To be Argued by:
RICHARD J. LIPPES
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Second Department

In the Matter of the Application of

Docket No.: 2020-02580

SIERRA CLUB and HUDSON RIVER FISHERMEN'S ASSOCIATION, NEW JERSEY CHAPTER INC.,

Petitioners-Appellants,

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

– against –

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

Respondents-Respondents.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

LIPPES & LIPPES
Attorneys for Petitioners-Appellants
1109 Delaware Avenue
Buffalo, New York 14209
(716) 884-4800
rlippes@lippeslaw.com

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REPLY ARGUMENT

This reply brief for the Petitioners-Appellants Sierra Club and Hudson River Fishermen's Association ("Petitioners") is submitted in reply to issues raised by Respondent-Respondent New York State Department of Environmental Conservation ("DEC") and Respondent-Respondent Helix Ravenswood LLC (hereinafter cited as "Helix") in their briefs in response. This reply brief will clarify and support the arguments made in Petitioners' initial brief as they relate to the arguments made by Respondents in their briefs. Therefore, as will be seen, arguments of deference or discretion do not excuse DEC's failure to fulfill its legal obligations under the Water Resources Protection Act of 2011, Environmental Conservation Law, (hereinafter cited as "ECL") Article 15, Title 15 ("WRPA") and the New York State Environmental Quality Review Act, ECL Article 8, ("SEQRA").

I. DEC FAILED TO COMPLY WITH WRPA

DEC's action in issuing a permit to Helix to withdraw over 1.5 billion gallons of water per day from the East River in the New York harbor estuary for operation of its Ravenswood Generating Station in Long Island City on February 20, 2019 (hereinafter cited as the "2019 Ravenswood WW Permit") is not in compliance with the substantive and procedural requirements of WRPA.

A. DEC Does Not Have Discretion Under WRPA to Use a Baseline of Current Operations or Existing Conditions

DEC's assertion that it has discretion to use current operations or existing conditions i.e., existing withdrawals, as the baseline against which to evaluate environmental impacts under ECL 15-1503.2, is an error of law. Nothing in the wording of ECL 15-1503.2 supports restricting the scope of the required determinations in this fashion. For example the requirement in ECL 15-1503.2(f), that DEC determine whether "the proposed water withdrawal will be implemented in a manner to ensure it will result in no significant individual or cumulative adverse impacts on the quantity or quality of the water source and water dependent natural resources" does not provide that this determination is to be made with reference to a baseline of existing operations and it is inconsistent with the clear wording of this section to introduce such a requirement. There is no reference to utilizing a baseline of current conditions in WRPA. In the federal Endangered Species Act regulations, where "environmental baseline" is defined, it is defined to include "the past and present impacts of all Federal, State, or private actions and other human activities in the action area," and is not limited to current conditions. 50 CFR 402.02.

As noted in Petitioners' initial brief, DEC's interpretation effectively exempts existing users from the requirements of WRPA. ECL 15-1501.9 supports Petitioners' arguments. This section mandates that permits issued to existing users

are to contain "appropriate terms and conditions as required under this article," in obvious reference to the requirements of ECL 15-1503.2 and ECL 15-1503.4. The reference to appropriate terms and conditions in ECL 15-1501.9 makes clear that the mandate contained in that section as to the size of the permit to be issued does not restrict what conditions may be included in a permit issued to an existing user. ECL 15-1501.9 guarantees a permit to an existing user in the amount of its reported withdrawal capacity, but makes clear that those withdrawals are subject to the substantive requirements of WRPA that water conservation measures tailored to the operations of the user must be implemented.

The discretion DEC holds to interpret the determinations required by ECL 15-1503.2 does not allow DEC to waive the statutory requirements, and its attempt to do so is an error of law.

B. DEC Does Not Have Discretion under WRPA to Substitute Out-of-Date BTA Determinations for a Current Impact Review

It is also an error of law for DEC to claim that it is entitled to substitute BTA determinations made in 2006 and 2012 for the Ravenswood SPDES Permit for a current review of adverse environmental impacts of Helix's water withdrawal permit application under ECL 15-1503.2. DEC claims that in making this argument, Petitioners are trying to litigate the Ravenswood SPDES permit, DEC Br. 30, n. 8. On the contrary, it is DEC that is invoking the old SPDES assessments instead of evaluating Helix's water withdrawal permit application in

coordination with the renewal of the Ravenswood SPDES permit. DEC's reliance on old SPDES determinations is contrary to the requirements of Section 601.7(f) of the WRPA regulations. Section 601.7(f) provides 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*." 6 NYCRR 601.7(f) [emphasis added]. This section instructs DEC to conduct a coordinated review of an initial WRPA permit application and the applicant's SPDES permit renewal. It does not authorize DEC to rely on old BTA determinations made under an out-of-date SPDES permit.[1] A. 159. DEC's online permit application database lists the SPDES renewal application filed by Helix as "Suspended Indefinitely."[2] This indicates that DEC avoided compliance with Section 601.7(f) by postponing the renewal of the Ravenswood SPDES permit until after the 2019 Ravenswood WW Permit was issued.

[1] The most recent Ravenswood SPDES permit included in the administrative record in the proceeding below states that it expires on 10/31/2017. A. 159.

[2] See https://www.dec.ny.gov/cfmx/extapps/envapps/index.cfm?view=detail&applid=1113616 .

C. DEC Did Not Make the Determinations Required by WRPA before Setting the Permit Terms and Conditions

Contrary to DEC's contention that Petitioners did not allege procedural violations of WRPA in the verified petition,[3] the petition alleges detailed procedural violations of WRPA, A. 25-28, ¶¶ 38-49, culminating in the allegation that "DEC's determination to issue a permit with the same terms and conditions as the permit invalidated in *Sierra Club v. Martens*, 158 A.D.3d 169 (2nd Dep't 2018) was made in violation of lawful procedures, ..." A. 28, ¶ 49. In particular, the petition alleges that "[t]he fact that Respondent DEC reissued virtually the same permit invalidated by the appeals court in 2018, a permit for which Respondent DEC conceded it had not made the determinations required by ECL 15-1503(2), is clear evidence that, whatever determinations Respondent DEC may or may not have made with respect to the issuance of the 2019 Ravenswood WW Permit, those determinations were not used to set appropriate terms and conditions for the 2019 WW Permit as required by ECL 15-1503(4)." A. 27, ¶ 45. As Petitioners' stated in their initial brief, "DEC cannot use the same generic conditions contained in the 2013 permit and claim that it made WRPA determinations tailored to Ravenswood." Pet. Br. 23.

[3] DEC Brief, p. 34, n. 11.

In its brief, DEC appears to argue that, because it complied with the requirements of the Uniform Procedures regulations, 6 NYCRR Part 621, in issuing the 2019 Ravenswood WW Permit, it is shielded from the procedural requirements of WRPA.[4] Petitioners acknowledge that the Uniform Procedures regulations apply to the issuance of water withdrawal permits and that the regulations state that "Notwithstanding any inconsistent provisions of the Environmental Conservation Law (ECL) or any regulations of the department, the provisions established in Article 70 of this Part shall govern the administration of applications for permits authorized by the following sections of the ECL." 6 NYCRR 621.1. The procedural requirements of ECL 15-1503.4, however, are not inconsistent with the requirements of the Uniform Procedures regulations and must be given effect. Although Section 621.7(b)(7) of the regulations, which requires that draft permit language be announced in the public notice of a federally-mandated permit, does not apply to water withdrawal permits, the fact that DEC is not required by the regulations to announce draft permit language when it announces a water withdrawal permit application in the ENB, does not shield DEC from the requirement of ECL 15-1503.4 that the determinations required by ECL 15-1503.2 be used in setting the terms and conditions of a water withdrawal

[4] DEC Br. 33-34.

permit. Thus the determinations should have been made before a DEC Permit Administrator advised one of Petitioners' attorneys in October 2019, that DEC had decided to issue a permit with the same terms and conditions as the permit issued in 2013. A. 433. The record clearly demonstrates that this was not the case. The belated assertions in DEC's response to public comments and in the affidavits provided by a DEC engineer during the trial court proceeding do not establish that the determinations were made before the permit conditions were set. Had DEC used its discretion to make tailored WRPA determinations in 2019, it would have used those determinations to set appropriate terms and conditions tailored to operations at Ravenswood in the 2019 permit. The fact that DEC merely reissued the 2013 permit is a strong indication that it did not make the required determinations in 2019.

D. Judicial Deference to DEC's Interpretation of WRPA Is Not Appropriate because the Statutory Language Is Clear

The cases cited by DEC and Helix in support of their contention that DEC has discretion in interpreting the provisions of WRPA and that deference is due to DEC's interpretations are inapposite because those cases do not address circumstances, such as the present case, in which the of statutory language is clear. Moreover, neither DEC or Helix address the precedents cited by Petitioners in their initial brief holding that judicial deference to an agency's statutory interpretation is not appropriate where the question the agency's interpretation conflicts with the

plain statutory language. *Raritan Development Corp. v. Silva*, 91 N.Y.2d 98, 102-103 (1997), *Matter of New York State Superfund Coalition v. New York State Dept. of Envtl. Cons.*, 18 N.Y.3d 289, 296 (2011), *Matter of Brown v. New York State Racing and Wagering Board*, 60 A.D.3d 107, 116 (2nd Dep't 2009).

II. DEC FAILED TO COMPLY WITH SEQRA

DEC's action in determining that there would be no significant impact from issuing a permit to Helix to withdraw over 1.5 billion gallons of water per day from the East River in the New York harbor estuary for operation of its Ravenswood Generating Station in Long Island City and in issuing an amended negative declaration on February 14, 2019, A. 556-557, is not in compliance with the substantive requirements of SEQRA.

A. DEC Does Not Have Discretion under SEQRA to Use a Baseline of Current Operations or Existing Conditions

As explained in Petitioners' initial brief, DEC's reliance on a baseline of current operations in making its determination of no significant impact for issuance of the 2019 Ravenswood WW Permit is not consistent with the clear wording of 6 NYCRR 617.7(c)(1)(ii) of the SEQRA regulations, which does not authorize consideration of changes in evaluating impacts on natural resources. Notwithstanding the clear wording of Section 617.7(c)(1)(ii) Respondents point to several cases that various cases that they claim authorize the use of existing

condition baselines in evaluating environmental impacts. The cases relied upon by Respondents in support of their baseline arguments, *Lazard Realty, Inc. v. New York State Urban Dev. Corp.*, 142 Misc.2d 463 (NY County 1989), *American Rivers v. FERC*, 201 F.3d 1186 (9th Cir. 1999), and *Matter of Riverkeeper, Inc. v. Johnson*, 52 A.D.3d 1072 (3rd Dep't 2008) and *Matter of Hells Kitchen Neighborhood Assn. v. City of New York*, 81 A.D.3d 460 (1st Dep't 2011) do not support using a baseline when that would be contrary to the applicable statutory or regulatory provision.

Furthermore, Respondents fail to address an important new case, *American Rivers v. FERC*, 895 F.3d 32 (DC Cir. 2018) addressing the application of baselines in evaluating natural resource impacts. In that case, involving a challenge to a hydropower relicensing proceeding in Georgia, the court stated that the Federal Energy Regulatory Commission ("FERC") and the US Fish and Wildlife Service ("USFWS") "gave scant attention to those past actions that had led to and were perpetuating the Coosa River's heavily damaged and fragile ecosystem." *Id.* at 55. The court agreed with the petitioner environmental groups that the "failure to consider the damage already wrought by the construction of dams" along the Coosa River failed to meet the requirements under the Endangered Species Act ("ESA"), 16 U.S.C. 1531 et seq. or the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321 et seq. *Id.* First, the court

rejected the USFWS' biological opinion (BiOp, a requirement under the ESA) because the agency's analysis excluded historic impacts and thereby departed irrationally from the agency's own ESA handbook and regulations. Next the court rejected FERC's NEPA analysis, which relied heavily on the BiOp and was "fatally infected" by the failure to consider the damage already wrought by the construction of dams. Finally, the court held that the analytical failures under NEPA and the ESA also violated FERC's obligations under the Federal Power Act, 16 U.S.C. 791-828c. The court therefore remanded the relicensing proceeding back to FERC and USFWS to perform new analyses. The DC Circuit's decision marks a break from case law in other circuits, as well as the DC Circuit itself, that had found it acceptable to use the existing conditions as the baseline in an environmental analysis and represents an important rethinking of baseline concepts as natural resources become more and more degraded.

Because DEC's interpretation of the permissibility of a baseline under 6 NYCRR 617.7(c)(1)(ii), its SEQRA review of the 2019 Ravenswood WW Permit was affected by an error of law and the 2019 Ravenswood WW Permit must be annulled. See *Purchase Envtl. Protective Ass'n, v. Strati*, 163 A.D.2d 596, 597 (2nd Dep't 1990) ("[t]he Planning Board's determination to issue the permit to conduct regulated activities on the wetlands was based upon an erroneous interpretation of the law and thus, it must be annulled.")

B. Judicial Deference to DEC's Interpretation of the Clear Wording of the SEQRA Regulations Is Not Appropriate

The SEQRA regulations require that DEC take a hard look at potential impacts and nothing in the clear wording of Section 617.7(c)(1)(ii) authorizes DEC to set a baseline of existing operations for examining impacts on natural resources. In these circumstances, for the reasons discussed above, judicial deference to DEC's interpretation of the scope of Section 617.7(c)(1)(ii) is not appropriate.

C. DEC's Decision to Substitute Out-of-Date BTA Determinations for a Current Impact Review under SEQRA Was Not Reasonable

The "hard look" standard that applies to judicial review of substantive agency actions under SEQRA is deferential to the agency's decision-making processes, but it does not mandate the approval of unreasonable actions. See e.g., *Matter of Chemical Manufacturers Assn v. Jorling*, 85 N.Y.2d 382, 396 (1995) (a Court's role in reviewing an agency action "is not to determine if the agency action was correct or to substitute its judgment for that of the agency, but rather to determine if the action taken by the agency was reasonable"); *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 416 (1986) ("an agency's substantive obligations under SEQRA must be viewed in light of a rule of reason"); *Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 (1974) ("Arbitrary action is without sound basis in reason and is generally taken without regard to the facts").

The "hard look" standard is not met by DEC's reliance on the BTA measures contained in the 2006 and 2012 Ravenswood SPDES permits for its determination that "that there are no significant cumulative adverse effects from issuance of the [2019 Ravenswood WW Permit]." A. 556. A reasonable evaluation of the impacts of the Ravenswood withdrawals would have updated those earlier determinations with an evaluation of current fish impingement and entrainment impacts, current alternative technologies that might further minimize fish entrainment and impingement such as closed cycle cooling, and an evaluation of the current cumulative impacts of the Ravenswood cooling water intake system and the other water withdrawals taken from the East River and the New York harbor estuary. DEC's failure to evaluate current impacts at the time that it made its SEQRA determination for the 2019 Ravenswood WW Permit demonstrates that it did not take a "hard look" at the potential impacts of the permit in accordance with the requirements of SEQRA.

A particular example of DEC's unreasonable failure to evaluate current impacts is its failure to evaluate the "highly anomalous" fish impingement and entrainment data for the Ravenswood plant identified in the comments filed on the Ravenswood WW permit application by Petitioner Sierra Club. Sierra Club presented a table of impingement and entrainment data for the five largest power plants operating in New York harbor taken from the plants' biological monitoring

reports. Sierra Club noted the extremely low entrainment and impingement data for Ravenswood, the largest power plant operating in the estuary," A. 517-518, and stated that the Ravenswood data was "highly anomalous" compared to the figures for the other plants in the estuary, "particularly when the size of Ravenswood's withdrawals are taken into account." A. 518. Sierra Club stated that "This anomaly needs to be explained." *Id.* DEC did not investigate the anomaly identified by Sierra Club. Instead, it accepted the Ravenswood data without question, and cheerily claimed that "Pre-2007 studies, as referenced in your comment, demonstrated that the Ravenswood Generating Station only accounted for approximately 2 to 3 percent of entrainment / impingement resulting from five New York Harbor power plants prior to the installation of any operational controls or technologies." A. 561. On the basis of the data showing "the comparatively small percentage of the facility's contribution to the overall levels of impacts to the river, and the further reduction of such impacts resulting from the SPDES permit BTA provisions," DEC concluded that "the environmental impacts on aquatic organisms from the permitting of existing operations at the facility are not individually or cumulatively significant under ECL § 15-1503.2(f) or 6 NYCRR 617.7." In the *American Rivers* case, *supra*, the DC Circuit found that this sort of cavalier acceptance by the regulatory agency of the power company's data was "fishy" and "certainly unreasoned." 895 F. 3d at 50. The court stated:

> That analysis is rife with flaws. First, the Commission's only cited evidence for the amount of fish deaths was a more-than-decade-old-survey of fish entrainment studies and estimates provided by the license applicant itself, Alabama Power. No updated information was collected; no field studies were conducted. Nor was any independent verification of Alabama Power's estimates undertaken. Assuming Alabama Power's good faith, its estimates were entirely unmoored from any empirical, scientific, or otherwise verifiable study or source. The Commission also failed to take even the preliminary step of attempting to acquire recent or site-specific data against which Alabama Power's estimates *could* have been compared. The Commission's acceptance, hook, line, and sinker, of Alabama Power's outdated estimates, without any interrogation or verification of those numbers is, in a word, fishy. And it is certainly unreasoned.

Id. For similar reasons, DEC's acceptance of the Ravenswood data was also not reasonable. As the Court of Appeals stated in *Akpan v. Koch*, 75 N.Y.2d 561 (1990), "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." *Id.* at 571. DEC avoided examining the pertinent environmental factors in this case with its incorrect baseline arguments and its failure to take a "hard look" at current impacts of the Ravenswood withdrawals, and its SEQRA determination of no significant impact must be annulled.

III. CONCLUSION

For the foregoing reasons, Petitioners Sierra Club and Hudson River Fishermen's Association respectfully request that this Court reverse the trial court's decision and annul the 2019 Ravenswood WW Permit.

DATED: Buffalo, New York
December 21, 2020

Respectfully submitted,

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

Attorney for Petitioners/Appellants

Rachel Treichler
Jonathan L. Geballe
of Counsel

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Dated: December 21, 2020

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On December 21, 2020

deponent served the within: **Reply Brief for Petitioners-Appellants**

upon:

Barclay Damon LLP
Attorneys for Respondent-Respondent Helix Ravenswood LLC
80 State Street
Albany, New York 12207
(518) 429-4200
yhennessey@barclaydamon.com

Letitia James
Office of the Attorney General
Attorneys for Respondent-Respondent New York State Department of Environmental Conservation, Basil Seggos, Commissioner
28 Liberty Street. 19th Floor
New York, New York 10005
(212) 416-8469
Appeals.nyc@ag.ny.gov

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