SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of SIERRA CLUB and the HUDSON RIVER FISHERMEN'S ASSOCIATION NEW JERSEY CHAPTER, INC., Petitioners, 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.	:	**Index No. 100524/2015** Hon. Alice Schlesinger

PETITIONERS' MEMORANDUM OF LAW

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

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

Attorneys for Petitioners

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PRELIMINARY STATEMENT

This case involves the interpretation of the water withdrawal permitting requirements of the New York State Water Resources Law, Environmental Conservation Law ("ECL") Article 15, Title 15, § 15-1501 *et seq.*, as amended by the Water Resources Protection Act of 2011 (Chapters 400-402, Laws of 2011) and the regulations promulgated pursuant thereto, and the application of the New York State Environmental Quality Review Act, ECL Article 8, ("SEQRA"), the federal Coastal Zone Management Act, 16 U.S.C.A. § 1453, the New York State Waterfront Revitalization of Coastal Areas and Inland Waterway Act, the New York City Waterfront Revitalization Program, the New York State Constitution and common law public trust principles to the water withdrawal permitting process.

STATEMENT OF FACTS

I. Con Ed's Permit to Withdraw Water from the East River

On May 30, 2013, Respondent Consolidated Edison of New York, Inc. ("Con Ed") applied to Respondent New York State Department of Environmental Conservation ("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. Administrative Record ("AR") 170-188. The East River Generating Station is located on the west bank of the East River between East 14th Street and East 15th Street in New York County. AR 171.

A key part of Con Ed's water withdrawal permit application is its Water Conservation Program Form ("WCPF"). AR 176-179. The WCPF surveys an applicant's water management practices and describes best management practices. Con Ed's responses on its WCPF show that it does not have in place the basic water conservation measures surveyed on the form.

Section III of the WCPF captioned "Water Sources and Metering" states that "Best Management Practices" are: "100% metering of all sources of water supply," and "Sources and secondary meters must be tested and calibrated annually." AR 176. Con Ed responded to questions in Section III as follows:

(1) In response to the question, "Are all sources of supply including major interconnections equipped with master meters?" Con Ed responded "No." *Id.*

(2) In response to the question, "How often are they calibrated?" Con Ed responded "n/a." *Id.*

(3) In response to the question, "Are there secondary meters located within the facility or system?" Con Ed responded "No." *Id.*

Section IV of the WCPF captioned "Water Auditing" states that "Best Management Practices" are: "At least once each year, a system water audit must be conducted using metered water production and consumption data to determine unaccounted-for water," "Keep accurate estimates of unmetered water use," and "Quantify all authorized water uses by consumption categories." AR 177. Con Ed responded to questions in Section IV as follows:

(1) In response to the question, "Do you conduct a water audit at least once each year?" Con Ed responded "No." *Id.*

(2) In response to the question, "What are your goals for future water system auditing?" Con Ed responded "None." *Id.*

Section V of the WCPF captioned "Leak Detection and Repair" states that "Best Management Practices" are: "Check any underground water distribution systems for leaks each

year," "Fix every detectable leak as soon as possible," and "Have an on-going system rehabilitation program." AR 178. Con Ed responded to questions in Section V as follows:

(1) In response to the question, "Do you regularly survey your facility for leakage?" Con Ed responded "No." *Id.*

(2) In response to the question, "Do you regularly survey underground piping for water leakage?" Con Ed responded "No." *Id.*

Section VI of the WCPF captioned "Water Reuse, Recycling and Drought Planning" states that "Best Management Practices" are: "Reuse or recycle water whenever possible," Employ efficient irrigation techniques," and "Develop a plan to reduce water use during times of drought." AR 179. Con Ed responded to questions in Section VI as follows:

(1) In response to the question, "Does your facility reuse or recycle primary use water?" Con Ed responded "No." *Id.*

(2) In response to the question, "Does your facility use reclaimed rainwater, storm water runoff or wastewater?" Con Ed responded "No." *Id.*

(3) In response to the question, "What are your future goals for recycling or reducing water usage?" Con Ed responded, "All water withdrawn is returned to its source." *Id.*

Con Ed justifies its lack of water conservation measures in the "Project Justification" section of its application by stating that "All water is returned to its source." AR 184, 187. Con Ed's application does not address the impingement and entrainment[1] of aquatic life in its water

[1] "Impingement" refers to the entrapment of adult fish and larger organisms against a power plant's water intake screens. Impinged organisms usually die or suffer injury as a result of starvation, exhaustion, descaling by screen wash sprays, or asphyxiation when forced against a screen by velocity forces which prevent proper gill movement for prolonged periods of time. "Entrainment" refers to organisms being carried through a power plant's condenser system. The organisms that become entrained are relatively small, including the eggs and larvae of larger organisms. *See* "The Quick and the Dead: Fish

withdrawal structures that would be reduced if less water were used, except to say that operating the plant's circulating water pumps at less than full capacity to reduce aquatic life entrainment and impingement would adversely affect the plant's operation. AR 195. The application states that "circulating water flow reduction was deemed limited because the Station's peak electric load months coincided with an increase in fish egg and larvae density." AR 196. The application says, "If a lower volume of water was used the heat rejected from the station would result in an increase in the temperature of the water being returned. The efficiency of the electric generation is highest when the cooling water temperature is the lowest possible. For environmental and economic reasons the volume of water cannot be reduced." AR 184, 187. The application states that the alternative to the project "would be to build a cooling tower. The space requirement and opposition from the community for this option make it unfeasible." *Id*.

Although Con Ed's application claims that "All water is returned to its source," AR 184, 187, most electric generating stations do have some consumptive water use. Consumptive use information is required to be included in a water withdrawal permit application. Consumptive use is shown in Section 2 of the annual Water Withdrawal Reporting Form ("WWRF") required to be included with a water withdrawal permit application. Section 2 of the WWRF shows water "withdrawn," "consumed" and "returned" by the plant on a monthly basis. Section 2 is not included in the WWRF in Con Ed's permit application.[2] Section 2 of the WWRF included with the water withdrawal permit application filed by TransCanada for its the Ravenswood power plant in Queens shows that water consumed monthly in 2013 by the Ravenswood plant was between

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Entrainment, Entrapment, and the Implementation and Application of Section 316(b) of the Clean Water Act," James R. May and Maya K. van Rossum, *Vermont Law Review*, Vol. 20:373, 378-380 (1995), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1358386 [accessed June 28, 2015].

[2] A copy of the applicant's latest annual water withdrawal reporting form is required to be included with a water withdrawal permit application. See Applicant Checklist for Water Withdrawal Permit, http://www.dec.ny.gov/docs/water_pdf/wwacheck.pdf [accessed June 28, 2015].

7.5 and 17 million gallons a day.[3] It is important to know whether the Con Ed plant consumes comparable amounts. Con Ed's application is also missing Section 4 of the WWRF, which summarizes "Water Conservation and Efficiency" measures.

DEC determined that the Con Ed East River application was complete on June 3, 2014. AR 201-203. Notice of Con Ed's application was published in DEC's Environmental Notice Bulletin ("ENB") on June 11, 2014. AR 204-206. The notice, which is a joint notice for Con Ed's water withdrawal permit application and its SPDES permit renewal application, states under the caption "State Environmental Quality Review (SEQR) Determination" that "Project is not subject to SEQR because it is a Type II action." AR 205. In addition, the project description states 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 states 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. Downs Aff. Ex. N.

Petitioner Sierra Club joined with the Natural Resources Defense Council, Riverkeeper Inc. and Citizen's Campaign for the Environment in submitting comments on the Con Ed water withdrawal permit application on August 11, 2014 ("Sierra-NRDC Comments"). AR 216-222. The comments raised a number of the issues regarding DEC's handing of Con Ed'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.

[3] A copy of the Ravenswood water withdrawal permit application is attached to the accompanying affidavit of Roger Downs, Conservation Director of Sierra Club Atlantic Chapter, dated July 6, 2015 ("Downs Aff."), Ex. H. Section 2 of Ravenswood'sWWRF is at Ex. H, p. 31.

> 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.

AR 216-222. In DEC's response dated September 27, 2014, to the Sierra-NRDC Comments, DEC disagreed with each point. AR 223-228. 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." AR 225-228.

Notwithstanding the issues raised in the Sierra-NRDC Comments, DEC issued a water withdrawal permit to Con Ed for its East River Generating Facility on November 21, 2014, that did not meet the objections raised. AR 238-242. The effective date of the permit is December 1, 2014, and it was issued for a five year term. AR 238. 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." AR 238. The permit is five pages in length. In the section captioned "authorization," the permit lists both SPDES permit ID 2-6206-00012/00004 and water withdrawal permit ID 2-6206-00012/00029. AR 238. A separate and more detailed SPDES permit with the same SPDES permit ID number was also issued. AR 243-266. The more detailed SPDES permit does not cross-reference the water withdrawal permit. Each permit is issued for a five year term with an effective date of December 1, 2014. AR 238, 243.

Eight conditions captioned "water withdrawal permit conditions" are listed in the water withdrawal permit. These conditions include condition 5, which 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." AR 239. The only other explicit water conservation measures contained in the water withdrawal permit are the requirements contained in conditions 7 and 8 that all sources of supply be metered and that all meters be calibrated. AR 240. Other practices identified as "Best Management Practices" in the WWCF are not required in the Con Ed permit, such as annual water audits, regular surveys for leakage, regular surveys of underground piping for water leakage, the recycling of water (such as a closed-cycle cooling system) or the use of reclaimed water. Thus, the conditions in the permit address only two of Con Ed's negative responses to the questions on the WCPF in its permit application.

II. Other Permits to Withdraw Water from the East River

The water withdrawal permit issued to Con Ed is one of the first water withdrawal permits issued by the DEC under New York's new water permitting law enacted in 2011 (Chapters 400-402, Laws of 2011), and DEC's new water withdrawal permitting regulations, which became effective April 1, 2013 (6 NYCRR Part 601). As far as Petitioners have been able to ascertain, the Con Ed East River permit is the first non-public water withdrawal permit DEC has issued in New York County. Downs Aff. ¶38.

The first permit issued under the new law and regulations is also a permit to take water from the East River. This is the permit issued to TransCanada LLC to take up to 1.528 billion gallons billion gallons per day from the East River for its Ravenswood Generating Station in

Long Island City.[4] To date, a total of four water withdrawal permits have been issued to facilities taking water from the East River. In addition to the Con Ed and Ravenswood permits, a water withdrawal permit was issued to US Power for its Astoria Generating Station in Queens to take up to 1.454 billion gallons of water a day from the East River on September 24, 2014, and a permit was issued to Brooklyn Navy Yard Cogeneration Partners for its facility at the Brooklyn Navy Yard to take up to 72 million gallons of water a day from the East River on February 27, 2015. Downs Aff. Ex.G, M.

Each of these facilities is a thermo-electric power plant. The combined withdrawals from the River authorized by the permits issued to these four plants are a staggering 3.4 billion gallons per day. Three and four/tenths billion gallons of water per day is 340% of the one billion gallons per day used by the New York City water supply system, which provides nearly half the population of all New York State with drinking water.[5] It is almost six times as much water as the 650 million gallons per day used by all the coal and gas power plants in the states of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming.[6]

The reason the East River power plants take so much water is because each of them uses a once-through cooling system to cool their thermo-electric generating units. Thermo-electric

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[4] The Ravenswood permit was issued on November 15, 2013, for 1.39 billion gallons per day and was amended on March 7, 2014 to increase the permitted amount to 1.528 billion gallons per day. Copies of the original and amended Ravenswood permits are attached to the Downs Aff. As Ex. K and L.

[5] See *New York City 2014 Drinking Water Supply and Quality Report*, http://www.nyc.gov/html/dep/pdf/wsstate14.pdf, p. 2, stating that: "The New York City Water Supply System provides approximately one billion gallons of safe drinking water daily to more than eight million residents of New York City, and to the millions of tourists and commuters who visit the City throughout the year, as well as about 110 million gallons a day to one million people living in Westchester, Putnam, Ulster, and Orange Counties. In all, the New York City Water Supply System provides nearly half the population of New York State with high quality drinking water."

[6] See *The Last Straw: Water Use by Power Plants in the Arid West*, Clean Air Task Force, April 2003, http://www.catf.us/resources/publications/files/The_Last_Straw.pdf [accessed June 28, 2015].

power plants use either once-through cooling systems or closed-cycle cooling systems.[7] A once-through cooling system withdraws water from the source water body, runs it through the condenser system, and then discharges it without recirculation. In contrast, closed-cycle cooling systems recirculate and reuse cooling water. A 2010 report on the impact of once-through cooling systems in New York power plants concludes, "Closed-cycle cooling is a proven technology that reduces power plant water intake by up to 98 percent, thereby reducing the damage to aquatic life by up to 98 percent."[8]

Each of the ENB notices for the power plants withdrawing from the East River states that the DEC has determined that the project is a Type II action and is not subject to review under SEQRA. Downs Aff. Ex. G. In fact, most of the ENB notices for each of the non-public water withdrawal permit applications to date contain the same statement. *Id*.

In addition, each of the ENB notices for the four East River power plants, except the amended Ravenswood notice, states that the plant is not located in a coastal zone. Downs Aff. Ex. G. In fact, each of the plants is located in a coastal zone. Downs Aff. ¶ 35, Ex. N, O. The amended Ravenswood ENB notice states, "This project is located in a Coastal Management area and is subject to the Waterfront Revitalization and Coastal Resources Act." Downs Aff. Ex. I.

III. The Significance of the East River to the Hudson River Estuary

The East River, from which these four power plants draw water for their once-through cooling systems, is an integral part of the Hudson River estuary. The biological richness of the

[7] See description of power plant cooling in "The Quick and the Dead: Fish Entrainment, Entrapment, and the Implementation and Application of Section 316(b) of the Clean Water Act," James R. May and Maya K. van Rossum, *Vermont Law Review* [Vol. 20:373, 378-380 1995]

[8] *Reeling in New York's Aging Power Plants: The Case for Fish-Friendlier Power*, Kyle Rabin, Network for New Energy Choices, June 2010, http://www.gracelinks.org/media/pdf/fishkill_report_online.pdf [accessed June 27, 2015].

estuary is described in a 2011 Sierra Club report[9] on the devastating impacts large water withdrawals by power plants can have upon aquatic ecosystems:

> [T]he Hudson begins . . . in the Adirondack Mountains and flows more than three hundred miles before emptying into New York Harbor at the southern tip of Manhattan. . . . .
>
> The lower Hudson's unique configuration as a narrow, 154-mile-long estuary creates a huge, diverse nursery that supports a mix of freshwater and saltwater fish. The river's marshes and tidal flats contribute essential minerals and nutrients to the food chain, allowing its quiet backwaters to become an essential nursery habitat for many types of wildlife. In fact, the Hudson is one of the two principal spawning grounds for aquatic life in the East Coast.
>
> 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. The river is a refuge for rare and endangered species such as the shortnose sturgeon and heartleaf plantain. The Hudson is also part of the great Atlantic flyway for migratory birds; and ducks, geese and osprey, among others, stop to feed in its shallows.
>
> The ecological influence of the Hudson estuary extends far into the Atlantic Ocean and along the coast. For vast schools of migratory sturgeon, herring, blue crab, mackerel and striped bass, the Hudson is a nearly unimpeded corridor from the Atlantic to their ancestral spawning grounds. These fish support a 350-year-old recreational and commercial fishery along the Atlantic coast that's worth hundreds of millions of dollars. . . .

Id. at 17-18. As the report notes, the New York State Legislature has declared the estuary "of statewide and national importance as a habitat for marine, anadromous, catadromous, riverine and freshwater fish species," and two federal agencies—the U.S. National Oceanographic and Atmospheric Administration and the U.S Fish and Wildlife Service— have designated the Hudson as an "Essential Fish Habitat" because it sustains large numbers of commercially

[9] *Giant Fish Blenders: How Power Plants Kill Fish & Damage Our Waterways,* Sierra Club, July 2011, http://vault.sierraclub.org/pressroom/media/2011/2011-08-fish-blenders.pdf, Downs Aff. Ex. A.

important fish species. *Id.* at 18. The report emphasizes the importance of looking at the cumulative impact of the plants withdrawals on the Hudson River:

> A total of 17 power plants using once-through cooling are located in the region: four on the Hudson River, eight on the Long Island Sound and five in New York Harbor. . . . All these plants use exorbitant amounts of water. . . . The Hudson River plants have a combined intake capacity of nearly 5 billion gallons per day; the Long Island Sound plants have a combined intake capacity exceeding 5 billion gallons per day; and the New York Harbor and East River plants have a combined intake capacity of more than 3.5 billion gallons per day. Altogether, the 17 plants can withdraw almost 14 billion gallons per day from the two estuaries and the harbor. . . .
>
> Because of these waters' importance as spawning and nursery grounds, it is unsurprising that entrainment of eggs and larvae occur in astronomic numbers. . . .
>
> [P]ower plants using once-through cooling on the Hudson have a huge, detrimental impact on the ecology of the estuary—and this impact goes well beyond the loss of large numbers of individual fish. In a 2007 report, New York State found that the cumulative impact of multiple facilities on the river substantially reduces the population of young fish in the entire river. In certain years those plants have entrained between 33 and 79 percent of the eggs and larvae spawned by striped bass, American shad, Atlantic tomcod and five other important species. Over the time the plants have been operating, the ecology of the Hudson River has been altered, with many fish species in decline and populations becoming less stable. Of the 13 key species subject to intensive study, ten have declined in abundance, some greatly. Power plants have played a considerable role in that decline.

Id. at 17, citing DEC's New York State Water Quality Report 2006 (published 2007).

The East River plays a critical role in the Hudson River estuary. Gilbert Hawkins, president of Petitioner Hudson River Fishermen's Association ("HRFA"), points out in his accompanying affidavit that the East River is one of the main fish migration routes between the Atlantic Ocean and both the Hudson River and Long Island Sound. Affidavit of Gilbert Hawkins dated July 6, 2015 ("Hawkins Aff.), ¶ 14. He says, "Because the East River is constantly filled with moving water, it is a very attractive location for fish. There are two tides a day in the East

River, which means that there are strong currents in the river four time a day—the incoming and outcoming flows for each tide. Millions of fish are riding on these flows in the migratory seasons." *Id.* ¶ 16.

The final environmental impact statement released in 2003 for the SPDES applications of three electric generating stations on the Hudson River upstream from Con Ed's East River facility, one of which was the Indian Point nuclear power plant, concluded that various techniques to "to reduce both impingement and entrainment mortality" by the once-through cooling water systems of those facilities, while these techniques "represent some level of improvement compared to operations with no mitigation or protection, there are still significant unmitigated mortalities from entrainment and impingement at all three of the HRSA facilities."[10]

In 2010, DEC refused to issue a Clean Water Act section 401 water quality certificate to Entergy's Indian Point nuclear power plant on the ground that the taking of short-nose sturgeon by the operation of Indian Point's once-through cooling system is unlawful and impairs the best usage of the waters of the Hudson River for propagation and survival of sturgeon.[11]

Shortly after the petition in the instant case was filed on March 23, 2015, DEC released its Draft Hudson River Estuary Action Agenda 2015-2020.[12] Target 4 for Benefit 3 "Vital Estuary Ecosystem Vision" of the Agenda calls for the reduction of fish kills in the estuary by taking steps to:

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[10] Final Environmental Impact Statement Concerning the Applications to Renew New York State Pollutant Discharge Elimination System (SPDES) Permits for the Roseton 1 & 2, Bowline 1 & 2, and Indian Point 2 & 3 Steam Electric Generating Stations, Orange, Rockland and Westchester Counties, New York State Department of Environmental Conservation as Lead Agency June 25, 2003, p. 29, http://www.dec.ny.gov/docs/permits_ej_operations_pdf/FEISHRPP1.pdf [accessed 03/19/15].

[11] Notice of the DEC's denial of Entergy's Joint Application for CWA § 401 Water Quality Certification appears http://www.dec.ny.gov/docs/permits_ej_operations_pdf/ipdenial4210.pdf [accessed 06/19/15].

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

> Reduce or have schedules to reduce fish kills at the four remaining steam electric power plants 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. Require that future Hudson River power-generating facilities have closed-cycle cooling systems.
>
> Reduce or have schedules to reduce fish kills at all industrial facilities 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, both of which call for minimizing adverse environmental impact. Require that future Hudson River industrial facilities requiring cooling systems have closed-cycle cooling.
>
> Reduce fish kills for all types of future water withdrawals compared to the impacts of unmitigated intake structures.

Id. at 30.

IV. Con Ed's Permit to Discharge Water into the East River

Con Ed's East River facility has held an Industrial SPDES-Surface Discharge permit pursuant to the State Pollutant Discharge Elimination System (SPDES) program for some years. Con Ed's most recent SPDES permit renewal application, dated March 1, 2012, is included in the Administrative Record. AR 28-161. The impingement and entrainment of fish and other aquatic organisms by the Con Ed East River plant has been documented over the years in studies conducted by the facility pursuant to its SPDES permit. These studies show that impingement and entrainment by the Con Ed power plant is much higher than at the Ravenswood plant, even though the Con Ed plant is withdrawing much less water.

The impingement and entrainment studies conducted by Con Ed are summarized in the Biological Fact Sheet provided at AR 232-235. The Biological Fact Sheet provides as follows:

> The Department required an impingement mortality and entrainment (IM&E) study to be conducted in 2005-2006. Consistent with other New York Harbor and East River power plants, results of this study

> indicated a large increase in IM&E from the 1990s abundances. An estimated 1.5 million fish were impinged, with Atlantic croaker, Atlantic tomcod, scup, bay anchovy and Atlantic menhaden making up 84 percent of the total It was estimated that 1.34 billion fish eggs and larvae were entrained with 92.6 percent being eggs. Cunner, bay anchovy, Atlantic menhaden, weakfish, and tautog were the principle species entrained.

AR 232-233.

These amounts are dramatically larger than the amounts reported in DEC's summary of the most recent impingement and entrainment results at the Ravenswood plant in the Biological Fact Sheet attached to the 2012 Ravenswood SPDES permit. The Biological Fact Sheet for the Ravenswood plant provides as follows:

> The most recent Impingement and Entrainment studies were conducted from March 2005 to February 2006. About 25,850 fish were impinged over the year, representing 61 taxons. Blueback herring (21.8%), bay anchovy (13.5%) and alewife (11.3%) were impinged in greatest numbers. Approximately 149.7 million eggs, larvae and juveniles were entrained through the station. Bay anchovy (22.8%), Atlantic menhaden (18.5%) and the goby family (12.5%) were the predominant taxons entrained. Post-yolk-sac larvae (51.2%) and eggs (47.0%) were the main life stages found in the entrainment collections.

Hawkins Aff. Ex. B, p. 2.

The entrainment data shows that the Con Ed plant entrained 1.34 billion fish eggs and larvae during the study year of 2005-2006 and the Ravenswood plant entrained 149.7 million eggs, larvae and juveniles during the same study year. According to these figures, the Con Ed plant entrained almost nine times as many eggs and larvae as the Ravenswood plant. 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 of entrainment for the Ravenswood plant.

The impingement data shows 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. According to these figures, the Con Ed plant entrained 58 times as many eggs and larvae as the Ravenswood plant. 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 astounding 237 times the impingement rate at the Ravenswood plant.

Notwithstanding that impingement and entrainment by the other power plants withdrawing water from the East River and elsewhere in the Hudson River watershed are also massive, Sierra Club *Fish Blenders* report, Downs Aff. Ex. A. p. 26, the "Impact Analysis" in the Con Ed Negative Declaration does not address any cumulative impacts on the Hudson River Estuary related to the water withdrawals by all these power plants. The analysis merely states, 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." AR 200.

As described above, notice of both the SPDES permit renewal application and the water withdrawal permit application was given in the ENB on June 11, 2014. Although the ENB notice states that DEC has determined that permit renewals are Type II actions, the Negative Declaration states, "due to administrative limitations within our public notice system which does not allow for nuance, the Notice will list the combined permit actions . . . as Type II but this Negative Declaration is written to cover the SPDES modification." AR 200.

The Con Ed East River SPDES permit was renewed on November 21, 2014, effective December 1, 2014, and expiring November 30, 2019. AR 243. Although the SPDES permit is substantially longer than the water withdrawal permit (24 pages versus 5 pages), the biological monitoring conditions are mostly just short headings. For most of the conditions, the permit states that the condition has been met. The conditions require an "Impingement Mortality and Entrainment Characterization Study," but state "condition has been met;" require a "Design and Construction Technology Plan," but state "condition has been met;" require a "Technology Installation and Operation Plan," but state "[t]he Technology Installation and Operation Plan was submitted and approved by the department;" and require a "Verification Monitoring Study," but state "[t]he Verification and Monitoring Plan has been submitted and approved by the Department." AR 254. The only detail in the biological monitoring conditions is provided in the requirement for "Complete installation of BTA." *Id.* This condition specifies that:

> Ristroph type modified intake screen installation and establishment of a dedicated fish return shall be completed in accordance with the DEC approved Technical Installation and Operation Plan (TIOP). The reductions in entrainment and impingement mortality resulting from these technologies and/or operational measures as determined through condition No. 4, can be no less stringent, and if possible, should be substantially greater than the following performance standards:
>
> a. Entrainment must be reduced by at least 75 % from the calculation baseline; and
>
> b. Impingement mortality must be reduced by at least 90 % from the calculation baseline.

AR 254-255. There are no conditions related to water conservation in Con Ed's SPDES permit.

ARGUMENT

I. DEC FAILED TO COMPLY WITH THE WATER RESOURCES LAW IN ISSUING AN "INITIAL" WATER WITHDRAWAL PERMIT TO CON ED

DEC violated the Water Resources Law ("WRL"), ECL Article 15, Title 15, §§ 1501 *et seq*., and its implementing regulations, 6 NYCRR Part 601, when it issued the Con Ed permit without making the determinations required by the WRL including an assessment of whether the withdrawals to be authorized would have significant individual or cumulative adverse impacts on the quality or quantity of water in the East River, on its aquatic life, and on other users of the water body, and when it failed to include conditions in the permit sufficient to avoid such impacts.

A. 2011 Amendments to the Water Resources Law

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 WRL 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. Water withdrawal permits have been required for public water supply systems since 1905. The purpose of the legislation is outlined in the Assembly sponsor's memorandum in support of the bill:

> 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 (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.[13]

As noted in the sponsor's bill memo quoted above, a major impetus for passage of the WRPA was to implement the requirements of the Great Lakes-St. Lawrence River Basin Water

[13] Assembly Sponsor's Memorandum in Support of Bill Number A5318A, pp. 5-10 of the Bill Jacket. Downs Aff. Ex. B. 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. Downs Aff. Ex. C.

Resources Compact (the "Compact"), ECL § 21-1001. 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."*Id*., Section 4.11.2.

At the time he signed WRPA into law, Governor Cuomo emphasized the protections offered by the new law. "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 Water Resources Compact (Compact) by regulating all significant water withdrawals occurring in the New York portion of the Great Lakes Basin."[14]

The new law provides that existing users who have registered their use with the DEC are eligible to receive a permit for their maximum reported use. ECL § 15-1501.

DEC promulgated new regulations implementing the 2011 amendments. 6 NYCRR Part 601. These regulations became effective April 1, 2013.[15] The regulations provide an expedited permitting process for existing water users, and provide that existing users will be permitted on a staggered schedule over a four-year period, with the largest users being permitted first. 6 NYCRR § 601.7. Section 601.7(f) of the regulations says that "Where the water withdrawal system listed in an initial permit application is associated with a project, facility, activity or use

[14] *Governor Cuomo to Sign Law to Protect New York's Waters*, Press Release Governor's Press Office, August 15, 2011, Downs Aff. Ex. D. http://www.governor.ny.gov/news/governor-cuomo-sign-law-protect-new-yorks-waters [accessed July 1, 2015].

[15] http://www.dec.ny.gov/permits/6036.html.

that is subject to a SPDES permit or another Department permit, the Department will review the initial permit application in coordination with the SPDES or other permit program, particularly with respect to any pending permit renewals."

B. DEC Failed to Make the Determinations Required by the Water Resources Law

DEC violated the WRL and its implementing regulations when it issued the Con Ed water withdrawal permit without requiring the necessary data and analysis in the application materials to make the determinations required in the law and the regulations. ECL § 15-1503.2 provides that "[i]n making its decision to grant or deny a permit or to grant a permit with conditions, the department shall determine whether:"

a. the proposed water withdrawal takes proper consideration of other sources of supply that are or may become available;

b. the quantity of supply will be adequate for the proposed use;

c. the project is just and equitable to all affected municipalities and their inhabitants with regard to their present and future needs for sources of potable water supply;

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;

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

h. the proposed water withdrawal will be implemented in a manner that is consistent with applicable municipal, state and federal laws as well as regional interstate and international agreements.

The mandates of ECL § 15-1503.2 are reinforced by Section 601.11(c) of the regulations. Subsection (c) provides that "[i]n making its decision to grant or deny a permit or to grant a permit with conditions, the Department shall determine whether:"

(1) the proposed water withdrawal takes proper consideration of other sources of water supply that are or may become available;

(2) the quantity of supply will be adequate for the proposed use;

(3) the proposed project is just and equitable to all affected municipalities and their inhabitants with regard to their present and future needs for sources of potable water supply;

(4) the need for all or part of the proposed water withdrawal cannot reasonably be avoided through the efficient use and conservation of existing water supplies;

(5) the proposed water withdrawal is limited to quantities that are considered reasonable for the purposes for which the water use is proposed;

(6) 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; this determination may include an evaluation of whether all withdrawn water that is not lost to reasonable consumptive use will be returned to its source New York major drainage basin;

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

(8) the proposed water withdrawal will be implemented in a manner that is consistent with applicable municipal, state and federal laws as well as regional interstate and international agreements.

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). Subsection (k) of Section 601.10 requires a "Project Justification," which is "[a] summary statement in justification of the proposed project using facts and information contained in the applicant's exhibits with specific references thereto." A Project Justification is required to show:

> (1) why the proposed project was selected from the evaluated alternatives;
>
> (2) why increased water conservation or efficiency measures cannot negate or reduce the need for the proposed water withdrawals;
>
> (3) why the proposed water withdrawal quantity is reasonable for the proposed use;
>
> (4) why the proposed water conservation measures are environmentally sound and economically feasible;
>
> (5) whether the proposed water supply is adequate;
>
> (6) whether the proposed project is just and equitable to other municipalities and their inhabitants in regards to present and future needs for sources of potable water;
>
> (7) whether the proposed withdrawal will result in no significant individual or cumulative adverse environmental impacts; and
>
> (8) whether the proposed withdrawal will be consistent with all applicable municipal, state and federal laws as well as regional interstate and international agreements.

The WRL explicitly applies to existing water withdrawals. ECL § 15-1501(1) provides that, "[e]xcept as otherwise provided in this title, no *person who is engaged in, . . . , the operation of a water withdrawal system* with a capacity of greater than or equal to the threshold volume, shall have any power to do the following until such person has first obtained a permit or permit modification from the department pursuant to this title: a. To make a water withdrawal *from an*

existing . . . source." *Id*., emphasis added. Although the WRL provides an expedited permitting process for existing water users in ECL § 15-1501.9, that section states that the " initial" permits granted to existing users are "subject to appropriate terms and conditions as required under this article," thus incorporating the requirements of ECL § 15-1503.2. Nor are "initial" permits exempted from the conditions set forth in 6 NYCRR §§ 601.11(c)(1)-(8). Consequently, it is apparent that the plain wording of the WRL and the regulations does not exempt DEC from making the determinations required in ECL § 15-1503.2 for "initial" permits.

Yet, as far as can be ascertained from the record, DEC failed to make the required determinations in the case of the Con Ed permit application. Furthermore, the record shows that DEC accepted an application from Con Ed that did not provide the information necessary to make the required determinations. For example, the contents of Con Ed's water withdrawal permit application do not provide a basis for DEC to meet its burden to demonstrate that "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." 6 NYCRR § 601.11(c)(6). Nothing in the record shows that DEC even attempted to make this determination with respect to the issuance of the Con Ed water withdrawal permit.

It is undisputed that the massive volumes of water used by the Con Ed East River Generating Station are attributable largely to the fact that the facility relies on a once-through cooling system and that a closed-cycle cooling system would use much less water. For this reason, in evaluating Con Ed's water withdrawal permit application, DEC is obligated under ECL § 15-1503.2 to determine whether closed-cycle cooling represents an "environmentally sound and economically feasible water conservation measure," and to impose a permit condition requiring

closed cycle cooling if appropriate. DEC's failure to determine whether closed-cycle cooling for the Con Ed power plant was an "environmentally sound and economically feasible water conservation measure" under the WRL is thus a violation of the requirements of the WRL.

C. DEC Failed to Impose the Conservation Measures Required by the Water Resources Law

Not only did DEC violate the WRL and its implementing regulations when it failed to make the required determinations regarding Con Ed's East River power plant withdrawals, it also violated the WRL when it failed to include appropriate water conservation conditions in the permit.

The failure of the DEC to require appropriate terms and conditions in the Con Ed water withdrawal permit violates the requirements of the WRL for issuance of "initial" permits. As noted above, under ECL § 15-1501(9) "initial" permits are "subject to appropriate terms and conditions as required under this article." In issuing the Con Ed permit without appropriate conditions, DEC ignored the requirements of Section 601.10(f) of the water withdrawal regulations, which provides that an application for a water withdrawal permit shall include a "Water conservation program. A completed form as made available by the Department or, if acceptable to the Department, a detailed plan, that demonstrates the applicant's water conservation and efficiency measures that are environmentally sound and economically feasible and that minimize inefficiencies and water losses. Such measures *must include but are not limited to: source and customer metering; frequent system water auditing; system leak detection and repair; recycling and reuse; and ability to enforce water restrictions during drought*." 6 NYCRR § 601.10(f), emphasis added. As outlined above, the WCPF contained in the Con Ed water withdrawal application demonstrated that the plant does not have a compliant water conservation program (AR 175-180), yet the application was determined to be complete and the permit was

issued without conditions requiring most of the conservation measures listed as minimal requirements in 6 NYCRR § 601.10(f). The only explicit water conservation measures contained in the water withdrawal permit are the requirements contained in conditions 7 and 8 that all sources of supply be metered and that all meters be calibrated. AR 240. Other practices required by Section 601.10(f), such as frequent system water auditing, system leak detection and repair, recycling and reuse (such as a closed-cycle cooling system), and the ability to enforce water restrictions during drought are not required in the Con Ed permit.

D. SPDES Permit Conditions Are Not a Substitute for Compliance with the Water Resources Law

The fact that DEC included a condition in Con Ed's water withdrawal permit incorporating the biological monitoring requirements of Con Ed's SPDES permit is not a substitute for compliance with the water conservation requirements of the WRL. Nowhere in the WRL or in its implementing regulations is DEC authorized to substitute conditions from a SPDES permit for the water conservations measures required in a water withdrawal permit. As noted above, Section 601.7(f) of the water withdrawal regulations says that "[w]here the water withdrawal system listed in an initial permit application is associated with a project, facility, activity or use that is subject to a SPDES permit or another Department permit, the Department will review the initial permit application in coordination with the SPDES or other permit program, particularly with respect to any pending permit renewals." This section does not state that incorporating provisions from a SPDES permit will fulfill DEC's duties the make the determinations required in ECL § 15-1503.2 and 6 NYCRR § 601.11(c) or to incorporate the required water conservation conditions in the permit.

New York's State Pollutant Discharge Elimination System (SPDES) program implements the requirements of ECL Article 17, §§ 17-0101 et seq. Article 17, entitled "Water Pollution

Control," was enacted to protect New York waters from discharges of pollution. The statement of purpose in ECL § 17-0103 provides, "It is the purpose of this article to safeguard the waters of the state from pollution by preventing any new pollution and abating pollution existing when the predecessor of this chapter was enacted."Water conservation is not listed as one of the purposes of Article 17.

The only water conservation requirements contained in the SPDES regulations, 6 NYCRR Part 750, are requirements applicable to publicly owned treatment works. These requirements are not nearly as stringent as the water conservation standards in the WRL, and they are not applicable to privately owned power plants such as the Con Ed East River facility. Section 750-2.9(c)(1)(ii)(a) of the SPDES regulations provides that, for publicly owned treatment works:

> (ii) The flow management plan required by subparagraph (i) of this paragraph shall also include provisions for implementation of any or all of the following that are necessary to stabilize influent flows below design flows:
>
> (a) Water conservation measures to reduce customer usage by measures including but not limited to customer metering, meter calibration, retrofitting existing plumbing fixtures with water conservation fixtures and revision of water rate structures; . . .

These requirements do not include many of the water conservation requirements mandated by 6 NYCRR § 601.10(f) such as frequent system water auditing; system leak detection and repair; recycling and reuse; and ability to enforce water restrictions during drought. There are no water conservation requirements applicable to non-publicly owned treatment works, and no water conservation measures are required in the Con Ed SPDES permit. AR 243-266. The biological monitoring conditions contained in the Con Ed SPDES permit are designed to reduce impingement and entrainment of aquatic life, as described above, but none of the conditions require water conservation measures. AR 254-255.

Whatever determinations DEC has made regarding the adequacy of Con Ed's once-through cooling system under the SPDES law and regulations does not substitute for the necessity of determining whether closed-cycle cooling represents an "environmentally sound and economically feasible water conservation measure" under the WRL. Furthermore, there is little in the record documenting what determinations DEC has made under the SPDES law with regard to Con Ed's once-through cooling system. Although Con Ed's SPDES permit contains a condition captioned "Complete Installation of BTA," and DEC claims in its Negative Declaration for the Con Ed SPDES program that "best practices" have been instituted at the plant, Petitioners note that Con Ed's water intake structures are not in conformance with DEC's 2011 guidance on Best Available Technology ("BTA") for Cooling Water Intake Structures.[16] The guidance requires closed cycle cooling. The guidance states that cooling water intake structures will be subject to one of four "performance goals" when selecting BTA--all four require "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*. The BTA policy requiring closed-cycle cooling should have been implemented when Con Ed's SPDES permit was renewed. Because it was not, it is not appropriate to claim that Con Ed's SPDES permit requires BTA.

For each of these reasons, DEC cannot substitute biological monitoring conditions in Con Ed's SPDES permit in satisfaction of the water conservation measures required in the water withdrawal permit.

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

There is no justification, therefore, for DEC's failure to make the determinations required by the WRL and include adequate water conservation measures in the Con Ed water withdrawal permit. It is respectfully requested that the water withdrawal permit issued by Respondent DEC to Respondent Con Ed be annulled and that Respondent DEC be directed to evaluate whether permit conditions requiring closed-cycle cooling and other water conservation measures should be included in the Con Ed water withdrawal permit, and that an injunction against issuance of a permit to Con Ed be entered until such time as the Respondent DEC has fully and completely complied with the requirements of WRL.

E. DEC's Decision to Preclude the Possibility of a Hearing on Con Ed's Water Withdrawal Permit Application was an Informational Injury to Petitioners

As noted above, Petitioner Sierra Club joined with the Natural Resources Defense Council, Riverkeeper Inc. and Citizen's Campaign for the Environment in submitting comments on the proposed Con Ed water withdrawal permit. These comments stressed the obligation of DEC under the WRL to evaluate the need for closed cycle cooling and other "environmentally sound and economically feasible water conservation measures" at the East River Generating Station.

By its claim that issuance of the Con Ed permit was non-discretionary, DEC rendered Petitioners' comments on the proposed permit meaningless, as there was no possibility DEC could, under its interpretation of the "initial permit" provision of WRL, find that anyone's public comments warranted the imposition of significant conditions in the proposed permit.

Petitioners' informational injuries are within the zone of interests protected by WRL because the permitting program established by WRL is subject to "the provisions of article 70 of this chapter" (ECL § 15-1503[5]), which are the "uniform review procedures for major regulatory programs" administered by DEC. ECL § 70-0101. These procedures are meant "to encourage

public participation in government review and decision-making processes and to promote public understanding of all government activities." ECL§ 70-0103(4).

The procedural provisions of Article 70 "govern the review by the department of applications for permits for proposed projects and modifications, suspensions, revocations, renewals, reissuances and recertifications of permits" administered by DEC. ECL § 70-0107(2). ECL § 70-0107(3)(a) specifically includes ECL Title 5 of Article 15, which is the WRL. Under the Article 70 procedures, if public comments on a permit application warrant "the imposition of significant conditions" on a proposed permit, DEC is required "hold a public hearing on the application." ECL § 70-0119(1).

DEC's decision to preclude the possibility of a public hearing by deeming as non-discretionary its decisions with regard to Con Ed's water withdrawal permit application created an injury to the interests of Petitioners and their members in participating more fully in the DEC permitting decision.

II. DEC FAILED TO COMPLY WITH SEQRA IN ISSUING AN "INITIAL" WATER WITHDRAWAL PERMIT TO CON ED WITHOUT AN ENVIRONMENTAL REVIEW

DEC violated SEQRA when it issued an "initial" water withdrawal permit to Con Ed to withdraw 373.4 million gallons of water per day from the East River and failed to conduct a review under the New York State Environmental Quality Review Act (SEQRA), ECL Article 8, §§ 8-0101 *et seq.* , and the SEQRA regulations, 6 NYCRR Part 617.

A. The Statutory Scheme of SEQRA

SEQRA was enacted by the New York State Legislature in 1976. While SEQRA was patterned after its Federal counterpart, the National Environmental Policy Act ("NEPA"), 42 USCA 4332 *et seq*., the Legislature recognized that NEPA was merely a procedural statute that

assures that environmental issues are considered by a decision maker prior to taking any action. NEPA does not require substantive decisions by the decision maker. See *City of Buffalo v New York State Department of Environmental Conservation*, 184 Misc.2d 243 (Erie Cty 2000). The Legislature wished to provide greater protection to the environment when it passed SEQRA, and therefore, made significant changes from NEPA, including the requirement that environmental impact statements must be prepared in a much broader category of actions, and the requirement of substantive duties on the part of the decision maker to assure that environmental consequences that are identified will be avoided or mitigated. *Id.* As pointed out in the *City of Buffalo* case:

> The substantive mandate of SEQRA is much broader than that NEPA. 42 USCA Section 4332 requires federal agencies to prepare an EIS [Environmental Impact Statement] for 'any major federal action significantly affecting the quality of the human environment.' This should be contrasted with Section 8-0109 of SEQRA which is more expansive it its terms. Subdivision 2 of this Section requires an EIS for 'any action which is proposed or approved which *may* have a significant effect on the environment.' Only a 'low threshold' is required to trigger SEQRA review."

Id. at 249, citations omitted, emphasis added. The Legislature declared that the purpose of SEQRA is to:

> Declare a State policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the State.

ECL § 8-0101.

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). As previously indicated, 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 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 an oft-cited quotation, the court in *Schenectady Chemicals* stated:

> By enacting SEQRA, the Legislature created a procedural framework which was specifically designed to protect the environment by

> requiring parties to identify possible environmental changes 'before they have reached ecological points of no return.' At the core of this framework is the EIS, which acts as an environmental 'alarm bell.' It is our view that the substance of SEQRA cannot be achieved without its procedure, and that *any attempt to deviate from its provisions will undermine the law's express purposes. Accordingly, we hold that an agency must comply with both the letter and spirit of SEQRA before it will be found that it has discharged its responsibility thereunder.*

83 A.D.2d at 478, citations omitted, emphasis added. New York courts continue to adhere to this strict and literal compliance standard as necessary to fulfill the goals of SEQRA, and not just because the Legislature mandated that the act be carried out "to the fullest extent" practicable. ECL 8-0103(6). 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.

Moreover, if a lead agency is allowed to rectify a SEQRA procedural violation without voiding the actions taken after the violation occurred and requiring it to be done properly, the lead agency could treat the renewed work as a mere post-hoc rationalization of what had gone on before. The Court of Appeals decision in *Tri-County Taxpayers Association v Town of Queensbury*, 55 N.Y.2d 41 (1982) is instructive. In that case, the Appellate Division, with two judges dissenting on the issue of remedy, determined that nullifying a vote of the electorate that took place prior to SEQRA compliance "would serve no useful purpose to undo what has already been accomplished . . . ." 79 A.D.2d 337 (3d Dep't 1981) at 342. However, the Court of Appeals adopted the position of the dissenters, holding that in order to properly insure that the goals of SEQRA would be met, the vote had to be nullified. The Court stated:

> It is accurate to say, of course, that by actions of rescission later adopted the Town Board could have reversed the action authorizing the establishment of the sewer district. As a practical matter, for several reasons, however, the dynamics and freedom of decision-

> making with respect to a proposal to rescind a prior action are significantly more constrained than when the action is first under consideration for adoption.

55 N.Y.2d at 64. Therefore, where a procedural violation of SEQRA is found, in order to assure that the goals of SEQRA are met, the decision must be annulled.

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:

(1) Identify all areas of relevant environmental concern;

(2) Thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and

(3) 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.

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). Section 617.5(a) of the regulations 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).

The question in this proceeding is whether issuance of the Con Ed water withdrawal permit is deemed a "Type I" or "Type II action." As noted above, DEC determined that it is a Type II action under SEQRA. For the reasons described below, Petitioners' assert that it is a Type I action.

B. Issuance of the Con Ed 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). In the instant action, it is apparent that the water withdrawals by the Con Ed plant meet this test. It is well-documented that the Con Ed East River is impinging and entraining billions of fish, fish eggs and other aquatic life in the East River and it is apparent that this may have a significant adverse impact on aquatic life in the River, the harbor estuary and the entire Hudson River watershed.

Furthermore, the amount of water withdrawn pursuant to the permit means that the Con Ed 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). As noted above, 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 Con Ed to take up to of 373,400,000 gallons per day, involves withdrawals that are *187 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 Con Ed water withdrawals and the explicit categorization of water withdrawals over 2,000,000 GPD as Type I actions in the SEQRA regulations, the decision of DEC to categorize the Con Ed permitting process as a Type II action is arbitrary and capricious and an abuse of discretion.

C. Issuance of an "Initial" Water Withdrawal Permit Does Not Qualify as a Type II Action under SEQRA

An action categorized as a Type I action, cannot be a Type II action. To be categorized as a Type II action, Section 617.5(b) of the SEQRA regulations provides that "Each of the actions on an agency Type II list must: (1) *in no case, have a significant adverse impact on the environment based on the criteria contained in subdivision 617.7(c)* of this Part; and (2) *not be a Type I action as defined in section 617.4* of this Part (emphasis added)." An action cannot be a Type II action if it meets either criterion. The Con Ed water withdrawal project meets both criteria. It is a Type I action as defined in Section 617.4 of the SEQRA regulations because it is for more than 2,000,000 GPD. In addition, it has a significant adverse impact on the environment based on the criteria 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). The destruction of aquatic life by the cooling water intake structures of the Con Ed East River power plant outlined above is clearly significant under these criteria. As documented in the plant's own impingement and entrainment studies, the plant's cooling water intake structures remove and destroy large quantities of aquatic life from the East River. The cooling water intake structures substantially interfere with the movement of migratory fish in the Hudson river estuary. Among the many species impacted, the structures have substantial adverse impacts on Atlantic sturgeon, which are an endangered species,[17] and on their habitat in the East River and the Hudson River estuary. 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). According to the Administrative Record, DEC did not make either determination for the Con Ed water withdrawal permit application. For these reasons, it is apparent that issuance of the Con Ed water withdrawal permit cannot be a Type II action.

For purposes of determining the application of SEQRA to the issuance of a water withdrawal permit, it is not relevant that Con Ed's operations are long-standing, as the new regulatory program falls on new and old facilities alike. The WRL and the water withdrawal permitting regulations do not grandfather existing facilities or otherwise exempt them from the reach of the new permitting requirements. This is not unusual when new permitting programs are adopted. For example, the landfill permitting and operation regulations adopted by New York in the 1970s imposed substantial new costs on existing landfills. As a result, the number of

[17] "Officially Listed as Endangered, Sturgeon Are on the Slow Way Back," Brad Sewell's Blog, NRDC Switchboard, January 31, 2012, http://switchboard.nrdc.org/blogs/bsewell/officially_listed_as_endangere.html [accessed July 6, 2015.]

municipal solid waste landfills in New York dropped from more than 200 before the regulations were adopted to 27 today.[18]

Even if the Con Ed East River water withdrawals did not meet the criteria for a "significant adverse impact on the environment" contained in Section 617.7(c)(ii) and were not categorized as a Type I action under Section 617.4(b)(6)(ii), the issuance of the Con Ed water withdrawal permit cannot properly be categorized as a Type II action as claimed by DEC. It would be an unlisted action because it does not meet any of the Type II exemptions listed in the SEQRA regulations.

1. The Statutorily-mandated Approval Process for Issuance of an "Initial" Permit Requires the Exercise of Discretion by DEC

Although the ENB notice for the Con Ed permit application does not specify on what grounds DEC claims that issuance of the permit was a Type II action, and DEC does not explain the grounds for its Type II claim in its response to the Sierra-NRDC Comments protesting the designation, DEC does not dispute the assumption in the Sierra-NRDC Comments that DEC is relying on the exemption provided in section 617.5(c)(19) of the SEQRA regulations, the "ministerial action" exemption. This is the exemption DEC identified in its response to comments on the Ravenswood water withdrawal application. Downs Aff. Ex. J. In its response on the Ravenswood comments, DEC asserted that section 617.5(c)(19) covers the issuance of "initial" water withdrawal permits:

> [T]he 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." . . . . Generally, an action may be deemed ministerial, if it could

[18] http://www.dec.ny.gov/chemical/23682.html.

> not have been approved or denied on the basis of SEQR's broader environmental concerns.

Downs Aff. Ex. J, p. 2.

However, DEC's claim that it has no discretion in issuing "initial" permits is contrary to the clear wording of the WRL and regulations, to the position taken by the DEC on the interpretation of the proposed regulations and to DEC's actions in issuing the Con Ed permit. For these reasons, issuance of the Con Ed permit cannot be classified as a Type II action under SEQRA.

Section 617.5(c)(19) of the SEQRA regulations provides that: "(c) The following actions are not subject to review under this Part: . . . (19) official acts of a ministerial nature involving no exercise of discretion, including building permits and historic preservation permits where issuance is predicated solely on the applicant's compliance or noncompliance with the relevant local building or preservation code(s)." A "ministerial act" is defined in the regulations to mean "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, such as the granting of a hunting or fishing license." 6 NYCRR § 617.2(w). The SEQRA Handbook states that "non-discretionary" decisions "are *based entirely* upon a given set of facts, as prescribed by law or regulation, without use of judgment or individual choice on the part of the person or agency making the decision." *SEQRA Handbook*, 3d Ed. 2010, p. 13, emphasis added. The Handbook gives several examples of "non-discretionary" decisions and examples of decisions where discretion is required:

> Non-discretionary or "ministerial" decisions are based entirely upon a given set of facts, as prescribed by law or regulation, without use of judgment or individual choice on the part of the person or agency making the decision. For example, the issuance of a building permit to construct a residence in an approved subdivision would be ministerial if the plans show the structure will conform to all local

> building codes. Another example of a ministerial act would be the issuance of a dog license by a town clerk. If the owner can show proof of required vaccinations and can pay the proper fee, the clerk has no discretionary decision - the license must be issued. There is no choice involved on the part of the issuing agent or governmental entity.
>
> In other instances, the building inspector is required or authorized by law to vary or request modifications in the qualifying criteria for the permit, based on environmental considerations, and such building permit would be subject to SEQR. For example, the proposed construction of an office building in a commercial zone where the building code enforcement officer has been designated as the reviewer for certain aspects of construction review which are normally exercised under site plan review. This exercise of discretion by the building inspector prevents this activity from being a ministerial act, and it should be reviewed under SEQR before a decision is made.

Id.

In the present case, it is clear that numerous aspects of the issuance of a water withdrawal permit involve the exercise of discretion by the DEC, and that the issuance of an "initial" water withdrawal permit is not "*based entirely*" upon the prescriptions of the WRL. As noted above, ECL § 15-1501.9, which authorizes the issuance of "initial" permits to existing users, states that "initial" permits are to be subject to "appropriate terms and conditions."[19] The determination of what terms and conditions are" appropriate" for a given permit is discretionary. The legislature's intent that DEC exercise broad discretion in specifying the terms and conditions of all water withdrawal permits, including "initial" permits, is made clear in ECL § 15-1503.2. As described above, there is no exemption from the requirements of Section 15-1503.2 for "initial" permits. Making each of these determinations and implementing them with appropriate conditions during

[19] The exact wording of Section 15-1501(9) is as follows: "9. The department shall issue an initial permit, subject to appropriate terms and conditions as required under this article, to any person not exempt from the permitting requirements of this section, for the maximum water withdrawal capacity reported to the department pursuant to the requirements of title sixteen or title thirty-three of this article on or before February fifteenth, two thousand twelve." The meaning of the term "initial permit" is not defined in Article 15 of the ECL.

the application process requires the exercise of very significant amounts of discretion by DEC. In the case of the Con Ed permit, DEC failed to make the required determinations.

Only one aspect of "initial" permitting is non-discretionary under ECL § 15-1501.9—the size of the maximum permitted amount. Section 15-1501.9 provides that "initial" permits shall be issued to existing users for the maximum water withdrawal capacity reported to DEC on or before February 15, 2012. Being constrained in the size of the maximum capacity to be permitted does not limit DEC as to what conditions may be provided in the permit. There is no contradiction between issuing a permit for a specified amount—whatever that amount might be—and also setting conditions requiring that various types of water conservation measures be used. Allowing a maximum volume is not inconsistent with examining the environmental impacts of that volume and requiring measures to reduce that volume if possible.

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 "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.

None of the cases applying the *Gavalas* test have addressed circumstances comparable to the facts of the present case. *In Matter of Ziemba v. City of Troy*, 37 A.D.3d 68 (3rd Dep't 2006) *lv*. *app. den.*, 8 N.Y.3d 806 (2007), the Third Department held that the discretion to be exercised in issuing a demolition permit under the City Code "is limited to a narrow set of criteria that is unrelated to the environmental concerns that would be raised in an EIS." *Id*. at 74. In *Matter of Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmark Preservation Commission*, 306 A.D.2d 113 (1st Dep't 2003), the First Department determined that the NYC Landmark Preservation Commission was not required to comply with SEQRA with respect to an application for a certificate of appropriateness "limited to the appropriateness of the proposed

building's exterior architectural features and narrowly circumscribed by the architectural, aesthetic, historical and other criteria specifically set forth in the Landmarks Preservation Law." *Id*. at 114. In *Matter of Island Park, LLC v New York State Dep't of Transp*., 61 A.D.3d 1023 (3rd Dep't 2009), the Third Department found that the safety issues presented by a particular railroad crossing were "unrelated to the environmental concerns that may be raised in an environmental impact statement." *Id*. at 1028.

The issues in the present case, in contrast, are directly related to the environmental concerns that may be raised in an environmental impact statement, and thus, under the rule in *Gavalas*, do not fall within the ministerial exemption under SEQRA.

2. DEC's Comments on the Proposed Regulations Took the Position that Initial Water Withdrawal Permits Are Not Subject to Different Standards

During consideration of the proposed water withdrawal regulations in 2012, DEC asserted that it would review initial permit applications and include appropriate conditions in initial permits, including water conservation measures, stating "The statute does not authorize the Department to apply different standards for the issuance of initial permits."[20] At that time, DEC acknowledged that it has substantial discretion in issuing "initial" water withdrawal permits. Entergy Nuclear Operations, Inc., the owner of the Indian Point power plant, raised several questions during the comment process regarding the issuance of "initial" permits. First, Entergy observed, "*There appears to be . . . no provision in the Proposed Regulations prohibiting substantive review of initial permits, and therefore no reason to believe NYSDEC will refrain*

[20] Responsiveness summary for the final water withdrawal regulations, Assessment of Public Comment: Section V — Table of Comments and Responses, Page 41-42 of 167, November 2012, pertinent pages attached to the Downs Aff. as Ex. M. response to Question #149.

from substantively reviewing initial permits for existing facilities or requiring that new substantive provisions be included in initial permits."[21] DEC responded:

> ECL §15-1501(9) requires that the Department issue an initial permit for the maximum capacity reported or registered with the Department on or before February 15, 2012; *however, it also provides that the permit will be subject to appropriate terms and conditions as required under ECL Article 15*. While the Department expects the initial permit process to be an expedited and less costly permit process*, it will review the permit applications and include in the permit appropriate conditions, including water conservation measures*.[22]

Entergy also commented:

> Further, the Proposed Regulations do not provide different standards for the issuance of initial permits and new permits. Instead, the Proposed Regulations make clear that an initial permit for existing facilities must include 'all terms and conditions of a water withdrawal permit.' Id . at §601.7(e). *Without a definitive statement that initial permits for existing facilities are subject to different issuance standards, it is logical to assume that initial permits are subject to the same issuance standards as new permits*. Entergy therefore requests that NYSDEC provide clarification on the standards for issuance of initial permits for existing facilities and whether the standards will be the same as those for new permits for proposed facilities.[23]

DEC responded:

> 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.* It requires only that the applicant obtain a permit for the maximum withdrawal capacity reported to the Department. [Emphasis added.][24]

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[21] *Id.*, Question #148, emphasis added.

[22] *Id*., response to Question #148, emphasis added

[23] *Id.*, Question #149, emphasis added.

[24] *Id*., response to Question #149, emphasis added.

DEC's current claim of a Type II exemption on the ground that the standards it applies to "initial" water withdrawal permits are different is inconsistent with these responses to public comments on the proposed water withdrawal regulations.

D. Environmental Review of a SPDES Permit is Not a Substitute for Environmental Review of a Water Withdrawal Permit

The DEC's new water withdrawal permitting program is independent of the SPDES permitting program and therefore calls for an independent environmental impact review of the potential consequences for other users and the environment of the issuance of a water withdrawal permit. DEC includes the conditional negative declaration it made on Con Ed's SPDES application in the administrative record of this case. AR 197-200. But whatever SEQRA determination has been made with regard to the renewal of Con Ed's SPDES permit is not a substitute for making a separate SEQRA determination regarding the issuance of Con Ed's "initial" water withdrawal permit. Even if a full environmental review had been conducted of the Con Ed SPDES permit renewal application, such a review would be inadequate to substitute for a full environmental review of the Con Ed water withdrawal permit application.

E. DEC's Failure to Conduct an Environmental Review Was an Informational Injury to Petitioners

DEC's obligations under SEQRA are mandatory, not discretionary. So long as DEC maintains its pattern and practice of non-compliance with SEQRA, Petitioners are profoundly hindered in their ability to advocate on behalf of their members and serve the public.

DEC's violation of SEQRA deprived Petitioners and their members of an adequate 'airing' of the relevant issues and impacts of the proposed water withdrawal permit, as well as an accurate assessment of the environmental impacts involved.

Petitioners' informational injuries are within the zone of interests protected by SEQRA. DEC has stated in the past that "SEQRA is intended to protect the public's opportunity to participate in environmental decisionmaking." *DEC Comm'r Interim Decision, In re 628 Land Assoc.* (Sept. 12, 1994).[25] Importantly, as the Court of Appeals stated in the *Gavalas* case, "the Legislature's clear intent [is] that an EIS be used as an informational tool to aid in the planning process." 81 N.Y.2d at 326. Thus where, as here, DEC elects not to even consider whether an EIS is necessary, as Petitioners contend DEC was required to do, Petitioners' interest in participating in that decision is clearly harmed in a manner that is squarely within the zone of interests protected by SEQRA.

The informational injury in this case is particularly important, since there can be no question that billions of fish and other aquatic species are killed because of the once-through cooling system used at the East River generating station. Moreover, there are alternatives that could be required of Con Ed under the permitting discretion of the DEC pursuant to WRL that would significantly mitigate the destruction of these aquatic species.

By issuing a Type II determination for the Con Ed East River water withdrawal permit, DEC failed to perform its duty, proceeded in excess of its jurisdiction, rendered an arbitrary and capricious decision, and abused its discretion. Petitioners request that the Con Ed East River permit be annulled and DEC be required to conduct a full environmental impact review of the Con Ed East River permit application.

[25] Available at http://www.dec.ny.gov/hearings/10932.html.

III. DEC'S FAILURE TO EXAMINE COASTAL ZONE IMPACTS OF CON ED'S WATER WITHDRAWALS VIOLATED FEDERAL, STATE AND NEW YORK CITY COASTAL ZONE LAWS

Because the Con Ed Generating Station is located in a coastal area, DEC's failure to conduct a coastal consistency review of the Con Ed East River water withdrawal permit violated the federal Coastal Zone Management Act, the state Waterfront Revitalization of Coastal Areas and Inland Waterway Act, the regulations implementing the Act, and the New York City Waterfront Revitalization Program.

A. Coastal Zone Regulatory Framework

1. Federal Coastal Zone Management Act

In recognition of the importance of meeting the challenges of continued growth in the nation's coastal areas, Congress enacted the Coastal Zone Management Act ("CZMA") (16 USCA § 1453) on October 27, 1972. The overall program objectives of the CZMA include "to preserve, protect, develop, and where possible, to restore or enhance the resources of the nation's Coastal Zone" and "to encourage and assist the states to exercise effectively their responsibilities in the Coastal Zone through the development and implementation of management programs to achieve wise use of the land and water resources of the Coastal Zone." The CZMA emphasizes the primacy of state decision making regarding the Coastal Zone. *Id*.

2. New York State Waterfront Revitalization of Coastal Areas and Inland Waterway Act

New York State's Waterfront Revitalization of Coastal Areas and Inland Waterway Act, (the "Act"), Executive Law, Article 42, authorizes the creation of the state's coastal management program. The implementing regulations of the Act and the state's coastal area policies are contained in the Department of State regulations at 19 NYCRR Part 600. The Act designates the Department of State (DOS) as the administrator of New York's Coastal Management Program

(CMP). The Act enunciates the state's policy to balance economic development and preservation in order to obtain the benefits of coastal areas while preventing the loss of fish, shellfish, open space, public access, and other environmental goals. Exec. L. § 912(1). The Act requires that "actions undertaken by State agencies within the coastal area ... shall be consistent with the coastal area policies of this Article," Exec. L. §919(1). The state program contains 44 coastal policies and provides for local implementation when a municipality adopts a local waterfront revitalization program. Policy 18 is one of the 44 policies contained in the state coastal management program. Policy 18 provides:

> To safeguard the vital interest of the State of New York and of its citizens in the waters and other valuable resources of the State's coastal area, all practicable steps shall be taken to ensure that such interests are accorded full consideration in the deliberations, decisions and actions of State and Federal bodies with authority over those waters and resources.

Under the Act, consistency determinations of state program actions are coordinated with the SEQRA process. Section 600.4 of the state coastal zone regulations provides that, "[a]s early as possible in a State agency's formulation of an action it proposes to undertake, or as soon as a State agency receives an application for a funding or approval action, it shall determine whether the action is located within the coastal area." 19 NYCRR § 600.4. The regulations specify that, "[f]or purposes of this Part, planning or rulemaking actions which affect land or water in the coastal area shall be deemed to be located therein." *Id*. Thus, even if the Con Ed East River generating station were not located in a coastal zone, which it is, its application to withdraw water from the East River would be deemed to be located in the coastal area. The regulations go on to provide that "[a] t the time it is determined that the action is located within the coastal area the State agency shall follow the review procedures set forth in this Part, including the completion of a coastal assessment form (CAF) in a form prescribed by the Secretary. The CAF shall be

completed prior to the agency's determination of significance pursuant to SEQR (6 NYCRR Part 617) so that it can then supplement other information used by State agencies in making determinations of significance pursuant to such Part 617." *Id*. Thus, had DEC properly determined that the Con Ed water withdrawal project is located in a coastal zone, it should have completed a CAF form *before* making a determination of significance pursuant to SEQRA.

The coastal zone regulations require that, *after* having made a determination of significance pursuant to SEQRA, "[w]here a determination is made pursuant to 6 NYCRR Part 617 that an action may have a significant effect on the environment, the agency shall comply with the requirements of 6 NYCRR 617.9(b)(5)(vi) and 617.11(e). Fulfilling such requirements constitutes a determination of consistency as required by Executive Law article 42." 19 NYCRR § 600.4(a). If "a determination is made pursuant to 6 NYCRR Part 617 that an action will not have a significant effect on the environment, and where the action is in the coastal area within the boundaries of an approved local Waterfront Revitalization Program area, and the action is one identified by the Secretary pursuant to section 916(1)(a) of the Executive Law," the coastal zone regulations require that "a State agency shall submit, through appropriate existing clearing house procedures, information on the proposed action to the local government and, at the time of making its decision on the action, file with the Secretary a certification that the action will not substantially hinder the achievement of any of the policies and purposes of the applicable approved local Waterfront Revitalization Program and whenever practicable will advance one or more of such policies." 19 NYCRR § 600.4(c). Section 600.4(c) goes on to provide: "If the action will substantially hinder the achievement of any policy or purpose of the applicable approved local Waterfront Revitalization Program, the State agency shall instead certify that the following three requirements are satisfied:

(1) no reasonable alternatives exist which would permit the action to be taken in a manner which would not substantially hinder the achievement of such policy or purpose;

(2) the action taken will minimize all adverse effects on the local policy and purpose to the maximum extent practicable; and

(3) the action will result in an overriding regional or statewide public benefit.

"Such certification shall constitute a determination that the action is consistent to the maximum extent practicable with the approved local Waterfront Revitalization Program as required by Executive Law article 42." *Id*.

3. New York City Waterfront Revitalization Program

In recognition of the state policy to encourage the revitalization of waterfront areas in a manner consistent with local objectives, the Act allows for the creation of optional local government waterfront revitalization programs ("LWRPs"). 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 contained in an approved LWRP become incorporated into the state's CMP. Accordingly, pursuant to the Act and the regulations adopted pursuant to the Act, state agency actions which are likely to affect the achievement of an LWRP must be reviewed for consistency with the local coastal area management policies (Executive Law § 916.1 [b], 19 NYCRR §§ 600.3 [c], 600.4).

In response to the Federal Coastal Zone Management Act of 1972 and the New York State Waterfront Revitalization and Coastal Resources Act of 1981, New York City developed a LWRP. The City's original Waterfront Revitalization Program ("NYC WRP") was adopted by the New York City Board of Estimate in 1982 as a local plan in accordance with Section 197-a of

the City Charter. Pursuant to state regulations, 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, in accordance with federal regulations. As a result of these approvals, federal and state program actions identified by the 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.

Section 916.1 of the Executive Law provides that, "where a local government waterfront revitalization program has been approved pursuant to [Executive Law §§ 915 or 915-a]," the secretary of state shall " identify actions under . . . state agency programs which are likely to affect the achievement of the policies and purposes of such approved program." 19 NYCRR § 916.1. Section 916.1 also provides that"[t]he state agency program actions so identified shall be undertaken in a manner which is consistent to the maximum extent practicable with the approved waterfront revitalization program." *Id*. The current list of state agency actions that should be undertaken in a manner consistent with the NYC WRP is attached as Appendix A to the recent revisions to the NYC WRP approved October 30, 2013 by the City Council.[26] Water withdrawal permits are listed in the appendix as one of the types of DEC permit actions that requires review under the NYC WRP: "10 Permit and Approval Programs . . .Water Resources . . . 10.60 Permit—Article 15, Title 15 (Water Supply)." [27]

[26] http://www.nyc.gov/html/dcp/pdf/wrp/revisions/nyc_wrp_city_approved.pdf, pp. 114-123 [accessed 06/19/15].

[27] *Id*. at 118.

B. Preparation of an EIS or Certification of Impacts under the NYC WRP Is Required for a Water Withdrawal Permit Application

As explained in the above discussion, because the Con Ed East River plant is withdrawing water from the East River, the coastal zone regulations require that a coastal consistency review be conducted as soon as Con Ed's application for an initial water withdrawal permit is received, before a determination of significance is made under SEQRA with regard to the issuance of the permit. 19 NYCRR § 600.4 If a determination is made under SEQRA that the project may have a significant impact on the environment is made under SEQRA, the coastal zone regulations provide that preparing and EIS under SEQRA satisfies the coastal consistency review requirements under the state coastal zone law. 19 NYCRR § 600.4(a). But if a determination of no significance under SEQRA is made, such as DEC's determination in this case, the coastal zone regulations provide that, if there is a local waterfront revitalization program in place, as there is in New York City, and if the action is identified pursuant to section 916(1)(a) of the Executive Law (as noted above, DEC water withdrawal permits are so listed), DEC is required to file a certification that the action will not substantially hinder the achievement of any of the policies and purposes of the NYC WRP and whenever practicable will advance one or more of its policies. 19 NYCRR § 600.4(c). Thus, the coastal zone laws require that, before issuing the Con Ed water withdrawal permit, DEC either prepare an EIS or prepare a certification evaluating the impacts of the Con Ed water withdrawal permit application under the policies and purposes of the NYC WRP. No EIS was prepared and there is no documentation in the administrative record showing any certification or communication between DEC and any state or New York City agency regarding the effect of Con Ed's water withdrawal program on the policies and purposes of the NYC WRP.

For these reasons, DEC's actions in issuing the Con Ed East River water withdrawal permit violated the federal Coastal Zone Management Act, the state Waterfront Revitalization of Coastal Areas and Inland Waterway Act, the regulations implementing the Act, and the New York City LWRP.

IV. DEC FAILED TO EXERCISE ITS PUBLIC TRUST RESPONSIBILITIES IN ISSUING A WATER WITHDRAWAL PERMIT TO CON ED WITHOUT PROTECTING FISH AND WILDLIFE

DEC's issuance of a permit that allows the destruction billions of fish and other aquatic organisms in the East River by the once-through cooling system of the Con Ed East River generating station and allows Con Ed East River to take unnecessary amounts of water for the plant's cooling system violated the agency's public trust responsibilities under the common law, the New York Constitution and numerous statutory provisions. Whether an environmental review is required on not under SEQRA, the DEC is required to consider the public trust implications that permitting withdrawals of 373.4 million gallons of water per day from the East River will have on other water users and the environment violates its public trust responsibilities under the common law, under Article X, Section 4 of the State Constitution, Articles 8, 11 and 15 of the ECL, Article 42 of the Executive Law, and the NYC Waterfront Revitalization Program. DEC failed to exercise its role of fiduciary on behalf of the public because it failed to consider the impacts of the water withdrawal.

A. Overview of the Public Trust Doctrine

The public trust doctrine refers to the duty of the state government to hold and preserve certain natural resources, including water and fish, for the benefit of its citizens. The natural resources protected by the public trust doctrine are of inestimable value to the public as a whole.

Their protection and preservation is a public interest that is recognized in numerous state and federal statutory provisions.

The common law public trust doctrine has long been recognized in New York and has been incorporated in the State Constitution, Article XIV, and in our state Environmental statutes, including Articles 8, 11 and 15 of the ECL and Article 42 of the Executive Law.

Common law public trust principles were applied in *W.J.F. Realty Corp. v New York*, 176 Misc.2d 763 (Suffolk Cty 1998), *aff'd* 267 AD2d 233 (2nd Dept 1999) (upholding the Long Island Pine Barrens Act, which protects the Long Island aquifer, against a takings challenge by applying the public trust doctrine), and *Smithtown v Poveromo*, 71 Misc.2d 524 (Suffolk Cty 1972), *rev'd on other grounds*, 79 Misc.2d 42 (App.Term Suffolk Cty 1973) ("The control and regulation of navigable waters and tideways was a matter of deep concern to sovereign governments dating back to the Romans . . . . The entire ecological system supporting the waterways is an integral part of them (the waterways) and must necessarily be included within the purview of the trust.").

B. Permitting Huge Fish Kills in the East River Violates DEC's Duty to Protect Fish and Wildlife in the Hudson River Estuary

The public trust doctrine applies to the protection of wildlife, including fish. In *Barrett v. New York*, 220 N.Y. 423 (1917), the court of appeals stated:

> [T]he general right of the government to protect wild animals is too well established to be now called in question. Their ownership is in the state in its sovereign capacity, for the benefit of all the people. Their preservation is a matter of public interest. They are a species of natural wealth which without special protection would be destroyed. Everywhere and at all times governments have assumed the right to prescribe how and when they may be taken or killed. As early as 1705 New York passed such an act as to deer. (Colonial Laws, vol. 1, p. 585.) A series of statutes has followed protecting more or less completely game, birds and fish.

Similarly, the court in *In re Del. River at Stilesville*, 115 N.Y.S. 745, 753 (App. Div. 1909) stated, "[t]he state, the representative of the people, the common owner of all things *feræ naturæ*, not only has the right, but is under a duty, to preserve and increase such common property." In the *Stilesville* case, the court rejected a dam owner's challenge to a requirement that it construct a fish ladder around the dam. The court observed that "[t]he people of the state have . . . as an easement in this stream the right to have fish inhabit its waters and freely pass to their spawning beds and multiply . . . and no riparian proprietor upon the stream has the right to obstruct the free passage of the fish up the stream to the detriment of other riparian proprietors or of the public. The court said that requiring the owner to add a fishway was not a taking of private property because "the petitioner cannot be deprived of a right which it never possessed. *Id.* at 754. Similarly, requiring Con Ed to install a closed-cycle cooling system would not be an infringement of its riparian rights.

Public trust principles were added to the state constitution by the vote of the people of New York in 1969, with the addition of Section 4 of Article XIV. Section 4 provides that: "The policy of the state shall be to conserve and protect its natural resources and scenic beauty . . . . The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, . . . and regulation of water resources."

The state legislature has incorporated public trust principles in a number of sections of the ECL, including Article 8, the State Environmental Review Act, Article 11, the Fish and Wildlife Law and Article 15, the Water Resources Law, as well as the Waterfront Revitalization of Coastal Areas and Inland Waterways Law contained in Article 42 of the Executive Law. The legislative

declarations contained in these laws make these public trust purposes clear. In ECL § 8-0103 "The legislature finds and declares:"

> 5. The capacity of the environment is limited, and it is the intent of the legislature that the government of the state take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds from being reached.
>
> 6. It is the intent of the legislature that to the fullest extent possible the policies, statutes, regulations, and ordinances of the state and its political subdivisions should be interpreted and administered in accordance with the policies set forth in this article. However, the provisions of this article do not change the jurisdiction between or among state agencies and public corporations. . . .
>
> 8. It is the intent of the legislature that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.
>
> 9. It is the intent of the legislature that all agencies which regulate activities of individuals, corporations, and public agencies which are found to affect the quality of the environment shall regulate such activities so that due consideration is given to preventing environmental damage.

ECL § 11-0105 provides:

> The State of New York owns all fish, game, wildlife, shellfish, crustacea and protected insects in the state, except those legally acquired and held in private ownership. Any person who kills, takes or possesses such fish, game, wildlife, shellfish, crustacea or protected insects thereby consents that title thereto shall remain in the state for the purpose of regulating and controlling their use and disposition.

ECL § 11-0306 establishes a Hudson River estuary management program "to protect, preserve and, where possible, restore and enhance the Hudson River estuarine district."

ECL § 15-0105 states: "In recognition of its sovereign duty to conserve and control its water resources for the benefit of all inhabitants of the state, it is hereby declared to be the public policy of the state of New York that:

> 1. The regulation and control of the water resources of the state of New York be exercised only pursuant to the laws of this state;
>
> 2. The waters of the state be conserved and developed for all public beneficial uses;
>
> 3. Comprehensive planning be undertaken for the protection, conservation, equitable and wise use and development of the water resources of the state to the end that such water resources be not wasted and shall be adequate to meet the present and future needs for domestic, municipal, agricultural, commercial, industrial, power, recreational and other public, beneficial purposes. . . .

As noted above, the Water Resources Protection of Act was passed in 2011 to strengthen the protections contained in Article 15.

Public trust principles are also incorporated in the state Waterfront Revitalization of Coastal Areas and Inland Waterway Act. Executive Law § 910 provides:

> The legislature hereby finds that New York state's coastal area and inland waterways are unique with a variety of natural, recreational, industrial, commercial, ecological, cultural, aesthetic and energy resources of statewide and national significance.
>
> The resources of the state's coastal areas and inland waterways are increasingly subject to the pressures of population growth and economic development, which include requirements for industry, commerce, residential development, recreation and for the production of energy.
>
> These competing demands result in the loss of living marine resources and wildlife, the diminution of open space areas, shoreline erosion, permanent, adverse changes to ecological systems and a loss of economic opportunities.
>
> The social and economic well-being and the general welfare of the people of the state are critically dependent upon the preservation, enhancement, protection, development and use of the natural and

> man-made resources of the state's coastal area and inland waterways. . . .

Public trust interests are explicitly referenced in Policy 8.5 set forth in the NYC Waterfront Revitalization Program:

> 8.5 Preserve the public interest in and use of lands and waters held in public trust by the state and city. . . .
>
> G. Re-establish public trust interests where appropriate in existing grants not used in accordance with the terms of the grant or the public trust doctrine.
>
> H. Minimize interference with public trust rights to the extent practicable, when exercising riparian interests. Provide mitigation to the extent appropriate where public access would be substantially impeded by the proposed activity.

New Waterfront Revitalization Program, as approved by the Council of the City of New York and the NYS Department of State with the concurrence of the US Department of Commerce, September 2002, at 26.[28]

DEC violated these public trust obligations when it issued a water withdrawal permit to Con Ed without consideration of alternatives that would reduce fish impingement and entrainment and conserve water, as evidenced by its failure to conduct an environmental review or a coastal consistency review, or to impose adequate water conservation measures.

Because DEC erroneously failed to comply with its public trust obligations in issuing the Con Ed water withdrawal permit, DEC is in violation of the requirements of Article X, Section 4 of the State Constitution, Articles 8, 11 and 15 of the ECL, Article 42 of the Executive Law, and the NYC Waterfront Revitalization Program.

[28] http://www.nyc.gov/html/dcp/pdf/wrp/wrp_full.pdf [accessed 06/19/15].

CONCLUSION

For the foregoing reasons, DEC failed its statutory responsibilities under the WRL, SEQRA, the ECL, and the Coastal Zone laws, as well as its public trust duties. Petitioners respectfully request that the Court enter an Order in this proceeding:

(1) Annulling the water withdrawal permit issued by Respondent DEC to Respondent Con Ed on November 21, 2015, for operation of its East River Generating Station;

(2) Enjoining Respondent DEC from approving Respondent Con Ed's water withdrawal permit application until Respondent DEC shall have complied with all applicable laws, including:

(a) Waiting for the necessary coastal zone reviews before making a determination of significance pursuant to SEQRA;

(b) Performing a full environmental impact statement in compliance with SEQRA;

(c) Complying with the requirements of the Water Resources Law in establishing the permit conditions;

(d) Complying with its public trust responsibilities in establishing the permit conditions; and

(3) Allowing costs and disbursements; and

(4) Granting such other and further relief as the Court may deem just, proper and equitable.

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Respectfully submitted,

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

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

Attorneys for Petitioners

To:

Laura Heslin, Esq.
Assistant Attorney General
Office of the NYS Attorney General
120 Broadway, 26th Floor
New York, New York 10271
Counsel for Respondent DEC Commissioner

Philip E. Karmel, Esq.
Bryan Cave LLP
1290 Avenue of the Americas
New York, NY 10104-3300
Counsel for Respondent Consolidated Edison