.
Assistant Attorney General
Office of the New York State Attorney General
120 Broadway, 26th Floor
New York, New York 10271
Telephone: (212) 416-6091
Counsel for Respondent Joseph Martens, Commissioner, NYS Department of Environmental Conservation

Philip E. Karmel, Esq.
Bryan Cave LLP
1290 Avenue of the Americas
New York, NY 10104-3300
Telephone: (212) 541-2311
Email: pekarmel@bryancave.com
Counsel for Respondent Consolidated Edison