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, 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 IN OPPOSITION TO THE MOTION TO DISMISS BY RESPONDENT CONSOLIDATED EDISON AND THE AFFIRMATIVE DEFENSES OF RESPONDENT MARTENS

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PRELIMINARY STATEMENT

Respondent New York State Department of Environmental Conservation ("DEC") attempts to shield its actions from judicial review by claiming that an extremely short statute of limitations applies, and that Petitioners missed the deadline. DEC is wrong on both counts. The cited statute does not apply here; instead the standard four-month Article 78 limitations period applies, and Respondents concede that Petitioners met that deadline.

Respondent Con Ed's arguments on standing misapply the special harm criterion to environmental organizations seeking to vindicate in-fact injuries to environmental resources protected by SEQRA. The public policy of the State of New York favors access to the courts by environmental organizations challenging government actions made in alleged violation of the requirements of SEQRA, a broad statute enacted to protect the state's natural resources and the environment.

Once the merits are reached, it is clear that DEC's decision to effectively exempt existing water users from the requirements of New York's new water permitting law cannot stand. DEC's decision is not consistent with the provisions of the law and the legislature's intent in enacting a new water withdrawal permitting program. The vast majority of persons subject to the new law are existing users, so if DEC's refusal to apply the requirements of the law to existing users is allowed to stand, the entire program will have been effectively nullified. The harm is compounded by DEC's claim that issuance of a water withdrawal permit to an existing user is exempt from review as a Type II action under SEQRA.

ARGUMENT

I. Petitioners' Claims Are Not Time-Barred

A. Petitioners' Claim under ECL Article 15, Title 15 was Brought within the Applicable Statute of Limitations

Respondents concede that Petitioners sued within four months after the challenged decision, the standard Article 78 period. However, they argue that Petitioners' Article 78 proceeding is barred by a statute of limitations set out at Environmental Conservation Law ("ECL") § 15-0905(2). While this section does contain a shorter limitations period than the default four months, as shown below, the shorter limitations period is not applicable.

ECL § 15-0905(2), contained in Title 9 of Article 15, sets forth a general statute of limitations period for actions under Article 15. The overall statutory structure, however, does not support the Respondents' argument that this provision governs the statute of limitations period for water withdrawal permits, which are issued under Title 15 of Article 15. Another provision in the same Title 9, ECL § 15-0903(1), provides that the provisions of Title 9 shall not apply to actions involving Title 15 of Article 15. This section states:

> *The provisions of this title shall not apply to applications for permits*, requests for permit renewals and modifications, or to permit modification, suspension or revocation proceedings initiated by the department *where any of such actions involve title 5, 15 or 27 of this article*.

ECL § 15-0903(1) (emphasis added). When section 15-0903(1) is read in conjunction with section 15-0905(2), text, structure, and logic lead to the conclusion that ECL § 15-0903(1) rather than ECL § 15-0905(2) governs the water withdrawal permit at issue here. Accordingly, Article 78's default four-month limitations period applies rather than ECL § 15-0905's 60-day period, and Petitioners' proceeding challenging DEC's issuance of Con Ed's water withdrawal permit is timely.

No different result is compelled by the decisions upon which Respondents rely. In *Rochester Canoe Club v. Jorling*, 150 Misc.2d 321 (Sup. Ct. Monroe Cty 1991), appeal dismissed 179 A.D.2d 1040 (3rd Dept.), appeal dismissed in part 79 N.Y.2d 1037 (1992), the court found that Section 15-0903(1) did not create an exception to the 60-day limitations period set out in Section 15-0905(2) for a permit issued under Title 5 of Article 15, but, rather, applied only to the section on "hearing procedures," the heading under which it was placed. The court's opinion in this respect, however, is inconsistent with the statutory language and structure of Article 15. The *Rochester* court ignored the language in Section 15-0903(1) stating that the provisions "of this title" shall not apply to applications for permits under Title 5, Title 15 and Title 27. Normally, "this title" would apply to all provisions beginning with 0900, including 0905. The court never explained why "this title" should instead be interpreted to mean "this provision."

In reaching its decision, the *Rochester* court relied on the Third Department's decision in *Spinnenweber v. New York State Dep't of Envtl. Conserv*., 120 A.D.2d 172 (3d Dep't 1986). The court in *Spinnenweber*, however, did not discuss Section 15-0903(1), the provision that specifies that Title 9 "shall not apply" to proceedings under Title 5 or Title 15. Rather, the court in *Spinnenweber* interpreted a provision that is not applicable in the present case, ECL § 15-0515, which applies to determinations pursuant to sections 15-0501, 15-0503, and 15-0505 of Title 5 of Article 15. Section 15-0515 provides that such determinations shall be reviewable in a proceeding pursuant to Article 78. The court in *Spinnenweber* held that the wording of Section 15-0515 did not evidence an intent to remove Title 5 proceedings from the rule in Section 15-0905(2). The court failed to address the application of Section 15-0903(1), which specifically states that the provisions of Title 9 do not apply to proceedings under Title 5 and Title 15, and

gives ample evidence of an intent to remove both Title 5 and Title 15 proceedings from the rule in Section 15-0905(2).

In the most recent case interpreting the applicability of Section 15-0905(2), a case that is not cited by Respondents, the Third Department declined to apply the 60-day period contained in that section to the review of a determination of a river regulating district under ECL § 15-2121, holding instead that the four-month statute of limitations provided for Article 78 proceedings is applicable. *Niagara Mohawk Power Corp. v. State,* 300 A.D.2d 949 (3rd Dep't 2002). Although the 60-day period of limitations imposed by Section 15-0905(2) by its terms applies to "a decision made pursuant to this article," which includes Section 15-2121, the court in *Niagara Mohawk* held that a "liberal interpretation of the statute [of limitations] in favor of [petitioners] which reason and authority compel us to employ" warranted a more generous limit. *Id*. at 951. The court stated, "Although we continue to appreciate the desirability—recognized in *Spinnenweber*—of uniform applicability of the limitations period to proceedings commenced pursuant to ECL article 15, . . . we conclude that the statutory language, on its face, is too narrow to give a petitioner fair notice that the 60-day limitations period applies to determinations of river regulating districts. " *Id*. Accordingly, the court held that "the 60-day limitations period does not apply to challenges to HRBRRD's determinations and Erie's petition should not have been dismissed on that basis." *Id*.

Similarly, in the present case the wording of Section 15-0903(1), which appears to remove actions under Title 15 from the shorter limitations of Title 9, does not give Petitioners' fair notice that the 60-day limitation period contained in Section 15-0905(2) might apply to determinations under Title 15. Accordingly, the 60-day limitation period should not be applied to Petitioners in this case.

The decision in *Loon Lake Estates v. Adirondack Park Agency*, 83 Misc.2d 686 (Essex County 1975) ruling that a challenge to a water withdrawal permit under Title 15 must be made within the 60-days prescribed by section 15-0905(2), a case cited by Respondent DEC, was issued in 1975, well before Section 15-0903(1) was added to Title 9 of Article 15 in 1979 (L. 1979, ch. 233, § 4), and therefore is not applicable to the interpretation of that section.

B. Petitioners Do Not Challenge Con Ed's SPDES Permit

Respondent Consolidated Edison ("Con Ed") asserts that Petitioners' case presents a challenge to the SPDES permit issued to Con Ed for its East River plant in 2010 and that such a challenge is time-barred. However, no challenge to Con Ed's SPDES permit is made in this proceeding.

II. The Doctrine of Laches Is Not Applicable

Respondent Con Ed asserts that Petitioners committed laches in failing to intervene in the 2010 proceedings surrounding issuance of its SPDES permit. However, as noted above, Petitioners have not challenged Con Ed's SPDES permit. Petitioners' claim that DEC must make the independent assessments required by the Article 15 of the ECL before issuing Con Ed's water withdrawal permit and cannot rely entirely upon determinations made in issuing Con Ed's SPDES permit does not constitute a challenge to Con Ed's SPDES permit. Because Petitioners have not challenged Con Ed's SPDES permit, there is no basis for asserting that Petitioners committed laches in making such a challenge. Petitioners note that at the time Con Ed asserts Petitioners should have intervened in its SPDES permit proceeding, the 2011 amendments to Article 15, whose interpretation is at issue in this case, had not even been enacted.

III. Petitioners Have Organizational Standing

Respondent Con Ed argues that Petitioners have not met the applicable tests for standing. In fact, Petitioners Sierra Club and Hudson River Fishermen's Association ("HRFA") do meet the criteria for organizational standing set forth in *Association for a Better Long Island v. New York State Department of Environmental Conservation*, 23 N.Y.3d 1 (2014); *Save the Pine Bush, Inc. `v. Common Council of City of Albany*, 13 N.Y.3d 297 (2009); *Society of the Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761 (1991); *Dental Society v Carey*, 61 N.Y.2d 330 (1984) and *Douglaston Civic Ass'n, Inc. v. Galvin*, 36 N.Y.2d 1 (1974).

The *Society of Plastics* case, which denied standing to a trade association because its interest was economic only and did not fall within the zone of interest of SEQRA, noted that in "the more common scenario of associations dedicated to environmental preservation seeking to represent the interests of persons threatened with environmental harm. . . . , in-fact injury within the zone of interest of environmental statutes has been established by proof that agency action will directly harm association members in their use and enjoyment of the affected natural resources." 77 N.Y.2d at 775-776. Sierra Club and HRFA are such organizations, and this proceeding is the common scenario of "associations dedicated to environmental preservation seeking to represent the interests of members threatened with environmental harm." *Id*.

Under the rule established in the *Plastics* case, in order to show that one or more members of the organization have standing to sue, the organization has to identify a member of the organization and show that the identified member meets the standards required to have standing. However, in the *Better Long Island* case decided by the Court of Appeals in 2014 and in the *Save the Pine Bush* case, decided in 2009, the court broadened standing rules for organizations whose members use and enjoy a natural resource more than the public at large. In *Save the Pine Bush*,

the court specifically adopted the standing rule established in the United States Supreme Court case of *Sierra Club v Morton*, 45 U.S. 727 (1972) which recognized that an injury to a particular plaintiff's "[a]esthetic and environmental well-being" are enough to confer standing. 13 N.Y.3d at 305, citing 45 U.S. at 734. *Save the Pine Bush* cited with approval the United States Supreme Court case of *Lujan v Defenders of Wildlife*, 504 U.S. 555, 562-563 (1992) in which the *Lujan* court said that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." 13 N.Y.3d at 305, citing 504 US at 562-563.

Even under earlier Court of Appeals rulings, "proof of special damage or in-fact injury is not required in every instance." *Sun-Brite Car Wash, Inc. v. Board of Zoning Appeal*, 69 N.Y.2d 406, 413 (1989), accord *Ecumenical Task Force of Niagara Frontier, Inc. v. Task Force of Love Canal Area Revitalization Agency (*179 A.D.2d 261, 265, (4th Dep't 1992), *app. dis'd* 80 N.Y.2d 758 (1992), (where a petitioner's interests "are within the 'zone of interest' protected" by a statute, the petitioner has standing, because "it is desirable that environmental disputes be resolved on their merits rather than by preclusive, restrictive standing rules").

In making a determination whether an asserted claim or appropriate relief requires the participation of an individual member of the organization, the Court of Appeals has stated, "It is enough to allege the adverse effect of the decision sought to be reviewed on the individuals represented by the organization; the complaint need not specify individual injured parties." *Dental Society*, 61 N.Y.2d at 334. "[W]e can identify no reason why the participation of individual members would be necessary to fully adjudicate this proceeding or to grant the relief sought" *Aeneas McDonald Police Benevolent Association, Inc. v City of Geneva*, 92 N.Y.2d 326, 331 (1998). The Court of Appeals has regularly admonished against instituting rules of law that

deny petitioners their ability to challenge administrative actions. Therefore, as to standing, the Court of Appeals has stated that standing rules "should not be heavy-handed" *Sun-Brite Car Wash*, 69 N.Y.2d at 413, *Better Long Island*, 23 NY 3d at 6, and as indicated in *Society of Plastics*, should not "insulate governmental actions from scrutiny." 77 N.Y.2d at 779, citing *Har Enterprises v Town of Brookhaven*, 74 N.Y.2d 524, 529 (1989).

The instant proceeding asserts the rights of Petitioners' members to assure adequate environmental review as required by SEQRA, and therefore, the relief requested in the petition can be granted without the participation of any individual members of the organizations. Petitioners represent the long standing interests of their members, and have the capacity to adjudicate the proceeding without the participation of its individual members. The interests of both Sierra Club and HRFA include the protection of water resources. Affidavit of Roger Downs, dated July 7, 2015 ("Downs Aff.") ¶¶ 5-6; Affidavit of Gilbert Hawkins, dated July 7, 2015 ("Hawkins Aff.") ¶¶ 6-8. Thus, both Petitioners' corporate interests are directly related to the subject matter of this proceeding, as both allege, *inter alia,* that DEC impermissibly bypassed its duty to undertake an environmental impact review of the consequences of permitting one of the State's largest water withdrawals, despite SEQRA's clear mandate to do so.

While Respondent Con Ed does not assert that Petitioners have not demonstrated that the interests they assert in this proceeding are germane to their purposes, the affidavits of both Roger Downs and Gilbert Hawkins clearly indicate the long standing interests and activities of both Sierra Club and HRFA in protecting New York's waters and the natural resources dependent thereon. Since Respondent Con Ed has not specifically challenged whether or not the Petitioners organizations' interests are germane to its purposes so as to satisfy the court that they are appropriate representatives of those interests, it is unnecessary to point to the specific paragraphs

of each affidavit indicating the long standing interests, as well as activities, of the Petitioners. These are sufficiently particularized in those affidavits, and just as the Court of Appeals noted in a different context that the National Organization for Women, was "a bona fide and nationally recognized organization dedicated to eliminating discriminatory practices against women" *National Organization for Women v. State Division of Human Rights*, 34 N.Y.2d 416, 419 (1974) so too Sierra Club, the oldest and largest environmental organization in the country, and HRFA, which was specifically formed to protect the aquatic resources of the Hudson River watershed, are recognized organizations dedicated to the preservation of the environment and water resources.

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

Mr. Hawkins states in his affidavit that he is an active member of both HRFA and the Sierra Club. Indeed, he is currently President of HRFA, and has served as Environmental Director and as a member of the Board of Directors of HRFA from 1996 to the present. Hawkins' Affidavit ¶ 9. Mr. Hawkins states that he is also a member of the Sierra Club, and has been a member of the executive committee for the Hudson-Midlands New Jersey Group since 2005. *Id*. ¶ 11. Besides being an active member of the two organizations, Mr. Hawkins is an active fisherman who fishes "whenever I can. Lately, that has been about once a month." *Id*. ¶ 12. While Mr. Hawkins indicates that he fishes in the Hudson River watershed, it is clear from his

affidavit, when taken as a whole, that he fishes in the Hudson River Harbor Estuary, where he lives and which he claims is adversely affected by the fish kill caused by the Con Ed intake.

Mr. Hawkins says that as President of HRFA he attends each general membership meeting of the organization, which is attended by approximately 75 to 100 members, where the members give reports on the fishing conditions in New York Harbor and the East River. *Id*. ¶ 20. Therefore, he is personally familiar with the activities of the members of HRFA concerning their fishing habits, and states that during the spring and fall fish migration seasons, HRFA members fish in the New York harbor estuary every day. *Id*. ¶ 17.

Finally, he also says, to his own knowledge, that the power plant fish kills have been a concern of HRFA for many years, and that the HRFA was instrumental in stopping the mass slaughter of stripe bass by the first Indian Point Nuclear Power Plant, and participated in an administrative challenge to the fish kills caused by the once through cooling system, the same cooling system at Con Ed, at the Danskammer Power Plant on the Hudson River in 2006. *Id*. ¶¶ 6-8.

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

For these reasons, the affidavit submitted by Mr. Hawkins clearly shows that he complies with the in-fact-injury requirement for standing, and that his injury as a fisherman is different than the public at large. Obviously, not all members of the public are fishermen, and therefore, his injury is different from the public at large. Moreover, it is clear as a fisherman, he uses and

enjoys the New York estuary, New York Harbor the Hudson River and the East River more than the public at large, and therefore, meets the standards as espoused in *Save the Pine Bush*. As previously indicated, the Court of Appeals in *Save the Pine Bush* quoted with approval the statement in *Lujan v Defenders of Wildlife* that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing." 504 US at 562-563. Mr. Hawkins "use" or observation of an animal species, in this case fish, meets the *Save the Pine Bush* standard for standing.

Respondent Con Ed raises the creative, although disingenuous argument that since its East River facility has withdrawn water from the East River since the 1960s, and since their newly issued water withdrawal permit allows them to continue withdrawing water in the same amount and in the same manner as previously, therefore, no one could meet the injury-in-fact standard since Con Ed is doing nothing differently than it has done in the past. Leaving aside for the moment the consistent holdings of the New York courts that standing requirements should not be so restrictive as to not allow anyone standing to challenge an administrative action, which would be the result of Con Ed's position on this point, the fact is that Con Ed's argument ignores the intervening passage of the Water Resources Protection Act of 2011, amending ECL, Article 15, Title 15, 15-1501 *et. seq*. (hereinafter the "WRL"). This 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. Among the requirements of the law are that proposed withdrawals "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 . . . [and] in a manner that incorporates environmentally sound and economically feasible water conservation measures. ECL § 15-1503(2) (f) and (g).

As discussed in Petitioners' initial memorandum of law, the new law was intended and does provide for a new regimen of permitting of large industrial water users like Con Ed, and requires the DEC to assure the conservation measures indicated that will preserve New York State's supply of water for all residents of the state, as well as the natural resources dependent upon that water. To take the position that there could be no injury in fact because Con Ed withdrew the same amount of water previously that is allowed in its initial permit, without any environmental review under SEQRA, is in fact the gravamen of Petitioners' claims in this proceeding, since Petitioners believe that a thorough environmental review as required by SEQRA, would in fact provide alternatives and mitigating measures that SEQRA would require to assure the conservation goals of WRL.

Mr. Hawkins' and Mr. Downs' affidavits emphasize the informational injury they would suffer as a members of Sierra Club and HRFA if DEC's decision to forgo environmental impact review for Con Ed's water withdrawal permit is allowed to stand.

Mr. Hawkins' and Mr. Downs' informational injury is within the zone of interests protected by WRL because the water withdrawal 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),

specifically including ECL Title 5 of Article 15, which includes WRL. ECL § 70-0107(3)(a). 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). By exempting its decision on the Con Ed water withdrawal permit from SEQRA, DEC has rendered meaningless the comments on the proposed decision filed on behalf of Petitioner Sierra Club by Mr. Downs, as there was no possibility DEC could, under its interpretation of the "initial permit" provision of WRL, find their or anyone else's public comments warrant "the imposition of significant conditions" on the proposed permit. *Id*. DEC's decision to preclude the possibility of a public hearing by deeming the Con Ed water withdrawal permit decision non-discretionary therefore creates an injury to Mr. Downs' and Sierra Club's interest in participating in the DEC permitting decision.

Petitioners' informational injury is also 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), available at http://www.dec.ny.gov/hearings/10932.html. Importantly, the Court of Appeals has stated that "the Legislature's clear intent [is] that an EIS be used as an informational tool to aid in the planning process." *Village of Atlantic Beach v. Gavalas*, 81 N.Y.2d 322, 326 (1993). Thus where, as here, DEC elects not to even consider whether an EIS is necessary, as Petitioners contend DEC was required to do so, 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 is no question that billions of fish and millions of aquatic species are killed because of the once-through cooling

system used at the Con Ed plant. Moreover, as indicated in Petitioners' Initial MOL, 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 beyond what has been required under Con Ed's SPDES permit.

Respondent Con Ed alleges that a litigant cannot establish standing by claiming injury from not having the information an EIS would provide, which they assert "is an injury common to everyone," and that "every person living on the planet would have standing to challenge an agency decision not to require an EIS, because as a result of that determination no EIS is prepared, and the information that would have been included in an EIS is not published." But these assertions distort Petitioners' claim regarding informational injury, which is an injury to those adversely affected by the issuance of the permit who are deprived by DEC's failure to follow statutorily mandated procedures. As in the *Better Long Island* case, "Petitioners have asserted a concrete interest in the matter the agency is regulating, and a concrete injury from the agency's failure to follow procedure." 23 N.Y.3d at 7. Moreover, "Petitioners' allegations are sufficient to satisfy the requirements that they have an actual stake in the litigation and suffer a harm that is different from that of the public at large." *Id*. at 7-8, quoting *Lujan*, 504 U.S. at 572-573 n 7, 8, "an individual can enforce procedural rights — which have been recognized as 'special' — 'so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing'." *Id*.

The allegations of the petitioners in *Better Long Island* were very similar to the allegations of Petitioners in this case regarding informational injury:

> Petitioners further allege that the violation of these procedural statutes deprived them of an adequate "airing" of the relevant issues and impacts of the proposed amendments, as well as an accurate

> assessment of the projected costs involved. The asserted statutory provisions set forth certain procedural steps to be followed when promulgating rules or regulations.

Id. The court found that these "alleged violations, including the deprivation of an opportunity to be heard, constitute injuries to petitioners within the zone of interests sought to be protected by the statutes." And that "[m]ost significantly, to deny petitioners standing in this case would have the effect of insulating these amendments from timely procedural challenge — a result that is contrary to the public interest. *Id*., citing *Har Enterprises*, 74 N.Y.2d at 529. The court said, "[g]iven the compressed four-month statute of limitations," to deny standing "would be erecting an 'impenetrable barrier' to any review of this facet of the administrative action . . . . Therefore, we find that petitioners have adequately alleged standing to contest the procedural claims. . . . The above-referenced factors are adequate to satisfy the jurisprudential concerns underlying the standing doctrine." *Id*.

Finally, this Court should find petitioners have standing because the proper administration of the state's new water withdrawal law is a matter of statewide public concern. "[T]he public interest would be subverted if no one were found to have standing to challenge the [agency's action]," . . . [u]nder the totality of the circumstances, even if the petitioners may not have established direct harm different from that of the public at large, they have properly pled standing herein." *Oyster Bay Associates Limited Partnership v. Town of Oyster Bay,* 2013 NY Slip Op. 52292(U), (Suffolk Co. 2013), citing *Committee to Preserve Brighton Beach v. Planning Commission of the City of New York*, 259 A.D.2d 26 (1st Dep't 1999); *State Communities Aid Assn. v. Regan*, 112 A.D.2d 681 (3rd Dep't 1985); *Albert Elia Bldg. Co. v. New York State Urban Dev. Corp*., 54 A.D.2d 337 (4th Dep't 1976); *Roosevelt Island Residents Assn. v. Roosevelt Island Operating Corp.*, 7 Misc.3d 1029(A), (New York Cty 2005). Accord *Better Long Island*, *supra*.

The holding in *Oyster Bay* is consistent with the Court of Appeals holding in a case involving citizen taxpayer standing pursuant to the state Finance Law:

> Actions of this type can serve as a means for citizens to ensure the continued vitality of the constraints on power that lie at the heart of our constitutional scheme (cf. *Matter of Dairylea Coop. v Walkley*, 38 NY2d 6, 10 [1975] Committee for an Effective Judiciary v State, 209 Mont 105, 112-113, 679 P2d 1223, 1227 [1984*]; State ex rel. Howard v Oklahoma Corp. Commn*., 614 P2d 45, 52 [Okla 1980]). Thus, where a denial of standing would pose "in effect ... an impenetrable barrier to any judicial scrutiny of legislative action," our duty is to open rather than close the door to the courthouse [citations omitted].

Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 815 (2003). Accord *Better Long Island*.

For the foregoing reasons, Petitioner organizations have standing to pursue this proceeding.

IV. Petitioners Have Demonstrated that DEC's Actions in Issuing a Water Withdrawal Permit to Con Ed Violate the Applicable Statutes and Its Public Trust Responsibilities

For the reasons set forth in the verified petition and in Petitioners' initial memorandum of law, Petitioners have demonstrated that DEC's actions in issuing a water withdrawal permit to Con Ed violated the applicable statutes and its public trust responsibilities. None of the legal arguments and facts submitted in Respondents' memoranda of law and affidavits refute Petitioners' claims.

Respondents point to a decision in another case filed by Petitioners challenging DEC's procedures in issuing water withdrawal permits, *Sierra Club v. Martens* (Sup. Ct. Queens Cty, Oct. 1, 2014), Index No. 2949/14, McDonald, J. Two decisions were issued in the case. The decision dated October 1, 2014 is attached as Exhibit 1 to Laura Heslin's affirmation dated August 7, 2015. The second decision dated October 2, 2014 is attached as Exhibit A to Rachel

Treichler's accompanying affirmation. In *Martens*, Petitioners challenged the first water withdrawal permit issued by DEC under the new law, a permit issued to TransCanada for its Ravenswood Generating Station in Queens to take over 1.5 billion gallons of water per day from the East River. In that case, Petitioners made essentially the same claims as are made in this case. The court's October 2, 2014, decision ruled that Petitioners had standing and granted TransCanada's motion to dismiss. Neither of the court's decisions addressed Petitioners' claim that issuance of a water withdrawal permit to TransCanada violated the requirements of the WRL or their claim that it violated DEC's public trust responsibilities. The court ruled against Petitioners on their SEQRA and Coastal Zone law claims. These rulings misconstrued the case law on Type II actions under SEQRA, as discussed below. For the reasons discussed, reliance on the *Martens* court ruling on Petitioner's SEQRA claim is not warranted.

Petitioners have appealed the *Martens* decisions to the Second Department, perfecting their appeal on July 27, 2015, Docket No. 2015-02317.

A. The Judicial Decisions on Title II Designations under SEQRA Do Not Support a Title II Designation for an "Initial" Water Withdrawal Permit

In reaching its determination that issuance of the TransCanada permit was a Type II action under the exemption for ministerial actions contained in 6 NYCRR § 617.5(c)(19), the *Martens* court relied on several cases interpreting the scope of the exemption. The court noted that, in determining whether an act is merely ministerial in nature, "the pivotal inquiry . . . is whether the information contained in an EIS may form the basis for a decision whether or not to undertake or approve such action . . . ." citing *Village of Atlantic Beach v. Gavalas*, 81 N.Y.2d 322 (1993); *Filmways Communications v. Douglas*, 106 A.D.2d 185 (4th Dep't 1985), *aff'd*, 65 N.Y.2d 878; *Island Park, LLC v. New York State Dep't of Transp.*, 61 A.D.3d 1023 (3rd Dep't 2009), and

Ziemba v. City of Troy, 37 A.D.3d 68 (3rd Dep't 2006) *lv. app. den.*, 8 N.Y.3d 806 (2007). However, these cases do not support the ruling of the *Martens* court. None of the cases cited by the court present circumstances comparable to issuance of a water withdrawal permit. In *Gavalas*, the Court of Appeals determined that issuance of a building permit did not constitute an agency "action" within the purview of SEQRA. The court said that that the village ordinance 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. In *Filmways*, the Court of Appeals held that in applying for the building permit, petitioner was not required to comply with SEQRA. The court said, "the act of the building inspector in granting or denying the building permit is ministerial; it does not involve exercise of discretion. There is no provision in the building code that gives the building inspector a latitude of choice. In determining whether to grant or deny a building permit, he must adhere to the definite standards of the code and if the applicant meets these standards, he must issue the permit." 106 A.D.2d at 186. . In *Island Park*, 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." 61 A.D.3d at 1028. In *Ziemba*, the Third Department held that the discretion to be exercised in issuing a demolition permit "is limited to a narrow set of criteria that is unrelated to the environmental concerns that would be raised in an EIS." 37 A.D.3d at 74

The water withdrawal permitting decisions made by DEC in the *Martens* case and in the present case, in contrast, are explicitly mandated by the water withdrawal permitting statute to address the environmental concerns that may be raised in an EIS, and thus, under the rule of the above cases, DEC's issuance of an "initial" water withdrawal permit does not fall within the ministerial exemption under SEQRA. 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. The information contained in an EIS is exactly the type of information that would inform the determinations required to be made in issuing a water withdrawal permit and in determining the conditions to include in the permit. For this reason, issuance of a water withdrawal permit is not properly categorized as a Type II action under the decisions cited by the *Martens* court.

B. Deference to DEC's Interpretation of its Discretion under the WRL is Not Appropriate

Because DEC's interpretation of its discretion in issuing "initial" water withdrawal permits runs counter to the clear wording of ECL § 15-1501.9, which states that "initial" permits are to be subject to "appropriate terms and conditions," judicial deference to DEC's interpretation is not appropriate. The rules for when a court should defer to an agency interpretation of a statute are set forth in *Raritan Development Corp. v. Silva,* 91 N.Y.2d 98 (1997):

> Where "the question is one of pure legal interpretation of statutory terms, deference to the [agency] is not required" . . . . On the other hand, when applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference. . . . Even in those situations, however, a determination by the agency that "runs counter to the clear wording of a statutory provision" is given little weight. . . .

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

> The statutory language could not be clearer. As noted above, a cellar is defined within the Zoning Resolution in terms of its physical location in a building. 'Floor area' includes dwelling spaces when not specifically excluded and 'cellar space,' without further qualification, is expressly excluded from FAR calculations. Thus, FAR calculations should not include cellars regardless of the intended use of the space. BSA's interpretation conflicts with the plain statutory language and may not be sustained.

Id. at 103.

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

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

Id. at 669, citations omitted.

The cases cited by the *Martens* court in support of its decision to defer to DEC's interpretation of its discretion are cases in which the courts relied on agency decisions involving special expertise in a particular field. *LMK Psychological Service. v. State Farm Mut. Auto. Ins. Co*., 12 N.Y.3d 217 (2009); *Samiento v. World Yacht Inc*., 10 N.Y.3d 70 (2008); *Nestle Waters North America, Inc. v. City of New York*, 121 A.D.3d 124 (1st Dep't 2014). No special expertise is involved in interpreting the application of Section 15-1501.9. Deference to DEC's interpretation is not appropriate in this case. This is particularly true when DEC has completely reversed its interpretation since 2012 when it promulgated the water withdrawal regulations, as demonstrated in Down Aff., Ex. E and as discussed in Petitioners' initial memorandum of law. Even in the special circumstances where the issue involves special agency expertise, deference is not appropriate when the agency's interpretation is "irrational or unreasonable" or "runs counter to the clear wording of a statutory provision," as the Court of Appeals noted in *LMK*, 12 N.Y.3d at 223.

DEC's claim that it has no discretion in issuing initial water withdrawal permits based on the prescription in ECL § 15-1501(9) that it "*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. . . . [emphasis added]," is inconsistent with DEC's longstanding interpretation of the oil and gas well permitting statute, which contains similar phrasing. The statutory mandate contained in ECL § 23-0503(2) governing the permitting of oil and gas wells provides that DEC "*shall issue* a permit to drill, deepen, plug back or convert a well, if the proposed spacing unit submitted to the department pursuant to paragraph a of subdivision 2 of section 23-0501 of this title conforms to statewide spacing . . . [emphasis added]." Far from claiming that issuance of an oil or gas well drilling

permit is a Type II action under SEQRA, DEC prepared an extensive generic EIS for oil and gas drilling permits in 1992, [1] and just completed a final supplemental generic EIS for hydrofracking, a technique not covered in the original GEIS.[2] DEC also requires that each applicant for a gas or oil well drilling permit provide an Environmental Assessment Form (EAF) for each well permit sought.[3] DEC's position with respect to interpretation of the water withdrawal permitting statute is in surprising contrast to its interpretation of very similar language in the oil and gas well permitting statute. This is another reason why deference should not be given to DEC's claim of a SEQRA exemption for "initial" water withdrawal permitting.

In addition, it is "a well-settled principle of statutory construction that a statute or ordinance must be construed as a whole and that its various sections must be considered together and with reference to each other." *People v. Mobil Oil Corp*., 48 N.Y.2d 192, 199 (1979); *Abood v. Hospital Ambulance Serv*., 30 N.Y.2d 295, 300 (1972); *Friedman v. Conn. Gen. Life Ins.*, 9 N.Y.3d 105, 115 (2007) ("A court must consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent . . . and, where possible, should 'harmonize [all parts of a statute] with each other ... and [give] effect and meaning ... to the entire statute and every part and word thereof'.")

Here, the purpose of Article 15 of the ECL is expansive, including numerous policies to protect, conserve and develop New York's water resources, including a strong policy promoting regulation of activities that adversely affect those resources. ECL § 15-0103. As noted above, a major impetus for passage of the 2011 amendments to the WRL was to implement the

[1] http://www.dec.ny.gov/energy/45912.html.

[2] http://www.dec.ny.gov/press/101706.html.

[3] http://www.dec.ny.gov/energy/1777.html.

requirements of the Great Lakes-St. Lawrence River Basin Water Resources Compact (ECL § 21-1001). See Assembly Sponsor's Memorandum in Support (R. 339). 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 withdrawals must "incorporate environmentally sounds 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 resources in the source watershed." ECL § 21-1001, Section 4.

If the exemption urged by Respondents and adopted by the *Martens* court were to be accepted, it would overturn the new water withdrawal law. The vast majority of the users subject to the new permitting requirements are existing users. If existing users are exempted from the substantive requirements of the new law, the law is essentially meaningless. This is contrary to the legislative history which shows that the purpose of the law is to strengthen the regulation of water withdrawals throughout New York. Such an interpretation applied to existing users in the Great Lakes watershed would be contrary to New York's responsibilities under the Great Lakes Compact.

For these reasons, deference to DEC's interpretation that existing users are not subject to the substantive provisions of the new water permitting law and that it has no discretion in issuing "initial" permits to existing users is not appropriate. There is no basis therefore for finding that DEC's issuance of the TransCanada water withdrawal permit is a Type II action under SEQRA, and the *Martens* court erred in so ruling.

CONCLUSION

For the foregoing reasons, Respondent Con Ed's motion to dismiss and Respondent Martens affirmative defenses should be denied and judgment should be rendered for Petitioners.

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Respectfully submitted,

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